



Civil and Administrative Tribunal New South Wales

Case Name: Kuzmanovic v Peacock

Medium Neutral Citation: [2022] NSWCATCD

Hearing Date(s): 2 June 2022

Date of Orders: [2022] NSWCATCD

Date of Decision: 27 September 2022

Jurisdiction: Consumer and Commercial Division

Before: D Moujalli, Senior Member

Decision:

1. Pursuant to s 237 of the *Strata Schemes Management Act 2015* (NSW), Premium Strata Pty Ltd is appointed the strata managing agent to exercise all the functions of the owners corporation of Strata Plan No 43576 for a period of 12 months from the date of these orders.
2. Premium Strata Pty Ltd has and may exercise all the functions of the chairperson, secretary, treasurer and strata committee of the owners corporation of Strata Plan No 43576 for the period of its appointment.
3. Premium Strata Pty Ltd is to be remunerated in accordance with the strata management agency agreement in the form attached to its letter dated 23 December 2021.
4. The interim appointment of Strata Central Pty Ltd as compulsory strata managing agent is to cease from the date of these orders.
5. The Applications in SC 21/5220, SC 22/01370 and SC22/20866 are otherwise dismissed.

Catchwords: STRATA TITLES LAW — strata schemes — order sought for appointment of compulsory strata managing agent - maintenance of common property - order sought for damages for breach of statutory duty to maintain common property

Legislation Cited: *Civil and Administrative Tribunal Act 2013* (NSW), s 36

Strata Schemes Management Act 2015 (NSW), ss 106, 226, 232, 237 and 241

Strata Schemes Management Act 1996 (NSW), s 162

Cases Cited: *Bischoff & Ors v Rita Sahade & Anr* [2015] NSWCATAP 135

Gershberg & Troyanovski v Owners Corporation SP 5768 [2011] NSWCTTT 411

Haines v Bendall (1991) 172 CLR 60

Hoare and Ors v The Owners-Strata Plan No 73905 [2018] NSWCATCD 45

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123

Lockrey v Rosewall [2022] NSWCATCD 27

Velastegui v Chan [2021] NSWCATCD 98

Texts Cited: Nil

Category: Principal judgment

Parties: Susan Kuzmanovic (Applicant in SC21/52250)

Alan Peacock (Applicant in SC22/01370 & SC22/20866; Respondent in SC21/52250)

The Owners - SP No 43576 (Respondent)

Representation: Ms Kuzmanovic: Strata Title Lawyers

Mr Peacock: Stanton Legal

The Owners – Strata Plan No 43576: Ms Van Aalst (strata managing agent)

File Number(s): SC 21/52250; SC 22/01370; SC22/20866

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 On 2 June 2022, the Tribunal had three related applications listed before it for hearing.
- 2 The first application was in file No SC 21/52250 (the **Kuzmanovic Application**). This Application was filed by Susan Kuzmanovic on 23 December 2021 against The Owners – Strata Plan No 43576. By order of the Tribunal made on 21 January 2022, Alan Peacock was added as a respondent to this Application. In the Kuzmanovic Application, the following orders are sought:
 - (1) That Strata Management Services NSW be appointed as compulsory strata managing agent to administer all functions of the owners corporation and the strata committee pursuant to s 237 of the *Strata Schemes Management Act 2015* (NSW) (**SSMA**);
 - (2) A number of orders requiring the compulsory strata managing agent to take certain specified action; and
 - (3) That the owners corporation pay Ms Kuzmanovic the sum of \$14,200 in respect of losses alleged to arise from the owners corporation's failure to maintain and repair the common property, which order is sought pursuant to ss106(5) and 232 of the SSMA.
- 3 The second application listed for hearing on 2 June 2022 was in file No SC 22/01370 (the **Peacock Application**). This application was filed on 14 January 2022 by Alan Peacock against The Owners – Strata Plan No 43576. This Application seeks an order that Premium Strata Pty Ltd be appointed as the compulsory strata managing agent of The Owners – Strata Plan No 43576 to exercise the functions of the owners corporation and the strata committee pursuant to s 237 of SSMA. It also seeks an order that Premium Strata Pty Ltd

is “to progress compliance with the fire order to completion as quickly as practicable”.

- 4 The third application listed for hearing on 2 June 2022 was in file No SC 22/20866 (the **Interim Application**). This Application was filed by Alan Peacock on 12 May 2022 against The Owners – Strata Plan No 43576. In that Application, Mr Peacock sought an order to continue the appointment of Strata Central Pty Ltd as the compulsory strata managing agent pursuant to ss 237(1)(a) and 231 of the SSMA on an interim basis.
- 5 On 19 May 2022, the Tribunal made orders including for the appointment of Strata Central Pty Ltd as compulsory strata managing agent on an interim basis until 5pm on 2 June 2022. The Tribunal also ordered that the Interim Application was to be listed for hearing with the Kuzmanovic Application and the Peacock Application on 2 June 2022.
- 6 At the hearing on 2 June 2022, I made orders, by consent, extending the appointment of Strata Central Pty Ltd as the compulsory strata managing agent on an interim basis until the making of final orders in the Kuzmanovic Application and the Peacock Application.
- 7 At the hearing on 2 June 2022, Ms Kuzmanovic was represented by Mr Bacon of Strata Title Lawyers. Mr Peacock was represented by Mr Stanton of Stanton Legal. The Owners were represented by Ms Van Aalst of Strata Central Pty Ltd. As has already been indicated, Strata Central Pty Ltd is the current compulsory strata managing agent appointed on an interim basis.
- 8 The hearing on 2 June 2022 proceeded by AVL.
- 9 At the hearing each party was given an opportunity to outline their case, present their evidence and ask questions of the other party.
- 10 The parties did this in a respectful manner notwithstanding the long and deep-seated differences of opinion between Mr Peacock and Mr Tamsett who is the

partner of Ms Kuzmanovic. The relationship between them can fairly be described as acrimonious. This is discussed further below. The Tribunal is grateful for the co-operation of the parties in the conduct of the hearing.

- 11 At the conclusion of the hearing on 2 June 2022, I made orders for the provision of written final submissions. The last of those submissions was provided on 5 July 2022.

Evidence

- 12 In determining the Application, the Tribunal has had regard to the following:
- (1) Affidavit of Rod Tamsett made on 19 April 2022 incorporating annexures comprising 355 pages. This was marked Ex A1 at the hearing on 2 June 2022. This affidavit was relied upon by Ms Kuzmanovic.
 - (2) A bundle of documents tendered on behalf of Ms Kuzmanovic comprising 233 pages. This was marked Ex A2 at the hearing on 2 June 2022.
 - (3) A bundle of documents tendered on behalf of Mr Peacock. This was marked Ex R2 at the hearing on 2 June 2022. This bundle includes an affidavit of Mr Peacock made on 24 May 2022 (Tab 4), an affidavit made by Ms Van Aalst on 15 January 2022 (Tab 6) (the **First Van Aalst Affidavit**) and a further affidavit made by Ms Van Aalst on 24 May 2022 (Tab 8) (the **Second Van Aalst Affidavit**).
 - (4) The oral evidence given by Mr Tamsett, Mr Peacock and Ms Van Aalst at the hearing on 2 June 2022.
 - (5) The closing written submissions on behalf of Ms Kuzmanovic dated 10 June 2022.
 - (6) The closing written submissions on behalf of Mr Peacock dated 28 June 2022.

- (7) The closing reply submissions on behalf of Ms Kuzmanovic dated 5 July 2022.
 - (8) The closing reply submissions on behalf of The Owners – Strata Plan No 43576 provided on 5 July 2022.
- 13 The findings made by the Tribunal on the basis of the above evidence is set out below.

Jurisdiction

- 14 The applicants in all three Applications before the Tribunal are lot owners in the relevant strata scheme and therefore have standing as an “interested person” as defined by s 226 of the SSMA to make an application to the Tribunal under the SSMA. The Applications raise issues in relation to the operation or management of the strata scheme. Accordingly, the Tribunal has jurisdiction to consider the Applications and to make such orders as it considers appropriate under ss 106, 232, 237 and/or 241 of the SSMA.

The Applicable Law

- 15 Section 106 of the SSMA relevantly provides:

106 Duty of owners corporation to maintain and repair property

(1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

...

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably

foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

...

16 Section 232 of the SSMA relevantly provides:

232 Orders to settle disputes or rectify complaints

(1) Orders relating to complaints and disputes
The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—

(a) the operation, administration or management of a strata scheme under this Act

...

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

...

17 Section 241 of the SSMA relevantly provides:

241 Tribunal may prohibit or direct taking of specific actions

The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.

18 Section 237 of the SSMA relevantly provides:

237 Orders for appointment of strata managing agent

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

(2) Order may confer 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, or
- (c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

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

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

Assessment of the Evidence and Findings of Fact

The witnesses

- 19 Mr Tamsett, the partner of Ms Kuzmanovic who is the owner of unit 4, and Mr Peacock, the owner of the other units in the strata scheme, have been engaged in a bitter dispute for many years. The genesis and nature of this dispute is described further below as it is relevant to the question of whether the Tribunal should exercise its discretion to continue the regime of compulsory strata management which has been in place since 2013.

- 20 Much of the affidavit evidence of Mr Tamsett and Mr Peacock was directed to making personal attacks against each other. For example, Mr Tamsett accuses Mr Peacock of delaying and hindering works required to the common property “by all means necessary”: Tamsett Affidavit [74]. He accuses Mr Peacock of having acted improperly to “gut” the finances of the owners corporation (Tamsett Affidavit [31]) and speculates that he did not keep proper records when he was “the only person in charge of the owners corporation” (Tamsett Affidavit [36]). Mr Peacock in turn accuses Ms Kuzmanovic and Mr Tamsett of “pursing their vendetta against me”: Peacock Affidavit [9(a)].
- 21 Additionally, large parts of the affidavit evidence of Mr Tamsett and Mr Peacock consisted of their opinions including on historical issues which have divided them and which has resulted in dysfunction in the management of the strata scheme. Often these opinions are simply asserted without any reasoning seeking to justify the opinions. For example, Mr Tamsett asserts that the strata building should be classified as “Type A” for the purpose of BCA requirements for fire resistance: Tamsett Affidavit [24]. Mr Tamsett fails to explain why he continues to assert this notwithstanding that in 2015 all lot owners consented to the Tribunal recording “the agreement between the Owners Corporation and all lot owners that the works necessary to comply with the Council Fire Safety Order should involve the implementation of a Type B approach and not a Type A approach”: Ex R1, p 715.
- 22 For the above reasons, the affidavit evidence of Mr Tamsett and Mr Peacock has been of limited assistance to the Tribunal in seeking to identify and determine the real issues which currently require determination. That is not to say that their evidence has been of no assistance but that the Tribunal has faced a considerable challenge in seeking to distil from their evidence that part of it that can have some genuine probative value in determining the real issues for determination.
- 23 Both Mr Tamsett and Mr Peacock were required for cross-examination. It appeared to the Tribunal that the cross-examination of both Mr Tamsett and Mr Peacock was mostly focused on those issues directly relevant to the current

applications before the Tribunal rather than the more broad-ranging issues ventilated by Mr Tamsett and Mr Peacock in their affidavit evidence. This reflected well on the professional judgment of Mr Stanton and Mr Bacon who conducted the cross-examination of Mr Tamsett and Mr Peacock respectively.

24 The Tribunal has been greatly assisted by the evidence of Renna Van Aalst. Ms Van Aalst is the strata manager from Strata Central Pty Ltd who has been managing the scheme since the appointment of Strata Central Pty Ltd as compulsory strata managing agent on 15 January 2020.

25 Ms Van Aalst has given a detailed account of the current issues involved in maintaining and keeping the strata building in a good state of repair pursuant to the duty of the owners corporation under s 106(1) of the SSMA. Unlike the evidence of Mr Tamsett and Mr Peacock, her evidence is factual and shorn of unnecessary commentary and opinion.

26 Ms Van Aalst was required for cross examination. She was an impressive witness. It was clear that she was conscious of her obligation to assist the Tribunal in its fact-finding function and she did not seek to advance one cause or the other. No challenge was made to her credibility and, it appears to me, no challenge could have responsibly been made to her credibility.

27 It was also clear from Ms Van Aalst's evidence and from my review of the documentary material that she has discharged her duties as a compulsory strata managing agent in a highly professional and conscientious manner, notwithstanding the difficulties confronting her because of the deep seated dispute between Mr Tamsett and Mr Peacock.

28 For the above reasons, much of the factual background set out below is based on Ms Van Aalst's evidence and the contemporaneous documentary material placed in evidence before the Tribunal.

29 I also note that I have not addressed all the issues raised by Mr Peacock and Ms Kuzmanovic. It appears to the Tribunal that Mr Peacock and

Ms Kuzmanovic have sought to re-agitate in the current proceedings issues that have already been ventilated in earlier proceedings: to take but one example, they have sought to re-agitate the issues raised in the Land & Environment Court proceeding in 2011 including the scope of the costs order made in that proceeding: see Tamsett Affidavit [13]-[19] and Peacock Affidavit [14]-[15]. I have sought to confine my determination to the “real issues in the proceedings” so as to allow as timely as possible a determination consistently with the requirements of s 36 of the *Civil and Administrative Tribunal Act 2013* (NSW).

Facts relevant to the question of compulsory strata management

- 30 The strata scheme for Strata Plan No 43576 consists of 4 lots.
- 31 The building comprising the units and common property in Strata Plan 43576 was built in the 1960s. The strata premises are located in Ramsgate Avenue, North Bondi.
- 32 Strata Plan 43576 was registered on 6 April 1993 (Ex A1 pp 271-272).
- 33 On about 27 May 1993, Mr Peacock became the owner of unit 2 in Strata Plan 43576 (Peacock Affidavit [1]). He subsequently became the owner of lots 1 and 3 in the strata scheme based on Strata Plan 43576 on about 28 November 2012 (Peacock Affidavit [1]).
- 34 Ms Kuzmanovic became the registered proprietor of unit 4 in Strata Plan 43576 (**Unit 4**) in about February 2009 (Tamsett Affidavit [2]). Mr Tamsett is her partner.
- 35 It will be apparent from the above, that while there are 4 lots in Strata Plan 43576, there are only two individuals who own the lots, namely, Ms Kuzmanovic and Mr Peacock.

- 36 Mr Tamsett is a qualified electrician. He also has tertiary qualifications in industrial design, mechanical engineering and building and construction. He currently works as a consultant project manager in design and construction projects (Tamsett Affidavit [6] – [11]).
- 37 The strata scheme relating to Strata Plan No 43576 has been subject to management by a compulsory strata managing agent pursuant to orders of the Tribunal since 22 March 2013 as follows:
- (1) On 22 March 2013, an order was made appointing Vesture Pty Ltd as the compulsory strata managing agent;
 - (2) On 22 July 2014, an order was made appointing Key Strata Management Pty Ltd as the compulsory strata managing agent: Ex A1, pp 13-19;
 - (3) On 18 October 2016, an order was made to replace Key Strata Management Pty Ltd with Kooper & Levi Pty Ltd as the compulsory strata managing agent: Ex A2, pp 11-14; and
 - (4) Since 15 January 2020, various orders have been made for the appointment and subsequent continuation of Strata Central Pty Ltd as the compulsory strata managing agent: Van Aalst First Affidavit [1]. As indicated above, the current orders provide for the appointment of Strata Central Pty Ltd on an interim basis.
- 38 The genesis of the dysfunction in the management of the strata scheme relating to Strata Plan 43576 can be traced back to 2008.
- 39 On 14 November 2008, the Council issued an order under s 121B of the *Environmental Planning and Assessment Act 1979* (**the Fire Safety Order**). The order required fire safety upgrades to the strata building. Since this time, there has been a dispute between Mr Tamsett and the other lot owners as to the nature and extent of measures required to comply with the Fire Safety Order. As has already been indicated, the only two lot owners now are

Mr Tamsett's partner and Mr Peacock. This dispute continues to the present day, as described in further detail below.

- 40 On 7 January 2011, Ms Kuzmanovic, as part of the dispute referred to above, commenced proceedings in the Land and Environment Court against the owners corporation and Mr Peacock. Ultimately, the only issue in these proceedings which required judicial determination was the question of costs as recorded in *Kuzmanovic v Owners SP 43576 and Peacock* [2011] NSWLEC 53: Ex R1, pp 664-675. The decision, however, gives an indication as to the acrimonious and litigious relationship between Ms Kuzmanovic and Mr Tamsett, on the one hand, and Mr Peacock on the other hand.
- 41 On 26 May 2011, the Council amended the Fire Safety Order (**the Amended Fire Safety Order**). Mr Tamsett contends that "the very heart of this matter" is the owners corporation's failure to comply with the Fire Safety Order, ie, the order issued in November 2008: Tamsett Affidavit [49]. This, however, ignores the evidence which indicates that the current order is the Amended Fire Safety Order, ie, the order issued on 26 May 2011. This is the order which is referred to in the letter dated 29 February 2012 from the Council to Strata Management Services NSW, the then strata managing agent (see Ex A1, p 2). Mr Tamsett's own solicitor made reference to the Amended Fire Safety Order in his letter to the Council dated 21 May 2021 (see Ex A1, pp 39-41). Ms Van Aalst gives evidence that the current fire safety order which must be complied with is the Amended Fire Safety Order issued on 26 May 2011 (Van Aalst First Affidavit [3]). I therefore reject Mr Tamsett's assertion that compliance is required with the Fire Safety Order issued in 2008. I accept Ms Van Aalst's evidence that the current fire safety order which must be complied with is the Amended Fire Safety Order issued on 26 May 2011.
- 42 On 10 July 2012, Adjudicator Ross determined an application made by Ms Kuzmanovic for the adjudication of a dispute. The dispute, for the purposes of the adjudication, was described by Ms Kuzmanovic to include, amongst other things, compliance with the Fire Safety Order. At [10] of the reasons for decision (Ex R1, p 695) Adjudicator Ross said the following:

In respect of the fire safety order I note that the reason that the work has taken so long has at least partly been as a result of [Ms Kuzmanovic's] actions, in insisting upon what is known as the four separate entrances proposal. It is somewhat disingenuous of [Ms Kuzmanovic] to complain about the way that work has progressed when one considers the lengths to which [Ms Kuzmanovic] has gone in attempting to prevent the work being carried out. I am not satisfied that the delay in attending to the fire safety order represents a failure to carry out essential repairs, when all the circumstances are considered.

43 Since about 2014, the owners corporation has engaged the consulting services of James Deters in relation to assisting the owners corporation with identifying and implementing the measures required to comply with the Amended Fire Safety Order. Mr Deters was initially employed with BCA Logic and is now a director of Credwell Pty Ltd. The evidence contains various communications involving Mr Deters and the strata managing agent, officers of the Council and the contractor engaged by the strata managing agent on behalf of the owners corporation. Having reviewed all of these communications which are in evidence, I am satisfied that Mr Deters has the relevant experience and expertise to assist the owners corporation with identifying and implementing the measures required to complete compliance with the Amended Fire Safety Order.

44 On 28 April 2014, Mr Deters sent an email to Maxine Wickey in the following terms (Ex R1, p 697):

We have been working on the scope for these works based on the scope of works within the Council Fire Order, but have had a phone call from Rod Tamsett advising us to hold off finalising the scope as he is having you issue us with an updated set of works which will include what I understand to be matters outside the Council Fire Order. Can you please confirm these instructions.

45 The evidence does not indicate the position held by Ms Wickey at the relevant time. It is not clear whether she was an officer of the compulsory strata managing agent then in place or an officer of the Council. In any event, the email indicates the degree to which Mr Tamsett has unreasonably interfered with and hindered the steps which the owners corporation has been seeking to take for the purpose of complying with the Amended Fire Safety Order.

- 46 As at April 2014, Mr Tamsett did not hold any official position in relation to the owners corporation. Vesture Pty Ltd had been appointed as the compulsory strata managing agent to exercise all the functions of the owners corporation and its strata committee. As such he had no authority to be instructing a consultant engaged by the Owners Corporation to “hold off” on work which was required for the purpose of allowing the Owners Corporation to comply with the Amended Fire Safety Order.
- 47 On 9 September 2015, in an earlier proceeding in the Tribunal concerning Strata Plan 43576, the Tribunal, by consent, noted “the agreement between the Owners Corporation and all lot owners that the works necessary to comply with the Council Fire Safety Order should involve the implementation of a Type B approach and not a Type A approach”: Ex R1, p 715.
- 48 On 9 January 2019, Mr Deters prepared a report which identified the works which were still required to be performed by the owners corporation for the purpose of complying with the Amended Fire Safety Order (First Van Aalst Affidavit [4]). A copy of that report does not appear to have been placed in the evidence. However, as will be set out further below, there is email correspondence from Mr Deters which is in evidence and which identifies the works which remain outstanding for the purpose of complying with the Amended Fire Safety Order.
- 49 On 15 January 2020, as already noted above, Strata Central Pty Ltd was appointed as the compulsory strata managing agent.
- 50 After the appointment of Strata Central Pty Ltd as the strata managing agent, Mr Tamsett requested a meeting with Ms Van Aalst to discuss the scope of works set out in Mr Deters’ report of 9 January 2019. This meeting occurred on 2 April 2020: Van Aalst First Affidavit [9(g)].
- 51 Following the meeting with Mr Tamsett, Ms Van Aalst passed on to Mr Deters the comments and certain documents which had been provided to her by Mr Tamsett. Mr Deters advised Ms Van Aalst that these comments and

documents did not cause Mr Deters to alter his recommendation as to the scope of works required to bring about compliance with the Amended Fire Safety Order. Ms Van Aalst then instructed Mr Deters to proceed with a tender process for the purpose of identifying a contractor to implement the scope of works recommended by Mr Deters in his report of 9 January 2019: Van Aalst First Affidavit [9(g)-(i)].

52 Mr Deters provided Ms Van Aalst with an initial tender assessment and recommendation report on 11 November 2020. He provided an updated report on 20 January 2021. Ms Van Aalst subsequently accepted the tender from Wynn Construction Group (**Wynn**).

53 On 23 March 2021, Ms Van Aalst, on behalf of the owners corporation, signed a contract with Wynn for the performance of outstanding works for the purpose of achieving compliance with the Amended Fire Safety Order: Van Aalst First Affidavit [9(m)].

54 On 21 May 2021, Mr Tamsett and Ms Kuzmanovic's solicitor wrote to the Council. The letter stated that the strata building must be classified as Type A for the purpose of BCA requirements for fire resistance. The letter failed to inform the Council that the parties had consented in 2015 to the Tribunal recording an agreement of the parties that "a Type B approach" would achieve compliance with the Amended Fire Safety Order. No real attempt has been made in these proceedings by Mr Tamsett or Ms Kuzmanovic to explain why Ms Kuzmanovic as a lot owner consented to the agreement recorded in the orders of the Tribunal made on 9 September 2015 and then subsequently resiled from this agreement to contend that "a Type A approach" was necessary.

55 These shifting positions by Mr Tamsett have hindered the ability of the owners corporation to complete the works required to achieve compliance with the Amended Fire Safety Order. It has resulted in excessive time and resources of the strata managing agent and Mr Deters being diverted to the dispute with Mr Tamsett when otherwise this time and resources could have been focused

on completing the works required to achieve compliance with the Amended Fire Safety Order. I set out below further details on how this dispute has unfolded.

- 56 On 16 July 2021, Mr Tamsett reported to Ms Van Aalst concerns which he had in relation to the balcony support columns which held up the roof structure. Ms Van Aalst immediately arranged for the inspection of the strata building by Michael Ilievski, an engineering consultant with Integrated Building & Engineering Consultancy (**IBEC**): Tamsett Affidavit [66].
- 57 IBEC provided Ms Van Aalst with a report dated 21 July 2021 (Ex A1, pp 328-341). The report noted that there was severe deterioration of supporting structural steel columns and other parts of the common property. The report recommended that “make safe works” be undertaken immediately. It also recommended that following these urgent works, the owners corporation “should urgently arrange to develop a scope of works/specification for the holistic building façade remediation works”.
- 58 Ms Van Aalst arranged for the emergency “make safe works” to be carried out: Van Aalst First Affidavit [13(d)]. I do not understand either Mr Tamsett or Mr Peacock to make any criticism in these proceedings of the adequacy or speed with which the make safe works were carried out. There is also no dispute between the parties that the further remediation works recommended by IBEC need to be carried out and that these will impose a significant financial burden on the owners corporation. Ms Van Aalst gave evidence at the hearing that she had received preliminary advice that the works recommended by IBEC could cost up to \$700,000.
- 59 On 28 September 2021, an electrical contractor engaged by Wynn attended at the strata premises for the purpose of carrying out electrical works. These works were not carried out. Mr Daher of Wynn sent an email to Ms Van Aalst explaining what occurred in the following terms:

Please be advised that the electrical contractor engaged to carry out approved non-compliant upgrade works to main switchboard has not carried out or started the works based on confrontational conversation with unit owner 4

Rodney issue being compliance and certification on completion of works. The owner of unit 4 made it clear he will contest the compliance of works carried out on completion as it wouldn't comply should the contractor carry works out. The contractor has refused to continue works and has now walked away from the job as he felt uncomfortable and threatened.

60 It is clear that the reference to "Rodney" in the above email is a reference to Mr Tamsett.

61 Various emails were then exchanged in the period between 28 September 2021 and 11 October 2021 between Ms Van Aalst, Mr Daher of Wynn, Mr Deters of Credwell and Mr Tamsett: Ex R1, pp756-768.

62 Ms Van Aalst's emails repeatedly urged Mr Daher to arrange for an electrical contractor to return to the strata premises to perform electrical works which were necessary to achieve compliance with the Amended Fire Safety Order. I will not set out the terms of these emails in full, however, I have reviewed them closely as I consider them to be highly relevant for the purpose of determining whether there is likely to be dysfunction in the management of the strata scheme if it were to return to self-management. I will set out what I consider to be the most salient aspects of these emails.

63 On 28 September 2021, Mr Deters sent an email to Ms Van Aalst in which he stated:

It is not reasonable that Rod Tamsett confronts the contractors that are there to do the works that they have been engaged to do.

It is my understanding that Rod Tamsett knew that the works were being undertaken as per [Mr Daher's] email below, as [Wynn] had altered the schedule of the works to suit [Mr Tamsett's] meeting schedule.

I am somewhat out of ideas to get this work done, without having Rod Tamsett confronting the contractors who have been engaged to carry out the works needed to complete the order. Do you have any suggestions?

64 Ms Van Aalst responded to the above email stating that she would write to Mr Tamsett's lawyer. She also stated that she had "authorised the contractors to proceed with the works and reasonable notice was provided to all residents

including Mr Tamsett". She also stated that Mr Tamsett had "no authority to interfere with the work pursuant to a fire order issued by Council".

65 On 5 October 2021, Mr Tamsett sent an email to, amongst others, Ms Van Aalst, Mr Daher and Mr Deters. In that email he denied that he had been "confrontational" with the electrical contractor engaged by Wynn who had attended at the strata premises to carry out electrical work. He did, however, admit that he had "indicated to him that we required the building to comply with statutory requirements and satisfy the fire order and if he had any doubts on certification to respond back to whoever contracted him". He also confirmed that after this exchange with the contractor, the contractor "went onto the street".

66 On 9 October 2021, Ms Van Aalst responded to Mr Tamsett by email in the following terms:

I have listened to a representative from Wynn Construction Group about your confrontation with the contractor on site and I accept their explanation why the contractor felt it necessary to leave the site. The contractor felt intimidated by your behaviour and to diffuse the situation he left.

This is not the first time you have disregarded the owners corporation's direction and without authority have attempted to impose your wishes and views on others.

I again ask you to stop hindering the progress of necessary works. Your interference with the contractors from Wynn Construction Group was unwanted and unwarranted and the only thing achieved was a delay to the works you say you want to be completed.

67 By email sent on 9 October 2021, Ms Van Aalst asked Mr Deters and Mr Daher of Wynn to "arrange for the work to be completed without delay". By email sent on 11 October 2021, Mr Daher of Wynn informed Ms Van Aalst and Mr Deters that he was still finding it difficult to find electrical contractors prepared to attend the site because of Mr Tamsett's conduct on 28 September 2021.

68 I do not accept Mr Tamsett's denial in his email of 5 October 2021 that his conduct on 28 September 2021 was not confrontational. As Ms Van Aalst made clear in her email of 9 October 2021, she satisfied herself on the basis of

enquiries which she had made that Mr Tamsett's conduct was confrontational and it resulted in the contractor engaged by Wynn feeling intimidated. I accept the version of events set out by Ms Van Aalst in her email of 9 October 2021.

- 69 In any event, Mr Tamsett admitted in his email of 5 October 2021 that he had purported to give instructions to the electrical contractor. At the time, Mr Tamsett had no authority to be giving any such instructions. Ms Van Aalst was acting as the compulsory strata managing agent pursuant to an order of the Tribunal. She had engaged Wynn in the performance of her duties as the compulsory strata managing agent on the basis of recommendations from Mr Deters. Mr Tamsett had no authority to be giving instructions to the contractor engaged by Wynn in relation to the work which Wynn had been engaged to perform by Ms Van Aalst. I find this is a further aspect of Mr Tamsett's conduct of unreasonably interfering with and hindering and delaying the works which are required to be performed so that the owners corporation can comply with the Amended Fire Safety Order.
- 70 On 19 October 2021, Mr Peacock entered into contracts for the sale of his units in the strata scheme. Those contracts are to be completed on 20 October 2022.
- 71 On 20 October 2021, Council issued a notice of intention to give a development control order (Ex A1, p 43). It invited representations on whether the proposed order should not be given, the terms of the proposed order and any period for compliance. By email sent on 31 January 2022, Mr Tamsett enquired as to when Council will be providing its decision on its notice of intention to give a development control order (Ex A1, p 47). An officer of Council indicated by email on 16 March 2022 that the draft order had been referred to Council's solicitors for review and advice (Ex A1, p 45). The evidence before the Tribunal in relation to the notice of intention to give a development control order by Council is limited and incomplete. I mention it at this stage, however, as it is something in respect of which Ms Kuzmanovic has sought relief in her Application.

72 On 22 December 2021, Mr Deters sent an email to the Council and Ms Van Aalst (Ex A1, p 51). In that email he stated “we are now almost complete”. I infer from the subject heading of the email and the response from Mr Magistrale, the officer from Council, that Mr Deters was referring to the works necessary to complete compliance with the Amended Fire Safety Order. Mr Deters identified the outstanding works as being electrical works, emergency lighting and a fire safety certificate.

73 On 20 April 2022, Mr Tamsett sent an email to Ms Van Aalst in which he demanded payment for electrical works which he had carried out to the common property: Ex R1, p 781. His email stated:

We now understand this infrastructure is part of the common property and request reimbursement before any further works are carried out to this installation.

74 By email sent on 22 April 2022, Ms Van Aalst informed Mr Tamsett that he did not have any authority to carry out works and incur costs “in the name of the Owners Corporation”: Ex R1, p 780.

75 Mr Tamsett replied by email on 23 April 2022 (Ex R1, pp 779-780) in the following terms:

To avoid further issues this requires reimbursement before you have any contractors work on the electrical, as currently we own it.

76 Mr Tamsett’s emails to Ms Van Aalst are extraordinary. Without any lawful authority, he interfered with common property and demanded payment for this unauthorised interference. When he was advised that he had no authority for this interference, he impliedly threatened Ms Van Aalst that he would prevent any contractors from doing electrical work unless his demand for payment was met. It is difficult to see what else he could have meant from the use of the words “to avoid further issues”. He also made the astonishing suggestion that somehow he had been able to unilaterally appropriate ownership to himself of common property. That appears to be the only reasonable interpretation of the use of the words “currently we own it”. This is a further instance of

unreasonable conduct by Mr Tamsett which has had the effect of interfering with and hindering the completion of works required to bring about compliance with the Amended Fire Safety Order.

- 77 Ms Van Aalst is no longer prepared to continue the appointment of Strata Central Pty Ltd as the compulsory strata managing agent. The appointment of Strata Central Pty Ltd is currently limited to an interim appointment.
- 78 In December 2021, Ms Van Aalst recommended to Mr Peacock's solicitor Premium Strata Pty Ltd as a replacement compulsory strata managing agent (Van Aalst Second Affidavit [5]). She considers Premium Strata Pty Ltd to be "highly competent and able to deal with a building with the issues that the OC is facing".
- 79 By letter dated 23 December 2021, Ms Habib on behalf of Premium Strata Pty Ltd confirmed the consent of Premium Strata Pty Ltd to act as compulsory strata managing agent. Ms Habib provided a copy of the license certifying that Premium Strata Pty Ltd is licensed under the *Property and Stock Agents Act 2022* (NSW). Ms Habib has also provided a proposed agency agreement pursuant to which the services of a strata managing agent would be provided: Ex R1, pp 607-636.

Facts relevant to Ms Kuzmanovic's rental loss claim

- 80 Between 2017 and 28 June 2021, Ms Kuzmanovic leased her unit in SP 43576 (**Unit 4**) to a tenant. The tenant vacated Unit 4 on 28 June 2021: Tamsett Affidavit [58] – [62].
- 81 Mr Tamsett gives evidence that a new tenant was ready to occupy Unit 4 in June 2021 at \$1,200 per week: Tamsett Affidavit [63].
- 82 At the time, Ms Kuzmanovic and her family were living at 6/89 Ramsgate Avenue, Bondi for which they were paying rent of \$5,796 per month: Tamsett Affidavit [69]. Mr Tamsett states that after the structural problems with the strata building were exposed in July 2021 and the emergency "make safe"

works were carried out, “the unit was unlettable”. He states that “I had no choice but to move into the unit in order to stem the flow of financial loss”: Tamsett Affidavit [68].

83 Mr Tamsett has not been entirely forthcoming in his affidavit as to the circumstances in which he and his family relocated their accommodation from 6/89 Ramsgate Avenue to Unit 4.

84 The evidence indicates that Mr Tamsett’s landlord of 6/89 Ramsgate Avenue had been seeking to terminate the tenancy agreement with Mr Tamsett since December 2019. In a statement to the Tribunal Mr Tamsett described this as “shocking and shattering” and stated that any termination would be disruptive to himself, Ms Kuzmanovic and their 3 children (Ex R1, pp 788-793).

85 On 24 February 2021, the Tribunal made orders for the termination of the residential tenancy agreement in respect of 6/89 Ramsgate Avenue. It also suspended the order for the giving of possession until 17 August 2021 (Ex R1, p 783).

86 Ms Kuzmanovic and her family moved into and commenced living in Unit 4 on 28 August 2021: Tamsett Affidavit [71].

87 On the basis of the above evidence, I find that Ms Kuzmanovic did not cease leasing Unit 4 to a tenant because it was “unlettable”. I find that she ceased leasing the unit to a tenant because after the termination of the tenancy agreement for the premises at 6/89 Ramsgate Avenue by order of the Tribunal, Ms Kuzmanovic and her family needed to find alternative accommodation. They needed to vacate 6/89 Ramsgate Avenue by 17 August 2021. As Unit 4 had become vacant at the end of June 2021, it became a convenient option for the family’s accommodation.

88 On 4 April 2022, Mr Tamsett obtained an assessment from a real estate agent, Ms Lahood, indicating that a “realistic rental figure” for Unit 4 was in the vicinity of \$1,300 to \$1,400 per week: Ex A1, p 351. By email sent on 19 April 2022,

Ms Lahood advised Mr Tamsett to obtain an engineer's report if he had any concerns in relation to the safety of Unit 4: Ex R1, p 353. No such report was obtained by Mr Tamsett.

Consideration

Compulsory strata management

89 Both Ms Kuvmanoivc and Mr Peacock seek the appointment of a compulsory strata managing agent, however, they each seek the appointment of a different entity. The Tribunal must, nevertheless, satisfy itself that one of the circumstances specified in sub-section 237(3) of the SSMA is established so as to enliven the discretion to appoint a compulsory strata managing agent. It appears to the Tribunal that the following issues arise for consideration on this aspect of the applications:

- (1) Whether a compulsory strata managing agent should be appointed?
- (2) If there is to be an appointment, which entity should be appointed as the compulsory strata managing agent?
- (3) What should be the period of appointment of the compulsory strata managing agent?
- (4) Should there be orders requiring the compulsory strata managing agent to take specified action in relation to the common property?

90 I will address each of the above issues in turn.

A: Whether a compulsory strata managing agent should be appointed?

91 It is of considerable concern to the Tribunal that the strata scheme constituted by SP 43576 has now been subject to compulsory strata management since 2013. Compulsory strata management is an exception to the norm of self-management of strata schemes. It should also be for a finite period limited in duration to that necessary to address specifically identified deficiencies in the

management of a strata scheme. It is in light of these considerations that orders under s 237 of the SSMA are a serious measure not to be taken lightly because they displace the democratic process that has been established under the SSMA for the owners corporation to govern itself: *Bischoff & Ors v Rita Sahade & Anr* [2015] NSWCATAP 135 at [148]; *Hoare and Ors v The Owners-Strata Plan No 73905* [2018] NSWCATCD 45 at [199]; *Velastegui v Chan* [2021] NSWCATCD 98 at [76]; *Gershberg & Troyanovski v Owners Corporation SP 5768* [2011] NSWCTTT 411 at [80]; *Lockrey v Rosewall* [2022] NSWCATCD 27 at [14].

- 92 The appointment of a strata managing agent under s 237 is discretionary; however, the discretion only arises if one of the circumstances specified in subsection 237(3) is established: see *Bischoff & Ors v Rita Sahade & Anr* at [107] to [110] which considered substantively identical provisions in s 162 of the *Strata Schemes Management Act 1996*. The consent of both Mr Peacock and Ms Kuzmanovic to the appointment of a compulsory strata manager does not relieve the Tribunal of the statutory requirement to satisfy itself that the necessary circumstances exist to give rise to the discretion to appoint a compulsory strata manager. It is for this reason that I have reviewed in some detail above the troubled history of the strata scheme for SP 43576.
- 93 Where an application is made under s 237 of the SSMA in circumstances where there are already orders in place for compulsory strata management, as in the present case, the relevant question arising from s 237(3)(a) appears to be whether it is likely that the strata scheme will not function satisfactorily or at all if it were to return to self-management. That appears to be the way the Tribunal approached the matter in an earlier decision concerning this Strata Plan: see *Peacock v Owners Corporation SP 43576* (29 December 2016) – a copy of the decision is at Ex A2, pp 11-14.
- 94 Based on the available evidence, I have no doubt that the strata scheme will not function satisfactorily or at all if it were to return to self-management at this stage.

- 95 The owners corporation, through the current strata manager, has determined on a course of action to achieve compliance with the Amended Fire Safety Order. This course of action is based on the recommendations of an independent and appropriately qualified consultant, namely Mr Deters of Credwell.
- 96 There are currently only two lot owners.
- 97 As I understand it, Mr Peacock is content for the owners corporation to act on the expert recommendations of Mr Deters: see Van Aalst First Affidavit [10].
- 98 Mr Tamsett, the partner of the other lot owner, however, is opposed to the implementation of Mr Deter's recommendations. There is no evidence that Mr Tamsett has obtained any independent expert recommendation to contradict that of Mr Deters. Instead, Mr Tamsett has actively and unreasonably engaged in conduct to interfere with and hinder the carrying out of works to achieve compliance with the Amended Fire Safety Order based on Mr Deter's recommendation. This conduct was referred to in 2012 by Adjudicator Ross (see [42] above) and it has continued to the present day. This conduct has included instructing the consultant engaged by the owners corporation to "hold off" on finalising a scope of works to achieve compliance with the Amended Fire Safety Order (see [44]-[46] above), intimidating and threatening contractors engaged by the owners corporation (see [59]-[69] above), carrying out unauthorised work to common property (see [73]-[74] above), demanding payment for unauthorised work carried out by him to common property (see [73]-[76] above), threatening to create "issues" if his demand for payment was not met (see [75] above), asserting that he had somehow appropriated to himself ownership of common property (see [75]-[76] above), resiling from an agreed position recorded by consent in orders of the Tribunal (see [47] and [54] above) and representing to Council that a "Type A" approach was required for compliance with the Amended Fire Safety Order notwithstanding the agreed position of all lot owners recorded in orders made by the Tribunal in 2015 that a "Type B" approach was appropriate (see [47] and [54] above).

99 The available evidence indicates that the works necessary for compliance with the Amended Fire Safety Order have not been completed because Mr Tamsett has unreasonably prevented those works from being completed. There is nothing to give the Tribunal confidence that Mr Tamsett will not continue his unreasonable conduct of interfering with and hindering the carrying out of works necessary to achieve compliance with the Amended Fire Safety Order based on Mr Deters' recommendation. Consequently, if the strata scheme were to return to self-management at this stage it is likely that it would quickly become gripped by dead-lock and paralysis because of the disputation and likely litigation that would be instigated by Mr Tamsett against the other the lot owner. This will delay even further completion of the works necessary for compliance with the Amended Fire Safety Order.

100 I therefore consider that it is appropriate to make orders for the continuation of the regime of compulsory strata management.

B: Which entity should be appointed as the compulsory strata managing agent?

101 While both Ms Kuvmanoivc and Mr Peacock seek the appointment of a compulsory strata managing agent, Ms Kuvmanoivc seeks the appointment of Strata Management Services NSW and Mr Peacock seeks the appointment of Premium Strata Pty Ltd. The Tribunal is placed in the somewhat invidious position of having to choose between two apparently reputable and qualified entities.

102 Both Ms Kuvmanoivc and Mr Peacock submit, in effect, that the other is seeking the appointment of their proposed strata manager in the expectation that they will obtain favourable treatment from them. I reject these submissions from both Ms Kuvmanoivc and Mr Peacock. There is no basis to think that either Strata Management Services NSW or Premium Strata Pty Ltd will not act in a professional manner, and without favour to one or other lot owner, if appointed. Any suggestion that a professional person will not act in a proper professional manner is a serious one and should not be made lightly.

- 103 While I have no reason to doubt the professionalism of either Strata Management Services NSW or Premium Strata Pty Ltd, the Tribunal can only make a decision based on the evidence before it. Ms Van Aalst has given evidence in relation to the particular experience and expertise of Premium Strata Pty Ltd. Ms Van Aalst has been a strata manager for 21 years. She has also been the compulsory strata managing agent for SP 43576 since January 2020. There can be no dispute that Ms Van Aalst has acquired extensive knowledge of the of the strata building for SP 43576, the relevant parties and issues affecting the building.
- 104 Based on her knowledge, Ms Van Aalst has recommended the appointment of Premium Strata Pty Ltd. She gave evidence that in doing so, she has had regard to the particular “complexities” that will exist in the management of this strata scheme. This particular strata scheme requires a strata manager who can deal with a “forceful character” such as Mr Tamsett (adopting the words used by Ms Van Aalst and with which I agree) and the complex issues arising from a building that is subject to a fire safety order and the type of recommendations in relation to structural integrity contained in the IBEC report of 21 July 2021. I did not understand Ms Van Aalst to be saying that Strata Management Services NSW did not have the requisite expertise but that she could definitively say that Premium Strata Pty Ltd did have the requisite experience.
- 105 In her reply closing submissions, Ms Kuzmanovic submits that Ms Van Aalst has recommended Premium Strata Pty Ltd because she “knows the manager at Premium”. I consider this to be an unfair characterisation of Ms Van Aalst’s evidence. Ms Van Aalst has drawn on her knowledge of the strata scheme for SP 43576 and personnel in the profession of strata management to make a considered and professional assessment as to who is suitable for the task at hand.
- 106 For the above reasons, I consider that Premium Strata Pty Ltd should be appointed as the compulsory strata managing agent and I will make an order to this effect.

C: *What should be the period of appointment of the compulsory strata managing agent?*

- 107 The appointment of a compulsory strata managing agent should generally only be for a defined period of time sufficient to allow corrective action to be taken to address deficiencies in the operation or management of a strata scheme: see *Bischoff & Ors v Rita Sahade & Anr* [2015] NSWCATAP 135 at [148].
- 108 Mr Peacock seeks the appointment of compulsory strata manager for a period of 2 years; Ms Kuzmanovic seeks an appointment for 2 years and, in the alternative, for 12 months.
- 109 I am not persuaded that an appointment period of 2 years is justified on the evidence. The email from Mr Deters to Mr Magistrale of Council sent on 22 December 2021 (see [72] above) indicates that the works required to achieve compliance with the Amended Fire Safety Order as “are now almost complete”.
- 110 While it may be inferred that structural works recommended in the IBEC report of 21 July 2021 will be extensive, there is no specific evidence as to the timeframe in which they are likely to be completed. In any event, it may be that the nature and scope of these works will not be as contentious between the lot owners as the works required to comply with the Amended Fire Safety Order.
- 111 I am also mindful that Mr Peacock is due to complete the sale of his lots on 20 October 2022. Assuming the sale is completed, that means that in the near future the purchaser will be affected by the orders in these proceedings in circumstances where it has not had an opportunity to participate in the proceedings. That is a further factor which in my opinion favours a shorter appointment period.
- 112 Taking all of the above factors into consideration, I will make an order for the appointment of the compulsory strata manager for a period of 12 months.

D: Should there be orders requiring the compulsory strata managing agent to take specified action in relation to the common property?

- 113 Both Ms Kuvmanoivc and Mr Peacock seek an order to the effect that the compulsory strata managing agent is to ensure compliance with the Amended Fire Safety Order. Additionally, Ms Kuvmanoivc seeks orders that the appointed agent is to repair the common property and comply with any Development Control Order issued by the Council.
- 114 There can be no doubt that the Tribunal can make orders in relation to the maintenance and repair of common property pursuant to s 232 of the SSMA, or alternatively pursuant to a combination of powers derived from the operation of ss 106, 232 and/or 241 of the SSMA: see *Linney v The Owners - Strata Plan No. 11669* [2021] NSWCATCD 123 at [132].
- 115 However, I am not persuaded that it is appropriate to make any orders specifying the actions to be taken by the compulsory strata managing agent, especially in the generalised terms which have been sought by the parties. An order will be made that the appointed agent is to have and may exercise all the functions of the owners corporation. That will include the duty to properly maintain and keep in good repair the common property pursuant to s 106(1) of the SSMA. It will be for the appointed agent to determine specifically what is required to comply with this duty.
- 116 I also fail to see the utility in making orders along the lines sought by Ms Kuzmanovic and Mr Peacock. To date, the reason for the non-completion of the works for compliance with the Amended Fire Safety Order is not any failure on the part of Strata Central Pty Ltd to take the necessary steps to this end. Strata Central Pty Ltd has continued to engage an independent consultant to make recommendations, it has obtained and considered Mr Deters' report, it has instructed Mr Deters' to undertake a tender assessment process to identify a suitable contractor to carry out works, it has selected and engaged a suitable contractor and it has instructed the contractor to attend to the electrical works which are necessary to achieve compliance with the Amended Fire Safety Order. The reason why these works have not been completed is because of

the conduct of Mr Tamsett in unreasonably interfering with and hindering the performance of the outstanding works. Any order directed to the appointed agent to progress compliance with the Amended Fire Safety Order will not resolve the underlying problem as to why it has not been possible to date to finalise compliance with the Amended Fire Safety Order.

Ms Kuzmanovic's rental loss claim

117 In his affidavit, Mr Tamsett seeks to justify Ms Kuzmanovic's claim for \$14,200 on the basis of "loss of rent". There are manifold problems with Ms Kuzmanovic's claim for alleged rental loss.

118 First, Mr Tamsett asserts that the "unit is unlettable in its current condition" (Tamsett Affidavit [68]). The evidence does not support this conclusion for the following reasons:

- (1) Following receipt of the IBEC report on 21 July 2021, Ms Van Aalst arranged for the emergency "make safe works" recommended in the report to be carried out: Van Aalst First Affidavit [13(d)]. I do not understand either Mr Tamsett or Mr Peacock to make any criticism in these proceedings of the adequacy of the "make safe works".
- (2) There is no expert evidence to indicate that the strata building is currently unsafe or uninhabitable.
- (3) Ms Kuzmanovic and Mr Tamsett and their three children are currently living in Unit 4. I do not consider it plausible that Ms Kuzmanovic and Mr Tamsett would live in the unit with their children if it were unsafe or uninhabitable. There is certainly no evidence that Ms Kuzmanovic and Mr Tamsett have no other option for the accommodation of themselves and their family.
- (4) On 4 April 2022, Mr Tamsett obtained an assessment from a real estate agent, Ms Lahood, indicating that a "realistic rental figure" for Unit 4 was in the vicinity of \$1,300 to \$1,400 per week. By email sent on 19 April

2022, Ms Lahood advised Mr Tamsett to obtain an engineer's report if he had any concerns in relation to the safety of the unit. No such report was obtained by Mr Tamsett.

- 119 Second, it is difficult to see how Ms Kuzmanovic has suffered any loss in circumstances where she has made use of the unit for the accommodation of herself and her family. After the termination of the tenancy agreement for the premises at 6/89 Ramsgate Avenue, Bondi by order of the Tribunal, Ms Kuzmanovic and her family needed to find alternative accommodation. They moved into Unit 4 on 28 August 2021: Tamsett Affidavit [71]. That coincides closely with the date (ie, 17 August 2021) when they were required to give up possession of the rental premises they were previously living in at 6/89 Ramsgate Avenue, Bondi: Ex R1, p 783.
- 120 Third, the basis for the calculation of the figure of \$14,200 is unclear and inadequately explained. It is said that this figure is arrived at by applying a figure of \$500 per week for the period 21 July to 23 December 2021, however, there does not appear to be any rational basis or supporting evidence for the alleged rental loss of \$500 per week.
- 121 Fourth, the available evidence indicates that the financial position of Ms Kuzmanovic and her family has in fact improved as a result of them living in Unit 4 rather than using it as rental premises. Mr Tamsett gives evidence that a tenant was ready to occupy the unit in June 2021 at \$1,200 per week which equates to \$4,800 per month. At the time, Ms Kuzmanovic and her family were paying \$5,796 per month to live in the unit at 6/89 Ramsgate Avenue, Bondi. After Ms Kuzmanovic and her family moved into Unit 4 they did not receive rental income from the unit of \$4,800 per month but they were also not required to pay rent of \$5,796 per month for accommodation. That saw a net improvement in their financial position of almost \$1,000 per month.
- 122 The assessment of damages for breach of a duty is generally governed by the fundamental compensatory principle stated by the High Court in *Haines v*

Bendall (1991) 172 CLR 60. At 63, Mason CJ, Dawson, Toohey and Gaudron JJ said:

The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed... Compensation is the cardinal concept. It is the one principle that is absolutely firm, and which must control all else... [Citations omitted and emphasis added]

123 While the above comments were directed to claims in contract or tort, I can see no reason why they should not also apply to a statutory cause of action based on breach of statutory duty.

124 Even if Ms Kuzmanovic can establish a breach by the owners corporation of the duty pursuant to s 106(1) of the SSMA, for the reasons set out above, she has not established any loss as a result of such breach. She has failed to show that any such breach has left her financially worse off than the position she would have been in had there been no breach. To award her damages in these circumstances would offend the compensatory principle stated by the High Court in *Haines v Bendall*.

125 For the above reasons, I will dismiss the Kuzmanovic Application to the extent that it claims damages pursuant to s 106(5) of the SSMA.

Conclusion

126 For the above reasons, the Tribunal makes the following orders:

- (1) Pursuant to s 237 of the *Strata Schemes Management Act 2015* (NSW), Premium Strata Pty Ltd is appointed the strata managing agent to exercise all the functions of the owners corporation of Strata Plan No 43576 for a period of 12 months from the date of these orders.
- (2) Premium Strata Pty Ltd has and may exercise all the functions of the chairperson, secretary, treasurer and strata committee of the owners corporation of Strata Plan No 43576 for the period of its appointment.

- (3) Premium Strata Pty Ltd is to be remunerated in accordance with the strata management agency agreement in the form attached to its letter dated 23 December 2021.
- (4) The interim appointment of Strata Central Pty Ltd as compulsory strata managing agent is to cease from the date of these orders.
- (5) The Applications in SC 21/5220, SC 22/01370 and SC22/20866 are otherwise dismissed.

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

