



Civil and Administrative Tribunal  
New South Wales

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Case Name: Sahade v Gilster

Medium Neutral Citation: [2016] NSWCATAP 245

Hearing Date(s): 18 October 2016

Date of Orders: 15 November 2016

Decision Date: 15 November 2016

Jurisdiction: Appeal Panel

Before: Hennessy LCM, Deputy President  
B Tamberlin QC, Principal Member

Decision: The appeal is dismissed.

Catchwords: STATUTORY INTERPRETATION – meaning of “change in the permitted land use” in s 183(2)(b) of the Strata Schemes Management Act 1996 – meaning of “the same validity and effect as it would have had if the error or omission had not occurred” in s 12(1)(c) of the Real Property Act 1900 (NSW)

Legislation Cited: Strata Schemes Management Act 1996 (NSW) s 183(2)  
Real Property Act 1900 (NSW), s 12(1)  
Strata Schemes (Freehold Development) Act 1973 (NSW), s 5(1)

Cases Cited: Rita Sahade v Owners Corporation SP 62022 [2013] NSWSC 1791 (3 December 2013)

Category: Principal judgment

Parties: Rita Sahade (Appellant)  
Carina Gilster (1st Respondent)  
Eckhart Bischoff (2nd Respondent)  
Celia Bischoff (3rd Respondent)  
Owners Corporation Strata Plan 62022 (4th

Respondent)

Representation: Counsel:  
B Walker SC (Appellant)  
C Birch SC (1st, 2nd and 3rd Respondents)

Solicitors:  
Trinity Legal (Appellant)  
Le Page Lawyers (1st, 2nd and 3rd Respondents)

File Number(s): AP 16/32513

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 22 June 2016

Before: S Thode, Senior Member

File Number(s): SCS 15/44553

## REASON FOR DECISION

### Overview

1 This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal dismissing an application under s183 of the *Strata Schemes Management Act 1996* (NSW). The application was dismissed for lack of jurisdiction under s 183(2)(b). Section 183 relevantly provides:

(1) Tribunal may make order allocating unit entitlements

The Tribunal may make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order.

(2) Circumstances in which order may be made

An order may be made only if the Tribunal considers that the allocation of unit entitlements among the lots:

(a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered, or

(a1) was unreasonable when a revised schedule of unit entitlements was lodged at the conclusion of a development scheme, or

(b) became unreasonable because of a change in the permitted land use, being a change (for example, because of a rezoning) in the ways in which the

whole or any part of the parcel could lawfully be used, whether with or without development consent.

(3) Matters to be taken into consideration In making a determination under this section, the Tribunal is to have regard to the respective values of the lots and (if a strata development contract is in force in relation to the strata scheme) to such other matters as the Tribunal considers relevant.

- 2 The Tribunal considered that the correction of errors in the boundaries made by the Supreme Court under section 12 of the *Real Property Act 1900* (NSW) was not a change of permissible land use for the purposes of s 183(2)(b) of the *Strata Schemes Management Act*. The Registrar-General may exercise the following powers under s 12(1)(d), that is to say:

(d) The Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register.

- 3 Sub-section 12(1)(c) sets out the obligations and effect of a correction of errors and omissions:

Where the Registrar-General, in the exercise of the powers conferred upon the Registrar-General by subsection (1)(d), makes a correction in the Register:

(a) the Registrar-General shall, by an appropriate recording in the Register, authenticate the correction and record the date thereof, and

(b) to the extent that, but for this paragraph, the correction would prejudice or affect a right accrued from a recording made in the Register before the correction, the correction shall be deemed to have no force or effect, and

(c) subject to paragraph (b), the Register shall, as so corrected, have the same validity and effect as it would have had if the error or omission had not occurred, and

(d) the Registrar-General shall, while any right preserved by paragraph (b) is subsisting, maintain available for search a record of the date, nature and effect of the correction, and

(e) the Registrar-General must keep a record of every correction.

- 4 The Tribunal based the dismissal on two grounds. Firstly, the operation of s12(3)(c) of the *Real Property Act* deemed the Supreme Court orders to have the same validity and effect as if the error or omission had not occurred. That is to say that the provision deemed the correction of the description to have occurred at and from the date of the registration of the Strata Plan in 2000 and not at the date upon which the order was made and the Register corrected.

- 5 Secondly, even if s12(3)(c) of the *Real Property Act* did not apply, the correction of an error in the register, because of a mis-description, pursuant to

s 12, was not a change of use for the purpose of s 183 *Strata Schemes Management Act* on a proper construction of that section.

## **Background**

- 6 This matter has had a long and complex history which it is not necessary to recite in detail. The relevant strata scheme was created in 2000 when the property at Wolseley Road, Point Piper was subdivided into three lots. Lot 1 had a unit entitlement at that time of 30 units, lot 2 had 30 units and lot 3 had 40 units. Subsequently, in the course of legal proceedings, an anomaly was discovered in the description of a narrow strip of land running along the northern boundary. This had the consequence that because of the land rising as one progresses up the corridor, the land as described was in effect a subterranean strip. This was never realised prior to evidence in a hearing in the Land and Environment Court in early 2012.
- 7 Having become aware of the error the appellant applied to the Registrar General to vary the boundaries of lot 3. This was refused and an application was made to the Supreme Court for an order under s12 of the *Real Property Act* requiring the Registrar General to correct the boundaries. On 3 December 2013 the Supreme Court made orders providing that lot 3, where it extended into the corridor on the northern side, was a three-dimensional space which included the space 2.4 metres above the ground: *Rita Sahade v Owners Corporation SP 62022* [2013] NSWSC 1791 (3 December 2013). This correction, which Kunc J described as a clear error in the register, ensured that an inclinometer travelled through space which was lot 3. This mistake corrected by the court had gone unnoticed for some years.
- 8 On 22 July 2015 the appellant applied under s 183 of the *Strata Schemes Management Act* for variation of unit entitlements. The member of this Tribunal whose decision is the subject of the appeal dismissed the application for want of jurisdiction on the grounds set out above.
- 9 On this appeal we have had the benefit of detailed written submissions from the parties and subsequent oral submissions.

## Appellant's submissions

10 The appellant submits in its first ground of appeal that the parcel of land in respect of which the Supreme Court orders were made had previously not been owned by any lot owner or the owners corporation. That submission was based on the following passage of Kunc J in *Rita Sahade v Owners Corporation* SP 62022 [2013] NSWSC 1791 (3 December 2013) at [48]:

48. Insofar as the owners corporation or any other lot owner were to claim a registered interest in that part of the access handle (including airspace) which currently falls outside it because of the error, indefeasibility would not attach to that part by reason of s 42(1)(c). However, this conclusion is academic because the very nature of the error means that the erroneously excluded section has not been expressly included as part of the common property or any other lot in the register.

11 Upon correction of the error in the register, additional land was added to lot 3 which could now lawfully be used as part of lot 3 because it had been brought into the strata scheme as a whole. As a result of this inclusion, the owner of lot 3 can now make an application for development consent consistent with any purpose permissible under the Waverley Local Environmental Plan 2014 under the Zoning Table "R2 – Low Density Residential", which includes dwelling houses and purposes incidental thereto. Previously the owner could not make such an application. It is said that this constitutes a change in the permitted land use as being a change in the ways in which that part of the parcel could lawfully be used with or without development consent.

12 It was the attachment of the new area of land to lot 3 and the bringing of it into the strata scheme as a whole which brought about the change in permitted use. Previously neither lot 3 nor the owners corporation could lawfully use or apply to use the land which had not expressly formed part of lot 3 and had not expressly been included as part of the common property. This submission is based on the premise that in effect the subject parcel of land, included as a consequence of the Supreme Court order, did not have any owner in the strata plan until the error was corrected.

13 While accepting that section 12 (3)(c) of the *Real Property Act* has "an element of retroactivity to it" the appellant says it was clearly not designed to work a "fiction" into s 183 of the *Strata Schemes Management Act*. The fiction would be to deem that there was no change of permitted land use.

- 14 The second submission is that the Tribunal erred in not holding that the corrected strata plan did not amount to a change in permitted use in respect of the ways in which that part of the parcel could lawfully be used.

### **Consideration**

- 15 We do not accept the proposition that the land in question was not in any relevant ownership prior to the Supreme Court decision. This would have been a strange and anomalous position as the respondents submit. We consider that the land in issue was previously in the ownership of the owners corporation as part of the common property as a consequence of section 5(1) of the *Strata Schemes (Freehold Development) Act 1973* (NSW). That subsection provides: "common property" means so much of a parcel as from time to time is not comprised in any lot.
- 16 In our view if the added parcel, including the space through which the inclinor moved, was not, on a proper construction of the strata plan, a part of lot 3, then it was part of the common property. The dictum of Kunc J, in *Rita Sahade v Owners Corporation SP 62022* [2013] NSWSC 1791, does not support a conclusion that prior to the orders there was no owner of the parcel. His Honour's remarks at [48] of the judgement do not mean that the parcel at any time lacked an owner or was not part of the common property. His Honour refers to his conclusion on indefeasibility as academic and to the fact that there was no "express" inclusion of the parcel in the common property.
- 17 The concept of an "ownerless" parcel of land outside the strata scheme for more than 12 years highlights the problem with the appellant's position. It would be unusual to say the least if on registration of a strata plan part of the land ceased to be in any ownership.
- 18 The consequence of the correction is that after the Supreme Court orders there was simply a change in ownership of the parcel, so that the owners of lot 3 became the owners of the parcel, but there was no change in the ways in which the use of the land was permitted. Section 183 of the *Strata Schemes Management Act* is concerned with the permitted use of the land and not with the identity of the particular individual owner from time to time who can use it in a permitted way either with or without the need for development consent. It is

concerned with correction of boundaries. It was not disputed by the appellant that a mere change of ownership by itself could not constitute a change in the permitted use of land.

- 19 The position, in summary, is that before the obvious mis-description error on the register was corrected, the owner for the time being of lot 3 could not use or seek consent to use the parcel because it was simply not owned by him or her. After correction of the mis-description the owner of lot 3 could take action to use the parcel. That is a change in the capacity of the owner from time to time. It is not a change in the permitted use or purpose in relation to the ways in which the parcel could be used.
- 20 Even if, contrary to our conclusion, the parcel had no previous owner, the only effect of the correction of the error in description on the register is that the parcel became part of lot 3. It does not change or affect in any way the permitted ways in which the land can be used. The operation of s 183 of the *Strata Schemes Management Act* is by reference to the land use as opposed to the identity or capacity of an owner to use or seek to use the land. Before the correction the owner of lot 3 could not use or apply to use the land whereas after the correction of the error in the register an owner could do so. But that fact or change in identity does not bring about a change in the land use.
- 21 In relation to the second ground of appeal concerning the operation of s 12 (3) of the *Real Property Act*, there is no submission that there is any question of accrued rights under subsection (3)(b). We see no reason to depart from the ordinary and natural meaning of subsection (3)(c) or to insert any limitation on the language such that it cannot operate in relation to the *Strata Schemes Management Act*. In matters of title where certainty is critical, it is clearly desirable to give full effect to provisions which remove doubt and the way to do this is to give the language full force and effect according to its terms.
- 22 There is no limitation on the words “validity and effect” which would justify a reading down. There is no question of preserved or accrued rights and there is no reason not to apply the provision on its terms with the consequence that the parcel is to be treated as if it had been part of lot 3 since 2000. That is the effect of the words “if the error had not occurred”. The error in question occurred in

2000. In questions of title it is important to have certainty and statutory language designed to achieve that end should not readily be watered down.

- 23 It is accepted that the use of the words “for example” in s 183 of the *Strata Schemes Management Act* indicate the section is not limited to zoning changes. Nevertheless there is a suggestion of a general planning control “regime” regulating land use which is changed. When pressed for other examples, counsel for the appellant referred to an ad hoc ministerial direction or a statute which might lead to a change in permitted use. In the present case there has been no rezoning ministerial direction or statute affecting the use of the land. Moreover, the *Real Property Act* is not directed to regulation of land use or changes thereof but with the regulation of title and ownership.
- 24 The Supreme Court orders make no reference to land use or change in the ways in which land is permitted to be used. On their face the orders simply correct an error in the register. That is the proper characterization of the decision and orders and their effect. They are not orders which in terms or by implication change permitted land use by changing the ways in which part of the parcel can lawfully be used. In terms of the language of s 12 of the *Real Property Act* the orders are directed at the correction of error and omissions of the register. They do nothing more.

### **Conclusion**

- 25 The Tribunal has no jurisdiction to make an order under s 183(2)(b) of the *Strata Schemes Management Act* because there has been no change to the ways in which the whole or part of the parcel could lawfully be used. This requirement is a jurisdictional fact. The effect of the orders of the Supreme Court is that the description error in the register must be taken never to have occurred and therefore the parcel must be treated as always having been part of lot 3. There has been no relevant change by reason of the correction.

### **Order**

The appeal is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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