The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602 - [2016] NSWSC 558

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 558**
Hearing dates:	29 April 2016
Decision date:	04 May 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Owners Corporation to bear costs of proceedings apart from those incurred in relation to the Switchboard C issue
Catchwords:	JUDGMENTS AND ORDERS – matters arising from earlier judgments; COSTS – where plaintiff only successful in relation to one issue – whether Sanderson order should be made concerning costs of the fourth defendant
Legislation Cited:	Civil Procedure Act 2005 (NSW) Contracts Review Act 1980 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Coombes v Roads and Traffic Authority (No 2) [2007] NSWCA 70 Schipp v Cameron (Supreme Court (NSW), Einstein J, 12 October 1998, unrep) The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602 [2016] NSWSC 496 The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602 [2015] NSWSC 1981 Vucadinovic v Lombardi [1967] VR 81
Category:	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):	SC2013/239085 SC2013/340426

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. I gave a further judgment on 22 April 2016 dealing with certain matters reserved for further consideration: *The Owners – Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners – Strata Plan 74602* [2016] NSWSC 496.

3. These final reasons deal with further matters arising from those judgments, and the question of costs. I will use the same abbreviations as in my judgment of 24 December 2015, which I will call "the First Judgment". I will refer to my judgment of 22 April 2016 as "the Second Judgment".

The Levy Proceedings

4. In the Second Judgment I said, in relation to the question of post 30 June 2014 payments, that I proposed to direct Mr Eagle and Mr Macdonald to confer and endeavour to resolve their differences and that, if they could not, I would refer out for decision the issues that divided them (see [17] to [29]).

5. The Owners Corporation and Eastmark have now reached agreement as to those matters and also as to a further amount of $31,039.09 that Eastmark has paid since February 2016.

6. The result is that the Owners Corporation and Eastmark agree that the total amount that the Owners Corporation has underpaid since 30 June 2014 is $215,149.41 for the period up to 16 February 2016 and $31,039.09 for the period from 17 February 2016 to date.

7. Those figures will be incorporated in the final orders that I will make.

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

8. In the Second Judgment I gave the parties the option of either accepting the figure of $100,000, as the amount of the Owners Corporation's reasonable costs for the purposes of cl 27.3 of the SMS, or, alternatively, having the question referred out to a costs assessor for determination (see [66] to [67]).

9. Both the Owners Corporation and Eastmark have agreed to accept my assessment of $100,000. That matter will also be reflected in the final orders to be made.

Owners Corporation's claim for interest in respect of Electricity Recoveries

10. In the First Judgment, I found that Strata Associates wrongly debited the Owners Corporation's levy account with $993,218.45 in respect of the Electricity Recoveries. Those amounts should have been debited to Eastmark's levy account.

11. The Electricity Recoveries were debited to the Owners Corporation's account on various dates between 1 July 2008 and 31 December 2013.

12. For the reasons I have set out in the First Judgment and Second Judgment, I propose to accede to Eastmark's submission that the amount of the Electricity Recoveries be set off against the amount owing by the Owners Corporation to the BMC for outstanding levies.

13. The bulk of those levies have been outstanding since September 2013.

14. Interest is not payable in relation to outstanding levies because of the conventional estoppel that I found at [638] of the First Judgment.

15. In those circumstances, the Owners Corporation seeks interest on the amount of the Electricity Recoveries on the basis that Eastmark has had the benefit of those payments (in that its levy account was not debited) to the Owners Corporation's cost.

16. It appears to me that there are two answers to this submission.

17. The first is that, since September 2013, such benefit as Eastmark has had by reason of the allocation by Strata Associates of the Electricity Recoveries has not been at the Owners Corporation's cost as the Owners Corporation has been in arrears of levies since that date for an amount exceeding the amount of electricity costs recovered.

18. Almost half of the interest claimed by the Owners Corporation is attributable to the period since September 2013.

19. Second, the only source of the Court's power to award interest up to judgment referred to in submissions was s 100 of the *Civil Procedure Act 2005* (NSW) . That section gives the Court power to "include interest in the amount for which judgment is given".

20. But here, for the reasons I have set out in the earlier judgments, I do not propose to enter judgment in favour of the Owners Corporation for any amount. I propose to set off the amount due to the Owners Corporation in respect of the Electricity Recoveries against the amount of the arrears of levies. There will thus not be any "judgment…given" in which I can "include interest".

21. The Owners Corporation did not suggest that it should have an award of interest at common law.

22. In these circumstances my conclusion is that I have no power to make the award of interest for which the Owners Corporation contends.

23. For those reasons it is not necessary to deal with Eastmark's submission concerning the significance, in this context, of the conventional estoppel that I found at [638] of the First Judgment (although, as the Owners Corporation submitted, that estoppel relates to late payment of levies, and not to circumstances where an amount "should not have been charged" at all: First Judgment at [596]).

Costs - Eastmark

The main proceedings

24. In substance, the only issue in respect of which the Owners Corporation was successful vis-à-vis Eastmark was in relation to the Switchboard C issue, being the issue that I dealt with in the First Judgment at [88]-[97], [99], [243]-[256] and [305].

25. I found that the Owners Corporation did not otherwise make out its claim for relief concerning the SMS under the *Contracts Review Act 1980* (NSW) . I did not accept any part of the Owners Corporation's case concerning breach of fiduciary duty or fraud on the minority.

26. I was not persuaded to make any order for damages in favour of the Owners Corporation for the reasons as set out at [310]-[316] of the First Judgment and [30] to [38] of the Second Judgment.

27. The Owners Corporation seeks an order that Eastmark pay 50 per cent of its costs.

28. On the other hand, Eastmark seeks an order that the Owners Corporation pay 90 per cent of its costs.

29. I do not propose to accede to either submission.

30. In the circumstances I have described, my opinion is that the appropriate order for costs is that Eastmark pay the Owners Corporation's costs of the Switchboard C issue and that otherwise the Owners Corporation pay Eastmark's costs of the main proceedings.

Eastmark's cross-claim

31. I dealt with this issue at [613] to [749] of the First Judgment.

32. Eastmark was entirely successful.

33. So far as concerns the Owners Corporation's reasonable costs of considering Eastmark's 2011 proposal, the parties have now agreed to accept my determination of those reasonable costs at $100,000 (which represents a compromise on the part of each of them).

34. In those circumstances I propose to make no order as to the costs of the assessment of those reasonable costs, but to otherwise order that the Owners Corporation pay Eastmark's costs of the cross-claim.

The Levy Proceedings

35. In the Levy Proceedings Eastmark was successful, albeit for a smaller sum than it originally sought.

36. Nonetheless it has achieved substantial success and should have its costs.

37. On 23 February 2015, Hammerschlag J made an order that, pending the hearing, each of the Owners Corporation and Eastmark share equally the costs and expenses of the BMC for shared facilities.

38. There has now been a working out of the consequences of that order, to the effect that Eastmark has overpaid, and the Owners Corporation has underpaid their respective contributions.

39. Now that the figures are agreed, Hammerschlag J's order should be discharged.

Costs – Strata Associates

40. The Owners Corporation succeeded against Strata Associates in respect of the Electricity Recoveries issue, but did not establish it had suffered any loss.

41. In any event, its damages would have been capped in accordance with the provisions of Strata Associates' contract.

42. I regard Strata Associates as having been substantially successful. It should have its costs.

43. The Owners Corporation seeks a *Sanderson* order that Eastmark (rather than the Owners Corporation) pay Strata Associates' costs.

44. A *Sanderson* order requires an unsuccessful defendant to pay, directly, the costs of a successful defendant.

45. Normally, it would only be appropriate to make a *Sanderson* order where each defendant has been sued in relation to the same matter.

46. Here, the only issue in respect of which it could be said that Strata Associates is a "successful defendant" and Eastmark is an "unsuccessful defendant" is the Electricity Recoveries issue.

47. Accordingly, on no view of the matter could a *Sanderson* order be made in relation to the costs incurred by Strata Associates in relation to the numerous other issues that arose between it and the Owners Corporation.

48. In any event, I do not see Eastmark as being an "unsuccessful defendant" in respect of the Electricity Recoveries issue. It played little, or no, role in relation to that issue (which was primarily agitated between the Owners Corporation on the one hand and Savills and Strata Associates on the other) and I propose to make no order against it in relation to that issue. Accordingly, I can see no conduct on the part of Eastmark which would warrant imposition on it of a *Sanderson* order (cf *Coombes v Roads and Traffic Authority (No 2)* [2007] NSWCA 70 at [8] to [13]).

49. In any event, Eastmark is in receivership, with a Deed of Company Arrangement in place. I find that to be a further factor weighing against the making of a *Sanderson* order, as such an order would impose upon Strata Associates the insolvency risk associated with Eastmark's financial position (see *Vucadinovic v Lombardi* [1967] VR 81 per Pape J; followed by Einstein J in *Schipp v Cameron* (Supreme Court (NSW), 12 October 1998, unrep) at p 27).

50. On 28 May 2014 Strata Associates made an Offer of Compromise under Uniform Civil Procedure Rules 2005 (NSW) r 20.26 to settle the Owners Corporation's claim against it on the basis of a judgment in its favour with no order as to costs. The possibility of making such an offer is recognised, in terms, by UCPR r 20.26(3)(a)(i) .

51. The Owners Corporation did not accept that offer. Strata Associates has now obtained a result, and will shortly obtain an order that is "no less favourable" to it than that offer.

52. Accordingly, Strata Associates is entitled to indemnity costs from the date following which the offer was made, unless the Court otherwise orders: UCPR r 42.15A(2) .

53. The Owners Corporation made no submissions as to why I should otherwise order. Accordingly Strata Associates will have its costs on an indemnity basis from 29 May 2014.

54. I made final orders (including as to costs) vis-à-vis Savills on 17 February 2016.

Conclusion

55. I will now circulate a draft of the final orders I propose to make in the proceedings and invite any further comments or submissions.

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Decision last updated: 04 May 2016