



Civil and Administrative Tribunal

New South Wales

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Case Name: Rosenthal v The Owners – Strata Plan No 20211

Medium Neutral Citation: [2020] NSWCATAP 251

Hearing Date(s): 23 November 2020

Date of Orders: 26 November 2020

Decision Date: 26 November 2020

Jurisdiction: Appeal Panel

Before: M Harrowell, Deputy President  
G Blake AM SC, Senior Member

Decision: (1) Leave is granted to the appellants to amend the notice of appeal in accordance with the document entitled “Amended Annexure A to Notice of Appeal” filed 15 September 2020.  
(2) The appeal is allowed and orders 1 and 2 made on 28 August 2020 in application SC 19/20671 set aside.  
(3) There is no order for costs.

Catchwords: JUDGMENTS AND ORDERS – Consent order – meaning of order – interim or final order – admissibility of extrinsic evidence  
  
ADMINISTRATIVE LAW – procedural fairness – order made without submissions from parties and without providing parties with an opportunity to be heard

Legislation Cited: Civil and Administrative Tribunal Act, 2013 (NSW)  
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Athens v Randwick City Council [2005] NSWCA 317;  
64 NSWLR 58  
Bookarelli Pty Ltd v Katanga Developments [2017] NSWCA 69  
Stead v State Government Insurance Commission

[1986] HCA 54; (1986) 161 CLR 141  
Wende v Horwath (NSW) Pty Limited [2014] NSWCA  
170; (2014) 86 NSWLR 674

Texts Cited: P W Young, "Construing Court Orders" (1998) 72 ALJ  
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Category: Principal judgment

Parties: Thomas Rosenthal (First Appellant)  
Jo-Anne Rosenthal (Second Appellant)  
The Owners – Strata Plan No 20211 (Respondent)

Representation: Counsel:  
A Fernon SC (Appellants)  
T Maltz (Respondent)

Solicitors:  
Speirs Ryan, Lawyers (Appellant)  
Grace Lawyers (Respondent)

File Number(s): AP 20/38124

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal of New South Wales

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Date of Decision: 28 August 2020

Before: G Meadows, Senior Member

File Number(s): SC 19/20671

## **REASONS FOR DECISION**

### **Introduction**

1 These proceedings relate to a dispute concerning the failure of the respondent (Owners Corporation) to repair and maintain common property which has led to water leaks and other issues affecting Lot 64 in the strata scheme which is owned by the appellants (Rosenthals). The original proceedings were

commenced in 2016, the Rosenthals seeking orders including for the repair of common property.

- 2 Work orders were originally made by the Tribunal on 29 August 2017. Those orders were varied by the Appeal Panel in application AP 17/41893 on 15 October 2018 (Work Order).
- 3 Subsequent to the Work Order being made, applications were made by the Owners Corporation seeking an extension of time to comply with those orders, a matter not presently relevant to the disposition of this appeal.
- 4 The Owners Corporation also filed two applications in the Tribunal seeking interim and substantive relief in connection with the carrying out of those works. These were application SC19/20664 (interim application) and application SC 19/20671 (substantive application). They were filed on 2 May 2019. In part, these applications related to a dispute concerning the liability of the Rosenthals to remove what were referred to as the “Disputed Items” to enable the work under the Work Order to be completed.
- 5 In the substantive application, the Owners Corporation sought an order under s 149(1) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) for the making of a common property by-law. This by-law would have imposed liability on the Rosenthals to pay for the maintenance of past works carried out to their lot which were said to have been unauthorised and which in turn were said to have affected, or which could affect, the good and serviceable repair of the common property. These works were said to include the Disputed Items.
- 6 In addition, both the interim application and the substantive application sought an order that the Rosenthals provide to the Owners Corporation access to Lot 64 to enable the Owners Corporation to “carry out remedial building works in compliance with the orders of the Appeal Panel in NCAT File No AP 17/41893”.
- 7 The interim application and substantive application were listed before the Tribunal for directions on 8 May 2019. Relevant to the present dispute, the Tribunal made the following orders by consent:
  2. The parties shall jointly approach the Appeal Panel with a view to extending the date for compliance with orders of the Appeal Panel in

proceedings No AP 17/41893 dated 15 October 2018 and varied on 4 March 2019 until 23 August 2019;

3. Pursuant to section 124 of the Strata Schemes Management Act 2015, the respondents shall provide the applicant with access to Lot 64 to enable the applicant's contractors to carry out the works the subject of the scope of works at Annexure pages 112 to 166 of the Chua Affidavit, and including the removal of the items designated "Lot owner Responsibility" at item 8.1 on page 163 of the annexure to the Chua Affidavit (the Disputed Items);

4. The question of liability for the costs of and incidental to the removal of the Disputed Items shall be determined at the final hearing of these proceedings if not otherwise agreed;

8 Directions were also made for the filing and service of evidence by the parties to facilitate a final hearing both applications. The hearing occurred on 21 August and 27 November 2019.

9 On 28 August 2020, the Tribunal made orders including the following:

**1 SC 19/20664**

(1) The application is dismissed.

**2 SC 19/20671**

(1) Pursuant to section 124 of the Strata Schemes Management Act 2015 (the Act), upon the provision of seven days notice in writing by the applicant, the respondents are to provide the applicant with access to lot 64 to enable the applicant's contractors to carry out remedial works in compliance with the orders of the Appeal Panel in NCAT file number AP 17/41893 (the works).

(2) The respondents are to comply with Order (1) above notwithstanding that they may disagree that the works will be effective or do not comply with the orders.

(3) The application is otherwise dismissed.

10 In short, the Tribunal dismissed the application under s 149 of the SSMA and made a further order for access (Order 2(1) above). The Tribunal published reasons for its decision (Reasons). In relation to the access order, the Tribunal said at [145]:

145. Given the passage of time, it is not clear to me whether access to lot 64 is still an issue. However, I make the orders below in order to obviate the necessity for further appearances before this Tribunal in relation to the current application.

11 The Tribunal did so despite the Owners Corporation saying in its submissions (both in writing and orally) that no issue of access remained for determination

by the Tribunal in circumstances where the parties had not otherwise provided submissions about the making of such an order.

- 12 In the meantime, that is between 2 May 2019 and 28 August 2020, a further application had been made by the Rosenthals. In that application, the Rosenthals sought to renew the proceedings under Sch 4 cl 6 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) because they contended that the Owners Corporation had failed to complete the work required by the Work Order by the due date of 23 August 2019 (renewal proceedings). At the date of hearing this appeal, the renewal proceedings were part heard before a differently constituted Tribunal to that which made orders on 28 August 2020 in the interim application and substantive application.

### **Notice of Appeal**

- 13 By Notice of Appeal dated 7 September 2020 the Rosenthals appealed the access order. Subsequently, an amended Annexure A to the Notice of Appeal was filed on 15 September 2020.
- 14 It does not appear that leave was granted by the Appeal Panel to amend the Notice of Appeal. However, it is appropriate we now make a formal order to permit that amendment, the parties proceeding on the basis of this amended notice.
- 15 The orders sought were as follows:
- (1) An order for the stay of orders (1) and (2) in NCAT proceedings SC 19/20671 pending the appeal; and
  - (2) An order striking out orders (1) and (2) made in the NCAT proceedings SC 19/20671 referred to above.
- 16 It is unnecessary to set out the grounds of appeal in detail. Rather, the issues necessary for us to determine can be identified from the submissions which the parties have filed and by reference to submissions made at the hearing of the appeal. In short, the Rosenthals' position can be summarised as follows:
- (1) There has been non-compliance by the Owners Corporation with the Work Order made by the Appeal Panel in the earlier proceedings.
  - (2) On its proper construction, the access order made by the Tribunal on 5 May 2019 is an interim order, not a final order. By reason of s 231(6)(a)

of the SSMA, that interim order has now expired, because a period of 3 months has elapsed since that order was made.

- (3) In respect of relief sought in the substantive application, the Owners Corporation did not finally seek an access order, having informed the Tribunal that no relief was sought. Reference was made to the Owners Corporation's written submissions at first instance (Appellants Submissions and Evidence Bundle Tab 7 p 258 para 4) and oral submissions made by its Counsel at the hearing on 21 August 2019: see appellants' transcript bundle (ATB) at tab 1 p 2 timestamp [00:04:38].
  - (4) In making the access order on 28 August 2020, the Rosenthals were denied an opportunity to be heard.
  - (5) Consequently, orders 1 and 2 made in the NCAT proceedings SC 19/20671 should be set aside and no further order should be made.
- 17 In response, the Owners Corporation initially asserted there was no denial of procedural fairness. However, a concession was properly made at the hearing of the appeal.
- 18 Nonetheless, the Owners Corporation said that no order should be made by the Appeal Panel, there being no practical injustice. Alternatively, the appeal should be adjourned to determine what orders should be made once the renewal proceedings had been determined by the Tribunal at first instance.

### **Consideration**

- 19 It is clear from the documents to which we have been referred and the Reasons of the Tribunal that the parties were not afforded an opportunity to make submissions in respect of the access order made by the Tribunal. This is an error of law for which there is a right of appeal: s 80(2)(b) of the NCAT Act.
- 20 As no final relief was sought and such relief was eschewed by the Owners Corporation in its submissions at first instance, the Rosenthals said it is sufficient for the access order and the order for the Rosenthals to comply with the access order made 28 August 2020 to be set aside.
- 21 In making this submission, the Rosenthals contended that order 2 made 8 May 2020 was not a final order. Rather, as outlined above, the Rosenthals submitted that the order was made at a hearing of the interim application and, on its proper construction, should be construed as an interim order only.

- 22 This issue of whether order 3 made 8 May 2020 was a final order is relevant in determining what relief should be granted in this appeal. If order 3 was an interim order, it might be appropriate for the Appeal Panel to remit the proceedings to the Tribunal (either as originally constituted or as presently constituted for the purpose of determining the renewal proceedings) for the purpose of deciding what, if any, final relief should be granted in respect of access. On the other hand, if order 3 made 8 May 2020 is properly construed as a final order, it would be inappropriate to remit the proceedings as the issue of access was finally resolved on that date.
- 23 In submitting that the order was an interim order, the Rosenthals made reference to s 231(6) of the SSMA and the time limit that applies to interim orders under that section. They said that the orders were made because of the need to remove the Disputed Items in the context of the Owners Corporation being required to carry out the Work Order by the due date. In effect the access order was intended to operate on an interim basis to facilitate that work being undertaken immediately, the issue of who was to pay for removal of the Disputed Items being left for resolution is part of determination of the substantive proceedings.
- 24 The Rosenthals said the Tribunal could not make an access order unlimited in time because to do so would have the effect of “circumventing the intention of the Appeal Panel orders which are, justifiably, limited in time for compliance to ensure the relevant works are completed within a reasonable period of time”.
- 25 In making these submissions, the Rosenthals sought to rely on the circumstances in which the order was made as justifying a conclusion that, on its proper construction, it was an interim order and not a final order.
- 26 We do not accept the submission the order was an interim order.
- 27 A court or Tribunal may have regard to extrinsic material where an order is ambiguous, a court or tribunal required to interpret the order may have regard to “extrinsic material, including the reasons for judgment” – Hodgson JA in *Athens v Randwick City Council* [2005] NSWCA 317; 64 NSWLR 58 at [29], referring to Justice P W Young, “Construing Court Orders” (1998) 72 ALJ 117: see also *Bookarelli Pty Ltd v Katanga Developments* [2017] NSWCA 69 at [40].

However, such evidence is not admissible to contradict the language of the instrument when it has a 'plain meaning': *Wende v Horwath (NSW) Pty Limited* [2014] NSWCA 170; (2014) 86 NSWLR 674 per Basten JA at [60].

- 28 In the present case, in our view order 3 made 8 May 2020 was a final order and there is no ambiguity which would permit the admission of extrinsic material in aid of its construction.
- 29 Order 3 specified the work as being that in the annexure to the "Chua Affidavit" including the removal of the Disputed Items. There is no dispute that the expression "Chua Affidavit" is referring to the affidavit of Lelien Chau found in the Respondent's Bundle of Documents in this appeal at p 118 and following.
- 30 While the Rosenthals contended that this work was only a subset of the work required by the Work Order, this fact does not give rise to any relevant ambiguity in the order nor does it mean it was intended to be an interim order only.
- 31 The order was made by consent pursuant to s 124 of the SSMA. It was not expressed to be interim orders made under s 231(6). The fact that it was a final order is corroborated by order 4, which confirms that the only issue remaining in connection with access (including in respect of the Disputed Items) is who should bear the costs for the removal if not otherwise agreed. Otherwise, there was no ambiguity in terms of what access was permitted and the fact it was unlimited in time does not create any relevant ambiguity, access being granted for the purpose of carrying out particular work.
- 32 As to the suggestion that the access order, unlimited by time, had the effect of displacing the time required for carrying out the Work Order made by the Appeal Panel, we do not accept this submission. The order does not say this and does not purport to affect the time for completion of the required work. Further, at the time Order 3 was made, namely 8 May 2020, the Tribunal recorded that the time for completion of the works was to be the subject of a further order to be made by the Appeal Panel: see Order 2 made 8 May 2020.
- 33 Otherwise, there is no reason to conclude that the order was not, by its terms, a final order intended to permit access for the purpose of carrying out the Work



Order (or at least some of it), including removing the Disputed Items as necessary.

- 34 Finally, the fact that the access order being a final order may have an impact on the renewal proceedings and the issue of which party has complied with relevant orders of the Tribunal is irrelevant to its proper construction. Such issues do not arise for determination in this appeal and are matters which remained to be dealt with, if relevant, in the renewal proceedings.
- 35 Prima facie, this would mean that an order should be made to set aside orders 1 and 2 made 28 August 2020.
- 36 However, it was submitted by the Owners Corporation that we should nonetheless dismiss the appeal. This was because there was no practical injustice. During the hearing, reference was made to the decision of the High Court in *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141: see eg at [9]-[10]. The Owners Corporation submitted that there was no evidence of prejudice in the Tribunal making the access order in the form that it did.
- 37 Alternatively, the Owners Corporation said we should adjourn the hearing of the appeal until determination of the renewal proceedings.
- 38 We do not accept these submissions.
- 39 Order 1 made by the Tribunal on 28 August 2020 was in different terms to consent order 3 made 8 May 2020. Order 3 granted access by reference to the scope of work in the Chua Affidavit and the Disputed Items. Order 1 made 28 August 2020 grant access by reference to the Work Order made by the Appeal Panel. Order 1 was not sought by the Owners Corporation at the hearing of the substantive proceedings. To allow that order to stand may permit the Owners Corporation to take advantage of an order improperly made after the date required by the Work Order as an excuse for any non-compliance with the Work Order.
- 40 Further, we have been told that the work contemplated by each of the orders is not coextensive and there is a dispute about this matter. This dispute should be

left for resolution by the Tribunal at first instance when resolving the renewal proceedings.

- 41 As to adjourning the appeal, there is no point to adopting this course. Any issues arising from a determination of the renewal proceedings will need to be the subject of a separate appeal.
- 42 It follows we should make orders allowing the appeal and setting aside orders 1 and 2 made by on 28 August 2020 in application SC19/2067.

### **Costs**

- 43 In the event we determined order 3 made 8 May 2020 was a final order, the Rosenthals accepted there were no special circumstances warranting an order for costs and that no order for costs should be made. The Owners Corporation's position was that no order for costs should be made in any event.
- 44 In light of the conclusion we have reached, there will be no order for costs.

### **Orders**

- 45 The Appeal Panel makes the following orders:
- (1) Leave is granted to the appellants to amend the notice of appeal in accordance with the document entitled "Amended Annexure A to Notice of Appeal" filed 15 September 2020.
  - (2) The appeal is allowed and orders 1 and 2 made on 28 August 2020 in application SC 19/20671 set aside.
  - (3) There is no order for costs.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

### **Amendments**

10 December 2020 - Representation corrected - "T Waltz" corrected to "T Maltz".

Typographical errors - [23] "not interim order" corrected to "an interim order" & "Oder" corrected to "Order".

10 December 2020 - File number corrected.

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