Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No. 84716 v Purcell
Medium Neutral Citation:	[2023] NSWCATCD 97
Hearing Date(s):	30 March 2023; written submissions to 21 April 2023
Date of Orders:	30 August 2023
Decision Date:	30 August 2023
Jurisdiction:	Consumer and Commercial Division
Before:	G Sarginson, Senior Member
Decision:	(1) The respondent, Delmont Purcell, is to pay the applicant, The Owners-Strata Plan No 84716, the amount of $1,320 by 14 days from the date of this decision. (2) Any costs application by the applicant is to be determined in the following manner: (a) Applicant to file with the Tribunal and serve on the respondent, by person or by post, costs submissions and documents by 14 days from the date of this decision. (b) Respondent to file with the Tribunal and serve on the applicant, by person or by post, costs submissions and documents by 28 days from the date of this decision. (c) Applicant to file with the Tribunal and serve on the respondent, by person or by post, costs submissions in reply by 35 days from the date of this decision. (d) The costs submissions of the parties are to identify whether or not they consent to the issue of costs being

	determined without a further oral hearing and if not why an oral hearing on the issue of costs is necessary. (e) Subject to consideration of the costs submissions of the parties the Tribunal may determine the issue of costs on the papers and without a further oral hearing in accordance with s 50 (2) of the Civil and Administrative Tribunal Act 2013.
Catchwords:	LAND LAW---Strata title---Civil penalty---s 147 Strata Schemes Management Act 2015---Service of notices to comply with by-laws---Whether contravention of notices to comply established---Applicable penalty
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Crimes (Sentencing Procedure) Act 1999 (NSW) Evidence Act 1995 (NSW) Interpretation Act 1987 (NSW) Strata Schemes Management Act 2015 (NSW) Surveillance Devices Act 2007 (NSW)
Cases Cited:	ASIC v McDonald (No 11) [2009] NSWSC 287 Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34 Brown v The Owners-Strata Plan No 82527 [2022] NSWCATAP 328 Di Liristi v Matautia Developments Pty Ltd [2021] NSWCA 328 Forest v Suzanne [2022] NSWCATAP 292 Gregg v R [2020] NSWCCA 245 Mulhearn v Merit Homes Pty Ltd [2015] NSWCATCD 139 Purcell v DPP (NSW) [2021] NSWDC 10 Robinson v Quick Built Systems Pty Ltd [2022] NSWCATAP 192 State of NSW v Hathaway [2010] NSWCA 184 The Owners-Strata Plan No 21367 v Letchford [2021] NSWCATCD 112 The Owners-Strata Plan No 4393 v Roberts [2023] NSWCATCD 57 The Owners-Strata Plan No 61285 v Taylor (No 2) [2022] NSWCATCD 118 TS v R [2022] NSWCCA 222 Westbury v The Owners-Strata Plan No 64061 [2021] NSWCATEN 3

	ZDB v The University of Newcastle (No 2) [2017] NSWCATAP 135
Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners-Strata Plan No 84716 (Applicant) Delmont Purcell (Respondent)
Representation:	Counsel: None Solicitors: Bannermans Lawyers (Applicant)
File Number(s):	SC 22/55814
Publication Restriction:	Nil

REASONS FOR DECISION

1 This is an application by an owners corporation against a Lot owner for the imposition of a penalty under s 147 of the *Strata Schemes Management Act 2015* (NSW) (SSM Act).

2 In this decision, any reference to "the owners corporation" is a reference to the applicant; and any reference to "the Lot owner" is a reference to the respondent.

3 The owners corporation is the subject of compulsory appointment of a strata manager under s 237 of the SSM Act. It has been in compulsory appointment at various times over the past 9 years. The current period of compulsory appointment commenced on 8 June 2022 by order of the Tribunal.

4 The Lot owner has control of 50% of unit entitlements (by ownership in person, and as a director of companies that are Lot owners), and has been a resident of the strata building for a long period of time. The strata scheme is located on the lower north shore of Sydney, NSW. The strata building comprises of 17 Lots. It has 3 stories with a basement carpark.

5 On 16 December 2022, the owners corporation filed an application with the Tribunal seeking the imposition of a penalty under s 147 of the SSM Act.

6 The application identifies that the Lot owner allegedly breached a Notice to Comply with By-law dated 28 October 2022 issued under s 146 of the SSM Act. The By-laws referred to are:

(1) By-law 5 (Damage to common property);

(2) By-law 7 (Behaviour of owners and occupiers);

(3) By-law 10 (Depositing rubbish and other materials on common property).

7 By-law 5 states as follows:

> **5 Damage to common property**
>
> 5.1 An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the owners corporation.
>
> 5.2 An approval given by the owners corporation under clause (1) cannot authorise any additions to the common property.
>
> …

8 By-law 7 states as follows:

> **7 Behaviour of owners and occupiers**
>
> An owner or occupier of a lot when on common property must be adequately clothed and must not use language or behave in such a manner likely to cause offence or embarrassment to the owner or occupier of another lot or to any person lawfully using common property.

9 By-law 10 states as follows:

> **10 Depositing rubbish and other material on common property**
>
> An owner or occupier of a lot must not deposit or throw on the common property any rubbish, dirt, dust or other material or discarded item except with the prior written approval of the owners corporation.

10 In substance, the allegation against the Lot owner is that she engages in conduct that harasses other Lot owners and residents of the strata scheme by verbal abuse; placing notices on common property; and moves bins located on common property.

11 The application filed by the owners corporation identifies the allegations against the Lot owner and attached a number of documents. Those documents relevantly included:

(1) The registered strata plan.

(2) The registered by-laws.

(3) The strata roll.

(4) Decisions and reasons of various decisions of the Tribunal appointing; re-appointing; or extending the period of appointment of a compulsory strata manager under s 237 of the SSM Act.

(5) A decision of the District Court (*Purcell v DPP (NSW)* [2021] NSWDC 10) involving an unsuccessful appeal by the Lot owner arising from convictions in the Local Court.

(6) Notice to Comply with By-law dated 12 January 2022 in respect of By-law 7.

(7) A letter from the Lot owner to the compulsory strata manager dated 12 January 2022 stating, among other things, that the Lot owner would not be complying with any Notice to Comply with By-law issued by the compulsory strata manager.

(8) A letter from Bannermans Lawyers on behalf of the owners corporation dated 31 October 2022. That letter attaches Notices to Comply with By-laws dated 28 October 2022 and asserts that if the Lot owner fails to comply with the Notices the owners corporation will take NCAT proceedings seeking the imposition of a penalty under s 147 of the SSM Act.

(9) Notice to Comply with By-law dated 28 October 2022 in respect of By-law 7.

(10) Notice to Comply with By-law dated 28 October 2022 in respect of By-law 5.

(11) Notice to Comply with By-law dated 28 October 2022 in respect of By-law 10.

12 The proceedings were listed for a directions hearing at the Tribunal on 13 January 2023 before Harrowell DP. There was no appearance by the respondent at that directions hearing. The Deputy President made detailed procedural directions for the filing and serving of documentary evidence and submissions. The procedural directions also directed the owners corporation to file and serve a Scott Schedule particularising the circumstances of the alleged contraventions. The procedural directions pointed out that pursuant to s 38 (3) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), rules of evidence apply to applications seeking a penalty under s 147 of the SSM Act.

13 On 24 January 2023, the owners corporation filed in hard copy its Scott Schedule. An electronic copy of that document had been sent to the Tribunal on 20 January 2023.

14 The procedural timetable for the filing and serving of documentary evidence was extended.

15 On 20 February 2023, the Lot owner filed documents with the Tribunal. Those documents included an affidavit dated 13 July 2022; and a written submission.

16 On 22 February 2023, the owners corporation filed documentary evidence with the Tribunal. The owners corporation's documentary evidence comprised of:

(1) An affidavit of Mr O'Neill, compulsory strata manager, dated 21 February 2023. Annexures to the affidavit of Mr O'Neill included a USB key with video evidence.

(2) An affidavit of Mr Napoli, Solicitor, dated 21 February 2023.

17 The matter was listed for hearing at the Tribunal on 30 March 2023. Mr Napoli, Solicitor, appeared for the owners corporation. Ms Zheng, Solicitor, of Bannermans Lawyers, was also present. The compulsory strata manager, Mr O'Neill, also attended the hearing.

18 The respondent Lot owner attended the hearing.

19 At the commencement of the hearing, the respondent Lot owner made a submission that the Tribunal should summarily dismiss the owners corporation's proceedings for want of jurisdiction.

20 The basis of the application was a conflation of various misguided assertions. One was that the Australian Constitution precluded the Tribunal from having jurisdiction. Another was that the SSM Act had been improperly enacted and was invalid. Another was that the owners corporation was a "foreign corporation." The Lot owner further submitted that since 1973 no Court or Tribunal had jurisdiction in strata scheme disputes.

21 It is unnecessary to provide a detailed response to all of the assertions made by the applicant as they are clearly misconceived. The Tribunal has the power to hear and determine the dispute pursuant to the relevant provisions of the SSM Act, which is legislation that was validly passed and enacted by NSW Parliament. Section 28 (1) of the NCAT Act gives the Tribunal jurisdiction to hear and determine matters conferred upon it under the NCAT Act and any other legislation. The interaction of the NCAT Act and the SSM Act gives the Tribunal jurisdiction.

Evidence of the Owners Corporation

Affidavit of Mr O'Neill

22 Mr O'Neill's evidence is summarised as follows:

23 In January 2022, he received "multiple complaints" from "multiple owners and tenants" regarding the respondent "putting up signs that were placed on the common property without authorisation.

24 Mr O'Neill's affidavit does not contain any detail of any conversation with any person about the "multiple complaints" he asserts he received in January 2022; nor are any emails or text messages attached to his affidavit in respect of the asserted complaints in January 2022.

25 Mr O'Neill attaches two photographs in respect of the alleged conduct of the respondent in January 2022. No evidence is provided as to who took the photographs; the date of the photographs; or who provided them to Mr O'Neill. The first photograph shows a number of papers signs including "No visitors permitted in the pool area" torn up. The second photograph shows a handwritten sign sticky taped to a wall reading "keep the gate shut."

26 Mr O'Neill issued a Notice to Comply with By-law dated 12 January 2022 in respect of breach of By-law 5. He asserts the Notice was served by placing it in the letterbox of the respondent.

27 Mr O'Neill states that in January 2022 he received "multiple complaints from various owners and tenants" that the respondent "verbally abused" them. Again, there was no direct evidence from any person as to what the respondent said to them; nor copies of any contemporaneous emails or text messages attached to the affidavit of Mr O'Neill in respect of the alleged complaints in January 2022. The substance of what was alleged to have been said by the respondent was referred to in Mr O'Neill's affidavit, but this was not admissible as it was hearsay and no exception to the hearsay rule applied.

28 On 12 January 2022 Mr O'Neill states that a Notice to Comply with By-law was served on the respondent in respect of breach of By-law 7. Mr O'Neill asserts this Notice was served by placing it in the letterbox of the respondent.

29 On 14 January 2022 Mr O'Neill received a letter from the respondent dated 12 January 2022. A copy of that letter was attached to the affidavit of Mr O'Neill. The letter states that the respondent "will not be complying with any "notice to comply (sic)" issue by you." The letter refers to occupants of Lot 7 being "unsuitable tenants" and makes various derogatory remarks about those persons.

30 On or about 13 September 2022 Mr O'Neill states that he received "further complaints from various owners and tenants" that the respondent had "defaced the common property gate".

31 Mr O'Neill states that in October 2022 he again received "complaints from various owners and tenants" that the respondent was "continuing to place signs on the common property". Again, details of what was said to Mr O'Neill are absent from his affidavit as well as copies of any emails or text messages providing a contemporaneous record or account of the conduct of the respondent.

32 Mr O'Neill states that on 28 October 2022 the applicant was "issued with" a further Notice to Comply with By-law in respect of breach of By-law 5. A copy of that Notice to Comply is attached to Mr O'Neill's affidavit.

33 Mr O'Neill asserts that he is "aware" the Notice to Comply with By-law 5 dated 28 October 2022 was "served by Bannermans Lawyers" on the respondent on or about 31 October 2022.

34 Mr O'Neill states that he is also "aware" that on 31 October 2022 Bannermans Lawyers served a Notice to Comply with By-law on the respondent in respect of By-law 7.

35 On or about 2 December 2022 Mr O'Neill states that he viewed CCTV footage of the respondent using a device to remove the locking chain from garbage bins of the owners corporation located in the common property bin area. That footage is footage from security cameras of the owners corporation. A copy of the footage is attached to the affidavit, and was played to the Tribunal at the hearing.

36 Mr O'Neill states that on 28 November 2022 he received an email from an occupant of the strata scheme that the respondent had called her 2 year old daughter a "stupid child". Mr O'Neill attaches a copy of that email. The occupant is Ms Winstone. The email dated 28 November 2022 relevantly complains that the respondent:

(1) Placed multiple signs and stickers on common property walls.

(2) Places chains on the pool fence on Wednesdays and Saturdays and the pool furniture "at every occasion."

(3) Stood at the entrance stairs of the Lot occupied by Ms Winstone and shouted that Ms Winstone's 2 year old daughter was a "stupid child".

(4) Intimidating and harassing an occupant of the strata scheme using the pool by sitting on chairs next to her. Video footage had taken video footage of this incident.

(5) The respondent takes out and returns the bins of the strata scheme and "screams" at Lot owners and occupants that they cannot use the bins to dispose of dirty nappies.

37 Mr O'Neill states that on about 28 November 2022 and 7 December 2022 he viewed video footage that was sent to him.

38 According to Mr O'Neill, the video taken on or about 27 November 2022 shows the respondent "pushing chairs" and removing a towel in the common property area, and speaking the words "useless people".

39 According to Mr O'Neill, the video taken on or about 7 December 2022 shows the respondent shouting at another person from her window: "You are a stupid little woman. Go away. You were too loud."

40 Mr O'Neill provided a copy of the video attached to his affidavit. The video was played at the hearing. The respondent did not object to the video being played at the hearing.

Affidavit of Mr Napoli dated 21 February 2023

41 The affidavit of Mr Napoli is brief and refers only to the issue of service.

42 Mr Napoli states that on 31 October 2022 he emailed the respondent the following documents:

(1) Letter of Bannermans Lawyers dated 31 October 2022.

(2) Notice to Comply with By-law 5 dated 28 October 2022.

(3) A copy of By-law 5.

(4) Notice to Comply with By-law 7 dated 28 October 2022.

(5) Copy of By-law 7.

(6) A complete copy of all of the strata schemes By-laws.

43 Mr Napoli states that on 31 October 2022 he sent a hard copy of the documents referred to in that email by express post to the respondent's postal address.

Video Evidence of the Respondent Played at the Hearing

44 The respondent did not raise any objection that the videos had been obtained in a manner inconsistent with the provisions of the *Surveillance Devices Act 2007* (NSW); nor that the video evidence required authentication (i.e. evidence from the person who took the video to establish the time, date, place and circumstances in which the video was made).

45 Had such an objection been raised, the Tribunal would have been required to make a ruling as to whether the videos should not be admitted into evidence by reason of the provisions of s 138 of the *Evidence Act 1995* (NSW).

46 Section 138 of the *Evidence Act 1995* (NSW) states:

> **138 Exclusion of improperly or illegally obtained evidence**
>
> (1) Evidence that was obtained—
>
> (a) improperly or in contravention of an Australian law, or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law,
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
>
> …
>
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—
>
> (a) the probative value of the evidence, and
>
> (b) the importance of the evidence in the proceeding, and
>
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
>
> (d) the gravity of the impropriety or contravention, and
>
> (e) whether the impropriety or contravention was deliberate or reckless, and

> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*, and
>
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
>
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.
>
> Note—
>
> The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

47 The operation of s 138 of the *Evidence Act 1995* (NSW) in the context of a dispute as to whether photographs and video images were taken in contravention of the provisions of the *Surveillance Devices Act 2007* (NSW) (and thus were either illegally, or improperly, obtained) was discussed by the Tribunal in *Mulhearn v Merit Homes Pty Ltd* [2015] NSWCATCD 139. In that decision (which did not involve proceedings to which the rules of evidence apply, but the Tribunal considered the objection made to the evidence sought to be tendered applying the principles under s 138 of the *Evidence Act 1995* (NSW) in any event), the Tribunal (without finding that the evidence had been illegally or improperly obtained) held that even if the evidence was illegally or improperly obtained the Tribunal was satisfied the probative value of the evidence outweighed the circumstances of any purported illegality or impropriety.

48 The Tribunal accepts that the respondent is not a legally represented person; and procedural fairness principles may, in some circumstances, oblige the Tribunal to raise the issue of the potential to object on the basis of s 138 of the *Evidence Act 1995* (NSW), or any other potential ground of objection.

49 However, the NSW Court of Appeal stated in *Di Liristi v Matautia Developments Pty Ltd* [2021] NSWCA 328 at [80]-[81]:

> It remains to consider the submission by counsel for Di Liristi that Di Liristi's position as an unrepresented litigant affects the weight to be given to the EMS quote, in circumstances where, had objection been taken, the quotes would have been inadmissible.
>
> The court's duty to unrepresented litigants is to ensure a fair trial for all parties: *Hamod v New South Wales* [2011] NSWCA 375 at [309]-[316] (Beazley JA,

> Giles and Whealy JJA agreeing). Nevertheless, it is not for the trial judge to raise and determine questions of admissibility: *Harrington-Smith on behalf of The Wongatha People v State of Western Australia (No 7)* (2003) 130 FCR 424; [2003] FCA 893 at [13] (Lindgren J). As observed in *Bauskis v Liew* [2013] NSWCA 297 at [69] (Gleeson JA, Beazley P and Barrett JA agreeing), the propositions which emerge from the authorities referred to in *Hamod* include:
>
> > Thirdly, the duty of a trial judge to assist an unrepresented litigant does not extend to advising the litigant as to how his or her rights should be exercised. That is, it is not the function of the court to give judicial advice to, or conduct the case on behalf of, the unrepresented litigant: see *Bhagwanani v Martin* [1999] SASC 406; (1999) 2004 LSJS 449; *Clark v State of New South Wales (No 2)* [2006] NSWSC 914.
>
> See also *Pollock v Hicks* [2015] NSWCA 122 at [91] (Gleeson JA, Macfarlan and Emmett JJA agreeing).

50 The evidence contained in the videos are clearly relevant to proving or disproving the facts in issue (s 55 *Evidence Act 1995* (NSW)). Even in the absence of evidence from the person who saw or heard the events depicted in the videos taken at the pool area and on the balcony, those videos are not within the hearsay rule under s 59 of the *Evidence Act 1995* (NSW), as they are direct evidence relied upon to establish what occurred (i.e. what was said and what events occurred), rather than a previous representation containing the assertion of the existence of a fact relied upon to prove the fact contained in the representation. The video taken by the security camera in the basement proximate to the location of the bins is also direct evidence of actions of the respondent (provided the Tribunal is satisfied that the person depicted in the video is the respondent).

51 Further, even if it was arguable the events depicted in the videos are hearsay the hearsay would be evidence of a firsthand admission in civil proceedings (being the specific conduct by the respondent that is alleged to constitute the failure to comply with the Notices) and would be an exception to the hearsay rule under ss 81 and 82 (b) of the *Evidence Act 1995* (NSW). A video recording falls within the definition of “document” in the Dictionary of the Evidence Act 1995 (NSW) and an “admission” is defined in the Dictionary as including a “previous representation” by a party to the proceedings which is “adverse to the person’s interest in the outcome of the proceedings”.

52 Although the person who took the videos in respect of the pool incident and the balcony incident did not give evidence, the evidence is admissible subject to

any dispute about the authenticity of the videos; . No dispute as to authenticity was raised other than the general assertion of the respondent that any action by the compulsory strata manager is illegitimate because she refuses to accept the authority of the compulsory strata manager. That is not a dispute as to the authenticity of the video evidence itself.

53 By reason of s 183 of the *Evidence Act 1995* (NSW) the Tribunal may draw an reasonable inferences from all of the video evidence as well as other matters from which inferences may be property drawn. Further, authenticity of a document under s 183 of the *Evidence Act 1995* (NSW) can be determined from the document itself, without the necessity of calling a witness (*Gregg v R* [2020] NSWCCA 245 at [362]-[368]).

54 It is unnecessary to express a concluded view as to whether the videos were illegally or improperly obtained because no objection was raised by the respondent in respect of that issue. The application of the *Surveillance Devices Act 2007* (NSW) to private videos taken of the words and actions of persons is a complex issue, with an exception in the Act when a sound recording is taken with the actual or implied consent of the person recorded; or to protect the lawful interests of a person who made the sound recording (s 7 (3) of the *Surveillance Devices Act 2007 (NSW)* and seek the discussion of relevant authorities in the Appeal Panel decisions of *Robinson v Quick Built Systems Pty Ltd* [2022] NSWCATAP 192 and *Forest v Suzanne* [2022] NSWCATAP 292 in the context of Tribunal proceedings where s 38 (2) of the NCAT Act applies; and *TS v R* [2022] NSWCCA 222 in the context of criminal proceedings where the *Evidence Act 1995* (NSW) applies).

55 Even if the Tribunal was satisfied that the video evidence of the 3 separate events was illegally or improperly obtained, the Tribunal would have exercised its discretion under s 138 of the *Evidence Act 1995* (NSW) to admit the evidence as its probative value outweighs any circumstances of illegality or impropriety in respect of how the recordings were made.

Evidence of the Respondent

56 The affidavit of the respondent dated 13 July 2022 does not contain any factual evidence responsive to the allegations by the owners corporation that the

respondent has failed to comply with the Notices to Comply With By-laws that are the subject of these proceedings.

57 Rather, the affidavit is a catalogue of complaints about the conduct of the compulsory strata manager, and various occupants of the strata building who the respondent asserts have engaged in "disgusting" behaviour.

58 The respondent also asserts that that the Tribunal has no jurisdiction for the following reasons:

> Administrative law, Admiralty law and Maritime law have no more function in our country. Australia is now a bankrupt foreign corporation and wear under alliance martial law, Australian corporate assets are under the control of President Donald J. Trump (sic) as Australia is a bankrupted corporation listed on the New York Stock Exchange. We are not under common law and as such NCAT will no longer be making decisions for the property of the above owners.

59 In cross examination at the hearing, the respondent's answers were generally non-responsive to the questions put. The respondent did not deny that she was the person shown in the video evidence, nor that she had engaged in the conduct complained of by the owners corporation.

60 The respondent's position was, in essence, that she was justified in her behaviour as the person enforcing "standards" in the strata scheme and she did not recognise the authority of the compulsory strata manager.

61 At the conclusion of the hearing, the Tribunal made procedural directions for the parties to file and serve written closing submissions. The owners corporation provided written submissions dated 20 April 2023. No written submissions were filed and served by the respondent.

CONSIDERATION

62 Section 146 of the SSM Act states:

> **146 Notice by owners corporation to owner or occupier**
>
> (1) An owners corporation for a strata scheme may give a notice, in a form approved by the Secretary, to the owner or occupier of a lot in the scheme requiring the owner or occupier to comply with a specified by-law if the owners corporation is satisfied that the owner or occupier has contravened that by-law.
>
> (2) The notice must contain a copy of the specified by-law.
>
> (3) A notice must not be given unless a resolution approving the issue of the notice, or the issue of notices for the type of contravention concerned, has first

been passed by the owners corporation at a general meeting or by the strata committee of the owners corporation.

(4) Subsection (3) does not apply to the giving of a notice by a strata managing agent if that function has been delegated to the strata managing agent in accordance with this Act.

63 Section 147 of the SSM Act states:

147 Civil penalty for breach of by-laws

(1) The Tribunal may, on application by an owners corporation, order a person to pay a monetary penalty of up to 10 penalty units if the Tribunal is satisfied that—

(a) the owners corporation gave a notice under this Division to the person requiring the person to comply with a by-law, and

(b) the person has since contravened the by-law.

(2) The Tribunal may, on application by an owners corporation, order a person to pay a monetary penalty of up to 20 penalty units if the Tribunal is satisfied that the person has contravened a by-law within 12 months after the Tribunal had imposed a monetary penalty on the person for a previous breach of the by-law.

(3) Despite subsections (1) and (2), the Tribunal may, in dealing with a contravention of a by-law made under section 137, impose a monetary penalty of up to 50 penalty units under subsection (1) and a monetary penalty of up to 100 penalty units under subsection (2).

(4) An application for an order under subsection (1) must be made not later than 12 months after the notice was given.

(5) An owners corporation is not required to give notice under this Division before applying for an order under subsection (2).

(6) A monetary penalty is payable to the owners corporation unless the Tribunal otherwise orders.

Note—

The penalty may be registered as a judgment debt and will be enforceable accordingly (see section 78 of the *Civil and Administrative Tribunal Act 2013*).

64 A penalty unit is $110 (s 17 *Crimes (Sentencing Procedure) Act 1999* (NSW)).

65 An owners corporation can bring multiple alleged failures to comply with multiple Notices to Comply with By-laws in a single application to the Tribunal (*The Owners-Strata Plan No 21367 v Letchford* [2021] NSWCATCD 112). It cannot, however, bring separate applications for civil orders due to breach of by-laws under ss 232 and/or 241 of the SSM Act with an application for a penalty under s 147 (or 247A) of the SSM Act in one set of proceedings (*Brown v The Owners-Strata Plan No 82527* [2022] NSWCATAP 328).

66 As discussed previously, rules of evidence (i.e. the provisions of the *Evidence Act 1995* (NSW)) apply to penalty proceedings in the Tribunal. That includes the provisions dealing with admissibility of evidence and the standard of proof. Section 140 of the *Evidence Act 1995* (NSW) states as follows:

> **140 Civil proceedings: standard of proof**
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
>
> (a) the nature of the cause of action or defence, and
>
> (b) the nature of the subject-matter of the proceeding, and
>
> (c) the gravity of the matters alleged.

67 As the proceedings are proceedings where a civil penalty is sought, the principles applicable to making factual findings are those set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 (*Briginshaw*) (see also *ASIC v McDonald (No 11)* [2009] NSWSC 287 at [182]-[186).

68 The *Bringshaw* principles have been the subject of extensive judicial extrapolation. In *State of NSW v Hathaway* [2010] NSWCA 184 the NSW Court of Appeal (Tobias JA, McColl JA and Macfarlan JA) described the principles as follows at [260]-[262]):

> 260 In a civil proceeding, the court must find the case of a party proved if it is satisfied that it has been proved on the balance of probabilities: *Evidence Act* 1995, s 140(1). In applying the civil standard of proof, it is appropriate to take into account the factors listed in s 140(2), one of which is "the gravity of the matters alleged": see also s 142(2)(b). In an often quoted passage, Dixon J stated in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362 the following:
>
> > "[W]hen the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction'

> should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

> 261 In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170; (1992) 110 ALR 449, Mason CJ, Brennan, Deane and Gaudron JJ elaborated on the principle enunciated by Dixon J. They stated in a joint judgment at 170-171 that:

> > "[t]he ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

> 262 This Court has often applied the passages in *Briginshaw* and *Neat Holdings* which we have reproduced. Relevantly to the present case, in *Palmer v Dolman* [2005] NSWCA 361, Ipp JA (Tobias and Basten JJA agreeing) stated at [47] that the more recent authorities and s 140 of the *Evidence Act*:

> > "make it plain that there are no hard and fast rules by which serious allegations might be proved from circumstantial evidence. The inquiry is simply, taking due account of what was said in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, has the allegation been proved on a balance of probabilities."

69 Further, in *Briginshaw*, (which involved a charge of adultery) Dixon J stated at 362 and 368-369:

> In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences"

> …

> "[u]pon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find."

70 In *Briginshaw*, Rich J stated at 350:

> "In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion."

71 There are two distinct issues in penalty proceedings. The first is the issue of liability. The second is, if liability has been established, the appropriate penalty to be imposed.

72 In respect of liability involving alleged breach of s 147 of the SSM Act, the Tribunal must consider:

(1) Do the Notice to Comply with By-laws comply with s 146 of the SSM Act? That involves consideration of whether the Notice to Comply with By-laws was properly authorised; contains the required documents under s 146; and was properly served;

(2) Has the owners corporation properly commenced proceedings under s 147 of the SSM Act? That will involve consideration of whether the proceedings were properly brought, and have been brought within 12 months of the date the Notice to Comply with By-laws was given; and

(3) Has the owners corporation proved, on the balance of probabilities (to the *Briginshaw* standard), that the recipient of the Notice to Comply with By-laws has contravened the By-law the subject of the Notice since the service of the Notice?

73 Although the application filed in the Tribunal by the owners corporation refers to a failure to comply with By-law 10, no evidence was provided that the owners corporation had served a Notice to Comply with By-law in respect of By-law 10 on the respondent; nor is By-law 10 referred to in the Scott Schedules of the owners corporation; nor its written closing submissions.

74 Strangely, the affidavit of Mr Napoli contained as an annexure a Notice of Breach of By-law dated 28 October 2022 in respect of By-law 10 directed to the respondent. The letter of Bannermans Lawyers dated 31 October 2022 refers to service of “attached” Notices to Comply with By-law in respect of By-laws 5, 7 and 10. However, para [3] of Mr Napoli’s affidavit only refers to Notices to Comply with By-laws in respect of By-laws 5 and 7 being served. As discussed previously, the Scott Schedules filed and served by the respondent make no reference to failure to comply with By-law 10; nor is breach of By-law 10 referred to in the closing submissions of the owners corporation. Further, there is no reference to withdrawal of penalty orders sought in respect of ongoing breach of By-law 10, despite it being referred to in the application filed in the Tribunal.

75 It is unnecessary to make any further comment about By-law 10. If it does form part of the application, in the absence of evidence regarding service of the Notice to Comply with By-law 10 dated 28 October 2022 and the absence of any submission pointing to evidence of breach of that By-law by the respondent subsequent in the relevant period after service of the Notice to Comply with By-law 10, that part of the application is dismissed.

76 The applicable Notices to Comply with By-law are in respect of By-law 5 and By-law 7.

77 As discussed previously, there were Notices to Comply with By-laws purportedly served on the respondent. The first were the Notices dated 12 January 2022 served by Mr O'Neill. The second were the Notices dated 28 October 2022 served by Bannermans Lawyers.

78 Pursuant to orders of the Tribunal appointing Mr O'Neill as compulsory strata manager and the provisions of s 237 of the SSM Act, Mr O'Neill had authority to issue Notices to Comply with By-laws on any occupant and/or Lot owner in the strata scheme.

Service of the Notices Dated 12 January 2022 In Respect of By-laws 5 and 7

79 Section 263 of the SSM Act relevantly states:

> **263 Service of documents by owners corporation and others**
>
> (1) Application of section This section applies to a notice or other document required or authorised under this Act or the by-laws to be given by the Secretary, the Tribunal, an owners corporation, the lessor of a leasehold strata scheme, the original owner, a strata committee, the secretary of an owners corporation or a strata managing agent and is subject to the other provisions of this Act.
>
> (2) Service on occupier of lot A notice or other document may be given to the occupier of a lot—
>
> (a) by post at the address of the lot, or
>
> (b) by leaving it at the address of the lot with a person apparently of or above the age of 16 years, or
>
> (c) by sending it by electronic transmission to an address nominated by the occupier of the lot as an address for the service of documents.
>
> (3) Service where address is included in strata roll If an address for the service of notices on a person is recorded in the strata roll or has been notified in a tenancy notice, a document may be given to the person—
>
> (a) in the case of a postal address, by post at that address, or

(b) by leaving it at that address with a person apparently of or above the age of 16 years, or

(c) in the case of an email address, by email to an email address specified for the service of documents.

(4) Service on owner of lot A document may be given to the owner of a lot in accordance with subsection (3) or if no address for service is recorded on the strata roll—

(a) personally, or

(b) by post at the address of the lot, or

(c) by leaving it on a part of the lot that is the owner's place of residence or business (otherwise than on a part of the lot provided for the accommodation of a vehicle or as a storeroom), or

(ca) by sending it by electronic transmission to an address nominated by the owner of the lot as an address for the service of documents, or

(d) by leaving it in a place provided on the parcel for receiving mail posted to the lot, or

(e) in any other manner authorised by the by-laws for the service of notices on owners.

…

80 Section 181 of the *Evidence Act 1995* (NSW) states as follows:

181 Proof of service of statutory notifications, notices, orders and directions

(1) The service, giving or sending under an Australian law of a written notification, notice, order or direction may be proved by affidavit of the person who served, gave or sent it.

(2) A person who, for the purposes of a proceeding, makes an affidavit referred to in this section is not, because of making the affidavit, excused from attending for cross-examination if required to do so by a party to the proceeding.

81 Mr O'Neill provides sworn evidence in his affidavit that he served the Notices to Comply with By-laws dated 12 January 2022 by placing those Notices in the respondent's letterbox. The affidavit of service attached to the Notices to Comply dated 12 January 2022 also state the Notices were served by placing them in the letterbox of the respondent.

82 That manner of service is only consistent with the provisions of either s 263 (4) (c) of the SSM Act (if the letterbox was on Lot property); or s 263 (4) (d) of the SSM Act (if the letterbox was on common property).

83 Importantly, the affidavit of Mr O'Neill does not contain a copy of the strata roll or relevant extract of the strata roll showing an address for service of the

respondent. His affidavit contains a title search of the Lots owner by the applicant and companies of which she is a director, but there is no extract of the strata roll.

84 As discussed previously, a copy of the strata roll was attached to the application filed by the Tribunal.

85 However, that document was not tendered as evidence at the hearing, nor did it form part of the evidence as it was not an annexure to the affidavit of Mr O'Neill or Mr Napoli. Merely attaching a document to the application does not cause it to become evidence in the proceedings. For a document to form part of the evidence, it must be admitted into evidence. The procedural directions of Harrowell DP dated 13 January 2023 clearly put the parties on notice that rules of evidence apply, and that the owners corporation must establish by admissible evidence that Notices to Comply with By-laws satisfy the requirements of the Act, including proving the manner of service (see directions 10 and 11).

86 There is no provision of the SSM Act that allows the Tribunal to overlook or waive the requirements of proof of service in penalty proceedings under s 147 of the SSM Act. Section 264 (2) of the SSM Act refers to nothing in the manner of service set out in s 264 affecting "the operation of any provision of a law or rules of a court authorising a document to be given to a person in any other manner". However, s 264(1) of the SSM Act states that s 264 only applies to service "other than as required by sections 262 or 263). Consequently, that provision does not assist the owners corporation.

87 As the owners corporation has not provided evidence that the Notices to Comply with By-laws dated 12 January 2022 were served in a manner compliant with s 263 of the SSM Act, the owners corporation cannot rely upon breach of those Notices. It is irrelevant that the respondent contemporaneously acknowledged in writing that she had received the Notices (when informing the compulsory strata manager she did not acknowledge his authority to issue the said Notices) or that she did not dispute in her evidence that she had received the Notices.

88 The SSM Act sets out how Notices are to be served. As these proceedings involve the imposition of a penalty, it is the onus is upon the owners corporation to provide to the *Briginshaw* standard that it has served the Notice to Comply with By-laws that it relies upon in a manner consistent with the method of service contained in the SSM Act, and not by any other method.

89 Accordingly, the Notices to Comply with By-laws dated 12 January 2022 are disregarded by the Tribunal. It follows that any purported breach of those Notices by the respondent (i.e. any conduct of the respondent prior to the service of the Notices dated 28 October 2022) cannot be taken into account in respect of liability to pay a penalty under s 147 of the SSM Act.

Service of Notices Dated 28 October 2022 in Respect of By-laws 5 and 7

90 The affidavit of Mr Napoli contains sworn evidence that the Notices were sent by post to the respondent on 31 October 2022. That is a manner of service compliant with s 263 (2) (a) of the SSM Act in circumstances where the respondent resides in the strata scheme.

The Content of the Notices Dated 28 October 2022 in Respect of By-laws 5 and 7

91 The Notices are compliant with the content obligations under s 146 of the SSM Act. They identify the By-law said to be breached; contain information to specify the manner the By-law is said to have been breached and what measures the respondent is to take to comply with the By-law. The Notices contain a copy of the By-law said to have been breached.

92 As discussed previously, the compulsory strata manager has the power to issue the Notices by reason of exercising the powers of the owners corporation.

Date When the Notices Dated 28 October 2022 in Respect of By-laws 5 and 7 Are Served

93 The Notices were posted on 31 October 2022.

94 By reason of s 76 (1) (b) of the *Interpretation Act 1987* (NSW) the Notices were deemed served on the seventh working day after the date they were posted. That date is 3 November 2022.

Breach of By-Law 5 After 3 November 2022

95 As discussed previously, By-law 5 states:

> An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the owners corporation…

96 In its written submissions and Scott Schedules the owners corporation relies upon the following alleged incidents in respect of By-law 5:

(1) 19 January 2022 when the respondent allegedly sent her own Notices to Comply with By-laws to occupants and Lot owners.

(2) 13 September 2022 when the respondent allegedly "defaced" a common property gate by writing "Shut the Gate" on the gate without consent of the owners corporation.

(3) On 2 December 2022 when the respondent removed bolts and chains from the wall next to the basement carpark. The evidence relating to that issue was discussed previously in respect of the CCTV footage tendered as evidence.

(4) On 13 February 2023, the respondent "defaced" common property walls by writing on the walls "No trespassing private property".

The Incidents on 19 January 2022 and 13 September 2022

97 As discussed previously, as the owners corporation has provided evidence that the Notice to Comply With By-laws dated 12 January 2022 were served in accordance with the SSM Act.

98 The owners corporation submitted that at the hearing the respondent made admissions regarding her conduct on 19 January 2022 and 13 September 2022.

99 It is unnecessary to discuss whether the owners corporation put to the respondent with specific detail the time, date and place of her alleged conduct during questioning in respect of the two incidents specified and whether the respondent made clear admissions that satisfy the Tribunal to the *Bringinshaw* standard.

100 The provisions of s 147 of the SSM involve the imposition of a penalty when a properly served Notice to Comply With By-laws has not been adhered to. It does not involve the imposition of a penalty because a Lot owner or occupant has not been complying with By-laws.

101 Accordingly, no penalty can be imposed in respect of the alleged conduct on 19 January 2022 and 13 September 2022.

102 However, it is appropriate to observe that it is difficult to understand how the respondent preparing her own purported Notices to Comply with By-laws and sending them to Lot owners or occupants involves damaging or defacing common property.

103 Further, the purported admissions at the hearing were not sufficiently specific to allow the Tribunal to make findings that the respondent had breached the Notices placed in her letterbox in January 2022. The owners corporation also failed to provide any evidence from persons who are said to have received the Notices to Comply with By-laws that the respondent was alleged to have sent.

104 No submission was made by the owners corporation that the purported incidents on 19 January 2022 and 13 September 2022 could be relied upon as tendency evidence under s 97 of the *Evidence Act 1995* (NSW) in respect of breaches after 3 November 2022; nor that a notice compliant with s 97 (1) (a) of the *Evidence Act 1995* (NSW) had been given. It is unnecessary to further explore whether the incidents could be relied upon as tendency evidence.

The Incident on 2 December 2022

105 This is the incident in the entry area to the basement carpark involving the removal of bolts/chain from a wall and the movement of bins.

106 The video is time and date stamped. The date identified is 1 December 2022. The duration of the video is approximately 11 minutes. However, the activities involving the respondent take approximately 7 minutes of the video (being the first 7 minutes depicted). The video commences at the time stamp 15:53:49.

107 The video shows the entrance to the basement car park. 4 bins are located in an area next to a wall immediately outside the security gate to the car park. There is a sign on the security gate that the area is under video camera surveillance. A blue Toyota Corolla hatchback pulls up to the security gate.

108 A person gets out of the vehicle. The identity of the person can be clearly seen. The Tribunal is satisfied that the person getting out the vehicle is the respondent, having viewed the respondent at the hearing and in the video. The

respondent did not dispute at the hearing that she was the person who had exited the vehicle.

109 The video depicts the respondent moving to the rear of the vehicle, opening the rear hatch, and taking out a claw hammer. The respondent then walks to the bins; appears to remove a bolt or other device which chains the bins to the wall; and moves each of the bins a short distance away from the wall.

110 The respondent is partially obscured when she is standing at the wall by the position of the car and the bins; but it is abundantly clear from the video that she moves the bins away from the position they were located and has only been able to achieve that outcome by removing the apparatus securing the bins to the wall.

111 The respondent moves back to the wall where a chain hanging to the ground and bolt can be seen. The respondent then uses the hammer device to remove the remaining bolt located in the wall. The respondent picks up

112 The respondent then returns the vehicle. She closes the rear hatch. She then opens the rear passenger driver's side door and puts the hammer and chain into the rear seat area of the vehicle. The respondent then opens the security gate and drives into the car park.

113 At the hearing, the respondent was asked in cross examination after the video was played whether she admitted to "cutting the chain" holding the bins. There was not detailed cross examination on the surveillance video. Her response to that question was "Yeah, we don't have our bins chained up, that's ridiculous."

114 The answer by the respondent was ambiguous, and the Tribunal is not satisfied that an admission was made. No further questions were asked to clarify or further explore what the respondent had done.

115 However, irrespective of whether or not the respondent clearly admitted "cutting the chain," the Tribunal is satisfied from the video evidence that the person depicted in the video is the respondent, and that the respondent damaged the common property structure of the wall by removing the chain bolted to the wall without the written consent of the owners corporation.

116 The Tribunal is satisfied to the *Briginshaw* standard that the respondent breached the Notice to Comply with By-law 5 dated 28 October 2022 by her conduct on 2 December 2022.

The Incident on 13 February 2023

117 This purported breach involves the email sent by Ms Chrisostomou to Mr O'Neill and others dated 12 February 2023. Three photograph are attached to that email, showing the words "No trespassing, private property" and written on a sign next to a gate and two common property walls.

118 The relevant paragraph of Mr O'Neill's affidavit is paragraph [23] where Mr O'Neill simply deposes to having received the email and photographs; and pp 106-110 of Mr O'Neill's affidavit where a copy of the email and the 3 photographs are set out.

119 The content of the email sent to Mr O'Neill by Ms Chrisostomou is that she arrived home "yesterday" to find the respondent had "vandalised the walls again" and requested the compulsory strata manager (a) access security video to show the respondent vandalising walls; and (b) arrange for the writing to be removed.

120 Although the evidence contained in the email (and the photographs) were admitted into evidence, there are significant flaws in the weight to be attributed to that evidence for the following reasons.

(1) Mr O'Neill does not set out in his affidavit who Ms Chrisostomou is, by stating that she is a Lot owner or occupant of the strata scheme.

(2) There is no evidence from Ms Chrisostomou by way of a statutory declaration or affidavit giving direct evidence of what she saw or heard.

(3) The email does not clearly state that Ms Chrisostomou saw the respondent write on common property. It ambiguously states that she had arrived home "yesterday" to "find Del had vandalised the walls again." That may simply be an expression of an opinion or an assumption that it was the respondent.

(4) The particulars of the breach identified in the respondents Scott Schedules and written submissions refer to the incident having occurred on 13 February 2023. However, 13 February 2023 is not the correct date. The email is dated 12 February 2023 and refers to Ms Chrisostomou arriving home "yesterday" to find the walls had been written upon.

121 The owners corporation submits that the respondent admitted writing on common property walls on or about 13 February 2023.

122 The respondent did make such admissions. In cross examination the respondent was shown each of the photographs taken at pp 108-110 of the affidavit of Mr O'Neill. She clearly stated that she had been the author of the writing. In respect of the two photographs showing writing at pp 109-110 the respondent stated that there had previously been "signs from Bunnings" which had been removed; and that was the reason the respondent had performed the writing.

123 As the respondent admitted the conduct and the Tribunal infers from the contemporaneous email evidence that the conduct occurred on or about 11 February 2023, the Tribunal is satisfied that the owners corporation has proved the respondent had failed to comply with the Notice to Comply with By-law 5 dated 28 October 2022 in respect of writing on common property walls. The Tribunal is satisfied that this conduct falls within the definition of "defacing" common property in the said By-law.

124 Had the respondent not made the admission, it is unlikely the evidence provided by the owners corporation would have been sufficient to satisfy the Tribunal to the *Bringinshaw* standard in respect of writing on walls in February 2023. However, the respondent chose to give evidence and expose herself to cross examination. The Tribunal clearly explained to hear at the hearing before she gave evidence that she was under no obligation to do so and it was up to the owners corporation to prove its case to the requisite standard of proof.

Breach of By-law 7 After 3 November 2022

125 As discussed previously, By-law 7 states:

> An owner or occupier of a lot when on common property must be adequately clothed and must not use language or behave in a manner likely to cause offence or embarrassment to the owner or occupier of another lot or to any person lawfully using the common property.

126 Two of the alleged breaches set out in the Scott Schedule were not pressed by the owners corporation and do not require comment.

127 Two alleged breaches were pressed.

128 The first was the video of the respondent taken at the swimming pool area.

Incident on 27 November 2022-The Swimming Pool

129 The affidavit of Mr O'Neill at para [28] states that he viewed the video on 28 November 2022 and that it was taken on 27 November 2022.

130 As discussed previously, the person who took the video did not give evidence; nor does the affidavit of Mr O'Neill explain how he knew the video was taken on 27 November 2022. There is no evidence from the person sitting at the swimming pool.

131 The date of the video, and the person who took the video, can be inferred from the email of Ms Winstone dated 28 November 2022 that is contained at p 112 of Mr O'Neill's affidavit. That email refers to Ms Winstone having witnessed the respondent engaging in conduct near the pool directed towards a tenant.

132 The video is very brief. The video shows the respondent pushing deckchairs including one with a towel on it. The video footage does not contain very clear audio. However, words are spoken between the respondent and the person sitting next do the pool. Among the words spoken by the respondent is the phrase "stupid people." The person sitting next to the pool states in response "that's my towel…you're such a nuisance, piss off."

133 The respondent did not admit what words were spoken by her when questioned in cross examination.

134 The Tribunal is satisfied that the person who moves the deckchairs and speaks to the woman sitting by the pool is the respondent.

135 The Tribunal is not satisfied to the *Bringinshaw* standard that the words and actions of the respondent depicted in the video are "likely to cause offence or embarrassment" to the person sitting by the pool. As discussed previously, there is no evidence from that person that she was offended or embarrassed. At their highest, the actions and words are annoying. They do not rise to the level of "likely to cause offence or embarrassment." Notably, the person sitting by the swimming pool does not state she is offended, but refers to the respondent as "such a nuisance."

136 The Tribunal is not satisfied the owners corporation has established breach of By-law 7 in respect of the swimming pool incident.

Incident on 7 December 2022

137 The video is brief. It appears to be taken from the ground floor in front of a Lot in an area near the swimming pool (what appears to be a pool fence can be seen in the video).

138 A person is leaning out of an upstairs window of a Lot opposite to where the video is being taken. The Tribunal is satisfied the person depicted is the respondent. Although she is partially obscured, the respondent is leaning out of the window. She shouts at the person on the ground floor calling her a “stupid little woman” and that “you are too loud.” When the person on the ground floor responds to being called a “stupid little woman” the respondent replies “you most definitely are!” The person on the ground floor states, “please leave me alone.” The respondent then replies, “then go away.” The person on the ground floor states, “I’m taking to my neighbour.” The respondent then states, “you are too loud.” The person on the ground floor states, “I’m talking to my neighbour.” The respondent replies “you are too loud, you are too loud.”

139 In cross examination, the only question asked about the incident on 7 December 2022 where the respondent was leaning out of her window shouting was that respondent used the words “stupid little woman”. The respondent stated that the video showed such words were spoken, but that she did not recall having used those words. The respondent did not assert that she was not the person depicted in the video or had not spoken the words that were recorded in the video.

140 The Tribunal has taken into account that the owners corporation failed to adduce evidence by way of a statutory declaration or affidavit from the person who took the video and to whom the respondent was shouting. It has also taken into account the brief cross examination of the respondent on what occurred.

141 However, the Tribunal is satisfied that the video and sound recording, although brief, is strong evidence in support of the owners corporation. The Tribunal is satisfied that the respondent is the person leaning out of the window and

shouting at the person who is taking the video. The language used and volume of the language is more abrasive, insulting, and severe than the language used in the incident near the swimming pool.

142 The Tribunal is satisfied that the language and behaviour of the respondent, which occurred on or about 7 December 2022 was likely to cause offence to the person who took the video, and an inference can be drawn that person was a lawful occupant of the strata scheme.

143 The Tribunal is satisfied that the owners corporation has proved breach of the Notice to Comply with By-law 7 dated 28 October 2022 in respect of the incident on 7 December 2022.

Conclusion-Breach

144 The Tribunal is satisfied that the owners corporation has proved 3 breaches of the Notices to Comply with By-laws dated 28 October 2022.

Appropriate Penalty

145 The procedural directions of the Tribunal dated 13 January 2023 make clear that the Tribunal may consider the penalty to be imposed without a separate hearing and that the evidence and submissions of the parties should address the issue of penalty together with the issue of breach.

146 The owners corporation's written closing submissions address the issue of penalty. As discussed previously, the respondent did not provide closing written submissions despite being given the opportunity to do so.

147 The Tribunal is satisfied that it is appropriate to deal with the issue of penalty without a further hearing on that issue.

148 The principles applicable to assessment of a civil penalty are set out in *The Owners-Strata Plan No 61285 v Taylor (No 2)* [2022] NSWCATCD 118 (*Taylor No 2*). That decision involves imposition of a penalty under s 247A of the SSM Act. However, the same principles apply to s 147 of the SSM Act.

149 The matters to be considered are:

(1) The nature and extent of the contravention.

(2) The circumstances in which the contravention took place.

(3) The effect of the contravention on the operation, administration or management of the strata scheme in question.

(4) The maximum penalty that may be imposed.

(5) The need for deterrence, both specific and general.

(6) The individual or personal circumstances of the contravenor.

(7) Any other relevant mitigating circumstances.

(8) The number of contraventions involved.

150 Further, when giving weight to the above matters, the Tribunal must take into account the importance of specific and general deterrence (*Taylor No 2* at [50]-[52]).

151 The contravention of the Notice to Comply with By-laws is a single contravention in respect of each of the Notices (i.e. there is a contravention of the Notice to Comply with By-law 5; and a contravention of the Notice to Comply with By-law 7). There are not multiple contraventions of each of the Notices with separate penalties being imposed. A single penalty is imposed in respect of the Breach of Notice to Comply with By-law 5; and separately in respect of Breach of Notice to Comply with By-law 7. The number of breaches after the Notices were served is a matter to be taken into account when assessing the magnitude of the penalty imposed, rather than each breach giving rise to a separate and distinct penalty. Further, when assessing the amount of penalty when there are multiple contraventions, the principle of totality when imposing a penalty involving a course of conduct requires that a person must not be punished twice for the same conduct (*The Owners-Strata Plan No 4393 v Roberts* [2023] NSWCATCD 57 at [138]-[157] (*Roberts*)).

152 The Tribunal also, when imposing a penalty, has the power to make the penalty conditional upon future conduct or make appropriate ancillary orders (*Roberts* at [158]-[159]).

Breach of Notice to Comply With By-law 5

153 The owners corporation has established two breaches of the Notice to Comply With By-law 5 dated 28 October 2022.

154 The Tribunal is satisfied that the contraventions are serious and deliberate. The actions of the respondent to remove the chain and move the bins involves a

conscious and deliberate course of conduct, as does the writing on common property walls.

155 The Tribunal is satisfied that the conduct is motivated by the respondent's opinion that the compulsory strata manager has no authority and it is the respondent who is the person who can impose her views about how the strata scheme is managed on other Lot owners and occupants. That subjective opinion is entirely misguided.

156 The contraventions have a significant effect on the operation, administration or management of the strata scheme, because they are defiant of the authority of the compulsory strata manager to manage the strata scheme. They are also likely to incur cost to the owners corporation, because the damaged and defaced areas require repair. This affects all Lot owners.

157 There are no mitigating factors put forward by the respondent. It was clear from the manner in which the respondent presented at the hearing that she is not apologetic about her conduct in breach of the Notice to Comply with By-law 5. Rather, the respondent is defiant and believes her conduct is entirely justified. Considering this lack of insight, it is unlikely the conduct of the respondent will change in the future regarding compliance with By-laws.

158 In all the circumstances, the Tribunal is satisfied that a penalty of 8 penalty units ($880) is appropriate.

Breach of Notice to Comply With By-law 7

159 The owners corporation has established one breach of the Notice to Comply With By-law 7 dated 28 October 2022.

160 The circumstances of the contravention are, in essence, that the respondent leaned out of her window and shouted offensive words at a person who was an occupant of the strata scheme.

161 The conduct was brief in nature. The conduct has a limited effect on the operation, administration or management of the strata scheme as it was directed at an individual, although this is in the context of the attitude of the respondent that she is able to impose her subjective belief that she can impose

a standard of conduct on other occupants of the strata scheme, and that the compulsory strata manager has no authority to do so.

162 The contravention has moderate severity in circumstances where the respondent has taken it upon herself to shout loudly from her window, which is conduct, assessed objectively, likely to disturb persons who could hear the respondent at the time of her actions.

163 The Tribunal has also take into account the issue of deterrence; and the absence of evidence from the person who the respondent spoke to as to what effect the conduct had upon them.

164 In all the circumstances the Tribunal is satisfied that a penalty of 4 penalty units ($440) is appropriate.

Who Should the Penalty Be Paid To?

165 Under s 147 (6) of the SSM Act, a monetary penalty is payable to the owners corporation unless the Tribunal otherwise orders. There is no reason to make an order that the penalty not be paid to the owners corporation.

The Issue of Costs of the Proceedings

166 The owners corporation submits that the Tribunal should order the respondent pay its legal costs "as a means to compensate" the owners corporation and relies upon the authority of *ZDB v The University of Newcastle (No 2)* [2017] NSWCATAP 135 (*ZDB*).

167 ZDB did not involve a costs application pertaining to penalty proceedings (either under ss 147 or 247A of the SSM Act). The decisions in *Westbury v The Owners-Strata Plan No 64061* [2021] NSWCATEN 3 at [207]-[220] (in the context of contempt proceedings under s 77 of the NCAT Act) and *Taylor No 2* (in the context of penalty proceedings under s 247A of the SSM Act) make clear that the provisions of s 60 of the NCAT apply.

168 The submissions of the owners corporation do not explain why there are "special circumstances" to justify an order for costs.

169 It is appropriate to adopt the same approach as was adopted in Taylor No 2 and give the parties an opportunity to be heard on the issue of costs. The

orders of the Tribunal include procedural directions to deal with the disposition of a costs application.

ORDERS

(1) The respondent, Delmont Purcell, is to pay the applicant, The Owners-Strata Plan No 84716, the amount of $1,320 by 14 days from the date of this decision.

(2) Any costs application by the applicant is to be determined in the following manner:

(a) Applicant to file with the Tribunal and serve on the respondent, by person or by post, costs submissions and documents by 14 days from the date of this decision.

(b) Respondent to file with the Tribunal and serve on the applicant, by person or by post, costs submissions and documents by 28 days from the date of this decision.

(c) Applicant to file with the Tribunal and serve on the respondent, by person or by post, costs submissions in reply by 35 days from the date of this decision.

(d) The costs submissions of the parties are to identify whether or not they consent to the issue of costs being determined without a further oral hearing and if not why an oral hearing on the issue of costs is necessary.

(e) Subject to consideration of the costs submissions of the parties the Tribunal may determine the issue of costs on the papers and without a further oral hearing in accordance with s 50 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

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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