NCAT
NSW Civil & Administrative Tribunal

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Case number **2021/00096377**

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5 August 2021

Case title	**Appeal of decision under Strata Schemes Management Act 2015 - Hugh McCullum v The Owners - Strata Plan No. 47383**

Please find enclosed a copy of the written statement of reasons for the decision of the Tribunal made on 6 July 2021.

Registrar
rwatte0

IN THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL
CONSUMER AND COMMERCIAL DIVISION

PRINCIPAL MEMBER SUTHERS
ACTING JUDGE COLEMAN

TUESDAY 6 JULY 2021

2021/00096377 - HUGH McCULLUM v THE OWNERS STRATA PLAN NO 47383

REASONS FOR DECISION

PRINCIPAL MEMBER SUTHERS: On 10 March 2021 the Tribunal's Consumer and Commercial Division made an order requiring the appellant to remove a structure he had placed on a common area of property within the strata development controlled by the respondent, which we will refer to as "the decision".

The appellant was not in attendance at the hearing, he had lodged no material in response to the application or to directions made by the tribunal in preparation for the hearing. The Tribunal proceeded to make its determination on an *ex parte* basis in his absence, after unsuccessfully attempting to call him at the time allocated for the hearing to commence.

The appellant claims that the Tribunal erred in various ways in that it proceeded in circumstances, where he had not been served with the respondent's application to the Tribunal below or the respondent's material lodged in support of the application. He challenges the jurisdiction of the tribunal to order the removal the structure, given it was affixed about 25 years ago.

The appellant also points to an application for leave to be legally represented and for an adjournment of the hearing at which the decision was made which he lodged through his proposed representative on 2 March 2021,

some eight days prior to the hearing. Those applications were not responded to or addressed by the Tribunal.

The respondent has failed to engage in the preparation for the appeal, beyond an initial appearance at a directions hearing and resisting an application for a stay. Despite being directed to do so, the respondent filed neither a Reply to Appeal nor material in opposition to the appeal. The appellant was successful in obtaining a stay of the decision pending the determination of the appeal.

For the reasons set out hereafter, we have decided to allow the appeal, quash the decision and remit the matter to the Consumer and Commercial Division for determination according to law.

An appeal to the Appeal Panel does not simply provide a losing party in the Tribunal below with an opportunity to run their case again. We cite *Ryan v BKB Motor Vehicle Repairs* [2017] NSWCATAP 39 at [10]. To succeed in an appeal, the appellant must demonstrate either an error on a question of law which, except in an appeal from an interlocutory decision, may be argued as a right, or that permission, or what is called leave to appeal, should be granted to bring the appeal.

At the hearing of the appeal the respondent did not initially appear. After waiting five minutes we commenced and heard from the appellant on what we considered to be the first ground that we needed to consider, which we go on to discuss later in these reasons. About 15 minutes after the hearing commenced, the respondent's representative joined the call, acknowledging his error in recording the commencement time for the hearing.

The respondent made three applications which had not been foreshadowed to the Tribunal or to the appellant. The respondent asked that

the hearing be adjourned, that it be given leave to be legally represented, and that it have an extension of time for filing its material.

From the bar table, as it were, the respondent's representative says that the respondent as an organisation is only now coming to terms with the complexity of the issues raised and needs time to properly participate. We dismissed the interlocutory applications after hearing from the parties. Not only were they unsupported by evidence and made at the last possible time, without explanation, but they had the likely result that the appellant would be prejudiced if the applications were allowed.

More importantly however, for reasons we will come to, we are not satisfied that an adjournment or the ability for the respondent to be represented or lodge more evidence could possibly cure what we are satisfied was the Tribunal's error, or allow the respondent to demonstrate that the error had not been made. We will go on to explain why that is the case.

In our view, it is unnecessary to traverse all of the appellant's grounds as the uncontroverted evidence before us indicates that the Tribunal has erred by failing to consider and deal with the appellant's application for an adjournment before the hearing. That uncontroverted evidence indicates, as does the respondent, that the appellant did seek an adjournment well prior to the hearing leading to the decision. The appellant also notified the respondent of their application, as confirmed by the respondent's representative at the hearing today.

We accept that the request was made via correspondence, rather than in the form of an Application for Miscellaneous Orders or on the Adjournment Request Form specific to the Consumer and Commercial Division, which would have been proper. Nonetheless it is not uncommon for parties to make

applications via correspondence without issue being taken by the Tribunal.

We note the Tribunal's obligation to act with as little formality as the circumstances permit and without regard to technicalities or legal forms contained in the *Civil and Administrative Tribunal Act 2013* (NSW), which we will call the NCAT Act, at s 38(4). We also note r 5, allowing the Tribunal to dispense with the *Rules,* including r 18 which requires parties to use correct forms.

In those circumstances, the fact that such applications are regularly accepted and considered by correspondence is not surprising. It would be unreasonable, in that context, to hold the appellant to a strict obligation to follow the proper form in determining the appeal in respect of this issue.

Similarly, the application was made by a solicitor on behalf of the appellant, absent leave having first being given for that solicitor to represent the party, which was required in proceedings of this nature. For the reasons we gave in respect of the application having been made by correspondence though, this should not count against the appellant in the appeal.

In *Minister for Immigration, Multicultural Affairs v Bhardwaj* [2002] HCA 1, the High Court characterised a Tribunal proceeding to determine a matter without adverting to an application for an adjournment as a constructive failure to exercise jurisdiction, with the effect the decision was "no decision at all". It was irrelevant, in the Court's view, that the application was inadvertently overlooked. Whilst that decision related to an exercise of administrative power, we are satisfied that the same principle applies in these proceedings.

It is apparent from the failure of the Tribunal to advert to the application for an adjournment in its reasons, or in the transcript of the hearing, that the appellant's application for an adjournment was overlooked by the Tribunal.

From reviewing the transcript, it appears that some of the material relevant to this application had been placed by the Registry in the file pertaining to earlier proceedings between the parties. Whether that is what happened to the appellant's application for adjournment is not to the point and does not need to be determined. The ultimate position is that the appellant's interlocutory application for an adjournment, which was the basis for his non-attendance or availability for the hearing, was not considered by the Tribunal.

Similarly, and unlike the position where a breach of procedural fairness *simpliciter* is alleged, we do not need to determine whether the Tribunal's failure to consider the adjournment application could have made no possible difference to the result. If the Tribunal has failed to exercise its jurisdiction, then the merits of the adjournment application can have no relevance unless we decide to proceed by way of a new hearing.

The Tribunal made a jurisdictional error and the appeal should be allowed.

We then need to decide what order to make in respect of the order reflecting the decision below. As it is to be treated as "no decision at all", as determined in *Bhardwaj*, we think the proper order is that the decision should be quashed, rather than set aside. From the point of view of the parties that distinction is semantic only and the effect is that the decision no long exists in law.

We may decide to conduct the appeal as a new hearing if we are satisfied that the grounds of appeal warrant it. A new hearing under the *NCAT Act* is a hearing de novo, or from the beginning, as determined in *Yuen v Thom* [2016] NSWCATAP 243. Here though, there has been no hearing on the merits. We are not satisfied, on that basis, that the grounds of appeal warrant

us determining the appeal by way of a new hearing, despite the appellant now lodging the material he would have wished to rely upon in the proceedings below. Rather, we are satisfied that we should remit the application to the Tribunal for determination according to law.

There may be requirement for the witnesses relied upon by the parties to be questioned at a hearing and for factual findings to be made. There is insufficient time allocated to us today for this to occur. Further, by remitting the matter to the Tribunal, the internal appeal rights of the parties will be preserved if they are dissatisfied with the determination. We are satisfied that this course will best promote the objects of the *NCAT Act* to resolve the matter in a way which is just, quick and cheap.

In declining to consider the other grounds raised by the appellant, and in particular the appellant's challenge to the jurisdiction of the Tribunal to order the removal of the structure, we are satisfied that it is appropriate that we restrict our consideration of the evidence and issues only to that relevant to the jurisdictional challenge to the Tribunal's decision. We refer to the decision of *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88*,* per Basten JA *at [13].*

We will restrict the parties to reliance on the material lodged by them in the proceedings below or in this appeal in respect of the remitted proceedings, given our power under s 80(3)(b) of the *NCAT Act*.

Both parties have now been given ample opportunity through directions made in the appeal and the proceedings below to lodge and serve material relevant to their positions. Our orders in respect of the substance of the appeal then will be as follows: the appeal is allowed, the decision is quashed and the proceedings are remitted to the Tribunal to be determined according to

law.

Is there anything arising from that from your perspective Mr Khan?

KHAN: No.

PRINCIPAL MEMBER SUTHERS: Anything arising from that from your perspective Mr Bowen?

BOWEN: No, not from myself.

ADDENDUM 26 July 2021

On 6 July 2021, after the conclusion of the hearing and our making the orders, the appellant's solicitors wrote to the Registry, relevantly, in the following terms:

> "In the Notice of Appeal, the Appellant sought an order for costs of the Appeal. The Principal Member did not mention whether costs of the Appeal would be awarded to the Appellant, even though the costs of the Appeal were discussed.
>
> We respectfully request that the Appellant have the right to file an application in relation to costs to be considered by the Tribunal within 14 days from today, with the Respondent having 14 days to respond."

We do not intend to make such directions, or revisit the issue of costs of the appeal. We did not overlook the order sought in the Notice of Appeal. Our intent, by making no order as to costs, was that they should lie where they fall.

Whilst we acknowledge that the appellant sought an order for costs in his Notice of Appeal, by directions on 23 April 2021 the parties were advised that:

> (2) If any party wishes to make an application for costs of the appeal, that party is to lodge with the Appeal Panel and give to the other party any submissions on costs at the same time as their submissions in relation to the appeal.

The appellant did not address the issue of costs in his written submission as directed. For that reason, we proceeded on the basis that the application for costs was abandoned. Nor did he raise the issue at the conclusion of the hearing when asked if there was "anything arising" from our decision.

Whilst we accept that it may not be possible for a party to address all issues of relevance in respect of costs until the decision is made, we do not take the view that this prevents them making preliminary submissions as the appellant was directed to on April 23. Compliance with such a direction allows the parties to attend the hearing forewarned about the majority of issues which may be said to be relevant to the costs of the appeal, and facilitates a prompt determination of the issue on the day of the hearing after brief oral submissions. This course, in our view, best promotes the just, quick and cheap

resolution of the matter.

In any event, it is not apparent to us that there are special circumstances warranting an award of costs to the appellant. The respondent's conduct cannot be said to have increased or contributed to the appellant's costs. They did little to oppose the appeal in any material sense.

Despite our decision, the appellant needed to conduct the appeal in any event to succeed. We are also of the view that the appellant's conduct in having his instructed lawyers write to the Tribunal and ask for an adjournment, without any follow up on the result of that application, contributed significantly to the Tribunal's error and was the principal cause of the costs he has incurred in the appeal. The appellant's lawyer's assertion that he was unavailable until after the day of the hearing below, provided an insufficient and unhelpful amount of information as to why another lawyer from the firm, or indeed another lawyer, could not have been briefed to appear and prosecute the application for an adjournment.

Our view would not change if the appellant could demonstrate that the amount claimed or in dispute in the proceeding below was more than $30,000, such that r 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) is engaged and special circumstances were not a prerequisite to the exercise of our discretion in relation to costs. Nor would the delay and expense of determining that issue be warranted.

For completeness, we do not recall that the "the costs of the Appeal were discussed" in any relevant sense at the hearing of the appeal, as suggested by the appellant in his solicitor's correspondence of 6 July 2021.

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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