Civil and Administrative Tribunal

New South Wales

Case Name:	Owners Corporation SP 68751 v Community Association DP 270281
Medium Neutral Citation:	[2015] NSWCATCD 99
Hearing Date(s):	On the papers
Decision Date:	20 August 2015
Jurisdiction:	Consumer and Commercial Division
Before:	K Rosser, Senior Member
Decision:	The application is dismissed.
Catchwords:	Community Management Statement; By-law; Whether by-law invalid; whether by-law not in the interests of the Community Association or lot owners
Legislation Cited:	Community Land Management Act 1989 Community Land Development Act 1989 Strata Schemes Management Act 1996
Cases Cited:	Casuarina Rec Club Pty Ltd v The Owners – Strata Plan 77971 [2011] NSWCA 159 Petrofina (Gt Britain) Ltd v Martin (1966) CH 146 Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1965] 2 All ER 933 Quadramain Pty Ltd v Sevastopol Investments Pty Ltd (1976) 133 CLR 390
Category:	Principal judgment
Parties:	Owners Corporation SP 68754 (applicant) Community Association DP No. 270281 (first respondent) Neighbourhood Association DP No. 285743 (second respondent) Neighbourhood Association DP No. 285761 (third respondent) Neighbourhood Association DP No.285711 (fourth respondent) Owners Corporation SP 67774 (fifth respondent) Owners Corporation SP 69600 (sixth respondent)

	McKenzie Aged Care Group (seventh respondent)
Representation:	ONeills Law for the applicant J.S Mueller & Co Lawyers - first respondent
File Number(s):	SCS 14/27600
Publication Restriction:	Nil

REASONS FOR DECISION

APPLICATION

1 The application was filed on 26 May 2014 by Jay Bracher. The name of the applicant was subsequently amended to Owners Corporation SP 68754.

2 The applicant is, along with the second to sixth respondents, a subsidiary body of the first respondent, Community Association DP 270281 [The Oasis]. The seventh respondent is an aged care provider that the first respondent states is located on a community development lot.

3 The Oasis is governed by a Community Management Statement [CMS] which contains by-laws. By-law 53 states:

> Each Subsidiary Body must use the Managing Agent of the Community Association.

4 The application purported to seek an order under s 157 of the *Strata Schemes Management Act* 1996 [the SSMA] that the respondent, "pursuant to section 14(3)(c) of the Community Land Management Act 1989 [the CLMA] specifically resolves to repeal by-law 53 of the community management statement".

5 Given that by-law 53 applies to subsidiary bodies of a community association and is contained within a CMS, it cannot be the subject of orders made under the SSMA. However, although the application has not been formally amended, it is clear from the submissions made by the parties that the applicant seeks an order that would have the effect of revoking by-law 53, under either s 80 or s 81 of the CLMA.

6 For the reasons set out below, I have determined not to revoke by-law 53 and have dismissed the application.

PROCEDURAL HISTORY

7 The application was initially filed as an application for adjudicator's orders. When it became clear that it was an application for orders pursuant to the CLMA, the application was listed for directions on 19 September 2014. On that date, the name of the applicant was amended and other subsidiary bodies of The Oasis were joined to the proceedings. The respondents were directed to provide to their respective lot owners notice of the application. Lots owners who wished to be heard in the proceedings were directed to give written notice to the Tribunal.

8 Another application from the same applicant was also before the Tribunal on 19 September 2014. In that application (SCS 14/14439) the applicant sought an

order requiring the strata managing agent to hand over its books. SCS 14/14439 has subsequently been withdrawn.

9 The applicant was directed to file and serve any evidence and submissions in respect of the application by 10 October 2014.

10 The matter next came before the Tribunal on 17 October 2014. On that occasion, time for the applicant to file and serve its submissions was extended to 31 October 2014 and the respondents were directed to file and serve their submissions by 21 November 2014.

11 The applicant's solicitor filed a submission on 31 October 2014. The respondent's solicitor filed a submission on 24 November 2014.

12 However, in letter dated 19 November 2014, which the Tribunal received on 26 November, the applicant's solicitor advised that he had withdrawn from the proceedings on the basis of a possible conflict of interest. They further advised that the submission filed on behalf of the applicant should not be used without hi express consent.

13 The matter again came before the Tribunal for directions on 28 November 2014. On that date, the applicant was directed to file and serve evidence and submissions by 19 December 2014. It was noted that having regard to the withdrawal of the applicant's previous lawyer, only documents submitted by the applicant pursuant to this direction would be considered by the Tribunal. The respondents were directed to file and serve any submissions in response by 23 January 2015 and the applicant was directed to file and serve any material in reply by 30 January 2015.

14 The parties consented to the application being determined on the papers.

15 When the matter was allocated to me to determine, I formed the view that a number of respondents had been incorrectly named and that a possible interested party – the owner of Raffles Nursing Home - had not been added as a party. I also formed the view that the parties' submissions in respect of one of the applicant's arguments, that is, that by-law 53 is in restraint of trade, were possibly inadequate.

16 The application was accordingly listed for directions on 14 May 2015. The names of respondents that had been previously incorrectly named were amended, the owner of Raffles Nursing Home (McKenzie Aged Care Group) was added as a party and directions were made for the filing and service of further submissions.

17 The only additional submissions received were from solicitors for the applicant and The Oasis.

EVIDENCE AND SUBMISSIONS

18 In making a decision in relation to the application, I have considered:

- The application and attachments to the application;
- The affidavit of Walter Klaus Buch dated 18 December 2014;

- Submissions dated 18 December 2014, 30 January 2015 and 21 May 2015 prepared on behalf of the applicant by O'Neills Law;

- Submissions in support of the application from lot owners Robyn Denkel and BR Brady;

- Pro forma submissions in support of the application from Arthur and Christine Tolland, Brian and Robyn Mitchell, Dorothy Mayson, Rita Crawley, Walter Buch, Tess A Betteridge, Pauline S LeVell, S G Chalmers, Leah Robson, Stanley Spinks, Neville W Lee, Michael and Mary Dixon and Leone Mabon;

- A submission and attached documents dated 21 November 2014 prepared on behalf of The Oasis by JS Mueller & Co Lawyers;

- A submission dated 21 November 2014 from David Ferguson, the Managing Director of Strata Plus;

- A submission dated 17 November 2014 from Brian McHaffie;

- An undated submission from Stan and Lee Vogel;

- A submission dated 10 November 2014 from John Wray, Chairman of Precinct 6 Executive Committee;

- A submission dated 13 November 2014 from Margaret Parker, Carole Hayden, Peter Donovan and Crena Morrison, the Precinct 7 (SP 67774) Committee;

- A submission dated 15 November 2014 from Patrick Allport, the President (sic) of SP 69600;

- A further submission dated 22 January 2015 prepared by Pat Allport, (on this occasion described as the Secretary/Treasurer of The Oasis);

- A submission dated 27 May 2015 from The Oasis.

19 In accordance with the directions made by the Tribunal on 28 November 2014, documents filed by the applicant prior to these directions having been made have not been taken into account in determining this application. Further, only those parts of the submission filed by The Oasis' solicitor that are relevant to the points made in the submission filed by the applicant's current solicitor have been taken into account.

JURISDICTION

20 Section 80 of the CLMA gives the Tribunal the power to revoke or vary a provision of a CMS if the Tribunal considers the provision not to be in the best interests of the members of the Community Association or the proprietors of neighbourhood lots or strata lots within the scheme to which the management statement relates.

21 Section 81 of the CLMA gives the Tribunal the power to revoke so much of a community management scheme as the Tribunal considers to be invalid.

22 As by-Iaw 53 is a provision of The Oasis' CMS, the Tribunal therefore has power to revoke or vary it. Accordingly, the Tribunal has jurisdiction to deal with the application pursuant to s 80 and s 81 of the CLMA.

23 The power to revoke or vary a provision of a CMS is discretionary. This means that even if the criteria for an order under s 80 and/or s 81 are met, the Tribunal is not obliged to make such an order.

BACKGROUND

24 The background to this matter is set out in the application and the submissions filed by the parties.

25 The Oasis came into existence as a community scheme on 4 December 2001, following the registration of DP 270281 as a community plan. The CMS was registered at that time. The Oasis is a complex consisting of 243 houses and units and an aged care facility. It has communal facilities including roads, swimming pools, a barbeque area, a change pavilion and a playground, for which The Oasis is responsible.

26 The Oasis is divided into seven areas, known as precincts 4 to 10. Precincts 4 to 6 are neighbourhood schemes, each of which has its own neighbourhood association. Precincts 7 to 9 are strata schemes, which comprise apartment buildings. Precinct 10 is an aged care facility, Raffles Nursing Home, which is owned by McKenzie Aged Care Group. According to the submission prepared on behalf of The Oasis, Precinct 10 is neither a strata nor a neighbourhood scheme, but a community development lot.

27 The Oasis is governed by its CMS, which contains a number of by-laws. By-law 53 is contained in Part 4 of the CMS, which is headed "Option Matters". This part of the CMS sets out by-laws dealing with management of The Oasis. By-law 53 was included in the CMS that was registered on 4 December 2001, when the community scheme came into existence. Since that time, it has been amended to include by-law 53.1. That amendment is not relevant to this application.

28 As noted above, by-law 53 provides that each "Subsidiary Body" must use the managing agent of the Community Association. "Subsidiary Body" is defined in by-law 59 of the CMS as a neighbourhood association or strata corporation.

29 Since the creation of The Oasis, it and each of its subsidiary bodies have engaged the same managing agent, Synergy Strata Pty Ltd, which is now known as Strata Plus.

30 The applicant wishes to appoint a different managing agent to that appointed by The Oasis.

31 At the AGM of the Community Association held on 13 February 2014, a motion to revoke by-law 53 was defeated, as only the committee of the Community Association voted.

32 The applicant's objective in bringing this application is the revocation of by-law 53, so that it can appoint a different managing agent to that appointed by The Oasis.

ISSUES

33 The issues to be determined are:

- Who is bound by The Oasis' CMS and by-laws?
- Is by-law 53 valid?
- If not, should it be revoked or varied?
- Is by-law 53 in the best interests of the members of The Oasis or the proprietors of neighbourhood lots or strata lots within the scheme?
- If not, should it be revoked or varied?

CONSIDERATION OF THE ISSUES

34 I have considered each of the issues in turn.

WHO IS BOUND BY THE OASIS' CMS AND BY-LAWS?

35 As noted above, by-law 53 is contained in The Oasis' CMS.

36 Section 13(1) of the CLMA states that a CMS is binding on:

a the community association, and

b each subsidiary body within the community scheme, and

c each person who is the proprietor, lessee or occupier, or the mortgagee or covenant chargee in possession, of a development lot, neighbourhood lot or strata lot within the community scheme.

37 As the applicant is a strata corporation, it is a subsidiary body of The Oasis. It is therefore bound by The Oasis' CMS. This means that the by-laws contained in the CMS that apply to subsidiary bodies apply to it. By-law 53 expressly binds subsidiary bodies. This means that by-law 53 is binding on the applicant. This will remain so unless there is a basis for the Tribunal to find that:

a By-law 53 is not in the best interests of the members of The Oasis or the proprietors of neighbourhood lots or strata lots within the Oasis and/or

b By-law 53 that it is not valid and

c The discretion to make order under s 80 or 81 is exercised.

38 I am satisfied that the wording and the clear intent of by-law 53 (that is, for one manager to be used by The Oasis and each of its subsidiary bodies) make it clear that the use of "must" in by-law 53 is mandatory and not discretionary.

39 Furthermore, I am satisfied that the by-laws contained in the CMS are binding on The Oasis' subsidiary bodies even if some individual lot owners were unaware of their content at the time they purchased their lots. This is because the CMS – which contained by-law 53 - was registered on 4 December 2001, the date on which The Oasis became a community scheme by the registration of DP 270281 as a community plan. This was prior to the applicant and other subsidiary bodies of The Oasis coming into existence. I am satisfied that lot owners within the various subsidiary bodies were on notice of the CMS and its contents at the time the subsidiary bodies were created.

IS BY-LAW 53 VALID?

40 The submission prepared by the applicant's current solicitor, which was filed on 19 December 2014, does not specifically distinguish between factors going to the validity of by-law 53 and the factors going to whether by-law 53 is in the best interests of the members of The Oasis and lot owners.

41 The reasons the applicant argues that by-law 53 should be revoked are, in summary:

- By-law 53 conflicts with the legislature's intent as expressed in ss 8, 9, 11 and 13 of the Strata Schemes Management Act [SSMA]; that is, that the Owners Corporation of a strata scheme has the principal responsibility for the management of the scheme (s 8), that an Owners Corporation may be assisted in carrying out its management functions by a strata managing agent appointed in accordance with Part 4 of the Act (s 9), that the owners of lots constitute a Body Corporate under the relevant name of the Owners Corporation (s 11) and that an Owners Corporation may employ such persons as it thinks fit to assist in the exercise of any of its functions (s 13).

- Raffles Nursing Home (McKenzie Aged Care Group), which the applicant states constitutes SP 70913, manages its functions internally without the need to appoint the same manager as the Community Association.

- The word "must" in by-law 53 should be considered to be directional rather than mandatory. It "should not remove the legislative powers granted to the Applicant under the legislation and therefore should be revoked".

- The requirement for the applicant to execute a contract in favour of the current strata manager is unfair under s 24(1) of the Competition and Consumer Act 2010.

- The requirement to execute a contract with the strata manager is in breach of the general principles of the "Law of Restraint of Trade".

- By-law 53 breaches the prohibition against contracting out set out in s 245 of the Strata Schemes Management Act.

42 Having considered the reasons for revocation articulated by the applicant's solicitor and the submissions made on behalf of The Oasis, I find that by-law 53 is valid for the following reasons. I have dealt with the submission that the word "must" in by-law 53 is not mandatory at [38] above.

43 First, there is no provision in either the CLMA or the Community Land Development Act 1989 [the CLDA] which prohibits the making of a by-law in the same or similar terms as by-law 53. The by-law is not of a kind listed in Schedule 3 cl 5 of the CLDA.

44 Second, by-law 53 is an original by-law and the power to make such by-laws is to be liberally interpreted, subject to the doctrine of fraud on the power and with the proviso that an unreasonable by-law will be held to be invalid. If an original by-law is to be declared invalid, a very strong case must be made out: Casuarina Rec Club Pty Ltd v The Owners – Strata Plan 77971 [2011] NSWCA 159 at [89] to [90].

45 In this case, the applicant's current solicitor has not submitted that by-law 53 represents a fraud on the power and I am accordingly not satisfied that by-law 53 is invalid for that reason.

46 I am not satisfied that by-law 53 is unreasonable. In relation to this, I am satisfied that the by-law is sufficiently connected to the functions of the Community Association, in that it is part of the regulation of the rights and responsibilities of the members of the Community Association and is clearly intended to assist in its administration and management.

47 Third, I am not satisfied that by-law 53 is inconsistent with provisions of the SSMA, specifically with ss 8, 9, 11 and 13. In relation to this, by-law 53 does not prevent the applicant from managing its strata scheme. While it restricts the candidates who can be appointed as strata manager, the by-law does not prevent the applicant from exercising its power to formally appoint a strata manager in accordance with Part 4 of the SSMA or from otherwise exercising its statutory functions. Nor does by-law 53 prevent the applicant from negotiating the terms of the managing agency agreement, including what powers (if any) it delegates to and what fee it pays the strata manager. In these circumstances, there is no basis for a finding that there is anything unfair about the contract between the applicant and the managing agent and by-law 53 does not constitute "contracting out" of the SSMA.

48 Fourth, the applicant's submission that by-law 53 is inconsistent with s 13 of the SSMA is misconceived. The applicant does not employ the strata manager: it appoints the strata manager as its agent. By-law 53 does not preclude the applicant from employing a person to assist it in the exercise of any of its functions. Pursuant to s 13, the applicant could, for example, employ a caretaker in accordance with Part 4A of the SSMA.

49 Fifth, I am not satisfied that Raffles Nursing Home (McKenzie Health Care Group) is a subsidiary body of the first respondent. The applicant has not provided any evidence that leads me to conclude that it constitutes SP 70913, or any other strata scheme that forms part of the first respondent. I note in this regard, the first respondent's submission that Raffles Nursing Home is located on a community development lot. In such circumstances, by-law 53 does not

apply to McKenzie Health Care Group and its ability to self-manage does not have an effect on either the validity of by-law 53 or its applicability to the applicant.

50 Sixth, I am not satisfied that by-law 53 is in restraint of trade. In relation to this, in their submissions the applicant and the first respondent both cite the leading case of Petrofina (Gt Britain) Ltd v Martin (1966) CH 146. In that case, the Court explained the rationale behind the law of restraint of trade in the following terms:

> Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with a consequence that any contract which interferes with the free exercise of his trade or business, by restricting him of the work he may do for others, or the arrangements which he make with others, is a contract in restraint of trade.

51 The applicant has not identified the trade or business in which it is engaged, other than by arguing that it is a corporate entity capable of engaging (and under certain legislative provisions obliged to engage) in the act of buying services. However, the fact that the applicant purchases services from time to time does not, in my view, mean that it carries on a trade or business which is restrained by by-law 53.

52 Even if the applicant is engaged in trade or business, I am not satisfied that by-law 53 is invalid on the basis that it is in restraint of trade. This is because the restraint of trade doctrine only applies if the restrained party gives up some freedom it would otherwise have had: Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1965] 2 All ER 933; Quadramain Pty Ltd v Sevastopol Investments Pty Ltd (1976) 133 CLR 390.

53 In this case, by-law 53 was in force at the time the applicant came into existence. It has therefore always applied to the applicant. It cannot be said that by-law 53 obliges the applicant to give up some right it previously had.

54 As I consider that by-law 53 is valid, I cannot make an order to revoke it under s 81 of the CLMA.

IS BY-LAW 53 IN THE BEST INTERESTS OF THE MEMBERS OF THE OASIS OR THE PROPRIETORS OF NEIGHBOURHOOD LOTS OR STRATA LOTS WITHIN THE SCHEME?

55 The onus is on the applicant to establish that by-law 53 is not in the best interest of members of The Oasis or of neighbourhood or strata lot owners and that an order should be made under s 80 of the CLMA. I am not satisfied that it has discharged that onus.

56 I am also not satisfied that the material before me demonstrates that by-law 53 is not in the best interests of the relevant stakeholders. In making this finding, I have taken into account the arguments in favour of revocation put in the applicant's submission, which are dealt with above.

57 In relation to whether or by-law 53 is in the interests of members of The Oasis, it is significant - although not determinative of the issue - that the applicant appears to be the only subsidiary body which takes the view that it is not. The

other subsidiary bodies that have filed submissions all oppose the application, providing reasons for their position. These reasons include:

- The difficulties that would ensue if the subsidiary bodies had to liaise with multiple agents in respect to such matters as the management of common property;

- The increase in cost to owners if different managers were appointed;

- The benefit of having one agent interpreting legislation and by-laws and

- The current sharing of experiences between the Precincts in relation to problem solving and sharing of legal advice and precedents.

58 There is force in these submissions. I agree that only having to deal with one managing agent, who is familiar with management and other issues of relevance to the scheme as a whole and to each of its constituent bodies, is of benefit to The Oasis and its subsidiary bodies and therefore to lot owners. In addition, having one manager is likely to keep down costs such as insurance and maintenance costs, by allowing for economies of scale. If there is dissatisfaction with the services provided by the current managing agent, that is an issue that should be resolved by the community scheme as a whole.

59 As I am not satisfied that by-law 53 is not in the best interests of member of The Oasis or lot owners, I am not satisfied that the basis for making an order under s 80 of the CMLA has been established.

CONCLUSION

60 In summary, I consider that by-law 53 is valid. I am not satisfied that it is not in the best interest of members of members of The Oasis or lot owners within the community scheme. The basis for making an order under either s 80 or s 81 of the CLMA has not been established. It is therefore unnecessary to consider any relevant discretionary factors. The application is accordingly dismissed.

K Rosser

Senior Member

Civil and Administrative Tribunal of New South Wales

20 August 2015

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