

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC1604/2021

CATCHWORDS

Owners Corporation Act (OC Act): recovery of levies by owners corporation (OC) for misappropriations of levies by manager and additional misappropriations by another intermediary. Forensic reconstruction of financial records 2015 to 2019 due to no records delivered up by manager and due to levies being paid by the intermediary to the OC manager in lump sums, without attribution to individual lots. Fee Notices ultimately issued for recovery of substantial deficiencies based on lot liability after adjustments in process of reconstruction of financial records. Applicant seeks to recover amounts paid under protest under Fee Notice issued for recovery of deficiencies and/or set off such amounts against levies alleged to have been paid previously to the OC manager. Applicant's claim dismissed.

Allegations that the OC adopted improper methodology in reconstruction of ledgers and accounts; allegations of dishonesty and fraudulent behaviour against the OC directly, and against OC as principal of its agent; applicant's reliance on s151 OC Act certificate issued by misappropriating agent manager to asset due payment by applicant of all levies.

Agency: liability of OC as principal for acts of its manager as agent where fraudulent misappropriations. Whether knowledge of agent's misappropriation is imputed to principal. The principal's liability rests not on imputation of the agent's knowledge but triggered because the agent does an act: *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557.

Loss suffered, where two innocent parties to a misappropriations of levies, is loss of the principal. Constructive receipt of levies by principal upon payment by third party to misappropriating agent: *South Melbourne Permanent Building and Investment Society and Deposit Institute v Field* (1893) 19 VLR 213 at 218.

Misleading or deceptive conduct where failure to take sufficient care of own interests: *ACCC V Dukemaster Pty Ltd* [2009] FCA 682.

Whether estoppel available against principal seeking to disavow false statements in s151 certificates issued by agent. Requirement to prove unconscionability: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Effect of fraud on a claim of estoppel, no imputation to the principal of the subjective dishonesty or state of mind of the agent: *Portland Downs Pastoral Co Pty Ltd v Great Northern Developments Pty Ltd* [2012] QCA 18.

Standard of proof necessary to establish fraud: *Briginshaw v Briginshaw* 60 CLR 336; [1938] HCA 34.

Circumstantial evidence (*Doney v The Queen* (1990) 171 CLR 207) and inferential reasoning (*Jones v Great Western Railway Co.* [1930] 144 LT 19), to determine that certain records are false and statements of the OC manager untrue.

APPLICANT

Jennifer O'Reilly

RESPONDENT

Owners Corporation PS318104R

WHERE HELD

Melbourne

BEFORE

MJF Sweeney OAM, Member

HEARING TYPE

Hearing

DATE OF HEARING

30 March 2022

DATE OF ORDER AND REASONS

27 May 2022

CITATION

O'Reilly v Owners Corporation PS318104R
(Owners Corporations) [2022] VCAT 590

ORDER

1. The applicant's claim for payment in the sum of \$7,976.70, or for any other amount or claim, is dismissed.
2. Costs reserved upon application by the respondent, no later than 14 days after receipt of these orders and reasons.

**MJF Sweeney, OAM
Member**

APPEARANCES:

For Applicant

In person

For Respondents

Mr J Cohen, CLP Lawyers

REASONS

Background

- 1 The property the subject of the Plan of Subdivision, Owners Corporation PS318104R (**OC**), is more commonly known as Gordon House, located at the upper end of Little Bourke Street, Melbourne. The applicant is the owner of lot 143.
- 2 In the period 2011 to on or about 25 January 2018 many of the apartments within the respondent owners corporation were separately leased by their owners to a serviced apartment operator who operated under a franchise. There were changes in the franchise and operator from time to time.
- 3 Around 2011 there was an assignment to a new operator known as QGP Pty Limited (and later around 2015 to another operator). For ease of reference, I will refer to the assignees as the Quest Franchisee.¹
- 4 It was a term of each lease agreement between each leasing lot owner and the Quest Franchisee, that the Quest Franchisee be responsible for the cost of OC administration levies and to pay them direct to the OC on behalf of each leasing lot owner.
- 5 The lease did not alter responsibility of each leasing lot owner for payment of maintenance or capital/sinking fund levies (maintenance levies). Maintenance levies remained the responsibility of each leasing lot owner to be paid by them to the OC. Notwithstanding this, the Quest Franchisee in fact made the physical payment of the maintenance levies direct to the OC on behalf of each leasing lot owner and deducted the maintenance levy cost from the rent otherwise payable by the Quest Franchisee to each leasing lot owner.
- 6 Up to a time, in or about March or April 2015, Kliger Wood Real Estate (**Kliger**) performed two roles:
 - (a) the first role, as the manager of the OC. George Martin, an employee of Kliger, was responsible on behalf of Kliger for attending to the administration of the OC;
 - (b) the second role, as administration manager of the Quest Franchisee of the leases between lot owners and the Quest Franchisee.
- 7 New appointments were subsequently made with the two roles later being separated.
- 8 In or about February 2015, Eagle Strata Services (**Eagle**) was incorporated, its sole director, George Martin.
- 9 In or about March 2015, Eagle was appointed the new OC manager, effective from April 2015. This continued until termination on or about August 2018.

¹ The applicant's lot 143, originally leased to Oakford, was later assigned to Quest/the Quest Franchisee.

- Throughout the whole period 2015 to August 2018, Martin was the person who actually performed the role of manager, whether for Kliger or for Eagle.
- 10 In or about March/April 2015, Uptown Partners was appointed by the Quest Franchisee as the new administration manager to administer the leases with lot owners. Its representative was Jonathan Sher who was previously General Manager of Kliger.
 - 11 Upon the termination of Eagle in August 2018, Eagle and Martin failed to hand over financial records for the period 2015 to 2018. Martin advised the OC that he lost all the data when trying to transfer it to the newly appointed OC manager.
 - 12 The OC suspected that Martin had engaged in misappropriation of the OC's funds. It lodged a fidelity insurance claim and reported the matter to Victoria Police. The OC resolved to issue legal proceedings against Eagle at its annual general meeting on 21 March 2019.
 - 13 The OC also ascertained that from 22 November 2016, the Quest Franchisee ceased on-paying levies of behalf of the lot owners.²
 - 14 On or about February 2020, Eagle was deregistered.
 - 15 On or about May 2020, the Quest Franchisee was placed in liquidation.
 - 16 The OC engaged forensic accountants to undertake a reconstruction of accounts and financial records from 2015 to 2018. The process of reconstruction was undertaken and overseen primarily by Johnny van Rensburg, a retired Chartered Accountant. The aim was to achieve a set of reconstructed ledgers and accounts suitable for the preparation of annual returns for the years from 2015 to 2019 (**reconstructed financial records**).
 - 17 The solvency position of the OC caused by the misappropriations by Eagle and cessation of payments by the Quest Franchisee was very serious. The reconstructed records identified misappropriations of \$372,812,³ in addition to unpaid levies of \$40,682 which were written off on legal advice.⁴ That advice was that those funds would likely be unrecoverable from bona fide purchasers of lots for valuable consideration, they being able to assert that a certificate issued under s151 of the *Owners Corporations Act 2006 (OC Act)* is conclusive evidence of the matters stated in the certificate, as it comprises a document required to be given under s32F of the *Sale of Land Act 1962*.
 - 18 Deliverables from the reconstruction process included van Rensburg's 'Reconstruction of Financial Records – Overview', reconstructed ledgers, including entries for the applicant's lot no.143, and summary of receipts reconciling unpaid levies, providing unpaid total levies as at 28 September

² Respondent's hearing book, Reconstruction of Financial Records, tab 13, pages 97 and 98.

³ Above, Reconstruction of Financial Records, tab 13, pages 85 and 86; Paul Harrison, witness statement for respondent dated 25 February 2022 (Harrison statement), including at [11] and exhibit 5.

⁴ Legal advice, CLP Lawyers dated 10 December 2020, Harrison statement, exhibit tab 8,

2018 of \$347,099, in respect of the financial years ending June 2015 to 2018.⁵

- 19 Ultimately, by January 2021, financial records were reconstructed to the extent that Stannards Accountants completed audits for 2015, 2016, 2017, and 2018.
- 20 At the annual general meeting of the OC held on 17 March 2021, it was resolved to accept the audited accounts, including to the year ending 30 June 2020.⁶

The present proceeding and the applicant's claim

- 21 From the reconstructed records referred to above, the OC established that there were total levies of \$347,099 which were not received by it from Eagle, for the years ending June 2015 to 2018.
- 22 As part of the reconstruction, the levies not received by the OC from Eagle were attributed, in the reconstructed levy ledger, to each of the leasing lot owner lots in accordance with lot liability under the plan of subdivision.
- 23 The OC issued Fee Notices and Final Fee Notices under s31 and s32 of the OC Act to recover the deficiencies sustained in respect of the misappropriations.
- 24 The reconstructed levy ledger shows the position of all lot owners after the reconstruction who had a lease agreement with the Quest Franchisee, apart from a number of third party purchasers of lots⁷ and the owner of lot 34 (claiming for damages due to unrelated water damage).⁸
- 25 In respect of lot 143, the applicant paid the OC, allegedly under protest, pursuant to a Final Fee Notice dated 29 September 2020⁹ plus interest on arrears to date of payment as follows:
 - (a) \$7,221.15, for levies 2015 to 2018¹⁰, overdue interest to date of Final Fee Notice of \$290.83, and arrears fee of \$66.00;
 - (b) \$398.73 for interest on arrears to 1 August 2021, a total of \$7,976.70.¹¹
- 26 The applicant's claim is put in a document titled 'Points of Claim' dated 16 September 2021 (**POC**). The POC comprise a statement of the alleged facts and submissions on law. It is organised as follows. 'Facts', paragraphs 1 to 41; 'Outline of Legal Arguments', paragraphs 42 to 75; Details of Losses

⁵ Respondent's hearing book, Reconstruction of Financial Records, tab 13, pages 85 to 105.

⁶ Above, tab 5, pages 35 to 44.

⁷ Harrison statement, [16], and [17] above.

⁸ Harrison statement, [17].

⁹ Respondent's hearing book, Final Fee Notice, tab 6, page 31.

¹⁰ Respondent's hearing book, Reconstruction of Financial Records, tab 13, pages 89 to 96; Harrison statement, 17 and tab 9a, outstanding debts as at February 2022.

¹¹ Applicant's points of claim (POC), [77].

Incurred by the Applicant', paragraphs 76 and 77, claiming loss and damage of \$7,976.70.

- 27 The POC is supported by the applicant's witness statement and numerous attachments numbered 1 to 324.
- 28 What is the applicant's claim?
- 29 The POC, including the legal submissions of the applicant, confuse and conflate a number of matters. Allegations of failure to comply with the provisions of the OC Act,¹² over charging having the effect of double charging,¹³ negligence,¹⁴ misleading or deceptive conduct, breach of guarantees under the ACL,¹⁵ allegations of deceit and fraudulent misrepresentation,¹⁶ are made against the OC, as principal of its agent Eagle, and it appears, against the OC directly, independent of liability as principal.
- 30 The applicant has not brought proceedings against Eagle as the OC's agent, or the Quest Franchisee as the applicant's agent. In some measure, that may be explained by the present status of Eagle and the Quest Franchisee referred to above.
- 31 The applicant claims she has suffered loss, totally due to the misappropriation by Eagle, of administration and maintenance levies, which she says were fully paid on her behalf for lot 143 to Eagle.
- 32 The applicant says that the payment under the Fee Notice in respect of 'historical levies', issued in accordance with the reconstructed financial records, amounts to 'double dipping'.
- 33 The applicant's claim is not a coherent pleading and disguises a clear explanation of her claim. This is exacerbated in circumstances where a series of misappropriations, generally acknowledged by the parties as fraud, have been made by the OC's agent and the Quest Franchisee, but where the applicant brings no claim against those parties and the evidence in respect of the important roles of Eagle and the Quest Franchisee in many of the transactions is scant or opaque.
- 34 After closely examining the material headed 'Points of Claim', the distillation I am able to make, the essence of the applicant's claim, appears that she has paid all levies due for lot 143, that this should be acknowledged and that she should be credited with, or refunded, the amount paid under the Fee Notice.
- 35 Following from this characterisation of the claim, the redress that the applicant appears to seek may be stated as:
 - (a) a declaration that she has paid, or had paid on her behalf, all levies for lot 143;

¹² POC, including [51], [53], [74].

¹³ POC [51b].

¹⁴ POC [63].

¹⁵ POC [66], [69].

¹⁶ POC [61].

- (b) a finding that any deficiency in levies due to the OC in respect of lot 143, due to misappropriations, is the OC's loss;
 - (c) an order that she is entitled to set off levies found to be paid by her under (a) above against the Fee Notice issued for historical levies; and
 - (d) to give effect to the set of, an order that the OC refund monies paid by her under the Fee Notice together with alleged related losses.
- 36 The case argued by the applicant, that she has paid all levies to the OC and that the OC refuses to acknowledge receipt, is centred on allegations as to the OC's conduct. Paragraph 42 of the POC states in respect of the claim for loss and damage:
- the respondent's conduct regarding the financial position of the applicant's Lot with respect to the Owners Corporation levies.
- 37 The complained of conduct has a number of elements, now summarised.
- 38 First, the applicant claims that the OC, in its reconstruction of the financial records, failed to give recognition to certificates under s151 of the OC Act, issued in October 2017 (**October 2017 Certificate**) and a number of fee invoice/statements¹⁷ (together, **October 2017 Certificate and Statements**) and a further certificate issued in February 2020 (**February 2020 Certificate**) and assurances of Martin which she says prove that there has been has been full payment of the levies for lot 143.
- 39 Second, in its reconstruction of the financial records, the OC, failed to take account all relevant transactions and improperly took into account irrelevant transactions resulting in the reconstructed financial records being an unreliable and inaccurate basis for calculating alleged outstanding levies for lot 143.
- 40 Third, in the alternative if it is found that the 2017 Certificate and Statements and 2020 Certificate are false and untrue, the applicant placed reliance on them, causing her loss.
- 41 Fourth, the OC directly, or through Eagle as its agent, acted negligently, with misleading or deceptive conduct, in breach of guarantees under the *Australian Consumer Law*¹⁸ (ACL), with deceit or fraudulently/fraudulent misrepresentation in wrongfully misappropriating levies paid in respect of levies for lot 143.
- 42 The OC defends against the claim, disputing the allegations as to its conduct.
- 43 The OC says, in the circumstances of the misappropriations, it would be improper for it to recognise or accord value to the 2017 Certificate and Statements and 2020 Certificate because they are false and untrue or subject

¹⁷ POC, including [35] to 38].

¹⁸ Schedule 2, *Competition and Consumer Act 2010* (Commonwealth), adopted as Victorian law by the *ACL and Fair Trading Act 2012* (Victoria).

to a clear disclaimer. The OC says the reconstructed annual accounts and financial records have been audited by Stannards Accountants and have been adopted by the OC at its annual general meeting on 17 March 2021.

- 44 The OC says that the applicant has not identified a loss, the loss being suffered by the OC due to the agent's misappropriation, or otherwise. Further, it says that any monies paid on her behalf/by her cannot be identified with the Quest Franchisee having paid by lump sum without reference to lot numbers.
- 45 The OC denies any alleged fraud on its part, but acknowledges the misappropriation/fraud of its agent, Eagle.
- 46 The OC says the applicant, as the owner of lot 143, is liable under s28 of the OC Act for fees, charge, contribution or amount owing the subject of a new Fee Notice.
- 47 Underlying the claims and defences in this proceeding is an anterior question. The corollary of the applicant's claims is to bring into question the validity and effect of resolutions passed at the 17 March 2021 annual general meeting of the OC, including resolutions approving the annual accounts based on the reconstructed financial records.
- 48 Whilst not clearly articulated by the applicant, the effect of her many argued claims discloses a proposition that she is not liable to pay levies made under a Fee Notices issued and arising out of the approved annual financial accounts,¹⁹ because the approved annual financial accounts cannot be accurate. Another consequential effect of her claims is that she is not bound by the resolution authorising the OC to recover all costs and expenses incurred by the OC for obligations imposed under the OC Act.²⁰
- 49 The issues for determination in the proceeding are:
 - (a) whether the resolutions approving the several reconstructed annual accounts and related resolutions, as passed at the 17 March 2021 annual general meeting of the OC, are valid and binding on all lot owners;
 - (b) whether the OC failed to act honestly, in good faith exercising due care and diligence by reconstructing financial records which are inaccurate:
 - (i) by failing to recognise evidence of full payment by the applicant of her levies contained in the October 2017 Certificate and Statements, verbal assurances of Eagle and in the February 2020 Certificate;
 - (ii) by improperly taking into account transactions, and by failing take into account other transactions, thereby creating reconstructed financial records which are inaccurate and not a proper basis for assessing whether levies paid or unpaid;

¹⁹ Respondent's hearing book, pages 38 to 39, annual general meeting of OC, 17 March 2021, items 14 to 15.

²⁰ Respondent's hearing book, page 40, annual general meeting of OC, 17 March 2021, item 17.

- (c) whether the OC failed to act honestly, in good faith exercising due care and diligence through the OC directly, or through its agent the OC manager²¹:
 - (i) where it is found that the 2017 Certificate and Statements, verbal assurances and 2020 Certificate are false and untrue, by causing the applicant to rely on them to the applicant's detriment thereby suffering loss;
 - (ii) by wrongfully misappropriating levies, thereby causing the applicant loss.

The Owners Corporations Act

50 The applicant claims compensation for loss and damage caused by the OC's conduct regarding the financial position of her lot 143 with respect to OC levies.

51 Section 5 of the OC Act provides:

An owners corporation in carrying out its functions and powers – must act honestly and in good faith; and must exercise due care and diligence.

52 The applicant must prove to the Tribunal's satisfaction that the conduct complained of was in breach of the OC's obligations under s5.

53 The applicant brings the present proceeding as a lot owner entitled to bring a proceeding under s163(1)(b) of the OC Act.

54 Under s162, the Tribunal is empowered to hear an owners corporation dispute.

55 Section 165 provides for the orders that VCAT can make in determining an owners corporation dispute:

What orders can VCAT make?

- (1) in determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following:
 - (a) an order requiring a party to do or to refrain from doing something;
 - (b) an order requiring a party to comply with this Act or the regulations or rules of the owners corporation;
 - (c) an order for the payment of a sum of money-
 - (i) found to be owing by one party to another party;
 - (ii) by way of damages ... ;
 - (iii) by way of restitution; ...

²¹ These issues are raised in the POC 'Outline of legal arguments' from [42], including alleged breaches of duties or obligations arising through negligence, misleading or deceptive conduct, in breach of guarantees under the ACL, deceit or fraudulence/fraudulent misrepresentation, directly or by law of agency.

56 Section 28 provides:

Liability of lot owners

- (1) The owners for the time being and any purchaser in possession of, and any person entitled to receive the rents and profits from, a lot are liable to pay any outstanding fees, charge, contribution or amount owing to the owners corporation in respect of that lot.
- (2) Subject to sections 24, 49 and 53, a lot owner is not liable to pay or contribute to the funds of the owners corporation a proportion of any amount required to discharge a liability of the owners corporation exceeding the lot owner's lot liability.

57 Section 30 provides:

Recovery of money owed

- (1) Subject to subsection (2), an owners corporation may recover any money owed to the owners corporation in any court of competent jurisdiction as a debt due to the owners corporation.
- (2) Sections 31 and 32 and Division 1 of Part 11 apply to the recovery of money owed to the owners corporation by a lot owner.

58 Section 31 provides:

Fee notice

- (1) The owners corporation must give notice to a lot owner in the approved form of any fees and charges due and payable by the lot owner to the owners corporation (the *fee notice*).
- (2) The fee notice must—
 - (a) state that the lot owner has an obligation to pay the fees and charges within 28 days after the date of the notice; and
 - (b) (if applicable) state that interest at the rate specified in the notice will be payable in respect of any overdue fees and charges; and
 - (c) include details of the dispute resolution process that applies under the rules in respect of disputed fees and charges.

59 Section 32 provides for the issue of a Final Fee Notice.

60 Section 6 provides that an owners corporation has the following powers.

An owners corporation has—

- (a) all the powers conferred on the owners corporation by—
 - (i) this Act or the regulations; or
 - (ii) the Subdivision Act 1988 or the regulations under that Act; or

- (iii) any other law; or
 - (iv) the rules of the owners corporation; and
- (b) all other powers that are necessary to enable it to perform its functions.

Applicant's submissions

- 61 The following summary is not intended to be a complete recitation of the evidence given. However, I have had regard to all the evidence given in making my determination.
- 62 The applicant affirmed the matters stated in her 92 paragraph witness statement, dated 18 January 2022, which was submitted together with annexures, pages 12 to 324.
- 63 The applicant also relied on evidence of her witness, David Dzur, who affirmed the matters stated in his 18 paragraph witness statement, dated 20 January 2022, which was submitted together with annexures, pages 4 to 41.
- 64 First, the applicant provided a detailed account of the property contained within the plan of subdivision, its operation as serviced apartments over a long period under the management of various franchise operators, and how many of the lots were subject to long term leases with the franchise operator.
- 65 As referred to above, the applicant says she is entitled to compensation for loss and damage of \$7,976.70, due to the conduct of the OC in its reconstruction of the financial records, by failing to recognise acknowledgement of payment for lot 143 of levies recorded by the October 2017 Certificate and Statements and verbal assurances given by Eagle/Martin. In addition, the applicant relies the further February 2020 Certificate.
- 66 The applicant says that this failure to recognise and acknowledge payment in the reconstructed financial records amounts to a 'new version of OC accounts'²² and does not accord with the information available.²³
- 67 It is an important part of the applicant's case that the activities of misappropriation of funds by Eagle/Martin do not derogate from the veracity of the matters stated in the October 2017 Certificate and Statements as support that all levies had been paid for lot 143.
- 68 Second, the applicant says she is entitled to compensation for loss and damage, due to the conduct of the OC in its reconstruction of the financial records of the OC, by improperly taking into account transactions (such as, waiver of levies for new purchasers), and not taking into account other transactions (such as monies deposited into different/personal accounts, direct offsets for maintenance and cleaning), to the effect that the reconstructed records are unreliable and inaccurate and not a proper basis for

²² POC, [25].

²³ POC, including [26] – [28].

assessing the state of levies paid or whether levies had been paid for lot 143.²⁴

69 Third, in the alternative, if it is found that the 2017 Certificate and Statements and 2020 Certificate are false and untrue, the applicant says she relied on October 2017 Certificate and Statements causing her loss.

70 Fourth, the applicant says the OC is liable for loss to her, either directly as OC, or through Eagle as agent, including by acting fraudulently or negligently, in wrongfully misappropriating levies.

71 The relevant franchise operations and the role of the Quest Franchisee are described above, under 'Background', for the period relevant to this proceeding, namely 2015 to 2019.

72 The applicant says that throughout the period of leasing her lot:

the OC's managing agents levied Quest directly for all OC levies payable.

I also understand that while Eagle Strata was its managing agent, the OC invoiced collectively for all lots combined, as one lump sum, rather than individual invoices for each Lot.²⁵

73 The applicant referred to minutes of the OC annual general meeting said to acknowledge the practise of Eagle issuing bundled fee notices.

74 In respect of his own lot in the OC, the applicant's witness, Dzur, says:

Pursuant our commercial lease, the tenant [Quest Franchisee] was responsible for the OC's Admin Fund levies on our lot ... the OC's managing agent [Eagle] levied Quest directly for OC Admin levies payable for our lot ...²⁶

Quest's lease administrator (Uptown Partners from 2015) deducted amounts to cover the OC's sinking/maintenance fund levies from its monthly rent payable to us and Uptown Partners paid those Sinking/Maintenance Fund levies directly to the OC.

75 The applicant says that during the period 2003 to 2017 she routinely on an annual basis contacted the OC's managing agent, initially Kliger and later Eagle, to verify that all OC fees and levies had been duly received by the OC. Each year the OC's managing agent verbally confirmed payment and that there were no arrears on her lot.

76 The managing agent, in terms of the person actually attending to the administration, throughout 2015 to 2018 (and for periods prior) was Martin. It was Martin who provided the verbal assurances.

77 The applicant says that in September 2017 she sought from Eagle's Martin (and paid for) a certificate pursuant to s151 of the OC Act. She received the

²⁴ POC, including [25], [29] – [32].

²⁵ Applicant's witness statement, dated 18 January 2022 (Applicant's statement), [11] to [12] and annexure, page 131.

²⁶ David Dzur, witness statement, dated 20 January 2022 (Dzur statement), [5].

- certificate dated 24 October 2017. It recorded that in respect of all levies, there was 'nil' outstanding for the period ending 31 December 2017.
- 78 The October 2017 Certificate was signed by Martin as registered manager, on behalf of the OC.²⁷
- 79 The applicant says that on 12 January 2018, the OC issued an OC levies invoice/statement which showed that there were no outstanding levies.²⁸ The applicant says she relied on the invoice/statement as to the current state of affairs as of the statement date.
- 80 On 10 April 2018 Eagle issued an invoice/statement, which included levies of \$1,732.83 from April to June 2018.²⁹ The applicant says she then spoke to Martin once more and that he verbally confirmed to her that, apart from \$1,251.35 (payable by 8 May 2018), there was no other levies outstanding for her lot. This was at a time when her lease with Quest Franchisee had come to an end in December 2017.
- 81 The applicant says that, following on the above information provided by Eagle and her conversation with Martin around 10 April 2018, and in reliance on the same, she finalised the post lease adjustments with Quest Franchise's lease administrator, Uptown.³⁰
- 82 From January 2018 to September 2018 (when Eagle was terminated as OC manager), the applicant says she paid directly all fees and levies. She says this is verified in each of the subsequent OC invoices which showed nil balances carried forward.
- 83 The applicant says that each of the levy invoices/statements referred to above: 'contained no provisos purporting to exempt any errors or omissions.'³¹
- 84 The applicant says that she relied on the information provided by Eagle that there were no levies outstanding in respect of the period of Quest Franchisee's lease to December 2017. She says that if she had known before April 2018 that OC levies were unpaid on her lot, she would have included outstanding levies on her final end of lease statement of adjustments and, if necessary, taken legal action against the Quest Franchisee.
- 85 The applicant attended the OC's AGM held 21 March 2019 at which the minutes record:³²
- (a) that the accounts and records of the OC had not been provided by Eagle to the new OC manager, SSKB;

²⁷ The applicant's statement, annexure E, page 74.

²⁸ The applicant's statement, page 108.

²⁹ In respect of the levies for April to June 2018, the invoice/statement was not in the usual form of a Fee Notice under s31 of the OC Act.

³⁰ The applicant's statement, [38] and annexure J, pages 112-113.

³¹ The applicant's statement, [40].

³² Respondent's hearing book, pages 3 to 8, Owners Corporation Minutes of AGM, 21 March 2019,

- (b) minutes of 29 November 2017 were not accepted as a true reflection of proceedings;
 - (c) it was noted that as records of the Owners Corporation are still awaited from the previous Owners Corporation manager [Eagle], veracity of proceedings cannot be verified and minutes cannot be amended;
 - (d) resolved that the Owners Corporation be authorised to bring legal proceedings at VCAT against the former manager, George Martin, Eagle Strata;
 - (e) election of Committee members, including Ms O'Reilly.
- 86 In her time as a member of the OC Committee, until December 2019, the applicant says she was provided with updates by van Rensburg on the reconstruction of accounts and financial records.
- 87 The applicant refers to the December 2019 AGM at which audited accounts, dated 17 December 2019, of Kelly and Partners for 2018/2019 were tabled. She refers to the auditor's qualification that no opinion has been formed by the auditor as to the material correctness of the individual lot balances that comprise the total lot position.³³
- 88 The applicant says the audited accounts also refer to Accrued Expenses, note 6, which relates to outstanding amounts owed to Quest Franchisee for caretaking duties performed in period 2017 to 2019.
- 89 On 17 February 2020, the Applicant sought and paid for another certificate under s151 of the OC Act. The February 2020 Certificate records that levies had been fully paid to 31 March 2020.³⁴
- 90 The February 2020 Certificate contains Item 22 'Other Matters'. This states as follows:
- The Owners Corporation is seeking legal advice as to the options to recover the Owners Corporation records from previous Owners Corporation Manager. As records are awaited, levy notices were sent with Nil outstanding amounts and accounts are currently in process of reconciliation. Owners Corporation records are being reconstructed as such Owners Corporation Certificate has been issued based on information available on records provided by Owners Corporation.
- 91 The applicant did not refer to the import of Item 22, other than to say that she did not realise it was there until she reviewed documentation after she received the OC's Points of Defence.
- 92 On 1 May 2020 (and 6 April 2020), the applicant received a tax invoice for \$7,221.14 for unpaid historical levies between 2015 and 2018 based on a reconstruction of the OC's accounts.

³³ The applicant's statement, [52] and annexure R, page 141.

³⁴ The applicant's statement, [55], annexure S, pages 142 to 147.

- 93 In relation to the reconstruction of accounts and records, the applicant disputes a number of assumptions and processes used in the reconstruction undertaken by the OC.³⁵
- 94 In relation to assumptions and processes, the applicant alleges:
- (a) the process assumes that all levy payments were listed in the Macquarie bank statements, but this is not so as it does not account for monies misappropriated by Martin and placed in his personal accounts;
 - (b) the OC's alleged practice of issuing 'collective invoices' for multiple lots to the Quest Franchisee, and Quest Franchisee's payment by lump sum, created a lack of information sufficient to allocate or reallocate administration levies between the various lots. Information provided by the October 2017 Certificate and the OC 2018 levy statements for lot 143 was not incorporated;
 - (c) allowance was not made for off-setting amounts payable by the OC to Quest Franchisee for cleaning/caretaking services;
 - (d) known unmatched receipts totalling \$7,177 remained unmatched to payer(s) and purpose(s).
- 95 The applicant says that the assumptions and approaches result in reconstructed records and accounts that do not accord with the formal and informal confirmations provided to her, such as the October 2017 Certificate and Statements and the February 2020 Certificate which show no carried forward balances. She says the reconstructed financial records have therefore resulted in a new version of accounts from 2014 to 2020, inconsistent with the information that all OC levies due for lot 143 had been paid.

Respondent's submissions

- 96 The following summary is not intended to be a complete recitation of the evidence given. However, I have had regard to all the evidence given in making my determination. Evidence for the OC was given by Paul Harrison in his affirmed statement dated 22 February 2022 and in oral evidence by way of cross examination.
- 97 The OC says that, given the circumstances of the misappropriations, it would be improper for the OC to recognise or accord value to the 2017 Certificate and Statements and 2020 Certificate or verbal assurances when reconstructing the financial records and determining the question of levies paid, because they are false and untrue.
- 98 The OC says the 2017 Certificate and Statements and 2020 Certificate and verbal assurances of Eagle, are overridden by the fact of the scheme of misappropriation of funds undertaken by Eagle/Martin, and by the fact that

³⁵ The applicant's statement, including [63] to [67]; POC, including [24] – [31].

- the Quest Franchisee ceased paying levies to Eagle from 22 November 2016.³⁶
- 99 The OC says it was unreasonable for the applicant to place reliance on the 2017 Certificate and Statements and 2020 Certificate or verbal assurances (when doing a statement of adjustments at the end of her lease with the Quest Franchisee) in circumstances where she had knowledge of irregularities or misappropriations from March 2019.
- 100 In relation to the second February 2020 Certificate, the OC says that it contained a clear disclaimer under the heading 'Other Matters', the content of which is stated in paragraph 90 above. By this, the OC says the applicant was given express notice of the conditional nature of the February 2020 Certificate and that any reliance placed on it by her is unreasonable, especially where she knew of the irregularities and misappropriations.
- 101 The OC says that the reconstructed financial records demonstrate that there were no offsets for cleaning and maintenance due to Eagle.³⁷ Further, that a later claim made by the Quest Franchisee of \$141,558 for cleaning/maintenance was 'bogus' and that it was subsequently demonstrated that no signed contract for such services existed.³⁸
- 102 It further says that monies not allocated in the initial reconstruction were subsequently identified,³⁹ and that waiver of levies for new purchasers was a legal imperative.
- 103 The OC says that the October 2017 Certificate and Statements and February 2020 Certificate and verbal assurances are all false and part of the scheme of misappropriation.
- 104 It says that the applicant has not identified a loss, the loss being suffered by the OC due to the agent's misappropriation. It says that any monies paid on her behalf/by her cannot be identified and that the Quest Franchisee have paid by lump sum without reference to lot numbers.
- 105 Harrison for the OC, in oral evidence, disputed that the OC or Eagle as its manager issued Fee Notices to lot owners in a bundled fashion.
- 106 The OC denies any alleged fraud on its part, but acknowledges the misappropriation/fraud of its agent, Eagle.
- 107 Further, the OC submits that the claim against it fails because it is too remote. The applicant had a commercial relationship with the Quest Franchisee who was responsible under her lease for paying administration levies and it to them that she should look.

³⁶ Harrison statement, [12b]. Quest Franchisee ceased to pay any levies from November 2016; Respondent's hearing book, Reconstruction of financial records. page 97; Applicant's statement, [62].

³⁷ Respondent's hearing book, Reconstruction of financial records, page 97.

³⁸ Harrison statement, [12e]; Respondent's hearing book, Reconstruction of financial records, page 97.

³⁹ Harrison statement, [13] about information received from Macquarie Bank.

- 108 The OC says the reconstructed accounts are accurate according to the information available and have been audited by Stannards Accountants for the years 2015 to 2018.
- 109 The OC says the reconstructed accounts were adopted by the OC at its annual general meeting on 17 March 2021. As such, they have been adopted as the accepted record of the OC, what the OC's solicitor referred to as, 'drawing a line in the sand'. The OC is entitled and obliged to proceed on the basis of validly approved financial records.
- 110 The OC says that the fees and charges have been levied pursuant to new valid Fee Notices and Final Fee Notices⁴⁰ issued in accordance with s31 and s32 of the OC Act, and are properly based on information in accordance with the approved reconstructed financial records.
- 111 The OC says the applicant, as the owner of lot 143, is liable under s28 of the OC Act for fees, charge, contribution or amount owing the subject of a Fee Notice.

FIRST ISSUE: Are the resolutions approving the several reconstructed annual accounts and related resolutions, as passed at the 17 March 2021 annual general meeting of the OC, valid and binding on all lot owners?

- 112 As noted above, the effect of the applicant's many argued claims discloses a proposition that she is not liable to pay levies made under fee notices issued and arising out of approved annual financial accounts, because the approved annual financial accounts cannot be accurate. The other consequential effect is that she is not bound by the resolution authorising the OC to recover all costs and expenses incurred by the OC for obligations imposed under the OC Act.
- 113 The applicant has not put evidence impugning the calling of, or the conduct of, the 17 March 2021 annual general meeting. Nor has she put evidence that impugns the voting procedures and passing of the resolutions.
- 114 The applicant's implicit proposition however is that, in respect of her lot 143, the reconstructed accounts are incorrect. It follows that, in claiming she is entitled to recover loss suffered for the reasons articulated in her POC, the resolutions do not have force.
- 115 On the evidence before me, it not being contested by the applicant, the resolutions approving the annual accounts and associated resolutions for recovering of expenses made at the 17 March 2021 annual general meeting were duly put and validly passed.
- 116 The consequence is, and I find, the applicant is bound by the resolutions passed at the 17 March 2021 annual general meeting of the OC.

⁴⁰ Respondent's hearing book, tab 6, page 31.

SECOND ISSUE: Has the OC failed to act honestly, in good faith exercising due care and diligence by reconstructing financial records which are inaccurate:

- (i) **by failing to recognise evidence of full payment by the applicant of her levies contained in the October 2017 Certificate and Statements, verbal assurances of Eagle and in the February 2020 Certificate**

- 117 My determination of validity of the resolutions passed at the 17 March 2021 annual general meeting would normally be the end of the matter.
- 118 The applicant's submission, to the extent it is limited to a complaint that the OC failed to take account of all allegedly relevant information (including the certificates and verbal assurances), falls away. The applicant is bound by the resolutions of the 17 March 2021 annual general meeting. It is binding on all lot owners.
- 119 However, the applicant has put her claims and submissions in many different ways.⁴¹ These include allegations against the OC of negligence, misleading or deceptive conduct, breach of guarantees under the ACL and, more seriously, deceit, fraudulence/fraudulent misrepresentation in misappropriating levies.
- 120 By these submissions, the applicant in effect is putting that the alleged negligence, misleading or deceptive conduct, breach of guarantees under the ACL, deceit and fraudulence/fraudulent misrepresentation of the OC are vitiating factors, which in respect of the applicant's lot 143, render the resolutions of the 17 March 2021 annual general meeting and adoption of the reconstructed financial records invalid.
- 121 In a similar vein, the applicant submits a case based on estoppel, that the OC is not entitled to disown the representations purportedly made by its agent, in the October 2017 Certificate and Statements and the 2020 Certificate.
- 122 I consider the allegations of negligence, misleading or deceptive conduct, breach of guarantees under the ACL, deceit and fraudulence/fraudulent misrepresentation and the operation of estoppel against the OC later in this decision.
- 123 The applicant's focus and reliance on arguing the validity of the October 2017 Certificate and Statements, verbal assurances of Eagle and the February 2020 Certificate, is put as evidence in point that levies were paid in respect of lot 143 and that the OC's alleged failure to accord value in respect of lot 143 amounts to a vitiating factor, rendering the resolutions of the 17 March 2021 annual general meeting invalid.
- 124 It is for this reason, notwithstanding my determination in paragraph 116 above that the applicant is already bound by the resolutions of the annual general meeting, that I now consider the alleged failure of the OC to

⁴¹ Refer [29], above.

recognise validity of the October 2017 Certificate and Statements, verbal assurances of Eagle and in the February 2020 Certificate.

- 125 If I find this documentary evidence to be false, and verbal assurances to be untrue, the impugned conduct of the OC of failing to recognise evidence of full payment by the applicant of her levies, is not demonstrated. Similarly, the applicant would fail to prove the documentary evidence and verbal assurances as being vitiating factors against the validity of resolutions passed at the 17 March 2021 annual general meeting.
- 126 Turning then to the applicant's argument that the above documents are evidence of payments having been made in respect of lot 143. She relies on them as a truthful recording and account of the fact of payment.
- 127 The applicant did not engage, when cross examined, about the comparative position of other lot owners who had leased their lots to the Quest Franchisee. She says she does not know their affairs.
- 128 It is an ingenuine position for her to adopt. The affairs of all the Quest Franchisee lot owners were very much the same, excepting the reliance of the applicant on the certificates. The applicant was generally informed of matters relevant to the misappropriations and that they also affected other lot owners (and in any event was aware of these matters well prior to the time of the hearing):
 - (a) the Eagle misappropriations have been identified as having been made largely in respect of all lot owners who had leased their lots to the Quest Franchisee;
 - (b) the reconstruction ledgers show reconstructed details for around 56 lots leased to the Quest Franchisee;
 - (c) payments by the Quest Franchisee to the OC were usually made as a lump sum of all Quest Franchisee lot owners. This makes attribution to each individual lot impossible with payments not separately identified. The applicant's lot 143 was in precisely the same position as all the other lots leased to the Quest Franchisee, where lump sum payments were made, but not attributed to a specific lot;
 - (d) the Quest Franchisee paid to the OC, maintenance levies, for the convenience of and as agent of the applicant. It did the same in respect of the other Quest Franchisee lot owners;
 - (e) in addition, the Quest Franchisee paid administration levies to the OC, also as agent of the applicant. It did the same in respect of all other Quest Franchisee lot owners;
 - (f) the major portion of the unpaid levies were the administration levies which the Quest Franchisee ceased paying to Eagle from November 2016⁴² affecting all Quest Franchisee lot owners in the same way;

⁴² Harrison statement, [12b]; Respondent's hearing book, Reconstruction of financial records, page 97; applicant's statement, [62].

- (g) the last payment by the Quest Franchisee on 22 November 2016, on the reconstruction, only cleared the levies 'paid' up to 30 September 2015;⁴³
 - (h) largely because the Quest Franchisee made lump sum payments of levies to Eagle, the reconstruction of the ledger process allocated a proportion of such payments to each lot, according to the Annexure A methodology, primarily on lot liability as the equitable approach;
 - (i) the February 2020 Certificate contained a clear disclaimer under, item 22: 'Other Matters', that the statement issued was qualified and that statements with 'Nil' outstanding amounts are currently in the process of reconciliation.
- 129 The above circumstances might reasonably warrant the applicant considering and explaining how a document, such as the October 2017 Certificate, could reasonably be constructed on the information then available to identify a state of affairs peculiar to a specific lot, such as lot 143.
- 130 In relation to the disclaimer in the February 2022 Certificate, the applicant simply said that she did not read it or see it until around the commencement of her VCAT application.
- 131 The applicant was a member of the OC Committee in 2019 when the exposure of the misappropriation and the plans for undertaking a reconstruction of financial records was openly discussed. The applicant was well aware that the other lot owners who leased their lots to the Quest Franchisee were in the same position as she found herself, other than possessing certificates.
- 132 In giving her evidence, the applicant repeatedly asserted the certificates and invoice/statements as the basis for her claim that she should not have to pay for any losses arising from the misappropriation of levies by Eagle. She says she is fully paid up. The case appeared to be put on the basis that the above documents speak for themselves and any failure to take them into account means that the reconstruction of financial records is inaccurate to her detriment.
- 133 For example, the applicant had put to her in cross examination, that van Rensburg, the Chartered Accountant, was charged with undertaking the reconstruction of the financial records to put in place a set of accounts where the OC had nothing. She responded: 'I was not concerned with this because I was fully paid up and I had written evidence they had been paid.'
- 134 The applicant accepted that it was necessary to do a reconstruction of accounts, but so far as she was concerned: 'I have fully paid up.'
- 135 And again: 'The reconstructed accounts cannot show I owe money because they are contrary to contemporaneous records of the OC manager at the time.'

⁴³ Respondent's hearing book, Reconstruction of financial records, page 98.

- 136 Later in cross examination, the applicant was asked did she accept that the certificates given to her were fraudulently issued. She said: 'no.' Later she said: 'No, I don't know. They are validly issued.'
- 137 She was asked why she did not accept the reconstruction of financial records as approved at general meeting of the OC. She replied: 'I do not accept because they are wrong about my lot. I have no evidence that the certificate was fraudulently given to me.'
- 138 It was put to the applicant by Mr Cohen, solicitor for the OC: 'You rely on the fraudulent information from George Martin and his fraudulent certificate to not pay based on the reconstructed accounts?'
- 139 The applicant did not answer the question directly. She responded by referring to the composition of the reconstructed financial records and said that either the reconstructed statements are accurate or inaccurate. She said that the reconstructed financial records are inaccurate for the reasons she has given, including not taking into account the matters stated as to nil owing in the certificate and invoice/statements.
- 140 She added, in the alternative, that if the certificate and invoice/statements are found to be inaccurate or fraudulent, then, she said, this is the OC's conduct, not just Martin. She added that this is because the OC is responsible for its agent manager for fraud, negligence and misleading or deceptive conduct.
- 141 The applicant said that she accepted that the OC was put in a dire financial position but that she did not see that she should have 'to pay my lot liability twice.'
- 142 The present question turns then on determining the validity of the matters stated in the October 2017 Certificate and Statements. I must make an assessment on the totality of the limited evidence relevant to this aspect. In this regard, and perhaps not surprisingly, there is no evidence from Eagle's Martin or the Quest Franchisee, which would have assisted.
- 143 Circumstantial evidence is evidence which proves or tends to prove a fact or set of facts from which the fact to be proved may be inferred.⁴⁴
- 144 An inference, in the legal sense is a deduction from the evidence, and if it is a reasonable deduction, it may have the validity of legal proof.⁴⁵
- 145 I am satisfied that the facts proved on the balance of probabilities include:
- (a) a term is contained in the Quest Franchisee leases with lot owners for administration levies to be the liability of the Quest Franchisee. The term is one of the commercial terms struck with lot owners. Quest Franchisee pays the administration levies (including for lot 143) as agent for its principal, in the present case, the applicant;

⁴⁴ *Doney v The Queen* (1990) 171 CLR 207.

⁴⁵ *Jones v Great Western Railway Co.* [1930] 144 LT 194; All ER Rep Ext 830 (HL).

- (b) the Quest Franchisee paid administration levies to Eagle without identifying individual lot numbers and lot liabilities in respect of which the levies were being paid and ceased paying on 22 November 2016;
- (c) there was a shortfall in the total administration levies paid by the Quest Franchisee compared to the amount paid into the OC's account. The major part of the shortfall related to administration levies unpaid by the Quest Franchisee. After reconstruction of the accounts, reconciled administration levies were only paid up to 30 September 2015;
- (d) maintenance/capital works levies are not a liability of the Quest Franchisee under the lease terms. These levies are payable by the lot owners. As a matter of practise and/or convenience, the lot owners have an arrangement where the Quest Franchisee pays the maintenance/capital works levies to the OC. In this regard, the payment is made as agent for its principal, in the present case, the applicant;
- (e) the Quest Franchisee paid the maintenance/capital works levies to Eagle without identifying individual lot numbers and lot liabilities in respect of which the levies were being paid;
- (f) there was a shortfall in the total maintenance/capital works levies paid by the Quest Franchisee compared to the amount paid into the OC's account;
- (g) without the identification of individual lot numbers and lot liabilities, both shortfalls (paid in respect of administration levies and maintenance/capital works levies) were not able to be attributed to individual lots;
- (h) the earlier shortfalls were due to Eagle misappropriating levies;
- (i) the other part of the shortfalls were due to alleged misappropriation by the Quest Franchisee when, the franchisee at that time, ceased paying levies to the OC from 22 November 2016;
- (j) as both the administration levies and the maintenance levies were paid to Eagle without identifying individual lot numbers and lot liabilities, the misappropriation giving rise to the shortfalls could not be attributed to any particular individual lots;
- (k) the October 2017 Certificate and Statements were issued by Eagle, purporting to record that there were nil levies due for lot 143;
- (l) the sole director with management and control of Eagle, George Martin, was responsible for issuing the October 2017 Certificate and Statements and, allegedly, giving verbal assurances that nil levies were due for lot 143;
- (m) without knowledge of the individual identity of lots in respect of which the Quest Franchisee payments were made, objectively, in seeking to attribute the misappropriation/shortfall, a certificate or statement asserting that any given lot, including lot 143, that 'nil' levy is owing cannot be made;
- (n) with no administration levies (and likely no maintenance levies) being paid by the Quest Franchisee beyond 22 November 2016, Eagle

received no funds beyond that date in respect of which it could attribute full payment of levies and declare that 'nil' is owing for lot 143.

- 146 The fact to be proved, namely that the state of affairs referred to in the October 2017 Certificate and Statements were false and that any verbal assurances of the sole director of the agent were untrue, may be reasonably deduced from the evidence.
- 147 Such inference is consistent with the context, where it furthers the purpose of Eagle/George Martin, and potentially the Quest Franchisee at the time, in the misappropriation of levies to issue false records and make untrue statements to disguise the misappropriation.
- 148 The October 2017 Certificate and Statements and any verbal assurances cannot be accepted, as the applicant contends, as proof of payment of levies in respect of lot 143.
- 149 Also, the applicant's reliance on the February 2020 Certificate is unreasonable where the disclaimer is clear and is made in circumstances where lot owners were all well aware of the difficulties of missing records and misappropriations. In all the circumstances, it would be very surprising if a certificate was issued without a disclaimer or warning. It is no defence for the applicant to state that she did not read item 22 of the February 2020 Certificate.
- 150 If the OC were to have conducted itself in a manner that gave credence to the October 2017 Certificate and Statements, the February 2022 Certificate and to have accepted as true the verbal assurances of the OC manager, in circumstances where the evidence clearly demonstrates the opposite, the OC would have conducted itself without the required due care and diligence demanded of it under s6 of the OC Act.
- 151 Moreover, had it conducted itself to accord recognition to the October 2017 Certificate and Statements, the February 2022 Certificate and accepted as true the verbal assurances of the OC manager, contrary to clear evidence of falsity, that itself may well constitute a vitiating factor telling against validity of the resolutions passed at the 17 March 2021 annual general meeting.
- 152 The OC adopted the only path open to it. It arranged for the conduct of an exhaustive forensic examination producing reconstructed OC ledgers in a manner that enabled the reconstruction of financial records suitable for audit and for purring before a meeting of members at the 17 March 2021 annual general meeting.
- 153 The applicant has failed to prove the OC engaged in the complained of conduct by not recognising and attributing in the reconstructed financial records, a value of 'nil' outstanding for lot 143.
- 154 At the annual general meeting, the reconstructed financial records were approved. The OC issued new Fee Notices in respect of the proved deficit so as to meet its statutory obligations, returning the OC to a position of proper

governance and compliance under the OC Act. Those resolutions are valid and binding.

SECOND ISSUE: Has the OC failed to act honestly, in good faith exercising due care and diligence by reconstructing financial records which are inaccurate:

- (ii) **by improperly taking into account transactions, and by failing to take into account other transactions, thereby creating reconstructed financial records which are inaccurate and not a proper basis for assessing whether levies were paid or unpaid?**

155 As already found above, my determination of validity of the resolutions passed at the 17 March 2021 annual general meeting puts an end to any question whether the OC should or should not have taken into account other matters and transactions in its reconstruction of the financial records. Again, the applicant's submissions in this regard fall away. The applicant is bound by the resolutions of the 17 March 2021 annual general meeting.

156 The applicant puts many aspects going to the reconstruction of the financial records said to represent why those records should not be accepted. Her claim is that the reconstructed accounts should not be relied upon as an accurate source of information, as they incorporate inconsistencies and retrospective alterations in the way they report and do not report.⁴⁶

157 Distributed across the narrative and submissions of the POC are many allegations of inconsistencies and retrospective alterations. Non exhaustively, they include:

- (a) not all payments made to the OC were deposited in its Macquarie bank account;
- (b) direct off sets of amounts payable to the Quest Franchisee for services, such as for cleaning, have not been recognised;
- (c) generally, a lack of information to support the reconstruction;
- (d) monies written off for new purchasers of lots, thus adding to the OC loss for allocation to other lots;
- (e) some receipts unattributed to any lot owner;
- (f) audit qualifications by Kelly and Partners and Stannards Accountants.

158 The OC gave evidence in response to the allegations.

159 However, having found that the approvals of reconstructed financial records and annual accounts were validly passed at the 17 March 2021 annual general meeting, it is not necessary for me to consider further the many particularities the applicant posits as impugning the reconstructed accounts. They have been considered by the OC and its methodology resulting in the reconstructed financial records adopted at general meeting.

⁴⁶ POC, including [25] to [38], [46] to [50], [53] to [57].

- 160 The Tribunal does not, save in extreme circumstances that impugn the very process of general meeting of an owners corporation, go behind decisions taken by an owners corporation at general meeting. In circumstances, such as at the present, a great deal of information has been put to lot owners for consideration in accordance with the requirements of the OC Act and resolved upon.
- 161 The detail and the consideration by lot owners directly affected, leading to the adoption of the reconstructed financial records, is not something to be lightly put aside. This OC was in an extremely serious position requiring every effort to rectify a situation where major misappropriations had been made against it.
- 162 The methodology adopted by van Rensburg in his forensic examination of available records and reviewed by auditing accountants was accepted. This is important. The methodology was clearly defined and implemented. It was put before several meetings of the OC and the OC committees. It was accepted by valid resolution of the annual general meeting.
- 163 The applicant may be dissatisfied with many aspects of the approved accounts and the allocation of deficiencies across lots, especially lot 143. But the applicant remains bound by resolutions on the annual general meeting, including that of 17 March 2021.

THIRD ISSUE: Has the OC failed to act honestly, in good faith, exercising due care and diligence through the OC directly, or through its agent the OC manager:

- (i) **where it is found that the 2017 Certificate and Statements, verbal assurances and the 2020 Certificate are false and untrue, by causing the applicant to place reliance on them to the applicant's detriment?**

- 164 The submission is one of common law estoppel.⁴⁷
- 165 The submission is that the OC should not be able to deny the statements of its agent, Eagle, contained in October 2017 Certificate and Statements and that the verbal assurances of Martin.
- 166 The applicant also submits that the OC is bound by the statement as to no outstanding levies contained in the February 2020 Certificate.
- 167 I have determined that the October 2017 Certificate and Statements are false and that the verbal assurances of Martin for Eagle are untrue.
- 168 The elements to be proved for estoppel in the present case may be summarised⁴⁸ as:
- (a) a party makes a statement, representation, promise;

⁴⁷ POC, [43] to [45].

⁴⁸ Cheshire and Fifoot's Law of Contract, eighth edition, [2.2].

- (b) the other party relies on the statement, representation, promise to its detriment; and
 - (c) the first party wishes to act contrary to the statement, representation, promise and this would be unconscionable in the circumstances.
- 169 The applicant contends that the representations were made in the October 2017 Certificate and Statements and the February 2020 Certificate, that she relied on the same, that her reliance was reasonable and that she suffered detriment, described as the compensation sought.
- 170 Leaving aside for the moment proof of representation, with reasonable reliance and detriment, the applicant has not sufficiently addressed the important element of establishing that it would be unconscionable for the OC to resile from the representations.
- 171 Mason CJ and Wilson J, in the celebrated case *Waltons Stores (Interstate) Ltd v Maher*⁴⁹, held that it was not sufficient that a party arguing estoppel has merely relied on a promise or representation. The failure to fulfill a promise does not of itself amount to unconscionable conduct. Something more is required.
- 172 In *Commonwealth v Verwayen*,⁵⁰ Deane J said conduct which is unconscionable will commonly involve the use or insistence upon legal entitlement to take advantage of another's special vulnerability in a way that is unreasonable or oppressive to an extent that affronts ordinary minimum standards of fair dealing. It involves a real process of consideration and judgment. Unconscionability is also referred to as behaviour of moral obloquy.
- 173 These are the tests that are to be applied in determining unconscionability.
- 174 The applicant submissions on the important elements to prove estoppel are made with brevity. But, even if I am to accept proof of representation, which may seem obvious enough on the part of Eagle, and proof of reasonable reliance and detriment, both of which are not clearly demonstrated, there is the remaining element of unconscionability.
- 175 Assessed against the lens of *Waltons Stores*, it is not sufficient that the applicant arguing estoppel has merely relied on a representation. The failure to fulfill the promise, or here to resile from it, does not of itself amount to unconscionable conduct.
- 176 Further, the matters put by the applicant, in respect of the October 2017 Certificate and Statements (and the February 2020 Certificate), appear to be submitted as going to proof unconscionable behaviour of the agent Eagle through its representative, Martin.

⁴⁹ (1988) 164 CLR 387.

⁵⁰ (1990) 170 CLR 394 at 441.

- 177 However, the estoppel argued by the applicant is one of estopping the OC from denying the certificates and assurances. It is put on the basis that the principal is bound by the representations of its agent.
- 178 Under legal principles governing the law of agency, an agent's knowledge will in the usual course be imputed to the principal. But the question arising in cases involving fraud is whether there is no imputing of knowledge to the principal for the purposes of establishing estoppel by conduct or representation.
- 179 It is difficult to impute to the principal the subjective dishonesty or state of mind of the agent. In *Portland Downs Pastoral Co Pty Ltd v Great Northern Developments Pty Ltd*,⁵¹ the Court of Appeal held that a principal who does not himself know of the state of affairs cannot be said to be acting dishonestly with respect to the state of affairs. He may be negligent in not making enquiries but his inactivity cannot sensibly be described as dishonest.
- 180 Whilst the principle espoused in the authority may not be one of universal application, it provides an appropriate guide in the matter before the Tribunal.
- 181 Each case must be assessed on its own merits, factually driven. This is a case where there was more than one principal/agent relationship operating, where there were several arrangements for payment of levies by the applicant's through her agent, and where there were misappropriations by Eagle and non payment of levies by the Quest Franchisee from November 2016.
- 182 This case occurred in circumstances where the OC had no reason, through its committees or otherwise, to reasonably suspect misappropriations.
- 183 In all these circumstances, the application of the principle in *Portland Downs Pastoral* is appropriate. There is an insufficient basis on which to impute to the OC dishonesty with respect to the conduct of its agent, Eagle. The applicant's submission on estoppel against the OC is not made out.

THIRD ISSUE: Has the OC failed to act honestly, in good faith, exercising due care and diligence through the OC directly, or through its agent the OC manager:

- (ii) **by wrongfully misappropriating levies, thereby causing the applicant loss?**

- 184 There are two issues that arise for determination under question (ii).
- (a) First, the question concerns liability: whether the OC itself is liable as having wrongfully misappropriated levies, or whether the OC is liable as principal, under the law of agency, for the wrongful misappropriations of its agent, Eagle;

⁵¹ [2012] QCA 18 per Chesterman JA, White JA and Margaret Wilson AJA concurring.

(b) Second, the question concerns loss: to the extent the OC may be liable as principal, whether the applicant third party has suffered a loss, due to the acts of Eagle, as agent.

(a) Is the OC directly liable for wrongfully misappropriating levies, or is the OC liable as principal?

185 ***Liability of OC directly:*** As discussed in paragraphs 29 and 41 above, the applicant's POC make allegations against the OC, directly, of negligence and appear to do so in respect of misleading or deceptive conduct, breach of guarantees under the ACL, deceit and fraudulence/fraudulent misrepresentation.

186 As direct allegations against the OC itself, not relying in this instance on liability as principal for its agent, each of the applicant's allegations rely on the actions and conduct of the principal. Apart from the allegation of negligence, the allegations of misleading or deceptive conduct, breach of guarantees under the ACL, deceit and fraudulence/fraudulent misrepresentation may be considered together, as they depend upon an examination of the same facts.

187 The applicant has not given sufficient evidence, whether on the balance of probabilities or under the *Briginshaw* standard,⁵² for a greater strength and cogency of evidence, necessary to establish actual deceit or fraudulence/fraudulent misrepresentation or fraudulent misappropriations of levies by the OC, or that the OC directed Eagle to commit the misappropriations, or that it had knowledge of the misappropriations by Eagle at the relevant time.

188 Nor has the applicant given sufficient evidence to identify particular conduct of the OC itself that is misleading or deceptive or is intended to mislead or deceive, in accordance with that norm of behaviour as prescribed by s18 of the ACL. The same lack of sufficiency exists in proving the relevant application of guarantees under the ACL to the circumstances of the case.

189 Identification of the precise conduct complained of is essential. At the least, conduct of OC Committee in committee meeting deliberations and decisions would need to be adduced together with evidence of breach of OC Committee obligations under the OC Act.

190 The conduct itself must lead, or be capable of leading, a person into error and the error or misconception must result from 'conduct' of the person and not from other circumstances for which the person is not responsible. The test is objective, but the section is not designed to for the benefit of those who fail to take reasonable care of their own interests.⁵³

191 In the absence of such evidence, and the circumstances where the applicant allowed the Quest Franchisee to act as her agent for payment of levies without any particular oversight, direct liability of the OC does not arise,

⁵² *Briginshaw v Briginshaw* 60 CLR 336; [1938] HCA 34.

⁵³ *ACCC V Dukemaster Pty Ltd* [2009] FCA 682.

whether based on the actual behaviour of the OC or based on knowledge of the OC of Eagle's misappropriations or conduct constituting misleading or deceptive conduct.

- 192 The applicant's allegations made directly against the OC, of deceit, fraudulent misrepresentation and misleading or deceptive conduct under the ACL or at common law, are not made out, either factually on the evidence, or as a matter of law.
- 193 The applicant also alleges negligence on the part of the OC. The applicant contends that there are a number of duties of care owing by the OC.
- 194 It must be said that since 1932 the areas where a duty of care may be found to arise has expanded greatly. There is no issue in the present case that an OC bears a duty of care, in parallel with statutory duties under the OC Act. But what must be proved is the breach of the duty to take care. The mere assertion of a duty does not amount to negligence. It is not a case of strict liability.
- 195 In a similar way to the above, there is an insufficiency of evidence that goes to prove that the OC, by its Committee or otherwise, has behaved in an unreasonable manner in relation to a risk of foreseeably injury.
- 196 The applicant appears to contend that the OC, by the fact that Eagle prepared and provided s151 Certificates under the name of the OC, which have been found to be false and untrue, amounts to a breach of duty. But the question remains as to whether it is reasonable to expect that the OC should reasonably foresee these actions of Eagle. The applicant has failed to demonstrate that, judged objectively, the mere failure to perceive the grossly improper actions of Eagle amounts to a breach of duty, in relation to a foreseeable harm.
- 197 There is another important consideration. It concerns the actions of the Quest Franchisee. The Quest Franchisee was the agent of the applicant for payment of administration levies (and bound to do so as a matter of contract). It was also the applicant's agent under the arrangement where it paid the maintenance levies on behalf of the applicant. In all these matters, the applicant did not involve herself. She did not seek to review Fee Notices. She did not request receipts evidencing payments. She did not have herself registered as the person to whom Fee Notices should be sent.
- 198 The applicant complains that these arrangements were arrangements of long standing custom that existed when she purchased lot 143 in early 1998. But it was the applicant who entered into the lease of her lot with the contractual provision for payment of administration levies by the tenant. It was the applicant who allowed her agent to reduce rent payable to her to the extent of maintenance levies.
- 199 In her evidence, the applicant did not make a distinction in her claims/losses or in her allegations of misconduct against the OC between pre and post November 2016. It will be recalled that from November 2016, the Quest

- Franchisee ceased paying levies onto the OC through Eagle and retained them to its own use.
- 200 Claims and allegations of misconduct against the OC after November 2016 introduce a causation issue in respect of any alleged loss made against the OC as principal, and a credit issue in respect of alleged misconduct by the OC where it is the applicant's agent that is engaging in misapplication/misappropriation of levies.
- 201 Returning to the behaviour of the OC, the OC, acting in accordance with its statutory obligations and at the direction of its Committee from time to time ensured that the OC was covered by a policy of insurance. The OC gave evidence of the existence of fidelity insurance cover and that a claim had been made under that policy in respect of Eagle's misappropriations. This is evidence of the OC acting, to the extent it can, with reasonable care.
- 202 The applicant also alleges breach of duty by the OC by allowing Eagle to issue and send Fee Notices to the Quest Franchisee 'in bulk' without identifying individual lot liability. The applicant referred to a Fee Notice she sighted in approximately 2018, said to be evidence that individual lot liability was not shown. It would be most unusual for there to be one single Fee Notice issued for administration and maintenance levies for over 50 lots. The document was not produced.
- 203 The applicant referred to minutes of an OC Committee meeting⁵⁴ which makes reference to the bulk sending of notices and that such a practise is improper and should not be repeated. That minute states: 'It was noted that these invoices were issued incorrectly by the previous Owners Corporation Manager to the tenant (QGP) in one lump sum rather than to individual lot Owners.' The OC's witness Harrison denies that issuing one single Fee Notice for all lots to the Quest Franchisee was the practise.⁵⁵
- 204 It is not clear whether the minute is a reference to the bulk sending of many Fee Notices to the one address of the Quest Franchisee or the sending of one single Fee Notice, bulking together all levies owing by all lots without them being identified individually.
- 205 The evidence is equivocal and the alleged Fee Notice from 2018 was not able to be produced. The burden of proof lies with the applicant. I am not satisfied that the applicant has proved the allegation of bulk lump sum sending of a Fee Notice that was for all levies without identification of individual lot liability.
- 206 I also refer to and repeat my findings in paragraphs 199 and 200 above concerning the distinction to be made, in any event, between pre and post November 2016, where the actions of the Quest Franchisee have an important bearing on any question of negligence, especially whilst acting as the applicant's agent.

⁵⁴ Applicant's statement, [12] (annexure Q, item 3.2) and [50e]; applicant's evidence, [94b] above.

⁵⁵ Harrison's evidence, [105], above.

- 207 For the above reasons, the applicant has not demonstrated that the OC has acted in breach of its duty of care. Negligence is not proved.
- 208 ***Liability of OC as principal:*** Generally, a principal is not imputed with the knowledge of facts known to the agent if the agent was committing a fraud upon the principal.⁵⁶
- 209 It is sometimes referred to as the ‘fraud exception’ and the underlying rationale is that presuming communications by the agent to the principal is unrealistic where the agent is defrauding the principal.
- 210 The broadly stated principle above is not without criticism. The ‘fraud exception’ has been held to be an unnecessary exception. The proper analysis of the situation will be that it is *the act*, not the knowledge of the agent which is the critical element. The principal’s liability rests not on imputation of the agent’s knowledge, but triggered because the agent does an act.⁵⁷
- 211 To the extent it can be said that the OC’s liability is triggered because of Eagle’s act as agent, simply demands the application of the law of agency, where the principal is generally liable for acts of its agent.
- 212 It is well settled that a principal may bear liability for the actions of its agent where the agent is acting within the bounds of actual or ostensible authority. The OC’s liability is triggered to the extent that its agent, Eagle, has engaged in acts of misappropriation of levies, for which the OC, as principal, is treated as responsible under the law of agency.
- 213 Where the fraudulent actions of an agent have created a loss, in considering which one of two innocent parties must bear the loss, the third party or the principal, there are sound reasons for attributing the loss to the principal on the basis that the principal set out the scope of the agent’s authority or failed to oversee the agent’s actions.⁵⁸
- 214 In the present case, the applicant and the OC are both innocent parties. But where the applicant can demonstrate proof of payment of levies to Eagle, or a reasonable inference of payment may be made, with Eagle acting within the bounds of its authority to receive such payments, then such payment is effective and binds the OC. Again, this is simply the application of basic agency law.
- 215 To the extent that levies in respect of the applicant’s lot 143 are proved as having been paid and misappropriated by Eagle, subject to the further comment below, those misappropriations constitute a loss in the hands of the OC, not the applicant as lot owner.
- 216 This is because once a levy is received into the hands of the agent, that levy is constructively received by the principal.⁵⁹ The agent may misappropriate

⁵⁶ Dal Pont, *Law of Agency*, 4th edition, [22.57].

⁵⁷ *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557;

⁵⁸ Dal Pont, above, 19.14.

⁵⁹ *South Melbourne Permanent Building and Investment Society and Deposit Institute v Field* (1893) 19 VLR 213 at 218.

the levy by putting it immediately into his personal account, but that does not take away from its characterisation as having been received by the principal, with its loss being a loss of the principal.

217 Thus, the OC is liable as principal for the misappropriations by Eagle as agent. It is the OC that has suffered loss for proved payments of the applicant or for payments that might reasonable be inferred as having been paid by the applicant. It is not the applicant who has suffered the loss.

218 Nevertheless, the OC is required to recover the deficiencies in administration and maintenance levies, as a deficiency in the funds of the OC, in accordance with its obligations to do so and pursuant to its powers to raise levies under the OC Act.

219 The recovery of such deficiencies was approved by annual general meeting of the OC on 17 March 2021.

220 The question of liability in relation to the non payment of levies, as a result of the Quest Franchisee ceasing to make payments to Eagle from November 2016, involves different considerations. The Quest Franchisee is not the agent of the OC, but is the agent of the applicant. This is considered below.

(b) Has the applicant suffered loss for which the OC is liable as principal due to the acts of Eagle, as agent?

221 The second question concerns whether the applicant third party has suffered loss of a kind that the OC is liable as principal.

222 With the important caveat that an owners corporation is a statutory entity incorporated under s28 of the *Subdivision Act 1988*, having the rights and obligations solely prescribed by the OC Act, including as to recovery of deficiencies, as a matter of general agency law, an OC, as principal, could not successfully bring a claim against a third party lot owner for non payment of a levy that is proved to have been paid, but misappropriated by the agent. That is because the agent's receipt of the levy constitutes receipt by the OC as principal.

223 In effect, the applicant sets off any liability in respect of 'unpaid' levies against the proved payments to the agent. The loss residing with the innocent OC is discussed below.

224 Thus, the question of loss turns on whether there has been proved payment of the levies by the applicant.

225 The various pathways of the flow of funds in respect of maintenance and administrative levies may be identified as follows:

- (i) bundled maintenance levies and administration levies paid by Quest Franchisee to Eagle, deposited to the OC's account;
- (ii) bundled maintenance levies paid by Quest Franchisee to Eagle, misappropriated to Eagle's account;

- (iii) bundled administration levies paid by Quest Franchisee to Eagle, misappropriated to Eagle's account;
- (iv) maintenance and administration levies retained by Quest Franchisee, from November 2016, misappropriated to Quest Franchisee's own use.⁶⁰

226 In seeking to determine the question of loss/proved payment of levies requires separate examination for each of these flows of funds.

(i) bundled maintenance levies and administration levies paid by Quest Franchisee to Eagle, deposited to the OC's account

227 In respect of this flow of funds, some maintenance and some administration levies were identified by van Rensburg as having been paid into the account of the OC, to the benefit of the OC and not misappropriated.

228 However, the payments made into the OC's account were bundled, without identification of individual lot numbers in respect of which the payments were made.

229 The applicant seeks to rely on the October 2017 Certificate and Statements (and later, the February 2020 Certificate) as proof of payment pertaining to her lot 143. For the reasons given above, they have been found to be false and any verbal assurances of Martin concerning payment, found to be untrue. They do not constitute proof of payment in respect of lot 143.

230 However, it is reasonable to infer that some unknown portion of the lump sum payments into the OC's account were related to the applicant's lot 143. The methodology adopted by van Rensburg in the reconstructed financial records details how there was an allocation made to individual lots of such payments received into the OC's account.

231 The applicant has received credit in respect of such payments identified as having been made in bulk lump sum, in accordance with the approved methodology. That methodology and those payments form part of the reconstructed financial records, audited and approved at the 17 March 2021 annual general meeting of the OC.

232 Beyond the above credits, the applicant has not proved that the lump sum payments paid to the OC's account and not misappropriated by Eagle, identifiably for lot 143, included full payment of all lot 143 levies.

(ii) bundled maintenance levies paid by Quest Franchisee to Eagle, misappropriated to Eagle's account up to November 2016

233 Eagle received payments for maintenance levies from the Quest Franchisee. These payments were usually made in a bundled manner without attributing them to individual lots.

⁶⁰ The flow of funds under (d), concerns liability and loss, beyond the acts of Eagle, and is concerned with the acts of the Quest Franchisee as agent for the applicant as principal.

- 234 As discussed, the Quest Franchisee deducted maintenance levies from rent otherwise payable by it to lot owners, and paid them to Eagle.
- 235 In this regard, the lot owners, including the applicant, gave authority to the Quest Franchisee to do so and in that respect the Quest Franchisee acted as each lot owner's agent for payment of maintenance levies. It is not to the point that the applicant says that this was an informal arrangement in place when she purchased lot 143 in 1998. It was an arrangement that operated to the convenience of the applicant by operating as a 'set and forget' mechanism, an arrangement that the applicant adopted and participated in for many years.
- 236 However, the applicant remains responsible for paying maintenance levies under the OC Act. Acting prudently, she should have her own records or other evidence of payment. The applicant has brought the present action against the OC. The applicant bears the onus of proof. Where it is reasonable to expect that the applicant should have records of proof of payment of maintenance levies, but does not, she is unable to establish as a fact her asserted payment.
- 237 The applicant relies on the October 2017 Certificate and Statements (and later, the February 2020 Certificate) as proof of payment. But, as determined above, the October 2017 Certificate and Statements and the February 2020 Certificate have been found to be false and any verbal assurances of Martin concerning payment, found to be untrue. They do not constitute proof of payment of maintenance levies to Eagle in respect of lot 143.
- 238 For the period up to which the Quest Franchisee did deduct and make payments of maintenance levies in a bundled manner to Eagle, and to the extent those bundled payments were misappropriated by Eagle, it may reasonably be inferred that some unknown portion of those misappropriated maintenance levies were in respect of the applicant's lot 143.
- 239 To the extent of the misappropriation by Eagle as the OC's agent of some unknown portion of maintenance levies reasonably inferred to be in respect of lot 143, that unknown portion⁶¹ constitutes a loss in the hands of the OC as principal, for the reasons given previously.
- 240 Whilst that unknown portion is not a loss of the applicant, the OC is required to recover deficiencies in maintenance levies, as a deficiency in the funds of the OC, in accordance with its obligations to do so and pursuant to its powers to raise levies under the OC Act.
- 241 The recovery of such deficiencies was approved by annual general meeting of the OC on 17 March 2021.

(iii) bundled administration levies paid by Quest Franchisee to Eagle, misappropriated to Eagle's account up to November 2016

⁶¹ The failure of the Quest Franchisee to identify payments for each separate lot may give rise to contributory liability, but that is not a matter for present consideration.

- 242 In respect of administration levies, Eagle received payments for administration levies from the Quest Franchisee, up to November 2016.⁶² These payments were usually made in a bundled manner without attributing them to individual lots.
- 243 Unlike the arrangement for deduction from the applicant's rent of maintenance levies by the Quest Franchisee, the payment of administration levies was provided for as term of the leases between lot owners and the Quest Franchisee. As part of the overall commercial deal, the lease agreements had embedded in them that the cost of administration levies was to the account of, and to be absorbed by, the Quest Franchisee.
- 244 The leases, including for lot 143, were a commercial package of benefits and obligations. Within that package, lot owners can be said to have received a benefit by reason of the Quest Franchisee paying the administration levies, no doubt influencing matters such as the level of rent agreed upon.
- 245 However, the commercial arrangement under the lease does not displace a lot owner's liability under the OC Act to pay all levies. Thus, to the extent the Quest Franchisee paid the administration levies to Eagle, it did so as agent of the applicant and as a contractual obligation under the terms of its lease with the applicant.
- 246 The applicant did not receive from the Quest Franchisee proof of payment to Eagle of administration levies for lot 143. Again, acting prudently, the applicant should have her own records or other evidence of payments made by her agent.
- 247 Again, for the reasons given above, the October 2017 Certificate and Statements (and later, the February 2020 Certificate) do not constitute proof of payment of administration levies to Eagle in respect of lot 143.
- 248 The applicant bears the onus of proof. Where it is reasonable to expect that the applicant should have records of proof of payment of administration levies by her agent, but does not, she is unable to establish as a fact her asserted payment.
- 249 As established in the process of the reconstruction of financial records, the major portion of adjustments required to build the reconstructed financial records related to unpaid administration levies.
- 250 To the extent that the Quest Franchisee paid levies in lump sum to Eagle up to 22 November 2016, without attributing them to individual lots, the reconstructed financial records allocated the deficiency of the misappropriation in accordance with the disclosed methodology, subsequently accepted by the OC at the annual general meeting.⁶³

⁶² Respondent's hearing book, Reconstruction of financial records, pages 97 and 98.

⁶³ Respondent's hearing book, Reconstruction of financial records, page 97 and 98.

- 251 To the extent of misappropriation of administration levies by Eagle, as the OC's agent, up to 22 November 2016, in respect of lot 143, this constitutes a loss in the hands of the OC as principal, for the reasons given previously.⁶⁴
- 252 Whilst the loss is not a loss of the applicant, the OC is required to recover deficiencies in administration levies, as a deficiency in the funds of the OC, in accordance with its obligations to do so and pursuant to its powers to raise levies under the OC Act.
- 253 The recovery of such deficiencies was approved by annual general meeting of the OC on 17 March 2021.

(iv) maintenance and administration levies retained by Quest Franchisee, from November 2016, misappropriated to Quest Franchisee's own use

- 254 The Quest Franchisee, of the time, ceased making payments to Eagle from 22 November 2016 and retained the funds in respect of maintenance and administration levies. It follows the forensic work of van Rensburg, and is reflected in the reconstructed financial records, that funds for the maintenance and administration levies not paid by the Quest Franchisee were misappropriated by it and impermissibly converted to its own use.
- 255 The applicant does not deny that the Quest Franchisee ceased making payments from November 2016.
- 256 The misappropriations by the Quest Franchisee were committed by it as the applicant's agent, causing a loss in the hands of the applicant as principal. The agency arises both under the Quest Franchisee lease agreement in respect of payment of administration levies and, in respect of payment of maintenance levies, under an arrangement between the applicant and the Quest Franchisee.
- 257 There was no agency relationship between the OC and the Quest Franchisee in respect of unpaid levies caused by the misappropriations of the Quest Franchisee.
- 258 Given the fact of non payment of administration levies by the Quest Franchisee to Eagle (or to the OC) from 22 November 2016, liability for these deficiencies in unpaid administration levies, and to the extent of unpaid maintenance levies, lies with the applicant in respect of lot 143.
- 259 The October 2017 Certificate and Statements (and later, the February 2020 Certificate) do not constitute proof of payment of administration levies to Eagle in respect of lot 143. Moreover, that no payments were made by the Quest Franchisee after November 2016, is further evidence of the falsity of the October 2017 Certificate and Statements (and the reason for the disclaimer in the February 2020 Certificate).

⁶⁴ In respect of the Quest Franchisee, as the applicant's agent, failing to identifying separate lots when making payment to Eagle, refer footnote 52 above.

- 260 To the extent of the Quest Franchisee misappropriation, the claim of the applicant against the OC is unfounded.⁶⁵ Nevertheless, there is a deficiency in the funds of the OC caused by the misappropriations of the Quest Franchisee.
- 261 The OC is required to recover the deficiencies in administration and maintenance levies, as a deficiency in the funds of the OC, in accordance with its obligations to do so and pursuant to its powers to raise levies under the OC Act.
- 262 The recovery of such deficiencies was approved by annual general meeting of the OC on 17 March 2021.

Conclusion

- 263 The applicant is bound by resolutions approving the several reconstructed annual accounts and related resolutions, as passed at the 17 March 2021 annual general meeting of the OC. The resolutions are valid and binding on all lot owners.
- 264 The applicant has failed to prove that the OC failed to act honestly, in good faith exercising due care and diligence in its reconstruction of financial records, including its exclusion of alleged values associated with statements contained the October 2017 Certificate and Statements, verbal assurances of Eagle and the February 2020 Certificate, in respect of lot 143.
- 265 The applicant has failed to prove that the OC failed to act honestly, in good faith exercising due care and diligence in its reconstruction of financial records, by not properly taking into account relevant transactions and by excluding irrelevant transactions. The OC has acted in accordance with its obligations under the OC Act and has properly put the reconstructed financial records before lot owners. All resolutions at the annual general meeting on 17 March 2021, including adoption of the several reconstructed annual accounts, were validly passed.
- 266 The applicant has failed to assert estoppel against the OC, including by failing to prove that the OC acted unconscionably, in respect of the matters contained in the October 2017 Certificate and Statements, verbal assurances of Eagle and the February 2020 Certificate, by reason of imputing to the OC, the dishonesty of its agent's conduct.
- 267 The applicant's allegations made directly against the OC, of deceit, fraudulent misrepresentation and misleading or deceptive conduct under the ACL or at common law, have not been proved.
- 268 The applicant's allegations, made directly against the OC, that the OC has acted in breach of its duty of care is not demonstrated. The allegation of negligence has not been proved.

⁶⁵ Any misappropriation of unpaid levies by the Quest Franchisee, as agent of the applicant, and any claim by the applicant for breach of contract and agency is not before the Tribunal for decision.

- 269 The OC is liable as principal for the misappropriations by its agent, Eagle. It is the OC that has suffered loss for proved payments of the applicant or for payments that might reasonable be inferred as having been paid by the applicant. The OC is entitled to recover the deficiencies in administration and maintenance levies, as a deficiency in the funds of the OC, in accordance with its obligations under the OC Act.
- 270 In respect of the Quest Franchisee misappropriations, arising by it ceasing to make payments of levies to Eagle from November 2016, the claim of the applicant against the OC is unfounded. The loss is a loss in the hands of the applicant. Nevertheless, there is a deficiency in the funds of the OC to the extent caused by the misappropriations of the Quest Franchisee. The OC is entitled to recover the deficiencies in levies, as a deficiency in the funds of the OC, in accordance with its obligations under the OC Act.
- 271 Pursuant to the OC's powers under s6 of the OC Act, and pursuant to the obligation on the applicant as owner of lot 143 to pay any outstanding fees, charge, contribution or amount owing to the owners corporation under s28, the OC issued a valid Fee Notice dated 1 May 2020⁶⁶ and a Final Fee Notice dated 29 September 2020.
- 272 The Fee Notice and the Final Fee Notice are validly issued for the recovery of the deficiencies and permissible interest in accordance with the reconstructed financial records and approved in accordance with the resolutions of the OC on 17 March 2021.
- 273 The OC has suffered the losses summarised above, both as principal for the misappropriations of Eagle, and as deficiencies caused by the non payment by the applicant of levies due to the misappropriations of the Quest Franchisee.
- 274 Whichever way the losses/deficiencies are characterised, the amount must be recouped by the OC in accordance with its obligations under the OC Act. Under the statutory scheme of the OC Act, this may only be achieved by the issue of a Fee Notice and Final Fee Notice.
- 275 The applicant has paid the sums due under the Final Fee Notice. In doing so, and limited to the extent of the Final Fee Notice, the applicant has complied with her the obligations under the OC Act.
- 276 The redress sought by the applicant for payment in the sum of \$7,976.70, or in any other amount, in respect of her claim, is dismissed.

⁶⁶ This Fee Notice replaced earlier Fee Notice dated 16 April 2020. The parties agree that in material respects, the Fee Notice of 1 May 2020 is to the same effect.

277 It follows that the applicant is not entitled to a declaration that she has paid, or had paid on her behalf, all levies for lot 143. The applicant is not entitled to any set off against monies paid by her pursuant to the Final Fee Notice or otherwise.

**MJF Sweeney OAM
Member**