

AUSTRALIA / JUDGMENT

Mitchell v Gong [2024] NSWCATAP 219

COURT

Civil and Administrative Tribunal

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record**Civil and Administrative Tribunal****New South Wales****Medium Neutral Citation: Mitchell v Gong [2024] NSWCATAP 219****Hearing dates: 29 October 2024****Date of orders: 29 October 2024****Decision date: 01 November 2024****Jurisdiction: Appeal Panel****Before: G Blake AM SC, Principal Member****Decision: (1) In respect of the decision made on 04 September 2024 in matter number 2024/00305574 the operation of order 3 is stayed and the order for possession is suspended until 5:00 PM on 08 November 2024 or finalisation of the appeal, whichever is the earlier in time.**

The preceding order is
conditional upon Reama
Mitchell (APPELLANT):

Paying the arrears of rent which includes any occupation fee outstanding as at 30 October 2024 to Yongwei Gong (RESPONDENT) on or before 4pm on 01 November 2024, and after that date, paying the occupation fee outstanding on a weekly basis from the date of this order, pending determination of the appeal.

NOTE: Yongwei Gong (RESPONDENT) is free at any time to make an application for the stay granted by these orders to be lifted, if a condition is not complied with or if there are any other sufficient grounds for doing so.

(2) The Appeal is listed for a Call Over and Hearing of the Application for a Stay on 08 November 2024 at 2:15 PM.

A separate written notice of the Call Over and Hearing of the Application for a Stay will be sent to the parties.

(3) On or before 04 November 2024 Reama Mitchell (APPELLANT) is to lodge with the Appeal Registry and give to the other party any evidence and submissions in support of the Application for a Stay by email.

(4) On or before 07 November 2024 Yongwei Gong (RESPONDENT) is to lodge with the Appeal Registry and give to the other party any evidence and submissions in opposition to the Application for a Stay by email.

Catchwords: APPEALS – Ex parte application for stay – principles – hardship – short stay granted

LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Recovery of possession of premises

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 43

Residential Tenancies Act 2010 (NSW), s 121

Cases Cited: Bentrán Pty Ltd v Sabbarton [2014] NSWCATAP 37

GE Personal Finance Pty Limited v Smith [2006] NSWSC 889; (2006) NSW ConvR 56-164
Qasim v PF 473 Pty Ltd [2024] NSWCA 248
Secure Funding Pty Ltd v Earley [2013] NSWSC 1368
Texts Cited: None cited
Category: Procedural rulings
Parties: Reama Mitchell (Appellant)
Yongwei Gong (Respondent)
Representation: Appellant (self-represented)
File Number(s): 2024/00401083
Publication restriction: Nil
Decision under appeal Court or tribunal: Civil and Administrative Tribunal
Jurisdiction: Consumer and Commercial Division
Date of Decision: 04 September 2024
Before: G Kinsey, General Member
File Number(s): 2024/00305574

REASONS FOR DECISION

The proceedings in the Consumer and Commercial Division

1. On 4 September 2024, the Tribunal constituted by General Member Kinsey in proceedings 2024/00305574 under the Residential Tenancies Act 2010 (NSW) (RT Act) between the Respondent as the Applicant and the landlord and the Appellant and Leone Koronisaku (Ms Koronisaku) as the Respondents and the tenants made orders against the Appellant and Ms Koronisaku, including a money order for \$5,360.00 (being rent owed from 10 July 2024 to 4 September 2024) on or before 13 September 2024, a termination order and a possession order which was suspended until 14 September 2014 (order 3) and an order for the payment of an occupation fee from 4 September 2024 to the date they gave vacant possession.
2. On 14 October 2024, a Deputy District Registrar issued a warrant for possession (the Warrant).

The history of the appeal

1. On 29 October 2024, the Appellant lodged the following documents:
 1. a Notice of Appeal in which she challenged the Warrant and:
 1. listed grounds of appeal including:

"I have a very sick baby at home who has just been released from Westmead Children Hospital for an open heart surgery to fix her leaking left valve. She just came home this weekend and we cannot live on the streets due to her condition."

1. sought leave to appeal on grounds including:

""On compassionate grounds as I have a sick baby with an operation on her heart just recently done and I am afraid that moving her out on the street will affect her survival."

1. an Application for stay of original decision pending appeal (the Stay Application) in which she sought a stay of the Warrant and:

1. provided an explanation for the stay including:

"My youngest daughter is 2 years old just undergone an open heart surgery and is currently recovering at home. We have no place to go for lodging if we get evicted tomorrow and I fear that my baby will not be able to survive leaving in our car."

1. a document recording the payment of \$5,360 to the Respondent's managing agent on 9 September 2024.
1. On 29 October 2024, an officer of the NSW Sheriff informed the Tribunal that enforcement of the warrant for possession was scheduled for 11.00 AM on 30 October 2024.

Consideration

1. Section 43 of the Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act) confers power on the Tribunal to stay a decision pending an appeal, and relevantly 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)—

...

- (c) an internal appeal.

...

- (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.
1. The principles applied by the Tribunal in exercising the power under s 43 of the NCAT Act are set out in *Bentran Pty Ltd v Sabbarton* [2014] NSWCATAP 37 (*Bentran*) at [9] where the principles applied by the courts when exercising the power to grant a stay pending an appeal were cited.

2. Recently when considering the stay of a writ of possession, the New South Wales Court of Appeal, having referred to two earlier judgments (which were also cited in Bentran at [9]) stated it is appropriate first to consider whether the appeal raises a serious question to be tried, in the sense of arguable grounds, and if so, where the balance of convenience lies: Qasim v PF 473 Pty Ltd [2024] NSWCA 248 at [9] (Gleeson JA).
3. In GE Personal Finance Pty Limited v Smith [2006] NSWSC 889; (2006) NSW ConvR 56-164 (GE Personal Finance) at [9]-[30], Johnson J set out some factors relevant to the stay of execution of a writ of possession including on hardship grounds even where the applicant was not in a position to demonstrate a reasonable foundation for one of the three common circumstances advanced on a stay application ([21]-[23]).
4. In Secure Funding Pty Ltd v Earley [2013] NSWSC 1368 (Secure Funding) Davies J granted a stay of execution of a writ of possession on hardship grounds for one month, and at [11] made the following finding:

"I must have regard, however - despite the lack of any merit on the part of the Defendants to justify a stay - to the fact they have a disabled son. It does not seem to me appropriate, despite their very late application and the lack of an explanation for it, that he should be put out onto the street tomorrow, given his disabilities. I think that the only fair course to do justice between the parties is to grant an extension to 18 October to enable the Defendants to take whatever action is needed to find other accommodation for the family."

1. I was satisfied that the principles applicable to the stay of execution of a writ of possession on hardship grounds in GE Personal Finance at [21]-[23] are equally applicable to the application for a stay of a possession order made under the RT Act.
2. I was not satisfied that the appeal raises arguable grounds. I was unable to discern any basis for the Appellant to challenge the issue of the Warrant as the application for its issue was made within the period specified in s 121(2) of the RT Act.
3. However, having regard to the principles in GE Personal Finance at [21]-[23] and the decision in Secure Funding involving analogous circumstances, I was satisfied that the balance of convenience or hardship favours the stay of the order for possession because it is necessary to do justice between the parties. In view of the urgency by reason of the impending enforcement of the Warrant at 11.00 AM on 30 October 2024, I was satisfied that I should make an ex parte order staying the order for possession for a period of 10 days pursuant to s 43(2) of the NCAT Act. However, as the Appellant is liable to pay a daily occupation fee to the Respondent, I was satisfied that I should impose a condition pursuant to s 43(3) of the NCAT Act that the Appellant pay the arrears of rent including any outstanding occupation fee to the Respondent.

Orders

1. For these reasons I made the following orders:

1. In respect of the decision made on 04 September 2024 in matter number 2024/00305574 the operation of order 3 is stayed and the order for possession is suspended until 5:00 PM on 08 November 2024 or finalisation of the appeal, whichever is the earlier in time.

The preceding order is conditional upon Reama Mitchell (APPELLANT):

Paying the arrears of rent which includes any occupation fee outstanding as at 30 October 2024 to Yongwei Gong (RESPONDENT) on or before 4pm on 01 November 2024, and after that date, paying the occupation fee outstanding on a weekly basis from the date of this order, pending determination of the appeal.

NOTE: Yongwei Gong (RESPONDENT) is free at any time to make an application for the stay granted by these orders to be lifted, if a condition is not complied with or if there are any other sufficient grounds for doing so.

1. The Appeal is listed for a Call Over and Hearing of the Application for a Stay on 08 November 2024 at 2:15 PM.
2. A separate written notice of the Call Over and Hearing of the Application for a Stay will be sent to the parties.
3. On or before 04 November 2024 Reama Mitchell (APPELLANT) is to lodge with the Appeal Registry and give to the other party any evidence and submissions in support of the Application for a Stay by email.
4. On or before 07 November 2024 Yongwei Gong (RESPONDENT) is to lodge with the Appeal Registry and give to the other party any evidence and submissions in opposition to the Application for a Stay by email.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 01 November 2024

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/192e08f6dda1fc5380c6de4>

CASE PAGE <https://chat.esheria.ai/case-law/australia/mitchell-v-gong-2024-nswcatap-219-2024>

Prepared on 27 October 2026 · Esheria