

FILED

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Form 85 (version 3)
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AMENDED SUMMONS (JUDICIAL REVIEW)

COURT DETAILS

Court	Supreme Court of New South Wales
#Division	Common Law Division
#List	Administrative Law List
Registry	Sydney
Case number	<u>2022/00311915</u>

TITLE OF PROCEEDINGS

[First] plaintiff	GUITANG LU
[First] defendant [active respondent- not decision-maker]	Community Association DP 270682
[Second] defendant	NSW Civil and Administrative Tribunal
#Additional information	

#PROCEEDINGS BEING REVIEWED

Title	Lu v Community Association DP 270682
Court [Tribunal or other decision-maker]	Appeal Panel, NSW Civil and Administrative Tribunal
Case [or file] number	2022/00081736
Date[s] of hearing	26 May 2022
Material date	21 July 2022
Decision of	S Thode, Senior Member; A Boxall, Senior Member

FILING DETAILS

Filed for	[GUITANG LU] plaintiff
#Filed in relation to	[whole decision] [include only if form to be eFiled]
#Legal representative	n/a
#Legal representative reference	n/a
Contact name and telephone	[Guitang Lu] [0433251006]
Contact email	[luke@cowise.com.au]

HEARING DETAILS

This summons is listed at [time, date and place to be inserted by the registry unless otherwise known].

TYPE OF CLAIM

[Other – Administrative Law List]

ORDERS SOUGHT

- 1 [That the whole decision made by the Appeal Panel of the NSW Civil and Administrative Tribunal be set aside.]
- 2 [That the proceedings be remitted to the Appeal Panel for re-consideration according to law.]

DETAILS OF DECISION

- 1 The decision maker was [Senior Member of the NSW Civil and Administrative Tribunal].
- 2 The decision to be reviewed was [Appeal dismissed].
- 3 The plaintiff seeks relief from the whole of the decision.

FOUNDATIONS**Background**

- 1 On 27 July 2021, the plaintiff commenced the Tribunal proceeding at the NSW Civil and Administrative Tribunal (NCAT), complaining about the first defendant's statutory breaches involving the circumstances of perceived racism where:
 - a. the first defendant excluded an eligible candidate with Chinese background from the election of its executive committee at the annual general meeting of 16 December 2020 (2020 AGM), while the plaintiff raised disagreement about this irregularity at the same Zoom meeting;
 - b. the plaintiff, Australian citizen with Chinese background, began to suffer racial attacks from the first defendant's executive committee member on 17 December 2020, following his complaint about the first defendant's breaches at the 2020 AGM; and
 - c. The first defendant excluded 2 qualified votes from lot owners with Chinese background, resulting in the removal of the plaintiff from the executive committee in March 2021.
- 2 The NCAT proceeding asked the Tribunal the question whether the s 85 order under the then applicable Community Land Management Act 1989 (the Act) to

appoint a compulsory managing agent for the concerned community scheme would be appropriate in the circumstances of breaches involving racism, and if not, what just remedies would be available to the plaintiff subjected to perceived racism.

- 3 On 1 March 2022 the NCAT made a decision to dismiss the plaintiff's application for remedies, while denying the existence of racism in the concerned community scheme despite evidence based on the balance of probabilities, failing to consider the first defendant's breaches but blaming the plaintiff's personality, and consequently made a costs order against the plaintiff to satisfy the first defendant's claim for five-digit costs, thus reinforcing racist harm to the plaintiff.
- 4 On 21 March 2022 the plaintiff sought an internal review of the Tribunal's first decision at the NCAT Appeal Panel, with the grounds in two categories:
 - a. Legal error: that the NCAT decision maker identified wrong issues and asked wrong questions; that the NCAT failed to consider, or genuinely or realistically consider, the first defendant's breaches; and that the NCAT decision maker misconstrued and misapplied s 85.
 - b. Equity ground upon seeking leave: That the NCAT decision was not fair or equitable in the circumstances of perceived racism and consequently made the plaintiff a victim subjected to a substantial miscarriage of justice.

Appeal Panel's decision

- 5 On 21 July 2022 the Appeal Panel made a decision (AD[X]) to dismiss the plaintiff's appeal, finding that the plaintiff's review application was not persuasive and failed to explain unfair or inequitable circumstances (AD[30,33,34,36]).
- 6 Now the plaintiff seeks a judicial review of the Appeal Panel's decision with two grounds below:

Ground 1

- 7 **The plaintiff was denied procedural fairness.**
 - a. The NCAT Appeal Panel has statutory obligations under ss 26(4) of Civil and Administrative Tribunal Act 2013 (the NCAT Act) to comply with applicable procedural directions and under ss 38(5)(c) of the NCAT Act to consider filed submissions.
 - b. On 6 April 2022, the NCAT Appeal Panel made a directions order (DO[X]), directing the plaintiff to lodge written submissions by 2 May 2022 (DO[3]).

- c. On 2 May 2022 the plaintiff filed and served 14-page written submissions dated 29 April 2022 together with 176-page other documents as well as 2 duplicate copies.
- d. The applicable NCAT Guideline - Internal Appeals paragraph 73 expressly provides that "(I)it is not necessary to repeat what has been covered in written submissions" at oral hearings; and the NCAT Appeal Panel directed the plaintiff to the same effect at the hearing of 26 May 2022.
- e. The plaintiff was led to believe that his written submissions dated 29 April 2022 as his main submissions would be located and considered by the NCAT Appeal Panel.
- f. At the oral hearing of 26 May 2022 the plaintiff further submitted that he would substantially rely on his written submissions.
- g. By the time when the Appeal Panel's decision was given to the plaintiff on 21 July 2022, the then decision record with written reasons (the initial decision record) showed that the NCAT Appeal Panel composed of 2 senior members had not located the plaintiff's written submissions dated 29 April 2022 (AD[14]) and had not considered same.
- h. After the plaintiff commenced this proceeding in the Supreme Court on 19 October 2022, the second defendant purported to amend the initial decision record on 2 November 2022 as if that the NCAT Appeal Panel had had a number of additional documents not previously recorded in the initial decision record.
- i. Thereupon, the plaintiff was denied procedural fairness. Otherwise, the plaintiff would have repeated his written submissions dated 29 April 2022, either orally or in writing, to the NCAT Appeal Panel before the decision under review was made on 21 July 2022.

Ground 2

8 **Alternatively, the decision of the NCAT Appeal Panel was affected by jurisdictional error in that the Appeal Panel failed to consider, or to give proper, genuine and realistic consideration to, relevant materials put before them.**

- a. The NCAT Appeal Panel has statutory obligations jointly under ss 26(4) and 38(5)(c) of the NCAT Act to consider party's submissions and relevant materials.

- b. The applicable NCAT Guideline 1 - Internal Appeals paragraph 72 expressly states that "(T)he material upon which the Appeal Panel will decide the appeal or application for leave to appeal will generally be the material in or attached to the Notice of Appeal or Reply to Appeal and **any material filed and served in compliance with a direction given by the Appeal Panel**".
- c. On 6 April 2022 the NCAT Appeal Panel made a directions order (DO[X]).
- d. On 2 May 2022 the plaintiff filed and served 14-page written submissions dated 29 April 2022 together with 176-page other documents pursuant to the directions order (DO[3]).
- e. By the time when the Appeal Panel's decision was made on 21 July 2022, the then decision record with written reasons (the initial decision record) showed that the NCAT Appeal Panel composed of 2 senior members had not considered, or not given proper, genuine and realistic consideration to, the plaintiff's submissions dated 29 April 2022, in particular:
 - i. The NCAT Appeal Panel failed to consider, or to give proper, genuine and realistic consideration to, the plaintiff's submissions dated 29 April 2022 concerning Ground Two as to consideration (AD[12, 31]).
 - ii. The NCAT Appeal Panel failed to consider, or to give proper, genuine and realistic consideration to, the plaintiff's submissions dated 29 April 2022 concerning Ground Three that the NCAT decisions are not fair and equitable (AD[12, 36]).
 - iii. After the plaintiff commenced this proceeding in the Supreme Court on 19 October 2022, the second defendant attempted to amend the initial decision record on 2 November 2022 as if that the NCAT Appeal Panel had had regard to a number of additional documents not previously recorded in the initial decision record (AD[14]).
- f. On 8 April 2022 the plaintiff filed and served the amendment to the notice of appeal (amended notice of appeal) pursuant to the directions order (DO[1]).
- g. The NCAT Appeal Panel failed to consider, or to give proper, genuine and realistic consideration to, the amended notice of appeal, as well as related submissions and evidence, as to the sought Order 2) therein that the NCAT's costs order of 6 March 2022 should be set aside (AD[13]).
- h. The NCAT Appeal Panel also failed to consider, or to give proper, genuine and realistic consideration to, the amended notice of appeal, as well as related submissions and evidence, as to the sought Order 4) therein seeking

nominal remedies for his complaint about the first defendant's breaches involving perceived racism (AD[13]).

- i. The decision maker's failure to consider, or to give proper, genuine and realistic consideration to, relevant materials resulted in a decision which gave no appropriate remedies to the plaintiff in his complaint about the first defendant's breaches involving perceived racism but made the plaintiff subjected to the NCAT costs order though the NCAT is not normally a costs jurisdiction (AD[13, 37]), and aided or encouraged the first defendant's oppressive conduct:
 - i. Following the NCAT decision of 1 March 2022, the first defendant's solicitor M _____ initially asked the plaintiff to pay \$16,000 as their legal costs, while the amount was later found extremely exceeding their actual costs paid or payable to him or his law practice.
 - ii. Following the Appeal Panel's decision of 21 July 2022, M _____ then asked the plaintiff to pay their legal costs by referring to his initial request.
 - iii. Following that the appeal proceeding was finalised to the effect with no order as to costs on 21 July 2022, the first defendant via their solicitor M _____, pursued further costs to the NCAT Appeal Panel regarding the appeal proceeding though the NCAT is not normally a costs jurisdiction.
 - iv. Following the Appeal Panel's decision of 21 July 2022, the first defendant's new managing agent _____ ultimately and oppressively deducted the plaintiff's levies money paid on trust to the managing agent for the purpose of admin/sinking levies as a compensation for the first defendant's mediation and NCAT directions hearing costs, to which however the first defendant was not entitled.