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TRIBUNAL UPHOLDS VALIDITY OF GENERAL MEETING SPECIAL RESOLUTION

DESPITE NON-COMPLIANCE WITH LEGISLATION AND REJECTS CLAIM OF VALUE OF LOT

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Introduction

In *Tolhurst v Owners Corporation SP 72114* [2018] NSWCATCD 23, the NSW Civil & Administrative Tribunal upheld a general meeting special resolution of an owners corporation that approved the installation of new rain water tanks in a strata scheme, despite there being technical non-compliance with the *Strata Schemes Management Act 2015* (**SSMA**) in the notice convening the general meeting. In doing so, the Tribunal also rejected an argument by a lot owner that the placement of the new rain water tanks near her lot devalued the lot.

Facts

Ms Tolhurst was the owner of a lot in Eversleigh Estate, a 109 lot residential strata scheme in Sydney's Inner West. Between 2015 and 2017, the owners corporation had been investigating renewable energy options including consulting with The University of Technology Sydney School of the Built Environment. The result of these investigations was that a general meeting was held on 15 August 2017 and the owners corporation passed a special resolution (85% for and 15% against, calculated by unit entitlements) to install the new rainwater tanks next to Ms Tolhurst's lot. However, the notice for that general meeting failed to specify that the motion to do so had to be passed by a special resolution.
Ms Tolhurst complained that the decision meant her lot was devalued and she relied on evidence in the form of an appraisal from a local real estate agent in support of this claim.
Section 108 of the SSMA requires any additions to common property (which the new rainwater tanks were) to be approved by special resolution of a general meeting. Clause 8(d) of schedule 1 of the SSMA also states that a notice for a general meeting must state whether a motion on its agenda requires a special resolution to pass it. The notice for the 15 August 2017 general meeting did not contain this statement and therefore did not comply with clause 8(d).

Section 24(1) and (3) of the SSMA state:

> *(1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.*
> *…*

(3) The Tribunal may refuse to make an order under this section only if it considers:

(a) that the failure to comply with the provisions of this Act or the regulations, or of the Strata Schemes Development Act 2015, did not adversely affect any person, and

(b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

Decision

The Tribunal found there was a breach of clause 8(d) of schedule 1 of the SSMA. But it also found that Ms Tolhurst had received the notice for the 15 August 2017 general meeting and had voted against the motion to install the new rainwater tanks, so that she was not adversely affected by the failure of the notice for the meeting to say that the motion had to pass by special resolution. The Tribunal said that when section 24(3)(a) refers to a person being adversely affected, it means adversely affected in their ability to vote on a motion or obtain more information about it.

In addition, the Tribunal found that the votes in favour of the motion (85%) compared to the votes against it (15%) meant that had the SSMA been complied with, there would not have been any change in the outcome. This meant that section 24(3) applied so that the Tribunal could decide not to set aside the special resolution and it decided not to set aside the special resolution.

The Tribunal also decided not to set aside the special resolution, pursuant to its general power in section 232 of the SSMA to settle strata disputes because: the owners corporation had for over 2 years explored options for renewable energy options; Ms Tolhurst was aware of this or should have been aware of it; and Ms Tolhurst's evidence on the loss of value of her lot was not convincing. In relation to the latter, the Tribunal noted that Ms Tolhurst's real estate agent did not provide any reasons for his opinion and the agent's report contained a disclaimer that it was computer generated and should not be relied on in the absence of appropriate professional advice.

Conclusions

The decision is a victory for common sense. It confirms that some technical breaches of the SSMA (eg minor slips) in calling a general meeting which do not disadvantage anyone or which do not result in a different vote compared with the hypothetical case where there is no such breach, will not result in the invalidity of resolutions passed at the general meeting.

The decision also highlights that the common complaint by lot owners that owners corporations' decisions have devalued their lots, will not be accepted by the Tribunal without convincing evidence in support and that appraisals by local real estate agents are unlikely to be accepted by the Tribunal as such convincing evidence.

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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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