



Civil and Administrative Tribunal

New South Wales

Case Name: Foo v Frew

Medium Neutral Citation: [2023] NSWCATAP 303

Hearing Date(s): 17 October 2023

Date of Orders: 9 November 2023

Decision Date: 9 November 2023

Jurisdiction: Appeal Panel

Before: A Suthers, Principal Member
G Burton SC, Senior Member

Decision: 1. Leave to appeal is refused.

2. Dismiss the Appellant's adjourned application for a stay of the primary order.

3. Make no order as to the costs of the appeal.

Catchwords: REAL PROPERTY – STRATA MANAGEMENT – appointment of compulsory strata manager - no error of law or fact - Strata Schemes Management Act 2015 (NSW) s 237

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

Cases Cited: Anderson v Owners SP 61034 [2019] NSWCATAP 61
Bate v Owners SP 60549 [2018] NSWCATCD 36
Bischoff v Rita Sahade [2015] NSWCATAP 135
Co Funds Management PL v Owners SP 78945 [2011] NSWCTTT 488
Collins v Urban [2014] NSWCATAP 17
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Farland v Simmons [2018] NSWCATCD 28

Foong v Scutella [2021] NSWCATAP 225
Gershberg v Owners SP 5768 [2011] NSWCTTT 411
Kahn v Owners SP 2010 [2017] NSWCATAP 39
Kotevski v Seadon and Owners SP 82413 [2013]
NSWCTTT 597
Linney v Owners SP 11669 [2021] NSCATCD 123
Lockrey v Rosewall [2022] NSWCATCD 27
Moallem v CTTT [2013] NSWSC 1700
Owners SP 14593 v Soares [2019] NSWCATAP 3
Prendergast v Western Murray Irrigation Ltd [2014]
NSWCATAP 69
Robinson v Owners SP 61717 [2018] NSWCATCD 49

Category: Principal judgment

Parties: Tzeh Foo (Appellant)
Belinda Frew (First Respondent)
David Frew (Second Respondent)

Representation: R Foo (Lay Advocate) (Appellant)
First Respondent (Self-represented)
Second Respondent (First Respondent)

File Number(s): 2023/00265686

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal NSW

Jurisdiction: Consumer and Commercial Division

Date of Decision: 31 July 2023

Before: M Tibbey, Senior Member

File Number(s): SC 23/16348

DECISION

Outcome of appeal

- 1 For the reasons below we have refused leave to appeal, which has the effect of dismissing the appeal.

Background, primary decision, procedural matters in appeal

- 2 The proceedings concern SP 38875 which is a two-lot strata scheme in Balgowlah, a suburb on Sydney's northern beaches. There is a history of dispute.
- 3 In SC 19/31775 on 17 October 2019, in a dispute focused on parking, the presiding primary member (who was not involved in the present proceedings or this appeal) found that the scheme was not functioning properly in that the respondents could not gain unobstructed access to part of their lot and that there was effective deadlock on the matter in a two-lot scheme. He expressed that he was of his own motion (as permitted by s 237 of the *Strata Schemes Management Act 2015* (NSW) (SSMA)) going to appoint a compulsory strata manager and requested both parties, being the lot owners, to provide names for eligible appointment as such. The parties to that litigation were the present appellant and the present respondents to this appeal, whom we shall call the respondents and who had purchased in the scheme on 31 January 2019.
- 4 The appeal from the 2019 proceedings, heard on 20 February 2020 with decision delivered 6 May 2020, focused on the parking issue and did not canvass the issue of a compulsory strata manager. As was observed at a directions hearing for the primary proceedings from which this appeal is brought on 11 May 2023, it is possible that the appeal in the earlier proceedings was interlocutory and the earlier proceedings were never finalised. It appears that any remaining substantive issues have been absorbed into the present primary proceedings, SC 23/16348, filed by the respondents on 6 April 2023. It is the decision to appoint a manager to the scheme in those proceedings from which this appeal is brought.
- 5 In the present primary proceedings the respondents complained that an AGM could not be held and had not been held since they purchased, despite their efforts. The appellant was said to have left Australia after the appeal in the earlier proceedings, remained overseas during the covid epidemic phases, returned in March 2022 and declined properly to discuss at any point garden maintenance and participation in an AGM. The respondents further contended that it was impossible to get agreement on parking, there had been no

meetings at all despite the SSMA requirements and the appellant had mingled strata levy monies in his personal bank account from which he said he had paid strata expenses. The respondents had withheld recent levies because of the absence of expense substantiation and the absence of a separate account.

- 6 The respondents sought the appointment of a compulsory strata manager for the maximum two years with full powers. The appellant resisted. The primary decision on 31 July 2023 ordered as the respondents sought and ordered the parties to file and serve details of candidates for appointment with supporting submissions by 21 August 2023. A hearing on candidature was appointed for 1 September 2023 if a hearing on that topic was sought, otherwise a determination was to be made on the papers.
- 7 At the appeal hearing we were told that the final step of appointment had not yet been taken but both parties wished to proceed with the appeal hearing, which we did. An application to stay the appointment order was adjourned on 6 September 2023 owing to the absence of an appointment.
- 8 The Senior Member who gave the primary decision provided the following written substantive reasons (summarised by us) for her decision:
 - (1) No lot owner had called a statutory meeting, despite the appellant being chair and treasurer and Ms Frew being secretary, although Ms Frew had called for an AGM in 2019: Primary Reasons (PR) [13].
 - (2) There was no separate bank account in the name of the Owners Corporation for scheme funds, which were held in an account in the appellant's name: PR [13].
 - (3) There was no capital works fund as required by the SSMA: PR [13].
 - (4) The parties were at an impasse, in tense and strained emails, over the respondents' cutting down a tree and heavily pruning others for which the appellant alleged illegality and claimed \$50,000 compensation: PR [14].
 - (5) These matters added to the prior parking disputes: PR [15].
 - (6) The foregoing illustrated dysfunction and non-compliance with statutory requirements for the scheme both individually and as part of a pattern: PR [16]-[20].

Grounds of appeal

- 9 The notice of appeal was filed, in time, on 21 August 2023.

10 The grounds for the appellant's challenge were, in summary, as follows, as discerned from the notice of appeal (which may have been prepared by the appellant without legal assistance) in conjunction with the appellant's oral submissions at final hearing. This was in accordance with the approach outlined in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, at [12]:

- (1) The primary member erred in law exercising discretion to appoint a compulsory strata manager.
- (2) The Tribunal's findings on reasons for dysfunctionality and non-compliance were not fair and equitable and against the weight of evidence: failure to recognise that Ms Frew as secretary should call for AGMs and willingness of the appellant in future to do so; failure to take into account a desire simply to defer the 2019 AGM until after the hearing of the appeal in the earlier proceedings; long-standing practice of use of a personal bank account for strata funds and no sinking fund; tree-logging had been done and was without permission; inadequate opportunity to address the last three matters as they were raised in reply submissions and by the Tribunal; carparking also a matter of history.

Scope and nature of internal appeals

11 As the decision which is the subject of the appeal is interlocutory in nature, the appellant requires leave (that is permission) to appeal even on a question of law: s 80(2) *Civil and Administrative Tribunal Act* 2013 (NCAT Act). However, cl 12 of Sch 4 to the NACT Act has no application in the appeal.

12 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

- (1) Whether there has been a failure to provide proper reasons where they are required;
- (2) Whether the Tribunal identified the wrong issue or asked the wrong question;
- (3) Whether a wrong principle of law had been applied;
- (4) Whether there was a failure to afford procedural fairness;
- (5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;
- (6) Whether the Tribunal took into account an irrelevant consideration;
- (7) Whether there was no evidence to support a finding of fact; and

- (8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.
- 13 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:
- “(a) issues of principle;
 - (b) questions of public importance or matters of administration or policy which might have general application; or
 - (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
 - (d) a factual error that was unreasonably arrived at and clearly mistaken; or
 - (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.”

Parties' contentions and evidence

- 14 The parties essentially repeated on appeal their contentions to the primary member.
- 15 The appellant submitted that the respondents were recent owners and rented out the lot as an investment with resulting tax benefit whereas the appellant and his son live in their lot. He said that the respondents did not understand Ms Frew's duty as secretary to call statutory meetings; there had been AGMs every year since the appellant bought in 2010 up to and including 2018. The parking issues had now been resolved, the respondents had unilaterally cut down tree cover for the appellant's lot and privacy and were bringing up other issues recently to try to cover up that mistake while misinterpreting a claim for compensation, made after advice was obtained, as a threat. There was no evidence of financial or other wrongdoing – all accounts were paid and the strata roll was updated on change of tenant - and he was willing for the respondents to manage the bank account. There was no justification for the cost and loss of freedom of action in appointing a strata manager.
- 16 The respondents submitted that the covid period caused difficulties for compliance but that they and the appellant were having two different conversations. They had requested an AGM in 2019 but the appellant said that it was not necessary and wanted it deferred until after his appeal. When

his appeal was unsuccessful, he was still strong in his opinion that an AGM was unnecessary (which the appellant disputed) so they didn't press at the time, then he was out of the country from after the appeal until March 2022. They had simply trimmed what were shrubs and cut down a damaged tree which posed risk after the appellant refused properly to discuss garden maintenance. Mr Frew provided gardening services from his landscaping business without charge. A compulsory manager would provide opportunity for engagement and a healthier neighbourly environment. Before the primary member, as the evidence showed and the primary member recorded in her reasons, the respondents had also pointed to the appellant opposing safety strips on the stairs, imposing unreasonable conditions on keeping of a pet, refusing to change to monthly insurance payments and failing to establish proper discussion channels.

- 17 The appellant in reply submitted that he wanted to appeal the expressed view in the previous decision on strata management but there was no actual decision to appeal. What had been cut were tall shade trees not shrubs. He agreed that the treasury role he undertook had mandatory financial requirements under the SSMA.
- 18 At the conclusion of argument, we suggested that the parties discuss to see if they could agree on an arrangement; for example, an agreed strata manager for 12 months to put compliance and other matters in order. After about 25 minutes of private discussion, we reserved our decision which gave the further opportunity for party discussion. We have been advised of no consent resolution.

19 **Consideration and conclusion**

20 SSMA, s 237 provides as follows:

(1) **Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation** The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent—

(a) to exercise all the functions of an owners corporation, or

(b) to exercise specified functions of an owners corporation, or

(c) to exercise all the functions other than specified functions of an owners corporation.

(2) Order may confer other functions on strata managing agent The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—

(a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

(b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

(c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made The Tribunal may make an order only if satisfied that—

(a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

(b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

(c) an owners corporation has failed to perform one or more of its duties, or

(d) an owners corporation owes a judgment debt.

(4) Qualifications of person appointed A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must—

(a) hold a strata managing agent's licence issued under the Property, Stock and Business Agents Act 2002, and

(b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) Terms and conditions of appointment A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

(6) Return of documents and other records A strata managing agent appointed as a consequence of an order under this section must cause a general meeting of the owners corporation to be held not later than 14 days before the end of the agent's appointment and must on or before that meeting make arrangements to return to the owners corporation all documents and other records of the owners corporation held by the agent.

(7) Revocation of certain appointments An order may be revoked or varied on application and, unless sooner revoked, ceases to have effect at the expiration of the period after its making (not exceeding 2 years) that is specified in the order.

(8) Persons who may make an application The following persons may make an application under this section—

(a) a person who obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,

(b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

- 21 SSMA s 237 gives, by the word "may", a discretion to the Tribunal which needs to be exercised on principled grounds.
- 22 The appointment of a compulsory strata manager under SSMA s 237, like the removal of a strata scheme officer under s 238, is not lightly made and requires some dereliction of duty or dysfunction in operation of the scheme, usually not arising from an isolated incidence unless it showed serious misconduct or dereliction of duty (including disobedience to Tribunal or Court orders): see, eg, *Kahn v Owners SP 2010* [2017] NSWCATAP 39 at [30]; *Owners SP 14593 v Soares* [2019] NSWCATAP 3 at [44], [46]; *Anderson v Owners SP 61034* [2019] NSWCATAP 61 at [41]-[42].
- 23 The aim of SSMA s 237 and its predecessors in the 1996 Act is, where possible, to maintain a democratic system which the legislative scheme has established, rather than substitute a compulsory appointment: *Kahn v OC SP 2010* [2017] NSWCATAP 39 at [30]. It is not enough that the owners simply do not get along: *Bischoff v Rita Sahade* [2015] NSWCATAP 135. The evidence may show a properly functioning strata scheme in all practical respects despite any personal animosities or disagreements on the decisions made: *Robinson v Owners SP 61717* [2018] NSWCATCD 49 at [53]-[58]; *Anderson v Owners SP 61034* [2019] NSWCATAP 61 at [41]-[42].
- 24 However, if dispute becomes chronic, complex and/or litigious the trigger point may well have been reached: *Moallem v CTTT* [2013] NSWSC 1700 at [7]; *Bate v Owners SP 60549* [2018] NSWCATCD 36 at [77]-[78]. This may also be the case where there is a clear and substantial dereliction in the duty to manage the scheme in accordance with statutory requirements and in the interests of all lot owners under SSMA s 9(2) and its statutory predecessors,

without discrimination: *Gershberg v Owners SP 5768* [2011] NSWCTTT 411; *Owners SP 14593 v Soares* [2019] NSWCATAP 3 at [44], [46].

- 25 Failure to engage or reasonably to act in accord with relevant expertise and advice, including the strata manager for voluntary members of a strata committee, may be a sufficient indicium: *Co Funds Management PL v Owners SP 78945* [2011] NSWCTTT 488 at [27]-[28].
- 26 There may be a need for intervention to provide a "clean slate", to re-establish proper functioning, and to facilitate non-repetition of dysfunctional conduct or non-compliance with statutory requirements, which may require the maximum appointment period of two years: *Kotevski v Seadon and Owners SP 82413* [2013] NSWCTTT 597 at [74]. This may require continuation on a serial basis if the complexity of the mix of uses in the scheme, the size of the scheme or other ongoing management issues are present: *Foong v Scutella* [2021] NSWCATAP 225.
- 27 If a compulsory strata manager is appointed, it should be someone who, in addition to giving the statutory consents, will provide the necessary impartial management at least cost: *Farland v Simmons* [2018] NSWCATCD 28 at [45].
- 28 In our view the primary member in her decision correctly applied the relevant principles set out above in exercising her discretion to appoint a strata manager for the period and with the powers that were to be granted. As the decision was discretionary in nature once a jurisdictional finding under s 237(3) of the SSMA was made, error would need to be shown on the principles outlined in *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40, where the Court recorded:

“It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed ... It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.”

- 29 We also discern no error justifying a grant of leave in respect of any error of fact on the above principles. In particular, past informal practice does not justify its continuance and there was a sufficient pattern of disharmony and non-compliance even if one or more instances were matters of history or in themselves were not sufficient to justify intervention.
- 30 The evidence before the primary member, and placed before us, very clearly indicated that there had been a history of contention between the only two lot owners and serial non-compliance with the requirements of the SSMA in terms of meetings, accounts, record-keeping and reporting. Who was responsible for parts of that dysfunction and non-compliance at what times did not matter. Rather, it was necessary to take the step of compulsory intervention to restore functionality and compliance. It is also necessary in order to bring objectivity to any disputes that arise between lot owners which seek to involve the owners corporation, such as the appellant's complaint concerning the garden.
- 31 It will then be up to the parties as lot owners to carry on co-operatively, otherwise a series of compulsory appointments may result at higher cost to the lot owners.
- 32 Accordingly, we refuse leave to appeal.

Costs

- 33 No party had leave to be legally represented or foreshadowed an application for costs, as they were directed to do if costs may be sought. We will make no order as to costs.

Orders

- 34 We make the following orders:
- (1) Leave to appeal is refused.
 - (2) Dismiss the Appellant's adjourned application for a stay of the primary order.
 - (3) Make no order as to costs.

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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