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NSW CASE LAW UPDATE

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NSW CASE UPDATE 2017

Introduction

In 2016 and early 2017 there were a number of strata title cases decided by the NSW Supreme Court. These cases dealt with a variety of issues.

The most significant cases considered the validity of an executive committee meeting held without proper notice;[1] the liability of a strata managing agent to a lot owner in negligence for economic loss;[2] the liability of an owners corporation to a lot owner in nuisance for damage to lot property;[3] the proper meaning of provisions in a strata management statement defining shared facilities in a large mixed use building;[4] and the ability of an owners corporation to repair common property in a manner that encroached onto a lot.[5]

The Supreme Court continued to deal with a number of cases concerning the liability of a builder, developer or others for building defects in strata title buildings.[6]

The NSW Civil and Administrative Tribunal continued to deliver decisions in a variety of strata title disputes. These included cases considering the question of whether the replacement of balustrades in a strata title building required the authorisation of the owners corporation by way of an ordinary or special resolution[7] and the power of the Tribunal to order amendments to a strata management statement in a mixed use strata title building.[8] Regrettably, most of the decisions of the Tribunal are unreported and unpublished.

The most significant case was the decision of the NSW Supreme Court in *The Owners – Strata Plan No. 57164 -v- Yau* [2016] NSWSC 1056 concerning the validity of an executive committee meeting convened and held without proper notice.

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[1] *The Owners – Strata Plan No. 57164 -v- Yau* [2016] NSWSC 1056
[2] *James -v- The Owners – Strata Plan No. 11478*; *The Owners – Strata Plan No. 11478 -v- James* [2016] NSWSC 1558
[3] *McElwaine -v- The Owners – Strata Plan No. 75975* [2016] NSWSC 1589
[4] *The Owners – Strata Plan No. 72381 -v- The Owners – Strata Plan No. 71067* [2016] NSWSC 1857
[5] *The Owners of Strata Plan 76888 -v- Walker Group Constructions Pty Ltd* [2016] NSWSC 541
[6] *The Owners — Strata Plan 76841 v-- Ceerose Pty Ltd* [2016] NSWSC 1545; *Owners - Strata Plan No 83297 -v- Eastern Construction Group Pty Ltd* [2016] NSWSC 387
[7] *Lipscher & Ors -v- The Owners – Strata Plan No. 30995* [2017] NSWCATCD
[8] Owners Corporation SP 80454 -v- Eddy Investments (NSW) Pty Ltd [2016] NSWCATCD (unreported, Member Vrabac, 27 January 2017)

The Owners – Strata Plan No. 57164 -v- Yau [2016] NSWSC 1056

Introduction

This case involved a dispute in a mixed use building in Sydney known as Millennium Towers. The plaintiff was the owners corporation of the building. The defendants (the Yaus) were the owners of a commercial lot in the building.

The genesis of the dispute was the desire of the Yaus to operate a restaurant from their commercial lot. In order to do so, the Yaus needed to access a grease arrestor and kitchen exhaust system situated on the common property in the building. The grease arrestor and kitchen exhaust system had fallen into disrepair and the owners corporation had decided not to repair them.

The Facts

In 2011, the Yaus commenced proceedings in the Supreme Court against the owners corporation seeking declaratory and injunctive relief, in essence, to require the owners corporation to maintain and repair the grease arrestor and kitchen exhaust system in accordance with its statutory duty to maintain and repair common property that arose under section 62 of the *Strata Schemes Management Act 1996* (**1996 Act**). The Yaus also sought ancillary relief to require the owners corporation to cause their commercial lot to be connected to the grease arrestor and kitchen exhaust system, damages and equitable compensation.

The hearing of those proceedings commenced on 12 August 2013. The first day of the hearing did not go well for the owners corporation. At the conclusion of the first day of the hearing, Senior Counsel for the owners corporation recommended that the proceedings be settled on terms proposed by the Yaus. The position of the owners corporation did not improve during the second day of the hearing on 13 August 2013. For that reason, Senior Counsel for the owners corporation pressed for a meeting with the executive committee that night to encourage the committee to accept the settlement offer made by the Yaus.

The Executive Committee Meeting

At 5:25pm on 13 August 2013, a member of the executive committee, Mr Burns, sent an email to the other committee members and to the legal representatives of the owners corporation in the following terms:

> Philip Clay [Senior Counsel] has asked to meet with the executive committee tonight. Can you please advise if you are available at 6:30pm either via phone or to meet in the meeting room at 289 Sussex Street.

Between about 7:00pm and 9:30pm on 13 August 2013, a meeting took place involving most, but not all, of the members of the executive committee. In total, five members of the executive committee were present in person, two others were present via teleconference (one of whom later attended the meeting in person), and the other two committee members did not attend at all. The legal representatives of the owners corporation, including Senior Counsel, also attended. The minutes of the meeting included the following:

> Mr Clay SC outlined the reasons for his opinion that the matter should be resolved and that it would be unreasonable for the executive committee to commit the owners corporation to additional costs and significant risk by continuing to defend the proceedings.
>
> Mr Clay SC strongly recommended that the executive committee accept his recommendation, as the committee was the representative of the owners corporation and instruct him to settle on best terms possible, generally in accordance with the Yaus' latest offer – although that offer itself had now expired (Tabled).
>
> ...
>
> Mr Clay SC advised that, after short consideration, it was his view that if there was any procedural irregularity in the calling of the executive committee meeting, then it was not such that it would invalidate the decision of the executive committee.

The minutes recorded that six of the seven members of the executive committee present at the meeting voted in favour of "the settlement offer" based on the advice of Senior Counsel. At the conclusion of the meeting, Mr Burns of the executive committee spoke to Senior Counsel and told him that the executive committee had voted to accept his advice and requested that

Senior Counsel "please settle the matter on the best terms possible in accordance with the Yaus' latest offer".

The Settlement

At 9:31pm on 13 August 2013, Senior Counsel for the owners corporation sent an email to Counsel for the Yaus putting a settlement offer in the same terms as the Yaus' last offer. At 9:50pm on 13 August 2013, Counsel for the Yaus emailed Senior Counsel for the owners corporation to indicate that the Yaus would consider the settlement offer of the owners corporation and provide their Counsel with instructions the next morning.

Prior to commencement of the hearing on 14 August 2013, the parties' respective Counsel had a conversation in which the Yaus' Counsel indicated that the Yaus were willing to settle the matter on similar terms to their previous offer with some alterations. Counsel for the Yaus then provided Senior Counsel for the owners corporation with a revised version of the settlement offer that had previously been the subject of discussion.

Later that morning, Senior Counsel for the owners corporation indicated to Counsel for the Yaus that the owners corporation was prepared to settle the matter on the terms of the Yaus' amended offer "with just some working out of the orders". Senior Counsel noted that there were "some nervous members of the executive committee who don't really want to make a decision because of what others might say". The parties' respective Counsel then had a further discussion about the settlement offer and made some handwritten alterations to the document that would be handed up to the trial Judge to record the terms of the orders to be made by the Court to dispose of the proceedings.

Shortly afterwards, the trial Judge was recalled and, by consent, made orders in accordance with the Short Minutes of Order handed up by the parties' respective Counsel. The orders made by the Court required the owners corporation to, relevantly:

(a) repair and connect the Yaus' commercial lot to the grease arrestor and kitchen exhaust system on common property;

(b) pay damages to the Yaus in the amount of $285,000 within 28 days and liquidated damages in the amount of $600 per day for each day that the owners corporation

failed to complete the repairs to the grease arrestor and kitchen exhaust system by 20 October 2013; and

(c) pay the Yaus' costs of the proceedings.

Later that day, Senior Counsel for the owners corporation sent a copy of the orders made by the Court to members of the executive committee and one of the committee members, Mr Burns, took steps to organise for the repairs to be carried out to the grease arrestor and kitchen exhaust system pursuant to the orders of the Court. At about that time, an email was sent by a committee member to the lot owners advising that the proceedings had been settled and that full details of the settlement would be provided to owners in due course.

On 26 August 2013, the executive committee held a meeting at which the settlement of the proceedings was discussed. The notice of the meeting (which was sent to owners) indicated that the settlement of the proceedings was a matter to be considered at the meeting. The minutes of the executive committee meeting recorded that the executive committee had settled the proceedings based on the advice of Senior Counsel.

On 27 August 2013, the executive committee became aware of the decision of the NSW Court of Appeal in *Owners Strata Plan 50276 -v- Thoo* [2013] NSWCA 270 in which the Court of Appeal held that a lot owner was not entitled to recover damages against an owners corporation for breach of its statutory duty to maintain and repair common property in section 62 of the 1996 Act. Shortly afterwards the solicitor for the owners corporation provided advice to the effect that there did not appear to be any grounds for the owners corporation to resile from the settlement agreement with the Yaus.

On 2 September 2013, a member of the executive committee sent an email to owners attaching the minutes of the committee meeting held on 26 August 2013, the advice of Senior Counsel recommending that the proceedings be settled and a copy of the orders made by the Court giving effect to the settlement. On 17 September 2013, the solicitor for the owners corporation sent a cheque for $285,000 to the solicitor for the Yaus in payment of the damages required to be paid in accordance with the Court's orders.

By late October 2013, the repairs required to be undertaken by the owners corporation to the grease arrestor and kitchen exhaust system pursuant to the orders of the Court were substantially completed. From about that time, the Yaus commenced to carry out the works

they were required to perform in accordance with the Court's orders and spent in excess of $57,000 doing so. By December 2013, the Yaus had connected their commercial lot to the kitchen exhaust system and grease arrestor.

On 18 February 2014, the owners corporation held a general meeting at which it passed resolutions to obtain legal advice on "all available options to the owners corporation" in relation to the proceedings with the Yaus and raise a special levy in the sum of $821,151 to pay for the repairs, damages and costs associated with the proceedings. On 3 June 2014, the owners corporation paid the Yaus $2,472.61 by way of interest on the damages sum of $285,000.

A Change of Mind

On 17 June 2014, the owners corporation held an annual general meeting. At the meeting, the following resolution was passed:

> Resolved that the owners corporation disagrees with the decision of the executive committee made on 13 August 2013 to settle in the case of Yau and Yau -v- Owners SP57164 and disagrees with the terms of the "consent orders" proposed by the Yaus and agreed to by the executive committee.

On 30 July 2014, the strata managing agent of the owners corporation wrote to Mr and Mrs Yau to advise that the owners corporation believed it had grounds to impugn the settlement of the proceedings and that if agreement could not be reached to overturn that settlement, the owners corporation would commence proceedings to set aside the consent orders made by the Court giving effect to the settlement with the Yaus.

On 31 July 2014, the NSW Civil and Administrative Tribunal (on the application of a lot owner) made various orders by consent including an order that the resolution made by the executive committee on 13 August 2013 in respect of the settlement of the proceedings, was of no force or effect as proper notice of that committee meeting had not been given.

Fresh Proceedings to Overturn the Settlement

On 17 December 2014, the owners corporation commenced proceedings in the Supreme Court seeking to impugn the settlement with the Yaus.

In the fresh proceedings, the owners corporation submitted that the executive committee did not have authority to instruct its Senior Counsel to enter into the settlement agreement on behalf of the owners corporation. This was for two reasons.

First, the owners corporation argued that proper notice had not been give of the executive committee meeting held on the evening of 13 August 2013 (which was the source of the instruction for Senior Counsel to settle the proceedings with the Yaus). This submission was made because the 1996 Act required the executive committee to give notice of its intention to hold a meeting at least 72 hours before the time fixed for the meeting by written notice given to each owner and executive committee member and ensure that the meeting notice specified when and where the meeting would be held and contained a detailed agenda for the meeting: see cl 6, Sch 3, 1996 Act.

The owners corporation contended that the executive committee did not give notice as required by the legislation as no notice was given to owners (other than to those who were members of the executive committee). The owners corporation argued that by reason of the failure to comply with the notice requirements in the legislation, the meeting of the executive committee was invalid as a result of which the resolution of the executive committee to instruct Senior Counsel to settle the proceedings with the Yaus was invalid or of no force or effect.

Second, the owners corporation contended that the executive committee did not have authority to instruct Senior Counsel to enter into the settlement agreement with the Yaus because certain parts of the agreement either involved matters that were reserved for the owners corporation to decide in general meeting or involved expenditure which the executive committee was precluded from incurring.

For example, the settlement agreement with the Yaus required the owners corporation to pass special resolutions in general meeting revoking a previous special resolution which had been passed not to maintain and repair the grease arrestor and kitchen exhaust system and required the owners corporation to make alterations to the common property which could only be authorised by special resolution passed in general meeting. By way of further example, the owners corporation claimed that the executive committee was forbidden from approving terms of settlement which committed the owners corporation to spending money which the owners corporation's annual budget did not allow, such as the $285,000 in damages that

would be payable to the Yaus, as the 1996 Act prohibited the owners corporation from spending monies on items not included in its annual budget.

Decision

The Court observed that the 1996 Act did not in express terms specify the consequences of a failure for an executive committee to comply with the requirements for giving notice of its meetings in the legislation. In particular, the Court noted that the legislation did not expressly state whether or not an executive committee meeting convened contrary to its requirements was invalid or that decisions made at such a meeting were invalid or of no force or effect. For that reason, the Court surmised that it was necessary to undertake a task of statutory construction in order to ascertain the consequences of the failure to adhere to the notice requirements for executive committee meetings in accordance with the dicta of the High Court in *Project Blue Sky Inc -v- Australian Broadcasting Authority* (1988) 194 CLR 355.

Regulation of Power Only

The Court concluded that the provisions concerning notice of meetings of the executive committee contained in the 1996 Act "regulate the exercise of powers by the executive committee [but] compliance with them is not a necessary condition for the existence of power on the part of the executive committee." The Court was fortified in its conclusion by the decision of the NSW Court of Appeal in *2 Elizabeth Bay Road Pty Ltd -v- Owners – Strata Plan No. 73943* [2014] NSWCA 409 where the Court of Appeal concluded that a failure of an owners corporation to pass a resolution in general meeting authorising the taking of legal action in breach of section 80D of the 1996 Act did not deprive the owners corporation of power to take that legal action or render the legal action invalid.

No Legislative Intention to Invalidate

Further, the Court did not discern a legislative intention to invalidate any act of the executive committee that was carried out without the committee complying with the notice provisions for its meetings in the legislation. This is because those notice provisions did not expressly indicate that a meeting held in breach of those provisions would be invalid, even though other parts of the legislation (for example, clauses 9(4) and 11(2) in Schedule 3 to the1996 Act)

expressly recognised the notion of an invalid executive committee meeting or a meeting of the committee having no force or effect.

Moreover, the Court observed that a Strata Schemes Adjudicator was empowered to make an order invalidating any resolution of persons present at a meeting of an owners corporation if the provisions of the legislation had not been complied with in relation to the meeting. The Court stated that that provision suggested that such non-compliance did not itself result in invalid resolutions or decisions and, instead, provided a remedy which may be given in appropriate circumstances.

Finally, the Court concluded that a failure to comply with the notice requirements for committee meetings in the legislation may take a number of forms. Some failures may be significant and others minor. In those circumstances, the Court held that it was difficult to see why the objects of the legislation would be promoted by holding that every resolution of an executive committee made at a meeting convened contrary to the notice requirements was invalid and of no effect.

For those reasons, the Court held that the failure of the executive committee to comply with the requirements of clause 6 in Schedule 3 to the 1996 Act in relation to its meeting on 13 August 2013 did not render the meeting invalid or cause the resolution of the executive committee to instruct its Senior Counsel to settle the proceedings with the Yaus to be invalid or of no effect.

Subject Matter of the Agreement

The Court then dealt with the owners corporation's claim that even if the executive committee meeting held on 13 August 2013 was valid, the committee did not have authority to instruct its Senior Counsel to enter into the settlement agreement with the Yaus due to the subject matter of that agreement. Section 21(2) of the 1996 Act relevant provided as follows:

> 2. ... the following decisions may not be made by the executive committee:
>
> (a) a decision that is required by or under any Act to be made by the owners corporation by unanimous resolution or special resolution or in general meeting;

> (b) a decision on any matter or type of matter that the owners corporation has determined in general meeting is to be decided only by the owners corporation in general meeting.

The owners corporation argued that the subject of the settlement agreement with the Yaus involved decisions that were required to be made by the owners corporation in general meeting, for example, decisions requiring the passage of special resolutions to revoke earlier special resolutions and to carry out alterations to the common property in connection with the grease arrestor and kitchen exhaust system.

The owners corporation also contended that section 80A of the 1996 Act prohibited the executive committee from spending more than 110% of the amount of any item included in its annual budget and that the budget of the owners corporation at the time of the settlement agreement did not include line item entries for payment of damages or costs to the Yaus.

Executive Committee had Power to Authorise Agreement to Commit the Owners Corporation

The Court rejected these contentions. The Court concluded that the executive committee had power to instruct its Senior Counsel to settle the proceedings with the Yaus. The Court held that the decision made by the executive committee to instruct Senior Counsel to settle the proceedings was not a decision that fell within section 21(2) or conduct that involved the executive committee spending money contrary to section 80A of the 1996 Act.

The Court found that the decision of the executive committee ought to be characterised as one to authorise its Senior Counsel to settle the proceedings with the Yaus along certain lines. However, the giving of an undertaking in the settlement agreement with the Yaus to pass a special resolution is not the same as the passing of the special resolution itself, which remained a matter for the owners corporation in general meeting. This applied with even more force where the decision was one to authorise an agent to enter into an agreement which includes an undertaking to pass a special resolution as distinct from the passing of the special resolution itself. Consequently, the Court did not consider that the decision of the executive committee to authorise its Senior Counsel to enter into an agreement which included an undertaking to pass a special resolution should be regarded as a decision that fell within section 21(2) of the 1996 Act.

The same reasoning applied to the subject matter of the settlement agreement which required the owners corporation to carry out repairs or alterations to the grease arrestor and kitchen exhaust system which could only be authorised by special resolution passed in general meeting. In other words, the Court concluded that a decision to authorise an agent to enter into an agreement which includes an obligation to carry out alterations to common property was distinct from a decision under section 65A of the 1996 Act to authorise alterations to common property.

And a decision by the executive committee to authorise its Senior Counsel to settle the proceedings with the Yaus on terms that included obligations on the part of the owners corporation to pay damages and costs did not amount to the spending of money by the executive committee in contravention of section 80A.

What About NCAT's Order?

The Court also concluded that the consent order made by the NSW Civil and Administrative Tribunal on 26 August 2014 to invalidate the resolution of the executive committee to authorise its Senior Counsel to settle the proceedings with the Yaus did not operate to retrospectively remove the power and authority the executive committee had to instruct its Senior Counsel. Neither did the resolution passed at the annual general meeting held on 17 June 2014 to the effect that the owners corporation disagreed with the decision of the executive committee to settle the proceedings.

The Settlement Agreement was Binding

For all of those reasons, the Court concluded that Senior Counsel of the owners corporation had actual authority to make the settlement agreement on its behalf and, accordingly, the settlement agreement became binding on the owners corporation.

Ratification

Finally, the Court concluded that even if the executive committee's decision to instruct its Senior Counsel to settle the proceedings was of no force or effect, the conduct of the owners corporation between 14 August 2013 and January 2014 ratified the making of the settlement agreement. This was because shortly after the settlement, the lot owners were advised that the proceedings with the Yaus had settled, the settlement was recorded in the minutes of the

next executive committee meeting which was circulated among owners together with a copy of the orders made by the Court and as a result of those matters the owners had clearly been informed by that time of the details of the settlement.

Moreover, minutes of the executive committee meetings held on 26 August 2013 and 26 September 2013 referred in detail to the repairs the owners corporation would carry out pursuant to the orders made by the Court and damages having been paid to the Yaus as a consequence of which the owners were aware that action was being taken on behalf of the owners corporation to comply with its obligations under the settlement agreement and the orders of the Court. Despite that, no steps were taken by the owners corporation to do anything to disavow the settlement or even question its validity and, throughout the relevant period, the owners corporation acted consistently with having become bound by the settlement agreement and orders of the Court.

The Court concluded that the conduct of the owners corporation in taking steps to perform the settlement agreement and failing to disavow it or question its validity, was unequivocal and having knowledge of the facts and circumstances in which the settlement agreement was made on its behalf by its Senior Counsel, the owners corporation clearly adopted the agreement as binding on it.

For those reasons, even if Senior Counsel lacked authority to make the settlement agreement on behalf of the owners corporation, the subsequent ratification of the agreement by the owners corporation meant that Senior Counsel was treated as having had the requisite authority.

Conclusion

For those reasons, the Court dismissed the owners corporation's claims for relief as a result of which the owners corporation was bound by the settlement agreement and required to comply with the orders made by the Court in the proceedings with the Yaus.

Comment

Yau's case appears to have been correctly decided. The decision is consistent with that of the NSW Court of Appeal in *2 Elizabeth Bay Road* where legal action taken by an owners corporation without an authorising resolution in breach of section 80D of the 1996 Act was

not held to be incompetent or invalid. Even though the 1996 Act was repealed and replaced on 30 November 2016 by the *Strata Schemes Management Act 2015*, there does not appear to be anything in the new legislation which suggests that *Yau* would have been decided any differently under the new legislation.

However, *Yau* is impossible to reconcile with *Owners – Strata Plan No. 62022 -v- Sahade* [2013] NSWSC 2002. There, the NSW Supreme Court held that a general meeting of an owners corporation of which insufficient notice had been given (six days instead of the seven day notice period required by the 1996 Act) was invalid and the decisions made at the meeting of no force or effect.

The decision in *Yau* also stands in contrast to a number of other decisions of the NSW Supreme Court and the Court of Appeal which had held that certain requirements of the 1996 Act were mandatory and an act done in breach of those provisions was invalid or of no force or effect: see *Eventang Development (Pyrmont) Pty Ltd -v- Owners Strata Plan 51573* [2001] NSWSC 452 (where votes cast in contravention of the proxy voting requirements in the legislation were held to be invalid) and *Owners – Strata Plan No. 64972 -v- Rinbac Pty Ltd* [2009] NSWSC 745 (where it was held that a caretaker agreement which delegated functions to a caretaker in breach of the prohibitions in the 1996 Act concerning delegating functions of an owners corporation to a person who did not hold a strata managing agent's licence was invalidated).

Ultimately, *Yau* and these other cases demonstrate that the legal effect of an act done in breach of legislation will depend on the specific provision of the legislation that is contravened read in the light of the statutory scheme as a whole.

The practical effect of the decision in *Yau* is that greater flexibility is given to an owners corporation and its executive committee as a result of the fact that strict compliance with the legislative provisions regulating their decision making powers is not always necessary.

James -v- The Owners – Strata Plan No. 11478; The Owners – Strata Plan No. 11478 -v- James [2016] NSWSC 1558

Introduction

These proceedings concerned a dispute between the owners corporation of a strata title apartment building in Tamarama, Sydney and the owner of lot 3 in the building, Ms James. Ms James sued the owners corporation and its strata managing agent claiming damages in negligence and also sought relief based on claims of oppression and fraud on the minority. In short, Ms James claimed that the wrongful conduct of the owners corporation and its strata manager had caused her to suffer financial loss primarily in the form of strata levies which she claimed should not have been imposed at all or which were excessive in amount. The owners corporation sued Ms James to recover overdue strata levies. Both proceedings were heard concurrently.

The Facts

Compulsory Appointment of Strata Manager

In February 2009, the Consumer, Trader and Tenancy Tribunal appointed Advanced Community Management Pty Ltd (**ACM**) as the strata managing agent of the owners corporation to exercise all of its functions. That order was made on the application of Ms James on the basis that the owners corporation was in a dysfunctional state. ACM's appointment was extended by the Tribunal on several occasions up until 2013 after which it acted as strata managing agent pursuant to agreements with the owners corporation.

Repairs

Soon after its initial appointment, ACM formed the view that the building was in dire need of repair. The owners corporation had obtained a report from a consulting engineer which confirmed as much.

On 4 May 2009, the owners corporation held its annual general meeting at which it raised contributions to its administrative and sinking funds and a "special levy" in the sum of $275,000 for part-payment of major building repairs. On 15 June 2009, the owners corporation held an extraordinary general meeting at which it was resolved to accept a quote

from a remedial builder in the sum of $671,275 to carry out the building repairs. The owners corporation also resolved to enter into a loan contract for credit up to $440,000 to fund the building repairs. A special levy of $493,341 was struck for the purpose of repaying the loan plus interest.

At a further general meeting held on 10 July 2009, the owners corporation resolved to rescind the acceptance of the quotation from the remedial builder and, instead, accept another quotation from a different builder for $653,110.50 for the building repairs. At a subsequent general meeting held on 24 August 2009, the owners corporation resolved to accept a variation submitted by the remedial builder and to enter into a contract with the builder for $709,187.60. All of those decisions were made by ACM in its capacity as the compulsory strata managing agent of the owners corporation.

The building repairs commenced on 15 October 2009, the repairs suffered considerable delays. By July 2011, the bulk of the repairs had been completed, although some of the repairs continued in early 2012.

Construction of Balconies

In April 2010, ACM turned its attention to the construction of balconies on the building. By that stage, one of the owners, a Mr Dunkley, had obtained development consent from the local council to permit the construction of balconies adjacent to each of the six lots in the building. But, up until that point, the owners could not agree on whether or not the balconies should be constructed and, if so, whether external stairs at the rear of the building (which gave Ms James direct access from lot 3 to the rear yard) should be demolished.

On 23 June 2010, a general meeting of the owners corporation was held at which a decision was made for an architect to be instructed to prepare drawings concerning the construction of balconies for the comment of the owners. On 31 August 2010, a general meeting was held at which some owners objected to the drawings of the balconies that had been prepared by the architect. ACM instructed the architect to finalise those drawings, with some modifications, to enable a development application to be lodged with the local council for the construction of the balconies.

Another general meeting was held on 25 November 2010 at which ACM was instructed to make final alterations to the drawings and lodge the development application with the local council for the balconies, which was done on 30 November 2010.

Fire Safety Works

In December 2010, the local council gave notice of an intention to issue fire safety orders against the owners corporation. On 20 May 2011, two fire safety orders were issued by the Council. The first order required the repair or reconstruction of external exit stairs, landings and balustrades at the rear of the building. The second order required the installation of various fire protection measures throughout the building.

On 15 June 2011, the Council granted development consent for the balcony construction. Some of the conditions of the development consent provided for the undertaking of fire safety upgrade works. On 17 June 2011, the Council revoked the fire orders as a consequence of the conditions of the development consent for the balcony construction requiring fire upgrades to be carried out to the building.

On 4 August 2011, the owners corporation held a general meeting at which it was resolved to raise a special levy of $220,000 to fund the fire upgrade. On 8 December 2011, the Council gave notice of an intention to issue a fire order essentially in the same terms as the development consent conditions which required fire upgrade works to be performed.

On 19 December 2011, the owners corporation held a general meeting at which resolutions were passed to enter into contracts for the fire safety works and for the making of various by-laws concerning the construction and the exclusive use of the balconies, the demolition of existing stairs on the exterior of the building and the construction of new stairs to provide access to two lots in the building, lots 1 and 2.

Antecedent Supreme Court Proceedings

On 19 December 2011, Ms James commenced proceedings in the Supreme Court. In those proceedings Ms James was granted interlocutory relief restraining the owners corporation from carrying out some of the fire safety works. On 4 June 2012, Ms James' claims for relief were heard and determined by Ball J. His Honour upheld Ms James' complaints in respect of the by-laws concerning the exclusive use of the balconies but otherwise dismissed her

complaints, including in relation to the validity of the by-law passed relating to the construction of the balconies: see *James -v- Owners Strata Plan No. SP11478 (No. 4)* [2012] NSWSC 590.

Further Decisions to Construct the Balconies and Demolish the Rear Stairs

By late June 2012, the fire safety works were completed. In mid to late-2012, the owners corporation held three general meetings at which further by-laws were made concerning the exclusive use of the balconies. Those by-laws granted certain owners exclusive use of the common property to be occupied by the balconies.

On 29 April 2013, the owners corporation held an annual general meeting at which there was discussion about the construction of balconies. There was also discussion at that meeting about the removal of the rear stairs of the building. On 29 August 2013, a general meeting was held at which a resolution was passed for the removal of the external stairs and the bricking up of the opening of the rear wall of the building. The carrying out of those works would have removed the means of direct access from lot 3 (which was owned by Ms James) to the rear yard.

On 7 October 2013, ACM's tenure as the compulsory strata managing agent of the owners corporation by way of orders made by the Tribunal ended. Up until then, all decisions had been made by ACM on behalf of the owners corporation. From that date, ACM acted as the strata managing agent of the owners corporation pursuant to agreements with the owners corporation.

On 3 January 2014, the owners corporation held a meeting and resolved to accept a quotation for the removal of the rear stairs in the sum of $48,400 and a further resolution was passed to raise a special levy of $66,000 to fund the removal of the rear stairs.

Further Supreme Court Proceedings

Ms James did not want the rear stairs to be demolished. Shortly after the decision to demolish the rear stairs was made, she commenced the proceedings in the Supreme Court against the owners corporation and its strata manager. Ms James secured an interlocutory injunction restraining the owners corporation from demolishing the rear stairs.

Construction of the Balconies Progresses

On 7 April 2014, the owners corporation held a meeting at which it resolved to progress the proposal to construct the balconies by engaging a structural engineer to provide design documentation and structural details for the balconies. A resolution was also passed to take legal action against Ms James to recover outstanding levies. Those proceedings were subsequently transferred to the Supreme Court and were held concurrently with Ms James' proceedings against the owners corporation and its strata manager.

During the latter half of 2014, the owners corporation, or its executive committee, passed resolutions to progress the balcony construction project. On 27 March 2015, the owners corporation held a meeting at which it resolved to engage a builder to construct the balconies for approximately $930,000 and to raise a special levy of $1 million to fund the balcony construction program. On 15 May 2015, a resolution was passed by the owners corporation to enter into a loan contract for a maximum amount of credit of $250,000 to partially fund the balcony construction program should Ms James not pay her levies on time.

By October 2015, construction of the balconies had commenced and the construction works were virtually complete by late May 2016.

Ms James' Claim in Negligence

Ms James pleaded that ACM owed her a duty of care in carrying on the functions of the owners corporation, including a duty to carry on those functions reasonably and in accordance with the *Strata Schemes Management Act 1996* (**1996 Act**) so as to prevent the infliction of loss and damage upon her. Ms James also pleaded that ACM owed a duty to have regard to the respective financial positions of the individual owners in the strata scheme, including Ms James, and their capacity to bear the costs of and associated with the repair and development of the common property when exercising functions in respect of the repair and development.

Decision

A Novel Duty of Care

The trial Judge observed that the duty of care suggested by Ms James was novel. The Judge observed that in *Caltex Refineries (Qld) Pty Ltd -v- Stavar* (2009) 75 NSWLR 649, the NSW Court of Appeal had formulated a non-exhaustive list of salient features or factors that may in a given case determine whether or not it is appropriate to impose a duty to take reasonable care to avoid harm or injury in novel circumstances.

No Duty of Care Exists

The trial Judge placed considerable emphasis on the statutory context in which ACM acted as a compulsory strata managing agent of the owners corporation. The trial Judge observed that the strata manager, as the compulsory managing agent, was placed in a position akin to that of the owners corporation itself: see *Owners – Strata Plan 5709 –v- Andrews* [2009] NSWCA 189. The Judge also observed that the relationship between an owners corporation and the owners of lots in the strata scheme involves a statutory trust citing *Owners Strata Plan 50276 –v- Thoo* [2013] NSWCA 270 in support of that proposition.

The Judge concluded that for that reason an owners corporation, as trustee of the common property, only has duties to act in a positive way to the extent that those duties are imposed by the strata titles legislation. The Judge also observed that the legislation establishes a detailed regime that sets out the functions of an owners corporation and provides for the determination of disputes in relation to the exercise of those functions: see *Ridis -v- Strata Plan 10308* (2005) 63 NSWLR 449. The Judge concluded (at [106]) that there would be "incongruity between the statutory regime and a duty of care of the type alleged by Ms James which is centred upon the avoidance of loss through necessary or excessive levies".

The Judge observed that one of Ms James' complaints was that ACM had negligently performed the owners corporation's duty to repair common property under section 62 of the 1996 Act. However, His Honour observed that lot owners did not have a right to sue an owners corporation for damages for failure to properly discharge that duty as a consequence of the decision of the Court of Appeal in *Thoo.* For that reason, the Judge considered that recognition of the duty of care alleged by Ms James would be incongruous in that respect as well.

Duty Alleged Impossible to Reconcile with Statutory Duties

The Judge considered that the duty of repair of common property imposed by section 62 was a strict duty and in those circumstances, it was not possible to reconcile with that strict duty a duty of care on the part of an owners corporation or its strata managing agent to have regard to the financial positions of individual lot owners and their capacity to bear the costs of repair of common property.

The Judge also observed that it would be difficult to reconcile the duty for which Ms James contended to the extent that it would require consideration of the capacity of individual owners to bear costs when compared to section 78(2) of the 1996 Act which requires that contributions are payable in shares proportionate to unit entitlements.

The Judge considered that those factors told strongly against the existence of the duty of care alleged to exist by Ms James. Ultimately, the Judge did not consider that it would be appropriate to impute a duty of care of the character alleged by Ms James because that would cut across the statutory regime to an intolerable extent. Even if the duty of care for which Ms James contended did exist, the Judge was not satisfied that ACM had been negligent.

Fraud on the Minority?

Ms James further argued that the powers conferred on ACM in its capacity as the compulsory strata managing agent of the owners corporation were intended to cure the dysfunctional nature of the owners corporation and did not extend to the undertaking of development works (without obtaining Ms James' consent) such as the construction of the balconies. The trial Judge did not accept those contentions.

Ms James alleged that the decision made by ACM, on behalf of the owners corporation, to strike a special levy to fund the fire upgrade works and to pursue the balcony construction program were oppressive and a fraud on minority. The trial Judge did not accept those allegations either.

The trial Judge concluded that the resolution passed on 4 August 2011 to strike a special levy of $220,000 to pay for the fire upgrade works was a bona fide exercise of power by ACM for a purpose within the scope of that power. The Judge reached that conclusion because the evidence revealed that from at least December 2010, it was clear that the local council would

require fire upgrade works to be carried out on the building. The Judge was also unable to accept that the imposition of the special levy was in any sense oppressive to Ms James. His Honour held that the owners corporation was taking steps to be in a position where it could meet expected expenditure on the fire upgrade works and nothing more.

The Judge considered that proceeding with the construction of the balconies was a decision ACM had power to make and that decision was not made for a purpose outside the scope of the powers of an owners corporation to alter or add to common property under section 65A of the 1996 Act.

Nor did the Judge consider that Ms James had been oppressed as a result of the decision made by ACM on behalf of the owners corporation to demolish the rear stairs that provided a means of access from lot 3 to the rear yard. The Judge considered that there had been a change in circumstance whereby the rear stairs had been demolished and balconies had been constructed in their place along with new stairs leading from the balconies for lots 1 and 2 to the rear yard. The Judge concluded that the amenity of lot 3 was clearly enhanced by the construction of the balcony adjacent to it and that access to the rear yard was still available from lot 3 albeit that access was no longer as easy or convenient as it once was.

Ultimately, Ms James had not shown that lot 3 as a whole had been adversely affected, or affected in any less advantageous way compared to any of the other lots, by the balcony construction. For example, Ms James adduced no valuation evidence to show that the value of lot 3 had been adversely affected by the construction of the balconies.

The Judge also rejected Ms James' claims that ACM's failure to respond to her requests for a payment plan concerning overdue levies amounted to unfair or discriminatory conduct sufficient to amount to oppression.

Conclusion

In the result, the Court dismissed Ms James' claims in negligence and those claiming oppression and fraud on the minority and held that the owners corporation was entitled to recover from Ms James the levies claimed by it.

Comment

The most important aspect of the *James*' case is the Court's conclusion that a strata managing agent (and an owners corporation) did not owe a duty to exercise reasonable care in the exercise of its functions (including its duties to repair common property and raise contributions to its administrative and sinking funds) so as to prevent an owner suffering economic loss.

That conclusion was undoubtedly correct when viewed in the context of the statutory scheme that then existed under the 1996 Act. The position may, however, be different under the *Strata Schemes Management Act 2015* which has reintroduced in section 106(5) the private cause of action for a lot owner to claim damages from an owners corporation for a breach of the statutory duty to repair common property.

McElwaine -v- The Owners – Strata Plan No. 75975 [2016] NSWSC 1589

Introduction

These proceedings concerned a dispute between the owner of a residential lot in a multi-storey apartment complex at Newcastle East and the owners corporation of the complex. The complex was affected by building defects which allowed water to enter and damage the owner's lot. Those defects were situated in the common property of the complex. The owner claimed that as a result of the water damage his unit was unfit for habitation. He sued the owners corporation for damages for the diminution in value of his unit, claimed to be about $860,000, loss of rent and expenses incurred in obtaining reports concerning the property damage.

It appears that the Statement of Claim pleaded a cause of action based on a breach of the statutory duty of the owners corporation to maintain and repair common property in section 62 of the *Strata Schemes Management Act 1996* (**1996 Act**). The owners corporation moved to strike out the Statement of Claim as a result of the decision of the NSW Court of Appeal in *Owners Strata Plan 50276 -v- Thoo* [2013] NSWCA 270. In *Thoo* the Court of Appeal had held that an owner was not entitled to claim damages against an owners corporation for a breach of a statutory duty to maintain and repair common property arising under section 62 of the 1996 Act.

Faced with the difficulties arising from the decision in *Thoo*, the owner amended his Statement of Claim to plead a breach of a common law duty the owners corporation was said to owe him not to continue a nuisance or to adopt a nuisance. The strike out motion came before the Court in the form of a separate question, namely "whether the legal effect of Chapter 5 of the *Strata Schemes Management Act 1996* is that the plaintiff has no remedy against the defendant in common law nuisance in relation to the claim pleaded in the proposed Further Amended Statement of Claim".

Decision

The trial Judge observed that Chapter 5 of the 1996 Act contained a number of provisions dealing with the resolution of disputes between unit holders and the owners corporation. The Judge then observed that the position of the owners corporation in respect of the common property was akin to that of a trustee and the individual owners were equitable tenants in

common of the common property. The Judge held, following *Thoo*, that a unit owner's status as equitable owner of an interest in the common property is not the source of any right against the owners corporation. The Judge also observed that, as a result of the decision in *Thoo,* breach of section 62 did not give rise to a private right of damages. His Honour observed that the rationale for this view was that the detailed provisions for resolving strata disputes contained in Chapter 5 of the 1996 Act provided an exclusive remedy for breach of statutory duties.

The Judge then turned to whether a cause of action in nuisance was nullified by the provisions of the 1996 Act. In considering those provisions, the Judge observed the following:

> [22] ... the scheme [of the *Strata Schemes Management Act 1996*] is that the owners corporation will do its duty, it will survey the state of repair of the building and the cost of keeping it in good repair, and will provide information to the annual general meeting so that levies can be made so that there will be a fund to meet the expenses of keeping the building in proper repair. If there is to be allowed common law claims by unit holders which will have to be met by the owners corporation, that is the sum total of unit holders, it would completely throw out of balance any scheme for ensuring that there is always a fund available to meet the cost of keeping the building in good repair and this tells against there being available to a unit holder a common law cause of action for a matter that would come within Ch 5 of the SSM Act.

The Judge then reviewed the dispute resolution provisions contained Chapter 5 of the 1996 Act. His Honour observed that there was no power for an Adjudicator to order payment of damages. In His Honour's view, that was significant. However, section 226(1) of the 1996 Act was in the following relevant terms:

> Nothing in this Act derogates from any rights or remedies that an owner, mortgagee or charge of a lot or an owners corporation or covenant chargee may have in relation to any lot or the common property apart from this Act.

Section 226(2) relevantly provided:

> In any proceedings to enforce a right or remedy referred to in sub-section (1), the Court in which the proceedings are taken must order the plaintiff to pay the defendant's costs if the Court is of the opinion that, having regard to the subject matter of the proceeding,

> the taking of the proceedings was not justified because this Act ... makes adequate provision for the enforcement of those rights or remedies.

The trial Judge then made the following observations about section 226:

> [31] Section 226(2) tends to give the view that it is possible for a person to commence proceedings for alleged breach of statutory duty or common law tort of nuisance or negligence and that the only consequence is that if the matter is covered by the SSM Act adequately, the Court is prohibited from giving the plaintiff any costs ... However, it seems to me that in the light of the decisions of the Court of Appeal such as *Ridis* and *Thoo*, that one would need to read it down so that the legislature recognised that there was a possibility that there might be a right of an owner which was not mandated to be dealt with under the dispute proceedings in Ch 5 but which could have been brought under Ch 5 in which case as a failsafe provision deprivation of costs was provided as a disincentive. It seems to me that that is more in accordance with the decisions of the Court of Appeal on the structure of the SSM Act generally than a more expansive view of s226(2).
>
> [32] Although Tobias AJA in *Thoo's* case was speaking in terms of an action to enforce a statutory duty, it seems to me that the interpretation of the scheme of the SSM Act taken by the Court of Appeal leads one to the view that the same applies to a common law duty. The SSM Act intends that disputes, whether or not they are also involved in a common law right, are to be dealt with in the adjudication system under the Act and not independently.
>
> [33] ... although there is no direct authority on the point, it seems to me that the reasoning of the Court of Appeal in analogous cases involving claims against the body corporate for breach of statutory duty that the legislation intended that claims by unit holders whether for statutory duty or common law duty were to be dealt with under the Act and that the common law claims are not available.

For those reasons, the Judge concluded that the 1996 Act operated so that the owner had no remedy against the owners corporation in common law nuisance for damages. The owner's claim was therefore dismissed.

The Owners – Strata Plan No. 72381 –v- The Owners – Strata Plan No. 71067 [2016] NSWSC 1857

Introduction

These proceedings concerned a dispute as to what constituted "shared facilities" under the strata management statement for World Tower in the World Square complex in the Sydney CBD. The dispute centred on whether or not a lobby on level 10 of World Tower was a shared facility within the meaning of the strata management statement and could be altered by one of the building owners without the consent of the other owners.

The Facts

World Square was originally divided into three vertical portions consisting of low-rise, mid-rise and high-rise portions of the building. The low-rise and mid-rise portions of the building were strata subdivided. Subdivision of those portions of the building resulted in the registration of a strata management statement.

The strata management statement operated as an agreement under seal binding, relevantly, the owners of the low-rise, mid-rise and high-rise portions of World Square. The strata management statement dealt with facilities in World Square that were shared by the owners and occupiers of the different components of the building (**shared facilities**).

Level 10 of the building forms part of the low-rise component of World Tower. There is a lobby area on level 10 of the building. Access from the entrance to the lifts for the mid-rise and high-rise portions of World Tower is gained through that lobby area. The owner of the low-rise component installed a glass/mirrored doorway in an internal wall situated within level 10.

The owners of the mid-rise component of the building claimed that the internal wall was a shared facility under the strata management statement which the low-rise owners could not alter without their consent. By its Summons, the mid-rise owners sought an order requiring the low-rise owners to remove that doorway and reinstate the wall to its previous condition.

Decision

The resolution of the dispute turned on the proper meaning of the World Tower shared facilities under the strata management statement. The Court concluded that the intention of the strata management statement was to, relevantly, provide for access to the mid-rise portion and the high-rise portion of World Tower through the common property lobby of the low-rise portion on level 10, but that a sensible reading the management statement did not lead to the conclusion that every part of the lobby was intended to be a shared facility.

The Court considered that the management statement should not be read as conferring on the mid-rise owners any rights in relation to any part of the common lobby on level 10 beyond the rights that are reasonably necessary to enable the mid-rise owners, and their licensees, to gain access to the mid-rise lobby and mail room.

The Court observed that the wall in which the new doorway had been constructed by the low-rise owners was not to be regarded as part of the World Tower shared facilities simply because it had been erected on that part of the common property in the low-rise component on level 10 that was marked as a foyer on a plan and was intended to be referred to as the lobby.

The Court reached those conclusions largely because there was no suggestion that the erection of the new doorway, or the wall in which it was installed, interfered in any way with access to the mid-rise lobby and the mail room. The Court held that the intent of the strata management statement was to afford protection to the mid-rise owners and high-rise owners from interference with the facilities that were actually used to gain access to the lifts and other communal areas such as the lobby on level 10, not areas adjacent to the lobby such as the doorway and wall in which it was constructed.

The Owners of Strata Plan 76888 –v- Walker Group Constructions Pty Ltd [2016] NSWSC 541

Introduction

The plaintiff owners corporation claimed damages from the defendant builder and developer for work undertaken in the construction of a residential apartment building in the Sydney suburb of Rhodes. The owners corporation alleged that the builder and developer breached the statutory warranties as to the quality of the work involved in the construction of the building implied into the contract between them by section 18B of the *Home Building Act 1989*. It sought to enforce those warranties against the builder and developer.

The Facts

The proceedings were referred to a referee for enquiry and report. Following a five day hearing, the referee delivered his report. The parties then sought to have various parts of that report adopted or rejected.

The case centred on the attempt by the owners corporation to have aspects of the referee's report dealing with two categories of defects rejected. Those defects related to waterproofing of bathtub and shower recesses in the residential units and the compliance with fire safety requirements for the building.

The dispute about the rejection of the referee's findings concerning the waterproofing defects related to the scope of works necessary to repair those defects. The referee concluded that the waterproofing of the bathtubs and shower recesses was defective and presented an "ongoing and uncontrolled risk of water penetration in all the bathrooms where the sealant [on the bathtubs] is subjected to water ponding during showers." The core controversy related to the appropriate method to repair that defect.

The owners corporation's expert proposed that the walls surrounding the bathtubs be demolished and the bathtubs removed and then reinstalled so as to comply with the applicable Australian standard. The builder's expert proposed that the defect be corrected by relining the back and side walls of the shower recess with villa board over the existing tiles and then re-tiling over the new villa board, or by fixing a glass splashback over the existing tiles on those two walls.

The parties' experts agreed that either of the two repair methods proposed by the builder's expert were acceptable. The referee considered that meant that the owners corporation's expert conceded that full demolition and reconstruction of each bath was not required.

The referee rejected the argument of the owners corporation that the repair methodology of the builder's expert would not achieve "contractual conformity" because they involved either two layers of tiles or the splashback being fixed over the tiled walls, and that it was not reasonable to adopt either of those alternatives as both would reduce the size of each lot by 3 or 4mm, something that could not be done without the consent of each lot owner.

Decision

The Court upheld the referee's findings concerning the appropriate method of repair of the waterproofing defects. The Court concluded that the contractual obligation of the builder was to construct the bathrooms so that they complied with the waterproofing requirements of the Building Code of Australia. The Court held that the referee correctly concluded that each repair methodology proposed by the builder's expert achieved compliance with those requirements. Further, the Court observed that there was no evidence that either option involved any substantial or significant compromise in terms of amenity, utility or value so as to suggest it was not reasonable to adopt it.

The Court then turned to consider the submission of the owners corporation that each of those options would involve, in the absence of the lot owners' consent, an unlawful or unreasonable expropriation of lot property. The Court rejected that contention. The Court concluded that the owners corporation was entitled, pursuant to section 65 of the *Strata Schemes Management Act 1996,* to enter each of the lots in order to maintain and repair the common property in accordance with its obligation under section 62. The Court held that the owners corporation was entitled to enter the lots in order to maintain and repair the common property "notwithstanding that the undertaking of the repair and rectification work may add to the common property" (at [42]). The Court concluded that section 65A of the *Strata Schemes Management Act 1996* "does not require the owners corporation be authorised by a special resolution of the lot owners in order to do repair work which has that consequence".

In other words, the Court held that the rectification of the waterproofing defects in the bathrooms would involve nothing more than the repair of common property (not the alteration or addition of common property which required authorisation under section 65A)

and that there was nothing wrong with repairs to common property adding to the common property even if that meant the structures used during the repairs would encroach onto the lots.

The Court also rejected the owners corporation's challenge to the findings of the referee in relation to the fire defects.

Comment

The Court came to the surprising conclusion that an owners corporation is able to repair common property in a manner that will encroach on a lot without the consent of the owner of that lot. The rationale for this conclusion was that in the exercise of its statutory duty to repair common property, the owners corporation is able to add to the common property. That may be so. However, the unqualified conclusion of the Court that, in so doing, the owners corporation may erect a structure that encroaches onto a lot, without the consent of the lot owner, is, with respect, unconvincing.

The Owners – Strata Plan No. 13631 -v- McGrath & Anor (No. 1) [2016] NSWSC 1929

The Facts

These proceedings involved an application for judicial review of orders made by the NSW Civil and Administrative Tribunal dismissing an application of an owners corporation for a pecuniary penalty of $5,500 to be imposed on an owner in its scheme for contravening an Adjudicator's order and ordering the owners corporation to pay the owner's costs on an indemnity basis fixed in the amount of $30,086.25.

The owners corporation had obtained orders by an Adjudicator requiring the owner to reinstate certain common property he altered to its previous condition and restraining the owner from making any other alterations or additions to the common property without the consent of the owners corporation. The owners corporation alleged that the owner breached the Adjudicator's orders. It applied to the Tribunal for the owner to be penalised $5,500 for breaching the Adjudicator's orders.

The owners corporation's penalty application was unsuccessful. The Tribunal ordered the owners corporation to pay the owner's costs of the penalty application proceedings. That order was made pursuant to section 204 of the *Strata Schemes Management Act 1996*.

Section 204(1) was in the following terms:

> The Tribunal may also make an order for the payment of costs when making an order requiring the payment of a pecuniary penalty under this Part.

The owners corporation contended that having dismissed its application for a pecuniary penalty, the Tribunal did not have power to order it to pay the owner's costs pursuant to section 204 of the *Strata Schemes Management Act 1996*.

The owners corporation was not able to appeal against the Tribunal's costs order. This is because no statutory appeal rights existed. This meant the owners corporation's only right of redress was to apply to the Supreme Court for judicial review of the Tribunal's decision (including the costs order) and seek an order in the nature of certiorari to quash the orders made by the Tribunal.

Decision

The parties agreed that the Tribunal's costs order should be quashed because it was made without power. Nevertheless, the Supreme Court could only make an order quashing the Tribunal's costs order if satisfied that either jurisdictional error or error on the face of the record had been established.

The Court (not unsurprisingly) concluded that, having dismissed the penalty application, the Tribunal did not have power to make an order for costs under section 204 of the *Strata Schemes Management Act 1996*. This was because the power to award costs in section 204 was pre-conditioned on there having already been an order made requiring the payment of a pecuniary penalty. No such order was made by the Tribunal.

The Court concluded that the Tribunal fell into jurisdictional error and quashed its costs order. Further, the Court ordered the owner to repay to the owners corporation the amount of $30,238.25 which he garnisheed from the owners corporation's bank account in satisfaction of the Tribunal's costs order which had been quashed.

Lipscher & Ors –v- The Owners – Strata Plan No. 30995 [2017] NSWCATCD 2

The Facts

The appellants were lot owners in a strata title apartment building in Neutral Bay, Sydney. The respondent was the owners corporation of the building. The building contains balustrades on its rear balconies. The balustrades are part of the original construction of the building.

In 2014, a group of owners formed the view that the balcony balustrades were not safe because they did not comply with the current requirements of the Building Code of Australia. Some of those owners were concerned that their children would climb over the balustrades and injure themselves. Another group of owners saw nothing wrong with the balustrades.

On 19 June 2014, the owners corporation held a general meeting. The meeting considered a motion (to be passed by ordinary resolution) that some of the balcony balustrades be replaced to make them safe and also compliant with Building Code of Australia standards. The strata managing agent of the owners corporation chaired the meeting. He declared the motion to be out of order. The strata manager made that ruling because he considered there was no supporting evidence that the balustrades were not safe and therefore any approval to replace the balustrades would require a special resolution as it would be considered an alteration to the common property under section 65A of the *Strata Schemes Management Act 1996*.

Unperturbed, a similar motion (to be passed by ordinary resolution) was put forward by one of the same group of owners for consideration at a general meeting held on 31 March 2015. The meeting became quite heated and the group of owners opposed to the replacement of the balustrades left the meeting before the motion was discussed. The remaining owners then discussed the motion to replace the balustrades and the meeting minutes recorded that it was resolved that:

> A maximum cap of $10,000 be imposed upon the executive committee for the replacement of the western balustrades to meet safety issues and to meet the latest BCA standards and that this work be completed before external painting starts.

The text of the resolution recorded in the meeting minutes differed from the resolution contained in the meeting notice.

On 28 April 2015, the group of owners opposed to the replacement of the balustrades lodged an Application for Orders by a Strata Schemes Adjudicator to overturn the resolution that had been passed at the meeting (in their absence) to replace the balustrades.

On 25 June 2015, the owners corporation held a general meeting and passed a resolution to approve a contractor's quotation to replace the balustrades in the sum of $17,000 subject to the outcome of the Adjudication Application which had been lodged by the group of owners opposed to the balustrade replacement.

The group of owners opposed to the replacement of the balustrades was unsuccessful before the Adjudicator. They appealed to the NSW Civil and Administrative Tribunal.

In the appeal, two key issues arose for determination. The first was whether or not a resolution to replace the balustrades had, in fact, been passed at the meeting held on 31 March 2015 and, if so, whether that resolution was valid. The second was whether the replacement of the balustrades constituted the repair of common property that was able to be authorised by an ordinary resolution, or the making of alterations or additions to the common property which needed to be approved by special resolution.

Decision

The Tribunal concluded that no resolution to replace the balustrades was passed at the general meeting held on 31 March 2015. This was because no motion to replace the balustrades was proposed, there was no vote taken (instead there was merely a discussion among owners) and there was no declaration of the result of any vote. The Tribunal noted that whilst in some instances those matters could be regarded as technicalities capable of being disregarded, that was not an approach the Tribunal was disposed to take in this matter. That was largely because the Tribunal was critical of the conduct of the group of owners who were in favour of replacing the balustrades (although the relevance of their conduct to the legal or factual question of whether or not a resolution was passed at the meeting is not entirely clear).

Moreover, the Tribunal concluded that there was no expert evidence to prove that the balcony balustrades were unsafe. For that reason, the Tribunal concluded that if the owners corporation was inclined to replace the balustrades, it needed to pass a special resolution in order to be authorised to do so.

In the result, the Tribunal set aside the orders of the Adjudicator, declared invalid the resolution to replace the balustrades and restrained the owners corporation from replacing the balustrades without a special resolution authorising it to do so.

Owners Corporation SP80454 -v- Eddy Investments Pty Ltd [2016] NSWCATCD (unreported, Member Vrabac, 27 January 2017)

The Facts

This case concerned a mixed use building known as the Riviera Apartments situated at the The Entrance on the Central Coast of NSW. The Riviera Apartments contains two components – a residential apartment building comprised in Strata Plan No. 80454 – and commercial premises on the ground floor of that building known as lot 102 in DP1124621.

There is a strata management statement for the Riviera Apartments. The strata management statement requires a Building Management Committee to be constituted to manage the building. The members of the Building Management Committee are the owners corporation of the residential component and the owner of the commercial component of the building.

The owners corporation claimed that the strata management statement was deficient in several respects. The strata management statement did not contain any provisions dealing with the convening of meetings of the Building Management Committee, the place for those meetings or the requirements for a quorum at those meetings. Nor did the strata management statement give the Building Management Committee clear power to adopt budgets, raise and collect contributions from its members, charge interest on overdue contributions or recover those contributions. The strata management statement also did not disentitle defaulting members of the Building Management Committee from voting at committee meetings. Further, the voting rights of the two members of the Building Management Committee were equal but the owners corporation paid about 85% of the costs of shared facilities in the building.

The owners corporation claimed that these deficiencies in the strata management statement meant that the Building Management Committee could not meet and make decisions unless both of its members attended meetings and made unanimous decisions. The owners corporation also pointed to the unfairness of the commercial owner failing to pay levies to the Building Management Committee but still being able to vote at Committee meetings including in a manner that stymied the management of the building.

The owners corporation applied to an Adjudicator for orders to amend the strata management statement, in a specified manner, to overcome those deficiencies. The owners corporation also sought ancillary relief to require the owner of the commercial component of the building

to move gas bottles and signage that had been erected in the building in breach of the strata management statement and to require the commercial owner to give the owners corporation access through a right of way on the ground floor of the building to enable owners to get to and from the swimming pool.

The owners corporation was partially successful before the Adjudicator. The Adjudicator ordered the commercial owner to remove the gas bottles and give the owners corporation access through the right of way. However, the Adjudicator concluded that she did not have power to make an order requiring the amendment of the strata management statement and considered that it was not appropriate for her to make an order to require the commercial owner to remove the signage even though it had been erected in breach of the strata management statement.

The owners corporation appealed against the Adjudicator's orders to the NSW Civil and Administrative Tribunal. The key issues for determination by the Tribunal were whether or not the Adjudicator had power to make an order requiring the strata management statement to be amended and whether it was appropriate for an order to be made to require the commercial owner to remove the signage.

Decision

The Tribunal considered that it was appropriate to make an order to require the commercial owner to remove the signage which had been installed in breach of the strata management statement without the approval of the Building Management Committee. The Tribunal held that whilst the erection of the signage in breach of the strata management statement by itself may not be sufficient reason to have the signage removed, the owners corporation pointed to a number of matters which made it appropriate for the signage to be removed. These included the fact that the strata management statement had not been amended to ensure that the commercial owner covenanted that the signage had been installed properly by licensed contractors with all necessary approvals, would be maintained and repaired by the commercial owner, and would be the subject of appropriate insurance and an indemnity by the commercial owner in favour of the owners corporation.

The key legislative provisions concerning the amendment of a strata management statement were contained in the *Strata Schemes Freehold Development Act 1973* and the *Strata Schemes Management Act 1996*.

Section 28U of the *Strata Schemes Freehold Development Act 1973* was in the following relevant terms:

> 28U Amendment of Strata Management Statement
>
> 1. A registered strata management statement may be amended only if the amendment is:
>
> (a) supported by a special resolution of the body corporate for each strata scheme for part of the building concerned and by each person in whom is vested an estate in fee simple in any part of that building or its site that is not included in a stratum parcel, or
>
> (b) ordered under this or any other Act by a Court, or
>
> (c) consequential on the revocation or modification, under section 103 of the *Environmental Planning and Assessment Act 1979*, of a development consent.

Section 28W of the *Strata Schemes Freehold Development Act 1973* provided that Chapter 5 of the *Strata Schemes Management Act 1996* applied to or in relation to matters arising under a strata management statement.

Section 138 of the *Strata Schemes Management Act 1996* relevantly provided:

> **138 General Power of Adjudicator to Make Orders to Settle Disputes or Rectify Complaints**
>
> (1) An Adjudicator may make an order to settle a dispute or complaint about:
>
> (a) an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme, or
>
> (b) the operation, administration or management of a strata scheme under this Act.

Section 173 of the *Strata Schemes Management Act 1996* relevantly provided thus:

173 Adjudicator to Have regard to Strata Management Statement

(1) Before making any order relating to the management of a strata scheme for a stratum parcel or the management of the building concerned or its site, an Adjudicator must have regard to the strata management statement for the building.

(2) This section does not prevent an Adjudicator from making an order that is inconsistent with the provisions of the strata management statement, or that requires the amendment of such a statement.

The Tribunal was not satisfied that it was open to it to re-write or amend the strata management statement in the way proposed by the owners corporation. The Tribunal agreed with the Adjudicator that an amendment of the strata management statement in the manner contemplated by the owners corporation, for example, to change the voting rights of the members of the Building Management Committee so that they would reflect the proportion in which each member was liable to pay for the cost of the shared facilities, did not fall within the ambit of section 28U.

The Tribunal also concluded that even though sections 138 and 173 of the *Strata Schemes Management Act 1996* indicated that there was power for an Adjudicator (or the Tribunal) to make an order that required the amendment of a strata management statement, those were general provisions which should yield to the specific power in section 28U of the *Strata Schemes Freehold Development Act 1973* which prescribed the manner in which a strata management statement could be amended.

Further, the Tribunal concluded that sections 138 and 173 could only be used to amend the strata management statement "to settle a dispute arising in relation to the operation, administration or management of any matter within Chapter 5 of the [*Strata Schemes Management Act 1996*]."

In essence, the Tribunal concluded that section 28U was the only source of power for substantial amendments to be made to a strata management statement (for example, amendments that would alter the voting rights or the governance of members of the Building Management Committee) and that section 138 and 173 were only able to be used to amend a strata management statement for the purpose of settling a dispute or complaint about the management of a strata scheme for a stratum parcel or the management of a building.

In the result, the Tribunal varied the orders made by the Adjudicator to require the commercial owner to remove the signage which had been erected in breach of the strata management statement but otherwise dismissed the appeal of the owners corporation.

Comment

It does not appear that *Eddy Investments* was correctly decided. The very essence of the complaint made by the owners corporation was that the strata management statement was deficient and required amendment to allow the building to be properly administered and managed by the Building Management Committee. That is precisely the purpose for which the Tribunal concluded it (or the Adjudicator) had power to amend the strata management statement. Ultimately, it appears that the amendments the owners corporation sought to make to the strata management statement were simply too far reaching or controversial for the Tribunal order them to be made.

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