

# With Great Power Comes Great Responsibility: Strata Managers and Section 162 Appointments

## Introduction

In *Xabregas v The Owners – Strata Plan No 79205; Moallem v Consumer Trader & Tenancy Tribunal (No 2)* [2014] NSWSC 1027 (31 July 2014), the NSW Supreme Court emphasised the high responsibility of a strata manager appointed under section 162 of the Strata Schemes Management Act 1996. The case highlights that a section 162 strata manager must act carefully when acting in the name of the owners corporation especially if the strata manager makes a decision that the owners corporation should sue a lot owner.

In that case, the section 162 strata manager instructed the lawyer to commence legal proceedings in the owners corporation's name against the lot owners in a two lot strata scheme. The owners corporation lost and normally it would have had to pay the costs of the winning lot owners and also pay its own lawyer. However, the Court decided that the strata manager should pay the legal costs of both the owners corporation's lawyer and the winning lot owners. This type of costs order is commonly known as a personal costs order. In what may seem a paradox, the Court made the personal costs order against the strata manager only and not the lawyer who gave the strata manager the advice to commence the legal proceeding which the Court found had no reasonable prospect of success and was doomed to fail.

## Why the strata manager had to pay costs

The Supreme Court ordered the strata manager to pay costs because:

- The owners corporation, as the unsuccessful party, was “a man of straw” because the only way the owners corporation could pay legal costs if ordered against it would be by raising levies against the lot owners who were the successful parties and successful parties should not have to subsidise losing cases brought against them.
- The strata manager was the real party driving the litigation because of its section 162 appointment rather than the owners corporation in a general meeting.
- While the lawyer gave advice to commence the legal proceedings, the strata manager relying on that advice was just like any other losing party who acted on legal advice in bringing an unsuccessful case.

## What about the lawyer who gave the advice to commence legal proceedings?

The Court decided not to make a personal costs order against the lawyer. The Court said that its power to make personal costs orders against a lawyer is limited because it does not want to discourage lawyers commencing litigation for clients who have borderline cases.

Even though the owners corporation's case had no reasonable prospect of success and was doomed to fail, the lawyer was not acting for an ulterior purpose or engaging in an abuse of the processes of the Court, so no personal costs order was made against the lawyer.

It may seem unfair that the lawyer who recommended a legal proceeding that had no reasonable prospect of success and was doomed to fail, should avoid a personal costs order, whereas the strata manager who relied on that lawyer's advice should suffer a personal costs order. However, it may not be hopeless from the strata manager's point of view. The Court indicated that perhaps the strata manager's remedy in that situation was to sue the lawyer for indemnity in either contract or negligence.

### Implications

- Section 162 strata managers should be careful when suing in the owners corporation's name against lot owners.
- Section 162 strata managers should ensure they have proper insurance cover for any personal costs orders that may be made against them.
- The type of orders of appointment of section 162 strata managers does not usually make mention of any form of indemnity for strata managers and this raises the question of whether or not the common law right of indemnity would apply: see link for further information:

[Strata Managing Agents – Tips on Managing Risk](#)

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