



Supreme Court
New South Wales

Case Name: The Owners Strata Plan No 68976 v Nicholls (No 2)

Medium Neutral Citation: [2018] NSWSC 471

Hearing Date(s): Written Submissions

Date of Orders: 19 April 2018

Decision Date: 19 April 2018

Jurisdiction: Common Law

Before: Rothman J

Decision: In addition to orders dated 6 March 2018, the Court further orders:

(5) Any costs payable by the plaintiff under Order 3 made on 6 March 2018 are to be paid from contributions levied in relation to Lots other than Lot 1, in shares proportional to the unit entitlements of the respective Lots other than Lot 1, except insofar as the costs are indemnified by Parridale Pty Ltd;

(6) Any costs of the plaintiff incurred in these proceedings are not payable in any part by the defendants and no such costs may be paid from any administrative fund, sinking fund or capital works fund held by or on behalf of the plaintiff.

Catchwords: COSTS – dispute in Strata Scheme – operation of s 90 of Strata Schemes Management Act 2015 (NSW) – undertaking to indemnify costs to Lot Owners by one Lot owner as basis for plaintiff’s actions – orders made preventing defendant from contributing to plaintiff’s costs in capacity as Lot Owner.

Legislation Cited: Strata Schemes Management Act 2015 (NSW), s 90

Category: Costs

Parties: The Owners Strata Plan No 68976 (Plaintiff)
Blair Milton Nicholls (First Defendant)
Liesel Von Molendorff (Second Defendant)

Representation: Counsel:
J O'Connor (Plaintiff)
K Rees SC (Defendants)

Solicitors:
Harris & Harris Solicitors (Plaintiff)
Jane Crittenden Lawyer (Defendants)

File Number(s): 2016/239839

JUDGMENT

- 1 **HIS HONOUR:** On 6 March 2018, the Court issued orders dismissing the proceedings and ordering that the plaintiff pay the defendants' costs of and incidental to the proceedings. On that day the defendant sought an order that they not contribute, by strata levy or otherwise, to any costs order made against the Owners' Corporation.
- 2 The defendants rely upon two aspects:
 - (1) Section 90 of the *Strata Schemes Management Act 2015* (NSW) ("the Act"); and
 - (2) A resolution of an Extraordinary General Meeting ("EGM") of the Owners Corporation held 24 August 2016.
- 3 The Court deals with the issues in reverse order. The resolution of the EGM held on 24 August 2016 determined to continue the appeal proceedings in the Supreme Court, which decision was carried by majority (the defendant voting against).
- 4 Further, the EGM delegated to one of the lot owners the absolute decision-making authority to provide instructions to its legal representatives on condition that the said lot owner (Parridale Pty Ltd) bears the full cost of conducting appeals against the decision and indemnifies the Owners' Corporation in respect of any adverse costs order in the proceedings. On the basis of that resolution, the defendant should not be in a worse position from any other lot

owner and the Owners' Corporation ought not be able to levy or otherwise tax the defendant in relation to the costs.

- 5 In relation to the first ground of the submissions of the defendant in relation to costs, s 90 of the Act provides as follows:

“90 Contributions for legal costs awarded in proceedings between owners and 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 the 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 the lots and in the proportions that are specified in the order.

(3) 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) This Division (other than provisions relating to the amount of contributions) applies to and in respect of contributions levied under this section in the same way as it applies to other contributions levied under this Division.”

- 6 The legislature has prescribed a scheme, albeit within the discretion of the Court, in relation to disputes coming before this Court or any other court in relation to the payment of costs. It would seem that, in the ordinary course, an order of the kind prescribed by s 90(2) of the Act ought to be made. Such an order properly compensates the parties to the proceedings for the need to assert or to defend their rights in the proceedings.

- 7 Given the terms of the resolution of the EGM which requires Parridale Pty Ltd to “indemnify” the Owners' Corporation in respect of any adverse costs and the terms of s 90 of the Act, the Court will make the orders as sought by the defendant by the making of further orders to those of 6 March 2018, in the following terms:

(5) Any costs payable by the plaintiff under Order 3 made on 6 March 2018 are to be paid from contributions levied in relation to Lots other than Lot 1, in shares proportional to the unit entitlements of the respective Lots other than Lot 1, except insofar as the costs are indemnified by Parridale Pty Ltd;

(6) Any costs of the plaintiff incurred in these proceedings are not payable in any part by the defendants and no such costs may be paid from any administrative fund, sinking fund or capital works fund held by or on behalf of the plaintiff.

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