



Supreme Court
New South Wales

Case Name: The Owners-Strata Plan No 21372 v Banovic (No 2)

Medium Neutral Citation: [2017] NSWSC 734

Hearing Date(s): On the papers

Date of Orders: 7 June 2017

Decision Date: 7 June 2017

Jurisdiction: Equity

Before: Darke J

Decision: Order made for transfer of proceedings to Civil and Administrative Tribunal.

Catchwords: PRACTICE AND PROCEDURE – transfer of proceedings – whether proceedings should be transferred to NSW Civil and Administrative Tribunal – dispute concerning rights and obligations under strata titles legislation – jurisdiction of Tribunal to determine dispute – more appropriate forum – where perceived advantage in pursuing claims in the Court no longer exists – proceedings transferred

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), ss 72, 73, 75, 77, Sch 4, cl 6(2),
Strata Schemes Management Act 1996 (NSW), ss 65, 117, 124, 137, 164
Strata Schemes Management Act 2015 (NSW), ss 124, 153, 232, 241

Cases Cited: North Wind Pty Ltd v Proprietors – Strata Plan 3143 [1981] 2 NSWLR 809
The Owners Strata Plan 21372 v Banovic [2017] NSWSC 177

Category: Procedural and other rulings

Parties: The Owners-Strata Plan No 21372 (Plaintiff)
Joe Banovic (First Defendant)
Nada Banovic (Second Defendant)

Representation: Counsel:
Mr T Davie (Plaintiff)
Mr L Geary (solicitor) (First Defendant)
Mr P Bambagiotti with Mr F F F Salama (Second Defendant)

Solicitors:
The Law Man (Plaintiff)
Salvos Legal (First Defendant)
Makinson d'Apice Lawyers (Second Defendant)

File Number(s): 2015/301623

Publication Restriction: None

JUDGMENT

- 1 In these proceedings the plaintiff Owners Corporation complains that the first defendant occupier of a unit in the strata scheme, and the second defendant owner of the unit, have obstructed or hindered the plaintiff in carrying out its repair obligations in respect of the common property. The plaintiff further complains that the defendants have used the unit, or permitted the unit to be used, in such a way as to cause a nuisance to the occupiers of other units in the scheme.
- 2 The proceedings were commenced on 15 October 2015. As currently framed, they are based on provisions of the now repealed *Strata Schemes Management Act 1996* (NSW) ("the 1996 Act"), and in particular ss 65 and 117. It is clear, however, that the plaintiff complains of continuing conduct on the part of the defendants, including conduct that has occurred since the commencement in November 2016 of the *Strata Schemes Management Act 2015* (NSW) ("the 2015 Act"). The plaintiff intends to rely also upon the cognate provisions of the 2015 Act, including s 153.
- 3 The plaintiff succeeded in obtaining certain interlocutory orders against the first defendant on 1 December 2015. Those orders were not complied with. The plaintiff pursued a contempt motion against the first defendant. However, on 28

February 2015, the Court ordered that the contempt motion be permanently stayed on the ground that the first defendant was not fit to be tried for contempt: see *The Owners Strata Plan 21372 v Banovic* [2017] NSWSC 177.

- 4 The proceedings were brought in this Court, rather than pursuant to the dispute resolution regime set forth in Chapter 5 of the 1996 Act, due in part to a concern about enforcement of any orders obtained against the first defendant, having regard to the limited nature of the enforcement powers available to the Civil and Administrative Tribunal (“the Tribunal”). The fate of the contempt motion, and the consequential acceptance by the plaintiff that seeking to enforce any orders against the first defendant is likely to be futile, obviously raised for consideration the question whether the proceedings should remain in this Court or should be transferred to the Tribunal. The question of the future conduct of the proceedings was raised in directions hearings. Orders were made for the provision of written submissions. Submissions have been provided by all parties. As no party suggested that a further oral hearing was necessary, the Court will proceed to deal with the question on the papers.
- 5 The plaintiff, whilst not formally applying for a transfer, submitted that cl 6(2) of Schedule 4 to the *Civil and Administrative Tribunal Act 2013* (NSW) conferred power upon the Court to order a transfer of the proceedings. Clause 6(2) of Schedule 4 provides for the transfer of certain proceedings in a court to the Tribunal. It is provided that transfer is to occur if the parties so agree, or if the court of its own motion or on the application of a party so directs, if the proceedings relate to a matter for which the Tribunal has jurisdiction to exercise a Division function.
- 6 A Division function is defined to mean a function of the Tribunal allocated to the Consumer and Commercial Division of the Tribunal by Schedule 4 to the *Civil and Administrative Tribunal Act*. The functions of the Tribunal in relation to the 2015 Act are allocated to the Consumer and Commercial Division. Those functions include dealing with applications made to the Tribunal under Part 12 of the 2015 Act (for example, applications for orders under ss 124, 232 and 241). Prior to the coming into force of the 2015 Act, the functions of the Tribunal in relation to the 1996 Act were allocated to the Consumer and

Commercial Division. Those functions included dealing with applications made to the Registrar of the Tribunal (under s 124 of the 1996 Act) pursuant to Chapter 5 of the 1996 Act, at least where such applications were referred to the Tribunal under either s 137(3) or s 164 of the 1996 Act.

- 7 In my opinion, the proceedings relate to a matter for which the Tribunal has jurisdiction to exercise a Division function within the meaning of cl 6(2) of Schedule 4. The subject matter of the proceedings is a dispute concerning statutory rights and obligations under the 1996 Act and the 2015 Act. The Tribunal is empowered to determine the controversy insofar as it concerns the 2015 Act. The Tribunal also has the power to determine the controversy insofar as it concerns the 1996 Act, albeit that the exercise of such power would, had the application been made to the Registrar of the Tribunal, require a referral of the application to the Tribunal. In these circumstances, it seems to me that the proceedings relate to a matter for which the Tribunal has jurisdiction to exercise functions that are allocated by the applicable legislation to its Consumer and Commercial Division. Accordingly, I agree with the submission of the plaintiff that the Court has the power to transfer the proceedings to the Tribunal.
- 8 No formal application for transfer was made by any party. Moreover, it could not be said that all parties agreed to a transfer. The Court may nonetheless direct a transfer of its own motion.
- 9 No party suggested that it was appropriate for this Court to proceed to determine the plaintiff's claims. The plaintiff accepted that it was now appropriate for the matter to be transferred to the Tribunal. The second defendant submitted that the Tribunal was the appropriate venue for a dispute of this kind. The first defendant opposed a transfer unless the proceedings against him were first dismissed or permanently stayed, but nonetheless submitted that this Court was not the appropriate jurisdiction for the determination of the dispute, and it was inappropriate for this Court to entertain the plaintiff's claims (see *North Wind Pty Ltd v Proprietors – Strata Plan 3143* [1981] 2 NSWLR 809 at 815-6).

- 10 Having regard to the nature of the claims made by the plaintiff pursuant to the strata titles legislation, I agree that it is more appropriate that the proceedings be determined in the Tribunal. It is generally desirable that disputes of this kind be determined in that forum in accordance with the comprehensive dispute resolution regimes found in the successive Strata Schemes Management Acts.
- 11 I accept the submission of the plaintiff that it was not inappropriate for it to commence in this Court rather than the Tribunal. It did so, at least in part, due to a concern over limitations that exist in the powers of the Tribunal in respect of enforcement and contempt (see ss 72, 73, 75 and 77 of the *Civil and Administrative Tribunal Act*). As was no doubt foreseen by the plaintiff, issues of enforcement emerged in this case. The Court's decision concerning the first defendant's fitness to face the charge of contempt means (and the plaintiff accepts) that in practical terms that avenue of enforcement now appears closed.
- 12 For the above reasons, I consider that an order directing the transfer of the proceedings to the Tribunal should now be made.
- 13 I do not accept the submissions made by each of the defendants that the proceedings should be dismissed. The plaintiff's case against the first defendant cannot be regarded as hopeless even if there are obvious obstacles in the way of enforcement of any orders obtained against the first defendant. Neither can the case against the second defendant be regarded as hopeless. The plaintiff should be permitted to continue to prosecute its claims.
- 14 The plaintiff recognises that it may be possible to discontinue against the first defendant without undermining its case against the second defendant, and the second defendant has offered not to take the point that the proceedings are "incompetent" if the first defendant ceases to be a party. It would be desirable for a way to be found which allows the first defendant to cease to be a party, but that is ultimately a matter for the parties themselves to achieve.
- 15 The Court has made various costs orders in the proceedings to date. These orders will remain. Those orders reflect the outcome of particular applications, including the plaintiff's contempt motion. The Court will not make any further orders for costs, as urged by the defendants (including by making the costs

already ordered payable forthwith). A party with the benefit of a costs order in its favour will be able to enforce the order once the proceedings are concluded against it. In circumstances where the merits of the plaintiff's claims remain to be determined, it is appropriate that the parties' costs, insofar as they are not covered by the existing orders, be treated as each respective party's costs in the proceedings that will henceforth continue in the Tribunal.

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