McElwaine v The Owners – Strata Plan No 75975 - [2016] NSWSC 1589

Supreme Court

New South Wales

Medium Neutral Citation:	**McElwaine v The Owners – Strata Plan No 75975 [2016] NSWSC 1589**
Hearing dates:	19 June 2015
Date of orders:	10 November 2016
Decision date:	10 November 2016
Jurisdiction:	Equity
Before:	Young AJ
Decision:	Plaintiff's claim dismissed with costs
Catchwords:	STRATA SCHEMES – Application for strike out – Whether Strata Schemes Management Act operates so that plaintiff has no remedy in common law nuisance
Legislation Cited:	Conveyancing Act 1919 (NSW) Strata Schemes (Freehold Development) Act 1973 (NSW) Strata Schemes Management Act 1996 (NSW) Succession Act 2006 (NSW)
Cases Cited:	Andrews v Hogan (1952) 86 CLR 223; [1952] HCA 37 Goldman v Hargrave [1967] 1 AC 645 Lin v Owners Strata Plan No 50276 (2004) 11 BPR 21,463; [2004] NSWSC 88 Lubrano v Proprietors of Strata Plan No 4038 (1993) 6 BPR 13,308 Owners Strata Plan 43551 v Walter Construction Group Ltd (2004) 62 NSWLR 169; [2004] NSWCA 429 Owners Strata Plan 50276 v Thoo (2013) 17 BPR 33,789; [2013] NSWCA 270 Ridis v Strata Plan 10308 (2005) 63 NSWLR 449; [2015] NSWCA 246
Texts Cited:	K Barker et al, The Law of Torts in Australia (5th ed 2011, Oxford University Press Melbourne)
Category:	Principal judgment

Parties:	Plaintiff: Paul Gerard McElwaine Defendant: The Owners – Strata Plan No 75975
Representation:	Counsel: Plaintiff: Mr M Orlov Defendant: Mr AJ McInerney with Ms S Clemmett Solicitors: Plaintiff: Kerin Benson Lawyers Defendant: Sparke Helmore
File Number(s):	2013/188816

Judgment

1. At all material times the plaintiff has been the registered proprietor of a second floor unit in a multi-storey apartment complex at Newcastle East. The defendant is the owners corporation with authority over that building.

2. The plaintiff alleges that there were a multitude of construction defects in the building which affected the water proofing of his unit. These are identified in the pleading.

3. The pleading puts that the defendant had a statutory duty under s 62 of the *Strata Schemes Management Act 1996* ("the SSM Act") properly to maintain and keep in repair the common property.

4. The pleading puts that between 8 and 12 June 2007 heavy rain fell in the city of Newcastle causing severe water damage to the plaintiff's unit through water penetration from the common property. He then pleads that there was further heavy rain in Newcastle on 2 and 3 March 2013 which resulted in further ingress of water from a portion of the common property. Liability for this damage was alleged to be as a result of the defendant's failure to carry out its obligation to keep the building (the common property) in repair. The plaintiff claims that his unit has been unfit for habitation since about early March 2013. He claims damages for the diminution in value of his unit, claimed to be about $860,000, loss of rent and expense incurred in obtaining reports etc as to the damage.

5. The defendant moved to strike out the claim and the plaintiff was given leave to make one final amendment before that motion was finalised. This he did by proposing a document which he entitled "Substituted Statement of Claim" and in this document the prime claim, perhaps the only claim, is breach of a common law duty not to continue a nuisance or to adopt a nuisance.

6. A motion to strike out the claim remained current. However, after some negotiations the parties agreed to formulate a separate question which might decide the case and it is this question that I

need to address in these reasons. The question is "Whether the legal effect of Ch 5 of the SSM Act is that the plaintiff has no remedy against the defendant in common law nuisance in relation to the claim pleaded in the proposed Further Amended Statement of Claim"?

7. I heard argument on that question on 19 June 2015. Mr M Orlov of counsel appeared for the plaintiff and Mr A McInerney and Ms S Clemmett of counsel appeared for the defendant. At the conclusion of the argument I said that 19 June was the last day of my then current sittings and that I would give judgment after considering the issues, probably in late August 2015. However, for some inexplicable reason, the matter then fell off my list of outstanding judgments and it was not until a recent reminder that my attention was brought to the fact that I had never actually delivered judgment. Thus, it is some 16 months after conclusion of the argument that I am delivering these reasons, indeed probably the final set of reasons that I will deliver as a Supreme Court judge. All I can do is apologise for the delay and hope that it did not cause too much anxiety.

8. The SSM Act, particularly Ch 5, contains a number of provisions seeking to deal with the mutual obligations of unit holders and the body corporate aimed at dealing with disputes between unit holders or between unit holders and the owners corporation. However, it is necessary to go back to the *Strata Schemes (Freehold Development) Act* 1973 ("the 1973 Act") to look more closely at the respective positions of the owners corporation and a unit holder. Under s 20 of the 1973 Act the estate or interest of the body corporate in common property is held as agent for the proprietors of the lots as tenants in common in shares proportional to the unit entitlement of their respective lots. It is rather odd to see the "word" agent in this context and the use of that term has been the subject of a number of judgments. However, this has already been noted in previous judgments, thus in *Owners Strata Plan 43551 v Walter Construction Group Ltd* (2004) 62 NSWLR 169 at 178 [42], Spigelman CJ said that the term "agent" is not used in the technical sense of the law of agency but one must glean its meaning from the whole context of the legislation. See also the observations of Gzell J in *Lin v Owners Strata Plan No 50276* (2004) 11 BPR 21,463 at 21,464 [7] . However, for present purposes it is sufficient to say that the word agent is to be construed as if the body corporate were a type of trustee and the individual lot owners equitable tenants in common of the common property; see e.g., *Owners Strata Plan 50276 v Thoo* (2013) 17 BPR 33,789 at 33,820 [136]-[137] . (I will refer to this as *Thoo's case*.) However, as the Court of Appeal pointed out in that case at [145], a unit holder's status as equitable proprietor of an interest in the common property is not the source of any right against the owners corporation.

9. Secondly, it must be observed that s 21 of the 1973 Act makes it clear that common property, and that includes a unit holder's interests in the common property, is not capable of being dealt with except in accordance with the 1973 Act and the SSM Act . Thus, in *Thoo's case* at [142] the Court said:

> "The purpose of s 21 is clearly to preclude any form of action by the owners corporation in relation to the common property that is not contemplated and expressly permitted by the strata titles legislation."

10. Thirdly, I should note s 24 of the *Conveyancing Act 1919* which provides that a person may assure property to himself or herself or to himself or herself and others. However, as noted in the LexisNexis commentary, there are still problems about the validity of a lease from A to A and B.

11. Fourthly, it is clear that the owners corporation does have obligations. I use the word obligation rather than duty because the authorities on the SSM Act show that confusion can result by speaking in terms of duty. The owners corporation owes obligations, but it is not entirely clear to whom it owes those obligations. Further, in its role as agent, is it owing a duty to its principal, namely the unit holders at common law, or does it only owe statutory duties and what is the content of those statutory duties and what are the consequences of a failure to perform those duties? I will seek to avoid most of these by using the word obligation.

12. Under s 62(1) of the SSM Act , "an owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation." However, it is to be noted that that obligation is significantly affected by s 62(3) of the SSM Act which empowers the unit holders by special resolution to resolve that the obligations shall not apply to a particular item of property.

13. Despite a series of the decisions of single judges, including my decision in *Lubrano v Proprietors of Strata Plan No 4038* (1993) 6 BPR 13,308 , the Court of Appeal has made it fairly clear that any obligation in s 62 is not one a breach of which would sound in damages.

14. In *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449 at 472 [115] McColl JA said:

> "A "breach" of s 62 does not sound in damages nor constitute an offence under the *Strata Schemes Management Act*. Rather, it is apparent, in my view, that the legislature intended the system of adjudication established under Chapter 5 to be the vehicle through which the owners corporation's discharge of its s 62 functions could be regulated."

15. In *Thoo 's case* at [205] Tobias AJA, with whom Barrett JA and Preston CJ of LEC agreed, noted that McColl JA's observations were clearly obiter. The reasoning of Tobias AJA in *Thoo's case* shows that he and his colleagues agreed with McColl JA's view, see particularly [212]-[214].

16. Accordingly, the construction of the SSM Act by which I am bound is that breach of s 62 does not give rise to a private right of damages.

17. In view of the detailed judgment in *Thoo's case*, it does not seem to me of any value for me to put in my own words the reasons for this view, except to say that the detailed provisions for assessing and levying contributions to keep the building in good repair is at the heart of why Ch 5 provides an exclusive remedy for breach of statutory duty.

18. I will briefly mention the key provisions shortly but before I do so, I should note that Mr Orlov expressly says that he is not suing on any statutory duty but rather on the common law tort of nuisance. He puts that neither *Thoo's case* nor any other exposition of the SSM Act excludes the right of a person to sue in common law nuisance.

19. Before dealing with other provisions of the SSM Act and Mr Orlov's propositions generally, I should note that I am now dealing with a separate question and, on the separate question, I probably need to assume that the plaintiff does have a cause of action in nuisance. It is not an easy case to make out, as Barker and others point out in *The Law of Torts in Australia* (5th ed 2011, Oxford University Press Melbourne) at 200 where they say:

> "An occupier adopts (ie actively makes use of) or continues (ie passively tolerates) a nuisance, so far as the law is concerned, if the occupier knows or ought to know of its existence and fails to take reasonable steps to bring it to an end. Liability in all these instances is essentially liability for negligently allowing a nuisance to remain on the land."

20. It is difficult to see how the present case is one of adopting a nuisance because before the storm water entered the common property, there was no nuisance. It is not a case like *Goldman v Hargrave* [1967] 1 AC 645 where there was a nuisance on neighbouring land which then caused damage elsewhere. There must be a lot to be said for the proposition that you cannot adopt or continue a nuisance unless the nuisance first exists.

21. I merely say this to show that it has not passed me by but I do not need to delve into this matter because the question posed for me to answer assumes that there is a nuisance which is being continued. There is some doubt about that proposition because the question actually says nuisance pleaded in the proposed further amended statement of claim. However, I will assume that there is a cause of action in nuisance despite my doubts. The vital question is, is it nullified by the provisions of the SSM Act ?

22. Apart from the provisions I have already set out, I should refer to s 75 of the SSM Act which requires the owners corporation to provide to annual general meetings an estimate of how much money it will need to maintain in good condition, on a day to day basis, the common property apart from other expenses. This section, together with other parts of the SSM Act , suggest, and this suggestion is enforced by decisions such as *Thoo's case*, that the scheme is that the owners corporation will do its duty, it will survey the state of repair of the building and the costs of keeping it in good repair, and will provide information to the annual general meeting so that levies can be made so that there will be a fund to meet the expenses of keeping the building in proper repair. If there is to be allowed common law claims by unit holders which will have to be met by the owners corporation, that is the sum total of unit holders, it would completely throw out of balance any scheme for ensuring that there is always a fund available to meet the cost of keeping the building in good repair and this tells against there being available to a unit holder a common law cause of action for a matter that would come within Ch 5 of the SSM Act .

23. During discussion in June 2015, there was reference to the similarity between the duty or obligation under s 62 and the obligation under the law of succession whereby between the date of

death of a person and the grant of probate or administration, the deceased's property vests in an entity, traditionally the Public Trustee. Cases decided on that provision such as *Andrews v Hogan* (1952) 86 CLR 223; [1952] HCA 37 make it clear that statutes may provide for a person to hold property without any obligation to other people with respect to that property. I believe that the submissions made about that matter are germane to the question I have to decide and that it reinforces the view that I have taken but it does not seem to me that it is necessary to delve into a comparison between the *Succession Act* and the present Act in order to reach the result that I have reached.

24. Chapter 5 is entitled "Disputes and orders of Adjudicators and Tribunal". The introductory note to the chapter says that "This Chapter gives power to Adjudicators and the Tribunal to make orders to settle disputes about certain matters relating to the operation and management of a strata scheme." Section 138 empowers an adjudicator to make an order to settle a dispute or complaint about "(a) an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act…". That includes s 62 .

25. Chapter 5 covers ss 123 to 210. Section 138 contains the general power of an adjudicator to make an order to settle a dispute. That, as Tobias AJA pointed out at [210] of *Thoo's case*, includes disputes involving whether there has been a failure of the owners corporation to exercise its duty under s 62 . However, at [211] Tobias AJA said:

> "[I]t is to be noted that by operation of s 138(3)(d) an Adjudicator cannot make an order under subsection (1) for the settlement of a dispute or complaint that includes the payment by a person to another person of damages. In my opinion, that provision is some indication of an intention on the part of the legislature that disputes relating to the owners corporation's duties under the 1996 Act, as well as disputes as to the strata scheme generally, are to be resolved in a manner which does not involve the payment of damages."

26. It is significant that in Ch 5 there is no express mention of the payment of damages or compensation by one unit holder to another or by or to the owners corporation.

27. However, I should refer to s 226 which is in Ch 7. Section 226(1) provides:

> "Nothing in this Act derogates from any rights or remedies that an owner, mortgagee or chargee of a lot or an owners corporation or covenant chargee may have in relation to any lot or the common property apart from this Act."

28. Mr Orlov says that this is a clear indication that his client's common law rights to sue in nuisance, which is all he is doing at the moment, as he is not suing in respect of any statutory duty, are not affected by the SSM Act or the decisions of the Court of Appeal to which I have already referred.

29. Section 226(2) provides:

> "In any proceedings to enforce a right or remedy referred to in subsection (1), the court in which the proceedings are taken must order the plaintiff to pay the defendant's costs if the

court is of the opinion that, having regard to the subject-matter of the proceedings, the taking of the proceedings was not justified because this Act ... makes adequate provision for the enforcement of those rights or remedies."

30. In *Thoo's case* at [220] Tobias AJA said:

> "[T]here is a distinction to be made between, on the one hand, the preservation of the concurrent jurisdiction of the court pursuant to the old s 146 and the current s 226, and, on the other, the question as to whether a breach of a duty imposed by the legislation on an owners corporation gives rise to a private cause of action for damages for breach of statutory duty."

31. Section 226(2) tends to give the view that it is possible for a person to commence proceedings for alleged breach of statutory duty or common law tort of nuisance or negligence and that the only consequence is that if the matter is covered by the SSM Act adequately, the Court is prohibited from giving the plaintiff any costs. I do not know of any decision on subs (2) and none was cited to me. However, it seems to me that in the light of decisions of the Court of Appeal such as *Ridis* and *Thoo* , that one would need to read it down so that the legislature recognised that there was a possibility that there might be a right of an owner which was not mandated to be dealt with under the dispute proceedings in Ch 5 but which could have been brought under Ch 5 in which case as a failsafe provision deprivation of costs was provided as a disincentive. It seems to me that that is more in accordance with the decisions of the Court of Appeal on the structure of the SSM Act generally than a more expansive view of s 226(2).

32. Although Tobias AJA in *Thoo's case* was speaking in terms of an action to enforce a statutory duty, it seems to me that the interpretation of the scheme of the SSM Act taken by the Court of Appeal leads one to the view that the same applies to a common law duty. The SSM Act intends that disputes, whether or not they are also involving a common law right, are to be dealt with in the adjudication system under the Act and not independently.

33. The thought went through my mind that it is perhaps odd that if a person who was not entitled to bring a complaint under Ch 5 had a claim in nuisance that that claim would be validly considered by a court and, if made out, damages would be awarded which would affect the levies made under the SSM Act . However, after some consideration it seemed to me that this is not a helpful thought because a third parties rights would be the subject of insurance mandated under the Act and that, in any event, it is extremely difficult to think of such a situation ever occurring. Although there is no direct authority on the point, it seems to me that the reasoning of the Court of Appeal in analogous cases involving claims against the body corporate for breach of statutory duty that the legislature intended that claims by unit holders whether for statutory duty or common law duty were to be dealt with under the Act and that the common law claims are not available. Accordingly, the question posed for my decision should be answered yes. However, it seems to me that the question should be reframed so that the order of the Court is that the SSM Act operates so that the plaintiff has no remedy against the defendant in common law nuisance in relation to the claim pleaded in the proposed further amended statement of claim.

34. It follows that the effect of that determination is that the plaintiff's proceedings must be dismissed with costs.

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Decision last updated: 10 November 2016