Civil and Administrative Tribunal

New South Wales

Case Name:	Sunaust Properties Pty Ltd v The Owners - Strata Plan No 64807
Medium Neutral Citation:	[2022] NSWCATAP 55
Hearing Date(s):	23 February 2022
Date of Orders:	24 February 2022
Decision Date:	25 February 2022
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member
Decision:	(1) The effect of order 1 made in proceedings SC 21/02639 on 17 January 2022 is stayed, solely to the extent that it affects the appellant's rights in respect of what is described in these reasons as by-law RB1. (2) The effect of order 2 made in proceedings SC 21/02639 on 17 January 2022 is stayed. (3) Order 2 herein is conditional upon the appellant forthwith granting to the respondent and its servants, contractors or agents an ongoing right to enter, remain upon and to use the "reception lot" (lot 109 in the scheme) and the security access control, fire safety equipment and CCTV equipment located therein pending determination of the appeal. Such right does not extend to any use of the lot which involves the promotion or provision of services involving the sale, leasing or letting of real property. Any keys or other access devices and security codes required to give effect to this order are to be provided by the appellant to the respondent. (4) Grant liberty to the parties to apply for a variation to the orders made by me if they contend that they do not properly give effect to the decision as indicated by my reasons today.

	(5) Grant liberty to the appellant to apply to vary the orders if the parties cannot agree upon a proper level of compensation to be paid by the respondent to the appellant for use of the reception lot pending determination of the appeal, within 14 days.
Catchwords:	APPEAL – stay pending appeal – concurrent proceedings in Supreme Court – strata scheme
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Beck v Colonial Staff Super Pty Ltd & Ors (No. 2) [2015] NSWSC 1360 Bentran v Sabbarton [2014] NSWCATAP 37 Cooper v The Owners – Strata Plan No.58068 [2020] NSWCA 250 New South Wales Bar Association v Stevens [2003] NSWCA 95 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 103
Texts Cited:	None cited
Category:	Procedural rulings
Parties:	Sunaust Properties Pty Ltd (Appellant) The Owners - Strata Plan No 64807 (Respondent)
Representation:	Solicitors: MC Lawyers (Appellant) DEA Lawyers (Respondent)
File Number(s):	2022/00035175
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	17 January 2022

Before:	G Ellis, Senior Member
File Number(s):	SC 21/02639

REASONS FOR DECISION

EX TEMPORE - REVISED

1 Yesterday, I heard the parties in respect of an Application for a Stay lodged with the appellant's appeal. This is my decision in respect of that application.

2 On 17 January 2022, the Consumer and Commercial Division made two substantive orders affecting the rights of the parties to this appeal, together with procedural orders including for the determination of costs in respect of the proceedings.

3 The appellant operates a business involved primarily in two activities:

(1) The first is providing caretaker services to one of two stages of a multi-unit development for which the respondent is the Owners Corporation.

(2) The second is what I will broadly describe as the provision of real estate services, including sales and letting of real property and of strata lots within the development.

4 The first of those activities is governed by a caretaker's agreement between the appellant and respondent ("agreement"), formed when the relevant stage of the development was completed. There had been an earlier agreement through which the appellant purchased the caretakers rights from the developer.

5 The term 'caretaker's agreement' was correct at the time. I should interpolate to indicate that it is now properly described as a 'Building Manager Agreement' under the *Strata Schemes Management Act 2015* (NSW) (SSMA). Given the consistent use of the term caretaker's agreement throughout the material, however, I will continue to use the original term in these reasons.

6 The Agreement was first made some 20 years ago. Subsequent renewals or agreements were entered into, but the effect of those, whilst contentious in the proceedings at first instance, is not pertinent to this application.

7 In furtherance of the agreement, the appellant also purchased two lots in the scheme. Lot 107 appears to be a commercial lot exposed to the street, from which the appellant predominantly undertakes the management of its real estate business. Lot 109, which I will describe as the "reception lot", appears to be an internal lot designed and utilised for the predominant purpose of facilitating face-to-face contact between those performing reception and caretaking services for the scheme, and the scheme's owners and occupiers. Relevantly, it also contains important utilities relating to the scheme, including alarm and fire utilities.

8 It would appear there was a significant breakdown in the relationship between the parties approximately two years ago. Whilst several issues appear to have arisen, and were agitated in the proceedings at first instance, a major source of contention between the parties was an ongoing increase of 5% sought by the appellant in respect of its fees payable under the caretaker's agreement. The appellant proceeded on the basis that it was entitled to such an increase under a verbal amendment to the agreement made with the developer, whereas the respondent came to the view that only CPI increases were applicable, in accordance with of the written agreement.

9 That issue, together with several others, is before the Supreme Court and does not need to be determined in respect of this application.

10 As a result of the dispute that arose, the respondent ceased making payments to the appellant under the agreement in about November 2019. Notwithstanding that, the appellant continued to provide the caretaker services, despite ongoing conflict between the parties as to the nature and quality of the service provided.

11 That led to the proceedings in the Tribunal at first instance. The Tribunal made various findings in what is, with respect, a lengthy and detailed decision. The Tribunal found that it had jurisdiction to make orders in respect of the agreement under s 72 of the SSMA; an issue challenged by the appellant and which requires a lengthy consideration of the legislative history relating to strata schemes in New South Wales. The Tribunal undertook that lengthy

consideration from [272] to [302] of its decision. It does not need to be repeated here.

12 The Tribunal also found, at [260] to [262], that the appellant had engaged in various aspects of conduct which the Tribunal described as "gross misconduct."

13 It was also determined that the appellant had levied unfair or improper charges against the respondent and, weighing those issues, the Tribunal determined that it should exercise its discretion to terminate the agreement. The agreement itself provided that, if it was terminated, the appellant was to sell its two lots in the scheme on specified terms. Consequently, the Tribunal also made an order that mandated the sale (order 2).

14 It appears that the power under s 72 of the SSMA is not one which has previously been utilised by the Tribunal.

15 I do not intend to dwell in these reasons on the relative merit of the appeal. The respondent, properly in my view, acknowledges that it is at least reasonably arguable.

16 Similarly, the respondent does not oppose a stay of order 2, requiring the sale of the appellant's lots in the development. However, that is subject to the respondent's claim that it should have ongoing access, via a fee-free licence, to the reception lot. I infer, whilst it was not explicitly stated, that the respondent also requires that access for the benefit of another Company it has contracted with since the decision was made, to undertake the caretaking duties on a month to month basis. That Company, the respondent assures me, does not provide real estate services.

17 The lodgement of an internal appeal does not affect the operation of the decision appealed from. Nonetheless, under s 43(3) of the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act), I may exercise a discretion to stay the operation of the decision pending the determination of the appeal. That discretion must be exercised judicially and the general principles that apply in relation to the exercise of the discretion are derived from the terms of s 43(3) itself and the principles applied by the courts. They were summarised in

a decision of the Appeal Panel constituted by the former President of this Tribunal, Justice Wright, in *Bentran v Sabbarton* [2014] NSWCATAP 37.

18 To summarise those principles today, it is sufficient to cite what was said by Slattery J in *Beck v Colonial Staff Super Pty Ltd & Ors (No. 2)* [2015] NSWSC 1360 at [35], that:

> [35] The principles governing a stay of a judgment pending appeal are well established. The applicant must demonstrate that there is a reason for the grant of a stay or that a matter is an appropriate case in the exercise of the Court's discretion: Alexander v Cambridge Credit Corporation (1985) 2 NSWLR 685 ("Cambridge Credit") at 694. It is not necessary for the applicant for the stay to establish special or exceptional circumstances: Cambridge Credit at 694. The stay is likely to be granted if the appeal would otherwise be rendered nugatory. The Court considering the grant of a stay is not required to determine the merits of the appeal but usually considers whether the applicant has at least an arguable case; and the Court may impose conditions on the grant of a stay including that the applicant pay a sum of money into Court or otherwise secure the payment of the disputed sum: Cambridge Credit at 694-5. The central determinant as to whether a stay would be granted, and if so upon what terms, if any, is the Court's assessment as to what is a fair balance of the rights of the parties, given that an appeal does not of itself operate as a stay and the party who has succeeded at trial is entitled to the fruits of its victory: Cambridge Credit and see also Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd [2015] NSWCA 227 ("Woodlawn") at [7]-[9].:

19 I note that the overriding principle in any application for a stay is to ask what the interests of justice require: *New South Wales Bar Association v Stevens* [2003] NSWCA 95 at [83]; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [18].

20 In support of its application for a stay, the appellant points to various rights and interests which are affected by the order for termination of the agreement (order 1).

21 First, the appellant points to its fundamental right under the agreement to perform work for reward for the respondent. I note, however, that no payment has been provided for that work for some time and the respondent has exercised separate rights available to it under cl 18 of the agreement, to require the appellant to stop work in respect of its caretaking obligations. It did so by notice on 15 February 2022. In any event, the appellant says that it will be precluded from maintaining its claim for ongoing profit under the agreement in the Supreme Court, as a result of the Tribunal's decision.

22 The appellant also says that there are intangible but valuable benefits which flow to it from conducting the caretaking services, including building relationships with owners in the scheme, which promotes the real estate aspect of its business as those owners are more likely to utilise its services.

23 Further, the appellant says that loss of the work involved in providing the caretaker services will mean that it needs to terminate the services of a cleaning subcontractor.

24 Separately, the appellant points to other legal rights available to it simply by virtue of the existence of the agreement itself. Two issues are raised.

25 Firstly, there are three by-laws in respect of the scheme in effect to facilitate the appellant's work under the agreement, which the respondent now intends to repeal. One of those by-laws may not, on its own terms, be repealed without the consent of the appellant if it is the caretaker under the agreement.

26 All three relevant by-laws are proposed to be repealed by motion at a meeting of the respondent's members, to be conducted on 25 February 2022.

27 Unfortunately, there is a variation in the numbering of those by-laws in the material before me, such that it is unclear whether they are numbered 28 to 30, or 30 to 32. For convenience, I will refer to them as "RB1", "RB2" and "RB3".

28 Broadly speaking, RB1 provides that the Owners Corporation has the power to enter into what is effectively the caretaker's agreement but also explicitly extends the description of the services to be provided to property management and sales. It is this by-law which, at subpart (4), requires the consent of the caretaker to repeal. Prima facie then, whilst the agreement remains in force, even by virtue of a stay, the by-law may not be repealed over the appellant's objection.

29 RB2 provides that owners and occupiers of lots must not interfere with or obstruct the caretaker in the course of its duties and RB3, headed "no competition with caretaker", provides that no other occupier or owner of a lot may engage in the business of letting, property management, on-site caretaking or similar duties.

30 Secondly, the appellant says that, in the absence of a stay, the proceedings in the Supreme Court will be unnecessarily delayed because the parties will need to re-plead issues of loss and obtain new expert evidence based on the changed position brought about by the Tribunal's order.

31 Of course, my considerations in respect of the stay lead to a single exercisable discretion, weighing all of the relevant considerations.

32 As referred to by Bell P, citing High Court authority in *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 at [77], though, it is commonly necessary that those considerations be dealt with sequentially in reasons, which I will now move to.

33 As regards the appellant's loss of income from the agreement if a stay is not granted, I accept the respondent's submission that this is an issue which is readily compensable if the appellant succeeds in their appeal. There is no proper basis, in my view, to find that if the Tribunal's order is overturned the appellant cannot be put back in its former position as regards profit forgone by an order for damages.

34 Further, is not the case that payment was otherwise being made, such that the appellant loses the immediate benefit of the cash flow generated from its rights under the agreement. The respondent has not been paying under the agreement since 2019, and there is no indication that it will otherwise voluntarily do so.

35 I agree with the appellant that the Tribunal's order, if not stayed, will directly impact its case for outstanding remuneration or profit in the Supreme Court. With the greatest respect, though, and without intending to presuppose what the Court might do, it does not seem that it would be unduly difficult for the Court to determine the issue of liability between the parties and then craft orders which allow for the potential success of this appeal in respect of quantum. Alternatively, it seems to me, the Court could make determinations on relevant issues, make preliminary orders in respect of damages and stand over any final determination until the outcome of this appeal is known.

36 I do not agree with the appellant's argument that refusal of a stay of order 1 is likely to necessitate significant re-pleading or new evidence in respect of the Supreme Court proceedings. My reasons for that are as follows:

(1) I will, by agreement, stay the effect of order 2, which required the appellant to sell its lots in the scheme. By virtue of my order, the conduct of the appellant's real estate business should proceed relatively unaffected.

(2) To the extent that the appellant argues that it loses the intangible benefit of ongoing contact with lot owners through its operation of the caretaking duties, I am satisfied that the stop work direction issued by the respondent has the same impact as the Tribunal's order in that regard. On that basis, the appellant's loss of goodwill and consequent profit, if it is to be claimed, would still need to be pleaded and supported by evidence of a similar nature, irrespective of whether the appellant's loss was caused by the Tribunal's order or the respondent's stop work direction. Given the short period between those two events, the difference in what would need to be calculated and established by evidence from the appellant would appear to be relatively minor.

(3) The orders I will make will have the consequence of ensuring that no lot within the scheme may be utilised for conduct in competition with the appellant's real estate business as a consequence of the Tribunal's decision.

37 In respect of the threatened termination of the cleaning subcontract by the appellant, it is acknowledged that the agreement with the subcontractor is not before me and I do not see that this argument can add much weight in those circumstances. Further, I can only infer that the subcontract has been maintained by the appellant for some time, despite the lack of payment from the respondent. It is difficult to accept a bare assertion that the appellant will now have to take a different course, simply because the subcontractor has no work to do. Whilst I accept the appellant assumes a greater risk in this regard after the termination of the agreement, in that obtaining the income which it no doubt intends to utilise to pay the subcontractor now relies on success in this appeal *and* in the Supreme Court, the bare assertion of the appellant's intent to terminate the subcontract if a stay is not granted (at para 27.7 of the affidavit of Yuan Xue) is insufficient to affect my view on the proper orders to be made. My considerations on the stay primarily relate to the competing rights in the interests of the parties to this appeal. The interests of the third-party subcontractor, whilst perhaps not irrelevant, are not directly pertinent. I do not

know, for example, whether there will be a pecuniary loss to the appellant by virtue of terminating the subcontract. Nor is it asserted that there would be reputational or other damage to the appellant which arises.

38 In respect of the relevant by-laws, the first issue raised by the respondent is that, as a result of the Court of Appeal's decision in *Cooper v The Owners – Strata Plan No.58068* [2020] NSWCA 250, the by law granting the appellant exclusive rights to caretaking and property management operated from lots in the scheme is liable to be struck down as harsh, unconscionable or oppressive under s 139 SSMA. Whilst that argument has some merit, there is a more fundamental problem with the appellant's position on this issue. RB3, which provides for non-competition with the appellant, does not require the appellant's consent before it is repealed. The same position applies in respect of RB2. The appellant's true rights as regards those two by-laws are simply unaffected if the stay is not granted.

39 That is not to say that I am unconcerned as to the effect of the termination order in respect of RB1. In my view, if there is relevant prejudice to the appellant in RB1 being repealed between now and when the appeal is determined, then my orders should take that into account. The respondent's position in that respect is that RB1 effectively does no more than create an opportunity for the Owners Corporation to enter into a caretaking agreement, a right now encapsulated in s 67 of the SSMA. It is also submitted that the appellant's rights to operate its real estate business are not otherwise reliant on RB1.

40 That submission is partially correct. RB1 does more than allow the appellant to operate the real estate arm of its business. At subparts (5) and (6) , RB 1 provides as follows:

> (5) The caretaker may, at the caretaker's expense, erect or procure the erection of all reasonable signs in or about the common property for the purpose of promoting the letting, property management and sales service of the caretaker, subject to the consent of the Owners Corporation, which will not be unreasonably withheld.
>
> (6) The Owners Corporation has the power to enter into any agreement with a financier of the caretaker, so that the financier's rights pursuant to any security arrangement between the caretaker and the financier can be enforced.

41 In my view, those two subparts create valuable rights and obligations beyond those currently provided for in the SSMA or the appellant's inherent rights. It would be inappropriate, pending the determination of the appeal, that RB1 be repealed without the consent of the appellant. I will return to that later when making my orders.

42 I also need to deal with the respondent's argument that any stay of the order for sale of the appellant's lots in the scheme ought to be conditional upon a licence being granted to it to use the reception lot. The basis for that argument is readily understood. Despite the dispute between these parties, there is no proper basis upon which the safety of owners and occupiers within the scheme should be jeopardised by a lack of access to essential utility services such as fire and security utilities, or even the closed-circuit television facility which is apparently maintained within the reception lot and which has also been a source of contention between the parties.

43 I accept that in determining the application for a stay, I also have power to make an order "otherwise affecting the operation of the decision," pursuant to s 43 (3) of the CAT Act. The appellant did not take issue with the respondent's submission that this power would extend to making an order providing access to the reception lot pending determination of the appeal. I am satisfied that the power under s 43(3) would extend to making such an order and that, in any event, the power to impose conditions upon the stay sought by the appellant pursuant to section 58 of the CAT Act would otherwise be enlivened.

44 The appellant did not oppose the essence of what was sought by the respondent. It says that it has conceded the point of access to the reception lot in correspondence prior to the hearing before me.

45 Without criticism of the appellant in this regard, I don't think that is entirely correct.

46 Clearly, the parties have engaged in some negotiation on this issue and some concessions have been made in correspondence. What the appellant has conceded, though, is that "[w]hilst the caretaker agreement is in effect, our client will comply with its terms including allowing the Owners Corporation or its authorised contractors to access the reception lot to facilitate any work that is

required on Owners Corporation equipment or common property upon reasonable notice”. On that basis, I am not satisfied that the parties are ad idem in this regard and, given the history of dispute between them, I am not satisfied that they will reach agreement on this issue in the absence of me making orders.

47 I am mindful of the fact that the order sought by the respondent for a licence to pass over and use the reception lot is greater than what it is entitled to under the agreement. The agreement provides that if the obligation on the appellant to sell its lots arises, it must "admit the Owners Corporation by its agents, servants and contractors to the caretaker's lots for the purpose of restoring the lots and its (sic) fittings and fixtures to a state of good, serviceable and clean repair.”: clause 9.3.4 of the agreement.

48 Whilst it was not raised by the parties, I am also mindful of the fact that the appellant retains its proprietary rights in the reception lot until sale, irrespective of whether a stay is granted. It is also likely to be incurring ongoing expense in respect of the lot, by virtue at least of strata fees and insurance. No offer has apparently been made by the respondent to meet those ongoing expenses if it has use of the lot, although I acknowledge that the issue does not appear to have been raised between the parties.

49 Finally, in respect of my consideration of the application, I should indicate that the appellant also sought and pressed for a stay of the directions made by the Tribunal in respect of the parties making submissions on costs of the proceedings at first instance. That was opposed by the respondent. It says that the directions have been partially complied with in any event. I agree with the respondent's submission that it is useful for the question of costs to be determined pending the outcome of the appeal, so that the ultimate operation of any costs order can be dealt with by the Appeal Panel when the appeal is determined. Any alleged errors in respect of the decision on costs could then be agitated at the same time.

50 Weighing those issues, and asking the overriding question of what the interests of justice require, I am satisfied that I should make the following orders:

(1) The effect of order 1 made in proceedings SC 21/02639 on 17 January 2022 is stayed, solely to the extent that it affects the appellant's rights in respect of what is described in these reasons as by-law RB1.

(2) The effect of order 2 made in proceedings SC 21/02639 on 17 January 2022 is stayed.

(3) Order 2 herein is conditional upon the appellant forthwith granting to the respondent and its servants, contractors or agents an ongoing right to enter, remain upon and to use the "reception lot" (lot 109 in the scheme) and the security access control, fire safety equipment and CCTV equipment located therein pending determination of the appeal. Such right does not extend to any use of the lot which involves the promotion or provision of services involving the sale, leasing or letting of real property. Any keys or other access devices and security codes required to give effect to this order are to be provided by the appellant to the respondent.

(4) Grant liberty to the parties to apply for a variation to the orders made by me if they contend that they do not properly give effect to the decision as indicated by my reasons today.

(5) Grant liberty to the appellant to apply to vary the orders if the parties cannot agree upon a proper level of compensation to be paid by the respondent to the appellant for use of the reception lot pending determination of the appeal, within 14 days.

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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