



Civil and Administrative Tribunal

New South Wales

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Case Name: The Owners – Strata Plan No. 64807 v Sunaust Properties Pty Ltd

Medium Neutral Citation: [2024] NSWCATCD 2

Hearing Date(s): 18 December 2023

Date of Orders: 16 January 2024

Decision Date: 16 January 2024

Jurisdiction: Consumer and Commercial Division

Before: M Harrowell, Deputy President

Decision: 

1. The application to dismiss the proceedings is refused.
2. The application to transfer these proceedings to the Supreme Court of New South Wales is refused.
3. The proceedings are stayed until the finalisation of Supreme Court proceedings 2020/311156.
4. These proceedings are listed for directions on 31 October 2024.
5. The application to amend the application is refused.
6. Costs of the application are reserved.
7. Liberty to apply.

Catchwords: PRACTICE AND PROCEDURE – Transfer of proceedings from Consumer and Commercial Division of NCAT to a court – Sch 4 cl 6 of the Civil and Administrative Tribunal Act 2013 – effect of Sch 4 cl 5 (jurisdiction to determine issues) on power of transfer –

relevant considerations in determining whether to transfer proceedings.

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW)  
Residential Tenancies Act 2010 (NSW)  
Strata Schemes Management Act 1996 (NSW)  
(repealed)  
Strata Schemes Management Act 2015 (NSW)

Cases Cited:

Aboriginal Housing Company Ltd v Kaye-Engel (No.3) [2014] NSWSC 718  
Australian Executor Trustees Ltd v Steak Plains Olive Farm [2014] NSWCATCD 248  
Di Liristi v Matautia Developments Pty Ltd (No 6) [2021] NSWSC 663  
Di Liristi v Matautia Developments Pty Ltd (No 7) [2021] NSWSC 760  
Di Liristi v Matautia Developments Pty Ltd [2021] NSWCA 163  
Di Liristi v Matautia Developments Pty Ltd (2021) 396 ALR 545; [2021] NSWCA 328  
Gunner v Lawrence [2015] NSWCATCD 127  
Lawrence v Gunner; Gunner the Lawrence [2015] NSWSC 944  
Lawrence v Gunner; Gunner v Lawrence [2015] NSWSC 1229  
Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015] NSWSC 289  
Sunaust Properties Pty Ltd v The Owners – Strata Plan No 64807 [2022] NSWCATAP 246  
Sunaust Properties Pty Ltd t/as Central Sydney Realty v The Owners – Strata Plan No 64807 [2023] NSWCA 188  
Sunaust Properties Pty Ltd v The Owners SP No 64807 (No 2) [2022] NSWCATAP 335  
Sunol v Collier [2012] NSWCA 14  
The Owners – Strata Plan No. 54026 v UniLodge Australia Pty Ltd [2019] NSWCATAP 289  
The Owners Corporation – Strata Plan 64807 v BCS Strata Management Pty Ltd [2020] NSWSC 1040

Texts Cited:

Nil

Category:

Procedural rulings

Parties: The Owners – Strata Plan No. 64807 (Applicant)  
Sunaust Properties Pty Ltd (Respondent)

Representation: Counsel  
R Gration (Applicant)  
E Young (Respondent)

Solicitors  
DEA Lawyers (Applicant)  
MC Lawyers & Advisers (Respondent)

File Number(s): 2022/00414759

Publication Restriction: Nil

## **REASONS FOR DECISION**

- 1 These reasons concern whether the proceedings should be transferred to the Supreme Court of New South Wales pursuant to Sch 4 cl 6 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) and what orders should otherwise be made in connection with their resolution.
- 2 The applicant (owners corporation) also seeks leave to amend its application.
- 3 These proceedings are, primarily, an application to terminate a caretaker agreement under s 72 of the *Strata Schemes Management Act 2015* (NSW) (SSMA). They were commenced on 20 January 2021.
- 4 The dispute has a long and complicated history. It is necessary to understand this history for the purpose of deciding whether a transfer order should be made.

### **History of dispute and proceedings in the Tribunal**

- 5 The parties prepared an agreed chronology for the purpose of considering the transfer application. That chronology records the following.
- 6 The strata scheme, in which the agreement operates, was registered on 18 January 2021. On 16 March 2001 the owners corporation, the respondent (Sunaust) together with Meriton Apartments Pty Ltd entered into a caretaker agreement (caretaker agreement) by which the respondent was appointed as a caretaker and was to perform various duties which included cleaning, security and leasing duties.

- 7 At that time, the relevant strata legislation was the *Strata Schemes Management Act 1996* (NSW) (repealed) (1996 Management Act). In about February 2003, the 1996 Management Act was amended to permit the then the Consumer Trader and Tenancy Tribunal to terminate caretaker agreements. This amending legislation also imposed limitations in connection with caretaker agreements. It is not presently necessary to examine these amendments.
- 8 Since then, the 1996 Management Act has been repealed and replaced by the SSMA.
- 9 In 2019, a dispute arose because the owners corporation ceased paying caretaker fees to Sunaust, the owners corporation disputing Sunaust's entitlement to charge an annual fee increase of 5% each year, which it had done since 2002. Following a notice of dispute, there was a formal mediation. However the dispute was not resolved and on 30 October 2020 Sunaust commenced proceedings 2020/311156 in the Supreme Court of New South Wales (Supreme Court proceedings). Sunaust claimed \$216,106 plus interest said to be due under the caretaker agreement.
- 10 On 11 December 2020, the owners corporation filed a cross claim in the Supreme Court proceedings seeking to recover overcharged amounts.
- 11 As noted above, on 20 January 2021, the owners corporation commenced the proceedings in the Tribunal by lodging a substantive and interim application (Tribunal proceedings), inter-alia seeking termination of the caretaker agreement.
- 12 Despite the existence of the Supreme Court proceedings, the Tribunal heard and determined the Tribunal proceedings. On 17 January 2022, the Tribunal made orders terminating the caretaker agreement under s 72 of the SSMA (original Tribunal orders).
- 13 The original Tribunal orders were the subject of an internal appeal filed 4 February 2022. The appeal was heard on 9 June 2022.
- 14 On 27 July 2022 the Appeal Panel set aside the original Tribunal orders and remitted the proceedings for further orders. The Appeal Panel published

reasons for decision: *Sunaust Properties Pty Ltd v The Owners – Strata Plan No 64807* [2022] NSWCATAP 246 (Sunaust Appeal Panel decision).

- 15 The Appeal Panel determined that, by reason of the Supreme Court proceedings, the Tribunal did not have jurisdiction to resolve various issues that arose in the Tribunal proceedings because of Sch 4 cl 5(7) of the NCAT Act. This clause provides:

(7) **Effect of pending court proceedings on Tribunal** If, at the time when an application is made to the Tribunal for the exercise of a Division function, an issue arising under the application was the subject of a dispute in proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue.

- 16 At [28] the Appeal Panel said:

In our view, if Supreme Court were to find that the Appellant's claim against the Respondent should be upheld and the Respondent's cross-claim dismissed the result would be that a significant factual matter in support of the Respondent's claim in the Tribunal for termination of the Caretaker's Agreement would no longer exist, and to that extent, the Respondent's application would be substantially less meritorious. Viewed in that light, it is clear to us that the provisions of clause 5(7) were applicable such that the Tribunal did not have jurisdiction to determine the Respondent's application in so far as required the tribunal to determine issues also arising in the court for determination.

- 17 The Appeal Panel then continued at [32]:

It does not follow from our conclusion concerning cl 5(7) that the tribunal does not have jurisdiction to determine the Respondent's application, so long as that application does not require determination of issues attracting the engagement of cl 5(7). Accordingly it is not appropriate for us to dismiss the application at first instance. It is a matter for the Respondent to decide whether to withdraw the application or prosecute it again in the Consumer and Commercial Division without reliance on issues before the Supreme Court. The appropriate order that we should make is to remit the application to the Division.

- 18 That is the Appeal Panel decided the Tribunal could still determine the application, the Supreme Court not having power to terminate the caretaker agreement under section 72 of the SSMA, but the Tribunal had no jurisdiction to determine the issues before the Supreme Court.

- 19 In doing so, reference was made to Sch 4 cl 5(9) of the NCAT Act. This clause provides:

(9) **Evidence from court proceedings** In proceedings on an application to the Tribunal for the exercise of a Division function, a finding or decision made by a court, tribunal, board, body or person referred to in subclause (2) is admissible as evidence of the finding or decision.

- 20 Clause 5(9) permits a finding by the Supreme Court in the Supreme Court proceedings to be admitted as evidence in proceedings before the Tribunal. Self-evidently, if a finding is made by the Supreme Court, it would, ordinarily, bind the parties in connection with any decision the Tribunal was required to make in the present application.
- 21 Consequently, the proceedings were remitted rather than dismissed.
- 22 Subsequently, the Appeal Panel determined that it had power under s 63 of the NCAT Act to correct its omission to deal with grounds 1 and 2 of the appeal. It provided reasons for decision on 27 October 2022: *Sunaust Properties Pty Ltd v The Owners SP No 64807 (No 2) [2022] NSWCATAP 335 (Sunaust Appeal Panel No. 2)*. The grounds of appeal considered in that decision were:
- (1) The Tribunal erred in making orders pursuant to s 72 of the SSMA in relation to the Caretaker Agreement which was entered into no later than 16 March 2001.
  - (2) The Tribunal erred in purporting to exercise jurisdiction which it did not have in relation to the Caretaker Agreement.
- 23 The Tribunal rejected these grounds, deciding the caretaker agreement was an agreement to which s 72 of the SSMA could apply: at [38] and following.
- 24 At this point we note *Sunaust Appeal Panel No. 2* was the subject of an appeal to the Court of Appeal. The Court of Appeal delivered its decision on 14 August 2023: *Sunaust Properties Pty Ltd t/as Central Sydney Realty v The Owners – Strata Plan No 64807 [2023] NSWCA 188 (Court of Appeal decision)*.
- 25 The Court of Appeal found the Appeal Panel was in error in concluding it had power under section 63 of the NCAT Act to correct an omission to deal with grounds 1 and 2 of the appeal. However, having granted leave to appeal, the Court concluded:
- (1) the Appeal Panel had power to correct its omission and deal with those grounds by reason of s 38 of the NCAT Act: per Basten AJA at [154], [159] (Meagher JA agreeing); and

- (2) the Appeal Panel was correct in its construction of Sch 3 cls 3 and 15 of the SSMA and that it had power under s 72 of the SSMA to consider the termination application in respect of the caretaker agreement: Basten AJA at [185] (Meagher and Stern JJA agreeing).
- 26 In the meantime, in the Supreme Court proceedings, an application was made to the Court to transfer the proceedings to the Tribunal. That application was dealt with by Rees J who dismissed the application on 9 December 2022: *Sunaust Properties Pty Ltd v The Owners – Strata Plan No 64807* [2022] NSWSC 1643 (Sunaust transfer decision). I will return below to the Court’s reasons for dismissing the application.
- 27 Also on 9 December 2022, the owners corporation served a notice of termination of the caretaker agreement. The notice commenced with the following words:
- The Owners Corporation hereby terminates with immediate effect under clause 9.3(iv) the Caretaker Agreement entered into on or about 16 March 2001, and renewed on or about 20 October 2020, 28 October 2015 and 12 October 2020 respectively for additional terms each of five years duration.
- 28 As to the Tribunal proceedings, due to the appeal to the Court of Appeal and the making of the transfer application to the Supreme Court, the remitted proceedings have not progressed. This was principally because the Court of Appeal proceedings had not been determined and may have led to the Tribunal proceedings being dismissed.
- 29 As noted above, the Court of Appeal determined the Tribunal did have jurisdiction to make an order to terminate the caretaker agreement under s 72 of the SSMA so this issue is resolved.
- 30 When the proceedings were again listed before the Tribunal in October 2023, following the Court of Appeal decision, the Tribunal raised the question of whether, of its own motion or on application by a party, the proceedings should be transferred to the Supreme Court to be heard with the Supreme Court proceedings. The Supreme Court proceedings are presently fixed for hearing for 10 days commencing 1 July 2024.
- 31 Directions were made to facilitate the hearing on the question of transfer of the proceedings to the Supreme Court, the owners corporation making that

application and Sunaust resisting the application and contending that the proceedings should be dismissed.

### **Parties submissions and evidence**

- 32 The parties filed detailed written submissions together with an agreed bundle of documents (AB). The application was heard on 18 December 2023. The parties were represented by Counsel. The decision was reserved.
- 33 The owners corporation's submissions can be summarised as follows:
- 34 In light of the Court of Appeal decision, there is no question the Tribunal has power under s 72 of the SSMA to make an order terminating the caretaker agreement. In this regard, the owners corporation says the Supreme Court does not have this power.
- 35 The Tribunal proceedings should be transferred to the Supreme Court "so that they may be heard at the same time as a related money claim made by [Sunaust]".
- 36 The issues in the Supreme Court are those set out at [52] of the Sunaust transfer decision.
- 37 Despite the absence of power in the Supreme Court to make an order under s 72 of the SSMA, the owners corporation says the proceedings could be transferred to the Supreme Court to determine relevant issues. Insofar as orders need to be made following any determination by the Supreme Court of relevant issues, the proceedings could be remitted to the Tribunal to make an order under s 72.
- 38 Reliance was placed on the decisions of:
- (1) *Gunner v Lawrence* [2015] NSWCATCD 127 (where the Tribunal transferred proceedings to the Supreme Court to be heard with related disputes between the same parties) and
  - (2) *Lawrence v Gunner; Gunner v Lawrence* [2015] NSWSC 944 (*Gunner v Lawrence 944*) and *Lawrence v Gunner; Gunner v Lawrence* [2015] NSWSC 1229 (*Gunner v Lawrence 1229*).
- 39 There, Stevenson J (who heard both the proceedings transferred from the Tribunal and proceedings commenced in the Supreme Court), determined the Court did not have jurisdiction to make a termination order under s 81 of the



*Residential Tenancies Act 2010* (NSW) (RT Act): *Gunner v Lawrence* 944 at [516]-[523]. Having considered and declined to make declarations concerning the entitlement to terminate the residential tenancy agreement, His Honour remitted the proceedings to the Tribunal “to be dealt with by NCAT in light of the reasons given in proceedings on 16 July 2015 in *Lawrence v Gunner*; *Gunner V Lawrence* [2015] NSWSC 944”: *Gunner v Lawrence* 1229 at [2]-[10].

- 40 In doing so, Stevenson J rejected the “tentative view” expressed by Davies J in *Aboriginal Housing Company Ltd v Kaye-Engel (No 3)* [2014] NSWSC 718 at [21] that the Tribunal had no power to transfer of proceedings to the Supreme Court because the Supreme Court had no power to make a termination order. In short, His Honour accepted the proceedings had been validly transferred and, having made relevant determinations of factual matters, could be remitted to the Tribunal to exercise the power reserved to the Tribunal to terminate a residential tenancy agreement under s 81 of the RT Act.
- 41 The owners corporation then says “[t]he validity of such an approach was apparently accepted by the Court of Appeal in *Di Liristi v Matautia Developments Pty Ltd* (2021) 396 ALR 545; [2021] NSWCA 328 (*Di Liristi Court of Appeal Decision*) per Gleeson JA at [23] and [95] (Macfarlan and Brereton JJA agreeing)”.
- 42 Next, the owners corporation submits, the issues in the Tribunal proceedings “clearly involve more than simply making an order under s 72(1)(a) to terminate the Caretaker Agreement”. The factual matters to be determined in the Tribunal proceedings (of which the Supreme Court does have jurisdiction) include whether:
- CI 3.1 of the Caretaker Agreement validly varied (sic) in 2001 (as claimed by Sunaust) so to change the reference to “CPI” to “5%”
  - the OC agreed to vary the Caretaker Agreement in 2009 (as claimed by Sunaust) to allow Sunaust to charge additional quarterly amounts
  - the OC agreed in about 2015 that Sunaust was no longer required to perform gardening and mowing duties
  - Sunaust improperly and unlawfully had its personnel sit as members of the executive committee and/or the Strata committee
  - Sunaust refused to accept lawful and proper directions from the Strata committee after August 2020

Sunaust by its employee unlawfully and/or improperly commenced legal proceedings in the Supreme Court in the OC's name for the purpose of furthering Sunaust's commercial interest

Sunaust unlawfully and/or improperly sought to prevent the AGM going ahead in August 2020 for the purpose of furthering Sunaust's commercial interests

- 43 These matters could be “conveniently, efficiently and cost effectively dealt with by the Supreme Court at the same time as it hears the [Supreme Court proceedings]”. In this regard, “the Supreme Court will be hearing all the evidence that was before the Tribunal in any event and no additional impost of any significance would result”.
- 44 In addition to making submissions criticising the conduct of Sunaust including that “Sunaust has repeatedly sought to avoid having the application being determined on its merits by the Tribunal based on various challenges to the Tribunal’s jurisdiction”, the owners corporation said matters identified in *Australian Executor Trustees Ltd v Steak Plains Olive Farm* [2014] NSWCATCD 248 (*Australian Executor Trustees*) at [27] were relevant considerations in deciding whether to transfer the Tribunal proceedings. The owners corporation said the statement at [27] was approved by Rees J in the Sunaust transfer decision at [24].
- 45 The owners corporation then said that transferring the proceedings to the Supreme Court will avoid the possibility of the Tribunal making further decisions which may be the subject of appeals to the Appeal Panel (and perhaps further). The possibility of wasted time and cost can be avoided by transferring the proceedings to the Supreme Court. The guiding principle found in the NCAT Act also supports such an approach.
- 46 In light of the fact that some relevant issues cannot be determined by the Tribunal, a transfer order is appropriate in the circumstances.
- 47 Alternatively, if the proceedings are not transferred, they should be stayed pending determination of the Supreme Court proceedings. They should not be dismissed.
- 48 On the issue of amendment, the owners corporation identified the document at AB 612-630 as containing the proposed amendments. In submissions, the

parties identified claims for orders 5, 6 and 7 as new but otherwise there was no markup showing how this document different from any document previously filed.

- 49 The owners corporation described the amendments as “minor” but did accept that some of the amendments proposed were matters about which the Appeal Panel had found the Tribunal had no jurisdiction to hear and determine because of Sch 4 cl 5. Of this fact the owners corporation said:

... However, if the proceedings were transferred to the Supreme Court, there will be no jurisdictional obstacle to the OC’s application being heard in full, based on all of the relevant matters the OC is entitled to raise.

As is readily apparent from examining the proposed amended Points of Claim, it draws heavily from the findings of the decision of Senior Member Ellis. It raises no new issues and therefore should come as no surprise to Sunaust.

- 50 Accordingly, the owners corporation said, on the assumption the proceedings were transferred, that leave should be given to amend its points of claim in the form found at AB 612 and following.

- 51 In response, Sunaust made the following submissions.

- 52 First, similar to the owners corporation, Sunaust said the proceedings had a long and unfortunate history in the Tribunal.

- 53 Sunaust referred to various amendments which had been made by the owners corporation and said the owners corporation had “pursued a strategy of steadily enlarging the dispute between the parties, often at a late stage, as it also seeks to do here”. Various historical matters were mentioned said to support this contention.

- 54 Sunaust also said that the transfer of these proceedings may interfere with the listing in the Supreme Court because new issues are introduced. As to the legal issues raised by Sunaust concerning jurisdiction, these were fundamental issues and properly raised. No criticism should be made in these circumstances, the Tribunal being required to determine if it has jurisdiction.

- 55 Next, Sunaust noted the comments of the Appeal Panel in the Sunaust Appeal Panel decision at [32] which is set out above.

56 Sunaust then noted that a notice of termination of the caretaker agreement was served on 9 December 2022 purporting to terminate the agreement. Having regard to this notice, Sunaust submitted that the maintenance of the proceedings seeking an order under s 72 of the SSMA is inappropriate, the owners corporation on its own case asserting the agreement has been terminated.

57 Despite asserting the caretaker agreement was terminated, the owners corporation maintains its section 72 application. In doing so, it “effectively ignore[s] the decision of the Appeal Panel referred to above by continuing to rely on matters which are in issue in the Supreme Court Proceedings”. This, Sunaust described, as unusual and, possibly, improper. It is conduct which seeks to have the Tribunal, “on remittal, ignore the decision of the Appeal Panel which made the remittal”.

58 Sunaust then made submissions under various headings which are summarised below.

59 If the owners corporation is successful in its contention that the caretaker agreement came to an end in March 2019 or was terminated by notice in 2022, the Tribunal proceedings must be dismissed. In this regard it is extraordinary that a party would maintain proceedings on a factual and legal bases which it denies. Further, Sunaust submitted:

The legal position is clear: in order to make good a case for the Tribunal to make an order terminating a contract, the OC would have to prove the existence of the contract that it seeks that the Tribunal terminate. Although this Tribunal does not use pleadings, if it did then the OC would have to plead the existence of the relevant contract. To the contrary, the OC denies the existence of that contract, and so cannot establish any proper basis for the application. The OC could not bring a case for orders terminating a contract where it pleaded that the contract had already been terminated and no longer existed. In a court, this proceeding could not be maintained and would be summarily dismissed. Although the Tribunal’s procedures are not as formal as those on a court, there is no reason why the same reasoning should not apply to this Tribunal.

60 Consequently, Sunaust submitted, the proper approach the owners corporation should take is to discontinue the Tribunal proceedings, which it should have done upon issue of the notice of termination dated 9 December 2022. That,

Sunaust submitted, “would have saved the parties and the Tribunal significant time and cost”. “Whether or not the Caretaker Agreement remains on foot is going to be determined by the Supreme Court”.

- 61 No substantive steps have been taken in the remitted proceedings since its remittal by the Appeal Panel. Maintaining the application, contrary to the owners corporation’s own position that the caretaker agreement has already been terminated, serves no practical utility and does not promote the just, quick or cheap resolution of the proceedings. Reference was made to s 36 of the NCAT Act.
- 62 Next, Sunaust identified the issues said to arise in the Tribunal proceedings. Of these issues, Sunaust said some are raised in the Supreme Court proceedings. Others involve “heavily disputed facts, and contested accounts of conversation and events, on old and minor issues”. If the proceedings are transferred, that will lead to the issues to be resolved by the Supreme Court increasing and a lengthening of the time taken to do so.
- 63 In any event, the Supreme Court does not have jurisdiction to make an order under s 72 of the SSMA. Relying on the decision of the Appeal Panel in *The Owners – Strata Plan No. 54026 v UniLodge Australia Pty Ltd* [2019] NSWCATAP 28 at [71], Sunaust submitted the proceedings should not be transferred because the issues that might remain to be resolved by the Tribunal are minor and heavily fact based and the Supreme Court could not finally resolve the dispute arising in connection with those matters due to its absence of power to make an order under s 72.
- 64 Further, if the proceedings are not dismissed, they should be stayed and not transferred. This approach, Sunaust submits, is consistent with the approach suggested by Brereton JA in *Di Liristi v Matautia Developments Pty Ltd* [2021] NSWCA 163.
- 65 In making this submission, Sunaust also said there must first be a matter over which the Tribunal has jurisdiction to determine before it can be transferred. Reliance is placed on the decision of the Court of Appeal in *Sunol v Collier* [2012] NSWCA 14 (*Sunol*) at [19].

- 66 It is difficult to understand this last submission regarding *Sunol*, the Court of Appeal having decided the Tribunal does have jurisdiction to make an order under s 72 of the SSMA in the present case. As to whether the Supreme Court has appropriate “jurisdiction”, this matter will be addressed below.
- 67 Sunaust also refers to the possibility of appeals in connection with any application to transfer, a matter that might further protract the proceedings. However this is a possibility in any proceedings in which the Tribunal might make an order with which one or other party disagrees.

### **Consideration**

- 68 There are three matters to consider:
- (1) Should the proceedings be dismissed? or
  - (2) Should the proceedings be transferred to the Supreme Court or stayed pending the resolution of the Supreme Court proceedings? and
  - (3) Should the owners corporation be given leave to amend its claim?

#### *Should the proceedings be dismissed?*

- 69 The proper approach to be taken in circumstances where Sch 4 cl 5 deprives the Tribunal or a court of jurisdiction is illustrated by the cases of *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 (*Steak Plains*) and *The Owners Corporation – Strata Plan 64807 v BCS Strata Management Pty Ltd* [2020] NSWSC 1040. Where all issues would be finally resolved in the forum where the proceedings were first commenced (and which has jurisdiction on relevant issues because of Sch 4 cl 5), including by granting or withholding an appropriate remedy, an application might properly be dismissed. On the other hand, where there are matters still to be resolved by the court or the Tribunal deprived jurisdiction in respect of particular issues by reason of Sch 4 cl 5, proceedings might properly be stayed.

- 70 It was for this reason, in *Steak Plains*, that White J (as he then was):
- (1) dismissed the claims for relief concerning whether Australian Executor Trustees Limited should or should not be given possession of the property as the Tribunal had power to grant any necessary relief and would resolve all issues to which the relief sought in the Supreme Court was directed. The Court was therefore deprived of relevant jurisdiction and that part of the summons seeking relief in connection with

possession of the subject property should be dismissed: *Steak Plains* at [106]; and

- (2) stayed the claim for damages, that claim being for an amount exceeding the Tribunal's order making power. On this claim, it was necessary for the Court to await the Tribunal's decision on issues concerning whether the agreement had been terminated and whether statutory remedies to relieve against forfeiture should be granted, the determination of these issues relevant to whether damages as claimed should be awarded: *Steak Plains* at [107]-[111]. Of this matter, White J said at [111]:

The hearing in the Tribunal might well result in the determination of issues relevant to SPOF's claim for damages. If those issues are essential to whatever orders the Tribunal makes then issue estoppels may well arise. The damages claim should not proceed in this Court whilst the proceedings in the Tribunal continue. There should be a stay of that claim until the final determination of the proceedings in the Tribunal or further order.

- 71 Sunaust says the proceedings should be dismissed. Primarily, this is because Sunaust says the claim for an order under s 72 of the SSMA is inconsistent with the allegations made in the Supreme Court proceedings, where the owners corporation alleges the agreement has either terminated by operation of law or was terminated on notice by it on 9 December 2022.
- 72 The chronology of events, which I have set out above, records the sequence of events giving rise to the possibility the caretaker agreement has been terminated. However, as recognised Rees J in the Sunaust transfer decision, that issue has not yet been determined. At [52], Rees J describe the issues in the Supreme Court proceedings as follows:

... a review of the pleadings indicates that the following issues arise in the proceedings in this Court:

- (a) the proper construction of the Caretaker Agreement;
- (b) whether the agreement was varied;
- (c) whether the agreement was terminated, including by operation of SSMA 1996 and, if so, when;
- (d) whether the OC is entitled to damages in respect of invoices paid which were not payable;
- (e) whether the OC is entitled to a set off in equity; and
- (f) whether the OC's claim for damages is precluded by an estoppel by convention or is time barred.

- 73 The parties agreed that this list recorded some of the issues that would arise for determination by the Supreme Court. That is, whether the caretaker agreement has in fact been terminated is a matter in dispute in the Supreme Court proceedings.
- 74 Further, the description of the claims made by the parties set out in [53] and following of the Sunaust transfer decision makes clear that Sunaust's position is that the agreement is continuing, the owners corporation contending to the contrary. In this regard, at [56] the Court described Sunaust's claim for unpaid fees and damages in the following terms:
- ... The unpaid fees now stood at \$750,000 with a further three years to run on the contract. I was also informed that, following amendments to the Caretaker's pleadings made during the course of the hearing of this application, further expert evidence will be served in respect of loss of profits said to have been suffered as a consequence of the OC's conduct, in the order of \$3 million. In particular, it will be contended that the Caretaker's business has suffered damage to its reputation, which had affected its ability to enter into other contracts. I was informed by the OC's counsel that the amounts sought by the Cross-Claim exceed \$1 million. I am not in a position on this application to assess whether these figures are realistic or aspirational, save to say that the suggested quantum points to the Court being an appropriate forum.
- 75 As such, it seems to me that if Sunaust is to be successful in its claim in the Supreme Court proceedings, at least in respect of its claim for damages after December 2022, the Court will need to determine that the caretaker agreement was not terminated by notice on 9 December 2022.
- 76 If this occurs, the present application may continue, subject to any relevant findings of the Supreme Court, so that the owners corporation could seek an order under s 72 of the SSMA.
- 77 This possibility was recognised by the Appeal Panel in its decision remitting these proceedings to the Tribunal.
- 78 Of course, the issue of whether the caretaker agreement has terminated, and the date and circumstances of such termination will be a matter for the Supreme Court to determine at the final hearing of the Supreme Court proceedings. Again this was recognised by the Appeal Panel in the Sunaust Appeal Panel decision.



- 79 In the absence of such determination, the possibility of the owners corporation seeking and being entitled to an order for termination under s 72 of the SSMA makes it inappropriate to dismiss the proceedings.
- 80 Sunaust contended that the continuance of these proceedings is inappropriate because the owners corporation must prove the caretaker agreement is on foot, an allegation contrary to its position in the Supreme Court proceedings.
- 81 In my view, this submission should not be accepted. Because of the multiple applications and the different powers given to the Supreme Court and the Tribunal and because of the fact of proceedings being first commenced in the Supreme Court (which proceedings have not been transferred to the Tribunal) there is a bifurcation of the dispute. Properly seen, the position of the owners corporation is that it makes an alternative claim (in the Tribunal) if it is wrong on its primary position that the caretaker agreement has already come to an end.
- 82 If the Tribunal proceedings and the Supreme Court proceedings were joined together, this would be no more than pleading facts in the alternative. It would not constitute an abuse, nor would it be a proper basis to dismiss the alternative count. On the other hand, if the proceedings are not joined together, there remains a remedy available to the owners corporation which is only available in the Tribunal.
- 83 It follows that I am not satisfied the proceedings should be dismissed.

*Should the proceedings be transferred to the Supreme Court or stayed pending the resolution of the Supreme Court proceedings?*

- 84 Where issues remain to be resolved in proceedings in the court or Tribunal deprived on jurisdiction, in this case the Tribunal, an alternative to staying proceedings is to transfer the proceedings to the court or Tribunal having jurisdiction to decide relevant issues, if permitted by Sch 4 cl 6 of the NCAT Act.
- 85 Schedule 4 cl 6 provides:

**6 Transfer of proceedings to courts or to other tribunals**

(1) If the parties in any proceedings for the exercise of a Division function so agree, or if the Tribunal of its own motion or on the application of a party so directs, the proceedings are—

(a) to be transferred to a court (in accordance with the rules of that court) that has jurisdiction in the matter, and

(b) to continue before that court as if the proceedings had been instituted there.

(2) If the parties in any proceedings that have been instituted in a court so agree, or if the court of its own motion or on the application of a party so directs, the proceedings are, if the proceedings relate to a matter for which the Tribunal has jurisdiction to exercise a Division function—

(a) to be transferred to the Tribunal in accordance with the procedural rules (if any), and

(b) to continue before the Tribunal as if the proceedings had been instituted in the Tribunal.

86 The fact that the Supreme Court may not have power to make a particular order or provide a particular remedy does not mean the Tribunal cannot make a transfer order: *Gunner v Lawrence* 944 per Stevenson J at [516]-[523] referred to above. Rather, if a transfer order is made by the Tribunal, the court to which the proceedings are transferred may make relevant findings and declarations as appropriate then remit the proceedings to the Tribunal to make any order the Tribunal is authorised to make under relevant enabling legislation: see eg *Gunner v Lawrence* 1229

87 A similar approach of transferring the proceedings where the Court lacked jurisdiction to make particular orders was taken by the Court as detailed in the reasons of Cavanagh J in *Di Liristi v Matautia Developments Pty Ltd (No 6)* [2021] NSWSC 663 and *Di Liristi v Matautia Developments Pty Ltd (No 7)* [2021] NSWSC 760. Having determined the entitlement of a landlord to terminate a residential tenancy agreement, His Honour transferred the proceedings to the Tribunal to make orders under the RT Act to terminate the residential tenancy agreement.

88 Of the approach of Cavanagh J, in the *Di Liristi Court of Appeal Decision* at [95]-[96], Gleeson JA said:

95 First, the submission incorrectly assumed that the primary judge made a declaration that the tenancy agreement terminated on 6 April 2020. That is not so. The terms of the declaration were that Matautia had validly terminated the lease. The declaration involved a rejection of Di Liristi's case that the notice of termination was invalid. The declaration did not purport to determine the time at which the notice of

termination took effect. That was a matter for the Tribunal exercising its powers under s 81.

96 Second, it is fanciful to suggest, as counsel for Di Liristi submitted, that in the circumstances of this case the Tribunal would make a termination order to take effect on a past date (6 April 2020), when such an order could never be complied with by Di Liristi, as he was and has remained in possession since 6 April 2020. Matautia had an accrued right to liquidated damages for unpaid rent of \$600 per week from 11 September 2019 to the date of judgment on 23 June 2021, together with interest thereon. There was no error in the award of damages for unpaid rent up to the date of judgment.

89 That is, the Court of Appeal accepted the Supreme Court could determine issues, even if lacking power to make particular orders, and could thereafter transfer the proceedings to the Tribunal to make orders the Tribunal was empowered to make consistent with findings of the Court.

90 It follows from the above that, in my view, Sch 4 cl 6 gives power to the Tribunal to transfer these proceedings to the Supreme Court if it is appropriate to do so. In this regard, as earlier cases make clear, there is a discretion to be exercised.

91 As to whether a transfer order should be made, considerations include those identified in *Australian Executor Trustees* at [27] being:

- (1) The fact here are claims made in other proceedings that cannot be determined in the Tribunal;
- (2) The history of the Tribunal proceedings and the conduct of the parties;
- (3) Whether the Tribunal is a convenient forum and has power to make orders to resolve particular controversies;
- (4) Whether or not a different form of relief is available in another forum;
- (5) Whether resolution of particular issues within the jurisdiction of the Tribunal will be delayed; and
- (6) The objects of the NCAT Act including those found in section 3(b)(i) and 3(d).

92 In the Sunaust appeal decision, Rees J referred to these factors as relevant considerations when considering whether to transfer the Supreme Court proceedings to this Tribunal.

93 In addition, in exercising the power under cl 6, the Tribunal is to have regard to the guiding principle, namely the just quick and cheap resolution of the real

issues in dispute: s 36(2) NCAT Act. The speedy disposition of proceedings was similarly recognised by Rees J in the Sunaust transfer decision at [55].

94 Further considerations, relevant to the present case, are the potential for the transfer of these proceedings to impact or delay a determination of the proceedings in the Supreme Court and whether any benefit will accrue to the parties by taking the course of transferring the proceedings.

95 This question is difficult and the determination finally balanced.

96 Factors in favour of transferring the proceedings include that a transfer order would:

- (1) avoid possibility of further technical arguments about whether the Tribunal or the Court has jurisdiction to determine particular issues;
- (2) permit one hearing in relation to issues that might overlap;
- (3) avoid the need for any further hearing by the Tribunal if the owners corporation is successful in contending that the caretaker agreement has come to an end.

97 Factors against transferring these proceedings include the possibility of complicating the Supreme Court proceedings by adding issues and/or requiring further interlocutory steps to be taken in those proceedings.

98 In addition, unlike the circumstances that arose in the Gunner and Di Liristi litigation, the issues that will remain to be determined in the Tribunal proceedings only arise if the Supreme Court determines the caretaker agreement has not been terminated. In this regard, it is evident the following issues are presently to be resolved by the Supreme Court:

- (1) whether the caretaker agreement has been terminated;
- (2) if not, what damages (if any) is Sunaust entitled to by reason of the conduct of the owners corporation. On this point, Sunaust appears to claim damages on the basis that the caretaker agreement still had 3 years to run as of 9 December 2022: Sunaust transfer decision at [56] set out above;
- (3) The claim for damages by Sunaust arises from asserted breach of a continuing agreement which Sunaust says it is ready willing and able to perform. Sunaust does not otherwise suggest it has accepted any repudiatory conduct by the owners Corporation and terminated the caretaker agreement: see Further Amended Summons and the Further Amended Commercial List Statement at AB 480-499

- 99 It is likely that, if Sunaust is entitled to damages, such assessment will include damages up to the date of judgement. It is also likely the Court will assess any damages to which the owners corporation is entitled under its cross claim at that date.
- 100 If so, it is likely findings will be made about whether, if at all, the caretaker agreement has been terminated at any time prior to the date of judgement, a matter which would appear essential as part of the fact-finding process in determining damages on the respective claims.
- 101 The significance of this point is that there has been some suggestion in the proceedings in the Tribunal that an order for termination of the caretaker agreement could be made on a date earlier to that on which the Tribunal determines an order is appropriate. While that might be a possibility, it seems to me unlikely that the Tribunal would do so. In this regard the comments of Gleeson JA in the *Di Liristi the Court of Appeal decision* at [96] are relevant. That is, if the Court in the Supreme Court proceedings finds the caretaker agreement has continued and awards damages on this basis up to a particular date, then making an order for an earlier date for termination under s 72 would appear, prima facie, inappropriate.
- 102 Whatever the position, transferring these proceedings to the Supreme Court does not seem to be necessary to resolve any issue that might remain for the Tribunal to consider in respect of the s 72 application.
- 103 On the other hand, if the question of whether an order should be made terminating the caretaker agreement after the Supreme Court proceedings are finalised remains a live issue, the facts relevant to that dispute arising from past events will have been determined by the Supreme Court.
- 104 In these circumstances, I have come to the view I should decline to make a transfer order. Rather, I should stay the present proceedings pending determination or finalisation of the Supreme Court proceedings. This will avoid further complicating the Supreme Court proceedings.

105 This also seems likely to be the most cost-effective approach as the s 72 application would appear to be redundant if the Supreme Court determines the caretaker agreement is already terminated.

106 Finally, as the matter is listed for hearing in the Supreme Court in July 2024, I will adjourn these proceedings until the end of October 2024 at which time the Tribunal can review the status of the Supreme Court proceedings. There will be liberty to the parties to apply to relist the matter in the event the Supreme Court proceedings are resolved at an earlier time.

*Should the owners corporation be given leave to amend its claim?*

107 I have determined it is appropriate to decide the question of amendment last, after considering the transfer application. This is because the owners corporation said in its submissions in support of the amendment application that the amendments sought included matters which, by reason of the Sunaust Appeal Panel decision, could not be made in the Tribunal because of Sch 4 cl 5: Owners corporation 's submissions in chief at [82].

108 As such, it would be inappropriate to permit an amendment which would have no effect or be impermissible if the proceedings are not transferred.

109 As to the other amendments, it is unclear to me what new allegations are made, other than the references made in submissions to new orders 5, 6 and 7 of the proposed amended points of claim found at AB 613-4.

110 In light of the view I have taken that it is appropriate to stay these proceedings rather than transfer them to the Supreme Court, it seems to me that any amendment to the present claim should await resolution of the Supreme Court proceedings as the need for and nature and scope of any amendments may be substantially affected by any decision made in the Supreme Court proceedings.

111 Consequently, at this stage, the application to amend should be refused.

### **Costs**

112 I think it appropriate that the question of costs be reserved.

113 In light of s 60 of the NCAT Act, it is likely the question of whether there are special circumstances will arise. This will lead to a further lengthy and

complicated debate, it being evident that the extent of the dispute has likely led to significant costs being incurred by both parties. This debate should await final disposition of the substantive claims to avoid the parties incurring substantial costs on a further interlocutory application.

## **Orders**

114 The Tribunal makes the following orders:

- (1) The application to dismiss the proceedings is refused.
- (2) The application to transfer these proceedings to the Supreme Court of New South Wales is refused.
- (3) The proceedings are stayed until the finalisation of Supreme Court proceedings 2020/311156.
- (4) These proceedings are to be listed for directions on 31 October 2024.
- (5) The application to amend the application is refused.
- (6) Costs of the application are reserved.
- (7) Liberty to apply.

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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

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