LEVY RECOVERY – THE NEW PROCEDURES AND TRAPS FOR YOUNG PLAYERS

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Introduction

The new Strata Schemes Management Act 2015 (**the new Act**) is in its second year of operation and even though it largely mirrors the old Act there is always a need to remind ourselves of some of the key aspects of the new Act.

This paper is limited to the consideration of levy recovery under the new Act and some of the important features of it that affects day to day collection of levies, interest and costs.

Levy Recovery

It is settled law that before an owners corporation (OC) can recover outstanding levies it has to first levy a contribution to be paid into the Administrative or Capital Works Funds of the OC by a lot owner.

1. Levy Notice – specify a date

Under the old Act, s.78 did not require a levy notice to specify that a levy will become due and payable on a date 30 days after the levy notice is given.

Under the new Act, s. 83(3) states that any contribution becomes due and payable on a date specified in the levy notice which "*must be a date at least 30 days after the notice is given*".

This means that you can no longer set a date at a general meeting to say when the levy will become due and payable because the new legislation requires that the levy notice now specify a specific date when the levy will become due and payable and that must be a date at least 30 days after the notice has been given.

It appears that parliament intended to give lot owners more time to pay levies as opposed to the shorter time frame under the old Act and for owners to know the date by when they are to pay their levies so that there is no confusion or argument about the due date of the levy which under the old and the new Acts becomes due and payable after 30 days anyway.

One issue that may arise in the future is the consequence of failing to specify a date in the levy notice. Does that mean that the notice is invalid and legal action that will follow will be deemed to be invalid? I raise this merely because s. 83(3) states that, " *the date **must** be at least 30 days after the notice is given*" *[emphasis added]*.

The use of the word "must" in any legislation usually mean that it is mandatory (i.e. compulsory) for something to be done and if it is not done then everything that follows thereafter may be rendered invalid.

Does the use of the word "must" in s. 83(3) mean that it is mandatory to specify a date and if one fails to do so then the legal action that follows is deemed invalid.

In a recent Supreme Court case of *Sher Global Enterprises Pty Ltd v Owners - Strata Plan 31758 [2018] NSWSC 1057,* the lot owner argued on appeal that the AGM at which the levy was struck was invalid.

The owner argued that the owners corporation failed to serve the owner with the notice of the AGM at its address for service which the owner said was mandatory because clause 32 of schedule 2 of the old Act stated that, "*notice of a general meeting of an owners corporation **must**, at least 7 days before the meeting, be served on each owner"[emphasis added]*.

The owner also relied on other provisions of the old Act in support of its argument which contained the word "must" to indicate that "must" means "must", expressing obligation and compulsion and that the consequences are the inevitable result of invalidity.

The Supreme Court did not directly answer the issue but in its judgment it discussed two key cases on point which are worth mentioning.

The first case it relied upon was *Project Blue Sky (Project Blue Sky") Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

In Project Blue Sky, the High Court stated at [91]:

> "*An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition*."

In the second case of *2 Elizabeth Bay Road Pty Ltd v The Owners - Strata Plan No 73943 [2014] NSWCA 409 ("Elizabeth Bay")*, the Court examined the words "must not" in s.80D of the old Act, which provided that owners corporations "must not" institute proceedings unless a resolution is passed at a general meeting. The Court of Appeal in *Elizabeth Bay* concluded that despite a general meeting not passing such a resolution, initiation of the proceedings for breaches of home warranties without prior approval was in breach of s 80D but that did not invalidate the proceedings.

This was explained by Barrett JA at [52]:

> " *The true effect of s 80D, in my opinion, is that, in the absence of a relevant resolution passed at a meeting of the owners corporation, an executive committee is not authorised to initiate legal proceedings for the owners corporation but that the initiation of a particular proceedings by the committee, although performed without authority, is an act that was, of its nature, within the powers of the corporation itself*."

Therefore, based upon the above cases it can be said that although the use of the word “must” imposes a prima facie obligation to exercise that function, the use of such a term merely expresses the directory nature of the function rather than it being mandatory.

If the owners corporation fails to provide a due date in the levy notice that is sent to the owner, as required by s.83(3), it would initially be seen to be a breach of that section, however, it will not be fatal and is not likely to invalidate any legal action that will follow.

Close scrutiny must always be adhered to when sending out levy notices but if for any reason the date is missed or left out it does not mean that the world has come to an end. I have not come across this issue thus far but that is not to say that it is not likely to be raised in the future. I do not think much is likely to turn upon it.

Therefore, the new provision that provides that the date that a levy becomes due and payable must be at least 30 days after notice is given will not have any material effect on regular periodic levies however; it will affect the raising of special levies. An OC will need to be careful to ensure that if a special levy is required to be raised to meet expenses that the resolution raising such contributions allows for a due date at least 30 days after the meeting (but probably longer because notice will then need to be given to each of the owners in order to be properly levied and recoverable).

For example, if an owners corporation raises a special levy today to rectify a defective roof and at its general meeting it decides to demand the payment of that special levy immediately then that will be seen in breach of s83(3) because the due date for that special levy must also be at least 30 days after the meeting. This may turn out to be unfair particularly in circumstances where urgent funds are required by the OC and any delay may be detrimental to the OC.

2. No obligation to issue levy notices

One issue that sometimes becomes relevant in a defended levy recovery claim is the failure to issue a levy notice in the first place.

Section 83(4) of the new Act retains section 78(6) of the old Act. It confirms that there is no legal obligation for an OC to issue a levy notice to an owner for ordinary levies even though this is always done.

In other words the owner cannot hide behind the excuse that if a levy notice is not sent or provided that the owner is not responsible for the payment of the levy. Some owners have in the distant past compared the payment of a levy to paying a tax invoice which is paid when the tax invoice is received. That argument makes perfect sense, however, when it comes to the payment of strata levies, the Act expects the owner to be aware of the quarterly levies by virtue of being an owner of a lot in a strata scheme and the expectation that the owner would attend an AGM at which levies are struck or at least make his/her

own enquiries regarding the due dates for the quarterly levies. The onus still remains with the lot owner to be proactive and diligent in paying levies whether a levy notice was received or not.

3. Letter of demand – the 21 days' notice

Under s.80 of the old Act there was no requirement to issue a letter of demand before commencing legal action for the recovery of outstanding levies even though most strata lawyers were issuing letters of demand requesting payment to be made say within 14 days. Under s. 80 there were no set criteria as to what was to be said or prescribed in the letter of demand.

Under the new s.86 which is now the key section that allows collection of outstanding levies, interest and costs, a 21 days' notice must be sent to the owner before any legal action can be commenced.

The section does not say who is to send this notice whether it is the OC or its lawyer. The section is silent on this issue.

Furthermore, the 21 days' notice must also specify certain things.

Section 86(5) provides that the 21 days' notice must set out the following:

- the amount of the contribution, interest or expenses sought to be recovered;
- the recovery action proposed;
- any other matter prescribed by the regulations for the purposes of this subsection.

Clause 19 of the Strata Schemes Management Regulation 2016 provides that the 21 days' notice must also include the following:

- the date the amount was due to be paid;
- the manner in which the amount may be paid;
- whether a payment plan may be entered into; and
- any other action that may be taken to arrange for payment of the amount.

Section 86(4) also says the owners corporation "must" not take legal action until the 21 days' notice is given. As discussed above, case law seems to indicate that the use of the word "must" does not always mean that something has to be done compulsorily or must is a must. Query whether the Courts would uphold the same principle in the context of s.86 (4) where legal action is commenced without the owners corporation or its lawyer having given a 21 days' notice. In my opinion a failure to give a 21 days' notice with the required particulars may not necessarily be fatal but it may go towards the question of cost when

the owners corporation seeks legal costs for the legal action. At present we do not have any case law that has addressed this particular issue but one may be forthcoming in the future.

4. 10% Interest

The provisions relating to the accrual of interest on contributions have been slightly amended.

Section 85(1) of the new Act provides that a contribution, if not paid when it becomes due and payable, bears until paid simple interest at an annual rate of 10% or such other rate that may be prescribed by the regulations.

Section 85(2) of the new Act provides that interest is not payable if the contribution is paid not later than one month after it becomes due and payable. These two provisions are consistent with the old sections of 79(1) and (2) of the old Act.

However, the ambiguity surrounding when interest runs from (whether it runs from the date that the contribution became due and payable or a date at the end of one month after it becomes due and payable) has been resolved.

5. Waiver of interest on overdue levies & discounts

Under the old Act, sections 79(3) & (4) required a "*special resolution*" to be passed at a general meeting of the owners corporation if interest was to be waived and a discount given in relation to a levy .

Under the new Act, sections 85(3) & (4), no longer require a special resolution. An ordinary resolution will suffice. One issue that arises from this is the flexibility with which the owners corporation can waive interest and give discounts. Does this mean that the strata committee can approve waiver of interest and also give a discount in the levy, if requested, or does the request have to be approved at a general meeting? In my opinion due the flexible nature of sections 85(3) & (4) a strata committee is able to give approval for a waiver or a discount, however, it would be more preferable if any request be considered at a general meeting via an ordinary resolution so that there is no allegation coming from owners suggesting that the strata committee is biased or has done a favour to the requesting owner.

The proposal seems to be making the process of granting a request for the waiver of interest in certain cases, much easier than it previously was.

6. Payment Plans

Under the old Act there was no specific provision allowing acceptance of payment plans for the payment of contributions. However, in a number of cases payment plans or instalment orders were accepted on an ad hoc basis and in appropriate cases. The payment plans or instalment orders were often entered into to settle a claim and it often said that upon any default the entire sum of the debt would become due and payable less any payments made such that the OC could continue with the recovery of the debt.

Payment plans are now reflected in the new section 85(5)-(7) of the new Act. The OC have a right to enter into payment plans for the payment of overdue contributions; however, the entry into a payment plan is discretionary and not mandatory. It will depend upon the case at hand and how deserving a request for such a plan is.

Prior to entering into a payment plan, the OC must accept the payment plan at a general meeting and an ordinary resolution can be passed to approve a payment plan. A special resolution is not necessary.

Therefore, any lot owner who wants to pay their overdue levies by instalments through a payment plan has to do the following:

1. Make a request (supported by owners who hold at least 25% of the unit entitlements) to the OC to hold an EGM at which the OC will consider the request of the lot owner to enter into a payment plan.
2. Pay the costs of holding the EGM at which the owner wants the payment plan to be approved.
3. Explain to the OC why the payment plan should be approved to convince other owners why they should be given more time to pay their levies.
4. Have the payment plan approved at the EGM or alternatively, wait until the AGM for the plan to be approved.

If a request for a payment plan is refused the lot owner may decide to take legal action in NCAT to ask for more time to pay their levies (but this would be unusual) or seek orders from the Local Court to permit the levies to be paid by instalments.

Any payment plan approved by an OC cannot extend beyond 12 months and still does not prevent the OC taking legal action against the lot owner to recover overdue levies.

The Strata Schemes Management Regulations 2016 contains requirements for payment plans.

Clause 18 provides that a payment plan for the payment of overdue contributions is to be in writing and is to contain the following:

- the name of the lot owner and the title details of the lot,
- the address for service of the lot owner,
- the amount of the overdue contributions,
- the amount of any interest payable for the overdue contributions and the way in which it is calculated,
- the schedule of payments for the amounts owing and the period for which the plan applies,
- the manner in which the payments are to be made,

- contact details for a member of the strata committee or a strata managing agent who is to be responsible for any matters arising in relation to the payment plan,
- a statement that a further plan may be agreed to by the OC by resolution,
- a statement that the existence of the payment plan does not limit any right of the owners corporation to take action to recover the amount of the unpaid contributions.

In addition to the payment plan there is nothing to prevent the Court to allow lot owners to pay overdue levies by instalments if an appropriate case is presented before the Court. Often after the entry of judgment an owner has the right under the rules of the Court to bring an application for an instalment order against any judgment debt which is usually considered by a registrar in chambers. If an order is made for an instalment the owners corporation is given 14 days to object to the instalment order and if successful the instalment order is revoked or if the OC decides not to object, the instalment order remains on foot but will cease to have any effect if a payment is missed under the order provided the OC files with the Court an affidavit advising the Court of the default in the instalment order.

Some concerns have been raised in relation to payment plans. One of them is that even though the OC may have entered into a payment plan there is nothing to prevent the OC from taking action to recover unpaid levies. See s. 85(7).

Why would the OC still pursue the owner for overdue levies whilst there is on foot a payment plan does not make any sense unless s. 85(7) means that the OC can still pursue the owner for unpaid levies which are not part of the payment plan. The meaning of this obscure provision will be unknown until it is considered in due course by a Court or a Tribunal.

The use of the phrase "*generally or in particular cases*", in section 85(5) is vague. The phrase is not defined and therefore it is unknown what can be a general or a particular case. It was expected that the regulations will give some guidance as to what will amount to a general or a particular case but the proposed regulation is silent on this issue at present. It is common sense that a deserving case of financial hardship due to loss of employment, illness or disability would fall into the category of "particular"; however, it is difficult to work out what would fall into the "general" category. Case law is yet to consider and clarify general or particular cases.

Entry into the payment plan is not mandatory because of the use of the word "*may*" in section 85(5). In other words, the OC holds the sole right to determine whether it will enter into a payment plan or not, rather than the owner having a legal right when experiencing financial hardship to ask for and be granted an appropriate payment plan. The OC can choose not to enter into a payment plan for any reason that it chooses, or, for that matter, no reason at all. Section 85(5) only allows entry into a payment plan when contributions have become overdue. The section prevents the OC from entering into a payment plan prior to any contribution becoming overdue.

7. Court –v- NCAT – for levy recovery

Under the old Act all levy recovery action was commenced solely in the Courts.

Under the new Act, s.86 now allows recovery of overdue levies, interest and costs in NCAT in addition to recovering via the Court system. In other words the Court system is not the exclusive jurisdiction where a levy recovery action can be commenced.

Despite the new changes, in my experience, all most all of the levy recovery actions are still being commenced in the Court system. I am not aware of how many claims have been commenced in NCAT (if any) since the new Act came into being. Nor, have I seen any case law coming out of NCAT relating to a levy recovery claim.

Some of the issues that may arise should a claim be commenced in NCAT are as follows:

- NCAT usually follows a certain route or timetable before a matter is heard. It can take somewhere between 15- 24 months or even more for a simple levy claim in NCAT to be finalised if the owner decides to delay the outcome. Whilst the owners corporation is protected with the accrual of interest it is in the best interest of the OC to reach finality as quickly as possible either by way of a settlement or a hearing. That cannot always be achieved in NCAT.
- Unlike a Court action, simple levy recovery action reaches finality within 4-6 months if the action is commenced in the Small Claims Division or 6-12 months if commenced in the General Division of the Local Court, District or Supreme Courts whichever may be relevant.
- The advantage of commencing an action in Court is that Court judgment does not need to be registered as a judgment before enforcement of it can take place.
- Unlike in NCAT after judgment is given a certificate of judgment will have to be obtained and the judgment will have to be brought across to the appropriate Court for it to be registered before it can become a judgment of the Court and enforced. Unnecessary costs and time is wasted in this process.
- The Court system also has certain costs implications for lot owners and litigants who may wish to delay the process unnecessarily.
- In the Courts, if after the service of the statement of claim, an owner fails to file a defence to the claim within 28 days, the OC is able to enter default judgment on most occasions via the online Court.
- In NCAT seeking a default judgment without an appearance is not possible. What further will be required before judgment by default could be obtained in NCAT is not known.
- In the Small Claims Division of the Local Court if an owner wishes to appeal the decision of the Division the owner can do so by lodging an appeal to the District Court.

- An appeal from a judgment or order in a small claims matter lies to the District Court, but only on the grounds of a **lack of jurisdiction or denial of natural justice.** See: s 39(2) Local Court Act 2007.
- A denial of natural justice includes failure to give sufficient reasons for judgment, and also making a finding of fact where there is no evidence to support such a finding, but does not include an error of law. See Stojanovski v Parevski [2004] NSWSC 1144.
- In other words the grounds of appeal from the Small Claims Division to the District Court are very limited.
- Unlike in NCAT an owner dissatisfied with an outcome is able to appeal to the appeal panel on any ground as the grounds for appealing is not limited hence the owner can advance grounds of appeal in NCAT which are totally unreasonable and can cause substantial delay and incursion of costs unnecessarily until the appeal is heard.
- A large majority of levy recovery claims are commenced in the Small Claims Division of the Local Court which is quick, just and cheap. Any chances of appealing a decision of the Small Claims Division are limited and that prevents delay and further escalation of costs.
- It cannot be said that levy recovery claims in NCAT will be quick, just and cheap even though one may think such to be the case.
- In NCAT overdue levies, interest and costs are not treated as a statutory debt to begin with. See s86 (1). Whereas in the Court, overdue levies, interest and expenses are treated as a "*statutory debt*" as was the case under section 80(1) of the old Act. See s.86 (2A).

Therefore, the more practical jurisdiction to recover overdue levies, interest and costs still remains in the Court system.

8. Putting legal costs on the ledger

It has always been the practice amongst strata managing agents and still is the case that legal costs and expenses (expenses) are always reflected on the owner ledger of the lot owner. The expenses are then paid from any levies that are received by the owner.

One particular judicial officer in the Local Court is against the idea of strata managers reflecting expenses on the owner ledger and then paying for those expenses from any levies received until the Court has determined the amount to be paid as was discussed in Dimitriou's case in the NSW Court of Appeal.

Technically, the judicial officer may be correct in his view, however, that view fails to take into consideration that expenses incurred by an owners corporation cannot wait until the conclusion of the claim otherwise very few lawyers will be prepared to accept instructions based upon payment being received at the end of a case. Furthermore, the owners corporation would have to strike special levies or

take out a loan at a very high interest rate to fund legal action for recovery. The latter approach is likely to cause a lot of issues amongst owners as some may not always have the resources to fund a special levy or carry the recalcitrant owner throughout the process.

In my view if levies are received during the progress of a claim, no matter how small it may be, the expenses ought to be paid to keep the process of levy recovery rolling. If at the conclusion of a case the Court makes a finding on expenses and those expenses are determined to be more than what the Court thinks is reasonable, then I see there being no issues as the OC could provide a refund of the difference as such would in my opinion be a debt owed by the OC to the lot owner. If this occurs the OC would be able to adjust its ledger with relative ease.

If, however, what the said judicial officer has stated is adopted in later cases and becomes the guiding rule then I foresee strata managing agents being forced to keep shadow ledgers for interest and costs in addition to a ledger for levies which will create an administrative nightmare and may result in software programs being changed.

It is my opinion that by reflecting the expenses on the owner ledger gives a complete picture of what is happening in relation to a lot and what the lot owner is causing the owners corporation to incur. This may at the very least cause some alarm or concern for the owner to do something to pay the levies and the expenses at the earliest opportunity. This is only my view which may or may not be correct but my preference is that the ledger should reflect the total indebtness of the owner and not just a part of it.

9. Community, Precinct & Neighbourhood Associations

One issue that is often encountered with these entities is their inability to recover legal costs for recovery of levies. At present the Community Land Management Act 1989 (CLM) does not have a provision similar to the Strata Schemes Management Act 2015 that enables associations to recover legal costs.

Until the CLM Act is changed to allow recovery of legal costs the best way around it is for the associations to pass a by-law to cover recovery of legal costs. In that way the associations will be able to recover the legal costs and the by-law can also express that such costs be recovered on an indemnity basis.

Conclusion

The Strata Schemes Management 2015 in the area of levy recovery has not brought about any drastic changes such as to put the OC in any serious disadvantage in comparison to the position it enjoyed under the old Act, however, there are some aspects of it that needs to be treaded carefully. There are issues that remain unclear but one can only hope that those will be clarified either by the judiciary or the parliament in due course.

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About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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