John Melick Investments Pty Limited v Harbourview Mansions Pty Limited - [2017] NSWSC 1132

Supreme Court

New South Wales

Medium Neutral Citation:	**John Melick Investments Pty Limited v Harbourview Mansions Pty Limited [2017] NSWSC 1132**
Hearing dates:	23, 24 August 2017
Date of orders:	28 August 2017
Decision date:	28 August 2017
Jurisdiction:	Equity
Before:	Brereton J
Decision:	Undertakings of defendant noted, summons otherwise dismissed.
Catchwords:	CORPORATIONS – membership, rights and remedies – class rights – where plaintiff's shares in company constitute a class under Corporations Act, s 246B – where company proposes to resolve to convert land and building it owns from company title scheme to strata title scheme – where plaintiff seeks a quia timet injunction to enjoin resolution – where proposed injunction leaves considerable room for interpretational argument – where defendant undertakes not to register a strata scheme that violates s 246B – where strata scheme potentially consistent with plaintiff's class rights – held, injunction refused.
Legislation Cited:	(CTH) Corporations Act 2001, s 140, s 246B (NSW) Strata Schemes Development Act 2015, s 9(1)
Cases Cited:	John Melick Investments Pty Limited v Harbour View Mansions Pty Limited [2016] NSWSC 1318 R v Macfarlane; ex parte O'Flanagan and O'Kelly (1923) 32 CLR 518 Wilson v Meudon Pty Ltd [2005] NSWCA 448; [2006] ANZ Conv R 93
Category:	Principal judgment
Parties:	John Melick Investments Pty Limited (plaintiff)

Harbourview Mansions Pty Limited (defendant)

Representation:	Counsel: EAJ Hyde (plaintiff) D Murr SC with HWM Stitt (defendant) Solicitors: Addisons Lawyers (plaintiff) Malouf Solicitors (defendant)
File Number(s):	2016/273546

Judgment

1. The defendant Harbourview Mansions Pty Limited is a home unit company. It is the registered proprietor of land at Point Piper on which is erected a six-storey block comprising some 21 apartments, which are occupied by the shareholders under a company title scheme. The objects of the company reflect the intention that it would acquire the land and building, and provide rights of occupation to the shareholders. Under the Articles of Association, the shares do not directly confer a right of occupation of a unit, but entitle their holder to a lease of a designated unit in the form prescribed in the First Schedule, which includes a term of 99 years.

2. The plaintiff John Melick Investments Pty Limited holds a parcel of 20,000 shares in the company, representing 9.6% of the issued shares, which entitle it to a lease of the penthouse and the garage associated with the penthouse ("the penthouse shares"). A lease in the prescribed form has been executed and registered, and on its expiry the plaintiff will, if still a shareholder, presumably be entitled to another such lease. The articles have the effect that, associated with its ownership of the penthouse shares, the plaintiff is entitled to appoint a director of Harbourview, and the rent payable by it is 9.6% of the amount fixed by the directors as reasonably necessary to cover certain specified expenses and outgoings of the company.

3. Many of the shareholders appear to consider that the effect of the articles – in particular, the manner in which outgoings are apportioned according to shareholdings, rather than size or value – results in the penthouse bearing an inequitably small proportion of the burden, and the other units commensurately an inequitably large share; and that its directorship gives the penthouse an unfair level of influence in control of the company's affairs. Those other shareholders have, for these – and perhaps other – reasons, explored how they might achieve what they consider more equitable arrangements – or in the terms which have been used in some of the correspondence, rid themselves of the "penthouse dragon". Conversion to strata title has been identified as a means by which this might be achieved, as under a strata scheme, levies would be apportioned according to unitholdings in the scheme, which in turn would reflect the relative values of the units. It appears that under such arrangements, the penthouse would bear more than 13%, rather than 9.6%, of the expenses. In addition, it would not have the right to appoint a director of the owners' corporation.

4. Notice was given of a motion for a resolution at the 2016 Annual General Meeting of the Company, to be held on 13 September 2016, that a new object be inserted in the Memorandum of Association, that object being "to do all such things and acts reasonably necessary and without undue delay to cause the Conversion of the Building from a company title scheme to a strata title scheme within the Building". The plaintiff sought an injunction to restrain the company from putting that resolution to the 2016 annual general meeting, and on 13 September 2016 McDougall J granted an interlocutory injunction. [1] The application was then put, and the injunction was granted, on the basis that the directors had provided insufficient information to the members for them to make a properly informed decision at the annual general meeting, McDougall J contemplated that the injunction might be varied or dissolved if the appropriate additional information were provided. His Honour referred specifically to the lack of information about the potential difficulties that would arise if a leaseholder such as JMI did not consent; the difficulties associated with increasing the financial burden on one or more units; and the doubt as to whether costs associated with investigating and converting to strata title could properly be recovered from shareholders via their portion of the rent.

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1. John Melick Investments Pty Limited v Harbour View Mansions Pty Limited [2016] NSWSC 1318 .

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5. On 25 October 2016, the plaintiff amended the summons to claim an injunction restraining the company, for such time as the plaintiff remains a shareholder, from proposing any resolution for the shareholders to resolve to convert the land and building known as Harbourview Mansions from a company title scheme to a strata title scheme, unless it has obtained the prior written consent of the plaintiff to undertake the conversion. It is that relief that the plaintiff now claims, on a final basis. The plaintiff says that any conversion to strata title will infringe its rights under the statutory contract which the articles found, the "class rights" attached to its penthouse shares, and its rights as lessee under its registered lease.

6. As to the statutory contract, *Corporations Act*, s 140 provides that a company's constitution has effect as a contract between the company and each member, and between the members, and that a member is not bound by a modification of the constitution made after the date on which they became a member so far as the modification increases the member's liability to pay money to the company (unless the member agrees in writing to be so bound):

140 Effect of constitution and replaceable rules

(1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

(a) between the company and each member; and

(b) between the company and each director and company secretary; and

(c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

(2) Unless a member of a company agrees in writing to be bound, they are not bound by a modification of the constitution made after the date on which they became a member so far as the modification:

(a) requires the member to take up additional shares; or

(b) increases the member's liability to contribute to the share capital of, or otherwise to pay money to, the company; or

(c) imposes or increases restrictions on the right to transfer the shares already held by the member, unless the modification is made:

(i) in connection with the company's change from a public company to a proprietary company under Part 2B.7; or

(ii) to insert proportional takeover approval provisions into the company's constitution.

7. It is not now in dispute, if it ever was, that the penthouse shares constitute a class for the purpose of *Corporations Act*, s 246B, and Article 44. [2] Section 246B relevantly provides as follows:

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2. Wilson v Meudon Pty Ltd [2005] NSWCA 448; [2006] ANZ ConvR 93.

246B Varying and cancelling class rights

(1) [If constitution sets out procedure] If a company has a constitution that sets out the procedure for varying or cancelling:

(a) for a company with a share capital — rights attached to shares in a class of shares; or

(b) for a company without a share capital — rights of members in a class of members;

those rights may be varied or cancelled only in accordance with the procedure. The procedure may be changed only if the procedure itself is complied with.

(2) [If constitution does not set out procedure] If a company does not have a constitution, or has a constitution that does not set out the procedure for varying or cancelling:

(a) for a company with a share capital — rights attached to shares in a class of shares; or

(b) for a company without a share capital — rights of members in a class of members;

those rights may be varied or cancelled only by special resolution of the company and:

(c) by special resolution passed at a meeting:

(i) for a company with a share capital of the class of members holding shares in the class; or

(ii) for a company without a share capital of the class of members whose rights are being varied or cancelled; or

(d) with the written consent of members with at least 75% of the votes in the class.

8. Article 44 provides as follows:

44. Whenever the issued capital is divided into different classes of shares then subject to the conditions of issue of any class the rights attached to any class may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class. ...

9. As the articles provide a procedure, in Article 44, for varying class rights, s 246B means that it is that procedure which applies. The requirement for consent under Article 44 is superimposed on the general procedure for amending the articles, so that a special resolution of the company in general meeting, as well as consent under Article 44, would be required. As the plaintiff holds all the penthouse shares, this means that the rights attached to those shares cannot be altered without its consent.

10. In its written submissions (of 17 August 2017), the company made an open offer to give acknowledgements, representations and undertakings to the Court that:

1. the penthouse shares constituted a class for the purposes of Article 44 and s 246B ;

2. the entitlements to occupy the penthouse and associated garage pursuant to a First Schedule lease were rights attached to a class of shares for the purposes of Article 44 and s 246B ;

3. those rights could only be varied in accordance with article 44 or s 246B , whichever is applicable;

4. there is no current proposal to register a strata scheme, but if it is the wish of a majority of members it will seek to formulate and implement a proposal to register a strata scheme; and

5. so long as JMI holds the penthouse shares, it will not implement a proposal to implement a strata scheme unless:

    1. it does not vary or cancel the class rights attached to those shares; or

    2. any decision to do so is taken in compliance with Article 44 and s 246B , whichever is applicable.

11. However, this was not acceptable to JMI, who contended that (1) it dealt only with class rights, and did not address rights under the statutory contract or lease; and (2) it left open the possibility that the company might propound a scheme which did not affect JMI's class rights, but would nonetheless infringe its leasehold rights.

12. The basis on which courts restrain actual or threatened infringements of legal rights was explained by Isaacs J in *R v Macfarlane; ex parte O'Flanagan and O'Kelly*, as follows: [3]

> But the law is clear that, to obtain an injunction to restrain an act alleged to infringe upon a right, it must be shown either that the act has infringed, or that, if persevered in, it is calculated to infringe, upon the right; that is, that the act if pursued to completion will be an invasion of the right relied on. It is not pretended that liberty or any other right has so far been interfered with. The nature of the application is, as Mr Watt very properly admitted, *quia timet*; that is, it is apprehended by the plaintiffs, in the first place, that their liberty will be interfered with. "But", said Lord Dunedin for the Privy Council in *Attorney-General for Canada v Ritchie Contracting and Supply Co* [1919] AC 999 at 1005, "no one can obtain a *quia timet* order by merely saying 'Timeo', he must aver and prove that what is going on is calculated to infringe his rights". In *Attorney-General v Manchester Corporation* [1893] 2 Ch 87 at 92 Chitty J said "The principle which I think may properly and safely be extracted from the *quia timet* authorities is, that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise".

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3. (1923) 32 CLR 518 at 538 .

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13. No right of the plaintiff is currently being infringed. Thus, the plaintiff seeks *quia timet* relief, and must show a strong case of probability that the apprehended infringement of its rights will, in fact, occur.

14. The injunction sought would restrain the company from *proposing* any *resolution of shareholders* to convert the property from a company title scheme to a strata title scheme, without the prior written consent of the plaintiff. There is not any resolution currently proposed to do so. On the other hand, it is clear enough that the majority of shareholders and directors are minded to do so, if they can find a way in which it can be done.

15. The legal event which would effect the subdivision of the property into strata lots (or strata lots and common property) is the registration of a strata plan. [4] A resolution of the company "to convert the property from a company title scheme to a strata title scheme" has no legal consequence in itself; it is a mere statement of policy, or at the highest an authority to the directors to lodge a strata plan for registration. Such a resolution would not of itself infringe any right of JMI, though the lodgement of a strata plan pursuant to it ultimately might.

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4. (NSW) Strata Schemes Development Act 2015, s 9(1) .

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16. It is not by any means clear that a decision, as a matter of policy, to convert to strata title would be beyond power. Such a step would apparently be within the scope of object (22) in the Memorandum, which provides as follows:

> (22) To promote and form other companies associations and societies of any nature for all or any of the objects mentioned in this Memorandum or for any objects similar thereto or allied therewith and to transfer to any such company all or any of the property of this Company and to take or otherwise acquire and hold shares stock debentures or other securities of any such company and to subsidise or otherwise assist the same.

17. No doubt, for the directors to lodge a strata plan for registration, some authority would be required, and such authority probably cannot be found in the present constitution. However, the injunction sought would not, in terms, restrain a resolution authorising the directors to lodge a strata plan, and on a contempt application there would be room for argument as to whether such a resolution fell within the scope of the injunction. Moreover, while a resolution granting such authority would create a reasonable apprehension that the directors would act on it, it would not of itself infringe any right of the plaintiff – although lodgement of a plan pursuant to it might do so.

18. Nor would the injunction sought, in terms, restrain a resolution to amend the constitution so as to permit conversion, and again there would be scope for argument on a contempt application as to whether such a resolution was caught. If such an amendment had the effect of altering the "class rights" attached to the penthouse shares, it would be ineffective without consent under Article 44. If it had the effect of increasing the plaintiff's obligation to pay money to the company, it would be ineffective without the plaintiff's consent under s 140(2) . But it is not apparent why the shareholders should be prohibited from considering it, as the first step in the multi-meeting process contemplated by Article 44 (or s 246B) ; it would have no effect unless and until the requisite consents were forthcoming.

19. It is conceivable that it may be possible to devise a means of converting to strata title which does not infringe the rights attached to the penthouse shares. If so, it is not apparent why the company should be enjoined from even proposing it. It is unlikely that a strata conversion that was inconsistent with JMI's leasehold rights would not also infringe its class rights, as the leasehold rights are themselves derived from the shares which entitle JMI to a lease in the prescribed form. But if somehow a scheme can be designed that, without infringing rights attached to the shares, nonetheless infringes the plaintiff's leasehold rights, then an injunction can be sought when the precise proposal is known. The decision should be made when a particular scheme is propounded, when it can be seen what its precise impact on JMI's rights, if any, will be.

20. It follows that not only is no right of the plaintiff presently being infringed, but a resolution of the kind sought to be restrained, to convert the property from a company title scheme to a strata title scheme, would not of itself infringe any right of the plaintiff, because it amounts to no more than

a statement of policy, or at the highest a grant of authority. Thus the plaintiff is not seeking to restrain an infringement of its rights, nor even a threatened infringement of its rights, but a step on the way to a possible infringement of its rights.

21. A case for a *quia timet* injunction is therefore not established. The plaintiff has no legal or equitable right to prevent the shareholders considering a resolution of the kind proposed, though – depending on the precise scheme if any that is propounded – it may have a right to prevent its implementation. It is no answer to invoke the consideration of convenience that this would require coming back to the Court; the convenience of not having to come back to court does not entitle a plaintiff to a *quia timet* injunction.

22. Moreover, the proposed injunction leaves considerable room for argument as to what it prohibits. It is undesirable to grant an injunction, which carries the sanction of committal for contempt, where its scope is ripe for future argument.

23. Reference was made from time to time to a claim for damages or equitable compensation, which claims are included in the amended summons. However, on what cause of action the plaintiff could presently be entitled to damages, where there has been no actual infringement of any legal or equitable right, is not apparent. If, as was suggested, the striking of a levy to cover costs associated with the proposed conversion and/or these proceedings inflicts a burden on the plaintiff, then (1) the defendant has acknowledged that the plaintiff ought not be required to contribute to its liability to pay the plaintiff's costs pursuant to orders previously made in these proceedings; (2) if it be contended that the resolution for a levy is otherwise beyond power, no relief to that effect has been sought in these proceedings; and (3) otherwise, there has been no actual infringement of the plaintiff's rights such as to found an entitlement to damages.

Conclusion

24. My conclusions may be summarised as follows:

25. No right of the plaintiff is presently being infringed. Moreover, a resolution of the company to convert the land and building known as Harbourview Mansions from a company title scheme to a strata title scheme will not of itself infringe any right of the plaintiff. An alteration of the constitution that affects the rights attached to the penthouse shares, or that increases the plaintiff's liability to pay money to the company, would be ineffective without the plaintiff's consent (under Article 44, or s 140(2), respectively). The proposed injunction would restrain consideration of a statement of policy or, at the highest, a grant of authority, and not a step that would effect any immediate infringement of the plaintiff's rights, although it is possible that steps subsequent to it, and in particular the registration of a strata plan, might – depending on the precise terms of any strata proposal – do so. Thus the plaintiff is not seeking to restrain an infringement of its rights, nor even a threatened infringement of its rights, but a step on the way to a possible infringement of its rights. The plaintiff has no legal or equitable right to restrain the company from considering a proposal for a strata conversion, though depending on the terms of any scheme propounded it might well be entitled to have the implementation of any such proposal restrained.

26. Accordingly, the Court notes that the defendant acknowledges that:

1. the groups of shares numbered 186,501 to 207,500 and 187,001 to 187,500 being the shares of the penthouse and the respective garage space referred to in Article 4(a) of the company's Articles of Association ("the penthouse shares") are classes of shares for the purposes of Article 44 and for the purposes of *Corporations Act* s 246B ;

2. the entitlements provided in article 4(b) to occupy:

    1. the penthouse home unit appurtenant to shares numbered 186,501 to 207,500; and

    2. the garage space appurtenant to shares numbered 187,001 to 187,500,

3. pursuant to a lease in the terms of the Memorandum of Lease in the First Schedule of the Articles are:

    1. rights respectively attached to classes of shares for the purposes of Article 44; and

    2. rights respectively attached to shares in classes of shares for the purposes of *Corporatio ns Act* s 246B ; and

4. the rights attached to those groups of shares, including the rights referred to in (2) above, can only be varied or cancelled in accordance with the procedure set out in Article 44 or *Corporations Act* s 2 46B , whichever is applicable.

27. The Court notes further that the defendant represents that:

1. there is no current proposal to register a strata scheme in relation to its land and building; but

2. if it is the wish of a majority of its members it will seek to formulate and implement a proposal to register a strata scheme.

28. The Court further notes the undertaking of the defendant to the Court that, for so long as the plaintiff holds the penthouse shares, it will not implement a proposal to register a strata scheme unless either:

1. it does not vary or cancel the class rights attached to those shares; or

2. any decision that varies or cancels the class rights attached to those shares is taken in compliance with the procedures set out in Article 44 or *Corporations Act* s 246B, whichever is applicable. A resolution of other decision that is subject to subsequent compliance with the applicable procedure will not breach this undertaking.

29. And the Court orders that:

1. the amended summons be otherwise dismissed.

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Endnotes

Decision last updated: 31 August 2017