Manbead Pty Ltd v The Owners - Strata Plan No 87635 - [2016] NSWCATAP 167

Civil and Administrative Tribunal

New South Wales

- Amendment notes

Medium Neutral Citation:	**Manbead Pty Ltd v The Owners - Strata Plan No 87635 [2016] NSWCATAP 167**
Hearing dates:	3 June 2016
Date of orders:	26 July 2016
Decision date:	26 July 2016
Jurisdiction:	Appeal Panel
Before:	N Hennessy LCM, Deputy President D Goldstein, Senior Member
Decision:	(1) The application to extend time to lodge the notice of appeal is refused. (2) The appeal is dismissed.
Catchwords:	APPEAL – standing to appeal – consent orders – no order relating to appellant – whether appeal should be accepted out of time
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Sch 4, cl 8(1) and 8(3), s 32(4), s 41, s 59, s 80 Civil and Administrative Tribunal Rules 2014 (NSW), r 25 Home Building Act 1989 (NSW), s 48A, s 48K
Cases Cited:	Gallo v Dawson [1990] HCA 30, 93 ALR 479 Jackamarra v Krakouer (1998) 195 CLR 516 Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22 Nanschild v Pratt [2011] NSWCA 85 S & G Homes Pty Ltd t/as Pavilion Homes v Owen [2015] NSWCATAP 190
Category:	Principal judgment
Parties:	Manbead Pty Ltd (Appellant) The Owners - Strata Plan No 87635 (1st Respondent) G D'Amico (2nd Respondent)
Representation:	Counsel: M Dawson (Appellant) I George (1st Respondent) Solicitors: Maguire & McInerney Lawyers (Appellant) 2nd Respondent (self-represented)
File Number(s):	AP 16/15851
Decision under appeal	Court or tribunal: Civil and Administrative Tribunal Jurisdiction: Consumer and Commercial Division Date of Decision: 28 May 2015 Before: M Harrowell, Principal Member File Number(s): HB 15/02899

REASON FOR DECISION

Two preliminary questions

1. Two preliminary questions arise in these proceedings. The first is whether the appellant, Manbead Pty Ltd, who we will refer to as the developer, has standing to appeal. The second is whether, if it does, should we accept the appeal when it has been lodged more than 9 months late. We have decided the developer does have standing but that we should not accept the appeal.

How the questions arise

2. The Owners - Strata Plan No 87635 applied to the Tribunal in January 2015 for an order that the developer and Gino D'Amico (the builder) pay it $25,000 for building defects to six town houses. Six separate applications were made in relation to each of the town houses. On 28 May 2015, the Tribunal ordered, by consent, that the builder carry out certain work to remedy the defects. The Tribunal made no order in relation to the developer other than dismissing the applications with no order as to costs. The Tribunal merely noted that the parties had agreed that if the builder failed to carry out the work, the developer would pay the Owners Corporation the reasonable cost of completing the works.

3. The orders in full were as follows:

> 1. By consent, these orders and the agreements recorded herein apply to applications HB 15/02899, HB 15/02919, HB 15/02896, HB 15/03020, HB 15/03063 and HB 15/03070 (the Applications).
>
> 2. By consent the Tribunal orders:
>
> a) The second respondent (the builder) shall carry out or cause to be carried out the works shown in the Scope of Works of 79 pages and in accordance with the Program of Works of 2 pages being the folder handed to the Tribunal on 28/5/15 and signed by the presiding member and placed with the papers (Work Order)
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> b) The work pursuant to order 2 (a) is to commence not later than 1 August 2015.
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> c) Save as provided herein the Applications are dismissed with no order as to costs.
>
> 3. The Tribunal notes the agreement between the parties as follows:
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> a) That the first respondent (the developer) will:
>
> (i) cause the second respondent (the builder) to carry out the works directly or by subcontractor;
>
> ii) to the extent that the second respondent (the builder) fails to carry out the Work Order, the first respondent (the developer) will pay to the applicants the reasonable cost of completing the works required by the Work Order.
>
> b) The parties agree that the works are to be carried out to the reasonable satisfaction of the parties' experts being Shawn Moore (for the applicants) and Stephen Campbell (for the Respondents).

4. The Owners Corporation alleged that the builder had not complied with the Work Order set out in Order 2(a) and, on 16 February 2016, sought leave to renew their application. The Tribunal may give leave to a person in whose favour an order has been made "to renew the proceedings if the order is not complied with within the period specified by the Tribunal": *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), Sch 4, cl 8(1). An application for renewal is treated as if it were a new application: NCAT Act, Sch 4, cl 8(3) .

5. A renewal of proceedings application can be made against the party ordered to do work in the original order. The renewal can be made for one or all of the orders made in the original order. In the renewal proceedings the Owners Corporation sought an order the developer pay an amount totalling $568,000.

Standing to appeal

6. The developer is entitled to appeal from an "internally appealable decision" if it was a "party to the proceedings in which the decision was made": NCAT Act, s 80(1) . An "internally appealable decision" is a decision of the Tribunal or a registrar over which the Tribunal has internal appeal jurisdiction: NCAT Act, s 32(4) . In this case the only decisions are the orders of the Tribunal.

7. The only order that the Tribunal made which relates to the developer is order 2(c) that:

> Save as provided herein the Applications are dismissed with no order as to costs.

8. The developer acknowledged that the notations at point 3 of the orders have no legal effect. Nevertheless it submitted that the agreement between the parties noted by the Tribunal was "derivative of order 2". The developer is said to have a sufficient interest in setting aside order 2 because the noted agreement between Manbead and the Owners Corporation involves some liability on the part of the developer.

9. Whether or not the Tribunal made any order affecting the developer, the developer was a party to the proceedings before the Tribunal. There is no basis for departing from the general rule that it has standing to appeal from any decision the Tribunal made and to which it was a party. We find that the developer has standing to appeal.

Extension of time

Principles for extending time

10. The developer should have lodged an appeal by 25 June 2015, 28 days after the Tribunal made its orders: Civil and Administrative Tribunal Rules 2014, r 25 . The appeal was not lodged until on 1 April 2016, 9 months late.

11. The Appeal Panel may extend the time in which to lodge an appeal even if the relevant period has expired: NCAT Act, s 41 . In *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 at [22] the Appeal Panel set out the principles which govern the granting of an extension of time to appeal:

> The considerations that will generally be relevant to the Appeal Panel's consideration of whether to grant an extension of time in which to lodge a Notice of Appeal include:
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> (1) The discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the appellant - Gallo v Dawson [1990] HCA 30, 93 ALR 479 at [2], Nanschild v Pratt [2011] NSWCA 85 at [38] ;
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> (2) The discretion is to be exercised in the light of the fact that the respondent (to the appeal) has already obtained a decision in its favour and, once the period for appeal has expired, can be thought of as having a "vested right" to retain the benefit of that decision - Jackamarra v Krakouer (1998) 195 CLR 516 at [4], Nanschild v Pratt [2011] NSWCA 85 at [39] and, in particular, where the right of appeal has gone (because of the expiration of the appeal period) the time for appealing should not be extended unless the proposed appeal has some prospects of success - Jackamarra at [7] ;
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> (3) Generally, in an application for an extension of time to appeal the Appeal Panel will be required to consider:
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> (a) The length of the delay;
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> (b) The reason for the delay;
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> (c) The appellant's prospects of success, that is usually whether the applicant has a fairly arguable case; and
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> (d) The extent of any prejudice suffered by the respondent (to the appeal), - Tomko v Palasty (No 2) [2007] NSWCA 369; (2007) 71 NSWLR 61 at [55] (per Basten JA) but note also [14], Nanschild v Pratt [2011] NSWCA 85 at [39] to [42] ; and
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> (4) It may be appropriate to go further into the merits of an appeal if the explanation for the delay is less than satisfactory or if the opponent has a substantial case of prejudice and, in such a case, it may be relevant whether the appellant seeking an extension of time can show that his or her case has more substantial merit than merely being fairly arguable - Tomko v Palasty (No 2) [2007] NSWCA 369; (2007) 71 NSWLR 61 at [14] (per Hodgson JA, Ipp JA agreeing at [17]) and Molyneux v Chief Commissioner of State Revenue [2012] NSWADTAP 53 at [58] - [59] .

Length of the delay and reasons for delay

12. The delay in this case is more than 9 months. That is a considerable period of time given that the primary rule is that an appeal must be lodged within 28 days.

13. In the Notice of Appeal, Manbead gave the following explanation for the delay:

1. The Appellant was not legally represented at the time consent Orders were made.

2. The Appellant did not understand the full meaning, effect and operation of the Consent Orders.

3. The Appellant was not familiar with the jurisdiction of the Tribunal.

14. These reasons do not explain the delay.

Prejudice to the respondent

15. The Owners Corporation did not submit that it would suffer any prejudice as a result of the delay.

Prospects of success

16. The developer is entitled to appeal on a "question of law" but must obtain the Appeal Panel's permission before appealing on any other ground: NCAT Act, s 80(2)(b) .

17. The grounds of appeal were expressed as follows:

    1. The consent orders were *ultra vires* in that they were made in circumstances where the Tribunal did not have jurisdiction to hear and determine the dispute in that the claim exceed the jurisdictional limit of $500,000 under section 48K of the *Home Building Act 1989* (NSW) .

    2. The Consent orders were *ultra vires* in that the claim against the Appellant was made more than 3 years after the relevant building goods and services were supplied under sections 48K(3) of the *Home Building Act* 1989 .

    3. The Tribunal made an error of law in making the Consent Orders in circumstances where the claim against the Appellant was not a building claim within the meaning of section 48A of the *Home Building Act 1989* .

18. The limits of the Tribunal's powers when asked to make consent orders under s 59 of the NCAT Act were explored in *S & G Homes Pty Ltd t/as Pavilion Homes v Owen* [2015] NSWCATAP 190 . At [67] the Appeal Panel concluded that:

> Section 59(1)(b) of the NCAT Act gives the Tribunal discretionary power to make consent orders if it is satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms that are consistent with the terms of the agreed settlement. Where there has been a dispute as to the Tribunal's powers, the Tribunal is bound to consider whether it is satisfied that it has power to make the order and to make that decision reasonably in the sense referred to in *Minister for Immigration and Citizenship v Li* [2013] HCA 18. If it is not so satisfied it may dismiss the application: NCAT Act s 59 (2). In particular, if

there is a dispute as to whether a matter has been lodged within the time limits set out in s 48K of the Home Building Act , the Tribunal must direct its mind to that matter before making consent orders and must not make an order that it unreasonable.

Exceeding the monetary limit

19. The monetary jurisdiction of the Tribunal is limited by s 48K(1) of the *Home Building Act* to $500,000. The Owners Corporation filed the application on 14 January 2015 claiming a money payment of $25,000. The developer submitted that in the proceedings before the Consumer and Commercial Division, the Owners Corporation served a Scott Schedule which claimed the value of the defective work to be $568,000 including contingency, site supervision, builder's margin and GST. The developer submitted that the claim exceeds the monetary limit and as a result the Tribunal had no jurisdiction to make the order it made on 28 May 2015.

20. The flaw in this submission is that the original claim was made on behalf of the Owners Corporation and six individual lot owners. The order made on 28 May 2015 applies to all six applications: HB 15/02899, HB 15/02919, HB 15/02896, HB 15/03020, HB 15/03063 and HB 15/03070.

21. At the hearing the appellant handed up a bundle of documents to which it referred in the course of argument. The Scott Schedule which it contended established that the Owners Corporation's claim was beyond the monetary jurisdiction of the Tribunal thereby making the orders of 28 May 2015 ultra vires is at pages 128 to 196 of the bundle.

22. The claim for defective work for unit 1 is set out at pages 191 – 199 of the bundle. The total amount claimed for defective work in connection with unit 1 is $23,679.05.

23. The claim for defective work for unit 2 is set out at pages 131 – 142 of the bundle. The total amount claimed for defective work in connection with unit 2 is $33,765.51.

24. The claim for defective work for unit 3 is set out at pages 143 – 153 of the bundle. The total amount claimed for defective work in connection with unit 3 is $32,253.14.

25. The claim for defective work for unit 4 is set out at pages 155 – 166 of the bundle. The total amount claimed for defective work in connection with unit 4 is $32,354.64.

26. The claim for defective work for unit 5 is set out at pages 167 – 178 of the bundle. The total amount claimed for defective work in connection with unit 5 is $32,159.62.

27. The claim for defective work for unit 6 is set out at pages 179 – 190 of the bundle. The total amount claimed for defective work in connection with unit 6 is $32,105.18.

28. The claim for remedial work to common property is set out at pages 195 of the bundle. The total amount claimed for remedial work to common property is $5,808.68.

29. The individual amounts claimed for units 1- 6 and the amount claimed in connection with the common property do not exceed the monetary jurisdiction of the Tribunal.

30. The Scott Schedule also identifies additional costs associated with rectification of defects which total $375,874.14, namely:

    1. Preliminaries - $102,116.58;
    2. Contingency - $58,848.48;
    3. Site supervision - $60,000.00;
    4. Builder's margin - $103,272.72; and
    5. GST - $51,636.36

31. Even if the additional costs identified were spread among the amounts claimed for units 1 – 6 and the common property, none of the claims made in the six sets of proceedings referred to in the Tribunal's order of 28 May 2015 would exceed the monetary jurisdiction of the Tribunal.

32. The renewal proceedings to which the developer refers illustrates this point, since the claim of $568,000.00 is divided between the owners of units 1 to 6. The amount claimed by a unit/lot owner does not in any one instance exceed $97,400.00. The amount claimed by each lot owner in the renewal proceedings will be well within the monetary limit.

33. At the hearing counsel for the developer sought to avoid the conclusion to be drawn from the Scott Schedule that he relied on and the content of the Renewal Application, by submitting that all the Scott Schedule items, or the majority of them, related to common property taking the claim for common property above the monetary limit. There was no evidence in the proceedings HB 15/02899, HB 15/02919, HB 15/02896, HB 15/03020, HB 15/03063 and HB 15/03070 to which we were referred to support this submission. Moreover, the developer did not seek leave to adduce fresh evidence to support its submission. We do not consider it appropriate to entertain submissions on each and every Scott Schedule item to ascertain whether there was any substance to counsel's submissions since the developer did not embark upon that exercise in the proceedings before the Consumer and Commercial Division.

Claim made out of time

34. According to the developer, the consent orders "embody an agreement by [it] to pay money to the Owners Corporation in the event of default by the builder". Because the building work was completed more than 3 years before the commencement of the proceedings, the Consent Order to

the effect that the developer pay the money upon the failure or refusal of the builder to carry out the work order, was said to exceed the jurisdiction of the Tribunal.

35. The flaw in this submission is that the agreement between the parties noted by the Tribunal is not an order of the Tribunal.

Claim is not a building claim

36. The developer submitted that the claim against it in the Renewal Proceedings is not a building claim as defined in s 48A of the *Home Building Act* .

37. The flaw in this submission is that the appeal is not from the renewal proceedings but from the consent orders made by the Tribunal on 28 May 2015.

38. Having considered the parties' submissions on the potential grounds of appeal raised by the Appeal Panel, we have concluded that the prospects of the appeal succeeding on any of those grounds is weak.

Conclusion

39. The discretion to extend time can only be exercised upon proof that strict compliance with the rules will work an injustice upon the appellant: *Gallo v Dawson* [1990] HCA 30, 93 ALR 479 at [2] , *Nanschild v Pratt* [2011] NSWCA 85 at [38] . The Owners Corporation has obtained a decision, by consent, in its favour. Once the period for appeal has expired, it can be thought of as having a "vested right" to retain the benefit of that decision: *Jackamarra v Krakouer* (1998) 195 CLR 516 at [4] , *Nanschild v Pratt* [2011] NSWCA 85 at [39] .

40. The appeal was lodged 9 months late and no cogent explanation was given for the delay. While there is no prejudice to the Owners Corporation if time to appeal were extended, the appeal has very poor prospects of success. In all the circumstances, we refuse to extend time to lodge the appeal.

Orders

1. The application to extend time to lodge the notice of appeal is refused.

2. The appeal is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

Amendments

26 July 2016 - Corrected Date of Decision

Decision last updated: 26 July 2016