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SUPREME COURT UPS THE ANTE FOR FAILURE TO CALL GENERAL MEETINGS PROPERLY

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A new decision not only renders void resolutions passed at general meetings called improperly but paves the way for owners who lose valuable rights because a resolution is invalid to sue the person responsible for the calling of the meeting.

Introduction

Owners corporations ("OC") have a statutory duty to strike contributions to their administrative and sinking funds. These are struck at a general meeting of the OC: ss.75 & 76, Strata Schemes Management Act 1996 ("SSMA"). If contributions are struck in a general meeting which is not properly convened, those contributions will be void and unenforceable. In *The Owners – Strata Plan No 62022 –v- Sahade [2013] NSWSC 2002*, the Court held that insufficient notice of the scheme's annual general meeting ("AGM") meant that the AGM was not properly convened and the contributions struck at the meeting were unenforceable.

The Facts

On 17 January 2012, the OC for Strata Plan No 62002 sent by post Notice of its AGM to all lot owners. On 30 January 2012, the AGM struck a contribution and a special levy in the combined sum of $19,569.75 on each lot owner. In March 2012, the OC served a Notice of Levies Due to the Defendant. The Defendant subsequently paid the levy of $3,569.75, but the special levy of $16,000 remained unpaid. On 3 September 2012, the OC sued the Defendant for the outstanding special levy in the Local Court. The presiding magistrate dismissed the OC's claim because the OC "*could not establish that it had provided 7 days' notice of the relevant general meeting*": [7]. The OC appealed to the Supreme Court against the magistrate's decision. The appeal was heard by Rothman J of the Supreme Court.

The Appeal

On appeal, two issues were argued before Rothman J. Both issues are important as they illustrate how a valid notice has to be served.

Issue 1 – Service by Post

Was the notice of the AGM in fact served? The lot owner raised this question for the first time before Rothman J. Citing other case law, the lot owner argued that each of the following factual elements had to be proved before effective postal service of a notice could be acknowledged: [10]:-

i. Contents of the document;
ii. The addressing of the envelope with the relevant address;
iii. The affixing of a stamp (or other tracking or prepaid process) to the envelope; and,
iv. The physical deposit of the addressed and stamped envelope in a post box or at a post office.

While the Court accepted that the lot owner's argument was correct: [10], the Court was not prepared to draw any conclusion on this issue because the lot owner did not dispute service of the notice before the magistrate.

Issue 2 – The Notice Required

The OC argued that sufficient notice of the AGM was given and clause 32 of Schedule 2 SSMA does not need to be complied with strictly. Clause 32 reads:-

"***32 Persons to whom notice of general meeting must be given"***

(1) *Notice of a general meeting of an owners corporation must, at least 7 days before the meeting, be served on each owner.*"

The OC relied on ss.153 and 154 SSMA which, the OC said, "evidence an intent to allow practical flexibility and a legislative intent that a breach of the strictures in Clause 32 would not, of itself, render invalid all resolutions at the meeting".

In brief, s.153(1) empowers an adjudicator to invalidate a resolution made by the persons present at an OC's meeting if the adjudicator considers that the provisions of the SSMA have not been complied with. Nevertheless, s.153(2) gives the adjudicator power not to invalidate a resolution if he or she is satisfied that the failure to comply does not adversely affect any person and if the resolution would still have been passed had the SSMA been complied with. Section 154 provides that an adjudicator may nullify a resolution if he or she is satisfied that the resolution has been passed as a result of the improper denial of the applicant's vote or because due notice of the relevant item of business has not been given to the applicant.

The Court rejected the OC's arguments that ss.153 and 154 relieve it from strict compliance with cl.32. The Court said that both ss.153 and 154 "assume a valid (and properly convened) meeting": [26]. In relation to s.153, the Court was of the view that it applies to irregularities going beyond the requirements of the calling of the meeting, such as breaches of the standing order: [27]. In relation to s.154, the Court said that it applied to situation where "a person, entitled to vote, attends a meeting and is denied a vote": [24]; or, where a person was "not given due notice of an item of business" as opposed to a "person who is not given notice of the meeting at all": [25]. The Court concluded that "neither s.153 or s.154 of the Act qualifies the ordinary and grammatical meaning of Clause 32 of the Schedule. Nor does either disclose goals or purposes inconsistent with the ordinary and grammatical construction of Clause 32": [29] and that "Clause 32 require strict compliance as is evidenced by the use of the word "must" which is consistent with the use of the words "at least"": [30].

Having ruled that strict compliance with cl.32 was necessary, Rothman J then applied the relevant provisions in the Interpretation Act 1987 concerning service of document and the calculation of days to conclude that "the meeting was held one day too early to comply with the Act": [32].

What does the case mean?

If an owners corporation fails to give the necessary notice for the calling of a general meeting, resolutions passed at that meeting will be invalid.

Further, any mandatory requirement for the calling of a meeting provided for by the SSMA may, if it is not met, also result in the resolutions at the meeting being invalid. For example, the requirements of Clause 8(1), (2), (3) and (4) of Schedule 2 set out below also use the word "must" and, in light of this decision, a failure to comply with those provisions is likely to invalidate resolutions passed at those meetings.

1) Notice of a general meeting must state that a vote at a meeting by the owner of a lot does not count if a priority vote in respect of the lot is cast in relation to the same matter.

2) The notice must state that an owner of a lot or a person with a priority vote in respect of a lot may not vote at the meeting on a motion (other than a motion requiring a unanimous resolution) unless payment has been made before the meeting of all contributions levied on

3) the owner, and any other amounts recoverable from the owner, in relation to the lot that are owing at the date of the notice.

4) The notice must state:

    a) if the addressee is not a corporation-voting and other rights conferred by this Schedule may be exercised in person or by proxy, or

    b) if the addressee is a corporation-voting and other rights conferred by this Schedule may be exercised only by the company nominee in person, or by proxy appointed by the corporation.

5) If the addressee of the notice is the first mortgagee, or a covenant chargee, of a lot, the notice must state:

    a) the name of the owner of the lot, and
    b) the address of the lot, and
    c) the place at which the meeting is to be held.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers 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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