

Supreme Court

New South Wales

Medium Neutral Citation:	Tan v The Owners Strata Plan 22014 (No 3) [2016] NSWSC 896
Hearing dates:	On the papers
Date of orders:	28 June 2016
Decision date:	28 June 2016
Jurisdiction:	Equity
Before:	Robb J
Decision:	See par 34 and 35
Catchwords:	COST ORDERS – third defendant sought indemnity from the first defendant owners corporation for her costs of the proceedings – first defendant was not initially capable of opposing plaintiffs’ application for leave to take proceedings in the name of the first defendant – court of its own motion joined the third defendant as a party to plaintiffs’ application – exceptional circumstances – principles of justice and fairness considered – court had already ordered the first defendant to indemnify the plaintiffs for their costs HELD court exercised discretion as to costs under Civil Procedure Act 2005 (NSW) , s 98 – first defendant to pay third defendant indemnity costs properly related to the third defendant responding to the plaintiffs’ application
Legislation Cited:	Civil Procedure Act 2005 (NSW)
Cases Cited:	Oates v Consolidated Capital Services Ltd [2009] NSWCA 183; (2009) 76 NSWLR 69. Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin [1997] HCA 6. Tan v The Owners Strata Plan 22014 (No 2) [2015] NSWSC 1920. Owners Strata Plan No 68372 v Allianz Australia Insurance Ltd (No 2) [2015] NSWSC 729. Wallersteiner v Moir (No 2) [1975] QB 373.
Texts Cited:	Ritchie’s Uniform Civil Procedure NSW
Category:	Costs
Parties:	Patrick Tian Teng Tan (first plaintiff) Ian Paterson Walters (second plaintiff) Rose Sok Kio Tan (third plaintiff) Owners Corporation Strata Plan No 22014 (first defendant) Whelan Property Group Pty Ltd (second defendant) Janette Daisy Porter (third defendant)
Representation:	Counsel: N Cotman SC (plaintiffs) D Russell (solicitor) (first and second defendants) D Hand (third defendant) Solicitors: Terrett Lawyers (plaintiffs) Chambers Russell Lawyers (first and second defendants) Mills Oakley Lawyers (third defendant)
File Number(s):	2014/176516
Publication restriction:	None

Judgment

1. On 17 December 2015, I published reasons for judgment in these proceedings on a number of costs questions: see [Tan v The Owners Strata Plan 22014 \(No 2\)](#) [2015] NSWSC 1920.
2. The reasons were primarily concerned with an application by the plaintiffs that the first defendant, the Owners Corporation, indemnify them in respect of their costs of the proceedings.

3. The plaintiffs made their application on the basis of the principle considered by the English Court of Appeal in Wallersteiner v Moir (No 2) [1975] QB 373. I considered the relevant legal principles at [\[90\]](#) to [\[118\]](#) of the earlier reasons.
4. Ordinarily, when an application is made that a corporation indemnify plaintiffs, who have commenced proceedings for the benefit of the corporation, or its members generally, in respect of their costs of the proceedings, there is a natural contradictor to the plaintiffs' application. In most cases, the natural contradictor will be the person or group who control the corporation, or who are members of the corporation who have taken some course in opposition to that desired by the plaintiffs.
5. The present case is exceptional. It concerned orders made by the Civil and Administrative Tribunal of New South Wales (NCAT) on 20 May 2014. The apparent effect of those orders was that the second defendant in these proceedings was appointed as the compulsory strata manager of the Owners Corporation, on the basis that the strata manager was empowered to exercise all of the functions of the Owners Corporation, including the functions of both the executive committee and the members in general meeting.
6. The effect of the NCAT orders appeared to be that the Owners Corporation had no power or authority to decide for itself whether or not to appeal the NCAT orders, or to challenge those orders by some other process.
7. Eventually, after several applications to the NCAT member who made the orders, retrospective corrections were made to the orders, which removed the incapacity of the members of the Owners Corporation in general meeting to decide for themselves whether or not the Owners Corporation should appeal from the orders made by NCAT, or to challenge those orders by some other process.
8. The exceptional aspect of these circumstances was that there was no one who was in a position to contradict the plaintiffs on their application, as it appeared to be beyond the power and the authority of the Owners Corporation, actuated by any persons who appeared to be able to control the actions of the Owners Corporation, to oppose the plaintiffs' application, other than the second defendant. The second defendant initially adopted the stance that it should not cause the Owners Corporation to appeal against the NCAT orders by which it had been appointed as managing agent, and that it had a conflict of interest in opposing the plaintiff's application.
9. On 27 June 2014, White J made an order that Ms Porter be joined in the proceedings as the third defendant. An order was also made that the plaintiffs' summons be served on each owner in the Strata Plan, together with the notice annexed to the orders, and all other lot owners were given an opportunity to apply to be joined as a party to the proceedings. None of the other lot owners made the application that they were invited to make.

10. Ms Porter was the natural lot owner to oppose the plaintiff's application, and was ordered by the court to be joined to the proceedings as a defendant, because she was the party who commenced the NCAT proceedings, and had obtained the benefit of the initial orders made by NCAT. Accordingly, she had an interest in contradicting the application made by the plaintiffs.
11. It is true that Ms Porter could have submitted to the order of the court, but then there would have been no contradictor to the plaintiffs' application.
12. Ms Porter remained active in the proceedings, although, as it has turned out, only in a conservative manner directed towards achieving the most expeditious and inexpensive resolution of the dispute that could be achieved.
13. For the reasons that I set out in detail in my earlier judgment, I found that it was appropriate for the court to make an order against the Owners Corporation in favour of the plaintiffs, that they be indemnified in respect of their costs of these proceedings. However, following an analysis of the history of the proceedings (see [163]), I ordered that the indemnity should be limited to costs incurred by the plaintiffs that were directly connected to the proceedings.
14. I gave the parties an opportunity to bring in short minutes of order, and made orders accordingly on 11 February 2016.
15. These reasons for judgment are concerned with the issue of whether the court should order the Owners Corporation to indemnify Ms Porter for her costs, in a manner generally equivalent to the way in which it has been ordered to indemnify the plaintiffs for their costs.
16. I dealt with this issue at [178] to [201] of my earlier reasons. In particular, at [200], I concluded that I could not see why, if the court has jurisdiction to order the Owners Corporation to indemnify the plaintiffs in respect of their legal costs, the court does not also have power to order it to indemnify Ms Porter for her legal costs, as the contradictor effectively appointed by the court, where the appointment was not made on her own motion.
17. That conclusion reflected what I have described above as the exceptional nature of the present case. There was no natural contradictor to the plaintiffs' application, and unless the application was to go without contradiction, a person such as Ms Porter, with an appropriate interest to oppose the application, had to be appointed by the court as a defendant, without her having made an application to be joined to the proceedings. Logically, the source of the power in the court to make an order against the Owners Corporation in favour of the plaintiffs should apply equally to an order made in favour of Ms Porter.
18. As I stated at [198], I have given the Owners Corporation and Ms Porter an opportunity to make further submissions on the issue of the appropriateness of the court making an order that the

Owners Corporation indemnify Ms Porter in respect of her costs of the proceedings. I took that course because it appeared to me that the parties had not had an opportunity to address the course that I have concluded was the most appropriate one for the court to take.

19. The Owners Corporation has delivered submissions in which it opposes the court making an order that it indemnify Ms Porter in respect of her costs. In essence, the Owners Corporation submitted that there is no authority that the principle in [Wallersteiner](#) can apply to a contradictor effectively appointed by the court in representative proceedings. So far as I am aware, that submission is technically correct. However, the question is whether the principle can, and should, be extended, to the situation where the court of its own motion appoints a contradictor, in what I have described as the exceptional circumstances where it appears that the Owner's Corporation lacks the power to respond to the plaintiffs' application.
20. The first reason why I would reject the submission is because there is no logical difference between the positions of the plaintiffs and Ms Porter in the present case that is material to the issue of whether the Owners Corporation should be ordered to indemnify them in respect of their costs of the proceedings. It is true that the plaintiffs wanted to challenge the orders made by NCAT, and Ms Porter wished to support them. Although only the plaintiffs wished to cause the Owners Corporation to appeal the NCAT orders by means of a representative action, they also sought to cause the Owners Corporation to seek judicial review of the NCAT orders in the Supreme Court. Ms Porter, had she sought to do so, could have applied to commence representative proceedings in the Supreme Court on behalf of the Owners Corporation for judicial review in the nature of a declaration that the orders made by NCAT were valid. Although the structure of the representative proceedings that the plaintiffs, on the one hand, and Ms Porter, on the other, may have sought to commence on behalf of the Owners Corporation may not have been identical, there is an essential symmetry between the positions of the members of the Owners Corporation who may have wished to challenge the NCAT orders on its behalf, and the members who may have wished to uphold those orders.
21. Secondly, Campbell JA in [Oates v Consolidated Capital Services Ltd](#) [2009] NSWCA 183; (2009) 76 NSWLR 69 at [86] to [91] analysed the reasoning of the English Court of Appeal in [Wallersteiner](#) : see earlier judgment at [101] . His Honour noted, at [88], "that all three members of the Court of Appeal approved a procedure that was adapted from that available to a trustee seeking directions of the court concerning the conduct of litigation". To the extent that an analogy is drawn with the position of a trustee seeking directions, to support the principle in [Wallersteiner](#) , support for the proposition in the present case that the Owners Corporation may also be ordered to indemnify Ms Porter, may be found in the practice of the court to order, in appropriate cases, that the costs of all parties be paid out of the estate, in cases concerning the administration of trusts and estates: see Ritchie's Uniform Civil Procedure NSW at [7.12.10].
22. I do not accept the Owners Corporation's argument that it should not be ordered to indemnify Ms Porter as to her costs, because Ms Porter could have submitted to the order of the court. That would not have solved the problem of the absence of a contradictor, which I consider to be a considerable problem in the present case, as the issues were novel, and would have called for comprehensive assistance to be given to the court, if it had been required to decide those issues. As it has happened, the dispute resolved before it was necessary for the court to make a decision.

If Ms Porter had submitted, it would have been necessary for the court to address the need to find an appropriate contradictor.

23. I also do not accept the Owners Corporation's submission that in reality, Ms Porter was simply seeking to preserve the benefit of her success before NCAT. That is a collateral advantage she would have obtained, if the court had been required to determine the plaintiffs' application, and rejected it. However, as I have explained above, the court ordered that Ms Porter be joined as the third defendant, and I am satisfied that Ms Porter proceeded in a conservative and helpful manner in order to facilitate a proper resolution of the dispute.
24. In the circumstances, I have concluded that it is fair and just for the court to exercise its power under s 98 of the [Civil Procedure Act 2005 \(NSW\)](#) to order Owners Corporation to indemnify Ms Porter for her costs of the proceedings: see [Owners – Strata Plan No 68372 – v Allianz Australia Insurance Ltd \(No 2\)](#) [2015] NSWSC 729 per Ball J at [17], where his Honour said: “Whether the court should exercise its discretion to depart from the general principle in any particular case depends on whether it is in the interests of justice and fairness to do so: [Commonwealth of Australia v Gretton](#) [2008] NSWCA 117 at [121] per Hodgson JA; [Turkmani v Visvalingam \(No 2\)](#) [2009] NSWCA 279 at [13] per Hodgson JA (with whom Beazley and McColl JJA agreed)”.
25. I should add that I do not regard this as being a case where the principle in [Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin](#) [1997] HCA 6 applies. This is not a case where the proceedings have settled, or the need for their continuation disappeared, before the court has had an opportunity to decide the dispute on the merits. This is a case where the plaintiffs obtained an indemnity for their costs of seeking to institute representative proceedings on behalf of the Owners Corporation, and Ms Porter was appointed by the court to respond to that application, albeit that she had a personal interest in doing so. See [126] to [133] of my earlier reasons in relation to the non-application of the *Lai Qin* principle to the plaintiffs' claim.
26. The Owners Corporation submitted in the alternative, that by parity of reasoning with the qualification imposed by the court on the order that the Owners Corporation indemnify the plaintiffs in respect of their costs, any indemnity ordered in favour of Ms Porter should not extend to any phases of the proceedings where Ms Porter was acting primarily in her own interests.
27. The Owners Corporation put this alternative submission first, on the basis that the indemnity should not extend in favour of Ms Porter for “her costs of those same identified phases of the proceedings”; being the phases in respect of which the plaintiffs did not receive an indemnity.
28. While I agree in principle that Ms Porter should not be indemnified in respect of costs, if any, that she incurred in any period when there was no need for her to incur costs for the purposes of furthering the proceedings, I am not aware of any such costs incurred by her. The phases referred to in the Owners Corporation's submissions are set out at [163] of my earlier reasons. There, I analysed the relatively detailed evidence that was before the court concerning the plaintiffs' activities, and was able to distinguish periods in which legal costs that they incurred should in principle relate to the furtherance of their application, on the one hand, and the pursuit of their

own interests, on the other. Even then, it had to be acknowledged that the purpose for which the plaintiffs incurred costs was not clearly defined by the individual phases, and in some phases, costs may have been incurred for both purposes. In contrast, there is not the equivalent evidence in the case of Ms Porter, and it is not clear whether the different phases that were relevant in the case of the plaintiffs are meaningful to the consideration of the legal costs incurred by Ms Porter, for which she should be indemnified by the Owners Corporation.

29. There is the additional consideration that Ms Porter was a defendant, and her need to incur legal costs may have been in response to steps taken by the plaintiffs. It is possible that Ms Porter may be able to justify legal costs incurred by her as being properly responsive to steps taken by the plaintiffs, even though the plaintiffs themselves are not entitled to an indemnity, because on balance they were acting in their own personal interests.

30. In these circumstances, all the court can do is to order the Owners Corporation to indemnify Ms Porter in respect of her legal costs properly incurred in defending the plaintiffs' application. If, which is presently not known, Ms Porter seeks to be indemnified for costs that were not properly incurred in defending the plaintiffs' application, that will be a matter for the relevant costs assessor to decide.

31. I do not accept the Owners Corporation's submission that Ms Porter should not be indemnified for what it described as her failed application for her costs to be paid by the plaintiffs. It was proper for Ms Porter to make an application for her costs to be paid. In this respect, I accept her submission that the one party who should not be called upon to bear costs in these proceedings is Ms Porter. She framed her application as an application that the plaintiffs pay her costs. The plaintiffs sought an order that the indemnity to be given to them by the Owners Corporation include their liability to pay any costs to Ms Porter. In these circumstances, it appeared to me to be appropriate to order the Owners Corporation to indemnify Ms Porter directly. The manner in which Ms Porter framed her application did not increase her costs of the application.

32. The final submission made by the Owners Corporation is that it, rather than Ms Porter, was the effective contradictor of the plaintiffs' application from the time of the filing of the motion by the fourth defendant in the proceedings to overturn the consent orders made by the court on 26 August 2014, as discussed at [13] to [17] of my earlier reasons. I do not see how the application to set aside the consent orders based upon the apparent agreement that the Owners Corporation would indemnify the plaintiffs for their costs of the application has any bearing on the reasonableness of Ms Porter incurring legal costs in response to the plaintiffs' application. What relevantly happened is that, by two successive steps, NCAT revised its initial orders for the purpose of ensuring that the strata manager that it appointed did not have the exclusive function of the members of the Owners Corporation in general meeting. I discussed the effect of these revisions at [I63(2)] of my earlier reasons. At the point in time when the plaintiffs ought to have realised that the Owners Corporation had the power to make its own decisions, the justification for the plaintiffs pursuing their application changed. The same may have been true for Ms Porter, but as she was a defendant, her position was necessarily responsive to the steps taken by the plaintiffs.

33. As was the case for the Owners Corporation's argument based upon what has been described as the phases in the history of these proceedings, the evidence is not detailed enough to enable the court to formulate any precise limitation on the indemnity that the Owners Corporation should give to Ms Porter. Ms Porter may be able to justify incurring legal costs even after it became clear that the Owners Corporation could make its own decisions, provided those costs were necessary and reasonable, and flowed from the fact that Ms Porter remained a defendant, and was entitled to incur costs in bringing the proceedings to a proper conclusion.

34. I therefore order the Owners Corporation to indemnify Ms Porter in respect of her costs of these proceedings, where such costs were reasonably incurred in responding to the application made by the plaintiffs, and in bringing the proceedings to an end.

35. I order that any remaining exhibits and documents produced on subpoena or notice to produce may be returned in accordance with the Rules.

Decision last updated: 05 July 2016