



Civil and Administrative Tribunal New South Wales

Case Name: Davis v Owners Corporation SP 63429

Medium Neutral Citation: [2018] NSWCAT

Hearing Date: 2 and 8 November 2017

Date of Decision: 21 June 2018

Jurisdiction: Consumer and Commercial Division

Before: T Simon, Senior Member

Decision:

- 1 By consent, the Tribunal prescribes that the by-law set out in attachment 1 is to replace by-laws 46.2 (attachment 1 is attached to these orders).
- 2 By consent, the Tribunal orders that within 60 days the Owners Corporation cause to be registered on title: Folio CP/SP63429 a "change of by-laws form 15CH" recording that special by-law 46.2 has been replaced by the foregoing.
- 3 By consent, the Tribunal orders that the respondent effect all repairs to or replace common property necessary to prevent water ingress into the main bedroom on the upper story of lot 18, by 28 February 2018.
- 4 By consent the respondent will retain an independent qualified engineer to provide a cope of works in order to comply with order 3 above ("Works"). Thereafter the respondent

through its chosen contractors will undertake the "Works"

- 5 Orders 3 and 4 are subject to the Applicant providing access to the Owners Corporation, its chosen contractors, engineer and persons working with the engineer on 4 days written notice, to comply with orders 3 and 4.
- 6 The Tribunal declares that special by law 59 is invalid on and from 23 March 2016, being the date when it was adopted.
- 7 On or before 31 August 2018 the Owners Corporation is to cause to be registered on title: Folio CP/SP63429 a 'Change of By-Law Form CH 15' removing special by-law 59.
- 8 On or before 31 August 2018 the Owners Corporation is to refund to the applicant all payments made by the applicant to the Owners Corporation pursuant to by-law 59.
- 9 The Tribunal declares that special by law 19 as repealed and replaced on 8 December 2014 and as adopted on 27 June 2017 is invalid from 8 December 2014.
- 10 On or before 31 August 2018 the Owners Corporation is to cause to be registered on title: Folio CP/SP63429 a 'Change of By-Law Form CH 15' removing special by-law 19.
- 11 On or before 31 August 2018 the Owners

Corporation is to refund to the applicant all payments, levies and/or contributions paid by the applicant to the Owners Corporation clause 19.8 of by-law 19.

- 12 If either party seeks to make an application for costs, they are to provide to the Tribunal and the other party, either in person or by post, submissions and documents in relation to costs by 3 July 2018.
- 13 Parties are to provide to the Tribunal and the other party any response to the costs application, either in person or by post, submissions by 17 July 2018.
- 14 Costs will be determined on the papers. If either party seeks to be heard in person, they should advise the Registry prior to 17 July 2018, setting out the reasons why and the Registry would advise of the outcome in due course.

Catchwords: STRATA – minor works – works affecting common property, unauthorised works.

Legislation Cited: Strata Schemes Management Act 2015
Strata Schemes Management Act 1996

Cases Cited: Italian Forum Limited v Owners Strata Plan 60919 [2012] NSWSC 895
Leach v R (2007) 230 CLR 1
MacDougall v Patterson (1851) 11 CB 755; 138 ER 672
Owners Corporation SP 32033; Patrick and Valerie Mullins [2015] NSWCATCD 23
Owners Strata Plan 60919 v Consumer Trader and Tenancy Tribunal [2009] NSWSC 1158

Category: Principal judgment

Parties: Anne Davis (applicant)
Owners Corporation SP 63429 (respondent)

Representation: Mr D Knoll (Counsel for the applicant)
Mr M Newton (Counsel for the respondent)

Slater & Gordon lawyers (solicitors for the applicant)
Polczynski Lawyers (solicitors for the respondent)

File Number(s): SC 16/54367 & SC 17/25558

Publication Restriction: Nil

REASONS FOR THE DECISION

The Application

- 1 These reasons deal with two applications made by the applicant who is the owner of lot 18. The first application (SC 16/54367) was made on 14 December 2016 and the second application (SC 17/25558) is a renewal of application SC 16/22935 and was made on 5 June 2017. By the second day of hearing, the issues between the parties had significantly reduced and the parties had reached a consent position in relation to many of the issues.
- 2 The following consent order were made:
 1. By consent, the Tribunal prescribes that the by-law set out in attachment 1 is to replace by-laws 46.2 (attachment 1 is attached to these orders).
 2. By consent, the Tribunal orders that within 60 days the Owners Corporation cause to be registered on title: Folio CP/SP63429 a "change of by-laws form 15CH" recording that special by-law 46.2 has been replaced by the foregoing.
 3. By consent, the Tribunal orders that the respondent effect all repairs to or replace common property necessary to prevent

water ingress into the main bedroom on the upper story of lot 18, by 28 February 2018.

4. By consent the respondent will retain an independent qualified engineer to provide a cope of works in order to comply with order 3 above ('Works'). Thereafter the respondent through its chosen contractors will undertake the "Works"
5. Orders 3 and 4 are subject to the Applicant providing access to the Owners Corporation, its chosen contractors, engineer and persons working with the engineer on 4 days written notice, to comply with orders 3 and 4.

- 3 There remained two outstanding issues which the parties agreed the Tribunal needed to make a decision about.
- 4 The first issue (which the applicant has labelled as issue 2) relates to the applicant seeking declaration pursuant to s 150 of the *Strata Schemes Management Act 2015* (SSMA) that special by law 59 which was adopted on 23 March 2016 was invalid. The applicant also seeks an order pursuant to s241 of the SSMA that within 60 days of the declaration the Owners Corporation cause to be registered on title: Folio CP/SP63429 a "Change of By-laws Form CH15" removing special by law 59 and a further order pursuant to ss 87 and 88 of the SSMA that all payments by the applicant pursuant to Special By-law 59 are refunded to the applicant.
- 5 The second issue (which the applicant has labelled as issue 4) relates to the applicant seeking a declaration, also pursuant to section 150 of the SSMA that special by law 19 as repealed and replaced on 8 December 2014 having LPI Dealing No: AJ8666F, was invalid because the Owners Corporation did not have power to make the by-law and special by law 19 as adopted by the Owners Corporation at the general Meeting on 27 June 2017 was invalid because the Owners Corporation did not have the power to make the by-law.

The applicant seeks an order pursuant to s241 and 232 of the SSMA that within 60 days of the declaration the Owners Corporation cause to be registered on title: Folio CP/SP63429 a "Change of By-laws Form CH15" removing special by law 19 and a further order pursuant to ss 87 and 88 of the SSMA that all levies and/or contributions paid by the applicant pursuant to by-law 19 are refunded to the applicant.

Consideration - By Law 59

6 It is not in dispute that on 22 September 2014, at an Extraordinary General Meeting of the Owners Corporation, a special by law 59 was approved by special resolution and was subsequently registered on 8 December 2014. It has dealing number AJ86667D and a copy of the by law has been marked Annexure 12 to the Witness Statement of Philip Anthony Feitelson (dated 1 December 2016) which was provided in the joint bundle to the Tribunal.

7 The by- law enables the Owners Corporation to charge an

"Annual Fee to an Owner granted Exclusive Use and/or Special Privilege to undertake Building Improvements to the lot where the Incremental Replacement Value of the Improvements exceeds \$50,000 (Indexed, as defined)."

8 In effect, the by-law requires certain villas in the strata plan (including the applicant's) which have carried out renovation works which have increased the value of their lot and in turn increased the insurance liability of the Owners Corporation to be passed on to the individual lot owner.

S82 of the Strata Schemes Management Act

9 The special by law was made and registered under the former *Strata Schemes Management Act 1996* (the 1996 Act). Section 77 had similar terms to the current s82 of the SSMA. Those sections allow the Owners Corporation to levy on individual lot owners (with consent) an increased insurance premium where the "use" to which a lot is put causes the insurance

premium for the strata scheme to increase. Section 82(2) allows the Tribunal to order that increase in contributions if the owner refuses to consent.

- 10 There is no evidence before the Tribunal that the "use" of the applicant's lot has changed. She has done significant renovations and improvements to her lot, but the "use" of the lot has not changed and so the section would not apply and could not justify the making of special by-law 59.

Sections 142, 143, 160 and 83 of the SSMA

- 11 The Owners Corporation claim that the special by-law was made pursuant to section s53 of the 1996 Act. Section 143(2) of the SSMA is in similar terms and relates to common property rights by-laws:

(2) A common property rights by-law may confer rights or special privileges subject to conditions specified in the by-law (such as a condition requiring the payment of money by the owner or owners concerned, at specified times or as determined by the owners corporation).

- 12 Section 142 defines a "common property rights by-law" as:

a by-law that confers on the owner or owners of a specified lot or lots in the strata scheme:

- (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or
(b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes),

- 13 The ability to make by-laws is not unfettered. Subsection 143(2), can require the payment of money by the owner or owners concerned as determined by the Owners Corporation. However, for by-law 59 to fall within s 143 of the SSMA it would have needed to confer exclusive use or special privilege on specified common property. Special by-law 59 does not confer exclusive use or special privilege on any part of the common property. Therefore it cannot be said to have been made pursuant to s 143 of the SSMA or the former s53 of the 1996 Act.

- 14 Section 160 of the SSMA requires an Owners Corporation to insure the building and failure to comply with the obligation carries a penalty.
- 15 Subsection 83(2), allows an Owners Corporation to charge owners only by levying contributions. That is subject to the exceptions in s 143, which do not apply in this case. The levy must be 'proportional to the unit entitlements' of all the owners' respective lots. Section 83 sets out for what, and how, levies can be made on lot owners. Sections 83 and 143 relevantly set out how an Owners Corporation may levy and what common property by-laws may be made.
- 16 In *Owners Strata Plan 60919 v Consumer Trader and Tenancy Tribunal* [2009] NSWSC 1158 a by-law made under the 1996 Act sought to impose a plan for a promotion of the complex as a retail and commercial centre with a schedule of marketing levies on lot owners in the scheme. Not all lots were required to pay, and the charging was not in accordance with unit entitlements. An adjudicator had determined that the by-law was beyond power and ordered it be repealed. Subsequently, in the related case of *Italian Forum Limited v Owners Strata Plan 60919* [2012] NSWSC 895, an application was made to set aside the previous orders made. That application was successful because s 43 of the 1996 Act permitted by-laws to be made in respect of "matters appropriate to the type of strata scheme concerned". There is no equivalent to s 43 in the current SSMA.
- 17 Having considered the submissions and evidence on this point the Tribunal is not satisfied that the Owners Corporation had the power to make the special by-law 59 under the SSMA.

Section 150

- 18 Section 150 of the SSMA allows the Tribunal to make an order invalidating a by law in the following circumstances:

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an

order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

(2) The order, when recorded under section 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).

(3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

19 The applicant seeks a declaration that the by-law is invalid. S 150(1) uses the word "may" in relation to the making of the orders. The applicant makes submissions that the determination of the validity of the legislation is a question of law, and that as a matter of law, the issue of invalidity is not discretionary, even though the word "may" is used.

20 The applicant refers to a series of cases to support that assertion beginning with the rule in *MacDougall v Patterson* (1851) 11 CB 755; 138 ER 672 at 677 that:

The word "may" is merely used to confer the authority; and the authority must be exercised, if the circumstances are such as to call for its exercise.

21 The applicant also referred to *Leach v R* (2007) 230 CLR 1 where the statute relevantly provided that

the court "may refuse to fix a non-parole period" if satisfied of the matters set out in the provision.

The High Court rejected a construction of the provision that if the court is satisfied of those matters, it then has to exercise discretion. Rather, it held that the word "may" is used not to give a discretion, but to confer a power which is to be exercised upon the court being satisfied of the matters described in the provision: 230 CLR at 17 [38].

22 In *Owners Corporation SP 32033; Patrick and Valerie Mullins* [2015] NSWCATCD 23, the Tribunal did apply a discretion and weighed various factors in relation to whether or not a discretion should be exercised to make the order declaring a by-law invalid. That applicant makes submissions that

the various authorities not requiring the weighing up of the discretion were not put before the Tribunal in that case.

- 23 In this case the Tribunal is satisfied to declare the by law invalid. Even if the applicant's interpretation of s150 is correct and there is no need to apply the discretion, the Tribunal, in weighing the discretion would still declare the by-law invalid in any case.
- 24 The respondent refers to attachment 14 of Mr Feitelson's affidavit where the applicant conceded that the cost of the refurbishment works carried out in 2010 was around \$950,000. They provided a tax invoice from CHU, the strata scheme's insurer, showing that an increase of \$950,000 in the amount insured which they claim was for the adjustment of the strata insurance cover. The CHU tax invoice shows an increase of \$950,000 in the amount insured from \$22,492,000 to \$23,442,000. That CHU tax invoice shows the additional premium for the \$950,000 increase in the sum insured is \$807.27. Attachment 22 to Mr Feitelson's affidavit is a letter from the scheme's strata manager confirming that the additional contribution has been reduced to \$764, which they claim is below the cost amount by which the strata insurance premium increased as a result of the applicant's estimation of the increase in the insurance replacement value of her building improvement works, and below the amount calculated in accordance with clause 3 of by-law 59.
- 25 Even considering the reasons put forward by the respondent as to the rationale for special by-law 59 and how it has been calculated, the Tribunal is not satisfied for the by-law, invalidly made, to remain in effect. The Tribunal finds that there is no significant prejudice to the respondent in setting aside the by-law which the respondent did not have the power to make in the first place. The levies charged for the insurance premiums are not substantial and as such do not warrant leaving a by-law, invalidly made, in place. Apportionment will become increasingly difficult when multiple lots have done refurbishment works making them liable pursuant to the special by-law. The respondent has not demonstrated any substantial prejudice in the Tribunal ordering that the invalidity be recorded from the date on which the invalid by-

law was adopted. The Tribunal finds that it is inappropriate for the by-law to remain in place and orders that the by-law was invalid from the date it was recorded.

By Law 19

- 26 By-law 19 in its present form was passed on 8 December 2014 and registered on 8 December 2014 with dealing number AJ6666F. A copy of it is also provided as Annexure 56 to the Witness Statement of Philip Anthony Feitelson. There is some dispute as to the differences in versions provided by the parties, but that is largely immaterial to the decision before the Tribunal. Subsequently, at an Extraordinary General Meeting held on 27 June 2017, the Owners Corporation passed a revised version of special by-law 19.
- 27 The by-law passes on to lot owners' responsibility to repair and maintain some of the common property. While some of the maintenance obligations relate to repairs on lot property, it is not in dispute that some of the items required to be undertaken by the lot owners are a delegation of the Owners Corporations responsibility to maintain and repair common property. Clauses 19.5 and 19.6 require the owners to maintain and clean certain items of the common property. They include pressure washing of external walls, storm gutters, driveways and walkways on the lot and sealing and coating of driveways and walkways on the lot. They also include maintenance and repair to water taps, wooden louvers to the windows and maintenance and repairs on any changes or items added to the common property by the lot owner since the lot was registered.
- 28 Section 141(1) of the 2015 Act, states that an "owners corporation may, in accordance with a special resolution of the owner's corporation, change the by-laws of the strata scheme". Section 47 of the 1996 Act (in force at the time) was also in similar terms. Section 106 of the SSMA places an obligation on the owner's corporation to maintain and repair common property.

- 29 In *Owners Corporation SP 32033; Patrick and Valerie Mullins* [2015] NSWCATD 23 it was found that the SSMA does not permit an Owners Corporation to pass on to owners the obligation to repair and maintain common property. That case involved an appeal from an adjudicator's decision under the 1996 Act and relevantly stated:

Under the SSMA, the obligation to maintain and repair common property can be transferred to lot owners. Specifically, it may happen when an Owners Corporation makes a by-law which gives to a lot owner either a right of exclusive use and enjoyment of all or part of the common property, or special privileges in respect of the whole or part of the common property. If such a by-law is made, then it may impose on the relevant lot owner or owners the responsibility for the maintenance and upkeep of the common property concerned. Such a by-law may be made by special resolution under s 52 of the SSMA, but only with but only with the written consent of the owner or owners of the lot or lots concerned.

However, there is nothing in s 62 or elsewhere in the SSMA that permits a Owners Corporation to impose on a lot owner the obligation to maintain and repair common property that has been the subject of a resolution under s 62(3). The Court of Appeal's decision in *Thoo* is no authority for such a proposition. The fact that an Owners Corporation has determined that it is inappropriate to maintain and repair common property does not mean that it can impose that obligation on lot owners without giving relevant lot owners exclusive use of or special privileges over the common property concerned.

- 30 There is nothing in by-law 19 which would expressly or impliedly allocate an exclusive use or special privileges by-law of a kind contemplated by s143 of the SSMA (referred to above). There is no evidence of consent by the lot owners as required by s 143(2). Special by-law 19 places an obligation on lot owners to repair and maintain the common property and is in direct conflict with the obligations imposed on the Owners Corporation under s 106. The fact that a special resolution has been made under s141 does not alter that fact. The Tribunal is not satisfied that the Owners Corporation had the power to transfer the obligation of maintenance and repair of common to lot owners unless it had also specially resolved to grant to the lot owners exclusive use of or special privileges over the common property in a by-law made in accordance with s143 of the SSMA.

31 Again, the applicant has made submissions that if the Tribunal finds that the by law was invalid, and then there is no need consider, on a discretionary basis, whether to make an order declaring it invalid. Again, in any case, the Tribunal, in the exercise of its discretion would declare the by-law invalid. The Tribunal finds that the by-law shifts a fundamental responsibility for repairs and maintenance on a basis other than in proportion to the unit entitlements. That shift outweighs any of the factors referred to by the respondent. The by-law is contained at page 237 of the joint bundle that was provided. The respondent makes submissions that the obligation to maintain only applies to the owners corporation in respect of common property and that there is no similar statutory obligation on owners. They make submissions that the by-law extends the obligations of lot owners in relation to certain (mainly external) lot property in order to improve the standard and appearance of the scheme and that the same obligation applies to all owners. They make submissions that the obligations in the by- law reflect normal maintenance that responsible property owners should carry out. However, in relation to common property, that issue is already regulated by the SSMA. Many of the items covered in the by-law are already regulated by the SSMA. Clause 19.7 of the by-law purports to deal with access in relation to termite inspection, yet that is already governed by s 122 of the SSMA. Clause 19.8 specifies ramifications of failure to comply with the by-law and entitles the owners corporation to do the work and recover the cost if the owners fail to comply. Again, failure of lot owners to comply is covered by s120 of the SSMA. The Tribunal is not satisfied that the reasons provided by the respondent outweigh the fact that this is a shifting of an obligation of the owner's corporation obligation which is required by statute. Accordingly the Tribunal finds that the discretionary factor in favour of making the order invalidating special by-law 19 outweighs the discretionary factors against such an order.

Refund of the levies and contributions paid by the applicant pursuant to by-law 59 and by law 19.8

32 The applicant has sought a refund of the levies and contributions made pursuant to the by-laws which the Tribunal has now found to be invalid. The

respondent claims that the Tribunal has no power to order the payment or repayment of money.

33 Section 87 of the SSMA relevantly states:

(1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable:

- (a) an order for payment of contributions of a different amount,
- (b) an order for payment of contributions in a different manner.

(2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.

34 Section 83 specifies how contributions can be levied:

(1) An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.

(2) Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.

(3) Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of the contribution. The date must be at least 30 days after the notice is given.

(4) Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.

35 Section 232 allows the Tribunal to settle disputes or rectify complaints in the following relevant circumstances

(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,

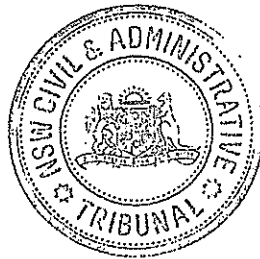
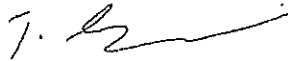
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- (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

- (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

36 The power in section 232 is broad. The Tribunal has declared the by-law invalid and therefore the levies and contributions which have been collected in accordance with them have been incorrectly levied. As a result the owners corporation has failed to properly exercise its function under the SSMA. Accordingly the Tribunal is satisfied it has the power to make the order for refund of any monies paid.

37 Orders have also been made for any application by the parties for costs.



T Simon
Senior Member
Civil and Administrative Tribunal of New South Wales

21 June 2018

"Attachment 1"

Attachment 1 to Motion – Special By-Law 46.2

Exclusive Use

That by Special Resolution, Special By-Law 46 be amended whereby the Owner of Lot 18 shall have a Special Privilege in respect of the common property to carry out works as:

A. Described in drawings by Vil Brickman Architects Project Number 107, Drawing Number A01, Issue Number 5 (a copy of which is attached). The amendments from Issue Number 3 (approved by the Owners Corporation by special resolution at an Extraordinary General Meeting held on 7 October 2009) generally comprise:

B. On the ground floor:

- (i) A relocated rubbish bin enclosure as indicated;
- (ii) Relocation of the north facing bi-fold doors;
- (iii) Reflection pool modified to incorporate a plunge pool with a compliant pool fence as indicated;
- (iv) Changing of the pitch of the hidden garage to house roof and changing the materials from glazing to metal deck roofing lined with a plasterboard ceiling.

C. On the first floor:

- (i) replacement of the original balustrade frame and glass with a frameless reinforced glass balustrade system;
- (ii) replacement of the existing timber slab balcony decking with a deck laid on fibre reinforced cement sheeting, fully waterproofed and covered in tiles, and
- (iii) removal and reinstallation of the upstairs north facing sliding glass doors and frame to facilitate the works performed in C.ii above, which is part of good building practice.

Exclusive Use over apartment

AND THAT such privilege is granted subject to the following conditions:

- (a) All work necessary to complete the works is to be carried out to a tradesman-like standard by licenced trades' people at the expense of the Owners of Lot 18.
- (b) The Owners of Lot 18 shall indemnify the Owners Corporation against any liability caused by the undertaking of the works referred to above.
- (c) The Owners of Lot 18 shall be responsible for due compliance with any relevant regulations as set down by statutory authorities including the Coffs Harbour City Council in respect of the works referred to above.
- (d) The Owners of Lot 18 shall be responsible for due compliance with any relevant regulations as set down by statutory authorities including the Coffs Harbour City Council in respect of the works referred to above.
- (e) The Owners of Lot 18 agree and consent to the creation of this By-Law.


Counsel for the Applicant

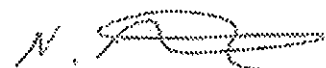
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Counsel for the Respondent

(f) The Owners of Lot 18 for the time being, are responsible for the proper maintenance and keeping in a state of good order and serviceable repair the works referred to in this By-Law and the Owners Corporation will not be held responsible for the maintenance thereof.

(g) Registration of the By-Law shall be arranged by the Strata Manager using a Solicitor approved by the Strata Committee and the Owners Corporation shall pay the costs incurred in a fixed sum of \$500.00.


Counsel for the Applicant


Counsel for the Respondent