

Civil and Administrative Tribunal
New South Wales

Case Name: Owners Corporation - Strata Plan 41710 v Lee

Medium Neutral Citation: [2015] NSWCATCD 151

Hearing Date(s): 4 November 2015

Decision Date: 15 December 2015

Jurisdiction: Consumer and Commercial Division

Before: D. Goldstein. Senior Member

Decision:

- 1 For the reasons provided pursuant to section 202 of the Strata Schemes Management Act 1996, the Tribunal orders the respondent to pay to the Director-General of the Department of Fair Trading a pecuniary penalty of an amount equal to 17 penalty units for contravention of the order of Adjudicator Thode on 8 July 2015 under section 170 of the Strata Schemes Management Act 1996.
- 2 Pursuant to section 204 of the Strata Schemes Management Act 1996 and after hearing the parties regarding costs the Tribunal orders the respondent to pay the applicant's costs of and incidental to this application such costs if not agreed to be assessed on the ordinary basis under the legal cost legislation as contained and defined in the Legal Profession Uniform Law Application Act 2014.

Catchwords: Penalties for breaching interim order of an Adjuicator

Legislation Cited: Civil and Administrative Tribunal Act 2013
Strata Schemes Management Act 1996

Category: Principal judgment

Parties: Applicant: Owners Corporation - Strata Plan 41710
Respondent: Yasmin Lee

Representation: Solicitor: Grace Lawyers for the applicant

File Number(s): SCS 15/49038

Publication Restriction: Unrestricted

REASONS FOR

- 1 These proceedings are brought by Owners Corporation Strata Plan 41710 against Yasmin Lee as respondent. The respondent is the owner of lot 27 in Strata Plan 41710.
- 2 The basis of the application which was filed in the Tribunal on 21 August 2015 refers to section 202 of the *Strata Schemes Management Act* 1996. The application does not identify the orders sought but in item 9 states 'We seek a fine against the owner for breaching the order. Copy of the interim order is attached'.
- 3 The application was heard on 4 November 2015. The following orders were made:
 1. For the detailed reasons given at the hearing on 4 November 2015 pursuant to section 202 of the *Strata Schemes Management Act* 1996, the Tribunal orders the respondent to pay to the Director-General of the Department of Fair Trading a pecuniary penalty of an amount equal to 17 penalty units for contravention of the order of Adjudicator Thode on 8 July 2015 under section 170 of the *Strata Schemes Management Act* 1996.
 2. Pursuant to section 204 of the *Strata Schemes Management Act* 1996 and after hearing the parties regarding costs the Tribunal orders the respondent to pay the applicant's costs of and incidental to this application such costs if not agreed to be assessed on the ordinary basis under the legal cost legislation as contained and defined in the *Legal Profession Uniform Law Application Act* 2014.'
- 4 On 20 November 2015 the respondent sought a statement of the reasons for the decision pursuant to section 62(2) of the *Civil and Administrative Tribunal Act* 2013.
- 5 The reasons for the decision are set out below.
- 6 As an overview, these proceedings concern the respondent's inter-reaction with the applicant Owners Corporation, more particularly the Executive Committee, as part of the process of renovating her lot in the strata scheme.
- 7 Owner's Corporation consent or approval was required if the respondent's renovation was to affect common property. It was also necessary that the renovation comply with strata scheme by-laws.
- 8 The evidence is that the respondent for whatever reason failed to obtain Owner's Corporation consent and also failed to comply with certain by-laws referred to in these reasons.
- 9 I have found that the respondent became impatient with the approval process and effectively charted her own course regarding the progress of the renovation work.
- 10 This lead to the Owners Corporation applying for an Adjudicator's interim order which is set out in full later in these reasons. The order prevented the respondent from carrying out work which affected common property.

- 11 The applicant alleges that the respondent disregarded the Adjudicator's orders. It now seeks to impose a penalty on the respondent as a result of the alleged breach of the orders.
- 12 Section 202 of the *Strata Schemes Management Act* deals with orders made by adjudicators in Tribunal matters and provides for civil penalties for contravention of orders under Chapter 5 of the Act. Subsection (1) of section 202 of the *Strata Schemes Management Act* states 'The Tribunal may by order require a person to pay a pecuniary penalty of an amount up to 50 penalty units for contravention of an order under this Chapter (the original order')
- 13 Pursuant to section 38(3) of the *Civil and Administrative Tribunal Act 2013* the laws of evidence apply to this application.
- 14 The evidence in the proceedings is as follows. Exhibit A is a witness statement of Yvonne Howard. Exhibit B is a witness statement of Jacqueline Yael Rotenstein. Exhibit C is the bundle of documents being the applicant's submissions and documents in support of adjudication application. Exhibit D is a witness statement of Mark John Lister dated 6 September 2015 which attaches photographs.
- 15 The respondent relies on a bundle of documents filed in the tribunal and served on the applicant which is exhibit 1. It is comprised of a letter dated 26 October 2015 which is by way of a submission and a whole range of documents which is attached thereto.
- 16 This application for penalty proceedings arises from an adjudication order Made by adjudicator Thode made in the Tribunal on 8 July 2015. This adjudication decision forms part of exhibit B. Adjudicator Thode made an order on 8 July 2015, namely
- 'Pursuant to the provisions of the Strata Schemes Management Act 1996 I order:
- The respondent shall immediately cease unauthorised renovation work only insofar (as) it interferes with common property until further order of the Tribunal or determination of the substantive application whichever is the earlier.'
- 17 The applicant alleges that the respondent breached those orders and that forms the basis of its application under section 202 of the *Strata Schemes Management Act*.
- 18 The solicitor for the applicant Mr Ton states that there are three instances where the respondent breached the orders of the adjudicator. Those areas are as follows. First, a false ceiling was attached to the common property ceiling. Secondly, opaque film was attached to the windows and glass external doors of lock 27. Thirdly, the common property drains in the courtyard of Lot 27 were covered by Astro turf.
- 19 So far as the false ceiling is concerned, the evidence is that the respondent was in communication with the executive committee of the applicant regarding

authorisations for the work to be carried out. This of course was an administrative process and the Owners Corporation requested that a deed of indemnity be entered into. I think that this was a standard form a deed of indemnity. The deed of indemnity required the respondent to fill out schedule two which she did. That required her to set out the work that she was intending to carry out. Schedule two was completed as follows, replace the kitchen with one as per plan. Relevantly, install fake ceiling in kitchen and relevantly install Astroturf (fake grass) to courtyard. Negotiations between the parties continued regarding the deed of indemnity.

- 20 Information supplied by the respondent to the applicant showed the technical details of the false ceiling as set out in an estimate from a builder called Joseph Antonios Projects and described in an estimate dated 19 May 2015 as follows:

‘Carpentry/Technical

Lowered ceiling cavity will consist of high-grade H3 treated pine structural members. Using specialty epoxy glue ‘Megaproxy’. This two-part structural adhesive has well within its capability the bonding strength and long-term firmness to secure the proposed ceiling structure. Ceiling extents will be built to reach the perimeters of the kitchen area. There will be a total absence of mechanical fixings or penetrations into the existing structural concrete slab. These are not needed in addition to the Megaproxy adhesive.

The function of the ceiling structure is to provide a non-invasive area to place a LED lighting fixtures for the kitchen area.’

- 21 My attention has been drawn to by-law 5 of the applicant. By-law 5 reads:

‘An owner or occupier of a lot must not mark, paint, apply permanent glue, drive nails or screws or the like into, or otherwise damage or deface any structure that forms part of the common property without the prior approval in writing of the owners corporation.’

- 22 The Owners Corporation through its solicitor has submitted and I have accepted that the ceiling of the respondent’s apartment was common property. Moreover it seems to be common ground as pointed out that the respondent in her letter dated 26 October 2015 which is Exhibit 1 concedes that a ‘False kitchen was glued to the old ceiling and wasn’t damaged or drilled in any way - again strata has given permission for this as per attachment E’.

- 23 I don't think that attachment E shows that there was any consent given at all. In any event to make good its application for a penalty in connection with the false ceiling attached to the common property ceiling, it will be necessary for the applicant to establish that this false ceiling was attached to the common property ceiling on or after 8 July 2015, that date being the date of the order made by Adjudicator Thode.

- 24 I find that there is no evidence before the Tribunal as to when the false ceiling was attached to the common property ceiling. Although it is clear that the false ceiling

was attached I cannot say on the evidence when that happened or, whether it happened before 8 July or after 8 July 2015.

- 25 Whether the applicant's burden of proof is to the civil standard or to the criminal standard, namely beyond reasonable doubt and there is some suggestion that in penalty applications the evidentiary standard is beyond a reasonable doubt, I would say whatever the test, there is simply no evidence as to when the false ceiling was affixed to the common property ceiling In accordance with the work methodology statement which was provided by the respondent.
- 26 The next area that the applicant complains about is the opaque film. It is conceded on behalf of the respondent that opaque film was actually applied to the external windows and doors. Again I accept the applicant's submissions that the glass of the external windows and doors formed part of the common property and that any opaque covering to that would have been to the common property.
- 27 So far as the time is concerned in connection with that, and before I go on the evidence makes it absolutely clear that this opaque film was on the external windows and on the external doors. The following pages of exhibit B discharge the applicant's onus of proof in connection with this issue, pages 38, 39, 40, 41, 42 and page 43 all of which show photographs containing these images. Exhibit D which is the statement by Mr Mark John Lister at annexure D shows photographs of the opaque film to the doors and windows.
- 28 I have also been referred to paragraph 25 of exhibit B which is the statement of Jacqueline Yael Rotenstein. Paragraph 25 reads as follows:
- 'Annexed hereto and marked 'JR 10' is a copy of colour photographs of some of the windows and doors of Lot 27 taken on 18 July 2015 by Mr Marc Lister. The photographs show that opaque screening and had been applied to the windows and doors Lot 27. I can confirm from my personal knowledge and to the best of my recollection, the opaque screening had been applied on about 18 July 2015 and had not been applied prior to the making of the interim order on 8 July 2015.'
- 29 I accept that evidence from Ms Rotenstein and I find as a fact based on that evidence that the respondent did apply the opaque film, that is the respondent by her contractors agents or workmen applied the opaque film to the glass windows and glass external doors after the order of Adjudicator Thode on 8 July 2015.
- 30 The final matter upon which the applicant relies is the Astroturf. Exhibit C shows the Astroturf over the courtyard. Exhibit C being the applicant's exhibit in support of the Adjudication Application. I should say now that the applicant does not complain about the laying of the Astroturf over the courtyard but complains, or its case is, that insofar as the Astroturf lies across drainage in the courtyard that is an interference with common property. Tab 20 of exhibit C shows the Astroturf across the courtyard and I accept that it is across the courtyard of lot 27. Also so far as exhibit B is

concerned, page 41 shows photographs from a LJ Hooker advertisement which clearly show the Astro turf and I accept the photograph is of the courtyard of Lot 27. So far as exhibit D is concerned, annexed are the photographs taken by Mr Lister and in particular in annexure A, the top photograph, I can see a drain in the courtyard which I accept is Lot 27. In addition there is a drain shown in the bottom photograph of annexure A. I accept this evidence and I find the courtyard to lot 27 contained two drains and I accept the applicant's submissions that those drains are common property. The photographic evidence makes it plain that those drains have been covered up by the Astro turf

31 It seems plain from the evidence of the parties that a procedure was in place whereby the respondent and the applicant were communicating one with each other and backwards and forwards regarding what I consider to be normal procedure between lot owners and the executive committee for the approval of work which affects common property and there is nothing unusual about that type of communication. Indeed it is a procedure which is normal in strata schemes and which is to be applauded and should be carried out. It seems that the respondent became impatient with the speed at which the approvals were being handled by the executive committee and lost patience and decided to go by herself and to chart her own course. As to the work she did, I note in particular that the evidence of the respondent so far as chronological order is concerned cuts out around 15 June 2015. On 15 June 2015 at 10:17 am the respondent's representative wrote to the strata managing agents stating

'Can you please advise Executive Committee that the owner will change the kitchen plans to its original design.

Meaning there will be no plumbing or electrical alterations as per the attached plan – the kitchen will be the same as original one.

The work will start on 30th June and we will put up signs advising other tenants at the end of this week - if you need to send a separate notice pls arrange that'

32 In quite clear terms on Monday, 15 June 2015 at 11:58 a.m. the strata managing agent Ms Yvonne Howard who has given evidence in these proceedings responded to the respondent's representative stating

'Boris

Please note that NO work can continue at all until the EC approved approves the DOI (which means the deed of indemnity) and the owner needs to provide a full amended DOI, including the matters you have been advised of previously for consideration by the EC BEFORE any works continue.'

33 As I have stated this evidence indicates to me that the respondent lost patience at that point and charted her own course to continue with the work and to carry out the work as and when it suited her for her own purposes. That led to the application

being made to the Tribunal for an adjudication and a decision was given pursuant to that adjudication on 8 July 2015 as referred to.

34 I would also refer to exhibit A, the witness statement of Yvonne Howard. In paragraph 7 of her statement Ms Howard states and I accept her evidence:

‘On 10 July 2015 I received a copy of the notice of order and reasons for decision of Adjudicator Thode dated 8 July 2015 in NCAT file number SCS 15/41787 (the interim order)’

35 Then she continues in paragraph 8:

‘On 10 July 2015 I sent an email to Mr Boris Bonin from L. J. Hooker Newtown at the email address bbonin@ljhookernewtown.com.au attaching a copy of the interim order. Annexed and marked YH2 is a copy of that email and the attachment thereto’

36 Ms Howard states that she knows Mr Bonin to be the property manager for Lot 27 in strata plan number 41710. Having regard to all of the evidence in the proceedings it is clear that Mr Bonin acted at all times as the property manager and agent for the respondent and was communicating with Ms Howard in connection with the respondent’s renovation plans.

37 Based on the evidence of Ms Howard and in particular annexure YH2 to her statement which was an email to Mr Bonin on Friday, 10 July 2015, I make a finding that the Owners Corporation in these proceedings, the applicant clearly brought to the respondent’s attention the interim order made by Adjudicator Thode. In all of the circumstances I find that for the reasons I have given the respondent was in breach of the Adjudicator’s orders dated 8 July 2015 in respect of the of the Astro turf and the opaque film to the glass doors and windows

38 I have already given reasons for decision for saying that there is no evidence that the respondent was in breach of the interim order so far as the false ceiling in the kitchen is concerned.

39 The applicant has submitted that the respondent should receive a penalty at the upper level of 50 penalty units because of the fact that she simply lost patience and ignored any need to communicate with the Owners Corporation and also ignored any need to comply with the order of the Adjudicator. I agree that the respondent simply disregarded the order of the Adjudicator. That is regrettable but at the same time I have said that the respondent’s action in using the opaque film to cover the windows and exterior glass doors is not obviously destructive or detrimental to the common property.

40 I have also stated that covering up drains is a serious matter for the Owners Corporation since the Owners Corporation has legitimate concerns regarding the blocking of common property drains because that may cause damage which is very difficult to predict, but can cause it to be liable to lot owners for flooding damage

should anything occur if the Owners Corporation simply ignored the blockage of common property drains which are for the benefit of all lot owners. In particular a blockage of common property drains would be significant for the owner of lot 27 which could be a completely different person to the respondent at some future point in time. Even so the Owners Corporation may have a liability to a tenant of Lot 27. In addition there is an obligation on the Owners Corporation under the *Strata Schemes Management Act* to keep common property in good repair and not let common property to fall out of repair.

41 Having regard to all of the evidence in the in these proceedings I will make an order that the respondent must pay to the Director-General of the Department of Fair Trading a pecuniary penalty of an amount equal to 17 penalty units for her breach of the Adjudicator's Interim orders.

42 On hearing the parties as regards costs, the applicant has submitted that costs follow the event. On the facts of this case there is no reason that I can see that would displace the usual rule that costs follow the event.

43 Section 204 of the *Strata Schemes Management Act* provides:

‘Order as to costs

The Tribunal may also make an order for the payment of costs when making an order requiring the payment of a pecuniary penalty under this Part.

(2) Any costs awarded against a person on an application for an order under section 202 include the amount of the fee paid when the application for the original order was made.’

44 I have decided that pursuant to section 204 of the *Strata Schemes Management Act* and after hearing the parties regarding costs the Tribunal orders the respondent to pay the applicant's costs of and incidental to this application such costs if not agreed to be assessed on the ordinary basis under the legal cost legislation as contained and defined in the Legal Profession Uniform Law Application Act 2014.

D Goldstein

Senior Member

Civil and Administrative Tribunal of New South Wales

15 December 2015

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