

Newly developed properties these days are predominately strata schemes. As such, strata disputes are on the rise. Legislation and common law together form the strata laws in NSW. A few significant strata cases that have shaped strata laws are discussed below.



#### **A. EB 9 & 10 PTY LTD V THE OWNERS SP 934 [2018]**

##### **A.1. KEY FACTS**

The plaintiff (a lot owner) brought proceedings against the owners corporation (the defendant) in the Supreme Court of NSW. The plaintiff sought to obtain declarations that the owners corporation was prohibited from commencing proposed building work on the common property. The plaintiff claimed that developing the common property in the manner suggested by the two proposals for building work would result in the plaintiff's access to their car space being hindered.<sup>1</sup>

##### **A.2. OUTCOME AND KEY DECISION**

The plaintiff was successful in obtaining a declaration that the owners corporation was prohibited from engaging in building work that would restrict access to the car space. The key reasoning for this decision was that a primary purpose of the common property is to ensure that lot owners are able to reasonably access their property. As such, the owners corporation cannot engage in conduct that would impede on this right.<sup>2</sup>

#### **B. EB 9 & 10 PTY LTD V OWNERS OF STRATA PLAN NO 934 (NO 2) [2018]**

##### **B.1. KEY FACTS**

This subsequent case concerned legal costs and who should pay them. The plaintiff submitted that the owners corporation should pay the legal costs for both parties because the plaintiff was successful in the earlier proceedings and the general rule for costs should therefore apply.<sup>3</sup> The owners corporation on the other hand submitted that the plaintiff should pay their costs or then each party should pay their own costs. The owners corporation relied on section 253(2) of the Strata Schemes Management Act 2015 (NSW) ('SSMA') to support their submission that the plaintiff should pay the defendant's legal costs. Section 253(2) provides that instituting proceedings in a court to enforce a right or remedy must be justified. In this case, the owners corporation argued that the plaintiff should have taken the matter to the NSW Civil and Administrative Tribunal ('NCAT') because they could have resolved the matter.<sup>4</sup>

##### **B.2. OUTCOMES AND KEY DECISION**

The plaintiff was ordered to pay the owners corporation's legal costs despite being successful in obtaining relief (ie the declarations). The key reasoning for this decision was that while NCAT does not have the power to make declarations, they do have other powers which would have also enforced and upheld the plaintiff's rights. For instance, NCAT could have made an order binding the owners corporation with the same terms as those in the declarations.<sup>5</sup> As such, it is important that the plaintiff commences proceedings in the correct tribunal or court.

<sup>1</sup> *EB 9 & 10 Pty Ltd v The Owners SP 934* [2018] NSWSC 464.

<sup>2</sup> *Ibid* [33]-[34].

<sup>3</sup> *EB 9 & 10 Pty Ltd v Owners of Strata Plan No 934 (No 2)* [2018] NSWSC 546 [6].

<sup>4</sup> *Ibid* [10]-[11].

<sup>5</sup> *Ibid* [33]-[34].



**C. YARDY V OWNERS CORPORATION SP 57237 [2018] NSWCATCD 19**

**C.1. KEYS FACTS**

In 2009, the owners corporation amended the by-laws to completely prohibit residents from keeping any pets. When considering whether to purchase an apartment in the building, the applicant obtained a strata report for the strata scheme which stated that the standard by-law applied – this being, that subject to approval pets were allowed to be kept on the premises and that the owners corporation could not unreasonably withhold approval. After purchasing the apartment, the applicant’s wife applied to the owners corporation for permission to keep their dog on the premises – this was based on the standard by-law which she believed applied. The owners corporation rejected the application and informed the applicant that pets were prohibited from the strata scheme.<sup>6</sup>

**C.2. OUTCOME AND KEY DECISION**

Pursuant to section 150(1) of the SSMA, it was held by the NCAT that the by-law imposing a blanket prohibition on pet ownership was invalid because it was unjust. That is, the by-law was harsh, unconscionable and oppressive.<sup>7</sup> The Tribunal noted that while the owners corporation could make such a by-law under section 136 of the SSMA because it related to the management of the scheme, the by-law was invalid due to it needing to meet the requirements under section 139(1) of the SSMA (ie that the by-law cannot be unjust).

**D. MCELWAIN V THE OWNERS – SP 75975 [2017] NSWCA 2**

**D.1. KEYS FACTS**

The plaintiff (McElwaine) was the registered proprietor of a lot that had sustained damage from water penetration through the common property.

As a result of this water penetration, the plaintiff suffered harm through a loss in the value of the lot, loss of rent and other costs related to obtaining reports for the damage caused to the unit. Due to the loss incurred, the plaintiff sought damages against the owners corporation on the basis of nuisance. The plaintiff submitted that the owners corporation failed to repair and take reasonable steps to prevent the water from penetrating into his unit. The issue for the court was whether damages in nuisance could be claimed under SSMA.<sup>8</sup>

**D.2. OUTCOME AND KEY DECISION**

It was held by the NSW Supreme Court of Appeal that the plaintiff was entitled to damages in nuisance. It was noted that a lot owner is entitled to and can seek common law damages in circumstances where the lot owner has suffered damages because of the owners corporation.<sup>9</sup> As such, the owners corporation is required to properly repair and maintain common under section 106 of the SSMA. Failure to do this may result in the owners corporation being sued for nuisance or negligence for which they would be liable to pay compensation.

**E. CONCLUSION**

In conclusion, these cases show a few significant aspects of strata laws that have been subject to a dispute in courts and tribunals.

Comasters Law Firm is able to assist clients with matters relating to strata law.

<sup>6</sup> *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD 19 [13]-[24].

<sup>7</sup> *Strata Schemes Management Act 2015* (NSW) s 139(1).

<sup>8</sup> *McElwaine v The Owners SP 75975* [2017] NSWCA 2.

<sup>9</sup> *Ibid.*

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