



# Précis Paper

## Strata and Community Titles

A discussion about the 2015 strata and community title law reforms including strata renewal, the validity of by-laws and duties and obligations of owner's corporations.

### Discussion Includes

- Strata Renewal
- Strata Renewal Process Cases
- By-law disputes
- Duties of Strata

## Précis Paper

### Strata and Community Titles

1. In this edition of BenchTV, Darren Jenkins (Barrister Level 22 Chambers, Sydney) and Allison Benson (Principal, Kerin Benson Lawyers, Sydney) discuss the 2015 strata and community title law reforms and cases arising from those reforms including strata renewal, the validity of by-laws and duties and obligations of owners corporations and strata committees.

#### Strata Renewal

2. Changes to the Strata Schemes legislation came into effect on 30 November, 2016, the most ground breaking of which were the strata renewal provisions.
3. As yet, there has not been much development in the case law with regard to the strata renewal process.
4. The strata renewal process was introduced under Part 10 of the *Strata Schemes Development Act 2015* (NSW) and it allows Owners Corporations to decide to opt in to a strata renewal plan to either collectively sell their property or to collectively redevelop their property.
5. To do so, the Owners Corporation requires 75% of the unit entitlements of a scheme to vote yes to the strata renewal plan. The proposed plan then goes through a ballot process whereby the lot owners consider the plan and they must vote. A minimum of 75% of lot owners must also agree to the strata renewal plan.
6. No strata renewal application has yet been the subject of a final decision.
7. At this state, whilst the interlocutory cases are helpful in establishing the strata renewal process, no case has gone through the entire process, where a strata renewal plan has received the consent of the Land and Environment Court.

#### Strata renewal process cases

8. *The Owners – Strata Plan 6666 v GSA Australia Acquisition No 2 Pty Ltd and Kahu Holdings Pty Ltd; The Owners – Strata Plan 6877 v GSA Australia Acquisition No 2 Pty Ltd and 2-4 Lachlan Avenue Pty Ltd [2018] NSWLEC 115* involves two cases, heard together as strata renewal cases.
9. These two schemes, SP6666 and SP6877 are adjacent to each other and Kahu Holdings and 2-4 Lachlan Avenue, were dissenting owners.
10. The Owners Corporation went through the strata renewal process and obtained 75% of unit entitlements and also 75% of lot owners voting in favour of the Strata Renewal Plan.
11. The Owners Corporation then resolved to go to the Land and Environment Court to receive consent and to obtain the orders to give effect to the Strata Renewal Plan.

12. The Land and Environment Court held that Kahu Holdings and 2-4 Lachlan Avenue were entitled to participate in the proceedings if they set out their interest in the matter. In this case both parties, as lot owners, held a financial interest.
13. Whilst Kahu Holdings and 2-4 Lachlan Avenue wished to have separate hearings, the Court determined that some parts of the hearing could be heard together, however this was not possible for the totality of both trials. However the Court held that some parts, such as town planning and valuation evidence) could be heard concurrently and therefore it was appropriate to set both matters down for the same hearing date and to make case management orders.
14. It is also important to note that a developer or other supporting party may also be joined to the proceedings by applying by way of a notice of motion and set out their material interest in the process. This was the case of GSA who proposed acquiring and redeveloping the properties.
15. The ability of supporting developers or objecting owners to join proceedings presents some difficulties in how the *Civil Procedure Act 2005* (NSW) applies to these cases as these parties do not fall nearly into the categories of plaintiff or defendant.
16. This is because, In these matters, there is the possibility for there to be respondents supporting the Owners Corporation application as well as objecting to the same.
17. In the case of SP6877, in terms of costs, the costs of the Notice of Motions by GSA and Lachlan Avenue, were awarded as costs in the cause both to the objecting lot owner and the supporting developer.
18. Another case involving the strata renewal process was *The Owners Strata Plan 49574 v Scorpio Holdings (Aust) Pty Limited & Ors* [2018] NSWLEC 54.
19. This case involved a collective sale where the Owners Corporation had applied for an order to give effect to the plan. Scorpio was an objecting lot owner and wanted to obtain its costs from the Owners Corporation.
20. In this case, The Land and Environment Court noted that it could not necessarily make an order for security of costs but they could make an order that would secure the costs for the dissenting lot owner and that was by way of a down payment for costs.
21. The Land and Environment Court held that under the Uniform Civil Procedure Rules it did not have the power to make an award for security of costs.
22. The other important point in this case, in relation to the process was that the case had gone through mediation before Land and Environment Court and one of the parties had not filed its position paper. The Court held that this was unfair and that the parties needed to provide the basis of their position prior to key dates in this process.
23. It is also important to note that the *Corporations Act 2001* (Cth) could not have allowed for security of costs as an Owners Corporation is not a corporation for the purposes of the Corporations Act and further, in terms of this process, the Owners Corporation is the Applicant, not the Respondent.

24. Whilst there has been a lot of activity by developers, very few cases have reached the Land and Environment Court as they settle before reaching the Court.

#### By-Law disputes

25. In contrast, there has been a lot of development and litigation in regard to by-laws and their validity.
26. These cases are taken to NCAT, as opposed to strata renewal cases which are taken in the Land and Environment Court, and are therefore cheaper and quicker cases to run.
27. The 2015 reforms established an additional provision under the Section 139(2) of the *Strata Schemes Management Act 2015* (NSW), which places a restriction on by-laws which are harsh, unconscionable or oppressive.
28. *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD 19 was a case which involved a harsh, unconscionable or oppressive by law.
29. The Yardys had applied to keep their dog, Baxter in their lot. The Owners Corporation had a by-law containing an absolute prohibition on the keeping of animals in the scheme.
30. The Yardys were not aware of the by-law which had been passed and there was expert evidence presented about Baxter's ability to live in Strata, as well as evidence presented about community standards in relation to pets
31. Community standards played an important role in the decision of the Tribunal.
32. The old by-laws noted that owners were not permitted to have a pet unless there was written approval from the owners corporation, that approval was not to be unreasonably withheld. The new model by-law shifted it in more of a positive way saying that lot owners are permitted to keep a pet on the lot, provided that they have written approval from the owner's corporation.
33. This reflects the change in community standards between the 1996 Act and the 2015 Act.
34. The first contention made by Mr Yardy, was that the by-law precluding all new pets was outside of the power of the owners corporation. This contention did not succeed, as the way that Section 136 is cast is that it would not be outside of the power to actually make such a by-law.
35. The second argument put forward by Mr Yardy was that the by-law was unjust, and that it was harsh, unconscionable and oppressive .
36. The Tribunal found that this was a by-law which sought to effect a blanket ban and that it did not allow a balanced consideration of the needs and interests of all lot owners having regard to the community standards. As a result, the by-law was found to be invalid.

37. The case of *Gurram v Owners Corporation SP36589* [2018] NSWCATCD 39 involved a by-law containing a blanket ban prohibition involving the installation of hard surface flooring.
38. Section 110 of the *Strata Schemes Management Act 2015* (NSW) enables hard surface flooring to be installed without a by-law provided either
  - a. An owners corporation resolves to approve it at a general meeting or
  - b. A strata committee with delegated power resolves to approve it
39. Section 136 of the *Strata Schemes Management Act 2015* (NSW) provides that a by-law must not be inconsistent with the Act.
40. The Tribunal found that Section 110 of the *Strata Schemes Management Act 2015* (NSW) provided a way of installing hard flooring and therefore the by-law prohibiting the installation of hard flooring was no longer valid as it was inconsistent with the provisions of approval contained in section 110 of the *Strata Schemes Management Act 2015* (NSW).
41. The Tribunal found the by-law to be invalid and noted that by-laws will not be deemed to be harsh, unconscionable and oppressive where
  - a. The *Strata Schemes Management Act 2015* (NSW) clearly provides a process for the type of work the by-law prohibits and
  - b. Parliament has clearly intended to set out a scheme for these types of works.
42. The Tribunal however, did little in the way of orders repealing the by-law or declaring that it was invalid, the result being that the by-law remains recorded on the registered by-laws for the scheme, which can create confusion over time.
43. Another relevant case relating to by-laws is *John Maait Properties Pty Ltd v The Owners – Strata Plan No 50396* [2019] NSWCATAP 26 which involved a by-law restricting access to certain parts of a development where there was more than one building.
44. There was a by-law that regulated the use of security keys within the scheme which set the number of keys that lot owners could have, the security levels for lot owners and provided the process as to how lot owners could obtain more keys.
45. The Tribunal found that the by-law was not a blanket ban as it provided a process that owners could go through to obtain more keys or greater access. Therefore the by-law was not an 'absolute embargo' on lot owners.
46. The Tribunal also looked at the security of the scheme, being 140 lots over two buildings and found that it was reasonable for the owners corporation to want to restrict access to different parts of the building for security purposes.
47. Therefore, the Tribunal found that the by-law was not harsh, unconscionable or oppressive and would not be so where:
  - a. A lot owner did not have a car space in the relevant area but did have access to areas where their lot was situated;
  - b. Security in the scheme was a valid concern to be balanced against lot owner's need to access their lot and

- c. It was not an 'absolute embargo' as the lot owner could apply for extended access to the common property.
- 48. A takeaway for practitioners is that if there is a blanket prohibition contained in a by-law, it is likely to be found invalid.
- 49. A by-law that regulates behaviour or access to areas within a scheme, as long as it regulates and provides the ability to increase, decrease or change a particular conduct, behaviour or regulation or restriction, is likely that that type of by-law will be valid.

#### Duties of Strata Committees

- 50. Section 37 of the *Strata Schemes Management Act 2015* (NSW) provides that it is the duty of each member of a Strata Committee of an Owners Corporation to carry out his or her functions for the benefit, so far as practicable of the Owners Corporation and with due care and diligence.
- 51. This is the first time that the Act has contained a Statutory Duty of a Strata Committee.
- 52. *The Owners - Strata Plan No 14593 v Soares* [2019] NSWCATAP 35 involved a scheme where one particular family group owned the majority of lots and therefore had the unit entitlements and voting power in their favour.
- 53. The family had used their voting powers to restrict who was going to be on the Strata Committee and as a result the only members of the Strata Committee were members of the family.
- 54. They had also used their voting power to put in place a cleaning contract to benefit the cleaner who was a member of the family. The cleaner was only putting out and bringing back the bins for members of the family.
- 55. The lot owners were paying their Strata levies and not getting the services that are being provided to other lot owners.
- 56. The Tribunal noted that it was this exclusion of lot owners and the fact that they did not obtain the benefit of the services that the Owners Corporation was providing which was a breach of section 37 of the *Strata Schemes Management Act 2015* (NSW).
- 57. Under section 9 of the *Strata Schemes Management Act 2015* (NSW), the Owners Corporation has responsibility for the management and administration of the scheme and must provide these services to its lot owners.
- 58. It is not permissible to exclude any one or more lot owners from the provision of these services or to discriminate against them.
- 59. Engaging in conduct which excludes lot owners from certain services provided or discriminating against owners by the Strata Committee, is a clear breach of Section 37. This means that both the owners corporation and Strata Committee must act for the benefit of all lot owners



## **BIOGRAPHY**

### **Darren Jenkins**

Barrister Level 22 Chambers, Sydney

Darren was admitted to the Bar in 2006. For the past 11 years he has regularly appeared in NSW and ACT courts. Darren represents clients principally in commercial, equity and property matters, including strata schemes disputes.

### **Allison Benson**

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Allison was admitted as a lawyer in 2007. She is renowned as a strata lawyer, providing general strata advice and acting in strata disputes. Allison has extensive knowledge in a variety of strata scheme matters enabling her to represent her clients both informally and before the courts. She is a member of the Australian College of Strata Lawyers and the Newcastle Law Society and has been published in both the Law Society Journal and the Australian Construction Law Newsletter.

## **BIBLIOGRAPHY**

### **Cases**

- *The Owners – Strata Plan 6666 v GSA Australia Acquisition No 2 Pty Ltd and Kahu Holdings Pty Ltd; The Owners – Strata Plan 6877 v GSA Australia Acquisition No 2 Pty Ltd and 2-4 Lachlan Avenue Pty Ltd* [2018] NSWLEC 115
- *The Owners Strata Plan 49574 v Scorpio Holdings (Aust) Pty Limited & Ors* [2018] NSWLEC 54
- *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD
- *Gurram v Owners Corporation SP36589* [2018] NSWCATCD 39
- *John Maait Properties Pty Ltd v The Owners – Strata Plan No 50396* [2019] NSWCATAP 26
- *The Owners - Strata Plan No 14593 v Soares* [2019] NSWCATAP 35

### **Legislation**

- *Strata Schemes Development Act 2015* (NSW)
- *Corporations Act 2001* (Cth)
- *Strata Schemes Management Act 2015* (NSW)