Civil and Administrative Tribunal

New South Wales

Case Name:	Vojkovic v Savva
Medium Neutral Citation:	[2023] NSWCATCD 141
Hearing Date(s):	16 October 2023
Date of Orders:	27 October 2023
Decision Date:	27 October 2023
Jurisdiction:	Consumer and Commercial Division
Before:	D Robertson, Senior Member
Decision:	(1) The application is dismissed.
Catchwords:	LAND LAW – Strata title – Obligations of owners and occupiers – Keeping of pets – Nuisance – Whether barking of dog shown to constitute a nuisance or unreasonable interference with the enjoyment of another lot LAND LAW – Strata title – Owners corporation – Strata committee – Whether respondent should be removed from the strata committee
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) ss 54, 153, 158, 238
Cases Cited:	Chehelnabi v Gourmet and Leisure Holdings Pty Ltd [2020] NSWCATAP 102 Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 Lockrey v Rosewall [2022] NSWCATCD 27 The Owners - Strata Plan No. 56587 v White [2021] NSWCATCD 67
Category:	Principal judgment
Parties:	Darko Vojkovic (Applicant) Andrew Savva and Georgina Savva (Respondents)

	The Owners – Strata Plan No 94579 (Other Party)
File Number(s):	SC 23/13745

REASONS FOR DECISION

Introduction

1 The applicant in these proceedings is an occupant of Lot 2 in Strata Plan No 94579, a multi-storey building in Brighton Le Sands. He states that his wife is the owner of Lot 2, but he brings these proceedings in his own right and not on behalf of his wife.

2 The applicant seeks orders against the respondents who are the owners of Lot 3.

3 Lots 2 and 3 are on the ground floor of the building and each has a courtyard at street level forming part of the lot.

4 The first order sought by the applicant is that, pursuant to s 238 of the *Strata Schemes Management Act 2015* (NSW) (SSMA), Mr Savva be removed from the Strata Committee of Strata Plan No 94579.

5 The second order sought by the applicant is that, pursuant to s 158 of the SSMA, the respondents be required to take action to terminate a nuisance arising from the respondents keeping a dog on their lot.

6 The applicant filed a folder of documents on 29 May 2023. He filed a further bundle of documents on 12 October 2023 and, at the hearing, sought to file a further 11 pages constituted by two tax invoices issued to the owners corporation of Strata Plan No 94579 by JS Mueller & Co Lawyers on 28 April and 30 June 2023.

7 The respondents filed a bundle of documents on 15 June 2023.

8 All of the documents were admitted in evidence.

9 Each of the applicant and Mr Savva took an oath and verified the contents of the various statements contained in their bundles of documents. Each was given the opportunity to ask questions of the other.

10 Sections 158 and 238 of the SSMA provide:

158 Order for removal of an animal permitted under by-laws

(1) The Tribunal may, on application by an interested person, make an order against a person who is keeping an animal on a Lot or common property in accordance with the by-laws for a strata scheme, if the Tribunal considers that the animal causes a nuisance or hazard to the owner or occupier of another Lot or unreasonably interferes with the use or enjoyment of another Lot or of the common property.

(2) The Tribunal may order that the person—

(a) cause the animal to be removed from the parcel within a specified time, and be kept away from the parcel, or

(b) within a time specified in the order, take such action as, in the opinion of the Tribunal, will terminate the nuisance or hazard or unreasonable interference.

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,

(b) an order prohibiting a strata committee from determining a specified matter and requiring the matter to be determined by resolution of the owners corporation,

(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 the office.

11 It is also relevant to note s 153 of the SSMA which relevantly provides:

153 Owners, occupiers and other persons not to create nuisance

(1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a Lot in a strata scheme must not—

(a) use or enjoy the Lot, or permit the Lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other Lot (whether that person is an owner or not), or

(b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other Lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or

(c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other Lot

> by the occupier of the Lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the Lot.

12 Applications pursuant to ss 158 and 238 of the SSMA may be made by "an interested person". "Interested person" is defined in s 226 of the SSMA to include:

> "(d) an owner of a Lot in the scheme, a person having an estate or interest in a Lot or an occupier of a Lot".

13 I accept that the applicant is an interested person for the purposes of making an application to the Tribunal pursuant to each of sections 238 and 158 of the SSMA.

Application pursuant to section 158

14 It is convenient to deal first with the application for orders pursuant to s 158 of the SSMA.

15 It is not in issue that the respondents keep on their lot a small dog, described variously in documents contained in the evidence as a "Moodle" and a "Maltese mix".

16 The bylaws of Strata Plan No 94579 provide:

> "**5 Keeping of animals**
>
> (1) An owner or occupier of a Lot may keep an animal on the Lot, if the owner or occupier gives the owners corporation written notice that it is being kept on the Lot.
>
> (2) The notice must be given not later than 14 days after the animal commences to be kept on the Lot.
>
> (3) If an owner or occupier of a Lot keeps an animal on the Lot, the owner or occupier must—
>
> (a) keep the animal within the Lot, and
>
> (b) supervise the animal when it is on the common property, and
>
> (c) take any action that is necessary to clean all areas of the Lot or the common property that are soiled by the animal.
>
> **6 Noise**
>
> An owner or occupier of a Lot, or any invitee of an owner or occupier of a Lot, must not create any noise on a Lot or the common property likely to interfere with the peaceful enjoyment of the owner or occupier of another Lot or of any person lawfully using common property.

17 The applicant gave the following evidence concerning the dog:

> "10. The dog is a small white terrier breed.

> 11. The dog is only a nuisance when it is allowed to roam in the front courtyard during the day.
>
> 12. My unit is at the front of the on the ground floor and at the front of the unit complex, as is that of the Savva's.
>
> 13. We are separated by the corridor that leads to the main entrance of the complex.
>
> 14. My lounge room has a full height (3.2m) triple sliding door that leads out onto the front courtyard.
>
> 15. Mr and Mrs Savva regularly take their dog for a walk and have it urinate at my front gate.
>
> 16. The Savva's barking dog can be clearly heard with the door partially open and much less so with it completely closed.
>
> 17. I am able to clearly hear the Savva's dog barking from the balcony of U29 that is directly above and 7 floors up."

18 The applicant maintains that the dog's barking disturbs his quiet enjoyment of Lot 2.

19 The applicant provided a DVD containing eight recordings made on five separate dates.

20 Mr Savva's evidence on behalf of both respondents included the following material directly relevant to the application:

> "Princess Street has dozens of dogs going up and down on a frequent basis. There are also 4 other dogs in the building owned by other owners or tenants, and presumably at various times making some kind of noise. In addition there is constant noise from traffic, builders working, people going up and down the street, and yet he claims to only have an issue with my dog? He has the ability to isolate and discern my dog's barking above that of the many dogs that go past his unit.
>
> …
>
> I only work 1 day per week and my wife is a retired school teacher, so we spend most of our time at home. When we are home the dog is inside with us, so his claim of the dog barking all day long is false."

21 In a separate document, Mr Savva provided responses to allegations made by the applicant. Among those responses were the following.

22 In response to the applicant's assertion that:

> "24. I have, on several occasions, walked out of my unit recording the barking, and to the front gate of U3. I have, on every occasion, witnessed the dog barking."

Mr Savva responded

> "What does this prove. Of course there are times when the dog barks. IT IS A DOG. When someone like the applicant invades his space by sticking his head over the fence to take videos, of course he will bark. He is timid and this would frighten him. Other than that, I dispute that there is excessive barking. All this shows is the obsession the applicant has to attack over a problem that simply does not exist. The applicant seems obsessed with proving my dog is a nuisance, which he is not, and to what point?"

23 In response to the applicant's statement that

> "25. I have attached several sound recordings on the DVD. There are three that shows the dog's typical behaviour over a I hr period on 23 May 2023 (during the preparation of this submission)."

Mr Savva responded:

> "The applicant has provided 7 cases of recorded barking over a period that we have lived there of 14 months as a typical behaviour. This does not prove the accusations. Of course, the dog occasionally barks as mentioned above, but as also mentioned, the barking is not excessive & the dog is not a nuisance. He has proved nothing with these recordings or the inappropriate and unauthorised photos he has distributed of my wife & I."

24 The respondents also included in their evidence statements from seven other residents of the Strata Plan. Two of those residents stated that they had never heard barking. The remainder stated that they have not heard "excessive" barking.

25 The issue for determination is whether the barking from the dog is a nuisance or unreasonably interferes with the applicant's enjoyment of Lot 2.

26 The test is an objective one. In *Chehelnabi v Gourmet and Leisure Holdings Pty Ltd* [2020] NSWCATAP 102, at [49] – [60] and [73] – [75], the Appeal Panel discussed the test for whether conduct amounts to a nuisance. The Appeal Panel set out s 153 of the SSMA and continued:

> "50 The clear focus of the parties in the conduct of the proceeding in the Tribunal at first instance was on an allegation that the operation of the café from the commercial Lot caused a nuisance to the appellants in their use of the residential Lot. Whilst some reference was made that it may also constitute a hazard, that was not strenuously pressed and not raised as an issue in the appeal.
>
> 51 During the appeal, the parties made submissions as to the proper meaning to be given to the word nuisance in s 153, as it is not defined in the SSMA.
>
> 52 Subsequent to our hearing the appeal, the Supreme Court of New South Wales handed down its decision in *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134 ('Veney').

53 In Veney, Darke J found, at [46], that “nuisance” for the purpose of s 153(1)(a) of the SSMA should be interpreted in accordance with the common law meaning of an actionable nuisance, consistent with the approach previously taken by the Tribunal in applications under the former *Strata Schemes Management Act 1996*, for example in *Cannell v Barton* [2014] NSWCATCD 103 at [95] and *Gisks v The Owners – Strata Plan No 6743* [2019] NSWCATCD 44 at [26] ([46]-[47]).

54 In broad terms, the Court in Veney found that an actionable nuisance may be described as an unlawful interference with a person’s use or enjoyment of land, or of some right over or in connection with the land. Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the **“**reasonable and convenient use” of their own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person’s land, citing *Hargrave v Goldman* (1963) 110 CLR 40 at [59]-[62].

55 The Court also referred with approval, at [45] to the comments of Lord Wright in *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 at 903, where his Lordship said:

> A balance has to be maintained between the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

56 That statement is consistent with the submissions of the parties here and so we will, with respect, adopt that meaning. …

57 The parties also referred us to *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, where Ward J framed the question for determination in relation to a claim for nuisance as:

> ...whether there has been a substantial and unreasonable interference by the defendants with the rights of Mr and Mrs Quick in relation to or in connection with the use of their land.

58 Ward J considered the principles relating to establishing whether a defendant has created or maintained a nuisance. Her Honour quoted from the judgment of Preston CJ in *Robson v Leischke* [2008] NSWLEC 152, from [47], relevantly as follows:

> Where the defendant created the nuisance, the fault element varies depending on the nature of the defendant's conduct and his or her state of knowledge. Clerk & Lindsell on Torts identify three situations where the defendant has created the nuisance:
>
> > (a) "if the defendant deliberately or recklessly uses his land in a way which he knows will cause harm to his neighbour, and that harm is considered by a judge to be an unreasonable infringement of his neighbour's interest in his property, and therefore an unreasonable use by the defendant of his property, the defendant is liable for the foreseeable consequences. This proposition covers all those cases of obvious or "patent" nuisances, and they are peculiarly the cases which call for prevention or prohibition by injunction. It is

> no defence that the defendant believed he was entitled to do as he did or that he took all possible steps to prevent his action amounting to a nuisance": Clerk &Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-39], p 1184;
>
> (b) "if the defendant knew or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide": Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-40], p 1185; and
>
> …

59 Ward J, at [158], said that unreasonable interference required a determination of whether the events in question interfered with the comfortable and convenient enjoyment by the plaintiffs of their land, and that "this turns on whether there has been an excessive use by the defendants of their land resulting in what is considered to be an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society; (Robson, at [84])."

60 In considering this question, her Honour went on to refer to the decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea* [1961] NSWLR1002 (‘*Bayliss*’) in which the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961at 400-1:

> The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners each of whom is claiming the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for that adjustment is reasonable use. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the Defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the Defendant using his property in what would be a reasonable manner if he had no neighbour? The question is: Is he using it reasonably, having regard to the fact that he has a neighbour?

…

73 As can be seen from the cases referred to above, for an actionable nuisance in respect of noise to be established, there are two primary elements which need to be satisfied.

74 The first is that there must be some noise that can be heard by the complainant (here the appellants) in the use of their Lot which emanates from the respondents’ Lot, allegedly causing damage or interference. This may readily be established by the subjective evidence of the appellants as to what they hear or experience.

> 75 The second element, though, is that there must be evidence to establish to the satisfaction of the Tribunal that the noise is caused by a use of the respondents' land which is excessive or unreasonable and "causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place" (*Bayliss*), or that what is experienced by the appellants is not "reasonable according to the ordinary usages of mankind living in … [our] society": *Sedleigh-Denfield v O'Callaghan* ibid. This is an objective test: *Marsh v Baxter* [2015] WASCA 169 at [247], referred to with approval in *Weber v Greater Hume Shire Council* [2018] NSWSC 667 at [427].

27 In *The Owners - Strata Plan No. 56587 v White* [2021] NSWCATCD 67 a Senior Member of the Tribunal held that he was satisfied that two dogs kept on a Lot within a strata scheme "caused a nuisance to the owner or occupier of other Lots, and/or unreasonably interfered with the use or enjoyment of other Lots or of the common property". The Senior Member identified the basis for that conclusion as follows:

> "(1) their loud and constant barking at all times of the day especially during the night and when the respondent has not been not in her apartment has constituted a nuisance and unreasonably interfered with the use or enjoyment of other Lots or of the common property as the noise has been excessive;
>
> (2) the odour from their urine and faeces has constituted a nuisance and unreasonably interfered with the use or enjoyment of other Lots or of the common property;
>
> (3) the settling of dust from the respondent's backyard containing the odour from their urine and faeces has unreasonably interfered with the use or enjoyment of other Lots or of the common property;
>
> (4) the aggressive nature of the two dogs has unreasonably interfered with the use or enjoyment of other Lots or of the common property, particularly for those owners and occupiers who have young children."

28 I have listened to the recordings tendered by the applicant. Those recordings disclose barking on a number of occasions, lasting for up to 4 minutes, which, were it persistently repeated, would in my view constitute a breach of s 153 and justify an order requiring the respondents to take action, most likely by ensuring the dog is not left outside their apartment, that is in the courtyard, when they are not present in their unit.

29 I accept the applicant's evidence that he made the recordings at the times and dates identified on the recordings and that it was the respondent's dog which was barking during the recordings.

30 The respondents submitted that the applicant could not know that it was their dog but I accept that the applicant would have been able to distinguish

between barking from the respondents' dog and barking from other dogs in the neighbourhood.

31 However, the evidence does not establish that the barking was of such frequency or duration that it can be fairly described as an unreasonable imposition upon the applicant's enjoyment of Lot 2.

32 As noted, the applicant produced eight recordings. Three recordings were made over a period of roughly half an hour on 23 May 2023. The dog can be heard barking for between one minute and 52 seconds and three minutes on those three occasions.

33 Two recordings were made on 24 January 2023 about an hour apart. The dog can be heard barking for 50 seconds in the first recording and nearly four minutes in the second recording.

34 The remaining three recordings were made on different dates in December and October 22.

35 The two recordings made in December 22 last less than a minute and the barking heard on the recordings lasts no more than 30 seconds. The recording made in October 2022 lasts just over 2 ½ minutes, during which the dog can be heard barking continuously.

36 There is no evidence before the Tribunal, such as a diary maintained by the applicant to establish the overall frequency with which the applicant was disturbed by the dog barking or the duration of any instances of the dog barking other than those recorded. Beyond the recordings, the only evidence of the frequency or duration of barking was the applicant's generalised assertion that the recordings made on 23 May 2023 showed the dog's "typical behaviour". I do not regard that evidence as being sufficiently particular to establish that the dog's barking, which the applicant conceded was only an issue when the dog was "allowed to roam in the front courtyard during the day", constituted a nuisance or an unreasonable interference with the applicant's enjoyment of Lot 2.

37 In the absence of evidence to establish that the applicant was disturbed by the barking of the dog on more than five occasions over a period of seven months,

I cannot conclude that the barking of the dog constitutes a nuisance or an unreasonable interference with the applicant's quiet enjoyment of Lot 2.

38 I am not satisfied that the applicant has establish any breach of s 153 of the SSMA or by-law 6 or that there is justification for the Tribunal to make any order requiring the respondents to take any action in respect of their dog's barking.

39 Accordingly, I will dismiss the application for an order pursuant to s 158 of the SSMA.

Removal of Mr Savva from the strata committee – section 238

40 The evidence discloses that Mr Savva had been chairman of the owners corporation for a period during 2022. Mr Savva maintained that he had ceased to act as chairman by the end of 2022. The applicant did not concede that proposition, but did not dispute that Mr Savva had ceased to be chairman after the Annual General Meeting of Strata Plan No 94579 in June 2023, although he remained on the committee.

41 The applicant identified a number of matters which he maintained warranted the making of orders removing Mr Savva from the committee.

42 Certain of those matters are either irrelevant to Mr Savva's position on the strata committee or so trivial that I declined to entertain submissions concerning them. An example of the latter was the fact that the owners corporation had paid for a plumber to inspect the stormwater pipes draining the respondents' lot. Stormwater pipes are part of the common property and no criticism could be levelled at Mr Savva because the owners corporation undertook an inspection when an issue (failure of the tiles on Lot 3's terrace to drain properly) had been identified. A second example of the latter was a complaint that Mr Savva had been involved in taking steps to remove a car from the visitors parking bay which had been left there for two months.

43 I turn to the remaining matters raised by the applicant.

44 The first allegation was that Mr Savva had failed to comply with the by-laws, in particular by law 2 which prohibited changes to common property without the consent of the owners corporation. The applicant alleged that Mr Savva had

installed CCTV cameras attached to the common property walls in Lot 3 without the approval of the owners corporation.

45 Mr Savva explained that he had seen that Lot 2 had CCTV cameras installed and didn't realise that he needed approval to instal cameras in Lot 3. He stated that, upon discovering that he needed approval, he "followed the correct procedure" and obtained approval.

46 The applicant also submitted that Mr Savva had used his position as chairman for his own personal benefit because two extraordinary general meetings have been called at which the only item on the agenda was to approve Mr Savva's CCTV installation and a special by-law required to enable him to add to or alter the common property.

47 The applicant maintained that not only had those meetings been held for Mr Savva's personal benefit but that the cost of holding those meetings had not been covered by Mr Savva. The applicant pointed to evidence which suggested that the cost of holding the meeting and the drafting of the special by-law had been in the order of $500.

48 Mr Savva's evidence was that the strata manager had not charged the owners corporation for the cost of calling the meetings and that he had paid the legal costs incurred in relation to the drafting of the special by-law. The evidence before the Tribunal did not enable me to confirm or reject either proposition.

49 The applicant also maintained that Mr Savva had not paid for legal services provided directly to him both in relation to these proceedings and otherwise. The applicant tendered the tax invoices issued by JS Mueller & Co Lawyers on 28 April 2023 and 30 June 2023. The matter description on each tax invoice is "Re: Building Defect Claim in NCAT." The applicant did not dispute that JS Mueller & Co were instructed by the owners corporation in relation to litigation in the Tribunal against the builder and developer of the Strata Plan. However, the applicant pointed to a number of items in the detailed narrations attached to the tax invoices:

(1) A number of items which related to the proposed special by-law authorising the installation of Mr Savva's CCTV camera;

(2) Other attendances upon Mr Savva not obviously related to the building defects litigation in the Tribunal; and

(3) Two items on 8 June 2023: "Telephone attendance upon Andrew Savva who rang to seek some advice about an NCAT application brought against him" and "Telephone attendance upon Andrew Savva who telephoned about a summons that he has been served for production". Both of those attendances are clearly related to these proceedings.

50 Mr Savva maintained that he had independently instructed JS Mueller & Co to give him advice in relation to these proceedings and had not been aware of the items identified by the applicant.

51 The applicant further maintained that Mr Savva had misled the Tribunal by making false statements in his submissions. The relevant allegation was that Mr Savva had denied viewing CCTV footage recorded on the owners corporation's cameras, when the records maintained by the owners corporation and a statement Mr Savva had made to the police clearly indicated that Mr Savva had reviewed the CCTV footage.

52 Mr Savva explained the inconsistency between his statements to the Tribunal and to the police concerning whether he had viewed the CCTV footage as arising from a failure of memory. He stated that he was 74 years old.

53 The applicant submitted that the fact that Mr Savva had viewed the CCTV footage was itself a reason why Mr Savva should be removed from the committee. The by-laws of the owners corporation include Special By-law 2 which governs the installation and operation of the CCTV system. Sub-clause (4) of Special By-law 2 provides:

> "(4) The recordings of the optical or audio surveillance device:
>
> (a) must be stored in a safe place that is locked and only the Strata Committte/Strata Manager is permittd to access it;
>
> …
>
> (c) may be viewed by:
>
> (i) the Strata Manager, in the event of a reported illegal incident;
>
> (ii) an Owner or Occupier, if written approval has been granted by the Strata Committee/Strata Manager;
>
> (iii) an order from the Tribunal and/or Court; and
>
> (iv) a person of authority i.e. police officer."

54 The applicant relied upon the CCTV viewing register which recorded that, on 20 December 2022, the owner of Lot 26 and Mr Savva had viewed CCTV footage. The reason for their viewing the footage being recorded as “ground floor theft”.

55 Mr Savva did not suggest that he had obtained written approval from the strata committee or the strata manager to view the footage. His explanation, as I understood it was that both he and the owner of Lot 26 were on the committee, and he had not been aware that formal written approval was required.

56 The next matter which the applicant submitted warranted Mr Savva’s removal from the strata committee was that, as chairman of the strata committee, the Mr Savva had allowed motions to be voted upon which were out of order. The applicant pointed to a number of motions included on agendas for strata committee meetings and general meetings which were included in the applicant’s evidence.

57 The first motion to which the applicant objected was a motion on the agenda for a meeting of the strata committee to be held on 31 August 2022 that “The strata committee reconfirm the decision to terminate the services of Credwell Consulting”. The explanation for this motion is detailed and does not warrant repetition. It is sufficient to note that the explanation involved the propositions:

(1) That the retainer of Credwell Consulting had been purportedly approved at a meeting of the former strata committee attended only by the applicant;

(2) That the retainer had been to prepare a report for the purposes of the building defect litigation;

(3) That the strata committee had no authority to approve the level of expenditure involved (which exceeded $20,000); and

(4) That the owners corporation’s lawyers had advised that the owners were not able to submit a further defects inspection report in the building defect litigation.

58 It is clear in my view that the motion was not in any way out of order. Of much greater concern is the suggestion that the applicant had purported to approve entry into a contract involving the expenditure of more than $20,000 at a meeting at which he was the only strata committee member present. Because

the proceedings before me do not involve any application in relation to the applicant, there is no need to consider this issue further.

59 The applicant took exception to six resolutions included on the agenda for the strata committee meeting to be held on 24 November 2022

60 The first motion was “That there is neither a pecuniary interest to be declared nor a conflict of interest any of the motions being voted on as outlined in this agenda.”

61 It is not clear on what basis such a motion could be out of order. The minutes of that meeting, which the applicant included in his evidence, indicate that the motion was passed. The applicant did not directly suggest that Mr Savva had a pecuniary interest or a conflict of interest in any of the motions on the agenda which should have been declared.

62 The applicant’s objections to that motion and to other motions on the agenda for that meeting appeared to have more to do with the fact that they are directed to conduct of the applicant than any legitimate objection to the motions being included on the agenda or being put to the meeting.

63 The second item on that agenda that the applicant objected to was that the strata committee approve additional works “to remove the dormant camera and associated cabling above the rear entry/exit door to the Ground Floor Courtyard” at a cost not to exceed $550 inclusive of GST.

64 The explanation for the motion included on the agenda was that the camera was not connected to the owners corporation’s CCTV system. The applicant did not explain why that motion was out of order.

65 The third item to which the applicant objected was a motion that the strata committee “proceed with the advice from SMSNSW [the strata managers] for the removal of the maroon 2003 Ford Falcon parked on B1 upper disabled parking space since 11 October 2022, that is issue notice of removal pursuant to Regulation 34 *Strata Schemes Management Regulation 2016* (NSW)”.

66 I note immediately that that motion is not in any way out of order or inappropriate, save for the fact that it refers to a regulation which was repealed in 2020. The explanation provided in the agenda was that:

> "the male driver of this vehicle was provided access to the basement parking by the occupant of Lot 2. The driver then proceeded to leave the building with luggage via the lift from B1 Upper to the Ground Floor Lobby. It is not known if the driver of this vehicle has returned at any stage since parking on 11 October 2022. The vehicle appears abandoned."

67 If any criticism is to be directed at any party to these proceedings in relation to this issue, it should be directed to the applicant, who appears to have regarded it as appropriate to permit someone known to him to occupy a visitors parking space continuously for over a month.

68 As I have already noted, the motion itself was entirely appropriate.

69 The fourth motion to which the applicant objected was: "That the SC on behalf of the OC provide approval for legal advice from a barrister relating to Lot 2. Cost estimate to be formalised." The explanation included in the agenda was that it was intended to "Investigate a number of matters that have resulted in significant cost for the OC e.g. insurance premiums."

70 The applicant did not expand upon why he submitted that that that the presentation of that motion to a strata committee meeting was out of order. It is not inappropriate on its face.

71 The fifth motion to which the applicant objected was: "That the SC on behalf of the OC approved the removal of the piece of timber featuring mould spores (shelving) that was left in the foyer on 4 October 2022." The explanation for this motion included on the agenda was "The placement of such items in the common property areas is prohibited and is defined as depositing rubbish and other material on common property under the SSMA."

72 The applicant's objection to this motion was apparently that the piece of timber belonged to him and had been kept in his parking space and used to assist him in aligning his car in the garage. It is not clear in what circumstances the piece of timber had been left in the foyer rather than the car park. In any event, given that the piece of timber had apparently been disposed of before the meeting, a motion ratifying the action of disposal could not be said to be out of order. The explanation is accurate when it states that the placement of such items on common property is prohibited and fairly categorised as disposing of rubbish

on common property. The disposal of rubbish and leaving other material on common property is prohibited under the by-laws.

73 The final item on the agenda for the meeting on 24 November 2022 to which the applicant objected was: “That the SC on behalf the OC install a new key cabinet and establish a system for the proper storage of building keys. Costs to be formalised.”

74 I note that the applicant had been chairman of the strata committee prior to Mr Savva’s appointment to that role. This motion appears to relate to the facts that it was apprehended that the applicant had retained a master key and that some formality needed to be introduced into the management of keys to the building. There is no basis upon which it could be said that the motion was out of order, or inappropriate.

75 The applicant next objected to an item included on the agenda of the strata committee meeting to be held on 10 February 2023 under the heading “Approval Notice to Comply Lot 2 for not returning the master key that is in his possession”. The motion was in terms reflecting the heading.

76 By February 2023, neither the applicant nor his wife remained on the strata committee. It was entirely appropriate for a notice to be issued requiring the applicant to return the master key. The applicant did not give evidence that he did not continue to hold the master key at that time or that he had not been requested to return it.

77 The applicant objected to two motions on the agenda for a meeting of the strata committee to be held on 19 May 2023:

78 The first was motion 4: “That the Strata Committee engage the services of an electrical contractor to isolate the common area power socket circuits.” The explanation for this motion included in the agenda was:

> “Due to the ongoing activities by an individual, who has been using the common area power supply in the basement areas personal use and creating inconvenience to other owners and residents, it is necessary to stop the ongoing electricity expense being born by the Strata Plan”.

79 The second was motion 5: “That the Strata Committee approve to engage the legal services of” one of three identified firms of solicitors “as per the directions

resolved at EGM 21 December 2022 motion 26." The explanation for this motion was: "For commencement of the required legal action against Lot 2 for ongoing breaches."

80 The applicant's objection to each of these resolutions appears to be that they were directed against him personally.

81 If it was the case that the applicant was utilising the owners corporation power supply for his own personal use, the strata committee was quite justified in considering steps to prevent that continuing. Similarly, if the applicant was engaged in breaches of the by-laws, in circumstances where there had been a resolution at the EGM held on 21 December 2022 approving the expenditure on legal services, it was entirely appropriate for the strata committee to consider a motion to engage one of the three identified firms of solicitors.

82 It is clear from the foregoing reasons, that I do not consider that any of the motions included on agendas for strata committee meetings, which the applicant has identified as motions which Mr Savva should not have permitted to be entertained, could be said to have been out of order or in any way warrant consideration of the removal of Mr Savva from the strata committee.

83 The applicant also identified a number of motions presented to general meetings which he submitted should have been either a special resolution but were presented as ordinary resolutions or involved the approval of changes to common property without an appropriate by-law.

84 As the minutes of the relevant general meetings were not included in the applicant's evidence, I am unable to determine whether the relevant motions were passed or were ruled out of order. Accordingly, there is nothing arising in relation to the motions identified by the applicant on the agendas of general meetings which would warrant consideration of the removal of the Mr Savva from the strata committee. In particular, I note that, in accordance with common practice in strata schemes, the agendas for the general meetings were prepared and circulated to lot owners by the strata manager not from Mr Savva himself directly.

Section 238 – Consideration

85 Section 238 of the SSMA confers upon the Tribunal the power to remove a member from the strata committee. While the section does not expressly limit the bases upon which the Tribunal may exercise the power, a clear indication of the nature of the circumstances in which it might be appropriate to exercise the power is provided by subs (2).

86 The operation of s 238 was considered by a Senior Member of the Tribunal in *Linney v The Owners - Strata Plan No. 11669* [2021] NSWCATCD 123. At [93] – [94] the Tribunal held:

> "93 In any event, the matters that are to be considered under s 238 of the SSMA are the matters set out in s 238 (2), being:
>
> (a) Failure to comply with the Act, the Regulations or the By-laws; or
>
> (b) Failure to exercise due care and skill, or engaging in serious and wilful misconduct.
>
> 94 Further, even if any of the matters set out in s 238(2) are established, the applicant must additionally satisfy the Tribunal that the matters are of sufficient magnitude to justify exercising its discretion in favour of removing the strata committee member from office.

87 To the extent that that decision suggests that the matters to be considered are only those set out in subs 238(2), I disagree. The words of subs (2) make it clear that that the circumstances listed in subs (2) are not the only circumstances in which the Tribunal might make an order removing a person from a strata committee.

88 Nevertheless, as the Tribunal held in *Lockrey v Rosewall* [2022] NSWCATCD 27, at [14] – [15]:

> "14 In respect of an application for an order appointing a strata managing agent under s 237 of the SSMA, the Tribunal has previously observed that such an appointment is a serious measure that should not be taken lightly as it removes the democratic process established by the SSMA for an owners corporation to manage its strata scheme: *Velastegui v Chan* [2021] NSWCATCD 98 ay [76]; see also *Gershberg & Troyanovski v Owners Corporation SP 5768* [2011] NSWCTTT 411 at [80].
>
> 15 It necessarily follows that the approach identified in *Velastegui v Chan* to an application for an order under s 237 should also be taken in respect of an application for an order removing a person from a strata committee under s 238 of the SSMA. Section 9 of the SSMA provides that the owners corporation for a strata scheme has the principal responsibility for the management of the scheme. The regime for self-management of strata schemes established by the SSMA involves the ability of an owners corporation to elect the members

> of its strata committee: see ss 29(1) and 30(4) of the SSMA. Compelling circumstances would need to be demonstrated to justify the intervention of the Tribunal to override the democratic wishes of the owners corporation by making an order under s 238 of the SSMA. The decisions of the Tribunal establish that such an order should only be made in the clearest of cases."

89 I do not consider that the evidence establishes that Mr Savva has failed to exercise due care and skill in fulfilling his duties as a member of the strata committee of Strata Plan No 94579 or that he has engaged in serious and wilful misconduct.

90 The only respects in which the evidence discloses that Mr Savva has, even arguably, acted in breach of the SSMA or Regulations, or the by-laws, are the installation of his own CCTV camera attached to common property without approval or an appropriate special by-law and the viewing of the CCTV footage without written approval from the strata committee or the strata manager.

91 Mr Savva's conduct in installing the CCTV camera is not directly related to his position on the strata committee. It cannot be said that Mr Savva took advantage of his position in doing so. As I have noted above, Mr Savva took action to correct and formalise the situation once he became aware of the requirements.

92 While there are legitimate concerns about the fact that Mr Savva has accessed footage from the owners corporation's CCTV camera without obtaining the formal written approval of the strata committee or strata manager, I do not consider that it is of itself sufficient to warrant the removal of Mr Savva from the committee. It would be incongruous to remove Mr Savva, without taking the same step in relation to the other committee member who joined him in viewing the footage.

93 There is nothing to suggest a continued and deliberate flouting of the requirements of the by-laws. Mr Savva viewed the footage on one occasion.

94 The applicant maintains that Mr Savva has repeatedly utilised his position on the committee for his own benefit.

95 I do not accept that the evidence establishes that that has occurred other than on very limited occasions, if at all. I accept that Mr Savva was not deliberately breaching the by-laws or otherwise acting improperly.

96 The applicant submitted that the fact that Mr Savva had explained the inconsistency between his submission to the Tribunal and his statement to the police about viewing the CCTV footage as a failure of memory as being itself sufficient ground to remove Mr Savva from the committee. I disagree. Regardless that Mr Savva's memory might not be what it was, he does not manifest a level of incompetence which would warrant his removal from the committee.

97 Members of strata committees are volunteers. Provided they are capable of conducting their own affairs, they should be considered capable of conducting the affairs of a strata scheme. In this regard it should be noted that Strata Plan No 94579 has a professional strata manager.

98 There is reason for concern about the way in which the owners corporation's solicitor has included charges bearing no apparent connection to the approved retainer in tax invoices relating to the building defects claim. However, there is no evidence to suggest that Mr Savva was in any way responsible for that.

99 While there are a number of aspects of the conduct of the affairs of Strata Plan No 94579 which might suggest that the strata manager has not been as diligent as lot owners might be entitled to expect, they are not matters for which Mr Savva should be considered responsible.

100 The applicant submitted that section 54 of the SSMA attributed to Mr Savva the actions of the strata manager. I do not accept that submission.

101 Section 54 provides:

> **54 Functions of officers and strata committee may be given to strata managing agent**
>
> (1) The instrument of appointment of a strata managing agent may provide that the strata managing agent has and may exercise all the functions of the chairperson, secretary, treasurer or strata committee of an owners corporation or the functions of those officers or the strata committee specified in the instrument.
>
> (2) However, the chairperson, secretary, treasurer and strata committee of an owners corporation may continue to exercise all or any of the functions that the strata managing agent is authorised to exercise.
>
> (3) Any act or thing done or suffered by a strata managing agent in the exercise of any function of the chairperson, secretary, treasurer or strata

committee conferred on the strata managing agent in accordance with this section—

(a) has the same effect as if it had been done or suffered by the chairperson, secretary, treasurer or strata committee, and

(b) is taken to have been done or suffered by the chairperson, secretary, treasurer or strata committee.

(4) This section is subject to section 56.

102 Section 54 is directed to ensuring that the strata manager's actions bind the owners corporation in the same way as if they had been carried out by the officers or strata committee. Section 54 does not have the effect that the officers and members of the strata committee are deemed for all purposes to be responsible for all of the actions of the strata manager.

103 For the foregoing reasons I dismiss the application for orders pursuant to section 238.

ORDERS

(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