BCS Strata Management Pty Ltd v Owners Corporation Strata Plan 61759 - [2016] NSWCATAP 257

Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:	**BCS Strata Management Pty Ltd v Owners Corporation Strata Plan 61759 [2016] NSWCATAP 257**
Hearing dates:	8 August 2016
Date of orders:	30 November 2016
Decision date:	30 November 2016
Jurisdiction:	Appeal Panel
Before:	J Harris SC, Senior Member D A C Robertson, Senior Member
Decision:	(1) Appeal allowed in part. (2) Set aside the decision of 14 April 2016 and order instead: 1. The respondent, BCS Strata Management Pty Ltd, is to pay the applicant, Owners Corporation Strata Plan 61759, the sum of $3,575.00 immediately. 2. The respondent is to pay the appellant's costs of the appeal. 3. If either party seeks to submit that the Appeal Panel should make a different order in respect of the costs of the application or the appeal, they may file within seven days written submissions of no more than three pages. Within a further seven days the other party may file submissions in response of not more than three pages. Any such application will be determined on the papers.
Catchwords:	Contract – strata management – payment of moneys contrary to instructions – measure of damages
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW)

Cases Cited:	Falcke v Scottish Imperial Insurance Co (1886) 34 ChD 234 at 248 ; Lilley v Doubleday (1881) 7 QBD 510 Lumbers v W Cook Builders (2008) 232 CLR 635 at [80] Matthews v Discount Corp (1869) LR 4 CP 228 Pape v Westacott [1894] 1 QB 272 Stearine Co v Heintzmann (1864) 17 CBNS 56; 144 ER 22 ;
Texts Cited:	McGregor on Damages (Nineteenth edition) 2014
Category:	Principal judgment
Parties:	BCS Strata Management Pty Ltd (Appellant) Owners Corporation Strata Plan 61759 (Respondent)
Representation:	Counsel: K Oliver (Appellant) Solicitors: D Le Page (Respondent) Grace Lawyers (Appellant)
File Number(s):	AP 16/22999
Decision under appeal	Court or tribunal: Civil and Administrative Tribunal Jurisdiction: Consumer and Commercial Division Date of Decision: 14 April 2016 Before: C Campbell, General Member File Number(s): GEN 15/31589

REASONS FOR DECISION

1. This is an appeal against a decision of the Tribunal ordering the payment by the appellant to the respondent of the amount of $38,314.00.

2. In September 2011 the respondent Owners Corporation entered into a Major Works Contract with Andersal Engineering Pty Ltd ("the builder") for the completion of remedial work on the respondent's common property involving the installation of waterproof membranes and other works. Part of the work the subject of the contract was the installation of tiles.

3. An issue arose between the Owners Corporation and the builder concerning liability for an over-order of tiles. As the Member stated in her decision, the tiles were a "one-off" order with a special non-slip treatment applied to the surface.

4. The contract allowed, as a prime cost item, 2,000 square metres of paving tiles at $99.00 per square metre and an additional 315 square metres of tiles for the pool area at $99.00 per square metre.

5. On 2 December 2011 the tile supplier, Nefiko Marble, provided a quote to the builder in respect of the supply of tiles. The quote included 2,580 square metres of pavers at $99.00 per square metre. On 5 December 2011 Mr van den Heuvel of the builder wrote to Structured Project Management (Australia) Pty Ltd (SPMA), the project manager nominated as the "architect" under the Major Works Contract, in the following terms:

> Pursuant to clause K4 we confirm the amount of tiles to be ordered and their prices and descriptions are as attached. This should allow for the main walkways and stairs, the pool, treads and sills plus 15% wastage. It also includes some tiles for the rear courtyards + wastage.
>
> A tax invoice will be raised shortly for the 30% deposit required by Nefiko.

6. On 8 December 2011 Mr Stapleton of SPMA signed a document headed "PC Adjustment Approval No: PC0001". That document referred to a request by Mr van den Heuvel dated 5 December 2011, recorded that it was a "PC Adjustment Summary" relating to the "revision of tile quantity as per Nefiko order" and referred to an attached invoice, being the invoice from Nefiko Marble dated 2 December 2011. The document included the following:

> "Response:
>
> SPMA approves PC adjustment request PC0001on the following basis:
>
> SPMA have reviewed the supplied Nefiko Invoice and have assessed the order quantities as reasonable. Under this assessment SPMA have completed a site measure of all stair treads to assess the increase in lineal metres for this item. Other additional costs include door sill and pool coping tiles.
>
> The costing of this adjustment has been calculated as follows:
>
> Contract prime cost funds for tile supply = $293,685.00
>
> Cost of tiles ordered excluding 124.2m2 for Units 20 and 21 rear yards = $355,824.20
>
> Total adjustment = $62,139.20
>
> TOTAL APPROVED: $62,139.20 + GST."

7. The subsequent events were described in the decision under appeal as follows:

> The applicant's issues with the over-ordering of the tiles had been an on-going since early 2013. On the 12.03.13 the applicant wrote to SPMA asking that they write to Andersal to reimburse the applicant for the costs associated with the oversupply of the tiles.
>
> On the 16.12.13 Andersal issued a Tax invoice to the applicant for the payment of the retention money in the sum of $62,064.50. This invoice was endorsed by Andersal as "A claim under the Building and Construction Industry Security of Payment Act 1999 ".
>
> The invoice was sent via email to SPMA and BCS on the 27.11.13. Mr Stapleton from SPMA responded the same day. He noted the date for practical completion was the 14.12.12 and under the contract there was a twelve month defects liability period, which had not yet expired. The Building and Construction Industry Security of Payment Act did not apply because these were monies retained as security for the performance of obligations by Andersal under the contract, in accordance the Final Certificate from SPMA.
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> On the 16.12.13 Andersal re-sent the invoice to SPMA. This email was addressed to Richard Stapleton, who was the Senior Remedial project manager with SPMA. The email was copied to Peter Blair, Project Director with SPMA, and to the General Manager and the Managing Director of Andersal, Richard Verco and to Henk van den Heuval the General Manager of Andersal. This particular email was not apparently sent to BCS.
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> SPMA responded the same day, advising Andersal it would not accept the claim until the notified defects had been rectified.
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> The following day BCS wrote to the applicant, asking for approval to pay the invoice. The respondent [sic: applicant] thanked BCS for asking and said nothing was to be paid until the work was completed to the Owners Corporation satisfaction. Dr Redelman [Chairperson of the Owners Corporation] went on to say in that email: "Please check with us for any account for Andersal".
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> The following day BCS responded that they would hold all Andersal invoices pending approval from the applicant.
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> On the 22.01.14 Mr Blair from SPMA wrote to the applicant saying that he had become aware the retention money had been paid out to Andersal, contrary to his advice and contrary to the terms of the contract, that is, the money was not to be paid until defects were rectified. He goes on to say "This will not assist in negotiations on the tile over order by Andersal".
>
> On the 23.01.14 Dr Redelman wrote to the respondent, asking it to confirm that the money had been paid, contrary to her instructions. The respondent replied on the same day apologising for the error and saying it would write to the respondent and inform it the money was not paid in accordance with instructions from the applicant.

8. It is common ground that payment to Andersal of the sum of $62,064.50 was made by the appellant from the Owners Corporation's funds on 21 January 2014. The project manager issued a final certificate in respect of the project on 14 October 2014. In the final certificate the project manager deducted from the builder's final claim of $62,064.51, $34,739.10 in respect of 319 square

metres of tiles, $2,475.00 in respect of "client costs for clearing blocked drains of tile screed and construction debris as per SPMA assessments - two call outs + water jetting" and $1,100.00 in respect of "re-grouting rectified works 2 areas where contractor has used incorrect grout." The total scheduled amount approved for payment in the final certificate was $23,750.41.

9. The appellant strata manager acknowledges that the payment made on 21 January 2014 was made without authority and in breach of contract by the strata manager. The dispute between the parties and the issue the subject of this appeal is what compensation from the strata manager, if any, is the Owners Corporation entitled to in respect of the unauthorised payment. By the decision under appeal the Tribunal Member determined that he respondent strata manager is liable to pay the applicant Owners Corporation the full amount of $38,314.00 being the total of the three deductions from the builder's final payment claim made by the project manager in the final certificate.

10. The appellant submitted below that the Owners Corporation's claim could be based only in negligence or breach of contract. The appellant submitted that the onus lay upon the respondent Owners Corporation to prove it was not liable to the builders for the value of the excess pavers and other items claimed. The Tribunal Member dealt with this submission in paragraphs 22 to 26 of the decision as follows:

> 22. I do not accept that the respondent's liability to the applicant for reimbursement of the unauthorised payment may only arise either, in negligence or for breach of contract. This analysis does not exhaust all of the possible categories of its liability. In particular it overlooks the significance of the relationship of principal and agent which is not necessarily confined or constrained by those categories of legal responsibility. Although, in a given case they may obviously be relevant.
>
> 23. Part of the agency relationship in this case is the important consideration that the monies paid to Andersal were monies held by the respondent on trust, which the respondent had been expressly instructed to hold pending further instructions. The important consideration is, that as an agent the respondent was not authorised to disburse its principal's money as it did. Rather it was instructed *not* to pay Andersal unless and until it received further instructions from its principal. Its breach of its obligation as agent, regardless of negligence and in the absence of any express contractual power to the contrary, itself renders the respondent liable to reimburse its principal.
>
> 24. Whether the agent is right or wrong in its opinion about the applicant's liability to Andersal is entirely irrelevant. As agent it is obliged to account to its principal for the latter's money held on trust by the former. And if it cannot, as I have said it is liable to reimburse the shortfall.
>
> 25. It lies ill in the mouth of the agent to say to its principal *I spent your money without your authority, indeed contrary to your express instructions, but I owe you nothing because in my opinion you were indebted to Andersal ("a debt I was not authorised to pay)"*. In my opinion the respondent is liable to the applicant for the amount of the unauthorised payment which it may seek to recover from Andersal if it can.

> 26. If I am wrong about this I would find, and there is no argument, if relevant, the respondent breached its duty to the applicant, that its breach caused the applicant to suffer economic loss, being the total loss of its commercial opportunity to hold Andersal to account for the oversupply of tiles. Once the respondent wrongfully paid out the money to Andersal that chance was entirely extinguished. Its prospect of favourable negotiation was lost.

11. In the appeal the appellant challenges the finding of the Tribunal on the basis that, in considering issues other than liability in contract and for negligence, the Tribunal failed to accord procedural fairness to the appellant in that no alternative bases for liability were raised or canvassed in submissions or argument before the Tribunal at first instance. The appellant also asserts that the Member made an error of law in ordering an account.

12. In response Mr Le Page, who appeared for the respondent, expressly disavowed any reliance on any entitlement to equitable compensation or an account and relied only upon the proposition that the Owners Corporation was entitled to the payment of the entire amount paid away contrary to instructions on ordinary principles relating to the assessment of damages for breach of contract. The Owners Corporation did not seek to support the decision on the alternative basis of liability referred to by the Tribunal in paragraph 26 of its decision.

13. Mr Oliver who appeared for the appellant submitted that, if the Tribunal did find the appellant liable on the basis of ordinary principles relating to the assessment of damages in contract, the Tribunal nevertheless made an error of law in so doing. Mr Oliver referred the Appeal Panel to paragraph 33-011 of *McGregor on Damages* (Nineteenth edition 2014) where it is stated:

> Where the principal's property entrusted to the agent is improperly parted with by the agent so that, though not physically destroyed, it is lost to the principal, the principal may recover the value of the property, or the value of that which should have been obtained in exchange.

14. Mr Oliver submitted that the value of what the Owners Corporation should have obtained in exchange for the payment was the tiles which it had already obtained. Therefore, Mr Oliver submitted, on the principle outlined in *McGregor*, the respondent had not sustained loss.

15. In our view Mr Oliver's submission does not reflect a correct understanding of the passage in *McGregor*. The "value of that which should have been obtained in exchange" is clearly a reference to something that an agent may have been authorised to exchange the principal's property for, which the agent has improperly failed to obtain when parting with the principal's property.

16. That this is so appears clearly from the authorities referred to in *McGregor* as illustrative of the principle. In each of those cases: *Stearine Co v Heintzmann* (1864) 17 CBNS 56; 144 ER 22 ; *Pape v Westacott* [1894] 1 QB 272; and *Matthews v Discount Corp* (1869) LR 4 CP 228, an agent was held liable for parting with goods or documents contrary to instructions from the principal. In *Stearine v Heint*

zmann the damages were assessed as the value of that which the agent had parted with. In *Pape v Westacott* , where the agent had handed over to the principal's lessee a licence to assign the lease without receiving the arrears of rent which the agent should have required in exchange, the principal recovered as damages the amount of the arrears, that is "the value of that which should have been obtained in exchange".

17. In paragraph 33-010 of *McGregor* the following principle is stated:

> Where the principal's property entrusted to the agent is physically destroyed by reason of the agent's default, the measure of damages is *prima facie* the market value of the goods. In the absence of cases on this matter, reference should be made to the general principles in relation to damages for the destruction of goods, which will apply. An agent will be liable for loss or destruction after he has improperly dealt with the goods where, but for the improper dealing, the immediate cause of the loss would have been one for which he would not have been liable, unless he can positively show that the loss from this cause would have occurred even in the absence of improper dealing by him.

18. The learned author of *McGregor* cites *Lilley v Doubleday* (1881) 7 QBD 510 as an example of the application of this principle. In that case the defendant, who had contracted to warehouse goods at a particular place, instead kept part of them at another place where they were destroyed by fire. The defendant was held liable for the value of the goods so destroyed. Grove J, with whom Lindley and Stephen JJ agreed, held (at 511):

> The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other."

19. In our view, on the principles outlined in *McGregor*, the prima facie measure of loss of the Owners Corporation was the moneys improperly paid away. However, as the passage from paragraph 33-010 quoted above suggests, an agent who has improperly paid away the principal's money might limit its liability "if he can positively show that the loss…would have occurred even in the absence of improper dealing by him". In other words, if the appellant can positively show that the Owners Corporation was liable to Andersal for the amounts improperly paid away and would have been liable to make those payments in any event, even if the improper payment had not been made, the appellant may reduce its liability to that extent.

20. In response to this argument Mr Le Page submitted that damages were required to be measured at the time of breach and that no moneys were payable at the time of breach. On that basis, Mr Le Page submitted, the measure of damages for the improper payment was the full amount of the improper payment, regardless that if the moneys had not been wrongly paid those moneys may subsequently have become payable to the builder.

21. We do not accept this proposition. In our view, the requirement that damages be assessed at the date of breach does not require that facts and circumstances existing at the date of breach are to

be ignored. If the agent establishes that the Owners Corporation was liable to the builder so that the moneys erroneously paid away would ultimately have been paid in any event, in our view that is sufficient to negative the proposition that the Owners Corporation sustained loss by reason of the incorrect payment.

22. In the alternative, Mr Le Page submitted that it could not be said to be certain that the Owners Corporation would have been obliged to make the payment to the builders even if, on the correct construction of the contract and relevant documentation, the Owners Corporation was liable to the builder. Mr Le Page suggested the builder may not have pursued the Owners Corporation for the moneys or that the Owners Corporation might have been able to negotiate a reduction in the amount payable. We address these issues below.

23. Mr Le Page also sought to compare the situation of the Owners Corporation with that of a party whose debt is paid by an officious bystander without any request or consent. In those circumstances it is clear that the officious bystander cannot recover the payment from the party whose debt has been paid: *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 248 ; *Lumbers v W Cook Builders* (2008) 232 CLR 635 at [80] . However, we do not consider the situation is relevantly similar or that the same principles are applicable. We are concerned to determine the loss sustained by the Owners Corporation by reason of the breach of contract by the strata manager. In that context it is not relevant to consider whether there was on the part of the Owners Corporation free acceptance of the benefit of the payment.

24. The question that must be determined therefore is whether the appellant strata manager has established that the Owners Corporation was liable to the builder for the disputed amounts. Consistently with the principles outlined in paragraph 33-010 of *McGregor*, we are of the view that it is for the strata manager positively to demonstrate that the Owners Corporation was so liable.

25. In our view the appellant has not established that the amounts totalling $3,575.00 which were disallowed in the final certificate by reason of alleged defects were amounts for which the Owners Corporation was liable to the builder. Therefore the appellant is liable to reimburse the Owners Corporation for those sums.

26. However, we consider that the evidence does demonstrate that the Owners Corporation was liable to the builders in respect of the claim by the builder for payment for the surplus tiles.

27. Mr Oliver submitted that SPMA in issuing the PC adjustment approval on 5 December 2011 had acted as agent for the Owners Corporation. Mr Le Page disputed that proposition. He referred to clause A6 of the agreement, in particular clause A6.3 which provides that the architect is the owner's agent for giving instructions to the contractor, but that in acting as assessor, valuer or certifier, the architect acts independently and not as the agent of the owner.

28. The relevant provisions of the Major Works Contract relevant to the assessment of amounts payable by the Owners Corporation in respect of prime cost sums are clauses K2 and K4 which provide:

K2 Architect may instruct regarding *provisional* or *prime cost sum*

.1 Subject to subclause K2.6, nothing is to be done for which a *provisional sum* or a *prime cost sum* has been included in the contract except in accordance with an instruction from the architect.

.2 The architect may instruct the contractor to provide a written quotation for anything for which a *provisional sum* or a *prime cost sum* has been included in the contract.

.3 The quotation must be for:

the direct cost to the contractor of performing the *necessary work*

connection of an *infrastructure service*

supplying, or supplying and installing an item of material or equipment or

the amount of a fee or charge to a *relevant authority*

excluding any margins for preliminaries, overheads, profit or *GST*. The contractor must notify the architect in writing if *GST* is not applicable to the fee or charge.

.4 Except in relation to payment of a fee or charge to a *relevant authority*, if the architect agrees with the quotation, the architect must issue an instruction to proceed accepting the quotation.

.5 Except in relation to payment of a fee or charge to a *relevant authority*, if the architect:

does not agree with the quotation or

has not instructed the contractor to provide a quotation

the architect may instruct the contractor to proceed, in which case the architect must issue a decision in accordance with clause H4.

.6 The contractor may pay a fee or charge to a *relevant authority* for which a *prime cost sum* has been included in the *cost of building work* without first receiving an instruction from the architect.

K4 Adjustment for *provisional* or *prime cost sum*

1. The architect must adjust the *cost of building work* to take account of any difference between a *provisional sum* or *prime cost sum* and:

the accepted quotation;

the architect's assessment of a claim under subclause K2.5;

the amount of a fee or charge to a *relevant authority*

as applicable. The architect must adjust the *cost of building work* in the next progress certificate.

2. If the assessed cost of performance of the *necessary work*, connection of an *infrastructure service*, or supply, or supply and installation is more than the *provisional sum* or *prime cost sum*, the extra cost will be increased by the percentage shown in item 23 of schedule 1 and added to the *cost of building work*.

3. If the assessed cost of performance of the *necessary work*, connection of an *infrastructure service*, or supply and installation is less than the *provisional sum* or *prime cost sum*, the different will be deducted from the *cost of building work*.

4. In relation to a fee or charge paid to a *relevant authority*, the architect must adjust the *cost of building work* by deducting, or adding, the net difference between the *prime cost sum* and the actual fee or charge.

29. Mr Oliver submitted that the PC adjustment approval was an instruction to proceed for the purposes of clause K2.4 and that in issuing that certificate the architect was not acting in a capacity as assessor, valuer or certifier. Mr Le Page disputed that the PC adjustment approval was an instruction to proceed for the purposes of clause K2.4 and submitted that the architect in issuing an instruction to proceed accepting a quotation under clause K2.4 would be acting as assessor or valuer.

30. In our view the PC adjustment approval No. PC0001 was clearly an instruction to proceed for the purposes of clause K2.4. The document was issued in response to the submission by the builder of a quotation for the purchase of tiles and approved an amount of $62,139.20 plus GST by way of "PC adjustment". In issuing that document the architect was clearly acting as assessor, valuer or certifier rather than as agent of the Owners Corporation.

31. However, as a decision or certificate of the architect, the PC adjustment approval was subject to clause A8 of the contract which provided as follows:

A8 Disputing architect's certificate, written decision or failure to act

1. If a *party* wishes to dispute a certificate, notice, written decision or written assessment issued by the architect, or to dispute the failure of the architect to issue something, the party must give the architect written notice under this clause within 20 working days after:

a. receiving the certificate, notice, written decision or written assessment or

b. becoming aware of the failure of the architect to issue something.

2. If the *party* fails to give a notice under subclause A8.1, the party will not be entitled to dispute the matter at all.

3. The architect must assess a notice given under subclause A8.1 and give a written decision to the *party* and the other *party* within 10 *working days*.

4. If a *party* wishes to dispute a written decision given under subclause A8.3, or the architect's failure to give that decision, the requirements of section P apply.

32. Therefore the question whether the approval was issued by the architect as agent for the Owners Corporate does not appear to be significant as the Owners Corporation is bound by the approval in either event. If the approval was not issued by the architect as agent for the Owners Corporation, the Owners Corporation is bound by the approval, because it did not dispute it within 20 working days of receiving the notice.

33. Mr Le Page submitted that the appellant agent should not be entitled to rely upon clause A8 as it had never sought to press a case in reliance upon clause A8 or the proposition that the Owners Corporation was bound by the approval by reason of its failure to dispute the notice. However, Mr Le Page was not able to point to any additional evidence which might have been led if the case had previously been put on that basis.

34. We also consider that the likelihood that Andersal would not have sought to recover the moneys if they had not been paid, or that the Owners Corporation might have been able to negotiate a reduction in the claim, is negligible. In our view the Owners Corporation's liability to Andersal was clear and there is no reason to conclude that Andersal would have been prepared to accept anything less than full payment.

35. We therefore conclude that, if the moneys had not been paid to Andersal by the agent, the Owners Corporation would nevertheless ultimately have been obliged to make payment of the sum of $34,739.10 to Andersal. We find that the Owners Corporation did not suffer loss of that amount by reason of the agent's breach of contract.

36. Accordingly, the appeal will be allowed and the orders will be varied to require the appellant to pay the respondent the sum of $3,575.00 for breach of contract.

37. As the proceedings were brought in the Consumer and Commercial Division of the Tribunal and the amount in issue in the proceedings is more than $30,000, pursuant to Rule 38 of the Civil and Administrative Tribunal Rules , the Tribunal below was empowered, notwithstanding the provisions of s 60 of the Civil and Administrative Tribunal Act 2013 (NSW) , to award costs without finding that there are special circumstances.

38. As the appeal was initiated after 1 January 2016, Rule 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) requires the Appeal Panel to apply the rules relating to costs applicable in the proceedings at first instance. Thus, in order to make an award of costs in respect of the appeal we do not need to find that there are special circumstances.

39. As the appellant has had significant success in the appeal, we consider it appropriate to order that the respondent pay the appellant's costs of the appeal.

40. If either party seeks a different order, they should within seven days file written submissions of no more than three pages outlining why a different costs order should be made. The other party may then respond within a further seven days with written submissions of no more than three pages. We will determine any such application on the papers.

41. Although the appellant by its notice of appeal seeks an order that the respondent pay the appellant's costs of the application below, the appellant has not been completely exonerated. The respondent did not obtain (or apparently seek) an order for costs below and has not brought any appeal against that result. As the appellant has been found to be liable to the respondent to some degree we do not consider it appropriate to make any order in respect of the costs of the proceedings below.

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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

Decision last updated: 30 November 2016