



Civil and Administrative Tribunal  
New South Wales

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Case Name: Wu v The Owners – Strata Plan No. 80611

Medium Neutral Citation: [2021] NSWCATCD 109

Hearing Date(s): 13 August 2021

Date of Orders: 24 November 2021

Decision Date: 24 November 2021

Jurisdiction: Consumer and Commercial Division

Before: R Notley, Senior Member

Decision: The application is dismissed.

Catchwords: LAND LAW — Strata title — Repair and maintain common property - Standing of applicant

Legislation Cited: Powers of Attorney Act 2003 (NSW)  
Power of Attorney Regulation 2016 (NSW)  
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Elga Steinecke (bht Gardos) v Wayne, Lindner, Stricker, Levy; Re Estate of Stricker & Karl Heinz Lindner [2011] NSWSC 428  
Urquhart and Another v Lanham and Others [2002] NSWSC 119  
Vickery v The Owners Strata Plan No 80412 [2020] NSWCA 284

Texts Cited: Nil

Category: Principal judgment

Parties: Zhanxia Wu (First Applicant)  
Robert Acevski (Second Applicant)  
The Owners – Strata Plan No. 80611 (Respondent)

Representation: First Applicant (Self represented)

Second Applicant (Self represented)

Solicitor:  
J Corry (Respondent)

File Number(s): SC 21/14473

Publication Restriction: Nil

## **REASONS FOR DECISION**

### **INTRODUCTION**

- 1 This is an application for several orders under section 232 of the *Strata Schemes Management Act 2015* (NSW) (the SSMA) arising out of an alleged breach by an owners corporation of its statutory duty to repair and maintain common property in section 106 of the SSMA.
- 2 The applicants are the occupants of lot 7 (Lot 7) in Strata Plan 80611 (the Strata Plan).
- 3 The respondent is the Owners Corporation of the Strata Plan (the Owners Corporation).
- 4 The applicants seek the following orders under section 232 of the SSMA:
  - (1) an order that the Owners Corporation has breached subsection 106(1) of the SSMA;
  - (2) an order that the Owners Corporation pay to relocate and house the residents of Lot 7 to suitable accommodation until such time as the external and internal works are completed in full, which are to be completed within three weeks of the date of these orders;
  - (3) an order that the Owners Corporation undertake external works to repair the water penetration into Lot 7;
  - (4) an order that the Owners Corporation undertake internal works to repair the damage and associated mould from the water penetration into Lot 7 within eight (8) weeks of the completion of the internal works; and
  - (5) an order that the Owners Corporation refund application fees and paper costs, ink, postage and other costs associated with these filings to the applicants.

### **THE HEARING**

- 5 The hearing was by audio visual link on 13 August 2021.
- 6 The applicants represented themselves.

- 7 The respondent was represented by a solicitor, Jack Corry, leave having been granted to both parties to be legally represented by Senior Member Thode on 28 July 2021.
- 8 At the commencement of the hearing, both parties stated that they were ready to proceed and were not seeking an adjournment for any reason.
- 9 The applicants relied on a folder of documents comprising 146 pages received by the Tribunal on 20 July 2021 and admitted into evidence and marked as Exhibit 1.
- 10 The respondent relied on a document titled “SUBMISSIONS OF THE RESPONDENT”, which included various annexures, received by the Tribunal on 10 June 2021 and admitted into evidence and marked as Exhibit A.
- 11 Both parties also made oral submissions during the hearing.

### **STANDING OF THE APPLICANTS**

- 12 A preliminary, but important and, in my opinion, ultimately decisive issue, is the standing of the applicants.
- 13 It was not in dispute that the owners of Lot 7 are Jiyue Wu and Meijin Zhao.
- 14 The respondent submits that the applicants do not have standing to bring this application as they are not the owners of Lot 7. For the reasons set out below, I accept that submission.
- 15 An application for an order under section 232 of the SSMA may be made by an “interested person”, which includes the occupant of a lot pursuant to section 226 of the SSMA. It is now settled that section 232 of the SSMA confers jurisdiction and power on the Tribunal to hear and determine a claim for breach of the statutory duty on an owners corporation in section 106 of the SSMA and, if appropriate, to award damages under subsection 106(5) of the SSMA: *Vickery v The Owners Strata Plan No 80412* [2020] NSWCA 284 at [19] and [26] to [58] per Basten JA and [160] to [169] per White JA. However, only an owner of a lot may bring an action for breach of the statutory duty in section 106 of the SSMA: subsections 106(5) and 106(6) of the SSMA.

16 The applicants brought these proceedings pursuant to a general power of attorney granted by Jiyue Wu and Meijin Zhao dated 15 December 2017 which provided as follows:

1. I appoint our daughter, Zhanzia WU of 7/16 Post Office Street, Carlingford NSW 2118 to be my attorney. My attorney may exercise the authority conferred on my attorney pursuant to Part 2 of the Powers of Attorney Act 2003 to do on my behalf anything I may lawfully authorise an attorney to do. My attorney's authority is subject to any additional details as provided in this Power of Attorney.

2. This power of attorney operates immediately.

3. This power of attorney is subject to the following conditions and limitations: nil.

17 As is apparent from the terms of the power of attorney, the second applicant, Robert Acevski, has not been appointed an attorney of the owners of the lot. Accordingly, he cannot have standing to bring a claim for relief under section 232 of the SSMA for breach of the statutory duty in section 106 of the SSMA.

18 The power of attorney is a prescribed power of attorney pursuant to Part 2 of the *Powers of Attorney Act 2003* (NSW) (the POAA): see also Schedule 2 of the *Power of Attorney Regulation 2016* (NSW).

19 Section 9 of the POAA states that, subject to the POAA, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.

20 An attorney can commence or defend legal proceedings for the principal, however the proceedings must be commenced in the name of the principal.

21 In *Urquhart and Another v Lanham and Others* [2002] NSWSC 119 Young CJ in Eq said at [15] to [18]:

As counsel for the defendants have submitted, a power of attorney confers no interest in property, it merely confers authority, *Gibbons v Wright* (1954) 91 CLR 423, 444; *Farwell on Powers* (Stevens & Sons, London, 1874) at p 1.

There is clear authority for the proposition that where an attorney has decided to bring action under the authority given to him or her by a power of attorney, the action must be brought in the principal's name, *Campbell v Pye* (1954) 54 SR (NSW) 308 and see *Jones v Gurney* [1913] WN (Eng) 72 and see *Gray v Pearson* (1870) LR 5 CP 568 and *Spellson v George* (1987) 11 NSWLR 300, 313.

There are some older authorities which seem to permit action in the agent's name. Many of these can be distinguished on their facts. However, insofar as

they suggest that an attorney can sue in his or her own name, they are no longer good law, see Bowstead & Reynolds on Agency 16th ed (Sweet & Maxwell, London 1996) at p 555.

It was submitted that the position has changed because of the enactment of s 159 of the Conveyancing Act 1919, added by amendment by Act 147 of 1997. However, a similar provision appeared in the Conveyancing Act from 1920. It has never been suggested that the section applies to actions in court by an attorney, nor, apparently, was that argument even raised in *Campbell v Pye*. There is no validity in the submission.

- 22 I note that section 159 of the *Conveyancing Act* 1919 (NSW) is in similar terms to section 43 of the POAA, which states that:

(1) An attorney under a power of attorney may, in the exercise of the power:

(a) execute any assurance or instrument with the attorney's own signature and, where sealing is required, with the attorney's own seal, or

(b) do any other thing in the attorney's own name.

(2) An assurance or instrument executed, or thing done, in accordance with subsection (1) is as effectual in law as if executed or done by the attorney with the signature and seal or, as the case may be, in the name, of the principal.

- 23 For the same reasons as those expressed by Young CJ in Eq in *Urquhart and Another v Lanham and Others* (supra), in my opinion section 43 of the POAA does not apply to this application.

- 24 Similarly, in *Elga Steinecke (bht Gardos) v Wayne, Lindner, Stricker, Levy; Re Estate of Stricker & Karl Heinz Lindner* [2011] NSWSC 428 Brereton J (as his Honour then was) said at [5] to [6]:

... it is significant to observe that even where expressly authorised to do so under a power of attorney, an attorney under power is not entitled to commence proceedings in his or her own name as attorney for the principal; such proceedings, though they may be commenced in a sense by the attorney, must be commenced in the name of the principal [*Campbell v Pye* (1954) 54 SR NSW 308; *Spellson v George and others* (1987) 11 NSWLR 300, 313; *Urquhart and Another v Lanham and Others* (2002) 11 BPR 20,765, 16].

The principle that appears to underlie this rule is that the attorney has no cause of action, only the principal having a cause of action, and that it must therefore be the principal, and not the attorney, who brings the proceedings on that cause of action. Authority given to an attorney to sue on behalf of the principal means authority to sign the initiating process on behalf of the principal and authority to instruct solicitors to bring proceedings and sign the initiating process without reference to the principal. It is not an authority to sue in the name of the attorney ...

25 Accordingly, in my opinion, the general power of attorney granted by Jiyue Wu and Meijin Zhao does not give either of the applicants standing to bring these proceedings and the application must be dismissed.

## CONCLUSION

26 For the reasons set out above, I dismiss the application.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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