Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No. 21367 v Letchford
Medium Neutral Citation:	[2021] NSWCATCD 112
Hearing Date(s):	27 September 2021
Date of Orders:	9 November 2021
Decision Date:	9 November 2021
Jurisdiction:	Consumer and Commercial Division
Before:	M Harrowell, Deputy President
Decision:	Applications SC 21/19579 and SC 21/19580 are dismissed pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act 2013.
Catchwords:	PRACTICE AND PROCEDURE – Strata Schemes Management Act – Penalty application – permissibility of seeking multiple penalties for breach of different by-laws in one application – subsequent proceedings duplicating earlier application – dismissal as abuse of process under s 55(1)(b) of the Civil and Administrative Tribunal Act
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Australian Hardboards Limited v Hudson Investment Group Limited [2007] NSWCA 104 Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75 Blair v Curran [1939] HCA 23; (1939) 62 CLR 464 Jago v District Court of NSW [1989] HCA 46; (1989) 168 CLR 23
Texts Cited:	Nil

Category:	Principal judgment
Parties:	The Owners – Strata Plan No. 21367(Applicant) Nathan James Letchford (Respondent)
Representation:	Applicant: Mr J Donney (Strata Committee Member) Respondent: Ms A Zappia (partner of the respondent) Solicitors: Not applicable
File Number(s):	SC 21/19579 SC 21/19580
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 These proceedings relate to a strata scheme at Port Macquarie.

2 The applicant, The Owners – Strata Plan No. 21367, seeks the imposition of civil penalties for breach of by-laws by the respondent, Mr Letchford, pursuant to s 147 of the *Strata Schemes Management Act 2015* (NSW) ('SSMA'). Section 147 permits an application to be made where a notice to comply with a by-law has been given under s 146 of the SSMA.

3 Two separate applications were listed before the Tribunal for hearing on 27 September 2021. The first is SC 21/19579 which sought the imposition of a penalty for contravention of by-law 9 following the issue of a notice to comply. By-law 9 referred to in that notice related to smoking on a person's lot which then penetrates common property or another lot. The second application is SC 21/19580. This application was in relation to non-compliance with by-law 6. By-law 6 related to behaviour likely to cause offence or embarrassment to the owners or users of Lot or common property.

4 There had been earlier proceedings between the parties being application SC 20/41822 (original penalty proceedings). Those proceeding also raise disputes about the failure to comply with notices issued under s 146 of the SSMA in connection with behaviour and smoking.

5 The original penalty proceedings were determined by the Tribunal on 22 February 2021 (February decision). At that time the Tribunal made the following orders:

> 1. The Tribunal finds that Nathan Letchford breached By-Law 6 by creating noise on a floor of the common property likely to interfere with peace and enjoyment of owner or occupant of another lot or any person using common property.
>
> 2. The Tribunal orders Nathan Letchford to pay a monetary penalty of $750 on order 22 March 2021.
>
> 3. The monetary penalty is payable to the Owners – Strata Plan No. 21367.
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> Note the penalty may be registered as a judgement debt under s 78 of Civil and Administrative Tribunal Act NSW (2013).

6 No reasons for the February decision were provided to the Tribunal for the purpose of determining the present applications. In addition the Tribunal was not provided with a transcript of the original penalty proceedings.

7 In the present proceedings, the applicant sought to rely upon the evidence which had been filed in original penalty proceedings, having failed to provide all evidence in the current proceedings as directed on the present 25 June 2021.

8 At the hearing of these proceedings on 27 September 2021, considerable time was taken trying to identify the documents in the original proceedings upon which the applicant sought to rely as well as particular events said to constitute each contravention for the purpose of s 147 of the SSMA.

9 In addition, the Tribunal was informed during the course of the hearing that the Member presiding on 22 February 2021 told the parties she was only dealing with one contravention and that a further application would have to be made for contraventions of other by-laws. Again, it is appropriate to note at this point that in the absence of any transcript of the Tribunal or reasons, there was no evidence of this at the hearing on 27 September 2021.

10 Finally, it should be noted that the Tribunal was not provided with copies of the by-laws as registered from time to time (as opposed to the type copy of what was said to have been registered). The relevance of this fact is that the by-law numbers changed. For example the noise by-law was variously numbered 1 and 6.

Consideration

11 Due to the confusion concerning the by-laws and the notices relied upon for the purposes of s 147, the Tribunal asked the applicant's representative, Mr Donney, to identify the particular notice relied on for the purpose of the present proceedings.

12 In respect of the smoking complaint, the notice identified was item 3 in a bundle of documents provided as the Applicant's Submissions contained in a blue folder submitted for the purpose of the Tribunal determining the present applications (which I have marked Exhibit A). That notice is dated 7 August 2020 and refers to by-law 9. It is the same notice attached to the applicant original application SC 20/41822. In relation to the behaviour complaint, this was identified as document 2 in Exhibit A. This notice, dated 1 May 2020 and referring to by-law 6, was the same notice attached to the original application SC 20/41822.

13 During the hearing of the application the Tribunal indicated to the parties that it appeared that the present application duplicated the original proceedings. The Tribunal also noted there were no orders made in the original proceedings to amend the application and it appeared the Tribunal finally determined those proceedings on 22 February 2021. While the Tribunal imposed a penalty in relation penalty to breaches of the noise by-law (which by then was apparently numbered by-law 6) the Tribunal did not otherwise make an order reserving any right to make further applications in relation to breaches of other by-laws. Rather, no order was made in relation to the smoking and behaviour claims.

14 The Tribunal identified a preliminary issue for determination. This was whether or not an application under s 147 SSMA could seek imposition of a monetary penalty in respect of separate by-law breaches for which separate notices to comply had been issued under 146 of SSMA or whether a separate application was required for each notice to comply.

15 A resolution of this issue involves a question of statutory construction.

16 If it is permissible to bring proceedings for breaches of all the notices in one application under s 147 SSMA, then the present proceedings would constitute an abuse of process because they were the subject of the original penalty

application which had been determined. On the other hand, if only one notice could be the subject an application under s 147, then it was not possible to hear all contraventions identified in the original penalty proceedings. In this situation, it could not be said the February decision only resolved the claim in respect of noise and no abuse of process would arise.

17 An abuse of process may arise where a party brings duplicate proceedings against another party concerning the same subject matter.

18 In the present case, three considerations are relevant in determining whether the present proceedings should be categorised as an abuse of process. First is the matter identified in *Australian Hardboards Limited v Hudson Investment Group Limited* [2007] NSWCA 104. In that case Campbell JA referred to the decision of Gzell J (in the proceedings at first instance) setting out the principles concerning abuse of process in the context of multiple proceedings giving rise to similar issues. At [34] Campbell JA, said:

> 34 His Honour recognised that multiplicity of proceedings in relation to similar issues should be avoided, and correctly stated the applicable principles, as follows:
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> > "6 In McHenry v Lewis (1882) 22 Ch 397 at 400, Jessel MR said that where two actions by the same man were brought in courts governed by the same procedure, and where judgments are followed by the same remedies, it was prima facie vexatious to bring two actions where one would do. In Williams v Hunt [1905] 1 KB 512 at 514, Collins MR said that where two separate remedies were possible and a start was made to put in force one of the remedies, it was an abuse of process of the Court to divide the remedy where there was a complete remedy in the Court in which the suit was first started.
> >
> > 7 In Reynolds v Reynolds [1977] 2 NSWLR 295 at 306, Waddell J cited both decisions and concluded that the existence of two proceedings was considered *prima facie* vexatious and one would, generally as of course, be stayed. His Honour said:
> >
> > > "The general principle in relation to proceedings in two courts in the one country is stated by the Court of Appeal in McHenry v Lewis and in relation to proceedings in each of two divisions of the one court in Williams v Hunt again a decision of the Court of Appeal. In such cases the existence of two proceedings is considered prima facie vexatious, and the court will generally, as of course, put the plaintiff to his election, and stay one of the proceedings; or it may, as in the latter case, stay the proceedings which it considers to be inappropriate."
> >
> > 8 Beach J put it this way in Burbank Australia Pty Ltd v Luzinat [2000] VSC 128 at [28] – [30]:

> "Where a party to a proceeding institutes a second proceeding in a different form in relation to the same subject matter as the first proceeding, prima facie the second proceeding is vexatious and will be stayed: see McHenry v Lewis and Williams v Hunt.
>
> In such a situation the courts have for many years taken the view that a litigant already deeply involved in one piece of litigation would be unduly harassed if a second piece of litigation was to proceed at the same time as the first. And such a principle applies to proceedings whether they be before a court, a board or a tribunal.
>
> All the more so where there is a significant risk, as there is in the present case, that VCAT's findings and the Board's findings may be in conflict one with the other.""

19 The second matter is whether the further proceedings are an abuse in the context of an earlier decision resolving the issues in dispute. This can give rise to res judicata or issue estoppel. Of issue estoppel, Dixon J (as he then was) said in *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 at 531-532:

> A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
>
> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J. in R. v. Inhabitants of the Township of Hartington Middle Quarter, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

20 The third is whether the subsequent penalty proceedings are an abuse if they seek the imposition of a civil penalty where the earlier proceedings involved the same facts which were considered for the purpose of resolving whether a contravention had occurred or what penalty should be imposed in the earlier proceedings. In this regard questions of unfairness and injustice may give rise to an abuse of process: *Barton v. The Queen* [1980] HCA 48; (1980) 147 CLR 75; *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 (*Jago*).

21 Where there is an abuse of process the Tribunal may dismiss the proceedings pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act, 2013 because the proceedings are frivolous, vexatious or otherwise misconceived or lacking in substance. In this regard the expression "abuse of process" is encompassed by the expression "vexatious": *Jago* per Gaudron J at [8].

22 As stated above, the relevant provisions of the SSMA concerning issuing a notice to comply with a by-law notice and applying for the imposition of a civil penalty in consequence of a subsequent breach are s 146 and 147 of the SSMA. These sections provide:

> 146 **Notice by owners corporation to owner or occupier**
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> (1) An owners corporation for a strata scheme may give a notice, in a form approved by the Secretary, to the owner or occupier of a lot in the scheme requiring the owner or occupier to comply with a specified by-law if the owners corporation is satisfied that the owner or occupier has contravened that by-law.
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> (2) The notice must contain a copy of the specified by-law.
>
> (3) A notice must not be given unless a resolution approving the issue of the notice, or the issue of notices for the type of contravention concerned, has first been passed by the owners corporation at a general meeting or by the strata committee of the owners corporation.
>
> (4) Subsection (3) does not apply to the giving of a notice by a strata managing agent if that function has been delegated to the strata managing agent in accordance with this Act.
>
> 147 **Civil penalty for breach of by-laws**
>
> (1) The Tribunal may, on application by an owners corporation, order a person to pay a monetary penalty of up to 10 penalty units if the Tribunal is satisfied that—
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> (a) the owners corporation gave a notice under this Division to the person requiring the person to comply with a by-law, and
>
> (b) the person has since contravened the by-law.

> (2) The Tribunal may, on application by an owners corporation, order a person to pay a monetary penalty of up to 20 penalty units if the Tribunal is satisfied that the person has contravened a by-law within 12 months after the Tribunal had imposed a monetary penalty on the person for a previous breach of the by-law.
>
> (3) Despite subsections (1) and (2), the Tribunal may, in dealing with a contravention of a by-law made under section 137, impose a monetary penalty of up to 50 penalty units under subsection (1) and a monetary penalty of up to 100 penalty units under subsection (2).
>
> (4) An application for an order under subsection (1) must be made not later than 12 months after the notice was given. (5) An owners corporation is not required to give notice under this Division before applying for an order under subsection (2).
>
> (6) A monetary penalty is payable to the owners corporation, unless the Tribunal otherwise orders. Note— The penalty may be registered as a judgment debt and will be enforceable accordingly (see section 78 of the *Civil and Administrative Tribunal Act 2013*).

23 Section 147(1) and (2) of the SSMA permit the Tribunal to impose a penalty for contravention of by-law "on application by an owners corporation". A penalty of up to 10 penalty units can be imposed if the Tribunal is satisfied "a notice under this Division" has been given to the other person requiring compliance with a by-law and that other person has since contravened the by-law (s147(1)). A penalty of up to 20 penalty units can be imposed if the other person has further contravened a by-law within 12 months after a penalty was imposed under as 147(1) (s147(2). In addition, in the case of occupancy limits imposed under s 137, the applicable penalty units for a contravention of each of ss 147(1) and (2) are 50 penalty units and 100 penalty units respectively.

24 All that is required to enliven the Tribunal's jurisdiction and power to impose a penalty is an application by an owners corporation and satisfaction of the statutory requirements which are preconditions to the imposition of any penalty.

25 Section 147 does not limit the content of the application nor does it limit the number of contraventions to which such an application can relate. This is so whether there are multiple contraventions of one by-law or contraventions of multiple by-laws. In the case of s 147(1) all that is required is that there has been a contravention of the by-law to which the notice relates on a date after the date of the relevant notice. In the case of s 147(2) all that is required is that the other person has "contravened a by-law … after the Tribunal had imposed a monetary penalty on the person for a previous breach of the by-law". If these

preconditions are satisfied, the Tribunal has a discretion to impose a penalty and, if a penalty is imposed, a discretion as to the amount of penalty (subject to the maximum penalty specified in the section for the particular contravention).

26 This interpretation is consistent with s 38(4) of the NCAT Act which requires the Tribunal "to act with as little formality as the circumstances of the case permit" … "without regard to technicalities and legal forms".

27 While s 38(3)(a)(ii) of the NCAT Act provides that the rules of evidence apply to applications under s 147 of the SSMA, this requirement does not affect the manner in which an application is made to the Tribunal.

28 It follows that the original penalty proceedings were properly brought, the owners corporation being permitted to seek penalties in connection with multiple contraventions of different by-laws by lodging only one application, rather than separate applications in relation to breaches of each by-law.

29 In reaching this conclusion, the Tribunal does not express any opinion concerning whether, by one application, a person may bring proceedings for the imposition of a penalty under s 147 as well as an application for orders under the SSMA that do not involve the imposition of a penalty in the same proceedings. This matter was not argued before the Tribunal, is unnecessary decide and raises complex questions including:

(1) whether the rules of evidence would apply in such a case in respect of orders other than for the imposition of a penalty; and

(2) whether, by reason of the different rights of appeal (in the case of a civil penalty to a court as provided in s 83(2) of the NCAT Act and in any other case, where there is an internally appellant will decision, to the to Appeal Panel as provided in s 80(1)), such combined claims in one application are impermissible and/or liable to be dismissed under s 55(1)(b) of the NCAT Act.

30 In addition, the Tribunal expresses no view as to whether the maximum penalty that may be imposed is cumulative where an application seeks a penalty arising from a breach of multiple by-laws or multiple breaches of a single by-law. Again this matter was not argued and is unnecessary to decide.

31 There can be no doubt that the original penalty proceedings sought the same relief now claimed in each of the proceedings listed before the Tribunal on 27 September 2021.

32 A submission was made to the Tribunal on 27 September 2021 concerning what happened when the original penalty proceedings were determined. It was asserted that the parties were told by the presiding Member that she could only deal with one application and that new applications would need to be lodged.

33 However, no evidence in admissible form was provided to the Tribunal to support this claim. The Tribunal was not provided with a transcript of what occurred at the hearing on 22 February 2021 nor was the Tribunal provided with any reasons for decision. Further, no suggestion was made that the application by which the original penalty proceedings were commenced was amended to delete that part of the application for the imposition of penalties which are the subject of the current proceedings.

34 In the absence of such evidence, the only conclusion that can be reached is that the original penalty proceedings were finally determined on 22 February 2021. At that time, the Tribunal determined to impose a penalty in connection with a breach or breaches of the then by-law 6 (which at that time related to noise) but declined to make any further orders. As the present applications relate to claims which have previously been determined, the owners corporation is prevented from pursuing these claims by reason of the principles of res judicata and/or issue estoppel. It follows that both of the present applications constitute an abuse of process and should be dismissed under s 55(1)(b) of the NCAT Act.

Orders

35 The Tribunal makes the following order:

(1) Applications SC 21/19579 and SC 21/19580 are dismissed pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act 2013.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal. Registrar

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