



Assessing and Determining Strata Levies and Reasonable Costs

Presentation to Bannermans Lawyers and NSW Strata Managers

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DEPUTY CHIEF MAGISTRATE THEO TSAVDARIDIS¹

Overview

The relevant legislation for assessing a claim for strata levies is the [Strata Schemes Management Act 2015 \(NSW\)](#) (*Management Act*) which commenced on 30 November 2016. Cases determined prior to 30 November 2016 refer to the former legislation, [Strata Schemes Management Act 1996 \(NSW\)](#) (*The former Act*).

Questions/issues

- What does the Court look for when assessing or determining a claim for the payment of levies?
- What does the Court look for when assessing reasonable costs in recovering a levy, in particular, strata managers' fees.

Jurisdiction

Pursuant to [Sch. 4, s 3](#) of the *Civil and Administrative Tribunal Act 2013* (NSW), the functions of the *Management Act* have been allocated to the NSW Civil and Administrative Tribunal ('NCAT').

Pursuant to [s 30](#) of the *Local Court Act 2007* (NSW), the Local Court has jurisdiction to hear and determine proceedings on any money claim, as long as the amount claimed does not exceed the jurisdictional limit of the Court. Money claim is defined by [s 29A](#) to mean a claim for recovery of any debt, demand or damages (whether liquidated or unliquidated). [Section 29](#) provides that the jurisdictional limit of the Local Court is as follows: -

- \$100,000.00 when sitting in its General Division; and
- \$20,000.00 when sitting in its Small Claims Division.

Commentary - Strata Law in NSW

A strata manager is a body permitted by [s 11](#) of the *Management Act* to "assist" the owners corporation to carry out its management functions under the *Management Act*. The functions of a strata managing agent depend on the delegation they are given by the owners corporation appointing them. [Section 55](#)

¹ Deputy Chief Magistrate, Local Court of NSW. The author also acknowledges the assistance of Madeline Little, law student and project officer, Chief Magistrate's Office, in the preparation of this paper.



provides that a strata manager must immediately make a record of its exercise of any function of an owners corporation or office and must at least once in each year provide a copy of the record for the previous year to the owners corporation.

[Section 79\(1\)](#) requires an owners corporation within 14 days after its creation, and at each Annual General Meeting ('AGM'), to estimate how much it will require to credit its administrative fund for actual and anticipated expenditure for maintaining in good condition, on a day-to-day basis, the common property and any personal property of the owners corporation and for payment of insurance premiums and other recurrent expenses. [Section 79\(2\)](#) requires that at each AGM, the owners corporation must estimate how much it will require to credit to its capital works fund for actual and anticipated expenditure for painting and repainting; replacing or repairing the common property; renewing or replacing fixtures and fittings that are part of the common property; acquiring, renewing or replacing personal property; and meeting other expenses of a capital nature.

At the AGM, the owners corporation must levy the amount it estimated as required for each fund, by virtue of [s 81](#). Subject to [s 82](#), each lot must be levied, and the amount is to be paid, proportional to the unit entitlement of each lot.

A special levy may be raised, but only if the owners corporation is subsequently faced with "other expenses" which it cannot meet from either fund: [s 81\(4\)](#). It follows that a special levy cannot be raised at an AGM. Simple interest is payable at the rate of 10% per annum once a levy is one month overdue.

An association can apply to the Tribunal or a court of competent jurisdiction for the recovery of unpaid contributions and interest. However, such an order can only be made for payment of outstanding contributions in the Tribunal if proceedings between the association and the member or other person are already pending before the Tribunal. Usually, an association will seek to recover unpaid contributions in a court of competent jurisdiction, which is ordinarily the Local Court of New South Wales. Judgments obtained at NCAT can be registered in the Local Court of NSW.

In a court, an association may recover a contribution not paid at the end of one month after it becomes due and payable as a debt, together with any interest payable on that unpaid contribution and reasonable expenses incurred in recovering those amounts. [Section 86](#) clearly makes the expenses incurred in recovering a contribution and interest a debt, which is recoverable by the association independently of any discretionary order for costs a court can make.



Where a person becomes the owner of a lot of which contributions are outstanding, that person automatically becomes liable, jointly and severally with the outgoing owner, for payment of those contributions.

The legal costs and disbursements (being expenses) are recoverable to the extent that they are reasonably incurred and reasonable in amount. The owners corporation's conduct in commencing recovery proceedings must also be reasonable.

Caselaw

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

In this case, the small claims assessor held that the service of notices in respect to regular periodic levies does not affect the obligation on the lot owner to pay them. However, the failure to serve a special levy notice means that the lot owner is under no obligation to pay those levies. Once notice of the special levies is received, the lot owner is then on notice of their obligation to pay those special levies. The small claims assessor referred to the case of *Coshott v Owners of Strata Plan No 48892* [2006] NSWSC 308 and the example provided by Handley AJA (at 402) and determined that the plaintiff should have withheld from proceeding with the first legal proceedings and that costs relating to those proceedings were unreasonably incurred.

It was held that there is no provision within the former act that gives expenses the characteristic of being a debt immediately due and payable upon being incurred by an owners corporation. A debt recovery expense incurred by an owners corporation does not, of itself, create a debt immediately payable by the lot owner. In addition, the small claims assessor held that expenses should not appear on a lot owner's account unless they have been subject to assessment either by a Court or a costs assessor under the [Legal Profession Act 2004 \(NSW\)](#) and interest pursuant to [s 79\(2\)](#) is calculated only on outstanding contributions. Levies raised against lot owners for the purpose of making contributions into the administrative and sinking are not taxable supplies. The small claims assessor held that the expenses were not reasonably incurred and entered a verdict in favour of the defendant.

***Council of the City of Sydney v Baboon Pty Ltd* [2020] NSWSC 1480**

In this case, the Court rejected the submission that the quantum of recovery expenses reflected the "significant difficulty and complexity" of the recovery proceedings in which significant, considerable and complex steps had to be taken. The Court held that the Owner's Corporation's recovery costs were disproportionate to the amount it was seeking to recover and ruled in favour of the defendant.

***Owners of Strata Plan 63800 v Wolfe & 1 ors* [2007] NSWSC 204**

In dismissing the summons, Associate Justice Malpass noted that the costs generated by the litigation were substantial and grossly disproportionate to what was in dispute. His Honour considered the significant court



time taken up by the small dispute and that courts cannot be expected to devote so much time to such litigation.

The Owners - Strata Plan No 36131 v Dimitriou [2009] NSWCA 27

In this case, the Court of Appeal held the following:

- (1) The word “expenses” in the Strata Schemes Management Act 1996, [s 80\(1\)](#), now [s 86 \(2\)](#), includes legal costs and disbursements.
- (2) For the purposes of [s 80\(1\)](#), contributions would extend to legal costs and disbursements only to the extent that such costs and disbursements are reasonably incurred and reasonable in amount; and the owners corporation claiming such costs and disbursements would have to prove this in order to obtain a judgment.
- (3) If legal costs incurred in proceedings before an Adjudicator or the Consumer Trade and Tenancy Tribunal are properly characterised as having been incurred in recovering arrears of contributions, then [s 80\(1\)](#) confers a right to cover those expenses.
- (4) The words “together with” in [s 80](#) mean that the claim for expenses including legal costs and disbursements must be made in the same proceedings as the claim to recover as a debt a contribution not paid.