



District Court
New South Wales

Case Name: The Owners - Strata Plan No 2227 v Navhand Pty Ltd

Medium Neutral Citation: [2023] NSWDC 568

Hearing Date(s): 4, 5, 6 April 2023
6, 7 December 2023

Date of Orders: 15 December 2023

Decision Date: 15 December 2023

Jurisdiction: Civil

Before: Russell SC DCJ

Decision: (1) Judgment for the plaintiff against the defendant for \$94,740.78.
(2) Order the defendant to pay the plaintiff's costs.
(3) The exhibits are returned.

Catchwords: LAND LAW — strata title — recovery of unpaid contributions, interest and expenses — regular periodic contributions — special levies — requirement to give notice of contributions and notice of meetings — whether notices were “given” — validity of appointment of strata managing agent

Legislation Cited: Strata Schemes Management Act 2015 (NSW), ss 4, 9, 11, 19, 24, 43, 73, 74, 79, 80, 81, 83, 85, 86, 103, 135, Sch 1, cll 7, 9, 14, 18
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Regulation 2016 (NSW), cl 19

Cases Cited: Australian Boot Trade Employee's Federation v Whybrow and Co (1910) 11 CLR 311
Achiam v The Owners – Strata Plan No 58026 [2022] NSWCATCD 66
Arjunan v Neighbourhood Association DP No 285853

(No 3) [2022] NSWSC 1524
Broken Hill South Ltd v Commissioner of Taxation
(NSW) (1937) 56 CLR 337
Coshott v The Owners of Strata Plan No. 48892 [2006]
NSWSC 308
Grey v Pearson (1857) HLC 61 at 106; 10 ER 1216
Project Blue Sky Inc v Australian Broadcasting
Authority [1998] HCA 28; (1998) 194 CLR 355
Read v The Owners-Strata Plan No 2533 [2021]
NSWCATAP 218
The Owners Strata Plan No 57164 v Yau [2017]
NSWCA 341; (2017) 96 NSWLR 587

Category: Principal judgment

Parties: The Owners – Strata Plan No. 2227 (Plaintiff)
Navhand Pty Ltd (Defendant)

Representation: Counsel:
R Pietriche (Plaintiff)
S O'Rourke (Solicitor) (Defendant)

Solicitors:
Makinson d'Apice Lawyers (Plaintiff)
Four Winds Legal Pty Ltd (Defendant)

File Number(s): 2022/114537

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Introduction

- 1 The plaintiff The Owners - Strata Plan No. 2227 (the Owners Corporation) is the owners corporation of a strata scheme for a building containing four home units and two garages in Rushcutters Bay. The defendant Navhand Pty Ltd (Navhand) is the registered proprietor of Lot 2 in the Strata Plan, which is a home unit, and Lot 6 in the Strata Plan, which is a garage.
- 2 The Owners Corporation sues Navhand for contributions to the administrative fund and the capital works fund of the Owners Corporation, said to have been levied upon Navhand. The plaintiff also claims interest at the statutory rate of 10% upon outstanding contributions, and costs and expenses relating to the attempted recovery of unpaid contributions said to be owing by Navhand.
- 3 The right of the Owners Corporation to recover these monies is governed by the *Strata Schemes Management Act 2015* (NSW) (the Act).
- 4 The pleadings, and much of the affidavit evidence, are contained in a Court Book (CB) and a Supplementary Court Book (SCB) prepared by the solicitors for the Owners Corporation. Where documents are in the CB or the SCB, I will refer to them by page numbers.

The Course of the Hearing

- 5 The Owners Corporation sued upon an Amended Statement of Claim (ASOC) filed on 27 March 2023 (CB 25).
- 6 The Owners Corporation sued for “levied contributions” in relation to Lot 2 totalling \$104,468.33 (noting that claims for levies said to be due on 31 December 2019 and 1 February 2022 were abandoned). Those contributions were said to have been due upon dates ranging between 31 December 2019 and 18 October 2021.
- 7 The Owners Corporation also sued Navhand for “levied contributions” in respect of Lot 6, falling due between 31 December 2019 and 18 October 2021. These total \$4,488.98 (noting that claims for contributions said to be due on 31 December 2019 and 1 February 2022 were abandoned).

- 8 The Owners Corporation also claimed costs and/or expenses incurred in attempting to recover unpaid contributions said to be due and owing by Navhand.
- 9 Finally, the Owners Corporation claimed simple interest on the outstanding contributions at the prescribed statutory rate of 10%.
- 10 Navhand filed a Defence on 26 May 2022 (CB 35). At the commencement of the trial Navhand made an application to amend its Defence, which was declined for reasons set out in a ruling given on 4 April 2023.
- 11 The trial was heard on 4, 5 and 6 April 2023. Judgment was reserved. A draft judgment was prepared, but there were two issues upon which the parties had not addressed. The matter was relisted on 20 April 2023 when the parties were informed that further submissions were required in relation to:
 - (1) The validity of a resolution purportedly passed in 2018 in relation to a special levy raised to comply with a fire upgrade order.
 - (2) The validity of a resolution purportedly passed at the 2020 annual general meeting (AGM) for quarterly levies payable in 2021.
- 12 The matter was stood over for further submissions on 24 April 2023. The plaintiff filed a motion for leave to re-open its case. The plaintiff sought leave to rely upon a further affidavit of Ms Smith which exhibited 231 pages of strata records and correspondence not tendered at the original trial. These were said by Ms Smith to have been located on an “obsolete” computer, only after the matter was relisted in April 2023.
- 13 The defendant’s motion to amend its Defence, referred to above, had been dismissed on Day 1 of the trial because, inter alia, the plaintiff asserted it was ready to proceed to finality at the April hearing. When it turned out that this was not the case, the defendant renewed its application to amend the Defence.
- 14 On 28 July 2023 the court granted leave to the plaintiff to re-open its case, and granted leave to the defendant to amend its Defence. Directions were made for the service of evidence and the matter was listed for the hearing to resume on 6 December 2023.

The Pleadings

15 At the further hearing the plaintiff abandoned some of its claims, including the claim in relation to the 2018 special levy. The abandoned claims were for:

- (1) Levies due on 31 December 2019 in the amounts of \$28,081.71 and \$1,220.94 (ASOC par 3, first item; par 4, first item).
- (2) Levies due on 1 February 2022 in the amounts of \$3,463.85 and \$150.60 (ASOC par 3, last item; par 4, last item).

16 The plaintiff's claim in relation to Lot 2 was for the following amounts:

Date Due	Amount
1 February 2020 (Quarterly Levy)	\$5,888.56
1 May 2020 (Quarterly Levy)	\$5,888.56
1 August 2020 (Quarterly Levy)	\$5,888.56
1 August 2020 (Fire Order Special Levy)	\$10,391.57
1 November 2020 (Quarterly Levy)	\$5,888.56
1 November 2020 (Fire Order Special Levy)	\$10,391.57
1 February 2021 (Quarterly Levy)	\$5,888.56
1 February 2021 (Fire Order Special Levy)	\$10,391.57
1 May 2021 (Quarterly Levy)	\$2,078.30
14 May 2021 (Fire Order Special Levy)	\$10,391.57
18 October 2021 (Quarterly Levy)	\$2,078.30
TOTAL	\$75,165.68

17 The levies claimed for Lot 6 were as follows:

Date Due	Amount
1 February 2020 (Quarterly Levy)	\$256.02
1 May 2020 (Quarterly Levy)	\$256.02
1 August 2020 (Quarterly Levy)	\$256.02
1 August 2020 (Fire Order Special Levy)	\$451.81
1 November 2020 (Quarterly Levy)	\$256.02
1 November 2020 (Fire Order Special Levy)	\$451.81
1 February 2021 (Quarterly Levy)	\$256.02
1 February 2021 (Fire Order Special Levy)	\$451.81
1 May 2021 (Quarterly Levy)	\$90.35
14 May 2021 (Fire Order Special Levy)	\$451.81
18 October 2021 (Quarterly Levy)	\$90.35
TOTAL	\$3,268.04

18 Thus the claim of the plaintiff for unpaid levies was:

(1) Lot 2: \$75,165.68

(2) Lot 6: \$3,268.04

TOTAL: \$78,433.72

19 The Amended Defence filed by Navhand (SCB 11) raises the following issues:

(1) The notices dated 4 March 2022 and 28 March 2022 did not comply with s 86(5) of the Act – Amended Defence par 3(c).

(2) The Owners Corporation has not complied with Resolution 12 of its Constitution Resolutions – Amended Defence par 3(d).

- (3) The Owners Corporation has failed to identify the amount of contributions claimed under s 86(5) of the Act for the administrative fund and the capital works fund – Amended Defence par 3(e).
- (4) The Owners Corporation has failed to comply with ss 83(1) and 83(4) of the Act in the following respects – Amended Defence par 3(f):
 - (a) There is no evidence of notices under s 83(1).
 - (b) There is no s 83(1) notice for the special levy raised on 25 June 2020.
 - (c) There are no regular periodic contributions levied because notices of motions to levy contributions were not received by the defendant seven days prior to any AGM under Sch 1, cl 7 of the Act.
 - (d) No s 83(1) notices were received for the contributions approved at AGMs held on 18 December 2019 and 30 October 2020.
- (5) The special levy approved at the extraordinary general meeting (EGM) held on 25 June 2020 is not valid under s 81(4) and Sch 1, cl 18 of the Act because of the following reasons – Amended Defence par 3(h):
 - (a) The levy can only be raised if the Owners Corporation is faced with “other expenses” being different or higher than those estimated at the preceding AGM, because of s 81(4) of the Act.
 - (b) The contribution should have been raised for the capital works fund, not the administrative fund, because of s 79(2) of the Act.
 - (c) No written notice of the motion to raise the special levy was given to the defendant seven days prior to the EGM, as required by Sch 1, cl 7 of the Act.
- (6) The Owners Corporation has failed to comply with the Act in the following respects – Amended Defence par 3(i):
 - (a) The Owners Corporation did not comply with s 79 before the 22 October 2021 AGM (by failing to estimate amount of funds required and having before it a statement of the existing financial situation and an estimate of receipts and payments).
 - (b) The Owners Corporation did not comply with s 80 (by failing to have a 10-year capital works fund plan in place).
 - (c) The Owners Corporation did not comply with s 81 (by failing to determine the amounts to be levied at the same meeting at which estimates were determined).
 - (d) The Owners Corporation did not comply with Sch 1, cll 9(a) and (b) of the Act (by failing to provide a copy of the last statements of key financial information with the AGM notice).
- (7) No contributions are payable because – Amended Defence par 3(j):

- (a) Written copies of the motions tabled at the meetings at which levies were approved were not given to the defendant seven days prior to the meetings.
 - (b) The appointment of Stratamark Pty Ltd (Stratamark) as strata managing agent was invalid because no notice was given to the defendant of the meetings at which the appointment was approved or ratified, under s 43(b) of the Act.
 - (c) Any notices of meetings and levies given by Stratamark to the defendant were not valid because Stratamark was not validly appointed as strata managing agent so had no authority to give such notices.
- (8) The 1 February 2021 levy is not due because Resolution 22(d) at the 2019 AGM provided that “if the next AGM cannot be held prior to 1 February 2021, then an equal levy amount is due on 1 February 2021” but that amount did not become due because the next AGM was held on 30 October 2020 – Amended Defence par 3(k).
- (9) No levies were struck at the AGM of 30 October 2020 for 14 May 2021 or 18 October 2021 because the minutes record contributions determined for 1 February 2020, 1 May 2020, 1 August 2020 and 1 November 2020 – Amended Defence par 3(l).
- (10) The Strata Collective fees of \$400 pertains to arrears notices for the levy due on 1 February 2022, which has been paid by the defendant – Amended Defence par 6A(a).
- (11) The costs of \$10,328.37 for solicitor’s fees in the period from 1 December 2021 to 20 April 2022 are not recoverable – Amended Defence par 6A(b).
- (12) The Owners Corporation’s costs do not arise out of the defendant’s failure to pay levies which have become due and payable – Amended Defence par 6A(c).
- 20 Those are the issues for determination in this judgment. The plaintiff bears the onus on the balance of probabilities of proving an entitlement to contributions, costs and expenses, and interest.

The Evidence

21 The Owners Corporation relied upon the following evidence:

- (1) Affidavit of Kerrie-Anne Smith dated 16 August 2022 (CB 45). This was marked as Exhibit PX 4.
- (2) Affidavit of Steven Song, solicitor, dated 29 March 2023 (PX 1, CB 8).
- (3) Affidavit of Seven Song, solicitor, dated 27 March 2023 (PX 2, CB 265).
- (4) Exhibit SS-02 to Exhibit PX 2 (PX 3).
- (5) Affidavit of Kerrie-Anne Smith dated 23 April 2023 (PX 9, SCB 33).

- (6) Exhibit KAS-01 to Exhibit PX 9 (PX 10, SCB 37).
 - (7) Affidavit of Mark Humphreys dated 11 May 2023 (PX 11, SCB 272).
 - (8) Exhibit MH-01 to Exhibit PX 11 (PX 12, SCB 279).
 - (9) Affidavit of Sarina Jackson dated 18 August 2023 (PX 13, SCB 427).
 - (10) Exhibit SJ-01 to Exhibit PX 13 (PX 14, SCB 430).
 - (11) Affidavit of Steven Song, solicitor, dated 4 December 2023 (PX 15).
 - (12) Exhibit SS-05 to Exhibit PX 15 (PX 16).
 - (13) Notice of AGM to be held on 30 October 2020 (PX 17).
- 22 Ms Smith was cross-examined in relation to PX 4, but not in relation to PX 9 or PX 10. Mr Song was not cross-examined. Mr Humphreys and Ms Jackson were cross-examined.
- 23 The defendant relied upon the following evidence:
- (1) Affidavit of Susan O'Rourke, solicitor, dated 24 March 2023 (DX 1, CB 3).
 - (2) Affidavit of Susan O'Rourke, solicitor, dated 3 April 2023 (DX 2).
 - (3) Affidavit of Susan O'Rourke, solicitor, dated 24 October 2022 (DX 4, CB 218).
 - (4) Affidavit of Susan O'Rourke, solicitor, dated 9 May 2023 (DX 5)
 - (5) Affidavit of Susan O'Rourke, solicitor, dated 19 May 2023 (DX 6).
 - (6) Affidavit of Susan O'Rourke, solicitor, dated 9 May 2023 (DX 7).
 - (7) Affidavit of Susan O'Rourke, solicitor, dated 22 September 2023 (DX 8).
 - (8) Notice of Motion dated 9 May 2023 and affidavit of Susan O'Rourke, solicitor, dated 9 May 2023 (DX 9, SCB 623).
- 24 There was very little evidentiary material in any of these affidavits. Most of the affidavits comprised submissions, and were treated as such.
- 25 Ms O'Rourke was cross-examined.

Financial Management of Strata Schemes under the Act

Administrative and Capital Works Funds

- 26 Part 5 of the Act deals with financial management. Division 1 deals with funds and accounts of the Owners Corporation.

- 27 By s 73(1) of the Act an owners corporation must establish an administrative fund. Amounts payable to the fund include “the contributions levied on, and paid by, owners for payment into the fund” – s 73(2)(a).
- 28 By s 74(1) of the Act an owners corporation must establish a capital works fund. In a previous version of the Act, the capital works fund was known as the sinking fund. It is wrongly described in the ASOC as the sinking fund.
- 29 An owners corporation must pay into the capital works fund “the contributions levied on, and paid by, owners for payment into the fund” – s 74(2)(a) of the Act.
- 30 It can be seen from the quoted words above that it is necessary for contributions to be levied upon owners, before they are due to be paid by the owners. This is reinforced by consideration of s 83 of the Act, dealt with below.

Levying Contributions

- 31 Part 5 Division 2 of the Act deals with contributions by owners. The Division provides a series of steps which must be followed by the Owners Corporation, before contributions are levied and become payable.
- 32 Firstly, an owners corporation must, at each AGM, estimate how much money it will need to credit to its administrative fund – s 79(1) of the Act.
- 33 Secondly, an owners corporation must, at each AGM, estimate how much money it will need to credit to its capital works fund – s 79(2) of the Act.
- 34 Thirdly, when estimating amounts needed for the administrative fund or the capital works fund, an owners corporation must have before it, and take into account, a statement of the existing financial position of the strata scheme and an estimate of receipts and payments – s 79(3) of the Act.
- 35 Fourthly, in estimating amounts to be credited to the capital works fund, an owners corporation is to take into account anticipated major expenditure identified in the 10-year plan for the capital works fund – s 79(5) of the Act.
- 36 Fifthly, an owners corporation is to prepare a plan of anticipated major expenditure to be met from the capital works fund for a 10-year period commencing on the first AGM of the owners corporation – s 80(1) of the Act.

37 Sixthly, an owners corporation may, by resolution at a general meeting, review, revise or replace a 10-year plan prepared under s 80, and must review the plan at least once every five years – s 80(3) of the Act.

38 Seventhly, an owners corporation must set contributions to the administrative and the capital works funds. Section 81 of the Act provides as follows:

“81 Owners corporation to set contributions to administrative and capital works funds

(1) The owners corporation must determine the amounts to be levied as a contribution to the administrative fund and the capital works fund to raise the amounts estimated as needing to be credited to those funds.

(2) That determination must be made at the same meeting at which those estimated amounts are determined.

(3) The owners corporation must levy on each person liable for it such a contribution.

(4) If the owners corporation is subsequently faced with other expenses it cannot at once meet from either fund, it must levy on each owner of a lot in the strata scheme a contribution to the administrative fund or capital works fund, determined at a general meeting of the owners corporation, in order to meet the expenses.

(5) A contribution is, if an owners corporation so determines, payable by the regular periodic instalments specified in the determination setting the amount of the contribution.”

39 Eighthly, an owners corporation must then levy the contributions upon the owners by giving written notice to each owner. Section 83 of the Act provides as follows:

“83 Levying of contributions

(1) An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.

(2) Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.

(3) Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of the contribution. The date must be at least 30 days after the notice is given.

(4) Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.”

- 40 The essential steps to be taken by an owners corporation which requires an owner to pay contributions to the administrative fund or the capital works fund are as follows:
- (1) An owners corporation levies a contribution by “giving the owner written notice of the contribution payable” – s 83(1) of the Act.
 - (2) Contributions are required to be paid to the administrative fund or the capital works fund or both – s 83(1) of the Act.
 - (3) Contributions levied by an owners corporation must be levied in respect of each lot – s 83(2) of the Act.
 - (4) A contribution levied becomes due and payable on the date set out in the notice of the contribution. This date must be at least 30 days after the notice is given – s 83(3) of the Act.

If a Contribution Notice is not Given

- 41 The Owners Corporation submitted that the evidence proved that, with one exception, appropriate contribution notices were given to Navhand. The levies for which no contribution notice was tendered were the levies said to be due on 18 October 2021 for Lot 2 (\$2,078.30) and Lot 6 (\$90.35). The alternative submission for the Owners Corporation was that, even if notices were not given, quarterly levies were still due and payable because of the operation of s 83(4) of the Act.
- 42 Section 83(4) of the Act provides an exception to the requirement that contributions only become payable after the owner of a lot has been given written notice of the contribution payable. The exception in s 83(4) applies only to “regular periodic contributions to the administrative fund and capital works fund”. Such contributions “are taken to have been duly levied” even though a notice levying the contributions was not given to the owner.
- 43 In the present case, the Owners Corporation relied upon s 83(4) in relation to regular periodic contributions to the administrative fund and the capital works fund, if the finding of the court was that notices levying the contributions were not given to Navhand.
- 44 Quite clearly s 83(4) of the Act operates as a deeming provision, so that regular periodic contributions to the administrative fund and the capital works fund of an owners corporation “are taken to have been duly levied” even though notice levying the contribution has not been given to the owner. This

reading of s 83(4) is supported by the decision of Cooper AJ in *Coshott v The Owners of Strata Plan No. 48892* [2006] NSWSC 308. His Honour was considering an earlier incarnation of the Act, and in relation to the provision equivalent to s 83(4) of the Act, he held that the Act cast the responsibility on the owner to pay the contributions as levied even if notice levying the contributions was not served on the owner – at [39]. To similar effect is the decision of the Civil and Administrative Tribunal of NSW in *Achiam v The Owners – Strata Plan No 58026* [2022] NSWCATCD 66 at [42].

- 45 Reliance on s 83(4) requires proof that the Owners Corporation has complied with the steps set out in ss 79, 80 and 81 of the Act, which have been summarised above.

Special Levies

- 46 An owners corporation can raise a special levy under s 81(4) of the Act if the owners corporation is faced with other expenses it cannot at once meet from either fund. It must then levy on each owner a contribution to the administrative fund or the capital works fund, determined at a general meeting of the owners corporation, in order to meet the expenses. While the term “special levy” does not appear in the Act, it is a term regularly used to describe this third species of contribution.
- 47 The Owners Corporation accepted that in relation to a “special levy”, s 83(4) did not apply, and that it was necessary for a written levy notice to be given to an owner, before the obligation to pay a special levy arises.

Interest upon Unpaid Levies

- 48 Section 85(1) of the Act provides that:

“A contribution, if not paid when it becomes due and payable, bears until paid simple interest at an annual rate of 10%”.

- 49 By par 7 of the ASOC, the plaintiff sought to recover simple interest at the rate of 10% per annum on unpaid contributions.

Reasonable Expenses

- 50 Section 86 of the Act provides for the recovery of unpaid contributions and interest. Section 86(2A) provides:

“An owners corporation may, without obtaining an order under this section, recover as a debt in a court of competent jurisdiction, a contribution not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.”

- 51 By par 6 of the ASOC, the plaintiff sought to recover the whole of its costs or expenses, including fees due to its solicitors.

Background to this Strata Scheme

- 52 Evidence for the plaintiff concerning unpaid contributions is to be found in the affidavits of Ms Smith, the current secretary of the Owners Corporation (commencing at CB 45 and SCB 33). Ms Smith and her husband are the owners of Lot 4 (a home unit) and Lot 5 (a garage) in the building. They have lived there since April 2016. Relevant evidence is also to be found in the affidavit of Mr Humphreys (commencing at SCB 272).
- 53 The strata scheme consists of 415 units of entitlement. The owner of Lot 1 has 60 entitlement units. Navhand has 115 entitlement units arising from its ownership of Lot 2 and 5 entitlement units arising from its ownership of the garage being Lot 6. Thus Navhand has a total of 120 entitlement units. The owner of Lot 3 has 115 entitlement units. Dr and Mrs Smith have 115 entitlement units arising from their ownership of Lot 4 and 5 entitlement units arising from their ownership of Lot 5.
- 54 Prior to 2019 the Owners Corporation was under self-management. The plaintiff alleges that from October 2019 to January 2021 the scheme was managed by Stratamark, a strata managing agent appointed under Part 4 of the Act. Navhand disputes that Stratamark was validly appointed. The scheme was again self-managed between January 2021 and about October 2021, when The Strata Collective, a different strata managing agent, was appointed.
- 55 The impression I gained from reading the documents was that during the periods of self-administration the record keeping and the observance of the formalities required by the Act was, to put it charitably, haphazard. No doubt that is part of the explanation for the abandonment of the claim for levies earlier in time than the involvement of Stratamark.

Fire Upgrade Order and a 2018 Special Levy

56 This claim was abandoned at the final hearing.

Levies Claimed for 2016-2019

57 This claim was abandoned at the final hearing.

Quarterly Levies for 2020

Stratamark Becomes Involved

58 Section 19 of the Act provides:

“19 Other general meetings

(1) The secretary or a strata committee of an owners corporation may convene a general meeting (that is not an annual general meeting) of the owners corporation at any time.

(2) The secretary of the owners corporation, or another officer if the secretary is absent, must convene a general meeting (that is not an annual general meeting) of the owners corporation as soon as practicable, and not later than 14 days after, receiving a qualified request.

(3) A meeting may be convened on a qualified request even if the first annual general meeting has not been held.

(4) A request is a **qualified request** for the purposes of this section if it is made by one or more owners of a lot or lots in the strata scheme having a total unit entitlement of at least one-quarter of the aggregate unit entitlements.”

59 In August 2019 Ms Sarina Jackson, solicitor, was retained by Ms Donnelley and Ms Scally, two of the unit owners in the scheme. Together they held 42.2% (175 units) of the aggregate unit entitlements. They were therefore entitled under s 19 of the Act to make a qualified request for a general meeting of the Owners Corporation.

60 By a letter dated 16 August 2019 (SCB 431) Ms Jackson wrote to the chairman of the Owners Corporation making a qualified request for a general meeting of the owners to be held on 5 September 2019. With her letter Ms Jackson provided a draft letter to owners, a draft notice to be displayed at the premises and draft proposed resolutions.

61 On 27 August 2019 Mr Ling, a solicitor in the employ of Ms Jackson, sent correspondence to the owners in the scheme containing notice of a proposed general meeting to be held on 5 September 2019 to appoint a strata managing

agent, a proposed resolution for the meeting and a letter with respect to the meeting (SCB 428, par 7).

62 On 29 August 2019 Mr Ling sent updated correspondence to the owners (SCB 428, par 8).

63 Ms Jackson exhibited to her affidavit copies of the correspondence sent by Mr Ling to Ms O'Rourke in relation to the proposed meeting (SCB 432-509).

64 By an email dated 29 August 2019 from Mr Ling to Ms O'Rourke, Ms O'Rourke was informed that the proposal to be considered at the general meeting on 5 September 2019 was to appoint Stratamark as the strata managing agent. The email said that the amended documents for the meeting had been sent not only by email but also by post to Ms O'Rourke (SCB 460).

65 The minutes of the meeting held on 5 September 2019 are contained in an email from Ms Donnelley to Mr Humphreys of Stratamark dated 11 September 2019 (SCB 320-321). The minutes record that representative of Lots 1, 3, 4 and 5 attended the meeting but that Ms O'Rourke and Navhand were not present or represented by proxies. Ms Scally was nominated as chairperson of the meeting and Ms Donnelley was nominated to be secretary of the meeting. The minutes record that both were duly elected.

66 Motion 4 in the minutes was headed "Strata Managing Agent Proposals". The minutes record as follows:

"JS proposed that Stratamark be appointed and that the following be delegated to the agent...

(A) All of the functions of the Owners Corporation (other than its power to make a decision on a matter that is required to be decided by the Owners Corporation or to make a determination relating to the levying or payment of contributions); and

(B) The functions of chairperson, secretary and treasurer are necessary to enable the agent to carry out the 'agreed services' and the 'additional services' as defined in the Agreement with effect from the date determined for that purpose by the Strata Committee provided that:

(C) The delegation to the Agent is subject to the conditions and limitations listed in the Agreement;

(D) The Owners Corporation is to execute the Agreement to give effect to this appointment and delegation; and

(E) Authority is given to two members of the Strata Committee to affix the common seal of the Owners Corporation to the Agreement.

Proposal accepted by JS and DD.

Opposed by proxy of Lots 4 and 5.

Motion carried.”

- 67 A Strata Management Agency Agreement dated 30 October 2019 (with a commencement date of 2 October 2019) was executed by Ms Donnelley and Ms Scally on behalf of the Owners Corporation and by Mr Humphreys on behalf of Stratamark (SCB 342-356).
- 68 Stratamark created a Notice of Annual General Meeting (commencing at SCB 309) dated 28 November 2019. The Agenda for that AGM included a proposal for Resolution 23 relating to “Managing Agent”. The proposed resolution was to ratify the appointment of Stratamark as strata managing agent on the terms and conditions set out in the Strata Management Agency Agreement. A notation to propose Resolution 23 said:
- “This motion was included by the Strata Managing agent to confirm their appointment.”
- 69 In evidence was a copy of a letter dated 28 November 2019 from Stratamark to Navhand c/- Ms O’Rourke and addressed to a post office box in Crows Nest, attaching a copy of the notice of the AGM (SCB 309).
- 70 The AGM was held on 18 December 2019 and the minutes (commencing at SCB 360) record that Resolution 23 was made, ratifying the appointment of Stratamark as the strata managing agent (SCB 363).
- 71 The evidence contains a letter dated 20 December 2019 from Stratamark to Navhand c/- Ms O’Rourke at the post office box in Crows Nest, attaching a copy of the minutes of the AGM (SCB 359).
- 72 In par 3(j) of the Amended Defence, Navhand pleads that the appointment of Stratamark as the strata managing agent was invalid because no notice was given to Navhand of the meetings at which the appointment was approved or ratified. Navhand also pleads that all notices of meetings and levies given by Stratamark to Navhand were not valid because Stratamark was not validly appointed, and thus had no authority to give such notices.

Were Notices Concerning Stratamark given to Navhand?

- 73 In his affidavit (commencing at SCB 272) Mr Humphreys gave evidence concerning the internal processes at Stratamark and the software used to issue notices and letters to Lot owners.
- 74 Stratamark became involved only in October 2020, so it can have nothing to say about service of the qualified request for the meeting on 5 September 2019, or service of the minutes for that meeting.
- 75 In relation to the Stratamark contact details, Mr Humphreys said (SCB 274, par 10):
- (1) On 4 October 2019 the details for the service of notices of correspondence to Navhand were entered in the records of Stratamark as c/- Susan O'Rourke at a post office box in Crows Nest.
 - (2) On 4 June 2020 the address for correspondence of Navhand was changed to be both by post to the post office box and to Ms O'Rourke's email address. Mr Humphreys exhibited to his affidavit screenshots printed from the software recording these changes (SCB 280-288).
 - (3) In his affidavit Mr Humphreys swore that Stratamark sent notice of the AGM to be held on 18 December 2019 by post to Navhand on 28 November 2019 (SCB 276, par 12).
 - (4) He also swore in that same paragraph that the minutes of the AGM held on 18 December 2019 was sent by post to Navhand on 20 December 2019.
 - (5) Mr Humphreys swore that on 5 March 2020 Stratamark received an email from Ms O'Rourke asserting that she had not received meeting notices (SCB 275, par 11(c)).
- 76 The obligation of the Owners Corporation in relation to such notices is "to give on behalf of the Owners Corporation and the Strata Committee of the Owners Corporation notices required to given under this Act" – s 43(b).
- 77 The requirement of s 83 is for notices to be "given" to an owner. In *Coshott, Cooper AJ* at [70] pointed out that the *Strata Schemes Management Act 1996* (NSW) (the 1996 Act) did not require proof of receipt of the notice by the owner. The 1996 Act required evidence of the service of the notice. In the case of a notice to be served by post, evidence can be called of a standard practice concerning posting notices.

78 The present Act says in s 83 that the Owners Corporation levies a contribution by giving to the owner written notice of the contribution payable. The requirement of giving a notice is an obligation which is no more onerous than serving a notice, considered in *Coshott*. I accept the evidence of Mr Humphreys and I accept the records of Stratamark in evidence, both of which show that the notice of the 2019 AGM and the minutes of the 2019 AGM were posted to the appropriate address for Navhand. I thus find that the notices were given to Navhand.

79 I am also satisfied that notice of the 11 September 2020 meeting was given to Navhand, both by post and email.

Even If the Notices Were Not Received

80 There is no obligation to ensure that the notices are received, although obviously that is the object of giving the notices. For reasons set out below, I have come to the view that even if non-receipt of notices by Navhand has legal consequences (contrary to the findings above), the resolutions in relation to the appointment of Stratamark and the ratification of that appointment, were valid. I have found that notices were given to Navhand in relation to the qualified response meeting of September 2019 and the 2019 AGM. The plaintiff submitted that even if notice was not given, or not validly given, to Navhand of either meeting involving Stratamark, that did not invalidate decisions made or resolutions passed at those meetings. This included resolutions to appoint Stratamark or ratify Stratamark's appointment.

81 The plaintiff relied upon the authority of *The Owners Strata Plan No 57164 v Yau* [2017] NSWCA 341; (2017) 96 NSWLR 587. The issue in that case was whether failure to give adequate notice of a meeting of the Executive Committee (the old name for a Strata Committee) invalidated a meeting or any decision made at the meeting. The decision involved the 1996 Act. However, there are cognate provisions in the Act which governs these proceedings.

82 The Court of Appeal referred to the well-known principles of statutory construction established by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]-[70] and [91].

83 In [106] of the Court of Appeal decision, the court said:

“In *Project Blue Sky v Australian Broadcasting Authority*, the High Court was specifically concerned with the consequences, as a matter of statutory construction, of a failure to comply with a condition regulating the exercise of power. The plurality observed, at [91], that:

‘An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.’”

84 The Court of Appeal held that the provision in the 1996 Act regarding notice of a meeting “was a regulating provision relating to the exercise of a power in respect of which no consequence was specified should there be non-compliance” – at [108].

85 The Court of Appeal was also of the view that because there was a provision in the 1996 Act that the resolution of an owners corporation could be invalidated by the order of an adjudicator, this provided a forum in which unit owners could seek relief in respect of resolutions where there had been non-compliance with the Act, where the consequence of non-compliance was not otherwise specified in the Act – at [111].

86 Section 24(1) of the Act provides as follows:

“24 Order invalidating resolution of owners corporation

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

87 The reference to “Tribunal” in this section is a reference to the Civil and Administrative Tribunal as defined in s 4(1) of the Act.

88 The Act does not specify a consequence for non-compliance regarding the giving of notice for meetings. The existence in s 24 of the Act of the power for an owner to apply to the Tribunal to make an order invalidating any resolution, if the provisions of the Act or the regulations have not been complied with in relation to a meeting, are on all fours with the decision of the Court of Appeal in *Yau*. I therefore find that even if notice of the meeting appointing Stratamark, or

notice of the AGM at which its appointment was ratified, was not given to Navhand, or was given but not received by Navhand, this does not invalidate the resolutions in relation to Stratamark. The consequence of that is that all notices of levies and meetings given subsequently by Stratamark to Navhand are not invalid.

89 To the same effect as *Yau*, and relied upon by the plaintiff, were the decisions of:

- (1) *Arjunan v Neighbourhood Association DP No 285853 (No 3)* [2022] NSWSC 1524 at [49].
- (2) *Read v The Owners-Strata Plan No 2533* [2021] NSWCATAP 218 at [38].

Quarterly Levies for 2020

90 The ASOC pleads that four quarterly levies due to be paid in 2020 by Navhand remain unpaid. In relation to Lot 2 there are four amounts of \$5,888.56 due on 1 February 2020, 1 May 2020, 1 August 2020 and 1 November 2020. For Lot 6 the claim was for 4 amounts of \$256.02 due on the same dates.

91 A copy of the notice of the 2019 AGM and the Agenda, addressed to Navhand c/- Ms O'Rourke at the post office box at Crows Nest, is at SCB 309-318. Stratamark, as the managing agent, produced the notice of the AGM and the Agenda. Motion 3 in the Agenda was that key financial statements for the administrative fund, the capital works fund and any other fund prepared by the Owners Corporation be adopted. Financial statements were provided with the Agenda (SCB 322-326).

92 Motion 18 in the Agenda was that the Owners Corporation resolve to review "the attached current 10-year Capital Works Fund Analysis report or prepare a new 10-year Capital Works Fund analysis".

93 Motion 22 in the Agenda dealt with "Budget". It proposed that total contributions to the administrative fund be determined in accordance with ss 79 and 81 of the Act for the period 1 February 2020 to 31 January 2021 in the amount of \$35,000. It also proposed that total contributions to the capital works fund for that period be \$100,000.

- 94 The minutes for the AGM held on 18 December 2019 are at SCB 360-363. Resolution 3 was that the key financial statements for the administrative fund, the capital works fund and any other fund prepared by the Owners Corporation be adopted.
- 95 Resolution 18 regarding the capital works fund was defeated.
- 96 Resolution 22 in relation to "Budget" resolved that contributions to the administrative fund be a total of \$35,000 and contributions to the capital works fund be a total of \$50,000. Those contributions were to be payable by instalments in advance, by payments due on 1 February 2020, 1 May 2020, 1 August 2020 and 1 November 2020. Part of the resolution was that the treasurer "will provide written notice of the contribution payable".
- 97 Stratamark prepared a levy notice for Lot 2 (SCB 366) dated 16 January 2020 addressed to Navhand c/- Ms O'Rourke at the post office box in Crows Nest. The due date for the levy was said to be 1 February 2020 and it was described as a "Standard Levy (01/02/20-30/04/20)".
- 98 The amount levied on Lot 2 for the administrative fund was \$2,424.70 and the amount levied for the capital works fund was \$3,436.86. This was a total of \$5,888.56. Mathematically this amount accords with the resolutions passed at the 2019 AGM.
- 99 Stratamark prepared a levy notice (SCB 367) dated 16 January 2020 addressed to Navhand c/- Ms O'Rourke at the post office box in Crows Nest. This levy notice was for Lot 6. It was similar in form to the levy notice for Lot 2. The contribution to the administrative fund was \$105.42 and the contribution to the capital works fund was \$150.60, a total of \$256.02. Again, this amount accorded mathematically with the resolutions passed at the 2019 AGM.
- 100 Mr Humphreys swore (SCB 276, par 12) that the Lot 2 levy notice and the Lot 6 levy notice were sent by post on 16 January 2020 to Navhand c/- Ms O'Rourke at the Crows Nest post office box.
- 101 I accept the evidence of Mr Humphreys, based upon practice within his office and its records, that these notices were "given" as required by the Act.

- 102 Even if they were not received by Ms O'Rourke on behalf of Navhand, the obligation to pay the levies fell upon Navhand because of s 83(4) of the Act.
- 103 The levy notice for Lot 2 due on 1 May 2020 is at SCB 371. The levy notice for that same date for Lot 6 is at SCB 372.
- 104 The levy notice for Lot 2 due on 1 August 2020 is at SCB 393. The levy notice for Lot 6 is at SCB 395.
- 105 The levy notice for Lot 2 due on 1 November 2020 is at SCB 404. The levy notice for Lot 6 is at SCB 406.
- 106 Mr Humphreys swore in his affidavit (SCB 276, par 12) that each of these levy notices was sent by post to Navhand c/- Ms O'Rourke at the Crows Nest post office box.
- 107 I find that, since I accept that evidence, each of these notices was given. I also find that even if they were not received by Navhand, the obligation to pay those levies fell upon Navhand because of s 83(4) of the Act.
- 108 I make the following findings in relation to the amounts claimed for the 2020 quarterly levies which were the subject of a resolution at the 2019 AGM:
- (1) The Owners Corporation validly resolved at the 2019 AGM to raise contributions to the administrative fund of \$35,000 and contributions to the capital works fund of \$50,000 by way of regular periodic contributions.
 - (2) The levy notices required by s 83 of the Act were given to Navhand.
 - (3) In any event, by force of s 83(4) of the Act, the regular periodic contributions to the administrative fund and the capital works fund of the Owners Corporation are taken to have been duly levied on Navhand even if notice levying the contribution was not given to Navhand.
 - (4) I find that Navhand is liable to pay total contributions arising from the resolution at the 2019 AGM in the amount of \$24,578.31 calculated as follows: \$85,000 x 120/415.
 - (5) I find that Navhand is also liable to pay interest at the prescribed rate of 10% upon such overdue amounts.

Fire Upgrade Order and the 2020 Special Levy

- 109 The ASOC pleads that four quarterly instalments of a special levy, due to be paid in 2020 and 2021 by Navhand, remain unpaid. In relation to Lot 2 there are four amounts of \$10,391.57. For Lot 6 the claim was for four amounts of

\$451.81. These claimed amounts appear mathematically correct, when regard is had to Resolution 2 passed at an EGM held on 25 June 2020. The contribution due each quarter for Lot 2 was thus $\$37,500 \times 115/415 = \$10,391.57$, and for Lot 6 it was $\$37,500 \times 5/415 = \451.81 .

- 110 A copy of the notice of that meeting is at SCB 373-385. Mr Humphreys gave evidence that Stratamark gave notice of the meeting by post and by email to Navhand (SCB 276, par 12). I accept that notice was given, as required by the Act.
- 111 The minutes of the EGM held on 25 June 2020 are at SCB 387-389. The meeting was chaired by Mr Humphreys, from Stratamark, the managing agent. A copy of the Minutes was given to Navhand by letter dated 1 July 2020 (SCB 386).
- 112 Resolution 2 was headed "Special Levy". It recorded a resolution pursuant to s 81(4) of the Act which acknowledged that the Owners Corporation was faced with expenses referred to in a schedule, which it could not meet at once from the administrative or capital works funds. The schedule referred to expenses needing to be raised for the fire upgrade order. The total contribution to be raised was \$150,000, by quarterly instalments of \$37,500, due on 1 August 2020, 1 November 2020, 1 February 2021 and 1 May 2021.
- 113 Such a resolution is authorised by s 81(4) where the Owners Corporation was faced with other expenses which it cannot meet from either fund. I reject the notion advanced in par 3(h)(a) of the Amended Defence that a special levy can only be raised when the Owners Corporation is faced with other expenses different or higher than those estimated at the previous AGM. Section 81(4) of the Act simply does not say that, and no authority was cited for that proposition.
- 114 As previously recited, s 83(4) does not operate in relation to contributions required by a special levy. It was therefore necessary for the Owners Corporation to tender evidence of appropriate contribution notices being given to Navhand by the treasurer.

- 115 Mr Humphreys exhibited to his affidavit the first three special levy notices for Lot 2 at SCB 390 (1 August 2020) and SCB 424 (1 November 2020 and 1 February 2021). These were prepared by Stratamark. He also gave evidence that Stratamark gave the required levy notices to Navhand (SCB 267-277, par 12). I accept his evidence.
- 116 By the time of giving the notice for the fourth instalment of the special levy, Stratamark had resigned as strata managing agent, and the scheme was again under self-administration. Part of the additional evidence adduced by leave to re-open was the affidavit of Ms Smith dated 23 April 2023. In the documents exhibited to her affidavit, there is a levy notice dated 23 April 2021 (SCB 242) addressed to Navhand c/- Ms O'Rourke at the post office box at Crows Nest. Payment is said to be "due within 21 days of the invoice date" (ie by 14 May 2021). For Lot 2 it refers to a "Special (Fire) Levy \$10,391.57". For Lot 6 the amount of the instalment of the special levy is \$90.35. It is hard to understand this amount, as the equal instalments of the special levy for Lot 6 were to be \$451.81. This is yet another example of the poor pattern of the self-administration of this scheme.
- 117 The "proof" of giving that fourth notice to Navhand is a copy of an email dated 23 April 2023 purportedly sent by "Denis Smith" to Ms O'Rourke (SCB 241). Dr Smith did not give evidence about sending the email. Ms O'Rourke said she did not receive it. There was no evidence that the notice was ever posted, in spite of the postal address on the notice itself (SCB 242). In the light of these deficiencies in the evidence, I am not satisfied that the fourth special levy notice was given to Navhand and the plaintiff fails in relation to the claims for the fourth instalment.
- 118 I find that the Owners Corporation is entitled to recover the first three instalments of the 2020 special levy from Navhand (each being \$10,391.37 for Lot 2 and \$451.81 for Lot 6), as it has proved that appropriate notices under s 83 were given to Navhand. Once the notices were given to Navhand, the obligation to pay the special levy instalments arose on the due dates set out in the notices.

119 In par 3(h)(b) of the Amended Defence Navhand pleaded that the levy should have been raised for the capital works fund, not the administrative fund. I accept the submission for the plaintiff that s 73(2) of the Act authorises payments into such fund, as was resolved. I also accept the submission for the plaintiff that monies in the administrative fund can be transferred to the capital works fund – s 73(4)(f) of the Act.

Quarterly Levies for 2021

120 The ASOC pleads that three quarterly levies due to be paid in 2021 by Navhand remain unpaid. In relation to Lot 2 there is one amount of \$5,888.56 due on 1 February 2021, and two amounts of \$2,078.30 due on 14 May 2021 and on 18 October 2021. For Lot 6 the claim was for one amount of \$256.02 due on 1 February 2021 and two amounts of \$90.35 due on 14 May 2021 and on 18 October 2021.

Anomalies in the Pleadings

121 These claimed amounts and due dates are confusing, when regard is had to Resolution 20 passed at the AGM held on 30 October 2020.

122 Ms Smith said that on 30 October 2020 the Owners Corporation convened its AGM and struck levies in the sum of \$30,000 for the period “between 1 February 2020 to 31 January 2021” (CB 49, par 22). Yet the AGM held on 18 December 2019 had already determined that there should be contributions due on four dates in 2020.

123 The notice for the 2020 AGM appears at CB 163-172. The minutes of the AGM appear at CB 173-180. Resolution 20 dealt with “Budget”. The Owners Corporation resolved that total contributions to the administrative fund for the period 1 February 2020 to 31 January 2021 should be the amount of \$20,000 and total contributions to the capital works fund for the same period should be \$10,000. The resolution included dates for instalments in advance of 1 February 2020, 1 May 2020, 1 August 2020 and 1 November 2020 (sic).

124 These dates make no sense. The AGM was held on 30 October 2020 to approve a budget for the following year. Instead, the resolution dealt with a period for contributions retrospective to 1 February 2020. Further, the AGM on 18 December 2019 had already set contributions due on four dates in the year

2020. The evidence contains the minutes for the next AGM held on 22 October 2021. Resolution 2 was that the minutes of the previous AGM be adopted as a true and accurate account of the proceeds of that meeting.

- 125 The ASOC makes a claim for levies said to be due on 1 February 2021, 14 May 2021 and 18 October 2021. This claim is hard to understand in several respects.
- 126 It is hard to understand how any levy fell due on 14 May 2021, when that was not the date mandated in the resolution. Similarly, it is hard to understand why 18 October 2021 was the due date for a contribution, when the surrounding dates were 1 August 2021 or 1 November 2021.
- 127 It is also hard to understand how any levies due on 1 February 2021 could be the amounts of \$5,888.56 for Lot 2 and \$256.02 for Lot 6. These dollar figures had been charged to owners four times already in 2020. But the claim for these amounts said to be due on 1 February 2021 is a fifth claim for such amounts, which is not consistent with any resolution passed at any AGM.

Notice of the 2020 AGM

- 128 These are anomalies in the pleadings. The evidence of Mr Humphreys in part explains how these came about. The Notice of the AGM to be held on 30 October 2020 and the Agenda were prepared by Stratamark (PX 17). Financial statements were provided with the Agenda (PX 17, pp 17-19, 22-25). Mr Humphreys swore that the notice was given to Navhand by post and by email (SCB 277, par 12). I accept that evidence.
- 129 The Agenda proposed Resolution 15 regarding the 10-year capital works plan, and Resolution 20 regarding the budget, including contributions to the administrative fund of \$20,000 and contributions to the capital works fund of \$10,000, for the period "1/2/20 to 31/1/21". No doubt these obviously incorrect dates sowed the seed for the later confusion about due dates. The 2020 AGM had as one of its main purposes, setting the levies for 2021, not 2020. The 2020 levies had already been set at the 2019 AGM.
- 130 One of the submissions for Navhand was that no notice of the AGM was received by Navhand and thus the AGM, when held, was somehow invalid. For

reasons set out above under the subheading “*Even If the Notices Were Not Received*”, I reject that submission.

The 2020 AGM

- 131 The 2020 AGM was held on 30 October 2020. The minutes are at SCB 409-416. A copy of those minutes was sent to Navhand by post and by letter dated 18 November 2020 and by email (SCB 408 and SCB 277, par 12).
- 132 Resolution 3 passed at the 2020 AGM was the adoption of the key financial statements for the administrative fund and the capital works fund (SCB 409).
- 133 Resolution 20 passed at the 2020 AGM considered the key financial statements, the estimated receipts and payments and the capital works fund plan and determined that:
- (1) Contributions to the administrative fund determined in accordance with ss 79 and 81 of the Act “for the period 1/2/20 to 31/1/21” would be the amount of \$20,000.
 - (2) Contributions to the capital works fund determined in accordance with ss 79 and 81 of the Act “for the period 1/2/20 to 31/1/21” were to be the amount of \$10,000.
 - (3) The contributions were to be payable by instalments in advance, “the first such instalment to be made on or before 1/2/20 and thereafter on or before 1/5/20, 1/8/20 and 1/11/20”.
- 134 It can be seen that the errors as to dates in the notice for the 2020 AGM were simply carried forward to and adopted in Resolution 20 dealt with at the 2020 AGM. The dates are obvious errors, and it was submitted by the plaintiff that these were simply typographical errors.
- 135 For quarterly levies to be due and payable the Owners Corporation must determine the amounts to be levied as a contribution to the administrative fund and the capital works fund to raise the amounts estimated as needing to be credited to those funds – s 81(1). The AGM did this, by resolving that contributions to the administrative fund should be \$20,000 and contributions to the capital works fund should be \$10,000.
- 136 The Owners Corporation also had power to determine whether contributions should be paid by “regular periodic instalments specified in the determination setting the amount of the contribution” – s 81(5). Resolution 20 did say that

contributions were to be paid in advance, by four equal quarterly instalments. However, as pointed out above, the dates make no sense, unless they are regarded as typographical errors. If the year 2020 in Resolution 20 is read as 2021, that makes sense. Such a reading also accords with one of the main purposes of the AGM, which was to determine the amounts to be levied as contributions to the two funds for the year 2021.

- 137 Thereafter the Owners Corporation had to levy contributions required to be paid to either fund by an owner, by giving the owner written notice of the contribution payable – s 83(1).

EGM held on 30 November 2020

- 138 To explain the obvious anomaly in the resolution passed at the 2020 AGM, and in support of the submission that what the Owners Corporation had meant to do was to set levies for 2021 and not 2020, the plaintiff relied upon the minutes of an EGM held on 30 November 2020 (SCB 236-237). This EGM was chaired by Mr Humphreys. The minutes record in relation to Resolution 1 as follows:

“Minutes

THAT the Owners – Strata Plan No. 2227 resolves by ordinary resolution to confirm the minutes of the owners corporation held on 30th of October 2020.

Defeated by Simply Majority.”

- 139 There is no indication in the minutes of the EGM held on 30 November 2020 as to the reason why the meeting declined to confirm the minutes of the 2020 AGM. Surprisingly, there is no recording of what the correct version of the minutes of the 2020 AGM should have been. There is certainly no indication that the disquiet about the accuracy of the minutes of the 2020 AGM related to the resolution regarding quarterly levies for 2021.
- 140 Mr Humphreys was the chairman of the EGM but, while he was called as a witness, he gave no evidence on this crucial matter. Ms Smith was present as the owner of Lot 4. All she said in her affidavit dated 23 April 2023 was:

“I was in attendance at that general meeting on 30 November 2020, and my recollection of the meeting was that the majority of owners present did not believe the minutes of 30 October 2020 was a true and accurate reflection of the events of that meeting.”

(SCB 35, par 10)

- 141 Ms Smith does not say that there was any discussion as to what the minutes should have recorded, and does not give any evidence about any resolution passed at the 2020 AGM different to what was recorded in the minutes of that meeting.
- 142 Ms Scally was present at the EGM as the owner of Lot 1. Ms Mills was present at the meeting as a proxy for Ms Donnelly, the owner of Lot 3. Ms Stanbury was present at the meeting as a proxy for Denis Smith, the owner of Lot 5. None of those people were called to give evidence about any discussion at the EGM or any proposed correction to the minutes of the 2020 AGM.

Absurda Sunt Vitanda (Absurdities Should Be Avoided)

- 143 This principle was known at the time of Aristotle and later, the Roman jurists. In *Grey v Pearson* (1857) HLC 61 at 106; 10 ER 1216 at 1234 Lord Wensleydale said:

“I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and **all written instruments**, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but not farther.” (Emphasis added)

- 144 This qualification of the literal approach is usually called the golden rule. Lord Wensleydale’s statement has been quoted with approval by the High Court in *Australian Boot Trade Employee’s Federation v Whybrow and Co* (1910) 11 CLR 311 at 341-2 and in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 371.
- 145 While the golden rule is usually deployed to deal with an absurdity in legislation, it is noted that Lord Wensleydale said that the rule applies to “all written instruments”. Above I have described the resolution passed at the 2020 AGM setting contributions to the administrative fund and the capital works fund “for the period 1/2/20 to 31/1/21” as an anomaly. It is more than this. It is an absurdity. The 2020 AGM was specifically required to set contributions to both funds for the year 2021. Contributions for the year 2020 had already been set at the 2019 AGM and levy notices were issued by Stratamark for those four quarterly levy instalments.

146 To avoid absurdity in Resolution 20, I propose to read it as a resolution setting contributions to the administrative fund and the capital works fund for the period 1/2/21 to 31/1/22. I propose to read the instalment dates as 1/2/21, 1/5/21, 1/8/21 and 1/11/21.

Levy Notices

147 There is in evidence a levy notice dated 20 January 2021 (SCB 424) addressed to Navhand at the post office box at Crows Nest. This refers, inter alia, to a standard levy due on 1 February 2021 for the period 1 February 2021 to 30 April 2021, split between the administrative and capital funds, and totalling \$2,078.30. This levy notice was issued by Stratamark and relates to Lot 2. This amount accords with the resolution passed at the 2020 AGM. The claim in the ASOC for \$5,888.56 is clearly wrong. The claim should be for \$2,078.30.

148 There is a similar levy notice relating to Lot 6 (SCB 426), which seeks payment of a standard levy due on 1 February 2021 for the period 1 February 2021 to 30 April 2021. The total amount, split between the administrative and capital works funds, is \$90.35. This amount accords with the resolution passed at the 2020 AGM. The claim in the ASOC for \$226.02 is clearly wrong. The claim should be for \$90.35.

149 I draw the inference that these two levy notices are evidence that the 2020 AGM intended to pass a resolution aimed at imposing quarterly levies for 2021, commencing on 1 February 2021. On the face of those levy notices, they make a claim for levies due on 1 February 2021.

150 In relation to the quarterly levies said in the ASOC to be due on 14 May 2021, the plaintiff relies upon one levy notice for Lot 2 and Lot 6 (SCB 242). This notice is dated 23 April 2021 and says that payment is due within 21 days of the invoice date (ie by 14 May 2021).

151 That levy notice (SCB 242) also purported to levy the fourth instalment of the fire upgrade special levy. I repeat what I said above about the giving of this notice. The “proof” of giving that fourth notice to Navhand is a copy of an email dated 23 April 2023 purportedly sent by “Denis Smith” to Ms O’Rourke (SCB 241). Dr Smith did not give evidence about sending the email. Ms O’Rourke

said she did not receive it. There was no evidence that the notice was ever posted, in spite of the postal address on the notice itself (SCB 242). In the light of these deficiencies in the evidence, I am not satisfied that the levy notice at SCB 242 was ever given to Navhand. The plaintiff can only succeed for this levy if it can rely upon s 83(4).

152 The plaintiff also claims for a quarterly levy said to be due on 18 October 2021. It is hard to understand this date, even if the minutes of the 2020 AGM are to be interpreted as containing a typographical error. The last quarterly levy for the year would have been due on 1 November 2021 and not 18 October 2021. There was no explanation for this anomaly.

153 There was no levy notice for 1 November 2021 in evidence and no evidence that any such levy notice was given to Navhand. This claim is for a levy said to be due during the second period of self-administration. The plaintiff can only succeed for this levy if it can rely upon s 83(4).

154 I have found above that the notice for the levies said to be due on 14 May 2021 has not been proved to have been given to Navhand. I have also found that there is no copy of a notice for the levy said to be due on 18 October 2021, and thus there is no proof of any notice being given to Navhand. Section 83(4) of the Act provides as follows:

“Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.”

155 This is exactly what I have found in relation to the contributions said to be due on 1 May 2021 and 18 October 2021. I find that, applying the golden rule, there was a resolution passed at the 2020 AGM that such levies would be due and payable on 1 May 2021 (not 14 May 2021) and 1 November 2021 (not 18 October 2021).

156 In relation to the 2020 quarterly levies, I find that the plaintiff is entitled to succeed for the levies due on 1 February 2021, 1 May 2021 and 1 November 2021. No claim was made in the ASOC for the levies due on 1 August 2021, which I presume were paid by Navhand.

Notice Under Section 86 of the Act

157 Another issue for determination in the proceedings is whether the Owners Corporation has complied with s 86 of the Act. That section deals with the recovery of unpaid contributions, interest and expenses of recovery. Subsections (1) and (2) give an owners corporation the right to go to NCAT to seek recovery of unpaid contributions and interest. Section 86(2A) says:

“(2A) An owners corporation may, without obtaining an order under this section, recover as a debt in a court of competent jurisdiction, a contribution not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.”

158 Section 86(4) provides:

“(4) An owners corporation must not take action to recover an amount under this section unless it has given the person against whom the action is to be taken at least 21 days notice of the action.”

159 Section 86(5) of the Act provides:

“(5) The notice of the action must set out the following--

- (a) the amount of the contribution, interest or expenses sought to be recovered,
- (b) the recovery action proposed,
- (c) any other matter prescribed by the regulations for the purposes of this subsection.”

160 There are matters prescribed by regulation. Clause 19 of the Strata Schemes Management Regulation 2016 (NSW) provides that the following information must be included in a s 86 notice:

- (1) The date the amount was due to be paid.
- (2) The manner in which the payment may be made.
- (3) Whether a payment plan may be entered into.
- (4) Any other action that may be taken to arrange for payment of the amount.

161 The notice under s 86 relied upon by the Owners Corporation is at CB 216. It sets out the amount of the contributions, interest and expenses sought to be recovered in pars 1, 2 and 3 of the notice. It sets out the manner in which the amount may be paid in par 4 of the notice. It sets out the recovery action proposed in par 5 of the notice. It sets out the date for payment in par 5 of the

notice. It deals with whether a payment plan will be accepted in par 6 of the notice.

162 There is an email serving the notice upon the email address of Ms O'Rourke at CB 215. There was no dispute raised about receipt of the notice.

163 I find that the notice served by the solicitor for the Owners Corporation satisfied the requirements of ss 86(4) and s 86(5) of the Act and cl 19 of the Strata Schemes Management Regulation 2016.

164 I find that because a valid s 86 notice has been given, the Owners Corporation is entitled to bring these proceedings for recovery of contributions, interest and expenses.

Resolution 12

165 Resolution 12 made at the AGM held on 20 October 2021 (CB 194) resolved in relation to levy collection that if contributions were not paid by the due date then:

“(a) The Strata Manager may issue 1st (34 days), 2nd (48 days) & 3rd (64 days) each requesting payment within 14 days of the reminder letter.”

166 The resolution continued that if the owner had not made payment of any outstanding amount in accordance with any reminder letter sent by the strata manager, then Bannermans Lawyers were to be engaged and instructed to prepare and issue to any owner in default a notice of proposed action under s 86 of the Act.

167 There was no evidence that a strata manager had ever issued any of the three proposed reminder letters.

168 On 14 February 2022 an EGM of the Owners Corporation was held. The minutes are at CB 214. Resolution 3 was that the Owners Corporation appointed Makinson d'Apice Lawyers “to act on their behalf in the matter of Navhand Pty Ltd's outstanding levies”.

169 Makinson d'Apice are the solicitors for the Owners Corporation, who had acted in these District Court proceedings from the start. They also issued the s 86 notice which was a preliminary to bringing these proceedings.

- 170 The simple argument for Navhand is that Resolution 12 continued in force notwithstanding the resolution passed at the EGM on 14 February 2022, and thus, since no reminder letters had ever been issued, the Owners Corporation could not bring these proceedings to pursue outstanding levies.
- 171 The response to that argument put on behalf of the Owners Corporation was simply that, subject to compliance with the Act, the owners can decide to do whatever they want, and they had done so by resolving to appoint Makinson d'Apice Lawyers to act in relation to recovery of the outstanding levies (see s 103 of the Act). In other words, the resolution passed at the EGM on 14 February 2022 superseded Resolution 12 passed at the AGM on 22 October 2021.
- 172 I accept the submission of the Owners Corporation in this regard. The whole philosophy of the Act is to allow the owners to decide their own fate and take charge of their own management and finances (see s 9 of the Act), subject to obtaining assistance from a strata manager (see s 11 of the Act). The logical consequence of the submission for Navhand is that a resolution once passed could never be altered. This cannot be the case. The Owners Corporation could have called a meeting on giving sufficient notice after Resolution 12 was passed and rescinded it (see Sch 1, cl 14 of the Act concerning decisions at meetings). They impliedly rescinded it by the resolution at the EGM on 14 February 2022.
- 173 Resolution 12 was not passed as a By-Law which binds the Owners Corporation and all of the owners (see s 135 of the Act).
- 174 Resolution 12 provides no bar to the Owners Corporation succeeding in these proceedings.

Levies which the Owners Corporation is Entitled to Recover

- 175 In accordance with the reasons set out above, the Owners Corporation is entitled to recover the four quarterly levies for 2020, the three quarterly levies for 2021, and the first three instalments of the 2020 fire upgrade special levy. The plaintiff is not entitled to recover the fourth instalment of the fire upgrade special levy. The dollar figures for the items upon which the plaintiff has

succeeded are set out below in the first column of the tables dealing with interest.

Interest which the Owners Corporation is Entitled to Recover

176 Section 86(2A) of the Act entitles an owners corporation to recover as a debt in this court not only the contributions not paid, but any interest payable on those unpaid contributions.

177 Section 85(1) of the Act provides that an unpaid contribution “bears until paid simple interest at the annual rate of 10%”. It was not in dispute that this was the relevant rate.

178 The following table sets out the principal amounts due, the dates on which they were due, and the interest to the date of judgment at 10% for Lot 2:

Amount	Start Date	End Date	Daily Rate (rounded to two decimal places)	Interest on Amount
\$5,888.56	1 February 2020 (Quarterly Levy)	15 December 2023	\$1.61	\$2,279.60
\$5,888.56	1 May 2020 (Quarterly Levy)	15 December 2023	\$1.61	\$2,134.40
\$5,888.56	1 August 2020 (Quarterly Levy)	15 December 2023	\$1.61	\$1,985.98

	y Levy)			
\$10,391.57	1 August 2020 (Fire Order Special Levy)	15 December 2023	\$2.85	\$3,504.66
\$5,888.56	1 November 2020 (Quarterly Levy)	15 December 2023	\$1.61	\$1,837.55
\$10,391.57	1 November 2020 (Fire Order Special Levy)	15 December 2023	\$2.85	\$3,242.74
\$2,078.30	1 February 2021 (Quarterly Levy)	15 December 2023	\$0.57	\$596.16
\$10,391.57	1 February 2021 (Fire Order	15 December 2023	\$2.85	\$2,980.81

	Special Levy)			
\$2,078.30	1 May 2021 (Quarterly Levy)	15 December 2023	\$0.57	\$545.48
\$2,078.30	1 November 2021 (Quarterly Levy)	15 December 2023	\$0.57	\$440.71
\$60,963.85				\$19,548.09

179 The following table sets out the principal amounts due, the dates on which they were due, and the interest to the date of judgment at 10% for Lot 6:

Amount	Start Date	End Date	Daily Rate (rounded to two decimal places)	Interest on Amount
\$256.02	1 February 2020 (Quarterly Levy)	15 December 2023	\$0.07	\$99.11
\$256.02	1 May 2020	15 December	\$0.07	\$92.80

	(Quarterly Levy)	r 2023		
\$256.02	1 August 2020 (Quarterly Levy)	15 December 2023	\$0.07	\$86.35
\$451.81	1 August 2020 (Fire Order Special Levy)	15 December 2023	\$0.12	\$152.38
\$256.02	1 November 2020 (Quarterly Levy)	15 December 2023	\$0.07	\$79.89
\$451.81	1 November 2020 (Fire Order Special Levy)	15 December 2023	\$0.12	\$140.99
\$90.35	1 February 2021 (Quarterly Levy)	15 December 2023	\$0.02	\$25.92

\$451.81	1 February 2021 (Fire Order Special Levy)	15 December 2023	\$0.12	\$129.60
\$90.35	1 May 2021 (Quarterly Levy)	15 December 2023	\$0.02	\$23.71
\$90.35	1 November 2021 (Quarterly Levy)	15 December 2023	\$0.02	\$19.16
\$2,650.56				\$849.91

Costs and Expenses

180 The plaintiff sought an order under s 86(2A) of the Act for its “reasonable expenses” incurred in recovering unpaid contributions and interest. Mr Song, the solicitor for the Owners Corporation, filed evidence to establish the legal expenses incurred in running the litigation. Ms O’Rourke, solicitor for the defendant, took issue with the reasonableness of many of the items claimed by Mr Song. One option for the court, since the plaintiff has succeeded, is to simply make a usual costs order. The matter could then go to an assessor unless the costs can be agreed (which in the light of the way this litigation has been conducted seems very unlikely). I expressed reluctance during final submissions to take this course.

181 However, on reflection, I propose to make an order that the defendant pay the plaintiff's costs of the proceedings. In my view the matter should be the subject of negotiation, or assessment, for the following reasons:

- (1) The plaintiff was clearly not ready to run its case in April 2023, and had to seek leave to re-open its case to tender further evidence. The original Court Book comprised 270 pages. The additional evidence, adduced pursuant to leave to re-open, comprised the supplementary Court Book of 509 pages.
- (2) The plaintiff abandoned its claim for the 2018 fire levy and abandoned its claim for quarterly levies between 2016 and 2019, although it had pursued those during the initial three-day hearing. I am not critical of that sensible decision, but it does mean that some of the time at the April 2023 hearing was wasted, by the plaintiff running claims which it later abandoned.
- (3) The plaintiff has failed in relation to the fourth instalment of the fire upgrade special levy.
- (4) The self-administration of this scheme was, with the benefit of hindsight, ill-advised. I have already referred to the haphazard nature of record keeping. The blame for this hearing running much longer than it should have, and for the twists and turns in claims which were either abandoned or which failed, definitely does not rest with the plaintiff's solicitor or counsel. It falls fairly and squarely upon the Owners Corporation itself.
- (5) Any figure which I selected for reasonable costs would necessarily be a "broad brush" figure, in relation to which I claim no particular expertise. A costs assessor has expertise to fix a figure after detailed analysis.
- (6) Given the reasons set out above for my impression that there should be a reduction in the costs figure payable by the defendant, I am reluctant to deny the defendant its right to have the costs properly assessed.

182 That having been said, there are two pre-litigation expenses which have been claimed in par 6 of the ASOC. They are \$400 for work done by The Strata Collective, and \$10,328.37 for work done by the plaintiff's lawyers, both of which were necessary procedural precursors to the commencement of these proceedings. I think it is appropriate that I include both those amounts in the judgment to be awarded in favour of the plaintiff.

183 The invoice for \$400 is at PX 3, p 24. It relates to an EGM convened with respect to these proceedings on 1 March 2022. That is an appropriate expense to include in this judgment.

184 The solicitor's costs of \$10,328.37 are contained in invoices at PX 3, pp 3-9. It is apparent from the invoices that the work done by the solicitor was undertaken in order to satisfy jurisdictional requirements to bring these proceedings. I find that they are recoverable as costs and expenses and will be included as part of the judgment in favour of the plaintiff.

185 As previously recited, post-commencement legal expenses will be covered by an order for costs.

186 I will therefore include in the judgment the following amounts, which total \$10,728.37:

- (1) \$400 relating to the invoice from The Strata Collective.
- (2) \$10,328.37 for legal fees for the period 1 December 2021 to 20 April 2022.

187 In par 6A(c) of the Amended Defence Navhand pleaded that the Owners Corporation's costs did not arise out of the failure of Navhand to pay levies which were due and payable. I fail to understand that submission. That is exactly the issue upon which this court has spent five days.

Conclusion and Orders

188 The plaintiff is entitled to judgment against the defendant comprising the following amounts:

ITEM	AMOUNT
Unpaid levies in relation to Lot 2	\$ 60,963.85
Interest on unpaid levies in relation to Lot 2	\$ 19,548.09
Unpaid levies in relation to Lot 6	\$ 2,650.56
Interest on unpaid levies in relation to Lot 6	\$ 849.91
Costs and expenses	\$

	10,728.37
TOTAL	\$94,740.78

189 The orders of the court are:

- (1) Judgment for the plaintiff against the defendant for \$94,740.78.
- (2) Order the defendant to pay the plaintiff's costs.
- (3) The exhibits are returned.

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