



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners – Strata Plan No 61618 v JPG Investment Holdings Pty Ltd

Medium Neutral Citation: [2023] NSWCATAP 167

Hearing Date(s): 7 June 2023

Date of Orders: 23 June 2023

Decision Date: 23 June 2023

Jurisdiction: Appeal Panel

Before: A Suthers, Principal Member

Decision: (1) In respect of the decision made on 12 May 2023 in matter number SC 22/26211, the operation of orders 1 & 2 is stayed pending further order or finalisation of the appeal, whichever is the earlier in time. This order is conditional upon the appellant, by motion passed at a general meeting, ratifying or having ratified the decision to lodge the appeal.
(2) The costs of the application for a stay will be the appellant's costs in the appeal.

Catchwords: APPEAL – Application for a Stay of order requiring Owners Corporation to consent to development application

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Environmental Planning and Assessment Regulation 2021 (NSW)

Cases Cited: Beck v Colonial Staff Super Pty Ltd & Ors (No. 2) [2015] NSWSC 1360
Bentran v Sabbarton [2014] NSWCATAP 37
Dranichnikov v Minister for Immigration and

Multicultural Affairs [2003] HCA 26
Hickie v Land and Enviro Corp Pty Ltd [2014] NSWSC 472
House v The King (1936) 55 CLR 489
Kalifair Pty Ltd v Digi-Tech (Australia) Ltd (2002) 55 NSWLR 737; [2002] NSWCA 383
Mars City Pty Ltd v Burwood Council [2020] NSWLEC 1585
New South Wales Bar Association v Stevens [2003] NSWCA 95
Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 103
Rose Bay Afloat Pty Ltd v Woolahra Council & Anor [2002] NSWLEC 208
Strata Schemes Management Act 2015 (NSW)
Vaughan v Dawson [2008] NSWCA 169
Wharf 11 Pty Ltd v Sydney City Council (unreported 15 February 1991)
Yolarno Pty Ltd v Shandong Delisi Food Co Ltd [2022] NSWCA 30

Texts Cited: None cited

Category: Procedural rulings

Parties: The Owners – Strata Plan No 61618 (Appellant)
JPG Investment Holdings Pty Ltd (First Respondent)
Conrad Corporation Pty Ltd (Second Respondent)

Representation: Counsel:

M Sheldon (Appellant)
V Kerr SC (Respondents)

Solicitors:

Jordan Djundja Lawyers (Appellant)
Bannermans Lawyers (Respondents)

File Number(s): 2023/00170875

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal
Jurisdiction: Consumer and Commercial Division
Citation: Not cited
Date of Decision: 12 May 2023
Before: M Tyson, Senior Member
File Number(s): SC 22/26211

REASONS FOR DECISION

Summary

- 1 The appellant Owners Corporation appeals from, and seeks a stay of, a decision of the Tribunal requiring it to consent to a development application proposed by the owners of a lot in the scheme (respondents) which, in itself, proposes a significant alteration to the building managed by the scheme in order that the respondents might redevelop their lot to better utilise the air space above the building. In essence, the respondents wish to add two floors of office space.
- 2 In advance of the hearing of the application for a stay I granted an ex parte stay, which I extended whilst I reserved my decision after hearing from the parties on 7 June 2023.
- 3 For the reasons set out below, I have decided to continue to stay the effect of the orders requiring the appellant to consent to the development application pending further order or finalisation of the appeal. Due to a somewhat unfortunate state of affairs which I will canvas below, I can only do so on a conditional basis which may not fully resolve the issue of the stay.

Background and decision under appeal

- 4 The respondents sought an order that the appellant consent to the making of a development application by them under the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA).
- 5 In a long and, with respect, detailed decision (“Reasons”) the Tribunal determined that it should make the order sought (which was given effect to by

the first two of the orders it made) and made a direction to determine the issue of costs later.

- 6 From that decision the appellant lodged its appeal, within time, and sought a stay of each of the Tribunal's orders. In argument before me, however, the application to stay the provision of cost submissions was abandoned. Further, a challenge raised by the respondents that the appeal had been lodged without appropriate approval by the Owners Corporation, including for the expenditure of legal fees, was not pressed on the basis that any stay I might grant would be made conditional upon the lodgement of the appeal being authorised or ratified at a general meeting of the appellant to be conducted on 14 June 2023, at which the expenditure of related legal fees was also moved for approval. Before finalising this decision, I sought a note from the parties advising whether they agree the lodgement of the appeal had been regularised by the outcome of that meeting. Unfortunately, rather than simply responding to that request, the parties have engaged in a course of correspondence with or through the Appeal Registry wherein the respondent argues that the lodgement of the appeal has not been ratified, and the appellant argues that it has. That is not what I sought from the parties. Nor has either party asked to have the matter re-listed to have the issue determined. Prima facie, the lodgement of the appeal seems to have been ratified, however the respondent says that the meetings at which that occurred suffer from technical deficiencies invalidating the motions ratifying lodgement of the appeal. I do not intend to descend into the arena by further review of the parties' response to my request that they advise whether they are in agreement. Nor will I re-list the matter in the absence of a request to do so. I will simply make any appropriate order subject to a condition that the lodgement of the appeal be ratified (or have been ratified) by general meeting of the respondent. If the parties cannot reach consensus about that point they will, unfortunately, need to agitate it separately by way of an application in an appropriate form and bear the costs that entails in the usual course.
- 7 The appellant submits that its grounds of appeal are strong and says that the appeal will be rendered nugatory in the event a stay is not granted. It challenges the decision on three primary grounds; firstly that the Tribunal

applied the wrong test in considering the application of ss 232(1) & (6) of the *Strata Schemes Management Act 2015* (NSW) (SSMA); secondly that the Tribunal denied the appellant procedural fairness by failing to consider a substantial, clearly articulated argument based on established facts in the sense outlined in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; and thirdly that the Tribunal erred in the exercise of its discretion in the sense outlined in *House v The King* (1936) 55 CLR 489. If granted leave, the appellant also seeks to challenge some of the Tribunal's factual findings.

- 8 Relevantly, the Tribunal accepted at Reasons [48] - [51], [77] & [106] that the works encompassed by the proposed development application may impact on the patronage of businesses operated from other lots within the scheme. Further, the Tribunal accepted that during the period of any construction authorised by an approved development application there would be disruption to other lot owners and impact on the building's plant, lifts, electrical systems and fire safety apparatus.
- 9 At Reasons [79] to [132], the Tribunal engaged in a thorough exercise of weighing the competing rights and interests of the parties and determined that, where they conflicted, it accepted the pertinent evidence of the respondents' expert over an expert relied upon by the appellant.
- 10 The appellant had argued at first instance, and argues in the appeal, that the development application which it has been ordered to consent to is bound to be refused by the relevant local authority, particularly as it fails to attach a "water management site plan." The significance of that issue is something I will return to later. The Tribunal made a particular finding at Reasons [98], though, contrary to the position advanced by the appellant in this regard.
- 11 Part of the evidence given by the respondents' expert, which the Tribunal implicitly accepted, is that the appellant's consent to the development application was only required at the point of its initial lodgement with Council and not at a later time, even if further material in support of the application needed to be produced for it to be favourably considered: Transcript P43, L34.

That position is supported by authority in any event: *Mars City Pty Ltd v Burwood Council* [2020] NSWLEC 1585 at [55].

Legislative Foundation and Principles Relating to Granting a Stay

- 12 The lodgement of an internal appeal does not affect the operation of the decision appealed against. Nonetheless, under s 43(3) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) the Tribunal has discretion to stay or make another order affecting 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.
- 13 Additional guidance in the application of the relevant principles 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 at [9].
- 14 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], with the citations omitted, 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. It is not necessary for the applicant for the stay to establish special or exceptional circumstances. 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 [...] or otherwise secure the payment of the disputed sum. 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.
- 15 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].

Consideration

- 16 The starting point of my considerations is that the respondents 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. The appellant must identify the circumstances that warrant a departure from the general rule that the decision at first instance should be presumed to be correct and is appropriate to be enforced: *Hickie v Land and Enviro Corp Pty Ltd* [2014] NSWSC 472 at [17].
- 17 The respondents initially submitted in writing that the appellant had not established that the appeal would be rendered nugatory absent a stay because the appellant could simply withdraw its consent, once given in accordance with the decision. I understand that position to have been abandoned in argument. If I am wrong in that, I record that I do not accept that the appellant could comply with the effect of the Tribunal's order by simply giving, and then immediately withdrawing its consent. Whilst the wording of the order may invite such a semantic argument, it is not an invitation I would expect a well advised party to take up, with confidence in achieving anything other than engaging in further, and likely unprofitable, litigation.
- 18 The appellant otherwise relies on s 8.11 of the EPAA read with r 91 of the Environmental Planning and Assessment Regulation 2021 (NSW) as authority for the proposition that if the local authority failed to determine the development application within the 40 days allowed there is a deemed refusal. If that risk eventuated, the appellant says the respondents could then take the matter to the Land and Environment Court, where its opportunity to meaningfully withdraw its consent would be negative in any event: *Wharf 11 Pty Ltd v Sydney City Council* (unreported 15 February 1991) cited in *Rose Bay Afloat Pty Ltd v Woolahra Council & Anor* [2002] NSWLEC 208 at [79] – [80].
- 19 In oral argument the respondents, properly in my view, conceded that the appeal will be rendered futile in the strict sense if a stay is not granted, albeit that they raise a significant challenge to the practical effect of that on the appellant, pointing to the well-established fact that the appellant giving consent to the lodgement of the development application does not equate to consent to

carrying out the development: *Wharf 11* supra where Cripps CJ said, relevantly, “the fact that a development consent runs with the land does not carry with it the notion that once a development consent has been granted the development can be undertaken on the land against the wishes of the owner.” They also acknowledge that such works, even if approved, could not occur in the absence of other steps including, in all likelihood, a common property rights by-law being made in their favour.

- 20 The respondents do not go so far as to submit that the appeal is not arguable, but they do submit that the weakness of the grounds of appeal and lack of substantial prejudice to the appellant, compared to the significant prejudice caused to them if the stay is granted, outweighs any futility argument.
- 21 In that regard, the respondents submit that there is no such principle of law as argued for by the appellant in respect of ground one. They submit that ss 232(1) & (6) of the SSMA do not direct the manner or method of the exercise of the Tribunal's discretion, other than mandating consideration of all the owners of lots in the strata scheme in the use and enjoyment of their lots and the common property. Even if wrong in that, they submit that the Tribunal did not fail to apply the test propounded by the appellant. On the contrary, the Tribunal acknowledged the appellant's submissions on that topic (at [61] that the respondents were "usurping" the rights of lot owners not to consent to an application) but, in weighing the competing interests of the parties, found that it did not provide a compelling reason not to grant the relief sought by the respondents: Reasons [100].
- 22 In respect of ground two, the respondents say that the evidence the appellant relies upon did not support the case articulated by the appellant, and that this is a significant factor which will also weigh against a grant of leave to challenge the Tribunal's factual findings. Relevantly, in respect of the absence of a “water management site plan” to be lodged with the development application, their expert's evidence in cross-examination was to the effect that while the Council's Development Application Checklist and Development Application Guide listed a water management site plan as a required document for a development application for external works, failure to include it would not

prevent the application from being lodged on the NSW Planning Portal or from being considered by the Council and that “any inadequacies would be addressed during the development application assessment process”.

- 23 In respect of ground three, the respondents say that the allegation of error in the *House v the King* sense is unparticularised and that the Reasons provide a comprehensive basis for the decision.
- 24 In assessing whether the appeal is reasonably arguable, which is all I am required to do at this juncture, I also need to allow for the possibility of amendment to the grounds of appeal to refine or clarify the alleged errors: *Vaughan v Dawson* [2008] NSWCA 169 at [22] (Campbell JA).
- 25 I think the appeal is arguable, at least in respect of ground three. In my preliminary view, the Tribunal arguably failed to expose with precision at Reasons [98] whether it accepted that the development application could be successfully lodged for consideration, as opposed to approved, without the water management site plan. If error in the Tribunal’s approach to determining that issue can be established, it may have had a real impact on the exercise of the Tribunal’s discretion to order the appellant to consent to a development application without knowledge as to how the respondents intended to manage the issue of waste water despite there being no need for ongoing consultation or further consent once that issue was addressed, if required.
- 26 Having determined that the appeal is arguable, and acknowledging that it will be rendered futile if a stay is not granted, I can then properly consider the balance of convenience and the competing rights and interests of the parties: *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737; [2002] NSWCA 383, at [18]; *Yolarno Pty Ltd v Shandong Delisi Food Co Ltd* [2022] NSWCA 30 at [4].
- 27 In terms of the balance of convenience, the prejudice to the appellant arising from the appeal being futile if a stay is not granted is clear, for the reasons I have set out earlier. However, it is bounded by the principle cited from *Wharf 11*, above. In that regard, I have also considered the following commentary on *Rose Bay Afloat in Mars City*:

50 The Applicant submits that as shown in *Rose Bay Afloat Pty Ltd v Woollahra Council* (2002) 126 LGERA 36; [2002] NSWLEC 208 (Rose Bay Afloat), the Court is not precluded from granting consent to development because the landowner no longer consents to the development application.

51 This is due, in part, because development consent is a product of environmental planning law as distinct from the act of development which is a matter of real property (Rose Bay Afloat, at [82]).

52 So understood, “[t]he submission suggesting a hardship to an owner by the Court determining that once his consent has been given it cannot effectively be withdrawn dissolves when the true nature of a development consent is understood.” (Rose Bay Afloat, at [81]).

- 28 I am satisfied, though, that some meaning and effect must be given to the requirement of an owner to provide consent, in the context of an appeal from a decision wherein it is forced to do so.
- 29 On the other hand, the respondents point to the long history of their attempts to obtain approval for the development application, which spans some 28 months. The respondents did not, however, provide any evidence as to the effect of that prejudice upon them other than as can be inferred by the fact that a stay pending determination of the appeal would likely delay further attempts to progress the development application by some months. There was no evidence, for example, as to how any such delay might affect the overall progress of the proposed development in the sense that there might be disproportionate prejudice caused. Nor do I know whether there is a particular periodic deadline for lodgement of development applications with the local authority which will be missed if the stay is continued pending the determination of the appeal. The only real assistance I have in that regard comes from the following recitation in Reasons [42], where the evidence of a Director of one of the respondent companies on this issue is recorded in the following terms:
- ... He anticipates the earliest time the construction works would be likely to commence would be sometime from mid-late (sic) 2024, subject to market factors and other external factors...
- 30 Relevantly, I have been able to list the appeal for hearing on a substantive basis before the end of July, meaning that delay in resolving the appeal can hopefully be minimised.

- 31 I have given careful consideration to the principle cited from *Wharf 11* and *Rose Bay Afloat* in reaching this decision. However, I have had to balance that against the undeniable fact that the appeal will be rendered nugatory if a stay is not granted and the lack of evidence from which I can be satisfied on a prima facie basis, even if by drawing a proper inference, that a delay in the respondents' ability to commence construction of the proposed development will likely be occasioned by continuing the stay pending determination of the appeal.
- 32 Weighing those issues on the information before me, the balance of convenience favours the continuation of the stay, on the condition I outlined earlier.
- 33 The parties were agreed that, despite the operation of s 60 of the NCAT Act creating a presumption that the parties should bear their own costs, there were sufficient unusual circumstances in relation to this application to warrant an order that the party who succeeded in respect of the application for a stay should have their costs made costs in the cause. Given the complexities involved in the matter referred to above, I agree. On that basis, the costs of the application for a stay will be the appellant's costs in the appeal.

Orders

34 My Orders are as follows:

- (1) In respect of the decision made on 12 May 2023 in matter number SC 22/26211, the operation of orders 1 & 2 is stayed pending further order or finalisation of the appeal, whichever is the earlier in time. This order is conditional upon the appellant, by motion passed at a general meeting, ratifying or having ratified the decision to lodge the appeal.
- (2) The costs of the application for a stay will be the appellant's costs in the appeal.

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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