

# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

## WOOLMER & ORS v THE OWNERS – UNITS PLAN NO 346 (Unit Titles) [2019] ACAT 95

UT 13/2019

**Catchwords:**           **UNIT TITLES** – where the *Unit Titles Management Act 2011* sets out the minimum number of members that may be elected to the executive committee at the annual general meeting, but there are insufficient candidates for the position – the validity of the election of the executive committee at the annual general meeting – whether the special general meeting was invalid – whether the owners corporation should reimburse an insurance excess to owners who have made a claim against the owners corporation insurance

**Legislation cited:**    *Insurance Contracts Act 1984* (Cth) s 7, 48  
                              *Legislation Act 2001* ss 138, 140  
                              *Strata Schemes Management Act 2015* (NSW) s 174  
                              *Unit Titles (Management) Act 2011* ss 31, 36, 39, 48, 100, 122  
                              129, Sch 3 cl 3.10 and 3.11, 3.5

**List of**

**Texts/Papers cited:** *Unit Titles (Management) Bill 2011* explanatory memorandum

**Tribunal:**               Senior Member H Robinson

**Date of Orders:**               11 September 2019

**Date of Reasons for Decision:** 18 October 2019

AUSTRALIAN CAPITAL TERRITORY )  
CIVIL & ADMINISTRATIVE TRIBUNAL ) UT 13/2019

BETWEEN:

**TIMOTHY WOOLMER**  
First Applicant

**ROSEMARY COCK**  
Second Applicant

**CHRISTINA WALKER**  
Third Applicant

AND:

**THE OWNERS – UNITS PLAN NO 346**  
Respondent

**TRIBUNAL:** Senior Member H Robinson

**DATE:** 11 September 2019

**IN CHAMBERS ORDER**

Having regard to the parties' submissions, the Tribunal makes the following order:

1. The application is dismissed.

.....*Signed*.....  
Senior Member H Robinson

## REASONS FOR DECISION

### The parties

1. The respondent, The Owners - Units Plan No 347, consists of 16 Class B residential units and common property.
2. The applicants are unit owners of three of the 16 units. They collectively hold 17.88% of the total unit entitlement.

### The hearing process

3. The parties attended a directions hearing on 3 July 2019. At that hearing, the parties agreed that this matter could be decided in chambers, subject to the parties filing documentation in accordance with directions made on that date, with either party entitled to request an oral hearing on or before 7 August 2019.
4. Both parties filed submissions in accordance with the directions. However, the Tribunal requested that the respondent provide a hardcopy of its submissions, and this was done on 2 September 2019. No party requested an oral hearing.
5. Both parties went to some effort to prepare comprehensive material, and I take this opportunity to thank the parties for this. The documentation was very helpful.
6. The Tribunal delivered its decision on 11 September 2019. The respondent sought written reasons. These are those reasons.

### Background

7. At its reduced quorum annual general meeting on 14 January 2019 (**the AGM**) the owners corporation elected only two persons to its executive committee (**the EC**). The applicants contend that this is a breach of section 39(2) of the *Unit Titles (Management) Act 2011 (UTM Act)*, which provides that a corporation with four or more members must have between three and seven members on its executive committee.
8. The applicants argue that several things flow from this:
  - (a) The subsequent purported appointment of a third executive committee member, Ms Georgina Tozer, was invalid as there was no executive committee to appoint her to;

- (b) The special general meeting on 3 June 2019 (**the special general meeting**) was not validly called, because there was no executive committee to call it; and
  - (c) The motions passed at the special general meeting are therefore invalid.
- 9. Accordingly, the applicants seek orders, pursuant to section 129(1)(l) of the UTM Act, that the special general meeting held on 3 June 2019 was void for irregularity and, consequently, that the owners corporation refrain from giving effect to any resolutions passed at that meeting.
- 10. Additionally, there was a dispute about the respondent's demand that the first and third applicants pay an insurance excess payable under an insurance policy taken out by the respondent.
- 11. On 25 February 2018 units belonging to two of the applicants, Mr Woolmer and Ms Walker, were flooded as a result of rain water flowing from the common property into their units. Their damage was compensated by the respondent's insurer pursuant to a building replacement and reinstatement policy purchased by the respondent in accordance with section 100 of the UTM Act. However, the applicants were required to pay the insurance excess of \$500. They say this is not permissible under the UTM Act.
- 12. Two other issues were resolved prior to these reasons.
- 13. On 7 May 2019 the second respondent emailed the EC members requesting to see copies of numerous documents. The request was not responded to and she sought Tribunal orders. Ms Cocks has since advised the Tribunal that she has the documents she required and therefore no orders were made on this point.
- 14. The applicants also sought an order that the owners corporation ensure, pursuant to section 122 of the UTM Act, that a notice showing the name of the corporation, and the address shown on the units plan for the service of documents, is continuously displayed in a conspicuous place. I understand that this has been done. Therefore no orders were made in relation to this matter either.

**Issue one: The validity of the election of the executive committee at the AGM of 14 January 2019**

**Background**

15. Unit owners representing only seven of the total 16 units at the property were present at the AGM on 14 January 2019. A quorum required eight unit owners to be present. Accordingly, any decisions made at the meeting were consequently reduced quorum decisions as per clause 3.10 and 3.11 of schedule 3 of the UTM Act.
16. The AGM minutes indicate a number of reduced quorum decisions were made at that AGM. All were carried unanimously. One of those motions (motion 9) was the election of the EC.
17. Only two unit owners nominated to be members of the EC and both were elected unanimously.
18. It would appear that during the AGM another unit owner, Ms Tozer, was contacted by email by the two elected members of the EC. She agreed to be appointed as the third member. This was not put to the vote and was not recorded in the minutes. However, the minutes, which were subsequently circulated to all members, did record that “[t]he Committee members are able to appoint a UP346 member to the vacant third position on the Committee.” I accept the applicants’ submission<sup>1</sup> that the minutes do not record that a third member of the EC was appointed that night, although I do not accept their submission that a third member was *elected* at the meeting, as it is quite clear that Ms Tozer was not elected.
19. The first applicant and the second applicant were present at the AGM. They did not nominate to be members of the executive committee.
20. A ‘Notice of Reduced Quorum Decision’ dated 21 January 2019 was issued by the respondent, as was required pursuant to clause 3.1 of schedule 3 of the UTM Act. There does not seem to be any suggestion that the applicants did not receive

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<sup>1</sup> Applicants’ submission ‘Correction of Facts,’ dated 8 August 2019 at [1]

this notice, although there is some suggestion it may have been sent outside the timeframe allowed.

21. Unit owners were entitled under clause 3.11(3) of schedule 3 of the UTM Act to disallow reduced quorum decisions by petition signed by majority of those entitled to within 28 days. No petition was received by the respondent.

### **Consideration**

22. The applicants argue that the AGM failed to elect an executive committee because it could not elect an executive committee with at least three members.
23. They applicants rely upon clauses 39(2) and (4) of schedule 3 of the UTM Act. This section provides in full:

#### **39 Executive committee—at and from the first annual general meeting**

- (1) *This section applies to the executive committee of an owners corporation beginning at the corporation's first annual general meeting.*
- (2) *The number of members of the executive committee (the executive members) is decided as follows:*
  - (a) *if there are only 1, 2 or 3 members of the owners corporation—each member of the owners corporation is an executive member;*
  - (b) *if there are 4 or more members of the owners corporation—the members of the corporation must, at a general meeting, decide—*
    - (i) *by ordinary resolution to have 3 to 7 executive members;*  
*or*
    - (ii) *by special resolution to have 8 or more executive members.*
- (3) *If the number of members of the owners corporation is equal to or falls below the number of executive members as decided by the corporation, all the members of the corporation are executive members (even if not nominated or elected).*
- (4) *The executive members—*
  - (a) *are elected (if necessary) by ordinary resolution at each annual general meeting; and*
  - (b) *hold office until the earlier of—*
    - (i) *the next annual general meeting; and*
    - (ii) *the executive member ceasing to be a member of the owners corporation.*

- (5) *An executive member (the removed member) of an owners corporation may be removed by the ordinary resolution that elects another member of the corporation to replace the removed member until the next annual general meeting.*
- (6) *The executive committee of an owners corporation may appoint a member of the corporation to fill a casual vacancy on the committee until the next annual general meeting.*
24. The applicants contend that the requirements of section 39(2) were not met, because the respondent must decide to have at least three executive committee members, and therefore the ordinary resolution appointing the EC with two members was invalid. The applicants further say that, as there was no valid executive committee, it was not open to the invalidly appointed and constituted EC to use section 36(6) to appoint a third person to a casual vacancy.
25. The respondents say, in response, that section 39(2) is concerned with deciding the number of executive committee members that an owners corporation will have, but that it does not actually impose upon an owners corporation an obligation to fill all those positions at the AGM. The respondent also points out that no consequences are prescribed for not filling all available positions.
26. This presents a rather interesting technical dilemma about interpretation of the Act. The owners corporation was required to have three executive members, yet only two persons nominated for election at the AGM. A phone call was then made to identify a third person, who was then appointed to the 'casual vacancy,' rather than submitting her name for election.
27. This is, to the best of my ability to discern, the first time this problem has come before the Tribunal. Given that parties appearing in this jurisdiction regularly submit that they have difficulty getting people to serve on an executive committee, I am somewhat surprised that I have not encountered this problem before.
28. There is much merit to the applicants' argument that the requirement to have three members is phrased in mandatory and absolute terms. However, I am concerned about the practical consequences of this. I am also satisfied that section 39(2) is ambiguous as to whether it is setting a minimum number of members or a minimal number of positions open for election. This means that I must work out the

meaning of the provision<sup>2</sup> having regard to other considerations that go beyond just the language of section 39.

29. In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation,<sup>3</sup> and the provisions of the Act must be read in the context of the Act as a whole.<sup>4</sup>
30. The purpose of section 39 is to establish a governing body for an owners corporation. A minimum number of members on an executive committee ensures appropriate representation and diversity of views. The minimum number should always be filled where there are candidates available. However, it is impractical to impose upon all owners corporations an obligation to always elect a minimum number of members at an AGM, lest they have no executive committee at all. Such a reading of section 39(2) has the potential to result in absurd or unreasonable outcomes that make some corporations unreasonable.
31. Consequently, while the situation is not beyond doubt, I am satisfied that section 39(2) of the UTM Act sets out the minimum number of members that may be elected at the AGM (in other words, the minimum number of positions open for election), but it does not necessarily require that minimum number actually be elected where there are insufficient candidates for the positions.
32. I note here that I have some concern that this interpretation could, potentially, be manipulated in a way to keep a potential executive committee member from participating in the process. However, this risk seems to me to be of a lesser seriousness than the alternative, which is that no executive committee can be elected at an AGM unless there are sufficient candidates. I am satisfied that could not have been the intention of the legislation. In any case, where a process was flawed or unfair, the resolution would ultimately be capable of review under section 129(1)(f).

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<sup>2</sup> *Legislation Act 2001* section 138

<sup>3</sup> *Legislation Act 2001* section 139

<sup>4</sup> *Legislation Act 2001* section 140

### The reduced quorum decision

33. Clauses 3.10 and 3.11 of schedule 3 of the UTM Act provide:

#### **3.10 Notice of reduced quorum decisions and adjournments**

(1) *If a decision (a reduced quorum decision) is made on a motion while a reduced quorum was present for the consideration of the motion, within 7 days after the meeting the owners corporation must give each person mentioned in section 3.6 (1) (Notice of general meetings) written notice of the reduced quorum decision.*

*Note If a form is approved under s 146 for a notice, the form must be used.*

(2) ...

#### **3.11 Reduced quorum decisions—effect**

(1) *A reduced quorum decision takes effect 28 days after the decision was made, subject to this section.*

(2) *Subsection (1) does not apply if the owners corporation fails to give notice of the reduced quorum decision under section 3.10 (1).*

(3) *A reduced quorum decision is disallowed if, within 28 days after the decision was made, the owners corporation is given a petition requiring that the decision be disallowed signed by a majority of people entitled to vote on the relevant motion at the time of signing (whether or not they were present or entitled to vote on the motion at the general meeting at which the decision was made).*

(4) *If, within 28 days after a reduced quorum decision is made, a motion is passed confirming the reduced quorum decision while a standard quorum is present at a general meeting for consideration of the confirmation motion, the reduced quorum decision takes effect on confirmation, whether or not a petition under subsection (3) is at any time given to the owners corporation.*

(5) *This section does not prevent a reduced quorum decision from being revoked at a general meeting, whether a standard quorum or reduced quorum is present while the revocation motion is being considered*

34. The owners corporation was required to give a ‘Notice of Reduced Quorum Decision’ to the owners within seven days after the meeting of the owners corporation. The notice issued pursuant to clause 3.1 schedule 3 was dated 21 January 2019.

35. Under the *Legislation Act 2001*, when something is required to be done ‘within’ a period of time, then the period “includes the stated day or the day of the stated act or event”. Consequently, the notice could be issued at any time up to 21 January 2019. There is no evidence one way or the other as to whether the

notice was given on that day, however, the presumption of validity must apply unless I am presented with evidence otherwise.

36. In any case, the applicants appear to challenge only the reduced quorum decision to elect the EC not the other decisions. Were I to make the orders sought by the applicants some concern would invariably arise in relation to the other decisions. It is not possible to 'pick and choose' the validity of reduced quorum motions in this way. Ultimately, however, I do not need to consider this issue, as there is no evidence that the 'Notice of Reduced Quorum Decision' was invalid.

**Issue two: Was the Special General Meeting of 3 June 2019 invalid?**

37. On 6 May 2019 five unit owners wrote to the chairperson of the EC and requested that a general meeting take place within 28 days. The five owners collectively held 29.8% of the total unit entitlement. Upon receipt of this letter the owners corporation was required, pursuant to clause 3.5 of schedule 3 of the UTM Act, to hold a general meeting within 28 days. It convened the general meeting on 3 June 2019.
38. On the evidence it appears that notice of this meeting was issued to all unit holders.
39. The meeting was held at an external venue and 13 out of the total 16 unit owners were present in person or by proxy, including the three applicants. Seven resolutions were passed. The minutes state that they were carried unanimously.
40. The second applicant, Ms Cox, was present at the beginning of the meeting but left prior to the voting, leaving 12 out of the 16 units represented in person or by proxy. The first and third applicants were in attendance throughout, although the first applicant was not financial and therefore was not eligible to vote. The third applicant voted in favour of the resolutions. The first applicant did not express any opposition to the proposals. The other two unit owners who sought the meeting also voted in favour of the resolutions.
41. As I understand the applicants' position, it is that this meeting was invalidly held, due to the EC committee being invalidly appointed, and thus having no authority to hold it.

42. For the reasons set out above, I am not satisfied that the EC was invalidly appointed. Consequently, I do not need to consider this matter further.

43. However, I note for completeness here the effect of section 48 of the Act.

**48 Executive committee—validity of acts**

*An act done honestly by an executive committee is not invalid only because there was a defect or irregularity in or in relation to the member's election or appointment.*

44. The respondent contends that this section “cures any defect or irregularity.”

45. I do not agree with the respondent’s interpretation that section 48 of the UTM Act ‘cures’ any defect in their appointments. However, it does provide that, as long as the EC members acted honestly, their acts are not defective or invalid merely because of it. That is a subtle but significant difference.

46. Clause 3.5 of schedule 3 of the UTM Act provides that:

**3.5 General meetings other than annual general meetings**

(1) *The executive committee of an owners corporation may call a general meeting, by notice under section 3.6, whenever it considers appropriate.*

(2) *Subsection (3) applies if the executive committee of an owners corporation receives a written request (a meeting request), stating the matters to be considered at the meeting, from people who are entitled to vote on all motions for units whose combined unit entitlement is at least 1/4 of the total unit entitlement in the units plan.*

(3) *The executive committee must hold a general meeting, by notice under section 3.6, within 28 days after the day it receives the meeting request.*

47. Clause 3.5 of schedule 3 required that the EC convene the 3 June 2019 meeting upon receipt of the request. The members of the EC did not exercise any discretion, and indeed had none to exercise.

48. The applicants have not suggested that there was any flaw in the process for convening the meeting, other than the status of the EC members who convened it. This would seem to be precisely the kind of situation that section 48 is designed to remedy.

49. Accordingly, even if there were some defect in the appointment of the EC members, the calling of the 3 June 2019 meeting is not invalid merely by a consequence of that.

**Issue three: The insurance excess**

50. The applicants seek an order pursuant to section 129(1)(a) of the UTM Act that the owners corporation repay to each of first and third applicants the sum of \$500, being the amount of insurance excess improperly collected from them.
51. The factual situation is crucial here. My understanding is that at no stage did the owners corporation prepare or lodge an insurance claim for the applicants and nor, on my understanding, did it liaise with the insurer. It is not entirely clear what happened, but as best I can determine on the information before the Tribunal:
- (a) the owners corporation did not make a claim on its insurance; but
  - (b) the owners corporation gave the first and third applicants the details of the relevant insurance policy taken out in the corporation's name; and
  - (c) the first and third applicants separately made a claim on that insurance and paid the \$500 excess directly to the insurer on that basis.
52. These are the facts as submitted by the respondent and there is nothing in the applicants' material that contradicts this.
53. The applicants rely upon sections 31 and 100 of the UTM Act. These provide, relevantly:

**31 *Recovery of expenditure resulting from member or unit occupier's fault***

- (1) *This section applies if an owners corporation for a units plan has in carrying out its functions incurred an expense, or carried out work, that is necessary because of—*
  - (a) *a wilful or negligent act or omission of a member of the corporation, or an occupier of the member's unit; or*
  - (b) *a breach of its rules by a member of the corporation, or an occupier of the member's unit.*
- (2) *The amount spent or the cost of the work is recoverable by the owners corporation from the member as a debt.*
- (3) *If the owners corporation recovers an amount under subsection (2) from a member for an act, omission or breach of an occupier of the*

*member's unit, the member may recover the amount from the occupier as a debt.*

(4) *In this section:*

***expense**, includes a reasonable legal expense reasonably incurred, including a legal expense relating to a proceeding in the ACAT.*

***work**, carried out by an owners corporation, means maintenance or anything else the corporation is authorised under this Act to do.*

**100 Building insurance by owners corporation**

(1) *An owners corporation for a units plan must insure and keep insured all buildings on the land for their replacement value from time to time against all of the following risks:*

...

(d) *bursting, leaking and overflowing of boilers, water tanks, water pipes and associated apparatus;*

...

(3) *A regulation may make provision in relation to an insurance policy required to be taken out by the owners corporation under this section including for the following:*

(a) *payment by unit owners of any excess payable under the policy;*

54. The applicants' argument is that section 31 of the UTM Act limits the circumstances under which the owners corporation can recover expenses incurred from a unit holder. Further, section 100(3) effectively provides that a regulation may make provision in relation to an insurance policy, including for the payment of unit owners of any excess payable under the policy. Because no regulation has been made under this section, the applicant's argue, the insurance excess cannot be recovered, except where 31 applies. There is no suggestion that the damage to which the insurance payment relates was in any way due to the applicant's negligence or omission or to a breach of the corporation rules, and therefore it is not in doubt that section 31 would not be available in this case.

55. The respondent's response is that, because the applicants dealt directly with the insurer, they are liable to pay the excess. The respondent says that there is nothing expressly in the UTM Act that requires an owners corporation to a make a claim against its building replacement and reinstatement insurance policy, or that requires that owners funds pay an excess for an insurance claim made by an individual unit holder on the corporations insurance.

56. I accept the respondent's arguments, as far as they go. Neither the UTM Act, or the UT Act, require an owners corporation to make a claim against the mandatory insurance policy, and nor does either Act impose a financial obligation to pay the excess required by the insurer for all claims made by individuals under that policy.
57. What the UTM Act requires the owners corporation to do is obtain and maintain the relevant insurance, that it raise funds from members to pay the premium as part of general fund contributions, and that it give details of the insurance policy to all unit owners at the AGM. There is no suggestion that this owners corporation has not met these obligations.
58. The *Insurance Contracts Act 1984* (Cth) (**IC Act**) applies to insurance contracts obtained pursuant to section 100 of the UTM Act, but only insofar as it does not, either expressly or by necessary implication, affect the operation of the UTM Act.<sup>5</sup>
59. On the evidence before me, the applicants are "third-party beneficiaries" as that term is defined by the IC Act, being:

*... a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.*

60. The relationship of third party beneficiary is set out in section 48 of the IC Act:

***Contracts of general insurance--entitlements of third party beneficiaries***

- (1) *A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.*
- (2) *Subject to the contract, the third party beneficiary:*
- (a) *has, in relation to the third party beneficiary's claim, the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured; and (b) may discharge the insured's obligations in relation to the loss.*
- (3) *The insurer has the same defences to an action under this section as the insurer would have in an action by the insured, including, but not*

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<sup>5</sup> *Insurance Contracts Act 1984* (Cth) section 7

*limited to, defences relating to the conduct of the insured (whether the conduct occurred before or after the contract was entered into).*

61. On the evidence before me, the insurer treated the applicants as third party beneficiaries within the meaning of this section. This means the applicants had the same obligations to the insurer as the corporation would have had, including the obligation to pay any excess. In other words, they processed their claims against the owners corporation insurance, subject to each of them paying the applicable excess required by the insurance contract.
62. Again, I am not entirely comfortable with this approach, and I do accept that this interpretation may in certain circumstances work an injustice to unit holders. I am also unsure whether this was the intention of the legislation. In particular, I note that the explanatory memorandum says that:

*The power to make regulations includes regulations providing for payment by unit owners of excesses payable under the policy. A regulation might require a proportion of the excess payable by the unit owner who has received a payment under the policy, or might include a cap on the amount payable by a unit owner towards an excess. Where there is no provision for the payment of excesses by unit owners, the unit corporation would need to pay all excesses for claims, as the policy of insurance is between the owners corporation and the insurance provider.<sup>6</sup>*

63. The passage of the explanatory memorandum may suggest that the intention of the Act was that the corporation make the claims and then that the excess payable be recovered from all unit owners. However, it is of minimal relevance where, as here, beneficiaries have dealt directly with the insurer. There is nothing in the explanatory memorandum that suggests it was the intention of the UTM Act that the owners corporations be responsible for the payment of excesses payable by an owner who makes a claim as a third party beneficiary under an insurance contract. It is not appropriate, nor permissible, to read into the act an obligation that is not there.
64. This raises the question as to whether the owners corporation should have made, or should be taken to have made, the insurance claim in its own right, rather than requiring that the owners make the claim on the insurance themselves.

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<sup>6</sup> *Unit Titles (Management) Bill 2011* – Explanatory Memorandum page 24

65. There is no means by which the owners can compel the corporation to make a claim on their behalf, other than perhaps where a motion has been put to a general meeting, in which case the proponent may seek an order giving effect to the resolution under section 129(1)(g) of the UTM Act.
66. I note that under section 174 of the *Strata Schemes Management Act 2015* (NSW), the and NSW Civil and Administrative Tribunal is given the express power to order a person to make or pursue an insurance claim if the tribunal finds the person has unreasonably refused to make or pursue the claim. The circumstances of this case raise the question as to whether such a clause should be inserted into the UTM Act as well. Ultimately, however, this is a policy question. The Tribunal cannot imply such an obligation and nor can it be implied on any reasonable reading of the UTM Act as it stands.
67. The applicants say that is if it is accepted that the owners corporation is not liable to ensure the individual units of members of the corporation, then individual owners would be entitled to bring an action against the owners corporation for nuisance. That may well be the case. However, no such application is before the Tribunal and therefore I cannot consider it.
68. Accordingly, for the reasons set out above, I must dismiss the application.

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Senior Member H Robinson