Civil and Administrative Tribunal

New South Wales

Case Name:	Shousha v Owners Strata Plan 2657
Medium Neutral Citation:	[2021] NSWCATAP 405
Hearing Date(s):	30 November 2021
Date of Orders:	15 December 2021
Decision Date:	15 December 2021
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President C Fougere, Principal Member
Decision:	(1) Application to extend time for lodgment of the appeal in respect of the Substantive Decision is refused. (2) The appeal (in respect of both the Substantive Decision and the Costs Decision) is dismissed. (3) If the Respondent seeks costs of the appeal, it must file and serve submissions within 14 days. (4) The Appellant has 14 days thereafter to file and serve submissions in opposition to the Respondents submissions. (5) The parties' submissions should address the question whether the Appeal Panel may determine costs on "on the papers" by dispensing with a hearing on costs.
Catchwords:	APPEAL; extension of time for late lodgement - appellants prospects of success - appeal against dismissal of costs application where appellant had mixed success.

Legislation Cited:	Civil & Administrative Tribunal Act 2013 (NSW) Civil & Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Jackson v NSW Land & Housing Corporation [2014] NSWCATAP 22 Rekrut and Scott v Champion Homes Sales Pty Ltd;Champion Homes Sales Pty Ltd v Rekrut and Scott[2017]NSWCATAP187.
Category:	Principal judgment
Parties:	Samir Shousha (Appellant) The Owners Strata Plan 2657 (Respondent)
Representation:	Solicitor: Thomas Martin Lawyers (Respondent)
File Number(s):	2021/00271764
Decision under appeal:	
Court or Tribunal:	New South Wales Civil & Administrative Tribunal
Jurisdiction:	Consumer & Commercial Division
Citation:	Not applicable
Date of Decision:	21 May 2021
Before:	C Paull (Senior Member)
File Number(s):	SC 20/19171

REASONS FOR DECISION

Background

1 This appeal arises out of two decisions, the first published on 21 May 2021 (the Substantive Decision) and the second on 20 August 2021 (the Costs Decision). The Tribunal was exercising its jurisdiction under the *Strata Schemes Management Act* 2015 (NSW) (the Strata Act).

2 By the Substantive Decision, the Tribunal made an order (order 1) for the Respondent (the Owners Corporation which was also the Respondent at first

instance) to remove and replace existing windows, security bar grills and fly screens in Lot 2 and replace those windows with new aluminium windows and reinstate the security bar rules and fly screens. Order 2 required the work described in order 1 to be commenced within six weeks. Order 3 stated that Application "SC 20/06873" is otherwise dismissed. Both parties agree that the reference to that application is a typographical error and what the Tribunal intended was to otherwise dismiss application SC 20/19171. The fourth order stated that the parties had until 31 May to seek leave to apply for costs.

3 By the Costs Decision, the Tribunal recorded that the Appellant had brought an application for costs. The application was refused.

4 The Appellant's Notice of Appeal was filed on 17 September 2021 and the Appellant appeals the orders made in both the Substantive Decision and in the Costs Decision. It is apparent that an issue arises as to whether the appeal in respect of the Substantive Decision was lodged out of time and, if so, whether time should be extended. We will deal with that issue later in these reasons.

5 In order to assist in the understanding of this appeal, it is helpful to summarise both the Substantive Decision and the Costs Decision.

The Substantive Decision

6 The following is a summary of the Substantive Decision:

(1) The Appellant owns Lots 1 and 2 in Strata Plan 2657 and has brought an application against the Respondent claiming that the Respondent has been in breach of its obligations under the Strata Act to maintain and repair the common property, particularly the common property pertaining to his lots. The Appellant's claims can be described in five categories.

(2) The first claim concerned a claim for reimbursement from the Respondent for costs he incurred with a third party (known as Window Line) in 2009 for the replacement of windows to Lot 1. There was a related claim for reimbursement of $2,200 which the Appellant says he paid to "another company". The Appellant's claim was to the effect that there was an agreement between the Appellant and the Respondent that he would make the two payments to those two companies and that the Respondent would later reimburse him. The Tribunal referred to two difficulties for the Appellant. One was that the claim is "statute-barred" (see [43]) and the other was doubt as to whether the Tribunal had power to make an order for reimbursement given the scope of powers available to the Tribunal under the Strata Act. However, the key reason

for the failure of the Appellant to achieve success with respect to this claim was that the Tribunal was not satisfied that there was sufficient evidence to support a finding of the existence of an agreement. This is clear from [32], [33], [35] and [36].

(3) The second claim resulted in the "work order" described above and is not the subject of appeal.

(4) The third claim was for damages of $80 for loss of the Appellant's car space for one week in June 2016. The Tribunal found that the car space was occupied by Botany Council "wheely bins" [69] but the Tribunal found that the Appellant had failed to establish who was responsible for placing the bins in the car space. Accordingly, the claim against the Respondent failed.

(5) The fourth claim concerned a claim for compensation in the sum of $3,771 in respect of the loss of personal items belonging to the Appellant. It was alleged that the Respondent was responsible for disposing of the items. This claim failed because the Tribunal found that there was no evidence to establish the value of the items [83].

(6) The fifth claim concerned a claim for loss of rental income from May 2019 and continuing in respect of Lot 2. The Appellant's claim was that Lot 2 was rendered uninhabitable by reason of the breach by the Respondent of its obligations to repair and maintain. Tenants who occupied that lot from March 2017 left in May 2019 because of the un-inhabitability of Lot 2. At [92] the Tribunal found that there was no evidence from the tenants or elsewhere to substantiate the Appellant's claim and that up until May 2019 the tenants continue to reside in the premises "despite the state of windows". The Tribunal went on to say at [93] that "most importantly" the evidence suggests that the "blame for the windows not being repaired to date does not rest solely with the Respondent". The Tribunal also found at [95] that the Appellant had a duty to mitigate and that it was not open to the Appellant to "stop the advancement of the window rectification because of the grilles issue and now claim in excess of $35,000 damages". The reference to the grilles issue refers to a dispute between the Appellant and the Respondent as to who was responsible for the cost of removing the grilles whilst the windows were rectified, and then replacing them.

The Costs Decision

7 The following is a summary of the Costs Decision :

(1) The Tribunal found that the amount in dispute was over $30,000 and therefore rule 38 of the Civil & Administrative Tribunal Rules (the Rules) regulates the claim, and that the Tribunal is not "confined by the parameters set under s 60" of the *Civil and Administrative Tribunal Act* 2013 NSW (the NCAT Act).

(2) The Tribunal stated that the Appellant's substantive application concerned five separate heads and that the Appellant was successful in only one. The Tribunal stated that the basis of the work order made in

the Substantive Decision rested on the fact that the Respondent had "always conceded that the windows were common property and needed replacement and that the difficulty in implementing this repair arose from the Applicant's inconsistent attitude in relation to any such action".

(3) The Tribunal said that of the four remaining categories the Appellant was unsuccessful and that the allegations were "general unsubstantiated and in some instances baseless".

(4) The Tribunal then concluded by saying that it should refuse the Appellant's costs application.

The Notice of Appeal

8 The grounds of appeal are wide-ranging and, in general terms, constitute a complaint about the conduct of the hearing, the conduct of the member and the reasons provided in support of the Substantive Decision.

9 The grounds also specifically deal with the Tribunal's process of reasoning with respect to the dismissal of each of the four claims under appeal.

10 The grounds further contended that the Decision was not fair and equitable and against the weight of evidence.

11 The Notice of Appeal seeks an order that time for the lodgment of the appeal be extended. In support, the Appellant submits that the Substantive Decision and the Costs Decision were "intertwined" and that the Appellant had received no reply to communications he sent to the registry asking the registry to explain the reference to application SC 20/06873 (to which we have made reference earlier in this decision).

12 We will refer to the Appellant's submissions in support of each of the grounds of appeal later in these reasons. It is not necessary to set them out in this section of our decision.

Reply to Appeal and Respondent's Submissions

13 The Respondent has filed a Reply to Appeal and has made written submissions. The Respondent supports the two decisions and does not cross-appeal.

The Appeal Hearing

14 At the hearing of the appeal both parties made oral submissions in elaboration of their written submissions and it is not necessary to refer to them in any detail.

Consideration

15 Appeals from decisions made in the Consumer & Commercial Division of the Tribunal are regulated by s 80 of the NCAT Act and by reference to cl 12 of sch 4 of the NCAT Act. In essence, that means that a party may appeal as of right on any question of law and with leave on the grounds set out in cl 12.

16 The relevant parts of cl 12 provide:

> **12 LIMITATIONS ON INTERNAL APPEALS AGAINST DIVISION DECISIONS**
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> (1) An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because-
>
> (a) the decision of the Tribunal under appeal was not fair and equitable, or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

17 In the Appeal Panel's decision in *Collins v Urban* [2014] NSWCATAP 17 the Appeal Panel set out the criteria that is applicable when determining whether leave should be granted under cl 12. A number of matters relevant to this appeal can be derived from *Collins v Urban* as follows:

(1) The concept of a substantial miscarriage of justice refers to a failure in the way a matter was conducted or decided which deprived the Appellant of a chance that was fairly open of achieving a better outcome than occurred [71].

(2) A decision can be said to be "against the weight of evidence" where the evidence in its totality preponderates so strongly against the conclusion found by the Tribunal at first instance that it can be said that the conclusion was not one that a reasonable Tribunal member could reach [77].

(3) If the Appeal Panel are satisfied that the Appellant may have suffered a substantial miscarriage of justice, then the Appeal Panel "may" grant leave under s 80(2)(b) of the Civil and Administrative Tribunal Act 2013

> NSW (NCAT Act). In order to be granted leave the Appellant must demonstrate something more than the primary decision-maker was arguably wrong in the conclusion arrived at and ordinarily, it is appropriate to grant leave only in matters that involve issues of principle, questions of public importance or matters of administration or policy which might have general application or an injustice which is reasonably clear [84]. In addition, leave may be granted where there is a factual error that was unreasonably arrived at and clearly mistaken.

18 The immediate question in relation to this appeal is whether time for the lodgment of the appeal should be extended insofar as the appeal concerns the Substantive Decision. Rule 25 of the NCAT Rules provides that an appeal of this kind must be lodged within 28 days from the day on which the Appellant was notified of the decision to be appealed or given reasons for the decision (whichever is the later). In this case the appeal should have been lodged in respect of the Substantive Decision (published on 21 May) on or before 18 June 2021 and was therefore lodged approximately three months out of time.

19 The reason for the delay in lodgment of the appeal was, according to the Appellant, occasioned by the Appellant's confusion concerning the dismissal of an application with a number that had no bearing to these proceedings and by the additional decision of the Appellant to await the outcome of the Costs Decision. The appeal papers provided by the Appellant in support of this appeal show that when the Appellant received the Substantive Decision, the Appellant had engaged a lawyer to provide advice. There is an invoice from the Appellant's law firm which refers to work from 21 May and includes advice on a "potential appeal". In our view the circumstances relied upon by the Appellant do not constitute an adequate reason for delaying the filing of the Notice of Appeal. Notwithstanding the confusion arguably caused by the reference to the wrong application number, the Appellant had the capacity through his own enquiries or through the advice he sought from his lawyers to ascertain that he had 28 days from 21 May to lodge an appeal. In short, we are of the opinion that the reason for the delay is inadequate.

20 In *Jackson v NSW Land & Housing Corporation* [2014] NSWCATAP 22 the Appeal Panel dealt with the principles relevant to whether time for lodgment of an appeal should be extended. The power to extend time exists under s 41 of the NCAT Act. In that case, the Appeal Panel decided that the relevant matters

to consider are the length of the delay, the reason for the delay and thirdly, the Appellant's prospects of success. The fourth consideration was the extent of any prejudice suffered by the Respondent to the appeal [22]. The Appeal Panel also stated at [21] that time limits are established by legislation for the purpose of promoting the orderly and efficient conduct of proceedings, providing certainty for the parties (especially the party in whose favour orders have been made) and achieving finality in litigation. For these reasons time limits should generally be strictly enforced.

21 We are of the opinion that the length of the delay and the reasons for the delay work against the Appellant having the benefit of an order for the extension of time. However, it remains necessary for us to consider whether the Appellant has reasonable prospects of success in relation to the matters raised in the Notice of Appeal concerning the Substantive Decision. We will deal with each claim in turn.

22 The first claim concerned the claim for reimbursement of the two sums paid to the two third-party companies (one being Window Line). The Tribunal found that the evidence was insufficient to demonstrate the existence of an agreement between the Appellant and Respondent by which the Respondent acquired an obligation to reimburse the Appellant. We have not been provided with any evidence which might suggest that the Tribunal's conclusion in respect of the failure to satisfy the Tribunal as to the existence of such an agreement was not open to the Tribunal. Were this matter to be relitigated it is our view that the Appellant's prospects of success are remote.

23 The next claim concerns the claim for $80 in respect of the loss of the use of a car space. Again, that claim failed because of a lack of evidence as to the responsibility of the Respondent. Were the matter to be reheard the Appellant's prospects of success appear poor.

24 In respect of the claim for loss of personal items, it is apparent that the claim failed, in part, because the evidence as to the value of the items was insufficient to enable the Tribunal to assess the extent of the Appellant's loss. At [79] of the Substantive Decision, the Tribunal said that there was very little correlation between the similarity in value of the internet items and the value of

the items in question. The reference to the internet items was a reference to the fact that values have been placed upon each lost item by reference to values obtained on the internet. Again, we are of the opinion that were the Appellant's claim in respect of this matter to be reheard, the Appellant's prospects of success are very poor.

25 The final claim concerns the claim for loss of rental income. It is our view that the Tribunal's concern was that there was no adequate evidence that the loss in rental was caused by the failure of the Respondent to discharge its responsibilities for the repair and maintenance of lot 2. At [92], the Tribunal stated that there was no evidence "from the tenants or elsewhere to substantiate" that the tenants vacated, because of the "window situation" [91]. It is true that the Tribunal also offered some other reasons for rejecting this claim (such as the contribution of the Appellant to the fact that the windows had not been repaired [93]). The Tribunal also referred to the Appellant's duty to mitigate. In our view, the reference to the duty to mitigate is not germane to the rejection of the Appellant's claim. The real difficulty for the Tribunal was that there was no explanation whether the tenants left because of the window situation or whether their departure was not caused by that situation. Again, it is our view that were this aspect to be reheard the Appellant's prospects of success are poor.

26 For all of the above reasons we cannot identify any error of law in the Substantive Decision, nor do we see that any of the cl12 grounds have been established. We do not think that there is any basis for the time for lodgment of the appeal to be extended.

27 However, before concluding in relation to the appeal of the Substantive Decision, it is necessary to say something about the contentions made by the Appellant as to the conduct of the hearing and the criticism of the member's conduct. In that regard we have been provided with a transcript of the hearing and also the sound recording (in the form of two compact discs). We indicated to the Appellant that we did not propose to listen to the sound recording because he did provide specific references to those parts of the sound recording which he said supported his views as to conduct which resulted in

procedural unfairness. He was not able to do so at the hearing. We explained to the Appellant that one reason for refusing to engage in a general review of the sound recording was that that process would be unfair to the Respondent who would not know in advance what precisely was alleged to constitute unfairness, and therefore the Respondent would be at a disadvantage in responding. We have reviewed the transcript and whilst one can see that there are difficulties and disruptions occasioned by the nature of a telephone hearing, we of the view that the conduct of the hearing was fair to both parties. To the extent that the Appellant's grounds of appeal contended that the Appellant suffered procedural unfairness by the way the telephone hearing was conducted it is our view that that ground has not been substantiated.

The Costs Decision

28 The Tribunal found that it was not required to find the existence of special circumstances in order to award costs, that being a requirement of s 60 of the NCAT Act. Rather, the Tribunal found that as the claim concerned a claim for an amount in excess of $30,000 rule 38 applied and that therefore the Tribunal had the discretion to award costs in the absence of special circumstances. The Respondent contends otherwise but it is not necessary for us to deal with that contention.

29 Where rule 38 applies the Tribunal has a discretion to award costs and generally the exercise of this discretion involves costs following "the event". This refers to the practical result of the proceedings (see *Rekrut and Scott v Champion Homes Sales Pty Ltd* [2018] NSWCATAP97 at [22]). Where there is a mixed outcome the exercise of the discretion depends upon matters of impression and evaluation (see *Rekrut* at [24]). Here there was a mixed outcome because the Appellant was successful in relation to one aspect but not with respect to the others.

30 In this case, the Tribunal noted that the Appellant was unsuccessful on four of its claims. Accordingly, the Appellant could not expect to obtain an order that all of its costs be paid because it was unsuccessful in relation to four of the five claims. However, the Appellant was successful on one of the claims but the Tribunal was critical of the Appellant's "inconsistent attitude" in relation to the

repair of the windows and therefore appears to have attributed some of the blame for the delay in the repair of the windows to the Appellant. We were not taken to any evidence by the Appellant which would demonstrate that findings by the Tribunal critical of the Appellant were not open to the Tribunal.

31 During the hearing of the appeal, we were concerned that there might have been an argument that the fees which the Appellant incurred with his expert witness Mr O'Donnell (which were not inconsiderable and totalled approximately $4,000) might have been the subject of an order requiring the Respondent to pay those fees on the basis that without that evidence from Mr O'Donnell the Appellant may not have been successful in obtaining the work order which he did obtain. One difficulty with that argument is that Mr O'Donnell's evidence also included evidence concerning the value of the lost items (see [78] to [80]). It is therefore not possible to say that the fees incurred with Mr O'Donnell related solely to the claim about which the Appellant was successful.

32 We are of the opinion that it would not be appropriate for us to interfere with the exercise of the discretion undertaken by the Tribunal by imposing a different costs order than the one that has resulted from the dismissal of the Appellant's application, namely that each party pays their own costs. As stated earlier where there is a mixed outcome (as here) the court or tribunal must undertake an evaluation as to who should pay costs. In considering this issue the Tribunal noted that the Appellant had been unsuccessful in four of the five claims and that in relation to the four "a considerable amount of time" had been devoted. There is no error displayed by the Tribunal in the way it considered how or whether it should make an order for costs to be paid. For these reasons in our view the Tribunal's exercise of its discretion to award costs, or to refuse to do so, has no miscarried

Orders

33 Accordingly the following orders are made:

(1) Application to extend time for lodgment of the appeal in respect of the Substantive Decision is refused.

(2) The appeal (in respect of both the Substantive Decision and the Costs Decision) is dismissed.

34 We will give the Respondent an opportunity to file and serve submissions concerning costs of the appeal and therefore make the following directions:

(1) If the Respondent seeks costs of the appeal, it must file and serve submissions within 14 days.

(2) The Appellant has 14 days thereafter to file and serve submissions in opposition to the Respondent's submissions.

(3) The parties' submission should address the question whether the Appeal Panel may determine costs "on the papers" by dispensing with a hearing on costs.

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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