Land and Environment Court

New South Wales

Case Name:	The Owners – Strata Plan 49574 v Scorpio Holdings (Aust) Pty Limited & Ors
Medium Neutral Citation:	[2018] NSWLEC 54
Hearing Date(s):	17 April 2018
Date of Orders:	17 April 2018
Decision Date:	18 April 2018
Jurisdiction:	Class 4
Before:	Molesworth AJ
Decision:	See orders at [47]
Catchwords:	PRACTICE AND PROCEDURE – strata renewal plan – necessity of position papers prior to mediation in proceedings under s 179 Strata Schemes Development Act 2015 – such position papers to be provided in a timely manner prior to mediation - respondent (dissenting owner) sought security for costs of proceedings – applicability of terms 'defendant' and 'plaintiff' in the context of the Strata Schemes Development Act 2015 – applicability of term 'security for costs' in such proceedings
Legislation Cited:	Civil Procedure Act 2005 ss 3, 56 Strata Schemes Development Act 2015 Pt 10 Strata Schemes Development Regulation 2016 Pt 6 Land Acquisition (Just Terms Compensation) Act 1991 Pt 3 Uniform Civil Procedure Rules 2005
Cases Cited:	Allesch v Maunz 203 CLR 172, [2000] HCA 40 Monti v Roads and Maritime Services [2018] NSWLEC 34 The Owners – Strata Plan 6877 v 2-4 Lachlan Avenue

	Pty Ltd [2018] NSWLEC 13 The Owners – Strata Plan 6666 v Kahu Holdings Pty Ltd [2018] NSWLEC 15
Category:	Procedural and other rulings
Parties:	The Owners – Strata Plan 49574 (Applicant) Scorpio Holdings (Aust) Pty Limited (First Respondent – Dissenting Owner) Alexander Investments Australia Pty Limited (Second Respondent – Dissenting Owner)
Representation:	Counsel: Mr Jason Lazarus (Applicant) Ms Katharine Huxley – solicitor (First Respondent – Dissenting Owner) Mr Simon Mitchell – solicitor (Second Respondent – Dissenting Owner) Solicitors: Project Lawyers (Applicant) McCabes Lawyers (First Respondent) Mitchell Lawyers (Second Respondent)
File Number(s):	2018/27229

JUDGMENT

Background

1 These proceedings relate to an application of The Owners - Strata Plan No 49574 (the Applicant) for orders to give effect to a Strata Renewal Plan for the property comprising 44 lots in Strata Plan 49574 being the whole of 270-272 Pacific Highway, Crows Nest, NSW, 2065 (the Land).

2 The Land has a street frontage to the Pacific Highway and Bruce Street, Crows Nest. Vehicular access exists from Bruce Street. The current development on the Land consists of two towers of commercial premises above a single podium basement and basement level parking. The Land has an area of approximately 3,795m2.

3 The Strata Renewal Plan is for the collective sale of the whole Strata Scheme in Strata Plan 49574. By a Class 3 Application, filed with the Court on 25 January 2018, the Applicant applied, pursuant to s 179 of the *Strata*

Schemes Development Act 2015 (Development Act), for an order, inter alia, "giving effect to the Strata Renewal Plan for the Collective Sale of Strata Plan 49574 pursuant to s 182(1) of the [Development] Act". The Applicant states that the requisite resolution of owners of Strata Plan 49574 was passed on 14 December 2017.

4 Scorpio Holdings (Aust) Pty Limited, ACN 144 758 476, (First Respondent) and Alexander Investments Australia Pty Limited, ACN 073 950 606, (Second Respondent) are dissenting owners in relation to the Strata Renewal Plan. These respondents filed their statements of Objection with the Court, pursuant to s 180(1)(a) of the Development Act on 15 February 2018 and 19 February 2018 respectively.

5 The First Respondent applied, by way of Notice of Motion filed 5 March 2018, to be joined as a respondent to these proceedings, pursuant to s 181(6)(a) of the Development Act. Similarly, the Second Respondent applied, by way of its Notice of Motion, also filed 5 March 2018, to be joined as a respondent to these proceedings. By orders made 9 March 2018, the Registrar of the Court joined both respondents to the proceedings.

6 There have been two other dissenting owners known to the Court: Marilyn Golden Property Pty Ltd, ACN 166 364 227, the owner of Lot 55, and Wenjing Wang, the owner of Lots 3, 4 and 5. These dissenting owners filed their objections to the Strata Renewal Plan on 23 February 2018 and 9 March 2018, respectively. At the hearing before the Court's Registrar on 9 March 2018, the Registrar noted that Marilyn Golden Property Pty Ltd did not seek to be joined as a respondent. Subsequently, via online Court on 13 April 2018, the Applicant advised the Court that this owner had signed a consent notice on 5 April 2018, thereby becoming a consenting owner. With respect to Wenjing Wang, the Registrar noted on 9 March that this dissenting owner was overseas until 14 March 2018 and so there may be an application to join filed at a later date.

7 The First Respondent is the owner of Lot 26 in SP 49574 (Lot 26). Lot 26 has an area of approximately 446m2. Lot 26 is located on the ground floor with a

frontage to the Pacific Highway of approximately 15m. Lot 26 is currently leased to Fresenius Medical Care Australia Pty Ltd.

8 The Second Respondent is the owner of Lot 25 in SP 49574 (Lot 25), which, like Lot 26, is also located on the ground floor of the Land. Further details of Lot 25 are not yet elaborated upon in material currently filed with the Court.

The interlocutory hearings before the Court

9 The proceedings have been the subject of a number of interlocutory hearings to date. Specifically, various orders have been made via online court, in addition to orders made by the Registrar on 9 March 2018 and on 14 March 2018, orders by consent by Pain J on 12 April 2018, and by the Registrar on 16 April 2018. The Registrar's orders of 9 March 2018, materially, included, in addition to the joinder of the First and Second Respondents, orders focused on filings in relation to the latter's then foreshadowed application for security for costs. On 14 March 2018 the Registrar ordered that the proceedings be listed for mediation before the Court on 23 April 2018.

10 The Second Respondent by its second Notice of Motion, filed 16 March 2018, sought, inter alia, the following orders:

> 1. An order pursuant to UCPR 42.21, and/or the inherent jurisdiction of this Honourable Court that the Applicant provide security for the costs of the Second Respondent, Alexander Investments Australia Pty Limited A.C.N 073 950 606, in the sum of $296,000.00 or, alternatively, such other amount as to this Honourable Court seems [sic] fit ('the Security Amount').
>
> 2. An order that the Applicant provide security for the Security Amount in a form acceptable to the Court within 7 days, failing which:
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> (a) these proceedings are stayed; and
>
> (b) if this security is not provided within 7 days, these proceedings are dismissed, and the Applicant is ordered to pay the Respondent's costs of them.

11 On 12 April 2018, Pain J made the following orders by consent:

> The Applicant to pay into Court the sum of $125,000.00 by 17 April 2018 to be held as security for costs of the Second Respondent in the proceedings.
>
> The costs of the Notice of Motion filed on 16 March 2018 to be reserved.
>
> The Notice of Motion filed on 16 March 2018 for Security for Costs to be dismissed.

> The security paid into Court in the amount of $125,000.00 excludes GST and shall not be levied against any dissenting owner including the Second Respondent.
>
> The parties to have liberty to apply on 7 days' notice in respect of this issue or any matter arising.
>
> The Applicant to pay into the trust account of Mitchell Lawyers the sum of $6,000.00 by 17 April 2018 for payment of the Second Respondent's valuer's fees of and incidental to his attendance at the mediation, scheduled for 23 April 2018.
>
> The First Respondent is to file and serve its Statement of Facts and Contentions and Position Papers which is to include an outline of the respective compensation claims under section 55 of the *Land Acquisition (Just Terms Compensation Act)* 1991 by 16 April 2018.
>
> The Second Respondent is to file and serve its Statement of Facts and Contentions by 16 April 2018.
>
> The Applicant is to file and serve its Statement of Facts and Contentions in Reply by 20 April 2018.
>
> The parties to the proceedings are required to have their appointed valuer attend the mediation scheduled for 23 April 2018.
>
> The hearing date for the Notice of Motion listed for 13 April 2018 to be vacated.
>
> The Directions Hearing listed for 13 April 2018 to be vacated.

12 The First Respondent complied with the orders made by Pain J whereas, at the time of the hearing before me, the Second Respondent had not.

13 The hearing before the Court on 17 April 2018 was listed by direction of the Registrar made 16 April 2018 following a request, received by email via online court at 2.33pm 16 April 2018, from the Applicant in the following terms:

> We provide the following reasons for the relisting:
>
> 1. On 12 April 2018 through Online Court, Justice Pain noted that the Court has no reference to an order made on 9 March 2018 requiring either Respondent in the proceedings to file and serve a position paper outlining their compensation claims.
>
> 2. The proceedings concern primarily, the issue of compensation to be paid to each Respondent.
>
> 3. The purpose of a position paper requiring the Respondents to outline their compensation claim with reference to the Strata Schemes Development Act 2015 and the corresponding provisions of the Land Acquisition (Just Terms Compensation) Act 1991, namely section 55, would greatly assist the Court and the parties to the proceedings in an effort to resolve the compensation claims to be addressed at the mediation and if required prior to the hearing.
>
> 4. The Court's standard directions for these proceedings do not make mention of an express requirement by the Respondents to outline their compensation claim with respect to section 59(a) to (e) of the Land Acquisition

(Just Terms Compensation) Act 1991, as is usually the case for Class 3 Proceedings.

14 The Second Respondent's response, received at 4.11pm that day, also by email via online court, was as follows:

> The Second Respondent opposes the relisting for the following reasons.
>
> 1. These proceedings are strata renewal development proceedings. Compensation is but one matter the court is required to determine under the Strata Schemes Development Act. Section 182 sets out various matters the court is required to take into account. Presently, there are various issues which have an effect on the issues in dispute, some of which bear upon a qualitative assessment of compensation payable.
>
> 2. The Second Respondent is presently attending to its Statement of Facts and Contentions.
>
> 3. The Second Respondent will in any event, provide a position paper to the Applicant prior to mediation.
>
> 4. The Applicant's request ought to have been made by way of Notice of Motion rather than via an Online request without prior notice to the Second Respondent.
>
> …

15 The request from the Applicant for the proceedings to be listed before the Duty Judge was, I surmise, in the context of a perceived imminent non-compliance by the Second Respondent with an order of Pain J made 13 April 2018, specifically Order 8 requiring the filing and service of its Statement of Facts and Contentions by 16 April 2018. Further, whereas the First Respondent, by Order 7, had been required to file and serve a Position Paper which is to include an outline of the respective compensation claims under s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*, no such requirement was made with respect to the Second Respondent.

16 The purpose of the hearing before me was, as a consequence of the foregoing, to consider the Applicant's requests for orders directing the Second Respondent to file and serve:

(1) a Statement of Facts and Contentions; and

(2) a Position Paper regarding the compensation it seeks.

Consideration

17 The Second Respondent is late with its compliance with Order 8 made by Pain J on 12 April 2018 in that it has failed to provide its Statement of Facts and

Contentions by 16 April 2018. Although compliance with the Court's orders should invariably occur, the slippage of a day or so does, from time to time, occur in litigation, despite it being unacceptable. For pragmatic reasons, a "blind eye" might occasionally overlook a slight exceedance. The Court's Practice Note – Strata Schemes Development Proceedings in [44], in effect, acknowledges that breach of the Court's directions does occasionally occur and provides a process to deal with "significant breach of the Court's directions sufficient to cause slippage in a timetable".

18 Whereas a day's slippage might not be significant in the normal course, in the circumstances of this case, a day's slippage is definitely not acceptable as the Applicant is required to reply, filing its Statement of Facts and Contentions in Reply by 20 April 2018, a mere four working days later. It is to be noted that the Court's Practice Note in [45] confirms that failure on the part of one party is no justification for another party not to comply. Further, and quite critically, the actual court-ordered mediation is to occur a mere five working days later on Monday 23 April 2018. Obviously, slippage of a mere day is commensurately more serious when replies and hearings are to shortly follow.

19 In the context of the parties being required to attend the court-ordered mediation, the appropriate approach to such a mediation should always be, on the part of all parties, to proactively determine if a resolution of the proceedings is achievable. Such an approach would be consistent with s 56 of the *Civil Procedure Act 2005* which seeks a just, quick and cheap resolution of civil proceedings. So parties should ready themselves to facilitate the mediation, if at all possible, aimed at achieving a successful outcome. A logical consequence of this expected approach is that parties should ensure that opposing parties fully understand the stance being adopted by a contradictor on both the facts and the law in issue. It serves no good purpose for a party to undermine that process by being tardy in providing the requisite information. All participants in the process, which includes the Court itself, should facilitate a full understand the issues at large and what might be required in order to resolve them.

20 Mr Mitchell, appearing for the Second Respondent, made a novel submission to the Court. He indicated that the Applicant, in compliance with Pain J's Order 1, had to pay the sum of $125,000 by 17 April 2018, the day of the hearing before me, as "security for costs" of the Second Respondent in the proceedings. Further, by Order 6, the Applicant was to pay direct into the trust account of Mitchell Lawyers, the Applicant's solicitors, the sum of $6,000 also by 17 April 2018, being payment for the Second Respondent's valuer's fees of and incidental to his attendance at the mediation, scheduled for 23 April 2018. Mr Mitchell indicated that those payments had not yet been made and that was a relevant factor that has restrained the Second Respondent from completing the preparation of its expert material in the proceedings. The Court inquired of Mr Mitchell whether he was really saying that there is a nexus between the non-payment, to that point-in-time, of the sums referred to in Pain J's Orders 1 and 6 and the Second Respondent's non-provision of its Statement of Facts and Contentions and its reluctance, at least to date, to provide its Position Paper setting out the compensation being sought. Mr Mitchell confirmed that the Applicant's valuer's analysis in part depended upon an understanding of town planning evidence that would provide the valuer a clearer understanding of the development potential of the Land and that the Second Respondent faced considerable "upfront" costs in responding to the Applicant's Strata Renewal Plan and the Class 3 proceedings commenced pursuant to the Development Act.

21 Before analysing this argument, I note that Mr Lazarus for the Applicant, at that point in the hearing, confirmed that the two cheques had been written and were in the process of being provided "today" in compliance with Pain J's orders. Accepting Mr Lazarus' assurance regarding these cheques, the Court notes that these payments would be made within time in full compliance with Pain J's orders.

22 Secondly, I consider it is necessary that I address the implications of Pain J's Order 1 in that it uses the term "security for costs" as a descriptor of the payment offered to be paid by the Applicant to Second Respondent, as an advance on reasonable costs, pursuant to the consent orders. I will return to this discussion below.

23 The Court queried the strength of Mr Mitchell's propositions pointing out that if the Second Respondent's Objection dated 19 February 2018 had been soundly founded upon expert professional analysis, then surely at that time at least some town planning and valuation evidence would already have been obtained in order for the Second Respondent to be confident enough to file its Objection. Given the passage of some two months since that notice of Objection, the Court queried why the Second Respondent was not now in a position to file its Statement of Facts and Contentions, together with a Position Paper. Subsequently analysing Pain J's orders, (which incidentally the Court notes were prepared by Mr Mitchell on behalf of the Second Respondent and were submitted to the Court as draft consent orders for its approval), the Court notes that the Order 1 $125,000 payment is to be paid into the Court as "security for costs" (as so described) and so not actually paid to the Second Respondent's solicitors. Secondly, whereas the Order 6 sum of $6,000 is to be paid to the Second Respondent's solicitors, this sum is specifically intended to be for valuer's fees "of and incidental to his attendance at the mediation". Accordingly, the Court does not believe there is a legitimate nexus between the sums payable pursuant to Orders 1 and 6, and any provision or otherwise of either a Statement of Facts and Contentions or a Position Paper by the Second Respondent.

24 Accordingly, as I indicated at the conclusion of the hearing, I could see no reason why both the Statement of Facts and Contentions or a Position Paper should not be provided by the Second Respondent in a timely fashion. The next question is what "timely" might mean in the context of this case. The Court confirms that Mr Mitchell, at the conclusion of his submissions, indicated that the Second Respondent would, most probably, be in a position to provide the Statement of Facts and Contentions by the end of the day and the Position Paper by the end of Friday, 20 April 2018.

Observations regarding dissenting owners' entitlement to an advance on costs

25 By way of observation, given the Second Respondent sought to argue that there is a material nexus between the provision of a costs payment ahead of time – that is, at an early stage in proceedings, by way of "security for costs" (as so described), and case preparation by a dissenting owner who has

become a respondent in such Development Act Class 3 proceedings – although the order bringing about such a payment was not strictly before me, having been made by Pain J on 12 April 2018, there is utility in me addressing the concept of such an advance on costs.

26 In my judgment in *The Owners – Strata Plan 6877 v 2-4 Lachlan Avenue Pty Ltd*, [2018] NSWLEC 13, which was followed by me in *The Owners – Strata Plan 6666 v Kahu Holdings Pty Ltd*, [2018] NSWLEC 15, at [30]-[33] I made the following observation and then ruling with respect to costs of respondent (dissenting owners):

> 30. The Respondent (Dissenting Owner) sought its costs on its Motion. The seeking of costs should be considered in the context of s 188 of the Development Act which states that the costs of a dissenting owner in relation to Class 3 applications of this kind will be costs to be covered by the Applicant. Specifically, s 188 states:
>
> > 188 Costs
> >
> > (1) Unless the court otherwise orders:
> >
> > (a) the reasonable costs of proceedings for an application for an order to give effect to a strata renewal plan that are incurred by a dissenting owner are payable by the owners corporation, and
> >
> > (b) the owners corporation cannot levy a contribution for any part of the costs on a dissenting owner.
> >
> > (2) The regulations may prescribe other matters for or with respect to the costs of proceedings for an application for an order to give effect to a strata renewal plan.
>
> 31. In the context of s 180(3) of the Development Act stating that a dissenting owner need not become a party, it might be argued that a dissenting owner ought to be satisfied that its concerns will be satisfactorily addressed when it files an objection pursuant to ss 180(1) and (2). Conceivably it might be argued that by joining a dissenting owner to the proceedings, the costs of the proceedings would be likely to commensurately, and unnecessarily, increase. It might then be argued that such additional costs, specifically of the dissenting owner, should be considered to be unreasonable. In the proceedings before me, no party argued that costs would be unacceptably increased by the joinder of Lachlan, nor was it argued that they should not be entitled to its costs.
>
> 32. Clearly, with the commencing words in s 188 "Unless the court otherwise orders", the Court has a discretion with respect to the award of costs. In the circumstances before me, I could see no reason why the costs of Lachlan incurred in bringing its Notice of Motion to join should not be costs covered by the Applicant owners corporation. I interpret s 188 as confirming that the default position with Class 3 Applications of the kind before the Court in these proceedings is that the costs of dissenting owners should be met by owners corporation applicants, providing, of course, that such costs are reasonable. In

> circumstances where it is clearly envisaged that a dissenting owner may be joined as a party to the proceedings, I cannot identify a reason why the costs of joining a dissenting owner ought not be covered by an applicant.
>
> 33. So in relation to the Respondent (Dissenting Owner) in this case I believe that it should be entitled to its costs on the Motion. The appropriate order is that the "costs of the dissenting owner be costs in the cause", with such order being applied in accordance with s 188 of the Development Act.

27 For the purposes of this judgment, I stress that the critical words in s 188(1) are "the reasonable costs of the proceedings". The two elements in those words focus on the issue of whether the costs are "reasonable" and whether the costs are "of the proceedings". The Court only has power to make an order as to costs if it can be satisfied of those two elements. It seems to the Court that it would face difficulties in determining with any accuracy, at the commencement of the proceedings, whether a dissenting owner's costs that the owner prospectively anticipates it will face, will be both reasonable and, strictly, will arise out of the proceedings.

28 Clearly, as I said in [32] of the Lachlan Avenue case "the default position with Class 3 Applications of the kind before the Court in these proceedings is that the costs of dissenting owners should be met by owners corporation applicants, providing, of course, that such costs are reasonable". However, is there a power vested in the Court to make cost orders prospectively, before it can assess whether the costs sought are both "reasonable" and "of the proceedings"?

29 The *Uniform Civil Procedure Rules 2005* (UCPRs) apply to the Land and Environment Court in, inter alia, Class 3 proceedings by virtue of Schedule 1 of the UCPRs. Division 6 of the UCPRs, which deals with security for costs, is not excluded from the jurisdiction of this Court, therefore the Court, in the normal course, can made orders for security for costs. Rule 42.21 provides the power of the Court to make orders for security for costs. However, there is a fundamental prerequisite to the application of that security for costs rule to proceedings and that is there is to be a "plaintiff" and a "defendant". An order for security for costs directs a "plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings".

30 In the context of the Development Act, how can a dissenting owner conceptually be defined as a "defendant" and how can a owners' corporation be defined as a "plaintiff"? In the *Civil Procedure Act 2005,* s 3 defines both "defendant" and "plaintiff". The term "defendant" is defined as "a person against whom proceedings are commenced, and includes a person against whom a cross-claim is made". The term "plaintiff" is defined as "a person by whom proceedings are commenced …and includes a person by whom a cross-claim is made…" With respect to a Class 3 Application, brought pursuant to s 179 of the Development Act in relation to a strata renewal plan, the dissenting owner finds itself a party only by its own volition: that is, by reason of the owner not providing a support notice, then objecting pursuant to s 180(1) and then applying to the Court to be made a party pursuant to s 181(6).

31 In short, it truly challenges the definition of a defendant as defined in the *Civil Procedure Act* for a dissenting owner to be a person "against whom proceedings are commenced". Further, relevantly s 180(3) specifically states: "A person who files an objection need not be a party in proceedings before the court relating to the strata renewal plan". It may be arguable that the owners of a strata plan, who may commence the Class 3 proceedings under the Development Act, can more closely meet the definition of "plaintiff" in the *Civil Procedure Act* as being a person by whom proceedings are commenced, however when the focus of security for costs orders is in relation to the protection of defendants, the UCPRs are sorely tested to apply those provisions to the dissenting owners under the Development Act.

32 For completeness, I note that the *Strata Schemes Development Regulation 2016* does not assist in prescribing "other matters for or with respect to the costs of the proceedings" which might be relevant to the making of orders under s 188(1), despite s 188(2) providing the power to do so. Regulations 30(1)(f) and (g) and 32 do make reference to costs, but those references are directed to other matters, irrelevant to the present discussion.

33 As a consequence of the foregoing, I am of the view that the use of the term "security for costs" in Order 1 made by Pain J on 12 April 2018, as drafted by consent between the parties, was a misnomer. The Court does not have the

power to order security for costs as described in UCPR r 42.21. In reality, the $125,000 payment provided for by that order was a down payment agreed to by the Applicant, at the request of the Second Respondent, which will, when eventually released by the Court to the Second Respondent at the conclusion of the proceedings, have been scrutinised to determine whether it is within the costs then payable to the Second Respondent meeting the prerequisites of being firstly, reasonable, and secondly, "of the proceedings".

34 Being a consent order, willingly entered into by the parties, it was within the power of Pain J to make the order, provided the sum in question did not purport to be the actual costs of the proceedings, considered to meet s 188 requirements. Accordingly, noting that in the affidavit of Simon Paul Mitchell, sworn 27 March 2018, the Second Respondent asserted that its costs, excluding GST, would amount to $343,416, it was appropriate that a far lesser sum of $125,000 was the sum specified in Order 1. It is also significant that by Order 3, Pain J dismissed the Second Respondent's Notice of Motion filed on 16 March 2018, which had specifically sought an order for security for costs to the amount of $296,000. Pain J never considered whether the Court had power to make an order for security for costs pursuant to UCPR r 42.21, rather she merely endorsed an offer on the part of the Applicant to pay a sum to the Court, far short of the sum that was sought in the dismissed Motion, pending a future determination of the actual costs that should be paid to the Second Respondent pursuant to s 188(1) of the Development Act.

Necessity for a Position Paper setting out a dissenting owner's preferred compensation

35 Section 182(1) of the Development Act sets out seven considerations in relation to which the Court needs to be satisfied. If the Court is so satisfied then the Court must make an order giving effect to the strata renewal plan the subject of a s 179 Application. Those seven matters are as follows:

> the relationship, if any, between the owners of lots and the purchaser or a developer has not prevented the plan being prepared in good faith;
>
> the steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with this Act;
>
> all notices required to be served under sections 179 and 181 have been served;

> if the plan is for a collective sale—the proposed distribution of the proceeds of sale apportioned to each lot is not less than the compensation value of the lot and the terms of the settlement under the plan are just and equitable in all the circumstances;
>
> if the plan is for a redevelopment—the amount to be paid to a dissenting owner is not less than whichever of the following is greater:
>
> the compensation value of the owner's lot;
>
> an amount equal to the total consideration that would accrue to the dissenting owner under the plan in relation to the redevelopment and the owner's lot if that owner had given a support notice for the plan;
>
> if the plan is for a redevelopment—the terms of the settlement under the plan, as those terms apply to any dissenting owner, are just and equitable in all the circumstances;
>
> any other matter prescribed by the regulations.

36 In the context of the Strata Renewal Plan the subject of these proceedings, being for a collective sale (as defined in s 154), material to the issues before me is the consideration set out above in (d) being, in part, whether the proceeds of sale apportioned to each lot is not less than the compensation value of the lot. Further, whether the terms of the settlement under the plan are just and equitable in all the circumstances. I rhetorically ask, where s 180 simply refers to an "objection" and the definition of objection appearing in s 154 simply refers to it being an objection filed in the court in accordance with that section, how is greater particularity of dissenting owner's objection to be achieved?

37 The Court's Practice Note – Strata Schemes Development Proceedings assists in this process. In [24] it is specified that an objection should: (a) specify the grounds of objection to the application; and (b) address the matters of concern to the person in s 182(1) of the Development Act with which the Court needs to be satisfied in order to make an order giving effect to the strata renewal plan. Although compensation reflecting the value of a dissenting owner's lot is just one of a number of seven considerations in s 182(1) with which the Court is to be satisfied, it is obviously a core issue most probably of greatest concern to an owner having their property potentially compulsorily acquired by order of the Court.

38 It is in this context that Pain J's Orders 7 and 8 made 12 April 2018 can be seen as essential if parties to such proceedings are to reach the level of

particularity required in order for parties to prepare their own cases, both the necessary evidence and their legal submissions, and then understand the cases of contradicting parties in the proceedings, also in relation to both their evidence and their submissions. In this respect paragraph [39]-[42] in the Court's Practice Note addresses the requirements with respect to parties wishing to adduce expert evidence at the hearing (as distinct from a conciliation conference or mediation ordered pursuant to s 181(2) of the Development Act).

39 Lest there be any doubt that orders requiring parties to serve and file a Statement of Facts and Contentions and a Position Paper which includes an outline of their respective compensation claim, akin to that which would be required under s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act) (obviously limited to those considerations which would be relevant to the dissenting owner's interests and claim under the Development Act), one only needs to reflect on the "indispensable requirement of justice" embodied in procedural fairness. In *Allesch v Maunz*, 203 CLR 172, [2000] HCA 40, at [35], Kirby J stated:

> It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as "an indispensable requirement of justice". It is a rule of natural justice or "procedural fairness". It will usually be imputed into statutes creating courts and adjudicative tribunals. Indeed, it long preceded the common and statute law. Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden.

40 Accordingly, the Court is of the view that it is entirely consistent with the principles of procedural fairness that parties to proceedings under the Development Act are required to effectively "state their case" ahead of the key stages in the proceedings so that each knows the contentions of the other parties that they are to meet or, desirably, accommodate. As observed above, the Court's Practice Note confirms in [24] that objections are to address the matters of concern to the objecting person, such as a dissenting owner, in s 182(1) of the Development Act in relation to which the Court must be satisfied. So prior to a court-ordered mediation or conciliation conference and, if no

mediation or conciliation conference has been ordered, then prior to the primary hearing in the proceedings, the provision of a Statement of Facts and Contentions and a Position Paper addressing the compensation claims of the dissenting owner, constitutes a reasonable practice that, if provided in sufficient time, would meet the requirements of procedural fairness.

41 With respect to a dissenting owner's Position Paper on their compensation claim, I used the word "akin" when I made reference to the Just Terms Act. It should be understood that in s 154 Definitions of the Development Act "compensation value" in relation to a lot means as follows:

> (a) the compensation to which the owner of the lot would be entitled as determined under section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (subject to any modifications prescribed by the regulations), or
>
> (b) if the regulations prescribe a different method of determining that value—the value of the lot determined in accordance with that method.

42 The *Strata Schemes Development Regulations 2016* (Development Regulations) do contain specific provisions to assist the Court in determining appropriate compensation value (as required by s 182(1)(d) and (e)) that effectively modifies the determination of compensation under s 55 of the Just Terms Act. Regulation 27 of the Development Regulations is in the following terms:

> **27 Compensation value**
>
> For the purposes of paragraph (a) of the definition of compensation value in section 154 of the Act, the determination of compensation under section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* is modified as follows:
>
> (a) sections 56 (1) (b) and (2) and 62–65 of that Act are taken not to apply in respect of that section,
>
> (b) any references in that Act to "acquisition", "compulsory acquisition" or "the public purpose for which the land was acquired" are taken, for the purposes of that section, to be references to the strata renewal proposal,
>
> (c) the buyer and seller referred to in section 56 of that Act are to be assumed to take into account the highest and best use of the land,
>
> (d) the matters set out in section 55 of that Act are to be valued at the following times:
>
> (i) for the purposes of inclusion in a strata renewal plan—on a day that is not more than 45 days before the day on which the general meeting of the owners corporation is held under

> section 172 of the *Strata Schemes Development Act 2015* to consider the plan,
>
> (ii) for the purposes of an application made under section 179 of the *Strata Schemes Development Act 2015* for an order to give effect to a strata renewal plan—on a day that is not more than 45 days before the day on which the application is made.

43 In the context of this exercise required in order to particularise the basis of compensation being claimed by a dissenting owner, and for that matter in relation to a collective sale (as is the case in these proceedings), the proposed distribution of the proceeds of sale apportioned to each lot (which is not to be less than the compensation value of the lot), it is clearly essential that the Applicant understands the parameters of each respondent dissenting owner's claim for compensation. Hence the importance of a Position Paper.

Time required to review Statements of Facts and Contentions and Position Papers

44 Finally, in the context of the Applicant's request for a Position Paper from Second Respondent, noting that Pain J's Order 8 was silent with respect to such a request, whereas Order 7 required the First Respondent to produce such a paper, Mr Mitchell for the Second Respondent first submitted that a Position Paper would be provided before the mediation scheduled for 23 April. Then, when pressed by the Court, it was indicated the paper could possibly be provided by Friday 20 April, by which the Court took it as being the close of the working day. Mr Lazarus for the Applicant strenuously opposed such a late provision of the proposed paper, reminding the Court that there would then only be a weekend separating the scheduled mediation from the provision of the paper and further that there would be no opportunity for the Applicant to prepare its own Statement of Facts and Contentions in Reply, required that same day in order to comply with Pain J's Order 9.

45 For similar reasons to those I expressed in [27]-[28] of my judgment in *Monti v Roads and Maritime Services* [2018] NSWLEC 34, the scheduling of times for the provision of documents by parties, such as in this case the Position Papers on compensation claimed, must always be reasonable and realistic, cognizant of the need for contradicting parties to properly prepare their replies. In the circumstances of the mediation being scheduled for Monday 23 April, it was not reasonable to contemplate the Second Respondent providing its critical

Position Paper just the working day before the mediation, most probably at the end of that day. Given that a reply was required from the Applicant, which is expected to be based on professional input from its valuer, reliance upon a weekend is far from reasonable. Apart from the implications for the parties endeavouring to properly prepare for the mediation, thought should also be given to providing the Court with a reasonable opportunity to read such material ahead of time, be it for a mediation, conciliation conference or the primary hearing.

46 Accordingly, at the conclusion of the hearing the Court indicated that the nothing other than the provision of the Second Respondent's Position Paper by 4.00pm on Thursday 19 April 2018 would be acceptable.

Orders

47 At the conclusion of the hearing on 16 April 2018, the Court ordered:

(1) the Court's orders dated 12 April 2018 be varied to the extent that Order 8 shall now be:

(2) "The Second Respondent is to file and serve its Statement of Facts and Contentions by 4.00pm 17 April 2018".

(3) the Second Respondent is to file and serve its Position Paper which is to include an outline of its compensation claim under the *Strata Schemes Development Act 2015*, the Strata Schemes Regulation 2016 and s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* by 4.00pm, 19 April 2018.

(4) the parties shall have liberty to apply to Molesworth AJ on 24 hours' notice.

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