Supreme Court

New South Wales

Case Name:	Rodny v Stricke
Medium Neutral Citation:	[2020] NSWSC 800
Hearing Date(s):	19 June 2020
Decision Date:	25 June 2020
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Refuse leave to appeal. (2) Dismiss the amended summons filed 19 June 2020. (3) Subject to an application being made in writing to my Associate within seven days of the date of this order for a different order, order the plaintiffs to pay the defendants' costs of the proceedings.
Catchwords:	APPEALS — Appeal from NSW Civil and Administrative Tribunal Appeal Panel — where Tribunal listed matter for hearing when plaintiffs' legal representatives unavailable — where plaintiffs' subsequent application for adjournment refused — where Appeal Panel refused leave to appeal — whether decision of Appeal Panel or original listing decision was legally unreasonable — whether each decision constituted denial of procedural fairness
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 36, 38, 60, 80, 83 Strata Schemes Management Act 2015 (NSW) Uniform Civil Procedure Rules 2005 (NSW), r 42.1
Cases Cited:	Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352; [2017] FCAFC 107

	Croke v R [2020] NSWCCA 8 Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57 Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24; [1986] HCA 40 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18 Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11 R v Small (1994) 33 NSWLR 575 Rodny & Communications Power Incorporated (Aust) Pty Ltd v Stricke & Ors [2019] NSWCATAP 150 Rodny v Stricke [2020] NSWCATAP 20
Category:	Principal judgment
Parties:	Laurence Rodny (First Plaintiff) Communications Power Incorporated (Aust) Pty Ltd (ACN 001 521 160) (Second Plaintiff) Angela Stricke (First Defendant) Helen Meddings (Second Defendant) Natalie Stoianoff (Third Defendant) Vlad Sofreski (Fourth Defendant) The Owners – Strata Plan No 56911 (Fifth Defendant)
Representation:	Counsel: C Birch SC (Plaintiffs) J Knackstredt (Defendants) Solicitors: Strata Specialist Lawyers (Plaintiffs) Clyde & Co (Defendants)
File Number(s):	2019/226633
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Appeal Panel
Citation:	[2019] NSWCATAP 150
Date of Decision:	23 May 2019 (given ex tempore); 19 June 2019 (written reasons provided)
Before:	S Westgarth, Deputy President

File Number(s): AP 19/23756

JUDGMENT

Introduction

1 By amended summons filed in Court on 19 June 2020, Laurence Rodny and Communications Power Incorporated (Aust) Pty Ltd (the plaintiffs) seek leave to appeal against a decision of the Appeal Panel of the New South Wales Civil and Administrative Tribunal (the Tribunal) made on 23 May 2019 refusing leave to appeal against the Tribunal's refusal to adjourn proceedings which were listed for hearing for three days commencing 28 May 2019: *Rodny & Communications Power Incorporated (Aust) Pty Ltd v Stricke & Ors* [2019] NSWCATAP 150.

2 The proceedings before the Tribunal concerned the plaintiffs' application pursuant to the *Strata Schemes Management Act 2015* (NSW) against the Owners Corporation and members of the strata committee (the defendants) for a multi-storied apartment building in Kent Street, Sydney of which the plaintiffs were lot-owners. The plaintiffs contended that the committee ought be removed. It is unnecessary, for present purposes, to address the nature of the substantive proceedings beyond this brief description.

3 This Court's jurisdiction is conferred by s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act), which relevantly provides:

> "**83 Appeals against appealable decisions**
>
> (1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.
>
> …"

The factual background

4 In order to place the decision under review in context it is necessary to set out some of the procedural background to the proceedings in the Tribunal.

The procedural history

5 On 20 October 2017, the plaintiffs filed the application referred to above in the Strata List of the Tribunal's Consumer and Commercial List. Issues arose

about whether the plaintiffs' original solicitors ought be permitted to act on their behalf and whether the same firm of solicitors could act for both the Owners Corporation and each of the strata committee members. These issues were litigated in the Tribunal and before the Appeal Panel. On 16 July 2018 the matter was listed for hearing for two days commencing on 7 November 2018. The dates were vacated because the time at which the plaintiffs had served their evidence had left insufficient time before the hearing for the defendants to respond. On 19 November 2018 a new hearing date was allocated and the matter was listed to commence on 27 March 2019.

6 A personal tragedy, which involved one of the plaintiffs' representatives, arose on the eve of the hearing date. The plaintiffs applied for an adjournment, which was not opposed by the defendants. The Tribunal refused the adjournment. However, the plaintiffs' solicitor, Mr Cunio, made a further application for an adjournment on the morning of the hearing, 27 March 2019. Senior Member Boyce, who had been allocated to hear the matter, granted the adjournment and directed the parties to advise the Tribunal and each other by 4pm on 10 April 2019 of unavailable dates for hearing of their witnesses and representatives and the names of the other parties' witnesses required for cross-examination. The written notice to the parties of the orders made concluded:

> "A separate written notice of the new hearing date will be sent to you in the near future."

7 By email sent on 2 April 2019, the defendants' solicitors advised the plaintiffs' solicitors that the earliest available time at which all of the defendants' witnesses would be available for three consecutive days was 28-30 May 2019. They also informed the plaintiffs' solicitors that additional dates could be provided if not all of their witnesses were required for cross-examination.

8 At 3.22pm on 10 April 2019 the plaintiffs sent an email to the Tribunal, which was copied to the defendants, which said, in part:

> "We refer to order 2 of the Tribunal made on 27 February 2019 [sic]. The applicants are only available for a three day consecutive hearing from 1 July 2019 to 5 July 2019, in the months of April, May, June and July 2019. The applicants have available dates for a three day non-consecutive hearing (two days plus one) in May and June 2019."

9 The plaintiffs' solicitors also listed the eleven witnesses to be called by the defendants who were required for cross-examination.

10 Ten minutes later, at 3.32pm on 10 April 2019, the defendants' solicitors sent an email to the Tribunal and the plaintiffs' solicitors:

> "We advise that we wrote to the Applicants' Solicitor on 2 April 2019 informing the Applicants' Solicitor:
>
> a. the Respondents require Mr Rodny and Mr Kioussis to be available for cross examination;
>
> b. 27-31 May is the first available window where all of our witnesses and representatives are available for a 3 day hearing.
>
> We requested that the Solicitor advise which of the Respondents witnesses are required for cross examination, as this may enable us to provide some alternative windows of dates.
>
> No response was received, and we note instead the email below to NCAT.
>
> Notwithstanding that the Applicant has sought 11 witnesses for cross examination - the Respondents are available for hearing 27-31 May.
>
> We consider it unreasonable for the Applicants to suggest that the hearing of this matter be adjourned to after 1 July 2019, three months away.
>
> The vacation of the hearing was on the Applicant's application on the morning of the hearing, which was opposed by the Respondents."

11 On 10 April 2019 at 3.41pm, the plaintiffs' solicitors emailed the Tribunal and the defendants' solicitors and said:

> "Apart from availability of Counsel, the writer is overseas on leave during that time. The flights were booked prior to the application for an adjournment and the orders made on 27 March 2019. The writer has had carriage of the substantive aspect of this application at all relevant times. The applicants would suffer an irreconcilable injustice if the matter were to be listed from 27 to 31 May 2019.
>
> If the Tribunal is not minded to list the matter for three days from 1 to 5 July 2019, then we suggest non-consecutive days are allocated to this hearing."

12 On 18 April 2019, the defendants' solicitors emailed the Tribunal and the plaintiffs' solicitors and said:

> "As the Applicants require all 11 witnesses to be available, there are no other dates during May, June, July or August where all 11 witnesses and counsel are all available, whether in blocks or in single days.
>
> This availability is primarily constrained as one witness, Deirdre Plummer, has two extended periods of overseas travel, and Andy Plummer has one extended period of overseas travel. If the Applicants do not require the Plummers for cross-examination, then the Respondents can further provide the following dates: 4-6 Jun, 22-24 July, 5-8 August, 12-14 August.

> Otherwise, 28-30 May are the first available dates where all witnesses and Counsel are available. I note that in the interceding period between 10 April and today, Counsel has become unavailable on 27 and 31 May. As for the Applicants' availability during that period, I note that they have senior and junior counsel briefed, who should be able to adequately represent the Applicants at any hearing."

13 The plaintiffs' solicitors did not respond to this email or further communicate with the defendants' solicitors or the Tribunal about the dates until after 3 May 2019.

The listing decision on 3 May 2019

14 On 3 May 2019 (a Friday), without further recourse to the parties, Principal Member Rosser of the Tribunal decided to list the matter for hearing for the three days commencing 28 May 2019 (the listing decision). She notified the parties in the following terms:

> "It appears that the reason the applicant is unavailable between 27 and 31 May is the solicitor and counsel unavailability. These are not sufficient reasons to postpone the listing of the hearing beyond the end of May. The matter has been before the Tribunal for some 18 months and the hearing was adjourned on the last occasion at the request of the applicant. There is sufficient time between now and late May for another solicitor to be instructed and alternative counsel to be briefed."

15 On 6 May 2019 (the following Monday), the plaintiffs' solicitors made submissions requesting that the Senior Member change the hearing dates to 5-7 June or 11-14 June 2019 (these having apparently become available since the email of 10 April 2019). They said that neither senior counsel, junior counsel, nor the solicitor was available for the allocated dates and that $50,000 would be required to be spent to brief new legal representatives. The letter concluded:

> "…
>
> 6. It is respectfully submitted that it is unreasonable to provide less than 25 days' notice of a three day hearing in circumstances where a party must engage a new solicitor and new Counsel in a matter that has a significant amount of evidence to consider and seeks an order under a new section of the legalisation [sic] that has not previously been decided by the Tribunal (Section 238 of the *Strata Schemes Management Act* 2015).
>
> 7. The Tribunal must seek to give effect to the guiding principle in the Civil and Administrative Tribunal Act 2013 when it exercises any power, including the power to list a matter for hearing. It is respectfully submitted that the decision to list the matter for a three day hearing with less than 25 days' notice, and over three weeks after our last communication to the Tribunal, and requiring a party to engage a new lawyer and Counsel at an additional cost in

> excess of $50,000, in circumstances where there is no prejudice suffered by the other party in having the matter heard later or on different day, does not facilitate the just, quick and cheap resolution of the real issues in dispute.
>
> 8. It is not only prejudicial to the applicants to have to throw away over $50,000 in additional costs to engage another lawyer and Counsel, but also is prejudicial in that it will be difficult if not impossible to engage suitable qualified lawyers and Counsel to prepare and appear on such short notice.
>
> …"

16 On 7 May 2019, the defendants' solicitors wrote to the Tribunal and the plaintiffs' solicitors and reiterated the availability of 4-6 June 2019 if A & D Plummer were not required for cross-examination. They responded to the plaintiffs' submissions and asserted that the defendants would be prejudiced by further delay by the fact of having to remain parties to proceedings which were not expeditiously determined.

The refusal of the plaintiffs' adjournment application on 9 May 2019

17 On 9 May 2019, the Tribunal (Principal Member Rosser) refused the application for adjournment (the adjournment decision) and gave reasons as follows:

> "1) The Tribunal is unable to accommodate a three day hearing on the dates specified by the applicant.
>
> 2) The applicant has provided no evidence to support a conclusion that alternative counsel cannot be briefed.
>
> 3) In circumstances where the proceedings have been on foot for an extended period of time and where the Tribunal has allocated three days for a final hearing after taking steps to arrange for a Tribunal Member to be available to hear the matter, a further adjournment is not appropriate, even if they [sic] applicant may put to the cost of briefing alternative counsel.
>
> 4) If the applicant is not ready to proceed, it is open to the applicant to withdraw the applicant [sic] and re-commence proceedings at a time when he is ready to proceed."

18 As appears from Mr Cunio's statutory declaration (extracted below), the plaintiffs' solicitors sought advice from their senior counsel, Mr Sirtes SC, which was received on 15 May 2019.

The plaintiffs' application for leave to appeal to the Appeal Panel against the listing decision and the adjournment decision

19 On 21 May 2019 the plaintiffs lodged an appeal from the listing decision and the adjournment decision. In support of their appeal, they relied on a statutory declaration made by Mr Cunio, their solicitor, which set out the background to

the matter, much of which has been extracted above. He also stated at paragraph 30:

> "Upon receipt of the communication from the Tribunal referred to in the previous paragraph, I sought the advice of Mr Sirtes SC, and received that advice on 15 May 2019. I also made enquiries with my clients as whether he had attempted to obtain the services of another lawyer or Counsel. He informed me that had made some attempts, but those solicitors he had contacted were either not available or would not take on the matter at such short notice."

20 The application for leave to appeal was heard on 23 May 2019 by the Appeal Panel (Deputy President Westgarth). In the course of argument, the Deputy President asked what would happen the following week if the matter went ahead, to which Ms Power, who appeared on behalf of the plaintiffs, said:

> "There was an option provided by the Principal Member on the 9th of May which was if the Applicant is not ready to proceed it is open to the Applicant to withdraw the application and recommence the proceedings at a time where it's ready to proceed. I think the practical consequence, if I can say it very blankly to the Tribunal, is that if the matter is to proceed the Applicant will withdraw the proceedings and recommence. That's simply the only practical course at this point open to t[h]e Applicants. And it is a course that was foreshadowed by the Principal Member. And that direction is at page 90 of Mr Cunio's Stat Dec.
>
> The necessary consequence of setting a matter down where one party is not available is simply either that party can show up unrepresented, or they can not show up, or they can - and this appears to be the most preferable course in the circumstances – they can discontinue and then recommence the proceedings. Now that would in all likelihood have the consequence of simply pushing the hearing even further down the track than if the hearing was to be allocated on the next mutually convenient date …"

21 At the conclusion of the hearing the Appeal Panel refused leave to appeal, dismissed the appeal and ordered the plaintiffs' to pay the costs of the appeal as agreed or assessed (the appeal decision).

The Appeal Panel's reasons for refusing leave to appeal

22 Because of the challenges made to the appeal decision, it is necessary to extract passages from the reasons in some detail. The Appeal Panel said at [3], when addressing the background to the leave application:

> "The notice of appeal sets out the orders which the appellants seek from the tribunal and they are that the appeal panel gives leave to the appellants to appeal from the decision of 9 May. There is also reference to the order of 3 May which I think is in fact the administrative publication by the tribunal of the notice of hearing …"

23 At [9] the Appeal Panel said of the selection of the hearing dates:

> "… The tribunal ultimately selected dates that were available to the respondents but it turns out were not suitable to the appellants."

24 At [10], the Appeal Panel found that it had been "some time" since the plaintiffs were aware of the likelihood that:

> "… a date would be chosen that would not meet their suitability and secondly once they did know of the dates chosen there could have been attempts made by the appellants to find alternative lawyers and counsel once it was apparent that briefed counsel were unavailable and the solicitor was going overseas on a planned trip apparently well-known some months ago to him."

25 The Appeal Panel referred, at [11] of its reasons, to paragraph 30 of Mr Cunio's statutory declaration. The Deputy President said:

> "[11] … I agree with the comments made by counsel for the respondents that that paragraph is rather sparse and does not give any detail and therefore any comfort as to the extent to which alternative counsel were sought and to the extent that alternative counsel were limited by those who would only act on the instructions of a solicitor, or what attempts were made to obtain an alternative solicitor. Paragraph 30 says attempts were made but there is no detail set out.
>
> [12] One cannot be left but with an impression that from a date at least sometime in early May and perhaps even earlier it would have been apparent to the appellants that firstly a date was going to be selected which might not suit their counsel who they knew was not available until July and then when the date was selected one cannot help but think that the reaction by the appellants was inadequate in terms of making alternative arrangements. Therefore there is some basis for the conclusion that if the matter proceeds next week the appellants will be handicapped. To some extent, in my view that is a matter of their own making."

26 At [13] of its reasons, the Appeal Panel adverted to the four options then available to the plaintiffs: obtaining legal representation in the time remaining; appearing for themselves; withdrawing and filing a fresh application; or making a further application for adjournment to the member who is allocated to hear the case. The Deputy President continued:

> "[15] Now I did refer to the history of this matter and it is relevant to draw attention to s 36 of the NCAT Act which describes the guiding principle for the conduct of proceedings in the tribunal which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> [16] These proceedings have been going on far too long in my view and need to come to a point where they can be resolved. The guiding principles also refer to the fact that the tribunal should proceed without undue formality and I draw that to the parties attention because that is reflective of the fact that in many cases parties do appear for themselves without legal representation. The informality is designed so as to assist the inexperienced lay person in not being tripped up by undue formality or the rules of evidence which do not apply in the tribunal.

> [17] Although Ms Power has put forward the proposition that the appellants will suffer an injustice if the case proceeds which I think she described as a substantial injustice, I have two responses to that. One is that I acknowledge that the appellants may be less effective in the prosecution of their case on their own than they would have been with lawyers but I am not convinced that there will be a substantial injustice were the appellants forced to run the hearing next week without legal representation and secondly, to some extent in my view the injustice has largely arisen through the inactivities on the appellant's side and it would be inappropriate to reward that inactivity by granting an adjournment of the hearing.
>
> [18] I have already indicated what choices the appellants have in the event that I refuse leave. So taking those choices into account the ethos which I have described in s 36 and 37 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act), my view about the level of the injustice and how it has come about, I am of the opinion that the case still has the potential to proceed in a fashion which offers procedural fairness and natural justice to both parties. The final factor is that I have the impression that there has been some unwillingness to really search hard for alternative counsel because of the additional cost that will be incurred by briefing new people afresh. That has to be weighed against the fact that if an adjournment is granted there will be some wasted costs on the other side and some additional cost in the future when the hearing does take place even if it is the same lawyers that are involved."

27 The Appeal Panel proceeded to refuse leave to appeal and dismiss the appeal. The order dismissing the appeal is curious given that leave was refused but nothing turns on this.

The Appeal Panel's decision to order the plaintiffs to pay the costs of the appeal

28 After the Appeal Panel had refused leave it addressed the defendants' application for costs before ordering the plaintiffs to pay the defendants' costs of the leave application. The reasons it gave were as follows:

> "[22] In my view there are special circumstances justifying an order for costs and they arise by reference to s 60(3)(a) and (f). Subsection (a) refers to a party conducting proceedings in a way that unnecessarily disadvantaged another party. In this particular case I think this appeal has constituted an unnecessary diversion away from the proper preparation of the hearing and the disadvantage is simply that diversion and the costs attendant with that activity.
>
> [23] The second basis is under subs (f) where a party has refused or failed to comply with a duty imposed by s 36(3). That section requires parties to co-operate with the tribunal to give effect to the guiding principle. I have already said during the course of this hearing that I did not think that sufficient attempts have been made by the solicitors to engage in the process of trying to find common dates and I think that has resulted in the tribunal being forced to appoint dates which were suitable to one side and not to the other, and then the appellants in my view did not respond quickly enough in terms of finding alternative representation.

> [24] In that broad sense the appellants have failed to engage in the co-operation that I think s 36(3) requires, and I think that is a second basis, and when you take them together in the overall circumstances in which this appeal has arisen being just a few days prior to a three day hearing, I think the facts are capable of the description that there are special circumstances. Therefore I will make an order that the appellants pay the respondents costs of the appeal as agreed or as assessed."

The plaintiffs' withdrawal of proceedings, the commencement of fresh proceedings and the costs order

29 Later on 23 May 2019, the plaintiffs wrote to the defendants to withdraw the proceedings and to foreshadow that they proposed to file a fresh application in identical terms, save for nominated exceptions. Also on that day, the plaintiffs filed the fresh application in new proceedings (the 2019 NCAT Proceedings).

30 On 6 June 2019, the defendants applied for a costs order of the proceedings which had been withdrawn. On 2 August 2019 the Tribunal (Senior Member Moran) ordered the plaintiffs to pay the whole of the defendants' costs of those proceedings. The plaintiffs sought leave to appeal against this order. Leave to appeal was granted; the matter was dealt with as a new hearing pursuant to s 80(3) of the Act, following which the appeal was dismissed: *Rodny v Stricke* [2020] NSWCATAP 20.

31 This decision is also the subject of a summons which the plaintiffs filed in this Court on 30 April 2020 seeking leave to appeal against the decision of the Appeal Panel regarding costs of the proceedings (the Costs Decision). The plaintiffs sought to have their application for leave to appeal against the Costs Decision dealt with together with the current leave application. Their request, which was opposed by the defendants, was declined by the Registrar. No challenge was made to the Registrar's decision. Accordingly, the plaintiffs' application for leave to appeal against the Costs Decision will be heard separately.

32 Dr Birch SC, who appeared for the plaintiffs in this Court, contended that the Costs Decision was only relevant to these proceedings on the question of utility.

33 After the plaintiffs had withdrawn the proceedings, they filed fresh proceedings which were heard by the Tribunal which, at the conclusion of the hearing on 14

February 2020, reserved its decision. The decision remained reserved at the time this matter was heard before me.

The relevant legislative provisions

34 Section 36 of the Act provides in part:

> "**36 Guiding principle to be applied to practice and procedure**
>
> (1) The ***guiding principle*** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> (2) The Tribunal must seek to give effect to the guiding principle when it—
>
> (a) exercises any power given to it by this Act or the procedural rules, or
>
> (b) interprets any provision of this Act or the procedural rules.
>
> (3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal—
>
> (a) a party to proceedings in the Tribunal,
>
> (b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.
>
> …"

35 Section 38 of the Act relevantly provides:

> "**38 Procedure of Tribunal generally**
>
> (1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.
>
> (2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.
>
> …
>
> (4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
>
> (5) The Tribunal is to take such measures as are reasonably practicable—
>
> …
>
> (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.
>
> …"

36 Section 60 of the Act confers power on the Tribunal to make costs orders and provides in part:

> "**60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
>
> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
>
> (g) any other matter that the Tribunal considers relevant.
>
> …"

37 The Appeal Panel's jurisdiction relevantly derives from s 80 of the Act, which provides:

> "**80 Making of internal appeals**
>
> (1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.
>
> Note.
>
> Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).
>
> (2) Any internal appeal may be made—
>
> (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
>
> …
>
> (3) The Appeal Panel may—
>
> (a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

> (b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances."

The grounds of appeal

38 The plaintiffs relied on the grounds of appeal set out in the amended summons. Dr Birch accepted that the decision of the Appeal Panel was the operative decision but submitted that, since the Appeal Panel's decision was to refuse leave, it was necessary to address the underlying decisions in respect of which the plaintiffs sought leave to appeal. In substance, Dr Birch contended that both the listing decision and the adjournment decision were legally unreasonable. Secondly, he contended that each decision constituted a denial of procedural fairness. Dr Birch submitted that the listing decision was a denial of procedural fairness because the hearing was fixed for unsuitable dates without warning to the plaintiffs and the adjournment decision was a denial of procedural fairness because there had been no genuine or realistic consideration of relevant matters. These matters will be addressed in turn.

Alleged unreasonableness ground

39 Dr Birch contended that, in effect, the plaintiffs, through Ms Powers, told the Tribunal and subsequently the Appeal Panel that they could not proceed on the allocated dates and that, if no adjournment were granted, they would have to discontinue. He submitted that what the Appeal Panel then did was to use the plaintiffs' option to discontinue against them as a reason not to grant the adjournment, which he described in oral submissions as a "trap". He contended that there was no rational connection between those two propositions and that the plaintiffs had little practical option but to discontinue. Dr Birch further submitted that the Appeal Panel was influenced by a desire for the hearing to be listed before the end of May and that this factor caused its discretion to miscarry and to make a decision (not to grant the adjournment) which was legally unreasonable.

Alleged denial of procedural fairness

40 Dr Birch contended that the Appeal Panel was in error in conducting the leave application as if it were merely a challenge to an unsuccessful application for an adjournment. He submitted that the application to the Appeal Panel was

one for leave to appeal against *two* decisions: first, the listing decision; and secondly, the adjournment decision. He argued that the Appeal Panel was in error in merely treating the listing decision as an administrative act by the Tribunal rather than a decision *per se*. He contended that this error led the Appeal Panel's discretion to miscarry in the relevant sense because it treated the plaintiffs as bearing the onus of establishing that they ought to have been granted an adjournment when, in substance, the plaintiffs' principal submission was that the listing decision amounted to a denial of procedural fairness. Dr Birch contended that procedural fairness had been denied because the matter had been listed without regard to the unavailability of the plaintiffs' legal representatives in circumstances where it was too late for them to obtain replacements, even if they were available, and if they did so, it would be at considerable cost.

41 Dr Birch relied on *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [48] (*Li*) and *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 at [40] (Gaudron and Gummow JJ) in support of the proposition that a failure to accede to a reasonable request for an adjournment can amount to a denial of procedural fairness. Further, he submitted that the Tribunal and the Appeal Panel had failed to give proper, realistic and genuine consideration to the challenges to the listing decision and the adjournment decision and that, had the Appeal Panel engaged in such consideration, it would have appreciated the legal unreasonableness of the listing decision and not listed the matter on dates unsuitable to the plaintiffs.

The challenge to the Appeal Panel's decision to award costs against the plaintiffs

42 The plaintiffs argued that the Appeal Panel had taken into account an irrelevant consideration in ordering that the plaintiffs pay the costs of the appeal: namely, the plaintiffs' conduct in the underlying hearing. They contended that, by finding that the plaintiffs had breached their duty under s 36(3) of the Act with respect to their conduct in the original proceedings, the Appeal Panel had erred in law.

Consideration

Alleged unreasonableness of the decisions

43 In *Li*, the plurality (Hayne, Kiefel and Bell JJ) described unreasonableness as "a conclusion which may be applied to a decision which lacks an evident and intelligible justification": [76]. French CJ referred to the limits of the jurisdiction to set aside a decision for legal unreasonableness at [30]:

> "The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker. Gleeson CJ and McHugh J made the point in *Eshetu* that the characterisation of somebody's reasoning as illogical or unreasonable, as an emphatic way of expressing disagreement with it, "may have no particular legal consequence". As Professor Galligan wrote:
>
> > 'The general point is that the canons of rational action constitute constraints on discretionary decisions, but they are in the nature of threshold constraints above which there remains room for official judgment and choice both as to substantive and procedural matters. In other words, within the bounds of such constraints, different modes of decision-making may be employed.'
>
> …"
>
> [Citations omitted.]

44 I am not persuaded that either the listing decision or the adjournment decision falls into the category of legal unreasonableness. In respect of both decisions there is both an evident and intelligible justification which has been outlined by the Appeal Panel in its reasons.

45 It is a matter of common experience that hearing dates will rarely suit everyone involved in proceedings. Thus, courts and tribunals give priority to parties and witnesses over legal practitioners on the basis that legal practitioners are replaceable, whereas parties and witnesses are not. Whenever a party is required, as a consequence of the allocation of an inconvenient hearing date, to replace one or more of the party's legal team, it is almost inevitable that the party will incur extra expense because the new legal representative will expect to be paid to read into the matter and undertake preparation which may already have been done by the outgoing legal representative. This cost is one of the costs of litigation. There is, accordingly, nothing unusual or necessarily undesirable about the fixing of a date which is not convenient to the legal

representatives of one or more parties. Fairness is not a concept that ought be viewed only through the perspective of one party rather than the other. Fairness requires attention to be paid to all parties, the witnesses to be called in a given proceeding, as well as to the overall work of the Tribunal.

46 A listing or adjournment decision will, accordingly, not be unreasonable merely on the basis of the unavailability of a legal representative. However, the obligation of a court or tribunal is to accord procedural fairness to the parties. If the fixing of a matter for hearing or the refusal to adjourn a matter would result in a denial of procedural fairness, that matter might make the decision unreasonable in the *Li* sense or render the decision susceptible to challenge on the ground that it amounts to a denial of procedural fairness. To take an extreme example from another area, an accused person will be entitled to a stay of criminal proceedings if, through no fault of his or her own, he or she is unrepresented. In *Dietrich v The Queen* (1992) 177 CLR 292; [1992] HCA 57 Mason CJ and McHugh J said at 311:

> "A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; *a fortiori*, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained."
>
> [Emphasis added.]

47 This dictum applies not only to circumstances where an accused who is charged with a serious criminal offence is unrepresented because he or she is unable to afford legal representation, but also where an accused's legal representative is unable to attend for a reason which is not the fault or responsibility of the accused: *Croke v R* [2020] NSWCCA 8 at [31]. Even in criminal trials, the accused's conduct in obtaining representation is significant to the question whether an adjournment will be granted. For example, an accused who withdraws instructions from counsel at the last minute will not necessarily obtain an adjournment: see the discussion in *R v Small* (1994) 33 NSWLR 575 at 588 (Hunt CJ at CL).

48 While criminal trials of persons accused of serious criminal offences represent the most acute example in which legal representation is thought to be necessary for a fair trial, the principles also apply in other settings, with some adjustment to take account of the different circumstances. Thus, a party which has not been diligent to obtain substitute legal representation is not entitled to expect that a court or tribunal will refrain from fixing a hearing or will adjourn a hearing which has already been fixed. The administration of justice cannot be allowed to depend on a party's whim or the availability of a party's preferred legal representatives. Nor can parties who defer obtaining legal representation count on an adjournment in circumstances where, had they acted in a timely fashion, they would not be in such a predicament. Principal Member Rosser regarded it as significant that the plaintiffs had not provided any evidence that alternative counsel could not be briefed. The Appeal Panel was critical of the efforts made by the plaintiffs which were described in general terms in Mr Cunio's statement. The plaintiffs' capacity and willingness to secure alternative legal representation was a factor which was relevant to the Tribunal's discretion whether to list the matter and whether to adjourn the matter.

49 The reasonableness or otherwise of a decision of a procedural nature, such as listing a matter for hearing or granting or refusing an adjournment, depends on the circumstances and the evidence (whether in admissible form or not) before the decision-maker. It was open to the Appeal Panel to regard Mr Cunio's evidence on the attempts by the plaintiffs to obtain new representation as "rather sparse". There was no suggestion that Mr Cunio himself had made any attempt to brief different counsel or to enquire whether any other solicitor familiar with the area of strata title disputes was available and at what cost. The evidence of the plaintiffs' own attempts was insufficient to indicate who had been approached and on what basis the plaintiffs had sought to retain the candidates who had been approached. There was no evidence that the plaintiffs' means were insufficient to bear the additional cost of retaining new legal practitioners or that Mr Rodny was incapable of representing himself. I reject Dr Birch's submission that the Tribunal, which was not bound by the laws of evidence, was not entitled to take into account the *quality* of the evidence before it in determining whether to grant leave or grant the adjournment, since

it is the quality of the evidence (as opposed to its strict admissibility) which is the principal determinant of whether an adjournment ought be granted. Further, the Appeal Panel can be taken to have been aware of the way in which such matters are conducted by the Tribunal and the measures taken by its members to ensure that self-represented litigants are not disadvantaged by lack of legal representation.

50 While it appears that the Appeal Panel treated the adjournment decision as the one which was subject to the application for leave rather than that the listing decision was also sought to be impugned, it was open to the Appeal Panel to take this approach. The operative decision was the refusal of the adjournment. The Appeal Panel was plainly aware of the chronology which had led to the listing and the adjournment application. It can also be taken to have been aware of the little time remaining between the hearing before it and the substantive hearing of the matter. It was not necessary for the Appeal Panel to inform the plaintiffs of their right to withdraw and re-file an application but I am not persuaded that it was erroneous of the Appeal Panel to take this potential course of action into account. I reject Dr Birch's submission that the Appeal Panel, in effect, trapped the plaintiffs by referring to their option of withdrawing and filing a fresh application. It is plain from the Appeal Panel's decision that the Deputy President considered that the plaintiffs bore the responsibility for their own predicament and that, if their remaining options inevitably led to invidious decisions, this was their own doing. The Appeal Panel considered that the Tribunal ought not, in these circumstances, reward the plaintiffs' lack of diligence in obtaining different legal representation by granting leave to appeal and adjourning the listing date.

Alleged denial of procedural fairness

51 This ground is related to the unreasonableness ground. It was, in my view, open to the Appeal Panel to focus on the most recent decision, the adjournment decision, in considering whether to grant leave. Thus, the Appeal Panel was not in error in not separately addressing the circumstance that the Tribunal had fixed the matter on dates which were inconvenient to the plaintiffs without expressly warning them that it was a possibility.

52 As to the alternative way in which Dr Birch put the submission, I reject the proposition that the Appeal Panel did not give genuine or realistic consideration to the matters raised by the plaintiffs in the sense referred to in *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352; [2017] FCAFC 107. It is apparent from the Appeal Panel's reasons that it was, after hearing from the plaintiffs' counsel, not persuaded that the plaintiffs had made out a case for an adjournment based on the scant evidence adduced in Mr Cunio's statement. It addressed the arguments which the plaintiffs had raised and, after identifying the issues, gave reasons why leave would be refused. The Appeal Panel's reasons indicate that it considered the history of the matter, the previous adjournments, the correspondence regarding dates which indicated the difficulties in accommodating legal representatives as well as parties and witnesses, the efforts (or lack thereof) made by the plaintiffs to secure alternate representation and the options available to the plaintiffs, including the right to seek an adjournment on the day of the hearing, which would be treated as a fresh application on its own merits. It does not follow from the Appeal Panel's rejection of the plaintiffs' arguments that it did not give them sufficient consideration.

53 The requirements for leave in ss 80 and 83 of the Act are also significant. The Appeal Panel can be taken to be aware of the Tribunal's jurisdiction and procedures. In the present case, the Appeal Panel was not persuaded to grant leave to appeal against the interlocutory decision of the Tribunal to refuse an adjournment. Notwithstanding Dr Birch's forceful submissions on behalf of the plaintiffs, I am not persuaded that this Court ought grant leave to the plaintiffs to appeal against the refusal of leave by the Appeal Panel.

Utility

54 I note for completeness that Mr Knackstredt, who appeared for the defendants in this Court, contended that leave ought be refused by this Court on the ground of utility because the plaintiffs had filed a fresh application in the 2019 NCAT Proceedings and the matter had been heard although not yet determined. Dr Birch contended that the application to this Court had utility because of the Costs Decision which itself was the subject of leave to appeal. He submitted that the application to this Court for leave to appeal against the

Costs Decision was necessarily affected by the underlying question whether the listing and adjournment decisions were lawful.

55 Plainly, this Court's decision in the present application cannot affect the hearing of the matter in the Tribunal since this has already occurred.

56 At the time of the Appeal Panel's decision, the making of a costs order in the proceedings was contingent on a number of factors including whether the plaintiffs would decide to withdraw the proceedings and whether, if they did so, the Tribunal would make a costs order against them. Because I am not persuaded that leave ought be granted, it is not necessary to address this matter further.

The challenge to the Appeal Panel's decision to award costs against the plaintiffs

57 The obligation imposed by s 36(3) of the Act requires parties to co-operate to give effect to the guiding principle. The Appeal Panel was entitled, under s 60(3), to take into account matters relating to the conduct of the proceedings. Because the application for leave to appeal to the Appeal Panel involved a question of practice and procedure in proceedings which were before the Tribunal and the determination of the application would directly affect the underlying proceedings, it was, in my view, open to the Appeal Panel to take into account the history of the proceedings for the purposes of determining the leave application (and, if leave had been granted, the appeal itself). It was a relevant consideration to the leave question and also the question of costs. Further, the Appeal Panel was entitled, pursuant to s 60(3)(g) of the Act to take into account any other matter which it considered to be relevant. The plaintiffs' conduct in the proceedings was not an extraneous matter. No necessary implication can be drawn from the Act that it was irrelevant in the sense described in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 38-41 (Mason J); [1986] HCA 40. I am not persuaded that this ground warrants a grant of leave since I am not persuaded that the Appeal Panel was not entitled to take into account these matters both on the question of leave and the question of costs.

Conclusion

58 Although each of the grounds relied on by the plaintiffs in the amended summons raised a question of law, I am not persuaded that any of the grounds warrants a grant of leave. I note that it has not been necessary to refer to Mr Knackstredt's helpful submissions in these reasons as they have largely been accepted.

Costs

59 The general rule is that costs ought follow the event: Uniform Civil Procedure Rules 2005 (NSW), r 42.1. As there is some possibility of an offer having been made which may affect the general rule, I propose to make provision for an application for a different order to be made in the orders set out below.

Orders

60 For the reasons given above, I make the following orders:

(1) Refuse leave to appeal.

(2) Dismiss the amended summons filed 19 June 2020.

(3) Subject to an application being made in writing to my Associate within seven days of the date of this order for a different order, order the plaintiffs to pay the defendants' costs of the proceedings.

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