Civil and Administrative Tribunal

New South Wales

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| Case Name: | Stevanovski v Man |
| Medium Neutral Citation: | [2023] NSWCATAP 284 |
| Hearing Date(s): | 17 October 2023 |
| Date of Orders: | 20 October 2023 |
| Decision Date: | 20 October 2023 |
| Jurisdiction: | Appeal Panel |
| Before: | A Suthers, Principal Member<br>G Burton SC, Senior Member |
| Decision: | 1. The appellants' application to rely on further evidence is refused.<br>2. Leave to appeal is refused.<br>3. The appeal is dismissed. |
| Catchwords: | APPEALS – real property – strata management – appointment of strata manager by Tribunal |
| Legislation Cited: | Civil and Administrative Tribunal Act 2013 (NSW)<br>Strata Schemes Management Act 2015 (NSW) |
| Cases Cited: | Collins v Urban [2014] NSWCATAP 17<br>Prendergast v Western Murray Irrigation Ltd [2004] NSWCATAP 69<br>Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39<br>Secretary, Department of Family and Community Services v Smith [2017] NSWCA 206<br>The Owners – Strata Plan 2010 v Kahn [2022] NSWCATAP 9<br>Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2008] NSWSC 399 |
| Texts Cited: | None cited |

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| Category: | Principal judgment |
| Parties: | Marianco Stevanovski (First Appellant)<br>Nikola Stevanovski (Second Appellant)<br>Lai Nog Man (First Respondent)<br>Jeahan Fahmy (Second Respondent) |
| Representation: | Marianco Stevanovski (Appellants)<br>Self-Represented (Respondents) |
| File Number(s): | 2023/00229250 |
| Publication Restriction: | Nil |
| Decision under appeal: | |
| Court or Tribunal: | Civil and Administrative Tribunal |
| Jurisdiction: | Consumer and Commercial Division |
| Date of Decision: | 20 June 2023 |
| Before: | R Titterton, Senior Member |
| File Number(s): | SC 23/07044; SC 23/24821; SC 23/27632 |

## REASONS FOR DECISION

### Summary

1 On 20 June 2023, the Tribunal's Consumer and Commercial Division determined three applications involving these parties and, in sum, appointed a compulsory manager to the strata scheme in which they are involved pursuant to s 237 of the *Strata Schemes Management Act 2015* (NSW) ("SSMA"). The manager was given power to exercise all functions of the Owners Corporation and strata committee for a period of 12 months. Section 237 of the SSMA provides the Tribunal with the discretion to make such orders where it is satisfied that one or more of the circumstances set out in s 237(3) of the SSMA exist. That includes where the management of the strata scheme is not functioning or is not functioning satisfactorily (SSMA, s 237(3)(a)), and where an owners corporation has failed to perform one or more of its duties (SSMA, s 237(3)(c)). A money claim in respect of strata levies, described below, was dismissed.

2 The relevant relationship between the parties is as follows:

(1) Mr Nikola Stevanovski and Mrs Zora Stevanovska own two of the four lots in the scheme that control one-half of the voting entitlements;

(2) Mr Marianco Stevanovski is their son, but not a lot owner. He says, with the support of his parents, that he has had an informal role in managing the scheme in the past;

(3) Ms Lai Man owns Lot 1 in the scheme, with one quarter of the voting entitlements; and

(4) Mrs Jeahan Fahmy owns Lot 4 in the scheme, which controls the remaining one-quarter of the voting entitlements.

3 The Stevanovski/Stevanovska family members are the appellants. Mrs Fahmy and Ms Man are the respondents.

4 The respondents maintain that the operation of the scheme is dysfunctional, and has, in effect, been controlled by the appellants without the necessary formalities of meetings and levies being arranged.

5 The appellants maintain that the scheme was managed appropriately and well, save that the respondents have failed to make ongoing financial contributions to the scheme as required under the SSMA. They say they are owed monies in the nature of contributions to the scheme as a refund of extra contributions made by them because the respondents have failed in their obligations and, as a result, they have paid monies on behalf of the Owners Corporation for which they should be reimbursed.

6 Mr Marianco Stevanovski and Mr Nikola Stevanovski lodged an appeal from the Tribunal's decision. It is apparent, though, that Mrs Zora Stevanovska also supports the appeal. They also purported to nominate the Owners Corporation as an appellant but an order removing the Owners Corporation was made at a directions hearing on 2 August 2023. For reasons we shall come to, that decision was correct and can have no bearing on the outcome of the appeal.

7 We have decided to refuse leave to appeal and to dismiss the appeal insofar as (and if at all) a question of law is raised.

**Background and the Tribunal's findings**

8 Three applications were determined by the Tribunal on 20 June 2023 involving these parties:

(1) In proceedings SC 23/07044 Mrs Fahmy and Ms Man sought the appointment of a specified strata manager for the strata scheme pursuant to s 237 of the SSMA, naming as respondents the appellants and Mrs Zora Stevanovska;

(2) In proceedings SC 23/24821 Mr Nikola Stevanovski, Mrs Zora Stevanovska and Mr Marianco Stevanovski sought the recovery of unpaid contributions and interest from Mrs Fahmy and Ms Man; an order striking out application SC 23/07044 or alternatively seeking that, in the event that the Tribunal does appoint a strata manager, that Manns and Moore Strata Management Pty Ltd be appointed rather than Resolution Strata Services Pty Ltd, which was proposed by Mrs Fahmy and Ms Man; and

(3) Proceedings SC 23/27632, purportedly lodged on behalf of the Owners Corporation but lodged and signed by Mr Nikola Stevanovski and Mr Marianco Stevanovski, which sought the same relief sought by the applicants in SC 23/24821 from Mrs Fahmy and Ms Man.

9 The nub of the respondents' concerns leading to their application had been that:

(1) Since about 2005, Ms Man had been told that she was to pay contributions to the scheme to Mr Marianco Stevanovski or Mr Nikola Stevanovski;

(2) Ms Man made payment pursuant to that instruction, but no invoices or receipts were ever provided;

(3) In 2009, after a dispute arose between the then owners about the payment of levies, a manager was appointed to the scheme under the former legislative equivalent to s 237 of the SSMA;

(4) That management was allowed to lapse in 2010;

(5) Since that time, Ms Man has continued to pay some levies when requested, but has never received any invoices or receipts despite repeated requests;

(6) After further dispute arose as to her levy contributions, Ms Man asked the appellants for all necessary strata records, financials and insurance in order to review for the purpose of determining if any payments were due. However, since that date, she has never received a reply.

(7) Mrs Fahmy has had a similar experience. Her rental managing agent has likewise asked for the proper documentation and records, to process any due levies payments. None of the documents, records or tax invoices has been provided. There is no other known source for such documents than the appellants since the earlier compulsory management lapsed.

10 The appellants' position is that:

(1) They have, with the informal assistance of Mr Marianco Stevanovski, sought to have the respondents pay levies as set out in correspondence from Mr Marianco Stevanovski to the respondents; and

(2) They have had to expend monies on such items as insurance and water bills (we infer in excess of their own levied amounts), for the benefit of the Owners Corporation, for which they should be compensated by the respondents.

11 The Tribunal found that:

(1) it had no probative evidence that Mr Marianco Stevanovski was ever appointed as strata manager to the scheme;

(2) the last annual general meeting (AGM) of the Owners Corporation (a mandatory requirement under s 18 of the SSMA) occurred in 2010;

(3) save for the appointments of a Mr Ibrahim and one of the Mr Stevanovskis (it is not specified which in the minutes) at the 2010 AGM, the strata committee of the Owners Corporation has never been properly constituted (in breach of s 30 of the SSMA);

(4) save for the appointments of Mr Stevanovski as Secretary of the strata committee and a Ms Fisher as Treasurer, the strata committee has never appointed a chairperson, secretary and treasurer of the strata committee, as required by s 41 of the SSMA;

(5) the strata committee and/or Owners Corporation has never prepared budgets for the strata scheme;

(6) save for the correspondence attached to his statement, Mr Stevanovski as secretary, in breach of s 43 of the SSMA, has never:

(a) prepared and distributed minutes of meetings of the owners corporation and submitted a motion for confirmation of the minutes of any meeting of the owners corporation at the next such meeting;

(b) given on behalf of the Owners Corporation and the strata committee notices required to be given under the SSMA;

(c) maintained the strata roll;

(d) enabled the inspection of documents on behalf of the Owners Corporation;

(e) answered communications addressed to the Owners Corporation;

(f) convened meetings of the strata committee and (apart from its first annual general meeting) of the Owners Corporation;

(g) attended to matters of an administrative or secretarial nature in connection with the exercise of functions by the Owners Corporation or the strata committee of the Owners Corporation.

(7) As there is no validly appointed Treasurer of the strata committee, then in breach of the SSMA:

(a) the lot owners have not been notified of any contributions levied in accordance with the SSMA;

(b) the Treasurer has not received, acknowledged, banked and accounted for any money paid to the Owners Corporation;

(c) the Treasurer has not prepared any strata information certificate; and

(d) the Treasurer has not kept the accounting records and prepared the financial statements.

(8) there is no evidence that an administrative fund has been established and maintained in accordance with s 73 of the SSMA;

(9) there is there is no evidence that a capital fund has been established and maintained in accordance with s 74 of the SSMA; and

(10) at no time has there ever been any attempt to comply with s 79 of the SSMA.

12 Those findings led to the appointment of the strata manager by the Tribunal on the application of the respondents to this appeal. The Tribunal appointed the manager proposed by the appellants.

13 The Tribunal decided to dismiss the subsequent applications. It did so because there has been no attempt since 2010 to comply with:

(1) s 83 of the SSMA in relation to the levying of contributions; or

(2) s 79 of the SSMA in relation to the preparation of estimates of contributions to the administrative and capital works funds.

14 The Tribunal also noted that some claims made in those proceedings may, in any event, be statute barred and that, in addition, it was not clear on what basis Mr Marianco Stevanovski, assuming he paid any rates or other notices on behalf of his parents or the Owners Corporation, had standing under the SSMA to bring some action against the respondents. It also found that there was no evidence of such payments before it.

**Scope and nature of internal appeals**

15 An appeal to the Appeal Panel does not simply provide a losing party in the Tribunal below with the opportunity to run their case again: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]. To succeed in an appeal, the appellant must demonstrate either an error on a question of law,

which, except in an appeal from an interlocutory decision, may be argued as of right; or that permission (that is, “leave”) to appeal should be granted to bring the appeal: *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), s 80(2).

16 The principles governing an application for leave to appeal under the NCAT Act are well-established and are repeated in many decisions of the Appeal Panel, often quoting *Collins v Urban* [2014] NSWCATAP 17. They are the same principles applied by the courts. It is enough as a summary to refer to *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206, where the Court said at [28] (citations omitted):

> Only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted. Ordinarily, it is only appropriate to grant leave where there is an issue of principle, a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable. It is well established that it is not sufficient merely to show that the trial judge was arguably wrong.

17 Where the appeal is from a decision made in the Consumer and Commercial Division (other than in respect of interlocutory decisions), there is a further qualification to the possible grant of leave in that we may go on to consider a grant of leave in the broader sense only if we are first satisfied that the elements of cl 12(1) of Sch 4 to the NCAT Act are made out, in that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

18 We agree with the Appeal Panel in *Collins v Urban where it said,* at [76], that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 of the NCAT Act may have been suffered where:

> ... [T]here was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.”

19 The Notice of Appeal did not frame grounds of appeal as might be expected by a legally represented party. Largely, it and the submissions lodged with it simply challenged various factual findings of the Tribunal and alleged the decision was against the weight of the evidence and not fair and equitable. However, at the hearing before us, the appellants raised for the first time an allegation that the decision was reached in a procedurally unfair manner in that the Tribunal decided to determine finally on 20 June 2023 all three proceedings when the latest proceeding (SC 23/27632) had not been listed for hearing on that date. Only the original proceeding SC 23/07044 brought by the respondents had been listed for final hearing on that date and the other matter SC 23/24821 brought by the appellants had been listed for directions on that date.

20 As the appellants are unrepresented, a broad interpretation of the grounds of appeal should be allowed unless it unreasonably prejudices the respondents: Prendergast v Western Murray Irrigation Ltd [2004] NSWCATAP 69.

21 It is sufficient, in our view, to note that a thorough review of the Notice of Appeal and the material filed by the appellants with it take the allegations of error by the Tribunal no further than that referred to in [19] above.

22 Whilst we may decide to conduct a new hearing, the parties did not ask us to do so here, and we were not satisfied that the grounds for appeal warranted it.

**An application to rely on new evidence**

23 In attempting to have the Appeal Panel reverse its decision that the Owners Corporation be removed as appellant in respect of proceedings SC 23/27632, the appellants sought to rely on a statement by Mr Marianco Stevanovski's wife that she had overheard a conversation between him and the strata manager appointed by the Tribunal, wherein the strata manager had encouraged the appellants to bring the appeal. The appellants also sought to rely on a USB said to contain a recording of that conversation. Another statement, co-signed by Mr Nikola Stevanovski and Mrs Zora Stevanovska, and dated 12 September 2023, was also proffered as evidence to similar effect.

24 We refused to admit that evidence in the appeal. Had the strata manager actually authorised or ratified the lodgement and prosecution of the appeal on

behalf of the Owners Corporation, it could easily have provided a letter to that effect. In fact, such confirmation had been sought, and in an email to Mr Marianco Stevanovski dated after the conversations referred to in the relevant statements that the appellants sought to rely on, the strata manager confirmed that "…I think there may be some confusion here. We would support NCAT reviewing the arrears if they have advised they will do this. However, it was clear in the NCAT document that this should be done by the Strata Manager. We have requested the bank statements and other financial information to assist in determining the current financial position. Can you please send this across asap so we can finalise this?"

25 We were not satisfied the hearsay evidence of those appellants or of Mr Marianco Stevanovski's wife could be probative as to the intention or final position of the strata manager in respect of the appeal in the face of that email communication. Nor does what it was alleged the strata manager said equate to the provision of authority to the appellants to lodge and prosecute an appeal in the name of the Owners Corporation. Rather, the documents suggest that, at the highest, the strata manager agreed that it would be best if the Tribunal "resolv[ed] the issues" or that it would support the appellants' appeal (which has not occurred). The USB had not been served in accordance with directions and the recording had, prima facie, been covertly made and not fully transcribed.

**Consideration**

*An alleged breach of procedural fairness*

26 The Tribunal is obliged to provide the parties with a reasonable opportunity to put material into evidence and to make submissions in respect of applications that affect them. We accept that proceedings SC 23/27632 were not listed for determination before the Tribunal on the date it was determined. However, neither was proceedings SC 23/24821 brought by the appellants and Mrs Stevanovska. Further, as the Tribunal noted, the relief sought in SC 23/27632 was the same relief as the appellants sought in SC 23/24821 but in the name of the Owners Corporation with the appellants signing the application on behalf of the Owners Corporation.

27 In that regard, the Tribunal recorded in its reasons that "this application was only listed for directions. However, it was common ground that all the parties wished both parties [scil proceedings] to proceed and to be finalised." The Tribunal also noted that the most recent proceedings SC 23/27632 was filed following comments at a directions hearing on 2 June 2023 that the question of who was appointed compulsory strata manager would be determined anyway in the proceedings listed for final hearing, if such appointment was to be made, and if action for unpaid levies had to be brought by the Owners Corporation, not individual lot owners, that might be more properly considered by any new compulsory manager.

28 The appellants raised this allegation of error only during oral submissions and without notice to the respondents, which denied them a fair opportunity to respond. Whilst it would be open to us to refuse to consider this ground on that basis, it is preferable that we consider it on its merits.

29 We will not allow the appeal on this ground.

30 Firstly, what the Tribunal recorded that is transcribed in [27], above, indicates that the parties were content for the Tribunal to determine all of the outstanding issues, albeit that its reasons only specifically referred to proceedings SC 23/07044 and SC 23/24821 in that regard.

31 Secondly, the parties were directed to put the sound recording and relevant transcript of the hearing at first instance before us if they relied on what occurred at first instance, and the appellants did not do so. On that basis we do not have any evidence that the appellants claimed any prejudice in the Tribunal determining all three applications, noting that the orders sought in proceedings SC 23/27632 were identical to those in proceedings SC 23/24821.

32 Thirdly, an appeal in respect of an allegation of procedural unfairness will only be allowed where an appellant can demonstrate some practical injustice. That is, the error must be "material," reflecting the fact that the concern of the law in the context of procedural fairness is to avoid practical injustice, and hence the focus is on whether there were submissions that could properly have been put that, as a matter of reality and not mere speculation, might have affected the

determination: *Trysams Pty Ltd v Club Constructions* (NSW) Pty Ltd [2008] NSWSC 399 at [52].

33 In that respect, the Tribunal found that there was no direct evidence of payments made by the appellants beyond lawfully raised levies that could have been recovered in the manner sought by the appellants. Despite being directed to lodge and serve any new evidence they sought to rely on in respect of the appeal, it remains the case that there is no such evidence before us, including that there is no documentary evidence such as a bank statement that the Owners Corporation even had an account in its own name, let alone evidence of the movement of funds into and out of such account.

34 Such evidence was relevant to the proceedings set down for final hearing on 20 June 2023 that had been the subject of preparation directions, as well as to the later proceedings. At its highest, the evidence simply demonstrates that some Owners Corporation's utility and insurance accounts are addressed to Mr Marianco Stevanovski. Therefore, there is no indication that submissions could properly have been put that, as a matter of reality and not mere speculation, might have affected the determination.

35 Finally, there is no evidence that the Owners Corporation ever resolved to bring proceedings SC 23/27632 and the evidence that is before us indicates that no such authorisation could exist.

36 Strictly speaking, then, the appeal against the dismissal of proceedings SC 23/27632 must be dismissed for want of standing in the appellants to bring it, because the Owners Corporation did not authorise or ratify the appeal: *The Owners – Strata Plan 2010 v Kahn* [2022] NSWCATAP 9. For the reasons we have given, though, the appellants could not have succeeded on this ground even if they had brought the appeal in that respect with proper authority.

*Leave to appeal*

37 This can be disposed of quite simply. Despite being given an opportunity to do so in oral submissions, the appellants did not challenge any of the Tribunal's findings that we have referred to at [11] above. In those circumstances, it cannot be said that the Tribunal's decision to appoint a manager to the scheme

is more than arguably wrong. Nor is there any issue of public importance or general principle raised.

38 Many of the findings referred to would, individually, have properly engaged the exercise of the Tribunal's discretion to appoint a manager to the scheme. Taken together, those unchallenged findings would, in a practical sense, likely have made any other order unreasonable. In respect of the dismissal of proceedings SC 23/24821, the appellants have failed to engage with the limitation period argument, or to demonstrate their standing to seek the orders. They have not shown that the Tribunal's finding that the evidence did not support the application, in any event, was even arguably wrong.

39 Leave to appeal should be refused.

40 It is now the role of the appointed strata manager to resolve the issue of any outstanding levies and the management of the scheme's accounts, with the cooperation of the parties.

**Orders**

41 Our Orders are as follows:

(1) The appellants' application to rely on further evidence is refused;

(2) Leave to appeal is refused;

(3) The appeal is 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