



Supreme Court
New South Wales

Case Name: Selkirk v The Owners – Strata Plan No. 2661

Medium Neutral Citation: [2022] NSWSC 858

Hearing Date(s): On the papers

Date of Orders: 29 June 2022

Decision Date: 29 June 2022

Jurisdiction: Equity

Before: Darke J

Decision: Proceedings transferred to New South Wales Civil and Administrative Tribunal. No order as to costs.

Catchwords: COSTS – dispute concerning a strata scheme – parties agree that proceedings should be transferred to NSW Civil and Administrative Tribunal – whether order for costs should be made against plaintiff – plaintiff not shown to have acted unreasonably – appropriate to make no order as to costs

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), sch 4 cl 6(2)
Fair Trading Act 1987 (NSW), s 30(4)
Strata Schemes Management Act 2015 (NSW), s 232

Category: Costs

Parties: Simone Selkirk (Plaintiff)
The Owners – Strata Plan No. 2661 (First Defendant)
Alexandra Stournas (Second Defendant)

Representation: Counsel:
Mr H Black (First Defendant)

Solicitors:
Sachs Gerace Lawyers (Plaintiff)

Vardanega Roberts (First Defendant)

File Number(s): 2021/196829

Publication Restriction: None

JUDGMENT

- 1 These proceedings were commenced by Statement of Claim filed on 9 July 2021. The plaintiff is the owner of a lot in a strata scheme that comprises a block of units in Darling Point. The first defendant is the Owners Corporation of the scheme. The second defendant is the owner of another lot in the scheme. She has not entered an appearance.
- 2 The plaintiff claims relief in respect of three complaints, as follows:
 - (1) a claim in respect of damage to a bathroom caused by leaking water;
 - (2) a claim that certain strata levies may not be recovered from the plaintiff; and
 - (3) a claim in respect of excessive noise said to emanate from the second defendant's lot.
- 3 No Defences have yet been filed. Indeed, little has occurred in the proceedings other than that the parties have engaged in debate as to the appropriate forum for the determination of the matter, and have made some efforts towards a settlement of the matter, including by participation in a Court-annexed mediation in December 2021.
- 4 The matter has not been resolved, but the parties at least agree that it would be appropriate for the matter to be transferred to the New South Wales Civil and Administrative Tribunal ("NCAT"). An order to that effect is sought by the plaintiff in a Notice of Motion that was filed on 6 May 2022.
- 5 The parties consent to the making of such an order, and it seems appropriate in the circumstances to do so. However, the parties have requested the Court to first determine a question of costs. The question is whether an order should be made that the plaintiff pay the first defendant's costs thrown away by the commencement of these proceedings. The first defendant seeks such an order, together with an order that such costs be payable forthwith. The plaintiff

resists the making of such orders, and seeks an order that the first defendant pay her costs of the Notice of Motion.

- 6 Directions were made by consent on 20 May 2022 to facilitate the determination of the questions of costs on the papers. The Court has read and considered the written submissions provided by the first defendant and the plaintiff in accordance with those directions, and has further considered the affidavits that are relied upon by those parties.
- 7 For the reasons which follow, I decline to make costs orders as sought by either the first defendant or the plaintiff. I consider that it is appropriate, in all the circumstances, that there be no order as to costs, including in respect of the Notice of Motion filed on 6 May 2022.
- 8 It is central to the argument of the first defendant that NCAT was always the most appropriate forum for the determination of the dispute, and that NCAT had jurisdiction to decide each of the three matters complained of by the plaintiff. However, the latter proposition is not correct, at least insofar as the plaintiff sought to claim relief in respect of strata levies pursuant to the Australian Consumer Law on the basis of alleged unconscionable conduct (see Australian Consumer Law, Part 2-2). The jurisdiction that is conferred upon NCAT by the *Fair Trading Act 1987* (NSW) in relation to the Australian Consumer Law does not extend beyond Part 2-3 of the Australian Consumer Law (see s 30(4) of the *Fair Trading Act*). It is therefore not the case that, as asserted by the first defendant, all matters complained of in the Statement of Claim “were squarely within the remit of NCAT”. It cannot be said that the proceedings should simply have been commenced in NCAT in the first place.
- 9 The plaintiff has ultimately come to the position that it would be appropriate for the dispute to be determined in NCAT. Presumably, the plaintiff intends to reformulate her claim in relation to the disputed strata levies so that it can be the subject of orders made by NCAT, including under s 232 of the *Strata Schemes Management Act 2015* (NSW).
- 10 I do not think that it has been shown that the plaintiff has acted unreasonably, either in the commencement or in the conduct of the proceedings in this Court. As I have said, little has occurred other than a debate concerning the

appropriate forum, and some efforts directed towards a settlement of the matter. It seems to me that where the underlying dispute between the parties remains unresolved, and the parties have come to the position that it would be appropriate to transfer the proceedings, it is appropriate that there be no order as to costs of the proceedings, including the costs of the Notice of Motion filed on 6 May 2022. I am not prepared to order that the first defendant pay the plaintiff's costs of that motion in circumstances where the first defendant has not acted at all unreasonably in relation to the question of transfer.

11 Accordingly, the Court will make the following orders:

- (1) Order pursuant to cl 6(2) of Schedule 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) that the proceedings be transferred to the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal, Sydney Registry, to continue before the Tribunal as if the proceedings had been instituted in the Tribunal.
- (2) No order as to costs, including as to the costs of the Notice of Motion filed on 6 May 2022.

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