



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners – Strata Plan No. 61285 v Taylor

Medium Neutral Citation: [2022] NSWCATCD 48

Hearing Date(s): 17 May 2022

Date of Orders: 19 May 2022

Decision Date: 19 May 2022

Jurisdiction: Consumer and Commercial Division

Before: M Harrowell, Deputy President

Decision:

1. On or before 27 May 2022 the applicant is to file and serve any further evidence and submission on penalty.
2. On or before 3 June 2022, the respondent is to file and serve any submissions and evidence in reply.
3. The notation and directions in orders 8 and 9 made in these proceedings on 8 December 2021 apply to these directions.
4. The proceedings are listed for further hearing on 8 June 2022 at 1:15pm.

Catchwords: LAND LAW – Strata title – Civil penalty proceedings – authority to commence proceedings – functions of strata committee – contravention of Tribunal order under Strata Schemes Management Act – availability of collateral challenge to primary order in proceedings for the imposition of a civil penalty

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Love v Attorney-General (NSW) [1990] HCA 4; (1990) CLR 307
Ousley v The Queen (1997) 192 CLR 69; [1997] HCA 49
Posner v Collector for Inter-State Destitute Persons

(Vic) [1946] HCA 50; (1946) 74 CLR 461
R v Trade Practices Tribunal; Ex parte Tasmanian
Breweries Pty Ltd (1970) 123 CLR 361 at 373; [1970]
HCA 8
Taylor v The Owners SP No 61285 [2021] NSWCATAP
270
Westbury v The Owners – Strata Plan No 64061 [2021]
NSWCATEN 3

Texts Cited: Nil

Category: Principal judgment

Parties: The Owners – Strata Plan No. 61285 (Applicant)
Cameron Taylor (Respondent)

Representation: J McGrath, strata agent (Applicant)
Respondent (Self-represented)

File Number(s): SC 21/47527

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

1 These reasons relate to an application by The Owners – Strata Plan No 61285 (applicant) against a lot owner, Mr Taylor (respondent), for the imposition of a civil penalty under s 247A of *the Strata Schemes Management Act, 2015 (NSW)* (SSMA) (penalty proceedings).

2 In these proceedings the applicant contends that the respondent has failed to comply with an order of the Tribunal made 3 June 2021 (June order) in application SC 21/04852 (original proceedings). The June order was in the following terms:

Order, pursuant to sections 132 and 232 of the *Strata Schemes Management Act 2015*, the respondent to carry out the work set out in Appendix A which work is to be completed by qualified and licenced contractor(s) with due care and skill by 03 October 2021

3 The work require in Appendix A was as follows:

1 Move the air conditioning unit from its current position on the balcony, being on the second or lower level of the lot, adjacent to the balcony wall (as shown on page 3 of Exhibit C), and reinstate that air conditioning unit it in its former

position, adjacent to the door to that balcony (as shown in the diagram on page 2 of Exhibit C).

2 Remove the bi-fold doors which currently lead to that balcony (as shown in the photo on page 46 of Exhibit A) and reinstate the sliding doors (as shown on the plan a copy of which is at page 50 of Exhibit A).

3 Remove the screening above the cement rendered wall on the rooftop, being on the third or upper level of the lot, (as shown in the photos on page 57 of Exhibit A and page 12 of Exhibit C).

4 Remove the cement-rendered wall on the rooftop (as shown in the photos on pages 12 and 13 of Exhibit C) so that it appears as shown on the plan (a copy of which is on page 49 of Exhibit A).

5 Remove the gate from the rooftop (as shown on pages 55 and 56 of Exhibit A and page 15 of Exhibit C).

6 Remove the tiles from the rooftop (as shown in the upper photo on page 15 of Exhibit C).

7 Remove the roofing material from the pergola on both levels of the lot.

8 Remove the pot plants that have been placed on the common property adjacent to the lot owner's lot (being the three pots plants shown in the photos on page 55 of Exhibit A and page 13 of Exhibit C).

9 Make good any areas affected by the above work so as to restore those areas to their condition prior to that work.

4 Section 247A of the SSMA provides:

247A Civil penalties for contravention of orders

(1) The Tribunal may, by order, require a person to pay a pecuniary penalty of an amount of up to 50 penalty units for contravention of an order under this Act (*the original order*).

(2) An application for the order may be made—

(a) by the applicant for the original order, or

(b) by the owners corporation, owner or other person having or acquiring an estate or interest in a lot in the strata scheme to which the order relates, or

(c) in the case of an order that gives effect to any agreement or arrangement arising out of a mediation session, by either party to the mediation.

(3) A person is not liable to be punished twice if the person's act or omission constitutes both a contravention for the purposes of this section and—

(a) a contravention for the purposes of a civil penalty provision of the *Civil and Administrative Tribunal Act 2013*, or

(b) a contempt of the Tribunal.

5 For the reasons below I have determined that there have been contraventions of the June order by the respondent and that the proceedings should be relisted to determine whether a civil penalty should be imposed and, if so, for how much.

Background

6 The applicant commenced the original proceedings against the respondent to remove various personal property from common property and to remove unauthorised building work and make good damage. Those proceedings were heard by the Tribunal on 28 May 2021. In making the June order, the Tribunal published reasons for decision (original reasons).

7 The June order was the subject of an appeal to the Appeal Panel. The appeal was dismissed by orders made 10 September 2021. The Appeal Panel published reasons for decision: *Taylor v The Owners SP No 61285* [2021] NSWCATAP 270 (Appeal Decision). Neither the work required or the date for completion of the work was altered by the Appeal Decision.

8 The penalty proceedings were commenced by application dated 31 October 2021 filed 19 November 2021. The orders sought were as follows:

An Order pursuant to section 247A of the Strata Schemes Management Act 2015 requiring the respondent to pay a penalty of 50 penalty units (\$5500). Also, an order under section 60 of the Civil and Administrative Tribunal Act 2013 that the Respondent pay the Applicant's costs being all costs in respect of this Strata Schemes application.

9 The reasons in the application for asking for the order were as follows:

The respondent was required to carry out the work detailed in Appendix A of the NCAT Order dated 3 June 2021. The respondent has failed to carry out the work by the due date and has carried additional installations to the pergola roof and privacy screen without approval of the Owners Corporation and in contempt of NCAT's Order. Costs should be awarded due to the Respondent's disregard in not comply with the Tribunal's order of 3 June 2021 with the power of the Tribunal to award costs to be Applicant pursuant to section 60(3)(f) and section 36(3).

10 At this point I note that no application was in fact made for the Tribunal to deal with this matter as contempt as might be permitted under the *Civil and Administrative Tribunal Act, 2013 (NSW)* (NCAT Act). Rather the application was pursued as a civil penalty application under the SSMA.

11 The penalty proceedings were the subject of directions made on 8 December 2021. At that time both parties were granted leave to be represented. In the case of the applicant leave was granted to Mr J McGrath, strata agent. Leave was given to the respondent to be represented by a legal practitioner.

- 12 Directions were made requiring the parties to file and serve evidence. In making these directions the Tribunal made the following notations:
8. The Tribunal notes that the rules of evidence apply and directs:
 - a) Evidence from witnesses must be in the form of an affidavit or expert report complying with Procedural Direction 3 – Expert Evidence as appropriate;
 - b) All witnesses must be available at the hearing for cross examination;
 - c) Documentary evidence must be in the form of an indexed and paginated bundle appropriately proved.
 9. The Tribunal will make rulings as to the admissibility of evidence at the hearing of the application and the party should be in a position to deal with any legal issues arising in relation to those matters.
- 13 The proceedings were listed for hearing on 17 May 2022. At that time, the Tribunal indicated there would be a two-stage hearing process. The first stage would consider whether there had been a relevant contravention. If a contravention was established, the second stage would be whether a penalty should be imposed.
- 14 Usually, both stages would be dealt with on the same day. However, on this occasion, during the course of dealing with the admissibility of evidence and the cross examination of witnesses, the Tribunal determined that it should make a ruling concerning the first stage of the proceedings and reserve its decision.
- 15 In doing so I invited submissions concerning specific matters:
- (1) Were the penalty proceedings properly authorised by the applicant;
 - (2) Is the June order susceptible to collateral challenge, the respondent asserting that the works required by that order could not lawfully be done as they would not comply with the Building Code of Australia; and
 - (3) Has a contravention of s 247A been established?

The Evidence

- 16 It is convenient to first refer to the evidence provided by the parties in respect of their positions and the concessions made by the respondent in relation to the alleged contraventions.
- 17 The applicant sought to rely on the following documentary evidence:
- (1) The penalty application and attachments (MFI 1);
 - (2) a letter dated 20 December 2021 and attachments thereto (MFI 2);

- (3) A letter dated 19 January 2022 and a bundle of documents attached thereto marked annexures "A" – "I" inclusive (MFI 3); and
 - (4) A letter dated 23 February 2022 and attachments thereto marked Annexures "A"- "D" inclusive (MFI 4).
- 18 The respondent's evidence consisted of his affidavit sworn 27 January 2022 and annexures thereto (Taylor affidavit).
- 19 At the commencement of the hearing objections were dealt with and various evidence was rejected. The evidence rejected included:
 - (1) the statutory declaration of Vikki Turnbull made 3 November 2021 from the photographs attached thereto (part of MFI 1);
 - (2) Annexure I (part of MFI 3) being a report prepared by Total Building Engineering Solution dated 18 January 2022 provided by the applicant relating to the work required by the June order; and
 - (3) A quotation dated 17 July 2021 prepared by Acme Built Contractors Pty Ltd (Annexure A) and a letter from Mr Gillett of Gilcon Structural Engineers dated 30 September 2021 (Annexure B) which were annexures to the Taylor affidavit.
- 20 In respect of the statutory declaration of Ms Turnbull, this document was ruled inadmissible because Ms Turnbull failed to provide appropriate evidence in proper form to prove various photographic annexures, who took the photographs and what they depicted.
- 21 In respect of Annexure I (MFI 3) and Annexures A and B of the Taylor affidavit, these documents were tendered as expert evidence concerning the work required to be done, the state of completeness of particular work and whether particular work required by the June order could be carried out in a manner that would comply with current building regulations. They were rejected because they did not comply with Procedural Direction 3 – Expert Evidence and were not in a form otherwise appropriate for admission as expert opinions. However, the quotation was admitted as evidence that the respondent had sought to obtain a quote from a builder to carry out work on his behalf the purpose of complying with June order.
- 22 Various letters sent to the Tribunal to which documents were attached were agreed by the parties to be treated as submissions only, not as evidence of matters recorded therein.

- 23 In relation to the photographic evidence relied upon by the applicant, there was also photographs annexed to Ms Turnbull's affidavit sworn 13 January 2022 (Annexure H of MFI 3). Paragraph 3 of Ms Turnbull's affidavit was rejected as it was inadequate to prove the photographic evidence being Annexures A-G inclusive to her affidavit. However, leave was given to Ms Turnbull to provide oral evidence concerning the provenance of the photographs. Ms Turnbull gave sworn oral evidence that she took the photographs being Annexures A - F from various locations on the common property and from the lot property of Mr Lay, another lot owner in the strata scheme on 13 January 2022. Following cross examination and submissions, these photographs were admitted into evidence, what they depicted being described in paragraph 5 of Ms Turnbull's affidavit. In respect of photographs being Annexure G to Ms Turnbull's affidavit, they were rejected as there was no admissible evidence to prove who took the photographs and when they were taken.
- 24 In addition to the above, Tribunal had initially rejected the applicant's evidence concerning the approval of the owners corporation to bring these penalty proceedings. This evidence consisted of an unsigned copy of minutes of a meeting of the Strata Committee of the applicant held 29 October 2021. This evidence is Annexure G of MFI 3. That document recorded in item 2:

2 Unit 14 – NCAT

Resolved that the Strata Committee resolved that an application be lodged to the NSW Civil & Administrative Tribunal against the owner of unit 14 seeking the imposition of a civil penalty of up to 50 penalty units (\$5500) for the contravention of the Order of 3 June 2021 of which required the owner to have the works completed under the Order by 3 October 2021. Further, that Mr J McGrath and Ms V Turnbull be authorised to represent the Owners Corporation in all hearings regarding this matter.

- 25 However, leave was given to Mr McGrath to provide oral evidence in connection with this document and its authenticity. Following that evidence and cross examination, the document was admitted as proof of the resolution made by the Strata Committee of the applicant, the respondent withdrawing his objection.
- 26 During submissions, the Tribunal noted there was no evidence a resolution had been passed by the applicant in general meeting authorising these proceedings and that there was an issue about whether the Strata Committee

had and/or was required to have delegated to it specific authority from the owners corporation to commence these proceedings. I will return to this issue below.

- 27 As to concessions, the respondent accepted that work items 2-4, 6-7 and 9 of Appendix A had not been carried out.

Consideration

- 28 At the conclusion of the evidence, which included cross examination of Mr McGrath, Ms Turnbull and the respondent, the Tribunal invited submissions of the parties including in respect of three issues identified at [15] above.

- 29 It is convenient to deal with the question of authority to commence the proceedings and whether a contravention has been established by reference to those three issues.

Were the penalty proceedings properly authorised by the applicant;

- 30 The applicant made two submissions concerning the need for the owners corporation to delegate to the Strata Committee authority to commence these proceedings.

- 31 First, the applicant said there was a resolution of the owners corporation in place providing delegated authority. However, there was no evidence of such a resolution before the Tribunal. To the extent necessary, the applicant sought leave to reopen its case to adduce this evidence.

- 32 Secondly, and in any event, the applicant said the Strata Committee had authority to commence these proceedings even if there was no resolution of the owners corporation delegating such authority to the Strata Committee. Reliance was placed particularly on s 36 of the SSMA, which deals with the functions of the Strata Committee and Sch 2 Meeting procedures on Strata committees of the SSMA and how motions of the Strata Committee are passed.

- 33 The respondent's submissions were short. He said leave should not be granted to reopen the applicant's case to adduce further evidence concerning resolutions of the owners corporation. Secondly, he said that the Strata

Committee does not have authority to otherwise commence proceedings without a resolution of the applicant in general meeting.

- 34 On the second aspect, no detailed submissions were made to support this contention.
- 35 The functions of an owners corporation are set out in ss 9 and 10 of the SSMA. Those sections provide:

9 Owners corporation responsible for management of strata scheme

(1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.

(2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—

(a) the management and control of the use of the common property of the strata scheme, and

(b) the administration of the strata scheme.

(3) The owners corporation has responsibility for the following—

(a) managing the finances of the strata scheme (see Part 5),

(b) keeping accounts and records for the strata scheme (see Parts 5 and 10),

(c) maintaining and repairing the common property of the strata scheme (see Part 6),

(d) taking out insurance for the strata scheme (see Part 9).

10 Functions of owners corporation generally

(1) An owners corporation has such other functions as may be conferred or imposed on it by or under this or any other Act.

(2) An owners corporation must not delegate any of its functions to a person unless the delegation is specifically authorised by this Act.

- 36 Section 11 of the SSMA prescribes other bodies or persons that may assist an owners corporation in carrying out its management functions. Section 11 provides:

11 Other management bodies and persons who assist the owners corporation

The owners corporation for a strata scheme may be assisted in the carrying out of its management functions under this Act by any one or more of the following—

(a) the strata committee of the owners corporation established in accordance with this Act,

(b) a strata managing agent for the scheme appointed in accordance with Part 4,

- (c) a building manager for the scheme appointed in accordance with Part 4.
- 37 In the case of a strata agent appointed under Part 4, the functions which may be exercised are those as permitted by delegation under s 52 of the SSMA.
- 38 As for a building manager appointed in accordance with Part 4 of the SSMA, appointment can only be made by the owners corporation in general meeting in respect of an appointment after the strata scheme is commenced: see s 67(2)(b). In such an appointment, the building manager agreement is the instrument by which the delegation of functions is made: s 70 SSMA.
- 39 The SSMA requires an owners corporation to establish a strata committee: s 29(1). However, the SSMA does not expressly require an owners corporation to delegate any of its functions to the strata committee.
- 40 As to the functions of a strata committee, they are set out in s 36 of the SSMA which provides:

36 Functions of strata committee

- (1) A strata committee has the functions conferred on it by or under this or any other Act.
- (2) A decision of a strata committee is taken to be the decision of the owners corporation. However, in the event of a disagreement between the owners corporation and the strata committee, the decision of the owners corporation prevails.
- (3) The following decisions cannot be made by the strata committee—
- (a) a decision that is required by or under any Act to be made by the owners corporation by unanimous resolution or special resolution or in general meeting,
- (b) a decision on any matter or type of matter that the owners corporation has determined in general meeting is to be decided only by the owners corporation in general meeting.
- (4) An owners corporation may in general meeting continue to exercise all or any of the functions conferred on it by this Act or the by-laws even though a strata committee holds office.
- 41 The question is whether, having regard to the terms of s 36 of the SSMA, a delegation of functions is required by an owners corporation to a strata committee.
- 42 In my view such a delegation is not required. Rather, subject to any restrictions in the SSMA or any restrictions imposed by an owners corporation by resolution and subject to any “disagreement” between an owners corporation

and the strata committee, the strata committee is able to exercise all functions of an owners corporation for the purpose of management of a strata scheme.

43 My reasons are as follows.

44 A strata committee must be appointed by an owners corporation. The role of such committee is to assist the owners corporation in performing its management functions: s 11 SSMA. There is no limit in s 11 or elsewhere in the SSMA as to how, when or in what circumstances this assistance is to be provided. Rather, the SSMA identifies particular circumstances in which the strata committee cannot act. For example:

- (1) in the appointment of a building manager which must be done in general meeting: s 67(2)(b) SSMA; and
- (2) in making a decision required by or under the SSMA to be made by the owners corporation by unanimous resolution or special resolution or in general meeting: s 36(3)(a) SSMA.

45 Secondly, a decision of a strata committee is taken to be a decision of an owners corporation unless there is a disagreement, in which case the decision of the owners corporation prevails: s 36(2) SSMA. This section suggests that a strata committee and an owners corporation may make a decision about the same matter, any conflicting decisions being resolved in the manner prescribed so as to give effect to the decision of the owners corporation and not the strata committee.

46 Thirdly, the ability of a strata committee to exercise a function of an owners corporation is otherwise only limited where the owners corporation has decided in general meeting that “a matter or type of matter” is to be decided only by the owners corporation in general meeting: s 36(3)(b). This subsection would only have meaning if the strata committee already had a general authority to exercise the functions of the owners corporation. If not, this subsection would be unnecessary.

47 Fourthly, the language of s 13 of the SSMA does not otherwise affect my interpretation of the powers of the strata committee. Section 13 provides:

13 Functions that may only be delegated to member of strata committee or strata managing agent

(1) The following functions of an owners corporation, strata committee or officer of an owners corporation may be delegated to or conferred only on a member of the strata committee or a strata managing agent—

- (a) the preparation of estimates for the purposes of section 79,
- (b) the levying of contributions,
- (c) the receiving of, acknowledging of, banking of or accounting for money paid to the owners corporation,
- (d) having custody of any money paid to the owners corporation or making payments from any such money,
- (e) the taking out of insurance required or permitted by this Act,
- (f) the conduct of meetings of the owners corporation and handling of correspondence,
- (g) the maintenance of records required to be kept under this Act,
- (h) such other functions as may be prescribed by the regulations.

(2) This section is subject to sections 56 and 101.

Note—

Section 101 enables some of these functions to be exercised by certain other specified persons.

48 Section 13 deals with delegation by an owners corporation, strata committee or officer of an owners corporation. It does not otherwise suggest that the strata committee is not, as the executive body of the owners corporation, entitled to exercise all powers of the owners corporation in the same way as might apply to the directors of a company.

49 For these reasons, in my view the resolution of the strata committee was sufficient authority of the owners corporation to commence the penalty proceedings and the penalty proceedings have been properly brought.

Is the June order susceptible to collateral challenge, the respondent asserting that the works required by that order could not lawfully be done as they would not comply with the Building Code of Australia?

50 The second matter to consider in the context of whether a contravention has been established is the submission that the works could not lawfully be done because they would not comply with relevant building requirements.

51 The respondent appeared to suggest in his submissions and the documents filed that the June order made could not lawfully be complied with due to applicable building standards. Therefore, he could not have contravened the June order. This submission appeared to me to be raised as a separate issue

to what, if any, penalty might be imposed if a contravention was established. Rather, it appeared to be a challenge to the June order.

- 52 In the course of the hearing, the parties were referred to the decision of the High Court in *Ousley v The Queen* (1997) 192 CLR 69; [1997] HCA 49 (*Ousley*) which dealt with the issue of collateral challenge. In that case McHugh J said at 98-99 (citations omitted):

A collateral attack on an act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. In *In re Preston*, however, Lord Scarman used the term "collateral challenge" to include any process challenging a decision - including an application for judicial review - other than a proceeding by way of appeal. This use of the term is readily intelligible. However, with the widespread availability of judicial review procedures, it conduces to clarity of thought, in my opinion, if the term "collateral challenge" is confined to challenges that occur in proceedings where the validity of the administrative act is merely an incident in determining other issues.

- 53 Following the decision of *Love v Attorney-General (NSW)* [1990] HCA 4; (1990) CLR 307 the Court in *Ousley* determined collateral challenge was available in respect of an administrative decision but not a judicial act: see e.g. Toohey J at 80 and Gaudron J at 87.
- 54 On the other hand, where there has been an exercise of judicial power, any decision made binds the parties and can only be challenged by appeal or application to a superior court to quash the decision. It cannot be challenged collaterally in other proceedings in the same tribunal. In this regard, in respect of orders of magistrates and other inferior tribunals, Dixon J (as he then was) said in *Posner v Collector for Inter-State Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461:

Modern legislation does not favour the invalidation of orders of magistrates or other inferior judicial tribunals and the tendency is rather to sustain the authority of orders until they are set aside and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as ineffectual, if the directions of the statute have not been pursued with exactness.

- 55 In the original proceedings the Tribunal was exercising judicial power, not making an administrative decision. In this regard, the exercise of the order making powers of the Tribunal under the SSMA is of the type described by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty*

Ltd (1970) 123 CLR 361 at 373; [1970] HCA 8 where his Honour said at 374-375:

Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.

- 56 It follows that this basis of challenge to the June order and the submission that there could be no contravention should be rejected.
- 57 Further, and in any event, there was no expert or other evidence before me to establish that the works in Appendix A of the June order cannot lawfully be done.
- 58 On the issue of the absence of evidence, I advised the parties at the start of the proceedings that I would deal with objections and make appropriate rulings on evidence. Documents which purported to be expert evidence provided by both parties were rejected as being inadmissible. No application was made for leave to adduce further evidence nor was an adjournment request made. This was despite me advising the parties that such applications would be considered if made.
- 59 Consequently, in the absence of evidence, this challenge must inevitably fail as a matter of fact.

Has a contravention of s 247A been established?

- 60 The applicant contended that there had been a failure of the respondent to comply with items 1-7 and item 9 of Appendix A of the June order.
- 61 As I indicated above, various concessions were made by the respondent concerning whether or not he had complied with the June order.

- 62 The respondent acknowledged he has not carried out the work required by items 2-4, 6-7 and 9 of Appendix A. In this regard he said he had been informed by a builder and an engineer that the works required would not comply with the Building Code of Australia, a matter I have dealt with above.
- 63 He asserted that he had complied with the obligation to remove the gate (item 5) but said the gate had been left in situ, unconnected to the wall or other structure, so as to prevent his young child from gaining access to the terrace/balcony area.
- 64 As to relocation of the air conditioning unit (item 1), he said it had been relocated from its position near the balcony. In relation to the photographs being Annexure F to the affidavit of Ms Turnbull sworn 13 January 2022 he said that those pictures did not represent the state of affairs on that date. However, no evidence was provided by the respondent by way of photographic evidence to contradict that evidence or to show the current state of affairs concerning the location of the air conditioning unit which was to be repositioned away from the balustrade and close to the wall where the balcony meets the internal living area.
- 65 In my view, the concessions made are sufficient on the balance of probabilities to establish a contravention of the June order for the purpose these proceedings for the imposition of a civil penalty.
- 66 The respondent suggested he had a reasonable excuse for non-compliance with the June order. The submission was made in the context of whether a contravention has occurred.
- 67 The submission appeared to be based on section 72 (3) of the NCAT Act. This section also permits the Tribunal to impose a civil penalty and is in the following terms:
- (3) A person must not, without reasonable excuse, contravene any other order of the Tribunal made under this Act or any other legislation.
- 68 In *Westbury v The Owners – Strata Plan No 64061* [2021] NSWCATEN 3 the Tribunal said at [16]:

Liability for the imposition of a civil penalty under s 72(3) arises where there is a contravention of an order of the Tribunal, and the party that has contravened the order does not have a reasonable excuse for the contravention.

- 69 Unlike s 72(3), s 247A of the SSMA does not talk of reasonable excuse. However, it can be accepted that a reasonable excuse may be relevant to the question of whether a civil penalty should be imposed and, if so, how much. Otherwise, it is not relevant in determining whether a contravention has been established.
- 70 It follows that a contravention is established in respect of items 1-4, 6-7 and 9 of Appendix A of the June order.
- 71 In relation to item 5, the order was for the gate to be removed. It was not denied that the gate is still in situ. Photographs provided by the applicant, although taken in January 2022, confirm this position. The fact the gate is not attached to any common property does not demonstrate compliance with the order which required removal.
- 72 The respondent submitted that the gate was necessary in order to provide a barrier to protect his child from possible injury or death if entry to the balcony area was not restricted. This submission ignores the fact that the gate would only operate as a barrier if the associated low-level wall depicted to the left of the gate in the photograph being Annexure D to Ms Turnbull's affidavit sworn 13 January 2022 remained in position. However, this wall was also to be demolished and removed as part of the June order: see item 4 of Appendix A.
- 73 It follows that a contravention of this part of the June order has also been established.
- 74 Finally, in respect of item 1 of Appendix A, the respondent gave evidence in paragraph 5 of his affidavit sworn 27 January 2022 that the air-conditioner was moved in about September 2021. In submissions, the respondent appeared to contend that the air-conditioner is not the position from which its removal was ordered by the June order. The respondent did not provide photographic evidence to support this submission. Indeed, though somewhat equivocal, the statement appeared to be that the air-conditioner had never been restored to the impermissible location after it was moved in September 2021.

- 75 The photographic evidence of Ms Turnbull (Annexure F of her affidavit sworn 13 January 2022) and her oral evidence to the Tribunal satisfies me that as at 13 January 2022 the air-conditioning unit was in the position from which the Tribunal ordered removal. I were to accept the respondent's evidence, that the air-conditioner was originally moved in September 2001, then I could only conclude that his submission to the Tribunal that it had not, at any time, been put back in the impermissible position was untrue.
- 76 For present purposes, I am satisfied that the work required by item 1 of Appendix A of the June order has not been complied with.
- 77 Consequently, I am satisfied there has been a contravention of the June order in respect of items 1 to 7 inclusive and item 9 of Appendix A.

Conclusion

- 78 The contraventions of the June order are established. The proceedings will be listed to determine whether a penalty should be imposed and, if so, how much.
- 79 I will permit further evidence from the parties on this matter.
- 80 I make the following directions:
- (1) On or before 27 May 2022 the applicant is to file and serve any further evidence and submission on penalty.
 - (2) On or before 3 June 2022, the respondent is to file and serve any submissions and evidence in reply.
 - (3) The notation and directions in orders 8 and 9 made in these proceedings on 8 December 2021 apply to these directions.
 - (4) The proceedings are listed for further hearing on 8 June 2022 at 1:15pm.



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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.