



Civil and Administrative Tribunal

New South Wales

Case Name: Delmont Purcell v The Owners - Strata

Medium Neutral Citation: [2021] NSWCATAP 3

Hearing Date(s): 24 September 2020

Date of Orders: 8 January 2021

Decision Date: 6 January 2021

Jurisdiction: Appeal Panel

Before: A Britton, Principal Member
A Boxall, Senior Member

Decision: (1) Leave to appeal refused.
(2) Appeal dismissed.
(3) Application for costs is refused.

Catchwords: APPEAL — NCAT — leave to appeal from decision of Consumer and Commercial Division of NCAT — assessment of whether decision is “against the weight of evidence” where Appeal Panel is not provided with all of the material that was before the Tribunal

COSTS — whether special circumstances warranting an award for costs are established — whether discretion to award costs should be exercised

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Property and Stock Agents Act 2002 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)

Category: Principal judgment

Parties: Delmont Purcell (Appellant)
Jaridel Pty Ltd (Second Appellant)
and Nimmitabel Waters Pty Ltd (Third Appellant)

The Owners Strata Plan No 84716 (Respondent)

Representation: Solicitors:
Appellant (Self-Represented)
Bannermans Lawyers (Respondent)

File Number(s): AP 20/30042

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 12 June 2020

Before: L Wilson, Senior Member

File Number(s): SC 20/06181

REASONS FOR DECISION

- 1 Ms Delmont Purcell owns one of 13 lots in a strata scheme in Neutral Bay, Sydney, The Owners - Strata Plan No 84716 (the **Owners Corporation**). In addition, Ms Purcell is a director of the second and third appellants, respectively, Jaridel Pty Ltd and Nimmitabel Waters Pty Ltd. Each holds lots in the strata scheme. Ms Purcell, Jaridel and Nimmitabel (the **appellants**) hold a cumulative unit entitlement in the scheme of 56%.
- 2 There is a long history of conflict between the appellants and other lot holders, over a range of issues relating to the property, including the use of compost bins, the maintenance of the property's swimming pool and smoking by residents.
- 3 In February 2020, the appellants applied to the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (**NCAT**) for various orders under the *Strata Schemes Management Act 2015* (NSW) (**SSM Act**). At a directions hearing on 14 February 2020, the Owners Corporation foreshadowed its intention to seek the compulsory appointment of a strata manager under s 237 of the SSM Act.

- 4 At a hearing on 12 June 2020, the parties agreed that the Tribunal should exercise the power to appoint a strata manager under s 237 but disagreed about who should be appointed to that role. The Tribunal decided to appoint the Owners Corporation's nominee, the existing strata managing agent, O'Neill Strata Management Pty Ltd (**O'Neill**), for a period of two years.
- 5 In addition, at that hearing the Tribunal made orders about the placement and use of compost bins on the common property.
- 6 The appellants appeal from the decision to appoint O'Neill. They contend that the decision was unreasonable, claiming that, since its appointment in 2017, O'Neill has "proven to be duplicitous, dishonest" and, in addition, has charged excessive fees for the work performed. The appellants do not challenge the order made by the Tribunal in relation to compost bins.
- 7 The Owners Corporation urge us to dismiss the appeal and make an order for costs.
- 8 For the reasons that follow, we have decided to dismiss the appeal and to decline to make an order for costs

Statutory basis of the appeal

- 9 The appellants have a right to appeal against the decision at first instance as of right on any question of law or with the leave of the Appeal Panel: s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the **NCAT Act**).
- 10 Where a decision the subject of the appeal is a decision of the Consumer and Commercial Division of NCAT, cl 12 of Sch 4 to the NCAT Act limits the circumstances in which an Appeal Panel may exercise the power to grant leave to appeal:

12 Limitations on internal appeals against Division decisions

- (1) An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
 - (a) the decision of the Tribunal under appeal was not fair and equitable, or
 - (b) the decision of the Tribunal under appeal was against the weight of evidence, or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

11 In *Collins v Urban* [2014] NSWCATAP 17 (**Collins**), an Appeal Panel of NCAT stated at [84] that there must be a “sound basis” for granting leave under s 80(2)(b) of the NCAT Act. The Appeal Panel stated that an appellant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at, or that there was a bona fide challenge to an issue of fact. Ordinarily, it will only be appropriate to grant leave to appeal in matters that involve:

- (a) issues of principle;
- (b) questions of public importance or matters of administration or policy which might have general application; or
- (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
- (d) a factual error that was unreasonably arrived at and clearly mistaken; or
- (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

(Citations omitted)

Grounds of appeal

12 In the notice of appeal, the appellants sought an order under s 237 of the SSM Act appointing strata managing agent, Foreshew Strata Pty Limited in substitution for O'Neill.

13 The appellants contend that the decision to appoint O'Neill was both against the weight of evidence and not fair and equitable. They argue that the Tribunal failed to have regard to, or adequate regard to:

- (1) the history of O'Neill's alleged mismanagement of the Scheme;
- (2) the history of the scheme being dysfunctional throughout the period of O'Neill's tenure as strata manager;
- (3) O'Neill's bias against Ms Purcell, as evidenced by its actions in supporting another lot holder in an application to the NSW Local Court for an AVO to be made in respect of Ms Purcell.

Power to appoint a “compulsory” strata manager

- 14 The respondent, The Owners - Strata Plan No 84716, is a body corporate, made up of the owners of the lots in that strata scheme: s 8 of the SSM Act. Section 9 of the SSM Act sets out the responsibilities of the owners corporation:

9 OWNERS CORPORATION RESPONSIBLE FOR MANAGEMENT OF STRATA SCHEME

- (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
 - (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—
 - (a) the management and control of the use of the common property of the strata scheme, and
 - (b) the administration of the strata scheme.
 - (3) The owners corporation has responsibility for the following—
 - (a) managing the finances of the strata scheme (see Part 5),
 - (b) keeping accounts and records for the strata scheme (see Parts 5 and 10),
 - (c) maintaining and repairing the common property of the strata scheme (see Part 6),
 - (d) taking out insurance for the strata scheme (see Part 9).
- 15 The owners corporation for a strata scheme may be assisted in carrying out its management functions under the SSM Act by a “strata managing agent” appointed in accordance with Part 4 of that Act: s 11(b) of the SSM Act. A strata managing agent is “a person appointed as the strata managing agent for a strata scheme”: s 4 of the SSM Act.
- 16 An owners corporation may appoint a person who is the holder of a strata managing agent's licence under the *Property and Stock Agents Act 2002* (NSW) to be the strata managing agent of the scheme: s 49(1). That appointment must be in writing and authorised by a resolution at a general meeting of the owners corporation: s 49(2). An owners corporation may delegate to the appointed strata managing agent some or all of its functions: s 52(1).

- 17 In the alternative, as occurred in this matter, in certain circumstances the Tribunal may exercise the power to appoint a strata managing agent powers under the SSM Act:

237 ORDERS FOR APPOINTMENT OF STRATA MANAGING AGENT

(1) Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent--

- (a) to exercise all the functions of an owners corporation, or
- (b) to exercise specified functions of an owners corporation, or
- (c) to exercise all the functions other than specified functions of an owners corporation.

(2) Order may confer other functions on strata managing agent The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—

- (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
- (b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
- (c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made The Tribunal may make an order only if satisfied that--

- (a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

...

(4) Qualifications of person appointed A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must--

- (a) hold a strata managing agent's licence issued under the Property and Stock Agents Act 2002 , and
- (b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so

...

Background to the appeal

- 18 The property the subject of the strata scheme was developed by Ms Purcell's family in the mid-1990's. It was converted to strata title in 2010.

- 19 There is a long history of dispute between Ms Purcell and other lot holders. Between May 2014 and July 2017, Bright and Duggan acted as strata managing agent, appointed under s 162 of the *Strata Scheme Management Act 1996* (NSW), the predecessor of s 237 of the SSM Act.
- 20 In September 2017 at Ms Purcell's recommendation, the Owners Corporation appointed O'Neill as its strata managing agent. O'Neill acted under that appointment until June 2020, when appointed by the Tribunal.

Decision under appeal

- 21 The Tribunal appointed O'Neill for a period two years to exercise all functions of the Owners Corporation, except:
- “(a) The making of an exclusive use or special privilege by-law; and/or
 - (b) The making of a licence; and/or
 - (c) The approval of a subdivision,
- With such issues referred to in (a) - (c) above to be determined by The Owners - Strata Plan No. 84716 at a general meeting pursuant to the usual requirements under the Strata Schemes Management Act 2015.”
- 22 The appellants do not challenge the Tribunal's decision to make an appointment under s 237 of the SSM Act, the term of that appointment or the scope of functions conferred under that appointment. The appellants' challenge to the order relates solely to the appointment of O'Neill.
- 23 In written reasons for its decision, the Tribunal recorded that the parties agreed that the management of the subject scheme “is not functioning or is not functioning satisfactorily” and therefore the power to appoint a manager under s 237(1) of the SSM Act could be exercised. In addition, the Tribunal noted that O'Neill and Foreshew each satisfied the requirements for appointment listed in s 327(4) of the SSM Act, namely to hold a strata managing agent's licence issued under the *Property and Stock Agents Act* and to consent in writing to their proposed appointment.
- 24 The Tribunal went on (at 4) to consider whether to appoint O'Neill as proposed by the appellants or Foreshew as proposed by the appellants. The Tribunal identified the following factors which weighed in favour of the appointment of each nominee:

In favour of Foreshew is that it has a cheaper base management fee, but onto that will be charged many schedule fees which are unknown. Another plus is that it is a new firm with no history with the personalities involved in this scheme.

In favour of O'Neill is that it has managed the strata scheme, in difficult circumstances, for three years. It knows the characters involved and yet it is still willing to manage the scheme, albeit on a compulsory basis rather than voluntary as it has been. It knows the issues and the scheme and knows it will cost \$6,600 plus GST and disbursements to manage the scheme, and his quotation is based on past experience. Despite many submissions about O'Neill's incompetence and dishonesty and bias against Ms Purcell, the Tribunal does not accept they are conducting themselves in an incompetent, dishonest or biased manner. Mr O'Neill frankly attests that "Delmont Purcell is one of my most challenging lot owners I have ever encountered" in his 24 years as a strata manager ... From all the evidence of the parties, the Tribunal accepts that Ms Purcell would be a challenging lot owner to deal with in this strata scheme ... Clearly, because of the AVOs which have been granted and all the other matters set out in the uncontested witness statement of fellow resident Julia Cantarella, Ms Purcell would be a difficult lot owner for any strata manager to manage. Yet O'Neill is still willing to manage this scheme for a further two years.

- 25 The Tribunal went on (at 4) to consider the factors which weighed against the appointment of O'Neill and Foreshew:

Against Foreshew is that there is no evidence that it is aware of the significant personal issues within this scheme, and is nonetheless willing to take it on. It is less desirable for the scheme to have yet another strata manager, as this will be the third in several years, the second compulsorily appointed manager and the third including O'Neill who has been voluntary. The fact that Foreshew has no bad relations with the applicant Ms Purcell is less relevant as it appears Ms Purcell has a history of becoming discontented with the strata managers, even if she initially suggests their appointment. The Tribunal considers it a very possible outcome that, over time, Ms Purcell will also come to loathe Foreshew if Foreshew were appointed as she is requesting.

- 26 Against O'Neill is their higher base management fees, but this is known by the owners corporation who instructed their lawyer to seek their appointment despite the higher fees. It is less important because when spread over 17 units the difference is not prohibitive. It is also relevant that O'Neill knows the hours and work involved and the fees are based on the reality of the situation. Against O'Neill is that there clearly has been some friction with Ms Purcell, but that is not to say O'Neill is biased against Ms Purcell, just that their relations may be strained. However, this cannot be a factor against O'Neill in circumstances where the Tribunal finds it likely Ms Purcell will take issue with any strata manager even if she recommends or votes for their initial appointment as was the case with O'Neills.

27 The Tribunal decided that the balance of considerations favoured the appointment of O'Neill reasoning (at 4):

In all the circumstances the Tribunal finds O'Neill to be appropriate to continue as the strata manager but for the next two years as the compulsorily appointed strata managers. Their experience in managing this particular scheme and their willingness to continue to do so count strongly in their favour.

Was the decision against the weight of evidence?

28 In its reasons for decisions (at 3) the Tribunal rejected the appellants' claim that O'Neill had been managing the scheme in an incompetent and dishonest manner and, in addition, had been biased against Ms Purcell. In support of the contention that that finding was against the weight of evidence the appellants assert that O'Neill:

- (1) "doctored" the minutes of the minutes of the strata committee meetings;
- (2) assisted a consortium of owners to have Ms Purcell "criminally charged";
- (3) had charged excessive fees for its services in managing the strata;
- (4) refused to give Ms Purcell access to the pool and electricity cupboard.

29 In support of those claims the appellants pointed to the following material that was apparently before the Tribunal at first instance:

- (1) Reports prepared by building manager, Clean Green Strata, of periodical inspections of the common property for the months November and December 2019;
- (2) A Computer Operational Policing System (COPS) report dated 3 February 2020, which recorded that Ms Purcell reported to NSW Police that a contract pool cleaner had removed a "No Smoking" sign she had erected. A verbal argument ensued. Ms Purcell is reported to have said,, "Go back to South Africa; nobody wants you here", to which the cleaner is reported to have replied, "John wants to get a contract against you";
- (3) Several invoices issued to Jaridel Pty Ltd for expenses relating to the maintenance of the pool, totalling about \$1,000;
- (4) Photographs apparently taken on the common property of broken flowerpots (2) and cigarette butts (1);
- (5) Numerous letters from Ms Purcell to O'Neill outlining her concerns about various issues, including: the provision of keys to electricity cupboards and garden gates for "owners involved in the running of the premises"; lots owners allegedly entering into short-term rental agreements; the use of CCTV cameras to monitor the common property; the removal of compost bins from the common property;

O'Neill's alleged failures to enforce the purported by-law banning visitors from using the pool, to notify Ms Purcell and her husband of strata meetings, and to take action in relation to a resident who discarded cigarette butts throughout the common property.

- 30 The appellants assert that the oral evidence given by Ms Purcell at the hearing at first instance, together with the documentary material they filed in those proceedings, supports their claim that in managing the strata plan O'Neill had been incompetent, dishonest and biased against Ms Purcell, and the allegations listed at [28] above. Neither party filed a transcript or sound recording of the proceedings at first instance. In orders made on 20 July 2020, the Appeal Panel directed the parties to provide a transcript or sound recording of the hearing if they proposed to rely on any oral evidence given in proceedings at first instance.

Consideration

- 31 To establish that the decision to appoint O'Neill was made "against the weight of evidence", the appellants must establish that "the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal Member could reach": *Collins* at [77].
- 32 Once satisfied that the proposed strata manager met the qualifications for appointment listed in s 237(4) of the SSM Act, the Tribunal was required to decide whether to appoint O'Neill, Forshew or some other strata managing agent. The Act does not prescribe any matters the Tribunal was required to take into account in evaluating the respective merits of the nominees. Nonetheless, we accept that the issue of whether O'Neill had failed to properly discharge the obligations of its role was relevant to the Tribunal's determination.
- 33 The Tribunal had before it the history of the long-running dispute between Ms Purcell, other lot owners and O'Neill. The Owners Corporation filed in the proceedings at first instance a detailed statement made 5 June 2020 by O'Neill's principal, Mr John O'Neill. In that statement, Mr O'Neill addressed the multiple allegations made by Ms Purcell about O'Neill's management of the scheme. Attached to that statement were contemporaneous documents and

business records said by Mr O'Neill to support the claims made in that statement. In addition, the Owners Corporation filed a detailed statement prepared by lot owner, Ms Julia Cantarella, disputing many of the claims made by Ms Purcell.

- 34 A difficulty posed in this appeal is that the appellants provided to the Appeal Panel only some of the documentary material, and none of the oral evidence, that was before Tribunal at first instance. Self-evidently, this makes it difficult, if not impossible, to evaluate whether, as contended by the appellants, the finding made by the Tribunal — that O'Neill was suitable to act as strata managing agent — was against the weight of evidence. We are being asked to evaluate whether the evidence “in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal Member could reach”, in circumstances where we have not been provided with all of the material that was before the Tribunal.
- 35 The material filed by the appellants in this appeal falls a long way short of establishing the allegations made by the appellants against O'Neill. While Ms Purcell may hold the genuine belief that since its appointment O'Neill has failed to properly discharge its role and was biased against her, objectively assessed, the material filed in this appeal does not support that belief.
- 36 The contention that the finding made by the Tribunal that O'Neill was suitable to act as strata managing agent was made against the weight of evidence must be rejected.

Was the decision to appoint O'Neill not fair and equitable?

- 37 In deciding whom to appoint as strata managing agent, the Tribunal considered the respective merits of O'Neill and Foresheew.
- 38 The Tribunal identified the following factors favouring Foresheew's appointment: its “cheaper base management fee” and the absence of any history with the “personalities involved in the scheme”. The Tribunal identified the following considerations as weighing against Foresheew's appointment: its “unknown scheduled fees”; its lack of knowledge of the “significant personal issues” within the scheme; the number of strata managers appointed over a relatively short

period. While acknowledging that its lack of any history of “bad relations” with Ms Purcell was a powerful factor favouring Foresheew, the Tribunal considered this to be of limited significance, given Ms Purcell’s history of becoming “discontented” with strata managers. The Tribunal considered it “a very possible outcome” that, if appointed, over time, Ms Purcell would “come to loathe Foresheew”.

- 39 The Tribunal identified the following factors as favouring O’Neill’s appointment: its history of managing the scheme for three years in “difficult circumstances”; the likelihood that, given its familiarity with the scheme, its estimate of its costs would be realistic; its willingness to undertake the role despite Mr O’Neill’s candid assessment that “in his 24 years as a strata manager Delmont Purcell is one of my most challenging lot owners I have ever encountered”.
- 40 Having addressed the threshold issue of whether O’Neill had acted dishonestly and incompetently in the discharge of its obligations as strata manager, the Tribunal went on to consider the respective merits of the nominees. It determined that of the two, O’Neill was the better choice and gave cogent reasons for that decision. That decision was open to the Tribunal on the available material. We are not persuaded that that decision was not fair and equitable.

Leave to appeal

- 41 The appellants have failed to establish that the decision to appoint O’Neill was made against the weight of evidence and/or was not fair and equitable. It follows that the power to grant leave to appeal cannot be exercised. Leave to appeal must be refused.

Costs

- 42 The Owners Corporation seeks its costs in the appeal. It contends that the appeal was hopeless and lacked any tenable basis in law or fact. Further, it contends that the proceedings commenced by the appellants in NCAT, and the appeal itself, was based on nothing more than a “multitude of wild claims” unsupported by evidence. In addition, the Owners Corporation contend that it is relevant to the assessment of their application for costs that the appellants have brought four sets of concurrent proceedings in NCAT.

- 43 The appellants oppose the application for costs.
- 44 Section 60 of the NCAT Act creates the general rule that each party to proceedings is to pay their own costs: s 60(1). An Appeal Panel may only order costs “if satisfied that there are *special circumstances* warranting an award of costs (emphasis added)”: s 60(2). Section 60(3) sets out a non-exhaustive list of factors that may be taken into account in deciding whether there are special circumstances warranting an award of costs:
- (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
 - (d) the nature and complexity of the proceedings,
 - (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
 - (f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),
 - (g) any other matter that the Tribunal considers relevant.
- 45 The term “special circumstances” is not defined by the NCAT Act. It has been interpreted to mean circumstances that are out of the ordinary but not necessarily extraordinary or exceptional. The discretion to award costs must be exercised judicially having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs. (See *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48]; *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [23]-[31]; *Nguyen & Anor v Perpetual Trustee Company Ltd*; *Perpetual Trustee Company Ltd v Nguyen & Anor (no 2)* [2016] NSWCATAP 168 at [16].)

Consideration

- 46 We agree with the Owners Corporation’s contention that, in light of the grounds advanced and the material filed in support of the appeal, there was no reasonable prospect that the appeal would succeed. Arguably, it lacked any tenable basis in law.

- 47 With respect to the second ground in support of the costs application, the commencement of concurrent proceedings by the appellants, the available material is insufficient to determine whether, as suggested by the Owners Corporation, those proceedings are unmeritorious or demonstrate that the appeal proceedings were vexatious.
- 48 We have considerable sympathy for those lot owners who are frustrated by what they see as Ms Purcell's attempts to dictate how the strata scheme is managed and to act unreasonably in her dealings with O'Neill, other lots holders and residents. Nonetheless, we are not persuaded that it is appropriate to exercise the discretion to award costs, notwithstanding our view that the appellants' case probably lacked any tenable basis in law. Had there been evidence of other factors supportive of a finding of special circumstances, such as the appellants conducting the proceedings in a way that unnecessarily disadvantaged the Owners Corporation, or, for some collateral purpose, we may have been more inclined to exercise the discretion to award costs.
- 49 While the considerations are finely balanced, we are not satisfied that special circumstances warrant an order for costs in this appeal.

Orders

- 50 We make the following orders:
- (1) Leave to appeal refused.
 - (2) Appeal dismissed.
 - (3) Application for costs is refused.

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

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