

Strata Fee Recovery

The Owners Strata Plan 52098 v Khalil [2014] NSWLC 2
The Owners Strata Plan 36131 v Dimitriou [2009] NSWCA 27

I have been involved in several cases against a certain strata manager who has been unlawfully extracting 'recovery expenses' from lot owners in strata plans that it manages. The strata manager engages an associated law firm that is owned by the same parent corporation. So, they essentially charge themselves and then unlawfully apply the 'recovery expenses' to the lot owner's ledger.

These 'recovery expenses' usually far exceed the amount in arrears. This practise has no legal basis but, sadly, many lot owners give in and pay the strata manager rather than hiring lawyers to fight the matter in court. This article aims to assist lawyers appearing in these matters in the Local Court of NSW.

Strata Schemes Management Act

Section 86(2A) SSMA provides that:

An owners corporation may, without obtaining an order under this section, recover as a debt in a court of competent jurisdiction, a contribution not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.

So, the contribution itself is a statutory debt but there is no provision in the Act that makes alleged expenses immediately due and payable. So, the Owners Corporation has to commence proceedings and obtain a judgment for the expenses before they can apply them to the lot owner's ledger.

The Court of Appeal held in Dimitriou:

Expenses incurred in recovering contributions would extend to legal costs and disbursements only to the extent that such costs and disbursements are reasonably incurred and reasonable in amount; the party claiming such costs and disbursements would have to prove this in order to obtain judgment for them.¹

Recoverable costs are limited to party and party costs and the actual amounts expended: *Coshott*² disapproved.

So, the burden is on the corporation to prove at a hearing that it was reasonable to commence and maintain proceedings and that the legal fees claimed are reasonable with respect to the amount of money in arrears.

¹ The Owners Strata Plan 36131 v Dimitriou [2009] NSWCA 27, Hodgson at [37], Handley [127] to [128].

² *Coshott v Owners of Strata Plan 48892* [2006] NSWSC 308

Khalil

These principles were applied in the Local Court matter of Khalil.³ The Strata Manager, Body Corporate Services, engaged an associated law firm, Kemps Petersons, to recover outstanding contributions. Both BCS and KP are members of the Pica Group.⁴ So, BCS were paying a related entity to provide legal services and then charging the 'recovery expenses' to Ms Khalil's strata ledger.

Assessor Olischlager held that the contribution itself was a statutory debt but that recovery expenses had to be proved in court. He held at [48] to [49]:

. . . There is no basis upon which the plaintiff is entitled to treat these expenses as a debt due and owing by the defendant.

. . . There is no provision within the Strata Scheme Management Act 1996 that gives expenses the characteristic of being a debt immediately due and payable upon being incurred by an owners corporation.

Olischlager concluded that Ms Khalil had brought her contributions up to date and the proceedings were maintained only for the purpose of recovering section 80 expenses.⁵ He found that those expenses were not reasonably incurred and entered a verdict in favour of the defendant.⁶

Conclusion

The upshot is that it is often worthwhile taking these matters to the small claims division of the Local Court and challenging the reasonableness of the 'recovery expenses'. The expenses could be unreasonable if:

1. The lot owner was suffering financial hardship,
2. Only a small amount was in arrears,
3. Proceedings were commenced soon after they fell into arrears
4. The lot owner was making payments to bring the account up to date,
5. The expenses exceed the amount in dispute,
6. The strata manager and their law firm are related entities.

I'm available every day after 4pm if you have any interesting issues.

Chris Nowlan
Barrister-at-Law
Ph: (02) 8251 0066
chris@chrisnowlan.com

³ The Owners - Strata Plan No 52098 v Khalil [2014] NSWLC 2

⁴ <https://picagroup.com.au/pica-group-family/>

⁵ The Owners - Strata Plan No 52098 v Khalil [2014] NSWLC 2 at [71]

⁶ The Owners - Strata Plan No 52098 v Khalil [2014] NSWLC 2 at [72]