

Publication Date: 23 May 2024
YSP Podcast Transcript: 409. Ending the Abuse of Democracy: The Barnes Case

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source.

Amanda Farmer: Hello and welcome to this week's podcast. I'm your host, strata lawyer, Amanda Farmer. It's my job here each week to help you out make things a little easier if I can, amidst this crazy world of apartment living.

Last week, some of you may have joined me live over on the Your Strata Property Facebook page, to hear all about a recent case that has come out of the New South Wales Civil and Administrative Tribunal.

It's the case of Barnes and others and the owners of Strata plan number 61934 and otherwise unreported case. But because I acted for the successful applicants in the proceedings, I have a copy of the case and have been sharing it with you.

There's been lots of interest in the case. Many of you have downloaded a copy and lots of you in my inbox after last Friday's session, asking me if there is a short summary of the case, a case note, the key points, the key findings summarised somewhere for you. So that's what I have decided to do for you today on the podcast.

Well, I'm actually not bringing it to you. I've invited someone else to give you a summary of the Barnes case, just to change things up, shake things up a bit. I've asked Adam to deliver today's case summary. Who is Adam? Is he a lawyer? Is he a strata manager? Was he an applicant in these proceedings? Well, here's the thing. Adam is not a real person. Adam has been created using AI, artificial intelligence. And this is the first time that I am introducing Adam to you. He is a big help to me.

You'll notice that Adam does have an American accent today. He doesn't have to. We can switch him up if we like, but for today's purposes, we did seem to get the clearest articulation of the issues from Adam's American accent. We do just have to put up with the pronunciation of the word strata and he does struggle with the word by-law, but only sometimes you will hear a voice in addition to Adam's in this case note. I'll leave that as a bit of a surprise for you, but I will say before you ask me, no, we did not hire Morgan Freeman or James L. Jones to play the role of the tribunal.

Yes, this is a bit of fun in the context of what is otherwise an important and serious tribunal decision. I know it is nice to hear a voice other than mine at times, especially when you can head over to our Facebook page and both hear and see me talk about the Barnes case in more detail link to the replay of that session is in the show notes for this podcast episode. Adam will remind you of that.

You can also head over to the show notes to grab a copy, to grab the full copy of, let's say that again, to access the full copy of the Barnes case. The show notes, if you're not sure, are over on our website, yourstrataproperty.com.au/podcasts.

You'll see this episode number 409 there in the list. Click on through. You'll be able to grab Adam's transcript, copy of the case and access that deeper dive into the case that I hosted over on the Facebook page last Friday.

That's all from me, ladies and gentlemen, introducing you now to Your Strata Property's Adam. Enjoy.

Adam: Hi, I'm Adam. I'm here today to help Amanda out with her podcast. I'm proudly powered by A.I. Amanda has asked me to share with you a comprehensive case note on a recent case coming out of the New South Wales Civil and Administrative Tribunal.

Here goes, in Barnes and others versus the owners of Strata Plan number 61934. The tribunal addressed significant legal challenges concerning the governance of a strata scheme.

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This case centers on the propriety and legality of a resolution to levy a substantial fee and the validity of a controversial by-law. The applicants in the proceedings were Neville Barnes and 13 others, each being owners of 24 lots within the Winbi River Resort, a strata complex on the Murray River, New South Wales. The respondent was the owners corporation of Strata Plan number 61934.

The dispute arose from a decision made during the annual general meeting in August 2022. That decision was to raise a special levy in the total sum of \$1.7 million. This levy was purportedly for the maintenance and repair of common property. The applicants argued that the levy was excessive, unnecessary, and skewed to benefit a particular group of lot owners who were also represented on the strata committee.

A further issue for the tribunal to determine was the validity of a by-law, by-law number 22. This by-law permitted the owners corporation to charge certain lot owners a facility and services fee. I won't go into all the details of the by-law in this summary, but the short story is that the by-law was considered oppressive and financially burdensome by the applicants. The circumstances in which it was relied on by the owners corporation were also considered to be unfair.

Turning now to the legal issues, in relation to the special levy made at the AGM, the applicants challenged the validity of the special levy resolution. The tribunal needed to examine the owners corporation's compliance with the procedural requirements of the Strata Schemes Management Act. When it came to the raising of special levies, the tribunal also had to consider whether the special levy resolution was passed for an ulterior purpose.

In relation to the validity of by-law number 22, the tribunal had to engage in an assessment of the by-law's fairness, considering the applicant's allegations that it was harsh, unconscionable, or oppressive. So what did the tribunal conclude after it had heard all the legal arguments?

Firstly, regarding the special levy resolution, the tribunal identified, "Significant procedural missteps". In the passage of the resolution that approved a \$1.7 million levy.

It found that the resolution was not only improperly passed, but also served an ulterior motive and was effectively, "A fraud on the power" Exercised by a particular group of lot owners. The tribunal also found "The resolution was used to secure benefits for certain lot owners to the detriment of others". Under the New South Wales legislation, a special levy can only be raised if the owners corporation has first identified an expense that it cannot meet but needs to pay.

In this case, the owners corporation admitted that it was not faced with any expense that was necessary to pay before the next round of quarterly levies was due to be set. As such, the tribunal found that the \$1.7 million levy did not fairly arise out of any proper purpose for which this section of the New South Wales legislation was intended. As for the challenged by-law, the tribunal struck down by law number 22, finding it to be harsh, unconscionable, and oppressive.

The by-law was determined to impose undue financial burdens on lot owners disproportionately, which was inconsistent with the principles of equitable and fair management required under the legislation. The end result of the case was that the tribunal declared the special levy resolution invalid and of no legal force.

No lot owner had to pay the \$1.7 million. Also, by-law number 22 was declared to have no legal effect relieving the lot owners of the financial obligations it imposed. The tribunal also ordered the owners corporation to pay the applicant's costs of the proceedings, stating that these costs should not be indirectly levied back onto the applicants through future strata levies or charges.

In addition to the findings I've just outlined, the tribunal also had something to say about committee members who have a direct or indirect financial interest in matters being discussed at committee meetings. These comments are important as there are few, if any, tribunal decisions where this area of the legislation has been dealt with so directly the tribunal was critical of at least two strata committee members who failed to remove themselves from voting on an issue that directly affected lots owned by their company.

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The issue was whether a new and independent report should be obtained by the owners corporation about the state of repair of their particular lots. Rather than the owners corporation continuing to rely on a questionable report the owners themselves had obtained. The tribunal said that both of these committee members, “Had a direct pecuniary interest in opposing the motion so that the only basis on which the owners corporation could consider these issues was with reference to reports that they themselves had commissioned.”

The tribunal also recognised that two other committee members may have had an indirect financial interest in the outcome of the same motion as those two members were associated with the relevant lot owners through various joint ventures and trusts. These comments assist us to interpret the meaning of clause 18 in Schedule Two to the Strata Schemes Management Act. That is the clause that requires committee members who have a direct or indirect pecuniary interest in a matter under discussion to remove themselves from the discussion and from voting where that pecuniary interest appears to raise a conflict of interest.

The tribunal also identified what it called “A stark and disturbing” conflict of interest, where there was a series of undisclosed written communications between a committee member and the owners corporation's lawyer. At the time of those communications, the committee member was wearing two hats, firstly, as the committee member instructing the lawyer in the tribunal proceedings on behalf of the owners corporation, and secondly, as a lot owner intending to make a claim against the owners corporation because of its alleged failure to repair the common property, the lawyer communicated with the committee member in both of these capacities, the tribunal is clear that this was a conflict of interest.

This decision is pivotal in illustrating the tribunal's enforcement of just and lawful management practices within strata schemes. The tribunal rigorously examined the motives behind the contested special levy resolution and the by-law with a particular commitment to fairness and equity.

Key quotations from the tribunal's decision highlight the depth of its scrutiny regarding the special levy resolution. The tribunal noted, “The procedural failures combined with the ulterior motivations behind the resolution demonstrate a clear fraud on the power vested in the owners corporation”.

On by-law number 22, the tribunal remarked, “This by-law serves to unjustly enrich a subset of the strata scheme at the expense of a larger group, which is contrary to the fundamental principles of strata management under the act”.

The case of Barnes sets a significant legal precedent for the governance of strata schemes in New South Wales. It is an example of how the democratic process that is so important to the proper functioning of strata communities can sometimes be abused by those in power. It highlights the importance of transparency, especially in decisions made by strata committees and the trap that owners, committee members and even lawyers can fall into when they do not properly recognise conflicts of interest.

Check the show notes for this podcast episode for your access to a full copy of the case. That's also where you'll find the link to the video replay of Amanda's deep dive discussion into the case hosted over on our Facebook page. Amanda is a real person, by the way, unlike me.

Have a fabulous week in strata. I hope to join you another time soon.

Outro: Thank you for listening to Your Strata Property. The podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode by the show notes at yourstrataproperty.com.au.