



Supreme Court
New South Wales

Case Name: Brenchley v The Owners – Strata Plan No 80609

Medium Neutral Citation: [2022] NSWSC 646

Hearing Date(s): On the papers

Date of Orders: 23 May 2022

Decision Date: 23 May 2022

Jurisdiction: Equity

Before: Robb J

Decision: The Court makes no order as to the costs of any party to these proceedings, with the intent that the plaintiffs and the second defendant should bear their own costs of the proceedings.

Catchwords: COSTS — party/party — general rule that costs follow the event — Court orders termination of strata scheme and winding-up of owners corporation — numerous appearances in Supreme Court and New South Wales Civil and Administrative Tribunal — parties achieve compromise in fact with assistance of Court and compulsory manager — application of principles in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6 — no order as to costs

Legislation Cited: Corporations Act 2001 (Cth), s 472
Strata Schemes Development Act 2015 (NSW), ss 135, 136

Cases Cited: Brenchley v Clissold [2021] NSWCATAP 319
Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6

Category: Costs

Parties: Anthony Reginald James Brenchley (First Plaintiff)
Mark Lambell (Second Plaintiff)
Jenny Lambell (Third Plaintiff)
Adam Severin (Fourth Plaintiff)
Ann Marie Connery (Fifth Plaintiff)
The Owners – Strata Plan No 80609 (First Defendant)
Keith Barry Clissold (Second Defendant)

Representation: Counsel:
D Sulan SC/B Yin (Plaintiffs)
T Davie (First Defendant)
T Rollo (Second Defendant)

Solicitors:
Makinson d’Apice Lawyers (Plaintiffs)
Minter Ellison (First Defendant)
Caroll & O’Dea (Second Defendant)

File Number(s): 2020/00344370

JUDGMENT

- 1 The plaintiffs and the second defendant were the lot owners in Strata Plan No 80609, by which the former first defendant, The Owners – Strata Plan No 80609, was created.
- 2 The Court has recently made orders under s 136 of the *Strata Schemes Development Act 2015* (NSW) that the strata scheme be terminated and that the first defendant be wound up. I will set out the relevant orders below.
- 3 The only outstanding issue for the Court to deal with is the costs of the proceedings.
- 4 The plaintiffs seek the following cost orders:
 - (1) the second defendant is to pay the plaintiffs' costs of these proceedings, to be agreed or assessed.
 - (2) no order as to costs in relation to the first defendant.
- 5 The plaintiffs accept that if orders are made in these terms, this will not disturb the previous costs order made by Darke J against the plaintiffs in favour of the first defendant on 24 September 2021.

- 6 The second defendant's response was that the plaintiffs should be ordered to pay the second defendant's costs. Alternatively, if the Court is not satisfied that the order sought by the second defendant is warranted, then the Court should, subject to the order of Darke J in favour of the first defendant, order that the parties bear their own costs.
- 7 In the second defendant's submissions, he canvassed many of the individual issues that arose in the proceedings and the parties' responses to those issues and submitted that in respect of many of them it would be warranted for the Court to order the plaintiffs to pay the second defendant's costs on the indemnity basis. Having made those submissions, the second defendant submitted that, striking a proper balance overall, an order for the plaintiffs to pay the second defendant's costs of the whole proceedings on the ordinary basis is appropriate.
- 8 The first defendant accepted that the appropriate order in respect of its costs was that there be no order as to those costs. I understand that there is no contest about the first defendant's position in respect of costs, and that order will be made.
- 9 I will begin by saying something about the circumstances that have led to the termination of the strata scheme and an order for the winding up of the first defendant.
- 10 There were five lots in the strata scheme, three of which were held by the plaintiffs and two of which were held by the second defendant.
- 11 Unfortunately for the lot owners, the building containing the apartments represented by the lots on the land owned by the first defendant was so poorly constructed that it was discovered that the building and the apartments were entirely uninhabitable. That had the result that the purpose of the strata scheme failed, and it became inevitable that the strata scheme would be terminated, and the first defendant wound up. Furthermore, the evidence established that the return to the lot owners would be substantially greater if the land owned by the first defendant was sold in one line, so that the building could be demolished and the land redeveloped, than if the lot owners sold their lots individually.

- 12 Before these proceedings were commenced by the plaintiffs, disputes had arisen between the plaintiffs and the second defendant concerning the conduct of the affairs of the first defendant.
- 13 That dispute led to proceedings in the New South Wales Civil and Administrative Tribunal (NCAT) that were determined by orders made on 8 September 2020. The orders were:
1. Pursuant to s 237 *Strata Schemes Management Act 2015* I appoint Strata Title Management (STM) to carry out all the functions of the Owners Corporation of SP 80609 and of the executive committee of that strata plan in accordance with the terms set out in the letter from STM dated 4 March 2020.
 2. In addition to any other functions that STM carries out pursuant to the above order STM is to have the accounts for the strata scheme audited from October 2016 to the date of these orders take effect and ascertain what, if any, levies are in arrears.
 3. Order 2 is to be undertaken within 3 months of these orders taking effect.
 4. Within 14 days of these orders taking effect the Owners Corporation of SP 80609 is to hand over all records in its possession and take all other necessary steps to ensure that STM can comply with the above orders.
- 14 The application to NCAT was made by the second defendant and resisted by the first defendant. At that time, the executive committee of the first defendant was controlled by the plaintiffs. Effectively, the plaintiffs caused the first defendant to resist the second defendant's application. That resistance was unsuccessful.
- 15 It is not necessary to consider the reasons in the NCAT decision in detail. The underlying facts considered by NCAT are not entirely clear to the outside observer.
- 16 In 2016, the second defendant was successful in obtaining an order for the appointment of a compulsory managing agent (apparently called "Hylands" or "Highlands"). On 4 October 2016, Highlands determined that a special levy of \$250,000 should be made on the lot owners. The second defendant paid his share of the levy in respect of the single lot that he owned at the time. NCAT found (at [107]) that the other lot owners were obliged to pay but failed to pay their shares in the levy when it was due. The plaintiffs had apparently paid money to meet the legal fees of the first defendant in litigation in which the first defendant and the plaintiffs were parties. The plaintiffs treated those payments

as loans to the first defendant. At a time when the plaintiffs controlled the executive committee, they made a resolution on behalf of the first defendant that they could set off the supposed loans to the first defendant against their obligations to meet their share of the 2016 levy. That arrangement was made without the concurrence of the second defendant.

17 NCAT accepted (at [116]-[118]) the present second defendant's submissions that there is no right under the strata legislation that allows a lot owner to step into the shoes of an owners corporation and make payments directly due or payable by an owners corporation to a third party. Lot owners have no right to absolve themselves of their obligation to pay levies and offset that obligation by a payment to a third party, or by making a loan to the owners corporation instead of paying their levies. Lot owners have no power to absolve themselves of their obligation to pay levies and instead to be credited for money they have paid to third parties on the owners corporation's behalf.

18 NCAT concluded (at [122]-[123]):

122 I therefore conclude that not only did the other lot owners breach their obligation to pay the October 2016 levy, rendering them unfinancial, but they remain in this position until they pay this levy.

123 Whether they have now paid this levy or indeed later levies becomes a more complex issue to which I now turn.

19 NCAT then considered that issue but was not able to determine it conclusively.

20 NCAT concluded:

185 A transparent and accurate record of levies raised and payments received goes to the core of managing a strata scheme.

186 The evidence before the Tribunal certainly leaves some doubt as to whether this is the case for this strata scheme.

187 What is clearly lacking in the evidence is an accurate reconciliation of the payments made and the payments that remain outstanding since the time of the October 2016 levy. The raising and collection of levies is the engine that drives the operation and management of the strata scheme.

188 Until this happens and the financial liability of all lot owners for outstanding levies is examined and clarified and steps are taken to enforce payment for any outstanding levies, the scheme cannot be said to be functioning satisfactorily.

189 Given the pattern of the other lot owners voting with their combined unit entitlement against the applicant, given that agents such as BCS were unable to control and work with the Owners Corporation, I am of the view that this can

only be achieved by an arm's length person, a person who has the expertise and authority to run the scheme unhampered.

190 For this purpose, the appropriate order is to appoint STM for 12 months with all the powers of the respondent Owners Corporation and the executive. It is to be hoped that once the state of the levies is unravelled and resolved, the scheme will have a clean slate and be able to then take on the responsibility of its own affairs.

- 21 Strata Title Management was therefore appointed to carry out all the functions of the first defendant and its executive committee and to have the accounts of the strata scheme audited from October 2016 to date.
- 22 On 10 August 2021, an appeal by the first defendant to the NCAT Appeal Panel was dismissed (see *Brenchley v Clissold* [2021] NSWCATAP 319 at [1]), and an order was made extending the compulsory management to 8 March 2022.
- 23 The summons commencing these proceedings was filed by the plaintiffs on 4 December 2020. The plaintiffs sought the following orders:

The plaintiffs claim:

1. Pursuant to *Strata Schemes Development Act 2015 (SSMA)* s 135 and 136, the 1st defendant, a strata scheme, be wound-up and thereafter terminated.
2. Pursuant to SSMA s 136(2)(i), Andrew Sallway and Jeffrey Marsden be appointed to wind up the 1st defendant to exercise such powers, authorities, duties, and functions of the 1st defendant as are necessary or convenient to effect winding up and termination of the said strata scheme.
3. The costs of this application be costs in the winding up ...

- 24 It will be noted that, apparently because the application became contested on an adversarial basis, no party has asked the Court to make the costs order sought in prayer 3 of the summons.
- 25 For the purposes of these reasons, the significant aspect of the relief sought in the summons is that the plaintiffs wanted an order appointing the two gentlemen to wind up the first defendant with all powers "necessary or convenient to effect winding up and termination of the said strata scheme", without any precise specification of their powers and functions or what the effect of the termination and winding up order would be.
- 26 The two sections of the *Strata Schemes Development Act* referred to in the summons relevantly provide as follows:

135 Application for order to terminate strata scheme

(1) Any of the following persons may apply to the court for a termination order for a strata scheme—

(a) an owner of a lot in the scheme,

...

136 Order to terminate strata scheme

(1) The court may, on an application made under section 135, make an order terminating a strata scheme (a *termination order*).

(2) A termination order may include directions about any of the following—

(a) the sale or disposition of property of the owners corporation,

...

(f) the distribution of the assets of the owners corporation and the proportionate entitlement of each person under the distribution,

(g) the administration, powers, authorities, duties and functions of the owners corporation,

...

(i) the winding up of the owners corporation, including the appointment, powers, authorities, duties and functions of any person to carry out the winding up,

(j) any matter in relation to which the court considers it just and equitable, in the circumstances of the case, to make provision in the order.

...

- 27 It is not necessary for the purpose of this costs judgment to consider the effect of the strata legislation in any detail. It is sufficient to note that it was agreed by the parties that the effect of the Court making an order terminating the strata scheme would be that, so to speak, all the individual lots would dissolve into the common property owned by the first defendant. Furthermore, the winding up of a strata scheme operates under a completely different legal regime than the winding up of a company incorporated under the *Corporations Act 2001* (Cth). Under the statutory scheme governing the winding up of a corporation, the corporation continues to exist until it is deregistered. The making of the order that the company be wound up does not have any immediate effect on the assets and liabilities of the company, although the way the assets and liabilities may be determined and the entitlements of third parties and members in relation to the assets and liabilities will be regulated by a new regime under the legislation. There are regulatory arrangements for the liquidator to receive proofs of debt from creditors and to determine creditors' claims, subject to

established appeal procedures. The making of the winding up order does not have any direct effect on the rights of the company's secured creditors.

- 28 The position is different in respect of the termination of a strata scheme and the winding up of an owners corporation because, as I have said, the individual lots disappear, as it were, when the termination becomes effective, and the lot owners' rights, and therefore the rights of any mortgagees, are fundamentally changed. Furthermore, there is no established regulatory scheme for the determination of the assets and liabilities of the strata scheme and the determination of claims by and between lot owners and the owners corporation.
- 29 As a practical matter, if the termination of a strata scheme and the winding up of an owners corporation is to be done in a proper, fair and orderly manner, the Court must fashion appropriate orders under the *Strata Schemes Development Act* on an ad hoc basis to deal with all of the issues that may arise.
- 30 The orders sought by the plaintiffs in the summons did not address these practical problems.
- 31 On 24 June 2021, the plaintiffs filed a notice of motion in these proceedings, which sought the following relief:
1. Upon the Plaintiffs by their counsel giving the usual undertaking as to damages, order that, the First Defendant be restrained until further orders of this Court from:
 - (a) incurring any further legal expenses with the sole exception of:
 - (i) reasonable expenses in connection with these proceedings; and
 - (ii) reasonable expenses in connection with the Appeal Panel Proceedings 2020/00371080; and
 - (b) taking any step (or further step) in respect of the carrying out of (sic) audit of the accounts of the First Defendant for the period from October 2016 in accordance with the orders of the NSW Civil & Administrative Tribunal on 8 September 2020 in proceedings no SC18/49404 & SC19/20511; and
 - (c) taking any step to recover from the Plaintiffs any unpaid contribution, interest and expenses of the First Defendant ...
- 32 This notice of motion was amended by the plaintiffs on a number of occasions, and it was ultimately dismissed, as I understand it, because it was not prosecuted. As mentioned above, Darke J ordered the plaintiffs to pay the first defendant's costs of the notice of motion.

- 33 The proceedings came before Darke J for directions on 6 August 2021. The transcript of those proceedings reveals the different positions as between the plaintiffs and the second defendant concerning the appropriate fate of the first defendant. The parties have challenged the propriety of the others' motivations in these proceedings, but it seems to me that all the parties had a reasonable basis for the approach that they took.
- 34 The plaintiffs were concerned about the costs, and in particular the legal costs incurred by Strata Title Management in carrying out the functions of the first defendant and its executive committee and in conducting the audit pursuant to the orders of NCAT. There was evidence in these proceedings that, between November 2020 and May 2021, legal fees of \$91,911.29 had been incurred, and, between June 2021 and January 2022, a further \$198,115.86 in legal fees had been incurred.
- 35 The plaintiffs' position, as explained to Darke J, was that as the termination of the strata scheme and the winding up of the first defendant was inevitable, there was no justification in Strata Title Management incurring further costs and fees, and that the appropriate course was for the Court to appoint liquidators and the liquidators could then decide in a summary way all outstanding questions to enable the termination of the strata scheme and the winding up of the first defendant. The then counsel for the plaintiffs said [T 06/08/21 3.41-3.49]:

So the most efficient way for the dispute underlying these proceedings to be resolved is for any question like that to be determined by somebody with the authority to make an authoritative decision.

Now, that is either your Honour appoint a liquidator, who then uses the power of the liquidator and then the parties can determine whether or not there is commercial value in taking whatever points they want to take. If they are taken, then they are determined either before you in the making of the orders, or on the instance of the liquidator returning the matter to the court.

- 36 Counsel added [T 06/08/21 4.15-4.18]:

... the problem that we are trying to avoid is that if this were an ongoing strata scheme, the parties would continue to be at each other's throats about matters that are fundamentally or ultimately trivial or peripheral or ephemeral once the strata scheme is in its terminal phase ...

- 37 Counsel made it clear that the plaintiffs' position was that there was no longer any point in the parties arguing about the standing of lot owners to participate in particular meetings.
- 38 The second defendant's response was to acknowledge that the termination of the strata scheme and the winding up of the first defendant was inevitable, but to submit that the issue was as to when that should happen. The second defendant submitted that Strata Title Management should be given an opportunity to finish its audit task to determine what the rights of the lot owners were as between themselves and as against the first defendant. The second defendant submitted that the preferred course was to permit the dispute resolution process available under the strata schemes legislation to take place before termination and winding up orders were made [T 06/08/21 5.32-5.40]. Counsel for the second defendant advised Darke J that the second defendant would abide by the decisions made by the compulsory manager through the audit process [T 06/08/21 6.4-6.7].
- 39 It is evident that the second defendant was concerned that, by commencing these proceedings, the plaintiffs were seeking to avoid the consequences of the orders made by NCAT and to deprive the second defendant of the benefit of the unfinished management and audit process in which Strata Scheme Management was engaged with the authority of NCAT.
- 40 Darke J decided that the appropriate course was to fix these proceedings for hearing as soon as was practically possible, substantially on the ground that his Honour considered that the dispute would not be resolved without a court hearing to determine the matter.
- 41 The initial hearing took place before me on 24 and 25 November 2021 commencing at 10:00 AM on the first day and ending at 2:55 PM on the second. The proceedings were conducted in an adversarial way.
- 42 Prior to the commencement of the hearing, my Associate received an email that contained draft short minutes of order stating the orders sought by the plaintiff and the revisions to those orders proposed by the second defendant. In particular:

- Both parties agreed that an order should be made for the termination of the strata scheme although they were at odds as to when the order should take effect.
- They also agreed that an order should be made that the first defendant be wound up.
- The plaintiffs wanted Messrs Sallway and Marsden to be appointed as liquidators while the second defendant suggested the appointment of Strata Title Management, or another named strata manager.
- The second defendant resisted the plaintiffs' suggestion that the liquidators be given the duties and functions of a liquidator under s 472 of the *Corporations Act*.
- The second defendant wanted the inclusion of a power to commence proceedings in NCAT to determine the rights of the parties.
- The parties were at odds as to many detailed aspects of the way that the winding up of the first defendant should be carried out.
- The second defendant's proposed orders made provision for the liquidator to increase the levies owed by the parties.

43 Counsel for the parties made detailed submissions to the Court as to how the strata scheme legislation operated generally, and in particular how it might operate in the context of the termination of a strata scheme and the winding up of the owners corporation in circumstances where some of the lots may be encumbered by mortgages. This was entirely appropriate and was invited by the Court because the issues for determination were unusual and not within the ordinary experience of the Court. The submissions also addressed the role of Strata Title Management, which was represented by counsel in the interests of the first defendant.

44 The parties led their evidence, which canvassed a significant range of issues concerning the history of the first defendant, the reasons why the termination of the strata scheme and the winding up of the first defendant were necessary, the financial affairs of the first defendant, the consequences of the defective building work and the legal proceedings that the defective work had generated, the mortgages on the lots owned by the plaintiffs and what steps might be appropriate to protect the interests of the mortgagees, the result of the NCAT proceedings and what should be done to properly balance the interests of the lot owners as between the completion of the implementation of NCAT's orders and the appointment of liquidators of the first defendant.

45 A particular focus of the discussion between counsel and the bench was how the simple appointment of liquidators of the first defendant with generally worded powers, as sought by the plaintiffs, could lead to a proper resolution of the dispute.

46 At the end of the hearing, I was not persuaded that the parties had provided the Court with sufficient information to enable it to make a proper determination of the appropriate orders to achieve the termination of the strata scheme and the winding up of the first defendant, particularly in respect of doubts as to how the relevant aspects of the strata scheme legislation operated in relation to the time when the Court's orders took effect and the directions that the Court might be empowered to give to the liquidators to ensure that the steps taken by them in pursuance of the orders were lawful and effective.

47 At [T 25/11/21 91.3-97.24], I listed a number of matters as to which I sought further information from the parties. I will now paraphrase those matters as follows:

- The parties were required to list in detail all the outstanding steps in the affairs of the first defendant required before the strata scheme could be terminated, its property sold, and the first defendant could be wound up. I indicated that I had no objection in principle to the compulsory manager completing the exercise that it was in the course of doing to prepare a report of its conclusions as to the final rights and obligations of the first defendant and the lot owners. The completed report might provide a basis for identifying the real issues that remained in dispute.
- The parties were required to provide a list of disputes between the lot owners that involved the first defendant that must be resolved before the owners corporation is wound up.
- The parties who were lot owners were required to state their positions in relation to the disputed issues identified in the compulsory manager's report.
- The parties were required to identify for the consideration of the Court cost efficient means of resolving outstanding disputes within the winding up.
- The parties were required to identify a practical timetable for the termination of the strata scheme, the winding up of the first defendant and the sale of its property, having regard to the effect on mortgages over lots caused by the making of an order terminating the strata scheme that led to the disappearance of the lots as separate parcels of property.
- The Court required the parties to provide detailed proposals about the appropriate treatment of mortgages pending the sale of the first defendant's

property, particularly in relation to the timing of the order for termination of the strata scheme taking effect.

- The parties were required to provide a schedule of the assets and liabilities of the first defendant including an expected timetable for getting in assets.
- The first defendant was asked to provide draft final accounts showing matters that were uncontroversial and matters that may be the subject of dispute.
- The parties were required to advise the Court whether the existing compulsory manager was willing and able to perform all the functions of a liquidator of the first defendant, given that there was a dispute between the parties concerning the identity of the liquidator to be appointed.
- Finally, the parties were required to obtain indications from any persons proposed to be appointed as liquidators of the first defendant their schedule of fees and costs, and an estimate of the costs of the winding up, so that the Court might be able to exercise some control over the costs of the winding up process.

48 The proceedings were then stood over to 16 December 2021 at 2:00 PM.

49 New counsel were retained to appear for the plaintiffs at the hearing on 16 December 2021.

50 At the end of the hearing on 16 December 2021, it was necessary to stand the proceedings over for further hearing at 10:00 AM on 17 December 2021.

51 At that hearing, counsel for the plaintiffs propounded a new set of short minutes of order that had been drafted having regard to the issues that I had raised at the earlier hearing. The plaintiffs proposed orders that would protect the mortgagees of lots on an interim basis and give them an opportunity to appear to protect their interests. Messrs Sallway and Marsden would be appointed to sell the first defendant's property. Orders would be put in place to restrict unnecessary costs being incurred, pending the making of a final order for the winding up of the first defendant. The underlying objective was to try to avoid unnecessary disputation by having the Court make orders in stages that might facilitate the termination of the strata scheme and the winding up of the first defendant being achieved in a practical way.

52 It was necessary for senior counsel for the plaintiffs to take the Court through the proposed orders to explain their effect. The Court was able to provide its provisional reaction to the various orders and, in some limited respects, that

process disclosed issues that would require some revision to the wording of the proposed orders.

- 53 In the interim since the earliest stage of the hearing, the person responsible for the compulsory management of the first defendant had prepared a report that, provided to the Court an updated explanation of the activities of the compulsory manager undertaken in performance of its appointment under the orders made by NCAT.
- 54 One aspect of the compulsory manager's activities was that it had exercised its power to ratify a number of resolutions made by the executive committee of the first defendant that had been contested, which had the effect of removing the issue of the effectiveness of those resolutions from the ambit of the dispute.
- 55 The compulsory manager had also made progress on the report that it had been preparing, which, in draft terms at the time of the adjourned hearing, provided the Court and the parties with a fairly close indication of the final divisible property of the first defendant, the liabilities of lot owners to the first defendant, and the likely distributable dividends. The compulsory manager was also working towards the calculation of interim distributions that could safely be made to lot owners. The Court was informed that it might only take the compulsory manager seven days to complete the report.
- 56 The Court was advised by counsel for the first defendant that an estimate had been made of the compulsory manager's costs to complete the work required by its appointment. It was said that the compulsory manager's costs of getting in an insurance payout of \$1.5 million had been increased by the necessity to resist the application made by the plaintiffs for the interlocutory injunction sought in the notice of motion that I have referred to above.
- 57 One of the advantages of the interim distributions being made would be that it would fund the repayment of mortgage debts that lot owners were not otherwise able to repay from their other resources.
- 58 The approach adopted by counsel for the second defendant was to make submissions about the Court's power under the strata schemes legislation to make some of the orders proposed by the plaintiffs. Counsel also made

observations about a number of practical aspects of the proposed orders. For this purpose, the second defendant proposed an alternate set of orders.

- 59 I decided the legal issues that were in contention in two brief *ex tempore* judgments in which I upheld the submissions made on behalf of the plaintiffs.
- 60 Ultimately, I considered that the version of the proposed short minutes of order that had been revised by the plaintiffs overnight to accommodate issues raised in the debate the previous day were appropriate in principle and within the Court's power.
- 61 Although the challenges made on behalf of the second defendant to the regime proposed by the plaintiffs for the termination of the strata scheme and the winding up of the first defendant were not successful, I consider that the view of the operation of the strata schemes legislation propounded on behalf of the second defendant was reasonably arguable and was conscientiously put to the Court to assist it to avoid error and in accordance with the invitation that the Court had earlier made to the parties to educate it about the operation of the legislation.
- 62 I made the following orders in chambers on 20 December 2021 based on the final form of the short minutes of order provided by the plaintiffs. My principal purpose in setting out the orders is to demonstrate how they vary in complexity with the orders sought by the plaintiffs in prayer 1 of their summons:

A. Termination of Scheme

1. Order pursuant to sub-section 136(1) of the Strata Schemes Development Act 2015 (the "Act") that the strata scheme under "Strata Plan No 80609" (the "Scheme") be terminated, and that, pursuant to sub-section 137(b) of the Act, such order will take effect on 24 January 2022.
2. Direct pursuant to sub-section 136(2)(j) of the Act that the following persons are to be notified of the making of these orders including that the termination of the Scheme will take effect on 24 January 2022:
 - (a) Mark Lambell and Jenny Lambell shall provide a copy of these orders to any person holding a security interest against lot 1 in the Scheme;
 - (b) Anthony Brenchley and Suzanne Brenchley shall provide a copy of these orders to any person holding a security interest against lot 2 in the Scheme;
 - (c) Ann Morris and Adam Connery shall provide a copy of these orders to any person holding a security interest against lot 4 in the Scheme;

(d) the second defendant shall provide a copy of these orders to any person holding a security interest against any or both of lots 3 or 5 in the Scheme.

(e) the Plaintiffs shall provide a copy of these orders to:

(i) Snowy Monaro Regional Council;

(ii) the Registrar-General.

3. Direct pursuant to sub-section 136(2) of the Act that:

(a) any security interest held against a lot in the Scheme becomes, on the termination taking effect, a charge against the applicable lot owner's entitlement to receive a distribution in the winding up of the Scheme;

(b) Andrew Sallway and Jeffrey Marsden be appointed as from the date of these orders to undertake the following tasks on behalf of the First Defendant owners corporation known as "The Owners – Strata Plan No 80609" (the "Owners Corporation"):

(i) establish an interest-bearing trust account (the "Account");

(ii) enter into any contract of sale with respect to all of the property of the Owners Corporation, including the land, and deposit into the Account the net proceeds of such sale;

(iii) liaise with the liquidator of Glenvine Pty Ltd and Paragon Construction (NSW) Pty Ltd with respect to the making of a final distribution to creditors;

(iv) engage licenced property agents, lawyers, valuers, and/or any other professional persons ("Advisers") to advise on or assist Mr Sallway and Mr Marsden in the execution of their duties pursuant to this paragraph;

(v) withdraw funds from the Account to pay the professional fees of the Advisers, and to pay their proper and reasonable remuneration and expenses, and may apply to the Court for confirmation that their remuneration and expenses were properly paid;

(c) Mr Sallway and Mr Marsden may make reasonable requests of the Owners Corporation for funds for the performance of the tasks in Order 3(b), which requests shall not unreasonably be refused.

4. Mr Sallway and Mr Marsden have liberty to apply on 3 days' notice to all parties in respect of any further directions required to carry out their functions set out in order 3.

B. Obligations of the Owners Corporation pending further order of the court

5. Direct pursuant to sub-section 136(2) of the Act:

(a) by 24 December 2021, the Owners Corporation shall file and serve an updated version of Exhibit E ("Updated Exhibit E") and Exhibit F ("Updated Exhibit F");

(b) by 31 January 2022, the Owners Corporation shall file and serve an affidavit from a proper officer which deposes to and provides:

(i) a statement of the assets and liabilities of the Owners Corporation as at 31 December 2021;

(ii) an account of all receipts and payments made from 8 September 2020 up to 31 December 2021, and, if requested by any of the Plaintiffs or the Second

Defendant, an explanation of the basis upon which any particular payment was incurred.

6. Direct pursuant to sub-section 136(2)(e) of the Act that as from the date of these orders and until further order of the court, the Owners Corporation shall not require any further contributions for the discharge of the liabilities of the Owners Corporation.

7. Direct pursuant to sub-section 136(2)(g) of the Act that as from the date of these orders and until further order of the court, the Owners Corporation's duties and functions shall not extend beyond:

(a) Properly maintaining and keeping in a state of good and serviceable repair the common property pursuant to section 106 of the Strata Schemes Management Act 2015 (NSW) ("SSMA");

(b) Keeping the building insured pursuant to section 160 of the SSMA;

(c) Preparing and keeping financial statements and accounting records in accordance with Divisions 3 and 4 of the SSMA;

(d) Retaining the records and information under Part 10 of the SSMA, and provide such information as may be required by Mr Sallway and Mr Marsden, any former lot owner or any purchaser;

(e) Facilitate compliance with division 2 of Part 10 of the SSMA concerning provision of information about the Scheme; and

(f) The matters required by these Orders.

C. Further conduct of the proceedings

8. The matter be relisted for directions at 9.15 am on Tuesday, 22 February 2022 so as to advance the resolution of any remaining disputes and directions under s 136(2), including the following, as applicable:

(a) whether additional time is required to effect a sale of the land;

(b) whether any person/s should be appointed to carry out the winding up of the Scheme, and if so in what capacity and on what terms;

(c) the basis upon which the proceeds in the Account should be distributed, including:

(i) whether the proceeds should be offset against any amounts owned by any lot owner to the Owners Corporation;

(ii) whether an interim distribution should be made (and if so, in what amount);

(d) whether the liabilities of the Owners Corporation exceed its assets;

(e) whether any persons are liable to contribute amounts required for the discharge of the liabilities of the Owners Corporation and the proportionate liability of such persons.

9. Liberty to apply.

10. Costs reserved.

63 At a short hearing on 22 February 2022, I made directions concerning the exchange by the parties of drafts of the final orders that they sought and

required the plaintiffs and the second defendant to confer in order to agree a single set of proposed orders to the extent possible.

64 The final hearing of about one hour in duration occurred on 7 March 2022. On that date, I made the following final orders for the winding up of the first defendant:

1. Direct pursuant to sub-sections 136(2) and 136(3) of the Strata Schemes Development Act 2015:

(a) that the owners corporation known as “The Owners — Strata Plan No 80609” (the “Owners Corporation”) be wound up;

(b) Andrew Sallway and Jeffrey Marsden (the Appointees) be appointed to carry out the winding up of the Owners Corporation subject to these orders;

(c) the Appointees, in the carrying out of the winding up of the Scheme, are so far as practicable to discharge all the duties and functions of a liquidator as though they were appointed as liquidators pursuant to s472(1) of the Corporations Act 2001 (Cth) (Corporations Act);

(d) that from the cessation of the existing appointment of Patrick Rush of Strata Title Management as compulsory manager, the administration, powers, authorities, duties and functions of the Owners Corporation during the winding up, including but not limited to the functions set out in paragraphs 3(b)(i)-(iv) and 7 of the orders of 20 December 2021 (the Prior Orders), may be exercised or performed by the Appointees;

(e) the Appointees take control of the books and records of the Owners Corporation and of all property of the Owners Corporation. For the avoidance of any doubt, the books and records of the Owners Corporation are to include any quantity surveyor reports and defect reports, obtained in connection with the Property;

(f) the Appointees have power to do, or to cause the Owners Corporation to do, all other things reasonably necessary for winding up the affairs of the Owners Corporation, including but not limited to:

(i) the functions set out in paragraphs 3(b)(i)-(iv) and 7 of the Prior Orders;

(ii) applying any monies received or realised:

(A) in payment of the Appointees’:

(1) reasonable remuneration for the work performed, such remuneration to be either approved in writing by a majority in number of the Former Owners (defined below) or by this Court; and

(2) expenses incurred in performing their role as Appointees;

(B) in discharge of the Owners Corporation’s liabilities;

(C) towards any interim distribution (and if so, the Appointees may determine in what amount) of the amounts to be distributed under paragraph (D); and

(D) by distributing the remaining monies to the Plaintiffs and the Second Defendant (in their former capacity as lot owners of the Scheme (as defined in paragraph 1 of the Prior Orders)) (Former Owners);

(iii) so far as is relevant, the matters specified in s 477 of the Corporations Act as if the Owners Corporation was a 'company' for the purposes of the Corporations Act;

(iv) seeking court orders or directions from the Court in relation to the winding up of the Owners Corporation;

(g) the Appointees shall not require any of the Former Owners to contribute any additional amounts for the discharge of the liabilities of the Owners Corporation;

(h) that each of the owners in the Scheme immediately prior to this termination (the "Former Owners" and each a "Former Owner") supply to the Appointees within seven (7) days of the date of termination full details of any security interest in existence immediately before termination, whether or not registered, over the Former Owner's former lot;

(i) that in applying amounts due to a Former Owner as a distribution:

(i) the Appointees are to pay the amount of the distribution up to the amount secured to any secured party who substantiates their entitlement as against the Former Owner's former lot to the Appointees (as a secured party in respect of the Former Owner's lot) at the time of distribution to the Former Owner;

(ii) such a payment will be taken to have been made in satisfaction, to that extent, of the obligation to make a distribution to that former owner under paragraph (f)(ii)(D); and

(iii) in the case of land tax and council rates relating to the interest of a Former Owner, the payments (whether or not liability was incurred on the lot or on other land owned by the Former Owner) are to be made (and treated as an interim distribution to the Former Owner) on or before completion of the sale of land and before the payment of any other secured party;

(j) that (subject to paragraph 2 below and subject to any further order of the Court):

(i) in ascertaining the amounts of the distributions to Former Owners under paragraph (f)(ii)(D), the Appointees shall (and the Former Owners agree) make distributions to the Former Owners in the amounts shown in column 8 of the table at Annex A:

(A) subject to any difference in the available funds for distribution;

(B) to the extent that the total available for distribution differs from the total row in column 8 of the table at Annex A, by applying the difference in proportion to the Former Owners' unit entitlements; and

(ii) in preparing the statement under paragraph (m)(i), the assets and liabilities of the Owners Corporation, as at 16 December 2021, are to be consistent with the report filed in these proceedings on 21 February 2022 at 11:21am, subject to:

(A) any other assets or liabilities that may come to the attention of, or be incurred by, the Owners Corporation;

(B) the effect of any differences between estimated and actual liabilities incurred by the Owners Corporation, as well as any differences between estimated and actual values of assets owned by the Owners Corporation net of realisation costs as contemplated by paragraph (i)(B); and

(C) paragraph 2 below;

(k) that any further order as contemplated in paragraph (j), sought by a Former Owner, is to be brought by application on a notice of motion;

(l) that the Appointees within twenty-one (21) days cause to be published in each of:

(i) the Sydney Morning Herald;

(ii) the Cooma-Monaro Express; and

(iii) the New South Wales Government Gazette,

a notice in the form set out in Annex B, and serve a copy of that notice with a sealed copy of these orders on:

(iv) the Snowy Monaro Regional Council;

(v) the Commissioner for State Revenue; and

(vi) the Registrar-General;

(m) upon completion of the winding up of the affairs of the Owners Corporation, the Appointees shall file and serve an affidavit containing:

(i) a statement of the assets and liabilities of the Owners Corporation as at the date of the completion of the winding up;

(ii) an account of all receipts and payments of the Owners Corporation from the date of the Prior Orders to the completion of the winding up;

(iii) a statement that the winding up of the Owners Corporation has been completed

(n) that upon the filing of that affidavit, the Owners Corporation shall be dissolved.

2. In relation to the order for costs made by Darke J on 24 September 2021 against the plaintiffs in favour of the Owners Corporation, in lieu of the amount of \$63,305.61 proposed by the Owners Corporation in the report filed in these proceedings on 21 February 2022 at 11:21am and allocated by the Owners Corporation between the Plaintiffs in proportion to their unit entitlements:

(a) the Plaintiffs and the Appointees are to seek to agree an amount for those costs orders by 4:00PM on 4 April 2022;

(b) failing such agreement by 4:00PM on 4 April 2022, the Appointees are to cause the Owners Corporation to make an application for assessment of those costs;

(c) the amount of those costs as agreed under paragraph (a) or assessed on application under paragraph (b) (including any costs of the costs assessment awarded to the Owners Corporation and less any costs of the costs assessment awarded to the Plaintiffs) is to be treated as an additional asset of the Owners Corporation (thereby being an amount that will be the total at column 8 of Annex A in accordance with paragraph 1(j)(i)(B));

(d) subject to paragraph (e), the Appointees are to cause the Owners Corporation to offset the liability of the Plaintiffs for costs as agreed or assessed, against their distribution under paragraph 1(f)(ii)(D), in proportion to their respective unit entitlements;

- (e) paragraph (d) will not apply to the extent that the amount is required for payment to be made under paragraph 1(i) to a mortgagee or chargee;
- (f) nothing in this paragraph 2 affects any right of any of the Plaintiffs to seek contribution from another of the Plaintiffs for a share of the costs applied against them under paragraph (d).

Costs of these proceedings

3. The plaintiffs and second defendant are to file and serve written submissions as to the costs of these proceedings as follows:

- (a) By Monday, 14 March 2022, the plaintiffs shall file and serve any written submissions as to the costs of these proceedings of no more than 3 pages.
- (b) By Monday, 21 March 2022, the defendants shall file and serve any written submissions as to the costs of these proceedings of no more than 3 pages.
- (c) By Friday, 25 March 2022, the plaintiffs shall file and serve any written submissions in reply as to the costs of these proceedings of no more than 2 pages.

4. The costs of these proceedings be dealt with on the papers unless:

- (a) Any party requests an oral hearing; and
- (b) The Court considers an oral hearing to be necessary.

Liberty to apply

5. Reserve liberty to the Former Owners, the Appointees or any other interested person to apply under s 136(3) of the Strata Schemes Development Act 2015 for an order adding to, varying or discharging any of the above directions.

65 For the purpose of these reasons, order 1(j) and (k) are particularly significant. I have referred above to the difference in the approaches proposed by the plaintiffs and the second defendant at the hearing before Darke J that took place on 6 August 2021, when the plaintiffs advocated the early appointment of liquidators of the first defendant with generally worded powers to resolve all outstanding disputes, and the second defendant resisted that approach because it would deprive the second defendant of the benefit of his success in the NCAT proceedings and the resolution of the financial disputes between the parties by means of the audit process. I mention this initial dispute because the significance of order 1(j) of the orders made on 7 March 2022 is that the passage of time enabled the compulsory manager to complete its investigations in a manner that was ultimately accepted by the parties so that it was able to be incorporated in the final orders.

66 I have set out the history of these proceedings at some length as that history is essential for the purpose of understanding the costs order that I consider is appropriate. Remembering that no party ultimately proposed that the parties' costs should be costs of the winding up of the first defendant, the appropriate order is that no costs order should be made as between the plaintiffs and the second defendant, with the intent that those parties will pay their own costs of the proceedings.

67 I will make that order for the following reasons:

- All parties accepted from an early time in the proceedings that orders terminating the strata scheme and winding up the first defendant should be made.
- The order sought by the plaintiffs in prayer 1 of their summons was not ultimately made by the Court, although an order was made for the appointment of liquidators of the first defendant, but in a number of stages and with significantly more complex provisions to deal with the exigencies of the termination of this particular strata scheme and the winding up of this owners corporation.
- The issues that initially caused the plaintiffs and the second defendant to propose substantially different approaches, being the need to deal with mortgagees and to resolve the disputes as to financial matters, were largely resolved during the course of the proceedings, particularly as a result of the completion of the report by the compulsory manager.
- The structure of the orders ultimately made in two stages on 20 December 2021 and 7 March 2022 obviated for practical reasons a number of difficulties that may have hampered the efficient termination of the strata scheme and the winding up of the first defendant. The structure of the orders proposed by the plaintiffs at the hearing on 16 December 2021 was more sophisticated and practical than the orders proposed by the plaintiffs on 24 November 2021 and accommodated the issues that were exposed in submissions at the earlier hearing.
- From 16 December 2021, the proceedings became much less adversarial than was previously the case and became primarily concerned with the determination of bespoke orders that dealt with the exigencies of the termination of this strata scheme and the winding up of this owners corporation in a manner that protected the interests of third-party mortgagees and was consistent with the Court's powers under the strata schemes legislation.
- As already mentioned, I am satisfied that it was appropriate for the second defendant to raise matters in opposition to the orders proposed by the plaintiffs, and it is not material that that opposition generally failed, as it provided assistance to the Court in understanding the effect of the powers that it was exercising.

- The Court has not been required to deliver any comprehensive reasons for judgment in these proceedings to determine the respective rights of the parties and has only been required to resolve two narrow questions by the *ex tempore* judgments that have been referred to above.
- Consequently, this is not a matter in which it can properly be said that the parties on one side of the record have succeeded, and other parties have failed in the proceedings.
- Although the termination of the strata scheme and the winding up of the first defendant was only achieved by the stepwise process that I have described above, that process was, in my view, akin to a gradual settlement of the disputes between the parties, whereby, with the passage of time, they addressed and resolved real problems and compromised on aspects of the dispute between them. Although not entirely a compromise or one by a single agreement, what the parties achieved was in substance a compromise in fact with the assistance of the Court and the compulsory manager.

68 These matters have caused me to conclude that the costs issue as between the plaintiffs and the second defendant should be resolved in the same manner as did McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624-5; [1997] HCA 6, on the same basis as if they had been able to resolve the issues in the proceedings by a single compromise agreement without the Court having to decide in a formal way the rights of the parties after a contested hearing. His Honour said (footnotes omitted):

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence a litigation. Thus, for example, in *R v Gold Coast City Council; Ex parte Raysun Pty Ltd*, the Full Court of the Supreme Court of Queensland gave a prosecutor seeking mandamus the costs of the proceedings up to the date when the respondent Council notified the prosecutor that it would give the prosecutor the relief that it sought. The Full Court said that the prosecutor had reasonable ground for complaint in respect of the attitude taken by the respondent in failing to consider the application by the prosecutor for approval of road and drainage plans.

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *South East Queensland Electricity Board v Australian Telecommunications Commission* where his Honour ordered the respondent to pay 80 per cent of the applicant's taxed

costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

69 The Court's order is:

(1) The Court makes no order as to the costs of any party to these proceedings, with the intent that the plaintiffs and the second defendant should bear their own costs of the proceedings.

70 In the order that I had just made I have not said anything about how the costs incurred by the first defendant will be paid. I assume that any costs of the first defendant under the management of the compulsory manager will be dealt with under the strata schemes legislation or the NCAT orders. I give the first defendant leave to provide my Associate and the other parties with proposed short minutes of order if it thinks it necessary that I deal with the first defendant's costs in a different manner than I have in the above order.

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