

Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: [The Owners Strata Plan Number 57164 v Yau \[2017\] NSWCA 176](#)

Hearing dates: 17 July 2017

Decision date: 19 July 2017

Before: Simpson JA

Decision: The parties to provide short minutes of order to reflect the conclusions in this judgment

Catchwords: CIVIL PROCEDURE – Court of Appeal – stay of costs order pending appeal – where judgment is reserved

Legislation Cited: [Civil Procedure Act 2005 \(NSW\)](#), s [135](#),
[Legal Profession Uniform Law Application Regulation 2015](#), cl [35](#),
[Uniform Civil Procedure Rules 2005 \(NSW\)](#), Pt [36.15](#), [51.44](#).

Cases Cited: [Adeels Palace Pty Ltd v Moubarak \[2009\] NSWCA 130](#),
[Alexander v Cambridge Credit Corporation Ltd \(Receivers Appointed\) \(1985\) 2 NSWLR 685](#),
[Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd \(2007\) 69 NSWLR 374](#); [\[2007\] NSWCA 57](#),
[Kalifair Pty Ltd v Digi-Tech \(Australia\) Ltd \(2002\) 55 NSWLR 737](#); [\[2002\] NSWCA 383](#),
[Lawrence v Gunner \[2015\] NSWCA 322](#),
[TCN Channel 9 Pty Ltd v Antoniadis \[No 2\] \[1999\] NSWCA 104](#); 48 NSWLR 381

Category: Procedural and other rulings

Parties: The Owners Strata Plan Number 57164 (Applicant)
Annie May Fun Yau (First Respondent)
Andy Sung Kit Yau (Second Respondent)

Representation: Counsel:
R Cheung (Applicant)
D Jenkins (Respondents)

Solicitors:
Rutland's Law Firm (Applicant)
LLL The Law Firm (Respondents)

File Number(s): 2016/257182

Decision under appeal Court or tribunal:
Supreme Court
Jurisdiction:
Equity
Citation:
The Owners Strata Plan No 57164 v Yau [\[2016\]](#)
[NSWSC 1056](#)
Date of Decision:
2 August 2016
Before:
Darke J
File Number(s):
2014/370045

Judgment

1. **SIMPSON JA:** By Notice of Motion filed on 30 June 2017 and amended on 17 July 2017 the applicant, The Owners Strata Plan Number 57164 (“the Owners”), seeks a stay of a costs order made against it by Darke J on 2 August 2016 in favour of the respondents, Mr and Mrs Yau.

Factual background

2. Mr and Mrs Yau are owners of a commercial lot in Strata Plan 57164. In 2011 they commenced proceedings against the Owners, seeking orders for compliance with terms of the by-laws under which the Strata Plan operated. On 15 August 2013, after three days of hearing, the Owners consented to orders of the kind sought, and orders were duly made and entered.
3. However, on 17 December 2013 the Owners sought, pursuant to [Uniform Civil Procedure Rules 2005 \(NSW\)](#) Pt [36.15](#), orders that the consent orders be set aside. That application came before Darke J, who heard the application over two days in June 2016. On 2 August 2016 his Honour dismissed the Owners’ application and ordered the Owners to pay Mr and Mrs Yau’s costs of the proceedings.

4. On 26 August 2016 the Owners filed a Notice of Intention to Appeal, and, on 28 October 2016, a Notice of Appeal. The appeal was heard over two non-consecutive days, 26 April 2017 and 15 May 2017. Judgment is presently reserved.
5. A copy of the Notice of Appeal is in evidence in these proceedings. It is said to be relevant by reason of the orders sought, which include Order 4, that Mr and Mrs Yau pay \$285,000, together with interest; Order 5, that Mr and Mrs Yau pay \$2,472.61 together with interest; and Order 6, that Mr and Mrs Yau pay \$262,372.21 together with interest.
6. So far as the evidence discloses, it was not until 9 June 2017 that Mr and Mrs Yau took their first steps towards the enforcement of the costs order of 2 August 2016. On that day they gave notice under cl 35 of the [Legal Profession Uniform Law](#) Application Regulation 2015 of their intention to apply for assessment of the costs claimed. On 13 June, 21 June and 28 June solicitors representing the Owners communicated with the solicitors representing Mr and Mrs Yau, asking that, in the circumstances, they delay further proceedings on the costs assessment pending the outcome of the appeal. They pointed out that, in the earlier proceedings, the costs assessment process had taken five months, and that the same could easily apply to the present costs assessment, meaning that it could be expected that judgment on the appeal would be delivered before a costs certificate issued. In the event that the appeal was successful, unnecessary costs of the assessment would be incurred. In the letter of 28 June, the Owners' solicitors also offered an undertaking that, if unsuccessful in the appeal, they would pay interest "at the applicable rate" on any costs awarded.
7. The solicitors acting for Mr and Mrs Yau did not respond to any of these communications. Instead, on 30 June, they filed an application for assessment of costs. On the same day the Owners commenced the present application.

Jurisdiction

8. The jurisdiction of the Court to make an order of the kind sought is not in dispute: see [Civil Procedure Act 2005 \(NSW\)](#) s 135, [UCPR 51.44](#). There is also an inherent jurisdiction to make such an order.
9. Nor, in any significant way, are the principles applicable to the application in contention. What is in contention is the application of the principles to the present set of circumstances.
10. The principles have been stated in a number of decisions of this Court. They were conveniently summarised by Gleeson JA in [Lawrence v Gunner](#) [2015] NSWCA 322 as follows:

"11 A successful party is prima facie entitled to the fruits of his or her judgment, but a stay may be granted where an applicant demonstrates an appropriate case to warrant the exercise of discretion in its favour. The mere filing of the appeal is insufficient, of itself, to demonstrate such a case. Usually it is demonstrated by showing that there are arguable grounds of appeal and that there is a risk that if money is paid it will be unable to be recovered if the appeal succeeds, or by demonstrating that unless a stay is

granted the appeal will be rendered nugatory: [TCN Channel 9 Pty Ltd v Antoniadis \[No 2\]](#) [1999] NSWCA 104; 48 NSWLR 381 at [15]. The Court will weigh considerations such as the balance of convenience and the competing rights of the parties.

12 It is for the applicant to demonstrate a proper basis for a stay that will be fair as between the respective interests of the parties: see [Alexander v Cambridge Credit Corporation Ltd](#) at 694; [Adeels Palace Pty Ltd v Moubarak](#) [2009] NSWCA 130 at [5].”

11. In [Kalifair Pty Ltd v Digi-Tech \(Australia\) Ltd](#) (2002) 55 NSWLR 737; [2002] NSWCA 383, citing [Alexander v Cambridge Credit Corporation Ltd \(Receivers Appointed\)](#) (1985) 2 NSWLR 685, this Court said:

“17 In [Alexander v Cambridge Credit Corp Ltd](#) (1985) 2 NSWLR 685 this Court (Kirby P, Hope, McHugh JJA) restated the principles to be applied in exercising this Court's jurisdiction to grant a stay pending an appeal. The Court said (694, 695):

In our opinion it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant ... demonstrates a reason or appropriate case to warrant the exercise of discretion in his favour ... The Court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair. In the exercise of its discretion the Court will weigh considerations such as the balance of convenience and the competing rights of the parties ... Two further principles may be mentioned. The first is that where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay ... where it is apparent that unless a stay is granted an appeal will be rendered nugatory this will be a substantial factor in favour of the grant of a stay’.”

12. A relevant consideration might be that a respondent to an application has a right of set-off, or an outstanding cross-claim to be determined: see [Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd](#) (2007) 69 NSWLR 374; [2007] NSWCA 57.

The competing arguments

13. On behalf of the Owners reference was made to [Australian Beverage Distributors](#), at [140], the authority for the proposition that a right of set-off or cross-claim might be relevant to the exercise of the power to grant a stay. The purpose of that reference was related to a submission that, by reference to the Notice of Appeal, it could be concluded that the Owners made a claim analogous to a cross-claim.
14. I am unable to draw any such inference. The Notice of Appeal gives no indication of how the amounts claimed are made up, or on what basis they were claimed.
15. It was also submitted on behalf of the Owners that the mere fact that the appeal had been heard, over two days, with both parties represented by senior and junior counsel, was sufficient indication that there were arguable grounds for the appeal.

16. To a limited extent, I accept that submission. In any event, it was conceded on behalf of Mr and Mrs Yau that, although the appeal was said to be weak, it was arguable.
17. Most significantly, in my opinion, the Owners pointed to the dilatoriness of Mr and Mrs Yau in taking steps towards costs assessment. This did not even commence until after the appeal had been heard, and judgment reserved.
18. The argument advanced on behalf of Mr and Mrs Yau relied upon the basic principle that a successful litigant is entitled to the fruits of his/her/its judgment, and that they ought not to be deprived of the opportunity to pursue recovery of the costs they had expended. Addressing the question of their own delay, counsel argued that the delay had operated to their own disadvantage, since they had not put in train the procedures for recovery of costs to which they are entitled.
19. They also pointed out that there is no suggestion of impecuniosity such that any costs recovered under a costs certificate would not be repaid if the appeal were to be upheld.

Decision

20. I have concluded that, in the circumstances of this case, a stay should be ordered. That is primarily because of Mr and Mrs Yau's own delay in implementing the procedures under the [Legal Profession Uniform Law](#), and that that has meant that the costs assessment procedure will, at most, coincide with the delivery of judgment, but will more likely (on the previous experience cited by the Owners' solicitors) not be concluded before delivery of judgment. There are considerable costs involved in contesting a costs assessment that will be thrown away if the appeal is successful.
21. It is simply too late for Mr and Mrs Yau now to proceed to costs assessment; that can await determination of the appeal.
22. In reaching this conclusion I am influenced by the offer of an undertaking by the Owners to pay interest on any costs ordered. However, before a final order is made, that undertaking must be formalised.
23. Subject to an appropriate undertaking being given, I propose to order that no further steps be taken by Mr and Mrs Yau to enforce the costs order made by Darke J on 2 August 2016 until after this Court has delivered judgment in the appeal.
24. It will be necessary for the parties to formulate appropriate orders and undertakings.

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

Decision last updated: 19 July 2017.