The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602 - [2016] NSWSC 496

Supreme Court

New South Wales

Medium Neutral Citation:	**The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602 [2016] NSWSC 496**
Hearing dates:	17 February 2016; 1 April 2016; thence on the papers
Decision date:	22 April 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Rulings made as to outstanding matters
Catchwords:	JUDGMENTS AND ORDERS - matters arising from earlier judgment – whether further consideration should be given to claims not developed at hearing – reconciliation of expenses incurred by parties after date the subject of evidence at hearing – quantification of reasonable costs incurred by owners corporation under strata management statement
Legislation Cited:	Civil Procedure Act 2005 (NSW) Contracts Review Act 1980 (NSW) Strata Schemes Development Act 2015 (NSW) Strata Schemes Development Bill 2015 (NSW) Strata Schemes Management Bill 2015 (NSW)
Cases Cited:	The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602 [2015] NSWSC 1981
Category:	Consequential orders (other than Costs)
Parties:	Parties in 2013/239085: The Owners – Strata Plan No 74602 (Plaintiff) Eastmark Holdings Pty Ltd (In Receivership) (First Defendant) 1 Denison Street Holdings Pty Ltd (In Receivership) (Second Defendant) Strata Associates Pty Limited (Fourth Defendant) Savills (NSW) Pty Limited (Fifth Defendant) Parties in 2013/340426: Eastmark Holdings Pty Ltd (First Plaintiff) 1 Denison Street Holdings Pty Ltd (Second Plaintiff) The Owners – Strata Plan No 74602 (Defendant)
Representation:	Counsel in 2013/239085: F Corsaro SC with E Peden (Plaintiff) A Leopold SC with E Holmes (First and Second Defendants) K Rees SC with A Barnett (Fourth Defendant) M McCulloch SC with R Notley (Fifth Defendant) Solicitors in 2013/239085: Colin Biggers & Paisley (Plaintiff) Clayton Utz (First and Second Defendants) Kennedys (Fourth Defendant) Wotton + Kearney (Fifth Defendant) Counsel in 2013/340426: A Leopold SC with E Holmes (First and Second Plaintiffs) F Corsaro SC with E Peden (Defendant) Solicitors in 2013/340426: Clayton Utz (First and Second Plaintiffs) Colin Biggers & Paisley (Defendant)
File Number(s):	SC 2013/239085SC 2013/340426

Judgment

1. I gave judgment in this matter on 24 December 2015: *The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602* [2015] NSWSC 1981.

2. These reasons deal with four matters which were reserved for further consideration.

3. I shall use the same abbreviations as in my judgment of 24 December 2015.

The Owners Corporation's claim for relief under the Contracts Review Act 1980 (NSW)

4. The Owners Corporation sought relief under the *Contracts Review Act* to vary the terms of the SMS.

5. At [305] of the judgment, I indicated I was prepared to grant such relief in respect of the Switchboard C issue.

6. In that regard, it is common ground that I should order that the SMS be varied as set out at [39(a) to (e)] of Eastmark's further submissions of 23 March 2016.

7. I then said:

> "306 I do not at present feel able to draw any other conclusions as to how, if at all, the SMS should be varied.
>
> 307 In part that is because of the deficiencies in the evidence to which I have referred. In part it is because the Owners Corporation has simply addressed no submissions to me about the particular changes it contends should be made.
>
> 308 What I propose to do is invite submissions from the parties as to how this aspect of the matter is to be progressed.
>
> 309 One possibility is that the parties be directed to mediation on this topic and that, absent agreement following such mediation, the matter be referred out for decision."

8. Having now received further submissions from the parties, I am not persuaded that I can, or should, draw any further conclusions concerning the terms of the SMS.

9. The Owners Corporation submitted that, in my 24 December 2015 judgment, I did not deal with the claim by the Owners Corporation that the SMS be varied so as to:

    1. reduce the allocation to the Owners Corporation of costs of building management services from 65 per cent to 25 per cent;

2. reduce the allocation to the Owners Corporation of the costs of repairs and maintenance from 100 per cent to 47 per cent;

3. reduce the allocation to the Owners Corporation of the costs of strata management services costs from 65 per cent to 25 per cent; and

4. vary the allocation of voting rights of the lot owners (currently 1 vote to each lot owner) so that votes be allocated "to those lots that have an interest and a liability in relation to a Shared Facility and/or in the proportion of their contributions having as right to vote" (to adopt the language of the Owners Corporation's submissions of 9 March 2016).

10. But, at the hearing, the Owners Corporation advanced no submissions as to these matters, beyond the bare assertion that the current provisions were not in the Owners Corporation's "best interests".

11. I have determined the issues raised by the Owners Corporation in respect of the *Contracts Review Act* as far as I can.

12. The fact that I was not able to draw any conclusions other than those set out in my reasons of 24 December 2015 is a consequence of the manner in which the Owners Corporation's case was presented.

13. In those circumstances, I am not persuaded that I should now order the parties to mediation.

14. The Owners Corporation drew my attention to the fact that the New South Wales Parliament has passed the Strata Schemes Management Bill 2015 and the Strata Schemes Development Bill 2015. The Owners Corporation submitted that the *Strata Schemes Development Act 2015* (NSW) is anticipated to come into force on 1 July 2016.

15. I fail to see what relevance that development has to the task before me. I have determined the Owners Corporation's claim under the *Contracts Review Act* to the extent that I am able.

16. It must now otherwise be dismissed.

The Levy Proceedings

17. In the Levy Proceedings, I found that, subject to the deductions referred to at [753] and [754] of the judgment, and the possibility of changes because of post 30 June 2014 events, Eastmark had made out its claim in the Levy proceedings.

18. The amount claimed by Eastmark was $2,010,286.35.

19. Deduction of the figures referred to at [753] and [754] of my judgment leaves a net amount due of $110,726.78.

20. The question is, what adjustment should be made to that figure to reflect payments made by Eastmark and by the Owners Corporation on account of BMC expenses incurred since 30 June 2014?

21. On behalf of Eastmark, Mr Ryan Eagle, a partner of Ferrier Hodgson, conducted a reconciliation from which he has concluded that, since 30 June 2014:

    1. the Owners Corporation has made total payments of $664,175.81 and has underpaid by $220,012.73; and

    2. Eastmark has made total payments of $931,881.09 and has overpaid by $143,071.17.

22. There is no dispute between the parties as to the matter in [21(b)].

23. As to the matter in [21(a)], the Owners Corporation has adduced evidence from Mr Robert Macdonald, of ML Financial Services Pty Limited who, while generally agreeing with Mr Eagle's analysis, has identified a number of payments made by the Owners Corporation in respect of shared facilities that, in his opinion, should also have been taken into account by Mr Eagle.

24. In the result, it is Mr Macdonald's opinion that the Owners Corporation has underpaid $90,970.41 (rather than $220,012.73 as opined by Mr Eagle).

25. I asked the parties for assistance as to how I was to reconcile the competing opinions of Messrs Eagle and Macdonald, bearing in mind that the exhibit to Mr Eagle's affidavit comprises almost six hundred pages.

26. In response, I have received high-level submissions that, in effect, invite me to myself engage in a detailed analysis of the kind not to be found in those submissions.

27. I am not prepared to take that course.

28. If the parties cannot otherwise come to an agreement about this matter, I will direct that Mr Eagle and Mr Macdonald confer and endeavour to agree on the result.

29. If they are not able to agree I will refer the matter out for decision by a third party.

30. So far as concerns the Owners Corporation's claim for damages against Eastmark and Denison Street, I made these observations at [310] to [315] of my judgment of 24 December 2015:

> "310 The Owners Corporation seeks damages from Eastmark and Denison Street.
>
> 311 However, its submissions on this question were, once again, barely developed and consisted of little more than a reference to alleged breaches of terms defined in the pleadings as the "Pre-Dated Term", the "Reconciliation Term" and the "Financial Documentation Term".
>
> 312 The submissions state that the "relevant quantum is outlined" in an attachment to the submissions.
>
> 313 That attachment appears to assume the correctness of calculations performed by Mr Gray. Thus, the calculations assume the correctness of much evidence which has been challenged.
>
> 314 I will return to the question of the damage that the Owners Corporation has shown when considering the detailed submissions made on that topic by Ms Rees on behalf of Strata Associates.
>
> 315 I will invite submissions from the parties as to what, if anything, needs to be done to finalise this aspect of the matter. Once again, one possibility is that the parties be directed to mediation on this topic and, absent agreement, the matter be referred out for decision."

31. In relation to the Owners Corporation's claim for damages against Strata Associates, I found against Strata Associates in relation to the electricity recoveries issue (at [585 ff]).

32. However, Strata Associates' liability to the Owners Corporation is limited in the manner I summarise at [594].

33. In any event, the total amount of the invoices for electricity recoveries ($993,218.45) is to be deducted from the Owners Corporation's liability to Eastmark in the Levy Proceedings (see the judgment at [753].

34. In the Levy Proceedings, Eastmark seeks an order pursuant to s 90(2) of the *Civil Procedure Act 2005 (NSW)* that the amounts referred to at [753] and [754] of the judgment (which include the amount of electricity recoveries) be set off against the amount to which it is otherwise entitled in the Levy Proceedings.

35. I propose to make such an order.

36. It will follow that the Owners Corporation has suffered no damage as a result of the manner in which Strata Associates dealt with electricity recoveries.

37. In those circumstances, I see no reason to enter a judgment in favour of the Owners Corporation against Strata Associates, even for the contractually limited figure that might otherwise have been recoverable by reason of the electricity recoveries issue.

38. In my opinion, the Owners Corporation has failed to establish an entitlement to any remedy against Strata Associates (other than, perhaps, as to costs; a matter about which the parties agree I should defer consideration pending final resolution of the issues the subject of these reasons).

The Owners Corporation's claim expenses under cl 27.3 of the SMS

39. At [613] to [748] of my reasons of 24 December 2015, I dealt with Eastmark's and Denison Street's cross-claim concerning the Relocation Proposal (contained in the 9 August 2013 Aurecon Report)

40. Under cl 27.3 of the SMS, Eastmark must pay the Owners Corporation's reasonable costs of complying with its obligations under cl 27 to consider proposals such as the Relocation Proposal.

41. The Owners Corporation's claim in these proceedings did not concern its consideration of the Relocation Proposal, but rather its consideration of an earlier (albeit similar) proposal.

42. In that regard, the Owners Corporation stated in its submissions on this question:

> "The Owners' Corporation claims its costs up to 8 August 2013. On that date Eastmark issued a new development proposal, that was said to replace the Development Proposal. For the sake of clarity, the Owners' Corporation reserves its rights to claim its costs incurred by reason of the 8 August 2013 proposal, which is a separate process not relevant to the claim made in the Commercial List Statement."

43. At [746] of my judgment I referred to an undertaking given to the Owners Corporation by Eastmark and Denison Street on 2 September 2015 to pay the Owners Corporation's reasonable costs under cl 27 and referred to what I understood to be an agreement between the parties that the assessment of "those costs" should be referred to an appropriately qualified referee.

44. Further, on 17 February 2016, I ordered that the Owners Corporation provide a written outline of its claim under cl 27.3 of the SMS for its costs of considering both the 2011 and the 2013 proposals.

45. Nonetheless, the fact remains that the only claim that the Owners Corporation makes in these proceedings is for its costs of considering the 2011 proposal. It has only made submissions concerning that claim.

46. Whether, in the events that have happened, the Owners Corporation would be prevented by an *A nshun* estoppel from, in later proceedings, claiming its costs of considering the 2013 proposal, is a matter that will require consideration if and when the Owners Corporation makes any such claim.

47. During the hearing, the parties informed me that I would not need to deal with the quantification of the Owners Corporation's reasonable costs and, as indicated at [748] of the judgment, the question would be referred out.

48. After delivery of judgment, the parties asked me to deal with the question.

49. I have found that task more difficult than I expected.

50. The Owners Corporation submits that it is entitled to recover "any expense" it incurred in assessing "its legal and factual position" so far as concerned Eastmark's 2011 proposal.

51. I do not accept that submission. Clause 27.3 entitles the relevant BMC member to its reasonable costs; not any costs. To be recoverable the expenses must, first relate to consideration of Eastmark's proposal and, second, must be reasonable.

52. In its submissions in chief on this question, the Owners Corporation claimed all of the amounts the subject of:

    1. 11 invoices (for a total of $213,445.28) rendered to it to it by its then solicitors, Henry Davis York between 28 February 2012 and 12 February 2013;

    2. three invoices from counsel (Hutley SC and McGrath) totalling $37,633.75; and

    3. three invoices from experts totalling $55,078.38.

53. Eastmark accepts that it was reasonable for the Owners Corporation to obtain advice from solicitors, counsel and experts.

54. However, it disputes that the amounts claimed are reasonable.

55. The Owners Corporation has withdrawn its claim for two of the Henry Davis York invoices (totalling $59,076.97) following Eastmark's objection that there were no "attached details" to those invoices.

56. The remaining Henry Davis York invoices contain a generalised description of the work done together with what appears to be the contents of the relevant solicitor's time costing records in relation to individual items of work done.

57. There are numerous such entries. There are many narrative entries that appear not to relate to consideration of the relevant proposal.

58. Without conducting an exercise akin to that of a costs assessor (which would involve consideration of more than Henry Davis York's invoices and, at least to some extent, consideration of Henry Davis York's work product) I am not able to come to any reliable conclusion as to what proportion of the fees charged fall within cl 27.2 of the SMS.

59. As to counsels' fees, there is in evidence an opinion prepared by Hutley SC and McGrath concerning the proper construction of cl 27 of the SMS.

60. As I pointed out in my 24 December 2015 judgment (at [683]), cl 27 is drawn awkwardly in a number of respects. For that reason, I accept it was reasonable for the Owners Corporation to seek counsels' advice as to that question.

61. Whether, however, counsels' fees in the amount claimed are reasonable is a matter about which I am not in a position to make any judgment. The narrative set out in at least one of counsel's invoices suggests matters other than the opinion were charged for.

62. As to the fees claimed for experts, ultimately the Owners Corporation persisted only with a claim for the fees of DP Martin Pty Ltd, quantity surveyors, in the sum of $18,700. The invoice from that company states that the fee was charged for 68 hours of quantity surveying services "in connection with further 'consent' investigation". I do not know why a quantity surveyor needed to be engaged to consider Eastmark's proposal. Nor can I assess whether the work done and fee charged is reasonable.

63. The task that the parties have invited me to undertake is one that must be carried out with a very broad brush.

64. Nonetheless, I only have before me the invoices submitted to the Owners Corporation by the relevant services providers. I am not able to draw any precise conclusion as to what fees are reasonably recoverable by the Owners Corporation; save that it is not the amount the Owners Corporation is claiming.

65. In those circumstances, I propose to give the parties a choice.

66. I am prepared to make an assessment of the reasonable costs recoverable by the Owners Corporation at $100,000.

67. If one or other of the Owners Corporation and Eastmark is not prepared to accept that figure, then I propose to order that the question be referred to a costs assessor, on the basis that the costs of that assessment follow the event. That is, if the costs assessor's conclusion is that the fees are $100,000 or more, then the costs of the assessment are to be borne by Eastmark. If the result of the assessment is that the costs are less than $100,000, then the costs of the assessment are to be borne by the Owners Corporation.

68. The parties should let my Associate know of their election by 5pm on 28 April 2016.

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Decision last updated: 22 April 2016