Civil and Administrative Tribunal

New South Wales

Case Name:	Butt v The Owners - Strata Plan No 71715
Medium Neutral Citation:	[2023] NSWCATCD 138
Hearing Date(s):	15 August 2023
Date of Orders:	25 October 2023
Decision Date:	25 October 2023
Jurisdiction:	Consumer and Commercial Division
Before:	R C Titterton OAM, Senior Member
Decision:	1. The application is dismissed. 2. Costs are reserved. 3. If the respondents seek costs, they should file and serve submissions on or before 08 November 2023. 4. The applicant may respond on or before 22 November 2023. 5. The respondents may reply on or before 29 November 2023. 6. Submissions are to be limited to 5 pages and must identify the relevant costs rule. 7. The Tribunal proposes to determine the issue of costs on the papers and without a hearing. If either party opposes that course they should address that issue in their submissions.
Catchwords:	STRATA SCHEMES - STRATA TITLES – meaning and scope of s 232 of the Strata Schemes Management Act 2015 (NSW)

Legislation Cited:	Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW), ss 9(1), 9(2)(b), 141, 146, 150, 242, 232, 237 Protection of the Environment Operations Act 1997 (NSW), s 268
Cases Cited:	The Owners – Strata Plan No 70871 v Turek [2022] NSWCATAP 83 Vickery v The Owners- Strata Plan No 80412 [2020] NSWCA 284 Walsh v The Owners- Strata Plan No 10349 [2017] NSWCATAP 230
Category:	Principal judgment
Parties:	Paul Thomas Butt, applicant The Owners - Strata Plan No 71715, First Respondent John O'Donnell, Second Respondent
Representation:	Counsel: Applicant: M Robinson SC and J Green First Respondent: D Weinberger Solicitors: Applicant: JPR Law First Respondent: Swaab Second Respondent: SpiersRyan
File Number(s):	SC 23/03267
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 By a Second Further Amended Annexure A to its application filed 15 August 2023, the applicant seeks the following orders:

(1) Order (1), being an order pursuant to ss 9(1), 9(2)(b) and s 232(1)(a) and (e) of the *Strata Schemes Management Act 2015* (NSW) (**SSMA**) that the first respondent (the **Owners Corporation**) take such steps and measures as are open to it, at its expense, and in a good and workmanlike manner, to abate, or cause to be abated, the noise nuisance found to emanate from the building's transformer room in the

recommended in the report of Acoustic Logic Pty Ltd (**Acoustic Logic**) dated 27 April 2021 (the **2021 Acoustic Logic Report**), by "isolate[ing] the transformer from the building by 25mm deflection springs and equivalent" or otherwise to take steps to abate the noise nuisance emanating from the transformer room as found by Acoustic Logic in the 2021 Acoustic Logic Report;

(2) Order (4), being an order pursuant to ss 9(1), 9(2)(b) and s 232(1)(a) and (e) of the SSMA that the Owners Corporation at its expense, obtain a further report from Tomas Bohdan of Acoustic Logic on the extent and nature and source of noise vibration complained of by the owner/occupier of lot 26, should the owner/occupier of the affected lot still complain of the said noise/vibration impacting the quiet enjoyment of the affected lot after the applicant's implementation of the remedial works specified in the Acoustic Logic Report of 3 May 2023 (the **Second Acoustic Logic Report**). The further report to be conducted on the basis of simultaneous noise data collection from the building transformer room and units 307 and 207 over a period of time. as determined by the Tribunal, at times between 7pm and 10pm, or such other hours as determined by the Tribunal, and so as to determine and report on the contribution to of the noise affecting the affected lot by the noise emanating from the transformer room and the noise emanating from the applicant's vibrating chair following the remedial works and the 3 May remedial works, if any, and recommend any further works needed to address ongoing noise impacting the affected lot;

(3) Order (4A), being findings pursuant to s 232(1)(a) of the SSMA that the applicant has not used his vibrating bed and/or chair so as to create a nuisance and/or to unreasonably interfere with the enjoyment of the affected Unit 307;

(4) Order (5), in the event that the applicant is found to be using his vibrating bed and or chair to cause a nuisance to, or unreasonably interfere with, the enjoyment of the affected lot within the meaning of the building's by law-4, an order that by law-4 be revoked in accordance with s 150(1) of the SSMA as being harsh, unconscionable and oppressive to the extent that it prevents the applicant using the medically prescribed and Therapeutic Goods Administration (**TGA**) approved vibrating chair in his home;

(5) Order (5A): findings pursuant to ss 9(1), ((2)(b) and 232 (1)(a) and (e) of the SSMA that the Owners Corporation has failed to exercise its functions under s 9 of the SSMA competently and in the interests of all lot owners in the management and administration of the lot 26 noise complaint and the conduct of these proceedings;

(6) Order (6), being an order pursuant to s 237 of the SSMA that a strata managing agent be appointed to deal with the matters referred to in

2 To these can be added a further order. In paragraph 3.2 of the applicant's submissions dated 28 July 2023, the applicant seeks an order under s 141 of the SSMA, that the respondents be prohibited from making further complaints

to and/or against the applicant in relation to the matters comprising the subject matter of these proceedings, at all, or alternatively, without the leave of the Tribunal.

3 However, in submissions in reply dated 15 August 2023, the applicant indicated that it was no longer pressing orders (5A) and (6).

4 For the following reasons, I decline to make any of the orders sought and the application is dismissed.

5 Costs are reserved.

Evidence

Applicant's evidence

6 The applicant relied on the following evidence:

(1) his affidavit sworn 22 March 2023;

(2) his statement affirmed 21 July 2023;

(3) the statement of Ms Heather Hill-Tanke dated 22 March 2023;

(4) the expert report of Mr Stephen Gauld of Day Design Pty Ltd dated 30 June 2023;

(5) the expert report of Mr Tomas Bohdan of Acoustic Logic Pty Ltd dated 27 April 2021;

(6) the joint expert report of Mr Bohdan and Mr Gauld dated 11 August 2023;

(7) Australian Standard AS/NSZ 2107:2016, Australian Acoustic Standard.

7 The applicant was required for cross-examination by Ms Meade, solicitor, who appeared for Mr O'Donnell.

8 Ms Hill-Tanke is a conveyancer employed by the applicant's solicitors, JPR Law Pty Ltd. She was not required for cross-examination.

9 Mr Gauld and Mr Bohdan participated in a brief "hot tub".

10 Where relevant, I will refer to any oral evidence in my findings.

The Owners Corporation's evidence

11 The Owners Corporation applicant relied on the following evidence:

(1) the witness statement of Ms Kate McLachlan dated 10 May 2023;

(2) the witness statement of Ms Kate McLachlan dated 14 July 2023;

(3) the expert report of Mr Tomas Bohdan of Acoustic Logic dated 3 May 2023.

12 Ms McLachlan is the strata manager for the Owners Corporation. Neither the applicant nor Mr O'Donnell required Ms McLachlan for cross-examination.

13 As noted, Mr Bohdan participated in the "hot tub".

Mr O'Donnell's evidence.

14 Mr O'Donnell is the owner of Unit 207. He relied on the following evidence:

(1) the affidavit of Nicholas David Robertson affirmed 9 May 2023;

(2) the witness statement of Rae Walters dated 10 May 2023;

(3) a bundle of documents referred numbered 1 to 11 contained in the bundle of documents filed by Mr O'Donnell on 11 August 2023;

15 Mr Robertson is a previous tenant of Unit 207. Ms Waters is Mr O'Donnell's property manager.

16 Neither the applicant nor the Owners Corporation required Mr Robertson or Ms Walters for cross-examination.

Factual findings

The applicant

17 The applicant is a 78 year old retiree.

18 He suffers from a number of medical conditions: sever insulin dependent diabetes type 2, high blood pressure and severe tinnitus. He was diagnosed with diabetes in about 2003.

19 The applicant is an NDIS client. He was accepted as an NDIS client upon the commencement of the scheme.

20 The applicant takes insulin injections every morning and every night, and several other daily medications for my diabetes.

Vibrating chair and bed

21 The applicant's doctor recommended that the applicant use a vibrating bed and chair to improve his blood circulation.

22 The applicant purchased a vibrating bed on 4 October 2019, and it was delivered to Unit 307 on 11 November 2019. The manufacturer installed the bed in the applicant's bedroom of Unit 307 where it has remained ever since.

23 The applicant purchased a vibrating chair on 25 February 2020, and it was delivered on 3 April 2020. The chair has been installed in the applicant's lounge room.

24 Both the bed and the chair are approved by the TGA.

25 The applicant says, and the Tribunal accepts, that he always used the bed and the chair as a regular routine, from the date that each device was delivered, as follows:

(1) the bed between 7pm to 8 am;

(2) the chair about 3 times per day, for about 20 minutes each time between the hours of about 10am to 7pm;

(3) the applicant does not use the vibration modes on the bed or the chair after 7pm;

(4) when the applicant uses the bed, it is set on various vibration modes;

(5) when the applicant uses chair, it is generally set on vibration mode "No 1".

26 The applicant says, and the Tribunal accepts, after using the bed and chair he feels refreshed and relaxed.

The subject premises

27 The applicant is the owner of Unit 307 in Strata Plan 71715.

28 Immediately below his unit is Unit 207 owned by Mr O'Donnell.

29 Strata Plan 71715 was first registered on 5 February 2004 and is comprised of 164 lots. The units are situated in a building in Macleay Street, Potts Point comprising a mix of commercial and residential properties in seven levels over two basement levels (**Building**).

30 A copy of the strata scheme's By-Laws and Strata Management Plan were in evidence. Relevantly, by-law 4 provides that an owner or occupier of a lot, or any invitee of an owner or occupier of a lot, must not create any noise on a lot or the common property likely to interfere with the peaceful enjoyment of the

owner or occupier of another lot or of any person lawfully using common property.

Noise complaints

2017 to 2020

31 From 9 November 2017 to 14 September 2020, Unit 207 was occupied by a tenant, Mr David Meagher.

32 Around November 2019, Mr Meagher advised Mr O'Donnell's property agent, of an ongoing vibrating noise into Unit 207 during the morning and night. At this time, the Owners Corporation's building manager was advised of the vibrating noise and began undertaking investigations to establish the source of the noise. Mr Meagher again reported the ongoing vibrating noise into Unit 207 on 11 April 2020 and 6 May 2020.

33 On 7 May 2020, the Building Manager of the Building wrote to the NSW Environment Protection Authority (**EPA**) relevantly as follows:

> Please see the report below relating to noises experienced by a number of apartments at [XXX] Macleay Street, Potts Point. These include Apartments 207, 208, 403 and others which are mainly situated on the lower north east corner of the building above the Ausgrid substation.
>
> The noises commenced back in November 2019 and numerous tests have been conducted at the site to ascertain whether the noises were building related. These tests have included the shutting down of all building mechanical plant for both residential and commercial tenancies, the shutting down of power into the … Centre and the nearby retail tenancy and, arranging Ausgrid attendance onsite to open up their substation but no audible noise could be detected from their plant room. Acoustic testing carried out yesterday (Wed 6/5) revealed that even though noise could not be detected from the Ausgrid plant room, vibration definitely was present from the external perimeter of it. This easily could manifest itself into noise as it travels up through the building and into the apartments above.
>
> Sadly, this matter still remains unresolved and our residents are looking for an outcome to this ongoing disturbance of their peaceful lives. As we have all but eliminated building plant noise, we now look to the EPA to provide assistance in bringing the relevant parties together to resolve this issue for the benefit of all.

34 In early May 2020, the Building Manager obtained a sound frequency testing report from a mechanical contracting firm. That report stated that the noise to Unit 207 was still present with all HVAC plant and equipment switched off.

35 On 19 May 2020, Ausgrid emailed the EPA stating that it had inspected the transformer on 30 December 2019, 3 January 2020 and 15 May 2020 and on all of those occasions the substation was found to be operating normally. Ausgrid also stated that the noise source the subject of the complaint had a frequency of 49Hz to 60Hz whereas the transformer noise is typically audible at 100Hz and so the frequency of the two noises did not match.

36 On 29 May 2020, the Building Manager emailed the residents of the Building confirming a City of Sydney inspection had been arranged. That inspection took place on 17 June 2020.

37 On 14 July 2020, the EPA emailed the City of Sydney stating that it had undertaken a number of investigations into low frequency noise in the Building. The EPA detected no noise, tonality or vibration occurring from the Ausgrid substation in the strata scheme. The EPA stated that noise results indicate that the noise was likely coming from a piece of mechanical plant within the Building such as a refrigeration unit.

38 On 15 July 2020, the Building Manager emailed the City of Sydney stating that a test had been carried out that day when both refrigeration compressors were turned off and there was no change noticed in Unit 207.

39 On 14 September 2017, Mr Meagher vacated Unit 207 and terminated the residential tenancy agreement as a result of the continuing noise disturbance and its impact on his mental and physical health.

40 On 19 November 2020, Mr O'Donnell entered into a residential tenancy agreement with Mr Zachary Paulic and Ms Katherine Velez. However, that residential tenancy agreement too was terminated and the tenants vacated Unit 207 on 10 January 2021 due to the ongoing noise disturbance.

41 From 10 January 2021 to 23 September 2021, Unit 207 was vacant due to Mr O'Donnell's inability to retain a tenant due to the ongoing noise disturbance. Mr O'Donnell incurred significant financial loss and stress during the period Unit 207 remained vacant and subsequently suffered additional losses when leasing the unit at reduced rent due to the ongoing noise disturbance.

2021

42 On 27 April 2021, Acoustic Logic prepared the 2021 Acoustic Logic Report. Acoustic Logic's investigation found a correlation between the substation floor vibration and the Unit 207 vibration over time. Acoustic Logic recommended that "the transformer to be vibration isolated by springs or equal".

43 Also in April 2021, the Building Manager engaged an electrical testing company to carry out electrical testing.

44 On 23 September 2021, Mr O'Donnell entered into a residential tenancy agreement with Mr James Nixon. The rent payable was significantly lower than market value due to the ongoing noise disturbance.

2022

45 On 24 March 2022, the applicant found a letter placed under his door. The letter was dated 23 March 2022 and was from the Owners Corporation's strata manager and addressed to the applicant. Relevantly, the letter stated:

> We write as the strata managing agent on behalf of the owner's corporation of the above-mentioned strata scheme regarding complaints of excessive noise and disturbance emanating from your vibrating bed and chair, significantly disturbing surrounding residents, which is in direct breach of the strata scheme's by-laws.
>
> We write … regarding complaints of excessive noise and disturbance emanating from your vibrating bed and chair, significantly disturbing surrounding residents, which is in direct breach of the strata scheme's by-laws.
>
> It has been reported that you have a vibrating bed and chair causing noise to reverberate into the surrounding lots. We are also informed by building management that you committed to cease using the bed and chair until the noise reverberation issue is resolved. However, we have received further complaints that the vibration function on the bed and chair has continued despite your commitment to stop using it, and such use is causing distress and annoyance to other residents. Therefore we ask that you immediately refrain from using the vibrating function at all times of day until the noise reverberation is resolved adequately.

46 The letter then set out the text of by-law 4(2) and s 153 of the SSMA.

47 On 24 June 2022, the applicant received a text message from "Ana" (the Building's Concierge) which relevantly stated:

> Could you please call me back asap regarding access to your apartment to inspect building issues.

48 The applicant did not respond to this message.

49 On 24 June 2022, as a result of continuing investigations into the source of the ongoing noise disturbance, the building manager informed Bresic Whitney by email that their investigations had found that the cause of the vibrating noise was a vibrating bed located in Unit 307, the unit directly above Unit 207.

50 On 28 July 2022, Mr Nixon terminated the residential tenancy agreement and vacated Unit 207 as the vibrating noise continued into the unit and he could no longer endure it.

51 On 5 August 2022, the applicant received a text message from someone he does not identify which relevantly states:

> We're just looking to test the sound today before the building manager leaves for the day, if possible.

52 Approximately two weeks later, the applicant and the building manager had a conversation in which words to the following effect were said:

> Lester: There is a noise downstairs, and we want to see if it is coming from you. I will test up here with my phone and there will be someone in the apartment 207 below testing with their phone. We will record the noise levels.

53 The applicant says that "Lester" (the Building's Building Manager) then pointed to the applicant's bed and chair, asking what they were. I pause to note that it would seem unlikely that Lester pointed to the bed and chair at the same time, if that is what the applicant means, as they were in different rooms, namely the bedroom and the loungeroom. Nevertheless, as the applicant was not challenged about this evidence (although the Owners Corporation objected to the Tribunal receiving the hearsay evidence of the conversation, which I rejected, the Tribunal not being bound by the rules of evidence), I accept this evidence.

54 The applicant told Lester that the two items were his bed and chair which he was using on doctor's advice.

55 The applicant then operated both the bed and the chair at Lester's request, and recorded the sound each made.

56 As Lester left the applicant's apartment further words to the following effect were said:

> Lester: Your bed and chair are causing a noise downstairs. The chair is not too bad. Its the bed.
>
> applicant: What does this mean for me?
>
> Lester: Don't worry, keep using them, we will get some matting to put underneath to stop the noise.

57 Approximately one week later, Lester returned to the applicant's apartment and placed matts under the bed. Lester then asked the applicant to turn the bed on, which the applicant did. Lester recorded the sound of the bed with his phone, and also talked to someone else on the phone. Lester then said to the applicant:

> That seems to have fixed it.

58 On 19 August 2022, the Mr O'Donnell entered into a residential tenancy agreement with Mr Nicholas Robertson and Mr William Briggs on the assumption that now that the source of the noise had been identified, it would be addressed by the owner of Unit 307.

59 Mr Robertson wrote to Bresic Whitney on 22 August 2022 regarding vibrating noise experienced in Unit 207 between 630pm and 1000pm on 19, 20 and 21 August 2022.

60 On 23 August 2022, Mr Robertson wrote to the strata manager of the strata scheme, Ms Kate MacLachlan, advising her of the vibrating noise into Unit 207 from the applicant's vibrating equipment.

61 On 23 August 2022, the Strata Manager wrote to Mr Butt stating:

> It has been reported that you have a vibrating bed and chair causing noise to reverberate into the surrounding lots. We are also informed by building management that you committed to cease using the bed and chair until the noise reverberation issue is resolved. However, we have received further complaints that the vibration function on the bed and chair has continued despite your commitment to stop using it, and such use is causing distress and annoyance to other residents. Therefore we ask that you immediately refrain from using the vibrating function at all times of day until the noise reverberation is resolved adequately.
>
> We draw your attention to By-law 4(2) and Section 153 of the Strata Act which state:
>
> In the event you fail to comply the strata scheme may refer the matter to the NSW Civil and Administrative Tribunal (NCAT) for Orders and a Penalty Application where fines of up to $1 ,00 may be imposed.

62 Sometime later, the applicant found a further letter dated 5 September 2022 placed under his door from the then occupants of Unit 207. The writers alleged that the use of the applicant's bed and chair was causing offensive noise (as defined in the *Protection of the Environment Operations Act 1997* (NSW) (**PEO Act**). The writers asked the applicant to cease all use of his bed and chair immediately, and that failure to do would lead to them seeking a noise abatement order from the Local Court under s 268 of the PEO Act.

63 Sometime later again, the applicant found a further letter, dated 16 September 2023, from the solicitors for the owner of Unit 207 making similar allegations.

64 The applicant was concerned about these allegations believing that the respective authors "meant business", and that he would be forced to choose between sacrificing his health (by not using the bed and chair) and becoming involved in three sets of proceedings with unknown costs and outcome.

65 On 22 September 2022, Mr Robertson vacated Unit 207 and terminated the residential tenancy agreement on 23 September 2022 due to the ongoing notice vibration.

66 In November 2022, the applicant contacted the manufacturer of the bed and chair. The manufacturer, which recommended installing sound insulation between where the bed/chair feet/wheels touched the floor and the devices themselves. This took place in mid-November 2022.

67 On 9 December 2022, the parties participated in mediation, but this did not resolve the noise complaint.

2023

68 On 10 January 2023, the applicant's solicitors wrote to the Owners Corporation and Unit 207 proposing that the parties approach UNISEARCH to appoint an independent expert to investigate and report on the Unit 207 noise complaint. By this time the applicant had formed the view that the parties had become "emotional" about the issue and may have lost objectivity.

69 On 23 January 2023, the applicant commenced these proceedings. He states that:

> Rather than risk of being involved in the three sets of proceedings by the three separate parties, I commenced these proceedings asking the Tribunal to make orders to resolve the complaint put against me and the strata dispute, both of which I have been drawn into by the threat letters, concerning me using my chair and my bed. I wanted the Tribunal to resolve the complaint/dispute by ordering the OC to procure an expert from UNUSEARCH to investigate and report on the Unit 207 noise complaint to solve the complaint put against me and the strata dispute created by the allegations contained in the threat letters and to appoint a compulsory managing agent to resolve the [unit] 207 noise complaint given what I regarded as dysfunction in the management and operation of the OC in relation to the [unit] 207 noise complaint.

70 On or about 27 January 2023, the applicant received from the Owners Corporation a copy of the 2021 Acoustic Logic Report.

71 At the time he commenced these proceedings, the applicant was not aware of the 2021 Acoustic Logic Report.

72 The 2021 Acoustic Logic Report concludes:

> Our investigation found a correlation between the substation floor vibration and the Unit 207 floor vibration over time.
>
> It is suspected that given the thick concrete foundation slab withy no resilient mounting that vibration energy is being supplied by the transformer to the … Hotel's building structure.
>
> It is recommended that the transformer to be vibration isolated by springs or equal.

73 The applicant assumed that the transformer room was part of the strata scheme's common property.

74 However, a letter from the Owners Corporation's solicitors to the applicant's solicitors dated 17 April 2023 relevantly states:

> … the transformer and transformer room are not common property.
>
> The transformer is located in substation 1529 which is located on the ground floor of the building, close to Baroda Street, Potts Point, on the eastern side.
>
> You will be aware from the Strata Plan that the ground floor and the first level of the building in this location are not part of Strata Plan 71715 but are Lot 2 of DP 1062048.
>
> Lot 2 of DP 1062048 is owned by the Council of the City of Sydney.
>
> Furthermore, the transformer room within Lot 2 has been leased to Ausgrid The transformer room is not our client's common property. And our client has no duty to maintain and repair that transformer room or the plant situated within it and so our client cannot breach that duty.
>
> Your client's case also appears to be that an asserted breach of section 106 meant that there were grounds to make an order for compulsory management under section 237. Since there has been no breach of section 106, there is no

> ground for a section 237 application. In any event, any allegation that the scheme is not functioning satisfactorily on any ground is outright rejected.

75 On the basis of this evidence, I find that the transformer room is owned by the Council of the City of Sydney and is presently leased to Ausgrid.

76 Acoustic Logic prepared a further report on 3 May 2023 (the **2023 Acoustic Logic Report**), following visits to the applicant's apartment.

77 In relation to the bed, Acoustic Logic concluded:

> The measured noise levels before and after the activation of the bed source are shown in Appendix 1. The LA90 noise level is chosen for the assessment, and this is permissible as the bed vibration is assumed to be constant. The LAeq "Energy Equivalent® noise level was affected by the opening and closing of the door to the room.
>
> The measured noise levels were :
>
> • 27dB(A) is the background noise level
>
> • 28dB(A) is the bed and background noise level.
>
> A change in noise level of 1B is not perceptible hence it appeared inaudible on the day. The result indicates the noise level from the bed alone is below 27dB(A). Normally a difference of 3dB is required to accurately provide a noise level. Due to inaudibility and the relatively low background at that time it was concluded this source was not the issue.
>
> (Emphasis added)

78 In relation to the chair, Acoustic Logic concluded:

> … The noise in the room from the chair was audible and identifiable. …
>
> In terms of vibration the source floor vibration level is 3.75 times greater than of the bed floor when operating. It is suspected that the chair due to its daytime use would generate greater vibration levels by design. We also suspect the location near the centre line of the apartment floor is making it easier for it to vibrate the floor. …
>
> 11 ASSESSMENT
>
> Acoustic Logic have determined that the noise from the vibrating chair is offensive based on the EPA's Noise Guide for Local Government checklist, …
>
> (emphasis added)

79 In June 2023, the applicant sought further assistance from the manufacturer of the bed and chair. The manufacturer attended the applicant's unit in early June 2023 and installed insulation devices.

80 In early June, the applicant also moved the chair to a different location as recommended by Acoustic Logic in the 2023 Acoustic Logic Report.

81 Since moving the chair and reading the applicant has not changed his usage pattern and routine in respect of the bed and the chair.

82 On 15 June 2023, the applicant's solicitor notified the respondents' solicitors by email that the applicant had carried out the updated remedial works and asked if Unit 207 still maintained a noise complaint.

Other expert evidence

83 Following receipt of the Second Acoustic Logic Report, the applicant retained Mr Stephen Gauld of Day Design Pty Ltd to peer review the two Acoustic Logic reports. In a report dated 30 June 2023, Mr Gauld concluded:

> The Model By-law provided in the AL2021 report does not apply to Strata Plan 71715. By-Law 4 - Obstruction/Nuisance states "An Occupier must not cause a nuisance or act in such a way that might unreasonable interfere with the peaceful enjoyment a/a person lawfully on another Lot or using the Comma Property".
>
> There is no objective noise or vibration level that determines whether or not an Owner is causing a nuisance or unreasonable interfere with the peaceful enjoyment of another person.
>
> Overall, the [2023 Acoustic Logic Report] is not conclusive, does not provide convincing measurements, analysis or logical arguments to arrive at the statement in Section 11 that the noise level is offensive.
>
> Given that the [2023 Acoustic Logic Report] finds the noise and vibration levels from the bed acceptable, and the vibration from the chair is acceptable, the only issue remaining is the noise level generated by the chair in Unit 207.
>
> The limitation on the chair noise level is that there is no objective noise level criterion that is considered acceptable and the background noise level in Unit 207 was too high during the measurements. This results in the chair noise levels not being able to be accurately determined, but it is known to be less than 29 dBA.
>
> Nevertheless, the recommendations provided in Section 13 of the AL2023 report have been implemented, which is likely to reduce any noise impact generated by the chair to less than it was initially.
>
> Based on the measurements of the vibrating chair noise level taken by Acoustic Logic, of less than 29 dBA, which on face value is not likely to create a nuisance or interfere with the peaceful enjoyment, with the owners of Unit 207 and the implementation of the recommended noise controls, it is unlikely that the noise level generated by the operation of the vibrating chair (and bed) in Unit 307 causes a noise level that is likely to interfere with the peaceful enjoyment of occupiers of Unit 207.
>
> (emphasis added)

84 Following this report, Mr Bodhan of Acoustic Logic and Mr Gauld prepared a joint report dated 11 August 2023. They agreed on the following matters:

1 The level of noise and vibration generated by the vibrating bed and measured, then presented in AL2023, is acceptable when assessed within Unit 207.

2 The level of vibration generated by the vibrating chair and measured, then presented in AL2023, is acceptable when assessed within Unit 207 for the settings Mr Butt implemented.

3 Both the bed and chair were fitted with vibration isolators that appeared to Mr Bohdan to be overloaded (not providing the full level of vibration isolation expected) between the floor and the feet prior to the measurements carried out by Mr Bohdan.

4 To our knowledge, there is no Bylaw, Regulation or other requirement that prescribes a noise level from a device such as a vibrating chair located within a residential Lot.

5 There is an objective noise level (either absolute noise level or relative noise level) that could be determined that, if the noise level generated by the chair is at or below that objective noise level, the noise impact of the chair would be considered acceptable.

6 If the "offensive noise checklist" discussed in both AL2023 and DD2023 were carried out, it would also satisfy a similar test to determine whether "interference of peaceful enjoyment" occurs, which is required in SP71715 By-law 6.

7 The noise levels of the vibrating chair measured by Mr Bohdan are found in Table 3 of AL2023. Mr Bohdan advised that there were difficulties encountered during testing with extraneous noise from rain, a garbage truck and the real estate agent minding the flat. We agree that a test carried out at night time would have provided a more accurate determination of the chair noise level.

8 We agree that Mr Bohdan did not accurately determine the noise level from the chair due to influence of ambient noises during the measurement.

9 An adjustment penalty of 5 dB should be added to the measured chair noise level if the frequency analysis of the noise requires a penalty to be added.

10 The shims placed above the gel pads as shown in Figures Al and A2 of DD2023, were not in place during the noise level measurements taken by Mr Bohdan and presented in AL2023. It is likely that the noise level has reduced as

85 However, the experts had three areas of disagreement, namely:

- the level of noise generated by the vibrating chair and measured, and presented in 2023 Acoustic Logic Report;
- whether an adjustment penalty should be applied to the noise level from the chair; and
- the noise criteria with which to assess the noise level from the chair.

Submissions

The applicant's submissions

86 The Tribunal had the benefit of lengthy written submissions prepared by the applicant's solicitors dated 28 July 2023. In summary, those submissions state:

(1) the Owners Corporation has improperly exercised the functions conferred on it under s 146 of the SSMA by:

(a) giving notice to the applicant of an alleged contravention of by-laws, in circumstances where the Owners Corporation was already in possession of the first Acoustic report and concealed from the applicant;

(b) giving notice to the applicant whilst withholding from the applicant the fact that the transformer room was not part of the common property of the strata plan until 17 April 2023;

(c) by giving notice to the applicant whilst withholding from the applicant until 10 May 2023, that there had been previous noise complaints made by unit 208 and 403, and that the noise complaints in relation to Unit 307 were first made in November 2019 (approximately five months prior to the delivery of the Chair to the applicant).

(d) by giving notice to the applicant whilst withholding from the applicant its interactions with Ausgrid and the recommendations made by Ausgrid;

(e) by giving notice to the applicant prior to properly investigating the issue and without following the recommendations made by Ausgrid.

(2) the irregularity of the Owners Corporation's officers' exercise of functions under the SSMA in issuing a notice to the applicant and maintaining allegations against the applicant despite knowledge of previous noise complaints in Unit 207, and despite being in possession of the First Acoustic Logic Report, constitutes a failure to exercise due care and diligence;

(3) the Tribunal should appoint a strata managing agent pursuant to s 237 of the SSMA;

(4) the Owners Corporation's failure to exercise due care and diligence in the management of the Strata Plan is evidenced by the Owners Corporation:

(a) investigating the noise complaints made in relation to the alleged noise issues in Unit 207 noise and obtaining an expert report but taking no active steps to investigate the issue further or resolve the issue.

(b) making allegations against the applicant contrary to findings in the expert reports.

(c) withholding the 2021 Acoustic Logic Report until after the commencement of the proceedings.

(d) withholding the fact that the transformer room is not part of the common property until after the commencement of the proceedings.

(e) withholding the fact that noise complaints commenced prior to the delivery of the Chair until after the commencement of the proceedings.

(f) withholding the fact that other noise complaints had been made by other units until after the commencement of the proceedings; and

(g) engaging in litigious conduct without a proper basis by way of making unsubstantiated allegations against the applicant, issuing unjustified notices to the applicant, and threatening the applicant with the institution of legal proceedings, all of which will incur costs and are not in the best interests of the Strata Plan;

(5) a broad scope of functions is conferred upon the Tribunal, and there is no express statutory provision identifying the kind of decisions and orders which can be made. Further, s 232 of the SSMA confers functions on the Tribunal and is expressed in broad terms: *Vickery v The Owners- Strata Plan No 80412* [2020] NSWCA 284;

(6) the amendments made to the SSMA from its repealed predecessor, the *Strata Schemes Management Act 1996* (NSW), together with the Second Reading Speeches in respect of the SSMA, demonstrate the purposive policy considerations to make the SSMA a much broader statute, with provisions that provided the Tribunal with broader scope and jurisdiction to determine matters such as the application. The expansive nature of the SSMA in contrast to SSMA is referred to in the matters of *Vickery* at [2], [11]-[19], [47]-[58], [73], [78], [93]-[96], [124]-[140] and [162]-[173] and *Walsh v The Owners- Strata Plan No 10349* [2017] NSWCATAP 230 at [71].

87 In addition, pars [95] to [100] of the applicant's affidavit of 27 June 2023 are actually submissions. In summary, those submissions state:

(1) the applicant does not believe that the allegations contained in the "threat letters" should have been made against him because at the time those allegations were made the parties making the allegations had the 2021 Acoustic Logic Report which attributed the Unit 207 noise to the transformer room;

(2) the Owners Corporation should have worked with the applicant to solve the Unit 207 noise complaint as advised by the expert;

(3) if the transformer room remedial works have not been done, then one does not know what effect those works would have had on the Unit 207 noise complaint;

(4) instead, the respondents have threatened, hounded and harassed the applicant with the allegations and threat letters without any justification for having done so and in this process have:

(a) made the allegations and issued the threat letters despite and in the face of the first expert report which they withheld from the applicant;

(b) not (so it appears) implemented the recommendations of the expert report and instead appear to have acted on the informal investigations of Lester, the Building Manager, who as far as the applicant is aware was not qualified to undertake those investigations;

(c) failed (so it appears) to implement any available negotiation/dispute resolution process under the strata schemes Strata Management Statement with the Council of the City of Sydney and Ausgrid in relation to any difficulty with implementing the transformer room remedial works;

(d) by withholding the 2021 Acoustic Logic Report, failed to mediate in good faith and wasted the mediation and ensuing negotiation process leading to these proceedings;

(e) withheld crucial information from the applicant until 10 May 2023, including the date of commencement of the Unit 207 noise complaints being November 2019, before delivery of the chair, and that noise also affected units 208 and 403;

(f) having withheld the 2021 Acoustic Logic Report until after the commencement of these proceedings and having been given notice prior to 15 February 2023 that the applicant would amend his application to seek an order that transformer room remedial works be done under s106 of the SSMA, said nothing about the transformer room not being common property at the 15 February 2023 directions hearing, or at any other time prior to 17 April 2023, despite and in the face of numerous unanswered enquires from the applicant's solicitor seeking to identify anything standing in the way of the transformer room remedial works;

(g) failed to cooperate with the 2023 Acoustic Logic Report so that testing for that report included the transformer room and units 208 and 403;

(h) maintained the allegations against the applicant even though the updated expert report excluded his bed and vibration as a cause of the Unit 207 noise complaint

The Owners Corporation's submissions

88 In short summary, the Owners Corporation submitted as follows.

89 First, order (1) should not be granted because:

(1) the Tribunal does not have the power to grant such relief under s 232 of the SSMA, as the order is not an order to settle a complaint or dispute about the management of the strata scheme or an exercise, or failure to exercise, a function imposed by the SSMA;

(2) the transformer is not situated on the common property of the Building. It is situated on land that is owned by the Council of the City of Sydney and that is leased to Ausgrid. The Owners Corporation has no power to isolate the transformer from the building by 25mm deflection springs and equivalent' or otherwise take steps to abate the noise nuisance emanating from the transformer room;

(3) in any case, an order that the Owners Corporation "take such steps and measures as are open to it" is not "an order to settle a complaint or dispute" within the meaning of s 232 of the SSMA;

(4) the order sought lacks any certainty and is meaningless.

90 Secondly, order (4) should not be granted because:

(1) again, it is not an order to settle a complaint or dispute about the management of the strata scheme or an exercise, or failure to exercise, a function imposed by the SSMA;

(2) it is a vague and confusing order to settle a hypothetical "compliant or dispute" that will arise "after the applicant's implementation of the remedial works specified in the expert's report of 3 May 2023.

91 Thirdly, orders (4A) and (5) should not be granted because:

(1) neither are orders to settle a complaint or dispute about the management of the strata scheme or an exercise, or failure to exercise, a function imposed by the SSMA;

(2) the applicant has forced the Owners Corporation to go to the expense of having to obtain a report from an expert to explain ways in which the applicant cannot cause a nuisance to other lot owners. The expert has suggested two recommendations in principle are to be implemented to reduce the vibration and noise effects. These are simple measures that can be undertaken by the applicant without the need to revoke the orthodox by-law that prevents lot owners from creating a nuisance to other lot owners;

(3) in any case, the revocation of the by-law in accordance will still not have the effect of revoking the long-standing common law cause of action of nuisance, which will remain available to other lot owners.

92 As noted above, orders (5A) and (6) are no longer pressed by the applicant.

43. Finally, as to the order sought under s 141 of the SSMA:

(1) the Owners Corporation submits that s 141 of the Act does not confer any power on the Tribunal to make any orders; and

(2) the applicant has provided no reasonable basis for the making of a draconian order prohibiting people from complaining about any noise emanating from Unit 307. In any case, the making of such a "ridiculous order" would still not prevent people from exercising their common law right to commence proceedings for a claim in nuisance.

93 In oral submissions, the Owners Corporation's counsel employed a range of epithets to describe or characterise the orders sought by the applicant. His adjectives included "ridiculous", "meaningless", "inutile", "absurd", "misconceived", "uncertain" and "incomplete".

The Owners Corporations' further submissions, 14 August 2023

94 These submissions deal with two matters.

95 The first is criticism of some of the areas of agreement reached by the two experts in the joint report. Principally, the Owners Corporation submits that, in relation to the acceptability of the noise levels of both bed and chair, the experts do not have the appropriate expertise, and that the "acceptability" of noise and vibration was not within the scope of their instructions.

96 The second matter relates to s 241 of the SSMA. In brief summary, the Owners Corporation submits that any order sought by the applicant pursuant to this section to prevent the respondents from making further complaints to and/or against the applicant in relation to the matters comprising the subject matter of these proceedings, at all, or alternatively, without the leave of the Tribunal ought to be rejected. Here the Owners Corporation rely on *The Owners – Strata Plan No 70871 v Turek* [2022] NSWCATAP 83 at [30].

Mr O'Donnell's submissions

97 Mr O'Donnell's submissions may be summarised as follows.

98 First, as to order (1), he opposes this order to the extent that it identifies the source of the vibrating noise disturbance into Unit 207 as the transformer room in the strata scheme. This is principally because the 2023 Acoustic Logic Report identifies the source of the noise as the applicant's vibrating chair.

99 As to order (4), Mr O'Donnell "largely" agrees to this order, while generally opposing the inference that the transformer room is the source of the vibrating noise into Unit 207. Mr O'Donnell agrees that the applicant must do the works

recommended in the 2023 Acoustic Logic Report and, if the noise disturbance into his Lot continues, the applicant should have to do any further works recommended by Acoustic Logic to stop the noise emanating from the applicant's Lot into his lot.

100 As to orders (4A) and (5), Mr O'Donnell opposes these orders on the basis that the Tribunal does not have jurisdiction to make them.

101 As to order (6), Mr O'Donnell opposes this order on the basis that the applicant has failed to demonstrate that the Owners Corporation is dysfunctional.

The applicant's submissions in reply

102 In brief submissions in reply, the applicant submits:

(1) the Owners Corporation's submission that the applicant's vibrating chair and bed have caused noise complaints contains an unfounded and contradictory conclusion in that:

(a) the question of whether the cause of the Unit 207 noise is the chair is a fact in issue in the proceedings which is yet to be determined.

(b) the entirety of the evidence establishes that the bed is not the cause of the Unit 207 noise.

(c) the weight of the evidence indicates that the chair is not the source of the Unit 207 noise.

(2) the reference to s 141 of the SSMA is a typographical error, and that the intended reference was s 241;

(3) the applicant disputes the respondents' contentions that the proceedings are not a dispute about the operation, administration or management of a strata scheme under the SSMA, and an exercise of, or failure to exercise, or a function conferred or imposed by or under the SSMA or the scheme's by-laws.

Relevant legal principles

103 Hotly in dispute is the meaning and scope of s 232 of the SSMA. Section 232 relevantly provides:

> **232 Orders to settle disputes or rectify complaints**
>
> (1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—
>
> (a) the operation, administration or management of a strata scheme under this Act,

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

(2) **Failure to exercise a function** For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if—

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

104 The meaning and scope of s 232 was considered by the Court of Appeal in *Vickery.* While Leeming JA dissented on the ultimate outcome (namely that s 232 was wide enough to encompass the awarding of damages for a breach of s 106 of the SSMA), I did not understand Basten and White JJA to be disagreeing with his Honour's following analysis of the "text and context" of s 232 which was:

> 124 One aspect of the approach to statutory construction beginning and ending with the statutory text (*Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]) is that it is preferable to commence with the language of the provision which Mr Vickery contended authorised NCAT to order damages in his favour, rather than differently worded provisions elsewhere in the statute. The answer to the question posed by this appeal turns upon the ways in which jurisdiction and power have been conferred upon the Tribunal.
>
> 125 The *Strata Schemes Management Act 2015* is the fourth major rewrite of innovative legislation, first introduced in New South Wales. The *Conveyancing (Strata Titles) Act 1961* (NSW) was drafted in the remarkable circumstances summarised in C Sherry, *Strata Title Property Rights* (Routledge 2017), pp 20-21. It was enacted at the instigation of the private sector, which paid for its drafting as well as a lengthy consultation process. The Act created for each strata scheme a body corporate which owned common property and which could make enforceable by-laws. As noted above, the statute imposed a duty on the body corporate to keep the common property in repair, but was silent on how that duty might be enforced. Indeed some of those most closely associated with its drafting wrote that "it may be that the statutory duties of the body corporate are not directly enforceable by a proprietor at all": A Rath, P Grimes and J Moore, *Strata Titles* (The Law Book Company Ltd, 1966), p 41. In any event, prior to 1974, disputes arising under

the schemes created pursuant to the statute could only be brought in the Supreme Court.

126 This changed from 1 July 1974. The *Strata Titles Act 1973* (NSW) created the Strata Titles Commissioner (s 97) and provided that every "Fair Rents Board" constituted under the *Landlord and Tenant (Amendment) Act 1948* (NSW) was also a Strata Titles Board (s 5(6)) (subsequently, Strata Titles Boards were constituted by Magistrates: see s 98A, inserted in 1987). The Commissioner could refer an application to a Strata Title Board if it raised matters of legal complexity or was of public importance: s 100(2). Neither the Commissioner nor a Board was able to make any order for the payment of costs: ss 104(5), 116. An appeal lay from the Commissioner to a Board (s 128), and a further appeal lay from orders made by a Board, on a question of law, in the same way as occurred under the *Justices Act 1902* (NSW): s 130(1).

127 Sections 106-114 empowered the Commissioner to make a variety of specific orders (to give consent to proposals (s 106), to lodge plans with the Registrar-General (s 107), to sell or prevent the purchase of personal property (s 108), to acquire personal property (s 109), to impose a different rate of interest for late contributions (s 110), to provide information (s 111), to remove animals in contravention of the by-laws (ss 112 and 113) and to enter information in the strata roll (s 114)). Those specific powers to make orders were preceded by the general power conferred by s 105, which was titled "General powers of Commissioner to make orders". The section relevantly conferred power on the Commissioner to:

> make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that strata scheme.

128 The textual similarity with s 232 of the 2015 statute is plain. The power conferred by s 105(1) of the 1973 Act was subject to three limiting provisions, as follows:

> (3) Nothing in subsection (1) empowers the Commissioner to make an order under that subsection for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed on the body corporate by this Act or the by-laws where that power, authority, duty or function may, in accordance with any provision of this Act or the by-laws, only be exercised or performed pursuant to a unanimous resolution or a special resolution.
>
> (4) Nothing in this Division authorises the Commissioner to make an order of the kind that may be made by the Supreme Court under section 32, 50, 51 or 67.
>
> (5) Nothing in this Division affects the generality of subsection (1), but an order in respect of any matter dealt with in any other section of this Division shall not be made under this section."

129 Subsection (3) emphasised the subject matter limitations upon the order-making power, and subsection (4) recognised the limits on the sorts of orders that may be made. The powers conferred on the Supreme Court included

> powers to readjust strata schemes for the purposes of resumption and to vary or terminate a scheme. Subsection (5) illustrated that s 105 was to be regarded as a general source of power, only available when the specific powers conferred in the (presumably common) circumstances in the subsequent sections were not involved.
>
> 130 The general power was frequently invoked and frequently exercised. …
>
> 131 Although s 232 does not have a title "General power to make orders ..." like its predecessor, it remains as an early section in a Division of the statute concerning orders, and precedes a series of separate specific order-making provisions (ss 233-238 confer power to make orders for settlement of disputes between strata schemes, enforcing a positive covenant, enforcing restrictions on uses of utility lots, reallocating unit entitlements, appointing a strata managing agent and removing persons from strata committees).

105 His Honour then turns to discuss whether of not s 232 authorises the Tribunal to order damages for breach of statutory duty. His Honour relevantly stated:

> 142 … it is common ground that the source of authority and power is, if there is a source, s 232 of the Act. But the language of s 232 is foreign to the sort of open-ended conferral of jurisdiction over claims upon which Mr Vickery's submission depends. The language of "settle" a "complaint" or "dispute", not to mention the breadth of the power, speaks of dispute resolution by means other than the principal remedy known to the common law, namely, payment of damages.

Consideration

106 I first commence my deliberations by noting that the applicant gave sworn evidence that:

> Rather than risk of being involved in the three sets of proceedings by the three separate parties, I commenced these proceedings asking the Tribunal to make orders to resolve the complaint put against me and the strata dispute, both of which I have been drawn into by the threat letters, concerning me using my chair and my bed. I wanted the Tribunal to resolve the complaint/dispute by ordering the OC to procure an expert from UNUSEARCH to investigate and report on the Unit 207 noise complaint to solve the complaint put against me and the strata dispute created by the allegations contained in the threat letters and to appoint a compulsory managing agent to resolve the [unit] 207 noise complaint given what I regarded as dysfunction in the management and operation of the OC in relation to the [unit] 207 noise complaint.

107 I have no issue with the applicant commencing proceedings for the appointment for the appointment of a strata manager pursuant to s 237 of the SSMA (a claim since abandoned), but one may well reflect on the appropriateness of invoking the Tribunal's jurisdiction for those purposes. This reflection is compounded somewhat by the observations of the applicant's senior counsel that the applicant sought to "push" matters "in the right

direction", that order (3) "would keep the wolves at bay", and the Tribunal ought to "give them [that is the Owners Corporation] a "nudge" or a "kick along".

108 As described above, the parties are in dispute whether the orders sought properly falls within the ambit of s 232. I accept that in *Vickery* Basten JA said at [26] that s 232 was "expressed in broad terms" and that White JA stated at [106] that he saw no reason to read the amplitude of the authority conferred by the Tribunal conferred on the Tribunal by s 232(1).

109 That said, I note the comments of the Appeal Panel in *Turek* at [24], as set out below:

> The Appeal Panel has jurisdiction to deal with the issue of costs of the appeal. However, it is not appropriate for us to make an order under s 241 of the SSM Act preventing the owners corporation from taking action in breach of section 104 (1) of the SSM Act for the following reasons:
>
> 1 We are not empowered under s 81 of the NCAT Act to make the orders sought, in circumstances where the costs application has been dismissed and there is no remittal of proceedings to the Tribunal.
>
> 2 In any event, the order sought is premature. No action has yet been taken by the owners corporation regarding the levying of contributions arising from the legal costs incurred by the owners corporation in the appeal proceedings we are dealing with and there is nothing to indicate what, if any, action will be taken. There is no current dispute between the parties in respect of this issue, and whether or not there will be a future dispute is merely speculative;
>
> 3 The submissions of the parties do not deal with the section 104 (1) issue;
>
> 4 Neither the Tribunal or the Appeal Panel has power to make declarations as distinct from findings in the context of other remedies under the SSM Act (Walsh v The Owners-Strata Plan No 10349 [2017] NSWCATAP 230 at [60]-[61]);
>
> 5 In the context of the power to make an injunctive order, it is usually inappropriate to make an order that a party comply with the law in the future or not be in breach of its future statutory obligations (ACCC v Dataline.Net.Au. Pty Ltd [2007] FCAFC 146; (2007) 244 ALR 300);
>
> 6 If there is a dispute about this issue in the future (i.e. the owners corporation issues a levy contribution that the Lot owner says is in breach of s 104 (1) of the SSM Act) the Lot owner has the right to take proceedings in the Tribunal and the Tribunal is the appropriate forum to deal with any such dispute.
>
> (emphasis added)

110 I think these passages are apposite in the circumstances of this application.

111 In my view, the application appears to be more pre-emptive in nature, which in my view is borne out by the content of the orders sought, rather than designed

to settle a dispute between the parties, other than in the broadest interpretation of that phrase. While the applicant asserts that this is an application for an order to settle a complaint or dispute about the operation, administration or management of a strata scheme under this Act, I am not satisfied that this is the case.

112 However, in case I am wrong in that conclusion I will consider each order on its merits.

Order (1)

113 This order is said to be sought pursuant to ss 9(1) and 9(2) of the SSMA, in addition to s 232.

114 The Owners Corporation is clearly correct that ss 9(1) and (2) do not provide a source of power for the order sought. That is plain from the language of the section itself which provides:

> **9 Owners corporation responsible for management of strata scheme**
>
> (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
>
> (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—
>
> (a) the management and control of the use of the common property of the strata scheme, and
>
> (b) the administration of the strata scheme.

115 Even assuming that s 232 is broad enough to encompass the relief sought, (which I do not) I would not grant the order sought. That is because, even assuming in favour of the applicant that the “noise” in fact emanates from the transformer/transformer room, the transformer room is located on property owned by the Council of the City of Sydney and leased to Ausgrid. I am therefore satisfied that the transformer room is not situated on common property owned by the Owners Corporation, and therefore I fail to see how this order could be implemented by the Owners Corporation. In other words, the order lacks any utility.

116 In my view, the form and content of the order, and its scope, assuming the Tribunal has power to make it, is misconceived.

Order (4)

117 I agree with the Owners Corporation's submissions on this order. It is a confusing order, and it is contingent on the owner/occupier of the affected lot still complaining of noise and vibration impacting the quiet enjoyment of their lot after the applicant's implementation of the remedial works specified in 2023 Acoustic Logic Report. As the Owners Corporation correctly submits, if the owner or occupier continues to "complain", it is open to the affected party to seek relief from the Tribunal. The Owners Corporation is therefore correct to submit that this order is an attempt to settle a hypothetical "compliant or dispute" that may arise in the future.

118 Again, in my view, the form and content of the order, and its scope, assuming the Tribunal has power to make it, is misconceived.

Orders (4A) and (5)

119 In my view these orders are also misconceived. They amount in substance declarations from the Tribunal that the applicant's use of his chair and bed has created a nuisance and has unreasonably interfered with the enjoyment of Unit 307. As the Appeal Panel stated in *Walsh:*

> 60 A declaration has been defined as "a decision of a court or judge on a question of law": Mick Woodley ed, *Osborn's Concise Law Dictionary*, (11th ed 2009, Sweet & Maxwell). The Tribunal held that there is no provision for such relief in the SSM Act. That is not strictly correct. If the Tribunal makes an order under s 232, it may also "declare" that the order is to have effect as a decision of the owners corporation: SSM s 245(1)(e). But the Tribunal was correct to conclude that, unlike the general power to give injunctive relief, the Tribunal does not have a general power to give declaratory relief. If a finding needs to be made or a Tribunal needs to 'declare' that it is satisfied of a particular matter, it expresses those views in the body of the decision, rather than in a separate order. For example, in a particular case the Tribunal may conclude that the owners corporation has breached the duty in s 106 to maintain and repair common property. That conclusion is expressed in the reasons for decision rather than as a separate order. If the Tribunal decides to make an order for damages as a consequence of that breach, that conclusion would be expressed as an order.
>
> 61 The Tribunal was correct when it found that it had no power to make an order that the owners corporation "instruct and ensure" the managing agent to comply with its statutory obligation.

120 I decline to make these orders.

121 I also note that order (5) is premised on the Tribunal finding that the applicant's use of his vibrating bed and or chair to cause a nuisance to, or unreasonably interfere with, the enjoyment of the affected lot.

122 No party is making the Tribunal for a finding to that effect. The application is misconceived.

Additional order

123 It was not clear to me whether the applicant was still seeking an order pursuant to s 241. But in case he is, I would not make that order either. While I would not characterise the order as "ridiculous" as the Owners Corporation did, I do agree that it is inappropriate in the circumstances of this application to issue what amounts to a pre-emptive injunction preventing the owner or occupier of Unit 307 from making applications to the Tribunal.

Conclusion

124 For the above reasons the application is dismissed.

Costs

125 A timetable for submissions on costs is set out in the orders.

Order

126 The Tribunal orders:

(1) The application is dismissed.

(2) Costs are reserved.

(3) If the respondents seek costs, they should file and serve submissions on or before 08 November 2023.

(4) The applicant may respond on or before 22 November 2023.

(5) The respondents may reply on or before 29 November 2023.

(6) Submissions are to be limited to 5 pages and must identify the relevant costs rule.

(7) The Tribunal proposes to determine the issue of costs on the papers and without a hearing. If either party opposes that course they should address that issue in their submissions.

****

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