



Supreme Court  
New South Wales

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Case Name: Glenquarry Park Investments Pty Ltd v Hegyesi

Medium Neutral Citation: [2019] NSWSC 1120

Hearing Date(s): 28 August 2019

Date of Orders: 28 August 2019

Decision Date: 28 August 2019

Jurisdiction: Equity

Before: Parker J

Decision: See [35].

Catchwords: COSTS – Indemnity for costs – whether Strata Corporation should indemnify plaintiffs for costs incurred in proceedings under Strata Schemes Management Act 1996 (NSW) (“SSMA”), ss 229 and 230 – distinction between grounds of appeal which advanced interests of Strata Corporation as a whole and those propounding a dispute between individual lot owners – whether Court’s powers under ss 229 and 230 extend to costs incurred in proceedings before New South Wales Civil and Administrative Tribunal.

COSTS – Party/party – costs incurred on preparing grounds of appeal attributed according to outcome on appeal.

Legislation Cited: Strata Schemes Management Act 1996 (NSW) (“SSMA”), ss 229 and 230.

Cases Cited: Pender v Lunshington (1877) 6 Ch D 70 at 75-6  
Tan v Owners corporation Strata Plan 22014 (No 2) [2015] NSWSC 1920

Texts Cited: Nil.

Category: Costs

Parties: Glenquarry Park Investments Pty Ltd (First Plaintiff)  
Fiona Sinclair King (Second Plaintiff)  
Peter King (Third Plaintiff)  
The Owners – Strata Plan No 17043 (Fourth Plaintiff)  
Evelin Hegyesi (First Defendant)  
Jamesons & Associates Unit Services Pty Ltd t/as  
Jamesons Strata Management (Second Defendant)  
Deborah Thomas (Third Defendant)  
Jennifer Harrison (Fourth Defendant)

Representation: Counsel:  
F Corsaro SC (First, Second, Third, Fourth Plaintiff)  
P Newton (First and Fourth Defendant)

Solicitors:  
Chambers Russell Lawyers (First, Second, Third,  
Fourth Plaintiffs)  
Stephen Wawn & Associates, Lawyers (First and  
Fourth Defendants)

File Number(s): 2017/291703

Publication Restriction: Nil

## **JUDGMENT – EX TEMPORE**

**Revised and reissued 30 August 2019**

- 1 In mid-April, I delivered my substantive judgment in these proceedings:  
*Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425. This judgment concerns the costs of the proceedings. It assumes familiarity with, and uses the same terminology used, in my earlier judgment.
- 2 The proceedings were brought as an appeal against orders made by the NSW Civil and Administrative Tribunal. As I noted in my first judgment at [16] to [18], the Tribunal's orders fell into three parts.
- 3 First, the Tribunal granted injunctions restraining the Strata Corporation from carrying out the disputed works. This followed from the Tribunal's conclusion that the works required a special resolution under the *Strata Schemes Management Act 1996* (NSW) ("SSMA") s 65A which had not been achieved.

- 4 The second part of the orders required the Strata Corporation to replace or repair certain specified parts of the common property. The third part of the orders appointed JSM as a strata manager with full power over the management and administration of the corporation.
- 5 All three parts of the orders were challenged. The appeal against the disputed works injunction failed. The appeal against the mandatory injunction succeeded. The orders appointing JSM as strata manager expired before the judgment was delivered so that the appeal from those orders did not have to be decided, but the question was consequential on the mandatory injunction order. Had the orders not expired by the time judgment was delivered, they would have been set aside.
- 6 For the purposes of deciding costs, I received submissions and further evidence from the minority on it, and submissions from the majority on it. Their positions were diametrically opposed.
- 7 I also received submissions from JSM Strata Manager appointed under the Tribunal orders. These submissions were purported to be made on behalf, not of JSM (which was the second defendant) but of the Strata Corporation (originally named as a defendant but named as the fourth plaintiff) following orders made by Sackar J on 7 March 2018 to which I will now refer.
- 8 Justice Sackar's orders reflected the approach of Robb J in *Tan v Owners corporation Strata Plan 22014 (No 2)* [2015] NSWSC 1920. In that case Robb J held that where a strata manager was appointed by the Tribunal with powers over the management of an owners' corporation, the Court could make orders permitting a lot owner to bring derivative proceedings on behalf of the corporation. Otherwise it would have been impossible to challenge the Tribunal's decision.
- 9 This feature was present in this case also. The order made by the Tribunal gave JSM powers of management over the Strata Corporation which included power to bring proceedings on its behalf. This explains why Sackar J made the orders that he did.

- 10 The fact that JSM as the second defendant purported to make submissions on behalf of the Strata Corporation as fourth plaintiff reflects a degree of confusion which has arisen about who in the proceedings is to represent the Strata Corporation's interests. A similar issue arose briefly at the beginning of the hearing: see my earlier judgment at [7].
- 11 In my view, the effect of Sackar J's orders is that, since 7 March 2018, has been the lawyers retained by the majority owners as the first, second and third plaintiffs who have been entitled to act in the Strata Corporation's name so far as these proceedings were concerned, not the lawyers retained for JSM. However, JSM was a party to the proceedings in its own right. The submissions made by JSM were properly directed to the position of the Strata Corporation as a corporate entity, and avoided taking sides. No-one suggested I should ignore them, and I have taken them into account.

*Indemnity for costs from Strata Corporation*

- 12 In SSMA proceedings, any costs paid by or awarded against the owners' corporation will ultimately have to be paid by the lot owners, either as part of their usual administrative fund levies or as special levies. Where a lot owner is on a different side of the litigation from the owners' corporation, the effect can be that without corrective action, the lot owner may end up bearing a share of the costs of litigation in which he or she has been successful.
- 13 Similar issues can arise in company litigation. SSMA ss 229 and 230 address this problem. They provide:

**229 Costs in proceedings by owners against owners corporation**

(1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).

(2) The court may order in proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to such lots and in such proportions as are specified in the order.

(3) If a court makes such an order the owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.

(4) Division 2 of Part 3 of Chapter 3 (section 78(2) excepted) applies to and in respect of contributions levied under this section in the same way as it applies to contributions levied under that Division.

**230 Restrictions on owners corporation levying contributions for expenses**

(1) An owners corporation cannot in respect of its costs and expenses in proceedings brought by or against it under Chapter 5, levy a contribution on another party who his successful in the proceedings.

(2) An owners corporation that is unsuccessful in proceedings brought by or against it under Chapter 5 cannot pay any part of its costs and expenses in the proceedings from its administrative fund or sinking fund, but may make a levy for the purpose.

(3) In this section, a reference to proceedings under Chapter 5 includes a reference to proceedings on appeal.

- 14 In the present proceedings, the minority owners sought orders designed to prevent any of the Strata Corporation's costs (which, they contended, should include a liability to bear their costs on a party/party basis) from being levied on them. The effect of this would have been to throw all of the Strata Corporation's own costs, and liability for the minority owners' costs, onto the majority owners and Ms Thomas, the owner of lot 1.
- 15 For their part, the majority owners sought orders that the Strata Corporation should pay their costs as agreed or assessed. The effect would be that all lot owners would bear the majority owners' costs, and the minority owners would be left to bear their own costs.
- 16 As it happens, the orders made by Sackar J on 7 March 2018 contain an order that the Strata Corporation indemnify the plaintiffs (that is, the majority owners), against all of the costs incurred by them in the proceedings. But the order was expressly made subject to variation on application of other lot owners at the end of the proceedings. I have therefore approached the question of indemnification on the basis that it is a matter for the Court to consider afresh.
- 17 It is clear from Robb J's decision in *Tan* that the first question as to whether the proceedings were brought in the interests of the owners' corporation or in the private interests of the lot owners who conducted the proceedings; this is determined as a matter of commercial substance, not legal form: (see [109] to [114]).

- 18 It is only if proceedings are brought in the interests of the owners' corporation that any question of indemnification arises. If that test is satisfied, one next asks whether it was reasonable to bring the proceedings. The latter question does not require a detailed analysis of the likelihood of the claim succeeding, and should avoid hindsight: *Tan*.
- 19 In my view the appeal against the mandatory injunctions was clearly in the interests of the Strata Corporation as a whole. As I have found, the orders put the Strata Corporation in the impossible position of being ordered to undertake works which were not properly defined and went beyond the Strata Corporation's obligations under the Act. This was a problem for the management of the Strata Corporation as a whole, not merely a sectional concern of the majority lot holders. The appeal against the appointment of JSM as strata manager was in the same category.
- 20 No question arises about the reasonableness of pursuing these appeal grounds. The appeal on these grounds was successful (or in the case of the appointment of JSM would have been successful if the appointment had not expired in the meantime).
- 21 The appeal grounds concerning the injunctions against the disputed works stand in a different position. Those injunctions arose out of resolutions presented by the majority shareholders to general meetings of the Strata Corporation in 2016, which passed as ordinary resolutions (with the support of Ms Thomas) but not as special resolutions. In voting at the general meetings of the Strata Corporation, the lot owners were advancing their private interests. They were under no obligation to consult the interests of the Strata Corporation as a whole: cf *Pender v Lunshington* (1877) 6 Ch D 70 at 75-6 per Jessel MR.
- 22 In my view, a dispute about those resolutions was in substance a dispute between the majority and minority owners in their capacity as lot owners, and the litigation about the dispute did not in any relevant sense advance the interest of the Strata Corporation.
- 23 The minority owners argued that the appeal against the disputed works injunctions were the major issue argued in the proceedings and should determine the overall cost outcome. For their part, the majority owners argued

that both issues required determination, and some level of costs would have been incurred in any event. The argument was that no additional costs were incurred by including the challenges to the disputed works injunction.

- 24 I do not accept either of these views. On the one hand, the minority owners pressed in the Tribunal their claim for mandatory injunctions and for the appointment of JSM as strata manager even after they failed before the adjudicator at first instance. This would have compelled the Strata Corporation to come to Court even if the disputed works injunctions had not been challenged. On the other hand, the challenge to the disputed works injunctions clearly occupied a larger proportion of the hearing time (and no doubt a correspondingly larger proportion of the preparation of the costs). It would be unrealistic not to recognise this.
- 25 I have concluded that the questions of indemnity and recruitment of costs by levy must distinguish between two classes of costs. A distinction must be drawn between the costs of the challenge to the mandatory injunction and the appointment of JSM as manager (that is the costs which would have been incurred if those had been the only challenges to the Tribunal's decision) on the one hand, and the additional costs attributable to the disputed works injunctions on the other. Costs in the former class should be borne by the Strata Corporation and passed on to all lot holders (to the extent not recovered inter partes). Costs in the latter class should not be borne by the Strata Corporation at all.
- 26 The effect of the way I have formulated the two classes of cost is the general costs of the proceedings, such as filing fees and the costs of attending at directions hearings will fall within the indemnity. I think that is proper because on any view an appeal was warranted. On the other hand, if the time spent at the hearing is any guide, the majority of the costs may well fall outside the scope of the indemnity.
- 27 Section 230 has its difficulties. It does not deal (at least expressly) with what is to happen where proceedings are partially successful and partially unsuccessful. But I do not need to go into this for present purposes. In derivative proceedings such as these, the Court has wide powers with respect

to indemnity against and the ultimate incidents of costs: see *Tan* at [101]-[102]; [117]. Those powers are wide enough to order indemnity in the way which I have foreshadowed.

#### *Costs inter partes*

- 28 A similar analysis applies to the award of costs inter partes. In my view there were really two "events", and it would be unfair to award all the costs on one basis or another because of the preponderance or supposed preponderance of one issue over the other. I therefore consider that the costs of the proceedings inter partes should be divided among costs attributable to the appeal against the mandatory injunction and the appointment of JSM as receiver on the one hand, and the additional costs attributable to the disputed works injunctions on the other.
- 29 The parties to the first issue were the Strata Corporation on the one hand and the minority owners on the other. The minority owners should pay the Strata Corporation's costs leaving unrecovered solicitor-client costs of the Strata Corporation covered by the indemnity to be borne by the lot owners as a whole. The minority owners will also be left to bear their own costs on this issue.
- 30 The costs of JSM are attributable to this issue. The minority owners should therefore pay JSM's costs of the proceedings as well.
- 31 On the disputed works injunction issue, the contest was between the majority owners and the minority owners. The majority owners failed, and they should pay the minority owners' costs. None of the costs on this ground will be borne by the Strata Corporation, and it is therefore unnecessary to make any order under s 229.

#### *Costs of Tribunal proceedings*

- 32 No party asked for any order concerning costs in the Tribunal but the minority owners did lead evidence that Ms Hegyesi was required to pay levies for the purpose of the Strata Corporation's costs of the Tribunal proceedings in which she was, on appeal to the Tribunal from the Adjudicator, largely successful. Orders were sought in these proceedings that those levies be refunded. In my view the Court does not have power to do this. The costs in the Tribunal are a



separate matter from the costs of these proceedings, and the Court's powers under ss 229 and 230 (and its inherent powers) do not reach them.

33 It should be clear that this does not necessarily mean that the costs and levies concerning the Tribunal proceedings must lie where they were initially imposed. But the question must be worked out between the parties in accordance with the Act like any other expense.

34 Despite difficulties in s 230, it would seem strange if Ms Hegyesi ultimately had to bear anything more than a small fraction of the Tribunal's costs in which she was largely successful. However, as I have said, this must be left to the good sense of the parties and cannot be the subject of an order by the Court in these proceedings.

### **Orders**

35 The orders of the Court are:

1. Pursuant to the condition imposed by Order 3 made by the Court on 7 March 2018, vary Order 2 made on that date so that the fourth plaintiff's indemnity is limited to the costs which would have been incurred if the appeal had challenged only orders 4 to 8 made by the NSW Civil and Administrative Tribunal on 29 August 2017.

2. Order that:

(A) the first and fourth defendants pay the fourth plaintiff's costs of the proceedings limited to costs which would have been incurred if the appeal had challenged only orders 4 to 8 made by the Tribunal on 29 August 2017;

(B) the first and fourth defendants pay the second defendant's costs of the proceedings;

(C) the first, second and third plaintiffs pay the costs of the first and fourth defendants other than the costs that would have been incurred if the appeal had challenged only orders 4 to 8 made by the Tribunal on 29 August 2017.

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