



Civil and Administrative Tribunal

New South Wales

Case Name: Sorbara v The Owners – Strata Plan 75666

Medium Neutral Citation: [2021] NSWCATAP 369

Hearing Date(s): 4 November 2021

Date of Orders: 18 November 2021

Decision Date: 18 November 2021

Jurisdiction: Appeal Panel

Before: The Hon F Marks Principal Member
K Ransome Senior Member

Decision: (1) Leave to appeal refused.
(2) Appeal dismissed.

Catchwords: APPEAL – failure by appellant to provide recording and transcript of proceedings from which appeal is brought
STRATA TITLES LAW – exclusive use and enjoyment by appellant of area created by by-law – by-law provided for appellant to be responsible to keep area in good repair – held appellant responsible for cost of maintaining the area.

Legislation Cited: Strata Schemes Management Act 2015 ss 135, 136, 142, 144

Category: Principal judgment

Parties: Dominic Sorbara (appellant)
The Owners – Strata Plan 75666 (respondent)

Representation: Appellant self-represented
Makinson and d’Apice (Respondent)

File Number(s): 2021/100226617

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 2 August, 2021

Before: J Ringrose General Member

File Number(s): SC 21/12712

REASONS FOR DECISION

Background

- 1 The appellant in these proceedings, Dominic Sorbara, is one of two joint owners of a lot being a residential unit in Strata Plan 75666. On 19 March 2021 he filed a strata schemes application in this Tribunal against the respondent, The Owners – Strata Plan 75666. It is not clear from the application what orders he sought against the respondent. It seemed to revolve around repairs as a result of water damage to his unit.
- 2 The application came on for hearing before a Member of this Tribunal on 2 August 2021. The Member dismissed the application, stating that
 - Having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established
 - The application for orders under the Strata Schemes Management Act 2015 is dismissed because the applicant has only sought relief in general terms and has not provided evidence to enable the Tribunal to make specific orders in any of his claims. Most of the claims made under sec 106 for repairs have now been carried out and claims for compensation are non-specific and out of time.
- 3 The Member also denied the respondent leave to be legally represented. The Member then referred to his reasons for decision, stating “Detailed oral reasons were provided at the hearing.”
- 4 The appellant filed a Notice of Appeal on 9 August 2021. He did not seek leave to appeal. His grounds of appeal appear to cover the following:

- (1) the respondent had refused mediation by Fair Trading
 - (2) the appellant had been refused the opportunity of being legally represented at the hearing
 - (3) he denied that any of his claims were “out of time”
 - (4) the Member had failed to take into account evidence whether a door or roof in a jacuzzi room was watertight.
- 5 On 1 September 2021 a Principal Member of this Tribunal made directions in these appeal proceedings that amongst other matters required the appellant to provide a sound recording or transcript of the hearing at first instance because oral reasons had been given together with a typed copy of the relevant parts. The appellant has failed to provide this material.
- 6 An appeal does not create an opportunity to rehear an application, except in circumstances granted by the Appeal Panel. In general terms, an appeal will only succeed if the appellant can demonstrate that in some way the Member made errors in her or his understanding of the law or of the factual basis for the proceedings and any such errors affected the proper outcome of the proceedings.
- 7 A consequence of the failure of the appellant to comply with the directions made for the preparation of these appeal proceedings is that the Appeal Panel had no means available to it of knowing what information or evidence was provided to the Member during the hearing from which the appeal was brought. This is particularly important because reasons for decision were given orally and were said to be “detailed”. If the Appeal Panel does not know what factual basis existed upon which the Member delivered his reasons, and if the Appeal Panel does not know what those reasons were, it is impossible to consider whether the Member made any error of a kind which would support the appellant’s entitlement to appeal. It follows, that in the absence of any of this material the Appeal Panel’s difficulty in considering the appeal will almost inevitably lead to its dismissal. We interpolate that the brief reasons which accompanied the order of the Member which we have set out in [2] above bear little resemblance to what we have ascertained is the real issue in dispute in these proceedings, which we shall refer to later in these reasons for decision. We also note that the respondent’s solicitor could not be contacted on the day

of the hearing before the Tribunal and was thus unable to make oral submissions to the Member.

- 8 During the course of the hearing we engaged with the appellant in an endeavour to discover what was the real issue in the proceedings. It was only when the appellant described the unit in which he lived, the particular maintenance problems which he was encountering and the respondent's solicitor explained the reasons why the body corporate refused to pay for the cost of repairs that we were able to bring the appellant to an understanding of his circumstances and why, as a result, the decision of the Member to dismiss his application was correct, albeit for different reasons, and that his appeal should fail.

The factual background

- 9 As we have said, we do not have available to us a recording or transcript of the proceedings below. The narration which follows is based on information given to us during the course of conducting the appeal hearing. This might strictly constitute "new evidence", but the facts are uncontroversial and assist in a resolution of what has been a long-running area of controversy between the appellant and the respondent.
- 10 The appellant's unit consists of 2 stories. On the upper level there is an enclosed terrace, with what is described in the relevant strata plan as being constructed of an "operable glass roof, louvres and associated fittings and fixtures." The appellant informed us that there is a jacuzzi in that enclosed terrace. The terrace adjoins his bedroom. The roof is capable of being opened by means of a hydraulic system. The appellant stated that for some time, water has been penetrating through the hydraulic roof covering the terrace.
- 11 We note that after the conclusion of the hearing of the appeal the appellant forwarded an email to the Tribunal registry seeking to assert that the water penetration was coming from a different part of the roof which is common property. There is no evidentiary basis of any kind to substantiate this allegation. In the circumstances we decline to reopen the appeal proceedings.
- 12 A diagram made available to us indicates that the enclosed terrace is common property but is an "exclusive use area" which means that the appellant has the

right to use and enjoy that area to the exclusion of any other lot owner. This entitlement is corroborated by by-laws 28 and 29 adopted by the respondent. The effect of these by-laws is:

- (1) the appellant has the exclusive use and enjoyment of the enclosed terrace
- (2) the appellant is responsible for keeping that area “in a state of good repair and serviceable repair including any associated machinery and the like.”
- (3) The appellant is responsible for the payment of any costs incurred by the respondent with respect to that area.

The legal effect of the application of the by-laws

- 13 We now come to deal with the heart of the issue between the parties. The appellant has always considered that the maintenance and any necessary repair to the roof of the terrace is the responsibility of the respondent, because roofs of buildings are usually considered to be common property. However, the appellant had not appreciated until the hearing of the appeal that a by-law can have the effect of displacing the usual responsibility of an owners’ corporation to maintain and repair common property. The respondent’s solicitor informed us during the hearing of the appeal that this matter was not raised during the hearing below. This would have rendered it impossible for the Member to have identified and determined this issue.
- 14 Once made, by-laws are binding on the owners’ corporation and on each lot owner. (Section 135 of the *Strata Schemes Management Act 2015*). By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme. (Section 136 (1)).
- 15 There is provision in that Act for the creation of a right of exclusive use and enjoyment of a part of the common property, which is what has occurred with respect to the appellant’s terrace. It is found in section 142

142 Common property rights by-law

For the purposes of this Act, a common property rights by-law is a by-law that confers on the owner or owners of a specified lot or lots in the strata scheme—

- (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or

(b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes),

or that changes such a by-law.

- 16 Importantly, if a common property rights by-law is created section 144(1) requires the owners' corporation to make provision for the maintenance and repair of that part of the common property, either by the owners' corporation or by the lot owner. In the case of the appellant, he, together with his joint owner are liable for that cost, which will include the cost of repair of the leaking roof to the enclosed terrace, and if it becomes necessary, all of that structure. Because the appellant has this responsibility, by section 144 (3) the owners' corporation is not responsible to maintain or repair the enclosed terrace. In order to assist the appellant, we have set out the provisions of section 144 in full.

144 Common property rights by-law must provide for maintenance of property

(1) A common property rights by-law must—

(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

(b) impose on the owner or owners of the lots the responsibility for that maintenance and upkeep.

(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.

Disposal of the appeal

- 17 The appellant readily conceded that once he had been made aware that he was responsible for repairing the leaking roof of his enclosed terrace at his cost, that his appeal must fail, and must be dismissed. In having endeavoured to set out the legal framework which applied to the appellant's circumstances in simple terms, we mean no disrespect to the appellant. The regulations which

apply to the varied circumstances attaching to communal living are necessarily complex in order to accommodate all of the exigencies of communal life.

- 18 To the extent that leave to appeal is necessary, we refuse leave to appeal. The appeal is dismissed.

Orders

- 19 We make the following orders

- (1) Leave to appeal refused.
- (2) Appeal dismissed.

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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