



Civil and Administrative Tribunal
New South Wales

Case Name: Chen v The Owners - Strata Plan No. 7262

Medium Neutral Citation: [2022] NSWCATCD 58

Hearing Date(s): 29 April 2022

Date of Orders: 02 May 2022

Decision Date: 2 May 2022

Jurisdiction: Consumer and Commercial Division

Before: K Andronos SC, Senior Member

Decision: (1) Pursuant to s. 188 of the Strata Schemes Management Act 2015 (NSW) the Respondent is to permit the Applicants to inspect the following documents at the offices occupied by Mr Geoffrey Kong and/or entities associated with him at XXX Sussex Street (the Inspection Premises):

- (a) The originals of any document comprised in the records of the Respondent which purports to bear the signature of either or both of the Applicants;
- (b) The originals of any tax invoice, certificate of insurance or statement of account held in the Respondent's records relating to the period 1 July 2016 to 31 December 2021;
- (c) The originals of each of the documents described as supporting documents in Exhibit 1, being the lever arch folder of documents filed by the Respondent in these proceedings under cover of a letter dated 25 January 2022 and received by the Registry on 27 January 2022.

(2) Inspection under order 1 above is subject to the following conditions:

- (a) Both Applicants are permitted to attend the Inspection Premises during business on 24 hours' notice, provided such attendance takes place between the hours of 2:00 pm and 5:00 pm;

(b) The Applicants are permitted to attend on more than one occasion;

(c) The Applicants may photocopy up to 30 pages of documents at the Inspection Premises at no charge to them, any further photocopies to be charged at 20 cents per page.

(3) Foresheew Strata Agency Pty Limited is appointed strata managing agent to exercise all of the functions of the Owners Corporation pursuant to section 237 of the Strata Schemes Management Act 2015 (NSW) with immediate effect.

(4) The parties are directed to notify Foresheew of its appointment forthwith.

Catchwords:	LAND LAW — Strata title — Appointment of compulsory strata managing agent — Order to supply information or documents
Legislation Cited:	Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bischoff v Sahade [2015] NSWCATAP 135
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Tracey Chen (First Applicant) Le San Huyn (Second Applicant) The Owners - Strata Plan No. 7262 (Respondent)
Representation:	First and Second Applicant (Self-represented) G Kong (Respondent)
File Number(s):	SC 21/43614
Publication Restriction:	Nil

REASONS FOR DECISION

- 1 This is an application for the supply of information under section 188 of the *Strata Schemes Management Act 2015 (NSW)* (the SSMA) and for the appointment of a strata managing agent under section 237 of the SSMA.
- 2 A degree of agreement was reached between the parties during the course of the hearing, partially disposing of the matters in issue. The Respondent agreed to provide access to the Applicants to certain original documents, according to

a regime that was largely (if not totally) agreed. Further, the Respondent ultimately did not oppose the making of an order under section 237, although it did oppose the appointment of the strata manager nominated by the Applicants and the period for which its appointment was sought.

- 3 The hearing was conducted by audio visual link on 29 April 2022. Ms Chen, the first Applicant appeared for both Applicants. Ms Huynh, the second Applicant was with her. Mr Kong, who owns five of the eight units comprised in the strata scheme and the chairperson, secretary and treasurer of the Respondent, appeared for the Respondent. He was assisted by Ms Anita Cheung. Mr Kong accepted in the course of the hearing that he “operated” the Owners Corporation, but according to the evidence, it is clear that he has effective control of it. A Cantonese-English interpreter was available and Mr Kong relied in her for the whole of his oral evidence and submissions. Ms Chen gave her evidence and made submissions primarily in English, although on occasion she too relied on the interpreter for assistance.
- 4 Relevantly, Mr Kong also accepted that he controls Kong and Kong Property Renovation Services, which was the subject of resolutions purporting to appoint it both strata manager and caretaker of the building at 23-25 Henley Road Homebush West (the Building). Kong and Kong Property Renovation Services is a registered business name, it is unclear whether it is a business conducted by Mr Kong in his personal capacity or through a corporation. In either event, I am satisfied that he relevantly controls it.
- 5 This Tribunal has jurisdiction pursuant to s. 188(1) and 237(1) to hear the current application. Nevertheless, the Tribunal cannot make the orders sought under s. 237 unless it is satisfied of one or more of the matters set out in s. 237(3). Similarly, the Tribunal cannot make the orders sought under s. 188 unless it is satisfied of the matters set out in s. 188(2). In each case, the exercise of the power is discretionary.

Evidence

- 6 The Applicants relied on a number of summaries and analyses conducted by Ms Chen of the financial records of the Respondent which have been made available to them to date. They also relied on annual financial statements of the

Respondent for the period 1 July 2016 to 30 June 2020, certain of the Respondents' bank statements, AGM minutes and agendas during the period 2016 to 2021, correspondence between the parties and documents created for the purpose of an unsuccessful mediation in 2021. A large volume of further documents, arranged chronologically, comprising summaries of issues and primary documents, annotated correspondence and documents was filed in reply to the Respondent's documentary tender. Some of the Applicants' reply materials were marked up copies of documents served by the Respondent in these proceedings, querying calculations and raising questions as to the authenticity of invoices and documents purportedly executed by the Applicants.

- 7 Pursuant to section 237(4) of the SSMA, the Applicants also tendered in evidence a written consent to act as strata manager, signed by Tony Foreshow on behalf of Foreshow Strata Agency Pty Limited, SCA licence number 945206, on 6 October 2021 (Foreshow).
- 8 The Applicants also referred in their evidence to a history of failed mediations or mediations where steps were agreed to be taken by the Respondent but which were subsequently ignored. Complaints to the Office of Fair Trading have similarly not resolved the matters in dispute.
- 9 The Respondent relied on a lever arch folder of documents comprising copies of minutes, financial statements, photographs, invoices, bank statements and correspondence, together with an explanation of some of those documents. A further submission was relied upon in answer to the Applicants' submissions which purported to explain errors and oversights in the Respondents' operational and accounting documents as identified in the Applicants' submissions and evidence.
- 10 Finally, on 28 April 2022 the Respondent filed a letter signed by Ms Anita Cheung on behalf of Mr Kong in his capacity as chairman of the Respondent, under cover of which was a form of Notice of General Meeting to take place on 2 May 2022 at 7.00 pm (the 2022 Notice). One of the proposed resolutions of the meeting is for the appointment of Centenary Park Management Pty Limited t/as CPM Strata (CP Strata) as strata management agent for the Respondent. There is no evidence that written notice of the meeting was given to each

owner at least 7 days prior to the proposed meeting as required by cl 7(2) of Schedule 1 of the SSMA.

- 11 The 2022 Notice further proposes a number of Motions, including confirmation of outstanding levies as against the Applicants of \$13,775.83 and \$13,785.00, as well as proposing an overdue levies/debt collection procedure. It should be pointed out that, as between the parties, the question of whether there are any arrears and, if so, how they are quantified, is a matter of dispute.
- 12 The 2022 Notice, while on CPM Strata letterhead, is not signed by anyone on behalf of CPM Strata, nor does it constitute a consent to the proposed appointment. Accordingly, it does not constitute a signed consent within the meaning of section 237(4) of the SSMA.

Findings

Meetings and appointments

- 13 It appears to be common ground that the matters in dispute first arose when a previous managing agent resigned due to health problems in about 2016. The outgoing agent recommended another agent appointed, however Mr Kong, who has an ownership interest in 5 out of the 8 units in the Building, claimed at the time to have sufficient strata management experience to manage the affairs of the Building himself or through a company which he operated. It seems that Mr Kong has also suffered from ill health, which may have affected his conduct of the affairs of the Owners Corporation.
- 14 Notice of an AGM of the Respondent to take place on 14 August 2017 was purportedly provided by Mr Kong in his capacity as secretary and chairman of the Executive Committee of the Respondent on that very day. The Applicants' evidence is that they did not in fact receive the agenda until 15 August 2017. According to the minutes of a purported meeting of the Executive Committee of the Respondent on 14 August 2017, Kong and Kong Property Renovation Services was appointed strata manager, building caretaker as well as to be responsible for cleaning and grass mowing. Copies of agreements purportedly executed by all lot owners, including the Applicants, giving effect to the appointments were in evidence. The Applicants do not recall ever signing such

agreements and have asked for access to the originals to confirm their signatures.

- 15 Mr Kong in his capacity as chairman, secretary and treasurer of the Respondent was further authorised to open a bank account on which he was the sole signatory on behalf of the Respondent, which he proceeded to do. Mr Kong apparently voted in favour of each resolution, including with respect to the appointments referred to in paragraph 15 above.
- 16 Mr Kong has admitted that he did in fact control Kong and Kong Property Renovation Services and that neither it nor he is (or has ever been) the holder of a strata managing agent's licence. Although Ms Chen's evidence is that Mr Kong claimed at the time to have strata management experience, Mr Kong's evidence before the Tribunal is that he does not have such experience. He does not hold any relevant licence in his personal capacity.
- 17 At this stage it may be observed that the apparent appointment of Kong and Kong Property Services suffers from a number of problems. Without necessarily being exhaustive:
 - (1) Under s. 49(1) of the SSMA, only holders of the relevant licence may be appointed by the Owners Corporation. No such licence was held.
 - (2) Under s. 49(5) of the SSMA an owner who is seeking appointment as a strata managing agent is not entitled to vote or cast a proxy vote at a meeting of the Owners Corporation. On the evidence, Kong and Kong Property Renovation Services, to the extent it is a separate legal entity at all, was an entity controlled by Mr Kong. There would appear to be no reason in principle why the prohibition in s. 49(5) would not extend to such entities, although such a finding is not crucial to the determination of these proceedings.
 - (3) There is no explanation for the disjunction between the Notice (for a meeting of the Owners Corporation) and the Minutes (for a meeting of the Executive Committee).
- 18 In June 2018 notice of a further meeting of the Respondent was given. The meeting apparently took place on 4 July 2018, although minutes were not provided to the Applicants until November 2021, after these proceedings were commenced. At that meeting, chaired by Mr Kong, he personally was "authorised" as Chairman, secretary, treasurer, strata management (sic),

building caretaker, cleaning services (sic) and grass mowing services (sic) of the Building.

- 19 The minutes, which were not signed, demonstrate that Mr Kong did not distinguish between his individual identity and that of any entity he controlled.
- 20 Notwithstanding these appointments, the minutes record that the Strata Committee Members declared that they had not conflict of interest of a pecuniary nature in relation to the motions considered at the meeting. This was plainly not the case – Kong and Kong Property Services was charging and continued to charge strata management fees and caretaker fees in aggregate the range of \$4,600 p.a. during this period. By way of comparison, Foresheew proposes to charge some \$2,650 p.a. for strata management services if appointed.
- 21 In breach of s. 18 of the SSMA, no meetings of the Owners Corporation were held in 2019 or 2020. Further, there does not appear ever to have been a properly constituted strata committee formed.
- 22 There is evidence of a notice, dated 26 October 2021, of a meeting scheduled for 5 November 2021, although it is not clear if or when such notice was communicated to the Applicants. According to that Notice, resolutions proposed for the meeting of 5 November 2021 included the appointment of “KK” as manager and caretaker. No minutes of any such meeting are in evidence, although Ms Chen referred in her oral evidence to such a meeting taking place. In her evidence Ms Chen refers to conversations between her and Mr Kong in which Mr Kong contended she was unable to vote on any resolutions as she was in arrears with payment of levies. The extent to which levies were properly struck and were due is in issue between the parties. It is not clear if any of the resolutions in the agenda were put or passed, who voted on such a resolution or whether any conflict of interest was declared.
- 23 There is substantial evidence of correspondence between the parties addressed to, and signed by, “KK” in which it is clear that “KK” is understood by both parties to mean Mr Kong and not any company controlled by him. I find that the proposed appointment in the 2021 agenda was for Mr Kong personally.

- 24 I have found, on the evidence, that the Respondent failed to hold annual general meetings in accordance with s. 18 of the SSMA in 2019 and 2020. I further find that the purported appointment and re-appointment in 2017, 2018 and – assuming for the purposes of these reasons, 2021 – of “KK”, being either Kong and Kong Property Renovation Services or Mr Kong personally, to be in breach of s. 49(5) of the SSMA.

Financial management

- 25 The Applicants have raised a number of concerns concerning Mr Kong’s financial management of the Respondent. They have alleged that there are many unexplained transactions which demonstrate that the affairs of the Respondent are, the very least conducted in an unsatisfactorily chaotic manner. Further, the Applicants contend that fees charged by, and paid to, entities apparently associated with Mr Kong indicate that the financial affairs of the Respondent have been mismanaged.
- 26 For his part, Mr Kong says that the Applicants have wrongfully failed to pay strata levies over a period of some years, exacerbating any financial problems experienced by the Respondent. He generally denies financial mismanagement, although in his evidence the submissions made on the Respondent’s behalf, Mr Kong does admit to a number of errors in the accounts as to specific charges and the recording of a number of invoices.
- 27 The Respondent has not brought any cross application under s. 86 of the SSMA. Accordingly, the question of whether the Applicants have failed to meet any obligation to pay levies does not fall for determination. It is sufficient to note that the amount of any liability on the Applicants to pay outstanding levies remains a point of dispute between the parties and to some extent this dispute will turn on the legitimacy of amounts invoiced to, and recorded by Mr Kong as payable by, the Respondent.
- 28 Without being exhaustive, the evidence demonstrates:
- (1) There is no administrative or capital works fund, contrary to sections 73(1) and 74(1) of the SSMA.
 - (2) According to such minutes of annual general meetings as are available, no estimates of the amount needed to be credited to the administrative

fund or to the capital works fund is made at each general meeting as has taken place, contrary to section 79 (1) and (2) of the SSMA.

- (3) There is no plan of anticipated major expenditure contrary to section 80 of the SSMA and no evidence that the issue had ever been considered.
- (4) A number of payments have been made from the Respondent's bank account by way of cash cheques, the purpose of which is not recorded or explained in the accounts of the Respondent.
- (5) The only bank account is that controlled by Mr Kong. It is not a trust account. There does not appear to be any, or at least any regular, bank reconciliation;
- (6) There are, on the Respondent's own evidence, frequent errors in the accounts – figures are changed in the accounts, multiple invoices from regular creditors, such as Sure Win for Change, in different sums for the same apparent work are recorded in the accounts. It is unclear on the evidence which invoices were paid and when and whether or not any payments were duplicated;
- (7) Mr Kong appeared to charge the Respondent a strata management fee of \$4,576.00 in FY 2017/18 according to a financial statement dated 1 July 2018, whereas in a statement dated 27 August 2018 relating to the same period the strata management fee had been reduced to \$2,228.00 and an additional building care taker fee also payable to Mr Kong in the sum of \$2,288.00 had been recorded. Similar discrepancies appeared in the 2016/17 statements, with four versions of each statement in different sums circulated.
- (8) In each year for which records were provided to the Tribunal, there has been a multiplicity of invoices which appear either to overlap, record the same amounts due for different work on different days pursuant to different invoices or which record different amounts for what appears to be the same work. While, in the absence of a bank reconciliation it is unclear which sums were in fact paid – particularly to Kong and Kong Property Services and Sure Win for Change – the multiple and inconsistent records indicate that the financial management and record keeping of the Respondent is poor.
- (9) In its submission of 22 March 2022, the Respondent concedes a number of "conceptual" errors and calculation errors, the omission of certain records from calculations and the historical need to revise figures to take account of overlooked or late rendered invoices. It concedes that some evidence it has put forward to support its contention of work having been performed and properly invoiced (such as certain photographs) was put forward in error. The Respondent does not concede that any improper or erroneous payments were made or that multiple invoices in respect of the same work were paid more than once.

29 It is not ultimately necessary for me to reach a conclusion as to whether any liabilities incurred by the Respondent or sums paid out by it were improper. I do

not understand that to be the Applicants' claim in any event. The Applicants contend that the financial management of the Respondent has been attended by chaos, error and confusion. While Mr Kong strongly denies any impropriety, it is difficult to avoid the conclusion that the record keeping and financial management of the Respondent has been unsatisfactory, particularly in light of the failure by the Respondent to institute the controls mandated by the SSMA with respect to budgeting, and account keeping as required by sections 73, 74 and 79 of the SSMA.

2022 Notice

- 30 Finally, the 2022 Notice, which was on CP Strata letterhead, demonstrates a number of matters. First, it shows an acceptance by the Respondent that it is in the interests of all parties for a professional strata managing agent to commence performing that role. The inclusion of the proposed resolutions relating to the confirmation of arrears and the introduction of a levy/debt collection procedure, however, suggests that issues which are in dispute as between the parties would not be resolved by the appointment of CP Strata. Indeed, the inclusion of those resolutions in the Notice suggests that CP Strata has pre-emptively adopted Mr Kong's views and the position he has taken with respect to levies.
- 31 Mr Kong indicated in the course of the hearing that he has known the operators of CP Strata for many years and has visited their offices. Mr Kong denied having done business with them before. He did not know precisely what they would charge for their services but believed it was between \$2,000 and \$3,000 p.a.. In my view, however, the terms of the 2022 Notice suggest that CP Strata would not bring an independent mind to the issues which continue to trouble the parties and would not provide a non-curial mechanism to resolve them.

Consideration

- 32 The Applicants' essential submission is that the management of the strata scheme is not functioning or is not functioning satisfactorily. The Applicants point to the poor history of meetings and provision of information as well as the gaps and outstanding questions in connection with the financial management of the Respondent, indicating at least the possibility of mismanagement. The

Applicants say their lack of confidence in the financial management of the Respondent has caused them partially to withhold levies purportedly struck by it, whilst continuing to be willing to pay those in respect of regular ongoing bills to the Respondent.

33 While the Respondent does not concede this submission, it does not oppose the appointment of an agent in principle, at least in part because Mr Kong regards the management of the Respondent as onerous and a burden of which he is content to be relieved.

34 For its part, the Respondent says that those tasks which have been necessary to ensure that the Building is adequately maintained have been performed. Specifically, the Respondent says that utilities and insurances are up to date and that repairs have been effected, often on an emergency basis and often attended to by Mr Kong personally at times when it has been inconvenient for him to do so. It blames the financial difficulties of the Respondent on the withholding by the Applicants of levies which it says were properly struck and says that it is the contribution by Mr Kong personally of additional funds that has allowed the Respondent to continue to function.

35 The power to make an order under s. 237(1) of the SSMA is discretionary. It may only be made when the Tribunal is satisfied of one or more of the matters identified in s. 237(3). Relevantly, those matters include:

- (a) *The management of a 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;*
- (b) ...
- (c) *(c) an owners corporation has failed to perform one or more of its duties*

36 I am satisfied that the matters identified in s. 237(3)(a) and (c) of the SSMA have been made out. In particular, it appears to me that the failure by the Respondent to comply with the provisions of the SSMA relating to the conduct of annual general meetings and the establishment of properly constituted and managed funds satisfy section 237(3)(a) and (c). Further, its failure to comply with statutory requirements relevant to the purported appointment of Mr Kong or entities associated with him, the unreliability of its accounts and the

circumstances in which liabilities have been incurred to Mr Kong or entities associated with him indicate to me that the management of the strata scheme is not functioning satisfactorily.

- 37 Finally, the history of dispute between the Applicants and Mr Kong has resulted in a number of unsuccessful mediations, the intervention of Fair Trading and ultimately the application in this Tribunal. I am satisfied that there is a genuine dispute between the parties in good faith as to the levies purportedly struck by the Respondent and which remain unpaid. While not determinative, I regard this as a factor indicative of the management of the strata scheme not functioning satisfactorily.
- 38 In my view, the appropriate exercise of my discretion requires an order to be made under s. 237 for the appointment of Foresheew. I do not have power to appoint CPM Strata as the requirements of s. 237(4) have not been met in their case. Even if I had the power I would decline to do so, for the reasons outlined above, in particular, in the acceptance by CP Strata in the 2022 Notice of matters which are plainly in dispute between the parties, without any apparent investigation, calls into question the extent to which CP Strata is capable of managing the affairs of the Respondent satisfactorily.
- 39 The question remains whether the willingness of Mr Kong to appoint CP Strata is a sufficient basis for me to decline to exercise my discretion to appoint Foresheew. In my view, it is not a sufficient basis. In my view the interests of all parties are best served by the appointment of an independent strata manager.
- 40 As to the question as to how long such an appointment should be, I am mindful of the decision of the Tribunal in *Bischoff v Sahade* [2015] NSWCATAP 135 in which it was pointed out that the appointment by the Tribunal of a strata manager is the exercise of an intrusive power which overrules the essentially democratic scheme of self-management comprised in the SSMA. Accordingly, I have taken the view that the appointment of Foresheew by the Tribunal should be for no longer than appears necessary to establish regular order in the management of the Respondent, after which the Respondent, acting within and in accordance with the SSMA, will be free to continue with Foresheew or take such other steps as are properly available to it.

- 41 The Applicants submitted that the Tribunal should appoint Foreshew for the maximum period permissible in accordance with s. 237(7), being 2 years, on the basis that the affairs of the Respondent are in such disarray that it is likely to take that long to put them back into order. I do not agree that such a period is necessary, particularly since an incoming manager will have the benefit of the evidence and submissions prepared by the parties for these proceedings.
- 42 Accordingly, I propose to appoint Foreshew as strata managing agent, or order the Respondent to make such an appointment, for a period of one year from the date of these orders.

Section 188 application

- 43 The Respondent has consented to an order allowing the Applicants to attend Mr Kong's offices in Sussex Street, Sydney to inspect the documents the subject of this application. Although the Respondent initially sought to make such consent conditional on payment by the Applicants of all arrears in levies allegedly outstanding, that condition was abandoned. The Respondent has therefore accepted unconditionally that the Applicant is entitled to view the documents the subject of the application, although because the documents to which access is sought are original documents, it has objected to the Applicants being permitted to uplift the documents. An access and photocopying regime has therefore been agreed and is recorded in the orders below.
- 44 To the extent that it remains necessary for me to do so, I find that the Applicants are entitled under the SSMA to inspect the documents and, to the extent that the Respondent has hitherto failed to permit such access it has wrongfully done so.

Orders

- 45 I therefore make the following orders:
- (1) Pursuant to s. 188 of the *Strata Schemes Management Act 2015* (NSW) the Respondent is to permit the Applicants to inspect the following documents at the offices occupied by Mr Geoffrey Kong and/or entities associated with him at XXX Sussex Street (the Inspection Premises):

- (a) The originals of any document comprised in the records of the Respondent which purports to bear the signature of either or both of the Applicants;
 - (b) The originals of any tax invoice, certificate of insurance or statement of account held in the Respondent's records relating to the period 1 July 2016 to 31 December 2021;
 - (c) The originals of each of the documents described as supporting documents in Exhibit 1, being the lever arch folder of documents filed by the Respondent in these proceedings under cover of a letter dated 25 January 2022 and received by the Registry on 27 January 2022.
- (2) Inspection under order 1 above is subject to the following conditions:
- (a) Both Applicants are permitted to attend the Inspection Premises during business on 24 hours' notice, provided such attendance takes place between the hours of 2:00 pm and 5:00 pm;
 - (b) The Applicants are permitted to attend on more than one occasion;
 - (c) The Applicants may photocopy up to 30 pages of documents at the Inspection Premises at no charge to them, any further photocopies to be charged at 20 cents per page.
- (3) Foreshow Strata Agency Pty Limited is appointed strata managing agent to exercise all of the functions of the Owners Corporation pursuant to section 237 of the *Strata Schemes Management Act 2015* (NSW) with immediate effect.
- (4) The parties are directed to notify Foreshow of its appointment forthwith.



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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