



Supreme Court  
New South Wales

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Case Name: Kerswell v Owners of Strata Plan No. 71241

Medium Neutral Citation: [2018] NSWSC 1309

Hearing Date(s): 16 August 2018

Date of Orders: 16 August 2018

Decision Date: 16 August 2018

Jurisdiction: Common Law

Before: Campbell J

Decision: (1) Refuse application for dismissal for want of due dispatch.  
(2) Direct the plaintiff to file and serve a copy of the transcript in the Local Court forthwith after it is received by him.  
(3) Direct the defendant to file any UCPR 50.14(2) affidavit upon which it may wish to rely by 13 September 2018.  
(4) Grant leave to the defendant to supplement its UCPR 50.14(2) affidavit within two weeks of receiving a copy of the transcript, if necessary.  
(5) List the matter before the Registrar to fix a date for hearing of the appeal on 20 September 2018 at 9:00 am.

Catchwords: CIVIL PROCEDURE – self-represented litigant – summons – appeal from Local Court – whether the plaintiff has complied with the Registrar’s orders – transcript not yet available but ordered – Uniform Civil Procedure Rules 2005 (NSW) – rule 50.14 – evidence before the lower court that the plaintiff wishes to be considered on appeal

Legislation Cited: Civil Liability Act 2006 (NSW), s 56

Uniform Civil Procedure Rules 2005 (NSW), r 50.14

Cases Cited: Nil

Texts Cited: Nil

Category: Procedural and other rulings

Parties: Kerry Kerswell (Plaintiff)  
Owners of Strata Plan No. 71241 (Defendant)

Representation: Counsel:  
Plaintiff (Self-represented)  
S Hendry (Solicitor)

Solicitors:  
K Kerswell (Self-represented) (Plaintiff)  
Grace Lawyers (Defendant)

File Number(s): 2018/43810

Decision under appeal:

Court or Tribunal: Local Court

Date of Decision: 16 November 2017

Before: Magistrate Greenwood

## **EX TEMPORE JUDGMENT - REVISED**

- 1 The plaintiff is largely self-represented although it appears he has the assistance of counsel from time to time. The decision appealed from is not entirely clear by a reading of the summons which was drafted by the plaintiff himself. However the appeal apparently relates only to a decision made by her Honour Magistrate Greenwood on 16 November 2017. There had been an earlier decision on the same subject matter and Mr Kerswell confirms that that is not the subject of the current appeal. He acknowledges, as doubtless he has been advised, any attempt to appeal from that decision made in 2016 would be grossly out of time.
- 2 Notwithstanding some assistance from counsel he has had the carriage of the matter largely himself and there has been, I think it is fair to say, some difficulty in him complying with the directions of the Registrar giving effect to the Uniform

Civil Procedure Rules 2005 (NSW) ("UCPR") relating to preparation of the appeal.

- 3 The inability of the plaintiff to comply with those directions in a timely manner, I infer, has frustrated the defendant which is represented and desirous of having the matter brought to a conclusion in accordance with the overriding purpose of civil litigation in New South Wales as expressed by s 56 of the *Civil Liability Act 2006* (NSW). But the particular issue that has been referred to me today by the Prothonotary relates to a question of whether the plaintiff has complied with the orders made by the Registrar on 3 July 2017.
- 4 The orders made at that time included an order that the plaintiff was to file and serve the affidavit required by UCPR 50.14 by 31 July 2018. The Registrar further ordered that should there be non-compliance with that order "then proceedings to be dismissed with an order for costs". Those orders, as one may well imagine, were made against the background of the plaintiff's failure to comply with previous orders and directions.
- 5 In purported compliance with the Registrar's order the plaintiff filed an affidavit on 19 July 2018. That affidavit provides evidence that the plaintiff has applied for a copy of the Local Court transcript. As is common in the Local Court, her Honour did not reserve her decision and provide published reasons for judgment but gave an oral judgment at the end of the case. Her Honour's reasons will appear from the transcript when it is produced. The plaintiff has also attached to his affidavit a number of exhibits from the Local Court.
- 6 Ms Hendry, who acts for the defendant and appears today, on receiving this material formed the view that the affidavit did not comply with UCPR 50.14 because it omitted to provide copies of affidavits read below and other exhibits relied upon before her Honour Magistrate Greenwood.
- 7 Ms Hendry also submits that given that the decision was made in the November 2017 it is unsatisfactory that the transcript of proceedings was only ordered after the Registrar made his orders on 3 July 2018. In her affidavit, she helpfully points out, specifically at para 20, the extent to which in her submission the plaintiff has failed to comply with the requirements of UCPR 50.14. Ms Hendry drew my attention, in particular, to the matters she set out at

para 20 subparagraph (b)(iii) A, B and C. The omissions, in her submission, include the motion that brought the matter before the Court below, the complete affidavit of Ms Hendry that was read and the complete affidavit of Mr Daniel Bradman that was also read.

- 8 On appeals to this Court and the Court of Appeal, there is a practice, especially when parties are fully legally represented, that the moving party on the appeal, whether plaintiff or appellant, will provide all of the pleadings, transcript, exhibits and judgments from the lower court. But it is not always necessary that the complete record of that type needs to be produced because often appeals will give rise to discrete issues and it is only necessary to produce the discrete material that is required for the appellant to make good his or her case on appeal. Naturally, the defendant will have an opportunity to supplement that material if the defendant, or respondent, submits that it is deficient in some way.
- 9 Mr Kerswell points, in particular, to the provisions of UCPR 50.14(1)(c) which is in the following terms:

[The plaintiff is required to produce] a copy of any exhibit, affidavit or other document from the proceedings in the court below that *the plaintiff wishes to be considered* at the hearing of the appeal or proposed appeal" (Emphasis added.)

Mr Kerswell submits that he has just done that. He has now produced everything that he wants the Court to look at on the hearing of the appeal.

- 10 Rule 50.14(2) should also be borne in mind because it is in these terms:

The defendant may prepare an affidavit to be relied on at the appeal, cross-appeal or application for leave to appeal or cross-appeal any exhibit, affidavit or other document from the proceedings in the court below that the defendant wishes to be considered at the hearing of the appeal...

- 11 Rule 50.14(3) also provides that the Court may make directions for the filing of such affidavits. This is what happened before Registrar Bradford on 3 July 2018. He made a direction under UCPR 50.14(3) for an affidavit to be filed by the plaintiff complying with sub rule (1). The plaintiff says in good faith that his affidavit of 18 July 2018, filed on 19 July 2018, is his attempt to comply with that rule and he does not consider that any other material needs to be before the Court for the ventilation of his appeal. He says he has now put before this

Court everything from the court below that he wishes to rely upon at the hearing of the appeal.

- 12 The transcript is not yet available. It is unfortunate that it took the orders of 3 July 2018 for Mr Kerswell to order the transcript for the first time. I can well understand Ms Hendry's frustration. The simple fact of the matter is he has ordered it now. It must be acknowledged that the Local Court is not as well served by transcription services as this Court and not infrequently there is a delay between the ordering of the transcript and it being made available. That is unfortunate.
- 13 I am of the view that Mr Kerswell has demonstrated compliance with the orders of the Registrar of 3 July 2018 and that there is no occasion for me to consider whether the appeal should be dismissed for want of compliance with order 2.
- 14 It is impossible for me to say whether Mr Kerswell has produced everything that he might need to have available to make good his arguments on appeal. I do not have the benefit of full written submissions or the judgment below to determine that. However, obviously to the extent to which the defendant considers that there is other material that should be before the Court to assist it in resisting the appeal then it has the opportunity, if it wishes to take it, under UCPR 50.14(2), to prepare its own affidavit making up for the deficiencies.
- 15 I have not said it explicitly but the matter is before me because the defendant wishes to enforce orders made by the Registrar indicating his view that the matter should be dismissed in default of compliance with his further direction under UCPR 50.14(3) made on 3 July 2018. To that end, Ms Hendry filed and served an affidavit seeking to have the proceedings dismissed essentially for want of due dispatch, as well as for non-compliance with the Registrar's order. Given the order made by the Registrar she did not consider it necessary to file a notice of motion in that regard and I will dispense with any requirement that may arise from the UCPR that she should do so.
- 16 Mr Kerswell does complain that the affidavit was served in less time than he was entitled to have under the UCPR but he frankly concedes that to the extent to which there may have been late service, it did not cause him any forensic disadvantage before me today. That being so, nothing turns upon the fact that

the affidavit may have been received by him later than the UCPR contemplates.

17 However, given the finding I have made I am not going to dismiss the appeal. Instead, I will put the matter back in before the Registrar for directions and I will direct that the defendant file any affidavit under UCPR 50.14(2) it decides to rely upon in the proceedings.

18 My orders are:

- (1) Refuse application for dismissal for want of due dispatch.
- (2) Direct the plaintiff to file and serve a copy of the transcript in the Lower Court forthwith after it is received by him.
- (3) Direct the defendant to file any UCPR 50.14(2) affidavit upon which it may wish to rely by 13 September 2018.
- (4) Grant leave to the defendant to supplement its UCPR 50.14(2) affidavit within two weeks of receiving a copy of the transcript, if necessary.
- (5) List the matter before the Registrar to fix a date for hearing of the appeal on 20 September 2018 at 9:00 am.

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