Davis v The Owners – Strata Plan No 63429 - [2017] NSWCATCD 7

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:	**Davis v The Owners – Strata Plan No 63429 [2017] NSWCATCD 7**
Hearing dates:	14 October 2016 Submissions closed 6 December 2016
Decision date:	31 January 2017
Jurisdiction:	Consumer and Commercial Division
Before:	P Boyce, Senior Member
Decision:	1 The appeal is allowed; 2 The Adjudicator's orders of 21 April 2016 dismissing the appellants application are revoked: 3 In place of the Adjudicator's orders the Owners Corporation of SP63429 is ordered to effect all repairs to common property necessary to prevent water ingress into main bedroom on the upper storey of Lot 18, on or before 30 May 2017.
Catchwords:	STRATA-appeal from Adjudicator's decision ;extent of common property; liability for repairs.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Management Act 1996 Strata Schemes (Freehold Development) Act 1973 Strata Schemes Management Act 2015 Strata Schemes Development Act 2015
Cases Cited:	Allen v Proprietors of Strata Plan Non 2110 [1970] 3 NSWR 339
Category:	Principal judgment
Parties:	Appellant: Anne Davis Respondent: Owners Corporation SP63429
Representation:	Appellant: Slater and Gordon Respondent: J.S.Mueller & Co
File Number(s):	SCS 16/22935

Publication restriction: Unrestricted

REASONS FOR DECISION

1. This is an appeal against an Adjudicator's orders made in file number SCS16/08945 on 21 April 2016 dismissing an application for orders that:

   The Owners Corporation of SP63429 effect all repairs to common property necessary to prevent water ingress into main bedroom on the upper storey, in accordance with the Tender of F & SJ Maione Building Contractors dated 30 November 2015;

   The Owners Corporation of SP63429 pay to the owner of Lot 18 the amount of $11,012.00 being the cost of replacing the owner's damaged carpet, in accordance with the quote of Andersons Carpets dated 1 December 2015;

   The Owners Corporation of SPP63429 pay the Applicant's legal costs.

2. The applicant for the adjudication is the appellant in this appeal.

3. The respondent in the adjudication is the respondent in this appeal.

Jurisdiction

4. Section 28 of the *Civil and Administrative Tribunal Act* 2013 (" CATA ") provides that the NSW Civil and Administrative Tribunal ("Tribunal") has jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation .

5. The Dictionary to the *Strata Schemes Management Act 1996* (*"SSMA")* provides that for the purposes of the Act "Tribunal" means Civil and Administrative Tribunal.

6. Section 181 of the *SSMA* provides that the Tribunal may determine an appeal against an order of an adjudicator by an order affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.

7. The appellant is the owner of Lot 18 in SP63429 also known as Villa 8.

8. The respondent is the Owners Corporation of SP63429.

9. The appellant contends that Tribunal has jurisdiction to hear and determine the appeal.

10. Section 177 (3)(a) of the SSMA provides that appeal against an Adjudicator's order must be lodged:

    (3) An appeal must be lodged:

    (a) in the case of an appeal against an order dismissing an application-not later than 21 days after the order takes effect,

11. Section 177 (4) of the SSMA provides:

    Section 41 of the Civil and Administrative Act 2013 does not apply in relation to the periods referred to in subsection (3)

12. Section 41 of CATA provides:

    The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.

    Such an application may be made even though the relevant period of time has expired.

13. Section 210 of SSMA provides that an Adjudicator's order takes effect:

    An order takes effect when a copy of the order is served:

    If the order requires a person to do or refrain from doing a specified act, on that person, or

    in any other case, on the owners corporation for the strata scheme to which the order relates.

    This section does not apply if express provision is otherwise made by this Act or in the order itself.

14. Section 174 of the SSMA requires a copy of an order of an adjudicator to be served as follows:

    A copy of an order of an Adjudicator under this Part must be served by the principal registrar on:

    The owners corporation for the strata scheme to which the order relates and, in the case of a leasehold strata scheme, the lessor under the scheme, and

    The applicant for the order, and

    any person who duly made submissions to an Adjudicator in connection with the application, and

    any person against whom the order was sought and any person who, by the order, is required to do, or refrain from doing, a specified act.

15. Section 235 (2) of the SSMA permits certain documents to be served on an owners corporation:

A document other than a summons or other legal process may be served on an owners corporation:

By leaving it with a person referred to in subsection (1) or in the letterbox of the owners corporation, or

By posting it, by prepaid mail, to the owners corporation at its address recorded in the folio of the Register comprising the common property, or

By sending it by facsimile transmission to a person referred to in subsection (1).

16. Section 76 of the *Interpretations Act* 1976 provides for service by post as follows:

If an Act or instrument authorises or requires any documents to be served by post (whether the word “serve”, “give’ or “send” or any other word is used), the service of the document:

May be effected by properly addressing, preparing and posting a letter containing the document, and

In Australia or in an external Territory-is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted, and

In another place-is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post

In this section:

“**Working day”** means a day that is not:

A Saturday or Sunday, or

A public holiday or a bank holiday in the place to which the letter was addressed.

17. The adjudicator’s orders were posted by ordinary post both to the appellant and the respondent by the Registrar of the Tribunal on 22 April 2016 being a Friday. Pursuant to section 76 of the *Interpretations Act* the adjudicator’s order was taken to have effect on 29 April 2016. The Appeal was filed by the appellant on 13 May 2016, that is 14 days after the order had effect and within 21 days as required by section 177(3)(a). The Tribunal is satisfied that the appeal was lodged in time for the purposes of section 177.

18. The *Strata Schemes Management Act 1996* and the *Strata Schemes (Freehold Development) Act 1973* were repealed on 30 November 2015 and respectively replaced by the *Strata Schemes Management Act 2015* (“2015 Management Act”) and the *Strata Schemes Development Act 2015* (“2015 Development Act”). However by virtue of the transitional provisions contained in Sch 3 of the 2015 Management Act and Sch 8 of the 2015 Development Act if proceedings are commenced but not determined or finalised under a provision of the previous Act they are to be dealt with and determined as if the previous Act had not been repealed: see cl 7 Sch 3 and cl 9 of Sch 8.

19. The Tribunal is satisfied that it has jurisdiction to hear and determine the appeal and that the appellant has standing to bring the appeal.

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20. The appellant appeals the Adjudicator's decision on the grounds she erred on 12 grounds, as follows:

(1) The adjudicator erred in accepting the respondent's submissions dated 30 March 2016 for the following reasons:

(a) On 23 February 2016 the Tribunal directed the parties to lodge submissions by 21 March 2016. It is to be inferred that the direction related to submissions and evidence in chief. There was no direction for any submissions or evidence in reply.

(b) The material lodged by the respondent on 30 March was directly in reply to the applicant's submissions in chief.

(c) At no time until the Reasons for the Decision was the applicant informed, either by the Tribunal or by the respondent, that the respondent had lodged submissions or evidence in reply.

(d) The applicant was not afforded the opportunity of lodging her own submissions or evidence in reply.

(e) As a matter of procedural fairness, the applicant should have been informed of the respondent's reply material, and been given the opportunity to likewise file reply material.

(f) The respondent's reply material was not filed pursuant to directions of 23 February, or pursuant to any other leave or direction to do so.

(g) The adjudicator should have rejected the respondent's submissions dated 30 March 2016.

(2) The adjudicator erred in finding that there was no other evidence that showed that the doors in other villas were not suitable, for the following reasons:

(a) The pre-purchase building report of Villa 7 by Greg Binet Building Company (attachment "EE" to A Davis 17.03.2016).

(b) Report of Chris Woods of O'Meara & Associates Pty Ltd in respect of Villa 7 (attachment "II" to A Davis 17.03.2016).

(3) The adjudicator erred in finding that pre-purchase building report in respect of Villa 7 by Greg Binet Building Company was:

(a) Evidence of water entry to Villa 7 of the same or similar kind as in the Applicant's Villa; and

(b) Evidence that supported the finding that the sliding door in the applicants Villa was not suitable,

For the following reasons:

(i) The report speaks for itself.

(4) The adjudicator erred in finding that there was no history in the complex of water entry through sliding doors due to their unsuitability, for the following reasons:

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(a) The pre-purchase building report in respect of Villa 7 by Greg Binet Building Company (attachment "EE" to A Davis 17.03.2016);

(b) Report of Chris Woods of O'Meara & Associates Pty Ltd in respect of Villa 7 (attachment "II" to A Davis 17.03.2016);

(c) The applicant did not assert that the water entered "through" the sliding doors.

(5) The adjudicator erred in finding that there was no history of water entry through the sliding door in the applicant's Villa prior to the renovation work in 2010, for the following reasons:

(a) Statement of Dr Anne Davis (17.03.2016) para's 7,8, 10, 11, 12, 13 Annexure "F" and "H" "balcony door runners not draining…","I" :two water leaks in the main bedroom";

(b) The applicant did not assert that water entered "through" the sliding doors.

(6) The adjudicator erred in relying on the report from Charles Barnes and Partners Pty Ltd for the following reasons:

(a) The adjudicator stated that Mr Barnes undertook an inspection of Villa 8 on 13 March 2016 (at [44]). That is incorrect. The Barnes report was addressed to Mr Colin Barclay, the owner of Villa 2. The first line of the report states "as requested by yourself I visited **your unit** on 13 March…" [emphasis added]. Mr Barnes never visited the Villa the subject of these proceedings.

(b) Since Mr Barnes never visited the Villa, and never conducted an inspection of the works the subject of these proceedings, his report is entirely inadmissible on the grounds that it is based purely on hearsay material, it is irrelevant and it is liable to mislead.

(7) The adjudicator erred in failing to reject the report from Charles Barnes and Partners Pty Ltd, for the following reasons:

(a) The applicant repeats (6)(a) & (b) above.

(8) The adjudicator erred in failing to find in accordance with the report of O'Meara Wood & Associates Pty Ltd, that the renovation work was not the cause of the water entry and that a door frame specifically designed for high wind loads should be installed, for the following reasons:

(a) On the grounds that:

(i) The Barnes report was inadmissible;

(ii) The adjudicator placed very limited weight on the lay evidence for both the applicant and the respondent; and

(iii) The adjudicator placed "great weight" on the Woods report the adjudicator should have found in accordance with the Woods report.

(9) The adjudicator erred in finding that there was considerable evidence that the cause of water entry was the result of the renovation work in 2010, for the following reasons:

(a) In reaching the finding the adjudicator relied on the inadmissible Barnes report and the reports of Savige and Hanson in respect of which she placed little weight as they were not considered independent.

(b) While the adjudicator also placed little weight on the Maione report, it is submitted that Mr Maione is the person able to give the best evidence about the matters the subject of the proceedings. Mr Maione was the person who undertook the works and has first-hand knowledge, unlike any other person who has given evidence in these proceedings, about what works took place, as a matter of fact that the Tribunal ought to know.

(c) The combination of the Woods and Maione reports strongly leads to the conclusion that the works undertaken in 2010 were not the cause of the water entry.

(10) The adjudicator erred in finding that the responsibility to rectify the water entry is the responsibility of the applicant, for the following reasons:

(a) The Special Resolution of 22 June 2009 created a special privilege in the favour of the applicant to, inter alia, carry out works to common property which included tiling and waterproofing the upstairs balcony.

(b) Specifically, it did not grant a special privilege in favour of the applicant in respect of the sliding door.

(c) While it is acknowledged that the applicant's builder removed and replaced the sliding door, there is no evidence that this was the cause of the water entry. To the contrary, the evidence points to the finding that the work did not cause the water entry.

(d) The adjudicator found that there is no issue that the door is common property (at [57]). Since the special privilege granted to the applicant did not include any aspect of the sliding door, and on the grounds that the evidence concludes that the removal and replacement of the door did not cause the water entry, the responsibility to repair and maintain the doo lies with the Owners Corporation-s. 62 of the Act.

(11) The adjudicator erred in failing to find that the Special Resolution of 22 June 2009:

(a) Created a special privilege in favour of the applicant to carry out the works to the common property including tiling and waterproofing the upstairs balcony;

(b) Did not grant a special privilege in favour of the applicant in respect of the sliding door; and

(c) Did not require the applicant to maintain the sliding door,

For the following reasons:

(i) The applicant repeats (10)(a)-(d) above.

(12) The adjudicator erred in dismissing the application for financial compensation, for the following reasons;

(a) The applicant repeats (1) to (11) above.

(b) On the basis that the Tribunal should have found in favour of the applicant, the Tribunal should have allowed the applicant's claim for the cost of replacing her carpet, since it was a natural and direct result of the water ingress, of which the respondent had been on notice since 2009 but failed to attend to.

(c) The conduct of the respondent in failing to repair the common property, having been on notice of the matter since 2009, was manifestly unreasonable.

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21. The nature of an appeal under section 177 is that the application is reheard and the Tribunal may admit new evidence.

Procedural

22. At the first directions hearing after the filing of the appeal on 29 June 2016, the Tribunal directed that:

1. The appellant file and serve the documents on which she intended to rely at the hearing by 27 July 2016;

2. The respondent file and serve the documents on which it intended to rely at the hearing by 24 August 2016;

3. The appellant file and serve any documents in reply to the respondents submission by 14 September 2016.

23. The:

1. Appellant filed her documents in compliance with the directions on 26 July 2016;

2. Respondent filed its documents in compliance with the directions on 24 August 2016;

3. Appellant filed her documents in reply in compliance with the directions on 12 September 2016.

24. The respondent sought to have the hearing of the appeal adjourned on the basis that the respondent had filed a subsequent application for adjudication to determine whether a by-law should be made by an adjudicator as the appellant had unreasonably refused to consent to a by-law being made making the appellant responsible for the repair and maintenance of the sliding doors.

25. The appellant opposed the adjournment.

26. The Tribunal refused the application for adjournment and the appeal was heard at Coffs Harbour Court House on 14 October 2016.

27. On 19 October 2016 the appellant sought to file and serve additional material after the hearing had concluded.

28. On 27 October 2016 the respondent opposed the filing and reliance on the further material purported to be relied upon by the appellant.

29. The application to adduce further evidence and re-open her case by the appellant was listed for hearing on 15 November 2016.

30. On 15 November 2016 the Tribunal allowed the appellant to reopen her case and rely on the additional material filed being:

1. A title search in respect of SP63429;

2. A location plan in respect of SP64352 (being a subdivision of SP63429);

3. A concept plan in respect of Lots 18-25;

4. An excerpt from the by-laws applicable to SP63429, by-law 17.1

31. On 15 November 2016 the Tribunal directed that:

1. The appellant file and serve submissions limited to the material admitted on that day on or before 22 November 2016;

2. The respondent to file and serve any evidence in reply to the appellant's evidence admitted on 15 November 2016 and any submissions limited to that material on or before 6 December 2016.

32. The:

1. Appellant filed her submission on 23 November 2016 and the Tribunal grants leave for the filing of those submissions out of time;

2. Respondent filed its submissions on 6 December 2016.

Evidence

33. The appellant's evidence consisted of:

1. The cross examined affirmed evidence of Dr Anne Davis including:

    1. Exhibit A1-being the appellant's statement made 17 March 2016 and bundle of documents exhibited to that statement including reports from building consultants, builders and engineers;

    2. Exhibit A2-being a section of the sliding door sill.

2. The cross examined affirmed evidence of Chris Wood, civil engineer.

34. The respondent's evidence consisted of:

1. The tender of the respondents bundle of documents admitted as exhibit R1;

2. The cross examined sworn evidence of Charles Philip Barnes, structural civil engineer.

35. Further evidence admitted with leave on 15 November 2016 after the hearing being:

1. Title search in respect of CP/SP63429;

2. Location plan in respect of SP64352(being a subdivision of SP63429);

3. Concept plan in respect of Lots 18-25 in SP63429;

4. An excerpt from By-laws to SP63429, By-law 17.1

Findings of fact

36. The Tribunal finds:

1. The appellant purchased Lot 18 in in Strata Plan 63429 in about 2008. At time of purchase, the preceding owner had plastic sheeting over the carpet in front of the sliding doors opening to the deck on the first floor. There is no other evidence of water penetration to Lot 18 before the appellant purchased the Lot.

2. By Special Resolution at the Extraordinary General Meeting ("EGM") of the Owners Corporation SP63429 held on 22 July 2009 the appellant was given approval to carry out works to renovate Lot 18 and including works on the common property. The approved works on the common property included the Special Privilege in respect of part of the common property. The EGM resolved to have the Special Resolution recorded as a by-law. Special Privilege did not extend the sliding doors to the first floor balcony.

3. By Special Resolution at another EGM held on 7 October 2009 amendments to the appellants proposed works were approved by the EGM.

4. The works were carried out after March 2010.

5. The Special Resolution was registered as Special By-law 46 after the works were carried out. At an EGM held on 3 February 2014 consideration was given to amending Special By-law 46 because of an omission at the time of registration. The EGM partially approved the motion to amend, but refused the appellants motion for:

    1. Inclusion of modifications as previously approved by the Owners Corporation, but unregistered; and

    2. approval of "as built" variations to the works.

6. The appellant and the appellant's builder's evidence is that Lot 18's main bedroom which faces the first floor balcony, has glass sliding doors for the length of the balcony failed to prevent water penetration of the appellant's Lot. Water penetration has and caused damage to her carpet along the entire length of the door sill.

7. During the works, the appellant's builder, removed timber decking to the first floor balcony and installed compressed sheeting and tiles on the balcony. The sliding door and sub-sill were removed during the course of the works as well as the cladding under the door.

8. The builder's evidence is that after it installed the compressed sheeting a waterproof membrane was applied by a licensed applicator to the compressed sheeting, the face of the wall, the under sill and up and over the particle board edge. The appellant's builder then reinstated the door frames and panels. During those works the bottom door track and sill were not removed.

9. Between 2010 and until 2013 the appellant noticed that in times of extreme weather events water continued to penetrate through the base of the sliding doors and the carpet became wet.

10. In a report dated 14 October 2010 Macleod Consultants Pty Ltd, Consulting Engineers, commissioned by the respondent, found that "the water penetration and damage has occurred

below the sills of the sliding doors at the First Floor of two of the Villas built in the early stages of the development, being Villas Nos. 1 to 24". Those Villas being Villa No. 9 and Villa No 18. The report attributes cause to water penetration through screw holes in the base of the sub sill. The report does not include a reference to Villa 8 (Lot 18).

11. On 28 February 2013 the appellant's partner reported water penetration through the sliding doors of Lot 18 to the respondent.

12. The respondent's builder, Savige Constructions Pty Ltd ("Savige"), undertook inspections of Lot 18 and on 22 May 2013 recommended in an email to a representative of the executive committee that certain remedial works be carried out.

13. On 9 October 2013 Savige carried out remedial work on the sliding doors for the respondent.

14. In a letter from Savige to the Strata Manager SP63429 dated 23 June 2014, Mr Savige reports after an inspection of the appellants Lot 18 that he "found that the inside of the track had a deflection of approximately 4 mm and the outside track was straight which makes for the outside of the track higher than the inside". No conclusion is given by Mr Savige as to what damage would result from such a deficiency.

15. In an email on or about 31 May 2014 G James, the original supplier and installer of the sliding doors reported that the doors at the time of installation complied with AS2047-1999 and AS1288-2006. The supplier identified that the building had suffered "some movement over the years and as discussed the supporting structures and the alike have bowed. With the building movement over the years this has created gaps in my opinion has led to air seals being broken which in turn leads (sic) and water ingress", "buildings done in this time frame openings were not fully membrane(d) or sills membrane(d)" and ""with the sealing up of the outside front leg on the sliding door sub-sill and tiles (*by the appellant during her renovations)* along with the building movement it is my opinion water is getting in and around the sliding door through the building movement".

16. On 25 May 2015 the appellant offered to the respondent that she would repair the sliding doors as proposed by the respondent's builder, Mr Savige at her cost and if the repair failed to remedy the defect then the respondent should repair at its cost.

17. The respondent refused the appellants offer and interpreted the advice of the window installer and supplier that the appellant's works were the sole cause of the water penetration. The respondent required the appellant to restore the "door and framing assembly installation to the manufacturer's specifications".

18. On 13 July 2015 Engineer Wood of O'Meara Wood & Associates Pty Ltd, Consulting Engineers, on the appellant's instructions, carried out a site inspection of the appellants Lot and an engineering review of the surrounding structure around the main bedroom sliding door. In the report of O'Meara Wood & Associates Pty Ltd, Engineer Wood concluded that *"the renovations to the deck area are not likely to be the cause of the leaking door frame. It is possible that the twisting of the door frame due to normal deflections of the timber floor joists has occurred which could result in a reduction of the door frames ability to drain and resist wind driven rain...it is likely that due to the location of the door frame in such a highly exposed area, a door frame specifically designed for the high wind loads would be required to ensure adequate drainage and resistance to wind driven rain."*

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19. The respondent relies on the report of Engineer Barnes of Charles Barnes and Partners Pty Ltd, civil and structural engineers, dated 16 March 2016 in support of its contention that the renovation works caused the ingress of water into the appellants Lot 18. Engineer Barnes, gave sworn oral evidence and was cross examined. In cross examination he admitted that he had not carried out an inspection of Lot 18 (Villa 8).

20. In a pre-purchase inspection report by Greg Binet Building Company Pty Ltd dated 26 October 2015 for Villa 7 in the same strata scheme it finds that in Bedroom 1 that "The timber floor boards are water stained and watermarked adjacent to the glass sliding door indicating water entry. Only limited drain holes were noted in the sliding door sill and the drain holes have no wind stops installed" and "the sliding door sill is twisted with the inside sill being slightly lower than the exterior which may result in water entry in heavy wind and rain. It would be visible (sic) to advise the strata manager about the water ingress along the sliding door".

21. The appellant purchased Villa 7 in about February 2016 and is located next to Villa 8.

22. Engineer Wood prepared a report in respect of Villa 7 following a site inspection by him. He makes similar findings and recommendations as he did in his report about the sliding door and water penetration to Villa 8. He also finds that;

    1. There is significant water damage to the timber floor boards adjacent to the sliding door frame including cupping of boards, opening of joints between floor boards and water staining.

    2. There are no records of any alterations being carried out to the door frame since its original installation.

23. On 23 March 2016 at the AGM of the strata scheme motion 16b was passed retrospectively authorising the renovation works carried out by the appellant to Villa 8 (Lot18) in 2010 and making the owner of Lot 18 liable for the works. The registration of the by-law was to be subject to the appellant's consent, which has not been given.

24. Mr Maione, letter of 11 July 2016 also reports that he inspected Villa 7 on 8 March 2016 and observed "water damage evident to the timber floor of Bedroom 1, which has the same sliding doors as (Villa 8)".

25. On 26 July 2016 a report following an inspection of Villa 8 and 7 by SGA Architectural Window Solutions "the issue that I notice in this instance is that the Sub Sill in its current form isn't being utilised due to the lack of drain holes into the Sub Sill".

26. On 12 August 2016, Wayne Hanson of G James replied to the report of SGA denying its ability to comment on its product as "the sliding door in unit 8 has been removed during renovation work to this unit and then later reinstated by a third party, we are unable to comment as to the installation methodology that the third party employed to refit the doors". Mr Hanson also stated "Contrary to suggestions made in SGA's report about the 245 sliding doors not being suitable for this site, G James confirm that the 245 sliding doors installed into this project did meet engineering requirements with regard to wind and water penetration at the time the building was built, in accordance with AS4055 for a class 1a building and are therefore fit for purpose". Although he denies any failure of the sliding doors, Mr Hanson recommends that as the doors have now been in place for 16 years that a comprehensive service be carried out on all sliding doors in the scheme.

37. The additional evidence filed with leave after the hearing sought to establish that the external sliding doors on the first of Lot 18 are common property.

38. The appellant contends in submissions in respect of that evidence that section 5 of the *Strata Schemes (Freehold Development) Act 1973* (" SSFDA ") defines "common property" as *"so much of a parcel as from time to time is not comprised in any lot"* and that "common property" is defined in the SSFDA as everything on the parcel that is not contained in a strata lot.

39. Section of the SSFDA also defines a "lot" as being:

"one or more cubic spaces forming part of the parcel to which a strata scheme relates, being designated as a lot on the floor plan and being in each case the cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries set out in section 5(2) but does not include any structural cubic space unless the structural cubic space has boundaries described as prescribed and is described in the floor plan as part of the lot".

40. Section 5(2) of the SSFDA provides:

The boundaries of any cubic space referred to in paragraph (a) of the definition of "**floor plan**" in subsection (1):

(a) except as provided in paragraph (b):

(i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition-the inner surface of that wall, and

(ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space-the upper surface of that floor and the under surface of that ceiling, or

(b) are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building).

41. The appellant submits that unless otherwise provided for in the strata plan the vertical boundary is the inner surface of a wall depicted on the floor plan.

42. Section 18 (1) –(3) of the SSFDA provides:

(1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

(2) The Registrar-General shall, upon registration of a strata plan, create a folio of the Register for the estate or interest of the body corporate in any common property in that strata plan.

(3) Upon registration of a strata plan of subdivision creating common property, the common property so created vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan

43. Section 20 (b) of the SSFDA provides that any common property vests in the owners corporation as agent for the various lot owners in proportion to their unit entitlements:

The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:

(a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned-for that proprietor or those proprietors, or

(b) where different persons are proprietors of each of two or more of the lots the subject of the strata scheme concerned-for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.

44. Section 23 (1) of the SSFDA provides that:

(1) In any folio of the Register for common property it shall be sufficient that the land therein comprised be described as the common property in a designated strata plan without definition of its area or dimensions, and a folio of the Register comprising common property shall be construed as certifying title to the common property, other than common property the subject of a lease accepted or acquired under section 19, in the strata scheme concerned as that common property may exist from time to time.

45. The title search of the common property of SP 63429 describes the land as "The common property in the strata scheme based on the Strata Plan 63429 within the parcel shown in the title diagram".

46. The appellant contends that documents admitted into evidence pursuant to orders made on 15 November 2016 identify by bold/thick border demonstrating the exterior of Lot 18.

47. Although not in evidence, the appellant submits that general answers to strata schemes questions about common property advice published on the Department of Land and Property Information web site provide that "walls shown by thick line work on the floor plan are common property: and "any window or door within these walls is also common property including working parts."

48. The appellant seeks to rely on documents not in evidence to support her as to interpretation of the extent of the common property. The appellant contends that by application of the SSFDA the boundaries of Lot 18 are the inner surface of its walls and therefore the inner surface of the sliding glass doors is the boundary of the lot and those sliding doors and its structural mechanism are therefore part of the common property.

49. The appellant also relies on Memoranda AG600000 and AG520000 registered on the Register. Those Memoranda are not in evidence and the appellant admits that they have not been adopted by the Owners Corporation.

50. In support of the appellants contentions she cites *Allen v Proprietors of Strata Plan Non 2110* [1970] 3 NSWR 339. In that case Street J was required to determine who was responsible as between a lot

owner and the Owners Corporation for repairs caused as a result of damp coming in through the wall of a lot. The legislation at the time was *Conveyancing (Strata Titles) Act 1961 (NSW)* which provided *"unless otherwise stipulated in the strata plan, the common boundary of any lot with another lot or with common property shall be the centre of the floor, wall or ceiling as the case may be."*. In accordance with that legislation, His Honour found that the boundary between the lot and the common property was the centre line of the external walls, floor and ceiling.

51. The appellant contends that in the absence of the respondent adducing evidence to suggest that the door is not common property, the provisions of the SSFDA applies.

52. Finally, the appellant contends that the respondent has attempted to repair the door, Mr Savige making alterations in an attempt to repair it. By doing so, the appellant submits that the respondent is admitting that the door is common property.

Respondent

53. The respondent submits that in the contention of the appellant as to the stipulations in the SSFDA as to what is common property based on, the appellant refers to a "floor plan". The appellant has not adduced evidence of a "floor plan" nor has she explained in her submissions as to what a "floor plan" is. The further evidence submitted by the appellant on 19 October 2016 does not constitute a floor plan.

54. If the Tribunal finds that any of the appellants evidence constitutes a "floor plan" within the meaning of the SSFDA then the respondent submits:

1. The appellant's reference to a vertical boundary being described by section 5 (2) of the SSFDA as the inner surface of a wall is incorrect. The respondent contends that the vertical boundaries of the cubic space forming a lot are only the inner surface of certain walls, not all walls. The boundary is not the inner surface of all walls in a lot.

2. The appellant has not explained the definition of "floor plan" and the Tribunal is unable to know what type of wall section 5(2) is referring to. The boundary of a cubic space forming part of a lot, unless there are notations on the plan.

3. The boundary of a lot is the inner surface of a wall only if that wall corresponds substantially with a line on a floor plan. The respondent contends that the appellant has produced no evidence as to where the wall containing the sliding glass doors are relative to the lines on SP643352. The appellant has not proven that the sliding glass doors correspond with a line on the plan.

4. The appellant has not satisfied the onus on her to prove on the balance of probabilities that the sliding door is common property and her case must therefore fail.

55. The respondent contends that the appellant cannot rely on the Department of Land and Property Information web site advice as introduction exceeds the extent of scope of submissions directed by the Tribunal. Such submissions were limited to the evidence admitted on 15 November 2016.

56. The appellant's submission that the boundaries of Lot 18 are the "inner surface of the walls". The appellant contends that the boundaries are only the inner surface of the walls which correspond

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with a line on a floor plan. It was for the appellant to prove that the wall in question corresponds with one of those lines. If they do not correspondent with a line on the floor plan the walls are the property of the Lot and not common property.

57. The respondent contends that appellant's introduction in her submissions of references to the Registrar General's Memoranda exceeds the extent and scope of submissions directed by the Tribunal and the Tribunal should have no regard to those memoranda in making a determination as to whether the sliding doors are common property. Such submissions were limited to the evidence admitted on 15 November 2016. These submissions would constitute further evidence and no leave was sought or granted to admit further evidence. Again the appellant has not proven the wall corresponds with a line on the strata plan. In any case, the appellant concedes that the Memoranda have not been adopted and therefore have no binding effect on the Strata Scheme..

58. In respect of the citation by the appellant of *Allen v Proprietors of Strata Plan Non 2110* the respondent contends that case is distinguished from the circumstances of the current proceedings in that its findings related to a predecessor of the SSFDA . It related to a finding that the boundary of Lot and the common property being at the centre line of a wall and are therefore irrelevant to the current proceedings. Further that the submission in relation to the *Allen* are outside the scope of the directions given by the Tribunal consequent on the leave granted for the admission of the new evidence on 15 November 2016.

59. The appellant's submission that the respondent has not adduced evidence to prove that the sliding doors are common property should be rejected as such a submission is again beyond the scope of the direction and it is for the appellant to prove that the sliding doors are common property.

60. The respondent concludes its submission by contending that much of the appellants submission are beyond the scope of the submission called for in the directions of 15 November 2016. Further, that the appellant has adduced no evidence to show the location of the sliding wall relative to the strata plan and no submissions whether a strata plan is a floor plan. There is no evidence to show that the sliding wall is a wall to which section 5(2) of the SSFDA applies. The Tribunal cannot find that the sliding doors are common property. The appellant has not satisfied the onus to prove on the balance of probabilities that the sliding wall is common property.

Finding as to Common Property

61. Despite the agitation by the respondent that the appellant has failed to satisfy the onus on her to establish that the glass sliding doors are common property, the Tribunal is satisfied that they are.

62. The respondent contends that the appellant has failed to adduce evidence of what constitutes a "floor plan" for the purpose of interpreting the Strata Plan in evidence. The Strata Plan tendered and admitted into evidence speaks for itself.

63. The definition of "floor plan" relates to the sheet or sheets of the strata plan describing the cubic space. Sheets 4 and 5 of Strata Plan 64352 describe the cubic space of Lot 8. In particular, the First Floor describes Lot 18's cubic space as "86m2" including the balcony. There is a thick black line where the balcony joins the residue of the first floor cubic space. The Tribunal is satisfied that the thick black line describes the vertical partition between the internal cubic space and the external cubic space limited in height above the horizontal plane of the balcony. The appellant's evidence infers that the glass sliding doors separate the internal space from the external space. On the

balance of probabilities the Tribunal accepts the inference that the glass sliding doors are the "wall" described by the thick black line on the Strata Plan. The surface of glass sliding doors being the vertical boundary of the internal first floor cubic space.

64. The glass sliding doors are common property.

Is the appellant liable to maintain and repair the glass sliding doors?

65. The liability for the maintenance, repair and replacement of the sliding glass doors to Lot 18 would in the ordinary course be the responsibility of the respondent Owners Corporation.

66. The appellant contends that the respondent should accept responsibility to carry out the repairs or replacement of the glass sliding doors so that water penetration is prevented to her Lot 18.

67. The respondent contends that the work involving the removal of the glass sliding doors carried out by the appellant when she carried out the authorised building works in 2010 when the appellant's contractor removed the glass sliding doors in order to carry out the water proofing of the replaced deck. The appellant's builder's evidence is that although the sub sill and the doors were removed to permit the work to be carried out, the sill and the bottom track were not removed. This is the only direct evidence before the Tribunal of what works were carried out.

68. The further evidence is that the Engineer Wood concludes that the renovations to the deck area are not likely to be the cause of the leaking door frame. He considers that the twisting of the door frame due to normal deflections of the timber floor joists has likely to have occurred which could result in a reduction of the door frames ability to drain and resist wind driven rain.

69. The Tribunal notes that the adjudicator at paragraph 44 of the adjudication found that Engineer Barnes had "undertaken an inspection of Villa 8 on 13 March 2016". This is incorrect. Engineer Barnes relied entirely on information supplied to him by the respondent without carrying out an independent inspection of the premises. Adjudications are determined on the papers. As such, the adjudicator can only rely on what is before her. The adjudicator did not have the benefit of being able to hear Engineer Barnes evidence tested. It was the cross examination of Engineer Barnes at the hearing of this appeal that revealed that he had not physically examined the sliding doors, their tracks or sills.

70. Notwithstanding the adjudicator's preference for Engineer Barnes evidence, his admission that he had not inspected the relevant Lot 18 or its sliding glass doors and their fixings devalues the weight that can be given to his evidence.

71. The evidence of Engineer Wood is preferred, he having inspected Lot 18 and its glass sliding doors, their frames and mechanisms..

72. The evidence of G James is that of the manufacturer and supplier of the glass siding doors. That evidence is not independent and serves to a great extent of supporting the product supplied and installed by it. As such its probative weight is discounted.

73. The evidence of Mr Savige, although finding that the inside of the track had a deflection of approximately 4 mm and the outside track was straight, making the outside of the track higher

than the inside, makes no conclusion as to what damage would result from such a deficiency. Mr Savige unsuccessfully attempted to repair the glass sliding doors to prevent water penetration on behalf of the respondent. The problem remains.

74. Although the appellant has not satisfied the Tribunal that there was evidence of damage to Lot 18 before she purchased it, the appellant has continually encountered water penetration through the tracks of the glass sliding doors and its sliding mechanism since that time.

75. The evidence adduced from the respondents records that other Lot's have encountered water penetration damage and leaks before the appellant purchased Lot 18 do not go to establishing the respondent's liability in respect of Lot 18.

76. However, the Tribunal is not satisfied that the respondent has avoided liability by asserting that the cause of the water penetration is that the appellant, by causing the doors to be removed during the course of the work, was the author of the problems she has experienced during her ownership of Lot 18.

77. On the evidence before it, the Tribunal is satisfied that the glass sliding door mounting and mechanism, the sill and tracks, are deficient and renewal and or replacement is the likely solution to prevent water penetration to Lot 18.. The respondent is obliged under section 62 of the SSMA to maintain and keep common property in a state of good and serviceable repair and to renew and replace any fixtures or fittings comprised in the common property and has not done so.

Conclusion

78. The Tribunal finds that the Adjudicator erred in relying on the evidence of Engineer Barnes in preference to the evidence adduced by the appellants. As such the adjudication should be revoked.

79. The Tribunal has heard this appeal *de novo* and makes its decision on the evidence adduced by the parties at the hearing and with leave following the hearing.

80. The Tribunal has found that the sliding glass doors and their fixings and tracks are common property. The Tribunal is not satisfied that the appellant's work in 2010 including the removal and refitting of the door is the cause of the defective performance of the door system allowing internal water penetration.

81. The Tribunal is satisfied that evidence adduced by the appellant's witnesses, her builder Mr Maione and Engineer Wood is preferred to the evidence of Engineer Barnes, Mr Savige and the statement of Mr St John on behalf of G James. That evidence establishes that the sliding door tracks and sills design, their frames and deteriorating structural support, does not prevent water penetration.

82. The Tribunal is satisfied that it should exercise its discretion to make orders generally as sought by the appellant in its application for adjudication and in this appeal that The Owners Corporation of SP63429 effect all repairs to common property necessary to prevent water ingress into main bedroom on the upper storey. The order sought that the rectification works should be in accordance with the Tender of F & SJ Maione Building Contractors dated 30 November 2015 is not an appropriate order. The respondent is entitled to engage its owner contractor to carry out the rectification works. If further defects arise after that work is carried then liability will rest with the

respondent and its contractors. With the issue of liability determined, the Tribunal allows for the respondent a period of four months to carry out the work;

83. The appellants proposed order that the respondent pay to her pursuant to section 138 of the SSMA or as an ancillary order an amount of $11,012.00 by way of compensation for replacing her damaged carpet is refused. Section 138 does not empower the Tribunal to make such a compensatory amount and is not an ancillary order within the intention of the SSMA.

84. As to the appellant's application for costs, the Tribunal is not satisfied that special circumstances prevail to an extent that would permit the Tribunal to exercise its discretion contrary to the intent of section 60(1). There will be no order as to costs.

85. The Tribunal orders that:

1. The appeal is allowed;

2. The Adjudicator's orders of 21 April 2016 dismissing the appellants application are revoked:

3. In place of the Adjudicator's orders the Owners Corporation of SP63429 is ordered to effect all repairs to common property necessary to prevent water ingress into main bedroom on the upper storey of Lot 18, on or before 30 May 2017.

Philip Boyce

Senior Member

NSW Civil and Administrative Tribunal

31 January 2017

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: 03 March 2017