



Civil and Administrative Tribunal
New South Wales

Case Name: Larsen v The Owners - Strata Plan No. 3573

Medium Neutral Citation: [2022] NSWCATCD 43

Hearing Date(s): 18 November 2021 and 28 January 2022

Date of Orders: 03 March 2022

Decision Date: 3 March 2022

Jurisdiction: Consumer and Commercial Division

Before: G Kinsey, General Member

Decision: 1 The application for the appointment of a compulsory strata manager under section 237 of the Strata Schemes Management Act 2015 is dismissed.

Catchwords: LAND LAW — Strata title — Appointment of compulsory strata manager — Whether grounds for compulsory appointment established

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Bischoff v Sahade [2015] NSWCATAP 135
Hoare and Ors v The Owners- Strata Plan No 73905 [2018] NSWCATCD 45
Maple v The Owners Strata Plan No 8950 [2021] NSWCATCD 108

Texts Cited: Nil

Category: Principal judgment

Parties: Bengt Larsen (First Applicant)
Robert Ball (Second Applicant)
The Owners - Strata Plan No. 3573 (Respondent)

Representation: First and Second Applicant (Self-represented)

Y Lee (Respondent)

File Number(s): SC21/37065

Publication Restriction: Unrestricted

REASONS FOR DECISION

The Parties

- 1 The Applicants are the owners of lots 7 and 8 in Strata Plan 3573.
- 2 The Respondent is the Owners Corporation of Strata Plan No 3573. The strata scheme is a mixed commercial and residential development situated at 237-245 Maroubra Road Maroubra. For the sake of convenience the Respondent shall hereinafter be referred to as “the OC”.
- 3 The Applicants appeared in person at the hearing.
- 4 The OC was represented by the secretary of the Owners Corporation Yuen Lee.

The Application

- 5 In an application filed on 23 August 2021 the Applicants sought an order pursuant to section 237 of the Strata Schemes Management Act 2015 (hereinafter referred to as “the SSMA”) for the appointment of a compulsory strata manager and interim orders pursuant to section 231 of the SSMA
- 6 Attached to the application is a summary of the reasons for seeking the appointment of a compulsory strata manager with supporting documents. Briefly the Applicants state the OC is not functioning satisfactorily because:
 - (i) The unreasonable control of the voting at all meetings by the owners of lots 12,13 and 14 since the expiration of the former compulsory manager’s term;
 - (ii) The inadequacy of funds to properly maintain the common property;
 - (iii) The calling of an extraordinary general meeting to remove the strata manager one month after appointment;
 - (iv) The irrational behaviour of the secretary Yuen Lee;
 - (v) The invalidity of Ms Lee’s actions in calling for the EGM scheduled for 27 August 2021.

- 7 The application provided background material and details of events which the Applicants assert support the case for the appointment of a compulsory strata manager.
- 8 At the hearing the Applicants informed the Tribunal that they would not seek the appointment of a compulsory strata manager if the secretary Yuen Lee resigned or was removed as the secretary pursuant to section 227(4) of the SSMA.

Procedural History

- 9 The Application was filed on 23 August 2021.
- 10 On 1 September 2021 the Tribunal listed the application for a hearing to determine if it should make interim orders under section 231 of the SSMA. The Tribunal directed the parties to file and serve evidence and submissions in support of the application for interim orders. The application was listed for hearing on 10 September 2021.
- 11 The application for interim orders (SC21/37602) was heard by Member R Titterton on 10 September 2021. He dismissed the application for interim relief and provided written reasons for his decision.
- 12 This application for appointment of the compulsory strata manager under section 237 of the SSMA was heard on 18 November 2021 and 28 January 2022.

Background

- 13 The strata scheme consists of 16 lots being a mixture of commercial and residential lots. Lots 1-10 are residential lots situated on levels 1 and 2 and lots 11-16 are commercial shops situated at ground level.
- 14 The strata scheme is managed by O'Neill Strata Management in Bondi Junction who was appointed strata manager at the annual general meeting held on 30 July 2020.
- 15 On 29 July 2021 the annual general meeting was convened by O'Neill Strata Management. The meeting voted to continue the appointment of O'Neill Strata Management for a further 12 months.

Applicant's Case

- 16 The Applicants' filed and served documentary submissions on 17 September 2021; 27 September 2021; 12 October 2021; 12 November 2021; 15 November 2021 and 2 December 2021. The documents were tendered as part of the evidence.
- 17 The Applicants seek the appointment of a compulsory strata manager. The Applicants submit that a small number of owners utilised their unit entitlements particularly in the commercial lots, to manipulate polls.
- 18 The Applicants allege these owners have been able to delay decisions about the repair and maintenance of the building's fabric.
- 19 The Applicants assert that since the end of the compulsory strata manager's appointment in 2020, the management of the OC has reverted to the unreasonable control of a small number of owners who successfully manipulate voting.
- 20 At point 9 of their submission attached to the application, the Applicants claim that the secretary "is abusing her position, incorrectly maintaining the strata roll, and may have unlawfully called an extraordinary meeting leading to the dismissal of the current strata manager."
- 21 The submission details instances of behaviour and conduct which they say constitute evidence that the OC is not functioning satisfactorily. Their concern is that the behaviour of the OC secretary Ms Yuen Lee's is irrational, she makes unilateral decisions, falsifies documents and acts in collusion with 2 other committee members being her husband Mr Delaney and Mr Leung.
- 22 Robert Ball provided a statement dated 12 November 2021 and gave sworn evidence in support of the application. He confirmed the contents of his statement were true and correct. The statement was tendered and marked as an exhibit in the proceedings.
- 23 Mr Ball submitted that Ms Lee was the source of the problems with the OC and should step down. He stated that if she resigned, the Applicants would not seek the appointment of a compulsory strata manager.

Respondent's Case

- 24 The OC opposed the application and disputed the allegations made by the Applicants.
- 25 The OC filed and served documentary evidence and submissions which were supplemented by oral evidence on affirmation from Yuen Lee. The OC's documents and submissions were filed on 29 September 2021; 16 November 2021; 17 November 2021 and 21 January 2021. They were tendered as part of the evidence.
- 26 The OC argued that there were no grounds for the appointment of a compulsory strata manager under section 231 of the SSMA and the OC was functioning satisfactorily.
- 27 Ms Lee further stated that there was no support from other lot owners for the appointment of a compulsory strata manager and vehemently denied the allegations of misconduct made against her by the Applicants.
- 28 In her evidence Ms Lee denied and answered each allegation of misconduct and irrational behaviour made against her. She believed that the current strata manager was working against her and not in the best interests of the OC. For this reason she was seeking to have O'Neill Strata Management removed and replaced as strata manager.
- 29 Ms Lee conceded there was a conflict between some other lot owners and herself. She stated these were personal attacks designed to have her removed as the secretary. She denied any wrongdoing and disputed the claims made by the Applicants.

Consideration

- 30 The Applicants are lot owners in the strata scheme and fall within the definition of "interested person" in section 226 of the SSMA. The Applicants have standing to bring the application seeking compulsory appointment of a strata manager.
- 31 Section 237 of the SSMA :

(1) Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation The Tribunal may, on its

own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent-

to exercise all functions of an owners corporation, or

to exercise specified functions of an owners corporation, or

to exercise all functions other than specified functions of an owners corporation.

(2) Order may confer other functions on strata managing agent

The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise-

all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions, or

all the functions of chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made

The Tribunal may make an order only if satisfied that-

the management of the strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

an owners corporation has failed to perform one or more of its duties, or

an owners corporation owes a judgment debt.

(4) Qualifications of person appointed

A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must-

hold a strata managing agent's licence issued under the Property, Stock and Business Agents Act 2002, and

have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) Terms and conditions of appointment

A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of the appointment) specified in the order making or directing the appointment.

(6) Return of documents and other records

A strata managing agent appointed as a consequence of an order under this section must cause a general meeting of the owners corporation not later than

14 days before the end of the agent's appointment and must on or before that meeting make arrangements to return to the owners corporation all documents and other records of the owners corporation held by the agent.

(7) Revocation of certain appointments

An order may be revoked or varied on application and, unless sooner revoked, ceases to have effect at the expiration of the period after its making (not exceeding 2 years) that is specified in the order.

(8) Persons who may make the application

The following persons may make an application under this section-

(a) a person who has obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,

(b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in the lease of a lot in the scheme,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

32 The principles regarding whether or not to appoint a compulsory strata manager are well established.

33 In *Hoare v The Owners – Strata Plan No. 73905* [2018]NSWCATCD45 at [199]-[200], the Tribunal said:

34 “The appointment of a compulsory strata manager is a serious measure not to be taken lightly, because it removes the democratic process that has been established under the [SSMA] for the owners corporation to govern itself. In essence, it places the owners corporation into the hands of an administrator for a period of time”.

35 In respect of 237(3)(a) of the SSMA, the Appeal Panel of the Tribunal stated in *Bischoff v Sahade* [2015]NSWCATAP 135 at [22]:

“Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

(1) does not perform a required function, for example to properly maintain the common property;

(2) exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular lot owner or group of lot owners in a manner not authorised by the SSMA;

(3) fails to exercise a power or make a decision to prevent a contravention by lot owners and occupiers of their obligations under the SSMA, including the lot owner's and occupier's obligation to comply with the bylaws; and

(4) raises levies and takes or defends legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners corporation or the lot owners as a whole".

- 36 The Tribunal must be satisfied on the evidence that one or more of the circumstances set out in section 237 (a)-(d) has occurred, and if so, there are appropriate discretionary reasons for the appointment of a compulsory strata manager.
- 37 As stated in *Hoare* the appointment of a compulsory strata manager is a serious matter which must be taken into account when exercising the discretion. The decision making process is taken out of the hands of the lot owners.
- 38 The decision in *Hoare* at [202] suggests the fact that some lot owners do not agree does not make an OC dysfunctional.
- 39 As noted by the Tribunal in *Maple v The Owners-Strata Plan No 8950* [2021] NSWCATCD 108 at [20]–[21] an applicant may provide sufficient objective evidence to satisfy the Tribunal that one of the matters set out in section 237 (a)-(d) has occurred, but failed to satisfy the Tribunal that the nature or duration of the actions or inactions of the owners corporation or the level of dysfunctionality does not justify the appointment of a compulsory strata manager.
- 40 A further relevant consideration is whether there has been a recent change involving compliance with obligations under the SSMA. The nature and degree of the non-compliance may also be relevant in the exercise of the discretion.
- 41 The Applicants bear the onus of proof and must provide evidence which satisfies the Tribunal on the balance of probabilities that it should appoint a compulsory strata manager.
- 42 The Reasons for seeking the appointment of a compulsory strata manager are set out in the Applicant's evidence and summarised in paragraph 7 above.
- 43 What is clear from the evidence is there is a conflict between the Applicants and Yuen Lee. Allegations have been made by the Applicants about Ms Lee's

behaviour and conduct as secretary of the OC. They have provided copies of emails, correspondence, and other documents in support of their application.

- 44 Ms Lee has denied any wrongdoing and wants a finding to that effect. As the Tribunal stated during the hearing, there will be no finding about Ms Lee's conduct as secretary. Ms Lee stated that she thought the application was a personal attack upon her, a claim which was strongly denied by the Applicants.
- 45 The real question for determination is whether the Tribunal should make an order appointing a person as strata managing agent having regard to the circumstances in section 237(3) of the SSMA.
- 46 The Tribunal is not satisfied that any of the criteria in *Bischoff* regarding section 237 (3) (a) have been established to the extent of the Tribunal being satisfied that the owners corporation is relevantly dysfunctional, and a compulsory strata manager should be appointed. The other matters in section 237 (3)(b)-(d) are not relevant to these proceedings.
- 47 Whilst Ms Lee and the OC may have made some questionable decisions in the opinion of the Applicants, they are not sufficient to justify the appointment of a compulsory strata manager. Ms Lee has provided reasonable explanations and clarification in answer to each of the matters raised in the Applicant's submission.
- 48 The Tribunal has given careful consideration to the evidence and submissions of the parties. Ms Lee as secretary is entitled to raise issues with O'Neill Strata Management about management of the strata scheme and seek answers to her questions. That is part of her role as secretary. It is understandable there will be friction between them from time to time.
- 49 On the objective evidence, the Tribunal is satisfied that the OC and strata committee are functioning satisfactorily notwithstanding the submissions and evidence provided by the Applicants. In arriving at this conclusion the Tribunal has taken into account the statements in *Bischoff* referred to earlier.
- 50 The evidence does not satisfy me on the balance of probabilities that the OC has not performed a required function, has exercised a power or made a decision for an improper purpose, failed to exercise a power or made a

decision to prevent a contravention by Lot owners and occupiers under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws, and raised levies and taken or defended legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the OC or lot owners as a whole..

51 The fact the Applicants are dissatisfied with the OC and strata committee do not establish that the strata scheme is not functioning satisfactorily. There is no evidence that the majority of other lot owners support the application or are in favour of the appointment of another strata manager.

52 The Tribunal has been referred by Ms Lee to an email from Bengt Larsen sent to the other lot owners on 16 November 2021 as follows:

“To all Owners

Ms Lee chose to use the subject heading ‘Compulsory Strata Manger’, which is misleading as both Robert Ball and myself are not in favour of compulsory takeover by the Strata Manger (ie OSM). However, the final determination will rest with the Tribunal Member but our recommendation will be to elect new OC Strata Committee without Ms Lee’s involvement

Hopefully this explains our intention and clears up this deliberate tactic generated by Ms Lee.”

53 The Tribunal notes that the next annual general meeting is to be held in May 2022. Given that the meeting is due in about 2 months, any decisions about appointment of a new committee secretary, committee members and managing agent can be dealt with at that meeting. It will be an opportunity for all lot owners to have their say about the matter.

54 A further consideration in the exercise of the Tribunal’s discretion is that GK Strata Management Pty Ltd was appointed the compulsory strata manager in 2016. That appointment ended on or about 30 July 2020. As noted in *Hoare* the appointment of a strata manager removes the democratic process and is akin to the appointment of an administrator.

55 The Tribunal’s view is that the appointment of a compulsory strata manager is a serious matter and the other lot owners should be given the opportunity to exercise their rights under the SSMA to elect their committee members and the appointment of a strata manager

56 For the above reasons the application for the appointment of a compulsory strata manager under section 237 of the SSMA is dismissed.

The image shows a handwritten signature in black ink, consisting of several loops and a long horizontal stroke. To the right of the signature is the official seal of the NSW Civil & Administrative Tribunal. The seal is circular with a double border. The outer border contains the text "NSW CIVIL & ADMINISTRATIVE" at the top and "TRIBUNAL" at the bottom, separated by two small stars. The inner circle features the coat of arms of New South Wales, which depicts a shield supported by a kangaroo and an emu, with a five-pointed star above them.

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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