Breaking Free from Strata Norms: Taking Charge of Your Strata Scheme's Destiny with a Managing Agent of Your Choice

In a recent Supreme Court case of *Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618* [2022] NSWSC 1246, the issue revolved around the validity of a strata management statement (the "**SMS**") and identical by-laws that mandated all subdivided strata schemes to appoint the same strata managing agent. However, the Supreme Court ruled in favor of the applicant, invalidating the clause in the SMS and the relevant by-laws, thereby allowing the individual subdivided strata schemes to appoint a strata managing agent of their choice.

The disputed clause in the SMS stated:

> ***"Obligations of Owners Corporations***
>
> *8.11 Members which are Owners Corporations must, after the expiry of the initial period for their Strata Schemes, appoint and retain under section 28 of the [Strata Schemes Management Act 1996 (NSW)] the same Strata Manager the Committee appoints under this clause."*

Additionally, two of the eight subdivided strata schemes' by-laws contained a similar provision requiring the owners corporations to appoint the strata managing agent appointed by the whole building.

The applicant, who owned three lots within two of the seven subdivided strata schemes, brought proceedings against three owners corporations, alleging a breach of clause 8.11 of the SMS and two owners corporations for breaching the equivalent by-laws.

The respondents of the proceedings challenged the validity of clause 8.11 and the equivalent by-laws on the grounds that they are:

A. inconsistent with the Strata Schemes Management Act 2015 (the "**SSMA**");

B. beyond the power conferred by the Strata Schemes Development Act 2015 (the "**SSDA**"); and

C. uncertain.

The Supreme Court upheld all three grounds contested by the respondents. An appeal was later filed but eventually dismissed.

Section 139 of the SSMA restricts the scope of by-laws, providing that they must not be harsh, unconscionable, or oppressive. Further, the Tribunal has the power to declare such by-laws invalid under Section 150 of the SSMA as extracted below:

> *"**139 Restrictions on by-laws***
>
> *(1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.*

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Note—
Any such by-law may be invalidated by the Tribunal (see section 150).”

“150 Order invalidating by-law

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.”

In examining the proper way to appoint a strata managing agent, the Tribunal considered relevant sections under the SSMA, including those dealing with appointment, the term of the appointment, delegation of functions, and other responsibilities of strata managing agents and building managers. The Tribunal concluded that clause 8.11 of the SMS was inconsistent with the SSMA, as it extinguished the owners' corporation's right to appoint a strata managing agent in a general meeting and to terminate their services when necessary.

With respect to the Respondent’s claim that clause 8.11 was contrary to the SSDA, section 105(5) as extracted below was considered in the proceedings:

“105 Effect of strata management statement

(5) A strata management statement has no effect to the extent that it is inconsistent with—

(a) a condition imposed on a planning approval relating to the site of the building to which the statement relates, or

(b) an order under Part 12 of the Strata Schemes Management Act 2015, or

(c) another Act or law.”

The court found that the SMS did not extend to a complete takeover of management functions delegated to a strata managing agent and deemed the disputed by-law as ultra vires, meaning "*beyond the powers*."

Given the Supreme Court's findings of inconsistency with the SSMA and SSDA, they concluded that it was no necessary to further assess whether clause 8.11 might also be deemed invalid due to uncertainty.

The primary judge of the Supreme Court ruled the challenged SMS and by-law invalid, a decision later upheld by the Court of Appeal.

Challenging an existing by-law can be complex, considering the context of the matter. If you have inquiries regarding a by-law in your scheme, do not hesitate to reach out to us.

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