

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)

CITATION : SPIRO [2022] WASAT 29

MEMBER : PRESIDENT PRITCHARD

HEARD : 10 MARCH 2022

DELIVERED : 10 MARCH 2022

PUBLISHED : 14 APRIL 2022

FILE NO/S : SAT Act 1 of 2022

BETWEEN : TERRY PETER SPIRO
First Applicant

ELLEN ANN SPIRO
Second Applicant

Catchwords:

Practice and procedure - Application for leave to commence proceedings pursuant to s 49 of the *State Administrative Tribunal Act 2004* (WA) - Where previous proceedings withdrawn and dismissed under s 46(2) of the *State Administrative Tribunal Act 2004* (WA)

Legislation:

State Administrative Tribunal Act 2004 (WA), s 46, s 46(1), s 46(2), s 47, s 48, s 49
Strata Titles Act 1985 (WA)

Result:

Application allowed

Category: B

Representation:

Counsel:

First Applicant : N/A

Second Applicant : N/A

Solicitors:

First Applicant : In Person

Second Applicant : In Person

Case(s) referred to in decision(s):

Nugawela and Medical Board of Australia [2021] WASAT 147

Antony and S. Omar Perdana Pty Ltd [2009] WASAT 96

REASONS FOR DECISION OF THE TRIBUNAL:

(These reasons were delivered orally at the conclusion of the hearing. They have been edited to correct matters of grammar and infelicity of expression.)

Introduction

1 This is an application by Mr Terry Spiro to 'reinstate an application [that he made in a previous proceeding in the Tribunal] in CC 892 of 2021'. By that, I understand that Mr Spiro in fact seeks leave to commence a fresh application in the Tribunal in the same or similar terms as the application he brought in CC 892 of 2021. That proceeding was dismissed on 6 January 2022 when Member Petrucci made an order that pursuant to s 46(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), Mr Spiro and Mrs Spiro had leave to withdraw the proceeding and the proceeding was dismissed pursuant to s 46(2) of the SAT Act. The application to withdraw was made by Mr Spiro himself in circumstances that I will describe further in a moment.

2 The position, therefore, is that Mr Spiro, having sought leave to withdraw CC 892 of 2021 and having had that proceeding dismissed as a result, now seeks to commence a further proceeding in the same or similar terms. Because that proceeding was dismissed under s 46 of the SAT Act, Mr Spiro requires leave to commence a proceeding of the same kind pursuant to s 49 of the SAT Act.

3 For the reasons which follow, leave should be granted to permit that to occur.

4 However, the grant of leave should not be understood by Mr and Mrs Spiro as any indication by the Tribunal of the merits of their application, nor should it be considered as imperative for them to actually commence further proceedings. That is a decision that they should make taking into account all relevant considerations, including the legal implications of proceedings, potential costs implications and the emotional and personal toll that litigation takes on any party.

5 An application under s 49 of the SAT Act would normally be made on an ex parte basis. It is an application, effectively, by a person to commence a proceeding by seeking an indulgence from the Tribunal in the form of the grant of leave. Because the substantive proceedings, which would be commenced if leave is granted, have not yet been

commenced, there are no parties whose interests may yet be directly affected. However, because of the background to this case, I required Mr Spiro to put the proposed respondent, namely the Owners of Majestic Rise and Majestic Crest Apartment Strata Plan 40793 (**Strata Company**), on notice. The chair of the Strata Company, Mr Thiel, responded and made some submissions to the Tribunal in relation to whether leave should be granted. Mr Thiel indicated that he did not wish to attend the hearing today to make oral submissions. I have taken into account the matters that Mr Thiel has raised in his written submissions.

Background

6 The proceeding in CC 892 of 2021 was an application by Mr and Mrs Spiro, which was commenced in the Tribunal on 8 June 2021 under the *Strata Titles Act 1985* (WA) (**ST Act**). The respondent was the Strata Company.

7 The Spiros own a unit in a group of units in East Perth. At the heart of the proceeding in CC 892 of 2021 was a dispute between the Spiros and the Strata Company about Mr Spiro's failure to pay certain levies or charges charged by the Strata Company, including for the cost of utilities. As I understand it, Mr and Mrs Spiro dispute the Strata Company's entitlement to charge those charges.

8 It appears the Strata Company has pursued proceedings in the Magistrates Court to recover the debt that it says the Spiros owe in respect to those charges. I understand that Mr Spiro has also disputed the Strata Company's entitlement to pursue that action in the Magistrates Court. It appears that Mr Spiro was unsuccessful in those proceedings and a judgment debt is now being pursued by the Strata Company in the Magistrates Court to recover the debt that it says the Spiros owe in respect to those charges. The amount of the debt is \$33,000, including costs and interest.

9 Mr Spiro says that he is also facing bankruptcy proceedings in the Federal Court arising from his failure to pay that judgment debt. The present application has been listed on an urgent basis because Mr Spiro says it is important for the question of leave to be determined before the proceedings in the Federal Court proceed.

10 The proceedings in CC 892 of 2021 were listed for a final hearing in the Tribunal on 6 January 2022. The parties had filed all of the material on which they wished to rely. Witnesses had been made available to give evidence. The hearing had commenced. The Member hearing the matter began by noting that the Spiros contended that the nine declarations or orders that they sought in their application were what the Tribunal had to resolve. The Strata Company had a different perspective on the issues that should be resolved.

11 The Member noted that the Spiros had been involved in separate ST Act proceedings in the Tribunal in CC 667 of 2020 between Tri Star Group Proprietary Limited and the Owners of Imago 2 Apartment Strata Plan 54685 (**Tri Star Group Matter**). (Mr Spiro has confirmed that he and Mrs Spiro are directors of Tri Star Group and they were involved in that litigation.) The Member noted that the proceedings in that matter were dismissed and that the Tribunal had refused to make the declarations sought by Tri Star Group in those proceedings on various bases, including that the Tribunal did not have power or authority to make declarations about matters such as the invalidity of agendas of Strata Company meetings, of the minutes of meetings and of the adequacy of financial records of the Strata Company.

12 In light of that background and in light of the similarity between the relief sought in CC 892 of 2021 and CC 667 of 2020, the Member asked whether Mr and Mrs Spiro wished to press for all of the declarations that they sought in their proceeding in CC 892 of 2021. She noted that costs orders could be made in the Tribunal and she stood the matter down to give the Spiros some time to consider what they wanted to do.

13 When the hearing resumed, Mr Spiro told the Member that he and Mrs Spiro were not ready for the fact that the result in the Tri Star Group Matter might be raised and that they should be given some time to consider restructuring their application for relief. He said that he had been unwell and had a serious heart issue, for which he wore a monitor. Further, Mr Spiro told the Member that he had rung his doctor and that the doctor did not want him to stay for the rest of the day in the Tribunal. Mr Spiro then sought the leave of the Tribunal to "stay" the matter until he had a chance to review and for his health to improve. The chair of the Strata Company, Mr Thiel, opposed any adjournment. He submitted that the respondent was ready to proceed and had waited for a long time to have the matter resolved.

14 The Member then observed that the Spiros had had several months since the decision in the Tri Star Group Matter had been delivered to consider its implications. She decided that at such a late stage in the proceedings the Tribunal would not permit the Spiros to amend the declarations that they sought, because that would prejudice the respondent. In relation to Mr Spiro's medical condition, the Member suggested that Mr Spiro provide her with the contact details of his cardiologist and that she would call him. Mr Spiro claimed that he did not have the contact details of his cardiologist and then said:¹

Look, I think we would just withdraw the application ... and we will have to revisit this at a later date.

15 The Member noted that if he withdrew the proceeding it would be dismissed and confirmed that that was what Mr and Mrs Spiro sought. After that was confirmed, the Member made the order permitting the proceeding to be withdrawn and dismissed pursuant to s 46(2) of the SAT Act.

The requirement for a grant of leave to proceed

16 I turn now to s 49 of the SAT Act, which imposes the requirement for the grant of leave. Section 49 provides that:

If a proceeding is dismissed or struck out under section 46, 47 or 48 of the SAT Act, another proceeding of the same kind in relation to the same matter cannot be commenced before the Tribunal without the leave of a judicial member.

17 It is immediately apparent that s 49 imposes a requirement for leave to commence proceedings of the same kind as those dismissed or struck out for a variety of reasons under sections 46, 47 or 48 of the SAT Act.

18 Under s 46 of the SAT Act, proceedings can be dismissed if they are withdrawn. Under s 47, proceedings can be dismissed if the Tribunal believes that they are, for example, frivolous, vexatious, misconceived, lacking in substance, being used for an improper purpose or an abuse of process. Under s 48, proceedings can be dismissed by the Tribunal if the Tribunal believes that a party to the proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by various forms of conduct.

¹ ts 12, 6 January 2021.

19 Two factual matters are of particular relevance in relation to the grant of leave under s 49. The first is that whether the proceeding now sought to be commenced is of the same kind as that which was dismissed or struck out. That involves a consideration of the proposed application. The question is whether the applicants are the same in this proceeding, whether the respondent is the same and whether the basis for the proceeding, that is, the grounds and the relief sought, is the same as in the proceeding which was dismissed or struck out. All of those things need to be considered.

20 The second factual question concerns the basis on which the proceedings were dismissed or struck out. The question of whether leave should be granted must be answered by reference to the interests of justice. Because of the variety of circumstances in which a proceeding can be dismissed or struck out under sections 46, 47 or 48, a variety of considerations will be relevant in determining whether the interests of justice warrant that another proceeding of the same kind should be permitted to be commenced.

21 Those considerations will include why the proceedings were struck out and why the applicant wishes to commence proceedings of the same kind. The potential impact on a respondent cannot be overlooked. That is particularly so in the Tribunal, which generally is a no costs jurisdiction. While costs may now be awarded under the ST Act, the award of costs can never compensate a respondent for the overall costs (financial and otherwise) of litigation. If proceedings were struck out because an applicant was conducting the proceedings in such a way as to disadvantage the other party (s 48 SAT Act), then the interests of justice may not warrant permitting the applicant another opportunity to potentially continue such conduct by pursuing a proceeding of the same kind against the same respondent. In that respect I note that leave to commence cannot be granted on conditions.

22 If the earlier proceeding was struck out in circumstances where the applicant was not given an opportunity to be heard, then the interests of justice might require the grant of leave. An example of a case of that kind is *Antony and S. Omar Perdana Pty Ltd*.²

23 If the earlier proceeding was struck out because it was regarded by the Tribunal as misconceived, frivolous or vexatious, then the interests of justice would hardly be served by permitting the same applicant to pursue a proceeding of the same kind.

² *Antony and S. Omar Perdana Pty Ltd* [2009] WASAT 96.

24 Finally, if the earlier proceeding was dismissed or struck out and
the attempt to commence a further proceeding was itself misconceived
because no practical utility could arise in doing so, then the interests of
justice would also not be served by the grant of leave. In that respect I
refer to my decision in *Nugawela and Medical Board of Australia*.³

Whether leave should be granted in this case

25 I turn now to explain why leave should be granted in this case.

26 Having regard to the application which Mr Spiro proposes to file,
dated 4 March 2020 (**proposed application**), it is possible to make the
following observations.

27 **First**, the proposed application is one which is clearly very similar
in its terms to the proceeding in CC 892 of 2021, which was dismissed
by the Member earlier this year.

28 **Secondly**, the only applicant named in the proposed application is
Mr Spiro. In that respect, however, I note that Mrs Spiro had been
included as an applicant in the earlier proceeding, by an order made by
the Tribunal after the proceeding commenced.

29 **Thirdly**, the proposed application seeks nine orders by way of
relief on various grounds. The grounds themselves appear to be similar
to the grounds relied on in CC 892 of 2021. The orders sought are not
in identical terms to those which were sought in CC 892 of 2021, but
they are in very similar terms and there is obviously a considerable
degree of overlap. For example, it appears that proposed order 2 raises
similar issues or seeks a similar form of relief to orders 4 and 5 in
CC 892 of 2021. It appears that proposed order 3, while not entirely
clear, appears to have some overlap with order 8 sought in CC 892 of
2021. Proposed order 4 is in very similar terms to order 3. Proposed
order 6 is in the same or similar terms to order 5 in CC 892 of 2021.
Proposed order 7 is in similar terms to order 6 in CC 892 of 2021.
Proposed order 8 is in similar terms to order 1 in CC 892 of 2021.
Proposed orders 1 and 5 are not in terms, so far as I can discern, the
same or similar to any of the orders sought in CC 892 of 2021.

³ *Nugawela and Medical Board of Australia* [2021] WASAT 147.

30 The upshot of all of that is that the proposed application is, in my
view, a proceeding of the same kind, albeit that it is not in identical
terms, to CC 892 of 2021, which was dismissed.

31 There are some potential problems that Mr and Mrs Spiro may
have to grapple with if they commence a proceeding in the terms of the
proposed application. That is because some of the orders that are
sought appear to be in very similar, if not identical, terms to orders that
were sought in the Tri Star Group Matter.

32 There appear to be some differences between the orders sought in
the proposed proceeding and those pursued in the Tri Star Group
Matter. It is not necessary to determine the extent of the differences.
It suffices to say that I cannot be certain that all of the forms of relief
sought in the proposed application are the same as those which were
dismissed in the Tri Star Group Matter. Therefore, I cannot say that the
proposed application is doomed to fail, on the basis that the Tribunal
would apply consistent principles, and that the facts are sufficiently
similar to those in the Tri Star Group Matter.

33 As to where the question of the interests of justice lie, I make the
following observations.

34 **First**, the proceedings in CC 892 of 2021 were ready for hearing
when they were dismissed. The dismissal occurred on the day of the
hearing. All of the evidence had been put together and the witnesses
were available. It would seem to me to be a relatively easy thing for
the Tribunal to make orders, if the proposed application is given leave,
to permit the evidence relied upon or collated in CC 892 of 2021 to be
used for these proceedings. That would save the parties costs and time
in getting the proceedings ready for a hearing and for determination by
the Tribunal.

35 **Secondly**, the interests of justice require consideration of the
circumstances in which CC 892 of 2021 was dismissed. As I said at the
outset, Mr Spiro sought to withdraw those proceedings. He was given
an opportunity to consider what to do. He did not, at least at the
beginning of the hearing, raise his ill health. He submitted to me today
that the transcript of the proceedings on 6 January 2022 in CC 892 of
2021 does not convey in truth what occurred, which is that he had
sought, unsuccessfully, to indicate to the Member that he wished to
raise a matter for her consideration. He tells me that would have been
his ill health. He tells me that in the course of the break in those

proceedings, he tried to contact his cardiologist, but was unable to speak to him because he was in surgery. The receptionist at the cardiologist's office told Mr Spiro that he probably should not be in a hearing. Mr Spiro tells me that that was the reason why he was not able to give the Member the cardiologist's contact details so that she could contact him, as she had suggested.

36 In any event, having regard to the medical evidence that Mr Spiro has now produced, in the form of a medical certificate, I am satisfied that he was unfit for a hearing on 6 January 2022. In that medical certificate Dr Powell indicates that Mr Spiro was unfit on medical grounds to attend a court or tribunal hearing on 6 January 2022. She refers to some previous incidents that Mr Spiro had had in relation to his health and to some subsequent treatment in relation to his heart condition. I take that into account as establishing that Mr Spiro was unfit for a Tribunal hearing on 6 January 2022 when CC 892 of 2021 was dismissed.

37 I also take into account that Mr and Mrs Spiro were unrepresented on 6 January 2022 and that their case in CC 892 of 2021 might have been presented in a different way, or the issues raised about the proceeding might have been addressed in a different way, had they had the benefit of legal representation.

38 Having taken all of these considerations into account, I have formed the view that the interests of justice do warrant the grant of leave to commence a proceeding in the form of the proposed application dated 4 March 2022.

39 As I have indicated, if Mr and Mrs Spiro decide to commence that proceeding, then they should consider whether Mrs Spiro should be named as an applicant.

40 It should be emphasised again that nothing in the observations I have made should in any way be taken as an indication of the merits of the proposed application, nor should Mr and Mrs Spiro assume that the grant of leave means they will not face the problems to which I have referred.

41 The final observation is that the grant of leave does not mandate the commencement of proceedings and it is open to Mr and Mrs Spiro to consider whether, in fact, they should do so. Costs consequences may need to be considered in deciding whether to actually commence the proceedings.

Orders

42

The Tribunal makes the following orders:

1. Pursuant to s 49 of the *State Administrative Tribunal Act 2004* (WA) Mr Terry Peter Spiro and Mrs Ellen Ann Spiro have leave to commence a proceeding in the Tribunal in the terms of the proposed application dated 4 March 2022.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

EN

Associate to the Honourable Justice Pritchard

14 APRIL 2022