Supreme Court

New South Wales

Case Name:	Huang v The Owners of Strata Plan No 7632
Medium Neutral Citation:	[2020] NSWSC 488
Hearing Date(s):	16 August 2019
Date of Orders:	1 May 2020
Decision Date:	5 May 2020
Jurisdiction:	Common Law
Before:	Walton J
Decision:	The Court confirms its orders of 1 May 2020.
Catchwords:	APPEAL – appeal from Local Court – appeal from costs – costs assessment under s 352(1) of the Legal Profession Act 2004 (NSW) – review decision – continued application of the Legal Profession Act 2004 (NSW) – costs order in Local Court – saving and transitional provisions of the Legal Profession Uniform Law Application Act – jurisdiction of Court – cost assessment and review appeal decision – whether amended summons brought out of time – application to extend time – refusal to extend time
Legislation Cited:	Civil Liability Act 2002 (NSW) District Court Act 1973 (NSW) Legal Profession Act 2004 (NSW) Legal Profession Uniform Law Application Act 2014 (NSW) Legal Profession Uniform Law Application Act 2014 (Vic) Legal Profession Uniform Law Application Regulation 2015 (NSW) Local Court Act 2007 (NSW) Strata Schemes Management Act 1996 (NSW)

	Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Currabubula v State Bank NSW [2000] NSWCA 232 Jingalong Pty Ltd v Todd [2014] NSWCA 330 Wende v Howarth (2014) 86 NSWLR 674; [2014] NSWCA 170
Category:	Costs
Parties:	Yu Huang (First Plaintiff) Cui'e Zhao (Second Plaintiff) The Owners of Strata Plan No 7632 (First Defendant) XLR8D Solutions Pty Ltd (Second Defendant)
Representation:	Counsel: C Purdy (First Defendant) Solicitors: Vardanega Roberts Solicitors (First Defendant)
File Number(s):	2019/205061
Decision under appeal:	
Court or Tribunal:	Local Court of New South Wales
Jurisdiction:	Civil
Date of Decision:	30 November 2016
Before:	Richardson LCM
File Number(s):	2015/106882

REASONS FOR DECISION

INTRODUCTION

1 This appeal is brought by an amended summons filed on 25 July 2019 from a decision of Local Court Magistrate Richardson of 30 November 2016, insofar as that judgment determined that Yu Huang ("the first plaintiff") and Cui'e Zhao ("the second plaintiff") (to be collectively referred to as "the plaintiffs") to pay the costs of The Owners of Strata Plan No 7632 ("the defendant"). Further, the plaintiffs sought to appeal the costs assessment made on 31 January 2019 and subsequent decision of the costs review panel of 28 March 2019.

2 XLR8D Solutions Pty Ltd, trading as Accelerate Showers ("the second defendant"), a waterproofing contractor, was listed as the second defendant in the Local Court proceedings. However, the plaintiffs settled with the second defendant prior to the commencement of the Local Court hearing on 11 May 2016.

3 There were subsidiary issues regarding the form that the Court Book should take and in relation to fresh evidence sought to be led on the appeal by the plaintiffs. Ultimately, given the disposition of this appeal, it unnecessary to resolve those issues.

4 The plaintiffs were not legally represented. The first plaintiff appeared, in person, for the plaintiffs.

5 On Friday, 1 May 2020, the Court made the following orders:

(1) The amended summons is dismissed.

(2) The notice of motion filed 25 July 2019 is dismissed.

(3) The plaintiffs shall pay the defendant's costs of the proceedings.

6 These are the reasons for that judgment.

FACTUAL BACKGROUND

7 The defendant was the body corporate and registered proprietor of the common property of Strata Plan No 7632, located in Epping, NSW. The plaintiffs were the registered proprietors of Unit 17 of the property ("the plaintiffs' unit").

8 In 2012, the plaintiffs became aware that water was leaking from their unit and penetrating into the property below ("the water damage"). On 19 September 2014, the defendant held an extraordinary general meeting. A resolution was passed at this meeting which approved the second defendant's quote for the cost of repairing the water damage to the plaintiffs' unit.

9 On 5 February 2015, the second defendant commenced work repairing the water damage to the plaintiffs' unit, with the approval of the plaintiffs. In the course of doing that work, the second defendant damaged the copper water pipes which resulted in the water to the property being turned off, rendering the

property uninhabitable ("the pipe damage") (the water damage and the pipe damage shall hereinafter, collectively, be referred to as "the damage").

10 On 6 February 2015, the defendant engaged AGM Plumbing Services Pty Ltd ("AGM Plumbing") to repair the damage to the plaintiffs' unit.

11 On 9 February 2015, a plumber from AGM Plumbing attended the plaintiffs' unit but no work was completed. The defendant contended that the plaintiffs turned the plumber away. However, the plaintiffs contended that they sought an independent report before proceeding with any further work.

12 On 23 February 2015, the plaintiffs lodged a complaint with Fair Trading NSW seeking to mediate with the defendant in order to have the damage to their unit rectified. The defendant declined to participate in mediation.

13 On 10 April 2015, the plaintiffs commenced proceedings against the defendant in the Local Court.

14 On 15 August 2015, the plaintiffs engaged DeLong Contractors to rectify the damage to their unit without informing the defendant. On 18 August 2015, the defendant directed the plaintiffs to cease work, however, the plaintiffs continued with that work until it was completed in February 2016.

15 On 13 October 2015, the second defendant was joined as a party to the proceedings.

Proceedings in the Local Court

16 By way of a statement of claim filed 10 April 2015, the plaintiffs made the following claims against the defendant:

(1) The defendant owed a duty of care to the plaintiffs:

(a) to maintain and keep the common property in a state of good repair; and

(b) not to cause property damage and economic loss to the plaintiffs.

(2) The defendant breached the above duty of care through the acts of its agent, the second defendant, in carrying out the waterproofing repairs, causing the pipe damage and failing to complete the waterproofing repairs.

(3) In breaching that duty of care, the defendant caused the plaintiffs to suffer loss and damage, which is particularised as being the costs of

repairs and the loss of rental income due to the property being uninhabitable due to the damage.

(4) The defendant is liable for the damage caused by or arising out of the work done by the second defendant, pursuant to s 65(6) of the *Strata Schemes Management Act 1996* (NSW).

17 It should be noted that the cost of repairing the water damage caused by the common property water leak was not pursued by the plaintiffs, as the claim was accepted by the defendant's insurer, CHU Underwriting Pty Ltd.

18 The total damages claimed by the plaintiffs were in the sum of $46,411.00, as well as interest and costs (the entirety of these claims, including any subsequent amendments, shall be referred to as "the plaintiffs' claim").

19 On 11 August 2015, the plaintiffs filed a notice of motion seeking leave to amend the statement of claim in order to plead a negligence action against the defendant. The parties attended the Local Court on 13 August 2015, where upon the motion was sustained. An amended statement of claim was received.

20 On 13 October 2015, the plaintiffs filed a further amended statement of claim which joined the second defendant in the proceedings. The following claims were brought against the second defendant:

(1) that the second defendant owed the plaintiffs a duty of care to perform the work in a proper and workmanlike manner, with due diligence and to not cause damage to the plaintiffs' unit;

(2) that the second defendant, in undertaking waterproofing repairs in 2015 on the plaintiffs' property, breached its duty of care when it struck and burst an external pipe; and

(3) as a result of the second defendant's breach, the plaintiffs suffered loss and damage in the amount of $15,000.

21 As mentioned earlier, on 11 May 2016, the plaintiffs and the second defendant settled the matter, whereby the second defendant agreed to pay the plaintiffs the sum of $15,000, being 50% of the repair costs and a further $7,000 for the plaintiff's legal costs.

22 The plaintiffs' claim was subsequently reduced from $47,863.00 to $33,952.20.

23 The defendant sought the plaintiffs' agreement that the proceedings be dismissed and the defendant pay the plaintiffs' costs on an ordinary basis. On

8 July 2015, the plaintiffs indicated that they would not resolve the proceedings on that basis.

24 Prior to the commencement of the Local Court hearing on 16 August 2016, several orders were made by the Local Court, including orders that the matter be adjourned on multiple occasions and that the parties file and serve additional documentation. On 17 August 2016, the final day of the hearing, the Local Court set the matter down for further oral submissions (each side was allocated 15 minutes). Judgment was scheduled to be delivered on 14 October 2016.

25 The Local Court vacated the 14 October 2016 judgment date and listed the matter for 30 November 2016.

Local Court Decision

26 On 30 November 2016, the Local Court made the following orders:

> **TERMS OF JUDGMENT/ORDER**
>
> Verdict for the Defendant
>
> Costs Order made –
>
> Costs on ordinary basis as agreed between the parties or assessed.

27 In his reasoning, Richardson LCM stated that with respect to the question of the defendant's negligence, the claim was not established by the plaintiffs to the requisite standard.

28 Richardson LCM then considered the issue of causation under s 5D of the *Civil Liability Act 2002* (NSW). In doing so, consideration was given to the plaintiffs' delay in obtaining an independent report, which went to the cause of the loss of rental income.

29 With respect to the issue of damages, Richardson LCM stated that the plaintiffs failed to quantify the damages and further, that the sum being claimed far exceeded what would have been the cost of rectifying the damage.

30 In the result, Richardson LCM awarded costs in favour of the defendant on an ordinary basis ("the Local Court costs order"). In doing so, he gave the following reasons:

> I think this is a situation where costs should be awarded in favour of the defendant on an ordinary basis throughout, because whilst there is a *Calderbank* offer, we are dealing here with a state of law that is in flux and we are dealing here with a genuine dispute which, at the commencement of these proceedings, was one where, arguably, the plaintiff was in difficulty with the first pleaded cause, but not the second, and it really behoved the Court to make the evaluation on the evidence and Mr Newton points out I've obviously made errors, but that's not evaluation of the evidence and as is the case of disputes of this kind, it is only after that evaluation of the evidence has taken place and the question asked whether there was negligence or not answered that you get a resolution.

Costs Assessment

31 The defendant filed a costs assessment application, claiming a total amount for costs in the sum of $130,915.48. On 31 January 2019, Ms Julie Wright of Greenway Chambers ("the costs assessor"), issued the Certificate of Assessment of Costs to the parties, which determined that the costs payable by the plaintiffs was in the amount of $105,764.15 ("the costs assessment"), pursuant to Div 11 of the *Legal Profession Act 2004* (NSW) ("the LPA 2004").

Costs Assessment Review

32 On 2 March 2019, the plaintiffs applied to have the costs assessment reviewed by the Costs Review Panel under s 373 of the LPA 2004.

33 On 28 March 2019, the Costs Review Panel assessed the total amount payable by the plaintiffs to be $100,240.15 ("the costs review decision").

34 In reaching its decision, the Costs Review Panel provided that the costs assessor had erred in allowing the defendant's professional costs on a GST inclusive basis to be included within the total sum. The defendant's professional costs were allowed as $60,766.00, with GST amounting to $5,524.00. In the result, the Costs Review Panel determined that the amount provided by the costs assessor should be reduced by $5,524.00, rendering the final sum owed by the plaintiffs to be, as noted above, in the amount of $100,240.15.

THE APPEAL

35 A summons seeking leave to appeal was filed on 2 July 2019. It was brought in two respects, namely:

(1) against the costs assessment; and

(2) against the costs review decision.

36 The plaintiffs filed an amended summons commencing an appeal on 25 July 2019 ("the amended summons"). The grounds of appeal under the amended summons, in summary, were brought on three bases:

(1) appeal against the costs order of the Local Court;

(2) appeal against the costs assessment; and

(3) appeal against the costs review decision.

37 As I will discuss, the amended summons was out of date to bring an appeal by 2 years and 7 months under r 50.12 of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR").

38 The proceedings brought by the amended summons shall hereinafter be referred to as "the appeal".

GROUNDS OF APPEAL

39 In broad summary, the grounds of appeal were as follows:

(1) There is new evidence relating to an issue that was disputed during the Local Court hearing, specifically, whether the plaintiffs turned away the plumber from AGM Plumbing and, therefore, did not rectify the damage to the plaintiff's unit.

(2) As a result of the Local Court costs order, the defendant claimed $130,915.48 in their bill of costs. The plaintiffs submitted that this was inequitably large and impossible for the plaintiffs to pay. The plaintiffs also sought for that amount to be reduced on the basis that the second plaintiff is 80 years old and frail.

(3) The plaintiffs submitted that they were treated badly in that the costs review decision was issued prior to the plaintiffs making their second set of submissions.

(4) The costs assessment was not fair and reasonable in determining the legal costs of the defendant.

(5) The costs assessor failed to provide adequate reasons.

(6) The reasons provided in the costs review decision were inadequate and due consideration was not given to the plaintiffs submissions.

40 In substance, the plaintiffs sought the following orders in the amended summons:

(1) the costs assessment and the cost review decision be set aside; and

(2) the Local Court costs order be upheld (and presumably set aside).

41 The plaintiffs sought other relief which did not feature in argument and would appear to have no significance, particularly in light of the ultimate conclusion reached by the Court in this matter. Some of those orders overlapped with the relief claimed in a notice of motion filed on 25 July 2019 by the plaintiffs ("the notice of motion").

42 The plaintiffs did not move on the notice of motion in these proceedings and no submissions were advanced with respect to it. The notice of motion was dismissed.

ISSUES

43 When the amended summons and plaintiffs' contentions are considered in light of the defendant's contentions, the issues raised on the appeal may be distilled to the following:

(1) Is the appeal from the cost assessment and costs review decision outside the jurisdiction of this Court?

(2) Should an extension of time be granted to bring the appeal from the decision of the Local Court?

(3) If time were granted to bring the appeal, should leave be granted to bring the appeal?

(4) Assuming that leave was granted, did the appeal from the Local Court (and subject to jurisdiction, the costs assessment and costs review decision) have merit?

Jurisdiction of the Court

44 The submissions of the plaintiffs, as to the challenge to the costs review decision, reflected a difficulty in the plaintiffs in navigating the appropriate jurisdiction to challenge that decision in light of the repeal of the LPA 2004, and the various transitional provisions introduced by the *Legal Profession Uniform Law Act 2014* (NSW). Those difficulties also extended to some of the merit submissions as to the appeal from the costs review decision. For convenience, a broad sample of the plaintiffs' merit submissions of the costs review decision appeal are included below:

(1) That the plaintiffs brought the matter to the Supreme Court as the Local Court declined jurisdiction to entertain an appeal from the Costs Review Panel's decision as it exceeded the jurisdictional limit of $100,000.

(2) The first plaintiff submitted that she engaged in conversation with the staff at the Local Court and District Court and had discussions with the

manager of the costs assessments team in order to ascertain where she should bring her claim, given that it exceeds $100,000. Consequently, the plaintiffs sought review of the costs assessment in the Supreme Court.

(3) There was minimal explanation provided by the Costs Review Panel as to why, in their determination, the costs assessment was set aside, yet the cost assessor's decision was ultimately confirmed. In the result, the plaintiffs submitted that adequate reasons were not provided for the Cost Review Panel's assessment of the cost assessor.

(4) The plaintiffs submitted that the Costs Review Panel did not take into account the plaintiffs' submissions in conducting their review of the costs assessment. The plaintiffs contended that the date of the costs review decision is prior to the date given to the plaintiffs to make their submissions. Whilst the plaintiffs made one set of submissions to the Costs Review Panel, they were under the belief that they had until a certain date to file further submissions. Consequently, the costs review panel was not able to take into consideration the issues raised in the plaintiffs' second set of submissions in coming to the costs review decision.

(5) The plaintiffs also contended that there was a discrepancy in the defendant's bill of costs. The plaintiffs stated they sent a letter to the Costs Review Panel outlining the alleged discrepancies in the defendant's bill of costs.

45 As noted earlier, it is reasonably clear the plaintiffs also sought to challenge the costs assessment.

46 Plainly, the plaintiffs have a significant stake in challenging the costs assessment and costs review decision. Further, following the commencement of the new legislative regime, the *Legal Profession Uniform Law Application Act 2014* (NSW) ("the Application Act"), an appeal as to a Local Court costs order or a costs assessment lay as of right to the District Court if the amount of costs in dispute is at least $25,000 and to the Supreme Court if that amount is at least $100,000. If the amount is above $100,000, an appeal lies to either court. The relevant appellate jurisdiction is no longer affected by the $750,000 jurisdictional limit that applied to a demand in an action in that Court (see s 44 of the *District Court Act 1973* (NSW)). In the result, under the Application Act, a court of appeal, being the District Court or Supreme Court, has all of the functions that the Costs Review Panel had under the former LPA 2004 (see s 89(2) of the Application Act).

47 Nonetheless, in my view, an appeal does not lie to this Court from either the costs assessment or the costs review decision, here under consideration, for the following reasons:

(1) The defendant was correct to submit that the provisions of the LPA 2004 continue to apply to appeals from the costs assessment and costs review decision for the following reasons:

(a) The LPA was repealed by s 167(a) of the Application Act as of 1 July 2015. By s 4 of the Application Act, the *Legal Profession Uniform Law* set out in Sch 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic) applies as a law of the State of New South Wales and may be referred to as the "*Legal Profession Uniform Law* (NSW)" (and so applies as if it were an Act). The *Legal Profession Uniform Law* commenced on 1 July 2015.

(b) However, cl 1 of Pt 1 of Sch 9 of the Application Act enabled the making of savings and transitional provisions to be made by regulation. Clause 59 of the *Legal Profession Uniform Law Application Regulation 2015* (NSW) ("the Application Regulation") provides:

> **59 Ordered costs – transitional provision**
>
> The provisions of the *Legal Profession Act 2004* and the *Legal Profession Regulation 2005* relating to ordered costs continue to apply to a matter if the proceedings to which the costs relate commenced before 1 July 2015.

(c) As earlier noted, costs were ordered by the Local Court in the Local Court proceedings on 30 November 2016. Those were the proceedings in which the plaintiffs' claim was determined adversely for the plaintiffs. Those proceedings were commenced before 1 July 2015, namely, on 10 April 2015. There can be no doubt, therefore, that costs ordered by Richardson LCM were costs made in the proceedings and hence, fall within the meaning of the words "the proceedings to which the costs relate" in cl 59 of the Application Regulation.

(d) An appeal from the costs review decision, under the LPA 2004, falls within the meaning of the expression used within cl 59 of Application Regulation.

(e) It is clear that the provisions of Ch 3 Pt 3.2 Div 11 of the LPA 2004, pursuant to which the costs assessment and cost review decision were made, related to costs ordered in the Local Court.

(f) Further, s 367A of the LPA 2004 provided:

> **367A Determinations of costs assessments for party/party costs**

> A costs assessor is to determine an application for an assessment of costs payable as a result of an order made by a court or tribunal by making a determination of the fair and reasonable amount of those costs.

(g) A costs review concerns the review of the costs assessment (s 373 of the LPA 2004).

(2) The appellate processes within Subdiv 6 of Ch 3 Pt 3.2 Div 11 of the LPA 2004 concern appeals from a costs assessment, which provisions concern appeals from, *inter alia*, a review panel (see s 382 of the LPA 2004). Those provisions have a necessary relationship to the assessment of party/party costs ordered in the Local Court (see Subdiv 3 of Ch 3 Pt 3.2 Div 11 of the LPA 2004). Those provisions concern or relate to "ordered costs" for the purposes of cl 59 of the Application Regulation.

(3) The right of appeal from the costs review decision is confined, under the appellate scheme of the LPA 2004, to appeals provided for in ss 384(1) and 385(2) of the LPA 2004. Neither of those provisions confer jurisdiction in relation to appeals from costs review decisions upon this Court. Putting aside this Court exercising its supervisory jurisdiction (which has not been invoked in this case), the plaintiffs' rights, if any, in respect of the costs review decision, can therefore only be enforced in either the District Court under s 384 or the Local Court, by leave of that court, under s 385 of the LPA 2004.

(4) As to the plaintiffs' appeal against the costs assessment, the defendant correctly contended that, in cases such as this one, where there has been a costs review decision by a Costs Review Panel under Subdiv 5 of Ch 3 Pt 3.2 Div 11 of the LPA 2004, it operates to supersede the decision of the original costs assessor. Hence, whilst the original decision will remain effective, the original decision is of no legal consequence. Basten JA (with whom Barrett JA and Beazley P agreed) in *Wende v Howarth* (2014) 86 NSWLR 674; [2014] NSWCA 170 at [20] and [24] stated:

> [20] Not persuaded by an expanding list of failures in resisting payment of an initial claim of $18,536, the applicants sought to appeal to this Court. The right of appeal conferred by s 127 of the *District Court Act 1973* (NSW) is limited to a judgment or order in "an action" in the Court. As the Court has held in a series of decisions, that phrase, generally speaking, does not include statutory appeals from other jurisdictions: *Muldoon v Church of England Children's Homes Burwood* [2011] NSWCA 46; 80 NSWLR 282 at [11] (Campbell JA). Counsel appearing for the applicants did not seek to contend that there was any appellate jurisdiction in the present case. He conceded that the application for leave to appeal should be dismissed. He resisted an order for costs, but largely on the basis that little additional expense would have been incurred by the jurisdictional mistake in this court and an order may give rise to further disputation. The probable amount may be low, but is not a reason to decline the usual order. If it is indeed low there should be no strenuous resistance, but that too is

> beyond the range of relevant factors. The summons seeking leave to appeal should be dismissed with costs.
>
> …
>
> [24] The right of a party to have an initial decision reviewed on the merits is closely analogous to the so-called "all grounds" appeal which used to be available under s 122 of the Justices Act 1902 , providing for such an appeal from a conviction by a magistrate to Quarter Sessions (later the District Court). It was a "full appeal on law and fact". As explained by Dixon J in *Wishart v Fraser* [1941] HCA 8; 64 CLR 470, so long as the decision of Quarter Sessions affirming the conviction stood it was conclusive of the issues determined and it was not open to the person convicted to seek prohibition with respect to the conviction by the magistrate. Even if the disposition involved the dismissal of an appeal which was "withdrawn", with orders confirming the conviction and penalty imposed by the magistrate, no prohibition would lie: *Blacker v Parnell* [1978] 1 NSWLR 616. By analogy, there cannot be two certificates of assessed costs in relation to one matter: where there has been a determination by a review panel, which "sets out the determination", pursuant to s 378(1), that determination must, by implication, supersede the determination under review. Accordingly, it was not open to the applicants in this court to seek to challenge the validity of the determination of Ms Dulhunty: the validity of that determination was assumed for the purposes of the review and it would be inconsistent with the fact of the review to allow the applicants to challenge the validity of the original certificate. Rather, unless and until the decision of the review panel be set aside, the original certificate has no legal consequence.

48 As to the plaintiffs' submissions *vis-à-vis* access to the Local Court, I note that the *Local Court Act 2007* (NSW)does provide a jurisdictional limit of $100,000 but that limit only applies to the Local Court's civil jurisdiction (see ss 29, 29A and 30(1) of the *Local Court Act*). In the Local Court's special jurisdiction conferred by the LPA 2004, the jurisdictional limit does not apply. In the result, the defendant correctly submitted, the Local Court's statutory jurisdiction to entertain appeals from costs assessors or Costs Review Panel decisions would not be subject to a jurisdictional limit.

49 It follows that, in the absence of judicial review proceedings, there is no jurisdiction to entertain the appeal against the costs assessment or costs review decision in this matter. The appeal from the costs assessment and cost review decision is dismissed.

Extension of Time

50 The question of leave to appeal is addressed in Pt 50 Div 4 of the UCPR. Rules 50.12 and 50.13 are extracted below:

50.12 Leave to appeal

(1) A summons seeking leave to appeal must be filed:

(a) within 28 days after the material date, or

(b) if the appeal relates to the decision of a judicial officer, within such further time as the judicial officer may allow so long as the application for such further time is filed within 28 days after the material date, or

(c) within such further time as the higher court may allow.

(2) An application for an extension of time under subrule (1) (c) must form part of the summons seeking leave to appeal.

(3) The summons must be in the approved form and must contain a statement as to:

(a) whether the appeal relates to the whole or part only, and what part, of the decision of the court below, and

(b) what decision the plaintiff seeks in place of the decision of the court below.

(4) The summons must also contain a statement of:

(a) the nature of the case, and

(b) the reasons why leave should be given, and

(c) if applicable, the reasons why time to apply for leave should be extended, setting out briefly but specifically the grounds relied on in support of the appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below.

(5) This rule does not apply to an appeal under section 39 of the Victims Support and Rehabilitation Act 1996.

51 The general principles as to the an extension of time application were summarised in *Currabubula v State Bank NSW* [2000] NSWCA 232 at [87] (per Einstein J):

> [87] … An extension of time in which to appeal is not granted automatically or as of right: the Rules of Court governing time steps for pursuing an appeal are to be complied with. However, those Rules of Court are not to be used to effect an injustice: the object of the power of the Court to extend time is to do justice as between the parties. The Court will extend time where not to do so would work an injustice. Relevant considerations in exercising the discretion include the history of the proceedings, the conduct of the parties, the nature of the litigation, the consequences to the parties of the grant or refusal of the extension of time, the prospects of the appeal's success and any prejudice caused to the respondent by extending the time. The trend of recent authorities is towards a growing liberality in granting extensions of time in which an appeal can be lodged: *Moulieux v Girvan NSW Pty Ltd* (unreported, Court of Appeal, 20 September 1991), Gallo v Dawson [1990] HCA 30; (1990) 93 ALR 479 at 480-481, *Jess v Scott* (1986) 12 FCR 187 at 194-195, Morris v Public Transport Commission of NSW (unreported, Court of Appeal, 28 May 1984).

52 The factors to be taken into account when considering whether or not to grant an extension of time are as follows (see *Jingalong Pty Ltd v Todd* [2014] NSWCA 330 at [40] per Basten JA with whom Hodgson and Ipp JJA agreed):

(1) the length of the delay;

(2) the reason for the delay;

(3) whether the proposed appellant has a fairly arguable case; and

(4) the extent of any prejudice suffered by the respondent as a result of the delay in seeking the leave.

Length of Delay

53 Given the earlier determination of the Court dismissing the appeal regarding costs assessment and costs review decisions, this question confined to the appeals from the Local Court. In fairness to the plaintiffs, I shall examine the application of the question as though the application for such an extension had been squarely made in the amended summons having regard to the submissions of the plaintiffs.

54 As previously mentioned, the Local Court decision was made on 30 November 2016. Therefore, the plaintiffs had 28 days, from that date, to file an appeal: r 50.12 of the UCPR. However, the amended summons, which was brought in the appeal, was not filed by the plaintiffs until 25 July 2019. Consequently, the appeal is out of time by approximately 2 years and 7 months.

55 The defendant correctly contended that the length of delay in this matter is considerable and the plaintiffs proffered no explanation for it.

Reason for Delay

56 The plaintiffs provided the following reasons for the delay:

(1) The plaintiffs promptly sought leave to appeal the costs review decision. This suggests that the plaintiffs adopted the perception that the 28 days commenced with the decision of the Costs Review Panel, rather than the decision of the Local Court.

(2) The plaintiffs were not aware of the Local Court costs order until they received an invoice from the counsel for the defendant on 27 April 2017.

(3) It was “common ground that the application for a retrospective extension was an application for seek leave to appeal to Supreme Court”.

(4) The delay was “trivial considering the defendant consumed vast majority time about 18 months to prepare for “Bill of Costs”.

(5) The plaintiffs "were advised, by their lawyer's at the time of Local Court order, it would be very difficult to appeal if there were no new evidence/s".

(6) The new evidence relied upon by the plaintiffs was not available within the 28 days.

57 I am prepared to accept the plaintiffs may have operated under some confusion with respect to the appeal process even though they did seek some advice in relation to it. However, even adopting that relatively generous approach, the appeal is still out of time (notably, by reference to the costs review decision) by 68 days. There was no explanation for this delay.

Merits of the Case

58 In substance, the plaintiffs argued the merits of the primary matter before the Local Court, not the Local Court costs order. The Local Court made an order, in essence, stating that costs follow the event (UCPR, r 42.1), as well as giving reasons as to why no indemnity costs order should be made in the circumstances.

59 There were no grounds or contentions directed to why the Local Court should not have awarded costs in relation to the plaintiffs' claim, given the plaintiffs failure to make out that claim. Rather, the plaintiffs sought to revisit the conclusion of Richardson LCM as to the plaintiffs' claim itself. That was what the evidence sought to be led by the plaintiffs was directed to in these proceedings.

60 In response to the plaintiff's contentions, the defendant made the following submissions:

(1) The plaintiffs did not engage with an appeal limited to challenging the Local Court costs order and tended to stray into the merits of the application originally brought before the Local Court.

(2) The plaintiffs, in their submissions, opposed any costs order other than on the ordinary basis. However, there is no evidence that the plaintiffs sought any departure from the usual position under r 42.1 of the UCPR that costs follow the event. Therefore, the plaintiff's submissions raised a challenge to the Richardson LCM's exercise of the discretionary power to award costs; a contention that was not made in the court below.

(3) Had the plaintiffs challenged the Local Court costs order at the outset, then the issues that arose could have been determined by the Supreme

Court in the normal course. However, as there was no challenge to the Local Court costs orders by the plaintiffs, the defendant incurred the expenses of preparing a bill in assessable form and of resisting the plaintiff's application for review of the costs assessment. In the instance that the Local Court costs order is disturbed, the aforementioned expenses will have been thrown away and further assessment expenses will be incurred by the defendant.

61 I accept those submissions.

Prejudice to the Defendant

62 As mentioned above, disturbing the Local Court costs order would prejudice the defendant given the expenses incurred in preparing a bill in assessable form and of resisting the plaintiff's application for review of the costs assessment.

Conclusion: Out of time

63 Given the delay in bringing the appeal from the Local Court, the absence of an explanation for delay (even on a generous approach to the circumstances of the delay), the weak merits of the appeal and the prejudice to the defendant, I refuse to exercise my discretion to extend time to bring the appeal from the Local Court decision.

64 It follows that the amended summons should be dismissed.

65 The Court confirms its orders of 1 May 2020.

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