

# Judicial guidance on procedure in **Strata Renewal Proceedings**



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The *Strata Schemes Development Act 2015* (NSW) (*'SSD Act'*) provides for the collective sale of strata schemes where a strata renewal plan (*'SRP'*) has received the support of at least 75 per cent of the owners in the strata scheme (s 178(1)(b)). If this level of support is received, the Owners Corporation may resolve to apply to the Land and Environment Court (*'the Court'*) for orders to give effect to the SRP (*'Strata Renewal Proceedings'*). Once such orders are made, the owner of each lot in the strata scheme (including any dissenting owners) must sell their lot in accordance with the SRP and the orders of the Court.

To date, three written judgments have been handed down in relation to Strata Renewal Proceedings: *The Owners – Strata Plan 6877 v 2-4 Lachlan Avenue Pty Ltd* [2018] NSWLEC 13 (*'Lachlan'*), *The Owners – Strata Plan 6666 v Kabu Holdings Pty Ltd* [2018] NSWLEC 15 (*'Kabu'*) and *The Owners – Strata Plan 49574 v Scorpio Holdings (Aust) Pty Limited & Ors* [2018] NSWLEC 54 (*'Scorpio'*).

While the *SSD Act* also provides for redevelopment of strata schemes, this has not been considered by the Court, to date. Each of the three judgments that have been handed down provide useful guidance on the procedure being adopted by the Court in relation to this relatively uncharted area of law. The key findings and observations of the Court can be wrapped up in the following eight points.

## 1. A dissenting owner has a clear material interest in Strata Renewal Proceedings and should be joined as a Respondent (Dissenting Owner) upon application

The Court's default position is that a person who receives notification that the Owners Corporation has sought an order to give effect to a SRP is likely to have a material interest in the proceedings and should be joined as a party upon appropriate request (*Lachlan* at [10]; *Kabu* at [10]). Once joined, the

## Snapshot

- To date, three written judgments have been handed down in relation to Strata Renewal Proceedings in the Land and Environment Court of NSW. Each of these judgments relates to interlocutory matters in applications to the Court for orders effecting strata renewal plans for collective sale.
- The three judgments provide useful guidance on the procedure being adopted by the Court for joinder of parties, costs orders and security for costs, identification of parties and the necessity for position papers in these proceedings.
- Given the increasing demand to accommodate Sydney's growing population and intensify land use, Strata Renewal Proceedings both for collective sale and redevelopment of strata schemes are expected to become a regular occurrence in the Court.

dissenting owner is identified as '[Numbered] Respondent (Dissenting Owner)' (*Lachlan* at [25]; *Kabu* at [25]). This has had the effect of shifting the onus for joinder in strata renewal proceedings, such that it is for an applicant to prove that a dissenting owner should not be joined as a party.

## 2. A supporting purchaser has a clear material interest in Strata Renewal Proceedings and may be joined as a Respondent (Supporting Purchaser) upon application

In both *Lachlan* and *Kabu*, the supporting purchaser sought by notice of motion to be joined as an applicant to the proceedings, an application which the *SSD Act* does not expressly consider. In each matter, the prospective purchaser was joined as a respondent to the proceedings, albeit a supporting respondent, under section 181(6)(b) of the *SSD Act*. In the absence of guidance in the *SSD Act* or *Practice Note – Strata Schemes Development Proceedings* (*'Practice Note'*) as to how a supporting purchaser should justify such an application, the Court found demonstrating a material interest in the outcome

of the proceedings to be adequate (*Lachlan* at [23]; *Kabu* at [23]). Once joined, the nomenclature of '[Numbered] Respondent (Supporting Purchaser)' is to be adopted.

## 3. Dissenting owner's costs of application to be joined to proceedings should be addressed as costs in the cause

The dissenting owners in *Lachlan* and *Kabu* sought costs of the motion for joinder. Provided they are reasonable, the costs on the motion for joinder of a dissenting owner to the proceedings should be costs in the cause in accordance with section 188 of the *SSD Act*, despite the fact that section 180(3) of the *SSD Act* provides that a dissenting owner need not become a party to the proceedings (*Lachlan* at [30]-[33]; *Kabu* at [30]-[33]).

#### 4. Supporting purchaser's costs of application for joinder are to be borne by the supporting purchaser

No application has been made by a supporting purchaser for costs in relation to an application for joinder. However, the Court has indicated that it would not make any such order as to costs. While section 188 of the *SSD Act* provides that the applicant is to pay the reasonable costs of dissenting owners in the proceedings, it is silent as to the costs of other interested parties joined to the proceedings, and costs would be inappropriate where supporting purchasers or developers are in effect the initiators of SRPs and the resulting proceedings (*Lachlan* at [34]-[36]; *Kabu* at [34]-[36]).

#### 5. The name of the applicant in Strata Renewal Proceedings must accord with the *Strata Schemes Management Act 2015* (NSW)

The name of the applicant should take the form 'The Owners – Strata Plan No X' with X being the registered number of the strata scheme, in accordance with section 8(1) of the *Strata Schemes Management Act 2015* (NSW) (*Lachlan* at [26]-[29]; *Kabu* at [26]-[29]).

#### 6. Security for costs cannot be sought in Strata Renewal Proceedings as there is no 'defendant' within the meaning of the *Civil Procedure Act 2005* (NSW)

In *Scorpio*, the Court made a number of observations about orders previously made for the applicant to pay into Court \$125,000 to be held as security for costs of the Second Respondent (Dissenting Owner) in the proceedings, and whether the Court had power to make such an order prospectively, before costs were incurred and could be assessed as being both 'reasonable' and 'of the proceedings' (*Scorpio* at [27]-[28]). The Court observed that prerequisite to rule 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) is that there is a discernible 'plaintiff' and 'defendant' to proceedings. However, in Strata Renewal Proceedings a dissenting owner is a party only by its own volition (if it seeks to be joined), and is therefore not a 'defendant' within the meaning of the *Civil Procedure Act 2005* (NSW) ('CPA') (*Scorpio* at [30]-[31]).

Accordingly, the term 'security for costs' in the orders made was a misnomer, with the payment more correctly characterised as a down-payment to be released at the conclusion of the proceedings following scrutiny of the Second Respondent's claim for costs (*Scorpio* at [33]).

#### 7. Strata Renewal Proceedings can be listed for either a conciliation conference or a mediation, which can affect the timeline of the proceedings

In *Lachlan* and *Kabu*, the parties sought to have the proceedings referred to conciliation under section 34 of the *Land and Environment Court Act 1979* (NSW) in accordance with s 181(2) of the *SSD Act*. The order made for a conciliation conference provided that if no conciliation date was available prior to 30 June 2018, the parties were to participate in a media-

tion under s 26 of the *CPA*. The election between conciliation and mediation in Strata Renewal Proceedings is one that can have considerable impact on the length of the proceedings. The current listing date range of the Court, particularly for Commissioners with valuation experience, means that parties are generally more likely to secure earlier mediation dates than conciliation dates in Strata Renewal Proceedings.

#### 8. Position papers should be provided by the Respondent/s (Dissenting Owner) a reasonable time prior to mediation or conciliation

The applicant in *Scorpio* sought an order (equivalent to an order agreed to between the applicant and First Respondent) for the Second Respondent to file a position paper outlining the party's compensation claim under section 55 of the *Land Acquisition (Just Terms Compensation Act) 1991* (NSW).

While the adequacy of the compensation amount offered in a SRP for a dissenting owner's lot is only one of the factors of which the Court must be satisfied (s 182(1)(d) *SSD Act*), it is a core issue for dissenting owners where their property may be compulsorily acquired by effect of a Court order (*Scorpio* at [37]).

Accordingly, parties should ensure that opposing parties (and the Court) are in a position to fully understand each party's stance on the facts and the law in dispute prior to mediation. The Court held that it was 'entirely consistent with the principles of procedural fairness' for parties to Strata Renewal Proceedings to effectively 'state their case' ahead of mediation (*Scorpio* at [35]-[43]). Orders were made for the Second Respondent to provide a position paper prior to mediation.

In determining the timing for the provision of the position paper, the Court cited *Monti v Roads and Maritime Services* [2018] NSWLEC 34, stating that the timing for the provision of documents such as position papers must be 'reasonable and realistic', to allow opposing parties to prepare considered replies (*Scorpio* at [44]-[46]). Accordingly, the provision of a position paper on the Friday before a mediation listed for Monday, would be 'far from reasonable', with consideration given to allowing both the applicant and the Court adequate time to prepare for the mediation.

#### Conclusion

As the Court and practitioners gain experience in these matters, it is envisaged that the process and procedure around Strata Renewal Proceedings will be refined. Until then, the Court expects parties and legal practitioners to work cooperatively to implement the Practice Note in a practical and sensible way that achieves its intended purpose (Practice Note at [50]). Given the increasing demand to accommodate Sydney's growing population and intensify land use, Strata Renewal Proceedings, both for collective sale and redevelopment of strata schemes are expected to become a regular occurrence in the Court. **LSJ**