Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No. 1813 v Keevers
Medium Neutral Citation:	[2022] NSWCATCD 104
Hearing Date(s):	28 April 2022
Date of Orders:	06 July 2022 [amended 19 July 2022]
Decision Date:	6 July 2022
Jurisdiction:	Consumer and Commercial Division
Before:	Kevin Andronos SC, Senior Member
Decision:	Pursuant to Section 63 of the Civil and Administrative Tribunal Act 2013, reasons published are amended to read as follows: In matter SC 22/03898 (1) Pursuant to s. 86(1) of the Strata Schemes Management Act 2015 (the SSMA), the Respondent pay to the Applicant the sum of $18,000.00. (2) Pursuant to ss. 86(1) and 85(1) of the SSMA the Respondent pay to the Applicant interest on the sum outstanding under order 1 at the rate of 10% per annum from 16 September 2021 to the date of payment. (3) The Respondent pay the costs of the Applicant as assessed or agreed. In matter SC 21/50064 (1) Pursuant to s. 86(1) of the SSMA, the Respondent pay to the Applicant the sum of $8,944.58. (2) Pursuant to ss. 86(1) and 85(1) of the SSMA the Respondent pay to the Applicant interest on the sum outstanding under order 1 at the rate of 10 % per annum from 2 November 2021 to the date of payment. (3) The Respondent pay the costs of the Applicant as assessed or agreed. In matter SC 21/51320 (1) Pursuant to s. 86(1) of the SSMA, the Respondent

	pay to the Applicant the sum of $18,000.00. (2) Pursuant to ss. 86(1) and 85(1) of the SSMA the Respondent pay to the Applicant interest on the sum outstanding under order 1 at the rate of 10% per annum from 16 November 2021 to the date of payment. (3) The Respondent pay the costs of the Applicant as assessed or agreed.
Catchwords:	LAND LAW – Strata schemes – Recovery of unpaid contributions and interest
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Australian Consumer Law (NSW) Body Corporate and Community Management Act 1997 (Qld) Evidence Act 1995 (NSW) Legal Profession Uniform Law (NSW)
Cases Cited:	Expense Reduction Analysts Group Pty Limited v Armstrong Strategic Management Pty Limited (2013) 250 CLR 303 Aon Risk Management Services v Australian National University (2009) 239 CLR 175 O'Neill v T and I Engines Pty Limited [2015] NSWCATAP 77 Sayhoun v Owners Corporation Strata Plan 75123 [2014] NSWCATAP 112 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 Dunlop & Anor v Body Corporate for Port Douglas Queenslander CTS 886 & Ors (No 2) [2021] QSC 265 Village Cay Marina v Acland [1998] 2 BCLC 327 Briginshaw v Briginshaw (1938) 60 CLR 336 Louth v Diprose (1992) 175 CLR 621 ACCC v CG Berbatis Holdings [2003] HCA 18, (2003) 214 CLR 51 ASIC v Kobelt [2019] HCA 18, (2019) 267 CLR 1 ACCC v Geowash Pty Limited [2019] FCA 72 ACCC v McCaskey [2000] FCA 1037; (2007) 104 FCR 8 Hodges v Webb [1920] 2 Ch 70

Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 1813 (Applicant) Francis Johnie Keevers (Respondent)
Representation:	Solicitors: Madison Marcus Law Firm (Applicant) Terrett Lawyers (Respondent)
File Number(s):	SC 21/50064 SC 21/51320 SC 22/03898
Publication Restriction:	Nil

REASONS FOR DECISION

1 In each of these proceedings, being matters SC 21/50064, SC 21/51320 and SC 22/03898, the Applicant (the **OC**) seeks orders under s. 86(1) of the *Strata Schemes Management Act* 2015 (NSW) (the **SSMA**) that the Respondent pay unpaid contributions under the SSMA, together with interest on those contributions, and reasonable recovery costs. The parties in each matter were the same and the three matters were heard together.

2 The OC is the registered proprietor of the common property at xx Severn Street, Maroubra (the **Building**) and manages the strata scheme in respect of that Building. There are four lots in the Building. The Respondent (**Mr Keevers**) owns one, being Lot 17. Lots 15 and 18 are owned by Sarraf Property Group Pty Limited (**SPG**) and Mr K Palonis as tenants in common. Lot 16 was recently acquired by SPG and Best Safety-Glass International Pty Limited as tenants in common. Mr Palonis is a director and shareholder of that company, holding substantially all of its shares. In these reasons I describe SPG, Mr Palonis and Best Safety-Glass International Pty Limited as the **SPG interests**.

3 Although comprised in three proceedings, these matters are all part of the same dispute. Each of the three matters relates to a claim for a different instalment of special levies struck at an extraordinary general meeting of the OC on 11 August 2021 (the **August EGM**). The OC alleges that Mr Keevers's aggregate liability pursuant to the special levies is $44,944.58. The OC's

claims in these proceedings are for instalments which it says had fallen due prior to commencement of each of the three proceedings, being the sums of $8,944.58 due on 1 November 2021 (SC 21/500640), $18,000 due on 15 November 2021 (SC 21/51320) and $18,000 due on 15 September 2021 (SC 22/03898).

4 It is not disputed that Mr Keevers has not paid those amounts. At trial he opposed the orders sought.

Litigation history

5 Proceedings SC 22/0398 were initially commenced in the Local Court of New South Wales but were transferred to this Tribunal by consent on or prior to 27 January 2022 pursuant to cl 4 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (the **NCAT Act**).

6 There has been extensive litigation between the parties in this Tribunal and in various Courts, which litigation continues. Among the matters contested between the parties are three proceedings (which originally bore the file numbers SC 19/28242, SC 19/28238 and SC 19/28234 and have been renumbered SC 21/33762, SC 21/33759 and SC 21/33770). In those proceedings, Mr Keevers (together with the then owners of Lot 16) successfully sought orders for the appointment of a compulsory strata agent under s. 237 of the SSMA and for the reduction of a special levy struck at the 2017 annual general meeting of the OC pursuant to s. 87 of the SSMA.

7 On appeal by the OC, the Appeal Panel set aside the order for the appointment of the compulsory agent and, subject to some qualification, the order reducing the special levy. The Appeal Panel remitted the proceedings to a differently constituted Tribunal for redetermination: *The Owners – Strata Plan No 1813 v Keevers* [2021] NSWCTAP 130 (the **Appeal Panel principal decision**) and *The Owners – Strata Plan No 1813 v Keevers* [2021] NSWCTAP 229 (the **Appeal Panel consequential orders**). With the recent acquisition of Lot 16 by the SPG interests, proceedings SC 21/33770 have since been withdrawn.

8 The Appeal Panel decisions have themselves been appealed to the Court of Appeal by Mr Keevers. That appeal has been heard but, as at the date of these reasons, judgment has not been delivered.

Jurisdiction

9 Jurisdiction was not conceded by Mr Keevers. As these are applications for orders for recovery of unpaid contributions under s. 86(1) of the SSMA, pursuant to s. 86(2)(b) the Tribunal only has jurisdiction to entertain them if there are proceedings pending in the Tribunal between the OC and the owner. Contributions are otherwise recoverable as a debt in a court of competent jurisdiction without the necessity of obtaining an order under s. 86: s 86(2A), SSMA.

10 I find by reason of the pendency of the remitted proceedings that s. 86(2)(b) of the SSMA is satisfied. Indeed, other proceedings between the parties were set down for hearing in the Tribunal in late May 2022. In any event, notwithstanding that Mr Keevers sought to take the jurisdictional point, I note that proceedings SC 22/03898 were remitted from the Local Court to the Tribunal with the apparent consent of Mr Keevers.

Adjournment application

11 These proceedings were heard on 28 April 2022. At the commencement of the hearing, Mr Keevers sought an adjournment and proposed a new timetable for points of claim, points of defence and further evidence. The adjournment application was opposed and, following argument, I refused the adjournment. I indicated at the time that I would provide written reasons, which now form part of this judgment.

12 On 18 February 2022 directions were made that all three matters comprising the present proceedings be listed and heard together and that they be adjourned for hearing to a date to be fixed by the Registrar. Directions were made at that time extending earlier directions for the service of evidence and submissions and providing for any application by Mr Keevers for a stay or adjournment of the proceedings to be filed and served by 10 March 2022. Mr Keevers did not make any such application. On 9 March 2022 the parties were notified by the Tribunal of the hearing date.

13 Mr Keevers did not appear on 18 February 2022. Since the commencement of the earliest of these proceedings, he has instructed 3 firms of solicitors, Mr Terrett having been instructed on 13 April 2022. Mr Keevers's first solicitor

withdrew due to suffering a heart attack in November 2021 and no explanation is given for the withdrawal of Mr Keevers's second solicitor, which appears to have been in late March 2022.

14 Mr Keevers instructed Mr Terrett that he was not aware until 12 April 2022 of the hearing date. I do not accept that allegation. Mr Keevers was notified by the Registry by letter to his home address of the directions made on 18 February 2022. He was further notified by the Registry of the hearing date of 28 April 2022 by letter from the Registry to his home address dated 9 March 2022. Mr Keevers through his solicitor confirmed that the address to which those notices were sent was and remains his home address. Mr Moir for the OC informed the Tribunal, and I accept, that the OC's evidence was served on Mr Keevers by email and by process server instructed by his firm. I do not accept that the notices and evidence were not received.

15 On 22 April 2022 Mr Keevers's solicitor emailed the Tribunal Registry seeking copies of all filed documents and foreshadowing an adjournment application. At about 4.30 pm on 27 April 2022 Mr Keevers first sought the OC's consent to the adjournment.

16 Mr Keevers's basis for the adjournment application was essentially that in the circumstances his current solicitor had not had a reasonable opportunity to prepare his defence and evidence and that there were good grounds on which the proceedings could be defended. Those grounds included contentions that the contributions levied were not properly debts due to the OC because of defects in the process by which the resolution was made and possible defences or a cross application under sections 30, 50 and 152 of the Australian Consumer Law (the **ACL**).

17 Accordingly, it was contended that Mr Keevers would be deprived of procedural fairness if the adjournment were not granted and the arguments and evidence in support could not be put.

18 The Tribunal's overarching obligation under s. 36 of the NCAT Act is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. It is relevantly informed with respect to adjournment applications by the well known principles in *Expense Reduction Analysts Group Pty Limited*

v Armstrong Strategic Management Pty Limited (2013) 250 CLR 303 at [51], itself informed by *Aon Risk Management Services v Australian National University* (2009) 239 CLR 175. Further, the Tribunal is obliged to consider the effect on the opposing party, who was present and ready to proceed: *Sayhoun v Owners Corporation Strata Plan 75123* [2014] NSWCATAP 112 at [17].

19 In *O'Neill v T and I Engines Pty Limited* [2015] NSWCATAP 77 the Appeal Panel set out the following principles with respect to adjournment applications:

> (1) matters should almost always proceed on the date fixed for hearing,
>
> (2) an application for an adjournment should be seen as the exceptional rather than the ordinary course;
>
> (3) where the adjournment is caused, at least in part, by the delay of the party seeking the adjournment, or non-compliance by that party with an extant order of the Tribunal, adequate explanation is called for, and its absence weighs heavily, and sometimes decisively against the grant of an adjournment.

20 In my view, Mr Keevers has had ample opportunity to be ready for the hearing. While Mr Terrett was instructed late and personally might not have had as much time to prepare for the hearing as he may have liked, this does not mean that Mr Keevers has not had such an opportunity. No explanation is provided for his apparent failure to take any steps on receipt of the 18 February 2022 and 9 March 2022 notices from the Tribunal. The OC was present and ready to proceed. I accepted that it would be prejudiced by an adjournment, having incurred costs in preparation for the hearing and because it was entitled to a prompt determination of its claim. I rejected the adjournment application and the matters proceeded on 28 April 2022.

Evidence and submissions on substantive application

21 The OC relied on statements made by John Sarraf made 11 March 2022, Norman Sarraf made 11 March 2022 and 28 March 2022 and Shane Vella made 11 March 2022. The statements and their attachments were admitted without objection. A USB drive which comprised a recording of the 11 August extraordinary meeting of the OC, the transcript of which was attached to the 11 March 2022 statement of Norman Sarraf, was also admitted into evidence.

22 Although he was afforded the opportunity to do so, Mr Keevers did not cross examine any of the OC's witnesses. He did not rely on any evidence at the hearing.

23 The OC, by its solicitor, made oral submissions at the hearing. Mr Keevers did not. I gave him leave to file written submissions, which leave he exercised and filed lengthy written submissions (the **RWS**) on 13 May 2022.

24 Mr Keevers also filed a statement made by him and a statement made by Mr Terrett, both dated 13 May 2022, and a bundle of documents. Mr Keevers's statement goes to a number of issues such as the conduct of these proceedings, his history as an owner in the Building, his relations with the SPG interests, conversations with Mr Norman Sarraf in February 2018 concerning a price at which Mr Keevers might sell his Lot to the SPG interests and conversations with Ms Louise Tyrell, the compulsory strata manager of the Building appointed in May 2020. Mr Terrett's statement largely concerns certain searches and enquiries undertaken by him with comments on the results. The bundle exhibited to his statement contains the results of those searches and some of the judgments in the remitted proceedings.

25 In accordance with leave granted to it at the hearing, the OC filed written submissions in reply on 20 May 2022.

26 Leave had not been granted to Mr Keevers to file statements or other evidence after the hearing. Such leave was only sought in a perfunctory way at [47] RWS, however, no submissions were addressed to that application for leave. As Mr Keevers has addressed no submission to the question of whether leave should be granted, I have inferred in his favour that he relies on the same matters advanced in support of the adjournment application.

27 The OC opposes that application on the basis that the reception of the evidence would cause it prejudice in that it is deprived of the opportunity to rely on any evidence in reply and to cross examine Mr Keevers and/or Mr Terrett. It also makes a general submission to the effect that the evidence sought to be relied upon by Mr Keevers is of little probative value, and aspects of it are prejudicial and embarrassing and should not be admitted in any event.

28 I have approached Mr Keevers's application according to the principles governing leave to reopen. The interests of justice provide the fundamental principle for determining such an application: *Urban Transit Authority of NSW v*

Nweiser (1992) 28 NSWLR 471. See also *Australian Securities and Investments Commission v Rich* (2006) 235 ALR 587.

29 In determining this application, I have considered what appear to me to be the relevant the factors from among those identified in *Australian Securities and Investments Commission v Rich*. Those factors include whether the occasion for calling such evidence could have been reasonably foreseen, the importance of the evidence to the determination of the facts in issue, the degree of relevance and probative value of the further evidence, the prejudice to the applicant in terms of delay and completion of the proceedings and consequent cost and the public interest in the timely conclusion of litigation.

30 I have taken the statements of Mr Keevers and Mr Terrett into account in considering whether to admit them on determining the substantive claims in these proceedings.

31 I accept the OC's submission that the late service of the statements sought to be relied upon by Mr Keevers causes it prejudice in that it is deprived of the opportunity to cross examine Mr Keevers's witnesses and to consider and rely on evidence in reply. I have also considered the public interest in the timely conclusion of litigation and prejudice to the OC in terms of further cost in determination of these proceedings.

32 Even having taken the 13 May 2022 statements of Mr Keevers and Mr Terrett into account, and inferring submissions on Mr Keevers's behalf, I am not satisfied that there is a sufficient basis for me to grant leave to him to adduce further evidence. He had been notified of the hearing and had been in receipt of the OC's evidence for some weeks. I accept that prejudice would be suffered by the OC. Taking all of the matters in the preceding paragraphs into account, in the exercise of my discretion, I do not admit the statements of Mr Keevers and Mr Terrett of 13 May 2022 or their exhibits into evidence on the substantive claim.

Positions of the parties

33 The OC submits that its claim in these proceedings is straightforward. It says there were properly struck special levies at the August EGM in the following terms:

(1) $1,248,037.00 payable to the Capital Works fund, due and payable in two equal instalments on 1 October 2021 and 1 December 2021 (Resolution 6);

(2) $10,667.17 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of a report from Urbis Heritage, payable in one lump sum on 1 November 2021 (Resolution 14);

(3) $13,068.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of a report from NBRS Heritage, payable in one lump sum on 1 November 2021 (Resolution 15);

(4) $7,150.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of a report from Xavier Knight Structural Engineers, payable in one lump sum on 1 November 2021 (Resolution 16);

(5) $1,329.90 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of advice received from Madison Marcus solicitors, payable in one lump sum on 1 November 2021 (Resolution 17);

(6) $2,250.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of payments made to Tyrell Strata Management, payable in one lump sum on 1 November 2021 (Resolution 18);

(7) $2,805.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost advice received from Adrian Galasso SC, payable in one lump sum on 1 November 2021 (Resolution 19);

(8) $150,000.00 payable to the Administrative fund in order to fund advice and possible legal action the subject of other resolutions of the EGM, due and payable in two equal instalments on 15 September 2021 and 15 November 2021 (Resolution 20);

34 The OC's claim is confined to the first instalment under Resolution 20 (SC 22/0398), the second instalment under Resolution 20 (SC 21/51320) and the 1 November 2021 contribution due under Resolutions 14, 15, 16, 17, 18 and 19 (SC 21/5064). No claim is made in these proceedings in respect of Resolution 6. The validity of that resolution is, therefore, not in issue in these proceedings.

35 As indicated above, Mr Keevers owns one of four lots in the Building and is liable for 24% of levies in accordance with the Strata Plan at Annexure A to Mr Vella's 11 March 2022 statement. Accordingly, the OC has calculated the sums due as:

(1) $8,944.58 for the contribution under Resolutions 14, 15, 16, 17, 18 and 19;

(2) $18,000.00 for the first instalment under Resolution 20;

(3) $18,000.00 for the second instalment under Resolution 20;

36 The Applicant also seeks interest under ss. 86(1) and 85(1) of the SSMA and reasonable expenses in recovering the amounts due.

37 In the RWS, Mr Keevers has sought to impeach the validity of those resolutions on many grounds, the reasoning for which is not always clear. Nevertheless, he appears to oppose the orders on two main bases. First, he says that for various reasons the resolutions passed at the August EGM are void and therefore no obligation to make any contributions pursuant to them can arise. Secondly, he says that in the exercise of my discretion I should take into account certain disentitling conduct of the OC in striking the levies and in pursuing payment of contributions.

38 Underlying the allegations of disentitling conduct, and to some extent underlying some of the allegations impugning the resolutions, is a more fundamental allegation that the OC and the SPG interests were actuated by an improper purpose. That purpose is variously described as being to pressure Mr Keevers into selling his interest in Lot 17 to the SPG interests for less than fair value. This is obviously a very serious allegation and is dealt with below at paragraphs 104 and following.

39 It should be noted that Mr Keevers has not brought an application for the exercise of the discretion under s. 24 of the SSMA to invalidate any resolution of the OC. Had he done so, he would have borne the onus of establishing non-compliance with the provisions of the Act or regulations, as required by s. 24(1). Given that his argument appears to be that the resolutions are impeachable and accordingly, in the exercise of my discretion I should not give effect to resolutions 14 to 20 when exercising my powers under s. 86 of the SSMA, I have approached the question of the onus of proof on the basis that he bears the obligation to demonstrate such non-compliance.

40 It might also be noted that Mr Keevers has not brought an application under s. 87 of the SSMA for an order varying the contributions sought pursuant to the special levies. The question of whether the special levies are excessive is therefore not addressed in these reasons other than with respect to the question of whether they have been struck for an improper purpose.

Credit

41 Mr Keevers has invited me to draw adverse inferences as to the credit of the OC's witnesses. At RWS [58] he criticises the applicant's witness statements as set out in a "vague, evasive contradictory and objectively unsatisfactory" manner. Further, he seeks to rely on findings made by the Tribunal at first instance in the proceedings between the parties determined in *Keevers, Bourke and Farrell v The Owners Strata Plan 1813* [2020] NCATCD 25 May 2020 (the **first instance decision**) and on the basis of further submissions made in the RWS.

42 As to the former, Mr Keevers elected not to cross examine any of the OC's witnesses. In my view, Mr Keevers cannot rely on the submissions in the RWS in the absence of having raised with each of the witnesses the challenge to their credit he now makes. While the Tribunal is not bound by the rules of evidence, the rules of natural justice nevertheless apply. As a matter of fairness, if a tribunal is to be invited to disbelieve a witness, the grounds upon which the evidence is to be disbelieved should be put to the witness in cross examination so that the witness may have an opportunity to offer an explanation: *Village Cay Marina v Acland* [1998] 2 BCLC 327 at 338.

43 As to the latter, the OC has correctly pointed out that the findings made in the first instance decision as to improper purpose were overturned on appeal. They are, in any event, addressed to different conduct at a different time. I do not make any findings as to credit or as to purpose on the basis of other proceedings in the Tribunal.

44 Further, having not objected to the admission of the OC's evidence at the hearing, in the RWS Mr Keevers raises an objection based on s. 135 of the *Evidence Act* 1995, namely the general discretion to exclude evidence that is unfairly prejudicial, misleading or confusing or would cause or result in an undue waste of time. That evidence was already admitted without objection, so the submission is rejected. Further, to the extent that Mr Keevers at RWS [53]-[55] relies on s. 135 as a discretionary ground not to make the orders sought by the OC, the submission is obviously misconceived and is rejected.

Findings of fact

45 I make the following findings of fact. I do so only on the basis of the evidence or concessions made before me and I have not relied on findings of fact or credit made by the Tribunal in the first instance decision.

46 In the first instance decision, the Tribunal ordered the appointment of a compulsory manager. As indicated above, the Appeal Panel allowed the OC's appeal against that decision and terminated the appointment with effect from about May 2021.

47 In July 2021, following the termination of the compulsory management of the strata scheme, the OC gave the Lot owners Notice of an Extraordinary General Meeting to be held by zoom video conference on 11 August 2021. The Notice contained an agenda identifying 20 proposed resolutions for determination at that EGM, including the appointment of Think Strata Pty Limited (**Think Strata**) as the OC's managing agent, for the delegation to Think Strata of certain functions, and to determine the composition of the strata committee.

48 Prior to the August EGM, the OC had been concerned that a draft planning proposal prepared by Randwick City Council (**Council**) contemplated listing the Building as a heritage item under the Randwick Local Environmental Plan 2012 (the **RLEP**). On 28 July 2021, the OC's solicitors sent a letter to Council seeking amendments to the proposed heritage listing of the Building. At the time, the OC was concerned that if Council were to list the Building, it would diminish the value of the Building. I am satisfied that Mr Keevers shared that concern.

49 The SPG interests took steps to protect the interests of the Lot owners by retaining various experts and consultants to prepare submissions to Council opposing the heritage listing. The compulsory strata manager was also due to be paid its fee for services provided during the period of compulsory management. SPG paid this invoice, reimbursement for which was the subject of resolution 18.

50 The OC had received invoices for each of the sums specified in motions 14 to 17 and 19, which invoices were in evidence. Some of the invoices were addressed to SPG or Norman Sarraf. Others were addressed to npj Property

Group, marked to the attention of Mr Norman Sarraf and described as being in relation to the Building. All of those invoices related to advice or services provided by various professionals to challenge the proposed heritage listing by Council or were otherwise properly sums due by the OC. Each of the invoices was raised in connection with work performed for the benefit of the Lot owners as a whole and the proper subject of motions 14 to 17 and 19. These invoices were also paid by the SPG interests.

51 To the extent that the OC in its evidence has treated steps taken by the SPG interests as taken on behalf of the OC, I do not regard the distinction to be material. Plainly a DA lodged in respect of the Building benefits the owners from time to time of the interests in that Building. To the extent that Mr Keevers says that steps taken by the SPG interests to advance the DA or otherwise protect the position of the Building were taken for the benefit of the SPG interests only, I reject that contention.

52 Resolution 20 is in a different category in that it relates to sums to be raised in anticipation of litigation, including with Council in respect of the DA. The Explanatory Note in the Notice of EGM provided:

> The [OC] will require additional funds to obtain legal and planning advice and fund possible legal action, as referred to in motions 7 (lawyers and consultants to challenge the proposed heritage listing), 8 (lawyers and consultants to lodge an application with council), 9 (lawyers for levy recovery), 10 (lawyers for advice on renting out units), 11 (lawyers re possible negligence by Rollings & Tyrell for entering into contracts with no funds), 12 (advice on terminating East Coast contract) and 13 (advice on s106(5) claim). The legal and consultant costs are likely to well exceed this figure but this will fund the initial advice and action.

53 On its face, the explanation given in the explanatory note appears reasonable, even if there is no analysis that supports the figure of $150,000. While that figure may appear high, whether it is so high that an order might be made to vary it under s. 87 is not raised in these proceedings.

54 Rather, Mr Keevers alleges that resolution 20 is part of a course of conduct brought for an improper purpose, namely to pressure him into selling Lot 17 to the SPG interests at less than a fair value. I consider this allegation separately at paragraphs 104 and following below.

The August EGM

55 The August EGM itself took place on 11 August 2021. Present were Mr Norman Sarraf, Mr Konn Palonis, Mr Keevers, Mr John Sarraf and Mr Moir, the OC's solicitor. The meeting was recorded and a transcription giving time references to events in the meeting was in evidence. Other than with respect to minor and immaterial discrepancies, I am satisfied that the transcription is accurate.

56 The minutes record Norman Sarraf as attending for Lot 15 as a company nominee, Mr Palonis for lot 16 as a company nominee, Mr Keevers as being unfinancial and John Sarraf as a company nominee for lot 18. The parties were well known to each other by this time. Mr Keevers was well aware of who each of the other attendees was and his interest in each of the Lots on whose behalf he purported to attend.

57 According to the transcript and the minutes of the August EGM, at its commencement Mr John Sarraf was elected chairman by the meeting. Mr Keevers did not oppose his election or his performing the role of chairman.

58 Mr Keevers does not dispute that he was unfinancial at the time and he acknowledged as much during the August EGM. Mr John Sarraf as chair stated at 04:14 on the transcript that the other three Lots were financial.

59 During consideration of a resolution to demolish the Building's garages, Mr Keevers raised the possibility of the other Lot owners buying his Lot. Mr Norman Sarraf responded in words to the effect that Mr Keevers had raised that possibility at an inappropriate time and that it could be dealt with later, in general business. He did not give any undertaking as to any negotiation for any purchase. Mr Keevers was not deprived of any opportunity to commence any such negotiation.

60 Although he was not financial, Mr Keevers voted against resolution 6 (the special levy of $1,248,037) and his vote was recorded in the minutes even though it was not validly cast.

61 Resolution 7 was for the engagement of consultants and lawyers to challenge Council's proposed heritage listing and for authorisation of the strata committee

to select those consultants. It appears that some (but not all) of the various consultants had already been engaged, so the resolution had the effect of ratifying their engagement. Mr Keevers opposed that resolution but not because he opposed the course to be taken. During the meeting Mr Keevers agreed that preventing the Building being heritage listed would be to the benefit of himself and the other parties. His opposition was on the basis that he considered it to be premature to engage lawyers and consultants. It was clear at the meeting that all parties, including Mr Keevers, wished to oppose heritage listing of the Building.

62 Resolution 7 was carried, with Mr Keevers's vote against recorded but not counted. It would not have altered the passage of the resolution if it had been.

63 Resolution 8, which authorised engagement of consultants and lawyers for the purpose of taking steps to challenge Council's proposed heritage listing of the Building. As with resolution 7, it appears that some of the consultants had already been engaged, so the resolution had the effect of ratifying their engagement. Those steps were expressed to include lodging a development application to challenge the heritage listing and protect the OC's position. As with resolution 7, Mr Keevers opposed it on the basis that it was not needed yet.

64 Resolution 8 was carried, with Mr Keevers's vote against recorded but not counted. It would not have altered the passage of the resolution if it had been.

65 Resolution 9 authorised commencement of legal action for recovery of unpaid contributions against owners in arrears. It was carried without Mr Keevers voting against. It relates to resolution 20 in that the costs involved in retaining lawyers to give effect to the resolution were anticipated future costs.

66 Similarly, resolutions 10, 11 and 13 related to obtaining legal advice for the benefit of lot owners, which advice had not yet been obtained. Resolution 10 was in relation to legal advice on the rights of lot owners to rent their lots while the Building was uninsured; resolution 11 was in relation to possible claims against the compulsory strata manager and resolution 13 was in relation to possible claims by the owners against the OC. Mr Keevers voted against resolutions 10 and 13. He did not vote against resolution 11.

67 By resolution 14, the OC resolved to strike a special levy of $10,667.17 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of a report from Urbis Heritage, payable in one lump sum on 1 November 2021. It was carried with Mr Keevers abstaining.

68 By resolution 15, the OC resolved to strike a special levy of $13,068.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of a report from NBRS Heritage, payable in one lump sum on 1 November 2021. It was carried with Mr Keevers voting against.

69 By resolution 16, the OC resolved to strike a special levy of $7,150.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of a report from Xavier Knight Structural Engineers, payable in one lump sum on 1 November 2021. It was carried with Mr Keevers voting against.

70 By resolution 17, the OC resolved to strike a special levy of $1,329.90 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of advice received from Madison Marcus solicitors, payable in one lump sum on 1 November 2021. It was carried with Mr Keevers voting against.

71 By resolution 18, the OC resolved to strike a special levy of $2,250.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost of payments made to Tyrell Strata Management, payable in one lump sum on 1 November 2021. It was carried with no votes recorded against the motion.

72 By resolution 19, the OC resolved to strike a special levy of $2,805.00 payable to the Administrative fund in order to reimburse the requesting lot owners the cost advice received from Adrian Galasso SC, payable in one lump sum on 1 November 2021.

73 By resolution 20, the OC resolved to strike a special levy of $150,000.00 payable to the Administrative fund in order to fund advice and possible legal action discussed in other resolutions of the EGM, due and payable in two equal instalments on 15 September 2021 and 15 November 2021. It was carried with no votes recorded against the motion.

74 At the close of the meeting the chairman, John Sarraf said that unless any of the other Lot owners wanted to say anything else, the meeting was closed.

Neither Mr Keevers nor Norman Sarraf raised the question of the SPG interests buying Mr Keevers's Lot.

Events following the meeting

75 As found at paragraph 48 above, all of the parties were concerned that the possible heritage listing of the Building by Council could diminish its value. After the August EGM and in accordance with resolution 8, the OC lodged a development application with Council for the construction of a new building with residential units on the site of the Building (the **DA**). The fact that parties other than the OC were involved in lodging the DA is immaterial; such arrangements are commonplace.

76 On 17 September 2021 Mr Keevers objected to the DA. In his letter of objection Mr Keevers claimed that the OC had not had a meeting to approve a DA or Urban Renewal. He said that the latest EGM "just a few weeks ago never mentioned this and only mentioned raising levies for repairs to the block".

77 This was at least in part incorrect. As has been established above, resolutions 7 and 8 passed at the August EGM did address the lodgement of the DA with Council. Resolution 8 in terms authorised it. A number of special levies had been approved in that respect.

78 The evidence does not follow the progress of the DA or of Mr Keevers's objection to it, however, I infer that it has not been determined by Council. Accordingly, to a large extent the subject matter of resolution 20 remains at large. There was no evidence as to whether lawyers have been retained in respect of the matters addressed at resolutions 10, 11 and 13.

79 The OC was successful in persuading Council to vary the proposed heritage listing such that its impact on the Building is much reduced. The OC says, and I accept, that this has preserved value in the Building and accordingly inures to the benefit of all Lot owners, including Mr Keevers.

The demands

80 On 16 September 2022 the OC's solicitor delivered a letter of demand to Mr Keevers, demanding payment of $18,000 together plus interest plus legal costs

of $400 by 7 October 2022. This was in respect of the first instalment under resolution 20, due on 15 September 2022. Recovery proceedings were foreshadowed in the letter and were commenced in the Local Court on 18 October 2022. They were later transferred to the Tribunal (SC 22/03898).

81 On 2 November 2022 the OC's solicitor delivered a letter of demand to Mr Keevers, demanding payment of $8,944.58 plus interest plus legal costs of $400 by 1 December 2022. This was in respect of the levies under resolutions 14 to 19, due on 1 November 2022. Recovery proceedings were foreshadowed in the letter and were commenced in the Tribunal on 7 December 2022 (SC 21/50064).

82 On 16 November 2022 the PC's solicitor delivered a letter of demand to Mr Keevers, demanding payment of $18,000 plus interest plus legal costs of $400 by 17 December 2022. This was in respect of the second instalment of the levy under resolution 20, due on 16 December 2022. Recovery proceedings were foreshadowed in the letter and were commenced in the Tribunal on 16 December 2022 (SC 21/51320).

83 More than 21 days had elapsed, therefore, between demand being made and proceedings being commenced.

Recovery of unpaid contributions and interest

84 The OC's claim is brought under s. 86(1) of the SSMA, which provides:

> 86 Recovery of unpaid contributions and interest
>
> (1) The Tribunal may order the owner of a lot in the strata scheme, or other person, to pay a contribution that is payable by the owner or other person under this Act that is not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.
>
> (2) The Tribunal may make an order under subsection (1) only—
>
> (a) on the application of the owners corporation, and
>
> (b) if proceedings between the owners corporation and the owner of a lot in the strata scheme or other person are pending before the Tribunal.
>
> (2A) An owners corporation may, without obtaining an order under this section, recover as a debt in a court of competent jurisdiction, a contribution not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.

> Note—
>
> Clause 6 of Schedule 4 to the *Civil and Administrative Tribunal Act 2013* provides for the transfer of proceedings between the Tribunal and a court which has jurisdiction (and vice versa) if the parties to the proceedings agree or if the Tribunal or court of its own motion or on the application of a party so directs.
>
> (3) Interest paid or recovered forms part of the fund to which the relevant contribution belongs.
>
> (4) An owners corporation must not take action to recover an amount under this section unless it has given the person against whom the action is to be taken at least 21 days notice of the action.
>
> (5) The notice of the action must set out the following—
>
> (a) the amount of the contribution, interest or expenses sought to be recovered,
>
> (b) the recovery action proposed,
>
> I any other matter prescribed by the regulations for the purposes of this subsection.

85 The OC also seeks interest calculated in accordance with s. 85(1) of the SSMA, which provides:

> 85 Interest, discounts on contributions and payment plans
>
> (b) A contribution, if not paid when it becomes due and payable, bears until paid simple interest at an annual rate of 10% or, if the regulations provide for another rate, that other rate.

Consideration: conduct of the meeting

86 Schedule 1 of the SSMA sets out meeting procedures for owners corporations. Mr Keevers makes a number of complaints concerning the procedures adopted at, and prior to, the August EGM. He contends that those deficiencies are sufficient to invalidate the resolutions by which the special levies were struck and, accordingly, in the exercise of my discretion I ought invalidate those resolutions or at least refuse to allow recovery within the meaning of s. 86(1).

87 As indicated at paragraph 39 above, Mr Keevers is seeking in effect the benefit of a s. 24 application by way of inviting the Tribunal to make cognate findings in the OC's s. 86 application. Section 24 of the SSMA relevantly provides:

> 24 Order invalidating resolution of owners corporation
>
> (b) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.

> ….
>
> (3) The Tribunal may refuse to make an order under this section only if it considers—
>
> (a) that the failure to comply with the provisions of this Act or the regulations, or of the Strata Schemes Development Act 2015, did not adversely affect any person, and
>
> (b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.
>
> ….

88 It is incumbent on an applicant in any proceedings under s. 24 to demonstrate that provisions of the SSMA or regulations have not been complied with in order to obtain relief. As Mr Keevers raises allegations of non-compliance as an affirmative factor going to the exercise of my discretion under s. 86(1), I consider it appropriate that Mr Keevers demonstrate any non-compliance with the SSMA or regulations that would be sufficient to invalidate any of resolutions 14 to 20 of the August EGM. As I have indicated in paragraph 39 above, Mr Keevers bears the onus in this regard.

89 I do not find any of Mr Keevers's criticisms of the notice or conduct of the meeting to be made out. I deal with each of the criticisms that Mr Keevers makes of the conduct of the August EGM below.

90 First, Mr Keevers alleges a deficiency in the provision of notice as not being accompanied by all of the items required under Schedule 1 of the SSMA. He does not identify which items were missing or in what way their absence ought vitiate the notice. It is insufficient for a party to simply make a general allegation without reference to the evidence and expect the applicant or the Tribunal to hunt through the evidence to address the allegation. In the absence of any meaningful and reasonably precisely articulated allegation in this regard, I do not find there to have been any deficiency in the notice.

91 Secondly, Mr Keevers points to a failure formally to appoint a chairman of the August EGM. I have found at paragraph 57 that Mr John Sarraf was properly elected chairman by the meeting.

92 Thirdly, Mr Keevers alleges that the chairman did not make any determination of the identity of the owners or establish whether each other Lot owner represented at the August EGM was financial. As set out at paragraph 58

above, I have found as a fact that whether the other Lot owners were financial was addressed at the August EGM. The identity of the owners and their representatives was well known.

93 Fourthly, Mr Keevers alleges that the other Lot owners were not financial and therefore their votes were not properly recorded and the resolutions were invalid. As I have indicated above, I consider Mr Keevers bears the onus of proving this allegation. He has failed to discharge that onus.

94 There is no evidence that demonstrates the other Lot owners had failed to pay levies as they fell due, still less that any failure was extant as at the date of the August EGM. The matters relied upon by Mr Keevers to demonstrate otherwise fell well short of doing so:

(1) Mr Keevers sought to rely on the existence of the $980,000 levy which was the subject of the remitted proceedings as establishing that, if the other Lot owners had paid their contributions in respect of it, the OC would have been awash with funds which it did not have. That levy had been overturned by the Tribunal member in the first instance decision and not reinstated by the Appeal Panel. In the circumstances no inference of failing to pay levies can be drawn from whatever was the financial status of the OC in August 2021.

(2) The evidence that Mr Keevers sought to rely on in this regard was not admitted. Even if it had been admitted I would not have accepted it as probative of a failure buy the other Lot owners to pay levies. At its highest it is comprised in undated hearsay evidence of the former compulsory strata manager, including that SPG had not paid their portion of a levy for the repair of the Building's stairs. This evidence in my view is not sufficiently compelling to establish a failure to pay levies, let alone an extant failure as at the time of the August EGM. If it was sufficiently probative (and I find that it was not), it would have been unfair to admit it without giving the OC an opportunity to respond, which in turn would have necessitated further delay in determination of the proceedings. Alternatively, I would have excluded it on the basis of my discretion under s. 135 of the Evidence Act.

95 Fifthly, Mr Keevers alleges that the meeting was procedurally irregular in that the chair did not call for proxies or company nominees, that proxies or nominee documents were not produced and there is no evidence to show who represented whom. Cl 23(3)(b) of Schedule 1 to the SSMA permits voting rights to be exercised by a company nominee on behalf of an owner. Provided the requirements of cl 23(1) with respect to the nominee being shown on the strata roll are met, a nominee is entitled to exercise such rights at the EGM.

The strata roll was not in evidence. Given my views as to who bears the onus on this issue, I am not prepared to infer that the nominees identified on behalf of the SPG interests at the August EGM were not shown on it. Mr Keevers has not established, by reference to Schedule 1 or otherwise, that there was any obligation to call for proxies during the EGM.

96 It should be noted that even if there had been a procedural irregularity in this regard, there does not appear to be any serious dispute that John Sarraf, Norman Sarraf and Kon Palonis had an interest in each of the Lots other than Lot 17 and were in a position to express views and act in the interests of the owners of those Lots at the August EGM. If the allegations made by Mr Keevers in this regard had been made in proceedings for relief under s. 24(1) of the SSMA, these matters would almost inevitably arise for consideration under s. 24(3). Both the minutes and the transcript demonstrate that there was no doubt as to who they represented – this was made clear at 00:17 of the transcript.

97 Sixthly, Mr Keevers alleges that the absence of any evidence as to the internal appointment processes by which company nominees were nominated, the voting is irregular. I am not aware of any obligation for such nominations to be proved to the OC. In the absence of an allegation supported by evidence that the nominees in question were not so authorised, I reject this submission.

98 Seventhly, Mr Keevers attacks the process of nomination of strata committee members. This is irrelevant since it is only resolutions 14 to 20 that are in issue in these proceedings. In any event, I am satisfied that nominations were made orally in accordance with cl 5(5) of Schedule 1 and regulation 9(2)(b).

99 Eighthly, Mr Keevers alleges that the absence of an announcement of the names of persons entitled to vote infringes cl 13 of Schedule 1. As no request was made for such an announcement, cl 13 of Schedule 1 to the SSMA is not enlivened. It is difficult to understand how this is alleged to have had any impact on the conduct of the meeting in any event, given the familiarity of the parties with each other.

100 Ninthly, Mr Keevers appears to challenge on the basis of cl 23(5) of Schedule 1 the company nominees' entitlement to vote at all. Cl 23(5) provides where

rights of co-owners are not exercised by a proxy, one of them may act as a proxy, inter alia, if the other co-owners consent. It is plain that a representative of each co-owner was present at the August EGM and that each was more than content for the nominated representative for each of Lots 15, 16 and 18 to vote. I do not accept that there is any basis under cl 23(5) to invalidate any votes at the August EGM.

101 Tenthly, Mr Keevers alleges that resolution 20 is invalid because of the operation of the *Legal Profession Uniform Law* (NSW) (the **LPUL**). In short, Mr Keevers refers to the requirement under s. 174 of the LPUL for fee disclosures to be made by lawyers as soon as reasonably practical after receiving instructions in a matter: s 174(a). It follows, according to the RWS, that Mr Keevers was a third party payer within the meaning of s. 171 of the LPUB, and cannot be made liable to pay any legal fees for which no fee disclosure was made. It is argued that the absence of evidence before the Tribunal of any fee disclosure in relation to the matters referred to in the explanatory note to proposed resolution 20 in the Notice allows the Tribunal to infer that there is no such disclosure and therefore Mr Keevers cannot be liable to make a contribution to any legal fees.

102 I do not accept this argument for several reasons. First, insofar as the absence of evidence at the hearing is propounded as evidence of absence, I do not accept that any such inference can be drawn. The OC did not have any notice that this was a live issue at the hearing and would have had no reason to anticipate that it would become an issue subsequently. Secondly, resolution 20 is not for payment of any invoice. It is for the purpose of raising funds to pay such invoices in due course. Recovery of legal fees is not, therefore, sought from Mr Keevers by reason of passage of that resolution. Thirdly, I am not satisfied that Mr Keevers as a lot owner is a third party payer in any event.

103 On the basis of the above findings, I am satisfied that there is no basis on the evidence before me in the conduct of the August EGM or the notice of it to exercise my discretion not to make orders under s. 86(1) for the recovery by the OC of levies struck pursuant to resolutions 14 to 20.

Consideration: improper purpose

General

104 Mr Keevers seeks to impugn the resolutions and the conduct of the OC in pursuing recovery of the unpaid contributions as being infected with improper purpose. Although expressed with reference to a large number of separate legal principles and statutory enactments, each of which has its own requirements and criteria, Mr Keevers says that the purpose of the special levy in resolution 20 was to put pressure on him so that the other owners could acquire his Lot for less than a fair value. He quantifies that value at $1.5 million by reference to a conversation he alleges occurred in February 2018 between himself and Norman Sarraf, at which he says that price was agreed.

105 In the RWS, Mr Keevers submits that I can take into account previous findings of improper purpose, being those made by the Tribunal in the first instance decision in May 2020. I cannot do so. Those findings were overturned on appeal: see the Appeal Panel decision at [102]. In any event, even if those findings were reinstated, they go to different conduct – being a resolution passed at the 2017 AGM – and cannot without more be probative of an allegation of improper purpose in August 2021 and following.

106 Mr Keevers's attempted reliance on the findings in the first instance decision raises another difficulty in his submission, which is the failure to put any allegations of improper conduct to the OC's witnesses when he was afforded the opportunity to cross examine. Allegations of the level of seriousness as those made in these proceedings ought be put to parties against whom the allegations are made, particularly where those parties have exposed themselves to cross examination by going into evidence. Mr Keevers's failure to cross examine each of Messrs Sarraf and Sarraf carries a great deal of weight in my determination of this issue.

107 Thirdly, the seriousness of the allegations has the effect that they must be established to a level of probability commensurate with their seriousness: see *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Whether any finding of improper purpose can be made in relation to the resolutions

108 In my view, no finding of improper purpose is available in relation to resolutions 14 to 19 and the levies thereunder. They are reasonable on their face and are supported by other resolutions and actual invoices which I have found to be for the purposes of the OC.

109 I have treated Mr Keevers's submissions, therefore, as directed to resolution 20. The alleged improper purpose is for the SPG interests to place such pressure on Mr Keevers that he sells Lot 17 to them at less than a fair value. I agree with Mr Keevers that, if this purpose were made out, it would be improper for the OC to connive in its execution and to appropriate the processes of the OC to achieve such an end.

110 On the evidence before me, however, I do not find that such a purpose is made out. The explanatory note for proposed resolution 20 in the notice of meeting, together with resolutions 7 to 11 and 13 as passed, appear on their face to be for proper purposes of the OC. On their face, each of the resolutions striking a special levy is for the purpose, and may well ultimately have the effect, of improving or preserving the value of the Building or otherwise benefitting all Lot owners.

111 In his attempt to displace the apparently regular and appropriate resolution and striking of the levy, Mr Keevers contends that the levy places him under financial hardship and that the SPG interest wish to exploit that hardship to force him to sell at an undervalue.

112 The evidence simply does not rise to meet the evidentiary burden on Mr Keevers in this regard. Although I did not admit his statement, which addresses in part the financial hardship he claims he is suffering by reason of the continued litigation, I am prepared to infer that there is at least a degree of financial hardship associated with meeting the special levies.

113 On the evidence before me, however, I do not find that the purpose of the striking of the levies and the subsequent recovery actions were actuated by the improper purpose alleged. I do not find on the evidence that the OC is trying to cause Mr Keevers financial hardship and I do not find that it is seeking to exploit any such hardship for the ulterior purpose alleged.

114 Mr Keevers alleges that in a conversation he had with Norman Sarraf in February 2018, they agreed that the price at which Mr Keevers's Lot would be acquired (it is not clear by whom) would be $1.5 million. The evidence does not establish whether an agreement for sale was ever reached. The evidence does not establish whether any party took steps to draw or enter into a contract to that effect in the four years since. Perhaps more significantly there is no evidence of any subsequent, lower, offers by the SPG interests to acquire the Lot that might evidence Mr Keevers's characterisation of the conduct as directed towards achieving a lower sale price.

115 The only direct evidence of any discussions concerning the sale by Mr Keevers of his Lot to the SPG interests was in the course of the August EGM. On that occasion it was Mr Keevers who raised the possible sale, not anyone on behalf of the SPG interests. Mr Norman Sarraf essentially fobbed him off to the end of the meeting and Mr Keevers did not return to the matter. This in my view is not evidence of the purpose alleged.

Whether any finding of improper purpose can be made by reason of the bringing of recovery proceedings

116 Similarly, I do not find any basis to impugn the recovery proceedings as having been brought for an improper purpose. The fact that they were brought as three separate proceedings does not speak of any impropriety. As they were ultimately heard together, there appears to have been no inconvenience to the parties or to the Tribunal and, perhaps apart from three sets of filing fees, no additional expense.

117 Further, the sheer number of proceedings – some of which were commenced by Mr Keevers – does not of itself establish any improper purpose. While it is certainly possible that proceedings can be used to harass or intimidate, the evidence before me does not establish such a purpose in the proceedings brought by the OC.

Conclusion

118 For the above reasons I find that Mr Keevers has not made out on the evidence before me any improper purpose that has infected the conduct of the

OC in passing the resolutions or in taking enforcement action in bringing the present proceedings.

Allegations of specific disentitling conduct

119 In light of the findings I have made with respect to the formal validity of the resolutions and the absence of improper purpose, it is strictly unnecessary to make findings in respect of the various statutory enactments relied upon by Mr Keevers. Nevertheless, if I am wrong in this regard, I briefly address the specific statutory enactments relied upon by Mr Keevers below.

Australian Consumer Law

120 Mr Keevers has raised a number of matters described in the RWS as "defences" under the ACL. They are properly to be understood as allegations going to the exercise of the discretion to order relief under s. 86(1).

121 There are a number of difficulties with Mr Keevers's submissions, which are not possible to address fully while keeping these reasons to a reasonable length commensurate with the value of the claim. As a threshold issue, however, each of the sections relied upon require that the conduct proscribed be conduct "in trade or commerce". This is true for each of ss. 20, 21, 30 and 152 and 50 and 168 of the ACL, which are considered separately below.

122 Mr Keevers contends that the fact that the Lot owners (not the OC) are developers means they are operating in trade or commerce. He does not attempt to explain, however, how such a status invests the particular conduct of the OC that is complained of with a trading or commercial character. Perhaps unhelpfully, the OC did not engage with any of Mr Keevers's submissions concerning the ACL, merely contending that there was no evidence to support his contentions.

123 In my view, the ordinary conduct of the OC vis a vis an owner is not trade or conduct in trade or commerce. This is because such conduct is internal to the corporation and is so even if property developers are owners and seek to redevelop the building. The meaning of acting "in trade or commerce" was explained by a plurality of the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 604. The plurality observed that section 52 of the old *Trade Practices Act* 1974 (Cth) was concerned with the conduct

of a corporation towards persons, be they consumers or not, with whom it has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.

124 This was recently considered in the context of a body corporate under the Queensland *Body Corporate and Community Management Act* 1997 in *Dunlop & Anor v Body Corporate for Port Douglas Queenslander CTS 886 & Ors (No 2)* [2021] QSC 265. That case concerned a strike out application in relation to allegations of misleading or deceptive conduct contravening s. 18 of the ACL. Henry J considered that in that case there was no reasonable cause of action arising out of allegations that representations made internally by way of a Notice of an EGM was misleading or deceptive. The Court found that the mere fact that there could be some commercial advantage was not enough.

125 It is not enough, therefore, simply to identify a trading or commercial party. The conduct itself must be of a trading or commercial character. Mr Keevers has not demonstrated that any of the conduct complained of may be so characterised. Accordingly, I consider that communications between the OC and Mr Keevers, the passage of resolutions for special levies and steps taken to enforce the special levies against him are not conduct in trade or commerce and are not governed by the ACL.

126 Mr Keevers addresses the question of the Tribunal's power to make orders under the ACL. Mr Keevers has not sought any orders at all (other than costs), including under the ACL. As indicated above, I treat his submissions as going to the exercise of my discretion under s. 86(1).

Unconscionable conduct under the ACL

127 Turning to the allegations of unconscionable conduct, these allegations are on the whole misconceived in any event. In my view, and leaving to one side whether the relationship between the OC and a Lot owner is one for the provision of services (which I do not decide), the matters before the Tribunal in the present proceedings do not comprise any unconscionable conduct within the meaning of s. 20 or s. 21 of the ACL, even if the ACL were to apply.

128 Section 20 of the ACL provides:

> 20 Unconscionable conduct within the meaning of the unwritten law
>
> (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.
>
> Note: A pecuniary penalty may be imposed for a contravention of this subsection.
>
> (2) This section does not apply to conduct that is prohibited by section 21.

129 In order for conduct to be unconscionable under the unwritten law and s. 20 of the ACL, a party to a transaction must be under a special disadvantage in dealing with the other party, with the consequence that there was an absence of any reasonable degree of equality and the other party must exploit that special disadvantage in a manner that is regarded as unconscionable: *Louth v Diprose* (1992) 175 CLR 621, *ACCC v CG Berbatis Holdings* [2003] HCA 18; (2003) 214 CLR 51.

130 In the present case, there was no transaction. Mr Keevers did not suffer any special disadvantage within the contemplation of s. 20 of the ACL. The transcript of the August EGM shows he was perfectly capable of identifying and conserving his interests. The conduct of the OC was not in trade or commerce. None of the elements of unconscionability under s. 20 are made out.

131 Section 21 of the ACL relevantly provides:

> 21 Unconscionable conduct in connection with goods or services
>
> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of goods or services to a person; or
>
> (b) the acquisition or possible acquisition of goods or services from a person;
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
>
> (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
>
> (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.
>
> ….

132 Section 22 of the ACL relevantly provides:

> **22** Matters the court may have regard to for the purposes of section 21

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the customer), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

133 I have set out section 22(1) in full because it indicates the true intent and operation of s. 21. Again, I leave to one side the question of whether the OC was providing "services" in the course of trade or commerce or otherwise.

134 "Unconscionability" within the meaning of s. 21 of the ACL is generally understood to be conduct that is not in good conscience and irreconcilable with what is right or reasonable. It is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience. A court should only take the serious step of denouncing conduct as unconscionable when it is satisfied that the conduct is offensive to a conscience informed by what is right and proper according to contemporary Australian values: *ASIC v Kobelt* [2019] HCA 18, (2019) 267 CLR 1.

135 It is a serious matter to have one's conduct impugned as offending conscience. Section 21 is not a dilution of the gravity of the equitable doctrine, it is more than a mere breach of accepted standards of accepted commercial behaviour: *ACCC v Geowash Pty Limited* [2019] FCA 72.

136 The evidence before me simply does not establish the type of conduct necessary to support a finding of unconscionability under s. 21. The RWS makes extravagant assertions which were not supported by any evidence. Even if the 13 May 2022 statements of Mr Keevers and Mr Terrett had been admitted into evidence, those statements do not make good the allegations made in the RWS.

137 In the RWS, Mr Keevers asserts that "the overall pattern of conduct of the controlling lot owners and the conduct of the OC itself towards Mr Keevers in relation to his participation in the OC and ownership of Lot 17 demonstrates unlawful unconscionable conduct contrary to s. 21(1) of the ACL". He refers to the following in support of that sweeping allegation:

(1) An alleged course of conduct "over years";

(2) The present contribution recovery proceedings and other proceedings before the Tribunal;

(3) The fact that his is always outvoted by the other Lot owners who hold a 76% voting share in the scheme;

(4) An allegation that he is "trapped in a situation where he is required to pay significant sums to a development application that he has no ability to gain from and which he has opposed in communications with Council";

(5) An allegation that there has been undue influence and pressure and unfair tactics brought to bear.

138 The evidence in these proceedings does not establish any unconscionable conduct. On the evidence before me, I am not satisfied that there has been a course of conduct over years which is unconscionable within the meaning of section 20 or 21 of the ACL. The evidence before me was narrow in compass. I am not satisfied that, as a Lot owner, Mr Keevers has established his interests are so permanently adverse to the other Lot owners that he is always outvoted or that the conduct of the other owners in this regard offends section 21 of the ACL. I cannot see that Mr Keevers has established that he is "trapped". I am not satisfied on the evidence that he could not benefit from the DA, given that he had acknowledged at the August EGM that all owners benefitted from the actions the OC took with respect to the heritage listing of the Building. I do not find any unfair pressure or tactics have been brought to bear. The principles of undue influence obviously do not apply.

139 I do not find any unconscionable conduct on the part of the OC. I reject the submission that I should decline to make the orders sought under s. 86(1) on that basis.

False statements as to land

140 At RWS [68] to [84], Mr Keevers contends that the OC has breached sections 30 and 152 of the ACL by making false or misleading representations about land. Section 30 of the ACL provides:

> **30** False or misleading representations about sale etc. of land
>
> (1) A person must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:

(a) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(b) make a false or misleading representation concerning the nature of the interest in the land; or

(c) make a false or misleading representation concerning the price payable for the land; or

(d) make a false or misleading representation concerning the location of the land; or

(e) make a false or misleading representation concerning the characteristics of the land; or

(f) make a false or misleading representation concerning the use to which the land is capable of being put or may lawfully be put; or

(g) make a false or misleading representation concerning the existence or availability of facilities associated with the land.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) This section does not affect the application of any other provision of Part 2-1 or this Part in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

141 Section 152 is a criminal provision which imposes penalties for the same conduct as is proscribed by s. 30 of the ACL.

142 Mr Keevers has made a number of allegations as to what representations were made, how they fall within the ambit of s. 30 and how they contravene the proscription in the ACL. I reject those allegations. This submission is also misconceived. Nevertheless, I address the alleged false representations as follows:

(1) That the SPG interests had paid all levies due up to the August EGM: I am not satisfied this was false;

(2) That the OC would lodge a DA, when it was consultants who in fact were to lodge it: I do not find the lodgement of the DA by consultants to falsify Resolution 8. The difference is in my view immaterial.

(3) Mr Sarraf stating at the August EGM that it was in the interests of the Lot owners to oppose the heritage listing: Mr Sarraf was expressing what is obviously an opinion, which opinion Mr Keevers agreed with at the time. Unless Mr Keevers can establish that Mr Sarraf did not genuinely hold the opinion expressed, it cannot be a false statement within the meaning of s. 30;

(4) Mr Sarraf stating that the he would discuss the sale with Mr Keevers: This was not the effect of what was stated. It could not fall within s. 30 even if it was said.

143 Section 30 does not apply to statements of the nature alleged in any event. These representations are not proscribed by s. 30 as they are not representations in sub-s. (1)(a) to (g). Even if I were to find that the ACL applied to the internal relations of the OC, I would reject these allegations.

Coercion and harassment

144 Perhaps the most serious allegations made in the RWS are those concerning coercion and harassment. Section 50 of the ACL provides:

> 50 Harassment and coercion
>
> (1) A person must not use physical force, or undue harassment or coercion, in connection with:
>
> (a) the supply or possible supply of goods or services; or
>
> (b) the payment for goods or services; or
>
> (c) the sale or grant, or the possible sale or grant, of an interest in land; or
>
> (d) the payment for an interest in land.
>
> Note: A pecuniary penalty may be imposed for a contravention of this subsection.
>
> (2) Subsections (1)(c) and (d) do not affect the application of any other provision of Part 2-1 or this Part in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

145 Section 168 imposes criminal sanctions for the same conduct.

146 This submission is also misconceived and I reject it.

147 "Undue harassment" is indicated by the frequency, nature or content of interaction with the person claiming to have been unduly harassed such that the court can find it calculated to intimidate or demoralise, tire out or exhaust the person: *ACCC v McCaskey* [2000] FCA 1037; (2007) 104 FCR 8. The proscription addresses the calculation of the harassing party to achieve that end.

148 "Coercion" involves force or compulsion negating choice or freedom to act: *Hodges v Webb* [1920] 2 Ch 70. There can be no serious allegation that the OC engaged in any acts of coercion against Mr Keevers.

149 I do not find there to be any acts of undue harassment or coercion by the OC against Mr Keevers in connection with the supply or possible supply of services

or any grant or sale of an interest in land or otherwise. The matters at RWS [87] cannot rise to the level of undue harassment or coercion. In particular:

(1) I am not persuaded that the mere fact of a large number of levies amount to undue harassment or coercion in the present circumstances, even if the levies are for a substantial sum.

(2) I am not persuaded that the number of legal proceedings initiated by the OC demonstrates any undue harassment or coercion within the meaning of the ACL.

Disposition and costs

150 On the basis of the findings I have made, I will make the orders sought by the OC under s. 86(1) of the SSMA.

151 The OC seeks its costs. Under s. 86(1) of the SSMA, the OC may seek its reasonable expenses in recovering an unpaid contribution and interest. The presumptive position under s. 60 of the NCAT Act, however, is that parties pay their own costs absent special circumstances. Section 60 provides:

> 60 Costs
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
>
> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
>
> (g) any other matter that the Tribunal considers relevant.
>
> (4) If costs are to be awarded by the Tribunal, the Tribunal may—
>
> (a) determine by whom and to what extent costs are to be paid, and
>
> (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(5) In this section—

costs includes—

(a) the costs of, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

152 Rule 38 of the Civil and Administrative Tribunal Rules (**NCAT Rules**) relevantly provides:

38 Costs in Consumer and Commercial Division of the Tribunal

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—

….

(b) the amount claimed or in dispute in the proceedings is more than $30,000.

153 As these proceedings were conducted as a single matter, the aggregate value of which was $44,944.58, I consider rule 38(2)(b) applies.

154 In any event, the OC has the benefit of a free standing statutory right under s. 86(1) of the SSMA to recover its reasonable expenses, which I consider includes its legal costs in conducting the present proceedings. I accept the OC's submission that the existence of the statutory right under s. 86(1) of the SSMA may constitute a special circumstance under s.60(3)(g) of the NCAT Act and I find it to be such a special circumstance in this case irrespective of the value of the claim.

155 Accordingly, I find that costs should follow the event and Mr Keevers should pay the OC's costs of these proceedings.

156 I also order Mr Keevers to pay interest as provided for in s. 86(1) of the SSMA. That interest should be calculated at the rate of 10% per annum in respect of each instalment from the day after the relevant instalment fell due until the date of payment.

157 I make the following orders:

In matter SC 22/03898

Pursuant to s. 86(1) of the Strata Schemes Management Act 2015 (the **SSMA**), the Respondent pay to the Applicant the sum of $18,000.00.

Pursuant to ss. 86(1) and 85(1) of the SSMA the Respondent pay to the Applicant interest on the sum outstanding under order 1 at the rate of 10% per annum from 16 September 2021 to the date of payment.

The Respondent pay the costs of the Applicant as assessed or agreed.

In matter SC 21/50064

Pursuant to s. 86(1) of the SSMA, the Respondent pay to the Applicant the sum of $8,944.58.

Pursuant to ss. 86(1) and 85(1) of the SSMA the Respondent pay to the Applicant interest on the sum outstanding under order 1 at the rate of 10 % per annum from 2 November 2021 to the date of payment.

The Respondent pay the costs of the Applicant as assessed or agreed.

In matter SC 21/51320

Pursuant to s. 86(1) of the SSMA, the Respondent pay to the Applicant the sum of $**18,000.00**.

Pursuant to ss. 86(1) and 85(1) of the SSMA the Respondent pay to the Applicant interest on the sum outstanding under order 1 at the rate of 10% per annum from 16 November 2021 to the date of payment.

The Respondent pay the costs of the Applicant as assessed or agreed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar