



Civil and Administrative Tribunal
New South Wales

Case Name: Kendal v Mackay

Medium Neutral Citation: [2021] NSWCATAP 309

Hearing Date(s): 28 September 2021

Date of Orders: 07 October 2021

Decision Date: 7 October 2021

Jurisdiction: Appeal Panel

Before: G Curtin SC, Senior Member
J Currie, Senior Member

Decision:

1. Time to appeal is extended up to and including 9 July 2021.
2. Leave to appeal is granted in relation to Ground 2.
3. Appeal upheld in part.
4. Order 1 made by the Tribunal on 8 June 2021 is varied so that it reads:

“Within 2 calendar months of the date of these orders, the respondents are to reinstate the common property of the Strata Plan to the condition it was in prior to the construction of the unauthorised fence. This will include removal of the fence and reinstatement of the lawn and garden.”
5. The proceedings are remitted to the Tribunal for consideration by the Tribunal of the appointment by the Tribunal of its own motion of a strata manager to strata plan SP 48348 pursuant to s 237 of the Strata Schemes Management Act 2015 (NSW).

6. The Tribunal is to give consideration to the joinder of Debbie Lacey to the proceedings.

Catchwords: LAND LAW – strata title – common property – lot owners not to unilaterally conduct work on common property – orders to restore common property to pre-existing condition – impossibility of complying with part of order – order varied

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), Sch 4 cl 12
Strata Schemes Management Act 2015 (NSW), ss 108, 111, 237

Cases Cited: Stead v State Government Insurance Commission [1986] 161 CLR 141

Category: Principal judgment

Parties: Sheila Irene Kendal (First Appellant)
Gordon Kendal (Second Appellant)
Timothy Andrew Mackay (Respondent)

Representation: Appellants in person
Respondent in person

File Number(s): 2021/00198948

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 8 June 2021

Before: P Harris, General Member

File Number(s): SC 21/07745

REASONS FOR DECISION

1 Fundamentally, this appeal arises from the breakdown of the relationship between the owners of the two lots in a two-lot strata scheme. Equally fundamentally, it arises from their failure to observe the rights and comply with

the obligations of lot owners granted and imposed by the *Strata Schemes Management Act 2015* (NSW) (the “SSMA”).

- 2 The Tribunal can do something about the latter, but not the former. It is hoped that the parties’ present and future attention to their and the other parties’ rights and obligations set out in the SSMA, and the passage of time, which will allow the former cordial relationship between them to be restored.
- 3 The appeal itself is concerned with two grounds of appeal, a procedural fairness ground and an appeal based on the fact that it is not possible for the appellants to comply with part of the Tribunal’s order. For the reasons set out below the first ground fails but the second must be upheld and the Tribunal’s order varied.
- 4 In addition to those matters, the evidence in the proceedings satisfied us that the matters set out in s 237(3)(a)-(c) of the SSMA were met (about which we say more below) and that the proceedings should be remitted to the Tribunal for consideration of the making of an order by the Tribunal, of its own motion, for the appointment of a strata managing agent to exercise all the functions of an owners corporation and all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, pursuant to s 237(1) of the SSMA and for a period of time to be determined by the Tribunal.
- 5 The parties indicated their consent to this course and that order. We could not make that order on this appeal as no person had been identified who we could order be appointed under s 237(1)(a). No doubt the Tribunal will make directions for the parties to put forward the names of persons who consent to being appointed to enable that to occur. Of course, the parties are encouraged and free to nominate any qualified person whom they agree should be appointed.

Background

- 6 The strata scheme is located in Tweed Heads South in NSW. It is comprised of a single level construction and consists of two lots. When constructed, a single water meter was installed for the strata scheme.

- 7 Lot 1 is owned by the appellants (and has been since early 2019) and Lot 2 is owned by the respondent (and has been since October 2016).
- 8 The appellants reside in Lot 1 whilst the respondent leases Lot 2 to tenants whilst he resides elsewhere in NSW.
- 9 Soon after the appellants purchased Lot 1 they expressed a desire to the respondent to erect a fence around part of the common property adjoining their lot so that they could provide an outside fenced area for their dog.
- 10 Various discussions (which it appears were, initially at least, amicable) ensued regarding the style, size and materials involved in the proposed fence, where it would be located, what common property was involved, what would be done with the common property, who would be responsible for the maintenance of the fence and the garden inside the fence, access to strata scheme services that would be within the fence, insurances and other consequential matters. At one point there was discussion of the appellants purchasing the affected common property from the owners corporation.
- 11 No agreement dealing with those, and other necessary matters, was reached.
- 12 Unfortunately, as the discussions progressed, the relationship between the parties deteriorated to the point where they refused to meet to discuss these matters and one party declined to receive any emails from the other.
- 13 It is an agreed fact on this appeal that lot owners (whether present or previous owners is not clear on the evidence) have erected other constructions on common property such as carports, sunrooms and verandahs and without the necessary authorisation provided for in the SSMA.
- 14 At a point of time after their relationship with the respondent broke down, the appellants proceeded unilaterally to erect a fence of their choosing and, after their successful application to the local authority (Tweed Shire Council), had Council connect a separate water meter for their lot. The water meter was connected by the Tweed Shire Council on 15 October 2019.
- 15 Subsequently the respondent objected to that work and asked the appellants to remove the fence and water meter and to restore the common property to the state it was in prior to the appellants' work. The appellants refused.

- 16 The parties attempted a telephone mediation conducted by the Community Justice Centre on 2 May 2020 in accordance with the *Community Justice Centres Act 1983* (NSW). Under that Act, Community Justice Centres were established and are operated for the purpose of providing dispute resolution and conflict management services, including the mediation of disputes.
- 17 Agreement was reached at the mediation and the terms of the agreement were reduced to writing and set out in an undated document headed Statement of Outcomes.
- 18 Clause 8 of the Statement of Outcomes noted that the agreement was not legally enforceable.
- 19 Clause 9 said that the parties agreed that they desired to enter into a legally enforceable agreement once decisions were made about the possible purchase of common property by the appellants.
- 20 Subsequently, the parties' relationship deteriorated further, and the appellants decided against purchasing the common property enclosed by their fence.
- 21 On or about 13 February 2021, the respondent commenced proceedings against the appellants in the Tribunal.
- 22 Section 4A of the respondent's Tribunal Application Form was headed "What Orders Do You Want?", followed by the words:
- "Write down the section/s of the *Strata Schemes Management Act 2015* and the orders you want the Tribunal to make. Refer to the orders table in the Strata Schemes Fact Sheet for sections of the Act and types of orders that can be made."
- 23 In the box provided for a reply the respondent said:
- "Section 232 (Holding meetings in accordance with the act) (Interference with the use or enjoyment of common property)
- Given instruction from NCAT the owners of unit 1 must remove and dispose the front fence from the property & regenerate the front garden area and lawns one month from date of instruction to do so."
- 24 In written submissions to the Tribunal at the hearing the respondent included the following submission:
- "With all endeavours to resolve the matter now apparently exhausted I am now forced to make undertakings for assistance to NCAT to propel the removal of

the front fence and the repositioning of the water meter (at [the appellants'] cost) as it is a trip hazard once the fence has been removed."

- 25 At the conclusion of the hearing the Tribunal found in favour of the respondent and made the following order:

"Within 2 calendar months of the date of these orders, the respondents are to reinstate the common property of the Strata Plan to the condition it was in prior to the construction of the unauthorised fence and installation of a separate water meter. This will include removal of the fence and reinstatement of the lawn and garden, and restoration of the water meter to a single meter for the strata plan."

- 26 The Tribunal's reasoning for making that order was contained in the following paragraphs in the Tribunal's written reasons for decision:

"This is an application under sect 232 of the Strata Plan Management (sic) Act 2015 (Act) by the applicant lot owner in a 2 lot Strata Plan, seeking orders that the second lot owner remove a fence constructed by the second owner on common property and reinstate the lawn and garden, and reinstate the single water meter located on the common property. The applicant's case was that these works were undertaken to the common property contrary to the requirements in sect 108 of the Act for a special resolution.

...

It was agreed facts that the respondent owner of lot 1 had caused the construction of a fence which enclosed part of the common property of the Strata Plan. This affected the lawn and garden. There was also an installation of a separate water meter. The respondent agreed that they made these changes to the common property without there being any resolution of the owners corporation authorising the works.

...

There was much evidence from both parties as to whether an agreement existed between the individual lot owners in relation to the fence. I am not satisfied that a concluded agreement existed, however such argument is misconceived as neither of the lot owners had authority to make such an agreement. A special resolution of the owners corporation is required by section 108 for approval, and no effort was made to obtain such a resolution.

I am satisfied that the fence, meter and related work were undertaken without the consent of the owners corporation as required by sect 108 and that it is just and appropriate to make an order to reinstate the common property to the condition it was in prior to the unauthorised work commencing."

- 27 The Tribunal's factual findings were not challenged on this appeal.

- 28 The appellants appealed on a number of grounds, but the only two grounds pressed at the hearing of the appeal were that:

- (1) the Tribunal had denied them procedural fairness;

- (2) it was not possible for them to comply with the Tribunal's order in relation to the water meter (on the basis of significant new evidence which had arisen and which had not been reasonably available to them at the time of the hearing before the Tribunal).

Extension of Time

- 29 The Notice of Appeal was filed about three days out of time. Given that the delay was short, that there was no prejudice to the respondent and that any refusal to grant an extension of time would mean the appellants would be subject to an order by the Tribunal with which they could not comply (see below commencing at [46]), we were satisfied that time to appeal should be extended up to and including the day the appellants filed their Notice of Appeal, being 9 July 2021.

Ground 1

- 30 The basis for Ground 1 was the contention by the appellants that they were unaware, at the time of the hearing before the Tribunal, that the respondent was seeking an order under s 108 of the SSMA for them to remove the fence and water meter.
- 31 They submitted that they were not made aware of this fact until the hearing itself and were denied the opportunity to prepare their defence against that claim.
- 32 There are three reasons why this ground must be dismissed. They are set out in the order they were addressed in submissions, although that is the reverse of their logical legal order.
- 33 First, when asked by us what they would have submitted to the Tribunal had they been made aware beforehand that the respondent was seeking that order, they said that they would have studied the SSMA, and organised a meeting of the body corporate.
- 34 This was not a response to the question asked, which was directed to what they would have submitted to the Tribunal, not what they would have done *before* the Tribunal hearing, a distinction which, with no disrespect to them, it appears the appellants did not understand at the hearing of the appeal notwithstanding our several attempts to explain it.

- 35 Nevertheless, assuming there was some procedural unfairness in them being unable to properly prepare submissions or evidence for the Tribunal hearing because they were not on notice of the particular claim which succeeded, an answer to our question was needed because a new hearing will not be ordered if there was no possibility of a different result – *Stead v State Government Insurance Commission* [1986] 161 CLR 141.
- 36 Put another way, on an appeal put on this basis the appellants were required to place before us the evidence or submissions they say they would have placed before the Tribunal had they been given advance notice of the s 108 claim.
- 37 If they did not place such material before us, which was the case, then we are unable to determine whether there was a possibility of a different result and thus their appeal (on this ground) must fail.
- 38 Second, in any event, it is tolerably clear that had they organised a meeting of the body corporate, and had the respondent attended (a question open to much doubt on the evidence) he would probably not have agreed to any proposal by the appellants to do what they did given the history of the parties' disputes and the significant breakdown in their relationship. Therefore, there would have been no additional evidence for them to have led which could possibly have altered the outcome and no obvious submission that they could have made which they did not.
- 39 Third, in our opinion there was no procedural unfairness.
- 40 It is true the respondent did not mention s 108 in his Application Form nor in his submissions. But he did not have to. His Application Form stated in section 4A (see [23] above) that he was seeking an order that the appellants remove the fence and restore the common property. That was repeated in his written submissions (see [24] above) which, by this time, included an express reference to the water meter.
- 41 Therefore, in our opinion the appellants were on notice prior to the Tribunal hearing that the respondent was seeking orders for them to remove the fence and water meter and to restore the common property. Mr Kendal accepted this conclusion in his oral submissions.

- 42 The requirements of procedural fairness vary according to the circumstances of the case, and in our view the requirements of procedural fairness did not require the appellants to be told, especially in the Tribunal where parties are not generally legally represented, of the specific section of the SSMA relied on for the order sought. Fairness was satisfied by the appellants being informed the respondent sought an order that they remove the fence and water meter and restore the common property.
- 43 We note that, despite the Tribunal's reference to it, s 108 was inapt as a basis for the Tribunal's orders. Section 108 applies, in terms, when the work done was for the purpose of *improving* or *enhancing* the common property, which was not the appellants' purpose in this case.
- 44 The appropriate section was s 111 of the SSMA which says that an owner of a lot in a strata scheme must not carry out work on the common property unless, amongst other things, the owner is authorised to do so under a by-law made under Part 6 of the SSMA, or a common property rights by-law, or by an approval of the owners corporation given by special resolution.
- 45 In the event, it does not matter that the Tribunal referred to s 108 when it should have referred to s 110 of the SSMA. The Tribunal had power to make the order it did, and the reference to the wrong section did not alter the appellants' challenge to the Tribunal's decision.

Ground 2

- 46 In an endeavour to comply with the Tribunal's order to remove the new water meter, the appellants requested Tweed Shire Council to disconnect the water meter on 19 June 2021, eleven days after the Tribunal's decision.
- 47 By email dated 21 June 2021 Tweed Shire Council refused the application to disconnect the water meter. Amongst other things the Council said:

“In the Tweed Shire, duplex owners who are part of a strata currently pay individual water and sewer access charges. Therefore Tweed Shire Council has been progressively encouraging and incentivising strata duplex owners to have individual water connections to allow for direct allocation of usage charges in line with how they are paying for water and sewer access charges. It is noted that this is a requirement for all new developments of this type.”

- 48 The request and Council's response referred to above was new evidence within the meaning of that term in cl 12 of Schedule 4 of the *Civil and Administrative Tribunal Act 2013* (NSW), and we admitted it on this appeal.
- 49 We observe that in the circumstances of this strata scheme, the separation of the parties' water connections would remove another potential source of dispute between them.
- 50 However, be that as it may, the Council's refusal to disconnect the new meter made it impossible for the appellants to remove it as the Tribunal ordered. It follows that the new evidence established that the appellants would suffer a substantial miscarriage of justice if the Tribunal's order stood in its current terms as the appellants would be unable to comply with it. The Tribunal erred in making an order with which the appellants could not comply.
- 51 The respondent accepted that the Council's position prevented the appellants from compliance with the Tribunal's order.
- 52 Accordingly, leave to appeal should be granted and the Tribunal's order should be varied to remove the water meter from its operation.
- 53 Other practical matters concerning the new meter require the attention of the body corporate. One of these is the fact that the water meter poses a tripping hazard. The appellants say that the Council is willing to bury the water meter to remove this risk, and thus this work should, in theory, be progressed. However other matters may arise in relation to the burying of the water meter which would fall within the concerns of the body corporate, and those issues need to be attended to by the strata managing agent when appointed (see below) or the body corporate if a strata manager is not appointed.

Appointment of a Strata Manager

- 54 As noted earlier, the materials supplied by the parties to us for this appeal satisfy us that the Tribunal should, of its own motion, appoint a suitably qualified, independent person as the strata managing agent for this strata scheme to exercise all the functions of an owners corporation pursuant to s 237(1)(a) of the SSMA and to have and to exercise all the functions of the

chairperson, secretary, treasurer or strata committee of the owners corporation.

55 Section 237(1)-(3) says:

(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.

56 The parties should familiarise themselves with those sub-sections, the remaining sub-sections of section 237 and the SSMA more generally.

57 The evidence revealed a complete breakdown of the relationship between the parties. At different times each party had sought to hold a meeting of the body corporate, and at different times each party had refused to attend for one

reason or another. We are satisfied the management of the strata scheme is not functioning or not functioning satisfactorily per s 237(3)(a).

58 It appears the affairs of the body corporate have not been conducted in accordance with the SSMA including the keeping of appropriate books and records, the appointment of officeholders, the keeping of bank accounts, the holding of meetings and the erection of multiple constructions on common property in the absence of proper authorisation from the body corporate and without local council consent. We are thus satisfied that the owners corporation has failed to perform one or more of its duties.

59 As the parties consent to this order we need not further detail the evidence which satisfies us of the matters referred to in s 237(3)(a)-(c) of the SSMA.

60 The appointment of a strata managing agent will also allow proper attendance by the body corporate to any other matters requiring attention in relation to the water meter which, at present, the parties agree, presents a tripping hazard to the public.

The Parties

61 Mr Mackay was the only party named as applicant/respondent in the application to the Tribunal and the appeal, however there is some suggestion in the material we were given that the respondent not the sole owner of Lot 2, but a co-owner with a person named Debbie Lacey.

62 The material provided to us on this appeal is insufficient for us to determine whether Ms Lacey is a co-owner of Lot 2 and so we should not make an order joining her to this appeal and the proceedings. Her joinder to this appeal is strictly not necessary because no orders have been made against the owner(s) of Lot 2.

63 However, on the remitted proceedings, if orders are to be made for the appointment of a strata manager, those orders would purport to bind the owner(s) of Lot 2 and therefore Ms Lacey should be joined to the proceedings so that the orders bind her if she is a co-owner of Lot 2.

Orders

64 We make the following orders:

- (1) Time to appeal is extended up to and including 9 July 2021.
- (2) Leave to appeal is granted in relation to Ground 2.
- (3) Appeal upheld in part.
- (4) Order 1 made by the Tribunal on 8 June 2021 is varied so that it reads:
“Within 2 calendar months of the date of these orders, the respondents are to reinstate the common property of the Strata Plan to the condition it was in prior to the construction of the unauthorised fence. This will include removal of the fence and reinstatement of the lawn and garden.”
- (5) The proceedings are remitted to the Tribunal for consideration by the Tribunal of the appointment by the Tribunal of its own motion of a strata manager to strata plan SP 48348 pursuant to s 237 of the *Strata Schemes Management Act 2015* (NSW).
- (6) The Tribunal is to give consideration to the joinder of Debbie Lacey to the proceedings.

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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