Civil and Administrative Tribunal

New South Wales

Case Name:	Stemp v Otis Elevator Company Pty Ltd
Medium Neutral Citation:	[2021] NSWCATAP 220
Hearing Date(s):	13 July 2021
Date of Orders:	20 July 2021
Decision Date:	20 July 2021
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member D Charles, Senior Member
Decision:	(1) The time for filing the Notice of Appeal is extended to 9 April 2021. (2) Appeal dismissed. (3) Leave to appeal refused.
Catchwords:	APPEALS – Application for leave to appeal – no question of principle – whether the Tribunal erred in finding that the appellants were not parties to the contract relied on
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – cl 12 of Sch 4 Strata Schemes Management Act 2015 (NSW) – s 273(2)(b)
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Trident General Insurance Co Limited v McNiece Bros Pty Ltd (1988) 165 CLR 107 Tweddle v Atkinson (1861) 1 B & S 393 Ryledar Pty Ltd v Euphoric Pty Ltd [2007] NSWCA 65

Texts Cited:	Is Privity of contract here to stay?, J McDonnell, S Ogden J Koe, King & Wood Mallesons, 21 October 2019
Category:	Principal judgment
Parties:	Leonie Stemp (Appellant) Otis Elevatory Company Pty Ltd (First Respondent) Pamela Murphy (Second Respondent)
Representation:	Appellant (Self Represented) Respondent: Otis Elevator Company Pty Ltd
File Number(s):	2021/00098648
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	24 February 2021
Before:	P Briggs, General Member
File Number(s):	HB 20/46738

REASONS FOR DECISION

Introduction

1 Leonie Stemp (Ms Stemp) and Pamela Murphy (Ms Murphy) appeal from a decision of the Civil and Commercial Division of the Tribunal (the Tribunal) of 24 February 2021 in matter HB 20/46838 (the Decision).

2 Ms Stemp had sought orders that the respondent Otis Elevator Company Pty Ltd (Otis) is required to repair a lift on the common property of the strata scheme premises occupied by her as a lot owner, and to install an emergency phone in the lift.

3 The Tribunal dismissed Ms Stemp's application for orders of the Tribunal. The Tribunal found that the proceedings were misconceived and that Ms Stemp had no standing to bring her application against Otis.

4 On the basis of the material before us, we find that the Tribunal at first instance acted correctly and according to legal principle in doing so.

5 Therefore we have decided to dismiss the appeal.

Procedural Matters

6 Ms Murphy was not a party to the proceedings in the Tribunal at first instance. However, she sought to be added as an appellant, and prior to the hearing the Appeal Panel made procedural directions joining her as an appellant.

7 The Notice of Appeal should have been filed within 28 days of the Decision, that is, by 24 March 2021, whereas it was not filed until 9 April 2021. At the hearing of the appeal, Otis did not object to the Appeal Panel extending the time in which to file the Notice of Appeal to 9 April 2021, and we have made that order.

The Decision

8 Ms Stemp had sought orders that Otis is required to repair a lift on the common property of the premises occupied by her, and to install an emergency phone in the lift.

9 In her application to the Tribunal at first instance, Ms Stemp relevantly stated:

> …
>
> On the 4/6/2020 I got into the lift as I had 2 bags to take to Lifeline. I got into the lift and pressed Ground. The door closed and then it shuddered and dropped twice. I was scared stiff and my heart was jumping the doors would not open. I had my mobile phone on me and I thankfully could ring 000 after about half and (sic - an) hour and taking (sic - talking) on the phone with 000 two Fire and Rescue trucks came and got me out of the lift.
>
> The lift is still taped up with Fire and Safety tape, I have never been told what happened to the lift WHY it broke down with me inside.
>
> I contacted Fair Trading numerous times regarding this issue and they suggested sending a Letter of Demand which I did on 29/6/2020 which I have never received a response to.

10 Ms Stemp sought orders that Otis "fully repair promptly" a communications system in the lift and install an emergency phone.

11 The Tribunal dismissed Ms Stemp's application. The Tribunal found that the proceedings were misconceived for the following reasons:

> Ms Stemp and Ms Murphy are the beneficiaries of a bi [sic – by] law which allows them exclusive use of a lift in Strata Plan 94900.
>
> The Owners Corporation has an essential maintenance agreement with Otis Elevator Company Pty Ltd. That contract was executed by Ms Stemp as chairperson of the Owners Corporation and Ms Murphy as witness (Owner no 5 of the residential building at 89 Old Hume Highway Camden on 2/2/2019.)
>
> The Maintenance Agreement indicates that the Customer (of Otis) is The Owners of Strata Plan 94900.
>
> I find that Ms Stemp and Ms Murphy make payments to the OC for maintenance of the lift, but they have no standing to bring this action against Otis.
>
> I have noted that the issue, giving rise to this Application is the provision of a particular telephone in the lift and that Otis is ready willing and able to carry out the installation.
>
> I urge the parties to resolve this dispute without bringing a further claim in the Tribunal which in all probability will cost more than the installation that is required before the lift is able to be made operational again.

Grounds of Appeal

12 The grounds of appeal as expressed by Ms Stemp in her Notice of Appeal are as follows:

> 1. The Strata Manager at the time had a contract prepared between myself and unit 5 with OTIS LIFTS.
> 2. The Body Corp has nothing to do with this contract.
> 3. We signed this contract as individual owners not committee members.
> 4. By law advises we are responsible for the maintenance, repairs and cost of this lift.

Reply

13 In its Reply to Appeal, Otis states, relevantly:

> The Appellant claims the Contract is "between the parties was not with the Body Corporate".
>
> The Contract clearly states it is between Otis and [the] Owners Corporation. The Common Seal of the Owners Corporation has been affixed, and Otis is therefore entitled to rely on the Contract as binding on the Owners Corporation pursuant to s 273 of the Strata Schemes Management Act 2015.
>
> The orders made by the Tribunal were correct and the Applicants did not have standing to bring any claim under the Contract. Further evidence was not required to be considered by the Tribunal in view of the Applicants' lack of standing.

14 In addition, Otis says that it opposes leave to appeal being granted as:

- the decision was fair and equitable. It was made on established legal principles that a person who is not a party to a contract does not have standing to bring a legal claim in respect of that contract;
- the only evidence relevant to the question of standing to which the Tribunal could have regard was the written contract between Otis and the Owners Corporation. The decision was made on the basis of the relevant evidence.
- no new evidence is available.

Nature of an appeal

15 Section 80 of the Civil and Administrative Tribunal Act 2013 (NCAT Act) sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any question of law or with leave of the Appeal Panel on any other grounds (s 80(2)(b)).

A question of law

16 In Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69, without listing exhaustively possible questions of law, the Appeal Panel considered the requirements for establishing an error of law giving rise to an appeal as of right.

17 In Prendergast the Appeal Panel also stated at [12] that, in circumstances where an appellant is not legally represented, it is appropriate for the Tribunal to approach the issue by looking at the grounds of appeal generally, and to determine whether a question of law has in fact been raised (subject to any considerations of procedural fairness to the respondent that might arise).

18 The appellants say that the error of law was the failure of the Tribunal to consider whether or not they fell within an exception to the privity of contract rule. Their second claimed error of law was the faint suggestion that Ms Stemp had been denied procedural fairness as the Tribunal hearing was only four minutes in length, and in her submission the Member at first instance could not have considered all her documentation.

19 Privity of contract is generally known as a “fundamental” and “settled” common law rule relating to contracts: *Trident General Insurance Co Limited v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 128. The rule is that no outsider to a

contract can take advantage of a contract even if the contract is made for the outsider's benefit: *Tweddle v Atkinson* (1861) 1 B & S 393 at 398. We note that an outsider is a person who is not a party to the contract although they may be mentioned in the terms of the contract.

20 One article has suggested (*Is Privity of contract here to stay?,* J McDonnell, S Ogden J Koe, King & Wood Mallesons, 21 October 2019 [https://www.kwm.com/en/au/knowledge/insights/is-privity-of-contract-here-to-stay-20191017]) that there is only one "true" exception to the doctrine of privity in Australia, namely for insurance contracts which was introduced by the High Court of Australia in *Trident*. The High Court, by majority, considered it as unjust not to allow a third party named in an insurance contract to benefit from it despite finding that there was no trust. Since *Trident*, other litigants have sought to widen the exception to non-insurance contracts, but no principle of wider application has emerged.

21 While we accept that Ms Stemp has identified a question of law, we are not persuaded that the Tribunal erred in not finding that she fell within an exception to the privity of contract rule.

22 As to the second error of law, namely procedural unfairness, Ms Stemp asked us to listen to a recording of the hearing. We have not done so. The directions of the Appeal Panel made on 14 May 2021 clearly state that if she wished to rely on what happened at the hearing, she needed to provide the Appeal Panel with a typed copy of the relevant parts of the hearing, in addition to the sound recording. In the absence of a transcript, we have not listened to the sound recording.

23 We accept, as claimed by Ms Stemp, that the hearing was of short duration. The fact that the Tribunal was satisfied that Ms Stemp had no standing to bring the application, as she was not a party to the Contract (as defined below) and dismissed the application on that basis, may explain the length of the hearing.

Leave to appeal

24 Clause 12 of Sch 4 of the NCAT Act provides that, in an appeal from a decision of the Consumer and Commercial Division of the Tribunal, an

Appeal Panel may grant leave to appeal only if satisfied that the appellant may have suffered a substantial miscarriage of justice because:

(1) the decision of the Tribunal under appeal was not fair and equitable; or

(2) the decision of the Tribunal under appeal was against the weight of evidence; or

(3) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

25 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled. In Collins v Urban [2014] NSWCATAP 17 the Appeal Panel conducted a review of the relevant cases at [65]-[79] and concluded at [84](2) that:

> Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) Issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

26 Even if an appellant establishes that they may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains a discretion whether to grant leave under s 80(2) of the Act. An appellant must demonstrate something more than that the Tribunal was arguably wrong: Pholi v Wearne [2014] NSWCATAP 78 at [32].

Appellants’ submissions

27 The grounds of appeal are elucidated in Ms Stemp’s explanations expressed in the Notice of Appeal (and then augmented with her written material and oral submissions) as to why she was asking for leave to appeal, why the Decision was not fair and equitable, and why the Decision was against the weight of the evidence.

28 In her reasons as to why the Appeal Panel should give leave to appeal, Ms Stemp states that the contract with Otis was with her and Ms Murphy, the only two people that could use the lift in the strata scheme. She says that previously "strata" had nothing to do with the lift. She says that she has evidence which proves that Otis never carried out their duty to check and maintain the lift, and that the lift has never had an emergency phone which worked. She says that she and Ms Murphy had always paid Otis themselves, and Otis was not paid by the owners corporation.

29 Ms Stemp was trapped in the lift on 4 June 2020 and she has never received an explanation as to why this happened. She believes that the onus is on Otis to put in a communication emergency system which should have been there in the first place when the lift was certified.

30 In her reasons as to why the Decision was not fair and equitable, Ms Stemp repeats her submission that the contract was between her andMs Murphy, on the one hand, and Otis, on the other hand. She says that the strata manager at the time "set up" the contract on their behalf and that is why they both had to sign it. Ms Stemp says that she has a lot of evidence regarding this matter which was not even looked at by the Tribunal Member.

31 Ms Stemp included in her appeal materials a "Table of Issues" (pages 1 and 2) which states:

> 1. Otis lift was installed at 89 Old Hume Highway in 2016
>
> 2. Otis Lift **was certified** on 22/12/2016
>
> 3. A contract was sent by Otis to Macarthur Strata Agency as we P Murphy and me L Stemp asked the Strata Manager to engage Otis *on our behalf* to commence maintenance on the lift.
>
> 4. We signed the contract on 12/2/19 not in front of Louise Hill from Macarthur Strata I signed as Lot owner 4 and P Murphy signed as Lot owner 5 as we are responsible for the lift.
>
> 5. P Murphy and I L Stemp I believe had a written agreement between us and the Strata Manager at that time this would be our standing.
>
> 6. The lift was maintained by Otis and paid for by P Murphy and myself L Stemp ***directly*** to Otis.
>
> 7. It was only divulged to us on 29/11/2020 that a (sim card had expired) and there was ***NO emergency*** phone working in this Lift.

> 8. I believe that the maintenance was not carried out with duty of care and NOT checked each visit.
>
> 9. I was advised by the builder and the developer that Otis had installed the phone system in the lift. In any event they **OTIS *certified the lift*.**
>
> 10. I have been trapped in the lift now twice and needed Fire Rescue to get me out of the lift. I have never been advised WHY the lift broke down.
>
> 11. The hearing was heard on 24/2/2021 by Member P Briggs. I am appealing this decision on an ***error of law***. The member "failed to take into consideration a relevant consideration".
>
> 12. The Member "***asked the wrong question***" as I believe that "***there was an exception to privity of contract".*** We privately asked the then Strata Manager to arrange this contract on our behalf.
>
> 13. I believe that both these are recognized as errors of Law as in Prendergast v Western Murray Irrigation (2014) NSWCATAP 69.
>
> 14. I also seek leave as a "**substantial miscarriage of justice**" referring to Collins v Urban (2014) NSWCATAP 17.
>
> 15. I also have the recording of the hearing on 24/2/2021 by Member P Briggs as part of my evidence.
>
> (emphasis as in original)

32 Ms Stemp amplified these matters at the appeal hearing. First of all, she explained the circumstances surrounding the entering into the contract with Otis. She said that "it was never signed in front of anyone". She said that she and Ms Murphy always made the payments to Otis, and that Otis had failed to carry out its maintenance obligations, including the installation of an emergency phone. Ms Stemp has had to call 000 on two occasions now when she has been trapped in the lift, and suffers trauma every time she enters it.

33 Ms Stemp accepted that the lift formed part of the common property of the strata scheme.

Respondent's Submissions

34 Otis was represented by its Company Secretary Mr David Ambery. He confirmed Otis' position was that the contract on which the appellants were suing was a contact entered into between Otis and The Owners Strata Plan 94900 and that the Tribunal was correct to dismiss Ms Stemp's application to the Tribunal on the basis that she had no standing to bring the application for breach of that contract.

Consideration

35 The appellants are the respective owners of lots 4 and 5 in a six lot strata scheme in Camden. This is a scheme for "the over 55s".

36 It is common ground that there is a lift installed on the common property for their exclusive use, and that the lift is to be maintained and repaired by them: see by-law 23.

37 It appears that sometime prior to 17 December 2018, The Owners Strata Plan 94900 was sent a contract titled "Essential Maintenance Agreement" by Otis bearing date 17 December 2018 (the Contract). The terms of the Contract relevantly included the following:

(1) the parties were The Owners Strata Plan 94900 as Customer and Otis;

(2) a service period of sixty months commencing on 1 March 2019, continuing for successive period of sixty months unless terminated;

(3) fees of $133 plus GST per Quarter payable by the Customer quarterly in advance;

(4) "Services" as set out in the "Specification Schedule"; and

(5) "Additional Services" being "any services requested and not set out as included in the Specification Schedule.

38 The Specification Schedule sets out a list of "Examinations" which Otis agreed to carry out. These relevantly include:

- communication (consisting of connection to eService and access to event driven email); and
- remote and priority service, being the "Otis Elite Service".

39 The Otis Elite Service is described on page 18 of the Contract. This page sets out the responsibilities of Otis, and the responsibilities of the Customer (that is The Owners Strata Plan 94900). Otis' responsibilities relevantly include the installation and maintenance of the Remote Elevator Monitoring Equipment (as defined in cl 5). The Customer's responsibility includes the installation and maintenance of a telephone between it and Otis for the purpose of the provision of the Elite Service, and to pay telephone connection fees and accounts including service and equipment: see paragraph 2(a).

40 We have set out the content of the Contract at some length as we understand that Otis' position is that, regardless of the identity of the parties to the Contract, it had no obligation to install an emergency telephone in the lift.

41 This is disputed by the appellants, Ms Murphy stating in a written submission:

> I fail to understand why this was not installed with the lift in the first place, as it is a major safety piece of equipment and should be the most important piece of item in a lift and part of Otis' obligation so that anyone can access assistance ASAP should a breakdown occur, which it has.

42 This is also Mr Stemp's position as is made clear in the Notice of Appeal in which she asks the Appeal Panel to make the following order:

> That the responsibility of the installation of an emergency phone (OTIS) is the responsibility of Otis and should have been installed by the costs of OTIS Lifts, which should have been installed in the beginning.

43 We consider that there is substance in Otis' position that it had no responsibility to install an emergency telephone in the lift. Here we note that Mr Ambery told us that, at the Tribunal hearing, Otis agreed to provide Ms Stemp with a "heavily discounted" quotation for the installation of a telephone. It did so, but the quotation was never accepted.

44 However, the real question in dispute is the identity of the parties to the Contract. The identity of the parties to a contract is determined objectively: *Ryledar Pty Ltd v Euphoric Pty Ltd* [2009] NSWCA 65 at [262] – [266]. The documents provided to the Appeal Panel by the appellants (relevantly, pages 8 and 9 of the Contract) clearly indicate, as noted above, that the contracting parties were The Owners Strata Plan 94900 and Otis with:

- the Contract being signed on behalf of The Owners Strata Plan 94900 by its then strata manager Ms Louise Hill on 18 February 2019;
- the Contract being signed on behalf of Otis by Mr Bryan Rhodes on 28 February 2019.

45 We do not accept, as claimed by the appellants, that The Owners Strata Plan 94900 "has nothing to do with this [C]ontract", or that "We signed this [C]ontract as individual owners". The appellants' position is not borne out, objectively, by the evidence before the Tribunal at first instance or before the Appeal Panel.

46 The Contract indicates that each of Ms Stemp and Ms Murphy placed their signatures on the Contract on 12 February 2021. Each signature appears under the statement:

> THE COMMON SEAL of the Proprietors Strata (or Units/Buildings/Group Title/Community Title/Plan No 94900 was hereunto affixed on the 12th day of February 2019 in the presence of the following person(s) who are duly authorised to attest the affixing of the seal.

47 Apparently the strata manager had possession of the Common Seal of The Owners Strata Plan 94900. This is not uncommon. We infer that the appellants were asked to place their signatures on the Contract by the strata manager before the strata manager signed the Contact on behalf of The Owners Strata Plan 94900 and placed the Common Seal on it. This may be out of an abundance of caution, as we note that s 273(2)(b) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) provides that the seal of an owners corporation that has more than two owners must not be affixed to any instrument or document except in the presence of:

- two persons, being owners of lots or members of the strata committee, that the owners corporation determines for the purpose or, in the absence of a determination, the secretary of the owners corporation and any other member of the strata committee (s 273(2)(a)); or
- the strata managing agent of the owners corporation (s 273(2)(b)).

48 Given the effect of s 273(2)(b), it seems that the appellants did not have to witness the placing of the Common Seal on the Contract. We note that s 273(4) of the SSMA provides that a strata managing agent who has affixed the seal of the owners corporation to any instrument or document is taken to have done so under the authority of a delegation from the owners corporation.

49 We further note that there is other material in the appellants' documents which supports a finding, objectively determined, that the Contract was between Otis and The Owners Strata Plan 94900. Specifically, there is evidence that Otis raised invoices for its maintenance work on the lift and addressed the invoices to The Owners Strata plan 94900. While we accept that the appellants were the persons who in fact paid these invoices, this was because they were required to do so under by-law 23 of the strata scheme's by-laws. In this way, the obligation of the appellants to pay the fees to Otis did not arise under the Contract but rather by reason of the appellants' obligations to the Owners

Corporation as the appellants had exclusive use of the lift pursuant to the terms of the common property rights by-law.

50 In summary, we accept that the appellants each believe that they were individually parties to the Contract. However, on the basis of the material before us and having regard to the objective theory of contract, their subjective position as to the identity of the contracting parties is not determinative of the legal position. In our view, the Tribunal acted correctly and according to legal principle in finding that Ms Stemp had no standing to institute proceedings relying on a contract in respect of which she was not a party.

Conclusion

51 For the above reasons, to the extent that the appeal raises an error of law, the appeal should be dismissed.

52 To the extent that the appeal raises other errors, we are not satisfied that any ground involves an issue of principle, a question of public importance, an injustice which is reasonably clear or that the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result. Therefore the decision of the Appeal Panel is that leave to appeal should be refused.

Other Observations

53 We were informed during the hearing that a compulsory strata manager had recently been appointed pursuant to s 237 of the SSMA. There was no information before us as to whether the strata manager was appointed to exercise all the functions of an owners corporation (s 237(1)(a)), to exercise specified functions of an owners corporation (s 237(1)(b)), or to exercise all the functions other than specified functions of an owners corporation (s 237(1)(c).

54 Whatever the position, we encourage the appellants to liaise with the new strata manager with a view to it contacting Otis to resolve any outstanding maintenance issues and to otherwise organise the installation of an emergency telephone in the lift. This seems an appropriate and necessary measure for the safety of the appellants.

Orders

55 The Appeal Panel orders:

(1) The time for filing the Notice of Appeal is extended to 9 April 2021.

(2) Appeal dismissed.

(3) Leave to appeal refused.

****

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

Amendments

05 August 2021 - Decision under appeal - File number corrected.

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