Civil and Administrative Tribunal

New South Wales

Case Name:	Crespel v The Owners – Strata Plan No 66165
Medium Neutral Citation:	[2022] NSWCATCD 141
Hearing Date(s):	29 March, 2 June 2022
Date of Orders:	06 September 2022
Decision Date:	5 September 2022
Jurisdiction:	Consumer and Commercial Division
Before:	G K Burton SC, Senior Member
Decision:	1. Note that: (a) between first and second hearing days a remedial scope of works the subject of a primary claim of the applicant has been approved by the first respondent owners corporation and processes in respect of performing those works have been begun to be implemented; (b) claims against the second respondent have been resolved following the second respondent's resignation from the strata committee immediately prior to the second day of hearing. 2. Otherwise dismiss the application in SC 21/48785 and (to the extent it is still not complete by orders made 17 December 2021 except for reserved costs) SC 21/48788. 3. Order as follows in respect of costs (including costs reserved in SC 21/48788): (a) Any application in respect of costs is to be filed and served on or before 20 September 2022 accompanied by any further evidence and submissions in respect of costs and any reasons in support of a hearing on costs if that is sought.

	(b) Any further evidence and submissions in response to the documents filed and served under order 3(a) are to be filed and served on or before 4 October 2022.
Catchwords:	REAL PROPERTY – STRATA MANAGEMENT – duty to maintain and repair common property – alterations to common property – common property rights by-law – compulsory strata management – Strata Schemes Management Act 2015 (NSW) ss 90, 106, 108, 126, 143, 149
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Anderson v Owners SP 61034 [2019] NSWCATAP 61 Bate v Owners SP 60549 [2018] NSWCATCD 36 Bischoff v Rita Sahade [2015] NSWCATAP 135 Co Funds Management PL v Owners SP 78945 [2011] NSWCTTT 488 Farland v Simmons [2018] NSWCATCD 28 Foong v Scutella [2021] NSWCATAP 225 Gershberg v Owners SP 5768 [2011] NSWCTTT 411 Kahn v Owners SP 2010 [2017] NSWCATAP 39 Kotevski v Seadon and Owners SP 82413 [2013] NSWCTTT 597 Maple v Owners SP 8950 [2021] NSWCATCD 108 Moallem v CTTT [2013] NSWSC 1700 Owners SP 14593 v Soares [2019] NSWCATAP 3 Owners SP 63341 v Malachite Holdings PL [2018] NSWCATAP 256 Owners SP 74698 v Jacinta Investments PL [2021] NSWCATAP 387 Robinson v Owners SP 61717 [2018] NSWCATCD 49 Vickery v Owners SP 80412 [2020] NSWCA 284
Category:	Principal judgment
Parties:	Julie Ann Crespel (Applicant) The Owners – Strata Plan No 66165 (first respondent) Ben Collis (second respondent)
Representation:	Applicant (self-represented) Bannermans Lawyers (first respondent)

	Bradbury Legal (second respondent)
File Number(s):	SC 21/48785, SC 21/48788
Publication Restriction:	Nil

REASONS FOR DECISION

Outcome of proceedings

1 For the reasons given below, I have noted particular outcomes which emerged between the two hearing days of the proceedings that rendered unnecessary to decide major contentious issues and influenced the refusal to appoint a compulsory strata manager in the present proceedings. I have otherwise dismissed the applications.

Background, issues, procedural

2 The applicant owns a lot in a strata scheme in North Curl Curl, a Northern Beaches suburb in Sydney, NSW. The scheme has six lots with five lot owners, including the applicant and the second respondent, actively participating at relevant times in governance of the scheme. The original respondent, who became the first respondent, is the owners corporation (OC) for the scheme. The applicant had been a member of the strata committee (SC) (previously the executive committee under prior legislation) for 15 years since 2006, including as an office-bearer in the OC. She said that she had been removed at the 2021 AGM held on 2 September 2021 so that other members could have work done on their lots, with that removal occurring on the votes of persons who had sold their lots and one of whom had been elected chair. The second respondent had been a member of the SC for over 18 months.

3 On 23 November 2021 the applicant filed SC 21/48785 for final relief and SC 21/48788 for interim relief. The latter claim sought an urgent stop to work on a roof skylight which she said was a lot property expense for the second respondent, not a common property expense for the OC.

4 On 1 December 2021 the second and third respondents, being SC members, were joined as parties and preparation orders were made for the interim application to be heard on 17 December 2021, with further directions on 16 December 2021. At the hearing, after extensive written material was

addressed, orders on the interim application were made for temporary measures to stop water ingress by the end of January 2022 and other interim relief was refused since it required findings on contentious factual matters best left for final hearing. Costs were reserved. At the final hearing it was confirmed that costs were the only outstanding aspect of the interim application, although the applicant's evidence complained that the temporary measures were inadequate in terms of preventing water ingress and permitting ventilation.

5 Also on 17 December 2021, in addition to correcting the name of the OC in both proceedings and removing the third respondent as a party, orders were made granting leave to all parties for legal representation. Orders in the proceedings for final relief extended the time for the applicant's documents from 17 to 31 January 2022, for the respondents' documents from 11 to 25 February 2022 then 15 then 18 March 2022, and for the applicant's documents in reply from 4 March to 22 March 2022, with what initially appeared to be a lack of clarity as to whether it had been further extended to 29 March 2022.

6 The applicant was represented by solicitors until about 22 March 2022 then acted for herself, including at final hearing. Each of the remaining respondents was represented by different solicitors, the OC throughout the proceedings, the second respondent from February 2022 including at the initial day of final hearing on 29 March 2022.

7 In her claim for final relief as stated at final hearing (which in substance remained unchanged from her application), the applicant sought orders as follows: for repairs, which she said she had sought over many years, to prevent water entry into her lot from defectively-sealed windows, compromised waterproofing under cladding and defective roofing guttering and flashing with consequent repairs required to damaged concrete, flooring, skirting, walls, ceiling and painting and the need for mould removal; for the OC to reimburse her for the cost of replacing the hot water system relating to her lot and for the legal expense of drafting an associated by-law or to grant her the right to install a gas hot water system as the second respondent had done; to stop the OC from permitting the second respondent via his company to undertake roofing repairs and other repair work allegedly without being appropriately licensed

and without competitive tender or quotations; to remove the second respondent from the SC and elect a new SC, and to replace the current strata manager (engaged since 2012, currently engaged by written agreement dated 1 July 2020) with a compulsory strata manager. She said the water entry was Interfering with her photo studio work as her equipment was sensitive to damp. She said that she had had prepared draft by-laws for replacing her hot water system with a re-located gas system which had not been progressed by the OC for her but which had been taken up and used by the second respondent. She opposed and sought to have rejected the second respondent's proposed by-law for building façade modifications and removal of existing bamboo and awning.

8 The relevant duty to maintain and repair on the OC was under s 106 of the *Strata Schemes Management Act 2015* (NSW) (SSMA), with the applicant's claims for relief said to be under s 126 with s 232. Reimbursement of by-law and hot water system expenses was sought under ss 90 and 126. The removal and compulsory strata management relief was sought under SSMA s 237 (originally with s 238 to replace the SC). The OC submitted that the applicant was required to choose between removing the SC and appointing a compulsory strata manager.

9 At the outset of final hearing on 29 March 2022, the OC, in response to my query, said that an EGM had been called for 5 April 2022 which it expressed confidence may resolve or assist with resolving repair issues and possibly with overall resolution and submitted that there should be an adjournment to ascertain the outcome of the EGM. The OC had commissioned a major independent expert report from Partridge Remedial and accepted the need for the work identified as required by the report. The second respondent didn't oppose an adjournment.

10 The applicant opposed the adjournment. She said that she had been waiting much time. She welcomed that some but not all issues on which she sought relief were on the EGM agenda and that there was a report by a remedial engineer including on the guttering. She had no confidence in the current strata manager to carry out the works properly. She said that (in her words) the

"incompetence of the strata manager" was illustrated by there having been no competitive quotations obtained in the three months since the interim relief hearing. She alleged that the SC members had got their own guttering fixed but not hers and others.

11 I refused the adjournment since the applicant objected to it and I could see that, despite interaction between the issues, some might remain for determination even if the works were approved at the EGM.

12 I marked into evidence the material from parties that was not the subject of objection and noted that the OC material for the interim application hearing had been repeated within the court book exhibits.

13 Both respondents objected to the applicant's material served 28 March 2022 as late, incomplete and prejudicial. The applicant said that she had been delayed by the delay of the OC. She was not able to continue to be legally represented for the hearing. She had simply run out of time after the respondents had the further extension of their time for filing evidence to 18 March 2022 to organise, copy and serve as well as file her reply evidence. She had not kept a record of what she had filed in the pressure of time and self-representation.

14 As referred to in part earlier, during this debate I expressed the view that the date of 22 March 2022 seemed not to be entirely clear whether it had been altered to 29 March 2022. Having reviewed the material again I thought the better view was that it remained at 22 March 2022 but there was room for confusion in the iterative extensions of time for all parties. Further, the owner had had a cessation of representation about the time of reply evidence being due and there had been no corresponding extension when the respondents obtained a further extension from 15 to 18 March 2022.

15 I admitted the applicant's reply evidence except on one new issue. I considered any lateness was excused by the matters in respect of timetabling I have already mentioned. I also noted that the original half day hearing estimate, which was supportable when the matter was set down after 17 December 2021, had become not sustainable given the evidence filed since that time which ran to near 1,000 pages. The respondents largely did not cavil with a revised time estimate of a further day at least to complete the evidence. The

respondents thought that there may be a need for written submissions. The adjourned hearing would be after the EGM result was known, with whatever impact that had on the resumed final hearing and possible resolution. It also allowed time to regularise the applicant's last round of evidence and enable the respondents to deal with it.

16 I initially proposed to proceed with the applicant's evidence so far as could be done in the remaining time (about half of the half day had been used on the procedural arguments). After discussion, the OC and the other remaining respondent opposed taking any evidence until they had the complete exhibits since what had been served to date was intrinsically cross-referenced to and dependent on documents filed but not served. There could be a forensic disadvantage in not having the entire evidence when starting cross-examination.

17 In an endeavour to facilitate the prompt service of copies of the documents not yet served, and since the owner had not kept a list or copies in the form the documents had been filed on 28 March 2022, I then spent about 40 minutes of the remaining allotted hearing time recording what was in the exhibit which was now marked Ex O2. The hearing ended shortly after, and shortly before its allotted half day expired, with discussion of the regime, reflected in orders then made, to obtain a resumed hearing date as soon as possible.

18 The orders also sought to make clear there was to be no further evidence from any party apart from the draft minutes of the upcoming EGM in the form approved for circulation to lot owners, which would provide at least context for what remained in contention.

19 A hearing date expected to be 29 April 2022 was agreed as available to the parties and representatives. Costs of the half-day were reserved.

20 On 31 March 2022 the Tribunal Registry advised the parties that no venue was available for the hearing to continue on 29 April 2022. Notices of hearing for 2 June 2022 were issued for a full further hearing day.

21 Draft minutes from the EGM were apparently provided on the morning of the resumed hearing. They showed that four motions to approve an existing

quotation for $93,100 to replace all east-facing windows and to borrow to finance the quoted works, or to strike a levy of $83,000 plus GST for the same purpose, had been defeated but that a motion to adopt all recommendations in the Partridge Remedial defects report and “to obtain suitable funding for the repairs” had been carried.

22 A further witness statement dated 1 June 2022 from the strata manager employee had been served and was admitted into evidence. It attached the Partridge Remedial report and indicated the process of tendering, approval and funding currently under way. There were three expected tenderers. The strata manager employee said that she would recommend finance from the two previous financiers but that new applications would be required for the more extensive scope of remedial works now proposed and accepted.

23 Further notes from the applicant were also admitted except for a new claim in them for $300 for contents insurance excess in respect of fixing some of the internal damage from water entry into the applicant’s lot. The notes expressed concern about further water entry damage while the remedial works were put in place and further vandal damage to the applicant’s car and e-bike in the garage. In support of the claim to remove the current strata manager there was complaint about the alleged delay and confusion in making an insurance claim for damage to skirting and walls in the applicant’s and the neighbouring lot from the applicant’s shower and hot water tank leaking in late March/early April 2022.

24 The OC relied in the afternoon on speaking to written closing submissions. The applicant made oral closing submissions in chief and reply.

25 The second respondent had, on 1 June 2022, resigned from the SC as advised by letter to the strata manager employee of same date, having moved out of the building. At the resumed hearing counsel for the second respondent applied to have proceedings dismissed against the second respondent with no order as to costs. The letter to the applicant had proposed that costs resolution to avoid a contest on costs with the second respondent seeking his costs against the applicant.

26 The OC consented to the proposal. The applicant was asked if she wished to contest costs, in which case that issue would be reserved. After consideration the applicant did not object to her claim against the second respondent being dismissed with no order as to costs. I made that order, noting that neither the applicant nor the OC wished to agitate costs against the second respondent who also did not seek costs.

27 Items 3, 7, 9 and 10 in the application, which with supporting narrative were added to Ex O1 remained live issues, being the issues concerning the hot water tank, an attempt to unwind the building façade modifications proposed by the second respondent, the appointment of a compulsory strata manager and the request for a security camera to be installed in the garage to attempt to stop damage and theft.

28 The applicant was briefly cross-examined. The OC after consideration decided not to call the former second respondent as a witness or to tender the documents relied upon by him. The relevant responsible employee of the current strata manager (the strata manager employee) was cross-examined extensively by the applicant.

Relevant evidence and submissions

29 In cross-examination the applicant, consistent with her written evidence, said that she had had an urgent need to replace her hot water system in May 2021 when it burst. The new gas hot water system that she wished to install outside her lot was the same type and was to be installed in the same location on common property as the second respondent's system installed with a registered by-law about four to six weeks after her attempted installation. Her written evidence said that the second respondent, using the draft by-law that she had had a solicitor prepare to obtain approval at an EGM, was not subjected to the scrutiny when it passed at the 2021 AGM on 2 September 2021 to which her proposal was subjected. This was despite informal consent to her by-law by other lot owners, with that initial consent withdrawn by the second respondent. She had not persisted with the by-law and had installed an electric system because of the urgent need to install hot water for her family and the delayed formal consideration by the SC and OC.

30 There was in evidence a solicitors' invoice dated 9 June 2021 for $649 (heavily discounted) for drafting the proposed by-law in late May 2021 and a plumber's invoice dated 9 June 2021 for $2,092.75. The plumber's invoice was for removing and disposing of the old system and starting to install a new gas system on 28 May 2021 with that installation being discontinued on 2 June 2021 for "No strata approval" (noted on the invoice) and with an electric hot water system being installed on 3 June 2021.

31 On another matter concerning the second respondent, the applicant's evidence denied the evidence of the strata manager employee about the approval process and context at the 2021 AGM for the second respondent's quotation to undertake roof repair work. The strata manager employee said that there were other quotations at the meeting, the second respondent's quotation was preferred as broader and with a warranty despite being more expensive, the second respondent declared his interest and did not vote. The applicant said that the resolution was carried on the votes of lot owners who had sold and pecuniary interest was not declared in the usual way.

32 The applicant's evidence detailed intrusions on common property (bikes stored under the stairs) by other lot owners as well as by her since there was nowhere else to store them. She complained of unauthorised and defective painting that damaged her new car and that other lot owners did not act to protect the security of the garage, from where she had had a new e-bike stolen.

33 The applicant agreed in cross-examination that the second respondent had moved out and taken out the bamboo to which she objected but had not removed an awning which was unauthorised works attached to common property and could fall on people in the restaurant below. She said that the second respondent had asked to modify the façade without drawings or architectural plans or a by-law to cover the OC in respect of indemnity for liability and for repairs. She said that the by-law in the OC's evidence was put in place only after the shop awning below fell and nearly killed someone, which reinforced the need for a by-law for the awning in a lot above the shop. In response to the suggestion that the lot awning in a worst case scenario could

hurt someone only in that lot, she agreed but said that the lot had tenants so the OC was still exposed to liability.

34 In response to the claim that she was unfinancial at the time of the 2021 AGM, the applicant tendered emails with which confirmed the applicant's belief that she had been advised by the strata manager employee that she was financial and that her lawyer as her proxy could vote. In fact she owed an amount less than $100 according to the ledger in evidence.

35 The strata manager employee said that she had been in strata management for six years and had been employed at this strata manager since 8 March 2021, being since that date primarily responsible for this scheme in addition to other schemes. The strata manager did not receive commissions on trades and monies in the sinking fund.

36 In cross-examination the strata manager employee said that her understanding was that the water leak and damage to skirting boards was a matter for the lot owner to make a claim on her contents insurance, but she didn't claim to be an expert in insurance. She was not sure what was meant by the applicant's suggestion of a three-month delay in respect of walls as it was relevant to the present claim. She received hundreds of emails and many phone calls a day so did not recall particular email or verbal exchanges but accepted that the building had had leaking windows.

37 The strata manager employee did not know that the applicant had been a member of the SC for 15 years rather than from 2013 since she was not required to keep records for that entire period, only for seven years under the strata management agreement. She had been unaware that two lot owners had sold at the time of the 2021 AGM, but voted at the AGM. Her required source of knowledge for who was entitled to vote was the strata roll where that information had not yet appeared and was not always lodged despite the requirement under SSMA s 22 of notice of a right to vote at OC meetings by a new owner. She did not rely on what she was told by a managing agent for a now-former owner. There was no evidence of a notice having been issued under s 22(4).

38 The strata manager employee said that she did not believe that the second respondent had been required to declare a pecuniary interest and absent himself from the 2021 AGM nor did she consider herself obliged to ask and to take action to exclude. If the person elected chair at that meeting was still on the strata roll he could be elected as chair and vote even if he had sold, as could any other lot owner who had sold but was still on the strata roll. She was challenged that the chair and other proxies were unfinancial on their levies at time of meeting. The applicant was asked to answer a call for the supporting evidence.

39 The strata manager employee believed that work had stopped during the hard covid lockdown on the northern beaches and did not believe that selling agents needed to notify other lot owners of inspections. In further cross-examination after the call was answered, she said that she was not obliged to tell a lot owner in advance of the meeting whether or not the lot owner was financial although usual practice was to determine who was financial and therefore could vote. When it was put to her that the applicant's lawyer had reported to the applicant that the lawyer was allowed to participate as proxy and to vote, she said that the lawyer ought not to have been allowed to vote as proxy but she could not recall actual voting, only attendance, and the minutes (on which no one had sought changes since the circulated draft) simply showed the outcome of voting, not who cast particular votes. The applicant's then lawyer did not give direct evidence.

40 The strata manager employee believed that she had facilitated repairs to and maintenance of the building. She generally responded to emails within a week. She had done everything in her power to repair leaks under instructions from the OC to address window leaks and leaks above the lot owner's unit. She understood that the roof had been fixed and she was waiting for the windows to be reviewed. She had sent contractors to follow up emails that the roof problem had not been resolved by initial work. She considered two months to be a timely response for these works. The strata manager employee had taken over in July 2021 and the pace of work had picked up dramatically since then, including obtaining the comprehensive independent expert report.

41 The strata manager employee said that an access door to where an e-bike had been stored was secured on her visit when challenged that the police had been able to push it open. She said that such property should not in any event be stored on common property.

42 The strata management agreement empowered the current strata manager to engage appropriately qualified trades and a principal contractor, for non-standard work such as the major remedial works in question, only where there was a minuted OC appointment of a principal contractor and the trades, the principal contractor was engaged to oversee and engage the trades and the contractor met the minimum requirements that included appropriate licensing, insurance and qualifications.

43 43 In submissions the applicant stressed the importance of moving forward with a strata manager who would administer fairly and treat all lot owners equally, which she said experience had shown had not occurred with the current strata manager. Good management was needed to prevent a recurrence of incorrect information, allowance of unauthorised work and the need to redo work that had been done to common property by a lot owner (the second respondent) without due process.

44 The OC submitted that most of the matters complained of by the applicant went beyond the evidence or beyond jurisdiction or were moot with the departure of the second respondent and the approval and subsequent processes occurring in respect of the remedial works. The Tribunal had no power to award compensation other than against the OC for breach of duty under SSMA s 106(5) with s 232. There was no evidence that the hot water system had been maintained as common property. The application to re-locate the hot water system outside the applicant's lot with the appropriate by-law had been withdrawn. There had been no compliance with s 108 and there was no proper application for a common property rights by-law under s 149. In respect of a security camera, there was no special resolution sought under s 108 and installation was not justified in any event on the evidence to protect property that should not be stored on common property.

45 In respect of works by the second respondent the OC submitted that the bamboo had been removed when the second respondent departed, only the OC had standing under SSMA s 132 to obtain orders to remove the awning and force remedial work, the proposed by-law by the second respondent to enclose the building façade adjacent to his lot had been registered and there was no application under SSMA s 150 but in any event façade works were subsumed within the remedial scope of works.

46 In particular, the OC stressed that, whatever the past conduct of alleged but contested delay and other alleged conduct, the current SC with the current strata manager were implementing appropriate processes for remedial works. The applicant's complaint was now restricted to the speed of implementation as she was satisfied with the independent expert assessment by Partridge Remedial of the scope of works. Changing the strata manager would disrupt and delay that implementation with no proof of corresponding benefit. The current strata manager was not responsible for that delay since it had no delegated authority for major works or works at the height required and had appropriately been acting on the OC's instructions. There had been no prejudice to the applicant as her proxy had in fact been allowed to speak and vote at the AGM.

Relevant legal principles

47 SSMA s 237 provides as follows:

> (1) **Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation** The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent—
>
> (a) to exercise all the functions of an owners corporation, or
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> (b) to exercise specified functions of an owners corporation, or
>
> (c) to exercise all the functions other than specified functions of an owners corporation.
>
> (2) **Order may confer other functions on strata managing agent** The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—
>
> (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

(b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

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

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

(a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

(b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

(c) an owners corporation has failed to perform one or more of its duties, or

(d) an owners corporation owes a judgment debt.

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

(a) hold a strata managing agent's licence issued under the Property, Stock and Business Agents Act 2002, and

(b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

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

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

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

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

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

(b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

48 SSMA s 237 gives, by the word "may", a discretion to the Tribunal which needs to be exercised on principled grounds. It is unlikely, for example, that principled grounds would lead to exercise of the discretion to appoint a compulsory strata manager for an isolated incident, however important in itself in terms of consequences.

49 The aim of SSMA s 237 and its predecessors in the 1996 Act is, where possible, to maintain a democratic system which the legislative scheme has established rather than substitute a compulsory appointment: *Kahn v Owners SP 2010* [2017] NSWCATAP 39 at [30]. It is not enough that the owners simply do not get along: *Bischoff v Rita Sahade* [2015] NSWCATAP 135. The evidence may show a properly functioning strata scheme in all practical respects despite any personal animosities or disagreements on the decisions made: *Robinson v Owners SP 61717* [2018] NSWCATCD 49 at [53]-[58]; *Anderson v Owners SP* 61034 [2019] NSWCATAP 61 at [41]-[42].

50 However, if dispute becomes chronic, complex and/or litigious on the objective evidence then the trigger point may well have been reached: *Moallem v CTTT* [2013] NSWSC 1700 at [7]; *Bate v Owners SP 60549* [2018] NSWCATCD 36 at [77]-[78]. This may also be the case where on the objective evidence there is a clear and substantial dereliction in the duty to manage the scheme in accordance with statutory requirements and in the interests of all lot owners under SSMA s 9(2) and its statutory predecessors, without discrimination: *Gershberg v Owners SP 5768* [2011] NSWCTTT 411; *Owners SP 14593 v Soares* [2019] NSWCATAP 3 at [44], [46].

51 Failure to engage or reasonably to act in accord with relevant expertise and advice, including the strata manager for voluntary members of a strata committee, may be a sufficient indicium: *Co Funds Management PL v Owners SP 78945* [2011] NSWCTTT 488 at [27]-[28].

52 There may be a need for intervention to provide a "clean slate", to re-establish proper functioning, and to facilitate non-repetition of dysfunctional conduct or

non-compliance with statutory requirements, which may require the maximum appointment period of two years: *Kotevski v Seadon and Owners SP 82413* [2013] NSWCTTT 597 at [74].

53 Conversely, the nature and duration of the conduct and whether steps are under way to remedy past inadequacy, non-compliance or dysfunction may lead to refusal of an order: *Maple v Owners SP 8950* [2021] NSWCATCD 108 esp at [21]-[22].

54 If a compulsory strata manager is appointed, it should be someone who, in addition to giving the statutory consents, will provide the necessary impartial management at least cost: *Farland v Simmons* [2018] NSWCATCD 28 at [45].

55 The above principles were applied more recently in a decision of the Appeal Panel in *Foong v Scutella* [2021] NSWCATAP 225, but in the context of large strata management scheme that had existed for years under compulsory strata management.

56 Other relevant provisions have been mentioned in the course of outlining the arguments, above.

Conclusions

57 There was no challenge to the applicant's standing to bring the compulsory strata manager application. In any event, the Tribunal has power to make an order for compulsory strata management of its own accord.

58 Turning to the merits of the application, the opposite categories to consider on the evidence are those in SSMA s 237(3)(a) and (c). The mass of evidence indicated a series of complaints by the applicant over a period of years in respect of alleged delay in and discriminatory treatment of repairs to the common property adjacent to her lot compared, she said, with repairs to the common property adjacent to the lots of SC members and work by one SC member in particular (the second respondent). The complaints were also directed to the alleged inefficiency and partiality of the current strata manager who was alleged to side with the current control of the SC that excluded the applicant.

59 As stated above, poor and fractious relationships between members of a scheme, or between a strata committee or lot owners and a strata manager, do not in themselves justify the relief of compulsory management. Further, a struggle for control of a strata scheme, using the democratic processes under the SSMA, does not of itself indicate paralysis, dysfunction or dereliction of duty until the valid outcome of such a struggle indicates such paralysis, dysfunction or dereliction. Changes may be occurring at time of hearing that indicate likely improvement or that remove the cause of alleged conduct or which mean that a "wait and see" approach should be adopted as to whether the alleged conduct continues despite changed circumstances.

60 At present the evidence does not reach the required degree of paralysis, dysfunction, dereliction in duty or non-compliance with statutory requirements that would presently justify the exercise of discretion in favour of appointing a compulsory strata manager. This is particularly because of the changed circumstances brought about between hearing days by approval and steps in orderly implementation of an independently and expertly assessed remedial scope of works that includes works sought by the applicant and works to the façade, together with (without making conduct findings one way or the other) the departure of an actor in the previous matrix.

61 For the foregoing reasons I refuse the current application to appoint a compulsory strata manager as inappropriate at this time in the changed circumstances. Of course, if the regime for repair does not result in prompt and orderly implementation, then the applicant may well bring a further application which may well succeed if the evidence supports the complaint that the OC is not "getting on with it" and/or is not giving uniform treatment to the applicant in this or other respects.

62 Turning to the applicant's other complaints, relief is no longer sought against the second respondent as part of resolution in open hearing of the proceedings concerning the second respondent without findings being made.

63 In relation to reimbursement of the hot water system costs, the applicant has not established that the conduct was a failure in the OC's strict duty to maintain and repair common property in respect of replacing the system, nor any other

legal basis under the SSMA for which the Tribunal has jurisdiction in respect of a claim for compensation against the OC concerning the circumstances of the system breaking and its replacement in the way that it occurred. The proposed by-law for a gas hot water system was withdrawn without a vote as I understand the evidence, so there is no basis in SSMA ss 108, 143 or 149 for relief. The prevailing view is that SSMA s 90 does not apply to the Tribunal, as opposed to a court: *Owners SP 74698 v Jacinta Investments PL* [2021] NSWCATAP 387 at [167]-[174], citing *Vickery v Owners SP 80412* [2020] NSWCA 284 at [35]-[39], [121]-[123].

64 A different basis for relief may have emerged had the by-law had been pressed and rejected and the applicant's version of events and motivations had been accepted, including that a very similar by-law for very similar installation had been passed for a lot then owned by the second respondent.

65 65 There is little objective evidence as to the security camera installation being required. Even if it was required, there is no evidence of a proposed resolution under SSMA s 108 which would appear to be the required basis to trigger any further relief if rejected.

Costs

66 The parties asked for costs to be argued and determined after the substantive decision was delivered. I shall make directions for that purpose.

67 I draw the parties' attention to what appears to be the applicability to this type of proceeding, not involving a direct claim for money orders under the SSMA, to the principles enunciated in *Owners SP 63341 v Malachite Holdings PL* [2018] NSWCATAP 256 esp at [2]-[5], [75]-[111], concerning the requirement in such claims to establish special circumstances under s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) in order to be awarded costs.

68 In that respect, the applicant may not have had much formal success but what she wanted in terms of the major relief of repairs to common property (whether or not prompted by these proceedings) has started to occur by events that began with an approval by the OC of a remedial scope of works between the two hearing days, which changes the landscape in which to assess the claim for compulsory strata management. Further, other issues have been resolved,

and the landscape in which to assess the claim for compulsory strata management has consequently changed, by the second respondent resigning from the SC. The need for more broad-ranging findings has accordingly been removed.

69 In that context and on the present material in evidence I do not see that special circumstances are likely to be established, subject to hearing submissions and any further material on the topic.

Orders

70 I make the following orders:

(1) Note that: (a) between first and second hearing days a remedial scope of works the subject of a primary claim of the applicant has been approved by the first respondent owners corporation and processes in respect of performing those works have been begun to be implemented; (b) claims against the second respondent have been resolved following the second respondent's resignation from the strata committee immediately prior to the second day of hearing.

(2) Otherwise dismiss the application in SC 21/48785 and (to the extent it is still not complete by orders made 17 December 2021 except for reserved costs) SC 21/48788.

(3) Order as follows in respect of costs (including costs reserved in SC 21/48788):

(a) Any application in respect of costs is to be filed and served on or before 20 September 2022 accompanied by any further evidence and submissions in respect of costs and any reasons in support of a hearing on costs if that is sought.

(b) (b) Any further evidence and submissions in response to the documents filed and served under order 3(a) are to be filed and served on or before 4 October 2022.

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

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