



Civil and Administrative Tribunal
New South Wales

Case Name: Rook v The Owners - Strata Plan No. 32865

Medium Neutral Citation: [2022] NSWCATCD 38

Hearing Date(s): 4 March 2022

Date of Orders: 24 March 2022

Decision Date: 24 March 2022

Jurisdiction: Consumer and Commercial Division

Before: M Deane, Senior Member

Decision: The application is dismissed.

Catchwords: LAND LAW — Strata title — Common property — Maintenance and repair of common property

Legislation Cited: Strata Schemes Management Act 2015 (NSW)

Cases Cited: Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425
Seiwa Pty Ltd v The Owners Strata Plan 35042 [2006] NSWSC 1157

Texts Cited: Nil

Category: Principal judgment

Parties: Karen Rook (Applicant)
The Owners – Strata Plan No. 32865 (Respondent)

Representation: Solicitors:
Pobi Lawyers (Applicant)
JS Mueller & Co (Respondent)

File Number(s): SC 21/20027

Publication Restriction: Nil

REASONS FOR DECISION

BACKGROUND

- 1 Karen Rook (the Applicant) is the owner of Lot 5 of Strata Plan No 32865. On 6 May 2021 the Applicant lodged an application seeking orders against The Owners – Strata Plan No 32865 (the Respondent).
- 2 In points of claim submitted on 8 September 2021, the Applicant sought an order under ss 230 and 232 of the Strata Schemes Management Act 2015 (the SSMA) that the Respondents cause to be undertaken the full scope of remedial works detailed in the Tender Specification and Tender Assessment prepared by Belmont Façade Engineering (the Belmont report) (as detailed below). The Applicant also sought further orders that the Respondent comply with its statutory duty of repair and maintenance under s 106 of the SSMA and that the Respondent must not levy a contribution from the Applicant for its costs in the NCAT proceedings.
- 3 The Applicant's request for an order for costs was withdrawn at the hearing, in light of legal representation previously having been granted on the condition that neither party would seek costs.

SUBMISSIONS

- 4 On behalf of the Applicant, it was submitted that the common property of the strata scheme was in disrepair, with cracking in the wall of the Applicant's townhouse and the brick retaining wall at the south west corner of the scheme, as well as subsidence in the paving stones of the courtyard. Many reports had been undertaken but the OC had failed to act on any of the expert reports.
- 5 On behalf of the Respondent, it was submitted that the Applicant had taken a view on the work that needed to be done and had involved herself in dealing with the matter since 2011. Since then, there had been a litany of remedies proposed with no underlying engineering rationale. The Applicant was still asking for orders based on recommendations set out in a tender specification document.
- 6 The Respondent contended that the OC was ready and willing to comply with its obligations under s 106 of the SSMA and to carry out the work in the report

provided by JKGeotechnics dated 6 March 2020. Mr Pearce had returned in 2022 and confirmed that the report was still accurate.

- 7 The Respondent submitted that the Applicant was required to demonstrate that the works were required and that the common property was no longer functioning. The report by JKGeotechnics of 6 March 2020 (the JKGeotechnics report) (detailed below) advised that their solution would enable functionality. The Belmont report went beyond what was required and there was no justification for works beyond what had been recommended by JKGeotechnics. The OC had been ready since the time of the JKGeotechnics report to implement the recommendations flowing from that advice, being the solution proposed in the Helifix report (detailed below), but had been hindered by the Applicant from carrying out the necessary works.

EVIDENCE

- 8 The history of the matter dates back to 2010, when cracking in the walls of the Applicant's townhouse were identified (Report of RJ Baxendale Consulting Engineer (AB 15 – 17)).

Reports

- 9 Subsequently there were several reports and investigations undertaken, including the following reports provided by the Applicant:
 - (1) A quote from Icon Construction Group (Icon) dated 2 May 2011 regarding a 5mm crack to the rear corner of Townhouse 3 that required remedial repair; underpinning was not required but a structural engineer should do some further investigation. Icon recommended the "Helifix crack stitching" method to repair the crack and quoted \$2,310 (AB33 – 34)
 - (2) A quote from Underpinning Solutions dated 5 May 2011 for underpinning of the rear corner of unit 3 and the rear boundary wall at a cost of \$17,290 (AB 35)
 - (3) A report from Core Project Construction Consulting dated 26 April 2018 recommending a scope of work which included demolishing the existing brick fence and footing on the southern boundary, rebuilding the fence and repointing existing cracking to the building (AB 42 – 61) tender documents (AB62 – 92 and 93 – 118) and various quotes (119 – 122).
 - (4) An Engineering Investigation Report by Abcon Engineers dated 10 April 2019 (AB 132 – 162)

- (5) A quote dated 9 April 2019 from Grasse Bricklaying for \$31,700 (AB166)
 - (6) A report from Wellstructured Consulting Engineers dated 9 September 2019 (AB 195 – 219)
 - (7) A project proposal from Pace Structural dated 4 November 2019 (AB 229 – 232)
 - (8) A proposal from JKGeotechics dated 10 October 2019 (AB 233 – 239)
- 10 In the JKGeotechics report of 6 March 2020 (AB 243 – 292), following an inspection on 5 February 2020, Matthew Pearce makes the following recommendations regarding the crack in the wall to the townhouse (at AB 252)

Given services appear to now have been repaired and the crack in the wall does not appear to have caused 'significant' serviceability damage, if the degree of cracking internally can be tolerated we recommend monitoring the cracks over the coming 12 month period at say 2 to 3 month intervals to check for any pattern of crack movement.

If no changes occur then the crack can be filled. If there are signs of cyclical (seasonal) movement without affect serviceability, then it can either be left as is or a flexible compressible filler used.

If further cracking becomes evidence and is not acceptable to the owner or serviceability requirements then the concrete footing would need to be underpinned to natural soil of at least medium dense relative density and a minimum depth of 1.5m below surface levels.

- 11 Regarding the boundary walls, Mr Pearce recommends (at AB 253)

Similarly to the house, if the structural assessment is that the walls are safe and serviceable (not likely to fall from being pushed over by a number of persons) we recommend a period of monitoring be carried out. ... If no movement is detected we expect the cracks could be repaired, or left in their current state. Alternatively, the southern corner could be dismantled and reconstructed

- 12 A report from Pace Structural (Pace) dated 23 March 2020 (AB 293 – 365) makes these recommendations regarding the townhouse wall (AB 295 – 296)

As the defects to the external walls are not considered a threat to person or property and the moisture content has likely stabilised (based on the favourable view of the founding materials by the geotechnical engineer), we would consider that a localised repair to the cracks may provide an adequate solution.

For the cracks to external masonry walls we would recommend adopting a Helifix crack stitch repair in strict accordance with the manufacturer's specification and a combination of flexible filler to horizontal cracks...

Should conditions worsen in the future then a more expensive and involved repair specification would need to be developed that would entail underpinning the footing at localised sections or locally ground injecting with a Mainmark Deep Lift Method System or similar.

13 Regarding the boundary wall, Pace recommended (at 296)

Due to the poor workmanship of the footing and the advanced state of disrepair inclusive of localised lateral displacement of the wall we would consider that reconstruction would be the most suitable long term solution.

14 A further report was obtained from Belmont dated 22 September 2020 (AB 371 – 388) (the Belmont report). No author is listed for the report. That report discussed repairs to the retaining wall, being demolition and reconstruction.

15 Belmont provided a tender assessment dated 6 November 2020 (AB 409 – 446), recommending a tender quote of \$186,956 for the work.

16 The OC then obtained further quotes (AB 449 – 457) including a quote from David Stevens Constructions for repairing 7 cracks, a corner and an opening in the amount of \$15,103.

17 The respondent provided more reports.

18 These included a report dated 15 February 2022 (RB 7 – 15) prepared in accordance with NCAT Procedural Direction 3 – Expert Evidence from Matthew Pearce (the Pearce report), an engineer employed by JKGeotechics and author of the JKGeotechics report dated 6 March 2020. In the Pearce Report, Mr Pearce notes that he conducted a further site inspection at the strata scheme on 15 February 2022. During that visit Mr Pearce took various photographs and measurements of the retaining wall and the cracks in the wall and in the wall of the townhouse. Mr Pearce affirmed the conclusions reached in JKGeotechics report and reported that in his view there had been no real change in the almost two years since early March 2020. Mr Pearce was satisfied that the solution set out in the report of Helifix was an appropriate one for dealing with the wall. Mr Pearce stated:

9. In my view, such a solution will enable the retaining wall and the wall of the Townhouse to maintain their functionality.

10 I have also been provided with two documents being the Belmont Façade Engineering Specification and Tender Assessment dated 22 September 2020 and 6 November 2020 respectively.

11. In my view, the solution set out in those documents goes beyond what is necessary to maintain the functionality of the retaining wall and the wall of the Townhouse.

- 19 The Respondent also provided the report from Helifix dated 11 February 2020 (the Helifix report) (RB 45 – 53), expressing the view that HeliBars would provide sufficient strength to reinstate structural integrity of the rear boundary wall.
- 20 On 3 March 2022 (the day before the hearing) the Applicant provided an affidavit from Bill Moisisdis, principal of Bellmont (the Moisisdis affidavit). At the hearing the Respondent objected to the affidavit being admitted on the basis that the applicant was retrospectively trying to bring the Bellmont report into compliance with NCAT Procedural Direction 3 for Expert Witnesses. This is discussed further below; however the Moisisdis affidavit was provisionally admitted on the basis that the Respondent could ask questions in chief of Mr Pearce with regards to the statements in the Moisisdis affidavit.
- 21 In the Moisisdis affidavit, Mr Moisisdis outlined the engagement of Bellmont by the OC and advised that he inspected the property on 12 August 2020. He had concluded that the foundations of the retaining wall were inadequate and that simple repair of the retaining wall using the method of crack stitching without rectification of the footings was not structurally adequate. In Mr Moisisdis' view, it was not possible to provide a definitive solution using the repair method of Helifix ties. Mr Moisisdis also gave the opinion that Mr Pearce's endorsement of the Helifix solution was incorrect and professionally irresponsible.

Owners corporation meetings

- 22 The matter had been raised at meetings of the OC, including an Extraordinary General Meeting (EGM) on 19 February 2019 where the OC passed a special resolution to demolish and rebuild the retaining wall dividing the property and the neighbouring Council Park but defeated a motion that the OC engage Core Project Consulting to proceed with stages 3 and 4 of their Project Management tender (AB 132 - 134).
- 23 At the Annual General Meeting on 14 May 2019 a motion was deferred that the OC review and approve the quotation from Grasse Bricklaying dated 9 April 2019 (AB 167 - 187).
- 24 At an EGM on 11 July 2019 an motion was defeated that the OC review and discuss the engineers report by Abcon dated 10 April, but a motion was

resolved to instruct an competent expert to review the Abcon Report, effect a site inspection and prepare a response to the Abcon report for presentation to the OC (AB 188 - 191).

- 25 At a meeting of the Strata Committee on 25 November 2019 it was resolved to accept (relevantly) the proposal of JKG Geotechnics dated 10 October 2019 and the proposal of Pace Structural dated 4 November 2019 (AB 228 - 241).
- 26 At a meeting on 20 July 2020, the Strata Committee resolved to accept the proposal of BellMont Façade Engineering to undertake the work described therein, being a fee proposal for an inspection and technical specification. (AB 367 – 370).
- 27 At a strata committee meeting dated 12 March 2021, the committee resolved to review and approve the quotation from David Stevens Construction in the amount of \$15,103 (AB 464).

The Applicant's evidence

- 28 The Applicant's witness statement sets out the history of the issues and the commissioning of the reports provided.
- 29 Under cross-examination at the hearing, the Applicant acknowledged that the Icon Construction report noted that underpinning was not required and Helifix crack stitching had been recommended in 2011. The Applicant acknowledged that she had been on site when the quotes were assessed from Rendosi Constructions, ICON Construction and Underpinning Solutions but stated that the quotes had been requested by the OC, of which she was a member of the strata committee as secretary until 14 May 2019.
- 30 Regarding an email that she sent to the strata on 3 November 2010, the Applicant acknowledged that she was not an engineer or qualified to set out specifications for work, but her father had been a licensed builder and she had written the email for him.
- 31 Under cross-examination, Mr Moisisdis acknowledged that one of the reports he had been given was the JKGeotechnics report. He stated that he had met with the strata manager, Ms Kennedy and the Owner on site on the day of the

inspection. It was put to Mr Moisisdis he had in fact never met Ms Kennedy. Mr Moisisdis did not recall and said he had met a group of people.

The Respondent's evidence

- 32 On behalf of the respondent, Jillian Kennedy, secretary of the OC provided a written statement in which she set out her understanding of the history of the matter.
- 33 The Applicant did not cross-examine Ms Kennedy.
- 34 Under cross-examination, Mr Pearce agreed that he was engaged to undertake geotechnical advice, not to prepare a scope of rectification works or to undertake a tender on behalf of the OC.
- 35 In response to Mr Moisisdis' affidavit, Mr Pearce rejected the comments by Mr Moisisdis in relation to his opinion. He agreed that he had regard to the solution provided by Helifix which noted that the most severe cracking was in the wall above the ground level. They would stitch the cracks to serve the purpose of the fence.

ISSUES

- 36 The Applicant contended that the Respondent's solution to the repair of the common property was insufficient. The Respondent contended that the Applicant had attempted to enhance the scope of works unnecessarily through intervening with the authors of the reports.
- 37 However, the central issues in this matter concern what the OC's obligation under s106 entails and whether the Applicant has established, on the balance of probabilities, that an order for the OC to undertake the scope of work that she seeks to be performed is justified on the evidence she has provided.
- 38 Accordingly, the issues which the Tribunal needs to consider are:
- (1) What is the extent of the Respondent's obligations under s 106?
 - (2) Which of the reports should be preferred as demonstrating the scope of works which needs to be undertaken to meet the Respondent's obligation under s 106?
 - (3) Has the Applicant demonstrated (on the balance of probabilities) that the Respondent has breached its obligation under s 106 such that orders should be made in the Applicant's favour?

FINDINGS AND REASONS

What is the extent of the Respondent's obligation under s 106?

39 The obligation on the Respondent to repair and maintain common property is set out s 106 of the SSMA. In this matter s106(1) is particularly relevant:

106 Duty of owners corporation to maintain and repair property

(1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

40 The obligation imposed by s 62(1) of the Strata Schemes Management Act 1996 (which applied prior to the SSMA), is in the same terms as the wording of s 106(1) and Brereton J's comments in *Seiwa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 (upheld on appeal) (*Seiwa*) at [3] are still relevant:

That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.

41 However, more recently, in the 2019 judgement in *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 (*Glenquarry*), at [71], Parker J considered the question of how extensive such maintenance and repair works must be, in the context of an application for an order for works which went beyond work that the OC was prepared to undertake.

42 Parker J considered:

71. There is force in the contention that practicality requires allowing a degree of judgment and latitude to an owners' corporation in determining how far to go with repair and replacement work in a maintenance context. Often, the replacement of an old and obsolete item may be cheaper and more effective in the long run than continuing to try to patch it up. There is also a textual basis for allowing a degree of latitude to an owners' corporation in deciding what and when should be replaced. Maintenance is not necessarily confined to responding to a breakdown; the term usually also includes preventative maintenance, that is, replacing something which has reached the end of its service life before it fails ...

...

74 In my view, it is implicit in what Tobias AJA said in *Thoo* [*The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270] that the obligation in s 62(2) to renew or replace items of common property is limited by a concept of reasonable necessity. ...

...

111. ... on any view the Tribunal is not entitled to order an owners' corporation to do things just because the Tribunal considers it desirable to do so. If, as seems to have been assumed, the justification for the order was that the Strata Corporation had not complied with its obligations under s 62, then the Tribunal's order could go no further than the minimum necessary to comply with that obligation.

112. In the present case, the Tribunal did not ask itself what needed to be done so as to order to achieve a minimal compliance with s 62(1) and then frame orders accordingly. In my view this means that there was no proper statutory foundation for the orders.

...

114. An adjudicator, and on appeal, the Tribunal, may have power to make an order that an owners' corporation carry out a defined repair in order to comply with its obligation under SSMA s 62 [now s 106 SSMA]. But the orders made in this case have been made in a form which takes them outside the limits of any such power. In truth, the orders are nothing more than a vague "wish list" from Ms Hegyesi. They should not have been made and must be set aside.

- 43 In the written statements and evidence the Applicant argued that the Respondent and particularly Ms Kennedy, were looking for a minimalist solution. The Respondent argued that the Applicant interfered with the experts to try to influence them towards her own more extensive view of the scope work which needed to be undertaken.
- 44 However, on the basis of the case law as set out in *Glenquarry*, the question is: what is reasonably necessary to achieve compliance with s 106? On this interpretation, the Respondents attempts to find an economical solution to the cracking issue is consistent with *Glenquarry*.
- 45 In line with *Glenquarry*, the Tribunal is not empowered to order work which is not strictly necessary for the required repairs. Any orders which the Tribunal does make must be supported by evidence which demonstrates that they are at least the minimum required to meet the OC's obligation under s106.
- 46 The Applicant pointed to various resolutions of the Respondent, including a resolution in 2019 "to demolish and rebuild the retaining wall dividing the property". The Respondent noted that this resolution was of historical interest only and had not been based on any reports which the Respondent had later obtained. In *Glenquarry*, resolutions had also been passed purporting to authorise the Strata Corporation to undertake extensive building works (at [10]). However those resolutions did not change the outcome of the

proceedings in *Glenquarry* favouring the less extensive works and I am satisfied that resolutions made by the Respondent prior to the relevant reports being received also do not necessarily dictate the outcome in this matter.

Which of the reports should be preferred as demonstrating the scope of works which needs to be undertaken to meet the OC's obligation under s 106?

- 47 The Respondent submitted that the only expert evidence on which the Tribunal could rely was the JKGeotechics report dated 6 March 2020 and the Helifix Solutions because this was the only expert evidence which the Tribunal had in these proceeding which had been appropriately prepared and was capable of being appropriately tested. The documents and reports in the Applicant's evidence had not been prepared in accordance with the directions for expert witnesses, and the Respondent would wish to test each of the reports by reference to their authors.
- 48 The Respondent submitted that the Bellmont report and tender documents relied on by the Applicant provided no rationale for the works which the Applicant wished to have undertaken and were deficient for various reasons. Other reports provided by the Applicant could not be accepted without the ability to test the evidence by questioning the authors.
- 49 As noted in NCAT Procedural Direction 3 – Expert Evidence (the Direction)
7. In non-Evidence Rules Proceedings, a failure to comply with the code of conduct does not render any expert report or evidence inadmissible but it may, depending on the circumstances, adversely affect the weight to be attributed to that report or evidence.
- 50 Accordingly, even though only Mr Pearce's report complied with the Direction, the Tribunal can nevertheless take the other reports into account.
- 51 In light of the case law set out above, the Tribunal needs to determine which report provides sufficient scope to repair and maintain the common property in accordance with the Respondent's obligation under s 106 at this point in time.
- 52 The most recent reports are the JKGeotechics report, the Bellmont report, the Helifix report and the Pearce report. While the other reports provide quotes or propose various solutions they are now several years old, generally in the form of a quotation or tender and their authors were not available at the hearing. Accordingly I am not prepared to give weight to those reports, apart from

accepting that they confirm that the issue has been in existence for considerable time.

- 53 The JKGeotechics report does not stipulate a scope of works. The Bellmont report and the Helifix report both take that report into account in the works that they propose. Although the date on the Helifix Report is 11 February 2020, Ms Kennedy's statement and the Pearce report both refer to the Helifix report being received on 11 February 2021. The Helifix report refers to the outcome of the JKGeotechics report which was provided in March 2020 and it appears that the date on the Helifix report might be incorrect. This was not raised as an issue at the hearing and I do not consider the date issue to otherwise undermine the Helifix report.
- 54 In the JKGeotechics report, Mr Pearce recommended a period of monitoring to ascertain whether further cracking occurred and if not, the cracks could be filled. He returned in 2022 and found that there was not further cracking and that the Helifix solution was appropriate.
- 55 Mr Moisisdis did not consider Mr Pearce's solution to be adequate. However the Bellmont report is a tender document which goes beyond the recommendations in the JKGeotechics report. Further, there is no indication that Mr Moisisdis had returned to inspect the site after his initial inspection in August 2020 and the monitoring recommended in JKGeotechics report has not been included in Mr Moisisdis' assessment.
- 56 As the author of the JKGeotechics report, Mr Pearce's opinion is highly persuasive as to the solution most suited to the issues raised in the JKGeotechics report. I do not accept Mr Moisisdis' comments regarding Mr Pearce's endorsement of the Helifix solution.
- 57 In light of these considerations, I prefer the more recent opinion in the Pearce report that the Helifix solution is adequate to restore the existing functionality of the walls.

Has the Applicant demonstrated (on the balance of probabilities) that the Respondent has breached its obligation under s 106 such that orders should be made in the Applicant's favour?

58 The Applicant submitted that even if the Tribunal found that crack stitching was appropriate to repair the cracking in the walls, there were the additional issues of the cracks in the walls of lot 5, the subsidence in the ground and pavers in the courtyard and the footings to the retaining wall.

59 However, the JKGeotechics report does cover the cracks in the walls to Townhouse 3 and finds that if there is no further movement, these can also be filled. If further cracking becomes evident, then the concrete footing would need to be underpinned (AB p 252); but Mr Pearce's report indicates that there has not been further cracking and the Helifix solution is adequate at this stage.

60 Apart from the comments in Mr Moisisdis' affidavit which I have not accepted, the Applicant's documents do not contain expert evidence to contradict the findings of the JKGeotechics report.

61 On 12 March 2021, the Strata committee resolved to review and approve the quotation from David Stevens Construction to implement the recommendations in the Helifix report for the amount of \$15,103. The Respondent submitted that they remained committed to implementing those works pending the outcome of these proceedings. The Respondent has demonstrated that those works are consistent with the extent of its obligation under s 106.

62 In order to succeed in obtaining the orders sought, the Applicant must show that the Respondent is not complying with s 106 (*Glenquarry* at [75]). The Applicant has failed to do so, on the balance of probabilities.

63 In the points of claim the Applicant also sought an order that the Respondent not levy a contribution from the Applicant for its costs in the NCAT proceedings. There were no further submissions made on this point at the hearing and the Applicant has not made out the claim for entitlement to this order.

64 The application will be 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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