



## Précis Paper

### Levies for Strata Scheme Insurance Premiums

A discussion of *Maphaven Pty Ltd v The Owners SP 4887 [2019] NCAT* concerned whether a proportion of increased insurance premiums for a strata scheme in Bondi could be recovered against a particular unit via a type of special levy.

#### Discussion Includes

- The powers of NCAT to resolve disputes and make orders relating to the way strata managers wield their powers
- Statutory rights to inspect records
- Facts of the case
  - The problem of insurance
  - Other commercial tenancies
  - The impact of the tattoo parlour
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  - The conduct of the strata manager
  - The findings of the Learned Member of the Tribunal
- Tips for busy strata practitioners

## Précis Paper

### Levies for Strata Scheme Insurance Premiums

1. In this edition of BenchTV, Sydney Jacobs (Barrister, 13 Wentworth Selborne) and Julia Park (Solicitor, AR Conolly and Company) discuss the case *Maphaven Pty Ltd v The Owners SP 4887 [2019] NCAT* concerned whether insurance premiums for a strata scheme in Bondi could be recovered against a particular unit via a type of special levy.
2. Levies are the life blood of a strata scheme, and are usually only able to be collected strictly *pro rata* to unit entitlements
3. This is one of the oldest rules of strata schemes - everyone pays *pro rata* .
4. This case was the first judgment in NCAT about the schema under the *Strata Schemes Management Act 2015 (NSW)* of how a SP via its strata manager would go about issuing a special levy against a unit, if an activity carried out in that unit increased the risk to the SP and thus caused levies to be increased.

### The powers of NCAT to resolve disputes and make orders relating to the way strata managers resolve their powers

5. The case also considered the powers of NCAT to make orders to resolve disputes relating to way strata managers exercise their powers, which are not necessarily obvious and involved a bit of debate.
6. One has to know ones' way around the whole *Strata Schemes Management Act* to know what Orders NCAT can make, whether under its specific statutory powers or under the general law.
7. This particular dispute centred around NCAT's wide remedial powers in *s 241 of the Strata Schemes Management Act 2015*

### Statutory rights to inspect records

8. Maphaven exercised their statutory rights under the *Strata Schemes Management Act* to inspect records, and used the records it found to great advantage in the litigation
9. Tucked away in the *Strata Schemes Management Act* is a wonderful provision for lot owners and certain others to inspect the SP's records.
10. It allows the unit owner to understand what's been debated by the EC, and what correspondence the strata manager has had with, for example, the insurance broker in the lead up to renewal.
11. It allowed Maphaven to understand the conduct of the strata manager – both what the strata manager had done and also, significantly, had not done. In Maphaven for example, it was found that the strata manager hadnot kept the strata roll up to date.

12. It allowed Maphaven to point to areas of the strata manager's conduct that fell below par, and allowed Maphaven to frame affidavits with an eye to the fault of the SP through its manager.
13. Sydney Jacobs strongly advises any unit holder to exercise their rights under the *Strata Schemes Management Act* to inspect records as soon as possible.
14. Documents viewed also identify legitimate targets for summonses for production; and thus allow the unit holder to build up a documentary case, based on the SP's records.

#### Facts in the case

15. Maphaven was the owner of a lot in the SP, which it had leased to the a bespoke, appointment-only tattoo artist trading as "Little Tokyo ".
16. Also, there were some other units in the SP - not owned by Maphaven - that traded, apparently, as "adult massage parlours".
17. In late 2013, Maphaven's proposed tenant, ie. the tattoo artist, Mr Rhys Gordon t/ a Little Tokyo, retained an architect to prepare a DA for change of use of the premises.
18. The architect duly provided the DA to the strata manager for its consent prior to submitting to Council
19. The DA said "Little Tokyo is an appointment only, private tattoo studio that provides customer designed tattoos."
20. The Strata Manager well knew of the nature of the business intended to be run from the client's premises.
21. The Strata Manager then apparently applied the seal of the SP strata seal to the DA to signify consent.
22. In December 2013, Waverley Council approved the DA, and the Applicant, ie. Maphaven, entered into the Lease with Mr Gordon, who then entered into possession of Shop 5A.
23. At the expiry of the Lease on 31 October 2016, Mr Gordon did not exercise his option for renewal but neither did he vacate. Rather, he continued in occupation holding over from month to month. .
24. This was a really important aspect, because had Maphaven been given due notice by the SP that there was some problem with Little Tokyo's tenancy, then Maphaven could have given 1 month's notice to Little Tokyo to vacate.

### The problem of insurance

25. The insurance was apparently renewed for the insurance periods commencing 1 January 2015 and 1 January 2016 on the basis that the entire building was residential, whereas in truth there were quite a few commercial units
26. Another complicating factor was that two units - not Maphaven's - were being used as "adult massage parlours"
27. In early January 2017, the underwriters advised the SP's brokers that they had learned via web advertising that there were two adult-oriented massage parlours operating from the building
28. The broker only became aware of the difficulty of obtaining renewal insurance once the updated commercial tenancy list was put before various insurers approximately 10 days before the renewal date - a matter specifically emphasised by the learned Senior Member
29. The strata manager was first advised that the insurance would not be renewed on or about 17 January 2017, in respect of an insurance policy that was due to expire on 27 January 2017.
30. Only on the 16 January 2017 did the SP's insurance broker provide an updated commercial occupancy list including the two massage parlours and the tattoo artist.
31. Maphaven first became aware there was a problem with the insurance arrangements of the SP on 17 February 2017; and when minutes of an AGM were sent to its directors.
32. Under the heading "Insurance" in the AGM, there was the following entry:

*"It was noted that the current insurer has declined to offer renewal on the basis that there are two massage parlours and a tattoo parlour operating from the building, this has also prevented other insurers quoting.*

*The current insurer has extended for one month only to allow the broker to obtain quotations in the overseas market. The broker has now been able to provide a quotation however this is approximately four times higher than the usual premium. RESOLVED that SM (strata manager) contact the Owners of the lots that have contributed to the issue and request they bring leases to an end/change manner of business and on this basis request the current insurer to consider extending for a further month. It was also RESOLVED that the higher insurance costs incurred be recharged to those Lot Owners (pursuant to the Strata Schemes Management Act 2015) until such time as the matters are rectified"*

33. Had Maphaven been notified of the supposed impact on the insurance premium of the use its Unit was being put, say, in December 2016, 1 month's notice could have been given to the tattoo parlour to vacate Unit 5A prior to the renewal date of the insurance.

#### Other commercial tenancies

34. There were always other commercial tenancies - 5 in all. However, the strata insurance for the whole of the SP in the years prior to 2017, appeared to be calculated on a residential basis..
35. This insurance rating changed in the 2017 renewal when updated tenancy disclosure occurred ; but the evidence was unclear whether that alone resulted in the uplift in premium as opposed to the use of some of the other commercial strata units.
36. It was not until April 2017, when the Strata Manager wrote to Maphaven. The letter referred to the AGM and then continued
- "The insurance cover has been finalised at \$175,033.32 including GST. This compares with the previous year's premium at \$42,201.33. As per section 82 of the Strata Schemes Management Act 2015 (attached) please find enclosed an invoice for a quarterly insurance contribution. Please note you will receive three further invoices for this amount (1/8/17, 1/11/17 and 1/2/18). Please advise if you would prefer to pay the amount as a lump sum (\$44,277) or if you wish to alter the timing of the payments."*
37. Attached to the letter was a print out of s 82 Strata Schemes Management Act 2015 (NSW) and a Miscellaneous Invoice for Lot 5 in the sum of \$11,069.25 including GST for 'Lot 5: Insurance Premium Contribution May 17 quarter'

#### The impact of the tattoo parlour

38. The Strata Manager admitted to the client in a conversation that they had no details from the Insurer as to how much the tattooist and the massage parlours caused an increase so he simply deducted the cost of the 2016 policy and then divided the remainder between the three lots.
39. The Strata Manager kept pressing for payment and went so far as to send, via its lawyers, a document styled "final demand notice", dated 21 August 2017.
40. On the evidence, it was unclear whether Chubb (or any other insurance company) treated the risks of the tattoo parlour and the adult massage parlours as impacting equally on any insurance premium increase.
41. What little evidence there was appears to give greater precedence to the adult massage parlour, but there was no clarity or finality of calculation in this regard.
42. The learned NCAT Member noted that the SP adduced no record as to the response of the proprietors of the two adult massage parlours to the increase levied upon them,

whether they received similar Miscellaneous Invoices as the Applicant did and, if so, whether they were paid and in what sum and for what term.

#### The Relevant Sections

43. *S 82 Strata Schemes Management Act 2015 (NSW)* states:

*"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 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.*

*3. An application for an order under this section may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner of a lot or a mortgagee in possession."*

44. A section in similar but not identical terms to s 82(1) is s 77 *Strata Schemes Management Act 1996 (NSW)*

#### The conduct of the strata plan

45. It seems that what occurred was that the SP simply issued an invoice requiring payment from Maphaven, Maphaven paid a ¼ of the amount claimed, then after it had given notice to its tenant, it refused to pay anymore. Then it seems the SP refused to back down & continued to press Maphaven for payment, instead of following the path called for in s 82, namely seeking orders from the Tribunal.

#### The findings of the Learned Member of the Tribunal

46. The learned Member found that the payment of ¼ of the uplift sought made by Maphaven was to its credit; ie the ¼ paid whilst Little Tokyo was seeing out its notice period.
47. He commended Maphaven on the respectfulness of its conduct in the way it declined to pay.

48. On the other hand, this is what the Learned Member had to say about the conduct of the SP:

*"The Tribunal is concerned at the lack of proper processes undertaken by SP48887, its strata committee, its strata manager and its insurance brokers to maintain proper and updated records about its own tenancies in order to properly and in a timely manner instruct its insurance broker to ensure it pays the minimum insurance premium on the correct rating basis." para [71].*

*"The respondent should have followed the scheme outlined in s.82 of the SSMA and sought the Respondent's consent in advance of invoicing the Applicant for the disproportionate insurance premium and, if consent was not forthcoming, then approach the Tribunal as the section permits. The Respondent has chosen not to proceed in this manner." para [73]*

49. S 241 Strata Schemes Management Act provides:

*The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.*

50. This is seen in context of s 232 Strata Schemes Management Act which provides as follows:

*Orders to settle disputes or rectify complaints*

*(1) Orders relating to complaints and disputes The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:*

- (a) the operation, administration or management of a strata scheme under this Act,*
- (b) an agreement authorised or required to be entered into under this Act,*
- (c) an agreement appointing a strata managing agent or a building manager,*
- (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,*
- (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,*
- (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.*

*(2) Failure to exercise a function. For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if:*

- (a) it decides not to exercise the function, or*
- (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.*

***(3) Other proceedings and remedies. A person is not entitled:***

***(a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or***

***(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.***

***(4) Disputes involving management of part strata parcels. The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if:***

***(a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or***

***(b) any of the parties to the dispute fail to consent to its determination by the Tribunal.***

***(5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.***

***(6) Disputes relating to consent to development applications The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the Environmental Planning and Assessment Act 1979 relating to common property of the scheme.***

***(7) Excluded complaints and disputes This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject-matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter.***

### **Tips for busy strata practitioners**

51. Strata managers must keep their roll of occupants and owners up to date , especially where the building is mixed use ie residential and commercial
52. The process of renewing strata insurance ought be done in a timely fashion
53. The wording of the *Strata Schemes Management Act* can be a bit tricky, eg s 82. However, s 82 does provide a procedure whose general outline is clear:
  - (i) SP can ask a unit holder to contribute via levies to a pro rata greater amount, if the use of the premises has impacted on premia



(ii) if the owner says No – for whatever reason - the pathway to follow is not for the SP to continue sending out letters of demand, threatening recovery action - that is the wrong way to proceed. Rather, the procedure is for the SP to file proceedings in the Tribunal, seeking an order that the owner contribute the sum of \$X, because they have unreasonably refused to contribute .

(iii) leases of strata units might be reviewed by landlords to allow a wider right to recover levies, for example, even after the tenant vacates, in the event the use of the premises by the tenant provokes an increase in insurance for the entire scheme.

## **BIOGRAPHY**

### **Sydney Jacobs**

**Barrister, 13 Wentworth Selborne Chambers, Sydney**

Sydney completed undergraduate studies and his LLB in Cape Town, South Africa and has an LLM from the University of Cambridge. Prior to being called to the NSW Bar in 1997, Sydney worked as a solicitor at Minter Ellison in Australia and lectured at the University of Technology Sydney. His practice focuses on commercial equity property disputes, such as notices to complete and to perform, rescission, repudiation and specific performance; leasing disputes; easement and strata disputes and also building and construction.

### **Julia Park**

**Solicitor, AR Conolly and Company Lawyers, Sydney**

Julia graduated from the University of Sydney with a double degree in Law and Commerce. Julia's career in law started in 2009 at A R Conolly & Company followed by various litigation work in commercial and personal injury. Julia tutored Business Law at the University of Sydney.

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***Maphaven Pty Ltd v The Owners SP 4887 [2019] NCAT***

### **Legislation**

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