



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners – Strata Plan No 76830 v Byron Moon Pty Limited

Medium Neutral Citation: [2020] NSWCATAP 186

Hearing Date(s): 4 August 2020

Date of Orders: 7 September 2020

Decision Date: 7 September 2020

Jurisdiction: Appeal Panel

Before: The Hon F Marks, Principal Member
M Gracie, Senior Member

Decision: (1) The appeal is upheld
(2) The orders under appeal are quashed and in lieu we order that the application before the Senior Member be dismissed.
(3) Costs are reserved with liberty to apply which should be exercised by making application within 28 days of this date

Catchwords: STRATA TITLE – appeal from order of Tribunal ordering repayment of contributions for cost of heating water not used by some lot owners - held s 232 and other provisions of the Strata Schemes Management Act 2015 did not empower order - appeal allowed.

Legislation Cited: Strata Schemes Management Act 2015 ss 79, 81,82,83,87,88,136, 232

Cases Cited: Davis v Owners Corporation SP 63429 [2018] NSWCATCD 27
The Owners Strata Plan No 74835 v Pullicin; The Owners Strata Plan No 80412 v Vickery [2020] NSWCATAP 5.
Shih v The Owners - Strata Plan No 87879 [2019]

NSWCATAP 263

Texts Cited: None cited

Category: Principal judgment

Parties: The Owners – Strata Plan No 76830 (Appellant)
Byron Moon Pty Ltd (First Respondent)
Sea Nest Pty Ltd (Second Respondent)

Representation: Counsel:
J Steele (Respondents)

Solicitors:
Small Myers Hughes Lawyers (Appellant)
Sachs Gerace Lawyers (Respondents)

File Number(s): AP 20/22800

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 27 April 2020

Before: S A McDonald, Senior Member

File Number(s): SCS 19/29466

REASONS FOR DECISION

Background

1 The appellant in these proceedings, The Owners – Strata Plan 76830 is the Owners Corporation responsible for the administration of a strata scheme comprising 30 lots and common property situated in a resort area in northern New South Wales. All but 3 of those lots are residential units. Lots 27 and 28 are commercial lots and are together owned by the respondents Byron Moon Pty Ltd and Sea Nest Pty Ltd.

- 2 Lots 1 to 22, which are all residential units are supplied with hot water from 3 hot water tanks which are situated on common property and which are connected to the common electricity supply for the strata scheme. Accordingly, since 2006 all of the cost of the electricity supply used to heat the water in the 3 tanks was paid by the appellant. This cost was reimbursed and paid for by all of the owners of all of the 30 lots by way of payment of levies to the administration fund established by the appellant. This included those lots whose hot water was not being supplied from those tanks.
- 3 On 29 June 2018 Mr R T Ahern wrote to the appellant on behalf of the respondents as owners of lots 27 and 28 asserting that the electricity costs to heat the 3 tanks should be paid for solely by the proprietors of units 1 to 22 inclusive. Mr Ahern was a member of the Strata Committee of the appellant for the period 2009 to 2018 and was Chairperson from 2017 to 2018. Upon receipt of Mr Ahern's letter, the Body Corporate proceeded to investigate the matter, retaining experts for that purpose. On 25 October, 2019 at an Extraordinary General Meeting, the appellant resolved to create an additional By-Law the effect of which was that the owners of lots 1 to 22 should be responsible for payment of all electricity metered charges for the hot water system located on common property which serviced those lots effective from 1 May, 2019.
- 4 By Application dated 24 June 2019 the respondents as applicants sought orders in this Tribunal relating to a number of issues, the sole issue for the purpose of these appeal proceedings consisting in effect of a claim for repayment by the appellant as respondent to the Application of so much of their contributions to the administrative fund that were attributed to the cost of electricity for the heating of the 3 hot water tanks. The Application was said to be based on the provisions of sections 87 and 232 of the *Strata Schemes Management Act 2015* ("the SSMA").
- 5 It is uncontroversial and agreed between the parties that the amount in issue is \$18,039.15.
- 6 The Application came on for hearing before a Senior Member of this Tribunal who, in a decision dated 27 April 2020 ordered the appellant to repay to the respondents that portion of contributions paid by the respondents towards the

cost of the heating of the 3 hot water tanks, dating back to 2007, the details of which are not relevant.

The reasons for decision

- 7 A substantial part of the reasons for decision published by the Senior Member referred to the competing methodologies advanced by each of the parties for the correct calculation of the amounts of the overpayments as alleged by the respondents. This is no longer a matter of controversy by reason of the sensible agreement reached by the parties to which we have earlier referred.
- 8 In his reasons the Senior Member paid particular attention to a number of registered By-Laws of the appellant which created differential circumstances pertaining to residential lots and commercial lots. The owners of the residential lots have the exclusive use of the swimming pool and of all other recreational facilities in the pool area. The owners of the commercial lots have exclusive use of the grease traps installed in relation to those lots and are solely responsible for the cleaning and maintenance of those grease traps. Commercial lot occupiers are entitled to erect signs and advertising on their lots, but otherwise there is a general prohibition without the consent of the appellant. The Senior Member concluded
 - 31 These By-Laws confirm that different rights, obligations and expenses can and do apply to the different categories of registered proprietor within SP76830 depending upon each unit holder's usage.
- 9 The Senior Member then proceeded on the basis that it was appropriate to make an order in terms as sought by the respondents provided that he had jurisdiction and power to do so.
- 10 The Senior Member noted that the appellant had challenged the power to make the orders sought by the respondents. The Senior Member then referred to the provisions of section 232 of the SSMA, relying on observations made by the Tribunal in *Davis v Owners Corporation SP63429* [2018] NSWCATCD 27.
- 11 The Senior Member next considered whether any of the orders sought were to a limited extent time-barred, a matter which does not concern us in these appeal proceedings. Having reserved costs, the Senior Member made orders

requiring the parties to quantify the amount payable by reference to a specified methodology. Costs were reserved.

The grounds of appeal

- 12 The grounds of appeal cover a number of matters, namely:
- (1) the Senior Member allegedly failed to specify whether he was basing his decision on the provisions of sections 87, 88 or 232 of the SSMA
 - (2) none of the sections empowered the Tribunal to make the orders that it did
 - (3) the Tribunal was in error in relying upon the ability of the appellant to make common property rights By-Laws and upon certain lay evidence given on behalf of the respondents as a basis for making the orders.
- 13 We state for completeness that the appeal raises questions of law and leave to appeal is not necessary.

The available statutory bases for the making of the orders

- 14 We firstly observe that our reading of the reasons for decision of the Senior Member indicates that he proceeded on the basis that he was entitled to make the orders which he did by reason of the provisions of section 232 of the SSMA. Although other provisions were mentioned in the Application, it was not necessary for the Senior Member to address them, having determined that there was a statutory basis for the making of the orders.

Section 87 as the basis for the order

- 15 The submissions by the respective parties considered at some length whether the orders could have been made under section 87 of the SSMA. In order to consider that provision it is also necessary to have regard to other provisions of the SSMA.
- 16 The type of expenditure of an owners corporation required to be credited and paid from the administrative fund is described in section 79 (1) of the SSMA, and is intended to include recurrent expenses in the nature of electricity charges for which the owners corporation is liable:

79 Estimates to be prepared of contributions to administrative and capital works funds

- (1) An owners corporation must, not later than 14 days after the constitution of the owners corporation and at each annual general

meeting after that, estimate how much money it will need to credit to its administrative fund for actual and expected expenditure—

- (a) to maintain in good condition on a day-to-day basis the common property and any personal property vested in the owners corporation, and
- (b) to provide for insurance premiums, and
- (c) to meet other recurrent expenses.

Note. Recurrent expenses would include such regular expenses as insurance, water charges, electricity charges, carpet cleaning, lawn mowing services and the like and minor expenses relating to maintenance of the common property.

- 17 The owners corporation is required by section 81 to set contributions inter alia to its administrative fund and to levy a contribution “on each person liable for it” to pay a contribution:

81 Owners corporation to set contributions to administrative and capital works funds

- (1) The owners corporation must determine the amounts to be levied as a contribution to the administrative fund and the capital works fund to raise the amounts estimated as needing to be credited to those funds.
- (2) That determination must be made at the same meeting at which those estimated amounts are determined.
- (3) The owners corporation must levy on each person liable for it such a contribution.
- (4) If the owners corporation is subsequently faced with other expenses it cannot at once meet from either fund, it must levy on each owner of a lot in the strata scheme a contribution to the administrative fund or capital works fund, determined at a general meeting of the owners corporation, in order to meet the expenses.
- (5) A contribution is, if an owners corporation so determines, payable by the regular periodic instalments specified in the determination setting the amount of the contribution

- 18 Section 82 contains a particular provision to enable differential contribution rates to be levied as against individual lots with respect to the assessment of insurance premiums:

82 Individual contributions may be larger if greater insurance costs

- (1) If the use to which a lot in a strata scheme is put causes an insurance premium for the strata scheme to be greater than it would be if it were not put to that use, so much of a contribution payable by the owner of the lot as is attributable to insurance premiums may, with the

consent of the owner, be increased to reflect the extra amount of the premium.

(2) The Tribunal may, on application, make an order for payment of contributions of a different amount to one or more contributions levied or proposed by an owners corporation on an owner if the Tribunal is of the opinion that the owner's consent has been unreasonably refused under this section.

(3) An application for an order under this section may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner of a lot or a mortgagee in possession.

- 19 Section 83 makes clear in subsection (2) that contributions must be levied in respect of each lot and are payable by lot owners in shares proportional to the unit entitlements of their respective lots. The only exception to this regime is that provided for in section 82 discussed above and within section 83 itself. For the purpose of these proceedings we conclude that the appellant was compelled to impose levies for contributions to the administrative fund referable to the cost of electricity to heat the 3 water tanks on all lot owners proportional to their unit entitlements.

83 Levying of contributions

(1) An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.

(2) Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.

(3) Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of the contribution. The date must be at least 30 days after the notice is given.

(4) Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.

- 20 It might be thought that the provisions of section 81 (3) could allow for the levying of a differential contribution to the extent that an owner might not prima facie be liable with respect to a particular item of recurrent expenditure, as is the case in these proceedings. However, we reject this approach to construction of this subsection because it seems to be directed more to a

liability to make a contribution with respect to levies raised by the owners corporation. Construed in this way this subsection is consistent with the provisions of section 83(2) which we have set out above.

- 21 The respondents sought to rely on the provisions of section 87 as entitling the Tribunal to make the orders which are the subject of these appeal proceedings. We reject this submission because section 87 (1) refers to the aggregate amount of the levy or the amount proposed to be levied by way of contributions, and does not in its terms permit any differential treatment of any individual lot owner by reference to the amount of contributions. The same approach applies when considering the “manner of payment of contributions”. In this latter regard ordinary English usage dictates that the manner of payment of contributions refers to the way in which the contributions are to be paid. We reject any suggestion that this expression would justify a differential approach as contended for by the respondents in their submissions.

87 Orders varying contributions or payment methods

(1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable—

- (a) an order for payment of contributions of a different amount,
- (b) an order for payment of contributions in a different manner.

(2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.

- 22 The approach which we take to the construction of section 87 of the SSMA is consistent with the provisions of section 88 which deal with the effect of any order varying contributions made under that section. By section 88 the effect of such an order is to reduce or increase the aggregate amount of the contributions, levied on the basis set out in section 83 (2), to which we have referred above.

88 Effect of order varying contributions where payments have been made

(1) If a contribution that is the subject of an order by the Tribunal under this Division has been wholly or partly paid—

- (a) an order to pay more has effect as if the owners corporation had decided to levy a contribution equal to the difference, and
- (b) an order to pay less imposes a duty on the owners corporation to refund the difference.

Section 232 as the basis for the order

23 We now come to consider the provisions of section 232 of the SSMA, upon which we infer the Senior Member relied as the basis for the orders made.

232 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.

(2) Failure to exercise a function For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if—

- (a) it decides not to exercise the function, or
- (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

(3) Other proceedings and remedies A person is not entitled—

- (a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or

(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.

(4) Disputes involving management of part strata parcels The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if—

(a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or

(b) any of the parties to the dispute fail to consent to its determination by the Tribunal.

(5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.

(6) Disputes relating to consent to development applications The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the Environmental Planning and Assessment Act 1979 relating to common property of the scheme.

(7) Excluded complaints and disputes This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject-matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter.

24 We firstly observe that the controversy between the parties consists of a complaint and a dispute which falls within both section 232 (1) (a) and (e). Neither party contended to the contrary. The appellant submitted that an order which may be made under section 232 could not have the effect of altering the scheme set out in section 83 (2) which required the appellant to levy contributions in shares proportional to the unit entitlement, notwithstanding that a particular lot owner might be disadvantaged in the way this has occurred in the circumstances of these proceedings. The only manner in which that scheme could be amended would be the creation of a By-Law as occurred effective from 1 May 2019. An alternative formulation of this submission is that

there can be no relevant complaint or dispute about conduct of the appellant which has complied strictly with the provisions of section 83 (2).

25 An answer to this submission is that the provisions of section 83 (2) may be overcome by the making of a suitably worded By-Law which is what occurred on 25 October 2019.

26 The SSMA contains specific provisions enabling owners corporations to make by-laws which is found in Part 7

136 Matters by-laws can provide for

(1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.

(2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.

27 However, section 136 (2) specifically provides that a by-law may not be made if it is inconsistent with the provision of the SSMA. Section 83 (2) is such a provision.

28 We note that the existing Special By-Law 9 created on 25 October 2019 is in the following form:

1. The owner for the time being of Lot 1 – 22 (“the owner”) shall be responsible for all electricity metered charges for the Hot Water system located on the common property and servicing those lots

2. The owner must indemnify Lots 23 – 31 (inclusive) for any costs the subject of cl 1

3. For the purposes of cl 2 the Owners Corporation shall where necessary credit Lots 23 – 31 any costs incurred by those lots for such electricity charges arising pursuant to s 83 of the Act from 1 May, 2019 and otherwise to give effect to the obligations arising pursuant to cl 1 – 2

4. The obligations and liabilities arising as a result of this special by-Law are to be reviewed not earlier than 30 April 2023

29 Seen in this way, the electricity charges for the hot water system no longer become monies needed to be considered as either actual or anticipated expenditure for recurrent expenses and are no longer required to be included within the amounts levied for the administrative fund. Accordingly, the By-Law is not inconsistent with section 136 (2). That By-Law may be taken to have

dealt appropriately and prospectively by the owners corporation to rectify a situation which impacted adversely on the respondents. The order made by the Senior Member would have had the effect of rectifying the same situation, retrospectively. Such an order would not be inconsistent with section 83(2) because it would become operative well after those contributions had been levied and paid. The order would deal with a situation which came to the attention of the appellant many years after it occurred. However, it is necessary to identify the jurisdiction and power to make such an order.

30 The respondents submitted that the terms of section 232 are expressed in such a manner that they ipso facto create the power to make such orders as are necessary to settle the complaint or dispute with which the Tribunal is dealing.

31 The power invested in this Tribunal to make orders under section 232 has been considered by Appeal Panels and at first instance on many occasions. It is not necessary for us to traverse those decisions. An Appeal Panel recently described the circumstances in which orders might be made under section 232 concisely and succinctly in *The Owners Strata Plan No 74835 v Pullicin; The Owners Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5. (“*Vickery*”) At [73] the Appeal Panel said:

While it is not necessary for us to determine comprehensively the scope of the order making power in s 232, our view is that the Tribunal is limited to making orders which it otherwise has power to make under specific or general order making powers in the 2015 Management Act, or the NCAT Act. The word “settle”, like the word “resolve” or “resolution”, does not confer order making powers.

32 Accordingly, in order to found the power to make an order under section 232 it is necessary to have recourse, relevantly, to another provision of the SSMA which entitles the Tribunal to make an order of the kind being contemplated.

33 The order made by the Senior Member required the appellant to pay certain monies to the respondents to compensate them for contributions which they had made to the cost of electricity which they had not consumed. Such an order is not of a kind contemplated by any other power created by the SSMA. (There is a comprehensive analysis of the powers of this Tribunal under the SSMA in the decision of the Appeal Panel in *Shih v The Owners - Strata Plan*

No 87879 [2019] NSWCATAP 263 and it is not necessary that we revisit them for the purpose of determining these proceedings).

34 We note that the parties did not refer to the decision in *Vickery* in their submissions and were unaware of it until we referred them to it. We conclude that the Senior Member's attention was not directed to this important decision.

35 In *Vickery* the Appeal Panel said at [9]

There are now three partially inconsistent Appeal Panel decisions about the same issue. None takes precedence. However, the current Appeal Panel is constituted by three members including two presidential members who are judicial officers. We agree with the observation of Bell J in *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 at [107] in relation to the Victorian Civil and Administrative Tribunal, that "... where there is a properly considered decision on point, especially on a legal question and by a presidential member, considerations of consistency and predictability of decision-making and maintaining public confidence in the legal process come into play".

36 In that the submissions of the respondents concerning the powers of the Tribunal to make orders under section 232 of the SSMA are inconsistent with the decision in *Vickery* we reject them. It follows that the Senior Member was not entitled to make the order which he did under section 232 and the appeal must be upheld.

Costs

37 At the conclusion of the hearing we announced that we would reserve costs, and the parties were in agreement that this was the most appropriate course. Costs will be reserved accordingly with liberty to apply.

Orders

38 We make the following orders

- (1) The appeal is upheld
- (2) The orders under appeal are quashed and in lieu we order that the application before the Senior Member be dismissed.
- (3) Costs are reserved with liberty to apply which should be exercised by making application within 28 days of this date

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

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