



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Anne Cecilia Casey and Tracy Cahn v The Owners Corporation Strata Plan No 586 [2016] NSWCATCD 69</b>
<b>Hearing dates:</b>	26 May 2016
<b>Date of orders:</b>	24 August 2016
<b>Decision date:</b>	24 August 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	D Robertson, Senior Member
<b>Decision:</b>	1. Appeal dismissed.  2. Pursuant to section 181(3) of the Strata Schemes Management Act 1996 (NSW) the order of the Adjudicator dated 3 February 2016 in proceedings SCS 15/61430 is confirmed.
<b>Catchwords:</b>	STRATA SCHEME – appeal from order of Adjudicator dismissing application for appointment of a strata managing agent – failure to comply with fire safety order – whether Owners Corporation in breach of duty – whether Owners Corporation functioning satisfactorily – appeal dismissed
<b>Legislation Cited:</b>	Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Regulation 2010 (NSW)
<b>Cases Cited:</b>	Bischoff v Sahade [2015] NSWCATAP 135 Mortlock v Owners Strata Plan 55434 (2006) NSWSC 363
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Applicants: Anne Cecilia Casey and Tracy Cahn  Respondent: Owners Corporation SP586
<b>Representation:</b>	Applicants: In person  Respondent: Dr Philip Harris
<b>File Number(s):</b>	SCS 16/10487
<b>Publication restriction:</b>	Nil

## REASONS FOR DECISION

- 1 This is an appeal brought to the Tribunal pursuant to s 177 of the *Strata Schemes Management Act* (1996) NSW (the "SSMA") against a decision of an Adjudicator dated 3 February 2016 dismissing an application seeking:
  - (1) An order pursuant to s 162 of the SSMA for the appointment of a Strata Managing Agent to exercise the functions of the Owners Corporation;
  - (2) An order pursuant to s 154 of the SSMA in the following terms:

"Nullify resolution/refund fees due to OC engagement of solicitor/owners denied opportunity of being informed or voting opportunity;
  - (3) An order pursuant to s138 as follows:

"Nuisance and hazard common property,  
Threatening other residents,  
Refund inappropriate engineering and legal fees favouring only a few owners".
- 2 The original application, the subject of the adjudication, was lodged on 11 November 2015. By the original application the applicants identified the reasons for seeking these orders as follows (I have added numbers for convenience):
  - (1) Intimidation/endangerment/threats to residents by an owner forcing my family to relocate;
  - (2) OC failure to reach decisions on a Council Fire Order for almost 5 years with no resolution, leaving residents and property untouched and major money spent;
  - (3) Sea wall applications to council failed for over 10 years at significant cost;
  - (4) Evidence of Bias: in 2006 denying one owner to enclose their balcony and then allowing many other illegally enclosed balconies. This inconsistency was magnified by allowing another (OC member) to enclose their balcony in 2010, these unauthorised works/renovations/alterations were done without notice to residents/owners and without approval of OC and local council who then placed a fire order on the building. Council Deemed: No development consent and non-fire compliance.
  - (5) The OC operates with a lack of transparency generally and non-disclosure of legal engagements to owners and payment of professional fees;
  - (6) Major money spent Engineering/Legal Fees with no results and without keeping owners informed;
  - (7) Bias: several owners had years of levies arrears totalling over \$22,000 at one point and OC and SM failed to act, yet they pursued one person for levies arrears with Debt collection fees of about \$15,000 (one year) without results;
  - (8) A mystery trust running in the SP 586 managed by SM involves paying private legal fees for one owner on a private matter without explanation or disclosure to owners;
  - (9) Repeated failure to repair and maintain common property and act on unauthorised works. There is a domination by a minority, to the detriment of both the other owners and the proper repair and maintenance of the building property as proven by the Fire Order.
- 3 The appeal was initiated by an application for Tribunal orders lodged on 1 March 2016.

In that document the applicants state that they also seek an order imposing a penalty for contravention of a by-law and an “other order” identified as “unauthorised works by OC [Owners Corporation] and SM [Strata Manager] without permission of owners”.

- 4 It is convenient at the outset to set out the provisions of the SSMA pursuant to which the applicants seek orders:

**138 General power of Adjudicator to make orders to settle disputes or rectify complaints**

- (1) An Adjudicator may make an order to settle a dispute or complaint about:
- (a) an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme, or
  - (b) the operation, administration or management of a strata scheme under this Act.
- (2) For the purposes of subsection (1), an owners corporation or building management committee is taken to have failed to exercise a function if:
- (a) it decides not to exercise the function, or
  - (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.
- (3) An Adjudicator may not make an order under subsection (1) for the settlement of a dispute or complaint:
- (a) dealt with in another section of this Chapter, or
  - (b) referred to the Tribunal or only within the jurisdiction of the Tribunal, or
  - (c) relating to the exercise, or the failure to exercise, a function conferred on an owners corporation by this Act or the by-laws if that function may be exercised only in accordance with a unanimous resolution or a special resolution (other than a special resolution under section 62 (3), 65A or 65B), or
  - (d) that includes the payment by a person to another person of damages.
- (4) If a dispute or complaint arises from or relates to the operation or application of a provision of a lease of a lot, or of the common property, in a leasehold strata scheme, the lessor of the strata scheme must not:
- (a) commence other proceedings in connection with the settlement of the dispute or complaint after having made an application under this section for the settlement of the dispute or complaint, or
  - (b) make an application under this section for the settlement of the dispute or complaint after having commenced other proceedings in connection with the settlement of the dispute or complaint.
- (5) An application for an order under this section may be made only by an interested person.

**154 Order where voting rights denied or due notice of item of business not given**

- (1) An Adjudicator may order that a resolution passed at a general meeting of an owners corporation be treated as a nullity on and from the date of the order if satisfied that the resolution would not have been passed but for the fact that the applicant for the order:
- (a) was improperly denied a vote on the motion for the resolution, or
  - (b) was not given due notice of the item of business in relation to which the resolution was passed.
- (2) An application for an order under this section may not be made after 28 days after the date of the meeting at which the resolution was passed.

(3) If an order under this section is made in relation to a resolution making a by-law or amending or repealing another by-law and the order has been recorded as provided by section 209, the by-laws have force and effect on and from the date the order is so recorded to the same extent as they would have had if the resolution had not been passed.

(4) Subsection (3) is subject to the by-laws having been or being amended or repealed in accordance with this Act and to any relevant order made by a superior court.

(5) An application for an order under this section may be made only by a person entitled to vote on the motion for the resolution concerned.

## **162 Order appointing strata managing agent to exercise certain functions**

(1) Order appointing strata managing agent to exercise functions of owners corporation  
An Adjudicator may by order 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  
An Adjudicator may also order, when appointing a strata managing agent under this section, that the strata managing agent is to have and may exercise:

- (a) all the functions of the chairperson, secretary, treasurer or executive committee of the owners corporation, or
- (b) specified functions of the chairperson, secretary, treasurer or executive committee of the owners corporation, or
- (c) all the functions of the chairperson, secretary, treasurer or executive committee of the owners corporation other than specified functions.

(3) Order may be made without application in certain circumstances  
An Adjudicator may make an order under this section, without an application having been made for the order, but only if satisfied that the management structure of a strata scheme the subject of an application under this Chapter is not functioning or is not functioning satisfactorily.

(3A) Order may be made on application in certain circumstances  
An Adjudicator may make an order under this section, on application, but only if satisfied that:

- (a) the management structure of a strata scheme the subject of an application under this Chapter 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 under this section must:

- (a) hold a strata managing agent's licence issued under the *Property, Stock and Business Agents Act 2002*, and
- (b) have given consent in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the chief executive officer of the corporation.
- (c) (Repealed)

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

(6) Revocation of certain appointments  
An order made in the circumstances referred to in subsection (3) may be revoked or varied by an Adjudicator on the application of a person entitled to make an application for an order under this section and, unless

sooner revoked, ceases to have effect at the expiration of such period after its making (not exceeding 12 months) as is specified in the order.

(7) Who may make an application? An application for an order under this section may be made only by:

(a) a person who obtained an order under this Act that imposed a duty on the owners corporation or on its executive committee, chairperson, secretary or treasurer and that has not been complied with, or

(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 a lease of a lot in the scheme, or

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation, or

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

5 The Adjudicator dismissed the original application for the appointment of a strata manager on the basis that:

6 “The applicant has not satisfied the onus of establishing that the management (paragraph 12 of the Adjudicator’s decision)

7 The Adjudicator dismissed the application for orders pursuant to ss154 and 138 on the basis that the applicants had not satisfied the onus of establishing on the balance of probabilities that the orders sought should be made (paragraphs 24-26 of the Adjudicator’s decision).

8 On an appeal pursuant to s 177 of the SSMA the Tribunal may admit further evidence and thus the parties are not restricted to the evidence put before the Adjudicator, see s 181(2) of the SSMA.

9 At the hearing before me both applicants and Dr Harris, the Secretary of the Executive Committee, Mr Skurnik, the Chairman of the Executive Committee and Mr Coyle, the current Strata Managing Agent, each gave evidence on oath. In addition the applicants filed a number of bundles of documents which included written submissions and various other documents. The respondents filed a detailed written submission of 25 pages together with a folder of annexures.

10 In the circumstances I need not consider whether the Adjudicator’s decision was justified on the evidence before the Adjudicator. I must consider whether, on the evidence before me, the applicants have established an entitlement to or justification for the orders sought.

11 Although both applicants appeared and presented evidence and submissions, Ms Casey, the first-named applicant, generally undertook the presentation of the applicants’ case. Dr Harris represented the Owners Corporation.

12 The applicants included in their bundles of documents the consent of the proposed Strata Manager as required by s 162(4)(b) of the SSMA. The consent is signed by a director of the proposed manager and identifies that the proposed strata manager holds a strata manager’s licence under the *Property Stock and Business Agents Act 1941*.

13 I note that subsequent to the hearing I received two further documents from the applicants. These documents were filed without leave and I have not taken them into account in reaching my decision.

- 14 As the respondent noted in its submissions, the applicants' documents and submissions were in a form that made them difficult to interpret.
- 15 In order to bring some coherence to the applicants' case, at the hearing I required the applicants to identify the basis upon which they alleged that orders pursuant to s 162 appointing a managing agent were justified. Ms Casey raised a number of issues which I will set out and address below. I will also address, concurrently where appropriate, the nine reasons set out in the original application which I have reproduced and identified by number in paragraph 2 above.
- 16 I note that I have reviewed the applicants' written submissions and considered any matters raised in those submissions which were not raised by Ms Casey at the hearing. I do not consider that any such matter warrants further consideration. There were no matters raised in the written submissions, other than those addressed below, which, alone or combined, would justify the orders sought by the applicants. Such matters were not the subject of evidence beyond mere assertion in submissions and to a large degree reflected disputes between lot owners rather than issues with the governance of the Owners Corporation.
- 17 The bases upon which, at the hearing, Ms Casey, on behalf of both applicants, sought to justify the appointment of a strata managing agent were that the Owners Corporation was not functioning satisfactorily and had failed to perform duties.
- 18 Insofar as it was alleged that the Owners Corporation had failed to perform duties, Mr Casey referred to the Owners Corporation's failure to comply with a fire safety order issued by the Woollahra Municipal Council. This is, as will appear below, the most substantial issue raised by the applicants. It is reflected in reasons (2), (6) and (9) set out in the original application. I will deal with it below.
- 19 Ms Casey also alleged that the Owners Corporation had failed to prevent the destruction of common property including electrical services. Ms Casey supported this allegation by reference to assertions that the owners of Units 20 and 16 had performed unauthorised work with the Owners Corporation's knowledge. In respect of Unit 20, that work involved the enclosure of a balcony in 2010. In respect of Unit 16, Ms Casey alleged that it involved converting a bedroom into a spa bathroom which involved the removal of a common wall (Ms Casey acknowledged that the common wall had been restored).
- 20 Ms Casey alleged that the alleged unauthorised work provided evidence that the Owners Corporation was not functioning satisfactorily. It appears that the allegation concerning the installation of the spa bath relates to the period 2010-2012. Mr Coyle gave evidence that the spa had been the subject of approval by by-law before it had been filled, albeit after it had been installed.
- 21 The question I have to determine is whether the Owners Corporation is currently functioning satisfactorily. The applicants did not put before me evidence that the Owners Corporation or the Executive Committee had deliberately allowed unauthorised works in Unit 16 or Unit 20. Given the length of time that has passed since the relevant

- events I do not consider that this allegation adds any weight to the applicants' case.
- 22 Ms Casey also complained that that there had been unauthorised entry into her unit. Mr Coyle explained in his evidence that that had been a response to an urgent situation involving water leaking into the unit below and that it had been necessary to undertake a dye test to establish the source of the water leaks into the unit below. I do not consider the entry into Ms Casey's unit to be evidence that the Owners Corporation is not functioning satisfactorily.
- 23 Ms Casey next identified the selective enforcement of levy arrears as a basis for the allegation that the Owners Corporation was not functioning satisfactorily. This was also the issue raised by reason (7) set out in the original application. The allegation made by the applicants was that legal proceedings had been brought against Ms Cahn after she had fallen behind in payment of levies for one quarter in 2012 to 2013, whereas other lot owners had not been the subject of legal fees despite falling into arrears. I will address this issue below.
- 24 Ms Casey then referred to the fact that Mr Skurnik's private legal fees had been paid by the Owners Corporation. The applicants identified that the Owners Corporation had reimbursed Mr Skurnik in respect of legal fees incurred in relation to litigation between him and Ms Casey. This was also the fact underlying reason (8) set out in the original application. The Owners Corporation produced documentation which established clearly that the moneys so paid were the proceeds of an insurance claim under an Office Bearers Liability insurance policy. As such, the Owners Corporation received the moneys by reason of Mr Skurnik's incurring of legal fees as a member of the Executive Committee and it was appropriate that the Owners Corporation reimburse Mr Skurnik in respect of those fees. The payment of Mr Skurnik's legal fees was not evidence that the Owners Corporation was not functioning satisfactorily.
- 25 Ms Casey complained of a failure to advise owners of the engagement of lawyers and alleged that the Owners Corporation's Executive Committee was attempting to conceal the incurring of legal fees. This complaint reflected reason (5) set out in the original application. To the extent this complaint raised issues beyond the payment of Mr Skurnik's legal fees, it related to the costs of engaging solicitors to advise in relation to the fire safety issues and in relation to the defence of these proceedings. In this context Ms Casey referred to s 80D of the SSMA which provides as follows:

**80D Legal action to be approved by general meeting**

(1) An owners corporation or executive committee of an owners corporation must not seek legal advice or the provision of any other legal services, or initiate legal action, for which any payment may be required unless a resolution is passed at a general meeting of the owners corporation approving the seeking of the advice or services or the taking of that action.

(2) The regulations may make provision for or with respect to exempting any type of legal service or legal action from the operation of this section.

- 26 Ms Casey also referred to s 230A of the SSMA which provides as follows:

**230A Disclosure of matters relating to legal costs**

If a disclosure under Division 3 of Part 4.3 of the *Legal Profession Uniform Law (NSW)*

is made to an owners corporation in respect of the costs of legal services to be provided to the owners corporation, the owners corporation must give a copy of the disclosure to each owner and executive committee member within 7 days of the disclosure being made.

27 I note that Regulation 15(1) of the Strata Schemes Management Regulation 2010 provides:

**15 Exemptions from need for approval for certain legal action**

(1) The seeking of legal advice, the provision of legal services or the taking of legal action is exempt from the operation of section 80D of the Act if the reasonably estimated cost of seeking the legal advice, having the legal services provided or taking the legal action would not exceed:

(a) an amount equal to the sum of \$1,000 for each lot in the strata scheme concerned (excluding utility lots), or

(b) \$12,500,

whichever is the lesser.

28 As there are more than 13 units in strata plan 586, the effect of Regulation 15(1) is that expenditure on legal fees of less than \$12,500 is exempted from the requirement for approval at a general meeting. There is no evidence before me that any of the legal engagements of which the applicants complain were estimated to cost in excess of \$12,500.

29 Mr Coyle acknowledged that the obligation pursuant to s 230A of the SSMA to provide a copy of any solicitor's fee disclosure to each lot owner had not been complied with in relation to at least some fee disclosures. It appeared that the obligation may have been overlooked, but Mr Coyle stated, and I accept, that he would be astute to ensure the obligation was complied with in future.

30 In response to the suggestion by Ms Casey that approval of expenditure and legal fees had not been recorded in Executive Committee minutes, Dr Harris explained that the Executive Committee would usually get approval by consultation and that that approval was not always recorded in the minutes of Executive Committee meetings.

31 I find there is no basis in the manner or extent to which the Owners Corporation has incurred expenses including legal fees to support a conclusion that the Owners Corporation is not functioning satisfactorily.

32 In reason (4) set out in the original application, the enclosure of the balcony by Unit 20 is alleged to evidence bias favouring some lot owners over others. The applicants allege that in 2006 one owner had been denied consent to enclose their balcony. They did not adduce evidence that that had occurred. Moreover, as noted above, the applicants did not produce evidence to suggest that the Owners Corporation or the Executive Committee had deliberately allowed the owners of Unit 20 to enclose the balcony.

33 Ms Casey did not, at the hearing before me, refer to any conduct of the Owners Corporation concerning the sea wall referred to in reason (3) set out in the original application and presented no evidence on that issue and I do not consider it further.

34 Nor did Ms Casey at the hearing before me expressly rely upon reason (1) set out in

the original application, that is intimidation and threats by another owner. It would appear from the material filed by the applicants that this reason related to an ongoing dispute between Ms Casey and Mr Skurnik which has resulted in court proceedings. I do not regard such a dispute as relevant to the question I have to determine, which is whether the Owners Corporation is functioning satisfactorily.

35 I turn to consider the two issues which I have identified above but not dealt with, that is the alleged selective enforcement of levy arrears and the failure to comply with a fire safety order.

36 The allegation of selective enforcement of arrears was related to the fact that the Owners Corporation had commenced proceedings against Ms Cahn seeking arrears of strata levies. That fact was not in dispute. However, the allegation by the applicants that the Owners Corporation's pursuit of Ms Cahn was discriminatory or demonstrated bias was not established. In particular the allegation that "several owners had years of levies arrears totalling over \$22,000.00 at one point" was not established.

37 There were adduced in evidence before me copies of the Owners Corporation's balance sheets for each of 30 September 2008, 30 September 2009 and 15 March 2010. Those balance sheets disclose that at 30 September 2008 one owner was in arrears by more than 90 days in an amount of \$759.00. As at 30 September 2009 the owners of three lots were in arrears by more than 90 days, one of them in the amount of only \$125.00. The owners who had been in arrears by more than 90 days as at 30 September 2008 had total arrears of \$7,500 as at 30 September 2009 and had been in arrears for nearly \$5,000 for more than 90 days. It is apparent nevertheless that they had made payment of some levies during the course of that year. The owners of another lot were in arrears for a total of \$4,700 of which \$3,600 had been outstanding for more than 90 days.

38 As at 15 March 2010 the owners who had previously been in arrears in the amount of \$7,500 were in arrears in the amount of \$919 which was less than 90 days overdue. The other owners who had been in arrears as at 30 September 2009 remained in arrears in the amount of \$5,800 of which \$3,700 was over 90 days overdue.

39 No documentary evidence of Ms Cahn's payment history in respect of levies was tendered. Mr Coyle gave evidence that he always sought to negotiate with lot owners who were in arrears in the payment of levies but that Ms Cahn had acquired her unit in 2012 and had not paid any levies at all by 2013 when the matter was referred to lawyers for recovery action.

40 In relation to one other owner who had been allowed to accrue arrears of levies for over 120 days, Mr Coyle explained that that particular owner was overseas a lot and there was no question as to her capacity to pay the levies together with interest on the arrears.

41 In circumstances where the documentary evidence put before me which was alleged to show the selective enforcement of levy arrears related to periods in 2008 to 2010 and there was no evidence before me of the circumstances in which the arrears were

permitted to arise at that time, or what steps had been taken to enforce the levies at that time, I do not consider that the Owners Corporation's conduct in bringing legal proceedings against Ms Cahn establishes or supports the conclusion that the Owners Corporation is not currently functioning satisfactorily or that it has failed to perform its duties.

42 The remaining issues to be addressed relate to the outstanding fire safety order. The factual background to those issues is that, over the years, a number of units within the building have enclosed their balconies. The extent to which that was authorised was a matter of contention at the hearing. On the material put forward by the parties, I am not able to conclude whether any and if so which of the enclosures were not authorised. I was informed at the hearing, as indicated below, that it was necessary that by-laws be passed before certain rectification works could be performed. I proceed on the assumption that at least some of the enclosures were unauthorised by the Owners Corporation. I note that this assumption is corroborated by statements made by solicitors retained by the Owners Corporation in advices provided to the Owners Corporation. I refer to those advices further below.

43 A consequence of the enclosure of the balconies was that the Woollahra Municipal Council's fire inspectors determined that the building did not comply with fire safety regulations.

44 On 10 November 2011 the Woollahra Municipal Council served upon the Owners Corporation a fire safety order pursuant to s 121B of the *Environmental Planning and Assessment Act 1979* relating to a number of issues including exit doors, lighting and signage, fire alarms and the installation of fire extinguishers. Item 3 of the notice was headed "The Prevention of the Spread of Fire" and was as follows:

3.01 Spandrel separation to external walls of building

That spandrels shall be installed to sole occupancy units 4, 7, 10, 12 and 20 on the west and southern elevations that are not adequately protected in accordance with the requirements of clause C 2.6 of the BCA;

(Work shall be completed as part of Stage 3)

Reason: - to minimise the risk of fire spreading from one floor to another via openings in external walls of the building.

45 In this context the term "spandrel" is clearly used as indicating the space between the top of the window in one storey and the sill of the window in the storey above.

46 The notice provided that the work was to be performed within various periods ranging from 146 days to 421 days. The period within which the installation of spandrels in accordance with Item 3 was required to be completed was 421 days, that is the notice required that work to be completed by 4 January 2013.

47 On 14 October 2013 the Council issued a revised notice which varied the requirements for the installation of spandrels by deleting the reference to particular units.

48 On 21 December 2015 the Council issued a further revised order which further varied the requirement relating to spandrels to read as follows:

3.01 Spandrel separation to external walls of building

That fire-rated glazing shall be installed to the enclosed balconies to a height of no less than 900mm above the finished floor level achieving a fire resistance level of -/60/-. The glazing shall be in a steel frame and fixed to the flooring which shall be non-combustible in accordance with AS1530.1 for a distance of 100mm into the interior of the sole occupancy unit; (work shall be completed as part of Stage 3).

Reason: - to minimise the risk of fire spreading from one floor to another via openings in external walls of the building. The use of glass that is consistent in appearance is necessary to reduce the visual impact of the development upon the harbour/foreshore.

49 I was informed by Dr Harris and Mr Skurnik that the Council had threatened prosecution of the Owners Corporation for failure to comply with the Fire Safety notices but had never actually commenced any prosecution. They stated that the Council had been prepared to engage in negotiation with the Owners Corporation in relation to the content of the notices. This proposition is supported by the fact that on 26 October 2015 Ms Casey received from Mr Smith, the Council Fire Safety Officer, an email noting that Council was still in discussion with the owners on the enclosed balconies and stating "I am hoping to hold a meeting with the Owners Corporation from your building and a Council planner in the next few weeks."

50 On 4 June 2014 Mr Coyle wrote to the owners providing a "Recap on history of Fire Order" as follows:

Mid 2010 – due to a complaint, Council issued the first Fire Safety notice about a non BCA compliant spandrel to only one individual unit and not to the Owners Corporation

Late 2010 – Council issued the first notice about Fire Safety to the Owners Corporation, but with no units nominated as non BCA compliant spandrels

Late 2011 – Council combined the notice to the first unit, with the notice to the Owners Corporation, and nominated other units with non BCA compliant spandrels, and instructed qualified consultant to be engaged to re-assess, advise and give final certification once rectification works are done

Late 2011- at the AGM, owners resolved/moved for legal advice to determine payment responsibility

Mid 2012 – some owners initiated an EGM and it was resolved/moved to change course from 2011 AGM resolution/motion

Late 2012 – at the AGM, owners resolved/moved for vertical spandrels, and for 3 spandrel affected units to pay for and have their own meetings with the consultant and make their own research and enquiries with other companies

Late 2012 to mid 2013 – the 3 spandrel owners completed their enquiries

Mid 2013 to mid 2014 – all progress to the entire building's works and projects were halted due to exhaustion of strata funds due to a significant owner strata fee/debt arrears, which is still >6 months in arrears

Consequently legal advice has been received and please find a copy of it enclosed.

We now have to act as quickly as possible to meet the dead lines in the Order.

It is expected that an EGM will be conducted within the next few months to ratify either of the following, which may be subject to change:

by-laws to deal with spandrel issue;

negotiation of the spandrel matters, such as extension of all balconies to comply with the spandrel issue for the 5 units and also provide works to all other units;

other by-laws to deal with other unauthorised modifications to CP; and/or

action with CTTT and/or Council to seek reversal of unauthorised works or modifications to common property.

Please ensure that you are educated on the matters and you are encouraged to obtain your own legal advice on the matters if you wish.

- 51 Mr Coyle attached to that letter a copy of legal advice dated 2 July 2012 received from Jane Crittenden, Lawyer. That advice included the following:

...

I am instructed that works have been carried out in a number of Lots over a period of years which were not approved by the Owners Corporation in accordance with Section 52 or Section 65A of the *Strata Schemes Management Act 1996* ("the ACT"), and which may not have had requisite approval by the local Council under the EP & A Act. Those works include the enclosure of balconies.

...

I have been asked whether the owners of Lots in which unauthorised works have been carried out can be compelled to carry out work to comply with the relevant parts of Council's order, such as [the fire safety order of 10 November 2011].

Where a Lot owner has carried out works which are affixed to or upon common property without obtaining approval of those works under Section 52 or 65A of the Act, and without obtaining requisite approval of the works from Council, the Owners Corporation can seek the removal of the works, either by:

- (a) applying for an order from a Strata Schemes Adjudicator for the unauthorised works to be removed; and/or
- (b) writing to Council to ask it to order the Lot owners to demolish the unauthorised works

Alternatively, if the Owners Corporation wishes to permit the unauthorised works to remain it can require the Lot owner to obtain a by-law for the works. The by-law should impose on the Lot owner an obligation to repair and maintain the works and renew or replace them when necessary. The by-law can require the Lot owner to comply with orders and notices of the Council or any Court or Tribunal in relation to the works. Such a by-law requires consent in writing of the owner concerned before a motion for a by-law is approved at a general meeting.

A by-law can retrospectively approve works which were carried out without prior approval of the Owners Corporation.

A by-law can also impose on a Lot owner, an obligation to carry out spandrel separation work.

If a Lot owner is not willing to consent to such a by-law, an application should be made to a Strata Scheme Adjudicator for the removal of the works. If the Lot owner is not willing to consent to a by-law which requires the Lot owner to carry out spandrel works which are necessary as a result of their carrying out unauthorised works to enclose a balcony, the Owners Corporation would have good prospects of obtaining an order from an Adjudicator for the demolition of the unauthorised works.

A by-law can and should include a condition requiring the relevant Lot owner to reimburse the Owners Corporation's costs of drafting and registering a by-law for that Lot owner's works.

This advice is applicable whether the current Lot owner carried out the unauthorised works or a previous owner of the Lot carried out the works.

- 52 On 18 November 2015 the Owners Corporation Annual General Meeting for 2015 was held. The agenda for that meeting included motion 7 "Fire order must be actioned to become compliant ASAP (over 4 years to date), costs for the outstanding spandrels to be funded by owners of illegally enclosed balconies." The minutes of that meeting disclose that motion 7 (which was moved by Ms Casey) was defeated 27 votes to 2.

- 53 The Owners Corporation included in its bundle of documents a quotation dated 4 December 2015 from Holland Fire Doors for steel framed fire rated windows for Units 7,

10, 12 and 20 at a cost of \$86,950. The cost was specifically allocated between the units. The cost for each unit ranged from \$34,900 plus GST for Unit 7 to \$11,750 plus GST for Unit 10. The Owners Corporation also included in its bundle another quotation dated 30 March 2016 from Manly Windows Pty Ltd in the amount of \$109,478 including GST. Although that quotation states on the first page that it relates to the supply and installation of aluminium windows, it is apparent from the plans and specifications attached to the quotation that it does relate to the provision of steel framed windows and fire-resistant glass to units 7, 10, 12 and 20. The quotation does not indicate an individual cost for each unit.

54 On 15 March 2016 the Owners Corporation received an advice from Mr Le Page of Le Page Lawyers which included the following:

We are instructed that Woollahra Municipal Council has issued a notice to the Owners Corporation under s.121B of the *Environmental Planning & Assessment Act 1979*.

The order required inter alia that the Owners Corporation undertake certain work on balconies on the southern side of the building, which had been enclosed by owners. The result of the enclosures was, in Council's opinion, to make the spandrel (that is, the space between the top of the window in one storey and the sill of the window in the next) inadequate for the purposes of preventing the spread of fire from one storey to the next.

After extensive negotiations between the Owners Corporation and the Council, the parties have agreed that the necessary work would consist of the replacement of the enclosures with enclosures of steel and glazing of a certain quality. The fire order has been reissued so as to require the Owners Corporation to undertake the work accordingly.

...

The Owners Corporation has asked us to advise whether the Owners Corporation is responsible to comply with the fire order, or whether responsibility to comply with the order falls to the owners of the relevant lots.

...

Our observation on site was that the aluminium and glazed structures had been constructed on the balcony slab so as to abut the edge of the slab, or within some 10-15 cm of it. Whether built before or after 1 July 1974, the structures were built wholly or partially upon common property.

...

In our opinion, the Owners Corporation is obliged to comply with the Council's order, whether the work required is to be carried out within a lot or upon the common property.

...

As the Owners Corporation is directly responsible for compliance with the Council's order, the next question is really whether the Owners Corporation has a right to require individual owners to discharge that responsibility on behalf of the Owners Corporation, or perhaps to indemnify the Owners Corporation against the costs reasonably and properly incurred by the Owners Corporation in complying with the order.

...The Owners Corporation made Special By-Law 29 on 12 December 2012. ...

*"When Common Property has been modified, renovated, improved or damaged, and of which (sic) relates to or benefits an individual lot, and whether or not such works or damage has been done by that individual lot's owner(s) or previous owner(s), any upkeep, maintenance, repairs, upgrade and/or works to comply with Council or Authority Orders for such works or damage, shall not be the responsibility of the Owners Corporation and shall be the responsibility of that individual lot's current owner(s)".*

...

The Owners Corporation remains liable to comply with the Council's order notwithstanding Special By-Law 29,

...

In interpreting the by-law, we believe that it is relevant that the by-law does not purport simply to require the owners of lots to undertake work that the Owners Corporation has been ordered by the Council to do. Rather, it purports to excuse the Owners Corporation from that liability, and to substitute the owners for the Owners Corporation as the parties responsible to undertake the works. The by-law is to be construed in its entirety, and the purported delegation by the by-law of the Owners Corporation's functions is apparent in the words "... shall not be the responsibility of the Owners Corporation and shall be the responsibility of that individual lot's current owners(s)."

...

However the by-law purports to excuse the Owners Corporation from its responsibility to comply with the order of the Council which (we assume) has been issued lawfully under s.121B of the *Environmental Planning & Assessment Act 1979*. We do not believe that the by-law can do so, and accordingly we consider that the attempt to replace the Owners Corporation by the owners of various lots as the party responsible for compliance with the Council's order must fail.

Further, a by-law will be invalid "if it contradicts or is repugnant to, or inconsistent with, the Act under it is made...".

...

In our opinion a by-law that attempts to negative that duty [to comply with the Council's order] will therefore be invalid.

For these reasons, in our opinion, Special By-Law 29 does not effect a delegation of the Owners Corporation's responsibility to comply with the Council's order to the current owners of the relevant lots, and it does not impose any such responsibility on those owners.

...

The Owners Corporation made another by-law on 12 December 2012, Special By-Law 26. ...

This by-law purported to authorise the owner of Lot 15 to undertake certain works (some of which in fact appear not to have affected the common property), including "the installation of three fixed pane double glazed windows at positions 3A, 3B and 3C in the plan drawn by E Merdjanic which is annexed to the Notice of Meeting at which this motion is to be considered...".

We have not seen the Merdjanic plan, however it seems likely that these words have been used to describe the enclosure of the balcony.

Permission was given on a number of conditions, including the following:

"The owner must properly maintain and keep the Works in a state of good and serviceable repair and must renew or replace the Works as necessary from time to time and must be responsible for all affixtures (sic) to common property that relate to Lot 15" (condition 4).

"The owner must indemnify the Owners Corporation against any loss or damage the Owners Corporation suffers as a result of the replacement, repair, maintenance, renewal or replacement of the Works" (condition 7).

...

In our opinion, the replacement of the aluminium structure by a steel structure with more fire-resistant glazing is an exercise of replacement that achieves "functional equivalence", that is, the enclosure of a balcony. The fact that the new structure will offer superior fire-protection measures does not mean that the principal function of the new and the old differs.

...

If, as we have suggested, “replacement” includes, for the purposes of the by-law, the replacement of the existing structure with the structure required by the Council, then under condition 7, the owner of Lot 15 will be liable to indemnify the Owners Corporation against “any loss or damage” the Owners Corporation suffers “as a result of” the replacement. Arguably, “loss or damage” may not include the expense of complying with the order, and the expense of compliance may not be incurred “as a result of” the replacement, but rather “for the purpose of” the replacement.

...

On balance we are inclined to the view that the Owners Corporation would not have a right to recover from the owner of Lot 15 the cost of the works required by Council.

...

The owner of Lot 7 has asserted that the enclosure of Lot 7’s balconies was undertaken with the consent of the Owners Corporation. However we have been unable as yet to ascertain that that is the case in respect of Lot 7 or the other relevant lots, or on what conditions such consent might have been granted.

...

The owner of Lot 10, we understand, concedes that the enclosure of his balcony was undertaken without the consent of the Owners Corporation.

Where structures are erected on the common property, or the common property is added to or altered, without the necessary authorisation of the Owners Corporation, the Owners Corporation is obliged to restore the common property to its authorised state:

...

However the Act itself recognises the authority of the Owners Corporation in certain circumstances to ratify such works previously undertaken without consent: s.140(2) and s.158(4) of the Act, and of course the Owners Corporation may seek orders that the relevant owner restore the common property.

What this appears to require on the part of the Owners Corporation is that any alterations or additions affecting common property that have been undertaken by an owner without the necessary consent of the Owners Corporation must be removed by the Owners Corporation (so as to restore the common property to proper condition) or, with the consent of the Owners Corporation, they may be removed by the owner, or the Owners Corporation must ratify the works. In this case, any such ratification might be on condition that the benefitted owner accept responsibility for the cost of the works required by the Council (inter alia, to permit consistency with the terms of the consent apparently benefitting Lot 15).

In our opinion, it is a moot point whether the Owners Corporation’s duty to remove the unauthorised additions and to restore the common property is displaced by the Council’s order that certain works be done. However we consider that the removal of the unauthorised works (so as secure compliance by the Owners Corporation with its duty under s.62 of the *Strata Schemes Management Act 1996*) will be undertaken in the course of complying with the Council’s order, and the addition by the Owners Corporation of new structures thereafter will be undertaken pursuant to the order of the Council. No further authorisation by the Owners Corporation will be required (specifically, under s.65A(1) of the *Strata Schemes Management Act 1996*).

- 55 I note that Mr Le Page’s advice appears to contradict that which the Owners Corporation had received from Ms Crittenden in 2012 and, were it necessary for me to determine which of the contradictory advices was correct, I would require some persuasion before accepting a number of conclusions reached by Mr Le Page. I refer in particular to the conclusions that By-Law 29 might be found invalid as a purported delegation of the obligation to carry out the work required to comply with Council fire orders rather than being construed so as to require the owners of the relevant lots to pay for work occasioned by the enclosure of balconies, and that the Owners Corporation’s duty to remove unauthorised works and restore the common property

could be displaced by a Council fire order which is clearly only necessitated by the original unlawful works.

- 56 However, I have not heard argument on those issues. The Owners Corporation has received Mr Le Page's advice and it is a matter for the owners whether they are prepared to accept and act upon it. I note that any owner may obtain their own legal advice.
- 57 On 24 May 2016 an Extraordinary General Meeting of the Owners Corporation was held. That was two days before the hearing in this matter. Motion 2 on the agenda of that meeting was to approve the quote from Manly Windows for \$109,478 to comply with the fire order dated 21 December 2015 from Woollahra Municipal Council. Motion 3 was to approve the raising of a special levy of \$109,478 due and payable 60 days from the date of the meeting.
- 58 I was informed by Dr Harris and Mr Skurnik that at that meeting the raising of the special levy was approved but the approval of the quote was deferred as it was necessary to pass a further by-law to vary boundaries of the common property and authorise the work involved in the enclosure of balconies where that had not previously been authorised.
- 59 Ms Casey submitted that the advice received from Ms Crittenden in 2012 should have been acted upon and that it is apparent from the fact that the Executive Committee had obtained further legal advice, and from the fact that the proposed rectification mechanisms to comply with the fire safety notice have changed, that the Body Corporate is not functioning satisfactorily.
- 60 The submission in response on behalf of the Owners Corporation was that the time taken to comply with the fire safety notices reflected the fact that the Executive Committee had been negotiating with Council to clarify and reduce the obligations enclosed upon the Body Corporate. This was reflected in the fact that the Council notice had been reissued on two occasions.
- 61 Dr Harris on behalf of the Executive Committee acknowledged that the Council had threatened to prosecute and there had been communications between solicitors acting for the Body Corporate and the Council. However the Executive Committee had been able to negotiate with Council to avoid prosecution and had engaged fire engineers to come up with an alternative solution. The submission put by Dr Harris on behalf of the Body Corporate was that, despite delays, the Executive Committee and Body Corporate were moving forwards towards compliance with the fire notices.
- 62 Mr Coyle stated in his evidence that there had been a levy raised in 2011 to carry out works, including works required by the fire notice. However those moneys had been expended in part on works required by the original fire notice other than the spandrels and part of the balance of the moneys had been expended on other works, for example some concrete cancer that required attention. Mr Coyle said that some of the funds raised in 2011 remained unspent.

63

The appointment of a strata managing agent pursuant to s162 of the SSMA is an extreme measure not to be made lightly. As an Appeal Panel of this Tribunal stated in *Bischoff v Sahade* [2015] NSWCATAP 135 at 147:

An appointment of a strata managing agent is “draconian”. This is because the SSMA provides for the Lot owners to decide how the functions of the Owners corporation are to be exercised through:

- (1) Passing resolutions at a general meeting;
- (2) Electing members to an executive committee; and
- (3) Having the executive committee make decisions in respect of delegated or authorised functions through the committee’s applicable processes

whereas upon appointment under s 162, those powers are vested in a third party strata managing agent who is not subject to direction and control

64 See also *Mortlock v Owners Strata Plan 55434* (2006) NSWSC 363 at [18].

65 In *Bischoff v Sahade* the Appeal Panel also noted, at 113-118 and 122:

[113] The language of s 162 (3A) does not suggest that:

- (1) the manner in which Lot owners, occupiers or other people who have dealings with each other; or
- (2) the way such people conduct themselves when on common or Lot property within the strata scheme,

is generally relevant to a determination of this question.

[114] Rather, the conduct relied upon must have an effect on the functioning or satisfactory functioning of the management structure.

[115] Management of the strata scheme is regulated by Chapter 2 of the SSMA. An owners corporation has principal responsibility for the management of the strata scheme: see s 8 of the SSMA. In doing so:

- (1) it may employ persons to assist in the exercise of its functions: see s 13 of the SSMA;
- (2) it must appoint an executive committee: s 16 of the SSMA;
- (3) it may appoint a strata managing agent or a caretaker: see s 26 and s 40B of the SSMA.

[116] The functions of the owners corporation are specified in s 12 of the SSMA which are the “function conferred or imposed on it by or under this or any other Act.”

[117] Relevant functions include the Owners Corporation:

- (1) Employing persons to assist in exercising its functions: see s 13 of the SSMA;
- (2) Serving notice upon an owner or occupier of a Lot to comply with relevant by-laws and taking action in respect of breaches of by-laws: see e.g. ss 45 and 202 of the SSMA;
- (3) Raising levies for the administration of the strata scheme and for the repair or maintenance of common property: see e.g. s 75 of the SSMA; and
- (4) taking legal action on behalf of the Owners Corporation, subject to any resolution passed at a general meeting as required by s 80D of the SSMA.

[118] Meetings of the Owners Corporation must be conducted in accordance with the requirements of Sch 2 of the SSMA which, inter alia, provide for the giving of notices of general meeting (including extraordinary general meeting) the conduct of those meetings, the counting of votes and other administrative matters.

[122] 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.

66 On the evidence before me I am not satisfied that the management structure of the Strata Scheme was not functioning satisfactorily or that, to the extent that the Owners Corporation has failed to perform its duties, in that it has failed to fully comply with the fire orders issued by the Council, the failures are such that the draconian remedy of the appointment of an administrator is warranted in this case.

67 I am satisfied on the evidence that the Owners Corporation has been seeking to comply with the fire orders and it has, through negotiation with the Council, reduced the financial burden on the Lot owners necessitated by compliance with the fire orders. It cannot be said that the Executive Committee or the Owners Corporation is "sitting on its hands".

68 As the Owners Corporation's own submissions recognise, the delay is at least in part attributable to debate between the owners, in particular in relation to whether the owners who have enclosed balconies should be responsible for the cost of the rectification work or whether it is the responsibility of the Owners Corporation. As noted above, the Owners Corporation has received contradictory advice on that issue and it would not be appropriate for me to say more about that advice than as set out above.

69 As at the date of the hearing there was to be a further meeting to pass a special resolution varying the boundaries of the common property and authorising the work involved in the enclosure of balconies where that had not previously been authorised. Presumably the members of the Owners Corporation at that meeting will have considered whether such authorisation should be on conditions requiring the owners who have enclosed their balconies to meet the additional costs occasioned to the Owners Corporation by reason of that action.

70 The Owners Corporation had at the time of the hearing obtained quotations for the work required to comply with the most recently issued fire safety order, had passed a special resolution to raise funds to carry out that work and proposed to hold a meeting to pass the necessary special resolutions to enable the work to be carried out. I do not find that the delays in carrying out the fire safety work justify the draconian step of appointing a strata manager.

71 I do not consider the other matters raised by the applicants constitute evidence that the management of the Body Corporate is not functioning satisfactorily or demonstrate that the Owners Corporation has failed to comply with its duties. In particular I am not satisfied that the evidence demonstrates that the Executive Committee has shown bias

against the applicants or either of them or that, apart from the delays in compliance with the fire notices, there has been any significant failure by the Owners Corporation to comply with its duties.

- 72 As the Appeal Panel noted in *Bischoff v Sahade*, the language of s 162 of the SSMA does not suggest that the manner in which Lot owners deal with each other or conduct themselves on common or Lot property within the strata scheme is relevant to a determination whether the Owners Corporation is functioning satisfactorily.
- 73 I therefore dismiss the application for the appointment of a Strata Managing Agent.
- 74 In respect of the applicants' claim for other orders, I am not satisfied that the applicants have established any justification for an order pursuant to s 154 of the SSMA. The applicants have not identified any resolution passed at a General Meeting of the Owners Corporation which should be treated as a nullity. In oral submissions Ms Casey referred to the payment of legal fees to Mr Comino, solicitor, in October 2014. The Respondent asserts, without contradiction by the applicants, that the legal fees paid to Mr Comino were \$6,634. Therefore the retainer of Mr Comino did not require approval by a General Meeting of the Owners Corporation.
- 75 Insofar as the applicants seek orders pursuant to s 138, in the course of submissions Ms Casey identified that the applicants seek that the Tribunal make an order that the Chairman, Mr Skurnik, be excluded from appointment as Chairman or appointment to the Executive Committee on the basis that his conduct was inappropriate because he obstructed the driveway on one occasion. The driveway incident was the subject of some documentary evidence put before me and was the subject of Court proceedings at the time. I do not consider that the general power of an Adjudicator to make orders to settle disputes or rectify complaints would authorise an Adjudicator, or the Tribunal on an appeal from Adjudicator, to make an order in the terms sought by Ms Casey.
- 76 Insofar as the application seeks orders pursuant to s 138 in relation to "inappropriate engineering and legal fees favouring only a few owners", I am not satisfied on the basis of the material before me that there is any basis on which any engineering or legal fees incurred by the Owners Corporation could be said to be inappropriate or favouring only a few owners. The major issue the subject of legal advice was whether the individual owners of lots with enclosed windows or the Owners Corporation was liable to pay for the installation of the fire resistant spandrels. That was an issue that was of concern to all lot owners. In any event I do not consider that the applicants have established any breach of the Owners Corporation's powers, functions, duties or obligations which would warrant orders in relation to the engineering and legal fees. I note that it was not made clear by the applicants from what source they proposed such an order should have required the Owners Corporation to obtain the funds to refund the fees or to whom they proposed the fees should be ordered to be refunded.
- 77 Insofar as the application for Tribunal orders by which the applicants commenced the appeal seeks, in addition to the orders sought before the Adjudicator, orders for the imposition of a penalty for contravention of a by-law, I note that the applicants have not

identified what by-law or by-laws they allege have been breached or who is alleged to have breached them. The applicants provided no evidence to support the allegation that any by-laws have been breached. I also accept the respondent's submission that I do not have jurisdiction to impose a penalty for the contravention of a by-law in these proceedings. Pursuant to s 203 of the SSMA, an application for the imposition of a civil penalty for a contravention of a by-law may only be brought by an Owners Corporation and orders may only be made in circumstances where a notice has been served under s 45 of the SSMA on the person the subject of the application requiring them to comply with the by-law. Therefore the application for the imposition of a penalty for contravention of a by-law is dismissed.

- 78 Insofar as the application for Tribunal orders seeks orders relating to unauthorised works allegedly carried out by the Owners Corporation, again the applicants have provided no detail or particulars of the allegation nor have they identified the orders which they seek be made. To the extent the claim relates to the alleged unauthorised entry into Ms Casey's apartment, I consider the entry of which Ms Casey complains has been adequately explained. I refer to the evidence of Mr Coyne in relation to the need for a dye test to establish the source of a leak. Ms Casey sought to suggest that the plumber who entered her apartment had damaged the waterproof membrane necessitating its replacement. Ms Casey produced no evidence to support this allegation. I do not find that the entry into Ms Casey's apartment has caused damage to her apartment. The application in this regard is also dismissed.
- 79 As I consider that the application should be dismissed I do not need to determine whether the provisions of the SSMA would empower the Tribunal determining an appeal from a decision of an Adjudicator to make orders which were not the subject of the application to the Adjudicator.
- 80 The appeal is dismissed. Pursuant to s 181(3) of the SSMA, the order of the Adjudicator is confirmed.

**(Signed)**

**D Robertson**

**Senior Member**

**Civil and Administrative Tribunal of New South Wales**

**24 August 2016**

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

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Decision last updated: 11 October 2016