



Civil and Administrative Tribunal

New South Wales

Case Name: Silberstein v Strata Choice Pty Ltd

Medium Neutral Citation: [2022] NSWCATAP 249

Hearing Date(s): 29 June 2022

Date of Orders: 7 July 2022

Decision Date: 28 July 2022

Jurisdiction: Appeal Panel

Before: A Suthers, Principal Member

Decision: (1) The application for a stay is dismissed.
(2) Subject to the outcome of any costs application pursuant to order (3) below, the appellant is to pay the first and second respondent's costs of the application for a stay on the ordinary basis as agreed or assessed.
(3) If any party wishes to make an application to vary order 2, the applicant (the costs applicant) must file and serve a costs application in the form of an Application for Miscellaneous Matters, including submissions limited to five pages and any evidence in support, within 14 days of the date of these orders.
(4) Any respondent to the costs application is to file and serve any submissions limited to five pages and any evidence in reply within 14 days thereafter.
(5) The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course, they should make submissions on this issue when complying with the directions as to their submissions on the substantive costs application.

Catchwords: APPEAL – application for a stay – dismissal of application against some but not all respondents at first

instance – power to stay conduct of proceeding at first instance in light of that order – parties to appeal not properly identified by appellant – costs – whether “special circumstances warranting an award of costs” within the meaning of s 60 of the Civil and Administrative Tribunal Act 2013 (NSW) established

Legislation Cited:

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

Cases Cited:

AVS Group of Companies Pty Ltd v Commissioner of Police [2010] NSWCA 81
Beck v Colonial Staff Super Pty Ltd & Ors (No. 2) [2015] NSWSC 1360
Bentran v Sabbarton [2014] NSWCATAP 37
Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico & Ors [2004] NSWSC 344
New South Wales Bar Association v Stevens [2003] NSWCA 95
Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 103
The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2) [2020] NSWCATAP 273
Vickery v The Owners - Strata Plan No. 80412 [2020] NSWCA 284

Texts Cited:

None Cited

Category:

Procedural rulings

Parties:

Jessica Hetty Silberstein (Appellant)
Strata Choice Pty Ltd (First Respondent)
Hecker Australia Pty Ltd (Second Respondent)
The Owners – Strata Plan No. 55468 (Third respondent)
Michael Adamo (Fourth Respondent)
Peter Michael Hans Engelbert (Fifth Respondent)
William Paul O’Brien (Sixth Respondent)
Terence Matthew Gagen (Seventh Respondent)

Representation:

Counsel:
R Clark, (Appellant)

Solicitors:
Silberstein Lawyers (Appellant)

Bannermans Lawyers (First Respondent)
HBA Legal (Second Respondent)

File Number(s): 2022/00175895

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not cited

Date of Decision: 24 May 2022

Before: S Corley, Member

File Number(s): SC 22/05083

REASONS FOR DECISION

Background

- 1 In the proceeding at first instance, the appellant sought orders against seven named respondents, primarily regarding the management of a strata scheme in which she is a lot owner. The named respondents hold various roles in relation to that scheme; as the Owners Corporation; officeholders on the strata committee, as strata manager, or as building manager.
- 2 Particulars of the claims against the respondents run to 67 pages and do not need to be repeated, even in summary, save to note that the applications against the first and second respondents to the appeal (who were the sixth and seventh respondents at first instance) involve claims for damages for breach of duty. For simplicity, I will hereafter refer to those parties as the “strata manager and building manager.”
- 3 By order determining an interlocutory application made by the strata manager and building manager, the proceeding insofar as it made claims against them was dismissed as misconceived. In summary, the Tribunal was satisfied that it had no jurisdiction to grant relief in the form of the money order against those parties in a claim for breach of duty, in reliance upon s 232 of the *Strata*

Schemes Management Act 2015 (NSW) (SSMA). I was informed that the first to fifth respondents at first instance elected not to participate in the hearing of that application.

- 4 From that decision the appellant lodged her appeal, within time. Quite simply, the appellant says the tribunal erred in finding that it did not have jurisdiction or power to make the orders sought against the strata manager and building manager.
- 5 With her appeal, the appellant sought a stay of the orders dismissing the application against the strata manager and building manager, and of any subsequent costs order against her which may be made in respect of that order. No such costs order had been made at the time the matter came before me.
- 6 The appellant says that if the orders are not stayed, she will be disadvantaged because the proceedings at first instance will continue without her being able to seek relief against the strata manager and building manager.
- 7 In her Notice of Appeal, the appellant failed to nominate the first to fifth respondents in the proceedings at first instance as parties to the appeal or as respondents to the application for a stay. They are properly considered parties to the appeal because they were parties to the proceeding at first instance: Civil and Administrative Tribunal Rules 2014 (NSW), r 29. That is so even if they did not elect to participate in the interlocutory application leading to the decision which is the subject of the appeal.
- 8 On 29 June 2022, the appeal came before me and I made directions to prepare the substantive appeal for determination. I made a direction noting that the first to fifth respondents at first instance were parties to the appeal, and directed them to notify the Tribunal, and the other parties, if they wanted to participate in the appeal.
- 9 I also heard argument on the application for a stay. Despite the first to fifth respondents at first instance not having been named as respondents to the appeal, I was advised that they had each been served with a copy of the Notice of Appeal. Understandably, they did not appear. The appellant submitted that I

could properly consider the application for a stay in the absence of those parties. The strata manager and building manager did not oppose that course. Subject to issues of procedural fairness, discussed later, I was satisfied that I could deal with the application as framed by the appellant in the absence of the remaining respondents.

- 10 The strata manager and building manager opposed the granting of a stay on the basis that it would put them to the expense of preparation for and potential participation in the hearing of the proceeding at first instance, despite the benefit of the orders they had obtained dismissing the proceeding against them, with the associated delay in resolution of the matter that may incur. They pointed out that, if the appeal succeeds, the claims against them may be heard separately to those against the other respondents.
- 11 By order of 7 July 2022, I dismissed the application for a stay and expressed a tentative view that the appropriate costs order was that the appellant should pay the strata manager and building manager's costs of the application on the ordinary basis. I did, however, give the parties the opportunity to seek a different order as to costs by application and submissions for which I made directions. No party has done so.
- 12 I also gave the parties a summary of my reasons for dismissing the application for a stay, noting that the parties could seek more complete reasons under s 62 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) should they wish to do so. The appellant took up that opportunity. These are my more complete reasons.

Legislative Foundation and Principles Relating to Granting a Stay

The lodgement of an internal appeal does not affect the operation of the decision appealed. Nonetheless, under s 43(3) of the NCAT Act, I have discretion to stay the operation of a decision pending the determination of the appeal. That discretion must be exercised judicially and the general principles that apply in relation to the exercise of that discretion are derived from the terms of s 43(3) itself. Additional guidance can be obtained from the considerations applied by the Courts in deciding whether to grant a stay pending an appeal, summarised in a decision of the Appeal Panel constituted

by the former President of the Tribunal, Justice Wright, in *Bentran v Sabbarton* [2014] NSWCATAP 37.

- 13 To summarise those principles here, it is sufficient to cite what was said by Slattery J in *Beck v Colonial Staff Super Pty Ltd & Ors (No. 2)* [2015] NSWSC 1360 at [35], that:

[35] The principles governing a stay of a judgment pending appeal are well established. The applicant must demonstrate that there is a reason for the grant of a stay or that a matter is an appropriate case in the exercise of the Court's discretion: *Alexander v Cambridge Credit Corporation* (1985) 2 NSWLR 685 ("*Cambridge Credit*") at 694. It is not necessary for the applicant for the stay to establish special or exceptional circumstances: *Cambridge Credit* at 694. The stay is likely to be granted if the appeal would otherwise be rendered nugatory. The Court considering the grant of a stay is not required to determine the merits of the appeal but usually considers whether the applicant has at least an arguable case; and the Court may impose conditions on the grant of a stay including that the applicant pay a sum of money into Court or otherwise secure the payment of the disputed sum: *Cambridge Credit* at 694-5. The central determinant as to whether a stay would be granted, and if so upon what terms, if any, is the Court's assessment as to what is a fair balance of the rights of the parties, given that an appeal does not of itself operate as a stay and the party who has succeeded at trial is entitled to the fruits of its victory: *Cambridge Credit* and see also *Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd* [2015] NSWCA 227 ("*Woodlawn*") at [7]-[9].:

- 14 The overriding principle in an application for a stay is to ask what the interests of justice require: *New South Wales Bar Association v Stevens* [2003] NSWCA 95 at [83]; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [18].
- 15 Unlike a superior court of record, which has inherent power to stay proceedings (see, for example the discussion in *Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico & Ors* [2004] NSWSC 344 at [14]), the Tribunal is entirely a creature of statute. On that basis, the Tribunal has no inherent power to grant a stay.
- 16 However, in respect of the Tribunal's practice and procedure, s 38 of the NCAT Act provides that the Tribunal may determine its own procedure in relation to any matter for which the Act or procedural rules do not otherwise make provision.

17 Section 43 of the NCAT Act provides:

43 Effect of pending general applications and appeals

(1) This section applies to the making or lodgment of any of the following (a pending general application or appeal)—

- (a) a general application for the review or other re-examination of a decision made by an external decision-maker,
- (b) an external appeal,
- (c) an internal appeal.

Note—

See Division 2 of Part 3 of Chapter 3 of the Administrative Decisions Review Act 1997 for the effect of pending administrative review applications on administratively reviewable decisions and the making of orders staying or otherwise affecting such decisions.

(2) A pending general application or appeal does not affect the operation of the decision to which the application or appeal relates, or prevent the taking of action to implement the decision, unless the Tribunal makes an order staying or otherwise affecting the operation of the decision.

(3) The Tribunal may make such orders (whether with or without conditions) *staying or otherwise affecting the operation of a decision to which a pending general application or appeal relates* as it considers appropriate to secure the effectiveness of the determination of the application or appeal. (emphasis added)

18 In my view, and it was not argued to the contrary, s 43 NCAT Act covers the field concerning the application before me, such that there is no scope to invoke the Tribunal's broad power to determine its own procedure under s 38 NCAT Act in respect of the orders which may be made in respect of this application.

Application of those Principles in the Present Case

19 The strata manager and building manager should be taken to be entitled to the benefit of the decision at first instance unless the appellant can demonstrate that it is appropriate to grant a stay of the orders made.

20 The first matter that I should consider is whether the appeal raises serious issues to be determined by the Appeal Panel or, in other words, whether the

appellant has a reasonably arguable case on appeal. It is neither appropriate nor necessary for me to attempt to determine whether the appeal will succeed.

- 21 I will treat the appeal as arguable. It involves issues of some complexity which have not, as far as I am aware, been definitively ruled upon by the Supreme Court. The appellant calls in aid the decision of the majority of the Court in *Vickery v The Owners - Strata Plan No. 80412* [2020] NSWCA 284 in support of her stance as to the Tribunal's jurisdiction and power to make the orders she seeks against the strata manager and building manager in the proceeding at first instance under the jurisdiction conferred on the Tribunal by s 232 SSMA. In that matter, of course, the orders were sought against the Owners Corporation only.
- 22 As particularised and initially argued by the appellant, she sought orders staying the dismissal of the application against the strata manager and building manager and any further related costs orders.
- 23 My next consideration is whether it would be appropriate to make such an order where its effect would require those parties to prepare for, and potentially participate in, the hearing of the proceeding at first instance in which they had otherwise obtained an order dismissing the claims against them.
- 24 As is apparent from subsequent directions in the proceeding at first instance placed before me, there are other interlocutory issues regarding privilege and to strike out various aspects of the points of claim being agitated between the remaining parties, before the matter can be determined.
- 25 In circumstances where the particulars of the claims against the seven initially named respondents traversed some 67 pages, and there are other interlocutory issues being argued by the remaining parties before the matter could proceed to hearing, it appeared to me that preparation for the hearing was likely to be involved and expensive for the legally represented strata manager and building manager. It also appeared unlikely that the proceeding could be confined to one day of hearing.
- 26 Further, were a stay to be granted and the proceedings at first instance to be litigated to conclusion, it is difficult to see how the Tribunal could appropriately

make any orders against the strata manager and building manager without the appeal having first been concluded and error established in the dismissal of the claims against those parties.

- 27 Whilst I accept that the appellant may be put to expense in running, in effect, two actions based on a similar if not identical factual matrix if the appeal succeeds, there was no evidence before me as to the likely additional cost to the appellant of doing so. Nor was it argued that the appellant may be prejudiced by the potential for findings to be made in the proceeding at first instance which may affect her ability to prosecute proceedings against the strata manager and building manager if she subsequently succeeded in the appeal.
- 28 In my view, nothing more need be said to demonstrate that staying the orders would not be what the interests of justice require or represent a fair balance of the competing rights and interests of the parties I had before me on 29 June 2022. There was, when I made my decision, no costs order which could be stayed. On that basis, the appellant failed to persuade me that I should make the orders sought in her application for a stay.
- 29 I should record, however, that argument on the stay also traversed the potential for me to make an order which, in effect, stayed or delayed the ongoing conduct of the proceeding at first instance until the appeal is determined.
- 30 I have some reservations as to my power to do so in this appeal, which I will detail below, but even if the power exists that was not what was sought by the appellant in her application for a stay. Such an order would, if made, have a real impact on the rights of the remaining respondents to the appeal, in that it may delay and potentially, as a result, increase the cost of the proceeding at first instance.
- 31 Whilst I was prepared to consider the stay in the terms initially sought by the appellant without hearing from those respondents, given they had not sought to participate in the interlocutory application for summary dismissal of the claims against the strata manager and building manager, I could not properly do so in respect of orders to stay the conduct of the proceeding at first instance as it

would have materially affected their rights and interests. I accept that they have been served with the Notice of Appeal but even if they had also been served with the application for a stay, I could not be satisfied that they ought not be given the opportunity to be heard on what would, in effect, be a very different application.

- 32 As I indicated earlier, I also raised with the parties in argument whether I had power to make orders staying the conduct of the proceeding at first instance, given the nature of the orders made by the Tribunal which are the subject of this appeal. Given my decision above, and where that issue was raised by me without the parties having an opportunity to prepare submissions on the topic, I do not need to definitively determine that issue.
- 33 In case I am found elsewhere to have erred in the exercise of my discretion on the assumption the power was available to me, though, I will record the nature of my concerns as to the power of the Tribunal to stay the conduct of the proceeding at first instance in these appeal proceedings.
- 34 As is clear from the terms of s 43(3) NCAT Act, in addition to *staying* the orders at first instance I also have power to make an order *otherwise affecting* the operation of the decision to which the appeal related. In my view, such a power extends to making such orders, other than in the nature of a stay, as the interests of justice require: see the discussion in *AVS Group of Companies Pty Ltd v Commissioner of Police* [2010] NSWCA 81 at [96], per Campbell JA in relation to a similar provision in the *Administrative Decisions Tribunal Act 1997* (NSW).
- 35 Of course, the orders must be made judicially (that is fairly as between the affected parties taking all mandatory and no irrelevant considerations into account) and with a view to ensuring that the proceedings are conducted and resolved in a way which meets the guiding principle in s 36 NCAT Act of being just, quick and cheap.
- 36 However, it appears to me that the power is not otherwise unbounded. It is also constrained, principally, by the need to ensure the orders are “appropriate to secure the effectiveness of the determination of the [...] appeal” and that they

affect “the operation of a decision to which the [...] appeal relates”: NCAT Act, s 43(3).

- 37 As I expressed to the appellant in argument, it is difficult to identify an appropriate correlation between the decision to dismiss the application as against the strata manager and building manager, and an order delaying the preparation of the proceeding against the remaining respondents at first instance, to enliven my power to make such an order. Put more plainly, a stay of the proceeding against the other respondents at first instance may not *affect*, in the relevant sense, the decision to dismiss the claims against the strata manager and building manager.
- 38 In contrast, it may be that if the appellant (or any other remaining party) sought such a delay in the progress of the hearing at first instance which was refused, by order, that the power to consider staying or delaying the preparation of the proceedings at first instance would be enlivened in an appeal from a decision of that nature.

Costs

- 39 It may be argued that if the amount sought by the appellant against the strata manager and building manager at first instance exceeded \$30,000 then the terms of rr 38 and 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) are engaged, such that the usual considerations as to costs apply.
- 40 In the appellant’s points of claim in the proceedings at first instance, the amount of damages sought against the strata manager and building manager is not particularised. I did not feel I needed to hear from the parties about that issue, though, because in my view, even if s 60 of the NCAT Act applies and special circumstances warranting an award of costs must be demonstrated, they appeared to be demonstrated here.
- 41 This legally represented appellant brought her appeal and application for a stay without proper consideration to nominating all the relevant parties and, in my view, without apparently having given proper consideration to the weakness of an application for an order that, in effect, the strata manager and building manager should be forced to prepare for and engage in a hearing after having succeeded in having the claims against them dismissed. There was also a

dearth of evidence provided by the appellant with which I could weigh the balance of convenience and competing interests between the parties in her favour. That is sufficiently unusual to constitute special circumstances, and in my preliminary view, warranted an order in favour of the strata manager and building manager on the principles set out in *The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2)* [2020] NSWCATAP 273 at [5] to [15], which I adopt as correct.

42 I note that, as it has transpired, despite being given the opportunity to do so none of the parties sought to take up the opportunity to persuade me to exercise my discretion as to costs differently.

43 Accordingly, I made the following orders relevant to the application for a stay on 7 July 2022:

- (1) The application for a stay is dismissed.
- (2) Subject to the outcome of any costs application pursuant to order (3) below, the appellant is to pay the first and second respondent's costs of the application for a stay on the ordinary basis as agreed or assessed.
- (3) If any party wishes to make an application to vary order 2, the applicant (the costs applicant) must file and serve a costs application in the form of an Application for Miscellaneous Matters, including submissions limited to five pages and any evidence in support, within 14 days of the date of these orders.
- (4) Any respondent to the costs application is to file and serve any submissions limited to five pages and any evidence in reply within 14 days thereafter.
- (5) The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course, they should make submissions on this issue when complying with the directions as to their submissions on the substantive costs application.

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

Registrar

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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