

# DISTRICT COURT OF SOUTH AUSTRALIA

(Civil: Minor Civil Review)

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## BYCZKO v STRATA CORPORATION 6222 INC

[2022] SADC 32

Judgment of his Honour Judge Burnett

17 March 2022

**MAGISTRATES - APPEAL AND REVIEW - SOUTH AUSTRALIA**

**COURTS AND JUDGES - COURTS - JURISDICTION AND POWERS**

**PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - ENDING PROCEEDINGS EARLY - SUMMARY DISPOSAL - SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT**

The applicant, Mr Joseph Byczko, has sought a review of a minor civil action in which the Magistrate granted summary judgment in favour of the respondent, Strata Corporation 6222 Inc. (the Corporation), in the sum of \$19,463.92.

The Corporation was the strata corporation within the meaning of that term under the Strata Titles Act 1988 of a strata title plan in which there are six units. Mr Byczko is the owner of one unit.

A dispute arose between the Corporation and Mr Byczko in relation to alleged unauthorised parking of motor vehicles in the common area by Mr Byczko. Mr Byczko ceased making payment of levies that had been imposed by the Corporation. The Corporation claimed the following sums from Mr Byczko:

1. Unpaid levies in the sum of \$10,124.72 which were imposed against all unit holders;
2. Unpaid legal fees in the sum of \$5,904.37, which were imposed partly in respect of the unauthorised parking and partly in respect of these proceedings;
3. Interest on the outstanding balance in the sum of \$2,514.03;
4. Overdue account fee notices in the sum of \$352.00;
5. Debt recovery fees in the sum of \$568.80.

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**On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE SCHULZ)  
AMCCI-18-29**

**Appellant: JOSEPH STANISLAW BYCZKO In Person**

**Respondent: STRATA CORPORATION 6222 INC Counsel: MR B TOLLNER-ATKINSON - Solicitor: BARRY.NILSSON.**

**Hearing Date/s: 27/08/2021, 10/09/2021**

**File No/s: CIV-21-009157**

**B**

The Magistrate assessed the claim as a straightforward claim in debt for the outstanding amounts and held that there was no reasonable basis for Mr Byczko defending the claim. She therefore awarded summary judgment in favour of the Corporation in the sum of \$19,463.82.

This Court, on the review, was required to consider (1) whether this Court had jurisdiction to hear the review and (2) if it did, was the Magistrate correct in granting summary judgment in favour of the Corporation in the sum of \$19,463.82.

Held:

1. The proceeding in the Magistrates Court was not a minor civil action as the amount claimed exceeded \$12,000 and the claim was not a minor statutory proceeding within the meaning of that term in s 3 of the Magistrates Court Act.
2. The dispute was instituted pursuant to s 41A of the Strata Titles Act 1988 (SA). Pursuant to s 48A of that Act, the application was treated as if it were a minor civil action with such modifications to the Magistrates Court Act 1991 as necessary. The action was therefore heard in the civil division of the Magistrates Court applying the procedure of a minor civil action. Section 48A was a procedural direction.
3. The consequences of treating the application as a minor civil action (and making any necessary modifications to the Magistrates Court Act) was that a review of the proceeding was to this Court. The requirement in section 48A to treat an imaginary state of affairs as real meant that the consequences of that putative state of affairs must also be treated as real: *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109 discussed.
4. The case was suitable for summary determination: *Spencer v Commonwealth* (2010) 241 CLR 118 and *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161 applied.
5. The Corporation had established that the levies that it imposed upon all members were payable and recoverable as against Mr Byczko subject to a minor adjustment in the sum of \$169.91.
6. Legal fees in the sum of \$2,673.89 were recoverable by the Corporation against Mr Byczko but the balance of the legal fees was not recoverable as they did not come within the terms of the resolution of the Corporation permitting the recovery of the fees and further were not claimable according to the rules that govern minor civil actions.
7. The interest claimed by the Corporation was calculated in accordance with s 27(4) of the Strata Titles Act 1988 and Regulation 11 of the Strata Titles Regulations 2018 (SA) and was therefore recoverable.
8. The claims for overdue fee notices and debt recovery expenses were not recoverable as they did not come within the terms of the relevant resolutions of the Corporation.
9. The judgment of the Magistrate in the sum of \$19,463.92 is rescinded and in lieu thereof I substitute judgment in favour of the Corporation in the sum of \$15,141.73. The judgment is otherwise affirmed.

*Strata Titles Act 1988* (SA) s 25, 27, 41A, 47A, 48A; *Magistrates Court Act 1991* (SA) s 3, 38(5), 38(6), 38(7), 38(8), 38(9); *Strata Titles Regulations 2018* (SA) r 11; *Uniform Civil Rules 2020* (SA) r 341.1, referred to.

*Spencer v Commonwealth* [2010] HCA 28; (2010) 241 CLR 118; *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161, applied.

*East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, discussed.

*Harradine v District Court of South Australia* [2012] SASC 96; *Gillott v District Court of South Australia* [2019] SASC 132; *Trittenheim Pty Ltd v H & H Gill Nominees Pty Ltd* (1994) 63 SASR 434; *Griggs v Norris Group of Companies* (2006) 94 SASR 126; [2006] SASC 23; *Yritiaho v Public Curator (Qld)* (1971) 125 CLR 228, considered.





**BYCZKO v STRATA CORPORATION 6222 INC**  
**[2022] SADC 32**

**Civil**

**Introduction**

1 This is a review pursuant to s 38(6) of the *Magistrates Court Act 1991* (SA) in which the applicant to these proceedings, Mr Joseph Byczko (Mr Byczko) (who was the respondent in the proceedings in the Magistrates Court), is dissatisfied with a decision made by the Magistrate in relation to a strata titles dispute. On 13 October 2020, the Magistrate granted summary judgment in favour of the respondent to these proceedings, Strata Corporation 6222 Inc (the Corporation) (which was the applicant in the Magistrates Court), in the sum of \$19,463.92 including costs.

2 On 8 January 2018, the Corporation instituted a claim in the Magistrates Court against Mr Byczko for unpaid strata fees and levies in the sum of \$6831.23. By an interlocutory application dated 27 April 2020, the Corporation sought leave to amend its claim from \$6831.23 to \$20,797.42 and then sought summary judgment in that sum. At the hearing of the application, the Corporation further amended the amount for which it sought judgment to \$19,463.92 and the Magistrate awarded summary judgment in the amended sum.

3 Mr Byczko opposed the application for summary judgment essentially on the ground that he did not understand how the amount claimed against him had been calculated.<sup>1</sup> The affidavits filed by Mr Byczko in the Magistrates Court did not raise any further ground.<sup>2</sup>

4 In his Notice of Review, Mr Byczko sought a review of the decision of the Magistrate on the following grounds (grouping some grounds together which raise the same issue):

- (1) The Corporation had not established that the original sum (of \$6831.23) or the amended sum, \$19,463.92, was owed by Mr Byczko to the Corporation;
- (2) Proof of payment was not examined by the Magistrate;
- (3) The calculation of the judgment sum was not substantiated;
- (4) There were further documents concerning illegal parking and possibly further issues which had not been produced to the Court.

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<sup>1</sup> Reasons of the Magistrate delivered on 13 October 2020 (Reasons) at [3] and [7].

<sup>2</sup> Reasons at [7].

### Application for Review

5 This review is conducted pursuant to s 38(6) to 38(9) of the *Magistrates Court Act 1991* (SA). On this review, the Court may inform itself as it thinks fit and in doing so is not bound by the rules of evidence. The Court may also, if it thinks fit, rehear the evidence taken before the Magistrates Court. In hearing and determining this review, the Court must act according to equity, good conscience and the substantial merits of the case, without regard to technicality and legal form. It is important to note that this review is a review of the matter and not a review of the judgment.

6 The conduct of a minor civil action must be considered in the context of the comments made by Blue J in *Harradine v District Court of South Australia*.<sup>3</sup> Blue J explained that the role of the Magistrate in such an action is that of an inquirer, rather than managing an adversarial contest between the parties.

7 In *Gillott v District Court of South Australia*,<sup>4</sup> Peek J discussed the meaning of the phrase ‘equity, good conscience and substantial merits of the case’ and quoted from the decision of Olsson J in *Trittenheim Pty Ltd v H & H Gill Nominees Pty Ltd*,<sup>5</sup> in which His Honour noted that the meaning of that phrase must be construed by reference to the nature of the issues involved and, where appropriate, the clear purpose of any relevant statute. Olsson J went on to hold that in certain cases the phrase required that the Court should adopt a broad approach of common sense and common fairness, eschewing all legal or other technicality. In *Griggs v Norris Group of Companies*,<sup>6</sup> White J referred to the phrase in the context meaning the good sense and natural justice of the matter. At times, he held the expression that the decision maker was empowered to do whatever he or she might think necessary to achieve fairness between the litigants.

8 Given the nature of the minor civil review and its purpose to achieve an economical and efficient disposition of the matter, I consider that the phrase ‘equity, good conscience and the substantial merits of the case’ is used in the context described above, that being that the Magistrate is required to act according to good sense and the natural justice of the matter and to do whatever was necessary to achieve fairness between the parties in relation to their legal rights, eschewing legal, or other technicalities. Regard must be had to the substance of the claim and permitting the parties to have an opportunity to address the real issues in dispute.

9 In the present case, if I find that the Magistrate has wrongly awarded summary judgment, there has been an error of law and a failure to conduct the

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<sup>3</sup> [2012] SASC 96 at [40]-[49].

<sup>4</sup> [2019] SASC 132 at [40]-[46].

<sup>5</sup> (1994) 63 SASR 434 at 442.

<sup>6</sup> (2006) 94 SASR 126 at 137; [2006] SASC 23 at [31].

hearing according to ‘equity, good conscience and the substantial merits of the case’.

10 The decision of this Court on review is final and is not subject to appeal pursuant to s 38(8) of the *Magistrates Court Act*.

11 As I am reviewing a decision of the Magistrate to grant summary judgment, if I allow the review, I can rescind the judgment and substitute a judgment that I consider appropriate or remit the matter to the Magistrates Court for hearing or further hearing.<sup>7</sup>

### **Conduct of the hearing in the Magistrates Court**

12 The Magistrate heard the two applications by the Corporation sequentially. The Magistrate granted the Corporation leave to amend its claim in accordance with the normal principles.<sup>8</sup>

13 Mr Byczko, in his Notice of Review, has not complained about the decision of the Magistrate to grant leave to amend and I cannot discern any error in that decision.

14 Having granted leave to amend, the Magistrate proceeded to hear the summary judgment application. The Magistrate observed that Mr Byczko had filed a defence to the initial claim, the substance of which was he did not understand how the amounts claimed from him had been comprised.<sup>9</sup> The Magistrate further observed that Mr Byczko advised the Court that at the hearing of the application for summary judgment that his defence would not alter to that which he had previously filed.<sup>10</sup> Mr Byczko had also been given the opportunity to file affidavits opposing the application by the Corporation for summary judgment, but the affidavits filed by him did not address the claim of the Corporation or provide any basis for a defence to the claim.<sup>11</sup>

15 In all of these circumstances, I consider that the Magistrate was correct in proceeding with the summary judgment application notwithstanding that Mr Byczko had not been given the opportunity to file a defence to the amended claim. Often summary judgment applications will be considered by reference to the affidavit material that is filed rather than any formal defence of the respondent to the application. Mr Byczko had been on notice of the claim made against him and how the amount claimed was calculated. He had advised the Court of the nature of his defence. In my view, he was not prejudiced at all by how the Magistrate dealt with the application. I further note in this regard that Mr Byczko has not filed any affidavits in this Court that provided a basis for opposing the application or cast doubt on the judgment of the Magistrate.

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<sup>7</sup> s 38(7)(d)(iii) of the *Magistrates Court Act 1991* (SA).

<sup>8</sup> Reasons at [5].

<sup>9</sup> Reasons at [3].

<sup>10</sup> Ibid at [7].

<sup>11</sup> Ibid.

16 The Magistrate then proceeded to determine the application for summary judgment. I note that the affidavits filed by the Corporation were sworn or affirmed by its solicitors. Although hearsay evidence is not permitted in an application for summary judgment, the affidavits did no more than recite and annex the relevant business records of the Corporation. Those business records were admissible on the application and therefore I consider that the Magistrate was correct in proceeding to hear the application.

17 The Magistrate correctly assessed the claim as a straightforward claim in debt for outstanding levies, overdue account fees, debt recovery and legal fees.<sup>12</sup> The Magistrate observed that an application for summary judgment is made where there is no reasonable basis for a defence.<sup>13</sup> As such it will not be lightly made and the Court must be so certain of the outcome that to permit the proceeding to go forward would amount to an abuse of process.<sup>14</sup>

18 I consider that the approach taken by the Magistrate was in accordance with the approach mandated by the High Court in *Spencer v Commonwealth*.<sup>15</sup> In that case, the Court held that a practical assessment of the claim (or in this case, the defence) was required. As Doyle J held in *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd*.<sup>16</sup>

By way of summary of the approach articulated in *Spencer v Commonwealth*, it can be said that the power to determine a claim summarily should not be exercised lightly. Exercise of the power requires a practical assessment of whether the applicant has real, as opposed to merely fanciful, prospects of success. While the Court need not be satisfied that the claim is hopeless or bound to fail, nevertheless it must be cautious not to do a party injustice by summarily determining an action, particularly where there are disputed issues of fact or law or mixed fact and law, merely because the Court considers that the claim is unlikely to succeed. However, beyond these very general guidelines, the Court should focus upon the words used in the rules and avoid applying any judicial gloss. [citations omitted].

19 Doyle J went on to hold that an abuse of process extends to (1) the pursuit of claim that had no proper basis because there is no basis on the material available and (2) claims which misstate the material upon which the claim is based or which extend beyond any assertion for which the material might provide a basis.<sup>17</sup> The above principle applies equally to a defence which has no proper basis.

20 I consider that the Magistrate approached the application for summary judgment in the correct way and in accordance with the approach dictated by *Spencer* and *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd*.

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<sup>12</sup> Ibid at [1].

<sup>13</sup> Ibid at [8].

<sup>14</sup> Ibid.

<sup>15</sup> [2010] HCA 28; (2010) 241 CLR 118 at [24]-[26].

<sup>16</sup> [2020] SASC 161 at [59].

<sup>17</sup> Ibid at [63].

### **The Conduct of the Review**

21 At the review, I raised the question of jurisdiction of the Court to hear the matter, given that the amount claimed was over \$19,000. Both parties made submissions on this issue. The question of jurisdiction was a legal issue which did not require further evidence.

22 As to the issue whether Mr Byczko had a proper basis for his defence, I admitted into evidence a further affidavit of Ben Tollner-Atkinson, solicitor for the Corporation, sworn 3 September 2021. That affidavit did not raise any new material (in which case I would not have admitted it), but reproduced the material that had been tendered in the proceedings in the Magistrates Court in a more straight-forward way. That permitted Mr Byczko to more readily understand the claim and facilitated questioning about the various components of the claim. The material in the affidavit could then be used as the basis for submissions. I considered that the affidavit provided a better framework for examining the justification and calculation of the each of the amounts claimed by the Corporation. I then invited Mr Byczko to say why he disputed each item or its calculation.

### **Background to the Claim**

23 The Corporation is a strata corporation within the meaning of that term under the *Strata Titles Act 1988 (SA)* in relation to strata plan 6222 being the land situated at 224-234 Tapleys Hill Road Seaton. There are 6 units that form part of strata plan 6222. The units are generally held for commercial purposes and not residential purposes, although Mr Byczko apparently lived in his unit. Mr Byczko was the registered proprietor of unit 3.

24 Pursuant to s 25 of the Act:

The functions of the [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol\\_act/sta1988173/s3.html](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol_act/sta1988173/s3.html) - [strata corporation](#) strata corporation are as follows:

- (a) to administer and maintain the common property for the benefit of the unit holders and, to such extent as may be appropriate, other members of the strata community; and
- (b) to administer all other property of the corporation; and
- (c) to enforce the articles of the corporation.

25 Pursuant to s 27 of the Act:

- (1) A strata corporation may raise such funds (including reserve funds for future expenditure of a capital nature) as it thinks necessary.
- (2) For the purpose of raising funds the strata corporation may, by ordinary resolution, levy contributions against all unit holders.

- (3) The contributions—
  - (a) will be proportional to the unit entitlements of the various units; or
  - (b) will be determined on such other basis as the strata corporation decides by unanimous resolution;
- (3)...
- (4) A strata corporation may by ordinary resolution
  - (a) ...
  - (b) fix (in accordance with the regulations) interest payable in respect of a contribution, or an instalment of a contribution, that is in arrears.
- (5) The strata corporation may recover an unpaid contribution (and interest on any such contribution), as a debt, from the unit holder of the unit in respect of which the contribution is payable (whether or not that person was the unit holder when the liability arose).
- (6)-(8) ...

26 Mr Byczko did not pay his share of the levies that had been imposed against all unitholders. Levies had also been imposed against Mr Byczko in respect of legal fees associated with having parked cars in the common driveway of the strata complex without authorisation.

27 The amount claimed by the Corporation comprised the following amounts:

- (1) Levies in the sum of \$10,124.72;
- (2) Legal fees in the sum of \$5904.37.
- (3) Interest in the sum of \$2514.03;
- (4) Overdue account fees in the sum of \$352;
- (5) Debt recovery fees in the sum of \$568.80.

### **Jurisdiction**

28 I raised with the parties whether the proceeding was properly a minor civil claim and therefore whether I had jurisdiction to hear a review of the matter. My concerns arose initially from the fact that the claim, as amended, exceeded the statutory limit for minor civil actions of \$12,000.

29 The proceedings instituted by the Corporation against Mr Byczko were instituted in the Magistrates Court pursuant to s 41A of the *Strata Titles Act*.

30 Section 41A governs the resolution of disputes between a Corporation and a member and provides that:

- (1) ...
- (2) Subject to this section, an application must be made to the Magistrates Court.
- (3) A person may, with the permission of the District Court, bring an application under this section in the District Court.
- (4) The District Court may, on the application of a party to proceedings under this section that have been commenced in the Magistrates Court, order that the proceedings be transferred to the District Court (and such an order will have effect according to its terms).
- (5) Proceedings should not be commenced in, or transferred to, the District Court under subsections (3) or (4) unless the District Court considers that it is appropriate for the court to deal with the matter by reason of the complexity or significance of the matter.
- (6) A court may, on its own initiative or on an application by a party to the proceedings—
  - (a) transfer an application under this section to the Supreme Court on the ground that the application raises a matter of general importance; or
  - (b) state a question of law for the opinion of the Supreme Court.
- (7) A court, in hearing and determining an application under this section, should act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms, and is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.
- (8)-(18) ...

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Pursuant to s 3 of the *Magistrates Court Act*:

- (2) Subject to subsections (3) and (4), a minor civil action is an action founded on –
  - (a) a small claim; or
  - (b) a claim for relief relating to a neighbourhood dispute;
  - (c) a minor statutory proceeding;
- (3) If a claim that is not within one of the classes referred to in subsection (2) is introduced into a minor civil action, the action ceases to be a minor civil action unless the Court orders that the subsequent claim be tried separately;
- (4) Subject to subsection 4(a) if a neighbourhood dispute or a minor statutory proceeding involves –
  - (a) a monetary claim for more than \$12,000; or
  - (b) a claim for relief in the nature of an order to carry out work where the value of the work is more than \$12,000,

a party may elect, in accordance with the rules, to exclude the dispute or proceeding from the rules governing minor civil actions, and in that case, the dispute or proceeding ceases to be a minor civil action.

32 Pursuant to s 3(1) a small claim means a monetary claim for \$12,000 or less. A minor statutory proceeding is relevantly defined as any other proceeding declared by statute to be a minor statutory proceeding.

33 The claim by the Corporation did not come within any of these categories. The amended claim exceeded \$12,000. The *Strata Titles Act* does not expressly declare a proceeding brought under that Act to be a minor statutory proceeding. Section 48A of that Act provides:

If an application is made to the Magistrates Court under any provision of this Act, the *Magistrates Court Act 1991* applies, with such modifications as may be necessary for the purpose or as may be prescribed, in relation to the application as if the proceedings were a minor civil action within the meaning of that Act.

34 I do not consider that the words “as if the proceedings were a minor civil action” in s 48A can be construed as a declaration that the matter is a minor civil action.

35 In *East End Dwellings Co Ltd v Finsbury Borough Council*,<sup>18</sup> Lord Asquith considered the use of the words “as if” and held:

In assessing the compensation for an expropriated interest in land, the section bids the assessing authority to imagine, contrary to the fact, that the damage had been made good before the acquiring authority had served notice to treat.<sup>19</sup>

36 Lord Asquith went on to hold:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must have inevitably have flowed from or accompanied it. One of these is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.<sup>20</sup>

37 It appears to me that the Magistrates Court, when hearing an application under the *Strata Titles Act*, is required to treat, contrary to the actual facts, the application as a minor civil action. That is, even though it is not a minor civil action, it is to be treated as such. It follows, in my opinion, that the matter proceeds in the civil division of the Magistrates Court but that the Court is directed, by virtue of s 48A, to apply the practice and procedure of the minor civil division. In my opinion, s 48A directs the Court how the application is to be heard but does not alter the essential characteristics or substance of the

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<sup>18</sup> [1952] AC 109.

<sup>19</sup> Ibid at 132.

<sup>20</sup> Ibid at 132-133.

proceeding. By way of an example, if legislation required a youth to be sentenced as if he or she were an adult, the Court is directed how to approach the task of sentencing, but that direction does not alter the status of the youth. On the other hand, if the legislation deemed the youth to be an adult, then the characteristic of the youth has been changed.

38 I am of the opinion that the statutory direction contained in s 48A is a procedural direction. It establishes the rules that govern the action brought by the Corporation. It does not seek to impair or bar the cause of action of the Corporation or, had there been one, the action of the member.<sup>21</sup> It simply amends the way in which the action is heard: without sections 41A and 47A, such an action would be heard in the normal way in the civil division of the Magistrates Court. The effect of the sections is to apply the procedure in the minor civil division, including adopting the inquisitorial approach.

39 I consider that it also follows that the consequences of treating the application as a minor civil action (and making any necessary modification to the *Magistrates Court Act*) is that a review of such an application is to be made to this Court. Section 48A requires, in my view, that section 38(6) of *Magistrates Court Act* be notionally amended to read:

The District Court (constituted of a single Judge) may, on the application of a party dissatisfied with a judgment given in a minor civil action or in a judgment given in an application made pursuant to s 41A of the Strata Titles Act, review the matter [notional amendment underlined).

40 Such a construction is also, in my view, in accordance with the purpose of s 41A and 48A of the *Strata Titles Act*. Section 41A treats applications under the *Strata Titles Act* in an informal way. The proceedings are initially to be brought in the Magistrates Court. The rules of evidence do not apply and the case is to be determined according to the principles of equity, good conscience and the substantial merits of the case. If the application is to be dealt with in this way, it appears to me that any review or appeal should be dealt with in a similar way. That is, following the passage that I have referred to in *East End Dwellings Co Ltd*, if an imaginary state of affairs is required to be treated as real, then the consequences that flow from such an imagined state of affairs must also be considered as real.

41 Such an approach accords with the statutory direction that the application is to be dealt with as if it is a minor civil action. If s 48A only applied to the initial application in the Magistrates Court and not to the review, then the only right to challenge the initial decision would be by way of appeal to the Supreme Court in circumstances where the appeal would be limited to challenging errors of fact or

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<sup>21</sup> *Yrittiaho v Public Curator (Qld)* (1971) 125 CLR 228 at 241.

law and would not constitute a review of the matter in the way described by Blue J in *Harradine v District Court of South Australia*.<sup>22</sup>

42 For all of the above reasons, I consider that there is a right of review to this Court of a decision made by a Magistrate in respect of an application made under the *Strata Titles Act*. It follows therefore that I have jurisdiction to hear this review.

### **Determination of the review**

43 The first three grounds of review essentially raise the same issue, namely that the Corporation has not established that the judgment sum was owing. Mr Byczko contended that (1) the Corporation had not established that the original sum (of \$6831.23) or the amount of the judgment sum of \$19,464.92 was owed by him to the Corporation (2) proof of payment was not examined by the Magistrate and (3) the calculation of the judgment sum was not substantiated.

44 I set out below details of the claim of the Corporation and whether it is established that the Corporation was entitled to summary judgment in the sum of \$19,464.92. As I stated earlier in these Reasons, the claim of the Corporation comprised five different components. They were levies, legal fees, interest, overdue fee account notices and debt recovery fees.

45 The first component of the claim was for unpaid levies. In respect of levies (which were imposed equally on all unit holders), Mr Byczko was responsible for 16.29% of the levies in accordance with the schedule of unit entitlement.<sup>23</sup> There were relevant resolutions at the annual general meetings that imposed the levies which form part of the claim. Those resolutions comprise:

- (1) At the annual general meeting held on 27 September 2016 a levy in the sum of \$16,144 was imposed. As Mr Byczko held 16.29% of the unit entitlements, he was liable for \$2629.85 of that annual levy or \$657.47 per quarter. The resolution at the AGM stated that the contribution was to be paid quarterly commencing on 1 January 2017;
- (2) At the annual general meeting held on 26 September 2017 a levy in the sum of \$16,144 was again imposed. As Mr Byczko held 16.29% of the unit entitlements, he was liable for \$2629.85 of that annual levy or \$657.47 per quarter. The resolution at the AGM stated that the contribution was to be paid quarterly commencing on 1 January 2018;
- (3) At the annual general meeting held on 25 September 2018 a levy in the sum of \$20,267 was imposed. As Mr Byczko held 16.29% of the unit entitlements, he was liable for \$3301.45 of that annual levy or \$825.38 per quarter. The resolution at the AGM stated that the

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<sup>22</sup> [2012] SASC 96 at [40].

<sup>23</sup> Exhibit BTA 3 to the affidavit of Ben Tollner-Atkinson sworn 3 September 2021 (Tollner-Atkinson).

contribution was to be paid quarterly commencing on 1 January 2019 but that a further contribution of a divided entitlement of \$3500 was to be paid within 30 days. Mr Byczko's share of that sum (16.29%) was in the sum of \$570.15;

- (4) At the annual general meeting held on 16 July 2019, a levy in the sum of \$20,267 was again imposed. As Mr Byczko held 16.29% of the unit entitlements, he was liable for \$3301.45 of that annual levy or \$825.38 per quarter. The resolution at the AGM stated that the contribution was to be paid quarterly commencing on 1 January 2020.

46 Mr Byczko did not pay any of the levies of \$657.47 per quarter imposed in the 2017 calendar year (or \$2629.85 in total).

47 He did not pay the \$657.47 per quarter levied in the 2018 calendar year (or again \$2629.85 in total for the calendar year). I note that the invoice of the last quarter of that year (30 November 2018) was for \$825.38 rather than the \$657.47. As that new rate of \$825.38 was not to apply until 1 January 2019, I consider that the levy for the last quarter for 2017 should have been in the sum of \$657.47. Mr Byczko is therefore entitled to an adjustment in the sum of \$167.91. In addition, Mr Byczko did not pay the additional levy in the sum of \$570.15 which was imposed at the 2017 annual general meeting.

48 Mr Byczko did not pay any of the quarterly levies in the sum of \$828.38 that were imposed in respect of the 2019 calendar year or the \$825.38 that was imposed in relation to the first quarter of the 2020 calendar year.

49 With the reduction of \$167.91, the amount of the levies that were outstanding were in the sum of \$9,956.81.

50 The second component of the claim is for legal fees. At the annual general meeting held on 29 September 2015, resolutions were passed that unanimously provided:

- (1) That Strata Data [the Strata Manager] arrange for the removal of illegally parked cars at the common property located at the rear of the building.
- (2) That Strata Data was authorised to take legal action to recover the money owed to the Corporation by the owner of Unit 3 (Shop 3) and engage the services and/or investigator as required.

51 At the 2017 annual general meeting, the minutes record that there was discussion concerning the unauthorised parking of certain specified vehicles on the common driveway, all belonging to the owner of Unit 3. The following resolutions were passed unanimously:

- (1) That Strata Data was requested to pass the amount of \$2673.89 to the owner of Unit 3, as the said amount represented advertising and legal expenses in the last

year resulting from Unit 3's unauthorised parking of vehicles in the common driveway;

- (2) It was further agreed that Strata Data is to engage the services of Barry Nilsson lawyers to arrange the removal of the four unauthorised vehicles;
- (3) The cost of all legal expenses in line with this resolution are to be passed on to the owner of Unit 3.

52 The Corporation invoiced Mr Byczko in the sum of \$2673.89 on 4 October 2017 which remains unpaid. That invoice was for legal fees in respect of the removal of the unauthorised motor vehicles. I am satisfied that invoice was properly claimable and was not paid.

53 The Corporation has issued further invoices to Mr Byczko for legal fees in the sums of \$688.45, \$55.00, \$412.50, \$216, \$330, \$330, \$361.63, \$201.50, \$335.40 and \$300, all of which remain unpaid. These invoices appear to relate to the payment of accounts in relation to the Magistrates Court proceedings. For example, the notation on the account for \$688.45 rendered on 21 May 2019 is for "Professional fees, Magistrate fees". The account for \$412.50, rendered on 20 December 2019 was for "Court attendance". The sums of \$330 are both described as being for court attendances, the \$210.50 as being for a warrant of sale, the \$335.40 being for a filing fee and the \$300 as legal fees.

54 I do not consider these further amounts are claimable for 2 reasons. First, they are not referable to the resolution which permitted the charging and recovery of legal fees in relation to advertising and legal expenses resulting from the unauthorised parking of vehicles in the common driveway. The Magistrates Court proceedings do not relate to the legal expenses resulting from the unauthorised parking: they relate to the claim for unpaid contributions which include some contributions for legal fees. Secondly, pursuant to s 38(5) of the *Magistrates Court Act*:

In a minor civil costs for getting up the case for trial, or by way of counsel fees, will not be awarded unless all parties were represented by counsel, or the Court is of opinion that there are special circumstances justifying the award of such costs.

55 Further *Uniform Civil Rule* 341.1 provides that a successful party in a minor civil action is entitled to costs on the Minor Civil costs scale in Schedule 6, Part 4. The costs claimed by the Corporation far exceed that amount. It would defeat the purpose of the procedure adopted in the *Magistrates Court Act* and the rules relating to minor civil action if costs could be recovered on some other basis.

56 For both these reasons, I consider that the sum of \$2673.89 for legal fees is payable and recoverable but that the balance of \$3230.48 is not recoverable. The amount of the summary judgment should therefore be reduced by \$3230.48.

57 The third component of the claim is for interest. In respect of the interest claimed, at the 2013 annual general meeting, it was resolved that:

In accordance with Section 27(4) of the Strata Titles Act 1988 (as amended) if a levy is not paid on the date by which it becomes due and payable in accordance with a Resolution of the Corporation, the Corporation resolves to apply interest charges on those levies at a rate of 10% per annum.

58 The Corporation has invoiced Mr Byczko in accordance with this resolution. The amounts claimed in interest in a given period have gradually increased over time as the amount outstanding has increased. The total amount claimed for interest is in the sum of \$2514.03. I am satisfied that the amount claimed is in accordance with the resolution. I am also satisfied that the interest rate complies with the statutory requirements regarding interest rates. Section 27(4)(b) of the *Strata Titles Act* permits the Corporation to fix an interest rate on unpaid contributions in accordance with the regulations. Regulation 11 of the *Strata Title Regulations* states that the interest rate imposed in respect of an unpaid contribution must not exceed 15% per annum.

59 The fourth component of the claim is for overdue fees notices. These are amounts charged by Strata Data (the manager appointed by the Corporation) in accordance with their Management Agreement with the Corporation. Pursuant to that agreement, Strata Data are entitled to charge fees according to the Schedule of Charges annexed to the agreement. Those charges include \$33 for the final notice fee and \$22 for an overdue account fee. The Corporation duly charged Mr Byczko those amounts. I am satisfied that the amount claimed by the Corporation has been claimed in accordance with this schedule. The total amount charged for overdue account fee notices is in the sum of \$352.

60 However, I do not consider that the Corporation has shown that it is has in fact imposed a levy against the accused in respect of these amounts. The Corporation has acknowledged that a levy can be imposed only against Mr Byczko and not the other unit holders, if it is imposed as a result of a unanimous resolution pursuant to s 27(3)(b) of the Act. I have already recited the resolution passed on 29 September 2015 which authorised the Corporation to take legal action and to engage the services of a solicitor and/or investigator as required. Subsequent resolutions authorised the Corporation to pass onto Mr Byczko all legal expenses.

61 On the evidence before me, there is no legal basis for the Corporation to charge Mr Byczko with the cost of the overdue fee notices. I do not consider that these notices are legal expenses or even the expenses of an investigator. I therefore do not allow the claim of the Corporation for these notices in the sum of \$352.

62 The fifth component of the claim, debt recovery fees, falls into the same category. The sum of \$568.80 is sought for these fees. Again, no resolution of the Corporation has been passed unanimously (or at all) that Mr Byczko is to be solely responsible for these fees. No other basis has been proffered as a justification for these fees. I therefore would not allow the sum of \$568.80.

63 It follows that subject to the adjustments to which I have referred, I consider that the Corporation has established that it is entitled to judgment against Mr Byczko but in an amended amount. It is not relevant to the review whether or not the Corporation has established that the initial amount claimed is owing, although I do consider, for the same reasons as set out above, that the Corporation has in fact established that it is owed more than that amount. Mr Byczko has not adduced any evidence that he has paid any of the amounts claimed. Such payment is contrary to the documentary evidence submitted by the Corporation. The onus is on Mr Byczko to establish that he has made payment and I consider that he has failed to establish that fact.

64 Mr Byczko last contention in his Notice of Review was that there were further documents concerning illegal parking and possibly other issues that had not been produced to the Court. Mr Byczko has not produced any such documents either on the hearing of the initial application or on this Review. It follows that I do not consider that this ground of review has been made out.

### **Conclusion**

65 In all of the circumstances and pursuant to s 38(7)(d)(ii) of the *Magistrates Court Act*, I rescind the judgment of the Magistrate only insofar as it involves a recalculation of some of the items referred to above. I have deducted the sum of \$4319.19, being the \$352 for account fees notices, the sum of \$568.80 for debt recovery fees, the sum of \$167.91 in respect of an adjusted levy and the sum of \$3230.48 in respect of some legal fees. I substitute a judgment in favour of the Corporation in the sum of \$15,144.73. I affirm the judgment in favour of the Corporation subject to that recalculation.