

Supreme Court
New South Wales

Case Name: Byrne v Strata Plan
Medium Neutral Citation: [2021] NSWSC 342
Hearing Date(s): 29, 30 March 2021
Date of Orders: 30 March 2021
Decision Date: 9 April 2021
Jurisdiction: Equity - Expedition List
Before: Sackar J
Decision: See paras [12] and [13]
Catchwords: CONTRACTS — Performance — deed of settlement — deed between owners corporation and owner as a result of water damage to property and resulting mould and related illnesses — whether Defendant had properly fulfilled obligations under the deed
Category: Principal judgment
Parties: Robert John Byrne (plaintiff)
The Owners – Strata Plan 75809 (defendant)
Representation: Counsel:
M Forgács (plaintiff)
D Weinberger (defendant)
Solicitors:
PVL Law Group (plaintiff)
Bannermans (defendant)
File Number(s): 2020/65512
Publication Restriction: n/a

JUDGMENT – EX TEMPORE

1 I granted expedition in these proceedings. The proceedings arise as a result of the purchase by the plaintiff some years ago of an apartment property in Pymont. There are many facts in the case which are uncontroversial. I will not rehearse all of them. There is no doubt that during 2012 the property suffered water damage and, in particular, the apartment, which had been purchased by the plaintiff. That led not only to damage internally, but it led to a whole series of consequential matters, including mould, spores, bacteria growing in the apartment. There was damage done to parts of the window frames and to the interior of the property.

2 The plaintiff, as a result of inhabiting the property, became ill and a claim was made in the District Court in 2016. Evidence was filed in those proceedings. As a result of discussions between the parties a settlement was arrived at and a deed was entered into between the respective parties on 10 September 2018. That deed, importantly, had a provision, cl 3, which involved numerous promises to be fulfilled by the Owners Corporation.

3 Mr Neil became involved in the property as a person nominated or at least accepted by the Owners Corporation, as an expert to determine certain aspects of the dispute, contained in cl 3 of the deed. Clause 3 of the deed deals with two matters; building works and remediation as a result of mould, fungal spores, bacteria and the like.

4 The dispute before the Court today and yesterday involves or did involve a question of whether the defendant had properly fulfilled those promises it made in the deed. As a result of comments made by me yesterday and the good sense of counsel, much has now been resolved in the case and I will be invited shortly to make certain orders by consent, which will have the effect of the Court ordering specific enforcement of certain provisions of the deed. Those provisions deal with the ongoing remediation issues connected with mould, bacteria and the like, and they involve certain specific items.

5 There are three issues in fact which are still outstanding. One is the plaintiff makes a claim for loss of rental for a finite period, that is from a date in September 2018 to date and within interest on that amount. He also makes a claim for his need to replace some blinds of approximately over \$4,000, which he says were once in the apartment and are no longer there. There is also a claim of the costs of the proceedings which I will deal with subsequently by way of written submissions and oral hearing.

6 I will deal briefly with the first two items immediately. The claim for rental is a claim made in relation to losses which the plaintiff asserts he has incurred as a result of the defendant's breach of its promise under the deed. In an earlier iteration of the statement of claim, as counsel for the defendant points out, there was a claim made for rental incurred by him in relation to other premises. That claim is no longer pursued and the only claim that is now pursued is the loss of the rental that he has suffered as a result of not being able to receive income from the unit in Pymont.

7 I accept his evidence in relation to this issue, namely, although he did buy the property intending to live in it, I have no doubt on the faith of an affidavit which has been tendered in these proceedings and not the subject of any cross-examination, that sometime in around late 2010 and thereafter, he decided that he would investigate the prospect of raising a tax advantaged loan on the property, moving out and renting it for the purposes of restructuring his financial affairs. He was perfectly entitled to do that.

8 As I say that evidence is not tested but there is nothing inherently improbable about it. In the affidavit, which was tendered, and which was sworn in the District Court proceedings in September 2016 in paras 33 and following, he sets out the chronology briefly of his both investigation and acceptance of a financial facility from Westpac for the purposes of

restructuring his financial affairs in relation to the apartment as a prelude to leasing it to a third party.

- 9 As I have said, I accept his evidence. It seems to me, therefore, that on the eve of the flood, which removed any prospect of him renting the property, he had an intention to utilise the property in the way that he suggests he would. Since then he has been unable to do so.
- 10 In my view, for that reason, it seems to me he is entitled to the lost rent from the date in September. The date in September is important. Mr Neil who did a report in late September of 2018 identified the matters which have not been attended to in his view pursuant to the promises undertaken by the Owners Corporation in respect of the settlement reached. It seems to me that is the appropriate point from which to commence the calculation.
- 11 Mr Casemore is a person whose evidence has been read in this case as well. He was not required for cross-examination. There is no opposing evidence as to the rental valuation and I see no reason why I should not accept his evidence as to the quantum of the rent that could have been obtained over time had the property been leased out from September 2018. I, therefore, accept his evidence and that will lead to a particular calculation.
- 12 In my view, therefore, the plaintiff is entitled to the loss of rent as calculated and interest upon that insofar as it remains unpaid.
- 13 So far as the blinds are concerned, there is evidence which I think is ambiguous. There is no evidence which persuades me necessarily on the balance of probabilities that the defendant should be obliged to reimburse the plaintiff for the loss of the blinds. There is no evidence before me as to whether or not he has a key to the property or whether someone else has a key to the property. The evidence certainly suggests the defendant has a key to the property, but on that basis alone I am not prepared to find the defendant is responsible to compensate the plaintiff for the cost of replacing those blinds.
- 14 I would invite the parties to prepare short minutes of order.

Amendments

09 April 2021 - typos