

# Uncertainty with section 80D resolved

Case note: 2 Elizabeth Bay Road Pty Ltd v The Owners—Strata Plan No 73943

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The Supreme Court of New South Wales Court of Appeal handed down its judgment in *2 Elizabeth Bay Road Pty Ltd v The Owners - Strata Plan No 73943* [2014] NSWCA 409 on 5 December 2014. The case provides important guidance for owners corporations and their executive committee members as to their obligations in the procuring of legal services and in the commencing of legal proceedings.

## Facts

In *2 Elizabeth Bay Road* the plaintiff owners corporation commenced legal proceedings against the developer of the strata scheme alleging defective work in the common property. At the time of the initiation of the legal proceedings the owners corporation had not passed a resolution at a general meeting authorising their commencement. However, the owners corporation passed a resolution purporting to retrospectively authorise their commencement some 4 months later.

The developer argued that the owners corporation had breached section 80D(1) of the *Strata Schemes Management Act 1996* in commencing the legal proceedings. Section 80D(1) is in the following terms:

*An owners corporation or executive committee of an owners corporation must not seek legal advice or the provision of any other legal services, or initiate legal action, for which any payment may be required unless a resolution is passed at a general meeting of the owners corporation approving the seeking of the advice or services or the taking of that action.*

Further, the developer argued that the breach was not cured by the later resolution with the effect that the legal proceedings were invalid and should be struck out. The legal point that was taken in the case raised major concerns for plaintiff owners corporations. This is because there are a number of circumstances, such as the need to obtain an urgent injunction or the imminent expiration of a time limitation period, where it may not be possible (without the owners corporation suffering prejudice) for an owners corporation to comply with section 80D(1) before commencing legal proceedings.

## The primary proceedings

The matter was first heard by Justice Hammerschlag in the Supreme Court of New South Wales who found that legal proceedings commenced in non-compliance with section 80D were not a nullity but were vulnerable to a strike-out application. However, in the circumstances, His Honour found that the non-compliance was cured because the owners corporation had fulfilled the statutory condition in section 80D in the passing of the resolution after the commencement of the legal proceedings. The developer appealed from those findings.

## The appeal proceedings

The Court of Appeal upheld the decision of Justice Hammerschlag.

Finding that section 80D would be breached if a resolution were not passed prior to commencement of legal proceedings, the Court focused on the consequence of any contravention, dismissing the notion that contravention resulted in invalidity.

In that regard, Barrett JA stated:

*'In my opinion, s 80D does not, in any circumstances or as against any class of defendant, deny or curtail the capacity of an owners corporation to commence legal proceedings or cause proceedings to be "invalid".'*

Leeming JA, with whom Basten JA agreed, delivered the majority judgment. In dealing with the consequences of contravention of section 80D in the commencement of legal proceedings, His Honour reasoned that such proceedings enlivened the jurisdiction of the relevant court or tribunal with the consequences of the contravention falling 'to be determined in accordance with the discretionary exercise of the procedural rules of the court or tribunal'. His Honour identified the juridical basis of the exercise of that discretion, the doctrine of abuse of process, as having been considered extensively in the Court of Appeal's decision of *Doulaveras v Daher* [2009] NSWCA 58.

Whilst the procedural rules of courts and tribunals may differ, His Honour found that some of the matters that will "loom large" in the exercise of that discretion included:

- ❑ Whether any breach has been cured.
- ❑ If a breach has not been cured, whether it will be promptly cured.
- ❑ Whether the breach was inadvertent or deliberate.

## Conclusion

The consequence of the decision is that proceedings that have been commenced in non-compliance with section 80D may still be vulnerable to a strike-out application. If such a point is taken (and the owners corporation does indeed wish to continue to prosecute the proceedings) then the owners corporation will need to be able to show that its legal proceedings are not an abuse of the relevant court or tribunal process.

As a result, owners corporations should ensure that an ordinary resolution of the owners corporation authorising the commencement of any legal proceedings is passed before their commencement. In circumstances where prior approval is not possible or has not been obtained (and the owners corporation wishes to continue to prosecute the legal proceedings) then appropriate steps should be taken as soon as practically possible to evidence that the owners corporation authorises and adopts the continuation of the legal proceedings. One important expression of this will be the owners corporation passing an appropriately worded resolution that evinces that intention.



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