Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 3004 v Smith
Medium Neutral Citation:	[2021] NSWCATAP 141
Hearing Date(s):	On the papers
Date of Orders:	18 May 2021
Decision Date:	18 May 2021
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member J Kearney, Senior Member
Decision:	(1) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Appeal Panel dispenses with a hearing of the appeal. (2) The application to extend time for the filing of the Notice of Appeal is refused. (3) The appeal is otherwise dismissed.
Catchwords:	PRACTICE AND PROCEDURE – time to appeal – extension of time for application – refused – no adequate explanation - whether reasonable prospects of success – relevance of extent of delay
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	Gibson v Drumm [2016] NSWCA 206, Jackson v New South Wales Land and Housing Corporation [2014] NSWCATAP 22 Ketteman V Hansel Properties Ltd (1987) 1 AC 189 Nanschild v Pratt [2011] NSWCA 85 The Owners Corporation Strata Plan No 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256 Vickery v The Owners – Strata Plan No 80412 [2020]

	NSWCA 284
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 3004 (Appellant) Ross Harold Smith (First Respondent) Jennifer Ann Smith (Second Respondent)
Representation:	Counsel: D Elliott (Appellant) T Davie (Respondent) Solicitors: Bannermans Lawyers (Appellant) Chapman Solicitors (Respondent)
File Number(s):	2021/00056085 (AP 21/05161)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	6 August 2020
Before:	Dr P Briggs, Member
File Number(s):	SC 19/34097 and SC 19/34098

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) against a decision made in the Consumer and Commercial Division of the Tribunal on 6 August 2020.

2 For the reasons set out below, we have decided to refuse the application to extend the time in which to lodge the Notice of Appeal and to otherwise dismiss the appeal.

3 Neither party argued against an order that a hearing of the appeal be dispensed with, and that it be determined on the papers. We are satisfied that the appeal can be adequately determined on the papers in the absence of the parties, and will make that order.

Background

4 The appellant (The Owners – Strata Plan No 3004 – hereafter "the Owners Corp") is the Owners Corporation of Strata Plan No 3004, being a block of residential apartments located in the Northern Beaches of Sydney. The Respondents to the present appeal (Ross Harold Smith and Jennifer Ann Smith – hereafter "the Smiths") are the owners of one of the lots in that strata plan.

5 In July 2019, the Smiths commenced two proceedings. The history of those two applications is extensive but we will attempt to summarise.

6 In the first, called the Interim Application (SC19/34097), they sought orders that they be allowed to undertake invasive testing of the concrete floor of their Lot (which is common property). In August 2019, the Tribunal made orders by consent allowing the testing to be conducted – which effectively determined the Interim Application, with the exception of the costs of that application.

7 In the second, (SC/34098) the Smiths sought orders that the Owners Corp meet its obligation to maintain the common property and keep it in repair - s 106(1) *Strata Schemes Management Act 2015* (NSW) ("SSMA") – and an order for damages including loss of rent – s 106(5) SSMA. The parties resolved the s. 106(1) part of the proceedings at a mediation on 3 February 2020 and the Tribunal made orders by consent, including for the carrying out of certain works in the Smiths' Lot. The Tribunal also ordered, again by consent, that the Smiths' claim for loss of rent be transferred to the Supreme Court for determination because the state of the law at that time was that the Tribunal was understood not have power to make such an order. Although that understanding was later reversed by the NSW Court of Appeal in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284, that does not affect the outcome of this matter.

8 All that remained for determination was the costs of the two applications made by the Smiths. On 6 August 2020, the Consumer and Commercial Division of the Tribunal made three orders determining the costs in the two related applications. It is the second of those orders that is the subject of this appeal and we will return to that shortly.

9 In the first order made 6 August 2020, which related to costs of the Interim Application, the Tribunal ordered each party to bear its own costs. The Smiths appealed from that order only and, on 8 February 2021, a differently constituted Appeal Panel made orders by consent allowing the appeal, setting aside the 6 August 2020 order, remitting the question to the Tribunal as originally constituted to be determined according to law and noting the parties agreed that s. 60 of the NCAT Act applies; the Tribunal also determined and gave oral reasons that, subject to any application by the parties, the matter was to be re-determined without a hearing and on the basis of the written submissions in the original proceedings. The Appeal Panel also determined the Owners were to pay the Smiths' costs of that appeal.

10 The third order related to the costs of the claim for damages under s. 106(5) SSMA – the Tribunal made no order as to costs. There has been no appeal by either party from that order.

11 This appeal relates to the second order made by the Tribunal on 6 August 2020, which was as follows:

> 2. In relation to the claim for rectification to the applicants' property and the common property the respondent is to meet the applicants' costs on the ordinary basis as agreed or assessed.

12 We note that the current appeal was filed on 5 February 2021, just three days before the determination of the Smiths' appeal from the first order was published on 8 February 2021 and well outside the applicable time period for bringing an appeal. To proceed, the Owners Corp needs an order granting an extension of time in which to bring this appeal.

13 For the reasons that follow, we have decided to refuse an extension of time to appeal and, to the extent then necessary, to dismiss the appeal.

Submissions

14 The Owners Corp submits the Tribunal made an error of law in its determination of the costs application. In effect, it says the Tribunal decided the matter by the application of r 38 of the Civil and Administrative Tribunal Rules (2014) (the Rules) when it should have applied s. 60 of the NCAT Act. It says it has strong prospects of success.

15 The Owners Corp concedes the delay in lodging the appeal is "significant" and the explanation for the delay is "not strong" but it says there is no prejudice to the Smiths if an extension is granted, but prejudice to it if it has to bear a costs order determined on an incorrect basis.

16 The Smiths submit the Owners Corp should be refused an extension of time to appeal, relying on the considerations in *Jackson v New South Wales Land and Housing Corporation* [2014] NSWCATAP 22 – the delay is lengthy, there is no explanation for it and there is injustice to a litigant who has a right to its judgment.

17 The Smiths also argue that:

(1) they have already appealed the decision, so that granting an extension of time in the present case would result in the wastage of the costs of the parties and the public resources of the Smiths' appeal would be wasted;

(2) the appeal is futile because, if the appeal succeeds, the discretion would have to re-exercised and the likelihood is that it would be re-exercised in the same way. Further, it might lead to yet another appeal.

18 On the substantive issue in appeal, the Smiths say the decision of the Tribunal was plainly just in the circumstances.

19 Regarding the reason for delay, the Owners Corp says that *"...having received further advice (privilege to which it does not waive) it decided to institute the present appeal".*

20 It also disputes that if the matter were remitted to the Tribunal for re-determination, the same outcome would ensue.

Consideration – extension of time

21 The time for filing the appeal was 28 days from the date the Owners Corp was notified of the decision: the Rules, r 25. The Owners Corp's Notice of Appeal states this date to be 6 August 2020. Thus, any appeal should have been instituted by 4 September 2020. It was in fact filed on 5 February 2021 making it 5 months and one day late.

22 The Appeal Panel may extend time:– the NCAT Act, s. 41:

> 41 (1) The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.
>
> (2) Such an application may be made even though the relevant period of time has expired.

23 In *Jackson v New South Wales Land and Housing Corporation* [2014] NSWCATAP 22 the Appeal Panel provided some guidance as to the principles to be considered in the granting of an extension of time. The appeal Panel stated. at [22]:

> [22] 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];
>
> (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;
>
> (b) The reason for the delay;
>
> (c) The appellant's prospects of success, that is usually whether the applicant has a fairly arguable case; and

> (d) The extent of any prejudice suffered by the respondent (to the appeal),
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> - Tomko v Palasty (No 2) (2007) 71 NSWLR 61at [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) 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].

24 We agree with the Owners Corp's submission that a delay of 5 months is substantial. During this 5 month period, the Owners Corp were the respondent to the Smiths' appeal involving Order 1 of the same decision and had legal representation in that matter. There is a clear inference to be drawn that the Owners Corp knew of its appeal rights but chose not to appeal until receiving the later advice.

25 We agree with the Smiths' submission that no proper explanation for the delay has been provided. The oblique reference to further advice (subject to a claim for privilege) appears to be the only information provided to us which might constitute an explanation for the 5 month delay by the Owners Corp in commencing this appeal. In our view, it is an excuse for the delay, but not an explanation. While the Owners are entitled to claim privilege over the advice, the effect is to leave the delay unexplained.

26 The length of the delay, the lack of any adequate explanation and the fact the appellant likely knew of its right of appeal and took no action, counts strongly against the grant of an extension of time.

27 **Prospects of success**

28 As to the prospects of success, the Owners Corp's main point is that the Tribunal fell into error in deciding that r 38 of the Rules applied when s. 60 should have been applied.

29 S. 60 of the NCAT Act provides:

> (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.

(4) If costs are to be awarded by the Tribunal, the Tribunal may—

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

30 Rule 38 of the Rules is:

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—

(a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or

(b) the amount claimed or in dispute in the proceedings is more than $30,000.

31 The parties agree that r 38(2)(b) is the relevant provision. As is stated in the Owners Corp's submissions, the difference between the two provisions is significant. Where r 38(2)(b) applies, the usual order is that a successful party should be entitled to an order for costs in their favour, while under s. 60 the starting point is that parties ordinarily bear their own costs, unless special circumstances warrant an order for costs.

32 The Owners Corp submitted that, once the claim for damages for loss of rent was transferred to the Supreme Court, the only remaining claim was for the rectification. That was settled at mediation and consent orders made providing for work to be done (refer [19] of the reasons). However, no dollar value of the work was attributed in the order. The Owners say that the Smiths did not prove that the amount claimed or in dispute exceeded $30,000. It relies on *The Owners Corporation Strata Plan No 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 ("Malachite"). The summary of that case contained in the reasons reads:

> 2. Rule 38(2)(b) of the Civil and Administrative Tribunal Rules, 2014 (NSW) (Rules) does not apply to proceedings under s 236(1) of the Strata Schemes Management Act, 2015 (NSW) (Management Act) for an order that the unit entitlements in a strata scheme be reallocated because the initial unit entitlement allocation was unreasonable.
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> 3. Rule 38(2)(b) applies to the following proceedings:
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> > (1) Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than $30,000;
> >
> > (2) Where an order is sought in the proceedings for the performance of an obligation (such as to do work), and the Tribunal has power make an order to pay a specific amount of money, even if not asked for by the claimant, provided that
> >
> > > (a) there is credible evidence relating to the amount the Tribunal could award; and
> > >
> > > (b) that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.
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> 4. Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than $30,000.
>
> 5. Rule 38(2)(b) does not apply to proceedings:
>
> > (1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or
> >
> > (2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:
> >
> > > (a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or

(b) the relief sought does not depend on there being a finding that a specific amount of money is owed.

33 The specific reasoning of that Appeal Panel on this issue is contained at [90] to [95] it its decision:

> 90. In cases where an amount is claimed by an applicant, an award of money may be made. In cases where an applicant seeks relief from payment, no amount is claimed as an order for payment is not sought. Rather, an order is made for relief from payment. However, "the amount in dispute" is the specific amount from which relief from payment is sought, there being a dispute about whether the applicant for relief is liable to pay the particular sum or should otherwise be relieved from the obligation to pay. In each case, "the amount" is identified and, where it is greater than $30,000, r 38(2)(b) is engaged.
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> 91. Rule 38(2)(b) may also operate in circumstances where the Tribunal has power to make an order for the payment of a specific amount of money, despite the particular relief sought by the applicant. For example, in a building claim under the HB Act, the Tribunal may make an order for the payment of money despite the preferred outcome for a claim in respect of defective work being a rectification order (see s 48MA of the HB Act) or despite an applicant for relief claiming a different order (see s 48O(2) of the HB Act).
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> 92. In these cases, the specific cost of the work to be undertaken can be determined by reference to the relief claimed, in order to ascertain whether the monetary threshold for engagement of the rule has been reached. However, in these cases, one or all parties to the proceedings would provide evidence of the cost of the rectification or completion so as to enable the Tribunal to make specific findings as to "the amount in dispute in the proceedings".
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> 93. If there is no such evidence, then it could not be said there is a dispute about the amount of the cost of rectification or completion of the works.
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> 94. Lastly, where it is necessary that the specific amount of any debt owed or payable must be determined as part of the fact finding process, in order to found any relief and establish that the specific amount in dispute is more than $30,000, it may also be said that this sum is "the amount in dispute in the proceedings" for the purpose of r 38(2)(b) and that the rule may also operate in these circumstances. An example might be where it is necessary to determine the specific amount of rent that remains unpaid for the purpose of making a termination order for non-payment of rent under the Residential Tenancies Act, 2010 (NSW). However, for the purpose of this appeal, it is unnecessary to resolve whether the rule would operate in cases where only an order for possession was being sought and not an order for the payment of rent.
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> 95. On the other hand, it seems to us that where there is a claim for relief that may, as a consequence of that relief being granted, result in the loss of a property or other civil right to a value greater than $30,000, it could not be said that there are proceedings in which the amount claimed or the amount in dispute is greater than $30,000 within the meaning of the rule. Similarly, the fact that it is necessary to evaluate evidence about the value of particular property or determine other rights as part of determining whether there is an entitlement to relief does not mean "the amount claimed" or "the amount in dispute" in the proceedings is more than $30,000. Where the relief sought is not dependent on a finding that a particular amount is payable or not payable,

> it could not be said that "the amount claimed or in dispute in the proceedings is more than $30,000".

34 Accepting that reasoning, in the absence of any submissions to the contrary, it may be possible for an order to be made under r 38 in a case such this where a work order is made provided that first, the Tribunal has power to, alternatively, make a money order; second, there is credible evidence of the amount that could be awarded; and third, that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.

35 The critical part of the Tribunal's reasons in the decision from which this appeal arises is contained in [130] to [135]:

> 130 …in matters where the issue in dispute involve a claim in excess of $30,000.00 the requirement to establish the existence of special circumstances does not apply. I am unable to reconcile that with the view that because the issue was settled by a consent order to perform work that Rule 38 of the Tribunal Rules should limit the Tribunal's discretion to award costs in appropriate circumstances. In this regard I note that his honour McHugh J in Lai Quin [Minister for Immigration & Ethnic Affairs (Cth) Ex Parte Lai Qin [1997] 186 CLR 622) noted that 'In an appropriate case a court will make an order for costs even when there has been no hearing on the merits. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence litigation"
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> 131 It appears to me that an inordinate period of time has been lost between the parties becoming aware of a problem and its resolution which of itself appears to give rise to 'special circumstances' in relation to the entirety of the dispute, however it is rule 38 under which I have determined the issue on the partial success of the applicants' claim.
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> 132. I find that in relation to the issues mediated that it is appropriate to deal with the settled matters in this jurisdiction and determine if, in relation to those issues the applicant, in accordance with the principle that a successful party should be entitled to an order for costs by way of indemnity – not punishment, should be entitled to its costs in relation to the substantial issues.
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> 133. The applicant has submitted that "Just because the proceedings are settled does not mean the applicants were not successful the applicants obtained substantially the relief they sought." …
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> 134. The applicants do not seek as part of the costs application in this Tribunal any costs in relation to the damages claim which has been severed to continue in a court of competent jurisdiction, furthermore, the applicants concede that the appropriate order in relation to the Interim Application should be that party bear its own costs.
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> 135. Taking account of the arguments presented, my analysis of the submissions results in a determination that the costs in relation to the application for rectification of defective/damaged common property within their unit should be met by the respondent on the ordinary basis as agreed or assessed.

36 In our view, the Tribunal did not address in its reasons the essential issues to bring the matter within r 38.

37 The Smiths submit that we should infer that the Tribunal was satisfied that the value of the work claimed, and therefore in dispute, exceeded $30,000. Given the Tribunal's expressed reasoning, we are not satisfied that we can properly do so. Importantly, however, that submission overlooks the first requirement set out in *Malachite,* which is that the Tribunal needs to have power to make a money order, rather than the order sought, for r 38 to be engaged in these circumstances. The claim under s 106(5) SSMA, which was transferred to the Supreme Court, has no bearing on the issue because, on transfer, it continues "before that court as if the proceedings had been instituted there": NCAT Act, Sch 4, cl 6.

38 Section 106(1) of the SSMA is in the following terms:

> 106 Duty of owners corporation to maintain and repair property
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

39 In a claim for relief under s 106(1) of the SSMA, an applicant lot owner may not, properly, be granted a money order. This is because it is always solely within the purview and responsibility of the owners corporation to effect repairs to common property.

40 We are satisfied there is a reasonably strong chance of the Owners Corp identifying an error on a question of law if the appeal proceeds.

41 However, that does not end the question of whether an extension of time should be granted because, in part, if the matter were returned for re-determination or re-determined by us, the Smiths submit that the same result will occur and so the appeal would be pointless.

42 Whilst we accept the appellant's submission that the Tribunal's comments (in *obiter,* at [131]) to the effect that special circumstances warranting a costs order may have been demonstrated are insufficient to base such a finding, there were clearly issues which the Tribunal was satisfied that it would need to

weigh, had it needed to consider the costs application on the basis that s. 60 applied.

43 The exercise of our discretion as to whether the Owners Corp should have an extension of time raises competing factors that need to be balanced. On the one hand, the error is reasonably clear, and we acknowledge the submission that the Owners Corp should not be burdened with an order irregularly obtained.

44 On the other hand, the delay is substantial and unexplained and the prospects of the Owners Corp achieving a better outcome if the appeal proceeds are by no means certain.

45 A further complicating factor is that the work orders made by consent by the Tribunal in resolving the respondents claim under s 106(1) SSMA were not complied with by the Owners Corp. Whilst the parties are at odds about what led to this, what is clear is that in resolving renewal proceedings brought by the respondent, the appellant again agreed to complete works, and to pay the costs of the respondents in the renewal proceedings: consent order in SC 20/28062 dated 12 November 2020.

46 Whilst we agree with the appellant's submission that any issues in that regard had no bearing on the Tribunal's decision as "special circumstances is to be determined when the costs order is made," if we set aside the costs order and re-determine it, or remit it for re-determination, it is clear that the issue of non-compliance would at least be argued in relation to the question of special circumstances being considered now, leading to further expense and delay to the parties irrespective of whether those issues are determined in favour of the respondent or considered relevant to the exercise of the discretion.

47 Lastly, we would note that we have been given no indication as to the amount of the costs claimed, agreed or assessed pursuant to the order which has been challenged, to enable us to assess the relevant extent of the potential prejudice to the appellant.

48 We accept that there is no monetary limit governing when leave to appeal, or, by analogy, an extension of time for lodging an appeal should be granted by the Appeal Panel.

49 However, the issue of the extent of prejudice is relevant in our view. In disputes such as this, the quantum of any order is a relevant consideration, due to the requirement on us to implement the practice and procedure of the Tribunal so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings: NCAT Act s 38(4).

50 In reasons relating to granting leave to appeal, but which in our view are apposite to our considerations here due to the discretionary nature of our considerations to extend time, the Court of Appeal held in *Gibson v Drumm* [2016] NSWCA 206, at [20]:

> Another consideration in determining whether to grant leave is the sum in issue in the proposed appeal: Dunn v Ross Lamb Motors (1978) 1 NSWLR 26. Although there is no minimum amount specified in the rules of court below which leave will not be granted, the Court has refused leave in matters because of the small amount involved, such as where it was considered the grant of leave was not warranted having regard to the appropriate allocation of court resources and the disproportionate costs to the parties: see Wilson v Tetley [2003] NSWCA 124; Zelden Sewell Henamast Pty Ltd [2011] NSWCA 56; Jaycar Pty Ltd v Lombardo. Accordingly, whilst the mere fact that a small amount is in issue will not necessarily disentitle a person to a grant of leave, having regard to the case management principles enshrined in the Civil Procedure Act, it will nonetheless be a relevant factor and in an appropriate case may be decisive.

51 As McColl JA said in *Nanschild v Pratt* [2011] NSWCA 85 at [38] directly in relation to the question of granting an extension of time in which to lodge an appeal:

> The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties. This means that the discretion can only be exercised upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: Gallo v Dawson [1990] HCA 30; (1990) 64 ALJR 458 (at 459) per McHugh J.

52 We conclude that while an error is reasonably clear, the Owners Corp's prospects of achieving a better outcome do not warrant such a significant extension of the time in which to appeal.

53 Whilst the Owners Corp submits that there is no prejudice to the Smiths if an extension of the time in which to appeal is granted, we do not agree. Some level of prejudice will almost invariably be caused by an extension of time being granted after such a lengthy delay. Having had a legitimate expectation that they were entitled to the benefit of the decision, and that the litigation between the parties had been brought to an end, the Smiths will undoubtedly suffer some prejudice if the costs decision is reopened, with the consequent expense, delay and uncertainty caused by the issues being re-agitated. This remains so even if we redetermine the matter and allow the appeal, as any order we make in substitution for the one below is itself amenable to appeal and, if we change the order for costs, may lead to further expense on the preparation and assessment of costs, or in such expense already incurred being thrown away.

54 As Lord Griffiths noted in *Ketteman V Hansel Properties Ltd* (1987) 1 AC 189 at 220, there is a strain imposed on litigants when the issues in proceedings change, which includes the anxieties occasioned by facing new issues, the raising of false hopes and the legitimate expectation that a trial would determine the issues one way or the other.

55 Further, to the extent that it could be argued that any prejudice to the Smiths could be cured by granting leave to extend time but making an order in favour of the Smiths to compensate them in some way for their costs, that would lead to only more expense, likely significantly reducing any benefit the Owners Corp would receive if it subsequently succeeds in the appeal.

56 Balancing the competing factors, we are satisfied that a refusal of the extension of time will not work an injustice on the appellant, in the circumstances of this case. Any potential injustice to the appellant has been caused by its own significant and unexplained delay.

57 In their reply to appeal, the Smiths sought their costs of the appeal if successful. By notation 2 to directions made in the appeal on 18 February 2021, they were advised that if they wished to pursue that application, they

should make submissions on costs with their submissions on the substantive appeal. They did not do so. For that reason, we will proceed on the basis that the application is not prosecuted. In any event, because the elements of r 38 were not engaged in the proceedings below, r 38A of the NCAT Act cannot be engaged and special circumstances would need to be demonstrated for a party to make a successful costs application in the appeal.

58 We make no order as to costs.

Orders

59 We make the following orders:

(1) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Appeal Panel dispenses with a hearing of the appeal.

(2) The application to extend time for the filing of the Notice of Appeal is refused.

(3) The appeal is otherwise 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