NCAT
NSW Civil & Administrative Tribunal

Quote the number below for all enquiries
Case number **2023/00378990**
Previous case number CL 23/38617

Community Association DP 270218
c/- Bannermans Lawyers - Jennifer Pham
jpham@bannermans.com.au

ORDER

Case title Millie Au v Community Association DP 270218

On 18 December 2023 the following orders (and/or directions) were made:

1 Each party is to bear their own costs.

2 If either party wishes to contend that a different costs order should be made, order 2. ceases to have effect and the following orders apply:

(a) Any application for a different costs order is to be filed and served, supported by submissions (not exceeding five pages in length) and evidence within 14 days of the date of these orders.
(b) Any submissions (not exceeding five pages in length) and evidence in response are to be file and served with the following 14 days.
(c) Any submissions in reply (not exceeding two pages in length) and evidence in reply are to be filed and served within the following 7 days.
(d) Each party's submissions should indicate whether they agree that costs should be determined on the papers, ie without the need for a hearing.

Reasons for decision:
Outline

1. These proceedings relate to a decision made in relation to the need to comply with a pool safety order issued by the local council. The applicant (the member) sought four orders against the respondent (the association), labelled a, b, c and d.

2. After considering the evidence, and having regard to the submissions, the Tribunal determined that it did not have the power to make orders a, b or d. As to order c, the Tribunal considered there was no basis for making that order and, even if there was, discretionary considerations did not favour making such an order. As a result, the application was dismissed.

History of the proceedings

3. After the application was filed on 23 August 2023, a directions hearing was held on 15 September 2023. A notice of hearing was issued on 20 October 2023 to advise the parties that the application would be heard on 2 August 2023.

Hearing

4. The member was self-represented. Mr Black, the managing agent, spoke on behalf of the association. The parties were advised that the three stages of the hearing would be (1) identification of the evidence, (2) cross-examination, and (3) submissions.

5. Documents either admitted as evidence or marked for identification were as follows:

Exhibit A Statement of the applicant, and attachments
Exhibit B Applicant's Points of Claim and Tally Sheet
Exhibit C Statement of Thomas Black, and attachments

MFI 1 Written submissions of the respondent

6. As there was no request for cross-examination, it remained to hear closing submissions. The usual sequence of applicant then respondent then applicant in reply was followed so that each party had an opportunity to speak in support of their case and to respondent to the case of the other party.

Jurisdiction

7. It is clear these proceedings relate to a site in Oatlands that is a community association that is governed by a deposited plan with the result that the provisions of the Community Land Management Act 2021 (NSW), which will be abbreviated to the CLMA, apply and the Tribunal thus has jurisdiction to hear and determine this application.

Member's evidence

8. Exhibit A set out events relating to three options for achieving compliance with a notice received from the local council in relation to the swimming pool fence and to events occurring at and after a meeting held on 17 July 2023.

9. Exhibit B comprised Points of Claim and a tally sheet prepared by the applicant. In the Points of Claim, the following orders were sought:

"a. A declaration that the Special Meeting of the Respondent held on 17 July 2023 (the SGM) was a properly constituted meeting of the Respondent.

b. A declaration that the voting outcome of the count of the Second Vote at the SGM as record in the tally sheet provided by the Applicant, a copy of which is Annexure A to these Points of Claim, showing 19 votes in favour of Options B versus 15 votes in favour of Option C for Motion 2 (the Resolution);

i. be carried out as the valid outcome of that Motion; and
ii. is binding on the Respondent.

c. An order that the Respondent comply with the Resolution within 30 days of the date of this order, by:

i. replacing the pool fencing to the height of 1.8 metres;

ii planting new hedges to replace the torn-out hedges; and
iii. paying for items I & ii above from the Respondent's Capital Works Fund.

d. A declaration that the electronic vote on Motion 2 conducted on 15 August 2023 (the Third Vote) be declared invalid."

Association's evidence

10. Exhibit C indicated that, in response to a letter from the local council dated 14 October 2022, indicating an intention to issue a direction in relation to non-compliant fencing surround the association's swimming pool, a special general meeting was convened and held on 17 July 2023 after which a further such meeting was held on 15 August 2023. It was also indicated that the decision in favour of Option C was subsequently implemented and that on 7 September 2023 the local council confirmed that the association's swimming pool was now compliant.

11. The notice for the meeting held on 17 July 2023 set out three options, each designed to achieve the outcome of a 1200 mm non-climbable barrier height, which may be summarised as follows:

Option A Extend the current fence to a height of 1800 mm at an estimated cost of $15,226 plus $2,860 to achieve a maximum height of 600 mm for the adjacent vegetation.

Option B Replace the existing fence with a new fence with height of 1800 mm at an estimated cost of $26,847 plus $2,860 to achieve a maximum height of 600 mm for the adjacent vegetation.

Option C Remove the vegetation so as to achieve the 1200 mm requirement at a cost of $2,860 plus a budget of $2,000 for any new replanting that would be at least 900 mm outside the fence and at least 300 mm inside the fence.

Member's submissions

12. The member submitted that the association had refused to provide information to verify the outcome of the 17 July 2023 meeting and that there had been no challenge to the member's analysis of the votes at that meeting with the result that Option B, not C, should be implemented.

13. Issues was also taken with the respondent's written submissions (MFI 1) which lodged on 12 December 2023, well after the due date for the provision of the documents upon which the respondent intended to rely at the hearing, which was 13 October 2023. The Tribunal noted that those pages were submissions, not evidence, with the result that they served to provide the member with almost a week's notice of what could otherwise be submitted orally, with no notice, at today's hearing.

Association's submissions

14. In the association's written submissions, it was contended that (1) the Tribunal did not have the power to make declarations, (2) the member had not indicated any provision in the CLMA which provided a basis for the order sought that was not a declaration, (3) any issue as to voting at the meeting held on 17 July 2023, as between Options B and C, had been resolved in favour of Option C by a subsequent meeting that was held on 15 August 2023, (4) the work required by Option C had been carried out.

Submissions in reply

15. In reply, reference was made to a contested proxy vote which, it was suggested, if it had been correctly determined, would have resulted in a decision in favour of Option B.

Consideration

16. Since cases such as Walsh v The Owners – Strata Plan No 10349 [2017] NSWCATAP 230 and EB 9 & 10 Pty Ltd v The Owners SP 934 [2018] NSWSC 464 establish that the Tribunal does not have the power to make declarations, the Tribunal does not have the power to make three of the four orders sought, namely those labelled a, b and d. Hence, it is only necessary to consider the order labelled c.

17. Before such an order can be made, there needs to be a legal basis for such an order. In the CLMA, s 109(1) imposes on the association an obligation to maintain and repair association property. A breach of that section could provide the basis for an order. However, where the association has carried out work that has achieved compliance with the requirements of the local council, there cannot be said to have been any breach of that obligation. The fact that the member preferred Option B to Option C is not sufficient to find there has been a breach of s 109(1).

18. Even if the member has established a breach of s 109(1), the Tribunal would have a discretion as to whether an order should be made, and that discretion could not reasonably be exercised in favour of the member by requiring Option B to be caried out when Option C has already been carried out.

19. The member could also rely on s 22 of the CLMA to suggest that an order should be made to invalidate the resolution recorded in relation to the 17 July 2023 meeting. However, that section requires a finding that the provisions of the CLMA or the associated regulations have not been complied with.

20. Even if such a finding was made, the fact that s 22 commences with the words “The Tribunal may …” means that the Tribunal has a discretion as to whether an order should be made. The fact that a subsequent meeting was held and resulted in a clear vote in favour of Option C, which decision has not been challenged by the member, has the consequence that the Tribunal would not be minded to make order c even if the applicant was able to establish a case based on s 22.

21. Accordingly, the Tribunal does not consider there is a valid basis for making what the member labelled as order c. In those circumstances, the application mist be dismissed.

22. The association’s submissions (MFI 1) raised the question of costs. In the Civil and Administrative Tribunal Act 2013 (NSW), the default position in applications such as this is that each party is to bear their own costs unless there are special circumstances that warrant an order for costs.

23. There do not appear to be any such circumstances in this case and an application for leave for the respondent to be legally represented was refused on 2 November 2023. While it is open to any party to incur legal costs, that does not necessarily mean that the other party should pay those costs. In these circumstances, the usual order will be made but with a facility for a different order to be sought.

G Ellis SC, Senior Member

Issued: 18 December 2023

For further information about your rights and obligations in relation to this order please read NCAT's Rights and Obligations Guideline available on the NCAT website at www.ncat.nsw.gov.au.