ACT CIVIL & ADMINISTRATIVE TRIBUNAL

CASTRO v THE OWNERS UNIT PLAN NO 246 (Civil Dispute) [2016] ACAT 111

XD 394/2016

Catchwords: **CIVIL DISPUTE –** electrical cables chewed by rodents in roof space – whether roof space is common property – whether electrical cables are for sole benefit of applicant – whether owners corporation was negligent in pest control on common property – whether owners corporation was aware of pest problem on common property

Legislation cited: *Civil Law (Wrongs) Act 2002* ss 42, 43
Unit Titles Act 2001 ss 13, Dictionary
Unit Titles Act 1970 ss 14, 15
Unit Titles (Management) Act 2011 ss 24, 129

Cases cited: *The Owners Units Plan No 1917 v Koundouris* [2016] ACTSC 96
The Owners Strata Plan 50726 v Thoo [2013] NSWCA 270

Tribunal: Senior Member H Robinson

Date of Orders: 5 October 2016
Date of Reasons for Decision: 5 October 2016

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 394/2016

BETWEEN:

JIM CASTRO
Applicant

AND:

THE OWNERS – UNITS PLAN No 246
Respondent

TRIBUNAL: Senior Member H Robinson

DATE: 5 October 2016

ORDER

The Tribunal orders that:

1. The application is dismissed.

……..
Senior Member H Robinson

REASONS FOR DECISION

1. By way of this application, the applicant, Mr Castro, seeks to have the respondent owners corporation reimburse costs he incurred to rectify damage to electricity cables leading to his apartment caused by rodents and/or other pests chewing through them.

The Application

2. This application was brought within the Tribunal's civil jurisdiction, not in the unit titles jurisdiction.

3. At the commencement of the hearing, the legal basis for the applicant's claim was not entirely clear. In his application, he cited duties of lessors under the *Residential Tenancies Act 1997* (ACT), but as he is not a tenant and the owners corporation is not his lessor, those claims were not well founded and I dismissed them. After some discussion, it became clear that the applicant was contending that the respondent has an obligation to ensure the maintenance of the common property, that this duty includes vermin control on that common property, and that the respondent failed in that duty. The claim was broadly phrased as a claim in negligence.

4. After some questioning from the Tribunal, the applicant's arguments were clarified as being that:

   (a) roof space is 'common property' and the owners corporation has a duty to control rodents within it, and did not do so, causing him damage;
   (b) the cables are common property and the owners corporation is required to maintain and repair them, and did not do so, causing him damage; or
   (c) the presence of rodents on the premises is a foreseeable safety risk and the owners corporation has a duty to take reasonable precautions against such risks, but did not do so, causing him damage.

5. Prior to the hearing, the applicant was not aware of the Tribunal's jurisdiction to make orders under Part 9 of the *Unit Titles (Management) Act 2011* (ACT) (**UTM Act**). When the Tribunal asked the parties whether this was really a matter that should have been brought within the Tribunal's unit titles

jurisdiction under that Act, rather than the civil jurisdiction, the respondent indicated that it had no objection to the Tribunal considering this matter under the Tribunal's unit titles jurisdiction, as well as under its civil jurisdiction. The applicant reiterated that his application was primarily based in negligence.

Hearing

6. The hearing took place on Wednesday 31 August 2016. The applicant represented himself. The owners corporation was represented by Ms Rosemary Dupont, assisted by Amanda Dengate, Natasha Drage and Jan Browne. There was little dispute over the facts, with the majority of the hearing focusing on submissions.

Background

7. The applicant is the owner of a unit in Unit Plan 246, one of several unit plans that together comprise the 'Argyle Square' development in Reid. Unit Plan 246 is comprised of nine two or three story 'townhouses' and three blocks of six units.

8. The applicant's apartment is a two level dwelling occupying the upper floors of a building. The buildings may broadly be described as 'terraced'. The applicant's building shares common walls on both sides with other buildings in the complex, but due to differences in height between buildings it does not share a common roofline.

9. The front half of the top floor of the applicant's apartment has rooms with sloped roofs and dormer windows. These rooms have a 'store area' that is below the lowest portion of the sloped and lowered roof. In these rooms, there is minimal, if any, space between the gyprock ceiling and the roof. The bathrooms and other rooms located at the back have a typical, flat gyprock ceiling, and there is 'crawl' space between that ceiling and the external roof. The cables in issue are located in this area.

10. The applicant cannot access the roof space from his unit. Access must be gained externally, likely involving placing a ladder against the complex and climbing into the roofspace from the outside.

11. On 11 September 2015, at the applicant's request, Vault Electrical attended his apartment to investigate a wiring issue causing power circuits to trip. The electrician who attended the property provided a report that opined that rats or some other rodents had eaten into the cabling, and that this could have, had it not been discovered, caused a fire in the complex. The report was tendered in evidence before the Tribunal, but the electrician was not called to give evidence. Although sceptical of the report in its submissions, the owners corporation ultimately did not contest the validity of this report, or its conclusion that the damage was likely caused by rats, at the hearing. Certainly, there was no evidence at the hearing that the damage to the cables was caused by anything else.

12. As a consequence of Vault Electrical's investigations the wiring was replaced and the switchboard upgraded. The applicant incurred costs of $818.00.

Legislative Context

13. The maintenance obligations of an owners corporation are governed by the UTM Act.

14. The UTM Act distinguishes between Class A units and Class B units, with different obligations imposed for each. Argyle Square is somewhat unusual in that it has both Class A and Class B units on the same plans. The applicant's unit is a Class A unit.

15. Section 24(1) of the UTM Act describes an owners corporation's obligation to repair, maintain and upkeep, relevantly, as follows:

> ***24 Maintenance obligations***
>
> *(1) An owners corporation for a units plan must maintain the following:*
>
> *(a) for a staged development—the common property included in a completed stage of the development;*
>
> *(b) for a development that is not a staged development—the common property;*
>
> *(c) other property that it holds;*
>
> *(d) the defined parts of any building containing class A units (whether or not the defined parts are common property);*
>
> *Note This does not include painting, unless the painting is required because of other maintenance (see s 26 (1)).*

(e) if a utility service mentioned in the Unit Titles Act 2001, section 35 (Easements given by this Act) is provided for the potential benefit of all units—facilities associated with the provision of the utility services including utility conduits;

(f) any building on the common property that encroaches on a unit if the building is the subject of an easement declared under the Unit Titles Act 2001, section 36 (Easements declared by owners corporations);

(g) as authorised by a special resolution (if any)—all buildings on all class B units on the units plan.

Example—par (g)

a special resolution authorising the owners corporation to paint all buildings on the class B units and to carry out roofing and structural repairs to all class B units, but excluding responsibility for internal painting and minor repairs of class B units

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) In this section:

***defined parts**, of a building containing class A units, means—*

(a) the following structures in the building, if load-bearing:

(i) walls;

(ii) columns;

(iii) footings;

(iv) slabs;

(v) beams; or

(b) any part of a balcony on the building.

16. 'Common property' is defined in section 13 of the *Unit Titles Act 2001* (**UT Act**) as "all parts of the land identified as common property ... in the units plan". A copy of the units plan was provided to the Tribunal. The roof space is not identified as 'common property' on the plan, but nor is anything else (eg. the stairways). The plans were drafted many years prior to the enactment of the UT Act.

17. The relevant legislation at the time was the *Unit Titles Act 1970* (ACT)(**1970 Act**). The provisions of that Act which dealt with unit boundaries and common property are as follows:

Boundaries of units and unit subsidiaries
14. (1) Where—

(a) the proposals show a unit as a Class A unit; or
(b) a unit subsidiary consists of a building or part of a building,

the boundaries of the unit or the unit subsidiary, as the case may be, shall be ascertained by reference to its floors, walls and ceilings.

(2) Where—

(a) the proposals show a unit as a Class B unit; or
(b) a unit subsidiary does not consist of a building or part of a building,

the boundaries of the unit or the unit subsidiary, as the case may be, shall be ascertained from the diagrams in the proposals, and the unit or the unit subsidiary, as the case may be, is unlimited in its vertical dimensions except to the extent of any projection above, or encroachment below, ground level by another part of the parcel.

Common boundaries

15. (1) Subject to subsection (3) where, in accordance with the proposals, a Class A unit or a unit subsidiary consisting of a building or part of a building is separated from common property, from a unit or from a unit subsidiary by a floor, wall or ceiling, the common boundary between them lies along the centre of that floor, wall or ceiling, as the case may be.

(2) Where a Class A unit or a unit subsidiary consisting of a building or part of a building is bounded by reference to an external wall of the building—

(a) the boundary of that unit or unit subsidiary lies along the centre of that wall; and

(b) so much of that wall as is outside that boundary is common property

(3) If the proposals specify that a boundary referred to in subsection (1) lies elsewhere than in the position there described, the boundary is as so specified.

18. The majority of these provisions are not dissimilar to those in the UT Act and the UTM Act. However, the Dictionary to the 1970 Act provides that:

> *"common property" means so much of a parcel as is not within a unit.*

19. Accordingly, at that time unit titles plan 246 was registered, the parts of the plan not marked as being part of a unit were considered common property.

20. The interaction of the 1970 provisions relating to boundaries were considered by Mossop AJ in *The Owners Units Plan No 1917 v Koundouris* [2016] ACTSC 96. Relevantly, his honour opined at [431] that:

> *The point to note about the operation of ss 15(1)-(2) is that, unless specified otherwise in the units plan under s 15(3), then the boundary between a class A unit or unit subsidiary and either common property or another unit is along the centre of the relevant floor, wall or ceiling. The consequence of this appears to be that half of each floor, wall or ceiling forms part of the relevant unit. Because the common property means so much of a parcel as is not within a unit, these half floors, walls and ceilings do not form part of the common property.*

21. It seems unlikely that the change in language between the 1970 Act, the UT Act and then the UTM Act would have been intended to change the nature of 'common property' in existing units plans (although the UTM Act does extend owners corporations' obligations in relation to designated areas, be they common property or not[1]). Consequently, I accept that, in the absence of the units plan identifying common property, it is appropriate to conclude that the common property is that which is not marked as part of a unit, or a subsidiary to the unit.

22. In this case, the unit plan clearly shows the unit entitlement for each unit, including its subsidiaries. The unit plan clearly shows the applicant's unit as including the second and third floor, two balconies, and a store area under the low lying portion of the roof. It does not show a roof space as part of his unit allocation (or any unit's allocation). Accordingly, having regard to the relevant definitions the 1970 Act and UTM Act, everything above the mid-point of the ceiling to the applicant's property is common property. This includes the roof space.

23. As the roof space is common property, the owners corporation must maintain it.

What about the cables?

24. Does the owners corporation's maintenance obligation extend to maintaining cables within the common roof space?

25. The owners corporation contended that cables that were for the exclusive use of a unit holder were the unit holder's responsibility. In support of this, the owners corporation cited an extract from a document that, they submitted, was prepared by the Office of Regulatory Services, a part of the ACT Government. The

[1] *The Owners Units Plan No 1917 v Koundouris* [2016] ACTSC 96 at [433] to [436]

original document was not provided. In the circumstances, I have not placed any significant weight on this extract.

26. Turning to the legislation, section 24(1)(e) of the UTM Act provides that the owners corporation is responsible for maintaining 'a utility service' if it is "*provided for the potential benefit of all unit holders*" (emphasis added). A 'utility service' is defined in the Dictionary to the UT Act to include 'electricity'. A 'utility conduit' is defined in turn to mean:

> *a conduit of any kind for the provision of a utility service, and includes, for example, pipes, wires, cables and ducts for a utility service.*

27. The electricity cabling is clearly a utility conduit.

28. The question as to who is liable for maintaining the damaged cables therefore turns to whether they were for the benefit of all unit holders, or only the applicant. The contention of the owners corporation was that the cables were for the exclusive use of the applicant, as they delivered power to his unit only. No contrary evidence was offered by the applicant.

29. I note here that it is not clear to me that the cabling for an electricity system can easily be divided into parts, such that one part can be said to be for the benefit of one owner and not another. An argument could be made that section 24(1)(e) is instead intended to capture a kind of service that is very clearly limited or targeted to certain unit holders – for example, a pay-tv service for a select number of unit owners. However, the applicant neither advanced this argument, nor put forward any evidence contrary to that submitted by the owner's corporation, and in the circumstances I have little option but to accept that the electricity cable in issue was solely for the benefit of the applicant. In such circumstances, the UTM Act does not require the owners corporation to maintain it.

Rodent Control

30. The Tribunal is satisfied that the owner's corporation is responsible for the maintenance of the roof space above the applicant's unit. But what does this 'maintenance' entail?

31. The Dictionary to the UT Act provides a definition as follows:

> *maintenance, of a building, a facility for a utility service or a utility conduit, means maintenance in good repair and working order, and includes—*
> *(a) repair; and*
> *(b) replacement; and*
> *(c) renewal; and*
> *(d) restoration.*

32. Do the concepts of 'repairing', 'renewing' or keeping the roof space 'in good repair' require that the respondent undertake appropriate rodent control? It is unrealistic and impractical to suggest that an owners corporation has an obligation to eliminate all pests – this would require constant monitoring that may not be justified. Rather, when considering what action must be taken to deal with pests, the answer must depend on what steps are reasonably available to the owners corporation, having regard to what, if any, damage the pests in issue are doing, or could foreseeably do.

33. The largely uncontested submission of the owners corporation was that ensuring the complex is at all times free from pests would be prohibitively expensive. The submission was that:

> *...the cost would be prohibitive because it would require the cost to hire a boom lift ($1000 to have delivered and picked up), $400 per day hire and the cost of a pest controller. It is not realistic to spend this kind of money on a routine basis, like the cleaning of guttering as suggested by the Applicant, if there is no evidence of rodents or possums in the roofs.*[2]

34. In light of this evidence, I accept the owner's corporation's submission that such testing would be impractical and unnecessary in circumstances where there is no evidence or suggestion of a pest causing any damage.

35. This does not mean that the owners corporation would never be responsible for rodent management. Where there is evidence of pests that are causing damage or affecting the good repair or working order of common property, it is the owners corporation's obligation to deal with those issues. It is also the owners corporation's duty to repair any damage to the common area that results from rodents.

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[2] Respondent's submissions page 3

Recompense for damaged cabling

36. As set out above, as the evidence shows that the damaged cabling was for the benefit only to the applicant only, is not something that the owners corporation is liable to repair or replace in accordance with its maintenance obligations under the UTM Act.

37. However, as I understand the applicant's argument, it is that the damage to the cables arose through the negligence of the owners corporation, and therefore he is entitled to compensation on that basis.

38. Although not clearly articulated by the applicant, there are two bases for such a claim – breach of statutory duty and common law negligence.

Breach of statutory duty

39. Section 24 of the UTM Act imposes a duty on an owners corporation to maintain the common property. This is a 'statutory duty'.

40. However, in order to make a claim for damages for breach of statutory duty, the applicant must show that a breach of section 24 of the UTM Act gives rise to a private right to claim damages, either in addition to, or as an alternative to, the other remedies that are expressly available in section 129 of the UTM Act.

41. As far as I am aware, the issue of the availability of private damages for a breach of statutory duty has not been considered in the context of section 24 of the UTM Act. A similar question was considered by the NSW Court of Appeal, in the context of the equivalent NSW legislation, in *The Owners Strata Plan 50726 v Thoo* [2013] NSWCA 270 (*Thoo*). In that case, the NSW Court of Appeal determined that, having regard to the other remedies available under the Act, a breach of the duty to maintain common property did not sound in damages. The provision in question in *Thoo* is not identically worded to section 24 of the UTM Act, but it is similar, and the reasoning of the Court of Appeal is persuasive.

42. Ultimately, I do not have to decide this issue as I do not consider there to have been any breach of the duty imposed by section 24 of the UTM Act as, for

reasons considered above and below, I do not think the owners corporation has failed in its obligation to maintain the common property.

The Negligence Claim

43. The other possible basis for the applicant's claim is that of common law negligence.

44. Notwithstanding the doubt as to whether a claim can be made for breach of statutory duty, there is no apparent reason why an owners corporation could not be liable for damage caused to an owner's property under the usual principles of common law negligence.

45. In order to succeed in his claim for negligence, the applicant had to establish three things:

    (a) that the owners corporation owed him a duty of care;

    (b) that it breached that duty by failing to reach the standard of care required of a reasonable owners corporation; and

    (c) that damage resulted.

46. There could be little doubt that an owners corporation has a sufficiently proximate relationship with unit holders that it owes a duty to take reasonable care to prevent reasonably foreseeable risks of damage, including damage to personal property. Therefore, the owners corporation owed the applicant a duty of care.

47. The difficulty for the applicant is that he had little evidence upon which it could be concluded that the owners corporation breached that duty.

48. Section 42 of the *Civil Law (Wrongs) Act 2002* sets out general principles relating to standard of care. It requires the applicant to show that a reasonable owners corporation, in the respondent's position, in possession of all the

information that it either had, or ought reasonably to have had, at the time of the incident, would have done something more that what it did.[3]

49. The 'time of the incident' would be the time when the cables were damaged. There is no evidence as to when this was, other than prior to the applicant engaging an electrician. Consequently, the applicant was required to establish either that the owners corporation should have known about the rodents, for example by conducting inspections, or that it should have taken precautions against rodents anyway.

50. In this regard, section 43 of the *Civil Law (Wrongs) Act 2002* further provides that:

> *A person is not negligent in failing to take precautions against a risk of harm unless—*
>
> *(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and*
> *(b) the risk was not insignificant; and*
> *(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.*
>
> *(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):*
> *(a) the probability that the harm would happen if precautions were not taken;*
> *(b) the likely seriousness of the harm;*
> *(c) the burden of taking precautions to avoid the risk of harm;*
> *(d) the social utility of the activity creating the risk of harm.*

51. There was no evidence before the Tribunal that established that the owners corporation knew of any problem with rodents prior to the applicant arranging for an electrician to attend the premises. Additionally, the owners corporation's submissions stated that records had been searched, and there were no records of the owners corporation having previously been involved in rodent management (although it had organised possum removal and possum proofing in the past). In the absence of any evidence that the owners corporation was aware of a problem with rodents, I cannot make a finding that it was negligent in failing to take any steps to deal with them.

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[3] *Civil Law (Wrongs) Act 2002*, s 42

52. Should the owners corporation have taken steps to routinely check for rodents? The respondent's reply to this, as set out in paragraph 33 above, was that the cost would be prohibitive. This submission was not seriously contested.

53. This does not mean that the owners corporation has no obligations in relation to rodents. Even in the absence of evidence of an actual rodent infestation, had the owners corporation been aware, or should it have been aware, of a foreseeable and not insignificant risk of harm *if* there were rodents, then it likely would have been required to take some mitigating action. However, there is nothing before the Tribunal to suggest that this case meets that test. The owners corporation was not aware, for example, of rodents having caused problems in this complex, in the Argyle complex more generally, or in similar complexes. The applicant pointed to no evidence that rodents are a not insignificant health and safety risk more generally. The owners corporation was not aware that there were any electrical problems, such that it would have been reasonable to conduct investigations to find the cause of those problems. There is nothing to suggest it did not meet its duty of care, having regard to the knowledge it had at the time.

54. The owners corporation's obligations, now that it is aware of a potential problem with rodents in the complex, may be different. But this does not give the Tribunal a basis to apply the benefits of hindsight to the question of liability for alleged omissions in the past.

55. In the circumstances, the applicant has not established that the respondent breached its duty of care to him by failing to arrange regular pest inspections, or otherwise identifying the risk posed by rodents. Accordingly, I need not consider whether damages should be awarded. The application is dismissed.

……..
Senior Member H Robinson

HEARING DETAILS

FILE NUMBER:	XD 394/2016
PARTIES, APPLICANT:	Jim Castro
PARTIES, RESPONDENT:	The Owners – Unit Plan No 246
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Senior Member H Robinson
DATES OF HEARING:	31 August 2016