

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

#### OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC995/2022

#### CATCHWORDS

Appointment of administrator, qualifications of administrator, *McKinnon v Adams* [2003] VSC 116, independence of administrator, terms of appointment, s 173 to 177 of the *Owners Corporations Act 2006* (Vic).

<b>FIRST APPLICANT</b>	Katrinka Szuhan
<b>SECOND APPLICANT</b>	Linh Tran
<b>THIRD APPLICANT</b>	James Chalmers
<b>FOURTH APPLICANT</b>	Leonie Jones
<b>FIFTH APPLICANT</b>	Devita Pathi
<b>SIXTH APPLICANT</b>	Sophie van der Linden
<b>RESPONDENT</b>	Owners Corporation 13206
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member C Price
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8 June 2023
<b>DATE OF SUBMISSIONS</b>	17 July 2023
<b>DATE OF ORDER</b>	25 August 2023
<b>CITATION</b>	<i>Szuhan v Owners Corporation 13206 (Owners Corporations)</i> [2023] VCAT 998

#### ORDER

1. Pursuant to s 174 of the *Owners Corporations Act 2006* (Vic) Alice Fay Ruhe, Registered Liquidator and Registered Trustee in Bankruptcy is appointed administrator of Owners Corporation 13206 until 1 September 2024.
2. Subject to this order, during the period of the administration, the administrator may do anything which Owners Corporations 13206 can do.
3. The remuneration and expenses of the administrator shall be calculated in accordance with the written proposal contained in the Affidavit of Alice Fay Ruhe and its exhibits dated 1 June 2023.

4. All proper costs and charges incurred by the administrator, including the administrator's fees, and the employment of suitably qualified experts be costs in the administration and payable by all lot owners in accordance with lot liability, unless otherwise determined by the administrator or ordered by the Tribunal.
5. The administrator must:
  - (a) Implement the 1 December 2021 owners corporation resolution regarding auditing to the international standard;
  - (b) Investigate and/or address the causes of damp and remediate any damage caused by damp site wide and its root causes including ventilation, the roof membrane, stormwater system and paint system having regard to the recommendations of Heritage Victoria for investigating including in accordance with Australian Standard AS4349.0-2007; and
  - (c) Commission, approve and commence implementation of a maintenance plan and maintenance fund.
6. The administrator must record in writing each decision she makes in the course of the administration in a record to be kept by her as part of the account of her administration.
7. Each party has liberty to apply for further orders or directions, including any order extending the term of the administration, by giving notice in writing to the principal registrar.

C Price  
**Senior Member**

**APPEARANCES:**

For Applicants

Ms Acreman (Counsel)

For Respondent

Mr A Block (solicitor)

## REASONS

- 1 On 16 March 2023, findings and orders were made by Member Sharkie which prioritised the application for the appointment of an administrator and listed that issue for hearing on 8 June 2023. The hearing proceeded on 8 June 2023, and I reserved my decision with reasons to be provided. That decision and those reasons are now provided in accordance with my orders of 8 June 2023.
- 2 During the course of the hearing, the applicants' representative asked me to consider the termination of the existing manager, Simon Saint John, of Melb OC. I confirmed that the only matter to be heard and determined at this hearing, was the application for the appointment of an administrator to the owners corporation. Accordingly, the orders and reasons that are provided relate solely to that issue. It is hoped that the orders and reasons which follow may resolve, or narrow some of the other issues which are the subject of this proceeding.
- 3 Although the decision is confirmed to the appointment of an administrator, it is helpful to briefly detail the nature of the dispute in more general terms to provide context around that decision.
- 4 This proceeding is brought by the applicants due to their concerns about the owners corporation's ('the OC') failure to repair and maintain common property, including water ingress, damp and mould to private lots, and their concerns around the financial position, governance and management of the OC and its failure to comply with the *Owners Corporations Act 2006* (Vic) ('*OC Act*').
- 5 The applicants seek the appointment of an independent administrator for a period of 12 to 18 months, and in this regard have nominated Alice Ruhe ('Ms Ruhe'), a registered liquidator, and registered trustee in bankruptcy as a suitable person to undertake the role. The applicants have standing to bring such an application pursuant to s 173 of the *OC Act* as they are lot owners.
- 6 The respondent OC does not oppose the appointment of an administrator, and agrees that the OC is 'dysfunctional and is unable to function at a satisfactory level and/or in accordance with its statutory obligations'.<sup>1</sup>
- 7 It is the OC's position that the existing manager Simon Saint John ('Mr Saint John') of Melb OC be appointed as administrator. Its alternative position is that if the Tribunal intends to appoint a liquidator as the administrator, then it appoint Matthew Gollant ('Mr Gollant') of CJG Advisory as administrator.<sup>2</sup>
- 8 Part 11, Division 4 of the *OC Act*, contains the provisions relevant to the appointment of an administrator.

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<sup>1</sup> Respondent's outline of submissions dated 5 May 2023 at para 13(c).

<sup>2</sup> Respondent's outline of submissions dated 5 May 2023 at para 23.

### OWNERS CORPORATIONS ACT 2006 - SECT 173

#### Application for appointment of administrator

An owners corporation, a lot owner, a creditor of an owners corporation or any person with an interest in land affected by an owners corporation may apply to VCAT for the appointment of an administrator for the owners corporation.

### OWNERS CORPORATIONS ACT 2006 - SECT 174

#### Appointment of administrator

On an application under section 173, VCAT may—

- (a) appoint an administrator and set down terms and conditions of the appointment; or
- (b) make any other order it thinks fit.

### OWNERS CORPORATIONS ACT 2006 - SECT 175

#### Remuneration of administrator

The lot owners must pay the remuneration and expenses of the administrator in accordance with their lot liabilities or, if the order otherwise provides, in accordance with the order.

### OWNERS CORPORATIONS ACT 2006 - SECT 176

#### Powers and responsibilities of administrator

An administrator—

- (a) must lodge with the Registrar a copy of the order of appointment without delay;
- (b) may proceed to alter a plan relating to land affected by the owners corporation in any of the ways set out in section 32 of the Subdivision Act 1988 only in accordance with an order of VCAT or a court order;
- (b) subject to any order of VCAT or court order, may do anything that the owners corporation or the committee can do;
- (c) may delegate in writing any power.

### OWNERS CORPORATIONS ACT 2006 - SECT 177

#### Administrator to act in good faith

An administrator in carrying out any functions and powers conferred by or under this Act or the Subdivision Act 1988 —

- (a) must act honestly and in good faith; and
- (b) must exercise due care and diligence.

- 9 Both parties referred the Tribunal to relevant authorities including *McKinnon v Adams* [2003] VSC 166 (*McKinnon*). In that proceeding, Bongiorno J

had to consider earlier legislation<sup>3</sup> in deciding whether to appoint an administrator.

10 His Honour relevantly states that:

To justify the appointment of an administrator the body corporate concerned must be affected by some incapacity, or must be acting so dysfunctionally as to render the provision of appropriate services to unit holders and/or care of the common property either non-existent, or so beset by difficulties as to render the body corporate unable to function at what the Court considers to be a satisfactory level. There may or may not be financial difficulties or even financial impropriety affecting the body corporate's capacity to function but there must be some deficiency in its operational capacity sufficient to justify the Court's intervention in the interest of some or all of the unit holders.

Thus, the power to appoint an administrator pursuant to s 38 (6) of the *Subdivision Act 1988* may be ordered, in the Court's discretion, where the evidence discloses that the body corporate is failing to operate properly in the interests of its members, is being inefficiently or incompetently managed, or the appointment is necessary to protect the interests of the members.<sup>4</sup>

11 As in the case of *McKinnon* the application for the appointment of an administrator is not opposed by the respondent, so it is not necessary for me to review in detail the factual evidence before the Tribunal. It is sufficient that I make reference to those parts of the factual evidence which demonstrate that the owners corporation is operating so dysfunctionally, or is so beset by difficulties impacting its capacity to function, that warrants the intervention of the Tribunal and the appointment of an administrator, in the interests of some or all of the lot owners.

12 Both the applicants and the respondent contend that the appointment of an administrator is necessary and warranted but for different reasons.

13 The applicants rely on evidence in support of their contention that the common property is not being maintained by the OC such that 'the condition of Brookwood Flats is in decline and safety and health is being compromised'.<sup>5</sup>

14 The applicants submit that there are significant ongoing issues including dilapidated pool surrounds, an uneven tennis court surface, ongoing plumbing issues including the leaking of pipes and water ingress, electrical safety hazards, rodent infestation and a hostile committee which is not making decisions in good faith.

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<sup>3</sup> Section 38 of the *Subdivision Act 1988* (Vic).

<sup>4</sup> *McKinnon v Adams* [2003] VSC 116 at paras 20 and 21.

<sup>5</sup> Appointment of Administrator Points of Claim at 3.2.

- 15 The respondent disputes the assertions made by the applicants but agrees that the OC is 'dysfunctional and is unable to function at a satisfactory level and/or in accordance with its statutory obligations'.<sup>6</sup> The respondent contends that the main source of dysfunction is an obstructionist approach taken by applicant Katrinka Szuhan in her dealings with the OC committee and previous managers.<sup>7</sup>
- 16 Notwithstanding the divergent views of the parties as to the cause of the owners corporation's dysfunction, I am satisfied that the owners corporation is both operating dysfunctionally, and failing to operate in the interests of its members, such that it warrants the intervention of the Tribunal and the appointment of an administrator pursuant to s. 174 of the *OC Act*.
- 17 The applicants seek the appointment of Ms Ruhe as the administrator. Ms Ruhe's affidavit sworn 1 June 2023 exhibits her proposal to act as the administrator for the respondent.<sup>8</sup>
- 18 Ms Ruhe is a registered liquidator and registered trustee in Bankruptcy, and has practiced over 20 years in corporate recovery and insolvency with experience in the building, and other industries. Ms Ruhe's fees would be charged on an hourly rate as outlined in annexure B, in which work is charged at different rates according to the level of expertise and experience of team members. A partner rate is \$450.00 (excluding GST) per hour.
- 19 Based on Ms Ruhe's understanding of the role of administrator she estimates the cost of a 12-month appointment to be \$100,000.00, plus GST, plus out of pocket expenses.
- 20 Ms Ruhe's proposed approach to the appointment of administrator includes engaging (or retaining) a qualified owners corporation manager, ensuring tax returns are prepared by an accountant and that past and current accounts are audited. She indicates she would have a maintenance plan developed and implemented, oversee works, engage legal advice where necessary and undertake any other tasks necessary to protect lot owners. She further states that she would operate as an independent administrator, and without any identified conflict of interest.
- 21 It is the OC's primary submission that the Mr Saint John be appointed as administrator for a period of 12 months. The OC submits that since Mr Saint John's appointment as owners corporation manager on 27 March 2023, he has successfully made progress in a range of areas that have plagued the owners corporation and has effectively 'steadied the ship'. Further that Mr Saint John is independent and has achieved significant success in a short

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<sup>6</sup> Respondent's outline of submissions dated 5 May 2023 at para 13(c).

<sup>7</sup> Respondent's outline of submissions dated 5 May 2023 at para 14.

<sup>8</sup> Ruhe affidavit sworn 1 June 2023, exhibit AFR-1.

time, and that he should not be prevented from completing that job. The OC submits that the actions of Mr Saint John have included:

- (a) Issuing work orders for thermographic imaging to determine the extent and origin of damp on the premises;
  - (b) Negotiating with contractors (Mattioli Bros Pty Ltd) who have been prevented from completing various works by Katrinka;
  - (c) Addressing the pest issue by appointing a new contractor, arranging for more appropriate composting bills and replacement of all baits and removal of a wasps nest;
  - (d) Progressing the intercom replacements by securing further quotations for consideration of the committee;
  - (e) Arranging for various repairs and maintenance issues to be addressed including the lighting of common areas, the failures of the CCTV system, pool and garden maintenance, excessive water usage via the sprinkler system and a more appropriate waste management system;
  - (f) Addressing the occupational, health and safety issues arising from the tennis court surface; and
  - (g) Placing warning signage in the premises where appropriate.
- 22 The respondent submits that the OC is best served by the appointment of an experienced manager being Mr Saint John, rather than appointing a liquidator who is unfamiliar with the *OC Act*, and the processes and management of an owners corporation. Further that the expense of a liquidator is unnecessary, and the affidavit of Ms Ruhe makes it clear that she will be relying on an OC manager, and that she would be engaging an auditor for the auditing process, rather than undertaking herself, which is exactly what Mr Saint John would do, but at a far lesser expense.
- 23 If appointed as the administrator, Mr Saint John has indicated that his approach will be... 'to only engage with repairs and maintenance whilst compiling a register of assets and repairs, so that by the end of the administration a complete independent picture of the community assets and their serviceable life is established. This will be complemented with a governance framework that will include procedure for decision making, meetings and forward maintenance'.<sup>9</sup>
- 24 The terms upon which Mr Saint John seeks to be appointed as administrator are the same as the terms of appointment upon which he acts as owners corporation manager. They include an annual fee of \$19,778.00, together with an hourly rate for additional services at \$242.00 per hour. In addition, it

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<sup>9</sup> Letter of Simon Saint-John dated 30 November 2022.

is proposed that 5% be charged to arrange any major (>\$1,000 or 15 minutes) maintenance/repair/replacements of Owners Corporation Property (% of project value).

- 25 In the event that it is the view of the Tribunal that a liquidator be appointed, the OC submits that Mr Gollant be appointed administrator. The OC filed a proposal for the appointment of Mr Gollant as administrator on 1 June 2023. That proposal states that Mr Gollant is the director and principal at CJG advisory and has over 25 years experience in the insolvency and reconstruction sectors. He holds current registration as a Registered and Official Liquidator, and his work in both the home building, and construction sector makes him capable of acting as administrator. Mr Gollant adheres to the Corporations Law in administering complex arrangements in building and related property services matters.
- 26 The proposal further states that Mr Gollant is able to investigate previous owners corporation committees, including conducting a forensic financial analysis, and can provide immediate solutions in situations where an owners corporation is unable to perform its duties.
- 27 Appendix A to the proposal indicates that the hourly rate for the appointee (excluding GST) is \$550.00. Other members of his team are billed at lesser hourly rates as indicated in the schedule.
- 28 Although the respondent's outline of submissions states that Mr Saint John has previously worked successfully with Mr Gollant in this capacity, the OC's representative confirmed during the course of the hearing that this was not the case, and that Mr Saint John and Mr Gollant were entirely independent of each other and have not worked together previously.

**Of the proposed administrators, who should the Tribunal appoint?**

- 29 Section 174 of the *OC Act* vests in the Tribunal the power to appoint an administrator and set down the terms and conditions of such an appointment.
- 30 The first question for the Tribunal to consider is whether the incumbent manager Mr Saint John be appointed administrator on the terms outlined in his proposal.
- 31 The decision of *Mckinnon v Adams* is of relevance in respect of this question. In that decision the plaintiffs sought the appointment of a property manager as administrator. The proposed administrator Mr Dunlea deposed that he was 'prepared to accept appointment as administrator on the terms set out in a pro-forma document entitled 'Appointment of Manager' published by the Institute of Body Corporate Managers'.<sup>10</sup>
- 32 His Honour Bongiorno J stated:

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<sup>10</sup> *McKinnon v Adams* [2003] VSC 116 at para 47.



The pro-forma document exhibited to Mr Dunlea's affidavit is not an appropriate basis upon which he could be appointed as administrator. It contemplates the appointment of a manager to a body corporate by the body corporate itself upon certain terms and conditions. It provides for decisions to be made by the body corporate and for the manager to perform functions at the request of the body corporate.<sup>11</sup>

33 I am satisfied that the basis upon which Mr Saint John seeks appointment as administrator, that is upon the terms of a standard form contract for the appointment of an owners corporation manager, is inappropriate and not the basis upon which the Tribunal would appoint an administrator to act, in circumstances where the role and duties of a manager is entirely different to that required by an administrator.

34 A further issue of significance in considering the appointment of Mr Saint John as administrator, is that of the independence of any administrator appointed to that role by the Tribunal.

35 Bongiorno J in *McKinnon* in considering the appointment of alternative administrators stated that:

Having regard to Mr Edwards' association with Ms Adams since at least about 1996 it would be inappropriate for him to be appointed as administrator in this case when there is an apparently completely independent person who is qualified and willing to undertake that role. In excluding Mr Edwards, however, I make it clear that I intend no reflection whatsoever either upon his capacity to act as administrator or upon his actual independence. Having regard to the sorry history of this body corporate it is important that the administrator **not only be independent of all of the unit holders but that he also exhibit the appearance of independence** (my emphasis).<sup>12</sup>

36 The OC seeks to distinguish the facts in this matter with those in *McKinnon*, submitting that unlike the facts in *McKinnon*, Mr Saint John has no historical or lengthy association with this OC, being first approached in November 2022 and appointed manager on 6 April 2023, and that he is independent.

37 Whilst I accept that there is not a lengthy or historical association between Mr Saint John and the OC, Mr Saint John has been appointed by the OC, and has been taking instructions and implementing decisions of the OC since his appointment as manager. An administrator must not only be independent but must exhibit the appearance of independence. Whilst there is nothing before me to suggest that Mr Saint John would not carry out his functions in an independent manner, his appointment as administrator would not give the appearance of independence and would not be an appropriate appointment in those circumstances.

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<sup>11</sup> *McKinnon v Adams* [2003] VSC 116 at para 48.

<sup>12</sup> *McKinnon v Adams* [2003] VSC 116 at para 52.

- 38 I then turn to consider the two liquidators proposed by the parties for appointment as administrator. Both fit the criteria of being independent, and given the appearance of independence, and in this respect I note that in submissions the OC's legal representative clarified that Mr Saint John and Mr Gollant have never worked together.
- 39 Both Ms Ruhe and Mr Gollant are highly qualified liquidators with significant experience. Their proposals for appointment would likely result in similar expense for the OC, and although it appears that neither of them have been appointed to the role of administrator of an owners corporation before, I am confident that both have the qualifications and experience to function effectively in that role. What distinguishes the two proposals in my view is the detailed and considered manner in which Ms Ruhe discusses her understanding of the role of administrator, and the actions she would implement if appointed by the Tribunal.<sup>13</sup> Mr Gollant's proposal provides an indication of his approach if appointed as administrator, but not in the detailed and thorough way provided by Ms Ruhe. On balance I therefore consider that Ms Ruhe's appointment as administrator to be the most appropriate in the circumstances.

#### **Terms of Appointment of the Administrator**

- 40 Section 174(a) of the *OC Act* provides that the Tribunal can appoint an administrator and set down terms and conditions of the appointment. In appointing the administrator, it is appropriate to provide terms of reference for the administrator that are relevant to the unresolved issues in this OC, but without setting down terms and conditions that completely fetter the discretion of the administrator in her role.
- 41 I note that the applicants have proposed orders including conditions of administration, and the respondent has agreed with proposed orders 3 through to 7. I consider a 1-year term appropriate, and taking all of the relevant considerations into account I make the orders set out above.

**C Price**  
**Senior Member**

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<sup>13</sup> Affidavit of Alice Fay Ruhe dated 1 June 2023, together with exhibit AFR-1 at paragraph 5 detailing the proposed approach to appointment.