



Supreme Court
New South Wales

Case Name: Council of the City of Sydney v Baboon Pty Limited

Medium Neutral Citation: [2020] NSWSC 1480

Hearing Date(s): 16 October 2020

Date of Orders: 16 October 2020

Decision Date: 16 October 2020

Jurisdiction: Equity

Before: Rees J

Decision: Order payment out of monies paid into Court.

Catchwords: MONIES PAID INTO COURT – council sold unit for unpaid rates – owner missing – net proceeds of sale paid into court – PAYMENT OUT – owners corporation and purchaser claim monies – agreement to distribute monies pari passu – r 41.3 UCPR – r 55.11 UCPR – owners corporation’s recovery expenses disproportionate – purchaser paid in full and balance to owners corporation.

STRATA SCHEMES – expenditure on legal services – obligations of strata managing agent and owners’ corporation lawyers to supervise legal expenditure – owners’ corporation entitled to recover reasonable expenses – s86(2A) Strata Schemes Management Act.

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 60, 98(1)(b) section of the Strata Schemes Management Act 2015 (NSW), ss 86(2A), 103, 105
Uniform Civil Procedure Rules 2005 (NSW), rr 18.1, 41.3(1), 42.4, 55.11

Cases Cited: Delta Electricity v Blue Mountains Conservation Society Inc [2010] NSWCA 263

Re C & L Cameron Pty Limited [2012] NSWSC 676
Re Perpetual Trustees Company Limited; application of
Chen (2010) 15 BPR 28, 845; [2010] NSWSC 808
Thomson v Golden Destiny Investments Pty Limited (2)
[2015] NSWSC 1929

Texts Cited: Taylor P, E Elms E, Justice G Bellew and M Meek,
Ritchie's Uniform Civil Procedure NSW (Looseleaf,
LexisNexis)

Category: Principal judgment

Parties: Council of the City of Sydney (Plaintiff)
Owners' Corporation Strata Plan No 46528 (Second
Interested Party)
Baboon Pty Limited (Third Interested Party)

Representation: Counsel:
No appearance (Plaintiff)
Mr W Khoury, Solicitor (Second Interested Party)
Mr D Legg, Solicitor (Third Interested Party)

Solicitors:
Benjamin & Khoury Solicitors & Attorneys (Second
Interested Party)
Burrige & Legg Solicitors (Third Interested Party)

File Number(s): 2020/147760

EX TEMPORE JUDGMENT

- 1 **HER HONOUR:** This is an application by two parties, the Owners' Corporation of Strata Plan 46528 and Baboon Pty Limited, for orders in respect of the payment of moneys out of court. The circumstances in which the moneys came to be paid into court are these. A unit in the strata plan was owned by Zaven Margarian. Mr Margarian disappeared. Mr Margarian failed to pay rates to the City of Sydney of some \$9,500 and levies to the Owners' Corporation of some \$26,000. In May 2018, the City of Sydney sold the unit for unpaid rates. Baboon Pty Limited bought the unit at auction for \$136,000.
- 2 The sale completed in November 2018. Ordinarily, when an apartment is sold, an adjustment will be made to the balance of the purchase price to be paid on completion such that any unpaid levies to the date of settlement are to the

account of the vendor and levies referable to the period after settlement are to the account of the purchaser. In this case, unpaid strata levies to the account of Mr Margarian stood at \$26,729.60 but, as Mr Margarian could not be found, completion went ahead without this adjustment. Following settlement, the Owners' Corporation looked to Baboon Pty Limited to pay the outstanding levies and, in September 2019, Baboon Pty Limited paid the unpaid levies owed by Mr Margarian.

- 3 On completion of sale of the unit, the Council paid the net proceeds of sale, after payment of rates, into Court and made further attempts to find Mr Margarian, but with no success. In May 2020, the City of Sydney sought an order that its costs of paying the net proceeds of sale into Court be paid. On 21 July 2020, Ward CJ in Eq ordered that the City of Sydney's costs of \$15,266.67 be paid from the funds in Court, leaving \$92,733.66.
- 4 The Council wrote to other parties who may have an interest in the net proceeds of sale. Baboon Pty Limited advised that it had a claim on the net proceeds of sale in respect of Mr Margarian's unpaid levies, which it had paid. The Owners' Corporation sought recovery expenses of \$118,899.20 in respect of unpaid levies, largely comprising solicitor and counsel's fees. It will be immediately observed that the recovery expenses far exceed the unpaid levies and almost equate to the price achieved at auction of the unit. I was told today by the solicitor for the Owners' Corporation that the quantum of the recovery expenses reflected the "significant difficulty and complexity" of the recovery proceedings in which significant, considerable and complex steps had to be taken. However, it does not appear that the proceedings were complex, but involved attempts to locate Mr Margarian, which failed, obtaining orders for substituted service, default judgment, commencing bankruptcy proceedings and dealing with the New South Wales Sheriff's Office in respect of writs of levy.
- 5 The Owners' Corporation and Baboon Pty Limited have reached a commercial compromise such that the remaining funds in Court be rateably proportioned between them. This would result in the Owners' Corporation receiving \$74,845.07 and Baboon Pty Limited receiving \$17,888.26. Whilst both parties'

motions cited rule 18.1 of the Uniform Civil Procedure Rules 2005 (NSW) (*UCPR*) as the basis for the orders sought, that does not appear to be the correct rule.

6 Rule 41.3(1) of the UCPR provides:

"Deposited funds may not be withdrawn or paid except by the authority of these rules or of a judgment or order."

7 The commentary to the UCPR, by Taylor P, E Elms E, Justice G Bellew and M Meek, *Ritchie's Uniform Civil Procedure NSW* (Looseleaf, LexisNexis), observes in respect of this rule at [41.3.5], "The Court has a general discretion to determine the release of the funds", citing *Thomson v Golden Destiny Investments Pty Limited (2)* [2015] NSWSC 1929 at [151]. In that case, Sackar J reviewed the relevant authorities at [17]-[24] and, after considering the parties' competing contentions, observed at [151]-[152]:

151 In my view the Court as custodian of the funds has a very wide discretion ultimately as to how the funds should be dealt with. It will no doubt take into account a number of factors so as to ensure the funds are properly administered.

152 Those factors include, but are not limited to: the extent to which NGI has a right to indemnity under the deed and/or the general law; whether NGI has any other assets; whether for any reason Avondale should rank ahead of other parties; and whether, if not, all claimants should be dealt with *pari passu* or on some other basis, to identify just a few.

8 Rule 55.11(1) of the UCPR provides,

Funds that have been paid into court may only be paid out of court pursuant to the directions of the Supreme Court.

9 An applicant for directions must satisfy the court as to four matters: the identity of the person who has the primary beneficial interest in the funds and the nature of their entitlement (in this case, Mr Margarian as the former registered proprietor); the identity of any other persons beneficially interested in the funds and the nature of their respective entitlements (in this case, the Owners' Corporation under section 86(2A) of the *Strata Schemes Management Act 2015* (NSW) and Baboon Pty Limited, having a chose in action against Mr Margarian in respect of his debt which it has discharged); that all potential fund claimants have been notified of the application (the City of Sydney had attended to this); and that the proposed payee either has a prior beneficial entitlement to the other interested parties or that they consent to the payment:

Re Perpetual Trustees Company Limited; application of Chen (2010) 15 BPR 28, 845; [2010] NSWSC 808.

- 10 The Court must necessarily determine the validity of any competing claims. In *Re C & L Cameron Pty Limited* [2012] NSWSC 676, Ward J observed at [128]:

In my view, what r 55.11 requires is a consideration of whether there are other competing claims and, if there are ... it is a matter for the court to determine their validity and the competing priorities between any valid claims. ... If the evidence before the court is such that the validity of the claim can be determined on the very payment out application, then the statutory mandate for the just, quick and cheap resolution of the real issues in dispute would support the conclusion that a final determination as to that claim should then be made. ...

- 11 I am concerned at the level of legal costs incurred by the Owners' Corporation. The *Strata Schemes Management Act* recognises the importance of the involvement of unitholders in any expenditure by an owners' corporation on legal services: sections 103 and 105. Ordinarily, it is necessary for unit holders to approve expenditure on legal services exceeding \$10,000 by resolution passed at a general meeting. Which such approval is not required for legal action to recover unpaid contributions, this does not derogate from the responsibilities of the strata managing agent and the Owners' Corporation's solicitors to ensure that legal proceedings taken on behalf of an Owners' Corporation are closely managed so that unit holders in a strata scheme are not resourcing overly expensive or unnecessary litigation. Consistently with this, the *Strata Schemes Management Act* only entitles the Owners' Corporation to recover unpaid contributions, interest and the *reasonable* expenses incurred in recovering these amounts: section 86(2A). Further, all solicitors have an obligation to consider whether costs being incurred are proportionate. The Court has wide powers to ensure that this is so: sections 60 and 98(1)(b), *Civil Procedure Act 2005* (NSW); rule 42.4 UCPR; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 at [185] per Basten JA.
- 12 I am not prepared to accede to the commercial arrangement between the parties for a *pari passu* distribution of the moneys paid into Court. In considering the competing claims of the Owners' Corporation and Baboon Pty Limited to the remaining funds, the Owners' Corporation has recovered the

unpaid strata levies in full, thanks to Baboon Pty Limited. The Owners' Corporation's recovery costs appear disproportionate to the amount it was seeking to recover. I consider it appropriate in the circumstances to direct that the monies in Court be paid, first, to Baboon Pty Limited in full reimbursement of the levies which it paid for Mr Margarian with the balance to be paid to the Owners' Corporation. This will have the result that the Owners' Corporation receives \$66,000 in recovery expenses, which is still almost three times the amount it was seeking to recover and appears to me to be more than adequate in the circumstances.

13 For these reasons, I make the following order:

- (1) Pursuant to rule 55.11 of the Uniform Civil Procedure Rules 2005 (NSW), direct that the funds remaining from those paid into Court by Council of the City of Sydney in the proceedings be paid as follows:
 - (a) to Baboon Pty Ltd, the amount of \$26,729.60; and
 - (b) to the Owners – Strata Plan No 46528 of 155 King Street, Sydney, the balance.

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