



Supreme Court
New South Wales

Case Name: Kerswell v Owners of Strata Plan No 71241

Medium Neutral Citation: [2019] NSWSC 119

Hearing Date(s): 14 February 2019

Date of Orders: 20 February 2019

Decision Date: 20 February 2019

Jurisdiction: Common Law

Before: Wilson J

Decision: (1) The Summons filed on 9 February 2018 is dismissed.
(2) Unless a party applies to my Associate in writing within 7 days of the date of these orders for a different order, costs on an ordinary basis in favour of the respondent.

Catchwords: APPEAL – application for leave to appeal against a costs order by Local Court of New South Wales – two grounds of error of law – one ground of error of fact

Legislation Cited: Local Court Act 2007 (NSW) ss 39, 40
Strata Schemes Management Act 1996 (NSW) s 80
Strata Schemes Management Act 2015 (NSW) Sch 3, Cl 7

Cases Cited: Ada Evans Chambers P/L v Santisi [2014] NSWSC 53
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Carolan v AMF Bowling Pty Ltd [1995] NSWCA 69
Ciszek v Enterprise Financial Solutions Pty Limited [2010] NSWSC 1265
Hoist-up Pty Ltd v Heartland Motors Pty Limited [2015] NSWSC 903
House v The King [1936] HCA 40; 55 CLR 499

Kerswell v Owners of Strata Plan No. 71241 [2018]
NSWSC 1309
Lesley-Swan v Owners SP 32725 [2013] NSWSC 1635
Phillips v Tobias Partners Pty Limited [2013] NSWSC
496
Relative Mirait Services Pty Ltd v Midcoast Under Road
Boring Pty Ltd [2013] NSWSC 107
Zelden v Sewell; Henamast Pty Ltd v Sewell [2011]
NSWCA 56

Category: Principal judgment

Parties: Mr KG Kerswell (Applicant)
Owners of Strata Plan No 71241 (Respondent)

Representation: Solicitors:
Mr KG Kerswell (Applicant in person)
Mr D Radman of Grace Lawyers Pty Ltd (Respondent)

File Number(s): 2018/00043810

Publication Restriction: None

Decision under appeal:

Court or Tribunal: Local Court of New South Wales

Jurisdiction: General Division

Date of Decision: 16 November 2017

Before: Greenwood LCM

File Number(s): 2015/00242761

JUDGMENT

1 **HER HONOUR:** This matter relates to an application for leave to appeal against a costs order made by the Local Court sitting in its General Division against Kerry Kerswell on 16 November 2017. Mr Kerswell brings the proceedings pursuant to Division 4 of Part 3 of the *Local Court Act 2007* (NSW) (“the Act”). Section 39(1) of the Act deals with appeals as of right; s 40 deals with those appeals which require the leave of this Court. The respondent to the

application is the Owner's Corporation of the Strata Plan to which the dispute relates. The quantum of the dispute is \$25,005.89.

- 2 In brief, the applicant is dissatisfied with the decision of the Local Court to order costs against him, relevant to the costs incurred by the respondent in seeking to enforce an earlier judgment made by the Local Court against the applicant.
- 3 The original proceedings in the Local Court, a claim by the respondent against the applicant and his wife for unpaid strata fees, were commenced late in 2015. Judgement against the applicant and his wife was given on 9 June 2016. They were required to pay an amount of \$66,853.59 to the respondent, a sum inclusive of costs.
- 4 Following that judgment, the applicant both corresponded with, and filed notices of motion against, the respondent, relevant to payment of the judgment sum. He also disputed the costs component of the order made against him and his wife, and sought mediation through the intervention of the Department of Fair Trading. Thereafter, the respondent applied to the Federal Circuit Court of Australia for a bankruptcy notice to issue against the applicant, and the notice issued on 24 March 2017. The applicant sought to have the notice set aside, but his application was dismissed with no order as to costs.
- 5 There followed further requests from the applicant for the intervention of the Department of Fair Trading, and a further notice of motion filed by him in the Local Court, concerning payment of the judgment sum.
- 6 That motion sought a stay of instalment payments of the judgment sum. It was listed for hearing on 16 November 2017. Also listed that day was a notice of motion filed by the respondent, which sought an order for payment of the legal costs associated with the recovery of the judgment sum, in an amount of \$16,819.91 with the costs of the motion. It is the orders made relevant to this motion that the applicant disputes.
- 7 The matter was heard on 16 November 2017, with the orders sought by the respondent made. The applicant's motion was dismissed.

8 The Summons commencing the appeal / application was filed by the applicant on 9 February 2018. The evidence filed by the parties runs to well in excess of one thousand pages of documentary material.

The Application

9 In his Summons Mr Kerswell set out the grounds of appeal as follows:

“1 The following critical evidence documents were handed up before Magistrate Greenwood in the hearing of 9th June 2016 Civil Claims (General) of the Local Court (Sydney)

“ Magistrate Greenwood chose not to accept these documents into evidence despite attempts by Mr Gallego (solicitor for the defendants) to have them entered into evidence, as critical evidence in the matter. The transcript of evidence will show this to be correct”.

A A thirteen page forensic accountants report produced by Trevor Vella on 8th June 2016. Mr Vella concluded that the amount of \$27 ,817.94 should not have been cancelled by the Directors and Managers of Strata Sense 207/50 Holt St Surry Hills NSW.

This document is attached and forms part of the grounds in this matter. This document has been filed in evidence in the lower Court.

B Our document showing Annexure “A”, the document forming primary evidence document in the Plaintiff’s evidence (Owners SP71241) in the hearing of 9th June 2017 [sic], had little basis in fact and further shows that the entries on “Annexure A ” were contrived and replicated entries shown in the records of SP 71241 under the management of Network Strata (Sydney), which were paid as a result of the deposit of the amount of \$27,817.94, as shown in the report of Mr Trevor Vella, produced on 8th June 2016.

This document is attached and forms part of the grounds in this matter. This document has been filed in evidence in the lower Court.

The transcript of evidence from the hearing of 9th June 2016 will show that Annexure “A” as described above (refer item B) is written perjury with regard to Daniel Radman (Partner) Grace Lawyers Sydney and Sylvia Quang (associate in Grace Lawyers at the time). The transcript of evidence will also show that verbal perjury was committed by Sylvia Quang and Natalie Fitzgerald of Strata Sense 207/50 Holt St Surry Hills 2010 at the hearing before Magistrate Greenwood on 9th June 2016. The document (Annexure “A” also represents an attempt to deceive and mislead a NSW Magistrate.

C A copy of the affidavit of Bradley Wood the Strata Manager at Network Strata prior to the handover of books, records and Trust monies the the Directors and Managers of Strata Sense. This document is dated 7th June 2016 and attests to the accuracy and correctness of the records of Strata Sense, prior to the handover of books, records and Trust monies to the Managers and Directors of Strata Sense.

This document is attached and forms part of the grounds in this matter. This document has been filed in evidence in the lower Court.”

- 10 Although it is a little unclear from the grounds articulated in the Summons, the applicant does not seek to advance any complaint about the 2016 decision of the Local Court that ordered him and his wife to pay outstanding strata fees and ancillary monies to the respondent. He confirmed that before Campbell J on 16 August 2018: *Kerswell v Owners of Strata Plan No. 71241* [2018] NSWSC 1309. His complaint relates only to the orders made by the Local Court on 16 November 2017 relating to the payment of costs connected with the recovery by the respondent of the judgment sum.
- 11 At the hearing before me the applicant advised the Court that he did not seek to advance any of the grounds set out in the Summons of 9 February 2018. Instead, he sought leave to plead three alternative grounds, which can be expressed thus:
- (1) The Magistrate erred in proceeding under the *Strata Schemes Management Act 1996* (NSW), rather than the *Strata Schemes Management Act 2015* (NSW);
 - (2) The Magistrate erred in having regard to evidence that was demonstrably false; and
 - (3) The Magistrate erred in not granting the applicant an adjournment of the hearing of the respondent's notice of motion filed on 7 November 2017.
- 12 Very fairly, the respondent did not argue that the amendment would occasion it prejudice, and consented to a grant of leave to amend the Summons. Leave was granted.

The Nature of the Proceedings

- 13 The proceedings were brought pursuant to s 39 and s 40 of the Local Court Act. Those provisions are in these terms:

39 Appeals as of right

(1) A party to proceedings before the Court sitting in its General Division who is dissatisfied with a judgment or order of the Court may appeal to the Supreme Court, but only on a question of law.

(2) A party to proceedings before the Court sitting in its Small Claims Division who is dissatisfied with a judgment or order of the Court may appeal to the District Court, but only on the ground of lack of jurisdiction or denial of procedural fairness.

40 Appeals requiring leave

(1) A party to proceedings before the Court sitting in its General Division who is dissatisfied with a judgment or order of the Court on a ground that involves a

question of mixed law and fact may appeal to the Supreme Court but only by leave of the Supreme Court.

(2) A party to proceedings before the Court sitting in its General Division who is dissatisfied with any of the following judgments or orders of the Court may appeal to the Supreme Court, but only by leave of the Supreme Court:

- (a) an interlocutory judgment or order,
- (b) a judgment or order made with the consent of the parties,
- (c) an order as to costs.

- 14 These proceedings, as they are now cast, seek to impugn an order as to costs only. That being so, s 40(2)(c) applies and the applicant requires the leave of the Court to advance his appeal. That is so even though, arguably, two of the grounds (those noted at [11(1)] and [11(3)]) involve questions of law: *Ciszek v Enterprise Financial Solutions Pty Limited* [2010] NSWSC 1265 at [10] per Schmidt J; *Phillips v Tobias Partners Pty Limited* [2013] NSWSC 496 at [15] per Beech-Jones J; *Ada Evans Chambers P/L v Santisi* [2014] NSWSC 53 at [7] per Adamson J.
- 15 There can be no appeal to this Court on a ground raising a question of fact alone: *Relative Mirait Services Pty Ltd v Midcoast Under Road Boring Pty Ltd* [2013] NSWSC 107 at [4] – [5] per Latham J; *Lesley-Swan v Owners SP 32725* [2013] NSWSC 1635 at [70] to [75] per Beech-Jones J; *Hoist-up Pty Ltd v Heartland Motors Pty Limited* [2015] NSWSC 903 at [3] per Button J.

The Question of Leave

- 16 There are a number of considerations affecting a decision to grant leave to appeal under s 40(2)(c) of the Act. Not least in an application concerning a relatively small amount of money as here is the question of the costs involved in the continuation of proceedings. In *Carolan v AMF Bowling Pty Ltd* [1995] NSWCA 69 Cole JA said, at [3],
- “It should be recognised that where such small claims are involved there must be an early finality and determination of litigation otherwise the costs which will be involved are likely to swamp the money sum involved in the dispute.”
- 17 Whether any reason has been shown to doubt the correctness of the impugned Local Court decision is another relevant consideration although, as was observed by Campbell JA (with the concurrence of Young JA) in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56 at [22], an applicant for leave must demonstrate something more than that the trial judge was arguably

wrong in the conclusion arrived at. An examination of the particular circumstances of the case, and of the merits of the appeal is required for this purpose, and it is to that that I now turn.

The Local Court Proceedings

18 The original proceedings of 2015 related to unpaid strata fees of \$25,284.21 together with interests and costs. Even at that stage, the latter exceeded the former, being awarded in a total amount of \$39,295.54. The action was brought pursuant to the then s 79(2) and s 80 of the *Strata Schemes Management Act 1996* (NSW), as amended from time to time (“the 1996 Act”). That legislation governed issues connected with strata management until its replacement, on and from 30 November 2016, with the *Strata Schemes Management Act 2015* (NSW) (“the 2015 Act”).

19 The 2015 proceedings, at which the applicant was legally represented, were determined by the Local Court on 9 June 2016, with orders made against the applicant and his wife for payment of the monies claimed (“the judgment sum”). In addition to the orders for payment of the judgment sum the Local Court made an order in these terms:

“The plaintiff [the respondent in this judgment] is at liberty to apply on 3 days’ notice to reopen the proceedings in relation to the recovery of the plaintiff’s costs of these proceedings including any enforcement costs or other costs associated with these proceedings generally pursuant to s 80 of the Strata Management Schemes Management Act 1996.”

20 Section 80 of the 1996 Act was in these terms as at 9 June 2016:

80 How does an owners corporation recover unpaid contributions and interest?

(1) An owners corporation may recover as a debt a contribution not paid at the end of one month after it becomes due and payable, together with any interest payable and the expenses of the owners corporation incurred in recovering those amounts.

(2) Interest paid or recovered forms part of the fund to which the relevant contribution belongs.

21 After judgment was entered there followed a great deal of correspondence and litigation, set out at [4] – [5] above, wherein the applicant sought to challenge, delay, or stay payment of parts of the judgment sum. In dealing with that correspondence and litigation, and particularly the numerous notices of motion filed by the applicant in the Local Court, the respondent incurred costs. It took

the view that the order of the Local Court granting it liberty to reopen the proceedings in relation to costs recovery and enforcement allowed for the filing of its motion of 7 November 2017, in which an order requiring the applicant to pay its costs of \$16,819.91 was sought.

- 22 On the date of hearing of that motion, and the applicant's motion seeking a stay of the order for the payment of the outstanding portion of the judgment sum by instalments, the applicant (who appeared for himself, with no appearance from Mrs Kerswell) sought to proceed on his motion, but asked for an adjournment of the respondent's motion. The basis of the partial adjournment application was given as a "need to seek further advice from senior counsel", and to obtain evidence that was said to go to the fraudulent conduct of persons connected with the respondent's case. The application was opposed.
- 23 From the transcript of the proceedings of 16 November 2017, the question of the adjournment application appears to have been canvassed quite exhaustively before the Magistrate. Her Honour was assiduous in attempting to assist the defendant to articulate what he wanted the court to do, and she permitted the applicant to expound at some length as to the reason he sought an adjournment. He was allowed to read a document to the court that he said senior counsel had prepared relevant to the application.
- 24 Having heard from both parties, the Magistrate refused the adjournment application. The reasons given for the refusal were that the defendant had had sufficient notice of the respondent's motion to secure legal representation, and had obtained advice from senior counsel; that the amount of money involved was small; that the respondent would be prejudiced by delay; and that the overriding obligation of the court to facilitate the just, quick and cheap resolution of the real issues in the proceedings was not served by delay.
- 25 Of the respondent's motion, the applicant's position was that the costs being sought by the respondent were illegitimate, in that they were principally costs related to the Federal Circuit Court ("FCC") bankruptcy proceedings, with respect to which no order for costs had been made. He maintained that other

costs sought were “illegal” pursuant to both the 1996 Act and the 2015 Act (T23 of 16 November 2017).

- 26 Of his motion, the applicant submitted that such payments as had been made by him towards satisfying the judgment sum had been made under duress, in circumstances where the respondent’s original summons was based upon fraudulent evidence that the Local Court should not have accepted.
- 27 There was a large volume of documentary evidence before the court, and the Magistrate considered that evidence, and the submissions of the parties. Having done so, she gave an ex tempore judgment (at T35 – 37), dismissing the applicant’s motion (against which decision no appeal is brought), but granting the motion filed by the respondent.
- 28 Having inspected copies of the invoices that supported the costs sought by the respondent, her Honour was satisfied that they were not costs associated with the FCC bankruptcy proceedings, but properly related to the costs legitimately incurred by the respondent in recovering the judgment sum, and enforcing the earlier court order. The applicant’s argument as to the “illegality” of other parts of the costs was considered by the court, but rejected as based upon an incorrect understanding by the applicant of the law. Her Honour concluded that the costs sought by the respondent were reasonable, and the applicant should be ordered to pay them.
- 29 Orders were made for the applicant to pay the amount sought, together with the respondent’s costs of both notices of motion.

The Proposed Grounds

The Magistrate erred in proceeding under the Strata Schemes Management Act 1996, rather than the Strata Schemes Management Act 2015

- 30 The first ground of appeal advanced by the applicant is his complaint that the Magistrate applied the incorrect legislation when making the orders of 16 November 2017.
- 31 The applicant contends that the Magistrate heard the motions, and made orders, pursuant to the 1996 Act, rather than the 2015 Act. Mr Kerswell bases his argument upon the dates on which the motions were filed, both being filed after the commencement of the 2015 Act on 30 November 2016.

32 The respondent argues that there was no error, and points to the transitional provisions that applied to the change of legislation, which provide for the 1996 Act to continue to apply to proceedings commenced when it was in force.

The Magistrate erred in having regard to evidence that was demonstrably false

33 The second complaint is with her Honour's acceptance, in making the impugned order, of the affidavit and documentary evidence filed for the respondent. The applicant asserts that the evidence was deliberately false and fraudulent, that the lawyer who appeared for the respondent at the Local Court hearing deliberately lied to the Magistrate, and that the matter should be investigated by police. The applicant relied upon the need for a formal investigation into these matters as part of his case for an adjournment.

34 The respondent contends that the applicant is revisiting allegations he raised at the hearing in June 2016 of the original 2015 proceedings, allegations for which there is no evidence. It noted that the Magistrate (properly) regarded herself as unable to reconsider her own judgment in that regard, an appeal being the appropriate avenue to challenge the 9 June 2016 judgment.

The Magistrate erred in not granting the applicant an adjournment of the hearing of the respondent's notice of motion filed on 7 November 2017.

35 By this proposed ground the applicant complains that the Magistrate treated him unfairly in refusing his application for an adjournment. He repeats those matters placed before the Magistrate – that he required further legal advice, and that it was necessary for a police investigation to take place with respect to the respondent's evidence – and says that the Magistrate erred in proceeding to hear the motions.

36 The respondent argues that the Magistrate's decision was a discretionary one, and the applicant has not pointed to any error such that it is amenable to review.

Consideration

37 In considering this matter, the Court has been obliged to try to make sense of well over one thousand pages of documentary evidence, much of which is repetitive and confusing. Having ploughed through the material, and having had regard to the oral and written submissions, I am unable to discern any

error in the approach of the Magistrate to the matter, much less an error of such a nature as to attract a grant of leave to appeal.

38 Whilst I do not doubt that he is dissatisfied with the November 2017 costs order against him, Mr Kerswell's real complaint is with the original orders of the Local Court of 9 June 2016, relating to the 2015 claim for unpaid strata fees. He clearly feels deeply aggrieved by that decision of the Local Court, and has been left angry and embittered because of what he claims to have been the perjured and dishonest conduct of the respondent's case during the course of the proceedings, and the fraudulent acts he attributes to the respondent's legal representatives throughout. The applicant's hostility to the lawyers in the case is plain from the language used in the affidavits and submissions filed, and was very obvious before me in the court room, where Mr Kerswell had to be instructed not to address comments to those at the other end of the bar table.

39 The Summons as originally filed principally related to complaints connected with the June 2016 orders of the Local Court, and it was clear from Mr Kerswell's conduct of the case before me that he regards the orders then made as procured by fraud and entirely wrong and unjust. However, as he is now aware, he is out of time for any appeal against the June 2016 orders. So much was clear from the ex tempore decision of Campbell J of 16 August 2018 when his Honour said,

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.

40 Being likely precluded from appealing against the June 2016 orders of the Local Court, Mr Kerswell reframed his current complaint as formally relating to the November 2017 costs order. However, much of what he had to say about that order, and the evidence he relied upon, related to or was connected with the earlier judgment.

41 As to the specific complaints, I am not satisfied that the applicant's proposed grounds of appeal are sufficiently arguable to call for a grant of leave, even where the ground complains of an error of law.

42 The first proposed ground is a case in point. The applicant complains that the Magistrate applied a repealed statute that had no application because of the introduction of a new statute. Although it is entirely understandable that a litigant without legal training would be unfamiliar with the operation of savings and transitional provisions, Mr Kerswell's complaint overlooks the relevant provisions.

43 Schedule 3 to the 2015 Act contains the savings and transitional provisions to the Act. Clause 7 provides:

7 Existing proceedings

Any proceedings commenced but not determined or finalised under a provision of the former Act are to be dealt with and determined as if the former Act had not been repealed.

44 The motions heard by the Local Court on 16 November 2017 were motions connected with the proceedings commenced in late 2015 during the currency of the 1996 Act (the 2015 Act having been passed by Parliament but not proclaimed to commence until 30 November 2016). The respondent's motion was brought pursuant to the liberty granted to it to reopen the initial proceedings. The Magistrate was correct to apply the 1996 Act.

45 This ground could not be made out if brought.

46 The proposed second ground, asserting the court's error in acting upon fraud by the respondent and its lawyers, is really no more than a complaint about the acceptance by the court of particular evidence as credible and reliable. There is no error of law where "the judge prefers one version of the evidence to another or one set of inferences to another": *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151. This is a ground asserting an error of fact, something the Court cannot review.

47 Even if it was an error of law to prefer one version of evidence over another, and review was possible, the ground is without merit. Mr Kerswell has asserted fraudulent conduct, without providing any evidence of it. He pointed to his

complaint to the police, but was not able to provide any evidence that an investigation was underway, or had produced any evidence of wrongdoing.

- 48 The Magistrate was entitled to accept the evidence of solicitors who, as her Honour observed, were officers of the Court bound by a solemn duty of honest dealings with a court. It was open to the Magistrate to accept them as credible witnesses, and the documents each produced as reliable. The applicant's claims about the conduct of the respondent and its lawyers have all the hallmarks of claims based in personal ill will, rather than reality, and the Magistrate may have viewed them in that way.
- 49 As to the proposed third ground, the decision to grant or refuse an adjournment of proceedings is a discretionary one. For there to be error, the applicant must demonstrate that the Local Court acted on wrong principles, allowed extraneous or irrelevant matters to guide the court, mistook the facts, or failed to take into account a material consideration: *House v The King* [1936] HCA 40; 55 CLR 499. It is not contended that her Honour made an error of this nature.
- 50 Her Honour took time to understand the nature of the application and the reasons for it, and determined it on the basis of appropriate considerations. There was no error and this ground must fail if advanced.

Conclusion

- 51 Having regard to the merits of the proposed appeal, I am satisfied that the applicant has not identified any error by the Magistrate and no error such that a review by this Court is warranted. Considerations of merit do not, therefore, favour the applicant.
- 52 Further, considerations of costs do not support a grant of leave. Proceedings with respect to what began as a debt of around \$16,000 have continued in one form or another for well over three years, generated many hours of work for the courts and all of those involved, led to a degree of stress and unhappiness for all concerned, and given rise to disproportionately large amounts of costs for the parties to meet. It is high time that these proceedings were concluded.

ORDERS

53 The Court makes the following orders:

- (1) The Summons filed on 9 February 2018 is dismissed.
- (2) Unless a party applies to my Associate in writing within 7 days of the date of these orders for a different order, costs on an ordinary basis in favour of the respondent.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.