



Civil and Administrative Tribunal
New South Wales

Case Name: EKG Pastries Pty Ltd v The Owners – Strata Plan No. 87145

Medium Neutral Citation: [2022] NSWCATCD 65

Hearing Date(s): 25 February 2022

Date of Orders: 01 June 2022

Decision Date: 1 June 2022

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision: (1) Pursuant to ss 136(2) and 150(1) of the Strata Schemes Management Act 2015 By-Law 29 of Strata Plan 87145 is declared invalid on and from 16 May 2018 being the date it was purportedly made.

(2) Before 1 July 2022, The Owners – Strata Plan 87145 must:

- (a) obtain a certified copy of order 1 of these orders from the NCAT Registrar;
- (b) lodge that certified copy of order 1 with the Registrar General NSW Land Registry Services;
- (c) do all other things necessary to ensure that order 1 is recorded on the common property title of Strata Plan 87145.

(3) Any application for costs is to be made by 10 June 2022. Any such application is to be supported by submissions limited to not more than 5A pages in not less than 11 point font.

(4) Any reply to any application for costs is to be made by 24 June 2022. Any such reply is to be supported by submissions limited to not more than 5A pages in not less than 11 point font.

Catchwords: LAND LAW — Strata title — By-laws — By-law levying on contributions contrary to s 83(2) — Ultra vires — Declaration of invalidity

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

Cases Cited: The Owners Strata Plan No. 60919 v Consumer Trader and Tenancy Tribunal & Ors [2009] NSWSC 1158
The Owners – Strata Plan No 76830 v Byron Moon Pty Limited [2020] NSWCATAP 186

Texts Cited: Nil

Category: Principal judgment

Parties: EKG Pastries Pty Ltd (Applicant)
The Owners – Strata Plan No. 87145 (Respondent)

Representation: Bannermans Lawyers (Applicant)
Strata Specialist Lawyers (Respondent)

File Number(s): SC 21/42016

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 This is an application by EKG Pastries Pty Ltd (the Lot Owner) for an order pursuant to ss 136(2) and 150(1) of the *Strata Schemes Management Act 2015* (SSM Act) declaring by-law 29 of Strata Plan No 87145 to be invalid on the basis that The Owners – Strata Plan 87145 (the Owners Corporation) did not have the power to make that by-law. In the alternative, the Lot Owner applies for an order pursuant to ss 139(1) and 150(1), or in the further alternative s 232(1)(a), declaring that by-law 29 is invalid because it is harsh, unconscionable or oppressive. This application was made to the Tribunal on 7 October 2021 (the application).
- 2 For the reasons set out following, the Tribunal has concluded that by-law 29 is invalid on the basis that the Owners Corporation did not have power to make it, it being a purported exercise of power pursuant to s 136(1) that is contrary to the mandatory terms of s 83(2) of the SCM Act. As a consequence of this

conclusion the by-law has been declared invalid pursuant to s 150(1) as and from the date it was made by operation of s 136(2) of that Act.

Procedural history

- 3 The application was first listed before the Tribunal, differently constituted, for directions on 15 November 2021. Mr Fei Yang, solicitor, appeared for the Lot Owner. Mr Colin Cunio, solicitor, appeared for the Owners Corporation. In accordance with the usual practice where both parties are present at the first listing of an application, the Tribunal attempted to assist the parties to resolve the dispute by conciliation. Those efforts were not successful. As a consequence, the application was adjourned to a Special Fixture Hearing and directions were given to the parties for the filing and exchange of evidence and submissions. Leave was granted to both parties to be represented by an Australian Legal Practitioner.

Evidence and Hearing

- 4 The Lot Owner relied upon a bundle of documents and submissions filed with the application on 7 October 2021 and a further bundle of documents and submissions filed on 7 February 2022. The latter bundle included a witness statement of Eric Jean Guillou, Director of EKG Pastries Pty Ltd, dated 7 February 2022. The Owners Corporation relied upon a submission filed on 7 February 2022. It filed no evidence
- 5 The Hearing was conducted in a Virtual Hearing Room in accordance with NCAT's COVID-19 Revised Hearing Procedure. No witnesses were called to give evidence. Mr Joseph Bannerman, solicitor, appeared for the Lot Owner. Mr Colin Cunio, solicitor, appeared for the Owners Corporation. The hearing proceeded principally on the basis of legal argument.

Material facts

- 6 The Lot Owner is the owner of Lot 24 in Strata Plan No. 87175. Lot 24 is a commercial Lot which is 69sqm in size and has a unit entitlement of 285 units. Although not entirely clear on the evidence, the Lot Owner appears to have owned Lot 24 since on or about the registration of Strata Scheme 87145.

7 Strata Scheme 87145 was registered on 25 March 2014. It comprises 41 commercial Lots which have 15000 aggregate unit entitlements. It is located in Banksmeadow.

8 At a General Meeting of the Owners Corporation conducted on 16 May 2018 a Special Resolution was adopted to create a by-law that would allow the “billing back” of water charges for “high water users”. The Lot Owner was not represented at this meeting, but there is no issue that it was entitled to participate in that meeting by its authorised representative. The resolution states as follows:

Resolution 18: IT WAS SPECIALLY RESOLVED that the Owners Corporation add a by law to allow the billing back of water for high water users. The meter should then be read at Lot 24 and the Lot will be billed back accordingly.

9 Although not entirely clear on the evidence it appears that Resolution 18 was directed only at Lot 24’s water usage. It is not clear on the evidence why Lot 24 is, or is considered by the Owners Corporation to be, a “high water user”.

10 In any event, pursuant to Special Resolution 18, By-Law 29 was subsequently drafted and registered. It relevantly provides as follows:

29. Excessive Water Use Charges

Preamble

1. There currently exists individual water meters for each lot that uses water in their daily business activities.
2. The Owners Corporation is invoiced and currently pays water usage charges for each Lot.
3. The purpose of this by-law is to make each lot responsible for payment of excessive water usage.

Definitions and interpretation

4. In this by-law:

- (a) “Act” means *Strata Schemes Management Act 2015*.
- (b) “Excessive water usage” means water usage in excess of 20 Kiloliters per quarter.
- (c) ...

Owner to pay excessive water usage charges

5. Each owner must pay excessive water usage charges in relation to their lot.
6. Upon inspection of the water meter for each lot, receipt of an invoice for water charges, or approximately every six months, the owners corporation will provide the owner with notice of any excessive water usage charges.
7. The notice may be in the form of an invoice for the relevant period or may be included in notice requesting payments of contributions levied by the owners corporation, or otherwise.
8. The owner must pay the amount of their excessive water usage charges in accordance with the notice of charges referred to in the previous clause.

Failure to pay and costs

9. Any amount payable by an owner under this clause may be recovered as a debt due and payable by that owner together with interest at the rate prescribed in section 85 of the Act and the expenses of the owners corporation in recovering those amounts.
- 11 By-law 29 is not specifically directed to Lot 24, but there is no evidence of any other Lot Owner being issued with an invoice for excessive water usage by the Owners Corporation pursuant to that by-law.
- 12 In his statement dated 7 February 2022, Mr Guillou, Director of the Lot Owner, states as follows, relevantly:
3. At a general meeting on 16 May 2018, special By-law 29 (“By-Law 29”) was passed by the owners corporation by way of special resolution.
...
 4. On 28 June 2018, the owners corporation forced me to pay a tax invoice in the amount of \$444.85 for “excess water charges”.
...
 5. On 22 December 2019, I received another invoice for \$1,961 for excessive water use charges.
...
 6. On 26 April 2021, I received another invoice in the amount of \$2,342 again for excessive water usage charges.
...
 7. The owners corporation has informed me that they have been charging me invoices for the alleged excessive water charges under the provisions of By-law 29.
...

8. I understand that By-law 29 allegedly allows the owners corporation to charge me differential levies without reference to my aggregate unit entitlement within the strata scheme.

9 I believe this is harsh, unconscionable and oppressive as the owners corporation is unlawfully invoicing me for water usage charges, for which it has no right to charge me for.

10 In addition, the invoices provided by the owners corporation do not provide a breakdown of the alleged usage of water from my lot, including meter readings or water rates. It is harsh, unconscionable and oppressive to seek the payment of these levies without any information as to how the charges were calculated.

11. Furthermore, I also find it harsh, unconscionable and oppressive that the owners corporation has sought the retrospective effect of By-law 29.

- 13 The invoices the Owners Corporation have issued the Lot Owner for excess water usage are in evidence. The invoice dated 28 June 2018 itemises: "Lot 24: Water Usage April – June: \$444.85 (inclusive of \$40.44 GST). The invoice dated 22 December 2019 itemises: "Lot 24: 721KL – July 18 – Dec 19 – Water: \$1,961.00". The invoice dated 26 April 2021 itemises "1 Water Bill – Excess Usage: \$2,786.85". That is, these invoices provide no information about the level of water usage or the basis upon which it has been charged.
- 14 As I have already stated above, the Owners Corporation has filed no evidence in the proceedings. There is nothing that provides any information about the water metre that is used to measure Lot 24's water usage, how and when it is read or how the charges have been calculated.

Contentions of the parties

- 15 The Lot Owners' principal contention is that by-law 29 is inconsistent with s 83(2) of the SSM Act and is therefore of no force or effect by operation of s 136(2) of that Act. It applies for a declaration that by-law 29 is invalid pursuant to s 150(1) of that Act. In the alternative, the Lot Owner contends that by-law 29 is harsh, unconscionable and oppressive contrary to s 139(1) of the Act because it operates in an arbitrary way against it, inconsistently with its unit entitlements and is an attempt to contract out of the Act contrary to s 270 of the Act. It asks the Tribunal to declare that that by-law 29 is invalid on that basis pursuant to ss 150(1) or s 232(1)(a) of the Act.

16 The Owners Corporation contends that it had the power under s 136(1) of the Act to make by-law 29 and that it was validity made. It denies that by-law 29 is harsh, unconscionable or oppressive. It contends that the by-law merely permits the Owners Corporation to recover from the Lot Owner the additional water usage charges it incurs as a result of Lot 24's water usage in a way that is proportionate to that use and fair to other Lot Owners. It submits that the application ought to be dismissed on the basis that there are no grounds for the orders sought.

Jurisdiction

17 There is no issue that the Tribunal has power to hear and determine this application in accordance with the provisions of the SSM Act.

Applicable law

18 Part 5, Division 2 of the SSM Act deals with contributions by owners to costs associated with the operation of a Strata Plan.

19 In this respect, s 73 relevantly provides:

73 Administrative Fund

(1) Establishment of fund

An owners corporation must establish an administrative fund.

(2) Amounts payable to fund

An owners corporation must pay the following amounts into the administrative fund –

(a) the contributions levied on, and paid by, owners for payment into the fund,

...

...

(4) Amounts payable from fund

An owners corporation may pay money from its administrative fund only for the following purposes-

(a) payments of the kind for which estimates have been made under section 79

...

20 Section 79 relevantly provides:

79 Estimates to be prepared of contributions to administrative and capital works funds

(1) An owners corporation must, not later than 14 days after the constitution of the owners corporation and at each annual general meeting after that, estimate how much money it will need to credit to its administrative fund for actual and expected expenditure –

(a) to maintain in good condition on a day-to-day basis the common property and any personal property vested in the owners corporation, and

(b) to provide for insurance premiums, and

(c) to meet other recurrent expenses.

Note: Recurrent expenses would include such regular expenses as insurance, water charges, electricity charges, carpet cleaning, lawn mowing services and the like and minor expenses relating to maintenance of the common property.

21 Section 81 provides:

81 Owners Corporation to set contributions to administrative and capital works funds

(1) The owners corporation must determine the amounts to be levied as a contribution to the administrative fund and the capital works fund to raise the amounts estimated as needing to be credited to those funds.

(2) That determination must be made at the same meeting at which those estimated amounts are determined.

(3) The owners corporation must levy on each person liable for it such a contribution.

(4) If the owners corporation is subsequently faced with other expenses it cannot at once meet from either fund, it must levy on each owner of a lot in the strata scheme a contribution to the administrative fund or capital works fund, determined at a general meeting of the owners corporation, in order to meet the expenses

(5) A contribution is, if an owners corporation so determines, payable by the regular periodic instalments specified in the determination setting the amount of the contribution.

22 Section 82 provides for differential contributions by Lot Owners to the Strata Scheme's insurance costs. It provides, relevantly:

82. Individual contributions may be larger if greater insurance costs

(1) If the use to which a lot in a strata scheme is put causes an insurance premium for the strata scheme to be greater than it would be if it were not put to that use, so much of a contribution payable by the owner of the lot as is attributable to insurance premiums may, with the

consent of the owner, be increased to reflect the extra amount of the premium.

(2) The Tribunal may, on application, make an order for payment of contributions of a different amount to one or more contributions levied or proposed by an owners corporation on an owner if the Tribunal is of the opinion that the owner's consent has been unreasonably refused under this section.

...

- 23 Section 83 of the SSM Act deals with the levying of contributions in a Strata Scheme. It provides:

83 Levying of contributions

(1) An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.

(2) Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.

(3) Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of contribution. The date must be at least 30 days after the notice is given.

...

- 24 The term "unit entitlement" is defined in s 4(1) of the SSM Act to mean the unit entitlement of the lot shown on the schedule of unit entitlements for the strata scheme.

- 25 Part 7 of the SSM Act deals with by-laws for strata schemes. Division 2 of Part 5 deals with the establishment and effect of by-laws.

- 26 In this respect, s 135 imposes a requirement on, relevantly, an Owners Corporation and Lot Owner, to comply with by-laws. It relevantly provides:

135 Requirement to comply with by-laws

(1) The by-laws for a strata scheme bind the owners corporation and the owners of lots in the strata scheme ... as if the by laws -

(a) had been signed and sealed by the owners corporation and each owner ..., and

(b) contained mutual covenants to observe and perform all the provisions of the by-laws.

- 27 Section 136 of the Act sets out the matters by-laws can provide for. It provides:

136 Matters by-laws can provide for

(1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.

(2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.

28 Section 139 of the Act imposes certain restrictions on the formulation of by-laws. Relevantly to this proceeding, s 139(1) provides that a by-law must not be harsh, unconscionable or oppressive.

29 Section 150 vests power in the Tribunal to make an order invalidating a by-law. It relevantly provides:

150 Order invalidating by law

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law ... make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

(2) The order, when recorded under 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).

(3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

30 Section 270 of the SSM Act prohibits contracting out of the Act. It provides:

270 Contracting out prohibited

(1) The provisions of this Act and the regulations have effect despite any stipulation to the contrary in any agreement, contract or arrangement entered into after the commencement of this section.

(2) No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this section operates to annul, vary or exclude any of the provisions of this Act or the regulations.

31 Section 232(1)(a) of the SSMA relevantly provides that the Tribunal may, on application by an interested person, make an order to settle a complaint or dispute about the operation, administration or management of a strata scheme under that Act. The term "interested person" is relevantly defined in s 226 to include a Lot Owner.

Consideration

- 32 In order to determine the outcome of this application the Tribunal must pose and answer the following questions:
- (a) Did s 136(1) of the SSM Act provide the Owners Corporation with the power to make by-law 29?
 - (b) If the answer to (a) is “no” is the Lot Owner entitled to an order pursuant to s 150(1) that declares that by-law invalid because it is of no force or effect by operation of s 136(2) of the SSM Act?
 - (c) If the answer to (a) is “yes” should the Tribunal nevertheless make an order pursuant to s 150(1) or 232(1)(a) declaring by-law 29 invalid on the basis that it is harsh, unconscionable or oppressive?
- 33 This dispute concerns water supplied to the Strata Scheme by a water retailer. The retailer’s water meter measures the whole of the water used by all Lot Owners in the Strata Scheme and bills the Owners Corporation for the total usage and other charges. The Owners Corporation pays these water bills from its administrative fund in accordance with s 73(4) based on estimates of the annual cost of water usage developed pursuant to s 79 and contributions from all Lot Owners determined in accordance with s 81 of the SSMA. If there is any doubt that water usage is a recurrent expense of the Strata Scheme that is payable from the administrative fund, that doubt is dispelled by the note to s 79(1).
- 34 The Owners Corporation has installed some form of sub-metre that measures the water supplied to or utilised by each Lot within the Strata Scheme (or at least that supplied to or utilised by Lot 24). It is apparent from the Preamble to by-law 29 that these water metres predate that by-law. There is no evidence as to the context in which, or the authority under which, this metre or these metres have been installed. There is no information about the nature (design and operation) of the sub-metre in evidence. There is no evidence as to how it is maintained. There is no evidence as to when it is read or by whom.
- 35 By-law 29 purports to permit the Owners Corporation to charge a Lot Owner for “excessive water usage” as determined by its water metre which is defined to be water usage in excess of “20 Kiloliters per quarter”. There is no evidence as to how it has been determined that water usage greater than 20 Kiloliters is

“excessive”, including, for example, by reference to average or mean water usage of other Lots or by reference to the retailer’s bill and any amount it designates “excessive”. There is no evidence as to the rate at which excessive water usage is charged and as to whether this rate is the same as that charged to the Owners Corporation by the water retailer. Of the three excessive water usage bills that have been issued to the Lot Owner by the Owners Corporation only 1 is for a quarterly period. The other two bills do not refer to quarterly periods. In this respect, excessive water charges are not being claimed by the Owners Corporation in accordance with by-law 29.

36 For each of these reasons it appears to me in all the circumstances that by-law 29 permits not only negative differential treatment of the Lot Owner with respect to the imposition of water usage charges, but that it permits arbitrary treatment. Were the issue reached, I am satisfied that by-law 29 is harsh and oppressive for these reasons and I would have declared invalid on that basis.

37 But there is a more fundamental reason why by-law 29 cannot be allowed to stand. It has no force or effect *ab initio* by operation of s 136(2) because it is wholly inconsistent with s 83(2) of the Act. In this respect, it purports to require the Lot Owner to pay contributions for water usage which is not in a share proportionate to its unit entitlement. With only one exception, the Owners Corporation cannot impose a levy payable to the Strata Scheme’s administrative fund that is not in a share proportionate to the Lot Owner’s unit entitlement.

38 That exception is found in section 82. An Owners Corporation is potentially entitled to levy Lot Owners differential amounts in relation to insurance if the Lot Owner’s use of their Lot causes an increase in an insurance premium payable by it in respect of the Strata Scheme. There is no equivalent provision authorising an Owners Corporation to charge Lot Owners differential rates for other items for which contributions are levied to the Administrative fund, including for utilities such as water.

39 By-law 29 purports to operate in a manner similar to that in which by-laws 11 and 18 purported to operate in *The Owners Strata Plan No 60919 v Consumer Trader and Tenancy Tribunal & Ors* [2009] NSWSC 1158 (the Italian Forum

case). These by-laws purported to permit the Owners Corporation to charge Lot Owners differential amounts for the marketing of the Italian Forum. Under predecessor legislation broadly equivalent to the current SSM Act the Court held that the by-laws were void *ab initio* because the monies required to be paid under the by-laws were differential and not in accordance with unit entitlements as required by the then equivalent of s 83(2): at [18] and [20]. I consider the ratio of this case authoritative and determinative of this application.

- 40 The Owners Corporation's case is essentially that the excess water charges are an "expense" incurred by the Owners Corporation in respect of a particular lot which exceed the contribution that is levied from Lot Owners to the administrative fund under s 81 in respect of water usage. It contends that it is entitled to pass on this "expense" incurred by it in respect of particular lots to those Lot Owners.
- 41 In this respect some reliance is placed upon paragraphs [24] to [29] of an Appeal Panel decision in *The Owners – Strata Plan No 76830 v Byron Moon Pty Ltd* [2020] NSWCATAP 186 (*Byron Moon*), in which the Appeal Panel concluded that the prohibition contained in section 83(2) "may be overcome by the making of a suitably worded by-law". With respect, I have some difficulty understanding how any wording of a by-law can have any effect on the operation of s 83(2) given the effect of s 136(2). I therefore respectfully decline to follow what is said there.
- 42 While I accept the general proposition that an Owners Corporation may recover from a particular Lot Owner an expense incurred by it that is only referable to that Lot Owner's particular lot, I reject the proposition that a utility charge such as water can be both the subject of a contribution paid by a Lot Owner pursuant to a levy and an expense charged on top of that levy. Such a construction of the Act appears to me to frustrate the constraint explicitly imposed on an Owners Corporation by s 83(2), potentially leading to arbitrary outcomes. It involves an arrangement that in substance attempts to contract out of the legislative scheme constituted by the SSM Act contrary to s 270 of that Act.

- 43 All or most strata schemes involve benefits and burdens that are potentially shared unequally between Lot Owners. Lot Owners of a ground floor unit are typically required to pay for the operation and maintenance of a lift serving upper Lots in a high rise strata scheme. All Lot Owners may be required to contribute to the operation of common property, such as a swimming pool or gym, even though some Lot Owners may never use these facilities. The proportion in which they are required to do so is a share equal to their unit entitlements, irrespective of subjective views as to the fairness of outcome produced by such a regime. I can see no difference in principle with respect to water usage.
- 44 I am thus satisfied that the Lot Owner is entitled to an order pursuant to ss 136(2) and 150(1) that declares by-law 29 invalid on the basis that it is ultra vires s 82(2) and therefore of no force or effect. As a consequence of that determination the Owners Corporation must register a certified copy of the order invalidating the by-law with the Registrar-General, NSW Land Registry Services, by 30 June 2022.

Costs

- 45 The Lot Owner indicated an intention to apply for an order which will require the Owners Corporation to pay its costs of the proceedings. This is a case where costs are governed by s 60 of the *Civil and Administrative Tribunal Act* 2013. It will be necessary for the Lot Owner to establish that there are special circumstances that justify an award of costs. I will therefore make orders for the filing and exchange of any costs application and reply.

Orders

- 46 For the foregoing reasons, I make the following orders:
- (1) Pursuant to ss 136(2) and 150(1) of the Strata Schemes Management Act 2015 By-Law 29 of Strata Plan 87145 is declared invalid on and from 16 May 2018 being the date it was purportedly made.
 - (2) Before 1 July 2022, The Owners – Strata Plan 87145 must:
 - (a) obtain a certified copy of order 1 of these orders from the NCAT Registrar;
 - (b) lodge that certified copy of order 1 with the Registrar General NSW Land Registry Services;

- (c) do all other things necessary to ensure that order 1 is recorded on the common property title of Strata Plan 87145.
- (3) Any application for costs is to be made by 10 June 2022. Any such application is to be supported by submissions limited to not more than 5A pages in not less than 11 point font.
- (4) Any reply to any application for costs is to be made by 24 June 2022. Any such reply is to be supported by submissions limited to not more than 5A pages in not less than 11 point font.

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

Registrar

The image shows a handwritten signature in black ink to the left of a circular official seal. The seal features the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem with a shield and a crown.

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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