



Civil and Administrative Tribunal

New South Wales

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Case Name: de Tarle v Newland

Medium Neutral Citation: [2022] NSWCATAP 148

Hearing Date(s): On the papers

Date of Orders: 9 May 2022

Decision Date: 9 May 2022

Jurisdiction: Appeal Panel

Before: S Thode, Senior Member  
P H Molony, Senior Member

Decision: (1) Time is extended pursuant to s 41 of the Civil and Administrative Tribunal Act 2014 to allow the appellant to lodge this appeal on 10 December 2021.  
(2) Appeal allowed.  
(3) Orders 2 and 3 made on 11 November 2021 in SC 21/27790 are set aside.  
(4) The appellant shall file and serve by no later than 31 May 2022 his submissions in reply on the issue of costs (limited to 5 pages plus material attachments) in the proceedings on file number SC21/27790.  
(5) The Appeal Panel will then re-determine the appealed decision without a hearing, on the basis of the written submissions provided.

Catchwords: APPEAL – procedural fairness – insufficient time given for party to file submission in reply on issue of costs – appeal allowed – costs issue to be re-determined by Appeal Panel

Legislation Cited: Civil and Administrative Tribunal Act 2013  
Strata Schemes Management Act 2015

Cases Cited: CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578  
Collins v Urban [2014] NSWCATAP 17

Jackson v NSW Land and Housing Corporation [2014]  
NSWCATAP 22  
Pholi v Wearne [2014] NSWCATAP 78  
Prendergast v Western Murray Irrigation Ltd [2014]  
NSWCATAP 69  
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017]  
NSWCATAP 39

Texts Cited: None

Category: Principal judgment

Parties: Benoit de Tarle (Appellant)  
Jan Newland (First Respondent)  
The Owners – Strata Plan No 576 (Second Respondent)

Representation: Appellant (Self Represented)  
First Respondent (Self Represented.)  
Darren Ford (Strata Manager) (Second Respondent)

File Number(s): 2021/00350892

Publication Restriction: None

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 11 November 2021

Before: S Hennings, General Member

File Number(s): SC 21/27790

## **REASONS FOR DECISION**

### **Background**

1 On 24 June 2021 the first respondent to this appeal commenced proceedings in the Consumer and Commercial Division of the Tribunal against The Owners – Strata Plan No 576 (the second respondent) seeking orders that the

appellant be removed from the strata committee under s 238 of the *Strata Schemes Management Act 2015* (NSW).

- 2 On 21 July 2021, on his own application, the appellant was joined as the second respondent to that proceeding. He says he did so in order to protect his reputation.
- 3 The first directions hearing in the proceedings took place on 6 August 2021. No objection was taken to the appellant being joined as a respondent in the proceedings. The directions hearing was adjourned to 27 August 2021. It was noted that the appellant was standing for re-election to the strata committee at an Annual General Meeting of The Owners – Strata Plan No 576 to be held on 16 August 2021. The future of the proceedings was contingent on the outcome of the election. If the appellant were not re-elected, he would not remain on the strata committee.
- 4 On 23 August 2021, the first respondent wrote to the Tribunal seeking to withdraw her application because the appellant had not been re-elected to the strata committee. That day the Tribunal made an order dismissing the application as it had been withdrawn under s 55(1)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act).
- 5 On the same day, the appellant sought an order for the payment of his costs in the proceedings. While he had not been represented in the proceedings, he indicated that he had sought legal advice.
- 6 On 31 August 2021, the Tribunal issued directions with respect to the filing of “evidence and submission” by the parties with respect to that costs application and as to whether costs could be determined on the papers. The appellant was to file his submissions on 14 September 2021, the respondent’s submission were due by 29 September 2021, with any submissions in reply from the appellant due 13 October 2021. The “costs submission” were not to exceed 5 pages in length.
- 7 The appellant then wrote a series of emails to the Tribunal seeking advice as to whether the Tribunal had received submissions from the other parties on the costs issue. The responses he received, while some were equivocal, were in

the negative. On 12 October 2012, the day before his submissions in reply were due, he emailed the Tribunal confirming that no responses had been received to his costs application.

- 8 In reality, the first respondent (the applicant in the initial proceedings) had emailed her response to the Tribunal on 27 September 2021 (not copied to the other parties) and asked whether filing by email was acceptable. The Tribunal did not alert the appellant to this, despite his numerous requests.
- 9 On 8 November 2021, the Tribunal made the following orders in chambers:
  1. On 31-Aug-2021 Principal Member Rosser issued procedural directions in this matter SC 21/27790. The directions were issued to facilitate determination of the costs application. The parties were advised that the Tribunal proposes to dispense with a hearing on costs and determine the application on the basis of the written material provided. A timetable was issued for the parties to submit their evidence and submissions.
  2. The Tribunal has received documents from both the second respondent Benoit de Tarle (5 pages hard copy) and the applicant Jan Newland (1 page electronic copy).
  3. It appears that both the respondent Benoit de Tarle's request dated 17-Sep-2021 and the applicant Jan Newland's request dated 27-Sep-2021 to file and serve electronically have not have [sic] been properly considered by the Tribunal at those times as requested. Those applications in respect of electronic service are now considered to facilitate the final determination of the cost application on matter SC 21/27790 on 10-Nov-2021.
  4. The Tribunal makes an order permitting electronic service of documents by both parties on each other and to the Tribunal in the matter.
  5. To avoid any doubt, both parties are to provide each other with a further electronic copy of the documents that have previously been submitted to the Tribunal on or before 7.30 pm on 8-Nov-2021.
  6. To address the second respondent's right to reply, the time for compliance with previous procedural direction 3 issued by the Tribunal on 31 Aug-2021 is now extended to 4.00 pm on 9-Nov-2021. That being [sic] the following procedural direction is now issued as relevant:
    - i. The second respondent is to provide electronically any evidence and submissions in reply to the applicant and the Tribunal by 4.00pm on 9 November 2021.
  7. The cost application shall then proceed to be determined on the already submitted documents provided by the parties and any additional documents that are submitted by the second respondent in compliance with procedural direction 6.
- 10 On 9 November 2021 at 11:29 pm the appellant emailed the Tribunal (copied to the other parties) stating that no submissions regarding costs had been

received from the other parties and requesting details of how the submissions were made and copies thereof.

### **The decision below**

- 11 On 11 November 2021, the Tribunal dispensed with a hearing on costs, and determined the costs application on the materials provided. No note was made of the appellant's email of 9 November 2021. The Tribunal dismissed the appellant's costs application and ordered that each party pay their own costs. The appellant does not appeal against the Tribunal's first order to dispense with a hearing on costs. He seeks orders that the decision otherwise be set aside and re-determined.
- 12 It is clear that no submissions in reply were made by the appellant, who says he did not receive submissions from the respondents to which he could reply. He claims that the timeframe provided by the order of 8 November 2021 was so short that he could not comply with it. He claims that this was procedurally unfair. In making its decision that Tribunal accepted the second respondent's submissions which the appellant says had not been given to him. The appellant claims this was also unfair to him.

### **The Appeal**

- 13 On 10 December 2021, the appellant lodged a notice of internal appeal in which he appealed against the costs order. He indicated that he had received the decision under appeal on 12 November 2021. He had 28 days from then in which to lodge his appeal under r. 25(4)(c) of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the NCAT Rules). That 28 day period expired on Friday, 7 December 2021. The notice of appeal was received on Monday 10 December 2021, the business day after it was due to be made. As a result, the appellant will require an extension of time under s 41 of the NCAT Act for his internal appeal to proceed.
- 14 The appeal purports to raise questions of law and also seeks leave to appeal on the grounds that the appellant has suffered a substantial injustice because the decision was against the weight of the evidence and was not fair and equitable. The appellant does not claim to have suffered a substantial injustice

because of the availability of fresh evidence, although he has filed evidence that was not before the Tribunal below.

- 15 The appeal was listed for call over on 14 January 2021 when directions were made regarding the future management of the appeal, including the filing of submissions and supporting materials. Importantly, the Appeal Panel:
- (1) joined The Owners – Strata Plan No 576 as a second respondent to this appeal; and
  - (2) dispensed with an oral hearing of the appeal pursuant to s 50(2) of the NCAT Act.

### **Material before the Appeal Panel**

- 16 In considering this appeal we have had regard to the following materials provided by the parties.
- (1) By the appellant:
    - (a) notice of appeal lodged 10 December 2021 and annexures;
    - (b) submissions filed on 7 February 2022 with attached materials in tabs 1 to 14 totalling 215 pages; and,
    - (c) submissions filed on 25 February 2022 with attached materials in tabs 15 to 28 totalling 84 pages.
  - (2) From the first respondent:
    - (a) reply to the appeal dated 21 January 2022 in which Ms Newland opposes the appeal; and,
    - (b) response received 16 February 2022.
  - (3) From the second respondent a reply with two attachments filed on 21 January 2022.

### **The principles applicable to applications to extend time**

- 17 Section 41 of the CAT Act provides:
- (1) The Tribunal may, of its own motion or on an application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.
  - (2) Such an application may be made even though the relevant period of time has expired.
- 18 The principles to be applied by the Appeal Panel on applications for an extension of time in which to appeal were considered in *Jackson v NSW Land*

*and Housing Corporation* [2014] NSWCATAP 22. The Appeal Panel relevantly said:

Under s 41, the Appeal Panel has power to grant an extension of time in which to appeal in the present matter. The discretion to grant an extension of time is unfettered under that section but it must be exercised judicially. It must also be exercised having regard to the statutory command in s 36 of the Act that the guiding principle for the Act "is to facilitate the just, quick and cheap resolution of the real issue in the proceedings".

...

22. ...

(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 61 at [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].

- 19 In the present case the appellant's notice of appeal was filed one working day late. It is apparent that he was not aware that an extension of time would be required as he has ticked "No" to a question to that affect. Why the application is late is unclear. Delays in postage could explain it, but that is a matter of speculation. The delay is short and has not occurred in egregious circumstances.
- 20 As appears from our discussion below we are satisfied the appellant's prospects of success on the appeal are good. While granting an extension of time to the appellant would deprive the respondents of the present order that each party bear their own costs of the proceedings below, a consideration of all

the relevant factors points to this being an appropriate case in which time should be extended for the appellant to bring his appeal.

### **Applicable legal principles in internal appeals**

21 Section 80(2) of the NCAT Act states:

#### **80 Making of internal appeals**

...

(2) Any internal appeal may be made—

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

22 Clause 12(1) of Schedule 4 to the NCAT Act states with respect to decisions made in the Consumer and Commercial Division that:

#### **12 Limitations on internal appeals against Division decisions**

(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).

23 A question of law for the purposes of s 80(2)(b) of the NCAT Act may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also by taking into account an irrelevant consideration or not having regard to a relevant consideration. This includes not making a finding on an element or central issue that is required to be made out in order to claim an entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 at [45] (Full Fed Ct), [2000] FCA 1343, applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179; [1995] HCA 58.

24 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (Prendergast) at [13], the Appeal Panel said that the following are specifically included:



- (1) whether the Tribunal provided adequate reasons, which explain the Tribunal's findings of fact and how the Tribunal's ultimate conclusion is based on those findings of fact and relevant legal principle;
  - (2) whether the Tribunal identified the wrong issue or asked the wrong question;
  - (3) whether it applied a wrong principle of law;
  - (4) whether there was a failure to afford procedural fairness;
  - (5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;
  - (6) whether it took into account an irrelevant consideration;
  - (7) whether there was no evidence to support a finding of fact; and
  - (8) whether the decision was legally unreasonable.
- 25 That Appeal Panel stated that, in circumstances where an appellant is not legally represented, it is appropriate for the Tribunal to look at the grounds of appeal generally, and to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations in favour of the respondent: Prendergast at [12].
- 26 The categories of errors of law that give rise to an appeal as of right, discussed in Prendergast are not exclusive.
- 27 Attached to his notice appeal the appellant provided a two page document which posed 18 separate, general questions concerning the procedure adopted and decisions made by the Tribunal below as "grounds of appeal," and nine assertions which do assert a number of questions of law concerning the Tribunal decision. Put shortly, they are that he was denied procedural fairness by the Tribunal:
- (1) accepting and considering late submissions from the first respondent; and,
  - (2) denying him a reasonable opportunity to respond to submissions;
  - (3) unreasonably restricting the submissions and evidence he could rely on to five pages.
- 28 The appellant also seeks leave to appeal on the basis that he suffered a substantial injustice because the decision of the Tribunal was not fair and equitable and was against the weight of the evidence.

- 29 If the appellant establishes that he may have suffered a substantial miscarriage of justice within clause 12 of Sch 4 to the NCAT Act, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]). The matters summarised in *Collins v Urban* [2014] NSWCATAP 17 at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.
- 30 In *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 an Appeal Panel stated at [10]:

An appeal does not provide a losing party with the opportunity to run their case again except in the narrow circumstances which we have described. Mr Ryan has not satisfied us that those circumstances apply to his case and we refuse permission for him to appeal.

### **Consideration**

- 31 We are satisfied that by varying the timetable without notice on 8 November 2021 and by providing the appellant with approximately one day to file submissions in reply, the Tribunal denied procedural fairness to the appellant. This was simply insufficient time for the appellant to submit submissions in reply. The fact that the appellant had not received the submissions he was to reply to at that time, reinforces that unfairness. That the Tribunal then proceeded to determine that application on 11 November 2021, despite being alerted to the fact that the appellant had no submissions to respond to by his email to the Tribunal of 9 November 2021, was also procedurally unfair to the appellant.
- 32 Procedural unfairness of this nature is an error of law. As a result the appeal must succeed.
- 33 There is no need in those circumstances for us to consider whether to grant leave to appeal on some other basis.

### **How should the appeal be disposed of?**

- 34 Section 81 of the NCAT Act is concerned with the determination of internal appeals. It provides:
- (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—

- (a) the appeal to be allowed or dismissed,
- (b) the decision under appeal to be confirmed, affirmed or varied,
- (c) the decision under appeal to be quashed or set aside,
- (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
- (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

35 In this case, in accordance with the guiding principle in s 36 of the NCAT Act, we think that the just, quick and cheap resolution of the real issues in this appeal will best be achieved by the Appeal Panel allowing the internal appeal, and then re-determining the costs issue ourselves.

36 We will give the appellant the opportunity to make the written submissions in reply that he was denied in the original proceedings. We will then decide the costs issue on the papers in accordance with the order already made for this appeal to be determined without a hearing. In relation to this, the order dispensing with a hearing made by the Tribunal below has not been challenged. Furthermore, we are satisfied that the costs application can be determined on the basis of submissions provided.

## **Orders**

37 The Appeal Panel makes the following orders:

- (1) Time is extended pursuant to s 41 of the *Civil and Administrative Tribunal Act 2014* to allow the appellant to lodge this appeal on 10 December 2021.
- (2) Appeal allowed.
- (3) Orders 2 and 3 made on 11 November 2021 in SC 21/27790 are set aside.
- (4) The appellant shall file and serve by no later than 31 May 2022 his submissions in reply on the issue of costs (limited to 5 pages plus material attachments) in the proceedings on file number SC21/27790.
- (5) The Appeal Panel will then re-determine the appealed decision without a hearing, on the basis of the written submissions provided.

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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

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