



Supreme Court
New South Wales

Case Name: Strata Plan 99960 v SPS Building Contractors Pty Ltd

Medium Neutral Citation: [2022] NSWSC 1464

Hearing Date(s): 14 October 2022

Date of Orders: 14 October 2022

Decision Date: 14 October 2022

Jurisdiction: Equity - Technology and Construction List

Before: Rees J

Decision: Defendant's application for security for costs dismissed with costs.

Catchwords: COSTS – security for costs – building and construction dispute between plaintiff owners corporation and defendant builder over alleged defects in townhouses – Court's inherent power to order security for costs – proceedings not vexatious or oppressive – Uniform Civil Procedure Rules 2005 (NSW), rule 42.21(1)(d) – whether owners corporation unlikely to be able to meet adverse costs order – where owners corporation is well-organised and has raised special levies in connection with these proceedings – Court's inherent and statutory powers to order security for costs not enlivened – application dismissed.

Legislation Cited: Uniform Civil Procedure Rules 2005 (NSW), r 42.21(1)(d)

Cases Cited: Bhagat v Murphy [2000] NSWSC 892
Logan v Bank of Scotland (No 2) [1906] 1 KB 141
McHenry v Lewis (1883) 22 Ch D 397
Morris v Hanley [2000] NSWSC 957
Owners – Strata Plan 50530 v Walter Construction

Group Ltd [2001] NSWSC 820

Category: Procedural rulings

Parties: Strata Plan 99960 (Plaintiff/Respondent)
SPS Building Contractors Pty Ltd (Defendant/Applicant)

Representation: Counsel:
Mr JJ Young / Dr A Lim (Plaintiff/Respondent)
Mr S Docker / Mr C Langford (Defendant/Applicant)

Solicitors:
OMB Solicitors (Plaintiff/Respondent)
Twomey Dispute Lawyers (Defendant/Applicant)

File Number(s): 2021/238327

EX TEMPORE JUDGMENT

1 **HER HONOUR:** This is an application for security for costs. The defendant is the builder of a development in Tweed Heads, comprising 45 townhouses. The plaintiff is the owners corporation of the development.

FACTS

- 2 The development was completed in 2019. In March 2020, the owners corporation pursued its concerns regarding building defects by a complaint lodged with NSW Fair Trading. In July 2020, a rectification order was issued by the NSW Building Commissioner. The builder completed some repair work. The evidence varies as to whether the owners corporation permitted the builder to do as much repair work as it would have liked and whether the repair work was satisfactory.
- 3 At the time when the rectification order was issued, the owners corporation's finances were modest. As at 31 August 2020, the net assets of the owners corporation were some \$27,000; it had levies in arrears of some \$3,000. The owners corporation's financial position has continued to improve in the interceding years.
- 4 In January 2021, an extraordinary general meeting of the owners corporation was held. A resolution was passed to raise a special levy of \$200,000 to fund building defects proceedings. The levy was raised. In August 2021, these

proceedings were commenced. By then, the owners corporation's net assets had increased to \$183,000, presumably by reason of the raising of the special levy. Levies in arrears had also then grown to some \$29,000.

- 5 The procedural history of the matter is unremarkable. Orders were made for the owners corporation to serve its evidence, followed by the builder. The owners corporation amended its Technology and Construction List Statement in October 2021, adding a substantial number of additional building defects. In October 2021, the builder requested security for costs, and, although correspondence was exchanged on this issue, ultimately the builder did not then file an application for security. Orders have been made from time to time extending the time for the parties to file their evidence.
- 6 In March 2022, the owners corporation passed another resolution at a second extraordinary general meeting, raising an additional special levy of \$160,000 to fund these proceedings. The owners corporation also served its expert reports and substantially amended the defects relied upon in these proceedings. A Scott Schedule was served on 31 March 2022, which appears to have recorded the defects then the subject of the experts reports that had been served. The builder turned to retaining experts. The builder's solicitor described difficulties in securing experts.
- 7 In July 2022, the owners corporation began to chase the builder for its contribution to the Scott Schedule and overdue expert evidence. I should pause to note then that the owners corporation's financial position, as revealed by its balance sheet, then indicated that its asset position had deteriorated slightly to net assets of \$125,000, with levies in arrears increasing to \$51,000.
- 8 In response to the owners corporation's correspondence requesting the whereabouts of the builder's expert evidence, the builder's solicitor again raised the prospect of a security for costs application and sought financial information from the owners corporation, which was promptly provided. The financial information revealed that, of the 45 lots, 12 lot owners were in arrears, that is, 26% of lot owners. The arrears ranged from \$0.59 to some \$3,000. Overall, some \$29,000 in arrears was outstanding. The owners corporation's net asset position remained positive.

- 9 In August 2022, the builder filed its motion for security for costs, supported by a considerable amount of affidavit material. In particular, the affidavit evidence includes the affidavits of three lot owners who are not in favour of the building defects proceedings. These lot owners have paid at least some of the special levies, but are reluctant to pay any more. One of the lot owners, Julianne Ludewig, said that she would prefer to sell her townhouse and leave the development and considers that the existence of these building defects proceedings is not improving her chances of doing so. In addition, evidence was relied upon from a local real estate agent, Anthony Holland, of the impact of these proceedings on the ability to sell the townhouses.
- 10 It is perhaps unsurprising that, if a building defects proceeding is on foot, the ability to sell the townhouses may be adversely affected. But that does not detract from the purpose of these proceedings which, as I understand it, is for the owners corporation to place itself into the position that it can discharge its statutory obligation to remedy defects to the common property if, in fact, such defects exist and are attributable to the builder. Obviously, it is in everyone's interests to ascertain the existence of, and responsibility for, any building defects as soon as practicable so that any defects can be fixed and everybody can get on with their comfortable occupation of the townhouses and ready re-sale, should they wish to do so.
- 11 Returning to the question before the Court on security for costs, I note that the current aged balance report shows that arrears now stand at \$9,500; that is, arrears have reduced in recent times. Glenn More, the strata manager of the owners corporation, deposed that payment plans have been entered into with eight lot owners to pay their levies. Mr More said that this is in accordance with procedures agreed with all lot owners. Those payments plans appear, so far as the evidence reveals, to be unrelated to any disquiet with the bringing of these proceedings. Mr More said that the level of arrears for this strata scheme is good compared to the other 52 strata schemes that he manages.
- 12 It appears from the financial records before the Court that the financial affairs of this strata scheme are well run. The fact that the owners corporation has been able to strike two special levies suggests that there is general consensus

amongst lot owners to progress these proceedings. Obviously, not all lot owners agree, and it will, of course, remain the burden of those running the owners corporation to seek to ensure that all lot owners are as happy as they can make them, notwithstanding that these lot owners no longer support the bringing of these proceedings.

- 13 An annual general meeting of the strata scheme is due to take place next week, at which it is proposed that additional levies will be raised, not necessarily for these proceedings but for the maintenance of the building more generally. In addition, it is proposed that the owners corporation will enter into a loan agreement for \$800,000 to pay costs associated with these proceedings or, alternatively, to remedy defects to the property. The letter from the strata manager proposing these resolutions to lot owners suggests that this is a fairer way to raise funds than the imposition of a special levy, in particular, as loan repayments can be made gradually over the next 12 months rather than by those who happen to own a townhouse at this particular moment.

CONSIDERATION

- 14 The builder submitted that the Court should order security for costs under its inherent jurisdiction, relying on *Bhagat v Murphy* [2000] NSWSC 892, where Young J observed that the Court has an inherent power to “to prevent abuse of the Court’s processes by putting a brake on proceedings which would otherwise operate oppressively and vexatiously against a defendant”: at [6]. The builder also relied on *Morris v Hanley* [2000] NSWSC 957, where Young J again observed that the Court may order security for costs where there is a vexatious action in order to prevent the administration of justice being perverted for an unjust end: at [13], citing *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141; *McHenry v Lewis* (1883) 22 Ch D 397 at 408.
- 15 There is nothing, with respect, about the history of these proceedings that puts them in the territory of “vexatious” or “oppressive”. It is apparent that some difficulty has arisen in relation to whether the builder’s expert has been given access to inspect some of the townhouses. That difficulty does not appear to be particularly unusual in these sorts of cases, but I, of course, encourage the parties to make sure that the builder’s experts can access the townhouses as

quickly as possible so that these proceedings can be progressed as quickly as possible. The first basis on which the application for security for costs is brought fails.

- 16 The builder also relied on rule 42.21(1)(d) of the Uniform Civil Procedure Rules 2005 (NSW), which provides:

(1) If, in any proceedings, it appears to the court on the application of a defendant –

(d) that there is reason to believe, that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so...

the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

- 17 The evidence before the Court indicates that the owners corporation is not presently impecunious; the builder does not suggest otherwise.
- 18 The question then becomes whether, if the owners corporation fails in this litigation and a costs order is made against the owners corporation, it will be able to pay any adverse costs order. Tori Martin, who is a member of the strata committee, said that such a costs order will have to be paid by using cash at hand, by raising a special levy, or by obtaining a loan.
- 19 It is reasonable to think that the cash at hand is unlikely to be sufficient to meet such an adverse costs order. However, the evidence before the Court indicates that the owners corporation is cohesive and well-organised, such that two special levies have been able to be raised and collected in relation to these proceedings without any great difficulty. There is also evidence that the owners corporation may soon obtain a loan, although there is no evidence to indicate whether the proposed resolution to enter into a loan agreement will succeed or fail at the upcoming meeting.
- 20 However, the onus of proof is on the builder. As Bergin J explained in *Owners – Strata Plan 50530 v Walter Construction Group Ltd* [2001] NSWSC 820 at [36]:

I am of the view that for the defendant to have discharged its burden, it needed to call evidence upon which, viewed objectively, I could be satisfied that the plaintiff was not entitled to raise a special levy to pay the costs or, if able to raise levies in respect of costs, that such levies would not be paid. There is no

evidence of any recalcitrance on the part of the unit holders to pay the special levies nor is there any evidence of an inability in any of the unit holders to pay a levied amount of approximately \$5,700 or \$11,500 depending on whether the costs are \$1 million or \$2 million.

- 21 Her Honour was not there satisfied that the defendant had discharged its evidentiary burden; the evidence viewed objectively did not give rise to the requisite satisfaction that there was reason to believe that the plaintiff would be unable to pay the defendant's costs if ordered to do so.
- 22 I am in the same position here. I am not presently satisfied that the Court's power to order security for costs has been enlivened in this case. For that reason, the builder's application is dismissed with costs.

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