



Civil and Administrative Tribunal
New South Wales

Case Name: Gee v The Owners – Strata Plan No 32191

Medium Neutral Citation: [2023] NSWCATAP 296

Hearing Date(s): 26 September 2023

Date of Orders: 08 November 2023

Decision Date: 8 November 2023

Jurisdiction: Appeal Panel

Before: D Robertson, Senior Member
G Sarginson, Senior Member

Decision: 1. Leave to appeal refused.
2. Appeal dismissed.

Catchwords: LAND LAW – Strata title – Appointment of compulsory strata manager---No error of law identified---No grounds for leave to appeal established

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

Cases Cited: Aboss v Hafeez [2022] NSWCATAP 345
Collins v Urban [2014] NSWCATAP 17
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Ryan v BKB Motor Repairs Pty Ltd [2017] NSWCATAP 39

Texts Cited: None cited

Category: Principal judgment

Parties: Heather Gee (Appellant)
The Owners – Strata Plan No 32191 (Respondent)

Representation: Appellant (self-represented)

J Rosenow (strata committee secretary) (Respondent)

File Number(s): 2023/00244080

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 19 July 2023

Before: R Titterton, Senior Member

File Number(s): SC 23/07621

REASONS FOR DECISION

Introduction

- 1 The appellant, Ms Heather Gee, appeals from a decision of the Tribunal delivered on 19 July 2023 in relation to an application brought by the appellant against the respondent, The Owners - Strata Plan No 32191. Strata Plan No 32191 is a 13 lot strata scheme at Merimbula, on the South Coast of NSW. Most of the lot owners rent out their lots, apparently for short term holiday stays. The secretary of the strata committee, Mr Jamie Rosenow, manages the letting of some of those lots not occupied by their owners. He also occupies a role as “resident caretaker/manager”, although the appellant disputed his entitlement to do so.
- 2 The appellant filed her application on 9 February 2023. Although the original application sought orders for access to documents pursuant to s 188 of the *Strata Schemes Management Act 2015* (NSW) (SSMA), by the time of the hearing on 17 July 2023 the appellant had amended her application to include application for an order for the appointment of a compulsory strata manager pursuant to s 237 of the SSMA. The Tribunal made by consent an order providing for the appellant’s inspection of the records of the strata scheme. The Tribunal dismissed the application for the appointment of a compulsory

manager. The appellant appeals against the dismissal of that part of her application.

3 Section 237 relevantly provides:

237 Orders for appointment of strata managing agent

(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 The appellant relied solely on the circumstance set out in s 237(3)(a) that is that the management of the strata scheme was not functioning or not functioning satisfactorily.

5 The Tribunal dismissed the application on the basis that it was not satisfied that the appellant had established that the management was not functioning satisfactorily. The Tribunal stated:

“I am not satisfied that any of the matters relied upon by the applicant individually or even cumulatively satisfy me that that is the case”

- 6 The Tribunal set out in its reasons for decision six matters upon which the appellant had relied in support of the proposition that the management was not functioning satisfactorily. Those matters were:

“First, the current management structure would benefit from the expertise of professional strata management.

Secondly, the current management is not aware of its responsibilities in relation to strata management, ‘its boundaries of jurisdiction or the need to be transparent when dealing with strata issues’.

Thirdly, in relation to Mr Poole:

1 The committee did not have the authority to appoint Mr Poole as its representative

2 there is a business or employment relationship between Mr Poole and Executive Committee Member Sue Hocking;

3 is an expert in Strata Law and was made a proxy;

4 he improperly amended a motion placed before the annual general meeting

Fourthly, the strata scheme is not under Strata or Building Management

Fifthly, the lack of timely production of the requested documents

Sixthly, the business activities of the Rosenows, who ‘should have nothing to do with the financial management’ of the strata scheme.”

- 7 The background to the third matter, as recorded in the decision, is that Mr Poole was purportedly appointed by the strata committee as “its representative” in about February 2023. He was supposedly an expert in strata matters. Mr Poole chaired a general meeting of the owners corporation on 24 April 2023. The minutes of that meeting record that the “Acting Chairman” changed the wording of a motion from that set out in the notice of meeting.

- 8 The Tribunal considered each of the six matters in turn. The Tribunal held:

“As to matter (1), I do consider that all strata schemes would benefit from the expertise of professional strata management. I am concerned that Mr Rosenow describes himself as a strata managing agent, when that may be both factually and legally not true. I am also concerned that the Rosenows may have voted in the past on motions in which they had an interest, such as their appointment as “managers” or caretakers. But there is no probative evidence before me that that is the case. I would have been very interested in seeing the “Caretakers Agreement for Building Managers” which Mr Rosenow sent to the applicant on 9 February 2023, but neither party included that document in their materials.

However, for the reasons which follow, in my view the strata scheme is functioning satisfactorily, and there is no reason to appoint a strata managing agent under s 237 of the SSMA.

As to matter (2), I reject the submission that the current management is not aware of its responsibilities in relation to strata management. On the contrary, based on the evidence before me, I am satisfied that Mr Rosenow ensures that:

- 1 annual general meetings are held in accordance with the SSMA.
- 2 financial statements including budgets (sinking, administrative and otherwise) are prepared in accordance with the SSMA.
- 3 a strata roll is maintained in accordance with the SSMA.
- 4 appropriate insurance is maintained.
- 5 An administrative fund is in place, as is required by s 73 of the SSMA.
- 6 A capital works fund is in place, as is required by s 74 of the SSMA.

As to matter (3), I see nothing inappropriate at all in the respondent retaining Mr Poole to assist in managing a situation where long standing lot owners and managers were somewhat confronted by a new lot owner exercising her legitimate legal rights and expectations under the SSMA. After all, she is a lot owner and entitled to know that the scheme is being managed in accordance with the SSMA.

That said, it was somewhat irregular of Mr Poole to have amended the motion at the AGM to a form other than that previously circulated.

As to the suggestion that there is a business or employment relationship between Mr Poole and Executive Committee Member Sue Hocking, there was no probative evidence to support that matter.

As to matter (4), many strata schemes are not managed by professional strata managing agents, and in my experience that is where there the number of lots are few in number. That said, that is where the Tribunal sees some of the most bitter disputes.

As to matter (5), any delay in the production of documents is more due to do in the breakdown of the personal relationship between the applicant and the Rosenows, rather than being a sign of strata scheme dysfunctionality.

As to item (6), there is no probative evidence before that suggests in any way that the Rosenows are conducting their business of managing the holiday lettings in a way which is consistent [sic]¹ with their duties as lot owners or Mr Rosenow's duties as a member of the strata committee. And I note that the Rosenows clearly have the support of those lot owners who did provide evidence to the Tribunal."

Scope and Nature of Internal Appeals

- 9 An appeal to the Appeal Panel does not simply provide a losing party in the Tribunal at first instance with the opportunity to run their case again: *Ryan v BKB Motor Repairs Pty Ltd* [2017] NSWCATAP 39 at [10].

¹ This is clearly intended to be "inconsistent".

- 10 Internal appeals against decisions of the Tribunal, other than interlocutory decisions, may be made as of right on a question of law, and otherwise with leave (that is, the permission) of the Appeal Panel: *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) s 80(2).
- 11 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.
- 12 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited by cl 12(1) of Sch 4 to the NCAT Act. In such cases, the Appeal Panel must first be satisfied 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).
- 13 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) in Sch 4 may have been suffered where:
- “ ... there 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.”

14 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Sch 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

15 In *Collins v Urban*, the Appeal Panel stated at [84] that:

“(1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact, ... [and]

(2) 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.”

Grounds of Appeal

16 The appellant's stated ground of appeal as set out in the Notice of Appeal was:

“The order states that for an appointment of compulsory strata management ‘Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

(2) exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;

Jamie Rosenow has used the position of secretary of the OC to incorrectly make claims that he is the strata/building manager and provide himself with the benefits and powers that relate to such an appointment when the submitted strata certificate under section 184 of the SSMA is evidence that he is not and so does not hold such powers or entitlement.”

17 The appellant also sought leave to appeal on the bases that the decision was not fair and equitable and that the decision was against the weight of evidence.

18 At the hearing of the appeal the appellant appeared in person. The owners corporation was represented by Mr Rosenow.

Appeal with respect to a question of law

19 The appellant accepted at the hearing that her stated ground of appeal did not raise a question of law.

20 In our view the stated ground of appeal clearly does not raise a question of law impugning the Tribunal's decision.

21 In asserting that Mr Rosenow had used his position as secretary to incorrectly make claims that he is the building manager, the appellant relied upon a certificate under s 184 of the SSMA provided to her at the time she acquired her lot.

22 Section 184 relevantly provides:

184 Certificate by owners corporation as to financial and other matters relating to lot

(1) **Persons who may request certificate** An owner, mortgagee or covenant chargee of a lot in a strata scheme, or a person authorised by the owner, mortgagee or covenant chargee, may request the owners corporation for the strata scheme to give a certificate under this section (a strata information certificate) in relation to a particular lot.

(2) **Form of request** The request must be made by written notice given to the owners corporation and be accompanied by the fee prescribed by the regulations.

(3) **Information relating to lot to be included in strata information certificate** The strata information certificate must specify the following information in respect of the lot and the strata scheme—

(a) the amount of any regular periodic contributions for the lot determined by the owners corporation under this Act, the periods for which those contributions are payable and any discounts applicable for early payment,

(b) whether there is any amount unpaid of any contributions determined for the lot and, if so, the amount unpaid and, in the case of a contribution levied for the capital works fund, the date on which the contribution was levied,

(c) whether there is any amount unpaid by an owner under a common property rights by-law or a by-law made under section 108,

(d) whether there is any amount unpaid of any contribution levied under section 81 (4) for the lot and, if so, the amount unpaid and the date on which it was levied,

- (e) any amount and rate of interest payable in relation to any unpaid contribution referred to in this subsection,
- (f) whether there is any amount recoverable from the owner of that lot for work carried out by the owners corporation,
- (g) the proposals for funding the matters set out in the 10-year capital works fund plan,
- (h) whether or not a strata renewal committee has been established in relation to the strata scheme under the *Strata Schemes Development Act 2015*,
- (i) any other information that is required to complete the certificate.

(4) Information relating to management of strata scheme to be included in strata information certificate The strata information certificate must state, as at the date of the certificate, the name and address of each member of the strata committee and of any strata managing agent and building manager appointed under this Act for the strata scheme.

23 Section 185 of the SSMA provides:

185 Strata information certificate is evidence of matters stated in it

A strata information certificate is conclusive evidence, as at the date of the certificate, of the matters stated in it in favour of a person (whether or not the applicant for the certificate or a person referred to in the certificate) taking for valuable consideration—

- (a) an estate or interest in a lot in a freehold strata scheme to which the certificate relates, or
- (b) an estate or interest in a lease of a lot in a leasehold strata scheme to which the certificate relates.

24 The certificate, which was provided to the appellant on 19 June 2022, was issued under the common seal of the owners corporation. It includes, under the heading “13 Strata managing agent and building manager”, space for the insertion of “Name of building manager (if any) appointed under section 67 of the Act.” That section of the certificate was struck through and the space provided on the standard form for the name and address of the building manager was left blank.

25 The appellant submitted that the effect of section 185 was that Mr Rosenow and the owners corporation were unable to claim that Mr Rosenow was the building manager of the strata scheme.

26 Sections 66 and 67 of the SSMA provide:

66 Building managers

(1) A building manager is a person who assists in exercising any one or more of the following functions of the owners corporation—

- (a) managing common property,
- (b) controlling the use of common property by persons other than the owners and occupiers of lots,
- (c) maintaining and repairing common property.

(2) However, a person is not a building manager if the person exercises those functions only on a voluntary or casual basis or as a member of the strata committee.

(3) A person may be both a building manager and an on-site residential property manager.

(4) A building manager may be a person who is entitled to exclusive possession (whether or not jointly with any other person) of a lot or common property in a strata scheme.

(5) For the purposes of this Act, a person is taken to be a building manager for a strata scheme if the person meets the description of a building manager set out in this section, regardless of whether the title given to the person's position is building manager, caretaker, resident manager or any other title.

67 Appointment of building managers

(1) A building manager may be appointed for a strata scheme.

(2) The appointment is to be made by instrument in writing (a building manager agreement) executed before or after the strata scheme commenced by the building manager and—

- (a) by the original owner, if executed before the strata scheme commenced, or
- (b) under the authority of a resolution passed at a general meeting of the owners corporation of the strata scheme, if executed after the strata scheme commenced.

27 We do not consider that it is necessarily the case that the fact that Mr Rosenow's details were not recorded on the certificate means that neither Mr Rosenow nor the owners corporation can maintain against the appellant that Mr Rosenow is the duly appointed building manager. But even if that were the case, that would not establish any error with respect to a question of law in relation to the Tribunal's decision. The Tribunal observed that Mr Rosenow had purported to provide a copy of the building management agreement to the appellant, enclosed with a letter which Mr Rosenow sent to the appellant on 9 February 2023, but that the agreement itself was not in evidence.

28 The Tribunal based no finding or conclusion on the proposition that Mr Rosenow was, or was not, the building manager or caretaker of the owners corporation.

Leave to appeal

Decision against the weight of evidence

29 To the extent that the appellant seeks leave to appeal on the grounds that the decision was against the weight of evidence, the difficulty that the appellant faces is that she has not provided to the Appeal Panel any transcript of the evidence before the Tribunal.

30 At the directions hearing for the appeal on 11 August 2023, the Appeal Panel directed:

“2 The Appellant is to lodge with the Appeal Registry and give to the Respondent by 01 September 2023:

(a) All the evidence given to the Tribunal at first instance on which it is intended to rely;

(b) Any evidence not provided to the Tribunal at first instance in making the decision under appeal, on which it is intended to seek leave to rely;

(c) The Appellant's written submissions in support of the appeal; and

(d) If oral reasons were given and/or what happened at the hearing at first instance is being relied on by the Appellant in the appeal, a typed transcript of the relevant parts of the hearing together with the sound recording of the entire hearing.”

31 Despite those directions, the appellant did not file either the evidence given to the Tribunal by the parties at first instance, or a transcript or recording of the hearing at first instance.

32 In these circumstances it is impossible for the Appeal Panel to conclude that the decision was against the weight of evidence (as the evidence weighed by the Tribunal is not available to the Appeal Panel): see *Aboss v Hafeez* [2022] NSWCATAP 345 at [27] – [30] and cases there cited.

Not fair and equitable

33 In relation to the application for leave to appeal on the ground that the decision was not fair and equitable, the appellant stated in her Notice of Appeal:

“It is not fair and equitable to assess the actions of the current management of the strata committee in the context of having building or strata management appointment under section 49 or section 67 of the Act when this is not the case.

Mr Rosenow has exercised his power as the secretary of the strata plan to make statements in emails and other strata communications provided to the tribunal indicating he has appointments of management rights and licences that he does not in order to suit his own interests, including financial interests both in gaining payment for strata and building management, and claims of controlling the use of the facilities of the complex for his holiday letting business.”

- 34 The member rejected the proposition that Mr Rosenow had allowed his business activities to impinge upon his obligations and duties as a lot owner or as a member of the strata committee.
- 35 In oral submissions, the applicant submitted that the Tribunal’s finding was not fair and equitable because, she alleged:
- (1) Mr Rosenow has been able to utilise his position as strata secretary to make false claims and favour himself, including obtaining payments from the owners corporation and preventing the appellant from using the common property;
 - (2) Mr Rosenow had allowed other persons to come onto her lot; and
 - (3) He “makes up the rules as he goes along”.
- 36 The evidence included in the appeal papers does not suggest that there is any substance to those assertions. In the absence of a full record of the evidence that was before the Tribunal, including a transcript of any oral evidence, it is impossible to conclude that the Tribunal’s conclusion was not correct or not fair and equitable.
- 37 Accordingly leave to appeal must be refused and the appeal dismissed.

ORDERS

- 38 Our orders are:
- (1) Leave to appeal refused.
 - (2) Appeal 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

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