



Civil and Administrative Tribunal
New South Wales

Case Name: Teixeira v The Owners SP No 37534

Medium Neutral Citation: [2021] NSWCATAP 366

Hearing Date(s): 9 November 2021

Date of Orders: 9 November 2021

Decision Date: 17 November 2021

Jurisdiction: Appeal Panel

Before: A Suthers, Principal Member
R C Titterton OAM, Senior Member

Decision: 1. Leave is granted to the appellants to be represented by Robert Teixeira.
2. Leave to extend time to lodge the Notice of Appeal is refused.

Catchwords: APPEALS – appeal lodged out of time – no evidence to provide a proper explanation for the delay

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111
Collins v Urban [2014] NSWCATAP 17
Gallo v Dawson (1990) HCA 30; 93 ALR 479
Jackamarra v Krakouer (1998) 195 CLR 516
Kelly v Szatow [2020] NSWSC 407
Owners SP 76269 v Draybi Bros [2014] NSWCATAP 20
Secretary, Department of Family and Community Services v Smith [2017] NSWCA 206
Tomko v Palasty (No 2) [2007] NSWCA 369

Yuen v Thom [2016] NSWCATAP 243

Texts Cited: None cited

Category: Principal judgment

Parties: Aristides Teixeira (First Appellant)
Zilda Teixeira (Second Appellant)

The Owners – SP No 37534 (First Respondent)
Ross Panebianco (Second Respondent)

Representation: Robert Teixeira (First Appellant)
Robert Teixeira (Second Appellant)

Joseph Amato (First Respondent)
Second Respondent (Self-represented)

File Number(s): 2021/00257787

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 21 July 2021

Before: G Meadows, Senior Member

File Number(s): SC 21/11841

REASONS FOR DECISION

Summary

- 1 This is an appeal lodged well out of time, and without evidence to support the assertions made as to why this was so.
- 2 For the reasons set out below, we decided after the hearing to refuse to extend time to lodge the Notice of Appeal.

Background

- 3 Strata scheme 37534 comprises three residential dwellings with a total of 50 unit entitlements and a commercial lot, also with 50 unit entitlements. The residential dwellings are all owned by one of the appellants. It is not clear, on that basis, why they were both applicants below, but that has no bearing on the issues we need to resolve. The second respondent owns the commercial lot. As a result of unhappy differences between the appellants and second respondent as to the proper management of the scheme there has been, by order, a strata manager appointed to the scheme since 2012. That manager is Mr Joseph Amato.
- 4 As a result of his appointment as manager in those circumstances, Mr Amato exercises all of the functions of the Owners Corporation and its Strata Committee. Mr Amato's last appointment, made on 13 August 2019, was for a period of two years.
- 5 There have been various applications made to the Tribunal in the past. Most recently, the appellants brought an application to the Consumer and Commercial Division seeking, inter alia, that the Tribunal make an order under s 237(7) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) varying the appointment of the compulsory manager to another proposed manager, whose business is in Wagga Wagga. The appellants also sought repeal of common property rights by-laws made by Mr Amato as Manager under the authority of the order of the Tribunal.
- 6 It is apparent from reading the Tribunal's decision, and we take it not seriously in dispute, that as a result of the nature of the documents creating the strata scheme, delineating the property, and in particular the common property, the strata scheme has been particularly difficult to manage and the respective rights and obligations of the parties are not clearly comprehensible.
- 7 The Tribunal determined the appellants' application on 21 July 2021. Relevantly, the Tribunal declined to replace Mr Amato as manager and made an order continuing his appointment for a further two years from that date on the previously ordered terms. The Tribunal made the order requested by the appellants, revoking the common property by-laws made by Mr Amato.

- 8 Central to that decision, the Tribunal found that common property by-laws instituted by Mr Amato had not been made with the consent of the relevant owners, as required by s 143(1) of the SSMA.
- 9 Notwithstanding that, the Tribunal remained satisfied that "Mr Amato has continued to exercise the powers and duties of the Owners Corporation and the strata committee in a professional and disinterested manner." The Tribunal also found that "... [h]e has consistently sought to put the management of the strata scheme into good order".
- 10 The Tribunal declined, in those circumstances, to appoint the appellants' preferred strata manager who lives remotely from Griffith, given that Mr Amato had carried out his duties and responsibilities properly. The Tribunal found that "had the case been different such that the compulsory strata manager was clearly not complying with the requirements of the [SSMA], then living in another town would not necessarily be a bar to appointment as a compulsory strata manager but in this case I find that it is preferable that the current appointment continue".
- 11 The appellants did not lodge their Notice of Appeal until 8 September 2021, that is some 20 days beyond the 28 days allowed for filing the notice under rule 25(4)(c) of the Civil and Administrative Tribunal Rules 2014 (NSW).
- 12 The appellants sought an extension of time on the basis of "ongoing health issues with Mr and Mrs Teixeira resulting in a delay in the decision to appeal orders handed down on 21 July 2021. This includes not engaging Mr and Mrs Teixeira for a period of time in order to no[t] exacerbate potential for self-harm and depression".
- 13 The Notice of Appeal also referenced "treatment for my own anxiety brought about by living under strict lockdown with curfew". The Notice of Appeal itself was signed by Mr Robert Teixeira, the son of the appellants. It is apparent that the reference to treatment for his "own anxiety" relates to Mr Robert Teixeira.
- 14 At the hearing, for the first time, Mr Robert Teixeira sought leave to appear for the appellants. That leave was not opposed. We granted it.

Scope and nature of internal appeals

- 15 To succeed in an appeal, the appellant must demonstrate either an error on a question of law, which, except in an appeal from an interlocutory decision, may be argued as of right; or that permission (that is, “leave”) to appeal should be granted to bring the appeal: *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), s 80(2).
- 16 The principles governing an application for leave to appeal under the NCAT Act are well-established and are repeated in many decisions of the Appeal Panel, often quoting *Collins v Urban* [2014] NSWCATAP 17. They are the same principles applied by the courts. It is enough as a summary to refer to the *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206, where the Court said at [28] (citations omitted):

Only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted. Ordinarily, it is only appropriate to grant leave where there is an issue of principle, a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable. It is well established that it is not sufficient merely to show that the trial judge was arguably wrong.
- 17 Where the appeal is from a decision made in the Consumer and Commercial Division (other than in respect of interlocutory decisions), there is a further qualification to the possible grant of leave in that we may only go on to consider a grant of leave in the broader sense if we are first satisfied that the elements of cl 12(1) of Sch 4 of the NCAT Act are made out, in that the appellant may have suffered a substantial miscarriage of justice on the basis that:
 - (1) the decision of the Tribunal under appeal was not fair and equitable; or
 - (2) the decision of the Tribunal under appeal was against the weight of evidence; or
 - (3) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).
- 18 We agree with the Appeal Panel in *Collins v Urban where it said*, at [76], that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 of the NCAT Act may have been suffered where:

... [T]here was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance."

- 19 We may decide to conduct a new hearing if we are satisfied that the grounds for appeal warrant it: NCAT Act, s 80(3)(a). A new hearing under s 80(3) of the NCAT Act is a hearing *de novo*, or "from the beginning": *Yuen v Thom* [2016] NSWCATAP 243 at [17].

An appeal commenced out of time.

- 20 As set out above, the appeal was not commenced within time.
- 21 In *Kelly v Szatow* [2020] NSWSC 407, the Supreme Court of NSW summarised the principles that apply to an extension of time to appeal. Relevant considerations include the length of the delay and any associated reasons for such, the strength of the plaintiff's case and consideration of whether the defendants would be prejudiced by a granting of the application: see *Jackamarra v Krakouer* (1998) 195 CLR 516 at [3]-[5]; *Tomko v Palasty (No 2)* [2007] NSWCA 369 at [55].
- 22 The appellant bears the onus of demonstrating that strict compliance with the timeframe would work an injustice: see *Gallo v Dawson* (1990) HCA 30; 93 ALR 479 ("*Gallo*"). In *Gallo*, McHugh J stated at [2]:

[2] ... The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties: see *Hughes v National Trustees Executors and Agency Co. of Australasia Ltd* [1978] VR 257 at 262. This means that 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 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: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-5. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263-4; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: *Vilenius v Heinagar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon

which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935:

'The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.'

Should we extend time to lodge the Notice of Appeal?

- 23 In submissions in support of the application to extend time for filing the Notice of Appeal, Mr Robert Teixeira said that his parents had been upset by the decision and the ongoing effects of the dispute between the parties. After the decision was made, he could not or did not think it appropriate to try to ask his parents to make a final decision as to whether they wished to appeal. He noted that, prior to the hearing below, both of his parents had been admitted to hospital for two days due to what he attributed to the anxiety caused by the actions of Mr Amato. He also asserted that after the hearing, on unspecified occasions, his parents "voiced a genuine desire to self harm."
- 24 He said that, when he thought it was appropriate, he asked them and they said they wished to appeal, shortly prior to the time for that to occur expiring. He says he then acted promptly to lodge the Notice of Appeal on their behalf. No explanation was proffered as to why that took a further 20 days, particularly when it had been within the contemplation of the appellants and Mr Robert Teixeira in the period leading up to the expiration of the time provided to file the Notice.
- 25 In questioning by us, Mr Robert Teixeira confirmed that he had lodged no medical evidence in support of any of those contentions. He acknowledged that his parents were legally represented in the proceedings below, and that they were aware of the time limits for lodgement of an appeal when the decision was made.
- 26 In the Notice of Appeal the appellants raise two grounds, described as follows:
- (1) No order was sought by the appellants or the respondent to have Mr Amato reappointed as compulsory strata manager for a period of two years commencing on 16 August 2021 on the same terms and conditions as the current appointment; and

- (2) The Tribunal Member did not give due weight to the evidence provided into the unprofessional and suspect activities of Mr Amato.
- 27 In expanding upon the substance of the appeal in submissions on the application to extend time, Mr Robert Teixeira also said that the decision of the Tribunal effectively brought about a monopoly because there are only two registered Strata Managers in Griffith and the other, apart from Mr Amato, had no availability to take on the management of this scheme.
- 28 It is clear that the second ground of appeal relied upon is a merits challenge to the Tribunal's decision, requiring leave to appeal.
- 29 The first ground raises the possibility of an error of law and, potentially, a question of law in that it appears to allege a breach of procedural fairness in appointing Mr Amato for another period of two years where that was not sought by either party. We note, though, that the Tribunal hearing occurred about three weeks before the expiration of Mr Amato's prior appointment, that both parties maintain that the management of the scheme is otherwise dysfunctional, they agree that a compulsory manager is required, and that this state of affairs has been in place since at least 2012.
- 30 Mr Robert Teixeira confirmed at the hearing that, unfortunately, he had been unable to obtain a recording or transcript of the hearing below. He said, although no material had been lodged in this regard, that he has sought the recording but that there had been a failure of the process leading to it not being available. We accept that assertion at face value.
- 31 Central to the issue which led to the appellants' concerns below was the question of whether three balconies in the building which is part of the strata scheme are, or are not, common property and who should maintain them. The Tribunal found that this issue was "very difficult to resolve because the Strata Plan shows no balconies associated with lots 1, 2, or 3. The plan for each of those lots comprises a rectangle in thick black lines and there is no notation of common property within or outside each of those rectangles and there is no reference to balconies". The Tribunal also noted that there "... is no actual evidence in that regard. Nor is there any photographic evidence which perhaps could help resolve the dispute".

- 32 In the appeal, the appellants sought to introduce fresh evidence that they have taken advice about that issue from New South Wales Land and Registry services and sought to put the content of that advice to Mr Amato. They say that Mr Amato's responses are indicative of ongoing problems in respect of the matters which brought them to make their application. In particular, they point to Mr Amato's ongoing refusal to reimburse them for approximately \$1,700.00 for repairs they say were to the original flooring in one of their lots.
- 33 Had we decided to extend the time for the filing of the appeal, we would have had to decide whether or not the appellants should be allowed to rely on this fresh evidence. The onus would have been on the appellants to establish that the evidence was not reasonably available at the time the proceedings under appeal were being dealt with: see cl 12 (3) of Sch 4 of the NCAT Act. The test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence: *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111 at [23]; *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 .
- 34 However, as we have decided not to grant an extension of time, there is no need to consider this issue.

Consideration

Prejudice to the respondent

- 35 Both respondents oppose the extension of time and point to the long running dispute between the parties which, they assert, will be perpetuated if leave to appeal is granted. The first respondent says that there is no clear or appropriate basis for the challenge to Mr Amato's ongoing appointment.
- 36 In any event, we needed to consider whether it was appropriate to extend time. The appeal cannot proceed unless we exercise the discretion conferred by s 41 of the NCAT Act to do so.
- 37 That discretion must be exercised judicially having regard to the "guiding principle" that the Tribunal is to facilitate the just, quick and cheap resolution of

the real issues in the proceedings: NCAT Act, s 36. The Tribunal is also to ensure that its practice and procedure are implemented 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 36(4).

- 38 There is relative prejudice to the respondents if leave to extend time is granted, in that it will create ongoing uncertainty in relation to the management of this dysfunctional strata scheme. It will also involve the parties in ongoing litigation, with the consequent time and expense that causes even unrepresented parties. Due to the unavailability of the transcript, through no fault of the parties, we would also need to rehear the application or remit it to the Consumer and Commercial Division if the appeal proceeds and we are satisfied that it should succeed. A rehearing could not occur today.

The relative merits of the appeal

- 39 Whilst the first ground relied on by the appellants could arguably proceed as of right, involving an allegation of procedural unfairness, it is by no means certain that it would succeed or, if it did, lead to a different result. Several factors lead to this conclusion:

- (1) Whilst no party may have specifically sought an order re-appointing Mr Amato for two years, the Tribunal had power to make such an order on its own motion: SSMA, s 237(1);
- (2) Whilst the Tribunal should afford procedural fairness before doing so, we do not have the transcript to know whether the issue was raised by the Tribunal or discussed at the hearing;
- (3) In any event, where the appellants suggested no time frame for the appointment of their preferred manager in their application; the parties agreed that a manager needs to remain appointed, and where Mr Amato's appointment was to expire three weeks after the hearing, it seems inherently likely in the absence of evidence to the contrary that:
 - (a) the parties conducted the hearing on the express or implicit assumption that a manager would remain appointed for two years, being the longest appointment available under s 237 SSMA (which may indicate that there was no failure to provide procedural fairness); and/or
 - (b) that given the history of the matter, such an outcome was, in effect, an inevitable result of the proper exercise of the Tribunal's discretion. This would raise for consideration whether, on the

Tribunal's finding that Mr Amato's appointment should not be changed, a different outcome was a possibility: *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145-6.

A reasonable explanation for the delay?

- 40 We must weigh the issues above against the fact that the basis for the appellants' not insignificant delay is completely unsupported by probative evidence. Whilst we can (leaving aside prejudice to the respondents) accept Mr Robert Teixeira's evidence that his parents were admitted to hospital prior to the hearing and that, in his opinion, his parents were not in a fit state to decide whether to appeal in time, that is not sufficient to discharge an evidentiary onus for us to conclude that the assertion is correct. Making a decision to appeal, where Mr Robert Teixeira stood ready to prepare and prosecute it for them, is a reasonably simple decision involving the appellants' attention for a comparatively limited period. Further, even if the decision was made only shortly prior to the expiration of the time to appeal, the explanation for a delay of a further 20 days remains unsatisfactory.
- 41 Lastly, we note that the appellants claim that new developments have arisen since the hearing below. Whilst an end to litigation is always preferable, if those assertions are correct, it may be that an application can properly be brought to the Consumer and Commercial Division of the Tribunal based on the changed situation.
- 42 We could not be satisfied that a strict application of the time limit would work an injustice on the appellants.
- 43 On that basis, we were not satisfied that we should exercise our discretion to extend time to lodge the Notice of Appeal.

Costs

- 44 We note that no party sought costs in accordance with directions made in the appeal.

Other - Notation for the Owners Corporation

- 45 It appears that the parties remain in dispute as to whether the Owners Corporation is responsible for the maintenance of the original tiles and

associated waterproofing affixed to the property at the time of registration of the strata plan, particularly on the balconies. If, in fact, Mr Amato believes on behalf of the Owners Corporation that the obligation for maintenance of those items depends entirely on whether they are now accessible to and used solely by an individual lot owner, he is wrong. It would be regrettable if that issue led to the commencement of yet more proceedings between the parties.

Orders

46 Our orders were as follows:

- (1) Leave is granted to the appellants to be represented by Robert Teixeira.
- (2) Leave to extend time to lodge the Notice of Appeal is refused.

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

Amendments

23 November 2021 - Pursuant to s 63 Civil and Administrative Tribunal Act (2013) the Case Title is amended to the correct SP number of: 37534

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