

Owners corporation failing to comply with NCAT rectification orders = penalty + costs

In the recent New South Wales Civil & Administrative Tribunal (the “**Tribunal**”) decision of *Archibald v The Owners – Strata Plan No. 50441* [2023] NSWCATCD 111, the Tribunal considered whether an owners corporation had breached work orders which were entered into by consent of the parties.

Background

On 11 December 2020, Mr Archibald (the “**First Applicant**”) commenced proceedings against The Owners - Strata Plan No. 50441 (the “**Respondent**”) following incidents of water ingress into a lot that he was the registered proprietor of along with his wife. The water ingress derived from an adjoining lot in the scheme, but it was ultimately found that the Respondent had failed to repair and maintain common property pursuant to section 106 of the Strata Schemes Management Act 2015 (NSW) (“**SSMA**”).

On 2 June 2021, the parties entered into consent orders with respect to works which the Respondent agreed to carry out to the common property and the Applicant’s lot (the “**Works**”). The Works were required to be carried out within a period of six months from the date of the orders.

The First Applicant and his wife (the “**Applicants**”) subsequently filed penalty proceedings against the Respondent on 17 March 2022 due to the Respondent’s failure to carry out the Works by 2 December 2021. The First Applicant had proceedings running simultaneously against the Respondent for an order pursuant to section 237 of the SSMA for the compulsory appointment of a strata managing agent. As such, the penalty proceedings were adjourned to be heard after the compulsory appointment proceedings were heard and determined.

The penalty proceedings were heard before Principal Member Rosser on 16 December 2022 and 6 April 2023, before a decision of the Tribunal was handed down on 18 September 2023.

Issues

The main issues for the Tribunal to consider were as follows:

1. Whether the Respondent contravened the consent orders with respect to the Works;
2. Whether a penalty should be imposed on the Respondent for its contravention; and
3. The amount and who should the penalty be paid to.



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Findings and decision

The Tribunal found that although the Works were intended to rectify causes of water ingress, each item contained in the Works had its own independent scope of work. In essence, each item was arguably standalone as it did not require performance of the other items in the Works to be completed. The Works were required to be carried out within a period of six months of the date of the orders, and the Respondent failed to meet this deadline.

The Tribunal found that the Respondent contravened the consent orders and, as such, a penalty should be imposed for the respective contraventions, the subject of the proceedings. The penalty was found to be payable to the First Applicant, affirming the decision in *The Owners - Strata Plan No 61285 v Taylor (No 2)* [2022] NSWCATCD 118. The Tribunal found that it was not appropriate to include both Applicants in the orders as the consent orders were only made in favour of the First Applicant.

The penalty orders were as follows:

1. Pursuant to s 247A(1) of the SSMA, the Respondent is to pay the First Applicant:
 - a. a civil penalty in the sum of 20 penalty units (\$1,100) in respect of contravention of orders 4A, 4B, 4C and 4E made on 2 June 2021 in proceedings SC 20/51793; and
 - b. a civil penalty in the sum of 50 penalty units (\$5,500) in respect of contravention of order 4D made on 2 June 2021 in proceedings SC 20/51793.
2. The Respondent is to comply with order 1 within 28 days of the date of these orders.

Similarly, the Tribunal exercised its discretion with respect to an order for costs in favour of the First Applicant only. The costs order was discounted to take into account the conduct of the First Applicant during the proceedings. It was found that special circumstances arose pursuant to section 60 of the Civil and Administrative Tribunal Act 2013 (NSW) in favour of both parties, so the Tribunal was required to make a finding with respect to an apportionment of costs.

Ultimately, the Tribunal make the following costs order:

3. The Respondent is to pay 70% of the First Applicant's costs of the proceedings, on the ordinary basis, as agreed or assessed.

Key takeaways?

Simply put, the above findings reinforce the importance of complying with Tribunal orders, particularly in circumstances where an owners corporation is in breach of its strict duty under section 106 of the SSMA. Failure to comply may result in an adverse order for payment of a civil penalty made against you, and potentially an adverse costs order as well. This is particularly important when entering into orders made by consent, as the Tribunal has continually expressed a

firmer approach with respect to orders that have been agreed to by all parties and subsequently breached with little attempt to seek an extension to comply with the respective order.

If you require assistance in handling a situation where a lot owner, occupant or owners corporation is in breach of orders made by the Tribunal, please contact Bannermans Lawyers on 02 9929 0226 or on enquiries@bannermans.com.au for advice on how to proceed.

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30 May 2024



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