



Civil and Administrative Tribunal
New South Wales

Case Name: Bradshaw v Cooke and The Owners – Strata Plan No 91905

Medium Neutral Citation: [2021] NSWCATAP 156

Hearing Date(s): On the papers

Date of Orders: 31 May 2021

Decision Date: 31 May 2021

Jurisdiction: Appeal Panel

Before: Dr R Dubler SC, Senior Member
L Wilson, Senior Member

Decision:

1. Leave to appeal against the Decision is not granted.
2. The Appeal is dismissed.
3. No order as to costs.

Catchwords: REAL PROPERTY - strata titles - section 80D of the Strata Schemes Management Act 2015 (NSW)

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Collins v Urban [2014] NSWCATAP 17

Texts Cited: Nil

Category: Principal judgment

Parties: Michelle Bradshaw (Appellant)
Stephen Cooke (First Respondent)
The Owners – Strata Plan No 91905 (Second Respondent)

Representation: Solicitors:
Appellant (Self-Represented)

First Respondent (Self-Represented)
Chambers Russell Lawyers (Second Respondent)

File Number(s): 2021/00056037 (AP 21/01516)

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: n/a

Date of Decision: 17 December 2020

Before: K Ross, Senior Member

File Number(s): SC20/43172 and SC20/43170

REASONS FOR DECISION

Introduction

- 1 The appellant and first respondent are owners of lots in a two lot strata scheme. The second respondent is The Owners Corporation which was granted leave to be legally represented in this appeal.
- 2 This Appeal is yet another cautionary tale for persons contemplating or living in a two lot strata scheme.
- 3 On 13 October 2020 the appellant lodged two applications against her fellow lot owner in their scheme, Mr Cooke. The first application was an interim application while the second was the substantive strata application.
- 4 Ultimately both applications were heard and determined on 17 December 2020 after a hearing which took place on that day.
- 5 For the reasons which follow we have decided to dismiss the appeal.

The issue on appeal

- 6 The appellant does not challenge any findings of fact made by the Tribunal in the Decision. The sole issue on the appeal is whether the Tribunal Member fell

into error by appointing the first respondent's proposed strata manager rather than the appellant's preferred strata manager: pages 2 and 4 Notice of Appeal.

History of the proceedings below

7 The appellant's original interim and substantive applications sought orders, respectively, for the owners corporation to "extend the existing AAMI insurance policy ... to the end of December 2020" and "take out an annual Strata Building Insurance policy with Hollard Insurance from the date of expiry of the AAMI insurance (extended under the Interim Order) for a period of 12 months" to ensure compliance with s.160 of the Strata Schemes Management Act 2015 (NSW) (SSMA).

8 On 14 October 2020 Principal Member Rosser made the following directions and orders:

The Tribunal has received an application for orders under the Strata Schemes Management Act 2015 (the Act).

In addition, the applicant has requested that the Tribunal make interim orders under s 231 of the Act.

...

The Tribunal otherwise makes the following orders:

1. The Owners - Strata Plan No. 91905 is joined as a respondent in the proceedings.

(Reasons: It is the responsibility of the Owners Corporation and not the responsibility of individual lot owners to have the building insured. The Owners Corporation therefore has an interest in the application.

2. Having considered the material provided in the application, the Tribunal is satisfied that urgent considerations justify the making of the following order(s) on an interim basis without hearing from the respondents:

The Owners Corporation is to take immediate steps to ensure that the building is insured in accordance with the relevant resolution at the last properly convened meeting of the Owners Corporation.

Reasons: Material provided with the application indicates that a decision to change insurers may not have been made with the approval of the Owners Corporation.

3. Order 2 above will remain in force until 5.00 pm on 30 October 2020, being the date on which the application for interim

orders will be listed for hearing and the application for substantive orders will be listed for directions.

4. Any application to continue or revoke the above order will be considered at the hearing on 30 October 2020.

5. By 4.30 pm on 14 October 2020, the applicant is to provide to the respondents a copy of the applications made to the Tribunal, all documents attached to the application and these orders.

6. By 21 October 2020, the applicant is to provide to the respondents and the Tribunal evidence and submissions in support of the continuation of the application for interim orders.

7. By 28 October 2020, the respondent is to provide to the applicant and the Tribunal any evidence and submissions in response to the application for interim orders or in support of any application to revoke the orders.

8. Evidence and submissions must specifically address:

a) Whether urgent considerations warrant the continuation of orders on an interim basis; and,

b) If so, the nature of the urgent considerations.

9 On 30 October 2020 Senior Member Charles had both applications listed before him. He made directions for the exchange of evidence and directed that “These orders and directions are made in File No SC 20/43170 (Application for Interim Orders) and in File No SC 20/43172 (Application for Substantive Orders). Both applications are to be listed for hearing together”: Order 2.

10 On 3 December 2020 Senior Member Ross, in advance of the hearing she was to preside over on 17 December 2020, made the following direction:

On 03/12/2020 the following procedural directions were made in chambers:

1. Each party is, on or before 10/12/2020 to give to the Tribunal and the other party a consent and terms of agreement by a licenced strata manager to act by way of compulsory appointment as manager of SP 91905.

Reasons:

It is apparent that the parties are unable to agree about a number of matters in respect of SP 91905.

The Tribunal may on its own motion following the hearing of this dispute, determine that an appropriate remedy would be to make an order appointing a compulsory strata manager.

The ensure that [sic], if the Tribunal determines to do so, it is able to make the appointment, a form of consent is required.

- 11 The hearing of both the interim and substantive applications took place on 17 December 2020 and orders were made on the same day (Orders). It is those Orders the appellant appeals against.
- 12 Pursuant to the Orders, Bright & Duggan Pty Ltd commenced as the compulsorily appointed strata manager shortly after 17 December 2020 and has been exercising all functions of the strata committee since. The Owners corporation remained a party to these proceedings and they were granted leave to be legally represented.

The ground of appeal

- 13 There is one ground of appeal; that the Decision was not fair and equitable because the Tribunal did not give “due consideration” to the appellant’s preferred manager “on the basis of an administrative oversight/ misunderstanding”: page 2 Notice of Appeal. The appellant acknowledges that this is not a question of law therefore she seeks leave to appeal: page 4 Notice of Appeal.

The appellant’s submissions

- 14 The appellant’s written submissions filed 18 February 2021 repeat what was written in the Notice of Appeal. They give a great deal of background information about the strata scheme and reinforce the Tribunal’s acceptance of the agreed fact that this strata scheme is not functioning satisfactorily.
- 15 The appellant submits that the chosen strata manager “does not offer value to the owners of SP 91905”. She reiterated that at “the time of the hearing, it was not clear to me, the difference between a voluntary appointment and compulsory appointment of a Strata Managing Agent.” She repeats that that misunderstanding lead her to submit the wrong documents for the purposes of s.237 of the SSMA and thus precluded the Tribunal from selecting her preferred strata manager. She submits that “Now that I am aware of the difference between a voluntary appointment and compulsory appointment, I have contacted Russell Property Partners and confirm they are willing to enter into an agreement for compulsory appointment as Strata Managing Agent for

SP91901 on the basis of the same fee proposal of \$900 per annum for an initial 12-month appointment.” (There are no page or paragraph numbers in the appellant’s written submissions)

- 16 On 11 March 2021 the appellant filed her “response to respondents’ statements”. The appellant’s response to the first respondent’s submissions was to argue the merits of appointing her preferred strata manager over the manager which was appointed: pages 2 – 5.
- 17 The appellant’s response to the second respondent’s submissions concerned the conduct of the hearing on 17 December 2020. The appellant discussed, on pages 5 and 6, what occurred at and after the hearing on 17 December 2020.
- 18 It must be noted that the appellant was directed by the Appeal Panel, on 2 February 2021, to “lodge with the Appeal Panel” the “sound recording or transcript of the hearing at first instance... if what happened at the hearing is being relied on and a typed copy of the relevant parts”: Direction 3(d). No sound recording or transcript was lodged by the appellant.
- 19 On page 6 the appellant submitted that had she been given the opportunity to request further time to submit the revised paperwork at the time of the hearing or immediately afterwards she would have done so.
- 20 Further, on page 6, the appellant submitted that the “opportunity to correct a minor administrative issue, was not provided at the hearing and therefore was not fair and equitable.”

The First Respondent’s submissions (other lot owner)

- 21 The respondent filed its submissions on 2 March 2021, which was in addition to his Reply to Appeal.
- 22 The first respondent’s submissions commenced with an opening statement that the appeal should be dismissed because the appellant had failed to provide submissions that prove the Orders were unfair on the basis of evidence provided to NCAT by both parties at the final hearing on 17 December 2020.
- 23 Next the first respondent set out the background to the NCAT hearing on 17 December 2020. This section finished with “It is not the fault of NCAT, Senior Member Ross or ours [that the appellant] was unprepared despite written

instruction. Entertaining the idea of change in compulsory strata management companies now 3 months later is not reasonable on this basis”: page 1.

- 24 The remainder of the first respondent’s submissions were the discretionary arguments which are ordinarily made at a hearing at first instance, when a Tribunal Member is deciding which strata manager to appoint.

The Second Respondent’s submissions (owners corporation)

- 25 The respondent filed its submissions on 2 March 2021, which were in addition to its Reply to Appeal.

- 26 The second respondent submitted, in paragraph 2, that the appeal should be dismissed because the appellant does not satisfy the criteria to be granted leave to appeal and the appellant’s grounds of appeal are baseless and misconceived.

- 27 These submissions were summarised by the second respondent as follows:.

(a) the appellant has not made out any reasonable basis for leave to be granted for the appeal in circumstances where:

the appellant has not indicated any basis on which the Tribunal's Decision was not fair and equitable, rather she alleges that the fees of Bright & Duggan are not fair and equitable, which has no bearing on the Tribunal's Decision and is entirely misguided; and

the appellant concedes the appeal is a result of her misunderstanding and error, rather than an error in the Tribunal's Decision; and

(b) in any event, the appellant's grounds of appeal are misguided because:

i. the Tribunal did give due consideration to the appellant's preferred strata manager, Russell Property, as noted at paragraph 6(i) of the Tribunal's Decision; and

ii. dissatisfaction with Bright & Duggan's fees is not a legitimate ground for appeal.

Consideration of the issues

- 28 This appeal concerns s.237 of the SSMA which is:

237 Orders for appointment of strata managing agent

(1) Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation The Tribunal may, on its own motion or on application, make an order appointing a person as

a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent—

- (a) to exercise all the functions of an owners corporation, or
- (b) to exercise specified functions of an owners corporation, or
- (c) to exercise all the functions other than specified functions of an owners corporation.

(2) Order may confer other functions on strata managing agent The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—

- (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
- (b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
- (c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made The Tribunal may make an order only if satisfied that—

- (a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or
- (b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or
- (c) an owners corporation has failed to perform one or more of its duties, or
- (d) an owners corporation owes a judgment debt.

(4) Qualifications of person appointed A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must—

- (a) hold a strata managing agent's licence issued under the Property and Stock Agents Act 2002, and
- (b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) Terms and conditions of appointment A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to

remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

(6) Return of documents and other records A strata managing agent appointed as a consequence of an order under this section must cause a general meeting of the owners corporation to be held not later than 14 days before the end of the agent's appointment and must on or before that meeting make arrangements to return to the owners corporation all documents and other records of the owners corporation held by the agent.

(7) Revocation of certain appointments An order may be revoked or varied on application and, unless sooner revoked, ceases to have effect at the expiration of the period after its making (not exceeding 2 years) that is specified in the order.

(8) Persons who may make an application The following persons may make an application under this section—

(a) a person who obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,

(b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

29 As can be seen, an order appointing a compulsory strata manager pursuant to s.237 can be made by the Tribunal on its own motion, and can only be made if the appointed strata manager holds the requisite licence and has consented in writing to the appointment: s.237(1) and (4). There are further requirements about how the consent can be given if the proposed managing agent is a corporation: s.237(4). The matters in s.237(4) are not optional; they are called conditions precedent to an order under s.237. This means the Tribunal is not able to appoint a compulsory strata manager unless the matters set out in subsection 237(4) are met.

30 The Tribunal very clearly wrote to the parties on 3 December 2020 setting out these matters and giving the parties an opportunity to provide the requisite information prior to the hearing on 17 December 2020: see paragraph 10 above.

- 31 The appellant was the applicant below. In her Notice of Appeal she claims the “difference between a voluntary appointment and compulsory appointment of a Strata Managing Agent was not clear to me at the time of the hearing. I was not aware that the documentation submitted for Russell Property Partners was on the basis of voluntary (standard) appointment only and that by agreeing to a compulsory appointment at tribunal this would preclude Russell Property Partners from consideration of appointment”: page 4 Notice of Appeal.
- 32 The applicant at first instance bears the onus of proof. This means they must satisfy the Tribunal, on the balance of probabilities, that the Tribunal should make the orders sought. This includes satisfying the Tribunal that it has the jurisdiction to make the orders sought, and that any conditions precedent to making the orders have been met. In the case below, the applicant satisfied the Tribunal on the balance of probabilities that it should order the owners corporation maintain the insurance: Order 1.
- 33 The parties also agreed that the owners corporation is not functioning satisfactorily, which is another condition precedent (among others in subsection s.237(3)) to making an order for compulsory appointment: [6(h)] of the Decision.
- 34 The Tribunal was satisfied, in all the circumstances, “that it is necessary for a strata managing agent to be appointed to carry out all of the functions of the owners corporation and the strata committee”: [6(h)] of the Decision. None of the parties to the appeal seek to interfere with that finding or decision of the Tribunal.
- 35 However the appellant considers the Appeal Panel should set aside the Tribunal’s order to appoint Bright & Duggan Pty Ltd and allow her the opportunity to provide the information required by s.237(4) so that the Tribunal, at a remitted hearing, could appoint her preferred strata manager (rather than the one which has been acting pursuant to the Tribunal’s orders for the past four months).
- 36 The Appeal Panel would need to grant the appellant leave to appeal from the Decision before it would interfere with the Tribunal’s orders. As the Decision is a Consumer and Commercial Division decision the Appeal Panel can only

grant leave if it is satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or was against the weight of evidence or significant new evidence is now available which was not reasonably available at the time of the hearing: cl.12 Sch 4 of the NCAT Act. The appellant relies on the first basis, namely the decision was not fair and equitable.

- 37 The appellant submits the Decision was not fair and equitable because the appointed strata manager costs more than the appellant's preferred manager.
- 38 However the fact is the Tribunal was not able to appoint the appellant's preferred manager because the appellant had not provided sufficient evidence to the Tribunal to satisfy the conditions precedent in s.237(4) which must first be met before the Tribunal has the power to appoint the appellant's preferred manager. There was nothing unfair or inequitable about the Tribunal's decision. The Tribunal appointed the only manager it was capable of appointing on the day of the hearing. These points were made by the second respondent in paragraph 9 of its written submissions and the Appeal Panel agrees with those submissions.
- 39 The Appeal Panel agrees with the second respondent's submission that the "Tribunal's decision was made at the final hearing with both lot owners present, and there is no indication that Ms Bradshaw raised any objection to the decision on that date or requested additional time to file and serve further documents": paragraph 8(e).
- 40 The appellant referred to the lack of required documents as a "minor administrative issue" on page 6 of her response submissions. The Appeal Panel cannot categorise the lack of documents to prove the matters in s.237(4) in that way. The appellant, who was the applicant below, did not satisfy the Tribunal of a condition precedent required before the Tribunal could appoint the appellant's preferred strata manager. Further, it is for the applicant to understand the law being applied in the proceedings she commenced, and the practice of the Tribunal. The appellant was on notice, from at least 14 days before the hearing, that the Tribunal would be considering the compulsory appointment of a strata manager and that it required certain documents if it

was to make such an appointment. If the appellant was confused about the contents of the 3 December 2020 letter, or about the law which the Member would be applying at the hearing, or required more time to provide the documents, it was incumbent on her, particularly as the applicant below, to inform herself about the practice and procedure and the law being applied, and make any applications she deemed necessary, for example an adjournment application. This she did not do.

41 It is not for the Tribunal, particularly when dealing with an urgent strata application, to suggest to a party, who already had 14 days' notice of what was required at the hearing, to suggest to the applicant that she make an adjournment application for the purpose of providing documents which she was on notice she needed to provide before the hearing.

42 The appellant complains about being unclear about certain matters at the hearing. It is obvious she misunderstood the practice and procedure of the Tribunal as after she received the orders she called the registry and asked to be put through to the Member so she could talk about the orders and change them. This is an example of the appellant's poor understanding of the Tribunal's practice and procedure. As the applicant, the appellant bears the onus of proof and needed to inform herself about matters pertinent to the resolution of her two applications filed below.

43 The Appeal Panel refuses to grant leave to appeal from the Decision. The appeal is accordingly dismissed.

44 **Costs**

45 The second respondent seeks an order that the appellant pay its costs pursuant to section 60 of the NCAT Act. In paragraphs 35 to 39 the second respondent makes submissions about special circumstances which warrant the award of costs in its favour.

46 The appellant did not respond to that aspect of the second respondent's submissions.

47 The Appeal Panel declines to make an order that the appellant pay the second respondent's legal costs because the Appeal Panel is not satisfied special circumstances exist to warrant an award of costs.

48 Furthermore s.104 of the SSMA makes such an order redundant, even if the Appeal Panel were minded to find special circumstances. Section 104 is as follows:

104 Restrictions on payment of expenses incurred in Tribunal proceedings

(1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.

(2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.

(3) In this section, a reference to proceedings includes a reference to proceedings on appeal from the Tribunal.

49 The effect of s.104(1) is that the owners corporation cannot levy a contribution on the first respondent as the first respondent was successful in the proceedings. The practical effect of this is that the only lot owner against whom the second respondent can levy a contribution for its legal fees would be the appellant. The Owners Corporation does not need an order of the Appeal Panel to comply with s.104 and levy a contribution on the appellant.

50 **Orders**

51 The Orders of the Appeal Panel are as follows:

(1) Leave to appeal against the Decision is not granted.

(2) The Appeal is dismissed.

(3) No order as to costs.

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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