Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 76700 v Trentelman
Medium Neutral Citation:	[2021] NSWCATAP 205
Hearing Date(s):	22 June 2021
Date of Orders:	09 July 2021
Decision Date:	9 July 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J McAteer, Senior Member
Decision:	(1) Application to extend time to appeal dismissed. (2) If any party desires to make an application for costs of the application to extend time: (a) that party is to so inform the other party within 14 days of the date of these reasons; (b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons; (c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons; (d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons; (e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, include submissions of no more than one page as to why an oral hearing should be conducted rather

	than the application being determined on the papers.
Catchwords:	APPEALS — procedure — time limits — extension of time — principles — delay of two years — no question of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 60 Strata Schemes Management Act 2015 (NSW), s 236
Cases Cited:	Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25 Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389 Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22 Karl Suleman Enterprizes Pty Ltd (In Liq) v Pham [2013] NSWCA 93 Katter v Melhem (2015) 90 NSWLR 164; [2015] NSWCA 213 Nanschild v Pratt [2011] NSWCA 85 O'Hare v Bradfield Bentley Pty Ltd (in liq) [2019] NSWCA 122 Tomko v Palasty (No 2) (2007) 71 NSWLR 61; [2007] NSWCA 369 Voitenko v Zurich Australian Insurance Ltd [2019] NSWCA 229
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 76700 (Appellant) Natalia Trentelman (Respondent)
Representation:	Counsel: J Mee (Appellant) T Davie (Respondent) Solicitors: I A McKnight (Appellant) Bannermans Lawyers (Respondent)
File Number(s):	2021/00108268

Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not reported
Date of Decision:	11 March 2019
Before:	P Boyce, Senior Member
File Number(s):	SC 18/32379

REASONS FOR DECISION

1 This is an application to extend time to appeal from a costs decision of the Tribunal when the Notice of Appeal was filed a little over two years after the Tribunal's decision was provided to the applicant/appellant (who we will refer to in these reasons as the Owners Corporation).

2 In short, although the appeal itself had reasonable prospects of success, we have decided to refuse the application for an extension of time because there was, in substance, no explanation for the delay, the delay was very significant and there was prejudice to the respondent, Ms Trentelman.

Background

3 On 20 July 2018, Ms Trentelman, the owner of Lot 53 in the Owners Corporation's strata plan, commenced proceedings against the Owners Corporation in the Tribunal seeking an order under s 236(1) of the *Strata Schemes Management Act 2015* (NSW) (the "SSMA") that the Initial Schedule of Unit Entitlements in the strata scheme be replaced by a revised Schedule of unit entitlements. The parties referred to this as the Reallocation Application and we shall adopt that nomenclature.

4 On 30 August 2018 a directions hearing took place in the Tribunal.

5 After that date, and before 18 October 2018, proceedings between the parties were commenced in the Supreme Court of NSW.

6 On 18 October 2018 a second directions hearing took place. At that directions hearing the Owners Corporation's solicitor informed the Tribunal that the Owners Corporation did not oppose a unit entitlement reallocation but wished to "test" the expert valuation report which Ms Trentelman was relying upon in her application. What opinions in that report were to be tested, and why, in circumstances when the application was not going to be opposed, was not explained.

7 According to the unchallenged evidence of the Owners Corporation's solicitor, it had not been financially possible for the Owners Corporation to obtain its own expert valuation evidence by the due date set by the Tribunal, or at all.

8 One reason for that financial predicament was said to be that Ms Trentelman had paid no levies since 1 July 2017, a fact said to have greatly added to the financial pressures bearing on the Owners Corporation. Audited financial statements tendered by the Owners Corporation disclosed that as at 30 June 2019 those outstanding levies were in the order of $65,000.

9 No evidence was given as to whether the Owners Corporation had considered increasing strata levies, raising any special levies or otherwise seeking increased financial support from the lot owners in the strata plan to meet these financial pressures, or whether there was some impediment in doing any one or more of those things.

10 The matter was set down for hearing before the Tribunal on 24 January 2019.

11 On 16 January 2019, the Owners Corporation made an application to adjourn that hearing. The application was refused, and a costs order was made against the Owners Corporation.

12 On 24 January 2019, at the hearing, the Owners Corporation made a further application to adjourn the hearing. The application was refused. The Owners Corporation's legal representatives then withdrew from the proceedings because they did not hold instructions from the Owners Corporation to appear for it at the hearing (other than to make the adjournment application) and the proceedings continued without the attendance of the Owners Corporation.

13 At the conclusion of the proceedings Ms Trentelman made an oral application for costs and made oral submissions in support of that application. We do not have a sound recording or transcript of that application and so do not know what the submissions were and what was claimed to be the basis for the order.

14 The Tribunal declined to make an order for costs at that time without the benefit of submissions from the Owners Corporation, and made directions for the Owners Corporation to file and serve any submissions in opposition to the application for costs.

15 At the conclusion of the hearing the Tribunal made a number of substantive orders in favour of Ms Trentelman and delivered written reasons.

16 No order was made directing Ms Trentelman to inform the Owners Corporation, in writing or otherwise, of the basis for the costs application or any submissions made in support of that application. Quite how the Tribunal expected the Owners Corporation to properly respond to Ms Trentelman's costs application without knowing its basis and the submissions made in support of the application is not known.

17 On 7 February 2019, the Owners Corporation filed written submissions on costs. In those submissions the Owners Corporation said that it assumed Ms Trentelman's application for costs was made pursuant to s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act"), but it had "no information or material" as to the basis for the application and did not understand the "nature of the application".

18 The Owners Corporation's submissions continued by reference to several authorities concerning s 60 and the "special circumstances" referred to in that section. The submissions said that the Owners Corporation could only "speculate" as to the basis for Ms Trentelman's costs application and proceeded to submit that none of the special circumstances set out in s 60 of the NCAT Act existed. The Owners Corporation submitted that there did exist several other discretionary factors (which were identified) which militated against an order for costs. The Owners Corporation submitted that each party should pay its and her own costs of the proceedings.

19 On 11 February 2019, Ms Trentelman filed submissions in reply, even though no direction to that effect had been made. The Tribunal took those submissions into account in its costs decision.

20 On 11 March 2019, the Tribunal published its decision. The Tribunal found that the special circumstances set out in s 60(3)(a), (b), (c), (d), (e), (f) and (g) had been made out and gave reasons for those findings.

21 The Tribunal then considered whether, in the exercise of its discretion, it should award Ms Trentelman her costs. The Tribunal referred to a number of well-known authorities generally to the effect that costs should follow the event and that costs orders are compensatory and not punitive.

22 The Tribunal then said:

> 32. The applicant submits that she was compelled to undertake the litigation because of the respondent's failure to consider her request to adjust the unit entitlements.
>
> 33. The applicant was successful in her application. It is not unreasonable that the applicant should be compensated for her costs in having to being [sic] the application to obtain the orders made.
>
> 34. The Tribunal is satisfied that it can exercise its discretion under s60 and orders that the respondent, The Owners-Strata Plan No 76700, pay the applicant, Natalia Trentelman costs on the ordinary basis as agreed or assessed on the basis set out in Division 11 of Part 3.2 of the Legal Profession Act 2104 [sic].
>
> 35. The Tribunal further orders that pursuant to s 90 of SSMA the monies that the respondent uses to pay these costs ordered must only be paid from contributions levied in respect of lots other that the applicant's lot.

23 We have considerable doubt about the correctness of [32] and [33] of the Tribunal's reasons, a matter to which we will return later in these reasons when considering the Owners Corporation's prospects of success on the appeal.

24 On 22 August 2019, the Tribunal amended the substantive orders it made on 24 January 2019 because of requisitions from NSW Land Registry Services.

25 On 9 March 2020, the hearing of the parties' disputes in the Supreme Court commenced before Parker J. Those proceedings resulted in the following judgments:

(1) *Trentelman v The Owners - Strata Plan 76700; The Owners - Strata Plan 76700 v Trentelman* [2021] NSWSC 155;

(2) *Trentelman v The Owners - Strata Plan 76700 (No 2); The Owners - Strata Plan 76700 v Trentelman (No 2)* [2021] NSWSC 377;

(3) *Trentelman v The Owners - Strata Plan 76700 (No 3); The Owners - Strata Plan 76700 v Trentelman (No 3)* [2021] NSWSC 578; and

(4) *Trentelman v The Owners - Strata Plan No 76700* [2021] NSWCA 62.

26 On a date not identified, but before 5 November 2020, Ms Trentelman had her costs in relation to the costs order made by the Tribunal on 11 March 2019 assessed.

27 On 5 November 2020, she registered a judgment for those costs in the Local Court of NSW. The amount of the judgment was $87,786.50.

28 On 19 April 2021, the Owners Corporation filed its Notice of Appeal in the Tribunal in relation to the costs decision of the Tribunal made on 11 March 2019. The Notice of Appeal included its application to extend time to appeal.

29 This Notice of Appeal was filed approximately two years after the time to appeal (28 days) had expired.

Evidence

30 The Owners Corporation read two affidavits: one by its solicitor Mr McKnight and one by a Mr Luddington, the current chairperson of the Owners Corporation. Both affidavits were read and the annexures to those affidavits were tendered without objection other than a small number of objections as to relevance. We admitted the material objected to subject to relevance. Neither witness was required for cross-examination.

31 The substance of Mr McKnight's testimonial evidence has been set out (in substance) above and won't be repeated. In addition to that evidence, he also gave evidence that he had acted for the Owners Corporation since about October/November 2016.

32 He annexed a portion of the transcript from the hearing before Parker J on 6 and 7 May 2020, documents which purport to show that Ms Trentelman was the person responsible for the original unit entitlements (which she sought to have replaced by her application to the Tribunal), a Deed dated 19 November 2015 and a decision of a Strata and Community Schemes Adjudication

dismissing an application by a Mr Martyn seeking to have a strata manager appointed to the Owners Corporation.

33 The Deed referred to assumes some importance in this application because the Owners Corporation submitted that its terms require Ms Trentelman to pay certain costs of the Owners Corporation, and that had the Deed been provided to the Tribunal the Tribunal's decision on costs would have been different.

34 Mr Luddington gave evidence that he was appointed chairperson of the Owners Corporation in August 2017 and remained in that office as at the date he affirmed his affidavit. He said he was generally aware of the circumstances of the Reallocation Application and the Supreme Court proceedings. He said that of particular importance in the Supreme Court proceedings was the Strata Plan of Subdivision 91510 (the "Plan") and events at certain AGMs of the Owners Corporation. He said that in addition to giving evidence in the Supreme Court proceedings he also observed the balance of the proceedings remotely. He said he was unaware of various matters concerning the Plan prior to the Supreme Court proceedings, and that until the submission of the Court Books for the Supreme Court proceedings (which must have been sometime prior to 9 March 2020) he was unaware of the existence of the Deed.

35 The Owners Corporation also tendered two audited financial statements of the Owners Corporation for the years ended June 2018 and 2019.

Principles Applicable to the Extension of Time

36 The general principles applicable to an application for an extension of time to bring an appeal in NCAT were set out in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 ("*Jackson*") at [18]-[22]. At [22] the Appeal Panel said:

> "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:
>
> > (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];
> >
> > (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:

(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) - *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

(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].

37 There are other factors which may be taken into account, as the Appeal Panel in *Jackson* acknowledged at [20]. In *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61; [2007] NSWCA 369 ("*Tomko*"), for example, Basten JA, with whom Hodgson and Ipp JJA agreed, said at [56]:

"Speaking more generally, Kirby J noted that there might be other factors relevant to the grant of an extension of time in particular cases. As his Honour stated, after reference to the factors identified in *Palata Investments* (at 543 [66] (7)):

'… But they are by no means exhaustive. Several others have from time to time been thought relevant. These include whether the delay was intentional or contumelious; or merely the result of a bona fide mistake or blunder; and whether the delay is that of the litigant or of its lawyers, with which the litigant should not be saddled. It may also be relevant, where the default is that of a party's legal representatives, to take into account any considerations personal to the party which might have affected its ability to safeguard its own interests, for example, by applying pressure to its lawyers. Similarly, the extent to which any such prejudice may be remedied by an appropriate costs order is another consideration that has sometimes been treated as relevant.'"

38 It was said by the plurality in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 ("*Aon*") at [103] that, generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. Not only should an applicant show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the need for the application to the court's attention, so that they may be weighed against the effects of any delay.

39 In *Karl Suleman Enterprizes Pty Ltd (In Liq) v Pham* [2013] NSWCA 93 ("*Suleman*") Meagher and Barrett JJA said at [22], referencing [103] of *Aon*:

> "As the plurality judgment in *Aon* makes clear at [102] and [103], the exercise of the discretion to allow an amendment necessarily involves a weighing process in which factors for and against the grant of leave must be identified and considered. Those factors include, if there has been delay in applying for the amendment, an explanation for the delay. At [103], it was said that the importance attached by Rule 21 (which is set out in Aon at [60] and is in similar terms to ss 56(1) and 57(1) of the Civil Procedure Act 2005) to the factor of delay 'will require' in most cases that the moving party bring the circumstances giving rise to the amendment, and explaining the delay, to the Court's attention 'so that they may be weighed against the effects of any delay and the objectives of the Rules'. Those circumstances ought explain the delay, and in doing so may justify it, in the sense that they may provide reasons for it which are not consistent with any failure on the part of the moving party, or its legal advisers, to act diligently and expeditiously in the prosecution or defence of the relevant claim. If those circumstances provide some justification for the delay, for those or some other reasons, they may be weighed against the effects of the delay on the other parties, as well as on other litigants."

40 Subsequently, in *Voitenko v Zurich Australian Insurance Ltd* [2019] NSWCA 229 ("*Voitenko*") Meagher and McCallum JJA said at [30], in relation to the passage from *Suleman* just quoted:

> "The applicants submitted, on the strength of the last sentence of that paragraph, that where the explanation does not justify the delay, it cannot be weighed in favour of the party seeking the amendment at all. The submission misconceives the import of the remarks in Karl Suleman. Where a court is required to exercise a discretion, the proper approach is to identify all of the relevant factors, obviously including any relevant mandatory considerations, and to weigh all of those factors in order to reach a conclusion as to how the discretion should be exercised. To exclude any individual consideration on the grounds that it alone does not warrant the relief sought would be a wrong approach."

41 *Aon*, *Suleman* and *Voitenko* were cases involving applications for amendments to pleadings, but the statements made by their Honours are applicable, generally speaking, to applications such as this.

42 In relation to applications for an extension of time to file an appeal, McColl JA, with whom Campbell JA agreed, outlined the general considerations to be taken into account in *Nanschild v Pratt* [2011] NSWCA 85. Her Honour said:

> "[38] 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.
>
> [39] The underlying premise to these propositions in *Gallo* (as is made apparent in *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 (at [7]) per Brennan CJ and McHugh J) is that the court's approach to an application to extend the time for filing an appeal from a judgment determining substantive rights (or here to seek leave to appeal) "at any time" recognises that "the respondent to the application has a vested right to retain the judgment" proposed to be the subject of appeal: *Jackamarra v Krakouer* (at [4]); *Tomko v Palasty (No 2)* [2007] NSWCA 369 (at [55]) per Basten JA (Hodgson and Ipp JJA agreeing)."

43 That passage has been cited with approval in subsequent cases in the Court of Appeal including *O'Hare v Bradfield Bentley Pty Ltd (in liq)* [2019] NSWCA 122 at [30] per Gleeson JA and *Katter v Melhem* (2015) 90 NSWLR 164; [2015] NSWCA 213 at [123] per JC Campbell AJA, with whom McColl and Leeming JJA agreed.

Decision

Explanation for the Delay

44 We are not satisfied that the delay in filing this appeal has been explained, either adequately or at all.

45 It seems to us that the matters identified in the quote from *Tomko* set out at [37] above are both relevant and important in this case because the Owners Corporation has been legally represented from about October/November 2016 to date, including during (at least in part) the proceedings in the Tribunal at first instance (including appearing for it for the purpose of making the written

submissions on costs referred to at [17]-[18] above) and during the time for filing an appeal subsequent to the Tribunal's costs decision.

46 In light of those facts, it seemed to us that it was particularly important on this application for the Owners Corporation to have explained: whether the delay in appealing the costs order was intentional or contumelious; or was it merely the result of a bona fide mistake or blunder; whether the delay was the fault of the Owners Corporation or of its lawyers; and if the default was that of the Owners Corporation's lawyers, were there any considerations personal to the Owners Corporation which might have affected its ability to safeguard its own interests.

47 We hasten to say that there was no evidence that the default was that of the Owners Corporation's lawyers as opposed to the Owners Corporation itself, we are only making the point that the reason for no appeal being filed within 28 days of the costs decision in circumstances where the Owners Corporation had retained solicitors was not explained, and that lack of explanation raised questions both important and relevant to a proper consideration of the application. Such questions were not answered by the Owners Corporation's evidence.

48 Examples of relevant and important questions which arose in this case included whether the Owners Corporation was advised of the 28-day time limit for appealing from the Tribunal's costs decision. If so, when was that advice given (relative to the expiry of the time to appeal)? Was the failure to appeal within the 28-day limit intentional? If not, why was no appeal filed until over two years later? Was the delay intentional, was it a result of a mistake or blunder (for all or part of the two years) and, if the latter, whose mistake or blunder was it?

49 In submissions, the Owners Corporation said:

> "The **primary** reason for the delay in bringing the appeal was the financial constraints facing the Owners Corporation, in light of the related Supreme Court proceedings between the parties."
>
> (Emphasis added.)

50 This submission was not supported by any evidence given by Mr McKnight or Mr Luddington. Mr McKnight gave some generalised evidence of how the Owners Corporation's asserted parlous financial position impacted on the

ability of the Owners Corporation to lead expert evidence in the Tribunal on the substantive matters, but his affidavit was silent in relation to any link between the Owners Corporation's financial position and the delay in filing the Notice of Appeal.

51 Mr Luddington gave no evidence suggestive that the Owners Corporation's financial position was a cause of the delay in filing the Notice of Appeal. Given he was the Owners Corporation's chairperson for the whole of the period between the Tribunal's costs decision and the Notice of Appeal, his failure to give evidence on this topic allows us to draw an inference that his evidence would not have assisted the Owners Corporation: *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418 per Handley JA.

52 The sole evidence led by the Owners Corporation to support this submission was the two audited financial statements for the years ended June 2018 and 2019 and whatever inferences could be drawn from them. But the financial statements proved little other than the state of the Owners Corporation's financial position as at those two dates (30 June 2018 and 2019) and whatever could be inferred from the Owners Corporation's income and expenditure for the preceding 12 months in each year, but particularly 1 July 2018 – 30 June 2019.

53 The financial statement for the year ended 30 June 2018 showed that, on that date, the Owners Corporation had about $104,000 cash at bank with liabilities of about $32,000, but of which about $31,000 were levies in advance (and thus were unlikely to have been repayable in that year).

54 As at 30 June 2019, Owners Corporation's cash reserves had been reduced to a little over $11,000, the Owners Corporation had expended about $111,000 in legal fees in the preceding 12 months and the Owners Corporation's total expenditure had exceeded its total income by about $110,000.

55 There was no evidence as to the cost of bringing this appeal, and so there is no evidence whether $11,000 was sufficient to fund the filing of the Notice of Appeal within time and perhaps draft some submissions in support.

56 An application to call oral evidence on this topic was made at the hearing of the appeal but was rejected by us as it would obviously prejudice the respondent to hear evidence of financial matters for the first time at the hearing of the appeal without any prior opportunity to investigate that evidence and perhaps to seek production of relevant financial documents from the appellant to challenge whatever evidence was given.

57 Returning to the Owners Corporation's evidence, there was no evidence why some of the $111,000 spent on legal fees (presumably on the Supreme Court proceedings) could not have been diverted to filing a Notice of Appeal from the Tribunal's costs decision. Of course, it may have been a case of competing priorities, but the evidence is silent about whether that may have been the case.

58 No financial statements were tendered for any year after the financial year ended June 2019. We were informed that that was because financial statements for the years after 2019 had not yet been prepared, but that is not really an explanation because the Owners Corporation could have tendered unaudited statements as the best available evidence of its finances for that period. Evidence is weighed, at least partly, according to the ability for a party to produce it, and the tender of unaudited statements when audited statements had not been prepared would have been unexceptional.

59 Assuming there were the financial difficulties for the Owners Corporation that it submits it was under, and those financial difficulties were the "primary reason" for the delay, that begs the question as to how those difficulties were overcome for the present appeal. This was not explained, and an explanation was called for in order for us to properly consider the reason(s) for the delay.

60 It was submitted that to assist in funding legal expenses, the Owners Corporation entered into a loan agreement for the amount of $200,000. Drawdowns of this facility had occurred since 30 June 2019. But no further details were provided, including whether or not funds from that facility were used for this appeal.

61 In our view the evidence did not support the Owners Corporation's submission that the primary reason for the delay in bringing this appeal was the financial

constraints facing the Owners Corporation. Those constraints have not been proved, although there was a little evidence in the financial statements, but no link was proved between whatever the Owners Corporation's financial predicament was and the over two-year delay in filing the Notice of Appeal.

62 The Owners Corporation's second reason for the delay was as follows:

> "Further, it was only upon the conclusion of the (Supreme Court) proceedings and the delivery of Parker J's judgment that the full extent of facts relevant to the Reallocation Proceedings and the costs Decision arising from it became known. These included:
>
> > a. strata plan of subdivision 91510 and the circumstances of its preparation (including its schedule of unit entitlements) at Ms Trentelman's instructions, and the fact that its certification that a special resolution had been passed agreeing to the unit entitlements was simply wrong;
> >
> > b. the Deed dated 19 November 2015, in which Ms Trentelman agreed to bear all costs of her subdivision;
> >
> > c. the previous history of the strata scheme, including the control of it exercised by Ms Trentelman and her husband, and the historical allocations, changes and use of unit entitlements by the Trentelmans to their advantage."

63 The judgment of Parker J referred to was delivered on 26 February 2021, about two months before this appeal was lodged with the Tribunal.

64 Yet Mr Luddington was aware of all relevant facts pertaining to the Plan (Strata Plan of Subdivision 91510) by the time the witnesses had given evidence in the Supreme Court proceedings. We do not know whether he meant their affidavit evidence or their oral cross-examination, but the transcript shows that the Trentelmans gave evidence on 6 and 7 May 2020, nearly 11 months prior to the appeal being lodged with the Tribunal and so it would appear Mr Luddington was aware of the relevant matters by those dates at the latest.

65 The same is true of the Deed and the previous history of the strata scheme, including the control of it exercised by Ms Trentelman and her husband, and the historical allocations, changes and use of unit entitlements by the Trentelmans.

66 As the submission was put to us, it was the *facts* (identified in the submission) exposed in the Supreme Court proceedings which were relevant to the delay, rather than any *findings* made by Parker J, and so the relevant time is the date

the facts became known to the Owners Corporation in the evidence / Court Books rather than the date Parker J delivered judgment. On the evidence, those facts were known by May 2020 at the latest.

67 The ignorance of some of those facts may be some explanation for the delay up until May 2020, or soon thereafter, but not for the period between May 2020 when these facts were known and 19 April 2021 when the Notice of Appeal was filed.

68 Further, the ignorance of those facts only affected some, but not all, of the grounds of appeal the Owners Corporation wished to raise.

69 Indeed, the Owners Corporation's primary submission as to the error of law into which the Tribunal fell in its costs decision, a submission with which we are inclined to agree (but do not need to decide), was that the Tribunal erred in impliedly finding that Ms Trentelman would not have needed to have brought her application in the Tribunal had the Owners Corporation consented to, or at least not opposed, the orders Ms Trentelman sought.

70 That submission did not depend on the Owners Corporation having knowledge of any of the facts set out at [62] above.

71 We are in basic agreement with the Owners Corporation's submission to the effect that the scheme of the SSMA required Ms Trentelman to have brought an application in the Tribunal to replace the Initial Schedule of Unit Entitlements with a revised Schedule of Unit Entitlements whatever the position of the Owners Corporation. That is, whether the Owners Corporation consented or not to the orders sought.

72 Section 236 of the SSMA requires an application to be made to the Tribunal if a person entitled to bring such an application (specified in subs (3)) wishes to have unit entitlements re-allocated. The Tribunal is only able to make such an order if the matters referred to in the section are considered including valuation evidence of each of the lots affected. Thus, even if the Owners Corporation consented, Ms Trentelman was required to bring the application and to lead the valuation evidence s 236 required.

73 To the extent of the cost of doing so in the absence of any opposition from the Owners Corporation, the Owners Corporation could not have been responsible, those costs needing to be incurred in any event. Yet the Tribunal ordered the Owners Corporation to pay the entire costs of Ms Trentelman's application (on the ordinary basis).

74 Further, we have considerable doubt about the correctness of the Tribunal's findings that all of the matters identified in s 60 of the NCAT Act existed, and considerable doubt whether the costs discretion was properly exercised.

75 However, we do not need to decide these points given our decision on the application to extend time, other than to say that those submissions had good prospects of success on appeal had time to appeal been extended.

76 But returning to the point we made at [69] above, that was a submission which did not depend on the knowledge of any of the facts identified at [62] above or elsewhere, and thus the ignorance of those facts was not a reason for any delay in filing this appeal and making that submission.

77 The third and final reason advanced to explain the delay was that the quantum of Ms Trentelman's costs claimed pursuant to the costs decision was not known until "much later". When "much later" was, and what happened to first bring the quantum of the costs to the Owners Corporation was not identified. We do not agree that ignorance of the quantum of costs is any reason for delay when clearly the costs would not have been minor, given the involvement of counsel, solicitors and the necessity for complex valuation evidence.

The Extent of the Delay

78 The extent of the delay is extraordinarily long, being a little over two years from the expiration of the time to appeal the Tribunal's costs decision and the filing of this appeal.

Prospects of Success

79 The appellant's prospects of success on the appeal were good for the reasons outlined at [69]-[74] above.

Prejudice

80 No particular prejudice was identified by the respondent if we were to extend time, but there would be the usual presumptive prejudice which arises from delay, magnified to an extent by the extraordinary delay: see McHugh J's well-known remarks in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551; [1996] HCA 25.

81 In addition, as the respondent submitted, she has a vested right to retain the judgment.

Conclusion

82 The discretion to extend time is given for the sole purpose of enabling the Appeal Panel 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 Owners Corporation.

83 Having regard to the history of the proceedings, the conduct of the Owners Corporation, the nature of the litigation, the extraordinary length of the delay, the lack of any explanation for that delay and the presumptive prejudice to the respondent, it is our opinion that we should not exercise our discretion to extend time to appeal notwithstanding the appeal's good prospects of success. To do otherwise would not be to do justice in the circumstances of this case.

Orders

84 We make the following orders:

(1) Application to extend time to appeal dismissed.

(2) If any party desires to make an application for costs of the application to extend time:

(a) that party is to so inform the other party within 14 days of the date of these reasons;

(b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons;

(c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons;

(d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

(e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, include submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

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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