

Land and Environment Court

New South Wales

Case Name: The Owners Strata Plan 65120 v Petty

Medium Neutral Citation: [2023] NSWLEC 122

Hearing Date(s): 10 August 2023 and 17, 22, 23 and 30 August 2023 (written submissions)

Date of Orders: 10 November 2023

Decision Date: 10 November 2023

Jurisdiction: Class 3

Before: Preston CJ

Decision: The Court orders:
(1) The applicant is to pay the reasonable costs of the proceedings of the first respondent as agreed or assessed.
(2) There is to be no order as to the costs of the proceedings between the applicant and the second respondent, with the intention that each of these parties bear their own costs of the proceedings.
(3) The applicant is not to levy a contribution for any part of the costs ordered by order 1 on the first respondent.

Catchwords: Costs – strata renewal plan – application for an order giving effect to – discontinuance of proceedings – statutory provision that owners corporation pay dissenting owner’s costs – otherwise order for costs sought

Legislation Cited: Land Acquisition (Just Terms Compensation) Act 1991 (NSW) s 55
Strata Schemes Development Act 2015 (NSW) ss 154, 158(4) (b), 170(1), 174(1), 179, 180(1), 182(1), 182(4), 188(1)
Strata Schemes Development Regulation 2016 cl 33(c)
Strata Schemes Management Act 2015 (NSW) s 90(2)
Uniform Civil Procedure Rules 2005 s 12.1(1)(b)

Category: Costs

Parties: The Owners Strata Plan 65120 (Applicant)
Jonene Lesley Petty (First Respondent)
9-11 Nelson St Pty Ltd (Second Respondent)

Representation: Counsel:
Mr A Maroya (Applicant)
Mr M Seymour (First Respondent)
Mr G Sirtes SC and Dr E Dunlop (Second Respondent)

Solicitors:
Shohmelian Legal (Applicant)

File Number(s): 2023/00075929

JUDGMENT

- 1 The Owners Strata Plan No 65120 is the owners corporation constituted under the *Strata Schemes Management Act 2015* (NSW) (SSM Act) for the strata scheme of Strata Plan No 65120 (Owners Corporation). That strata scheme relates to land at 9-11 Nelson Street, Chatswood.
- 2 The Owners Corporation applied to the Court under s 179 of the *Strata Schemes Development Act 2015* (NSW) (SSD Act) for an order to give effect to a strata renewal plan for the strata scheme. The Owners Corporation's application was filed on 7 March 2023. The strata renewal plan was for the collective sale of the strata scheme.
- 3 Ms Jonene Petty is the owner of Lot 13 of Strata Plan No 65120. She is a dissenting owner, as that term is defined in s 154 of the SSD Act, as she did not provide a support notice supporting the strata renewal plan under s 174(1) of the SSD Act (the dissenting owner). On 3 April 2023, Ms Petty filed, under s 180(1) of the SSD Act, an objection to the Owners Corporation's application for an order to give effect to the strata renewal plan.
- 4 As noted, the strata renewal plan is for the collective sale of the strata scheme. The purchaser of the strata scheme, if the Court were to make an order under s 182(1) of the SSD Act giving effect to the strata renewal plan, is 9-11 Nelson St Pty Ltd (the purchaser). The purchaser made an application to be joined to the proceedings, which the Court granted on 13 April 2023.
- 5 The proceedings were heard on 10 August 2023. During the course of the hearing it became evident that at least two procedural steps in preparing the strata renewal plan had not been carried out in accordance with the SSD Act. This non-compliance with the SSD Act mattered as the Court only has power under s 182(1) of the SSD Act to make an order giving effect to the strata renewal plan if it is satisfied of the matters of relevance in s 182(1).
- 6 The first matter, in s 182(1)(b), is that "the steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with this Act". One of the steps that needed to be taken in preparing the strata renewal plan and obtaining the required level of support was giving notice of the general meeting of the Owners Corporation in accordance with s 158(4)(b) of the SSD Act. That provision requires that notice of the general meeting must "be given to each owner at least 14 days before the meeting". In this case, it was common ground that the notice that was given to each owner on 6 April 2022 was only 7 days, and not 14 days, before the general meeting on 13 April 2022.
- 7 The second matter concerned the strata renewal plan itself. One of the steps that needed to be taken, in order for the strata renewal plan to be prepared in accordance with the Act as required by s 182(1)(b), was for the strata renewal plan to include the mandatory information required by s 170(1) of the SSD Act. Section 170(1)(e) provides that a strata renewal plan

must include “any other information or document about the proposed collective sale or redevelopment prescribed by the regulations”. Clause 33 of the Strata Schemes Development Regulation 2016 (SSD Regulation) prescribes, for the purpose of s 170(1)(e) of the SSD Act, the information that must be included in a strata renewal plan, including:

“(c) a report of an independent valuer that includes details of the market value of the whole building and its site (at its highest and best use) and details of the compensation value of each lot”.

8 The term “compensation value”, in relation to a lot, is defined in s 154 of the SSD Act to mean:

“(a) the compensation to which the owner of the lot would be entitled as determined under section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (subject to any modifications prescribed by the regulations), or

(b) if the regulations prescribe a different method of determining that value—the value of the lot determined in accordance with that method.”

9 The regulations do not prescribe any different method of determining value so the compensation payable to the owner of the lot remains to be determined under s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (Land Acquisition Act).

10 Section 55 of the Land Acquisition Act, as applied to a strata renewal plan, requires that, in determining the amount of compensation to which the owner of the lot is entitled, regard must be had to the market value of the lot, any special value of the lot, any loss attributable to severance, any loss attributable to disturbance, the disadvantage resulting from relocation, and any increase or decrease in the value of any other land of the person which adjoins or is severed from the lot or by reason of the giving effect to the strata renewal plan.

11 The strata renewal plan did include a report of an independent valuer, the Anderson report of 16 May 2022, but that report only addressed the market value of the whole building and its site and did not provide any details of the compensation value of each lot, determined in accordance with the definition of “compensation value” in s 154 of the SSD Act and s 55 of the Land Acquisition Act. The valuation report was therefore not a report of an independent valuer that satisfied the requirements of cl 33(c) of the SSD Regulation.

12 The consequence was that the strata renewal plan was not prepared in accordance with s 170(1)(e) of the SSD Act, as it did not contain the information prescribed by cl 33(c) of the SSD Regulation.

13 Once it became evident that the Court would not be able to be satisfied of the matter in s 182(1)(b) of the SSD Act, that the steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with the Act, the Court lacked the power to make an order giving effect to the strata renewal plan. Section 182(4) provides that: “The court must not make an order giving effect to the strata renewal plan if the court is not satisfied about the matters referred to in subsection (1).”

14 Once this was realised, the Owners Corporation sought, and the Court granted, leave under s 12.1(1)(b) of the Uniform Civil Procedure Rules 2005 for it to discontinue the proceedings.

The Owners Corporation was directed to file and serve a Notice of Discontinuance, which it did on 11 August 2023. That leave to discontinue was subject to costs.

15 The Owners Corporation sought an “otherwise order” under s 188(1) of the SSD Act that it not have to pay the costs of the proceedings of the dissenting owner. The dissenting owner and the purchaser sought an order that the Owners Corporation pay their costs of the proceedings.

16 The parties’ arguments on the question of costs has proceeded on the papers, with the parties filing their respective written submissions.

17 Section 188(1) of the SSD Act provides:

“188 Costs

(1) Unless the court otherwise orders—

(a) the reasonable costs of proceedings for an application for an order to give effect to a strata renewal plan that are incurred by a dissenting owner are payable by the owners corporation, and

(b) the owners corporation cannot levy a contribution for any part of the costs on a dissenting owner.”

18 Under that subsection, the Owners Corporation would be required to pay the reasonable costs of the proceedings of the dissenting owner, unless the Court otherwise orders. That usual order applies regardless of the outcome of the proceedings, whether the Court does make an order giving effect to the strata renewal plan under s 182(1) or does not make an order giving effect to the strata renewal plan because of s 182(4).

19 Accordingly, the fact that the Owners Corporation has chosen to discontinue the proceedings, and hence has not obtained an order giving effect to the strata renewal plan, is not itself a reason for the Court to order otherwise than the usual order that the Owners Corporation pay the dissenting owner’s costs of the proceedings.

20 The Owners Corporation submitted that the Court should otherwise order that each party bear its own costs of the proceedings for three reasons.

21 First, the Owners Corporation’s application for an order giving effect to the strata renewal plan “went off” only for two reasons, namely that the general meeting required by s 158 of the SSD Act took place on 7 days’ notice, not 14 days’ notice, and the report of the independent valuer included with the strata renewal plan did not assess the compensation value of each lot as required by s 170(3) of the SSD Act and cl 33 of the SSD Regulation. There was no other substantial defect.

22 Second, the dissenting owner, although asserting that the report of the independent valuer was not in accordance with the SSD Act and SSD Regulation, did not suggest a method of assessing the compensation value of each lot which could have resulted in a different value to that given in the valuer’s report or a competing compensation value.

23 Third, the dissenting owner had said, on many occasions before the Owners Corporation brought the proceedings seeking an order giving effect to the strata renewal plan, that she would be “keen to sell” her lot if the price was right. The Owners Corporation inferred that the

dissenting owner's objection to the strata renewal plan was motivated by what she felt ought to be the right price, rather than other factors, including that the strata renewal plan had not been prepared in accordance with the SSD Act.

- 24 The dissenting owner contested that any of these reasons would justify the Court ordering otherwise than that the Owners Corporation pay the dissenting owner's costs of the proceedings.
- 25 As to the first, the dissenting owner noted that the usual order under s 188(1) applies irrespective of whether the application is successful or not or whether the application proceeds to an adjudicated outcome, is settled or is discontinued.
- 26 As to the second, the dissenting owner submitted that there was no onus on her to advance her own assessment of the compensation value of her lot. The onus was on the Owners Corporation to satisfy the Court that the strata renewal plan had been prepared in accordance with the SSD Act. This included establishing that the strata renewal plan included all of the information required by the SSD Act and SSD Regulation, one of which was a report of an independent valuer that satisfied s 170(1)(e) of the SSD Act and cl 33(c) of the SSD Regulation. The Owners Corporation could not discharge that onus.
- 27 As to the third, the dissenting owner submitted that none of the statements referred to by the Owners Corporation about the dissenting owner, indicating that she would sell her lot if the price offered was right, amounted to unreasonable conduct such as would justify the Court making an otherwise order. All of those statements predated the Owners Corporation commencing the proceedings. They were unrelated to the Owners Corporation doing so. The Owners Corporation was obliged to bring the proceedings in order to secure an order of the Court giving effect to the strata renewal plan. The dissenting owner's objection, filed within 21 days after notice of the Owners Corporation's application was served on her, as required by s 180(2) of the SSD Act, identified procedural defects in the preparation of the strata renewal plan. These defects included those that I have earlier summarised. Thus, the dissenting owner submitted, its earlier statements before the proceedings were commenced are of no relevance to the issue of the costs of the proceedings.
- 28 I find that the Owners Corporation has not established that the Court should make an order otherwise than the usual order for costs provided for by s 188(1) of the SSD Act. That usual order is that the reasonable costs of the proceedings brought by the Owners Corporation for an order to give effect to the strata renewal plan that are incurred by the dissenting owner are payable by the Owners Corporation. That usual order applies irrespective of the outcome – whether the Owners Corporation is successful or unsuccessful in obtaining an order to give effect to the strata renewal plan. Hence, the fact that the Owners Corporation has chosen to discontinue the proceedings, and thereby not obtain an order to give effect to the strata renewal plan, is not persuasive in the Court's exercise of discretion to order otherwise than the usual order that the Owners Corporation pay the dissenting owner's costs of the proceedings.

- 29 The policy of the usual order for costs reflects the statutory scheme for renewal of a strata scheme, whether by redevelopment or collective sale. An owners corporation must apply to the Court for an order to give effect to the strata renewal plan if there is a dissenting owner who does not support the strata renewal plan. Provided the Court is satisfied of the mandatory matters in s 182(1) of the SSD Act, the Court must make an order giving effect to the strata renewal plan. Those mandatory matters include not only that the steps taken in preparing the plan and obtaining the relevant level of support were carried out in accordance with the SSD Act (s 182(1)(b)) but also that the interests of any dissenting owner are taken into account and satisfied, in the manner required by s 182(1)(d), (e) and (f).
- 30 In these circumstances, it is just and equitable that the Owners Corporation, which seeks an order of the Court that will override the objection of the dissenting owner, compensate the dissenting owner for the costs the dissenting owner has incurred by filing an objection to the application, as she was entitled to do by s 180(1) of the SSD Act.
- 31 The grounds of objection filed by a dissenting owner should relate to the application for an order to give effect to the strata renewal plan. This will include the matters about which the Court must be satisfied referred to in s 182(1) of the SSD Act. In this case, the grounds of the objection filed by the dissenting owner did relate to the matters referred to in s 182(1). Of relevance to the application for an order for costs, the dissenting owner raised in her objection the matter under s 182(1)(b) that certain steps taken in preparation of the strata renewal plan and obtaining the required level of support of the lot owners were not carried out in accordance with the SSD Act. That was a proper matter to raise in her objection and it has been agreed to be established on the facts.
- 32 In these circumstances, the Owners Corporation's first reason for an otherwise order is not established. The fact that the Owners Corporation's strata renewal application "went off" for reasons of non-satisfaction of s 182(1)(b) of the SSD Act is a reason to make the usual order, not to make an otherwise order.
- 33 Equally, the Owners Corporation's second reason is not established. The onus rested on the Owners Corporation to establish that the strata renewal plan was prepared in accordance with the SSD Act. This included establishing that the strata renewal plan has the content required by s 170(1)(e) of the SSD Act and cl 33(c) of the SDD Regulation, including a report of an independent valuer, with "details of the compensation value of each lot". The strata renewal plan in this case did not include such a report as the valuer's report did not provide details of the compensation value of each lot, as that term is defined in s 154 of the SSD Act. That was one of the defects raised by the dissenting owner in her objection. This defect would preclude the Court being satisfied that the strata renewal plan had been prepared in accordance with the SSD Act and hence would require the Court under s 182(4) to not make an order giving effect to the strata renewal plan. The Owners Corporation would therefore fail to discharge the onus on it to satisfy the Court of the matters referred to in s 182(1).
- 34 There was no onus on the dissenting owner to establish what was in fact the compensation value of her lot if determined in accordance with the SSD Act. The fact that the dissenting

owner did not assay that task is irrelevant to the issue of costs of the proceedings brought by the Owners Corporation.

- 35 The Owners Corporation has not established the third reason it advanced for an otherwise order. The statement of the dissenting owner before the Owners Corporation brought the proceedings seeking an order to give effect to the strata renewal plan do not constitute unreasonable conduct or other justification for making an order otherwise than the usual order under s 188(1)(a) of the SSD Act.
- 36 Those statements were not causative of the Owners Corporation bringing the proceedings. The Owners Corporation was obliged under the SSD Act to bring the proceedings in order to obtain an order giving effect to the strata renewal plan, irrespective of what was said by the dissenting owner. Once proceedings were brought, the dissenting owner filed an objection, as she was entitled to do, properly raising the matters the Court was obliged to consider and be satisfied of before making an order giving effect to the strata renewal plan.
- 37 As the Owners Corporation has not established justification for the Court to order otherwise than to make the usual order, the Court should order the Owners Corporation to pay the dissenting owner's reasonable costs of the proceedings. The amount of the reasonable costs can be agreed or assessed.
- 38 There is a separate issue of costs between the Owners Corporation and the purchaser. The purchaser applied, and the Court ordered, that it be joined as a party to the proceedings. The purchaser's commercial interests would be affected by the Court making or not making an order giving effect to the strata renewal plan. The purchaser was under a contractual obligation to purchase the lots, if an order were to be made giving effect to the strata renewal plan, as the plan was for a collective sale.
- 39 The purchaser sought an order that the Owners Corporation pay the purchaser's costs of its counsel for two days, a day of preparation before the hearing and the day of the hearing. The reason advanced by the purchaser was that the Owners Corporation's delay in discontinuing the proceedings caused the purchaser to have incurred unnecessarily those costs. The defects in the preparation of the strata renewal plan raised by the dissenting owner in her objection were clear and likely to be established at the hearing. The Owners Corporation did not have reasonable prospects of success in satisfying the Court of the matters referred to in s 182(1) of the SSD Act.
- 40 In these circumstances, the purchaser submitted the appropriate course would have been for the Owners Corporation to have discontinued the proceedings earlier rather than proceed to a contested hearing and incur further and unnecessary costs. The unreasonable conduct of the Owners Corporation was not in discontinuing the proceedings, but rather in delaying discontinuing the proceedings until the end of the first day of the hearing. If the Owners Corporation had discontinued the proceedings earlier, the purchaser would not have had to incur the costs of counsel in preparing for and attending at the hearing.
- 41 The Owners Corporation submitted that the appropriate costs order between it and the purchaser is that there be no order as to costs. The purchaser chose to apply to be joined to

the proceedings; the SSD Act did not require the purchaser to be a party to the application for an order giving effect to the strata renewal plan. Although the purchaser had an evident commercial interest in the outcome of the proceedings, it had no ability to affect the outcome.

42 The purchaser did not file an objection to the application or any contention by way of pleading stating its position in relation to the application. The purchaser did not file any evidence before the hearing. Indeed, the purchaser did not make known its attitude to the application until it served its written opening submissions on the afternoon before the hearing. In those submissions, although the purchaser acknowledged some of the defects raised by the dissenting owner, it remained equivocal on a number of aspects.

43 I consider that no order for costs should be made as between the Owners Corporation and the purchaser. Section 188(1) of the SSD Act expressly provides for the costs of the dissenting owner to be paid by the Owners Corporation. But it is silent as to the costs of any intervening party, such as the purchaser where the strata renewal plan is for a collective sale. Any intervenor must establish a basis for a costs order in its favour.

44 The purchaser has not established a basis for a costs order in its favour. The purchaser chose to apply to be joined to the proceedings as its commercial interests were apt to be affected by the outcome of the proceedings. But that intervention was more in the nature of a watching brief. The purchaser did not file any contentions or evidence. It did file written opening submissions, as directed by the Court, in the afternoon before the hearing. Those submissions acknowledged the force of some of the grounds of objection to the application raised by the dissenting owner but did not add to those grounds.

45 As to its argument about the timing of the discontinuance, the purchaser did not disclose its position to the Owners Corporation until the afternoon before the hearing. By that time, the purchaser and the other parties had already incurred the costs of preparing for the hearing and were committed to commencing the hearing the next day. If the purchaser considered that it would be reasonable for the Owners Corporation to discontinue the proceedings in light of the defects identified by the dissenting owner and acknowledged by the purchaser, the purchaser should have suggested that course to the Owners Corporation well in advance of the hearing. By remaining silent until the afternoon before the hearing, the purchaser made its own decision to incur the costs of counsel in preparation for and attendance at the hearing. The incurring of these costs was not induced by the Owners Corporation's conduct in also preparing for and attending the hearing.

46 There is one final issue relating to costs to decide. Section 188(1)(b) of the SSD Act provides that, unless the Court otherwise orders, "the owners corporation cannot levy a contribution for any part of the costs on a dissenting owner". No party sought an order otherwise than that provided for in s 188(1)(b). But the dissenting owner did seek an order under s 90(2) of the SSM Act to confirm what it said was the legislative policy in s 188(1)(b) of the SSD Act. Section 90(2) of the SSM Act provides:

"(2) The court may order in the proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order."

- 47 The dissenting owner submitted that making an order under s 90(2) of the SSM Act would reduce the risk of a different dispute emerging about the right of the dissenting owner to obtain her costs from the Owners Corporation out of funds to which she has not contributed.
- 48 The Owners Corporation contested that an order under s 90(2) of the SSM Act needs to be made. The Owners Corporation noted that s 90(2) states that the Court “may”, not “must”, make an order of the kind there stated. That kind of order is not required by s 188(1)(b) of the SSD Act. The Owners Corporation submitted that there is no proscription in either s 188(1)(a) or (b) of the SSD Act or s 90(2) of the SSM Act against satisfaction of a cost order from the Owners Corporation’s existing reserves. Section 90(2) of the SSM Act only applies if a levy is ordered to be struck by the Court or if a levy needs to be struck because the existing cash reserves are insufficient to satisfy the costs order.
- 49 I consider that an additional order under s 90(2) of the SSM Act should not be made; it will be sufficient for an order to be made in terms of s 188(1)(b) of the SSD Act. I have two reasons.
- 50 First, this was not a principal contested issue in the proceedings. The Owners Corporation’s application to the Court only sought an order to give effect to the strata renewal plan. The dissenting owner’s amended statement of facts and contentions only sought that the Owners Corporation’s application to give effect to the strata renewal plan be refused. Hence, neither the originating process nor the pleadings sought an order under s 90(2) of the SSM Act. The issue of whether an order under s 90(2) should or should not be made was also not raised as a contention in the proceedings.
- 51 In these circumstances, it is not appropriate for the issue to be raised for the first time in the exercise of the discretion to order costs under s 188(1) of the SSD Act on the discontinuance of the proceedings. It is not a sufficient reason to make an order under s 90(2) of the SSM Act that to do so might reduce the risk of a dispute about the issue arising in the future.
- 52 Second, s 188(1)(b) of the SSD Act is particular about how the Owners Corporation can and cannot levy a contribution to pay the costs of a dissenting owner. The usual position is that provided for in s 188(1)(b) of SSD Act. The Court would have power to make an additional order under s 90(2) of the SSM Act, but such additional order is not mandated by s 188(1)(b) of the SSD Act. If the legislature had intended that an order in terms of s 90(2) of the SSM Act should be made to give effect to the legislative policy in s 188(1)(b) of the SSD Act, s 188(1)(b) would have been drafted differently to require an order under s 90(2) of the SSM Act to be made when making a costs order under s 188(1) of the SSD Act. That s 188(1) is not so drafted must be seen to be deliberate.
- 53 In summary, the Court should order the Owners Corporation to pay the dissenting owner’s costs of the proceedings, make no order for costs between the Owners Corporation and the purchaser, and make an order in terms of s 188(1)(b) of the SSD Act.
- 54 The Court orders:
- (1) The applicant is to pay the reasonable costs of the proceedings of the first respondent as agreed or assessed.

- (2) There is to be no order as to the costs of the proceedings between the applicant and the second respondent, with the intention that each of these parties bear their own costs of the proceedings.
- (3) The applicant is not to levy a contribution for any part of the costs ordered by order 1 on the first respondent.
