



Supreme Court  
New South Wales

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Case Name: The Owners - Strata Plan No 54026 v Phillipa Ternes

Medium Neutral Citation: [2019] NSWSC 1579

Hearing Date(s): 12 November 2019

Date of Orders: 12 November 2019

Decision Date: 12 November 2019

Jurisdiction: Equity - Real Property List

Before: Parker J

Decision: See [60].

Catchwords: Practice and procedure — Proceedings — Transfer of proceedings — Forum – application for summary dismissal or stay of proceedings – application for disclosure of details recorded on strata roll per Strata Schemes Management Act 2015 (NSW), ss 187, 188 and 232 – whether appropriate proceedings be transferred to NCAT – jurisdiction of Tribunal.

LAND LAW — Strata title — Owners corporation — Strata roll – application for production from building manager of contact details of owners recorded on strata roll – Schemes Management Act 2015 (NSW), ss 187, 188 and 232 – jurisdiction of Tribunal.

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), Schedule 4  
Interpretation Act 1987 (NSW), s 34  
Strata Schemes Management Act 2015 (NSW), s 22, Part 4 Division 4, s 181, 187, 188, 232, 253, 258

Cases Cited: *Batistatos v RTA of NSW* (2006) 226 CLR 256; [2006] HCA 27  
*Owners Strata Plan 21372 v Banovic* [2017] NSWSC

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Teele v FCT (1940) 63 CLR 201

Voth v Manildra Flour Mills (1990) 171 CLR 538; [1990] HCA 55

Texts Cited: Dennis C Pearce and Robert S Geddes, Statutory interpretation in Australia (8th ed, 2014, LexisNexis Butterworths) at [2.26]

Category: Procedural and other rulings

Parties: The Owners – Strata Plan No 54026 (Plaintiff)  
Phillipa Ternes (First Defendant)  
UniLodge Australia Pty Ltd (Second Defendant)  
Sydney Campus Apartments Pty Ltd (Third Defendant)

Representation: Counsel:  
P Doyle Gray (Plaintiff)  
R Gratton (First, Second and Third Defendants)

Solicitors:  
Kreisson Legal (Plaintiff)  
Swaab (First, Second and Third Defendants)

File Number(s): 2019/340667

Publication Restriction: Nil

## **JUDGMENT – EX TEMPORE**

**Revised and reissued 14 November 2019**

- 1 This is an interlocutory application by the defendants. By notice of motion the defendants seek orders that the proceedings against them be summarily dismissed or stayed.
- 2 The proceedings concern a strata property at Broadway, Sydney. The strata building is a former department store which has been converted into 586 units, primarily residential but including some shops. There are a further 27 commercial units.
- 3 Under the terms of the development consent for the conversion of the building, the residential units must be occupied by students. Some of the units are

owned by students or their families, but most are owned by investors and let out to students for occupation.

- 4 I will refer to the owners' corporation for the strata property as the "Strata Corporation".
- 5 The property is managed by a strata managing agent, as is contemplated by the *Strata Schemes Management Act 2015* (NSW) ("SSMA"). There is also a building manager; see Part 4 Division 4 of the Act.
- 6 The majority of the units are managed on behalf of the investor owners by an organisation known as UniLodge. It appears that the holding company for UniLodge is a company called UniLodge Australia Pty Ltd ("Unilodge Australia"). The units in this particular strata property are managed for the investor owners pursuant to lease arrangements between the owners and a company called Sydney Campus Apartments Pty Ltd ("Sydney Campus"), a wholly owned subsidiary of UniLodge Australia. As I understand it, at all times around 500 of the 586 residential units have been the subject of such lease arrangements; currently 501 are.
- 7 Under the lease arrangements, the owners grant residential leases of their properties to Sydney Campus. UniLodge then arranges to licence the units for occupation by students. Under the terms of the leases, the owners appoint Sydney Campus as their representative for the purpose of exercising their rights of ownership *vis* the Strata Corporation under the strata scheme. In particular, voting rights in the strata scheme are exercised by Sydney Campus, not the individual investor owners.
- 8 The origin of the claims made in these proceedings was an email written in March 2015 by Philippa Ternes, the general manager for UniLodge in Sydney, to the then strata managing agent. The letter asked for the managing agent to enter a post office box of UniLodge as the mailing address for all of the units under UniLodge's management. It appears that the then strata managing agent, Prudential Investment Company of Australia Pty Ltd ("PICA") acted on the instruction. Since that time, all of the units managed by UniLodge have had the UniLodge post office box entered as their contact address in the strata roll. This position continued for over four and a half years.

- 9 At the end of November 2018, questions arose about the management and administration of the strata scheme. The background appears to have been a request put forward at the November 2018 Annual General Meeting of the Strata Corporation for approval to spend approximately \$13 million on certain repairs and maintenance works on the building to meet concerns which had been raised by the local council. Some of the individual owners appear to have been of the view that this was too expensive.
- 10 At the Annual General Meeting, the proposal to undertake the works (and a related proposal for a levy on the owners) was voted down. All of the then existing members of the Strata Committee were voted off, apart from Ms Alvie Lin. A new Strata Committee consisting of owners sympathetic to Ms Lin's aims was subsequently elected. Ms Lin and her associates now control the Strata Corporation and are at loggerheads with UniLodge.
- 11 UniLodge Australia is a unit holder, owning one of the units in the strata scheme.
- 12 In June 2019, PICA ceased to act as strata scheme manager for the property, and it appears to be common ground that its appointment was terminated. Ms Lin and her associates then exercised the power of the Strata Corporation to retain a new strata managing agent, Whelan Property Group Pty Ltd.
- 13 In the meantime, on 21 June, approximately 10 days after PICA stopped acting as the strata scheme manager, UniLodge and Sydney Campus commenced proceedings in the New South Wales Civil and Administrative Tribunal ("NCAT") against the Strata Corporation. I will deal with the application in more detail below. For present purposes it is enough to say that, among the orders sought by UniLodge and Sydney Campus, are orders under SSMA, s 237 appointing a new strata manager to manage the property to the exclusion of the Strata Corporation and the Strata Committee.
- 14 Those proceedings generated some interlocutory applications, **including** an application for leave to appeal to the Appeal Panel of the Tribunal which is yet to be determined. In the meantime, however, the application has been fixed for final hearing on 4 and 5 December 2019.

- 15 The proceedings in this Court were commenced about two weeks ago, on 30 October. The plaintiff in the proceedings is the Strata Corporation. The first defendant is Ms Ternes, the second defendant is UniLodge Australia and the third defendant is Sydney Campus.
- 16 On 5 November the defendants filed a notice of motion. The thrust of the application is that the Strata Corporation's claim in these proceedings, if viable at all, properly belongs in the Tribunal.
- 17 The defendants' first contention is that the claim falls within the Tribunal's exclusive jurisdiction and, accordingly, this Court has no jurisdiction to entertain it. If this contention succeeds, the proceedings should be summarily dismissed. The defendants' next contention is that if the Tribunal's jurisdiction is not exclusive, the plaintiff's claim has already been the subject of proceedings in the Tribunal and, as a result, these proceedings are an abuse of process. Should this contention succeed, the defendants seek to have the proceedings stayed. Finally, if the Court does not accept their first two contentions, the defendants seek orders to have the proceedings transferred to the Tribunal to be dealt with there.
- 18 In response, the Strata Corporation contends that the Tribunal has no jurisdiction to entertain the claim for relief which it makes in these proceedings. This is the first issue which must be determined.

### **Jurisdiction of Tribunal**

- 19 As I have mentioned, more than four and a half years passed after Ms Ternes' letter of 15 March 2015, during which PICA appears to have kept the strata roll in accordance with UniLodge's request. Then in December 2018, shortly after Ms Lin's group obtained control of the Strata Corporation, Ms Lin wrote a letter on the Strata Corporation's behalf to Ms Ternes in the following terms:

We would like for you to submit the followings to the Owners' Corporation. Under Strata Schemes Management Act 2015 Division 1, Section 176 and Section 181. We require you in the capacity of the building manager and property manager to provide all contact details records that you hold in your possession to the Owners' Corporation within 14 days of this notice. A prescribed form by the Owners' Corporation is attached to this letter.

Under Section 258 of the Strata Schemes Management Act 2015, Tenancy notice to be given to Owner's Corporation of leases or sublease, we require you in the capacity of building manager and property manager for SP54026 to

submit copies of leases and subleases to the Owners' Corporation within 14 days of this notice. Under Section 258 of the Strata Schemes Management Act 2015, we would require you to provide within 14 days the name of tenant of lease and sublease, and address for services of notices, including an email address of the tenant/s of lease and sublease.

Moving forward, the Owners' Corporation would require you to observe and comply with the Strata Schemes Management Act in respect to providing notices and submit a copy of lease and sublease, name of tenant of lease and sublease, and address for services of notices including an email address of tenants to the Owners' Corporation within 14 days of commencement of any lease; And to providing notices and submit a copy of lease and sublease to the Owners' Corporation within 14 days of commencement of any lease.

- 20 The particulars in the attached form, described as an "Owner Contact Details Form" included the owner's home address and other contact details such as email. The evident purpose of this request was to allow Ms Lin and her group, through the Strata Corporation, to communicate directly with owners, rather than dealing with their appointed agent, Sydney Campus. The solicitors for UniLodge subsequently wrote refusing to comply with the request. The result is that, for the vast majority of units (being those which have been leased to Sydney Campus) the Strata Corporation is unable to make direct contact with the owners.
- 21 In its Summons, the Strata Corporation seeks an order that Ms Ternes, UniLodge and Sydney Campus produce a verified list of names and addresses, together with other contact details, for the persons recorded as owners of the strata units. Although the orders seek to have the defendants provide such information for all registered owners, I assume that the real thrust of the application is to obtain contact details for those whose properties are managed by UniLodge. The orders sought would also require the information to be provided in tabulated form in a spreadsheet.
- 22 In the course of the hearing, I asked counsel for the Strata Corporation to identify the legal basis for the relief claimed in the Summons. Counsel's principal response was to rely upon SSMA, s 181, which is referred to in the December 2018 letter. Section 181 relevantly provides:

**Owners' Corporation may require certain persons to produce records, accounts and property of the Owners' Corporation**

- (1) If the Strata Committee of an Owners' Corporation gives a notice to a person who has possession or control of property (including records) of the Owners' Corporation requiring the person to deliver the property to the Strata

Committee, the person must, not later than 14 days after the notice is given, deliver that property to a member of the Strata Committee specified in the notice.

Maximum penalty—20 penalty units.

(2) If the Strata Committee of an Owners' Corporation gives a notice to a person who has possession or control of property (including records) of the Owners' Corporation advising of the decision of the Owners' Corporation to terminate the person's appointment as strata managing agent, the person must, not later than 14 days after the notice is given, deliver that property to a member of the Strata Committee specified in the notice.

Maximum penalty—20 penalty units.

(3) This section does not take away or affect any just claim or lien which a strata managing agent may have against or on any records or other property of an Owners' Corporation.

23 Counsel for the Strata Corporation contended that the letter of December 2018 was a notice for the purpose of s 181. Although the section refers to possession and control of "property", counsel pointed out this was defined to include "records". Counsel also pointed out that it was clear from correspondence that one or other of the defendants actually had the relevant information.

24 Section 181 appears in Part 10 of the Act, which deals with records and information about strata schemes. The section appears in Division 1, which concerns the strata roll and other records. Division 3 provides for orders about the strata roll and records. Sections 187 and 188 provide:

**187 Order confirming information for strata roll**

(1) The Tribunal may, on application by an Owners' Corporation, owner or other person having or acquiring an estate or interest in a lot in a strata scheme, order an Owners' Corporation to enter information contained in a strata interest notice in the strata roll if a person fails to provide the required written confirmation of the notice.

(2) In making the order, the Tribunal may amend the information in the strata interest notice to which the order relates in any manner the Tribunal thinks fit.

(3) The Tribunal must dismiss an application for an order if the Tribunal considers that the rights of any person would be prejudiced if the order were made.

(4) A copy of an order under this section given to an Owners' Corporation is taken to be a strata interest notice given to the Owners' Corporation and information entered on a strata roll in accordance with the order is taken to have been entered from a notice with any written confirmation required.

**188 Order to supply information or documents**

(1) The Tribunal may, on application by a person, order an Owners' Corporation, strata managing agent, officer or former strata managing agent of an Owners' Corporation to supply to the applicant information that the Tribunal considers that the Owners' Corporation, strata managing agent, officer or former strata managing agent has wrongfully withheld from the applicant and to which the applicant is entitled under this Act.

(2) The Tribunal may, on application by a person, order an Owners' Corporation, strata managing agent, officer or former strata managing agent of an Owners' Corporation to supply or make available to the applicant a record or document if—

(a) the Tribunal considers that the Owners' Corporation, strata managing agent, officer or former strata managing agent has wrongfully failed to make the record or document available for inspection by the applicant or the applicant's agent, and

(b) the applicant is entitled under this Act to inspect the record or document.

(3) The order may specify the manner in which information is to be supplied or made available.

25 Section 187 gives the Tribunal power to order an owners' corporation to enter information contained in a strata interest notice in the strata roll, which is maintained by the owners' corporation. Strata interest notices are dealt with under s 22. Section 187 is not applicable here because the owners' corporation is seeking information rather than refusing to record information which has been supplied. No application has been made to have information recorded in any strata interest notice recorded in the roll.

26 Section 188 does allow the Tribunal to make an order for information to be supplied either by or to an owners' corporation, but where the information is to be supplied to an owners' corporation the section is limited to a strata managing agent, officer or former strata managing agent of the owners' corporation. This also is not applicable as none of the defendants has ever answered that description. As I have mentioned, Sydney Campus is the building manager but its status as such is really irrelevant to the relief sought by the Strata Corporation. And, in any event, s 188(1) does not deal with requiring information from building managers.

27 Accordingly, neither of the provisions in Division 3 are applicable. Counsel for the defendants, however, relied upon SSMA, s 232(1), which appears in Part 12 and relevantly provides:

**Orders to settle disputes or rectify complaints**



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

- (a) the operation, administration or management of a strata scheme under this Act,
- (b) an agreement authorised or required to be entered into under this Act,
- (c) an agreement appointing a strata managing agent or a building manager,
- (d) an agreement between the Owners' Corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,
- (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,
- (f) an exercise of, or failure to exercise, a function conferred or imposed on an Owners' Corporation under any other Act.

- 28 Counsel contended this general power extended to the present case. Counsel submitted that entitlement to the information involved a “complaint or dispute” about the “operation, administration or management” of the strata scheme (subparagraph (a)). Other subparagraphs, in particular, (b) and (c) may also be applicable.
- 29 As I understood his submissions, counsel for the Strata Corporation did not dispute that if s 232(1) stood on its own, it would confer jurisdiction on the Tribunal to make the orders which are sought by the summons in these proceedings. But counsel submitted that s 232 had to be read down because of the presence of specific powers in Part 10, Division 3. Counsel submitted that otherwise, Part 10, Division 3, would be redundant. Counsel relied on the principle of construction which requires an instrument to be interpreted so as to give all parts of it some work to do; see, generally, Dennis C Pearce and Robert S Geddes, *Statutory interpretation in Australia* (8th ed, 2014, LexisNexis Butterworths) at [2.26].
- 30 In *Teele v FCT* (1940) 63 CLR 201, Dixon J commented on this principle of construction. He said (at 207) that arguments from redundancy are never strong. Although the principle exists, in my view it is very much a last resort. I have some doubt about whether it is appropriate to apply the principle at all in the area of conferral of jurisdiction, but even if the principle were potentially applicable in this area, I do not think that it should be applied in the present

case. The result would be that s 181 would create a right which could not be fully vindicated because of the limitations in the nature of the orders provided for under ss 187 and 188.

- 31 In these circumstances, I do not accept the contention of counsel for the Strata Corporation. I am satisfied that the Tribunal would have jurisdiction to make an order under s 181 if the conditions set out in that section were satisfied.
- 32 Counsel for the Strata Corporation also relied on s 258, which is also referred to in the letter of December 2018, and on equitable doctrines which, counsel submitted would entitle the Court to make the orders sought. It is not necessary for me to consider whether there are alternative bases for the claim. If such alternative bases exist, they provide a further basis for the Tribunal's jurisdiction under s 232. This is because the orders sought concern the maintenance of the strata roll, which is clearly part of the "administration" of the strata scheme under the Act (see s 232(1)(a)).
- 33 Finally, counsel for the Strata Corporation submitted ss 187, 188 and 232 should be construed in the light of the Introductory Note of Part 12 of the Act. The Introductory Note consists of a table summarising various provisions of the Act which confer powers on the Tribunal and identify the nature of orders which can be made and the parties entitled to seek each of those orders. Orders under ss 187 and 188 are listed separately under the heading "Orders relating to records of owners corporation". Section 232 appears under the heading "General orders for settlement of disputes".
- 34 As to the force of the Introductory Note, the *Interpretation Act 1987* (NSW), s 34 relevantly provides:

**Use of extrinsic material in the interpretation of Acts and statutory rules**

(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or

- (b) to determine the meaning of the provision:
  - (i) if the provision is ambiguous or obscure, or
  - (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

35 Counsel's submission accepted that the Introductory Note does not form part of the Act itself. But counsel submitted that the Note is relevant to construction to the extent provided for by s 34.

36 In my opinion, the note is of no real use in resolving the question of construction in these proceedings. No question of ambiguity or obscurity arises, nor does the note disclose anything which would make the conclusion which I have reached manifestly absurd or unreasonable.

### **Exclusive Jurisdiction**

37 Having concluded that the Tribunal has jurisdiction, I must now consider whether that jurisdiction is exclusive as counsel for the defendants contends. Counsel relied on Schedule 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("CATA"). That Schedule concerns the Consumer and Commercial Division of the Tribunal. The functions allocated to the Division include functions of the Tribunal provided for under the SSMA. Clause 5 of relevantly provides:

(3) **Effect of application to Tribunal or court** If, at the time when an application was made to the Tribunal for the exercise of a Division function, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.

(4) Subclause (3) ceases to apply to the extent to which the application concerned is dismissed for want of jurisdiction or withdrawn.

(5) Subclause (3) does not prevent a court from hearing and determining any proceedings in which it is claimed that any order, determination or ruling of the Tribunal in exercise or purported exercise of a Division function is invalid for want of jurisdiction or from making any order as a consequence of that finding.

38 Counsel for the defendants contended that the claim made in these proceedings involved an "issue arising under" the existing application for the purpose of cl 5(3) in the Tribunal and, accordingly, this Court had no jurisdiction.

- 39 As I have mentioned, the Tribunal proceedings were commenced in June 2019. There are actually two applications, one for interim relief and one for final relief, but for present purposes there appears to be no significant distinction between them. The applicants in the application for final relief are UniLodge Australia and Sydney Campus; and the respondent is the Strata Corporation.
- 40 As I have mentioned, the principal relief sought is an order under SSMA, s 237, appointing a firm known as Bright & Duggan, or some other alternative firm, as the strata managing agent. Under the orders sought, Bright & Duggan would exercise all of the functions of the Strata Corporation and also all of the functions of the Chairperson, Secretary, Treasurer and Strata Committee, for a period of eighteen months. UniLodge and Sydney Campus also seek orders declaring that certain resolutions passed at a general meeting of the Strata Corporation on 14 June 2019 were invalid, or orders invalidating those resolutions.
- 41 The grounds for the application essentially involve two complaints. The first is an alleged failure to deal properly with the obligation to repair the property and pay outstanding invoices of service providers, contractors, maintenance providers and the like. The second complaint concerns the way in which Ms Lin as Chairperson conducted the general meeting, and in particular her alleged refusal to allow proxy votes of lot owners through Sydney Campus to be counted for the purposes of the meeting.
- 42 On 3 September, the Strata Corporation made an application for directions in the proceedings. The directions sought included an order that the applicants disclose the last known contact details for all lot owners to the new strata manager, Whelan Property Group. The purpose of the orders was said to be to allow lot owners to be made aware of the proceedings, so they could be joined to the proceedings if they wished. Those orders were refused. The Tribunal member found that all of the owners represented by UniLodge had been notified of the proceedings.
- 43 Counsel for the defendants pointed to the similarities between the orders which were sought and refused in the interlocutory application, and those sought in

these proceedings. However, there are significant differences. The purpose of these proceedings is to raise an issue about what information needs to be recorded on the strata roll for the owners represented by Sydney Campus. The state of the roll has a significance which extends well beyond the particular dispute which precipitated the application to NCAT. In my view, the term “issues” in cl 5 is a reference to the substantive issues going to final relief in the NCAT application. The term refers to facts or legal propositions which must be established before the relief sought in the Tribunal can be granted. This is reflected in Schedule 4, cl 5(6), which provides:

(6) For the purposes of subclause (3), an issue arises under an application made to the Tribunal for the exercise of a Division function only if the existence of the issue is shown in the applicant’s claim or is recorded in the record made by the Tribunal in accordance with this Act.

- 44 In my opinion, the mere making of an interlocutory application by one or other party to the NCAT proceedings cannot create an “issue” where none previously existed. The “issues” raised by the application to NCAT are entirely distinct from the issues which arise before the Strata Corporation can obtain the relief sought in these proceedings.
- 45 For these reasons, I reject the contention by counsel for the defendants. In my view, although the Tribunal has jurisdiction, it is not an exclusive jurisdiction.

### **Abuse of process**

- 46 Counsel for the defendants relied upon the principle that where a litigant has commenced legal proceedings seeking particular relief, it is generally speaking of an abuse of process to institute separate proceedings, whether in the same court or another court seeking substantially the same relief: see, eg, *Batistatos v RTA of NSW* (2006) 226 CLR 256 at 265 [9]. An immediate problem with the application of this principle in the present case is that the plaintiff in these proceedings is the Strata Corporation, which has not made any application to NCAT at all. In any event, for the reasons I have given concerning exclusive jurisdiction, I do not see the claims in these proceedings as overlapping in any relevant way with the claims in the NCAT proceedings.
- 47 The identity of the two proceedings must be determined by reference again to the substantive relief sought, rather than by reference to interlocutory

applications. As I have mentioned, the relief sought in these proceedings raises issues concerning the administration of the Strata Corporation's affairs, which go well beyond the specific matters which are the subject of the application before NCAT.

### **Transfer of proceedings**

- 48 Initially, the defendants sought only that the proceedings be summarily dismissed or stayed. However, the Court has power of its own motion to make an order transferring the proceedings to NCAT (see, Sch 4, cl 6 and *Owners Strata Plan 21372 v Banovic* [2017] NSWSC 734 per Darke J). The prospect was raised by the Court and counsel for the defendants embraced the proposition that, if the proceedings should not be dismissed or stayed, then they should be transferred.
- 49 Counsel for the Strata Corporation resisted the transfer. Counsel submitted that the issue raised by the claim in these proceedings could be dealt with by this Court in an efficient way and probably in advance of the hearing before NCAT on 4 and 5 December.
- 50 In general, the appropriate forum for disputes under the SSMA should in my view be the Tribunal. Applications under that Act form an important part of the Tribunal's jurisdiction, and the Tribunal has ample powers and resources to deal with this particular dispute. There is no doubt that this Court would have the ability to deal with the Strata Corporation's claim if the circumstances were sufficiently urgent, but I do not consider that they are.
- 51 Obviously, it is desirable that the Tribunal should, if possible, deal with the dispute at the same time as the application scheduled for hearing, but that is a matter for the Tribunal. In my view, even if there were no proceedings pending in the Tribunal, this application should be transferred to it, as there is nothing about these proceedings which requires that there should be a departure from the ordinary run of cases under the SSMA. For these reasons, I will order that the proceedings be transferred to the Tribunal.

[Counsel addressed on the form of orders and costs]

## Costs

52 At the conclusion of the application, I heard argument from counsel on the question of costs. The argument is centred on SSMA, s 253(2), which relevantly provides:

In any proceedings to enforce any such right or remedy, the court in which the proceedings are taken must order the plaintiff to pay the defendant's costs if the court is of the opinion that, having regard to the subject-matter of the proceedings, the taking of the proceedings was not justified because this Act or Part 4 of the *Community Land Management Act 1989* makes adequate provision for the enforcement of those rights or remedies.

53 Counsel for the defendants submitted that, given my conclusion that the proceedings could be dealt with in the Tribunal, this provision meant that the defendants should receive a costs order in their favour; otherwise they would be worse off than if the proceedings had been allowed to proceed to judgment in this Court.

54 Counsel for the Strata Corporation turned this logic around by arguing that the proper course for the defendants would have been simply to permit the proceedings to continue in this Court and that, by bringing their notice of motion, the defendants had unnecessarily increased costs. Counsel for the Strata Corporation further argued that the defendants had sought to have the proceedings dismissed or stayed and that, as I have already recorded, the transfer of the proceedings was the third best option, which was actually proposed by the Court.

55 Although I propose to order that the proceedings be transferred, it would have been possible to give effect to my conclusions simply by staying the proceedings on the grounds that this Court is a clearly inappropriate forum: see, *Voth v Manildra Flour Mills* (1990) 171 CLR 538. That would have meant it would have been up to the Strata Corporation to commence fresh proceedings in the Tribunal.

56 The only practical effect of transferring the proceedings, rather than staying them and requiring fresh proceedings to be commenced, is that it will be unnecessary for the Strata Corporation to redraft its application for relief (as that appears in the Summons already) and the affidavits which the Strata Corporation has filed in support of its application will simply accompany the file

to the Tribunal. In the end, there will be some slight saving of effort and, I hope, of time, but it is very marginal. Indeed, in one sense, it might have been procedurally more advantageous to require the Strata Corporation to commence fresh proceedings in the Tribunal as it would have required the Strata Corporation to set out the grounds for its claim in an originating application in the form used in the Tribunal.

- 57 In these circumstances I think it is unrealistic to see the defendants as not having achieved what they sought to achieve via their Notice of Motion. As a matter of substance, the purpose of the motion was to ensure that the proceedings were conducted, if at all, in the Tribunal, and this the defendants have achieved. I do not regard the defendants as having brought this application unnecessarily.
- 58 While the defendants' notice of motion has no doubt given rise to substantial costs, those costs are much less than would have been incurred in this Court if the proceedings had continued to hearing. In my view, the defendants' Notice of Motion has succeeded in substance, and the plaintiffs ought to pay the costs of the Notice of Motion.
- 59 I consider that s 253(2) is not directly applicable, because its terms deal with costs after the conclusion of the proceedings. But the idea behind s 253(2) is that a plaintiff who brings proceedings in this Court, when the proceedings might have been brought in the Tribunal, must pay the costs and this principle supports the order which I propose to make.
- 60 The orders of the Court are:
1. Pursuant to *Civil and Administrative Tribunal Act 2013* (NSW), Sch 4, cl 6(2), I direct that these proceedings be transferred to the Civil and Administrative Tribunal, and continue before the Tribunal as if the proceedings had been instituted before the Tribunal.
  2. Order that the plaintiff/respondent pay the costs of the defendants/applicants Notice of Motion dated 5 November 2019.
  3. I direct the costs be assessable forthwith.

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