Civil and Administrative Tribunal

New South Wales

Case Name:	McDaid v The Owners – Strata Plan No. 60346
Medium Neutral Citation:	[2023] NSWCATCD 134
Hearing Date(s):	16 May 2023; 9 August 2023; final submissions closed 6 September 2023
Date of Orders:	01 November 2023
Decision Date:	1 November 2023
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	(1) The application is dismissed.
Catchwords:	LAND LAW – Strata title – duty of an Owners Corporation to maintain and keep common property in a good and serviceable state of repair – breach – damages – appointment of compulsory strata manager – removal of an office holder from office
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 38 Residential Tenancies Act 2010 (NSW), s 26 Residential Tenancies Regulation 2019 (NSW), s 8 Strata Schemes Management Act 2015 (NSW), ss 106, 226, 232, 237, 238, 241
Cases Cited:	Catapult Constructions Ltd v Denison [2018] NSWCATAP 158 De Soleil v Palmhide P/L [2010] NSWCTTT 464 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 Hoare v The Owners – Strata Plan No. 73905 [2018] NSWCATCD 45 Linney v The Owners – Strata Plan No. 11669 [2021] NSWCATCD 123 Lockrey v Rosewall [2022] NSWCATCD 27

	Menashi v Ly [1997] NSWRT 162 McCue v The Owners Strata Plan No. 3844 [2021] NSWCATCD 35 Petropoulos v CPD Holdings Pty Ltd t/a The Bathroom Exchange (No. 2) [2018] NSWCATAP 233 Proudfoot v Hart (1890) 25 QBD 42 Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Peter McDaid (Applicant) The Owners – Strata Plan No. 60346 (Respondent)
Representation:	Peter McDaid (Self-represented) David Glover (Strata Committee)
File Number(s):	SC 22/57153
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Peter McDaid (the Lot Owner) for 16 orders under the *Strata Schemes Management Act* 2015 (NSW) (the Act), which include an order that would require The Owners – Strata Plan 60346 (the Owners Corporation) to pay him damages, being lost rent, he contends he continues to suffer due to the Owners Corporation's alleged failure to repair common property in his Lot, an order that would require the Owners Corporation to effect such repairs, and orders that would either appoint a compulsory Strata Manager to manage the Owners Corporation's affairs or remove a current member of the Strata Committee from office. This application was made to the Tribunal on 29 December 2022 (the application).

2 For reasons explained in greater detail following I have determined that the application must be dismissed. While it may be accepted that the common property associated with the Lot, being the water proofing, has been in a state

of disrepair since at least May 2022, the Lot Owner has failed to substantiate his damages claim in respect of lost rent from that date. Neither party has placed before the Tribunal a final scope of works which could provide the basis for a work order, and the Lot Owner, who bears the onus of doing so, specifically rejects the possibility that a 'preliminary scope of remediation works' recommended by the Owners Corporation's building consultant, Mr Thorburn, dated 22 May 2023 could provide an adequate foundation for such an order. The appointment of a compulsory Strata Manager and the removal of a Strata Committee Member are very serious steps that can only be taken in the clearest cases of persistent dereliction of an Owners Corporation's functions. There is no evidence of this in this case.

Procedural history

3 The application was first listed before the Tribunal, differently constituted, for directions by AVL on 1 February 2023. The Lot Owner, Mr McDaid, attended that listing of the application with his Property Manager Ms V Nikos. Mr David Glover, Chairperson of the Strata Committee attended the hearing on behalf of the Owners Corporation. In accordance with the Tribunal's usual practice where both parties are present at the first listing of an application the Tribunal attempted to assist the parties to resolve the dispute co-operatively by Conciliation. Those efforts were not successful. Consequently, the application was adjourned to a Special Fixture hearing and directions were given to the parties for the filing and exchange of the documentary evidence that they intended to rely upon for that hearing.

Evidence and hearing

4 Both parties have complied with the Tribunal's procedural directions for the filing and exchange of their documentary evidence. The Lot Owner filed bundles of documents on 15 February 2023, 29 March 2023 and 30 June 2023. These which was marked Exhibits A1 to A3 respectively. The Owners Corporation filed bundles of documents on 15 March 2023 and 29 June 2023 which were marked Exhibits R1 and R2 respectively.

5 The application was listed for a Special Fixture Hearing conducted in person on 15 May 2023. That hearing proceeded but could not be completed in the time

allocated on that occasion. It was adjourned part-heard to a further Special Fixture Hearing conducted in person on 9 August 2023, at which the hearing of evidence was completed. Submissions could not be reached on that occasion. By agreement with the parties, I therefore made directions for the filing and exchange of post-hearing written submissions. Both parties have complied with those directions.

6 Mr McDaid attended both Special Fixture Hearings in person. He gave oral evidence under oath. Mr Glover attended both Special Fixture Hearings in person on behalf of the Owners Corporation. He also gave oral evidence under affirmation. The parties had the opportunity to present their respective cases, to ask each other questions and, as set out above, to make post-hearing written submissions.

The orders sought

7 The Lot Owner sets out in his application a list of 16 orders sought. There is informality in the drafting of those proposed orders. As they are expressed, a number do not call for any specific order, and I doubt the Tribunal's power to make a number of others. Nevertheless, the Tribunal has an obligation pursuant to s 38(4) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act) to act in accordance with the substantial merits of the case without regard to legal technicalities or forms, subject of course to the rules of natural justice (s 38(2) of the NCAT Act).

8 Having regard to that obligation the orders sought by the applicant ultimately titrate to the following:

(i) an order pursuant to ss 232 or 241 of the Act that would direct the Owners Corporation to comply with the duty reposed in it by s 106(1) of the Act to repair common property associated with his lot that is permitting water ingress to the Lot,

(ii) an order pursuant to ss 232 or 241 of the Act that would direct the Owners Corporation to repair Lot property that has been damaged by water ingress that results from defective common property,

(iii) an order pursuant to ss 232 and 106(5) of the Act that would require the Owners Corporation to pay him damages for lost past and future rent he contends he has

and will suffer due to the state of disrepair of common property associated with his Lot and the damage to Lot property caused by that state of disrepair,

(iv) an order pursuant to s 237(1) of the Act that would appoint a compulsory Strata Managing Agent to exercise the functions of the Owners Corporation,

(v) an order pursuant to s 238(1)(a) or (c) of the Act that would remove Mr Glover from the Strata Committee.

Consideration

Order for repair to common property and lot property

9 The Tribunal's power to make orders requiring an Owners Corporation to comply with an obligation reposed in it by the Act are found, relevantly, in ss 232 and 241 of the Act, which provide, relevantly:

> **232 Orders to settle disputes or rectify complaints**
>
> (1) Orders relating to complaints and disputes: The Tribunal may, on application by an interested person … 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,
>
> …
>
> (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.
>
> …
>
> (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) the 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.
>
> …
>
> **241 Tribunal may prohibit or direct taking of specific actions**
>
> The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.

10 With respect to ss 232(1) and 237 (see following) the term "interested person" is defined in s 226 of the Act to include an owner of a lot in the scheme.

11 An Owners Corporation's duty with respect to the maintenance of common property is found in s 106 of the Act which provides, relevantly:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> …
>
> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that –
>
> (a) it is inappropriate to maintain, renew, replace or repair the property, and
>
> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> …

12 There is no issue in these proceedings that common property associated with the Lot Owner's lot, being the waterproof membrane in the area of the external walls of the living and dining rooms of the apartment is in a state of disrepair, resulting in water penetration to underfloor area of those rooms adjacent to the walls. The water has caused serious damage to sections of floor adjacent to the walls (being aluminium framed windows and sliding doors).

13 There is no issue that the Owners Corporation has an obligation pursuant to s 106(1) of the Act to repair the waterproofing to prevent water penetration into the Lot. There is no dispute, in principle, that the Owners Corporation also has an obligation to replace or repair Lot property which has been damaged by water penetration which is the floating timber floor in the living and dining rooms. There is a dispute about the scope of work required: that is, whether a satisfactory repair could be achieved by the replacement of the damaged sections of the floor or whether replacement of the whole floor is necessary.

14 I put to one side for the moment the issue of whether there are sufficient grounds to justify the making of a work order. While the Owners Corporation is, ipso facto, in breach of s106 of the Act because the common property is in a state of disrepair, for reasons I set out in relation to other elements of the claim I am not satisfied, at least as at the date of the hearings, that that the Owners Corporation is in dereliction of its obligation to carry out remedial work to remedy that breach. I cannot see that the intervention of the Tribunal would improve the Owners Corporation's response, although I accept the Lot Owner's submission that a work order it would make it legally binding.

15 The fundamental difficulty for the applicant with respect to these elements of the claim is that he has failed to place before the Tribunal a sufficiently particularised scope of work for the remedial works necessary to repair the waterproofing and to repair/replace the floor. I raised this issue as a concern at the first Special Fixture Hearing on 16 May 2023 and at the conclusion of that hearing made directions which enabled both parties to file a scope of proposed works prior to the resumption of the hearing.

16 At the resumed hearing both parties relied on a report dated 23 May 2023 prepared by the Owners Corporation's Building Consultant, Mr Robert Thorburn t/a Building Matters Assist. That report states as its purpose:

> The primary purpose of this report is [to] present BMA's conclusions, following recent investigations, on the cause of water entry to Unit 5 at floor level along the window walls along the northern and western sides of the Patio … and to make preliminary recommendations on the scope of remediation works to overcome this problem.
>
> The report details the results of the investigations, recommends further investigations to confirm some suspected issues and provides site related information to assist the preparation of the design and specification for the remedial works.

17 At paragraph 9.3 of Mr Thorburn's report he sets out a 'preliminary scope of remediation works' which is expressed to be subject to the Owners Corporation's authorisation of a "Dts solution for the remedial works" and "concurrence with the registered design professional".

18 I invited the parties to consider if paragraph 9.3 of Mr Thorburn's report contained a sufficiently detailed description of the remedial work required to

provide the basis for a work order. Neither party contended that it did. With a degree of reluctance, I accept that is the case. While a work order could overcome Mr Thorburn's first qualification by, in effect, directing a Dts solution, it could not overcome the second, which is that the proposed scope of work requires evaluation and concurrence by a registered design professional before it can be considered a viable remedial method.

19 It is well established law that the Tribunal does not have power to make a work order in the absence of a sufficiently detailed scope of work that enables the person on whom the obligation is imposed to know precisely what they must do to comply with the order: *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425; *Catapult Constructions Ltd v Denison* [2018] NSWCATAP 158; *Petropoulos v CPD Holdings Pty Ltd t/a The Bathroom Exchange (No. 2)* [2018] NSWCATAP 233; and, *McCue v The Owners Strata Plan No. 3844* [2021] NSWCATCD 35.

20 For the foregoing reasons, these elements of the claim must be dismissed.

Claim for damages for lost rent

21 There is a degree of uncertainty in the way the claim for lost rent is set out, but doing the best that I can I understand the following is sought:

(i) damages of $22,195.00 being rent allegedly lost for the period 21 March 2022 to 29 September 2022 while the property was kept vacant in the expectation of repairs,

(ii) damages of $6,728.57 being the difference between the rent achieved for the property ($700.00 per week) and its alleged market value ($850.00 per week) for the period 30 September 2022 up to the date of the final hearing (9 August 2022),

(iii) unspecified damages likely to be incurred in future due to the persistent state of disrepair of the premises calculated on the basis of the difference between current and alleged market rent, which is $150.00 per week.

22 The Owners Corporation's primary defence to this element of the claim is that it has not breached its obligation to maintain and keep in a good and serviceable state of repair the common property of the strata scheme, and therefore that no loss has been suffered by the Lot Owner consequent upon such a breach. The first of those contentions cannot be accepted. The duty reposed in an Owners

Corporation by s 106(1) of the Act is breached the moment common property falls into a state of disrepair: *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 at [5]. That is no less the case in circumstances where an Owners Corporation may be working diligently to remedy the breach. There is a dispute about that in this case, but resolution of that dispute makes no difference on the question of breach.

23 The real issue in relation to this element of the claim is whether the Lot Owner has proved his loss. In the alternative to its primary defence the Owners Corporation submits that the Lot Owner has not discharged his onus of proving rent loss to the civil standard.

24 The Lot Owner's evidence with respect to this element of the claim comprises the following:

(i) a copy of a residential tenancy agreement made in respect of Unit 5 on 5 February 2020 for a fixed term of 52 weeks starting on 26 February 2020 and ending on 23 February 2021. The rent payable under that agreement was $805.00 per week,

(ii) listings of 5 rental properties in the general locality of Unit 5 which are said to be comparable with Unit 5. The advertised rent for these properties varies between $820.00 and $880.00. The listings are undated and have been selected by the Lot Owner' current Managing Agent

(iii) An undated "appraisal price range" for Unit 5 drafted by the Lot Owner's Managing Agent. It states a price range of $830 - $850 per week and includes the following "notes from your agent":

Tenancy for period: 26.02.2020 – 23.02.2021, secured the property at the onset of Covid-19 when market rents had just started to reduce. The rent achieved at this time was $805.00 per week. The previous tenancy had a lease term of 25.02.2021 – 24.03.2022 during a period where Covid had drastically impacted rent achieved. This tenancy secured the property at $730 per week. At the point where the current tenancy was secured rents had dramatically improved and were well beyond pre-COVID rents achieved. The current value without damage incurred to property, unresolved building defects and the disclosure that the tenancy could be terminated at the end of the lease term for works to be carried out is between $830 - $850 per week.

(iv) a list of 168 "contacts" or "prospective tenants" who inspected the premises between 4 July 2022 and 5

September 2022. The following annotation appears on the final page of this document:

> There was a high level of enquiry throughout the rental campaign with many inspections carried out. It was extremely difficult to secure given the condition of the flooring and once disclosing the unresolved defect.

v. a copy of a residential tenancy agreement made in respect of Unit 5 on 5 September 2022 for a fixed term of 69 weeks starting on 30 September 2022 and ending on 25 January 2024. The rent payable under that agreement is $700.00 per week.

vi. photographs of the damaged floor, which appear at page 9 of Exhibit A1. Those photographs depict localised discolouration/staining of the floor and wood rot in the interior of the apartment immediately adjacent to the sliding doors up to approximately 10cm into the interior of the apartment and more extensive displacement of floorboards (rippling, gaps) for approximately 1metre into the apartment (at least so far as can be seen in the photographs).

25 There is no evidence that the tenants who occupied Unit 5 under the residential tenancy agreement that was made on 5 February 2020 left the property due to any state of disrepair of the property, and as I understand it that is not contended. On the face of it, the agreement that subsisted at the material time for them giving up possession was a periodic agreement. They provided the landlord's agent with the required 3 weeks' notice of termination of that agreement on or about 4 March 2022 and moved out on or about 25 March 2022. There is no evidence of complaint about the condition of the floor or of the apartment more generally from those tenants.

26 It is not in issue that no attempt was made by the Lot Owner or his Managing Agent to advertise the premises for lease after the tenants gave notice or before about 4 July 2022. Rather, they decided to leave the property vacant because they considered it a convenient time or, 'window of opportunity' as it was put, to have the floor repaired.

27 In this respect the Lot Owner contends that he had an expectation that the Owners Corporation would carry out repairs at that time because he had reported the water damage to the floor to Mr Glover as Chairperson of the Strata Committee in September 2020. However, on the final state of the

evidence I find that although Mr McDaid did report water damage to the floor to the Owners Corporation in 2020 neither he nor the Owners Corporation established that this was consequent upon any defect in the common property waterproofing until May 2022. I note that Mr McDaid admitted this under cross-examination.

28 Putting to one side the question of whether the Owners Corporation ought to have carried out earlier investigation of the cause of the water damage to the floor, Mr McDaid therefore could not have had any reasonable expectation that remedial work would be carried out in March 2022. Such works would have to have been planned and approved by the Owners Corporation. As a Lot Owner, Mr McDaid knew or ought to have known that no works of this kind had been planned and approved. He knew or ought to have known that the Owners Corporation would only be responsible for rectifying the water damage if it was established that it resulted from some defect in the common property of the strata scheme. That was not known at that time.

29 Although the damage to the floor should not be minimised, nor should it be exaggerated. It comprises some water staining, some wood rot, and some displacement of floorboards on part of the floor. The staining, wood rot and displacement is unsightly, but on the evidence before me I am not satisfied that it is dangerous. None of the photographs depict any trip hazard created by the floor movement. There is one area of wood rot that appears to have resulted in a small section of a floorboard breaking away immediately adjacent to the sliding door but due to its position against the door sill it is unlikely to create a trip hazard. I do not understand it to be contended that there is any mould associated with the water ingress, and if I am wrong about that, there is no objective evidence of mould from a mould specialist. There are several building and related reports in evidence. None assert that the condition of the floor represents a safety hazard.

30 Rented premises will be fit for habitation if it is capable of being dwelt in with reasonable comfort and safety having regard to contemporary standards: *Proudfoot v Hart* (1890) 25 QBD 42; *Menashi v Ly* [1997] NSWRT 162. Uninhabitability will not be found lightly: *De Soleil v Palmhide P/L* [2010]

NSWCTTT 464. Having regard to that standard, while the floor of the premises was in a state of disrepair, that state of disrepair did not render the premises uninhabitable.

31 For the foregoing reasons I cannot be satisfied that the rent loss the Lot Owner experienced from 21 March 2022 to 29 September 2022 arose from the Owners Corporation's breach of s 106(1). It resulted from his own decision not to lease the property at that time based on an expectation that the Owners Corporation would carry out repairs to the floor which at that time was not reasonable.

32 The second and third strands of the Lot Owner's damages claim is constituted by the asserted gap between the rent that the Lot Owner was able to secure under the lease that commenced on 30 September 2022 and the asserted market rent he would have achieved if the floor was not damaged and if remedial works requiring the relocation of the tenants were not required.

33 In relation to the third stand, the Lot Owner currently has a fixed term agreement with his current tenants which lapses on 25 January 2024. No damages for lost rent could be claimed beyond that date now because, as landlord, the Lot Owner can have no expectation that the agreement would continue beyond the contracted for period.

34 The evidence that the Lot Owner relies upon to establish the difference in the rent he achieved under the residential tenancy agreement that commenced on 30 September 2022 and the market rent has difficulties.

35 First, the Lot Owner contends that prospective tenants were repelled by the fact that major repairs were required to the apartment and would likely take place during the period of their tenancy. Section 26(1) of the *Residential Tenancies Act* 2010 (NSW) and s 8 of the *Residential Tenancies Regulation* 2019 (NSW) require a landlord who is renting premises in a strata scheme where rectification work or major repairs will be carried out to common property during the fixed term of the agreement to disclose this to a prospective tenant in the pre-agreement period. In this case, in July to September 2022, and indeed up to the present, the Owners Corporation has not scheduled remedial works to the common property associated with the Lot. Planning towards those

works has taken place, but they have not been scheduled. If the landlord's agent (Ms Nikos) did tell prospective tenants that major works would be carried out to the property during the period of their prospective tenancy, she had no basis for doing so. To the extent that this repelled prospective tenants Ms Nikos is responsible for that circumstance, not the Owners Corporation.

36 Second, the market appraisal relied upon by the landlord is given by his own Managing Agent. Under usual circumstances a market appraisal given by a property specialist would be given significant weight. However, in this case I am not prepared to do so. Ms Nikos and her agency do not come before the Tribunal as an independent expert, but as an advocate for the Lot Owner. Ms Nikos has not provided any statement, affidavit, statutory declaration, or expert report that sets out the basis of her opinion. She was not offered as a witness. She participated in the hearing as a support person for Mr McDaid and had to be warned repeatedly about her inappropriate hearing room conduct. It was clear from her behaviour that she has a high degree of emotional investment in the subject matter of the dispute and an animus towards Mr Glover. Additionally, the opinion as to market rent contained in the appraisal is not the same as the Managing Agent's estimate of market rent it previously provided to the Owners Corporation to support an unsuccessful insurance claim. That estimate was $730.00 per week. For these reasons, I am satisfied that the appraisal should be considered with caution. There is a significant risk that it is self-serving. I give it little weight.

37 Third, the appraisal and comparative listings are not anchored in time. In this respect it makes a difference if they refer to market conditions in July to September 2022 (which was still a period of post COVID-19 Pandemic recovery in the rental market) or to those that prevailed in February 2023 when the Lot Owner's evidence was filed (which was a period of significant escalation in rent values). The market rent achievable for the property in February 2023 is of no assistance in establishing if the $700.00 in rent achieved in September 2022 was an under market value resulting from the condition of the floor.

38 Fourth, the period of vacancy from July to September 2022 and the number of persons who inspected the premises as prospective tenants (168) would only be of significant assistance to the Lot Owner's case if there was sufficient contemporaneous comparative evidence of vacancy periods and rates of leasing to inspections. There is no evidence of this kind. At face value it may be accepted the property was vacant for a substantial period, despite frequent open inspections, and inspections by many people, but without comparative data the matter cannot be taken further.

39 Fifth, the rent that was achieved under the residential tenancy agreement that commenced on 5 February 2020 ($805.00) is of no assistance in establishing that the rent achieved under the agreement that commenced on 30 September 2022 was diminished due to the condition of the floor. This is to compare a rent level in a very early stage of development of the COVID-19 Pandemic with a rent level during the period of COVID-19 Pandemic recovery. Given the tumult that occurred in the rental market between those dates no satisfactory inference related to the floor can be drawn from the difference in the rent levels achieved.

40 While I accept at the level of general principle that the condition of the floor had the potential to make the property less desirable, for the foregoing reasons I am not satisfied that the Lot Owner has substantiated any rent loss arising from the Owners Corporation's breach of the duty contained s 106(1). This element of the claim must therefore be dismissed.

Order for appointment of compulsory strata manager

41 The Tribunal's power to order the appointment of a compulsory Strata Managing Agent is found in s 237 of the Act which relevantly provides:

> **237 Orders for appointment of Strata Managing Agent**
>
> (1) Order appointing or requiring the appointment of strata managing agent to exercise the functions of owners corporation: The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent –
>
> (a) to exercise all the functions of an owners corporation, or
>
> (b) to exercise specified functions of an owners corporation, or

(c) to exercise all the functions other than specified functions of an owners corporation.

(2) Order may confer functions on strata managing agent: The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise –

(a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

(b) specified functions of the chairperson, secretary, treater or strata committee of the owners corporation, or

(a) all of the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made: The Tribunal may make an order only if satisfied that –

(a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

(b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

(c) an owners corporation has failed to perform one or more of its duties, or

(d) an owners corporation owes a judgement debt.

(4) Qualifications of person appointed: A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must –

(a) hold a strata managing agent's license issued under the *Property and Stock Agents Act 2002*, and

(b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) Terms and conditions of appointment: A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

…

(7) Revocation of certain appointments: An order may be revoked or varied on application and, unless sooner revoked, ceases to have effect at the expiration or the period after its making (not exceeding 2 years) that is specified in the order.

> (8) Persons who may make an application: The following persons may make an application under this section –
>
> …
>
> (b) a person having an estate or interest in a lot in the strata scheme concerned …

42 The gravamen of this element of the Lot Owner's claim is that the Owners Corporation has failed to ensure the repair of common property associated with his Lot and the damaged Lot property within a reasonable time, because –

(i) water damage to the floor of Lot 5 was reported to the Owners Corporation (Mr Glover) in September 2020 yet no action was taken to address that situation until May 2022,

(ii) Mr Glover has persistently been non-responsive, defective of responsibility, and minimising of the water penetration and damage to the floor,

(iii) it ignored the advice and recommendations of three suitably qualified tradespersons who had assessed the damage and made recommendations for its remediation, instead commissioning a fourth Building Consultant,

(iv) it relied upon the expertise of a Building Consultant, Mr Pitcher, who had certified remedial work carried out in 2012, which failed, causing the current water penetration, who recommended invasive investigation of the cause of the water penetration, when it was unreasonable to do so,

(v) it has failed to ensure that there are sufficient funds in the strata scheme's capital works fund to carry out the necessary remedial work to the defective common property and damaged lot property.

43 In the above respects the Lot Owner contends that the Owners Corporation is not functioning satisfactorily and has failed to perform one or more of its duties (s 237(3)(a) and (c) of the Act). As I understand it, he contends that a compulsory Strata Manager ought to be appointed to exercise all of the functions of the Owners Corporation and all of the functions of the Chairperson, Secretary and Treasurer and Strata Committee.

44 The Lot Owner proposes the appointment of Netstrata Pty Ltd t/a Netstrata as the compulsory Strata Manager. At Tab 11 of Exhibit A1 there is a letter to the Tribunal from the Director of Netstrata dated 8 February 2023 which consents to the appointment of Netstrata as Strata Manager. Netstrata's license number

is quoted in that letter. Tab 11 also includes a quotation which describes Netstrata's expertise, approach to management, its services, and its costs. It also includes a proposed Managing Agency Agreement.

45 The Owners Corporation denies it is not functioning satisfactorily and that it has failed to perform one or more of its duties. It opposes the appointment of a compulsory Strata Manager.

46 The appointment of a compulsory Strata Manager is a very serious intervention in the affairs of an Owners Corporation. It operates to deprive the Owners Corporation of the ability to govern itself by democratic process. It is a step that will only be taken in clear cases where self-governance has resulted in one or more of the circumstances described in s 237(3). It is not a step that is taken lightly: *Hoare v The Owners – Strata Plan No. 73905* [2018] NSWCATCD 45 at [199].

47 I have determined that this is not an appropriate case in which to appoint a compulsory Strata Manager. It is not a clear case where the Owners Corporation is not functioning satisfactorily or has failed to perform a duty imposed on it by the Act. In this respect I make the following findings:

(i) When the Lot Owner notified Mr Glover that the floor of Unit 5 had developed water damage in September 2020, he did not assert that this was due to some defect in the common property; he expressly states that this had an "unknown cause". Although it would have been prudent for the Owners Corporation to investigate what was causal of the water damage, in the absence of clear evidence at that time that it was a defect in common property I cannot be satisfied that the failure to do so constitutes unsatisfactory functioning of the Owners Corporation or its failure to perform a duty,

(ii) it was not until 17 May 2022 that it was established that the floor damage was caused by water penetration to the lot caused by defective water proofing (being common property). As I have stated above, Mr McDaid admitted under cross-examination that he did not know that fact until that date. Although the Owners Corporation's failure to investigate the source of the water damage before May 2022 cannot be overlooked, it was open to Mr McDaid to put the opinion of a builder, water proofer or other suitably qualified person before the Owners Corporation after the water damage came to his attention to indicate the

Owners Corporation' responsibility. I am satisfied that the Owners Corporation has taken reasonable steps with reasonable diligence to plan remedial works necessary to address the defective common property water proofing and damaged Lot property since 17 May 2022. In this respect, there is in evidence a Project Plan for this work which is clearly sequenced with target dates for each activity,

(iii) Mr McDaid is critical of the Owners Corporation for not acting upon the findings and recommendations of 3 tradesmen who inspected the damaged floor and for engaging Mr Pitcher to re-examine the issue. I can understand that the delay this caused was frustrating for Mr McDaid. However, I cannot be satisfied that it reflects an absence of satisfactory functioning of the Owners Corporation or the failure to perform a duty. As set out above, as at the hearing no final scope of work for the remedial work required to address the failed water proofing was yet available. I therefore cannot see how it can be said that the Owners Corporation was in a position to proceed with remedial works based on the inspection and recommendations of the 3 tradesmen who initially inspected the work. All they did (and this is not to say this was not important) was to establish that the damage resulted from defective water proofing. They did not provide a satisfactory scope of work for its remediation.

(iv) Mr McDaid vehemently objected to Mr Pitcher's engagement and to his invasive investigation proposal. But Mr Pitcher's engagement was determined by a democratic process. The fact that the Owners Corporation sought to carry out due diligence before committing what could reasonably be expected to be substantial funds from the Strata Plan's capital works fund to the remediation work does not reflect a lack of satisfactory functioning of the Owners Corporation, it reflects the opposite. In any event, the Owners Corporation ultimately acceded to or acquiesced in Mr McDaid's objection to Mr Pitcher's involvement and accepted his recommendation that Mr Thorburn be engaged to investigate and advise in relation to a scope of remedial works. Although that occurred in the context of conflict between Mr McDaid and Mr Glover, functioning of the Owners Corporation is demonstrated by these events despite the conflict. That is, the Owners Corporation did not shirk responsibility for remedial and found common ground with Mr McDaid on a way forward,

(v) Mr McDaid's assertion that the Owners Corporation has failed to ensure that it has sufficient funds in its capital

works fund to fund the remediation works is speculation. At this stage there is no final scope of works, and no tender for the remedial works has been developed. It is therefore not known what the cost of the work will be. The Strata Scheme's audited financial statements and budget are in evidence. They reveal substantial funds are held in the capital works fund and that a provisional sum of $30,000.00 is set aside for the remedial works. Whether that will be sufficient is not a matter that can presently be known.

(vi) there is no other reason in evidence to justify the appointment of a compulsory Strata Manager. Mr McDaid makes one complaint about receiving late notice of a change of modality for a Strata Committee meeting, but otherwise there is no evidence that the Owners Corporation has failed to comply with the requirements for the conduct of its meetings. The notices and minutes of several of those meetings are in evidence. It is clear from this material that the Owners Corporation is operating transparently and democratically. There is no evidence of any financial mismanagement. The Owners Corporation maintains a solvent administrative and capital works fund and levies contributions to those funds in accordance with the rights and obligations imposed on it under the Act. There is a 10 year Capital Works Plan in place as required by the Act which on its face appears comprehensive and responsive to the Strata Scheme's likely future needs. The Owners Corporation has the necessary insurances in place to manage risk. There is no evidence of complaint or other expression of dissatisfaction about the functioning of the Owners Corporation by any other Lot Owner other than Mr McDaid. Four Lot Owners have written letters which are in Exhibit R1 expressing satisfaction and confidence in the current management of the Strata Scheme.

48 For the foregoing reasons, the application for the appointment of a compulsory Strata Manager must be dismissed. There is really no evidence that would support such a drastic step being taken.

Order removing Mr Glover as Chairperson, Secretary, Treasurer and Member of Strata Committee

49 The Tribunal's power to make an order removing a person from a Strata Committee is found in s 238 of the Act, which provides, relevantly:

238 Orders relating to strata committee and officers

(1) The Tribunal may, on its own motion or on application by an interested person, make any of the following orders –

(a) an order removing a person from a strata committee,

…

(c) an order removing one or more of the officers of an owners corporation from office and from the strata committee.

(2) Without limiting the grounds on which the Tribunal may order the removal from office of a person, the Tribunal may remove a person if it is satisfied that the person has –

(a) failed to comply with this Act or the regulations or the by-laws of the strata scheme, or

(b) failed to exercise due care and diligence, or engaged in serious misconduct, while holding office.

50 Mr McDaid's complaints about Mr Glover's conduct as a member of the Strata Committee are:

(i) Mr Glover has excessive power because he holds the positions of Chairperson, Treasurer and Secretary. It is suggested that Mr Glover has abused this power by influencing other Lot Owners and the Owners Corporation's contractors to the detriment of Mr McDaid,

(ii) Mr Glover receives payments from the Owners Corporation for the work he does as a Strata Committee Member through his company Ad Verbum Pty Ltd. It is suggested that this arrangement is improper on some unspecified basis,

(iii) that Mr Glover's dealings with Mr McDaid are motivated by animus towards Mr McDaid, resulting in him acting 'dishonestly', 'unconscionably' and using 'high pressure tactics' and 'threats'. It is further suggested that Mr Glover's dealings with Mr McDaid are characterised by 'intransigence', unresponsiveness, and denial of the Owners Corporation's responsibilities to him as a Lot Owner in the Strata Plan.

51 Mr Glover denies each of these allegations.

52 There need to be compelling reasons to justify the Tribunal's intervention in the democratic processes of an Owners Corporation to remove an officer of a Strata Committee elected by Lot Owners: *Lockrey v Rosewall* [2022] NSWCATCD 27 at [15]; *Linney v The Owners – Strata Plan No. 11669* [2021] NSWCATCD 123 at [94].

53 With respect to the consideration found in s 238(2)(a) I adopt in the context of this element of the claim the findings and reasoning set out above in relation to the application for an order pursuant to s 237. The evidence does not support a conclusion that Mr Glover has failed in his roles as a member of the Strata Committee to comply with any obligation imposed on him or the Owners Corporation in relation to the management of the Strata Plan.

54 Mr Glover's occupation of the three executive positions on the Strata Committee does mean that he has substantial responsibilities under the Act. Although that is not the same thing as 'power' I accept that the Owners Corporation's dependence on him in those roles does provide Mr Glover with the opportunity to influence decision making. However, two things must be said about this in the circumstances of this case.

55 First, it is not suggested that Mr Glover acquired these appointments other than by democratic election. I also note that he has been repeatedly appointed to these positions by democratic process over a number of years without any significant dissent or controversy (other than Mr McDaid's opposition to his appointment).

56 Second, there is no evidence of any abuse of power by Mr Glover. It is not suggested, and there certainly is no evidence, that he has ever used these positions to benefit himself as a Lot Owner contrary to the interests of any other Lot Owner or the Owners Corporation. Mr McDaid's claims of Mr Glover's influence over other Lot Owners are in reality an expression of frustration and disappointment that other Lot Owners have tended to accept Mr Glover's advice and recommendations contrary to what Mr McDaid would prefer. There is absolutely no evidence of Mr Glover using any form of undue influence to secure another Lot Owner's vote in a particular direction. Other Lot Owners are free to disagree with Mr McDaid based on material and recommendations put before them by Mr Glover. Mr McDaid's claims that Mr Glover has influenced the opinion of contractors engaged by the Owners Corporation are explicitly refuted in statements they have provided to the Owners Corporation and which are contained in Exhibit R1.

57 It is not in issue that Mr Glover receives payment from the Owners Corporation for the services he provides in the roles of Chairperson, Secretary and Treasurer through his company. There is a potential for conflict of interest in this arrangement which requires a high degree of transparency. But it has not been established that there is any lack of transparency in this arrangement. Mr Glover's remuneration has been approved by the Owners Corporation. Payment is made on receipt of itemised invoices. It has not been shown that the fees charged by Mr Glover exceed any industry norm or mean for the provision of strata management services. Mr Glover gave evidence, which was not challenged by Mr McDaid, that the professional fees he charged the Owners Corporation for his services last year were less than half the costs that Netstrata would charge if it was appointed Strata Manager in accordance with the quotation submitted by Mr McDaid.

58 Mr McDaid was cross-examined at some length in relation to his claims of Mr Glover's intransigence, dishonesty, unconscionability, and other alleged unethical and improper conduct. None of these claims remained standing at the end of this cross-examination. The correspondence that Mr McDaid claimed demonstrated this improper conduct by Mr Glover does not. Mr McDaid's oral evidence in relation to these matters was also unpersuasive. It is fairly characterised as evasive, argumentative, and dissembling.

59 There is a single occurrence where it is arguable that Mr Glover's conduct was inappropriate towards Mr McDaid. At a General Meeting of the Owners Corporation Mr Glover used an expletive towards Mr McDaid during a heated discussion about the Owners Corporation's management of the repairs required to Unit 5 common and lot property. Mr Glover admits to using this expletive and to losing his temper with Mr McDaid. However, it is also not in issue that he later apologised to Mr McDaid for doing so. This was an unfortunate single incident that occurred in circumstances of high emotion. It is very far from a sufficient basis to justify Mr Glover's removal from any of the offices he holds in the Strata Committee.

60 For these reasons this element of the claim must also be dismissed.

Orders

61 For the foregoing reasons I made the following order:

(1) The application is dismissed.

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