



Civil and Administrative Tribunal

New South Wales

---

Case Name: BlueHouseCoffs Pty Ltd v The Owners – Strata Plan No 61419

Medium Neutral Citation: [2023] NSWCATCD 145

Hearing Date(s): 13 July 2023

Date of Orders: 13 July 2023

Decision Date: 4 September 2023

Jurisdiction: Consumer and Commercial Division

Before: D Robertson, Senior Member

Decision: In proceedings SC 23/27421:

1. BlueHouseCoffs Pty Ltd is joined as an applicant.
2. Karin Puels is removed as an applicant.
3. The respondent, The Owners - Strata Plan No 61419 is restrained for three months or the delivery of judgment in proceedings SC 22/39925 whichever is the earlier from obtaining any further legal services for which any payment may be required (save for legal services falling within paragraphs 103(3)(a) or (b) of the Strata Schemes Management Act 2015) unless a resolution approving the obtaining of those services is passed at a general meeting of the owners corporation.
4. The Tribunal notes that the chairman and the secretary of the respondent owners corporation have confirmed to the Tribunal that the applicant, by its director Karin Puels, has been given access to the portal maintained by the owners corporation upon which the records of the owners corporation are kept and to the hard copies of documents yet to be uploaded to the portal retained by the owners corporation and that there are no documents held by the owners corporation, other than potentially privileged documents, that is correspondence with solicitors, that

have been withheld.

5. The application is otherwise dismissed.

In proceedings SC 22/39925:

1. The Tribunal notes that the chairman and the secretary of the respondent owners corporation have confirmed to the Tribunal that the applicant, by its director Karin Puels, has been given access to the portal maintained by the owners corporation upon which the records of the owners corporation are kept and to the hard copies of documents yet to be uploaded to the portal retained by the owners corporation and that there are no documents held by the owners corporation, other than potentially privileged documents, that is correspondence with solicitors, that have been withheld.

Catchwords:

LAND LAW – Strata title – Strata Schemes Management Act 2015 (NSW) – Interim relief – Production of documents – Owners Corporation is not required to disclose to a lot owner with which it is in dispute documents subject to legal professional privilege

Category:

Procedural rulings

Parties:

BlueHouseCoffs Pty Ltd (Applicant)  
The Owners – Strata Plan No 61419 (Respondent)

File Number(s):

SC 23/27421; SC 22/39925

## **REASONS FOR DECISION**

1 On 13 July 2023 I made orders in proceedings SC 23/27421 as follows:

1. BlueHouseCoffs Pty Ltd is joined as an applicant.
2. Karin Puels is removed as an applicant.
3. The respondent, The Owners - Strata Plan No 61419 is restrained for three months or the delivery of judgment in proceedings SC 22/39925 whichever is the earlier from obtaining any further legal services for which any payment may be required (save for legal services falling within paragraphs 103(3)(a) or (b) of the Strata Schemes Management Act 2015) unless a resolution approving the obtaining of those services is passed at a general meeting of the owners corporation.
4. The Tribunal notes that the chairman and the secretary of the respondent owners corporation have confirmed to the Tribunal that the applicant, by its director Karin Puels, has been given access to the portal maintained by the

owners corporation upon which the records of the owners corporation are kept and to the hard copies of documents yet to be uploaded to the portal retained by the owners corporation and that there are no documents held by the owners corporation, other than potentially privileged documents, that is correspondence with solicitors, that have been withheld.

5. The application is otherwise dismissed.

2 On the same day I made the following order in proceedings SC 22/39925:

1. The Tribunal notes that the chairman and the secretary of the respondent owners corporation have confirmed to the Tribunal that the applicant, by its director Karin Puels, has been given access to the portal maintained by the owners corporation upon which the records of the owners corporation are kept and to the hard copies of documents yet to be uploaded to the portal retained by the owners corporation and that there are no documents held by the owners corporation, other than potentially privileged documents, that is correspondence with solicitors, that have been withheld.

3 On 7 August 2023 the Tribunal received a request for written reasons for my decision in each of those matters.

4 Section 62(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) provides:

62 Tribunal to give notice of decision and provide written reasons on request

(1) The Tribunal (including when constituted as an Appeal Panel) is to ensure that each party to proceedings is given notice of any decision that it makes in the proceedings.

(2) Any party may, within 28 days of being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not already been provided to the party. The statement must be provided within 28 days after the request is made.

(3) A written statement of reasons for the purposes of this section must set out the following—

(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,

(b) the Tribunal's understanding of the applicable law,

(c) the reasoning processes that lead the Tribunal to the conclusions it made.

(4) Nothing in this section prevents the Tribunal from giving oral reasons or a written statement of reasons for a decision it makes even if it has not been requested to do so by a party.

5 The request for written reasons did not indicate whether reasons were sought in respect of all of the orders made on 13 July 2023 or only some of them. In the absence of specification of the orders in respect of which reasons are

sought, I provide below reasons for each of the orders made on 13 July 2023 in each of the above-mentioned matters.

## **A Orders made in proceedings SC 23/27421**

*1 and 2 – Orders joining BlueHouseCoffs Pty Ltd as an applicant and removing Karin Puels as an applicant.*

- 6 Proceedings SC 23/27421 were commenced by Ms Karin Puels as an application for urgent interim orders against The Owners - Strata Plan No 61419.
- 7 The Tribunal has jurisdiction to make interim orders in proceedings under the *Strata Schemes Management Act 2015* (NSW) (SSMA) pursuant to section 231 of that act. Standing to make an application for an interim order under that section is available only to “an applicant for an order by the Tribunal under this Act”. Ms Puels was not an applicant for an order by the Tribunal under the SSMA. The proceedings by reference to which Ms Puels purported to make application for interim orders were proceedings SC 22/39925 brought by BlueHouseCoffs Pty Ltd (BlueHouseCoffs) against The Owners - Strata Plan No 61419 (the owners corporation). Ms Puels is a director of BlueHouseCoffs.
- 8 Proceedings SC 23/27421 were listed for hearing of the interim application on 13 July 2023. Consistently with the Tribunal’s obligations under the NCAT Act:
  - (1) to facilitate the just, quick and cheap resolution of the real issues in the proceedings (s 36(1));
  - (2) to implement the practice and procedure of the Tribunal so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings (s 36(4)); and
  - (3) to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 38(4)),

rather than simply dismissing the interim application, I invited Ms Puels as a director of BlueHouseCoffs to make application for the company to be joined as an applicant in the proceedings SC 23/27421 and to have herself removed as an applicant. Ms Puels made that application, which was not opposed by Dr Abrahams, who appeared for the owners corporation.

9 Accordingly, I made orders 1 and 2.

3 *An order restraining the owners corporation from obtaining further legal services for which payment may be required (save for legal services falling within paragraphs 103(3)(a) or (b) of the SSMA) unless a resolution approving the obtaining of those services is passed at a general meeting of the owners corporation.*

10 Section 103 of the SSMA provides:

**103 Legal services to be approved by general meeting**

(1) An owners corporation or strata committee of an owners corporation must not obtain legal services for which any payment may be required unless a resolution approving the obtaining of those services is passed at a general meeting of the owners corporation.

(2) An owners corporation or strata committee may obtain legal services without obtaining approval under this section if—

(a) it is of the opinion that urgent action is necessary to protect the interests of the owners corporation, and

(b) the cost of the legal services does not exceed \$10,000 or another amount prescribed by the regulations for the purposes of this subsection.

(3) Approval under this section is not required for the following—

(a) to obtain legal advice before commencing legal action,

(b) to take legal action to recover unpaid contributions, interest on unpaid contributions or related expenses,

(c) to take any other legal action prescribed by the regulations for the purposes of this section.

(4) A failure by an owners corporation or the strata committee of an owners corporation to obtain an approval under this section does not affect the validity of any proceedings or other legal action taken by the owners corporation.

(5) In this Division—

*legal services* includes obtaining legal advice and taking legal action.

11 Regulation 26 of the *Strata Schemes Management Regulation 2016* (NSW) (the Regulation) provides:

**26 Approval for legal services costs**

(1) The amount of \$15,000 is prescribed for the purposes of section 103(2)(b) of the Act.

(2) For the purposes of section 103 of the Act, approval is not required under that section to the obtaining of legal services in relation to a matter that is not urgent if the cost of the legal services does not exceed \$3,000.

12 Evidence before the Tribunal, including invoices submitted to the owners corporation by its solicitors, suggested that the owners corporation had incurred legal expenses in excess of \$3000 without approval by a resolution

passed at a general meeting of the owners corporation. The evidence disclosed that those expenditures related to the defence of proceedings SC 22/39925 and could not be described as being for the purposes of “urgent action... necessary to protect the interests of the owners corporation”.

13 Dr Abrahams explained that expenditure as having been incurred on the basis of legal advice from the owners corporation’s solicitors that an exemption to the requirement to obtain approval in general meeting applied where the expenditure was estimated to be less than one thousand dollars per lot. If the owners corporation had received such advice from a firm of solicitors, that would be a cause of grave concern, because the provision referred to by Dr Abrahams was contained in clause 15 of the *Strata Schemes Management Regulation 2010* (NSW) which was repealed in 2016. It is not necessary to pursue this matter further.

14 Because it was apparent that the owners corporation had obtained legal services contrary to the requirements of the SSMA and the Regulation, I considered it appropriate to make an order on an interim basis restraining the owners corporation from continuing to do so. The order does no more than require the owners corporation to comply with the requirements of section 103 of the SSMA and, for that reason, may be said to be unnecessary, but breach of that section having been established, I considered that there was sufficient justification to impose a further obligation on an interim basis to reinforce the obligation to obtain approval from the owners corporation in general meeting before incurring further legal expenses.

*4 Noting that the officers of the owners corporation had confirmed that all documents held by the owners corporation other than privileged documents had been made available to the applicant*

15 Paragraph 4 of my orders made in proceedings SC 23/27421 was not an operative order but rather merely noted certain confirmations given to the Tribunal by Mr Dr Abrahams in relation to the provision to Ms Puels of records of the owners corporation which, by virtue of ss 182 and 183 of the SSMA, BlueHouseCoffs Pty Ltd was entitled to inspect.

16 The notation was made in the context that the interim order application sought orders:

“[Under] section 188 [of the SSMA]:

1. That the Owners Corporation make available records which have been wrongfully withheld in breach of Section 180 (the Obligation to retain records) and Section 183(3) — the Obligation to make records available for inspection.

That under the powers in the Strata Schemes Management Act under Section 229(a) to make ancillary orders NCAT orders

2. That in accordance with Section 182(3)(j) any other record or document in the custody or control of the owners Corporation that the Secretary obtain a copy of all client records from Fishburn Watson Obrien and make them available for inspection by owners within 14 days of the date of these orders.

3. That the law firm Fishburn Watson O'Brien be ordered to make available documents and records on the client File for Owners Corporation SP 61419 pertaining to Matter No 2220958 specified on their invoices to the Owners Corporation SP 61419 Bill number 461523, 462115, 461692, 461668.”

- 17 The notation in paragraph 4 of my orders was intended to place on the record the fact that Dr Abrahams had confirmed to the Tribunal that the only documents held by the owners corporation which had not been made available to Ms Puels, either through being given access to the portal upon which the records of the owners corporation are kept or through being given the opportunity to inspect the hard copies of documents which had yet to be uploaded to the portal, were documents subject to legal professional privilege.
- 18 Ms Puels maintained on two bases that that confirmation was not sufficient response to the application.
- 19 First, Ms Puels insisted that she was entitled to view all documents held by the owners corporation, including documents such as legal advice from the owners corporation's lawyers relating to BlueHouseCoffs' application SC 22/39925.
- 20 Secondly Ms Puels referred the Tribunal to a letter in which she had listed 143 documents or categories of documents which she claimed had not been provided.
- 21 In respect of the first basis I do not consider that ss 182 and 183 of the SSMA require an owners corporation to make available to a party with which the owners corporation is in dispute documents relating to the dispute which are subject to legal professional privilege. In *The Owners - Strata Plan No 2000 v Bylinska* [2019] NSWCATAP 116 at [34] to [38] the Appeal Panel held:

34 ... it is our view that there is a clear error of law made by the Tribunal in its analysis of the entitlement of Mrs Bylinska to documents claimed by the

Owners Corporation to be documents protected from disclosure by legal professional privilege. The Owners Corporation is a separate entity from the lot owners and as a separate entity it is entitled to the protection provided by the common law concerning legal professional privilege. This means that documents or communications recording a request for legal advice and the documents recording that advice may be the subject of claims for legal professional privilege. In our view, the only individuals entitled to such documents are those individuals authorised by the Owners Corporation. Generally, that would be limited to members of the strata committee.

35 Legal professional privilege is a fundamental common law right, and because, the Decision is in error, an injustice would ensue were we not to extend time for lodgement of the appeal in relation to Order 4. Furthermore, we reject the argument put by Mrs Bylinska that the right of a lot owner to access documents of the Owners Corporation provided by s 182 of the Strata Act has the effect of giving to a lot owner the right to inspect documents protected by legal professional privilege. This issue was dealt with in *Eastmark Holdings Pty Limited v Kabraji (No 3)* [2012] NSWSC 1463. That case in part concerned s 108 of the 1996 Act (which is similar to s 182 of the Strata Act). At paragraph 92, the Court said:

As stated, the third Defendant responds that "it is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect": *Daniels Corporation v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at [11]. It says that what follows from this is that s 108 cannot be read as authorising the inspection of legal advice.

36 At [94] the Court accepted the above reasoning.

37 The Owners Corporation sought to rely upon the decision in *The Owners - Strata Plan No. 74602 v Eastmark Holdings Pty Limited* [2013] NSWCA 221. That concerned a dispute between the Owners Corporation and a lot owner. In that case, the Court of Appeal appeared to agree with the primary Judge. (see [21]) when it is stated that where the Owners Corporation was purporting to act on behalf of the lot owners in obtaining legal advice concerning the entry into a contract that affected the interest of all lot owners, such advice was not confidential between the lot owners and the Owners Corporation once it was obtained. However, in paragraph 23, the Court of Appeal dealt with aspects of the dispute between Eastmark and the Owners Corporation where their interests were "quite divergent". In that context, the Court said that there is "every reason why the Owners Corporation should be entitled to assert its legal professional privilege as against Eastmark in respect of documents relating to those disputes." At [26] the Court of Appeal held that Eastmark in its capacity as a potential defendant in adversarial proceedings brought against it by the Owners Corporation is not entitled to access documents that relate to those disputes.

38 In our view, Mrs Bylinska and the Owners Corporation are in dispute over the enforceability and terms of the 1997 Agreement and to the extent that she seeks documents consisting of legal advice provided to the Owners Corporation in respect of that dispute, the Court of Appeal decision is authority for the proposition that she is not entitled to access those documents.



22 For that reason, I declined to make any order requiring the owners corporation to obtain records from its solicitors or requiring the owners corporation to make such documents available for inspection by BlueHouseCoffs. In my view the solicitors' client records would presumptively be subject to legal professional privilege and therefore not required to be disclosed to Ms Puels or BlueHouseCoffs.

23 For the same reason I declined to make an order requiring the owners corporation's solicitors to make their records available for inspection. There was, however, a second reason why it was not appropriate to make such an order. That second reason was that Fishburne Watson O'Brien, the owners corporation's solicitors, were not a party to the application and it would not be appropriate to make an order binding them to take any action without giving them an opportunity to be heard.

24 In relation to the second issue the evidence before me was not sufficient to satisfy me that the owners corporation held documents, other than potentially privileged documents, which it had not made available to Ms Puel. The application for the production of other documents was not limited to specific documents or specific categories of documents. The list set out in the letter included numerous categories of documents and a large number of vaguely identified individual documents. The application was, in my view, over-broad and unduly general and non-specific.

25 In my view it would not be appropriate to make an order, either pursuant to s 231 or pursuant to s 188, or for the purposes of preparation of evidence for hearing, for the production of a specific document unless there is evidence to establish on the balance of probabilities:

- (a) that the document exists; and
- (b) that the document has not been made available.

26 As is stated in *Ritchie's Supreme Court Procedure* at 21.2.20 in relation to orders for further discovery:

An order for further discovery will not be made merely on the basis of a speculative possibility that a party has not disclosed a relevant document .... In order to justify an order for further discovery the applicant must specify the document, or class of documents, in respect of which further discovery is

sought and must establish reasonable grounds for believing that the documents were, or had been, in the opponent's possession: ... [citations omitted].

27 The evidence before the Tribunal did not, other than in the most general and non-specific way, support either proposition. In circumstances where Dr Abrahams stated that all documents had been made available, I was not persuaded on the balance of probabilities that there were any documents which should have been produced and had not been produced.

28 In those circumstances the Tribunal found it impossible to do anything other than note that the respondent by its chairman and secretary had stated that all documents had been made available to the applicant.

5 *An order dismissing the balance of the application for interim orders.*

29 In respect of the application for the production of documents pursuant to section 188, I have explained above why I declined to make any order in that regard.

30 I made, by order 3, one order sought by the applicant, albeit in slightly amended form in that I carved out the exceptions to the prohibition on incurring legal expenses provided by s 103(3)(a) and (b) of the SSMA.

31 The application also sought an order:

“That the management is ordered to circulate to all owners a copy of the fee proposal prior to any general meeting where orders are sought for approval of expenditure on legal services concerning the application for section 237 orders/appointment of a compulsory strata manager”

32 The owners corporation would be required by order 3 and by s 103 of the SSMA to obtain approval to further legal expenditure in relation to proceedings SC 22/39925. Any notice of a general meeting of the owners corporation will be required to identify the motions sought to be passed. In the absence of any evidence that the owners corporation has failed to comply with any requirements of the SSMA or the Regulation in relation to the calling of meetings, I did not consider it appropriate to make orders directing the owners corporation in relation to the manner of giving notice of general meetings or the contents of any such notice. Accordingly, I declined to make the order sought by BlueHouseCoffs.

## **B Proceedings SC 22/39925**

- 33 Proceedings SC 22/39925 were listed for directions only on 13 July 2023. It is the practice of the Tribunal in relation to applications for interim orders under section 231 of the SSMA to list the substantive application for directions at the same time as the interim application is listed for hearing.
- 34 This case was unusual in that the substantive proceedings were already listed for final hearing on 14 and 15 August 2023. There was, or should have been, no reason for the Tribunal to be called upon to make directions in relation to that matter on 13 July. Nevertheless, Ms Puels sought to maintain an application for production of documents in the same terms as the orders sought in the interim application. The notation made in proceedings SC 22/39925 was identical to the notation in paragraph 4 of the orders made in proceedings SC 23/27421. The reasons for that notation and for declining to make any further order were the same reasons as I have outlined above for the making of order 4 and refusing the further orders relating to documents sought by the applicant in proceedings SC 23/27421.

\*\*\*\*\*

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.