



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners-Strata Plan 36965 v Alexander

Medium Neutral Citation: [2021] NSWCATAP 407

Hearing Date(s): 23 September 2021

Date of Orders: 15 December 2021

Decision Date: 15 December 2021

Jurisdiction: Appeal Panel

Before: M Harrowell, Deputy President
A Bell SC, Senior Member

Decision: 1. Application for an extension of time to lodge the notice of appeal is refused.
2. Appeal dismissed

Catchwords: LAND LAW – Strata Schemes Management Act – whether dog is an assistance animal – requirements for training – whether Federal matter arises- extension of time to lodge appeal - relevant principles.

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Companion Animals Act 1998 (NSW),
Disability Discrimination Act 1992 (C'th)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22
Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130
Murphy v Trustees of Catholic Aged Care Sydney [2018] NSWCATAP 275

Category: Principal judgment

Parties: The Owners – Strata Plan 36965 (Appellant)
Jennifer Alexander (Respondent)

Representation: Solicitors:
Appellant: Self-represented (by A. Gough, an owner of
a lot in the strata scheme)
Respondent: Everyday Legal

File Number(s): 2021/00139572

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not Applicable

Date of Decision: 30 March 2021

Before: K Rickards, Tribunal Member

File Number(s): SC 20/47590

REASONS FOR DECISION

Introduction

- 1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act 2013 (Act)* from a decision made in the Consumer and Commercial Division of the Tribunal on 30 March 2021.
- 2 The application to the Tribunal was brought by The Owners – Strata Plan 36965 (Owners) against Ms Jennifer Alexander, seeking the removal of a dog known as “Luna” from the strata scheme.

Background

- 3 Strata Plan 36965 is an 800 acre rural property at Larnook, New South Wales. The Owners describe it as a “rural, ‘horizontal’ strata scheme”. Ms Alexander is the owner of Lot 74. At least at the time of the Tribunal hearing, Ms Alexander resided at Lot 74 with Mr Alfredo Bonanno and their son, Darel. “Luna” is kept at lot 74.

4 At material times the By-Laws of Strata Plan 36965 included the following:

4. Keeping of animals

The owners or occupiers of the lot shall be entitled to keep any animal upon their lot provided that:

4.1 no dogs or cats, other than assistance animals as prescribed by legislation, shall be allowed upon any lot or the common property;

4.2 the animal is adequately restrained to prevent the animal entering or encroaching upon the common property or any other lot; and

4.3 the keeping of such animal is not otherwise prohibited by law.

5. Noise

5.1 an owner or occupier of a lot, or any invitee of an owner or occupier of a lot, must not create any noise on a lot or the common property is likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or of any person lawfully using common property.

5 Complaints were made to the Strata Committee of the Owners that Luna was not being adequately restrained to prevent it entering or encroaching upon the common property or other lots and that Luna's barking was interfering with the peaceful enjoyment of other owners or occupiers. This led to the Owners issuing two Notices to Comply with a By-Law to Ms Alexander on 28 February 2020.

6 The first notice was dated 28 February 2020 and claimed that Ms Alexander had contravened by-law 4.2 by failing to ensure that Luna was adequately restrained to prevent it entering or encroaching upon common property or any other lot. The second notice was also dated 28 February 2020 and claimed that Ms Alexander had contravened by-law 5.1 by failing to ensure that Luna did not bark "so as to not create any noise on a lot or the common property likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or of any person".

Tribunal proceedings and decision

7 The two notices dated 28 February 2020 were not complied with to the satisfaction of the Owners, who lodged an application with the Tribunal on 12 November 2020. In their application, the Owners sought an order under section 158 of the *Strata Schemes Management Act 2015 (NSW)* (SSM Act) that Luna be removed or that action be taken to terminate the nuisance, hazard or

unreasonable interference caused by Luna. The Owners also sought a monetary penalty under section 147 of the SSM Act.

8 Section 158(1) of the SSM Act provides as follows:

(1) The Tribunal may, on application by an interested person, make an order against a person who is keeping an animal on a lot or common property in accordance with the by-laws for a Strata scheme, if the Tribunal considers that the animal causes a nuisance or hazard to the owner or occupier of another lot or unreasonably interferes with the use or enjoyment of another lot or of the common property.

9 An application under section 158 of the SSM Act (in contrast to section 156) is predicated on the assumption that the relevant animal is being kept on the property *in accordance with the by-laws*. In this case, the consequence of that assumption is that the Owners, by the nature of the application which they made, must be taken to have accepted that Luna was an assistance animal as prescribed by legislation.

10 The application was heard by the Tribunal on 29 March 2021. It appears that by that time the Owners had withdrawn their application for a monetary penalty under section 147 of the SSM Act. Despite the application being brought under section 158 of the SSM Act, the Tribunal Member stated at [2] of the reasons for decision that the preliminary issue for determination was whether Luna was an assistance animal as defined by relevant legislation. We were informed at the hearing of the appeal that this was indeed a live issue between the parties at the Tribunal hearing.

11 The Tribunal Member identified the relevant legislation as section 5 of the *Companion Animals Act 1998* (NSW), which defines an “assistance animal” as “an animal referred to in section 9...of the *Disability Discrimination Act 1992* of the Commonwealth, but does not include a working dog”. The Tribunal Member then noted that in turn section 9(2) of the *Disability Discrimination Act 1992* (C’th) (DD Act) provides as follows:

(2) For the purposes of this Act, an assistance animal is a dog or other animal:

(a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or

(b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or

(c) trained:

(i) to assist a person with a disability to alleviate the effect of the disability; and

(ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

- 12 The Tribunal Member stated at [7] that it was not in issue that Ms Alexander's partner, Mr Bonanno, suffered from a disability.
- 13 The Tribunal Member noted at [9] that there was no evidence that Luna had been trained or certified by any disability training organisation. However, the Tribunal Member referred to *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 (*Mulligan*), which established that an animal may be an "assistance animal" within the meaning of section 9 of the DD Act if it has received relevant training, regardless of who has provided training, and that there is no requirement for the animal to be certified by a government agency.
- 14 At [13] the Tribunal Member found that Luna had "received an amount of training under the supervision of the respondent and/or her partner with a view to addressing certain concerns". The Tribunal Member added, "However, it appears from the available evidence that this training has not completely addressed the noise issue which has precipitated the present proceedings." At [14] the Tribunal Member stated that "it may be appropriate in the circumstances" for Luna to undertake further training but noted that this was not the order sought by the Owners. The Tribunal Member then concluded at [15] that Luna was an assistance animal within the meaning of the relevant legislation. The Owner's application was dismissed.

Application for extension of time to appeal

- 15 The notice of appeal was lodged by the Owners on 18 May 2021 which is outside the 28 day time period specified in cl 25(4) of the Civil and Administrative Tribunal Rules 2014 (NSW) (Rules). The Tribunal's decision was sent to the parties by email on 30 March 2021, which means that the 28 day period for lodging a notice of appeal expired on 27 April 2021.

- 16 As the notice of appeal was lodged out of time, the Owners applied for an extension of time to lodge the notice of appeal under section 41 of the Act. In *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22, the Appeal Panel set out the principles to be considered in determining whether to grant an extension of time in which to lodge a notice of appeal. These principles are:
- (1) Discretion can only be exercised in favour of the applicant if strict compliance with the rules will work an injustice upon them.
 - (2) The discretion is to be exercised in 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.
 - (3) Generally, the Appeal Panel will be required to consider:
 - the length of the delay;
 - the reason for it;
 - the appellant’s prospects of success: and
 - the extent of any prejudice suffered by the respondent.
 - (4) It may be appropriate to explore further 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. 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.
- 17 The Owners sought an extension of time to appeal on the basis that their strata managing agent did not forward the Tribunal’s decision to them until 21 April 2021, which, they submitted, meant that they were not in a position to consider an appeal until that time. Mr Gough, who represented the Owners at the hearing of the appeal, asserted that this was due to an oversight by the managing agent. There was no evidence presented by the Owners to support this assertion.
- 18 Ms Alexander opposed the application for an extension of time to lodge the appeal. Ms Alexander pointed out that the orders were served by email on 30 March 2021 at the email address for service notified by the Owners. Ms Alexander referred to the fact that she had filed an application for costs on 11 April 2021 which would have been an additional reminder to the Owners that orders had been made in her favour. She emphasised that the notice of appeal

was not lodged until 18 May 2021, some 49 days after the Tribunal's decision had been sent by email to the parties.

- 19 Section 36 (1) of the Act provides that the guiding principle of the Act and the Rules is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. Section 36 (2) provides that the parties to proceedings in the Tribunal have a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with its directions and orders . The discretion to extend the time for lodging an appeal has to be considered in this statutory context, which emphasises the correctness of the principle identified in *Jackson* that the discretion to extend time should only be exercised if strict compliance with the rules will work an injustice.
- 20 We are not satisfied that the Owners have provided a satisfactory explanation for the quite extensive delay in lodging a notice of appeal in this matter. Even if it is accepted that an oversight by the managing agent meant that the Owners were not aware of the Tribunal's decision until 21 April 2021, this does not explain why there was a further delay of 27 days until an appeal was lodged. On 21 April 2021 there was still a further period of six days for the Owners to lodge an appeal within time, yet no steps were taken as a matter of urgency to comply with the deadline.
- 21 In these circumstances, acting consistently with the decision in *Jackson*, it is necessary for us to consider whether the appeal has more substantial merit than merely being fairly arguable.

Grounds of appeal

- 22 The Owners identified two grounds of appeal in their notice of appeal, in respect of which they sought leave to appeal. The first ground challenged the conclusion reached by the Tribunal that Luna was an assistance animal, because the Tribunal acknowledged that there was no evidence that Luna had been trained or certified by any disability training organisation. The Owners submitted that the decision that Luna was an assistance animal in the absence of training or accreditation "opens the floodgates" to owners claiming that dogs were assistance animals without evidence.

- 23 The Owner's second ground of appeal was that the Tribunal had not addressed their application for orders based on breach of by-law 5.1, because of Luna's barking. In this regard the Owners submitted that the Tribunal should have given more weight to the evidence of neighbours concerning Luna's barking.
- 24 In their notice of appeal, the Owners also contended that Mr Bonanno was no longer living at Lot 74 and that this was significant new evidence not reasonably available at the time of the hearing. However, Mr Gough stated at the hearing of the appeal that this issue was not pressed.

Jurisdiction

- 25 At an interlocutory hearing of the appeal, an issue was raised as to whether a federal matter arose concerning the interpretation of the DD Act and its effect on the ability of the Tribunal to make an order under section 158 of the SSM Act. The parties were directed to file and serve submissions in relation to that issue.
- 26 However, at the hearing of the appeal, both parties confirmed that the only issue which was raised at the hearing in the Tribunal concerning the DD Act was the definition of "assistance animal". This only arose by virtue of the fact that section 5 of the *Companion Animals Act 1998* (NSW) defines an "assistance animal" by reference to the definition in section 9 of the DD Act.
- 27 It is clear then that the DD Act only arises in an incidental fashion in this case because the definition of "assistance animal" in the NSW legislation refers to the definition in the DD Act. In these circumstances no issue arises as to the Tribunal exercising federal jurisdiction and there is no constitutional impediment to the Tribunal determining the matter: see the principles identified in *Murphy v Trustees of Catholic Aged Care Sydney* [2018] NSWCATAP 275 (*Murphy*) at [22]. It is worth noting that in *Murphy* the relevant by-law purported to expressly prohibit the keeping of dogs, which gave rise to the question whether the by-law was valid to the extent to which it was inconsistent with the DD Act. In contrast, in this case the relevant by-law expressly permits the keeping of dogs which are assistance animals as prescribed by legislation.

Merits of the appeal

- 28 Although the Owners were seeking leave to appeal and relied in their submissions on what had occurred at the hearing at first instance in the Tribunal, contrary to the directions made by the Appeal Panel, the Owners did not provide the Appeal Panel with the sound recording or transcript of the hearing at first instance and nor did they lodge with the Tribunal any of the evidence given to the Tribunal below on which they intended to rely.
- 29 At the hearing of the appeal, Mr Gough, for the Owners, apologised for these oversights. Mr Duden, for Ms Alexander, indicated that Ms Alexander had no objection to the Owners being given further time to lodge with the Appeal Panel the evidence which was considered by the Tribunal at first instance. However, in the circumstances, we are able to form a view as to whether the appeal has substantial merit without considering that further material, which would have required an adjournment of the hearing of the appeal.
- 30 We are satisfied that the first ground of appeal has no prospects of success. It is clear that the statutory definition of “assistance animal” contemplates that an animal may be trained as required by section 9(2)(c) of the DD Act without that training being conducted by an animal training organisation. The Tribunal referred at [9] to the decision of the full Court of the Federal Court in *Mulligan*, which supports that conclusion. It is clear that at [15] the Tribunal found that Luna had received the relevant training, albeit not by an animal training organisation, and was an assistance animal by virtue of the definition in section 9(2)(c) of the DD Act.
- 31 In relation to the second ground of appeal, although the Tribunal’s reasons were brief and we have not been provided with the sound recording or transcript of the hearing, the Tribunal did consider the issue of Luna’s barking at [13] of the reasons. The Tribunal found that the noise issue had not been “completely addressed”, indicating that the Tribunal did weigh the evidence in relation to barking but concluded that no orders were warranted in that regard under s 158 of the SSM Act at that time.
- 32 Under cl 12(2) of Schedule 4 of the Act the Appeal Panel may grant leave to appeal on the ground that the decision of the Tribunal was against the weight

of evidence if it is satisfied that the appellant may have suffered a substantial miscarriage of justice. We do not consider that there is any serious prospect that the Owners may have suffered a substantial miscarriage of justice in relation to the issue of Luna's barking.

33 In these circumstances, as the Owners have not in our view provided a satisfactory explanation for their delay in lodging the notice of appeal, we are not satisfied that the appeal has sufficient merit to warrant us making an order for an extension of time.

Conclusion

34 Accordingly the Appeal Panel makes the following orders:

- (1) Application for an extension of time to lodge the notice of appeal is refused;
- (2) Appeal dismissed.

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

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