

Supreme Court

New South Wales

Medium Neutral Citation:	The Owners – Strata Plan 70030 v Decon Australia (No 2) [2016] NSWSC 21
Hearing dates:	1 February 2016
Date of orders:	01 February 2016
Decision date:	01 February 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Order plaintiff to pay second to fifth defendants' costs of the plaintiff's amended notice of motion. Order that first defendant's notice of motion be dismissed with costs. No order as to costs of second to fifth defendants' amended notice of motion.
Catchwords:	COSTS — plaintiff successful in notice of motion – undue prejudice suffered by defendants — plaintiff ordered to pay second to fifth defendants' costs of motion – first defendant did not appear, ordered to pay plaintiff's costs of motion
Category:	Costs
Parties:	The Owners – Strata Plan No 70030 (Plaintiff) Decon Australia Pty Ltd (First Defendant) Eissa Soliman Tadros (Second Defendant) Afaf Aziz Tadros (Third Defendant) Shawki Hanna Gad (Fourth Defendant) Lily Aziz Gad (Fifth Defendant)
Representation:	Counsel: D Feller SC / I D George (Plaintiff) T J Davie (Second to Fifth Defendants) Solicitors: Spinks Elphick Ho (Second to fifth defendants) Peter Merity Solicitor Pty Limited (Plaintiff)
File Number(s):	2014/179564

Judgment (ex tempore – revised 1 february 2016)

1. **HIS HONOUR:** For reasons I gave earlier today, I concluded that the plaintiff Owners Corporation should have the leave that it sought to amend its list statement and to rely on certain specified evidence. I concluded further that the competing notice of motion from the second to fifth defendants, the developers, should fail. I expressed the tentative view that notwithstanding those outcomes, the Owners Corporation should pay the developers' costs of its amended notice of motion.
2. The starting point is to observe that the Owners Corporation's notice of motion was listed for hearing on 9 October 2015. It did not proceed to finality on that day. The reason it did not was that the Owners Corporation's basal proposition, that the further evidence it was seeking to put on was no more than fleshing out the case that had been made throughout in its evidence, was totally opaque. It was for that reason (and I say

this notwithstanding the submissions of Mr Feller of Senior Counsel to the contrary) that I required the Owners Corporation to put on the schedule that, in my view, ultimately demonstrated that the Owners Corporation was continuing to put, and to flesh out further, the one case as to particulars of damage. In that sense, and again despite the submissions of Mr Feller to the contrary, the schedule was powerful and perhaps conclusive on the question of leave.

3. The next point to note is that although the developers' notice of motion failed, it failed simply because the Owners Corporation's notice of motion succeeded. It was in effect defensive: the obverse of the Owners Corporation's notice of motion. The view to which, ultimately, I came on the Owners Corporation's notice of motion necessarily dictated the fate of the developers' notice of motion.
4. The third point to note is that I was satisfied, and remain satisfied, that making the orders I have will cause very real and distinct prejudice to the developers. It is only because I concluded that there was substantial (although incommensurable) prejudice on the other side that I was able to come to the conclusion that I did.
5. The fourth point to note is that, as I said earlier, the conduct of the proceedings, from the time they were filed in the CTTT up until the time they came to this Court, on behalf of the Owners Corporation has been appalling. The total failure to come to grips with the case and to seek to prove it by proper evidence has led to the situation where the Owners Corporation was required to seek the indulgence of the Court that it did.
6. The fifth point, following from the fourth, is that the Owners Corporation was required to seek an indulgence of the Court. There were in place directions of the CTTT for the filing of evidence. Those directions expired over three years ago. There was no basis on which the Owners Corporation could file and rely upon further evidence, without directions of the Court permitting it to do so. The same may be said of the application to amend the list statement, which (by annexing the schedule) made the case relatively transparent and did so for the very first time.
7. It may be correct to say, as Mr Feller submitted, that if the Owners Corporation had had its schedule available from the very beginning, and had conducted the application from the very beginning as it did today, the developers' position would have been the same. The answer to that is, simply, that it is not in the power of the Owners Corporation to rely on that argument in circumstances where it did not act in the way speculated.
8. The final point to note is that the developers own six of the fifteen lots in question. Leaving aside niceties of unit entitlement, the likelihood is that the developers in any event are paying about 40 per cent of the costs incurred by the Owners Corporation, as well as the costs that they themselves will incur. In circumstances where in my view their opposition to the Owners Corporation's notice of motion was justifiable, and where the questions of prejudice were very real, it seems to me to be utterly unconscionable to require them to pay as well the remaining 60 per cent.

9. In all the circumstances, I remain of the view expressed by me earlier. This is not a case where costs ought to follow the event of the Owners Corporation's amended notice of motion. It is, rather, a case where, because of the facts I have listed, the Owners Corporation ought pay the developers' costs of that notice of motion.

10. In circumstances where the developers' notice of motion was a reflex of the Owners Corporation's, I think that sufficient justice as to costs is done if I make no order as to the costs of that notice of motion.

11. That leaves the position of the first defendant, Decon. Decon did not appear today. It did appear on the first day of hearing of the notice of motion. I have very grave doubt that a costs order in favour of the Owners Corporation against Decon is likely to produce any tangible result. Nonetheless, in circumstances where the particular problems as to prejudice that were so strongly raised as between the Owners Corporation and the developers did not apply (on the evidence at least) between the Owners Corporation and Decon, I think that the Owners Corporation should have its costs against Decon.

12. I make the following further orders:
 1. Order the plaintiff to pay the second to fifth defendants' costs of the plaintiff's amended notice of motion.
 2. Order the first defendant to pay the plaintiff's costs of that notice of motion.
 3. Make no order as to the costs of the second to fifth defendants' amended notice of motion filed in court today.
 4. Dismiss the first defendant's notice of motion and order to pay the plaintiff's cost of that notice of motion.

Decision last updated: 03 February 2016