

AUSTRALIA / JUDGMENT

Jayne v Walker [2024] NSWCATAP 257

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Jayne v Walker [2024] NSWCATAP 257

Hearing dates: 12 December 2024

Date of orders: 16 December 2024

Decision date: 16 December 2024

Jurisdiction: Appeal Panel

Before: G Ellis SC, Senior Member

D Dinnen, Senior Member

Decision: (1) An extension of time in which to appeal the Tribunal's decision of 31 May 2024 is refused.

(2) The appeal is dismissed.

(3) The stay order made on 27 November 2024 is lifted.

(4) Pursuant to s 81 of the Civil and Administrative Tribunal Act 2013 (NSW), Order 3 of the Tribunal made on 31 May 2024 is varied to suspend the date for possession to 23 January 2025.

Catchwords: APPEAL – No error on a question of law established – extension of time not warranted

LEASES AND TENACIES – Revision of date for possession – avoiding need for further proceedings – – guiding principle applied – exercise of discretion

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)

Civil and Administrative Tribunal Rules 2014 (NSW)

Residential Tenancies Act 2010 (NSW)

Cases Cited: Cominos v Di Rico [2016] NSWCATAP 5

Jackson v NSW Land and Housing Corporation

[2014] NSWCATAP 22

Ryan v BKB Motor Vehicle Repairs Pty Ltd

[2017] NSWCATAP 39

Texts Cited: None cited

Category: Principal judgment

Parties: Wendy Jayne (Appellant)

Carol Walker (Respondent)

Representation: Appellant (Self-represented)

M Nye, property agent (Respondent)

File Number(s): 2024/00423557

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Decision under appeal Court or tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 31 May 2024

Before: N M Kennedy, General Member

File Number(s): 2024/000181781

REASONS FOR DECISION

Outline

1. On 31 May 2024 orders were made terminating a tenancy or more than 20 years, based on s 94 of the Residential Tenancies Act 2010 (NSW) (the RTA), but suspending the order for possession until 1 December 2024. On 14 November 2024 an appeal from those orders was lodged.
2. The issues raised by that appeal were (1) whether an extension of time should be granted, and (2) whether there was an error on a question of law. As the tenant (appellant) did not establish either of those issues, they were both determined in favour of the landlord (the respondent).
3. As the order for possession had been suspended to a date prior to the hearing of the appeal, having heard from the parties, it was decided to grant the request of the tenant for that date to be varied to six weeks after the hearing of the appeal.

Scope and nature of internal appeals

1. Internal appeals may be made either (1) as of right on a question of law, or (2) with leave (that is, the permission) of the Appeal Panel: s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) (the NCAT Act). In the Notice of Appeal, the appellant did not seek leave to appeal.

Extension of time

1. As the first instance orders were made on 31 May 2024, r 25 of the Civil and Administrative Tribunal Rules 2014 (NSW) (the Rules) required that the Notice of Appeal be lodged within the following 14 days, which is by 14 June 2024. As the Notice of Appeal was received on 14 November 2024, the appeal was out of time by five months.
2. However, s 41 of the NCAT Act, set out below, provides the Tribunal with the power to extend time:
 - (1) The Tribunal may, of its own motion or on 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.
1. Since s 41(1) commences with the words "The Tribunal may ...", there is a discretion that must be exercised. The relevant considerations as to the exercise of that discretion were set out in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 (Jackson) at [22]:
 - (1) Is there proof that strict compliance with the rules will work an injustice on the applicant?
 - (2) In the context of a pending appeal, the expiration period for the appeal gives a vested right to retain the decision in question with the consequence that the time for appealing should not be extended unless the proposed appeal has prospects of success.
 - (3) It will usually be necessary to consider:
 - (a) the length of the delay,
 - (b) the reason(s) for the delay,
 - (c) the applicant's prospects of success, i.e. whether there is a fairly arguable case, and
 - (d) the extent of any prejudice suffered by the opponents.
 - (4) If the explanation for the delay is less than satisfactory and/or if the opponent has a substantial case of prejudice, it may be necessary for the applicant to show substantial merit, not just that it is fairly arguable.

Hearing

1. After the Appeal Panel had identified the relevant documents, the parties were advised what were the two issues requiring consideration. They were then provided with an opportunity to make oral submissions, following in the usual sequence of appellant then respondent, followed by the appellant in reply, so that each party was able to speak in support of their case and to respond to the case of the other party.

Documents

1. A Notice of Appeal was received on 14 November 2024, but no Reply to Appeal was lodged. The documents lodged by the parties in respect of this appeal were those received from the appellant on 3 and 4 December 2024, and from the respondent on 14 November 2024.

Appellant's submissions

1. In the documents received on 3 December 2024 it was said that the appellant sought a further suspension of the order for possession, based on matters occurring since the orders were made on 31 May 2024. Reference was made to her health prior to and during that period. It was also indicated that an offer for the appellant to move to a retirement village which it was said did not proceed due to "the permissible size of the washing machine". Copies of medical reports dated 22 March 1999, 4 March 2003, 1 March 2005, 1 August 2024 and 12 November 2024 accompanied the three-page written submission.
2. The additional documents received on 4 December 2024 comprised a medical report dated 4 December 2024 and a copy of a document relating to the potential retirement village accommodation that did not proceed.
3. When provided with an opportunity to make oral submissions, the applicant indicated that she wished to rely on the submissions and other documents she had provided in support of her appeal.

Respondent's submissions

1. Documents received for the respondent comprised a covering letter dated 5 December 2024, a letter dated 3 December 2024 that was sent to the appellant, a three-page submission, a 28 November 2024 email from the respondent to her property agent, copies of identification documents for the 82-year old respondent and her 84-year old partner, a 28 November 2024 email from the respondent's property agent to a housing provider, and ten pages containing copies of text messages to and from the appellant.
2. The only oral submission made was that the respondent was 82 years old and had done everything right in trying to obtain vacant possession of her unit.

Submissions in reply

1. The appellant acknowledged the health concerns of the respondent and her partner but said she had tried to find alternative accommodation despite being extremely ill.

Consideration

1. It is necessary to first note what was indicated to the parties at the outset of the hearing of the appeal, namely that it is not the role of the appeal panel to hear the case again. As stated in Guideline 1, Internal Appeals (published on the Tribunal's website), "an appeal is not an opportunity to have a second go at a hearing". That position is well established by Appeal Panel decisions such as *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39, at [10].
2. The background to these proceedings is that the respondent, whose partner suffers from dementia, wishes to sell her unit to "stabilise her financial situation and secure her future". It was for that reason that she applied to the Tribunal to have the appellant's tenancy terminated, which she is entitled to do by s 94 of the RTA which provides as follows:
 - (1) The Tribunal may, on application by a landlord, make a termination order for a residential tenancy agreement—
 - (a) if the tenant has been in continual possession of the same residential premises for a period of 20 years or more, and
 - (b) if the tenant occupied the premises under a fixed term agreement, the fixed term of the original agreement has expired, and
 - (c) if the Tribunal is satisfied that it is appropriate to do so in the circumstances of the case.
 - (2) A landlord may make an application under this section without giving the tenant a termination notice.
 - (3) The Tribunal must not make a termination order under this section that specifies a termination date that is before the end of the fixed term if the residential tenancy agreement is a fixed term agreement.
 - (4) The Tribunal, in determining the day on which vacant possession of the residential premises is to be given to the landlord, must not order that vacant possession be given earlier than 90 days after the order is made.
1. The appellant, who has been a long-term tenant, has what may be summarised as health issues. The appellant did not attend the first instance hearing on 31 May 2024, when orders were made, and oral reasons were given.
2. For this appeal to be allowed, the appellant needs to show that there was an error on a question of law. That has not been done for the following reasons.

3. First, the Notice of Appeal did not identify any error on a question of law. Secondly, neither the written nor oral submissions identified any error on a question of law. Thirdly, the absence of either a copy of the recording of the first instance hearing or a typed transcript of the hearing prevents any assessment of whether there was such an error.
4. It is convenient to here note that, when parties to an appeal do not have legal representation, the issue which arises is whether an Appeal Panel should consider whether there is either a ground of appeal or a basis for leave to appeal which has not been raised by the appellant.
5. In *Cominos v Di Rico* [2016] NSWCATAP 5, at [13], the Appeal Panel said:

It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal. The Appeal Panel has taken such an approach in a number of cases, for instance, *Khan v Kang* [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. However, this must be balanced against the obligation to act fairly and impartially (*Bauskis v Liew* [2013] NSWCA 297 at [68] citing *Hamod v State of New South Wales* [2011] NSWCA 367 at [309]-[316]). Relevantly, s 38(2) provides that that Tribunal "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice".

1. As the appellant has not identified an error on a question of law, and as we have been unable to discern any such error, the appeal must be dismissed, even if an extension of time were to be allowed.
2. While the question of whether an extension of time should be granted was not addressed in either the written or oral submissions of the appellant, it may be inferred that she relies on her health issues. However, given matters such as attempting to secure alternative accommodation in a retirement village, there is no satisfactory explanation for why it took 24 weeks instead of two weeks for a Notice of Appeal to be lodged. It is noted that the appeal was not lodged until 14 November 2024, just over two weeks before the date for surrendering possession of 1 December 2024 and that suggests the motivation for this appeal was not to raise an error on a question of law but to defer the date for returning possession of the unit to the landlord, reflected in a stay being sought when the Notice of Appeal was lodged.
3. Considered in isolation, the appellant has not made out a case that would justify exercising the discretion to extend time conferred by s 41 of the NCAT Act in her favour.

4. In Collins it was said that the time for appealing should not be extended unless the proposed appeal has prospects of success. That case also suggested that, if the explanation for the delay is less than satisfactory then it may be necessary for the appellant to show that the appeal has substantial merit. In other words, an extension of time may be granted if either there is a good explanation for the delay or a good prospect of success for the appeal. In this case, both those aspects lack strength.
5. It is for those reasons that the discretion to extend the time for commencing the appeal cannot be exercised in favour of the appellant.
6. Before concluding the hearing of the appeal, each party was invited to make submissions in relation to the date to which the order for possession should be suspended if the appeal was dismissed.
7. The reasons for that were as follows: (1) the order for possession had been suspended to 1 December 2024, close to two weeks prior to the hearing, (2) lifting the stay would give the appellant no time to prepare to vacate the premises, (3) the Sheriff's office may not be executing warrants for possession at this time of year, and (4) it may be necessary for the respondent to commence further proceedings in order to obtain possession.
8. It was contended by the appellant that a minimum of six weeks should be allowed, due to the Christmas-New Year break, and even suggested as long as another six months, while the respondent's agent said that she would normally seeks two weeks but, in view of the time of the year, 30 days should be considered reasonable.
9. Reasons why it is considered that the date to which the order for possession was suspended should be varied are (1) the four considerations set out above, (2) s 81(1)(b) of the NCAT Act permits an Appeal Panel to vary an order made at first instance, and (3) the Tribunal's guiding principle, set out in s 36(1) of the NCAT Act, of the "just, quick and cheap resolution of the real issues in the proceedings" favours making an order that is reasonable in the circumstances of this case.
10. Bearing in mind (1) that the appellant will need to arrange alternative accommodation, (2) that the appellant will need to prepare for the removal of her possessions from the unit where she has lived for more than 20 years, (3) her health issues, and (4) the time of year, the Tribunal considers it should grant the 42 days sought by the appellant, which is less than two weeks longer than the 30 days suggested by the respondent. Taking six weeks (42 days) from the date of the hearing of the appeal gives 23 January 2025 as the date to which the order for possession should be suspended.
11. It appears that the respondent has acted reasonably and that, in circumstances where both the position of both parties is affected by health issues, the appellant has been provided with reasonable time both at first instance and by the orders that will now be made in this appeal.

ORDERS

1. For the reasons set out above, the following orders are made:
1. An extension of time in which to appeal the Tribunal's decision of 31 May 2024 is refused.
2. The appeal is dismissed.
3. The stay order made on 27 November 2024 is lifted.
4. Pursuant to s 81 of the Civil and Administrative Tribunal Act 2013 (NSW), Order 3 of the Tribunal made on 31 May 2024 is varied to suspend the date of possession to 23 January 2025.

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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