Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 1813 v Keevers, Bourke & Fardell (No 2)
Medium Neutral Citation:	[2021] NSWCATAP 229
Hearing Date(s):	On the papers (in part) & Hearing on 22 July 2021
Date of Orders:	22 July 2021
Decision Date:	30 July 2021
Jurisdiction:	Appeal Panel
Before:	P Durack SC, Senior Member D Robertson, Senior Member
Decision:	1. Vary orders 1 and 2 of the Tribunal's orders made in proceedings SC 19/28242 such that the appointment of Rollings and Tyrell Pty Ltd as strata managing agent under order 1 terminated on 28 May 2021. 2. Set aside order 1 in proceedings SC 19/28238 and order 1 in proceedings SC 19/28234 save to the extent that each order required payment of a levy referable to the repair work required to the common stairs in the sum of $80,000 by each of Lots 16 and 17 making payment in the amount of $19,200 and each of Lots 15 and 18 making payment in the amount of $20,800 by the due date of 1 July 2020. 3. Remit to a differently constituted Tribunal for redetermination, consistently with the Appeal Panel's decision dated 12 May 2021, all claims made in proceedings SC 19/28242, 19/28238 and 19/28234 concerning: the special levy of $980,000 raised by the appellant on 28 November 2017 unrelated to the levy the subject of the order referred to in order (2) above

requiring payment of $80,000;
the appointment of a compulsory strata manager pursuant to s237 of the Strata Schemes Management Act 2015;
ordinary levies allegedly unpaid by the owners of Lot 16.

4. Remit also to the same differently constituted Tribunal for redetermination the question of the costs of the proceedings at first instance the subject of the Tribunal's decision on 25 May 2020.

5. Such redetermination by the Tribunal is to be based upon the evidence adduced to the Tribunal in relation to its decision made on 25 May 2020 and such further evidence as the Tribunal may allow.

6. The SPG Appellants' costs of the appeal are to be paid by the respondents.

Catchwords:	APPEALS-orders consequential upon substantive decision-remittal of claims for redetermination-costs COSTS - -costs of the appeal follow the event-substantial success by the appellant LAND LAW - Strata title –orders consequential upon substantive decision-set aside appointment of compulsory strata manager-set aside orders varying amount of the levy
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW). Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Grain Growers Limited v Chief Commissioner of State Revenue (No 2) [2015] NSWSC 1445 Johnson T/As One Tree Constructions & Ors v Lukeman & Anor [2017] NSWCATAP 45 Rekrut and Scott v Champion Homes Sales Pty Ltd; Champion Homes Sales Pty Ltd v Rekrut and Scott [2018] NSWCATAP 97 The Owners - Strata Plan No 1813 v Keevers [2021] NSWCATAP 130.

Texts Cited:	None cited
Category:	Consequential orders
Parties:	The Owners – Strata Plan No 1813 (First Appellant) Sarraf Property Group Pty Ltd (Second Appellant) Konn Palonis (Third Appellant) Francis John Keevers (First Respondent) Peta Bourke (Second Respondent) Joanne Fardell (Third Respondent)
Representation:	Counsel: G Sirtes SC (Second & Third Appellant) S Phillips (First Respondent) Solicitors: Madison Marcus Law Firm (First, Second & Third Appellants) JP Gould Solicitors (First, Second & Third Respondents)
File Number(s):	2020/00370815 (AP 20/23648)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil & Administrative Tribunal
Jurisdiction:	Consumer & Commercial Division
Citation:	Not Applicable
Date of Decision:	25 May 2020
Before:	G Ellis SC, Senior Member
File Number(s):	SC 19/28242; SC 19/28238; SC 19/28234

REASONS FOR DECISION

Overview

1 Following written submissions from the parties and a hearing on 22 July 2021, on that date we made the further orders in this appeal set out below. The

orders were sent to the parties by the Registry by written notice dated 23 July 2021. These are the reasons for making those orders.

2 In our substantive decision in this appeal we concluded that the Tribunal had erred in arriving at its conclusions that a compulsory strata manager be appointed pursuant to s237 of the Strata Schemes Management Act 2015 (NSW) (**SSM Act**) and that a special levy raised by the owners corporation be varied to a substantially reduced amount. We concluded that the claims concerning these matters needed to be redetermined by a differently constituted Tribunal: *The Owners - Strata Plan No 1813 v Keevers* [2021] NSWCATAP 130.

3 As to a redetermination of claims, we note that as a result of events that have occurred since our decision it may be unnecessary for the Tribunal to proceed with such redetermination. However, this will be a matter for the Tribunal to examine with the parties when the proceedings are listed for directions. The events to which we refer are the purchase by the SPG Appellants of Lot 16 (owned by the second and third respondents) and the intention of the SPG Appellants to pursue a renewal of the strata plan for redevelopment in circumstances where they have, or will, acquire 75% of the lots in the scheme.

4 In our substantive decision we made some orders, including that the appeal was allowed, but refrained from making complete final orders for the reasons set out in paragraphs 273 to 278 of that decision. There also remained to be determined the question as to the costs of the appeal.

5 Written submissions have been provided by the active appellants, the SPG appellants, and the first respondent, the owner of Lot 17, concerning the remaining orders to be made and on 22 July 2021 we heard oral submissions from these parties about the order to be made by the Appeal Panel concerning the Tribunal's orders varying the amount of the special levy. Despite the opportunity afforded to them, no submissions have been made by the second and third respondents (the owners of Lot 16), who had been represented by the same legal representatives as the first respondent at the hearing of the appeal in December 2020. At the hearing on 22 July 2021 Mr Phillips of Counsel appeared only for the first respondent..

The Tribunal's appointment of a compulsory strata manager

6 The SPG Appellants and the first respondent consent to the order below concerning the appointment of a compulsory strata manager. The order is of the nature foreshadowed by us in paragraph 274 of our reasons in the substantive decision, except that it takes account of the uncontroversial fact that the strata manager appointed by the Tribunal ceased to act under that appointment on 28 May 2021 (a little over a fortnight from the date when our substantive decision was issued). It is unnecessary for us to examine why or how this occurred.

The Tribunal's variation of the special levy orders

7 As we explained in our substantive decision, the Tribunal's variation involved its rejection of the whole of a special levy raised by the appellant on 28 November 2017 (in the amount of $980,000) and its conclusion that an amount of $80,000 was needed to fund necessary repairs by the appellant to the common stairs in the property as a result of a problem that arose in January 2020. We concluded that the Tribunal had erred in arriving at its conclusion to reject the special levy raised on 28 November 2017. There was no challenge on appeal to the Tribunal's conclusion that repairs to the common stairs were necessary and as to the amount of the levy in respect of such repairs. (The SPG Appellants did challenge the conclusion that the owners corporation had *failed* to carry out these works. They said steps were being taken toward the repair work being carried out).

8 In our substantive decision we explained that we stopped short of ordering that the Tribunal's variation orders be set aside until we had heard from the parties because we envisaged that the amounts ordered to be paid by the Tribunal in respect of the $80,000 repair work had, presumably, been paid and, accordingly, we needed to consider the implications of the contemplated order setting aside the variation orders (at paragraph 277).

9 Having heard from the parties, pursuant to s 81 (1) of the Civil and Administrative Tribunal Act 2013 (**NCAT Act**) we have decided that order 2 below, in combination with the remittal for redetermination of the claims in the proceedings concerning the special levy raised on 28 November 2017, are the

appropriate orders to make in the light of our substantive decision. In our opinion, these orders, correctly, reflect the outcome of the appeal concerning the variation of the special levy issues.

10 We note that s 81 (1) of the NCAT Act provides:

> **81 Determination of internal appeals**
>
> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,
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> (c) the decision under appeal to be quashed or set aside,
>
> (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
>
> (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

11 Our orders do not accord with the competing orders with respect to this issue proposed by the parties in their written submissions. However, at the hearing on 22 July 2021 we informed the parties of our preliminary view as to the orders on this issue we were inclined to make and both Counsel took the position that they did not wish to be heard any further on this subject.

12 In essence, as we explain below, in our view the orders suggested by the parties in their written submissions did not, accurately, reflect the outcome resulting from our decision on the appeal. In view of the position of the parties at the oral hearing we will explain our reasons more briefly than we otherwise might have done.

13 In their written submissions the SPG Appellants proposed orders in respect of this issue as follows:

(1) Set aside Order 1 made by the Tribunal on 25 May 2020 in proceedings SC 19/28238 and Order 1 made by the Tribunal on 25 May 2020 in proceedings SC 19/28234 (***Reduced Special Levy Order***).

(2) In place of the Reduced Special Levy Order, order pursuant to section 87 of the Strata Schemes Management Act 2015 (**SSM Act**) that the special levy in the amount of $980,000 be varied to make the levy payable in two stages, namely:

(a) A first stage payment of $80,000 due on 1 July 2020, with dollars 19,200 payable for each of Lots 16 and 17 and dollars 20,800 payable for each of Lots 15 and 18; and

(b) A second stage payment of $900,000, or such varied amount as the Tribunal determines is payable pursuant to s 87 of the SSM Act, to be payable on a date to be determined by the Tribunal (***Second Stage Special Levy***).

14 The SPG Appellants' proposed orders then made for provision for the Second Stage Special Levy to be included in the matters is to be redetermined by a differently constituted Tribunal.

15 In support of these proposed orders the SPG Appellants submitted that it may be inferred that the current financial position of the owners corporation and the levy position of the lot owners exist by reference to the Reduced Special Levy Order and that *payments which have been made or credits which have been applied pursuant to the Reduced Special Levy Order* can be treated as having been paid pursuant to the first stage of the proposed order and are matters that the differently constituted Tribunal could consider, and if appropriate take into account, when deciding the extent to which (if at all) the second stage of the special levy should be varied pursuant to s 87 of the SSM Act.

16 They submitted that in circumstances where it would be difficult to unwind what has occurred with levies such proposed variation of the special levy of $980,000 should be ordered by the Appeal Panel pursuant to its powers under s 81 (1) (b) of the and s 87 of the SSM Act.

17 On the other hand, the first respondent submitted that all that should be ordered is that the Tribunal's variation orders be set aside in conjunction with the remittal of all remaining issues for redetermination.

18 The first respondent submitted that the orders proposed by the SPG Appellants would involve an inappropriate exercise by the Appeal Panel of the variation power in s 87 of the SSM Act in circumstances where the issue of variation needed to be redetermined by the Tribunal. It was also submitted by the first respondent that there was no evidence that payments had been made as ordered by the Tribunal and that there would be any need for unwinding steps taken as a consequence of the Tribunal's orders. The first respondent went further and submitted that circumstances suggest that the opposite inference

should be drawn, namely that the levies ordered to be paid have not been paid (in full) and that no substantive work in respect of the common property has been carried out. Those circumstances are that Ms Bourke has, recently, agreed to sell her unit (Lot 16) to the SPG Appellants, who, as a consequence, intend to pursue a strata renewal process and that the compulsory strata manager appears to have ceased to act in that capacity.

19 However, these events have only occurred relatively recently and we fail to see how they can possibly lead to the inference suggested by the first respondent.

20 Whilst the manner in which the parties have addressed the question about steps taken in respect of the Tribunal's variation orders is somewhat peculiar (we have not been told what actually occurred) it is unnecessary for us to examine that question any further because, as we have said, in our view, neither set of orders proposed by the parties reflects the outcome of our decision.

21 We do not accept the orders proposed by the SPG Appellants. In the first place, it is a condition of the exercise of the power under s 87 (the proposed order involves an exercise of the power) that, relevantly, the Tribunal considers that any amount levied is inadequate or excessive but it is plain from our substantive decision that this is a question to be resolved upon a redetermination. Furthermore, it, plainly, follows from our decision that all claims in the proceedings concerning the raising of the special levy of $980,000 on 28 November 2017 must be redetermined, including the claim that the resolution to raise the levy was invalid, as well as the claim that the Tribunal, in the exercise of its discretionary power under s 87 of the SSM Act, should vary the levy because it was excessive. Accordingly, it is not appropriate that we make an order that limits the redetermination to an issue solely about variation of this levy or that we pronounce any fresh exercise of power under s 87 of the SSM Act.

22 We do not accept the order proposed by the first respondent because it ignores the unchallenged element of the Tribunal's variation, namely that a levy should be raised in an amount of $80,000 in respect of the repairs to the stairs, being

work that was unrelated to the special levy raised in November 2017. On the appeal, no party challenged this element of the Tribunal's variation decision.

Redetermination order

23 Rather than frame the redetermination order as covering "all remaining issues in the proceedings", we prefer to be more specific about the claims to be redetermined in order to assist the Tribunal conducting the redetermination. That explains why our redetermination order differs from either of those proposed by the parties on this point.

Costs of the appeal

24 Correctly, the parties are in agreement that the Appeal Panel may award costs in respect of the appeal in the absence of special circumstances because in this matter (where the amount in dispute exceeds $30,000) the general rule in s 60 of the NCAT Act that each party is to pay their own costs of proceedings in the Tribunal is modified by rules rule 38 (2) (b) (1) and 38 A of the *Civil and Administrative Tribunal Rules* 2014 (NSW).

25 In these circumstances, as was outlined by the Appeal Panel in *Rekrut and Scott v Champion Homes Sales Pty Ltd; Champion Homes Sales Pty Ltd v Rekrut and Scott* [2018] NSWCATAP 97 at [21]-[23]:

> "21 Generally, the exercise of an unfettered power to award costs involves costs "following the event" unless there are factors which militate against the successful party being awarded all of the party's costs – *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] and [69]; [1998] HCA 11.
>
> 22 Generally the "event" refers to the event of the claim or the appeal, as the case may be, and may be understood as referring to the practical result of a particular claim or appeal – *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [15].
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> 23 Unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed – *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 (*Bostik*) at [38].

26 The SPG appellants submitted that they were the substantially successful parties on the appeal and they should be paid their costs of the appeal.

27 On the other hand, the first respondent submitted that a determination of the costs of the appeal should await the outcome of the redetermination and be

determined by the Tribunal following such redetermination, or it should be ordered that each party bear their own costs of the appeal.

28 In written submissions the first respondent said that there were several factors which militated against the SPG appellants being awarded their costs of the appeal and which were in favour of the costs order he sought, which we summarise as follows:

(1) It would be a misapplication of the costs discretion to award the costs of the appeal to the SPG Appellants in circumstances where, by their own election, they were not parties to the proceedings below and, therefore, had required a contentious, relatively novel, order joining them as parties to the appeal in order to prosecute the appeal.

(2) The SPG Appellants only achieved limited practical success as a result of the appeal, namely a remittal of the proceedings to a freshly constituted Tribunal, an outcome which it did not seek from the appeal and, therefore, as a matter of substance, they did not succeed in relation to the whole of the appeal. Indeed, it was said that the respondents achieved substantial practical success as a result of the appeal because it appears that the original strata manager will not be accepting re-appointment and a new strata manager will need to be appointed.

(3) The SPG Appellants advanced multitudinous grounds of appeal and either failed or did not succeed with respect to several important and significant grounds.

(4) It was submitted that the outcome should be characterised as a "mixed" outcome supporting the position that each party should bear their own costs. In this regard, reliance was placed on *Johnson T/As One Tree Constructions & Ors v Lukeman & Anor* [2017] NSWCATAP 45 at [23] - [29].

(5) To the extent that the SPG appellants had limited success in the appeal, they did so only because of errors of law made by the Tribunal with respect to its fact-finding function and not because of any act or omission by the respondents.

(6) One plausible outcome of the proceedings is that the first respondent may again succeed in having the 2017 special levy set aside or found to be unenforceable or substantially reduced, or events which have transpired since the decision of the Appeal Panel may make the redetermination of the proceedings otiose, in which case, the appeal will have been, in a practical sense, futile.

29 First, the events that have transpired since our substantive decision, which we have already referred to, as well as the apparent refusal of the original strata manager to accept a new appointment, have no bearing upon our costs

determination, which, in accordance with principle, must be founded upon the outcome of the appeal and any relevant aspects of the conduct of the parties in dealing with the appeal.

30 Secondly, the present circumstances are quite different to what occurred in the *Johnson* case. There, the respondents succeeded in upholding the Tribunal's decision about liability, whilst the appellant was successful in its challenge to the decision about quantum such that quantum was ordered to be redetermined. By contrast, the respondents did not succeed in upholding any aspect of the Tribunal's orders which were challenged or any of the key conclusions which supported the relief which was granted.

31 Thirdly, whilst it may be appropriate to characterise the outcome as a "mixed" outcome in the sense that the SPG Appellants did not obtain all that it sought on the appeal or succeed on all issues that were put, we regard the SPG Appellants as achieving substantial success in the appeal (see *Grain Growers Limited v Chief Commissioner of State Revenue (No 2)* [2015] NSWSC 1445 at [20] and [25]) for the following reasons:

(1) They have succeeded in having all of the orders made by the Tribunal which they challenged overturned.

(2) Whilst the orders sought by the SPG Appellants on appeal extended to orders dismissing the respondents' claims in the proceedings and upholding the claims of the owners corporation, overwhelmingly, if not entirely, their grounds of appeal and submissions on appeal were directed at establishing that significant parts of the Tribunal's fact-finding were flawed rather than establishing that the claims and defences of the owners corporation should succeed on the merits. Such an approach was understandable given the extent of the evidence adduced to the Tribunal and the credit issues that arose.

(3) The first respondent contended that out of 12 grounds of appeal the SPG Appellants failed to succeed on 4 of those grounds, namely Grounds 7, 8, 9 and an additional ground relating to the validity of an appointment to the Strata Committee. However, in fact, the SPG appellants failed to succeed on one of these grounds only, namely Ground 7 (a challenge to the Tribunal's conclusion that The Owners corporation had contravened s106 of the SSM Act by failing to repair the common stairs). We found it was unnecessary for us to deal with Ground 8 and the additional ground of appeal concerning a finding by the Tribunal in respect of an appointment to the Strata Committee (a matter addressed in our substantive decision at [269] to [272]). We

upheld Ground 9 concerning the claim against Ms Bourke for unpaid levies.

(4) Ground 7 was a subsidiary part of the challenge to the Tribunal's appointment of a compulsory strata manager (the main part was based upon the Tribunal's conclusions about the November 2017 special levy). Only a small part of the submissions of the parties was directed to this ground of appeal.

32 Fourthly, we fail to see why the SPG Appellants should be refused costs of the appeal because of the matters in paragraph 29 (1), (5) and (6) above.

33 As to the matter in paragraph 29 (1), the fact is that the SPG Appellants were joined as parties to the appeal in order to allow the appeal to be prosecuted. That order contained no limitation about their entitlement to costs and the respondents should have been aware that they were at risk of an adverse costs order in favour of the SPG Appellants.

34 As to the matter in paragraph 29 (5), on the appeal the respondents argued against the contentions as to the flaws in the Tribunal's fact-finding. In doing so, they exposed themselves to the risk of an adverse costs order if they were unsuccessful.

35 As to the matter in paragraph 29 (6), we have already said that the events which have transpired since our decision are irrelevant to our assessment of costs. As to the potential outcome of a redetermination, similarly, that is a hypothetical matter that can have no bearing on our present assessment.

Further orders

36 For the above reasons, we made the following further orders in this appeal:

(1) Vary orders 1 and 2 of the Tribunal's orders made in proceedings SC 19/28242 such that the appointment of Rollings and Tyrell Pty Ltd as strata managing agent under order 1 terminated on 28 May 2021.

(2) Set aside order 1 in proceedings SC 19/28238 and order 1 in proceedings SC 19/28234 save to the extent that each order required payment of a levy referable to the repair work required to the common stairs in the sum of $80,000 by each of Lots 16 and 17 making payment in the amount of $19,200 and each of Lots 15 and 18 making payment in the amount of $20,800 by the due date of 1 July 2020.

(3) Remit to a differently constituted Tribunal for redetermination, consistently with the Appeal Panel's decision dated 12 May 2021, all claims made in proceedings SC 19/28242, 19/28238 and 19/28234 concerning:

(a) the special levy of $980,000 raised by the appellant on 28 November 2017 unrelated to the levy the subject of the order referred to in order (2) above requiring payment of $80,000;

(b) the appointment of a compulsory strata manager pursuant to s237 of the Strata Schemes Management Act 2015;

(c) ordinary levies allegedly unpaid by the owners of Lot 16.

(4) Remit also to the same differently constituted Tribunal for redetermination the question of the costs of the proceedings at first instance the subject of the Tribunal's decision on 25 May 2020.

(5) Such redetermination by the Tribunal is to be based upon the evidence adduced to the Tribunal in relation to its decision made on 25 May 2020 and such further evidence as the Tribunal may allow.

(6) The SPG Appellants' costs of the appeal are to be paid by the respondents.

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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