



Civil and Administrative Tribunal
New South Wales

Case Name: Ghosn v The Owners - Strata Plan No 87837

Medium Neutral Citation: [2022] NSWCATAP 175

Hearing Date(s): 16 May 2022

Date of Orders: 26 May 2022

Decision Date: 26 May 2022

Jurisdiction: Appeal Panel

Before: The Hon D A Cowdroy AO QC, Principal Member
L Wilson, Senior Member

Decision: 1. The appeal is dismissed;
2. The stay granted on 14 March 2020 is lifted.

Catchwords: APPEAL – Strata schemes – claim for appointment of compulsory strata manager resulting from breaches by owners corporation in the administration of a strata scheme – whether Tribunal erred in its discretion to decline to appoint compulsory strata manager.

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

Cases Cited: Foong v Scutella [2021] NSWCATAP 225
Fox v Percy (2003) HCA 22 20003, 214 CLR 118
House v The King 1936 55 CLR 499
Prendergast v Midwestern Murray Irrigation Ltd 2014 NSWCATAP 69

Texts Cited: Nil

Category: Principal judgment

Parties: Antoine Ghosn (Appellant)
The Owners - Strata Plan No 87837 (Respondent)

Representation: Appellant (self-represented)
T. Dick (Agent)(Respondent)

File Number(s): 2022/00070582

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: New South Wales Civil & Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 10 February 2022

Before: S Hennings,

File Number(s): SC 21/45791

REASONS FOR DECISION

- 1 By Notice of Appeal filed 11 March 2022 the appellant appeals the decision of the Tribunal delivered on 11 February 2022 in relation to an application for relief concerning the alleged mismanagement of a strata title home unit complex. The Strata Schemes application was filed on 2 November 2021 in proceedings SC 21/45791. In such application the appellant raised 16 grounds which he claimed justified the principal relief sought namely the appointment of a compulsory strata managing agent, namely Foreshaw Strata Managers, to exercise all the functions of the Owners Corporation SP 8737. Such application may be made pursuant to section 237 of the Strata Schemes Management act 2015 (NSW) (“the SSMA”).
- 2 The respondent to the appeal filed a Reply on 1 April 2022 which disputes that the appellant is entitled to the relief which the appellant sought.

Tribunal Orders

- 3 Orders were made by the Tribunal on 10 February 2022 as follows:
 1. The Owners Strata Plan number 8738837 are to ensure that they are complying with their duty to properly maintain and keep in a state of good and serviceable repair;

2. The Owners Strata Plan number 87837 shall on or before 10 May 2022 conduct a full enquiry/investigation by a suitably qualified expert into any movement in the building and the structural integrity of the building. The Owners Strata plan number 87837 shall on or before 10 May 2022 provide all owners with a copy of a report identifying investigation undertaken, recommendations (if any) and conclusions of the expert who carried out the required enquiry/investigation;

3. The Owners Strata Plan number 87837 shall before 10 April 2022 as resolved at the annual general meeting on 10 June 2020 engage an auditor to audit the annual accounts of the Strata Plan for the financial year July 2020 – 2 June 2021 . The Owners Strata plan number 87837 shall by 14 April 2022 provide all lot owners with a copy of the auditor's report;

4. The application seeking a compulsory appointment of a strata managing agent pursuant to section 237 of the Strata Schemes Management act 2015 is dismissed.

Tribunal Reasons

4 The Tribunal provided detailed reasons for decision following the making of those orders. The appellant applied for a stay of proceedings. Pursuant to orders made by the Tribunal on 14 March 2022 by consent the operation of Orders 2 and 3 made on 10 February 2022 in matter number SC 21/45791 were stayed until further order of the Tribunal or the hearing of the appeal has taken place.

Appeal Hearing

5 The appellant who is not legally represented has provided extensive written submissions. The respondent is represented by its representative managing agent Mr Dick .

Grounds of appeal

6 The Appeal Panel notes the issues of law which the appellant seeks to raise as set out in his grounds of appeal which accompany the notice of appeal. The Appeal Panel considers that each of the grounds of appeal raise issues of law, namely relating to the findings of the Tribunal member in respect of the Tribunal's application of the law. Although within the grounds raised there are certain issues of fact which are challenged by the appellant, they are subsumed by the overall claim made by the appellant that the Tribunal erred in not appointing a new strata manager.

7 Because the Appeal Panel considers that questions of law have accordingly been raised as considered in *Prendergast v Midwestern Murray Irrigation Ltd*

2014 NSWCATAP 69 at [13]. The Appellant is entitled to bring these proceedings by way of appeal as of right pursuant to s 80(2) (b) of the Civil and Administrative Tribunal Act 2013 (NSW) (“NCAT act”).

- 8 The Appeal Panel notes that the appellant raised the 16 specific complaints as justification for the appointment of a Strata Schemes Manager pursuant to section 237 of the SSMA. Within those 16 specific complaints the Tribunal made findings in respect of each one. With respect to some of the grounds of complaint, the Tribunal found that the complaints were justified and that there had been failures by the respondent to properly comply with the requirements of the SSMA. For example issues such as the time taken by the respondent to repair a garage door, the appellant complained that 5 months and 20 days to repair the door was excessive; the time taken to prepare a broken entrance door was excessive. Such complaints were found to be justified. The Tribunal found that the appellant’s complaints of rubbish being dumped in common areas by residents or unknown persons was a matter which the was being dealt with by the respondent .
- 9 There were complaints made by the appellant made concerning repairs being taken to the exterior of the building namely the painting on the wall on the balcony without approval. The Tribunal found that prior written approval was required for such painting and that the respondent had passed a resolution retrospectively approving the work. In fact such resolution did not retrospectively approve such work but merely stated that because the work had been carried out by the previous owner, no action would be taken against the owner to rectify such work. However the Tribunal apparently considered did not justify the ordering of any relief on the basis that it was a very minor matter .
- 10 Other complaints raised by the appellant related to whether or not it was appropriate for the respondent to include in a notice of meeting additional matters which were raised after the notice had been sent out or whether, as required by Schedule 1 cl4 of the SSMA, a separate meeting was necessary to deal with any matters raised after the issue of the notice.
- 11 The appellant also raised the issue of waterproofing to balconies. The appellant claimed that such work constituted structural work and that

accordingly, a special resolution was required and that no special resolution had been passed.

- 12 Appellant also raised concern that the minutes of the meeting were not being recorded correctly because in a meeting which was convened in 2019 a proxy was not recorded as having been received. Other matters of a similar kind raised. The appellant submitted that having received notice requisition of an Extraordinary General Meeting 14 July 2019 , such meeting was required to be held within 14 days as required by the SSMA. In fact the meeting was held on 12 August 2019, thereby being in breach of the SSMA.

Tribunal Findings

- 13 Each of appellant's issues were considered by the Tribunal. The Tribunal's decision found that there were some shortcomings in the way in which the conduct of the management of the strata scheme was being conducted as submitted by the appellant. However the Tribunal found that the respondent was undertaking measures to rectify the deficiencies. In the concluding paragraphs of the decision the Tribunal stated that it was a very serious and final step to compulsorily appoint a strata manager and take away the management of the strata scheme from the respondent. The Tribunal continued:

“The Tribunal has considered the cases submitted by the parties. Each case ultimately has to be determined on the individual merits of the facts in the matter as they apply and what order is required to ensure the Owners Corporation resolves any outstanding issues and can function satisfactorily. Pursuant to s 240 [of the SSMA] the Tribunal may deal with an application for an order under specified provision of this Act under a different provision of this Act if it considers it is appropriate to do so. The Tribunal is satisfied having heard from the strata manager that the respondent understands what is required and is willing to comply with any such order allowing a reasonable time to comply.”

- 14 Tribunal decision continues:

“Taking all factors into consideration the Tribunal is not satisfied that it is compulsory the managing agent should be appointed.”

- 15 Order 4 of the Tribunal's orders was accordingly made declining to appoint a strata manager.

Appeal Hearing

- 16 The appellant submitted that Tribunal erred by relying upon s240 of the SSMA to make orders under s 106 of the SSMA and that the appropriate section to make such orders was s232 of the SSMA. Section 232 (1) provides that the Tribunal may on application by an interested person, original owner or building manager make an order to settle a complaint or dispute about, inter alia, “ the operation administrative management strata scheme under this act”: See s232 (1) (a).
- 17 The Appeal Panel notes that it may have been preferable to refer to s 232. However there is no error by referring to s240 which provides that the Tribunal may deal an application for an order under a specified provision by making an order under a different provision of the SSMA if it considers appropriate for it to do so. Section 106 relevant states:
- (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 corporation.
- 18 The Tribunal could exercise powers under s240 or under s 232.
- 19 Because this is an appeal on a point of law there are certain tests which the Appeal Panel must follow: the point of law raised by the appellant is whether the discretion of the Tribunal in failing to appoint a new strata manager miscarry?. The principles concerning the exercise of discretion and challenges to the exercise of discretion are stated in *House v The King* 1936 55 CLR 499 at pages 584 – 585, where Dixon , Evatt and McTiernan JJ said:
- “The manner in which an appeal against an exercise discretion should be determined is governed by established principles . It is not enough that judges comprising the appellate court consider that if they had been in the position of the primary judge they would have taken a different course.”
- 20 Their Honours continued, stating that it must be shown that there is some error in exercising the discretion. For example, if the primary judge made an error of legal principle; made a material error of fact; mistakes the facts; or if the primary judge does not take into account some material consideration, then his determination should be reviewed . An appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, or

upon the facts it is unreasonable or plainly unjust, then the appellate court may interfere because the discretion has miscarried.

- 21 In these proceedings, the Tribunal has stated clearly the reasons for arriving at a decision not to grant the orders sought by the appellant concerning the appointment of a new strata manager. The reasons are contained in the individual 16 complaints which culminate in the overall decision. The reasoning of the Tribunal is understandable and logical. As stated in *Fox v Percy* (2003) 214 CLR 118 at 828 – 29, per Gleeson CJ, no judicial reasons can ever state all pertinent factors nor can they express every feature of the evidence that causes a decisionmaker to prefer one factual conclusion another. However in this case the Appeal Panel can readily discern the reasons which led the Tribunal to arrive at the decision.
- 22 The appointment of a compulsory strata manager should not be made lightly. It has been described as “Draconian” because it circumvents the lot owners’ control powers and transfers that control and the compulsory strata manager: see *Foong v Scutella* [2021] NSWCATAP 225 at [12(c)].

Conclusion

- 23 The Appeal Panel finds that the Tribunal has justified the reasons for not granting a the relief of a compulsory strata manager and finds no error in the decision. Accordingly the Appeal Panel makes the following orders:
- (1) The appeal is dismissed;
 - (2) The stay which was made in these proceedings on 26th March 2022 is lifted.

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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