



Supreme Court
New South Wales

Case Name: Voicu v The Owners-Strata Plan No 1624

Medium Neutral Citation: [2020] NSWSC 296

Hearing Date(s): 17 February 2020

Date of Orders: 27 March 2020

Decision Date: 27 March 2020

Jurisdiction: Common Law

Before: Basten J

Decision: (1) Grant Mr Voicu an extension of time under UCPR r 49.20(4) to 24 September 2019 to file the summons seeking to review the decision of the Manager, Costs Assessment's refusal to extend time to allow an application to a review panel.

(2) Dismiss the summons.

(3) Order that the plaintiff, Ilie Gheorghe Voicu, pay the costs of The Owners-Strata Plan No 1624 in this Court.

Catchwords: COSTS – costs' assessment – late application to review certificate – application to Manager, Costs Assessment to extend time – whether assessment under Legal Profession Uniform Law Application Act 2015 (NSW) or Legal Profession Act 2004 (NSW) – error by Manager as to applicable law – whether error material – whether applicant demonstrated available grounds for review

CIVIL PROCEDURE – application to review decision of Manager, Costs Assessment – whether proceedings for judicial review or review under Uniform Civil Procedure

Rules 2005 (NSW), r 49.19, 49.20 – nature of review

WORDS AND PHRASES – “proceeding” – whether appeal is a different proceeding from trial – transitional provision – Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59

WORDS AND PHRASES – “review” – Uniform Civil Procedure Rules 2005 (NSW), cl 49.19 – distinguished from judicial review under Supreme Court Act 1970 (NSW), s 69

Legislation Cited: Civil Procedure Act 2005 (NSW), s 98
Legal Profession Act 2004 (NSW), 363, 373, 379, 384, 385
Legal Profession Regulation 2005 (NSW)
Legal Profession Uniform Law Application Act 2014 (NSW), ss 63, 74, 75, 76, 83, 89, 93B; Pt 7
Legal Profession Uniform Law Application Regulation 2015 (NSW), cll 53, 59
Supreme Court Act 1970 (NSW), s 69
Uniform Civil Procedure Rules 2005 (NSW), rr 6.2, 42.2, 49.19, 49.20

Cases Cited: Ferella v Stomo [2017] NSWCA 268
In Re the Will of FB Gilbert (1946) 46 SR (NSW) 318
Tomko v Palasty (No 2) (2007) 71 NSWLR 61; [2007] NSWCA 369

Category: Principal judgment

Parties: Ilie Gheorghe Voicu (Plaintiff)
The Owners-Strata Plan No 1624 (First Defendant)
The Manager, Costs Assessment (Second Defendant)

Representation: Counsel:
Applicant self-represented
Ms A Power (First Defendant)
Submitting appearance (Second Defendant)

Solicitors:
Applicant self-represented
J S Mueller & Co (First Defendant)
Crown Solicitor’s Office (Second Defendant)

File Number(s): 2019/298157
Decision under appeal:
Court or Tribunal: Supreme Court – Manager of Cost Assessment
Date of Decision: 20 March 2019
Before: Brendan Bellach
File Number(s): 2017/388313

Decision under review

JUDGMENT

- 1 **BASTEN J:** By proceedings commenced on 24 September 2019, Ilie Gheorghe Voicu (the plaintiff) sought judicial review of a decision of the Manager, Costs Assessment, dated 20 March 2019, refusing to extend the time within which the plaintiff could seek to review three certificates setting out the decisions of a costs assessor.
- 2 The first defendant, The Owners-Strata Plan No 1624 (owners corporation), manages a strata plan in which the plaintiff and his wife own a unit. Because it appears that these were intended to be proceedings for judicial review of a decision of an independent officer exercising a statutory power, he was required to be joined as a second defendant. He was not originally joined, but an order joining him was made by the Registrar on 16 December 2019.
- 3 Before addressing the challenge to the determination of the Manager, it is necessary to note that the plaintiff did not appear at the hearing of the matter on 17 February 2020, nor at the hearing of his matter in the Court of Appeal, which had been listed for the same day. The date was fixed at a directions hearing on 16 December 2019. Notice was duly given to the parties by letter from the Registrar who fixed the date. The plaintiff, who had sought an adjournment of the proceedings, was not present when the date was fixed but, as explained in the Court of Appeal judgment handed down contemporaneously with this judgment, there is no doubt that the plaintiff was aware of the date of the hearing. The affidavit of 31 January filed in the Court

of Appeal proceedings (though not served) explicitly referred to this proceeding and objected to the two matters being heard together.¹

- 4 It should also be noted that the proceedings were not heard together, but separately and sequentially. I accept that the issues raised in each are different. The point of connection is that if any challenge to the assessments of the costs ordered in the District Court must be dealt with under the *Legal Profession Uniform Law Application Act 2014* (NSW) (Application Act), then no appeal will lie to the District Court except from a decision of a review panel, and unless the plaintiff can overturn the decision of the Manager, Costs Assessment, of 20 March 2019 to refuse to extend time to allow such a review by two assessors, no review will be available.

Procedural background

- 5 On 5 June 2015 the owners corporation commenced proceedings in the Local Court alleging that the plaintiff and his wife, Lucia Voicu, owed an amount of \$1,648 on account of levies payable to the owners corporation with respect to their unit. On 23 September 2015 orders were made in favour of the owners corporation for the amount claimed and legal costs in an amount of \$4,077.90.
- 6 On 16 October 2015 Mr and Mrs Voicu lodged an appeal in the District Court. They alleged that the Local Court lacked jurisdiction to hear the owners corporation's claim and that they were denied procedural fairness by the assessor in the Local Court. The appeal was heard by Judge M L Williams SC on 4 March 2016. He delivered an ex tempore judgment and made orders dismissing the summons and ordering that the Voicus pay the costs of the defendant owners corporation.
- 7 Despite the dismissal of their appeal, on 31 March 2016, and again on 19 May 2016, Mr and Mrs Voicu filed motions in the District Court. On 20 May 2016 Judicial Registrar Howard dismissed the motions and ordered that Mr and Mrs Voicu pay the costs of the owners corporation of the motions.

¹ Affidavit, 31 January 2020, pars 10, 11 and 12.

- 8 On 14 May 2018 a costs assessor, Mr T L Stern, assessed the costs ordered to be paid by the District Court on 20 May 2016. That assessment resulted in a certificate issuing in an amount of \$6,670.39.²
- 9 On 21 May 2018 a further assessment was undertaken by Mr Stern, this one relating to the costs ordered on 4 March 2016, and resulted in an award of \$16,241.34. He also made a determination in relation to the costs of the costs assessment in an amount of \$1,126.13. Copies of the determinations were sent to the parties, under cover of a letter from the Manager, Costs Assessment, dated 6 June 2018. The Manager's decision under review accepted that the parties were not in fact notified until 10 July 2018, but that was not consistent with Mr Voicu lodging an appeal before that date.
- 10 On 2 July 2018 Mr Voicu filed a summons in the District Court appealing from the costs assessment number 2017/388313, which reference encompassed all three certificates issued by Mr Stern. That appeal came before Kearns ADCJ on 6 December 2018. On that date, the appeal was dismissed and an indemnity costs order made against Mr Voicu in favour of the owners corporation. Proceedings were commenced by Mr Voicu in the Court of Appeal seeking judicial review of that judgment and orders.
- 11 On 8 February 2019, two months after the judgment dismissing his appeal to the District Court, Mr Voicu made an application to the Manager, Costs Assessment, seeking a review of the three determinations in matter 2017/388313. The application acknowledged that it was made more than 30 days after the relevant certificates had been sent to the parties and sought an extension of time within which to apply for review. The application was apparently signed by the review applicant (Mr Voicu) over the date 31 December 2018. The grounds were then listed, in 24 paragraphs. It was not served on the owners corporation.
- 12 On 20 March 2019 the Manager, Costs Assessment, Mr Bellach, provided, by letter to the parties, a determination refusing to grant an extension of time for filing the review application. It is that decision which is the subject of the present application for review in this Court.

² Affidavit of Faiyaaz Shafiq, 6 February 2020, par 2 and annexure "A".

Legal principles

- 13 It is convenient to commence by considering the relevant law applicable to the costs assessments underlying the Manager's decision. This is important because on 1 July 2015 the *Legal Profession Act 2004* (NSW), which had governed such matters prior to that date, was replaced by the *Legal Profession Uniform Law (NSW)* in accordance with the provisions of the Application Act. Part 7 of the Application Act provides for the assessment of legal costs. However, the provisions of the *Legal Profession Act 2004* and the Legal Profession Regulation 2005 (NSW) "relating to ordered costs continue to apply to a matter if the proceedings to which the costs relate commenced before 1 July 2015."³
- 14 The costs assessments the subject of relief sought in this proceeding related to costs orders made in the District Court in March and May 2016. Those orders were made in relation to proceedings commenced by a summons filed in the District Court on 16 October 2015 and in relation to notices of motion filed on 31 March 2016. The costs payable pursuant to those orders were never subject to assessment under the *Legal Profession Act* and Regulation, but, being "ordered costs" as defined in s 63 of the Application Act, were subject to assessment under Pt 7 of that Act. The application filed by the solicitors for the owners corporation correctly identified it as an application for assessment of ordered costs under s 74 of the Application Act.
- 15 The Manager, Costs Assessment, is a registrar appointed to the position of Manager by the Chief Justice.⁴ The "acts and decisions of the Manager, Costs Assessment are reviewable by the Supreme Court in the same manner as acts and decisions of other registrars are reviewable by the Court".⁵ That provision engages Uniform Civil Procedure Rules 2005 (NSW) ("UCPR"), r 49.19, which states that "if in any proceeding a registrar gives a direction or certificate, makes an order or decision or does any other act, the court may, on application by any party, review the direction, certificate, order, decision or other act and

³ Legal Profession Uniform Law Application Regulation 2015 (NSW) ("Application Regulation"), cl 59.

⁴ Application Act, s 93B(1).

⁵ Application Act, s 93B(3).

make such order, by way of confirmation, variation, discharge or otherwise, as the court thinks fit.”⁶

- 16 The application for review filed by Mr Voicu with the Manager, Costs Assessment, was identified in a heading as being made under s 83 of the Application Act. Section 83 provides as follows:

83 Application by party for review

(1) A party to a costs assessment may, within 30 days after the certificate of determination by the costs assessor has been forwarded to the parties in accordance with the regulations or the costs assessment rules, apply for a review of the determination.

(1A) The Manager, Costs Assessment may extend the period for lodging an application.

(2) Subject to this section, an application for a review is to be made in accordance with the costs assessment rules.

(3) An application for a review must—

(a) be filed with the Manager, Costs Assessment, and

(b) be accompanied by the fee (if any) prescribed by the local regulations, and

(c) be served on the other parties to the costs assessment concerned in accordance with the costs assessment rules.

...

- 17 The summons seeking judicial review of the decision of the Manager was filed in the Division on 24 September 2019. The details contained in the summons did not identify (and are not required to identify) the provision under which the proceedings were brought. Nevertheless, if the proceedings were by way of judicial review under s 69 of the *Supreme Court Act 1970* (NSW), the applicant would need to establish jurisdictional error on the part of the decision-maker, or an error of law on the face of the record. If the proceedings are by way of review under r 49.19, there is no such constraint on the powers of this Court.⁷
- 18 The summons is an appropriate form for commencing proceedings under s 69; it is also an appropriate originating process in any matter where a statement of claim is not required.⁸ On the other hand, in the case of proceedings already

⁶ The exclusions in r 49.19(2) have no application in this case.

⁷ *Tomko v Palasty* (No 2) (2007) 71 NSWLR 61; [2007] NSWCA 369 at [5]-[9] (Hodgson JA).

⁸ UCPR, r 6.2.

commenced in the Supreme Court, the normal process for seeking a review under r 49.19 would be to file a notice of motion in those proceedings.

- 19 It is not entirely clear whether the lodgement of an application to assess costs constitutes a proceeding in the Supreme Court. Although the Manager, Costs Assessment, is a person appointed by the Chief Justice and is a registrar of the Court, and although the costs assessors are also persons appointed by the Chief Justice (though not otherwise officers of the Court), the filing of an application for an assessment of costs would appear not to be the institution of proceedings in the Court. On that basis, a summons is an appropriate originating document of the Manager's decision. (If the application for an assessment of costs were treated as commencing proceedings in the Court, a review of the Manager's decision could be sought by a notice of motion in that proceeding, but that appears not to be the appropriate course.) Accordingly, although the respondent assumed (as did the Registrar), without contradiction from the applicant, that the summons in this Court was brought pursuant to s 69 of the *Supreme Court Act*, given that Mr Voicu is a litigant in person, the appropriate course is to treat the summons, beneficially to his interests, as seeking a review under UCPR r 49.19.
- 20 Reviews under that power are not restricted, even in the sense that an appeal would be restricted, to identifying error of law or error of any particular kind. They are certainly not restricted to errors of the kind necessary to engage the supervisory jurisdiction. Nevertheless, in accordance with the principles established in *In Re the Will of FB Gilbert*,⁹ the Court will not readily interfere with directions given as a matter of practice and procedure.¹⁰
- 21 On the other hand, the refusal of the Manager, Costs Assessment to grant an extension of time for a review of the two certificates of the costs assessor means that Mr Voicu has no right of appeal to the District Court. Under the Application Act, the right of appeal to the District Court is limited to a decision of a review panel: Application Act, s 89(1).

⁹ (1946) 46 SR (NSW) 318.

¹⁰ *Tomko v Palasty (No 2)* at [46]-[48].

Review of decision of the Manager, Costs Assessment

- 22 The applicant identified no particular error on the part of the Manager in refusing to extend the time within which leave to appeal was to be sought. However, as acknowledged by the respondent in the course of the hearing, there is an error apparent on the face of the Manager's reasons. It is clear that the Manager considered that he was determining an application under the *Legal Profession Act*.
- 23 Although it is troubling that the Manager, Costs Assessment, and the costs assessor, should mistake the legislation under which they were operating, for present purposes the relevant question is whether the mistake was material to the outcome. Both the *Legal Profession Act* (s 373(1)) and the Application Act (s 83(1)) provided that an application for review must be lodged within 30 days of the certificate being forwarded to the parties. That was qualified in the *Legal Profession Act* by provision of an alternative, namely within such further time as the Manager, Costs Assessment may allow. In the Application Act, there is a separate provision, s 83(1A), which confers on the Manager power to "extend the period for lodging an application". That provision was originally omitted from s 83 and was added by an amendment. However, there is no reason to treat the sections as having any different operation.
- 24 Further, both Acts required that an application for review be served on the other parties to the costs assessment.¹¹ As noted above, that was not done in the present case. That omission was a relevant consideration in determining whether to extend time.
- 25 There is one variation between the legislative schemes which does have the potential to affect how the Manager might treat an application to extend time. Under the *Legal Profession Act*, a bifurcated right of appeal was given with respect to either "a decision of a costs assessor as to a matter of law" (s 384(1)) or "the determination of the application made by a costs assessor" (s 385(1)). The appeal granted under the Application Act is limited to a "decision of the review panel": s 89(1). Given that the existence of a review is a precondition to an appeal, the Manager may be more willing to grant an

¹¹ Legal Profession Act, s 373(5); Application Act, s 83(3)(c).

extension of time in an appropriate case in circumstances where the refusal to do so will leave the dissatisfied party with no right of appeal to a court. It will be necessary to return to the significance of this difference below.

- 26 The Manager approached the question by reference to four criteria, namely (i) the proposed grounds of review, (ii) the reason for delay in seeking review, (iii) prejudice to either party, and (iv) whether there was apparent merit in the application for review.
- 27 The consideration of these factors focused on the last criterion; that was because the proposed grounds of review formulated by Mr Voicu lacked any allegation of error on the part of the costs assessor. So far as delay was concerned, the Manager noted that it appeared to be explained by the many other investigations and challenges that Mr Voicu had pursued over the period since the certificates were provided to him. Although describing the length of the delay as “sizeable”, it is clear that that consideration was not decisive. It is also apparent that the question of prejudice was not decisive, the Manager recognising that either party would experience “some form of prejudice”, depending on the decision. The critical element in refusing the application was identified in the following passage:¹²

“Mr Voicu’s grounds of review can be best described as dissatisfaction with the costs assessor’s determination, towards the amount determined as being fair and reasonable. When considering an application for additional time, compelling submissions addressing the grounds of review are required.

Dissatisfaction with an outcome; want for a further assessment; or taking an opposing view to the objective assessment undertaken by an assessor, are not sufficient to address or demonstrate merit in support of the delay. Having considered the material provided, the [Manager] is not satisfied that it would be just and fair in the circumstances to grant an extension of time for filing the review application.”

- 28 As an afterthought, the Manager noted that the costs of a review “are commonly in the range of \$4,000 - \$8,000 and may be more.” They would be borne by the review applicant if he were unable to vary the costs assessor’s determination by at least 15%. That liability originally arose under s 379(3) of the *Legal Profession Act*, and is now to be found in cl 53(2) of the Application Regulation.

¹² Determination, Out of time Costs Assessment Review, 20 March 2019, page 4.

29 The remaining question is whether, given that the Manager’s decision turned almost entirely upon his assessment of the merit of the proposed review, the manner of assessing costs has changed from that provided under the *Legal Profession Act* to that provided under the Application Act and Uniform Law.

30 In *Farella v Stomo*¹³ White JA stated, obiter, but with the agreement of Macfarlan JA:

“[34] ... The applicants did not suggest that there were any differences between the [*Legal Profession*] Act and the *Application Act* that could have led to the costs assessor or the Review Panel reaching different figures had they applied Pt 7 of the *Application Act* instead of the [*Legal Profession*] Act.”

Similarly, in the present case, neither party suggested any relevant difference and there is no reason to suppose that any such difference was intended. The assessment of “ordered costs” is based upon an order made under s 98 of the *Civil Procedure Act 2005* (NSW), read in combination with Pt 42 of the UCPR. Rule 42.2 provides that unless otherwise ordered, costs “are to be assessed on the ordinary basis.” Pursuant to the Application Act, the assessment of ordered costs is to be made in accordance with the terms of the order and “the rules of the relevant court or tribunal that made the order for costs”: s 75(1)(b). Costs may be made on the ordinary basis or on an indemnity basis: s 75(2). The assessment is to be undertaken according to the conventional standard of “what is a fair and reasonable amount of costs for the work concerned”: s 76(2). Similar provisions were to be found in the *Legal Profession Act* at s 363 ff.

31 No error was identified in the Manager’s reasons for reaching an assessment as to the absence of merit in the proposed review. Accordingly, unless it can be said that this Court should interfere with his exercise of discretion on the sole basis that he failed to take into account the fact that Mr Voicu had no right of appeal unless he first obtained a determination of a review panel, the application in this Court must be dismissed.

32 There are two reasons for thinking that such an additional consideration should not lead to a different outcome. First, it is in the interests of neither party to provide a basis for further reviews and appeals unless there is some evident

¹³ [2017] NSWCA 268.

merit in the challenge to the costs assessor's assessments. Yet, on the basis of the material before this Court, there is no reason to depart from the view adopted by the Manager, namely that the proposed review has no apparent merit.

- 33 Secondly, there is good reason not to provide a further basis for appeal in this matter. Although there was no requirement to obtain a determination from a review panel before appealing to the District Court, the opportunity to obtain such a determination was always available to Mr Voicu; he declined to take that opportunity. Pursuant to s 89(2) of the Application Act, the District Court had "all the functions of the review panel." Even if the District Court thought that it was exercising powers under s 384 or s 385 of the *Legal Profession Act*, its powers under s 385, following a grant of leave, were to conduct an appeal by way of a "new hearing" with fresh evidence available to be given.¹⁴ The application for an extension of time to apply to a review panel was only made after the proceedings in the District Court had been completed, adversely to Mr Voicu. It would be inappropriate in those circumstances, to allow him a further opportunity to review the certificates of the costs assessor when the District Court, albeit on a mistaken basis, had the power to review the assessments on Mr Voicu's own application.
- 34 Finally, it should be noted that the timing of the review application, apparently prepared some three weeks after the appeal to the District Court was dismissed, appears not to have resulted from Mr Voicu's realization that his appeal, absent a review panel decision, was misconceived. No-one suggested in the District Court that the appeal was unavailable, the District Court did not dismiss the appeal on that basis and Mr Voicu proceeded to challenge the dismissal in the Court of Appeal. A belated realization of the legal dilemma formed no part of his case for an extension of time, and was not relied upon in this court.

Conclusion

- 35 For these reasons, even accepting that Mr Voicu was entitled to a review of the Manager, Costs Assessment's refusal to extend time to allow an application to

¹⁴ Legal Profession Act, s 385(4).

a review panel, pursuant to UCPR r 49.19, the summons seeking the review should be dismissed. Mr Voicu must pay the defendant's costs in this Court.

36 It is appropriate to add that if a review under UCPR r 49.19 fails, a fortiori a claim under s 69 of the *Supreme Court Act* would fail.

37 The Court orders:

- (1) Grant Mr Voicu an extension of time under UCPR r 49.20(4) to 24 September 2019 to file the summons seeking to review the decision of the Manager, Costs Assessment's refusal to extend time to allow an application to a review panel.
- (2) Dismiss the summons.
- (3) Order that the plaintiff, Ilie Gheorghe Voicu, pay the costs of The Owners-Strata Plan No 1624 in this Court.

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.