



Supreme Court
New South Wales

Case Name: Strata Plan 94417 trading as The Owners-Strata Plan 94417 v TC Build

Medium Neutral Citation: [2021] NSWSC 1284

Hearing Date(s): On the papers

Decision Date: 11 October 2021

Jurisdiction: Equity - Technology and Construction List

Before: Ball J

Decision: (1) The first defendant's notice of motion filed on 26 August 2021 be dismissed with costs;
(2) The second defendant's notice of motion dated 6 September 2021 be dismissed with costs.

Catchwords: COSTS — Security for costs — Whether security should be ordered against an Owners Corporation

Legislation Cited: Design and Building Practitioners Act 2020 (NSW)
Home Building Act 1989 (NSW)
Strata Schemes Management Act 2015 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: Wollongong City Council v Legal Business Centre Pty Limited [2012] NSWCA 245
Zenith Corp Australia Pty Ltd v Optus Mobile Pty Ltd [2020] NSWSC 1110

Category: Procedural rulings

Parties: Strata Plan 94417 trading as The Owners-Strata Plan 94417 (Plaintiff)
TC Build Pty Ltd (First Defendant)
FPG Northbridge Pty Limited (Second Defendant)
Fiducia Development Group Pty Ltd (Third Defendant)

Representation:

Counsel:

P Folino-Gallo (Plaintiff)

D Hand (First Defendant)

D Byrne (Second Defendant)

Solicitors:

Mayweathers (Plaintiff)

Chedid Storey Legal (First Defendant)

Paul Bard Lawyers (Second Defendant)

File Number(s):

2020/355200

JUDGMENT

- 1 The plaintiff Owners Corporation is the owner of common property in a residential strata development in Northbridge comprising 31 residential lots. In these proceedings, it relevantly claims damages for breaches of the warranties implied by s 18B of the *Home Building Act 1989* (NSW) and breach of the statutory duty of care under Part 4 of the *Design and Building Practitioners Act 2020* (NSW) against the first defendant, the builder of the development, and the second defendant, the developer, in respect of defects said to exist in the common property.
- 2 By notices of motion filed on 28 August 2021 and 6 September 2021 by the first defendant and second defendant respectively, the first defendant and second defendant seek security for their costs. The first defendant seeks \$661,687.50. The second defendant seeks \$400,000.
- 3 The proceedings were commenced on 15 December 2020. The Owners Corporation's claim has been amended on a number of occasions. On 30 July 2021, the Court directed that the Owners Corporation serve its Scott Schedule and any evidence on which it relies by 29 October 2021. The Court also directed that the Owners Corporation may not rely on any evidence served after that date without leave of the Court. It appears that the Owners Corporation intends to rely on evidence from nine expert witnesses. Those witnesses are:
 - (a) A building consultant;
 - (b) A remedial builder;

- (c) An environmental consultant;
- (d) A mechanical engineering consultant;
- (e) An electrical engineering consultant;
- (f) A fire consultant;
- (g) A hydraulic engineering consultant; and
- (h) A quantity surveyor.

- 4 The Owners Corporation's financial statements for the financial period 1 April 2021 to 21 September 2021 indicate that it has net assets of \$17,965.97. Its own costs of the proceedings have been funded by a special levy that was struck on 29 September 2020. As at 21 September 2021, strata levies of \$20,678.61 are in arrears.
- 5 Plainly, any order for security would need to be funded through a further special levy. A number of lot owners have sworn affidavits to the effect that they would not be able to afford to pay their proportion of that levy, although that evidence largely consists of inadmissible and conclusory assertions that that is the case. I have placed no weight on that evidence.
- 6 The principles applicable to the grant of security for costs are not in doubt. The applicant for security must establish that "there is reason to believe that [the] plaintiff ... will be unable to pay the costs of the defendant if ordered to do so" (to quote from Uniform Civil Procedure Rules 2005 (NSW) r 42.21(d)). Once the defendants satisfy that threshold requirement, the evidential onus shifts on the plaintiff to satisfy the Court that, taking into account all relevant factors, the Court's discretion should be exercised by either refusing to order security or by ordering security in a lesser amount than that sought by the defendants:
Wollongong City Council v Legal Business Centre Pty Limited [2012] NSWCA 245 at [30] citing Beazley JA (Meagher & Barrett JJA agreeing). See also *Zenith Corp Australia Pty Ltd v Optus Mobile Pty Ltd* [2020] NSWSC 1110.
- 7 The *Strata Schemes Management Act 2015* (NSW) contains a mechanism by which the Owners Corporation must raise funds from lot owners to meet its financial obligations and a mechanism for recovering any unpaid contributions owing by lot owners. Consequently, in substance, these proceedings are brought for the benefit of lot owners who ultimately must bear the costs of the

proceedings, including any costs orders made against the Owners Corporation. There is no evidence before the Court that the individual lot owners would not ultimately pay any special levy raised to meet any costs order against the Owners Corporation. Indeed, it is the applicants' case that the Court should not conclude that the lot owners would be unable to pay any special levy raised to meet the defendants' costs.

- 8 The true position, therefore, is that, not unsurprisingly, the Owners Corporation does not have cash on hand to meet any costs ordered against it. However, it has not only the ability but the obligation to raise that cash from unitholders if an adverse costs order is made against it. At most, all that can be said on the evidence is that it may take some time for the Owners Corporation to raise funds to meet any costs order against it. The question is whether that provides a sufficient basis for an order for security for costs. In my opinion, it does not.
- 9 There is no suggestion in this case that the Owners Corporation's claim is without any merit. If the defendants are ultimately successful, it is to be expected that they will be able to recover their costs albeit with some delay. They are likely to be entitled to interest to compensate them for that delay. On the other hand, if the Owners Corporation is required to provide security, it will need to levy unitholders. There is no obvious mechanism by which those levies could be returned if the Owners Corporation is ultimately successful and the unitholders will be out of pocket in the meantime. These considerations suggest that security should be refused.
- 10 The orders of the Court are:
 - (1) The first defendant's notice of motion filed on 26 August 2021 be dismissed with costs;
 - (2) The second defendant's notice of motion dated 6 September 2021 be dismissed with costs.

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.