Civil and Administrative Tribunal

New South Wales

Case Name:	Jones v The Owners – SP 93087
Medium Neutral Citation:	[2023] NSWCATCD 73
Hearing Date(s):	19 July 2023
Date of Orders:	31 July 2023
Decision Date:	31 July 2023
Jurisdiction:	Consumer and Commercial Division
Before:	D Ziegler, Senior Member
Decision:	(1) Order 1 made on 10 January 2022 in SC 21/46495 is extended to 30 November 2023. (2) The application is otherwise dismissed. (3) If a party wishes to make a costs application, the costs applicant is to file and serve submissions and documents on the costs application by 14 days from the date of these orders. (4) If an application for costs is made by a party, the costs respondent is to file and serve submissions and documents on the costs application by 28 days from the date of these orders. (5) The costs applicant is to file and serve costs submissions in reply by 35 days from the date of these orders. (6) The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50(2) of the Civil and Administrative Tribunal Act 2013. (7) The Tribunal may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.
Catchwords:	LAND LAW---Strata scheme---s 237 Strata Schemes

	Management Act 2015 (NSW)---Appointment of compulsory strata manager---Where compulsory strata manger already appointed---Whether circumstances justify a further appointment of compulsory strata manager---Whether circumstances justify extension of the existing order.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Home Building Act 1989 Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 Strata Schemes Management Act 2015
Cases Cited:	Dawes and Ors v The Owners-Strata Plan No 93087 and Ors (file number SC SC 21/46945, unreported, January 2022) Hoare and Ors v The Owners-Strata Plan No 73905 [2018] NSWCATCD 45 House v The King (1936) 55 CLR 499 Maple v The Owners-Strata Plan No 8950 [2021] NSWCATCD 108 Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618 [2023] NSWCA 125
Category:	Principal judgment
Parties:	Michael Jones and others (Applicants) The Owners – SP 93087 and others (Respondents)
Representation:	A Popovic (Applicants) No appearance (First respondent) Madison Marcus Law Firm (Second to 71st Respondent)
File Number(s):	SC 23/20818
Publication Restriction:	Nil

REASONS FOR DECISION

1 This is a dispute regarding appointment of a compulsory strata manager under s 237 of the *Strata Schemes Management Act 2015* (the Strata Act).

2 The dispute involves a strata scheme in Sydney with 262 lots. 41 lot owners are named as applicants in these proceedings. The respondents are the owners of SP 93087 (the owners corporation) and 70 lot owners.

Background

3 The dispute has a lengthy and convoluted history, much of which was set out in detail by Senior Member Sarginson in *Dawes and Ors v The Owners-Strata Plan No 93087 and Ors* (file number SC SC 21/46945, unreported, January 2022) (*Dawes*). It is not necessary for me to repeat all of that history in detail here but an overview of the salient background facts is set out below.

4 The building was completed approximately eight years ago. In 2018, the owners corporation initiated proceedings in the NSW Supreme Court (the Supreme Court proceedings) against the developer of the building (JKN Field Pty Ltd), the builder (Toplace Pty Ltd) and Mr Jean Nassif who is a director of both companies. The Supreme Court proceedings involve alleged building defects in breach of s 18B of the *Home Building Act 1989*.

5 The alleged building defects include serious structural problems which have required temporary propping of the building.

6 The problems with the scheme have attracted media attention and have resulted in the involvement of NSW Fair Trading, the NSW Building Commissioner and NSW Public Works Advisory.

7 In 2021 a group of lot owners commenced proceedings in the Tribunal (SC21/46945) seeking appointment of a compulsory strata manager (the original Tribunal proceedings).

8 On 10 January 2022 the Tribunal published written reasons in the original Tribunal proceedings (*Dawes)* and made the following order:

> Bright & Duggan Pty Ltd is appointed as the strata managing agent of The Owners-Strata Plan No 93087 to exercise all the functions of the owners corporation and all the functions of the chairperson, secretary, treasurer and strata committee of the owners corporation under s 237 (1) (a) and (2) (a) of the Strata Schemes Management Act 2015 (NSW) for a period of 18 months from the date of the making of this order.
>
> (the original Tribunal order)

9 In September 2022 a tripartite deed was entered into between Toplace Pty Ltd (Toplace), the Secretary of the Department of Customer Service and the Owners Corporation, the purpose of which was to provide a process to assess and respond to the structural defects (the tripartite deed).

10 Since February 2022 the Secretary of the Department of Customer Service has issued four "Building Work Rectification Orders" to Toplace Pty Ltd. Section 33 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act* 2020 empowers the Secretary of the Department of Customer Service to issue rectification orders to developers if the Secretary has a reasonable belief that the building has a serious defect.

11 The most recent Building Work Rectification Order was issued on 7 July 2023 and requires steps to be taken to address inadequate supporting beams and columns in part of the building. The final due date for compliance with all the works specified in that order is 12 weeks from the date of the order.

12 Earlier this month Toplace went into external administration. Shortly before the hearing of this application JKN Field Pty Ltd (JKN Field) entered voluntary administration.

13 The Secretary of the Department of Customer Service intends to imminently reissue the Building Works Rectification Orders to JKN Field.

14 It is not yet clear how these events will impact the Supreme Court proceedings.

15 The compulsory appointment of Bright & Duggan Pty Ltd (Bright & Duggan) expired on 10 July 2023 but interim orders have been made in SC23/30312 extending that appointment pending the outcome of these proceedings.

The claim

16 In their application lodged on 5 May 2023 the applicants sought "an order for an extension of the compulsory management (Order made on 10 January 2022) for 24 months".

17 There was some discussion at the hearing as to whether the application was for an extension of the original Tribunal order, which in effect would be an application under s 237(7) of the Strata Act to vary that order, or whether it was

an application made under s 237(1) for a fresh appointment of a compulsory strata manager.

18 During the hearing the applicants conceded that s 237(7) of the Strata Act precludes the Tribunal from extending the original Tribunal order beyond the date which is two years from the date of that order.

19 The applicants informed the Tribunal that their intention had been to apply for:

(1) A fresh order under s 237(1) for appointment of a compulsory manager for a period of 24 months; or

(2) If that application was unsuccessful, an extension of the original Tribunal order under s 237(7) to 9 January 2024.

20 Although the application form lodged by the applicants sought an extension of the original Tribunal order rather than a fresh order for compulsory management, and there was no formal request to amend the application prior to the hearing, I allowed the application to proceed on this basis. This was appropriate in circumstances where:

(1) the applicants were not legally represented;

(2) the legally represented respondents were clearly on notice both before and during the hearing of the alternative claims. In this regard although the application was framed as a request for a 24-month extension of the original Tribunal order rather than an application for a fresh order under s 237(1), both parties confirmed they had prepared their respective cases on the assumption that it was a fresh application.

(3) the respondents' written submissions made clear that they had turned their minds to both issues prior to the hearing. Although the respondent's written submissions correctly stated that the Tribunal was precluded from extending the original Tribunal order for a further 24 months, the respondents would have been aware that it was nonetheless open to the Tribunal to extend the order for a more limited period of up to six months;

(4) the parties were given an opportunity to make further oral submissions on both issues at the hearing; and

(5) the evidence in relation to both issues substantially overlapped.

Documents and evidence

21 The documents admitted into evidence and relied on by the applicants were two folders of documents lodged on 14 July 2023, as well as three additional documents tendered at the hearing –a copy of a letter from the owners

corporation's solicitors (Swaab) dated 11 July 2023, a copy of the Building Work Rectification Order dated 7 July 2023, and a series of email correspondence between various lot owners and the Tribunal.

22 The applicants did not rely on any witness statements but their documents include a letter dated 12 April 2023 addressed to the Tribunal from Mr Matt Press, Executive Director, NSW Fair Trading Building and Construction. Mr Press also provided oral evidence in chief at the hearing for the narrow purpose of explaining the consequences, from the perspective of NSW Fair Trading, of Toplace entering external administration. The respondents' representative Mr Moir elected not to cross-examine Mr Press.

23 The documents admitted into evidence and relied on by the respondent were a folder of documents which included witness statements of Yan Lin, the owner of lot 7 and of Nicholas Rovolas, a lawyer employed at Madison Marcus Law Firm. Mr Popovic cross-examined Ms Lin but elected not to cross-examine Mr Rovolas.

24 The parties also made written and oral submissions.

CLAIM FOR APPOINTMENT OF A COMPULSORY STRATA MANAGER FOR 24 MONTHS UNDER S 237(1)

25 I will first address the fresh claim for appointment of a compulsory manager for a period of 24 months before turning to the claim for an extension of the original Tribunal orders.

Legislative regime

26 Section 237 of the Strata Act states as follows:

> **237 Orders for appointment of strata managing agent**
>
> (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
>
> (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 and Stock 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.

Applicants' submissions

27 The applicants' submissions can be summarised as follows:

(1) Appointment of a compulsory strata manager is warranted either under s 237(3)(a) (ie the management of the scheme is not functioning or is not functioning satisfactorily) or s 237(3)(c) (ie the owners corporation has failed to perform one or more of its duties).

(2) The owners corporation "was and will continue to be" highly dysfunctional due to the difference of opinions between owners and their personal objectives.

(3) The Building Works Rectification Orders issued against Toplace are "outstanding" due to continual legal objections and challenges by Toplace.

(4) The insolvency of Toplace and the voluntary administration of JKN Field mean that urgent steps will need to be taken to obtain advice to make decisions about the Supreme Court proceedings and protection of the owners corporation's position against those companies.

(5) The magnitude of the issues and challenges facing the scheme is well beyond the duties and obligations that would normally be the responsibility of an owners corporation.

(6) Given the serious nature of the defects, decisions need to be made promptly and actions undertaken immediately. Rapid responses would be inhibited under the "required operating process" of a functioning owners corporation.

(7) The management required to complete the scope of works requires a high level of resources, skill and knowledge not held by individuals within the owners corporation. The owners corporation would not be capable of overseeing the significant works required to meet its obligations under s 106 and the time taken to remedy the defective works will be significantly extended if the scheme is not under compulsory management.

(8) A portion of owners are "in denial" about the structural issues facing the complex or are disengaged from the problems facing the building. The increased levies is causing financial stress and anguish.

(9) The insurance premiums payable by the owners are "exorbitant" and will continue to be so until all the building defects have been addressed.

(10) The owners corporation remains divided with regard to the rectification work required and as such "would not be capable of being able to elect a cohesive group to form an objective strata committee that could effectively manage the complex legal negotiations and the execution of the Building Rectification Work Orders".

28 The respondent's submissions can be summarised as follows:

(1) Section 237(3)(a) is written in the present tense. That is, it requires an assessment as to whether the management of the scheme is *presently* dysfunctional. However, the applicants' core position is that the operation of the scheme is *presently* functioning satisfactorily under the compulsory management of Bright & Duggan Pty Ltd (Bright & Duggan).

(2) The evidence relied on by the applicants to show dysfunction is the evidence which was before the Tribunal in the original Tribunal proceedings. That historical evidence cannot be relied on 18 months later as the basis for seeking a fresh order.

(3) With respect to s 237(3)(c), whilst there may ongoing breaches of the legislative obligation to maintain and repair common property as required by s 106 of the Strata Act, significant steps have been undertaken to rectify this. Furthermore, s 106(4) permits the owners corporation to defer compliance with the obligation to maintain and repair common property to the extent that the damage to the common property is the subject of the Supreme Court proceedings, and the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

29 The respondents' submissions also raise a jurisdictional issue as to whether the Tribunal has the power to make the order sought. They say, in summary:

(1) there is a two-year limit on appointments made under s 237, the purpose of which is to give owners a chance to self-govern every two years at most;

(2) on a proper construction of s 237 of the Strata Act, the references to "management" and "the owners corporation" do not extend to circumstances where there is a compulsory appointment in existence at the time of the application; and

(3) where the scheme is already under compulsory management, the only circumstances in which the Tribunal has power to make a fresh order for compulsory management is when the compulsory manager has held a general meeting as required by s 237(6) of the Strata Act. This has not yet occurred in this instance.

Consideration

30 The applicable principles for appointment of a compulsory strata manager were summarized in *Maple v The Owners-Strata Plan No 8950* [2021] NSWCATCD 108 as follows at [18]-[22]:

> The principles regarding whether or not a compulsory strata manager should be appointed are well established. In Hoare and Ors v The Owners-Strata Plan No 73905 [2018] NSWCATCD 45 the Tribunal stated at [199]-[200]:
>
> Appointment of a compulsory strata manager is a serious measure not to be taken lightly, because it removes the democratic process that has been established under the SSMA 2015 for the owners corporation to govern itself. In essence, it places the owners corporation into the hands of an administrator for a period of time.
>
> In respect of s 237 (3) (a) of the SSMA 2015, the Appeal Panel of the Tribunal stated in Bischoff v Sahade [2015] NSWCATAP 135 ('Bischoff') at [22]:
>
> "Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:
>
> (1) does not perform a required function, for example to properly maintain the common property;
>
> (2) exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;
>
> (3) fails to exercise a power or make a decision to prevent a contravention by Lot owners and occupiers of their obligations under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws; and
>
> (4) raises levies and takes or defends legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners Corporation or the Lot owners as a whole"
>
> The Tribunal must be satisfied, based on sufficient evidence, that one or more of the matters set out in s 237 (3) (a)-(d) has occurred, and, if so, there are appropriate discretionary reasons for the appointment of a compulsory strata manager. The exercise of that discretion must take into account the fact that appointment of a compulsory strata manager is a serious matter.
>
> An applicant may, for example, provide sufficient objective evidence to satisfy the Tribunal that one of the matters set out in s 237 (3) (a)-(d) has occurred, but fail to satisfy the Tribunal that the nature or duration of the actions or inactions of the owners corporation (or the level of dysfunctionality) does not justify the appointment of a compulsory strata manager.
>
> Further, a relevant matter is whether, despite past inadequacies of the management of the owners corporation that involve failure to comply with obligations under the SSMA and/or the Strata Schemes Regulation 2015 (NSW) there has been a recent change in behaviour involving compliance, such as the recent election of a new strata committee that has adopted an approach that accords with ensuring the owners corporation complies with its obligations; and whether any previous "dysfunctionality" has improved.

> The applicant bears the onus of establishing that a compulsory strata manager should be appointed. The Tribunal focusses upon the objective evidence. It is axiomatic that a Lot owner who is making an application for compulsory appointment of a strata manager is subjectively dissatisfied with the current management of the owners corporation. However the matters set out in s 237 (3) of the SSMA and the discretionary considerations as to whether a compulsory strata manager should be appointed are not established merely because of the subjective belief of a Lot owner that management of the owners corporation is, or has been, inadequate.

31 As Senior Member Sarginson said in *Dawes*:

> When determining whether there should be compulsory appointment, the Tribunal must be satisfied of at least one of the matters in s 237 (3) of the SSMA. However, deciding whether or not to appoint a compulsory manager depends upon the nature and extent of the matters under s 237 (3) of the SSMA. Appointment of a compulsory manager may not be appropriate if the only relevant matters were a relatively minor failure to repair common property under s 106 of the SSMA and taking out strata insurance for a 6 month policy period rather than a 12 month period (*The Owners-Strata Plan No 1813 v Keevers* [2021] NSWCATAP 130 at [253]-[256]).

32 I will now deal with each of the grounds on which the applicants say a compulsory strata manager should be appointed.

Does the evidence establish that the management of the scheme is not functioning or is not functioning satisfactorily (s 237(3)(a))?

33 The respondents correctly assert that s 237(3)(a) is cast in the present tense and that therefore the question for the Tribunal is whether the management of the scheme is *currently* dysfunctional.

34 The bulk of the evidence put forward by the applicants to establish dysfunction consists of the findings made by the Tribunal in the original decision, and the evidence which was before the Tribunal in those proceedings. However, that evidence is historical evidence which was assessed by the Tribunal when the original decision was made 18 months ago. Since that time the scheme has been under the compulsory management of Bright & Duggan. Evidence of dysfunction which predates Bright & Duggan's tenure has therefore been superseded by the period of compulsory management (during which, as discussed below, the scheme has been managed effectively). Historical evidence which predates the period of compulsory management does not assist the Tribunal to decide whether the management of the scheme is *currently* dysfunctional for the purposes of s 237(3)(a).

35 The recent evidence on which the applicants rely establishes that the scheme is currently being effectively managed by Bright & Duggan. Bright & Duggan has taken numerous steps to address the scheme's problems since it was appointed on 10 January 2022. These include:

(1) Cooperating with Fair Trading in negotiations with Toplace and JKN Field;

(2) Obtaining legal advice and instructing solicitors in relation to the Supreme Court proceedings;

(3) Entering the tripartite deed;

(4) Appointing an independent structural engineer (Chris Potter of Robert Baird Group) in accordance with the terms of the tripartite deed;

(5) Arranging for Rothshire Pty Ltd (a structural engineer engaged by the owners corporation) to carry out implementation of independent crack monitoring;

(6) Obtaining various expert reports to advise on the extent of the various defects (including fire defects, hydraulic defects, defects affecting waterproofing, and defects associated with glazing and balustrades);

(7) Engaging Hansen & Yucken Pty Ltd to provide construction management services and to project manage the installation of temporary propping;

(8) Arranging for urgent remediation works to take place including the temporary propping;

(9) Arranging a loan facility to fund the cost of urgent propping works;

(10) Raising special levies to cover insurance and remedial costs; and

(11) Appointing a new building manager commencing August 2022.

36 The evidence also establishes that the scheme is insured, that Bright & Duggan has been taking steps to address the prohibitive insurance premiums currently payable by the scheme (which is in excess of $1,000,000), and that whilst there are significant levy arrears, the scheme's financial position has improved since Bright & Duggan commenced its period of management.

37 This evidence does not support the applicants' case that the management of the scheme is dysfunctional for the purpose of s 237(3)(a). Conversely it establishes that the scheme is *currently* being effectively and efficiently managed by Bright & Duggan.

38 The applicants assert, and I accept, that there is continued animosity and hostility between various lot owners. The number of lot owners whose names have been added as parties to these proceedings is in itself testament to the discord amongst a large number of lot owners. However, in any scheme it is to be expected that there will be various disagreements and clashes of personalities between interested parties, and that factions will form. This is particularly to be expected in a case such as the present where the scheme has a large number of lots, a history of animosity and legal proceedings, and the scheme faces very significant challenges. Animosity and discord between lot owners are not on their own sufficient to establish that s 237(3)(a) has been satisfied. What is relevant is whether that discord and disharmony is affecting the management of the scheme.

39 Similarly, the applicants say that a number of lot owners are disengaged or are in denial about the extent and seriousness of the problems facing the scheme. Again, it is to be anticipated in any scheme that there will be a range of views and attitudes about the management of the scheme and the challenges it faces. There will generally be some owners who are more active and involved, some who take no interest whatsoever, and others who fall somewhere in between. A range of attitudes is especially likely in a scheme such as the present where there is a large number of lots and many owners reside offshore. What is relevant is whether the disengagement or attitude of lot owners is affecting the scheme's management.

40 The evidence does not establish that the disharmony between lot owners or the range of attitudes among lot owners is currently affecting the management of the scheme. For the reasons outlined above, the scheme is currently being managed effectively.

41 The other significant evidence relied upon by the applicants is a letter from Matt Press, Executive Director, NSW Fair Trading Building and Construction dated 12 April 2023. In that letter Mr Press explains that NSW Fair Trading has been involved in the scheme since 2021, primarily as part of its regulatory role to respond to serious building defects. Mr Press outlines some of the challenges the owners corporation has faced and makes representations to the

Tribunal in relation to the appointment of a compulsory strata manager. In that letter Mr Press says in summary:

(1) The exercise of Fair Trading's powers in relation to this scheme has been particularly complex because of the serious nature of the structural problems, the stance of the developer, and the inability of the developer to pay for undisputed remediation work.

(2) As the building is occupied, issues relating to access, safety and legal proceedings have added to the complexity of the issues with the building.

(3) Bright & Duggan has dealt with the serious defects efficiently and effectively.

(4) Fair Trading's extensive experience is that the tripartite deed could not have been agreed without the scheme being under the control of a compulsory strata manager.

(5) Temporary propping was required to address "urgent and life threatening" defects. As the developer was unable to pay for this work, the compulsory strata manager stepped in and arranged for the owners corporation to pay for the urgent propping work in a timely way.

(6) The scheme will likely face a number of significant administrative decisions and management pressures in the next 12 months because:

    (a) Rectification of the building's defects will be a time consuming and costly process;

    (b) Many owners are likely to be under both financial and emotional stress due to the special levies and existence of the serious defects;

    (c) The mandatory insurance costs of the scheme are prohibitive;

    (d) There is a possibility that the developer may not fulfil its obligations to perform or finance the remedial works required by the Building Works Rectification Orders; and

    (e) There are differing opinions among owners about the legal responsibilities of the owners corporation and how the building should be managed.

(7) It is likely to be challenging for the scheme to respond effectively to these issues in the absence of a compulsory strata manager. Fair Trading's experience with the scheme has been different to other strata buildings affected by serious defects where "it is commonly observed that it is challenging for Owners Corporations to make decisions appropriately and in a timely manner". Mr Press says the key difference here has been the expertise, capability and decision making power of the compulsory strata manager.

42 Whilst I appreciate Fair Trading's position, and acknowledge that this is a challenging situation, there is nothing in Mr Press's letter which satisfies me

that the management of the scheme is currently dysfunctional for the purposes of s 237(3)(a). Indeed to the contrary, the letter is further evidence of the effective management of the scheme by Bright & Duggan.

43 I appreciate that having Bright & Duggan in control of the scheme has been of significant benefit, and has likely facilitated simpler and smoother interactions between the owners corporation and Fair Trading. I also appreciate that the scheme may face challenges when it returns to self-management and that there is a risk of future dysfunction. However, these are not determinative factors for the purposes of s 237(3(a).

44 For these reasons the evidence does not satisfy me that the circumstances set out in s 237(3)(a) of the Strata Act apply in this case.

Breach of duty

45 It is not in dispute that the owners corporation has a duty under s 106(1) of the Strata Act to maintain and repair common property, and that common property of the scheme continues to be in disrepair. The evidence of this includes Mr Press's letter of 12 April 2023, Mr Press's oral evidence given at the hearing, the multiple Building Works Rectification Orders issued to Toplace which are yet to be complied with, and letters from Bright & Duggan to the owners outlining the multiple problems with the scheme.

46 The respondents submit that the owners corporation is nonetheless not in breach of its duty under s 106(1) because s 106(4) of the Strata Act permits the owners corporation to defer compliance with the obligation to maintain and repair common property to the extent that the damage to the common property is the subject of the Supreme Court proceedings.

47 Section 106(4) states:

> If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

48 There was insufficient evidence before me as to the scope of the Supreme Court proceedings to ascertain whether, or the extent to which, s 106(4) applies to all of the outstanding defects. In any event it seems almost certain

that at least some of the outstanding issues affect the safety of the building and are therefore excluded from s 106(4). Whilst s 106(4) may entitle the owners corporation to defer attending to some repair and maintenance items, I am not satisfied that s 106(4) absolves the owners corporation of its duty under s 106(1) to repair and maintain all of the outstanding repair items.

49 Accordingly, I am satisfied that the scheme remains in breach of its obligations under s 106(1) of the Strata Act.

50 However, as the Tribunal said in *Maple*, where there has been a history of non-compliance with statutory duties, it is relevant to consider whether there has been a recent change in behaviour involving compliance.

51 In this instance, for all the reasons outlined above, it is clear that since the appointment of Bright & Duggan, meaningful and appropriate steps have and continue to be taken to address the scheme's significant repair issues.

Conclusion in relation to s 237(1)

52 For the reasons explained, I am not satisfied that the management of the scheme is not functioning or is not functioning satisfactorily for the purpose of s 237(3)(a).

53 With regard to s 237(3)(c), although the common property continues to be in disrepair, I am satisfied that there has been a significant improvement since the original Tribunal orders were made, and that productive steps have and continue to be taken to address the state of disrepair. Moreover, due to the seriousness of those issues, and the added complexity brought about by the Supreme Court proceedings, the involvement of NSW Fair Trading, the non-compliance by the builder with the Building Works Rectification Orders, and the recent entry into administration by Toplace and JKN Field, it is not surprising that there remain outstanding repair issues. Indeed, it is unlikely that many of the scheme's repair issues will be resolved quickly, whether or not the scheme is under compulsory management.

54 The legislative intention of the Strata Act is that principal responsibility for the management of a strata scheme is vested in the owners corporation: *Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618* [2023]

NSWCA 125 at [40]. The Strata Act establishes a democratic process for an owners corporation to govern itself. It is for this reason that appointment of a compulsory manager is a serious step not to be taken lightly: *Hoare and Ors v The Owners-Strata Plan No 73905* [2018] NSWCATCD 45 at [199]. There is no exception to the general rule for large schemes or for schemes facing unusually challenging circumstances.

55 There is insufficient evidence to satisfy me that the owners corporation would not be capable of dealing with the scheme's complex issues when it returns to self-management, particularly as it will have the ability to obtain guidance and assistance from a voluntary strata manager.

56 It may well be that once the scheme re-enters self-management, it will struggle to manage its challenges satisfactorily. However, the owners have not had an opportunity to self-govern for over 18 months, and it is not yet known whether, or the extent to which, they will successfully manage the scheme when Bright & Duggan's tenure ends. If problems occur there may well be grounds for a fresh application under s 237(1) but the owners should be given an opportunity to self-govern again before any such application is made. A possibility of future problems is not a sufficient reason to appoint a compulsory strata manager.

57 For these reasons I am not satisfied that the continuing issues with the building justify a fresh appointment of a compulsory manager.

58 As I have reached the conclusion that a fresh appointment of a compulsory strata manager is not warranted, it is not necessary for me to address the jurisdictional issues raised by the respondents.

CLAIM FOR EXTENSION OF EXISTING APPOINTMENT UNTIL 9 JANUARY 2024: SECTION 237(7)

59 The next issue which I must decide is whether to extend the appointment of Bright & Duggan, and if so, to what date.

60 It is common ground that s 237(7) of the Strata Act empowers the Tribunal to extend the appointment of a compulsory manager, provided that the total period of appointment does not exceed two years.

61 The applicants contend that the original Tribunal order should be extended for the maximum period permitted by s 237(7) – ie to 9 January 2024. The respondents are opposed to any extension.

62 Section 237(7) does not specify any particular considerations which must be taken into account when deciding whether to extend an appointment. However, when exercising its discretion the Tribunal must act judicially, in accordance with the principles set out in House v The King (1936) 55 CLR 499.

63 The starting point is the decision in *Dawes* in which the Tribunal, when addressing the length of time for which Bright & Duggan should be appointed, relevantly said at [164] – [165]:

> Considering that compulsory appointment is a serious step, the Tribunal is not satisfied that a 2 year period is appropriate. A 1 year period is not sufficient, considering the recommendations of NSW Public Works Advisory; the recommendations of Rothshire Pty Ltd; the issue of whether the owners corporation is going to continue to engage Rothshire Pty Ltd; the issue of payment of Rothshire Pty Ltd's outstanding invoices; and the ongoing Supreme Court proceedings.
>
> In all the relevant circumstances, the Tribunal is satisfied that compulsory appointment for a period of 18 months from the date of these orders is appropriate to bring stability to the owners corporation.

64 One of the reasons that the Tribunal decided that a shorter term of one year was not sufficient, was the ongoing Supreme Court proceedings. The Tribunal was of the view that a longer period of 18 months was appropriate in part because of those proceedings.

65 In recent weeks there have been important developments which will significantly impact those proceedings.

66 First, there was the placement into external administration of Toplace on or about 10 July 2023. A letter from Swaab to the owners corporation dated 11 July 2023 states "We will liaise with the owners corporation further about the continuing litigation and our recommended next steps shortly. We will also provide further advice about the next steps for the owners corporation in the administration of Toplace Pty Ltd including the lodging of a proof of debt with the administrators."

67 Since that letter the situation has changed even more significantly with the placement into external administration of JKN Field just days before the hearing of this application.

68 These serious developments mean important and difficult decisions will imminently need to be made about the Supreme Court proceedings, about the owners corporation's position as an unsecured creditor, and more generally about the impact on future remedial works.

69 In this regard the respondents correctly point out that the Building Works Rectification Orders are not issued to the owners corporation. However, the orders affect common property and therefore there will be decisions to be made in relation to the works the subject of those orders if JKN Field does not or cannot comply with the orders, including whether to strike additional special levies to pay for those works. I also note in this regard that JKN Field is not a party to the tripartite deed.

70 In all of these circumstances I am satisfied that it is appropriate to extend the appointment of Bright & Duggan to allow it to continue managing the scheme during this period of flux. Bright & Duggan has for over 18 months now been effectively dealing with the owners corporation's solicitors, with Fair Trading, with the various experts appointed by the owners corporation and with other persons involved in addressing the scheme's problems. Bright & Duggan is abreast of the issues and well versed in dealing with the relevant players. It is important for there to be consistency and stability when dealing with these significant new developments over the coming months and Bright & Duggan is best placed to do this.

71 It is likely to take at least several months for these issues to be ironed out and therefore I am of the view that an extension of Bright & Duggan's appointment until 30 November 2023 is warranted. This will give the new strata committee (which will need to be appointed at the general meeting called pursuant to s 237(6) of the Strata Act) an opportunity to settle into its role before the Christmas/summer holiday period. I am not satisfied that an extension beyond 30 November is warranted.

Orders and costs

72 Rule 38A of the Civil and Administrative Tribunal Rules 2014 does not apply to these proceedings. Therefore, the general rule operates that parties bear their own costs, unless there are "special circumstances": see *Civil and Administrative Tribunal Act* 2013, s 63. I am not aware of any special circumstances that would warrant the making of a costs order in favour of either party. Nonetheless, as the parties have flagged a possible application for costs, I am making directions for the parties to exchange submissions on costs.

73 For these reasons I am making the following orders:

(1) Order 1 made on 10 January 2022 in SC 21/46495 is extended to 30 November 2023.

(2) The application is otherwise dismissed.

(3) If a party wishes to make a costs application, the costs applicant is to file and serve submissions and documents on the costs application by 14 days from the date of these orders.

(4) If an application for costs is made by a party, the costs respondent is to file and serve submissions and documents on the costs application by 28 days from the date of these orders.

(5) The costs applicant is to file and serve costs submissions in reply by 35 days from the date of these orders.

(6) The costs submissions of the parties are to state whether the parties seek an oral hearing on costs, or consent to the costs application being determined on the papers in accordance with s 50(2) of the Civil and Administrative Tribunal Act 2013.

(7) The Tribunal may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.

****

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