



## Civil and Administrative Tribunal New South Wales

Case Name: Robert Nigel Dickson Pty Ltd v The Owners – Strata Plan No. 69703

Medium Neutral Citation: [2021] NSWCATCD

Hearing Date(s): 11 November 2020, last submissions 24 December 2020

Date of Orders: 13 January 2021

Date of Decision: 13 January 2021

Jurisdiction: Consumer and Commercial Division

Before: Graham Ellis SC, Senior Member

Decision: In the proceedings SC 20/22571:

1. The interim order is discontinued.

In the proceedings SC 20/15335:

1. An order under section 237(1) of the Strata Schemes Management Act 2015 appointing Strata Central Pty Ltd as strata managing agent to exercise all the functions of The Owners – Strata Plan No. 69703 (the Owners Corporation) for a period of 18 months from the date of this Order.
2. An order under section 237(2) of the Strata Schemes Management Act 2015 appointing Strata Central as strata managing agent to exercise all the functions of the chairperson, secretary, treasurer and

strata committee of the Owners Corporation for a period of 18 months from the date of this Order.

3. On or before 27 January 2021 any application for costs is to be made by providing written submissions to the Tribunal and the other parties.

4. On or before 10 February 2021 any response to any such application is to be made by providing written submissions to the Tribunal and the other parties.

5. Any submissions on costs are to address the question of whether costs can be determined on the papers (ie without the need for a further hearing).

Catchwords: LAND LAW – Strata title – Strata managing agent – Compulsory appointment of strata managing agent

Legislation Cited: Heritage Act 1977  
Property, Stock and Business Agents Act 2002  
Strata Schemes Management Act 1996  
Strata Schemes Management Act 2015

Cases Cited: 2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943 [2014] NSWCA 409  
AHB v NSW Trustee and Guardian [2014] NSWCA 40  
APX Projects Pty Ltd v The Owners – Strata Plan No. 64025 [2015] NSWSC 1250  
*Bischoff v Sahade* [2015] NSWCATAP 135  
Casey and Cahn v The Owners Corporation Strata Plan No 586 [2016] NSWCATCD 69  
Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited [2013] HCA 46  
Hoare v The Owners – Strata Plan No 73905 [2018] NSWCATCD 45  
McKenzie v McKenzie [1970] P 33  
Mortlock v Owners of Strata Plan No 55434 [2006] NSWSC 363  
Re Holpitt Pty Limited v Swaab [1992] FCA 1  
Siewa Pty Ltd v The Owners Strata Plan 35042 [2006] NSWSC 1157  
The Owners – Strata Plan No 14593 v Soares [2019] NSWCATAP 35  
The Owners Strata Plan No 57164

[2017] NSWCA 314  
Unilodge Australia Pty Ltd v The Owners Strata Plan  
54026 [2020] NSWCATCD, 29 April 2020  
Vickery v The Owners Strata Plan No 80412  
[2020] NSWCA 284  
Yardy v Owners Corporation SP 57237  
[2018] NSWCATCD 19

Category: Principal judgement

Parties: Robert Nigel Dickson Pty Ltd (Applicant)  
The Owners – Strata Plan No. 69703  
(First Respondent)  
Samantha Ford (Second Respondent)  
Ronald Hakes Wood and Rita Yip  
(Third Respondents)

Representation: Ms A Farmer (Applicant)  
Ms L Johnston, instructed by Mr J Powys (First  
Respondent)  
Mr R de Robilliard (Third Respondents)

File Number(s): SC 20/22571 (interim), SC 20/15335 (substantive)

Publication Restriction: Nil

## REASONS FOR DECISION

### Overview

- 1 This is an application for the appointment of a strata managing agent under section 237 of the *Strata Schemes Management Act 2015* (the SSMA) with an alternative request for an order under section 232 to enable repair and maintenance work to be undertaken.

### History of the proceedings

- 2 On 31 March 2020 Robert Nigel Dickson Pty Ltd (the applicant) commenced proceedings (SC 20/115335) against The Owners – Strata Plan No 69703, seeking an order for the appointment of a compulsory strata manager.
- 3 On 22 April 2020, when that application was listed for directions, orders were made to provide the other lots owners with (1) copies of the documents, (2) an opportunity to become a party to the proceedings, and (3) an opportunity to apply for leave to have legal representation.
- 4 A second application, dated 21 May 2020 (SC 20/22571), sought interim orders. On 26 May 2020 a restraining order was made in relation to “*carrying out any work in accordance with the August 2019 ICG Report*”, along with directions for the provision of submissions by the parties.
- 5 At a directions hearing on 12 June 2020, Ms Ford, Mr Wood and Ms Yip were added as respondents and it was noted that the application was amended to seek an order for the appointment of a compulsory strata manager but no such order was made on an interim basis. The restraining order was continued.
- 6 On 18 August 2020, when the proceedings were listed for hearing, they were adjourned and directions were made for the provision of documents. The restraining order was continued until the earliest of 25 November 2020 and the determination of the proceedings.

- 7 On that occasion, an order was made for the respondents to pay the costs of the applicant that were “thrown away” due to the adjournment due to the respondents’ lack of readiness to proceed. The reasons given for adjourning the proceedings included the following paragraph:

However in granting the adjournment, the Tribunal impressed upon the respondents that this was their final opportunity to prepare and put their case before the Tribunal. No further extensions or adjournments would be granted except in exceptional circumstances, and the hearing would proceed on the next occasion irrespective of the degree of their preparedness.

- 8 On 28 August 2020 a notice was issued to advise the parties the proceedings were listed for hearing on 11 November 2020.

### **The hearing**

- 9 The hearing was not conducted with attendance at the Tribunal’s hearing rooms due to COVID 19 movement restrictions but was instead conducted using AVL and telephone calls. Ms Farmer represented the applicant. Ms Johnston, instructed by Mr Powys, represented the Owners Corporation (OC) and Ms Ford appeared in person.
- 10 Mr De Robilliard was granted leave to represent Mr Wood and Ms Yip on a “Mackenzie friend” basis (i.e. a person who is not legally qualified or is not currently admitted to practise law but is permitted to represent a litigant in person, as established in the UK case of *McKenzie v McKenzie* [1970] P 33). That leave was confined to attendance during the hearing and being able to make submissions. That appeared to the Tribunal to be the appropriate course since (1) Mr Wood was already a witness for the OC, (2) there were already lawyers putting the case for and against the orders sought by cross-examination, and (3) permitting submissions to be made on behalf of Mr Wood thereby enabled him to not only give evidence but also provide his views as to what should be the outcome of the application.

## **Jurisdiction**

- 11 It is clear that the building in Millers Point is the subject of a registered strata scheme. Thus, the SSMA applies with the result that the Tribunal has jurisdiction to hear and determine the proceedings.

## **Background**

- 12 The owners and unit entitlements (UE) of the lots in the strata plan the subject of these proceedings (SP 69703) is as follows:

Lot 1, owned by Mr Wood and Ms Yip, has a UE of 30

(Lot 2 was subdivided by Strata Plan 79818)

Lot 3, owned by the applicant, Robert Nigel Dickson Pty Ltd, has a UE of 22

Lots 4 and 5, both owned by Ms Ford, each have a UE of 24

- 13 It is also relevant to note that on 06 July 2020 Mr Wood and Ms Yip agreed to sell Lot 1 to JJSF Family Holdings Pty Ltd (JJSF) with a deferred settlement since the date for completion was stated to be the “9<sup>th</sup> month after the date of *this contract*”, ie 09 April 2021, with the result that the sale had not been finalised at the time of the hearing.

- 14 Located at 1-7 Argyle Place in Millers Point, the strata plan the subject of these proceedings is listed on the State Heritage Register. As a result, section 57 of the *Heritage Act* 1977 requires Heritage Council approval before any alteration is made to the building.

## **Evidence**

- 15 The evidence that was admitted at the hearing was as follows:

Exhibit A Documents lodged for the applicant on 17 August 2020

Exhibit B Documents lodged for the applicant on 15 October 2020

- Exhibit C Documents lodged for the OC on 11 November 2020
- Exhibit D Copy of contract for sale of Lot 11 dated 06 July 2020
- Exhibit E Proxy appointment form for Lot 1 dated 21 October 2020
- Exhibit F Company search for JJSF dated 07 August 2020
- Exhibit G Strata Managing Agency Agreement dated 05 June 2020
- Exhibit H Minutes of OC meeting held on 25 October 2020

- 16 There was also an application to admit two bundles of documents as evidence at the 11 November 2020 hearing, being documents filed by the OC's lawyer on 09 November 2020 and late on 10 November 2020. Those documents have not been admitted as evidence for a number of reasons.
- 17 First, since there was a direction made on 18 August 2020, when the hearing of this application was adjourned, for the OC (which was ordered to pay the costs of that adjournment) to file the evidence upon which it relied by 15 September 2020. The effect Order 7 was that documents not provided by that date would require leave which would only be granted in exceptional circumstances. Further, paragraph 8 of the reasons delivered on that occasion indicated that the Tribunal was giving the OC a final opportunity to lodge the documents upon which it relied.
- 18 Secondly, since the documents appear to have been provided, without prior notice, close to the hearing: two days prior to the hearing in one instance and late on the afternoon of the day before the hearing in the other case. Thirdly, since it would be procedurally unfair to admit those documents when the applicant has not been given sufficient time to consider them. Fourthly, since there was no adequate explanation why those documents were not provided earlier.
- 19 Finally, since the OC suggested that any prejudice to the applicant could be cured by an adjournment and it is relevant to consider that the Tribunal's

Commercial and Consumer Division deals with more than 50,000 cases each year with the result that hearing time is a scarce resource and cannot be thrown away by permitting parties to lodge whatever documents they wish whenever they wish.

- 20 The Tribunal notes that it is now well-established, by decisions such as *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [51] and *AHB v NSW Trustee and Guardian* [2014] NSWCA 40, that case management principles are a relevant and legitimate consideration.
- 21 In addition to the documentary evidence, there was oral evidence since the evidence of Mr Gohil and Ms Lee, witnesses in the applicant's case, was challenged by cross-examination as was the evidence of Mr Gleeson, Ms Ford and Mr Wood for the OC.

### **Chronology**

- 22 The evidence establishes the following chronology:

15 Apr 11	Strata Committee (SC) meeting held
07 Jun 11	Sinking Fund Plan provided to SC
11 Jul 11	Strata Managing Agency Agreement for Strata Plus
08 Feb 13	Applicant's email regarding awning repair
08 Feb 13	Ms Ford's email regarding works to be undertaken
12 Jul 16	Annual General Meeting (AGM) for 2016 held
	SC Meeting following that meeting
05 Jul 17	AGM for 2017 held
18 Jul 17	EGM held

- 20 Feb 18 Integrated Consultancy Group (ICG) provided a report to the OC which set out a Maintenance Schedule and identified items requiring urgent attention, namely water leaks, paving settlement and roof defects
- 29 Jun 18 A tender and scope of works was provided by ICG to the OC
- 24 Aug 18 A tender analysis was provided for three quotations, for amounts ranging from just under \$500,000 to just over \$700,000
- 15 Feb 19 Email suggests “inundations of water ... during recent rains”
- Mar 19 Emails reveal that staging the work was considered
- 27 Mar 19 Applicant’s lawyers reminded OC of duty to repair under s106 SSMA
- 12 Jun 19 Follow-up letter, suggesting no progress on that issue
- 23 Jun 19 Principle Building estimate for \$325,737.50
- 29 Jul 19 At the 2019 AGM a motion to “consider rectification works required to common property” was withdrawn by lots 1, 4 and 5 and was noted “to be tabled at a subsequent meeting”
- 29 Aug 19 ICG prepared a “*Scope of Works & Tender Document*” for “*programmed maintenance repairs*” which split work into two stages
- 17 Oct 19 Ms Ford emailed strata manager regarding pest control
- 22 Oct 19 Ms Ford emailed strata manager regarding removal of fireplace
- 05 Nov 19 Ms Ford emailed strata manager regarding Lot 3 aircon units
- Nov 19 Ms Ford emails to/from City of Sydney Council regarding aircon units
- 13 Nov 19 Ms Ford emailed strata manager re City of Sydney investigation
- 13 Nov 19 Fair Trading notified the OC of an intended date for mediation

22 Nov 19 City of Sydney order in relation to Lot 3

11 Dec 19 An agreement was documented as a result of that mediation

19 Dec 19 Applicant's lawyer wrote to OC, expressing concerns in relation to the 29 Aug 19 ICG document which set out Priority 1 and Priority 2 stages

13 Feb 20 Report from Strata Roofing re leaks they repaired

24 Feb 20 Broker's report suggests 70% insurance premium increase

24 Feb 20 Email from ICG suggests items removed at request of Ms Ford

06 Mar 20 ICG provided OC with fee proposals

11 Mar 20 Applicant indicated its agreement to those proposals

13 Mar 20 Ms Ford email to say she is waiting on a health clearance

16 Mar 20 Email suggests Ms Ford "*sighted walking down Kent St*" on 13 Mar 20

18 Mar 20 Mr Wood send email, complaining about "*Lack of action*"

23 Mar 20 Strata Plus letter of consent to appoint and draft agreement

30 Mar 20 Applicant's lawyer requests motion be placed on the agenda of the Extraordinary General Meeting (EGM) that has been called

30 Mar 20 Notice of EGM issued

02 Apr 20 Strata Plus email notifying lot owners of its consent to act

24 Apr 20 At EGM, resolved to call for quotations for ICG's "*List 1*" with "*List 2*" be "*part of a new 10-year budget plan*" for the capital works fund

At that EGM it was also resolved to defer the selection of consultants, such as heritage consultants to "*a later General Meeting*" and a proposal to accept quotation from IBC and Weir Phillips was defeated

26 May 20 Interim orders made by the Tribunal, restraining any work set out in August 2019 ICG report until 12 June 2020

28 May 20 Notice issued for SC meeting on 10 Jun 20

05 Jun 20 Copy of Strata Managing Agency Agreement for Strata Choice

01 Jun 20 Mr Wood seeks clarification from Strata Plus

10 Jun 20 Hand over from Strata Plus to Strata Choice

12 Jun 20 Interim order continue until the earlier of 25 August 2020 and the determination of the substantive application

26 Jun 20 General Meeting appointed Strata Choice as strata managing agent and delegated to the secretary (Ms Ford) authority to engage lawyers

03 Jul 20 Report from Shreeji Consultant Structural Civil Engineers, suggesting splitting work will increase maintenance costs and create significantly higher chance of failure of part of the building system

06 Jul 20 Date of contract for sale of Lot 1

10 Jul 20 Amended application served

31 Jul 20 Mr Mills of Strata Choice not aware of any work order for the building

03 Aug 20 Applicant's lawyer expresses concern in relation to repair work, suggesting Ms Ford unilaterally engaged contractors and strata manager knew nothing of the work, said to have been urgent work (photos of that work are at A433-435, i.e. pages 433-435 of Exhibit A)

14 Aug 20 Strata Central letter of consent to appoint and draft agreement

11 Sep 20 Mr Gleeson provided Building Engineers report

30 Sep 20 Minutes for 2020 AGM do not record any resolution in relation to repair and maintenance of common property

- 12 Oct 20 Further report from Shreeji Consultant Structural Civil Engineers
- 21 Oct 20 Proxy appointment form for Lot 1 in favour of Fady El Ghitany of JJSF
- 25 Oct 20 General Meeting resolves to convene EGM to terminate solicitors, engage new solicitors and lodge insurance claim for legal costs
- 06 Apr 21 Date for completion of sale of Lot 1

## Relevant law

23 Section 237 of the SSMA provides as follows:

- (1) **Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation** *The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent-*
  - (a) *to exercise all functions of an owners corporation, or*
  - (b) *to exercise specified functions of an owners corporation, or*
  - (c) *to exercise all functions other than specified functions of an owners corporation.*
  
- (2) **Order may confer other functions on strata managing agent** *The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise-*
  - (a) *all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or*
  - (b) *specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions, or*
  - (c) *all the functions of chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.*
  
- (3) **Circumstances in which order may be made** *The Tribunal may make an order only if satisfied that-*

- (a) *the management of the strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or*
- (b) *an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or*
- (c) *an owners corporation has failed to perform one or more of its duties, or*
- (d) *an owners corporation owes a judgment debt.*

(4) **Qualifications of person appointed**

*A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must-*

- (a) *hold a strata managing agent's licence issued under the Property, Stock and Business Agents Act 2002, and*
- (b) *have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.*

(5) **Terms and conditions of appointment**

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

(6) **Return of documents and other records**

*A strata managing agent appointed as a consequence of an order under this section must cause a general meeting of the owners corporation not later than 14 days before the end of the agent's appointment and must on or before that meeting make arrangements to return to the owners corporation all documents and other records of the owners corporation held by the agent.*

(7) **Revocation of certain appointments**

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

(8) **Persons who may make the application**

*The following persons may make an application under this section-*

- (a) *a person who has obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,*
- (b) *a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in the lease of a lot in the scheme,*
- (c) *the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,*
- (d) *a judgment creditor to whom the owners corporation owes a judgment debt.*

24 The words appearing in that section have been previously considered on a number of occasions and the decisions in those cases aid the application of section 237 to the circumstances of this case although such decisions obviously do not override the words of that section.

25 In *Mortlock v Owners of Strata Plan No 55434* [2006] NSWSC 363 (*Mortlock*) at [18] there is quoted the words of the decision-maker being challenged in that appeal which describes the earlier equivalent of section 237 of the SSMA as draconian on the basis that it removes the democratic process established by statute but goes on to suggest that there must be objective evidence that the management of the owners corporation is dysfunctional before an order is made for the appointment of a compulsory strata managing agent. Those words serve as a reminder that section 237 of the SSMA contains a significant power that requires an evidentiary basis before an order is made under that section.

26 The decision in *Hoare v The Owners – Strata Plan No 73905* [2018] NSWCATCD 45 (*Hoare*) at [202] suggests the fact that some lot owners do not agree does not make an OC dysfunctional and, at [199], that the appointment of a compulsory strata manager is “*a serious matter not to be taken lightly*”.

27 Despite dealing with a similar provision in the former legislation, *Bischoff v Sahade* [2015] NSWCATAP 135 (*Bischoff*) remains relevant since the grounds for an order to appoint a managing agent set out in section 162(3A) of the *Strata Schemes Management Act 1996* (the 1996 Act) contain exactly the same words as the grounds set out in subsection 237(2) of the SSMA. *Bischoff* at [32] is quoted below:

Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

1. does not perform a required function, for example to properly maintain the common property;
2. exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;
3. fails to exercise a power or make a decision to prevent a contravention by Lot owners and occupiers of their obligations under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws; and
4. raises levies and takes or defends legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners Corporation or the Lot owners as a whole.

28 It is worth noting that the decision in *Bischoff* was recently considered in *Unilodge Australia Pty Ltd v The Owners Strata Plan 54026* [2020] NSWCATCD, 29 April 2020 (*Unilodge*), where one of the grounds for the appointment of a compulsory strata manager was a failure to repair common property despite expert advice, detailed work and funding proposals and a notice from the City of Sydney Council.

29 *Siewa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 (*Siewa*) is another decision which is commonly referred to as indicating that the obligation to repair and maintain is a strict duty and not just a matter of reasonable care or best endeavours.

## **Submissions**

30 The submissions which received were as follows:

- (1) Submissions for the applicant, dated 02 December 2020.

- (2) Submissions on behalf of Mr Wood, dated 03 December 2020.
- (3) Submissions lodged for the OC, dated 10 December 2020.
- (4) Applicant's submissions in rely, dated 17 December 2020.
- (5) An email, sent on behalf of Mr Wood, on 24 December 2020.

### **Applicant's case**

- 31 The applicant relies on paragraphs (a), (b) and (c) of subsection 237(3). It submitted that the OC and strata committee (SC) are not functioning in a satisfactory manner and that the OC has failed to maintain and repair the common property of a heritage building which has been determined to have historical significance.
- 32 A submission was made that the OC has been on notice of the need for such work since receiving the 28 February 2018 ICG report (the 2018 report), that the motion relating to that work was withdrawn at the 2019 AGM. The OC then obtained a report from ICG dated 29 August 2019 (the 2019 report) about which the applicant expressed concerns when it was received in December 2019. Despite those concerns, the OC resolved on 24 April 2020 to proceed with that 2019 report.
- 33 The applicant relies on the report of Mr Gohil in support of the contention that the ICG methodology is unsuitable for a heritage-listed building. It is also noted that work was done in breach of an interim order of the Tribunal made on 26 May 2020 and submitted that such work was not carried out properly. While recognising there was a conflict between the evidence of Mr Gohil and Mr Gleeson for the OC, it was contended that the evidence of Mr Gohil should be preferred. It was also noted that the evidence indicated that work was carried out in response to an instruction by the SC secretary (Ms Ford) without the knowledge of the strata manager (Mr Mills).

- 34 As to the OC failing to perform its duties, the applicant noted the OC has not budgeted for repair and maintenance works and has set a budget of \$5,000 for “repairs and replacements” for the year from 01 June 2020 to 31 May 2021. Further, an invoice for work carried out on 31 July 2020 for more than that amount has already been paid.
- 35 Further, it was observed that the 30 September 2020 AGM did not pass or even consider any motion to either raise funds or consider any form of repair or maintenance works, even though the OC’s own expert, Mr Gleeson, identified that urgent work was required. Moreover, it was noted that the 24 April 2020 resolution to consider heritage consultants “at a later General Meeting” was not raised at that 2020 AGM.
- 36 By way of summary, it was submitted there was no scope, tender, budget or schedule to carry out necessary maintenance and repair of a heritage-listed property.
- 37 Another reason advanced for the order sought was that Mr Wood, a co-owner of Lot 1, gave evidence that he has been “*excluded totally*” from giving instructions to the OC’s lawyers in relation to these proceedings. It was noted that, even though Ms Ford holds 48% of the unit entitlements, neither she nor the current strata manager have any authority to issue instructions to the OC’s lawyers in a manner that excludes Mr Wood.
- 38 The applicant’s submissions included that (1) it was not until 29 July 2020 that the applicant became aware that the OC had engaged Angelkov Lawyers to act on its behalf in these proceedings, (2) there was no meeting of either the OC or the SC to retain them, and (3) there was no circulation of costs disclosure, as required by section 105 of the SSMA.
- 39 In relation to the alternative order sought, the applicant referred to the recent decision in *Vickery v The Owners Strata Plan No 80412* [2020] NSWCA 284, notably what was said by Basten JA at [26]:

A complaint by a lot owner that common property is in a state of disrepair would readily be characterised as a complaint of a failure to exercise the function of maintaining the common property in good repair. If the owners corporation did not accept there had been a breach of duty, or did not agree with a request in the lot owner's claim for remedial steps to be taken, there would be a "dispute" within the meaning of the chapeau to s232(1).

40 An application for costs was foreshadowed.

### **Mr Wood's position**

41 In his submissions, Mr Wood referred to his email of 19 October 2020 in which he expressed his shock as receiving a notice for the EGM to be held on 25 October 2020 without any prior discussion with him and her refusal to contact him in 2020 from the end of September until a week after the 11 November 2020 hearing. He noted that his wife, Mr Yip, is the treasurer of the OC. Mr Wood, not surprisingly, suggested that the OC's lawyers were taking instructions from Ms Ford and Mr El Ghitany.

42 The Tribunal was reminded that *The Owners – Strata Plan No 14593 v Soares* [2019] NSWCATAP 35 at [44-48] discussed the nature of each lot owner's interest in the OC. It was said that, on the basis of events since 19 October 2020, Mr Wood now accepts it would be reasonable for the Tribunal to find that the OC has become dysfunctional. A desire was expressed for Mr Wood to be permitted to make submissions on the question of costs in due course.

### **OC's case**

43 It was submitted that the order sought was extreme in that (1) it sought the approval of the applicant's preferred strata manager, (2) it would grant that strata manager all the powers of the OC and SC, and (3) it would override all levels of management of the strata scheme.

44 Further, it was noted that two of the reasons now advanced only arose during these proceedings, namely the alleged breach of the interim order and the alleged failure to properly engage the solicitors now acting for the OC. It was

contended that the interim orders were not breached because the works in question were emergency works in response to “weather events” and that the solicitors to which reference was made were no longer acting for the OC.

45 In relation to the alleged failure to repair the common property, it was submitted that, due to inconsistencies between the evidence of Messrs Gohil and Gleeson, there was no “*real evidence ... so as to guide the Tribunal in determining what would amount to ‘proper’ maintenance of the common property in this particular scheme*”. It was contended the present situation was not as serious as was the case in *Unilodge* and that there was no denial of the right to vote in this case, as there was in *Unilodge*.

46 It was contended that “*many of the tasks that ICG identified as requiring work have in fact been completed*”, by reference to the report of Mr Gleeson, and that the present situation more resembled the position in *Casey and Cahn v The Owners Corporation Strata Plan No 586* [2016] NSWCATCD 69 where an order under section 237 was not made. In addition, it was suggested that the work would have been more advanced but for the interim order having prevented further works from being undertaken.

47 On the topic of the heritage status of the building, it was disputed that the appointment of a compulsory strata managing agent would better protect the heritage features. It was contended that, since Ms Ford is not an expert witness, cross-examining her as to priority works was of low probative value. However, it was contended that “*she has substantial experience in managing heritage renovations*”, in contrast to the applicant’s witness, Ms Lee. It was subsequently submitted that Ms Ford’s evidence was that she had made 13 heritage applications to planning authorities.

48 As to the alleged breach of the 26 May 2020 interim order made by a Tribunal member, it was suggested that, when those orders were made, “*he expressly noted*” (emphasis added) that the order would not prevent urgent work. Further, that even if that observation was not made, “*it would seem to follow as a matter of logic and good sense*”. It is noted that these submissions, in

referring to a breach of the 26 May 2020, overlook that (1) the 26 May 2020 order was made in chambers, not during a hearing, (2) that both that order and the 12 June 2020 order, which was made during a hearing, were made by Ms K Rosser, a Principal Member of the Tribunal.

- 49 On the question of any lack of consultation by Ms Ford, it was contended that it was neither mandatory nor best practice to refrain from engaging a contractor to do urgent work until an OC meeting has approved that course and that this aspect did not provide support for a finding that there was dysfunction.
- 50 Next, the question of the engagement of the previous solicitors for the OC was raised. It was submitted this was only a matter of historical significance and that the solicitors now acting for the OC have been duly appointed.
- 51 Moving to the position in relation to those solicitors, the questions of whether they were validly appointed and whether they were validly taking instructions was addressed. It was said that those solicitors were validly appointed at an OC meeting held on 25 October 2020. It was also suggested that the Tribunal “*granted leave to that firm to act*” but that submission is rejected as the Tribunal never grants leave to a particular solicitor or firm of solicitors but only grants leave for legal representation.
- 52 It was suggested that Mr Wood was not excluded from that 25 October 2020 meeting as he gave a proxy to the purchase of his lot. However, Mr Wood’s submission was not confined to that meeting. Further, it was noted that Mr Wood and his wife had been added as respondents. The position was said to be that Ms Ford was providing instructions in her capacity as secretary of the OC and that there had been compliance with section 103 of the SSMA which requires solicitors for the OC to be appointed by a general meeting.
- 53 As to the role of Ms Ford, it was contended that “there is no evidentiary basis for the Tribunal to conclude that Ms Ford bears any particular responsibility for

any alleged failure to repair common property in the scheme”, or that it is necessary to remove and replace her.

54 After noting that disharmony between the lot owners does not constitute dysfunction, it was submitted that the matters raised against the OC, either individually or considered as a whole, do not establish dysfunction and that the facts of this case are distinguishable from cases where an order has been made under section 237 on that basis.

55 It was also submitted that, even if the Tribunal considers the strata scheme to be dysfunctional, the Tribunal should decline to make an order under section 237. Reasons advance in support of that submission were that recent events, namely the appointment of a new strata manager in June 2020 and the recent sale of Lot 1 will change the way the scheme operates.

56 Further, it was submitted that if the Tribunal decides to make an order under section 237 then it should appoint the current strata manager, Strata Choice, in order to preserve the “*democratic process*” referred to in *Hoare* and avoid the situation where the scheme has three different strata managers in the course of a year.

57 A submission was also made that any order under section 237 should be limited to an order for the maintenance and repair of the common property and only for six months’ duration. After submitting there was no evidence as to the period required to complete the required common property works, it was suggested a period of six months would be sufficient to engaged tradesperson and issue work orders. An additional submission was made that the order should be limited to the powers of the OC.

58 In relation to the alternative claim for relief, although conceding that *Vickery* empowers the Tribunal to make an order “*to settle a complaint or dispute*”, it was suggested it was unclear whether section 232 permits the Tribunal to

make the prescriptive order which the applicant seeks. It was suggested that there was no evidence to suggest Mr Gohil was any better qualified and that the Tribunal would not ordinarily go into the level of detail of the kind suggested by the applicant. In short, the OC opposed an order directing the engagement of a particular expert to conduct particular work.

59 Finally, as to Mr Robilliard's role in the proceedings, it was noted that the position of Mr Wood and Ms Yip has changed in that they now support the application. Reference was made to matters said to have occurred subsequent to the hearing which the Tribunal does not consider either relevant or appropriate to consider.

### **Applicant's reply**

60 The applicant's submission that the majority of unit entitlement holders do not oppose an order under section 237 is considered irrelevant since that section falls for consideration by the Tribunal whenever anyone entitled to apply does so and since Ms Ford is a respondent who opposes such an order. It was contended that the OC could not legitimately oppose the application when only Ms Ford, who holds 48% of the unit entitlements, opposes the order sought. Reference was made to the OC's submissions which were said to contend that Ms Ford, in her capacity as secretary, had the authority to determine the OC's position and unilaterally instruct the OC's lawyers.

61 It was noted that the SC comprised three persons, Ms Ford, Ms Yip and Ms Lee and that section 43 of the SSMA sets out the functions of the secretary of an OC which, it was submitted, did not extend to making decisions or issuing instructions in relation to this application. Reference was made to section 36(2) which indicates that a decision of the SC is a decision of the OC but, in the event of a disagreement, the decision of the OC prevails.

62 After referring to *The Owners Strata Plan No 57164* [2017] NSWCA 314 and 2 *Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* [2014] NSWCA 409 it was contended that it was the SC's authority to do what Ms Ford was doing in relation to these proceedings.

- 63 It was suggested that guidance could be obtained from company law principles which established that a company secretary does not have the power, by virtue of that position, to direct the conduct of litigation: *Re Holpitt Pty Limited v Swaab* [1992] FCA 1.
- 64 The applicant's case on this point was that there has been no decision of the SC in relation to this litigation and no delegation of authority from the SC to the secretary empowering her to do what she is doing nor has the OC made any such decision. It was noted that the OC's submissions (at [50]) expressed reliance on what was resolved at the general meeting held on 25 October 2020 but that meeting only resolved to convene an EGM in order to (1) engage the current lawyers, (2) terminate the appointment of the previous lawyers, and (3) lodge an insurance claim.
- 65 After analysing the position, reference was made to *Bischoff* at [122]:
- Circumstances in which the management structure may not be functioning or functioning satisfactorily included where the relevant level of management:
- ...
- (4) ... defends legal action on behalf of the owners Corporation in circumstances where such action is unnecessary or not in the interests of the owners corporation or the Lot owners as a whole.
- 66 It was submitted that the position changed when it became apparent, in written submissions dated 03 December 2020, that Mr Wood and Ms Yip no longer opposed the order sought by the applicant and that the lack of subsequent action by Ms Ford provided support for a finding that there was a failure of the OC to function satisfactorily.
- 67 The status of the purchaser of Lot 1 was covered and it was submitted that the purchaser's view of this application was irrelevant as it is not a lot owner and thus not a member of the OC. As a result, it was suggested the only legitimate opposition to the order sought was that of Ms Ford.
- 68 Next, it was submitted that the current lawyers have not been properly approved to act as the OC's solicitors as the 25 October 2020 resolution is only a resolution to convene an EGM to consider that proposal and there is no

evidence any such meeting has been held. That submission was put in response to the OC's submission that there has been a decision to appoint the OC's current solicitors that complies with section 103 of the SSMA and that the same breach occurred in relation to the previous solicitors for the OC.

69 In relation to the repair and maintenance of common property, it was noted that Mr Gohil had clearly articulated the steps that should be taken to properly address those matters and that his experience in working with state heritage listed properties was unchallenged. Secondly, it was observed that the interim order did not prevent the OC from obtaining quotes, but none have been obtained in the past six months. Thirdly, the Tribunal was reminded that there is no recorded intention to proceed with work which Ms Ford, as secretary, acknowledged and that was despite Mr Gleeson report that work needs to be done, some of which is urgent. As to Ms Lee's failure to obtain the requisite approval, it was suggested that incident serves to remind of the need for any future work to comply with all legal requirements.

70 On the topic of the breach of the interim order, it was noted that the only evidence the work that was done was urgent was that of Ms Ford and that other lot owners were not informed about that work.

71 By reference to the agency agreement (Exhibit G), it was noted that a \$5,000 invoice from a contractor engaged to carry out work on the common property required pre-approval, ie approval before being paid. The submissions in reply also referred to work carried out on common property sandstone subsequent to the hearing.

72 It was submitted that section 229 of the SSMA and the decision in *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD 19 provide support for the view that the Tribunal can make an order under section 237 even if it does not consider the order proposed by the applicant to be appropriate.

73 In relation to the choice of a strata manager, in the event the Tribunal was disposed to make an order under section 237, it was submitted the current

strata manager had twice failed to ensure compliance with section 103 in relation to the appointment of solicitors. The submission that six months was a sufficient period was contested.

74 Accepting that the proposed alternative orders are prescriptive, the applicant submitted that was necessary for a number of reasons:

- (1) The OC has previously defeated motions at general meetings to obtain advice from heritage specialists.
- (2) The OC had failed to adequately acknowledge the heritage status of the building and Mr Gohil's report was not provided to Mr Gleeson.
- (3) For a number of years, the lot owners have been unable to reach a consensus as to what work needs to be done and by what method.
- (4) Expertise is required to guide the OC through the twin necessities of compliance with section 106 of the SSMA and heritage-listing requirements.
- (5) The recommendation of "next steps" by Mr Gohil was not challenged.

75 A submission was also made that sections 204 and 241 provided another basis for the Tribunal to make the alternative orders and that neither section 232 nor section 241 should be read down: *Vickery* at [71]. Support was also said to be found in *APX Projects Pty Ltd v The Owners – Strata Plan No. 64025* [2015] NSWSC 1250 at [58].

### **Consideration**

76 The Tribunal has not taken into consideration anything that has occurred since the hearing. Further, the Tribunal does not intend to address any of what might be called the personal allegations which are not relevant to the real issues in these proceedings. The primary issue in relation to this application is whether paragraphs (a), (b) and (c) of subsection 237(3) of the

SSMA have been satisfied by the evidence, having regard to the submissions which have been made since the hearing as well as both the words of section 237 and the decisions which have considered those words.

77 The Tribunal makes the following findings of fact:

- (1) On 29 February 2018 the OC was advised by ICG of items requiring urgent attention, namely water leaks, paving settlement and roof defects.
- (2) On 29 June 2018 ICG provided a tender and scope of works to the OC.
- (3) On 24 August 2018 a tender analysis for 3 quotations was provided to the OC.
- (4) A 27 March 2019 letter reminded the OC of its duty under section 106.
- (5) On 12 June 2019 a follow-up letter was sent.
- (6) On 23 June 2019 a further quotation for \$325,737.50 was provided to the OC.
- (7) On 29 July 2019 a motion to “*consider rectification works required to the common property*” was withdrawn, “*to be tabled at a later meeting*”.
- (8) On 29 December 2019 the applicant’s lawyer expressed concern at the division of work into Priority 1 and Priority 2 stages.
- (9) On 24 February 2020 ICG indicated that items had been removed at the request of Ms Ford.
- (10) On 24 April 2020 an EGM, resolved to defer the selection of consultants, such as heritage consultants, to “*a later General Meeting*” and a proposal to accept quotation from IBC and Weir Phillips was defeated.

- (11) That EGM resolved to call for quotations for ICG's "*List 1*".
- (12) There does not appear to be any evidence that such quotations have been obtained.
- (13) On 26 May 2020 an interim order was made in chambers by Ms K Rosser, a Principal Member of the Tribunal.
- (14) On 12 June 2020, at a hearing, that order was continued by the Tribunal's Ms K Rosser.
- (15) On 26 June 2020 a General Meeting delegated to Ms Ford the authority to engage lawyers.
- (16) On 03 July 2020 Mr Gohil warned the OC against splitting the repair work.
- (17) On or about 31 July 2020 building repair work was carried out.
- (18) That work was contrary to the interim order of the Tribunal.
- (19) That work was conducted without the strata managing agent being informed
- (20) That work was undertaken at the direction of Ms Ford.
- (21) On 18 August 2020 a Tribunal hearing was adjourned, it was recorded that the reasons for that adjournment included a breach of orders made on 12 June 2020, and an order for costs was made against the OC.
- (22) The minutes of the 30 September 2020 AGM do not record any resolution in relation to repair and maintenance of the common property.

- (23) On 25 October 2020 a General Meeting resolved to convene an EGM in order to terminate the existing solicitors and engage new solicitors.

78 In view of those findings of fact, the Tribunal is satisfied that paragraph (c) is applicable in that there has been a failure to meet the obligation imposed by section 106 of the SSMA to repair and maintain the common property by reason of the following matters:

- (1) The fact that the building in question is heritage-listed does not alter the scope of the obligation under section 106 of the SSMA but it does make fulfilling that obligation of greater importance because that building has been determined to be of historical significance.
- (2) Despite being advised by a report dated 28 February 2018 of the need for urgent work, it was not until 24 April 2020 that a decision was made to proceed but in stages.
- (3) That decision to proceed was despite a warning against proceeding in stages.
- (4) Despite that decision to proceed with that revised report, no scope of work, tender or quotations have been obtained.
- (5) On 24 April 2020 a proposal to obtain advice of heritage consultants was deferred but was not subsequently raised at the 30 September 2020 AGM.
- (6) No consideration has been given to raising money in order to carry out that work.
- (7) The budget for the period from 01 June 2020 to 31 May 2021 only provides an amount of \$5,000 for “*repairs and replacements*” which amount has already been spent.

- (8) As a result, there is urgent work that has not been carried out more than two years after the need for that work was indicated, no money has been raised for that work and no heritage consultant has been retained in relation to it.
- (9) That situation has arisen despite the evidence, to which the OC's submissions referred, that Ms Ford has considerable experience in the field of heritage buildings.
- (10) That situation has arisen despite the applicant's solicitors reminding of the need to comply with the obligation imposed by section 106 on 27 March and 12 June in 2019.
- (11) The interim order of the Tribunal has not prevented the progress of the matters referred to in (4), (5) and (6) above.

79 The Tribunal is also satisfied that the applicant has established a case under paragraph (a) in that the strata scheme is not functioning satisfactorily for the following reasons:

- (1) The manner in which the obligation to maintain and repair the common property has been handled, as indicated above in relation to paragraph (c).
- (2) The evidence that Ms Ford directed ICG to remove items of work which it considered were required to repair and maintain a heritage listed property.
- (3) The fact that Ms Ford took it upon herself to authorise repairs in mid 2020 without consulting other members of the SC or the strata manager and contrary to an order of the Tribunal and, even if the work was urgent, the Tribunal should have been notified either as soon as the need for that work became apparent or as soon as the work was carried out.

- (4) An invoice was paid without the required pre-approval being obtained.
- (5) The conduct of Ms Ford has gone beyond what falls within section 43 of the SSMA and beyond what has been delegated to her by the OC or the SC.
- (6) The evidence satisfies the Tribunal that the SC is not functioning properly due to the autocratic conduct of Ms Ford as established by the evidence.
- (7) There was a failure to provide the disclosure required by section 105 of the SSMA in relation to the OC's former solicitors.
- (8) There was a failure to provide the disclosure required by section 105 of the SSMA in relation to the OC's current solicitors.
- (9) By 25 October 2020 the OC's current solicitors had not been engaged as required by section 103 in that the position at that date was that the SC resolved to convene an EGM in order to comply with that section.
- (10) There was a failure to comply with orders of the Tribunal which caused an adjournment of the 18 August 2020 hearing and resulted in an order for costs being made against the OC.

80 As a result, the Tribunal is satisfied that an order should be made under section 237 of the SSMA. That raises three further questions: who should be appointed, with what powers and for what period.

81 In relation to who should be appointed, the candidates are:

- (1) Strata Plus, who were the strata managers up to May 2020,
- (2) Strata Choice, who have been the strata managers since June 2020, and

(3) Strata Central, proposed by the applicant in these proceedings.

82 The Tribunal does not consider it appropriate to appoint either Strata Plus or Strata Choice as they have both served as strata manager during the period which the Tribunal has found to have involved circumstances that satisfied paragraphs (a) and (c) of subsection 237(3) of the SSMA. No persuasive reason has been provided against the appointment of Strata Central and the documents required by section 237 have been provided to the Tribunal.

83 Next, what powers should be granted? In view of the findings set out above and the reasons provided by the Tribunal for making an order under section 237, the Tribunal is satisfied that the order should cover all the functions of both the OC and all the functions of the chairperson, secretary treasurer and strata committee. To confine the power to the area of repairs and maintenance is difficult, especially when that need extends into budgeting and financial considerations. Further, a 'split functions' situation may sound simple but it is administratively difficult. For the reasons set out above, the Tribunal is satisfied a finding is warranted that both the OC and SC are "not functioning properly".

84 Thirdly, what should be the term of the appointment? The OC suggests six months, while the applicant suggests the maximum period of two years. Having regard to what is required in relation to the repair and maintenance of the common property favours a period of more than six months and, having regard to the removal of the democratic process which the proposed section 237 order will involve, a period of less than two years is considered appropriate. The Tribunal determines that the period of appointment should be eighteen months which it is noted was the period of the appointment in *Unilodge*, another case involving the section 106 obligation.

85 There was an alternative claim for an order under section 232 which sought to have the Tribunal make an order that would cause the repairs and maintenance to be undertaken. In view of the Tribunal's decision on the primary issue, it is not necessary to consider this alternative claim. However,

having regard to the recent decision in *Vickery* and the evidence in these proceedings, the Tribunal is satisfied that such an order could and should have been made in the event that the case under section 237 failed.

86 Finally, noting that the question of costs was raised in the written submissions, the orders will cater for that issue to be ventilated.

## **Orders**

87 For the reasons indicated above, the Tribunal makes the following orders:

In the proceedings SC 20/22571:

(1) *The interim order is discontinued.*

In the proceedings SC 20/15335:

(1) *An order under section 237(1) of the Strata Schemes Management Act 2015 appointing Strata Central Pty Ltd as strata managing agent to exercise all the functions of The Owners – Strata Plan No. 69703 (the Owners Corporation) for a period of 18 months from the date of this Order.*

(2) *An order under section 237(2) of the Strata Schemes Management Act 2015 appointing Strata Central as strata managing agent to exercise all the functions of the chairperson, secretary, treasurer and strata committee of the Owners Corporation for a period of 18 months from the date of this Order.*

(3) *On or before 27 January 2021 any application for costs is to be made by providing written submissions to the Tribunal and the other parties.*

(4) *On or before 10 February 2021 any response to any such application is to be made by providing written submissions to the Tribunal and the other parties.*

- (5) *Any submissions on costs are to address the question of whether costs can be determined on the papers (ie without the need for a further hearing).*

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

Registrar

