Civil and Administrative Tribunal

New South Wales

Case Name:	Strang v The Owners - Strata Plan No. 92709
Medium Neutral Citation:	[2021] NSWCATCD 48
Hearing Date(s):	09 June 2021
Decision Date:	8 July 2021
Jurisdiction:	Consumer and Commercial Division
Before:	S Thode, Senior Member
Decision:	The application is dismissed.
Catchwords:	LAND LAW — Strata title —Strata Schemes Management Act 1996 — Order invalidating resolution
Legislation Cited:	Strata Schemes Management Act 1996 (NSW)
Category:	Principal judgment
Parties:	John Thomas Strang (First Applicant) Janette Strang (Second Applicant) The Owners - Strata Plan No. 92709 (Respondent)
Representation:	JFM Law (Applicants) Chambers Russell Lawyers (Respondent)
File Number(s):	SC 20/51026
Publication Restriction:	Unrestricted

REASONS FOR DECISION

The proceedings

1 For convenience I shall refer to Mr and Mrs Strang as the applicants and the Owners Corporation as the respondent.

The Application

2 The applicants filed application SC 20/51026 on 4 December 2021 seeking an order pursuant to s232 of the Strata Schemes Management Act 2015 (the Act). By further amendment dated 11 March 2021 the applicants sought amended relief to the following effect:

> 1. An order under section 232 of the Strata Schemes Management Act 2015 (NSW) that the owners Strata Plan number 92709 take all necessary steps to investigate any defects relating to the Air Conditioning Service/System servicing Lot 26 in Strata Plan 92709.
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> 2. An order under section 232 of the Act that the Owners take all necessary steps to ensure that the Air conditioning Service/System servicing Lot 26 in Strata Plan 92709 is installed in accordance with all relevant codes, standards, and specification requirements to comply with any law and the manufacturer's recommendations.
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> 3. An order pursuant to section 232 of the Strata Schemes Management Act 2015 that the Owners/Strata Plan number 92709 take all necessary steps to investigate any defects relating to the Level 5 Common Property Deck including, but not limited to, rectifying the Level 5 Common Property Deck so that it is installed in accordance with the manufacturer's specification.
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> 4. An order pursuant to section 150(1) of the Act that the by-laws 130 to 139 being an original by-law registered in September 2016 are inoperable or of no effect pursuant to section 136(2) of the Act because:
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> a. By-laws 130 to 139 were not passed by way of special resolution and are therefore inoperable to the extent that they exempt The Owners – Strata Plan 92709 from the statutory obligations and restrictions imposed on them under the Strata Schemes Management Act 2015; or
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> b. By-laws 130 to 139 are harsh, unconscionable or oppressive.
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> 5. Costs.

Background

3 The applicants are owners of lot 26 in Strata Plan 92709 at Belmont Avenue, Wollstonecraft. The date of their final occupation certificate is 26 September 2016. On 23 September 2016 an "Approved Form 27 By-laws Instrument" setting out the terms of the by-laws to be created upon registration of the strata plan was registered on the common property title of the strata plan.

4 In around 2018 the owners corporation brought proceedings in the Tribunal against the builder and the developer of the scheme.

5 On 15 April 2019 the Tribunal make consent orders in favour of the owners corporation for the repair of defective work in respect of the air conditioning system and the roof terrace. It is the applicants' contention that the final orders have not been complied with and accordingly the air conditioning service remains without a filter on the roof terrace has not been installed in accordance with the manufacturer's specifications and laying instructions. The builder and developer have been released from their obligations under the final orders and the owners corporations maintains that all the orders to repair the defective work have been complied with.

6 It is the applicants' submission that the air conditioning service and the roof terrace remain in a state of disrepair and the issues contained in the final consent orders remain unresolved. In around 26 June 2020 the applicants engaged Hill's Air Conditioning Services Pty Ltd to report on the condition of the air conditioning service. With respect to filtration of the air, the investigator made the following findings:

> …there is no filter attached to the air-conditioning system and this means that any dust with in the ceiling cavity will be extracted into the system… This will block the indoor coil and will cause excessive build-up of dirt on the fan blades… This will avoid any warranty…

7 In addition to these concerns the expert also states that:

> …there is a filter on the return air grill and this only prevents dust from the habitable space from entering the air conditioning.… And there is very little access to the system which is not in accordance with the manufacturer's installation guide.…

8 With respect to there being no air to the bedroom the investigator made the following findings:

> there is no insulation around the refrigeration pipework connections… Apart from this not being quality workmanship, these pipes will form condensation and drip water onto the ceiling which will in turn cause water stains and mould… And we have found there is no air to bedroom. There are a number of faults and installation issues causing this.

9 The applicants rely on a second expert report. A report by Mr Jordan Blackwell of Air Pressure Pty Ltd dated 27 April 2018 states:

> …we believe that the builder as is the case with all buildings should have supplied access panels to all exhaust fans and accessible

> positions which are relative to the fans so that they could be replaced or repaired when they become faulty. This is also the case with the air conditioning system located in the kitchen ceiling. The access that has been supplied currently is through the return air grill in the ceiling which is necessary for the system to run. However, if there were any issues with the zoning motors or if the unit had to be replaced, the entire ceiling would need to be removed….
>
> Access to the air-conditioning system would require two panels within the kitchen that gives you access to the zoning motors so that they can be repaired or replaced, and larger access to the air-conditioning unit itself so that it can be easily worked on, and not just restricted to the return air grill.

10 The applicants acknowledge that the scheme is subject to by-laws and special conditions 132 to 137 (the by-laws). The by-laws state that the owner of each lot is responsible for the repair, maintenance and replacement of the air-conditioning unit that exclusively services that owner's or individual's lot and the owner must not alter the location of the air conditioning unit without the prior consent of the owners corporation.

11 The applicants submit that the by-laws are inoperable to the extent that the owners corporation has attempted to avoid its statutory obligations and restrictions by registering the by-laws without a special resolution. It is the applicants' submission the air conditioning service remains part of the common property and that the by-laws are invalid pursuant to section 139 of the Act and remain the responsibility of the owners corporation.

12 In the alternative, the applicants submit that the by-laws are harsh and unconscionable because they shift the entire responsibility for repair and maintenance to the applicant lot owner. The repair required to fix the air conditioning unit is considerable, the work required is major and involves the removal of a ceiling and the costs incurred is disproportionate and the lot owners of lot 26 should not be responsible to repair the unit.

The roof terrace

13 The applicants rely on correspondence among the lot owners to demonstrate that the owners corporation has failed to repair and maintain the roof terrace. The applicants rely on documents 10 and 11 in their bundle to demonstrate that the roof terrace is in a state of disrepair. Documents 10 and 11 contain pictures of a roof terrace without commentary. It is alleged that the composite

joist boards are not installed on a firm surface but instead have been installed and are supported by chairs or blocks. As I understand it, it is the contention of the applicants that the installation has not been performed in accordance with the manufacturer's installation guide. I have not been provided with an expert report to support this contention

14 It was the submission of the solicitor for the applicants that the defects in respect of the air-conditioning and the roof terrace deck have "already been established" by reason of the consent orders entered by the Tribunal on 16 April 2019. No further argument or case has been submitted to advance this contention.

The respondent's evidence

15 The respondent relies on a bundle of documents filed with the Tribunal on 13 May 2021 and marked exhibit one.

Consideration

16 The owners corporation must repair and maintain and keep the common property in good and serviceable repair. The applicants have failed to establish a failure by the Owners Corporation to keep common property in good and serviceable repair and for the reasons that follow the application is dismissed.

17 In respect of the air-conditioning, by-laws 130 to 139 were registered as developer by-laws upon registration of strata plan 92709 on 23 September 2016. The by-laws remain registered on the common property certificate title. The effect of the by-laws is that the owners corporation's repair and maintenance obligation in relation to common property air conditioning services throughout the strata scheme has been displaced and that the obligation has been shifted to the respective owner of the lot that benefits from the air-conditioning system. It is submitted by the respondent that this is regulated pursuant to section 143 of the Act and is common practice with developer by-laws.

18 Developer by-laws are permitted under the Strata Schemes Development Act 2015 (Development Act) and its predecessor, the Strata Schemes (Freehold Development) Act 1973 which was in force as at the date of registration of Strata Plan 92709.

19 The contention of the applicants that a work order entered in HB 18/41442 gives the applicants a cause of action, or entitles the applicants to commence proceedings against the owners corporation, is misguided. In its proceedings HB 18/41442 the owners corporation enforced its statutory right to pursue a claim for damages for breach of statutory warranty in respect of common property defects against the builder and developer. The owners corporation was successful and a work order was entered by consent of the parties (the work order). It is submitted by the applicants that the builder and/or developer of the scheme did not comply with the terms of the work order to rectify the air-conditioning system. The owners corporation, however, is satisfied that the terms of the work order were complied with and that no additional filters were required to be installed on the air-conditioning system that services the applicants' lot.

20 Had the work order not been complied with, it would have been incumbent upon the owners corporation to renew the proceedings pursuant to clause 7 Schedule 4 of the Civil and Administrative Tribunal Act 2013. The applicants have no standing to bring an application to renew the work order made in favour of the owners corporation.

> 8 RENEWAL OF PROCEEDINGS IN RESPECT OF CERTAIN DIVISION DECISIONS
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> (1) If the Tribunal makes an order in exercise of a Division function in proceedings, the Tribunal may, when the order is made or later, give leave to the person in whose favour the order is made to renew the proceedings if the order is not complied with within the period specified by the Tribunal.
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> (2) If an order has not been complied with within the period specified by the Tribunal, the person in whose favour the order was made may renew the proceedings to which the order relates by lodging a notice with the Tribunal, within 12 months after the end of the period, stating that the order has not been complied with.

21 The applicants are not the person(s) in whose favour the order was made to renew the proceedings and any such application for renewal may have been made by the owners corporation within 12 months after the end of the period stating that the order has not been complied with. The applicants were not parties to the proceedings and have no standing to enforce the work order.

22 In the alternative, it is the applicants' submission that the by-laws are harsh unconscionable or oppressive. The applicants argued that the by-laws 130 to 139 have not been passed by way of a special resolution of the owners corporation as required by section 62 (3) of the 1996 Act (that was in force at the relevant time) and that the owners corporation maintains responsibilities in relation to the air-conditioning under section 106 of the Act.

23 The applicants further and in the alternative submit that by-law is 130 to 139 are harsh, unconscionable or oppressive and contrary to section 139 (1) of the Act on the basis that the by-laws impose a disproportionate obligation on the applicants alone. The applicants seek an order under section 150 of the Act that the relevant by-laws be declared harsh, unconscionable and oppressive.

24 I refer to the respondent's submissions at page 10. Section 10 of the Development Act (which operates in essentially the same terms are section 8 (4B) and 8 (4C) of the 1973 Development Act) says that by-laws other than model by-laws being developer by-laws may be made in relation to matters referred to in Part 7 of the Act. Part 7 of the Act includes the provisions that empower the owners corporation to make common property rights by-laws which have the effect of displacing the owners corporation's repair and maintenance obligations and shifting that obligation on to individual lot owners.

25 The Development Act expressly permits developer by-law such as the by-laws 130 to 139 to be made and are, in the words of the respondent, 'entirely common and uncontroversial'.

26 The applicants provided no caselaw to support the submission that a developer by-law is required to be passed by a special resolution in order to be validated and the assertion that a special resolution was necessary before registration of the by-laws is not correct.

27 I am satisfied that by-laws, having been validly registered continue to be enforceable (Casuarina Rec Club Pty Ltd v The Owners – Strata Plan 77 971 [2011] NSWCA 159. In Casuarina Rec Club McFarlane JA (Handley A JA agreeing) held at paragraph 49 to 53 in relation to developer by-laws:

> 49 As the primary judge pointed out, the instant case concerns by-laws established on registration of the relevant strata plan, not by-laws

> created by amendment of or addition to those original by-laws. However, he considered that if amendment or addition can be justified because what is changed or added is associated with the control, management, administration, use or enjoyment of lots or common property, the criteria for assessing the validity of the original by-laws should be no narrower.
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> 50 Some very different considerations arise when one is considering whether an original by-law is valid as opposed to an amended by-law. In the case of an original by-law, people have vested rights which are not lightly to be diminished by an amendment at the behest of the majority.
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> 51 As White J said at first instance (p 699 [46]) the original by-laws accompany the strata plan and people who buy a lot in the strata scheme buy with notice of the by-law, so that it can hardly ever be said that the by-law creates an injustice.[emphasis added].
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> 52 It must be observed that for that very reason it is rare that an original by-law (or, in the case of limited companies, an original article) will be held to be invalid. An illustration of the rare exception is provided by Eley v The Positive Government Security Life Assurance Co Ltd (1876) 1 Ex D 88 where an original article purporting to appoint a non-member as the company's solicitor was held to be ultra vires and void.
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> 53Indeed, it may be that one should consider that the strata scheme includes the original by-laws. This matter was argued as a peripheral matter: Mr Simpkins denied the proposition. I favour it, but would not wish to be taken as having so held on the slight argument presented on the point.

28 I am satisfied that there is no basis to the applicants' claim that the by laws are "invalid" and I dismiss this aspect of the applicants' case.

29 In respect of the submission that the by-laws are harsh, unconscionable or oppressive, this submission is not made out. The proper construction of s 139(1) and approach to determining an application under s 150 of the SSMA was recently discussed by the Appeal Panel in The Owners – Strata Plan No 55773 v Roden; Spiers v The Owners – Strata Plan No 77953 [2020] NSWCATAP 95 (Roden). A a challenge to a by-law based on s 139(1) and a determination of whether a by-law is harsh, unconscionable or oppressive requires an enquiry concerning the terms of the by-law and its operation in the context of the particular strata scheme and any relevant circumstances of the applicant(s). The Tribunal must determine, on an objective basis, whether s 139(1) is contravened having regard to the terms of the by-law and all relevant circumstances of the case.

30 In considering whether a by-law contravenes s 139(1), the following matters are relevant: the terms of the by-law, the history of the by-law, the circumstances in which the by-law came to operate on various lot owners (including the circumstances in which any lot owner acquired a legal interest in property in the strata scheme), and the particular circumstances of the applicants that might otherwise demonstrate the by-law is harsh, unconscionable or oppressive. The test of harsh, unconscionable or oppressive under s 139(1) is objective.

31 The applicants allege that the air-conditioning servicing Lot 26 is the only air condition unit requiring repair and maintenance.. The applicants seek to have the by-law declared invalid because the air conditioning to *their* lot requires repair and maintenance. I accept the respondent's evidence that there are 29 lots in the strata scheme and that the owner of each lot is responsible for the ongoing repair and maintenance of the air conditioning system which services their lot and that there is no evidence available whether other lot owners' air conditioning requires repair and maintenance. Certainly no other lot owners support the applicants' contention that the by-law should be invalidated and there are no other, separate, applications alleging the owners corporation has failed to repair and maintain the air conditioning system. I find there is simply no evidence before me, addressing the issues in *Roden*, that would allow a finding that the exclusive use by-laws in respect of the air conditioning are harsh, unconscionable or oppressive in this case.

The deck

32 In respect of the deck, the applicants have failed to demonstrate that he owners corporation has breached its absolute duty to repair and maintain common property. The relevant evidence is contained at 64 and following of the applicants' bundle. The documents are generic in nature and do not contain an expert report that would establish, on the balance of probabilities, that the deck requires repair and or maintenance. The evidence may be described as lay evidence collated by the applicant Mr Strang and mostly contains documentation downloaded from the internet purporting to be the installation guide of the decking, but without reference to the origin of the documentation. Photographs allegedly demonstrate that the decking has "already fallen into a

state of disrepair" (see submissions page 7 paragraph 36). In the absence of a professional opinion that the decking has been defectively installed, I do not agree with the applicants' interpretation of the photographs. I am satisfied that the documentation does not satisfy the applicants' onus of proof, and there is no material before me that would allow me to conclude that the decking is defective, or that the owners corporation has failed to repair and maintain common property. I dismiss this aspect of the applicants' case also.

Submissions received on 2 June 2020 and 5 July 2021 respectively.

33 The application was adjourned on 9 June 2021 allowing the applicant to file and serve additional submissions limited to the following question:

> If the air-conditioning was not correctly manufactured and installed, do the exclusive use by-laws shift the owners on the applicant to repair and maintain a defectively manufactured or installed air conditioning system.

34 It is the applicants' submission that the by-laws do not extend to the rectification of installation defects in the air conditioning service because any rectification of original defects does not constitute a repair, maintenance or replacement, and therefore the application of the by-laws is not enlivened. The applicants refer to the decision of The Owners of Strata Plan number 3397 v Tate [2007] NSWCA 2017 at [71]. The applicants state that 'replacement' has been held to connote no more than the installation of one thing in the place of another to achieve functional equivalents. Rectification work to this particular air conditioning service, however, will not involve 'replacement' because the nature of the installation defect is that units on site do not have filters fitted to the unit (see paragraphs [23] to [26] of John Strang's affidavit of 7 April 2021. Accordingly, there will be no 'replacement' to the air-conditioning service because the air conditioning service was not working as it should, in accordance with the proper warranty conditions on the registration of the strata plan and there is no apparatus or appliance to replace. The applicants submit that by-law 137 only refers to repairing, maintaining or replacing any appliance or associated apparatus. It is submitted that in this case there is no appliance or associated apparatus for the applicants to repair, replace or maintain rather, the relevant apparatus, being the filter, is absent. It is submitted by the solicitor for the applicants that the Tribunal is prevented from interpreting the relevant

by-laws to extend to the repair, replacement or maintenance of installation defects because such an interpretation would go beyond the language presented by the relevant by-law and to do so would 'create an injustice' to the applicants.

35 In consideration of the applicants' submissions I find that the by law requires the applicants' to repair and maintain the air-conditioning whether or not the need for repair maintenance and/or replacement arose as a result of an original building defect. Repair and maintenance obligations under the Act extend to the repair and maintenance of parts of the common property that were defective upon registration of the strata plan (Brookfield Multiplex Limited the Owners Corporation Strata Plan 61,288 [2014] HCA 36). I refer to Section 144 of the Act.

> 144 Common property rights by-law must provide for maintenance of property
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> (1) A common property rights by-law must--
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> (a) provide that the owners corporation is to continue to be responsible for the proper maintenance of, and keeping in a state of good and serviceable repair, the common property or the relevant part of it, or
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> (b) impose on the owner or owners of the lots the responsibility for that maintenance and upkeep.
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> (2) Any money payable under a common property rights by-law by more than one owner to the owners corporation or to any person for or towards the maintenance or upkeep of any common property is payable by those owners proportionately according to the relative proportions of their respective unit entitlements of their lots unless the by-law otherwise provides.
>
> (3) To the extent to which a common property rights by-law makes a person directly responsible for the proper maintenance of, and keeping in a state of good and serviceable repair, any common property, it discharges the owners corporation from its obligations to maintain and repair the property under this Act.

36 The section dictates that a common property rights by-law must stipulate whether the owners corporation shall continue to be responsible for the repair and maintenance of the relevant part of the common property or whether that obligation is to be imposed on the owner or owners of specified lots. A common property rights by-law including a developer by-law can impose on a lot owner the application to repair and maintain common property which extends to

common property that was defective at the time of registration of the strata plan and make the relevant lot owner responsible for addressing the defect if required.

37 Furthermore, section 144 (3) of the Act stipulates that in doing so such a by-law discharges the owners corporation of its obligation to repair and maintain that part of the common property under the Act which extends to the owners corporation's obligation under section 106 of the Act in respect of the original defects.

38 I am satisfied that by-laws 130 – 139 are entirely consistent with present legislation in that the by-laws make provision for who is to be responsible for the proper maintenance and upkeep of the common property to which it applies, as is permitted pursuant to s144(2).

39 I find that the registered exclusive use by laws 130 - 139 remain in full force and effect and that the applicants are responsible for the repair and maintenance of the air conditioning unit. The result is that the applicants' application must fail and is accordingly dismissed.

Orders

40 The application is dismissed.

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I

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