



Civil and Administrative Tribunal New South Wales

Case Name: Unilodge Australia Pty Ltd v The Owners Strata Plan 54026

Medium Neutral Citation: [2020] NSWCATCD

Hearing Date(s): 4 and 5 December 2019

Date of Orders: 29 April 2020

Date of Decision: 29 April 2020

Jurisdiction: Consumer and Commercial Division

Before: T Simon, Principal Member

Decision: **The Notice of Order issued on 29 April 2020 is amended under Section 63 of the Civil and Administrative Tribunal Act 2013, and should read as follows:**

1. Bright and Duggan are appointed as strata managing agent to exercise all the functions of the of the Owners Corporation pursuant to s237 of the Strata Schemes Management Act.
2. The appointment is to continue for a period of 2 years from the date of these orders.
3. The resolutions carried at the adjourned General Meeting of 14 June 2019, **11 July 2019 and 14 August 2019** are invalid
4. The interim application SC 19/28952 is dismissed.
5. If the applicants seek to make a costs application, they are to provide to the Tribunal and the respondent, either in person or by post, submissions and documents by 15 May 2020.

6. The respondents are to provide to the Tribunal and applicant, either in person or by post, submissions and documents in response by 29 May 2020.
7. The **applicants** are to provide to the Tribunal and respondent, either in person or by post, submissions and documents in reply by 12 June 2020.
8. It is anticipated that costs will be determined on the papers. If either party seeks to be heard in person, they should advise the Registry prior to 29 May 2020 setting out the reasons why and the registry will advise of the outcome in due course.

Catchwords: Strata, compulsory management, invalid proxies.

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Oaths Act 1900
Oaths Regulation 2017.
Strata Schemes Management Act 1996
Strata Schemes Management Act 2015

Cases Cited: Bischoff v Sahade [2015] NSWCATAP 135
Quest Rose Hill Pty Ltd v White [2010] NS WSC 93 9
(Quest No 1)
Stuart v Hishon [2013] NSWSC 766

Texts Cited: None

Category: Principal judgment

Parties: Unilodge Australia Pty Limited (applicant)
Sydney Campus Apartments Pty Limited (applicant)

The Owners Strata Plan 54026 (respondent)

Representation: Counsel:
P. W. Gray SC and R.C. Gratian (applicants)
P Doyle Gray (respondent)

Solicitors:
Swaab (applicants)

Kreisson (respondent)

File Number(s): SC 19/28952 and SC 19/28957

Publication Restriction: **Nil**

REASONS FOR THE DECISION

Background

- 1 These reasons relate to two applications, both made to the Tribunal on 21 June 2019. The first application, SC 19/28952, was an application for interim orders. An initial application for interim order was refused by the Tribunal on 9 August 2019. The second application, SC 19/28957, is the substantive application seeking final relief. The applications are relevantly identical. On 19 July 2019 the Tribunal ordered that the matters be heard together at a final hearing.
- 2 The strata scheme is made up of 613 lots and 586 of those are residential lots that are permitted to be used for student accommodation. The remaining 27 lots are commercial lots comprising mainly shopfronts on the ground level.
- 3 The first applicant (UniLodge) is the owner of Lot 609 in the Strata Scheme. The second applicant Sydney Campus Apartments Pty Limited (Sydney Campus Apartments), is a subsidiary of UniLodge and under a Management Agreement between it and the Owners Corporation, is the building manager for the Strata Scheme. The current Management Agreement expires on 10 January 2022.
- 4 The owners of approximately 502 of the 586 residential lots have leased their lots to Sydney Campus Apartments and there are approximately 502 residential tenancy agreements for residential apartments in the Strata Scheme with Sydney Campus Apartments named as the tenant.
- 5 Under the terms of each of those residential tenancy agreements, Sydney Campus Apartments manages the lot on behalf of the relevant owner, and licenses the apartment to students to live in. The lot owner then receives from Sydney Campus apartments the rent less any operating expenses.

- 6 Under clause 15 of the additional terms of each of the residential tenancy agreement's the lot owner has appointed Sydney Campus Apartments in writing as the lot owner's purported attorney, under an irrevocable power of attorney.
- 7 There has been a long history to this dispute, however the following summary is generally undisputed between the parties.
- 8 In July 2015, the City of Sydney Council sent a letter to the Owners Corporation requesting that the awning "be inspected by a professional engineer for structural adequacy". Various expert consultants were engaged as to the work to be done for repairs. On 20 April 2017, the City of Sydney Council issued to the Owners Corporation a 'Notice of Intention to Give an Order', in relation to serious safety concerns about the awning.'
- 9 The Strata Committee then engaged a series of additional experts and finally obtained a quote by Buildcorp for an amount of \$13.8 million for repairs and maintenance work to the awning, windows and façade.
- 10 Since November 2018, Ms Alvie Lin has been the Chairperson of the Owners Corporation. She has also been a member of the Strata Committee, and the Secretary, since 2011. She is currently both Chairperson and Secretary. Ms Lin is a real estate agent, and the sole director and shareholder of Dilan Realtors Pty Ltd. That company owns a commercial lot (Lot 600) in the Strata Scheme from which Ms Lin operates her real estate business.
- 11 On 15 November 2018, an Annual General Meeting was held and a motion for the proposed \$13.8 million works in relation to the awning, windows and façade was rejected.

- 12 At a general meeting on 17 May 2019 motions were proposed to reduce previously approved strata levies for the period 1 May 2018 to 1 February 2019 by a total of \$880,000 (including GST) and to proceed with works to the awning only (not the window or façade work). That meeting was subsequently postponed to 14 June 2019.
- 13 On 14 June 2019, at the adjourned meeting, 291 of the 321 proxies and company nominees that had been given by various lot owners were excluded from being able to vote. Those were proxies or company nominees for lots managed by Sydney Campus Apartments. The motions proposed were passed. Also on 11 June 2019, the strata managing agent terminated its strata management contract with the Owners Corporation.
- 14 At a General Meeting held on 11 July 2019, the Owners Corporation passed motions appointing Whelan Property Group as the strata managing agent; and appointing a solicitor to provide legal services with a fee estimate of \$80,000. The Owners Corporation appointed Whelan Property Group as the Strata Managing Agent.
- 15 At a further General meeting held on 14 August 2019 further motions were passed:
- (1) to appoint Kreisson Legal to act for the Owners Corporation in these NCAT proceedings, with an estimate of \$162,100 plus GST;
 - (2) to appoint Kreisson Legal to act for the Owners Corporation in unspecified other proceedings To consider, advise, prosecute and defend legal action against UniLodge Australia Pty Ltd and Sydney Campus Apartments Pty Ltd in the appropriate Court or Tribunal with an estimate of \$400,000 plus GST;

(3) to raise a special levy of \$562,000 plus GST to fund those legal costs.

16 On that occasion 348 of 360 proxy forms and company nominee forms, made on behalf of lot owners whose lots are managed by Sydney Campus Apartments were rejected.

The Applications

17 The applicants now seek the following orders:

- (1) an order under s 237 of the Strata Schemes Management Act 2015 (SSMA) for the appointment of a compulsory strata managing agent; and
- (2) orders under ss 24 and 25 of the SSMA invalidating certain resolutions purportedly passed at general meetings held on 14 June, 11 July and 14 August 2019.

Evidence

18 The Tribunal labelled the documents relied on amounting to 48 Exhibits.

19 The parties also provided final submissions on the following dates:

- (1) Applicants submissions received 10 December 2019
- (2) Respondents submissions received 17 December 2019
- (3) Applicant's submissions in reply received 20 December 2019.

20 All exhibits (subject to the objections allowed at the hearing), oral evidence of the parties and witnesses given at the hearing, and submissions received have been considered by the Tribunal in coming to its decision. Ms Phillipa

Ternes, Mr Uchino, Ms Alvie Lin and Mr Price were cross examined at the hearing.

Standing

21 The respondent in these proceedings alleges that Sydney Campus Apartments does not have standing as an applicant in these proceedings because it is not an 'interested person' or 'a person entitled to vote as contained in Sch 1, cl 23(1) of the SSMA.

22 Section 232(1) of the SSMA, permits a building manager to make an application to the Tribunal for an order to settle a complaint or dispute about the operation, administration or management of a strata scheme, or the exercise of, or failure to exercise, a function conferred or imposed by or under the SSMA. It is not in dispute that Sydney Campus Apartments is a 'building manager' within the meaning of the SSMA.

23 However, regardless of whether Sydney Campus Apartment has standing, it makes little practical difference. UniLodge is a lot owner and an applicant and also seeks the same orders under sections 24, 25, 232 and 237 of the SSMA and the Tribunal is able to proceed on its application.

Compulsory Strata Management

24 Section 237 of the SSMA allows the Tribunal to make an order appointing a person as a strata managing agent, to exercise some or all of the powers of the Owners Corporation in circumstances where the scheme is not functioning or is not functioning satisfactorily. The Act does not specify any particular matters to be considered.

25 In *Bischoff v Sahade* [2015] NSWCATAP 135 (dealing with a similar provision in the former legislation) the Appeal Panel considered what matters might

properly be considered by the Tribunal in deciding whether a strata scheme is 'not functioning ' or is 'not functioning satisfactorily'. The Appeal Panel also set out at [122]:

Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

does not perform a required function, for example to properly maintain the common property;

exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;

fails to exercise a power or make a decision to prevent a contravention by Lot owners and occupiers of their obligations under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws; and

raises levies and takes or defends legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners Corporation or the Lot owners as a whole.

- 26 The applicant has made submissions on a number of grounds as to why the scheme is dysfunctional. The Tribunal shall deal with each of these in turn

Refusal of Proxies

- 27 The applicant submits that the Owners Corporation has improperly refused valid proxies and corporate owner nominee forms from lot owners who have leased their apartments to Sydney Campus Apartments or who had appointed Sydney Campus Apartments as their attorney.

- 28 As stated above, approximately 502 lot owners in the strata scheme have granted to Sydney Campus Apartments an irrevocable power of attorney, by written instruments (executed as deeds) that formed part of their residential tenancy agreements with Sydney Campus Apartments as the tenant.

29 Clause 15 of those written instruments empowers Sydney Campus Apartments to:

(1) complete, sign and lodge any proxy form, corporate owner nominee notification form, owner's representative notification form and any other notice or documents required under the Strata Schemes Management Act 2015 or the Strata Schemes Management Regulations 2016 so often as is necessary to allow the Tenant to vote in the name of the Landlord at all meetings of the Body Corporate or the Committee held during the Term;

(2) attend and/or vote in the name of the Landlord in respect of any matter or issue arising at all meetings of the Body Corporate or the Committee that are held during the Term;

(3) complete, sign and lodge any voting payer in the name of the Landlord in respect of any matter or issue arising at all meetings of the Body Corporate or the Committee that are held during the Term.

30 Relevantly in Clause 16(a), the lot owner as landlord:

irrevocably appoints the Tenant [SCA] and the Officers of the Tenant and their substitutes, jointly and severally, to be the proxy of the Landlord to act for and on behalf of the Landlord at all meetings of the Body Corporate or the Committee and vote on any matters or issues whatsoever.

31 By clause 16(c), the Landlord acknowledges:

that if any further proxy forms are required to be signed during the Term, the Tenant may execute such forms on behalf of the Landlord pursuant to the power of attorney conferred in clause 15.1(a)(1).

32 Pursuant to the Powers of Attorney, Sydney Campus Apartments has appointed various proxies on behalf of the relevant lot owner, and company nominees on behalf of various lot owners that are companies, in accordance with the requirements of the SSMA, to cast votes at general meetings of the Owners Corporation.

33 At the three general meetings held on 14 June, 11 July and 14 August 2019, the proxy forms and company nominee forms from lot owners whose lots are managed by Sydney Campus Apartments were rejected.

- 34 Having considered the submissions and evidence of the parties, the Tribunal is satisfied that the proxy forms and company nominee forms from lot owners whose lots are managed by Sydney Campus Apartments were wrongly rejected by the Owners Corporation.
- 35 In *Quest Rose Hill Pty Ltd v White* [2010] NS WSC 93 9 (Quest No 1) Ward J considered a similar fact situation to the present applications. The relevant legislation at the time was the *Strata Schemes Management Act 1996* (1996 Act).
- 36 *Quest* was the lessee under leases with various landlords who owned lots in the building. *Quest* operated a serviced apartment business by letting out those leased lots to *Quest*'s customers. Under the leases, each relevant landlord had granted an irrevocable power of attorney to *Quest* in a form substantially the same as clause 15 in the present proceedings
- 37 The landlords challenged the right of *Quest* to rely on the power of attorney given under the respective leases on the basis clause 13 was inconsistent and irreconcilable with the various similar provisions in the then 1996 Act, which provide for the entitlement of lot owners to vote at general meetings and in the exercise of voting rights by proxy.
- 38 The Court rejected that submission and held at [106]:

It seems to me that clause 10(3) of schedule 2 [of the 1996 Act], which provides for the manner in which a vote may be exercised, is permissive in its terms. It is open to a Landlord to appoint a proxy or an attorney to act on his or her behalf without in any way contracting out of the Act in breach of s 245. Similarly, I see no reason why the Landlord could not (subject to compliance with any procedural requirements under the Act) irrevocably appoint someone to attend and vote on his or her behalf at meetings of the Owners Corporation (and/or executive committee, if so permitted under the rules of the Owners Corporation). There must be many lot owners of strata title units within New South Wales who, for whatever reason, do not seek personally to exercise their voting rights (whether or not they choose to attend such meetings) from

time to time or at all and wish to do so by appointing proxies for that purpose. If they do so by contract, they surely cannot all be said to be so doing in contravention of the Act.

- 39 The Court also applied the decision in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 194 FLR 322 (Cordiant) at [111]:

What clause 13.2 does, in my view, is to appoint Quest as the Landlord's attorney (that expression including proxy) for the stated purpose(s). With that appointment would surely come the implied obligation on the parties to do what is necessary to enable the proxy rights so conferred to be validly exercised in accordance with any procedural requirements under the legislation. Therefore, to the extent that it is necessary for a Landlord or Quest to submit duly executed notices or forms to the Owners Corporation in order to comply with the statutory requirements for the valid exercise of a vote as proxy, that fact of itself does not seem to me to negate or contravene the Act. It simply means that further steps need to be taken before any vote is validly cast by the attorney acting as the Landlord's proxy.

- 40 The Tribunal is satisfied that for the same reasons outlined in *Quest*, the proxies and nominee forms in this case were validly exercised.
- 41 The respondent makes a series of further submissions as to why the proxies in this case were properly rejected.
- 42 Firstly, they allege that the documents which the applicants are relying on in relation to the proxies have been improperly redacted and the documents have never been properly verified by statutory declaration. Further, they allege that the purported powers of attorney used to appoint a nominee for a person who has an interest in a lot were never verified by statutory declaration as required by s.22(3) of SSMA and s.34 of the *Oaths Act* 1900 and reg. 6 of the *Oaths Regulation* 2017.
- 43 The respondent also submits that the proxies are not in the form prescribed by the regulations and signed by the person appointing the proxy or executed in any other manner permitted by the regulations, in breach of the SSMA,

Schedule 1, clause 26(1) and (7), and Strata Schemes Management Regulation 2016 (SSMR) reg. 13. The respondent submits that many of the forms were not signed by any attorney and instead an electronic facsimile of an attorney's signature was applied.

- 44 The Tribunal is satisfied that the proxies and nominations were improperly rejected at the meeting.
- 45 The unredacted parts of the power of attorney's instruments that were provided to the Owners Corporation include the title page, the signature page, and the relevant provisions, namely clauses 15 and 16 of the 'additional terms' of each residential tenancy agreement as identified above. The Tribunal is satisfied that those clauses establish a grant of a power of attorney to Sydney Campus Apartments and what has been provided is enough to establish that. The Tribunal is satisfied that the parts of the Power of Attorney that were provided were sufficient and appropriate for the purpose for which the Owners Corporation being provided with a copy, namely to verify that the owner(s) of the lot had appointed Sydney Campus Apartments as their attorney.
- 46 The Tribunal is also not satisfied that an instrument granting a power of attorney must be verified by statutory declaration because of s 22(3) of the SSMA. Subsection (3) operates only in relation to a 'strata interest notice', which is defined in subsection (1) to be written notice of 'a person who has an interest in a lot that'. The power of attorney does not create an 'interest' in a lot. The right to cast a vote at meetings is given, not by a power of attorney, but rather by the lodgment of a proxy form pursuant to clause 23 of Schedule 1 to the SSMA, or by the notification of a company nominee under s 154 of the SSMA.

- 47 In relation to the proxy forms being invalid by reason of cl 27 of Schedule 1 to the SSMA, that clause deals with provisions of a contract for the sale of a lot in a strata scheme. The Tribunal does not find it relevant to a residential tenancy agreement. There is a prohibition in in clause25(1) of Schedule 1 of the SSMA, against an original owner of a lot casting a vote by means of proxy or power of attorney, if it was obtained pursuant to a term of the sale contract for the lot, or an ancillary arrangement and that is not relevant here.
- 48 In relation to the 'authentication' of proxies and company nominees that were rejected, the Tribunal finds not basis for that assertion of the respondent. Sydney Campus Apartments have been casting votes by proxy on behalf of lot owners for some years. The Tribunal accepts from the evidence that the proxies and company nominee forms were authentic and has no basis beyond the assertion to accept otherwise.
- 49 The Owners Corporation makes a claim that documents signed by Sydney Campus Apartments where the signature was by means of electronic facsimiles of the relevant Sydney Campus Apartments director's and company secretary's signatures, were invalid because the signatures are by way of facsimile and in electronic form. The Tribunal is not satisfied that an electronic signature would invalidate the documents. In the case of *Stuart v Hishon* [2013] NSWSC 766 the Court found:

Mr Stuart typed his name on the foot of the email. He signed it by doing so. It would be an almost lethal assault on common sense to take any other view .

- 50 The Tribunal is satisfied that the refusal to accept the 'UniLodge' proxies and company nominee forms as valid, at three separate general meetings, amounts to an unwarranted denial of voting rights for those lot owners. Further, the Tribunal is satisfied that Ms Lin who is both Chairperson and Secretary, was part of the decision not to allow the proxies and that has resulted in a disenfranchising those lot owners of a vote in those meetings.

The Tribunal is also satisfied that this demonstrates that general meetings of the Owners Corporation were not being conducted properly and that the scheme is not functioning satisfactorily.

51 The Tribunal is satisfied that the resolutions passed at general meetings held on 14 June, 11 July and 14 August 2019 refusing to accept virtually the proxy forms and company nominee forms were invalid.

52 For that reason, the Tribunal also finds that the resolutions carried at the adjourned General Meeting of 14 June 2019 **and the meetings of 11 July 2019 and 14 August 2019** are invalid.

Failure to Repair Common property

53 The Tribunal also accepts that the scheme is not functioning satisfactorily because the Owners Corporation have failed to repair common property, in particular the awning above a public footpath adjacent to the Strata Scheme. In effect the scheme has been polarized into factions. The applicants allege that the Owners Corporation has failed to carry necessary repairs and maintenance, to the windows and the facade, at the same time as the awning work which would save the Owners Corporation some \$1.5 million in the long run.

54 Section 106 of the SSMA requires an owners corporation to:

properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

55 Since July 2015 the awning has required repair and has not been repaired. The evidence reveals that there has been considerable time spent obtaining expert engineering advice, and detailed works and funding proposals, to remedy the awning.

- 56 A Notice of Intention to Give an Order was issued by the City of Sydney Council on 20 April 2017, warning of 'catastrophic failure' of the awning. The Owners Corporation's previous solicitor, Muellers, advised the Owners Corporation to embark upon the repair of the awning as required by the Council letter of April 2017.
- 57 Each party blames the other for the delay, but what is clear is that in the situation of conflict in the Owners Corporation has been the reason for the failure to finalise the repair to the awning which clearly requires undertaking (and neither party denies).
- 58 By 22 November 2019, all that was being done about the awning was only to accept a fee proposal from Landlay to "carry out an assessment of the awning and preparation of a report" and in relation to the windows and facade, not to do any actual remedial work but only to "carry out an assessment" and "prepare a report" on the condition of the windows. It is noted from the evidence that such assessments had already been undertaken.
- 59 The serious and prolonged failure by the Owners Corporation to carry out the urgent repair to the awning in these circumstances is evidence that the scheme is not functioning satisfactorily.

Spending on legal costs

- 60 The dispute between the parties has also generated an inordinate spending on legal costs. At the general meeting on 14 August 2019 a resolution was passed for expenditure of \$562,500 plus GST on legal services. Of that, \$162,500 was for these proceedings, while \$400,000 was for future legal proceedings. In affidavit dated 29 November 2019, Andrew Ucchino of Whelan's Property Group who is the the current strata Manager indicates at page 4, that as at that date the Owners Corporation had spent \$569,338.76

(exclusive of GST) on legal costs since March 2019. Mr Price, for Whelan's Property Group conceded in cross examination that the total was 'likely to exceed \$700,000'.

61 It should be noted that the sheer volume of the evidence filed in these proceedings, much of which has proved irrelevant to the making of the decision, and the history of litigation reflects the high level of conflict and animosity in this scheme.

62 There can be no doubt that the dispute between the various factions of the Owners Corporation has caused an extraordinary amount of time and money to be spent in litigation on legal expenditure and proceedings. That is a clear indication that this scheme is not function satisfactorily and is in a high level of dispute paralyzing it in making decisions.

Conclusion

63 The applicant has raised some other grounds in relation to the scheme functioning unsatisfactorily, but given the unjustified failure of the Owners Corporation to accept proxies and company nominees, the failure to repair the awning and the inordinate spending on legal costs, the Tribunal is satisfied that the scheme is not functioning satisfactorily and that in the circumstances a compulsory strata managing agent should be appointed.

64 The Tribunal accepts the applicant's proposal to have Bright and Duggan appointed as the Strata Managing Agent and there is consent to appointment provided to the Tribunal. The appointment is subject to that consent agreement. It will be for that Strata Managing Agent to determine what works are required to meet the obligations of the Owners Corporation going forward and what works are required.

65 For the reasons given above and given the factiousness that exists in this scheme, the Tribunal does not find it would be practical to limit the appointment of the compulsory manager and makes an order conferring all the functions of the owner's corporation on the Strata Manager for a period of two years. Full conferring of functions for that period will allow the strata manager time to facilitate the maintenance required and move the parties towards non-compulsory management.

Orders

66 Accordingly, the Tribunal makes orders for the appointment of the compulsory manager and the Tribunal has also made provision for any cost application.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

The image shows a handwritten signature in black ink, consisting of stylized initials 'JR'. To the right of the signature is the official seal of the NSW Civil & Administrative Tribunal. The seal is circular with a double border. The outer border contains the text 'NSW CIVIL & ADMINISTRATIVE' at the top and 'TRIBUNAL' at the bottom, separated by two small stars. The inner circle features the coat of arms of New South Wales, which includes a shield with a kangaroo and a sheep, topped by a crown and a sunburst.