IN THE NSW SUPREME COURT, COURT OF APPEAL **No 29443 of 1013**

SYDNEY REGISTRY

FILED

06 MAY 2013

Between: **BRETT ANTHONY COLLINS**

Applicant

ATTORNEY GENERAL OF NEW SOUTH WALES

Respondent

OPPOSING PARTY'S RESPONSE

1. The Attorney General of New South Wales (the "**Respondent**" or "**Opposing Party**") opposes the extension of time and leave to appeal.

ARGUMENT AND REASONS

Background

2. On or about 11 March 2010, Mr Saeed Dezfouli filed an application in the Supreme Court of New South Wales for leave to appeal from a determination made by the Mental Health Review Tribunal (the "**MHRT**") (the "**Proceedings**").[1] Mr Dezfouli is a person under legal incapacity.[2] As such, he brought the Proceedings through his tutor - Brett Anthony Collins (the "**Applicant**").[3]

3. On or about 26 November 2010, Johnson J ordered that Mr Dezfouli was refused leave to appeal.[4] His Honour also ordered that Mr Dezfouli was to pay the Respondent's costs of and

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[1] *A by his Tutor Brett Anthony Collins v Mental Health Review Tribunal and Anor* [2010] NSWSC 1363 ("***A v MHRT***") at [1] and [6].
[2] *A v MHRT* at [2].
[3] *A v MHRT* at [2].
[4] *A v MHRT* at [91].

incidental to the Proceedings and that those costs could be recovered from the Applicant (the "**Costs Order**").[5]

4. On or about 30 January 2013, the Applicant filed a Summons seeking Leave to Appeal the Costs Order (the "**Summons**").

Extension of Time

5. The Applicant did not file any notice of intention to appeal. As such, he was required to file any summons seeking leave to appeal by 24 December 2010.[6] The Summons was filed on 30 January 2013.

6. The Court has the power to extend the time for filing the Summons.[7] The discretion is for the sole purpose of enabling the Court to do justice between the parties.[8] The Applicant must demonstrate that strict compliance with the *Uniform Civil Procedure Rules 2005* (NSW) (the "**Rules**") would work an injustice upon him;[9] the Applicant bears the burden of demonstrating that an extension of time would not give rise to an unfair trial.[10]

7. In *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61, Basten JA (with whom Ipp JA and Hodgson JA agreed) identified the factors of general relevance to be considered by the Court on an application to extend time.[11] In the circumstances of this case, each of the factors weigh against a grant of further time:

The Length of the Delay

8. The Applicant filed the Summons on 30 January 2013 - two years and one month after the required date. On any view, the delay was gross and excessive.

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[5] *A v MHRT* at [91].
[6] Rules 51.10(1)(b) and 51.2 of the *Uniform Civil Procedure Rules 2005* (NSW) (the "**Rules**").
[7] Rule 51.10(2) of the Rules.
[8] *Gallo v Dawson* (1990) 93 ALR 479 at 480.
[9] See *Gallo v Dawson* (1990) 93 ALR 479 at 480.
[10] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 547 (Toohey and Gummow JJ).
[11] *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at 74 [55].

The Reason for the Delay

9. The Applicant states that "*being unrepresented and not legally qualified*" he was "*unaware of a right to appeal*".[12] The Applicant's ignorance of the right of appeal is not a sufficient explanation for delay. In *Jaffari v Grabowski* [2012] NSWCA 425, Barratt JA stated that:[13]

> "As to the reasons for the delay, there is really nothing to which the applicants point apart from their lack of knowledge of what it was that they needed to do and their inability - they say through lack of means although there is no evidence before me on that - to discover what it was that they should be doing and how they should discover what they should be doing. That is a position in which litigants in person are always placed. A balance must be struck. Persons who have no legal knowledge must be recognised as being at a disadvantage but that is not something that can be turned on its head, as it were, to produce under prejudice for another party. The lack of evidence of diligent and detailed steps to pursue the possibility of appeal, means that there is really very little beyond generalised statements now before the Court to explain the reasons for the delay."

10. The Applicant also states that "*There were ongoing negotiations between the Applicant, politicians and the Attorney-General regarding the withdrawal of the costs order*" and that these negotiations "*gave the Applicant an expectation that the costs order may be withdrawn and that there would be no need to appeal*".[14]

11. Any negotiations between the parties had concluded by no later than 13 December 2011. On that date, the costs assessments for the Proceedings were entered as a judgment against the Applicant in the Local Court of New South Wales.[15]

12. In *Gallo v Dawson* (1990) 93 ALR 479, McHugh J stated that "*Lack of legal knowledge is a misfortune, not a privilege*".[16] In all the circumstances, the Applicant is not entitled to rely on any assumptions made or expectations held by him.

13. The Applicant has not provided any satisfactory explanation for the gross delay.

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[12] Paragraph 4.1 of the Amendment to Summary of Argument filed on 22 April 2013 (the "**Applicant's Summary**").
[13] *Jaffari v Grabowski* [2012] NSWCA 425 at [9].
[14] Paragraph 4.2 of the Applicant's Summary.
[15] Paragraph 3(e) of the Affidavit of Kaye Sato sworn on 6 May 2013 (the "**Sato Affidavit**").
[16] *Gallo v Dawson* (1990) 93 ALR 479 at 481.

Whether the Applicant has a Fairly Arguable Case

14. Costs are in the discretion of the Court; they also fall into the category of practice and procedure.[17] As such, the Applicant will not succeed on appeal unless there was some error of principle in the exercise of the discretion, a consideration of irrelevant matters or some other manifest mistake.[18]

15. The Applicant asserts that his Honour did not take into account: the fact that he had not withdrawn instructions from his solicitor; the fact that he had received legal advice that his case was meritorious; the bias of the MHRT; international covenants; and the public interest. None of these factors demonstrate any reason for the Court to uphold any appeal of the Costs Order.

16. *First,* the Applicant submits Johnson J erred in finding that the Applicant withdrew instructions from his solicitors.[19] The question of whether the solicitors had ceased to act for the Applicant was a matter raised in the Proceedings. Indeed, Counsel for the Respondent in the Proceedings stated "... *Mr Dezfouli has had three different sets of solicitors. Those solicitors, each of them in turn has ceased to act because they say – I understand Mr Collins disagrees with this proposition – but they have said that they had their instructions withdrawn and now he does the proceedings himself*".[20] The Applicant was afforded the opportunity to respond to the submissions made by Counsel for the Respondent;[21] the Applicant failed to take that opportunity to address this issue.[22]

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[17] *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 651 (Priestley JA with whom Glass JA agreed).
[18] *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 644. See also *Maiden v Maiden* (1909) 7 CLR 727 at 742 (Issacs J).
[19] Paragraphs 3.1.1, 3.1.3 and 3.2.1 of the Applicant's Summary.
[20] Page 30, lines 7- 12 of the Transcript, which is Annexure A to the Affidavit of Brett Anthony Collins sworn on 2 April 2013 (the "**Transcript**").
[21] Page 30, lines 19 – 20 of the Transcript.
[22] Page 30, lines 22 – 27 of the Transcript.

17. Further, Johnson J found that "*On 19 November 2010, a Notice of Ceasing to Act was filed in the Court, by which the last solicitor to act for the Plaintiff communicated that his instructions had been withdrawn by the Plaintiff's tutor on 16 November 2010.*"[23] As such, it appears that the finding of fact was made on the basis of the record of the Court.

18. In any event, the fact that the Applicant withdrew instructions from his solicitors was not the primary basis of the Costs Order. In distinguishing the facts of this case from those in *Adams by Her Next Friend O'Grady v State of New South Wales (No. 2)* [2008] NSWSC 1394, Johnson J gave significant weight to the finding that the Applicant had been represented by three different solicitors during the course of the Proceedings; [24] that the Applicant had been afforded the opportunity to discontinue the Proceedings with no costs consequences;[25] that the Applicant had no reasonable prospect of obtaining leave to appeal;[26] and that the Applicant had been on notice of the basis on which the application would be opposed for some months.[27] The finding that the Applicant withdrew instructions from his solicitors was not the basis of the Costs Order. No substantial wrong has occurred.

19. *Second,* the Applicant submits that Johnson J failed to give sufficient reasons for his decision.[28] This is not so. His Honour clearly and concisely explained his reasons for making the Costs Order. In particular, Johnson J stated that: the Respondent offered to settle the Proceedings with no costs consequences;[29] the Applicant pressed on with the Proceedings in circumstances where the outcome of the application was "*more than reasonably predictable*";[30] Mr Dezfouli had been represented by three different solicitors during the

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[23] *A v MHRT* at [7].
[24] *A v MHRT* at [89].
[25] *A v MHRT* at [87].
[26] *A v MHRT* at [89] and [90].
[27] *A v MHRT* at [89].
[28] Paragraph 3.1.2 of the Applicant's Summary.
[29] *A v MHRT* at [87].
[30] *A v MHRT* at [87] and [89].

course of the Proceedings;[31] Mr Dezfouli had no reasonable prospect of success; [32] and notwithstanding the novelty of the application, costs should follow the event.[33]

20. *Third*, the Applicant asserts that he was "*acting on legal advice from multiple sources that supported the case as being meritorious*".[34] The Applicant has failed to adduce any evidence in support of this assertion in these proceedings. The Court is unable to find as a matter of fact that such advice has been received.

21. *Fourth,* the Applicant submits that Johnson J failed to take into account the bias shown by the MHRT.[35] It is unclear on what basis Johnson J was required to consider any alleged bias by the MHRT in the making of the Costs Order. Any allegation of bias would only be relevant to the substantive allegations made by the Applicant in the Proceedings.

22. *Fifth,* the Applicant submits that the Costs Order is against the public interest. He asserts that "*Primary Carers will be deterred form (sic) carrying out their duty*"[36] and that the Proceedings raised matters relevant to the "*welfare of mental health consumers within the criminal justice system*".[37]

23. The Applicant raised these issues in the Proceedings. He stated that "*Acting as the primary carer and certainly with the goodwill referred to by the Crown there is a community interest in the work we are doing and also the fact that we adopt the position of primary carer beside Mr Dezfouli*".[38] It is likely that Johnson J considered these matters at the time his Honour reviewed the facts and circumstances that gave rise to *Adams By Her Next Friend O'Grady v State of New South Wales (No. 2)* [2008] NSWSC 1394 wherein Rothman J found that "*it would be a travesty of justice, if the State of New South Wales were to pursue the tutor for*

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[31] *A v MHRT* at [89].
[32] *A v MHRT* at [89] and [90].
[33] *A v MHRT* at [90].
[34] Paragraph 3.2.2(A) of the Applicant's Summary.
[35] Paragraph 3.3.1 of the Applicant's Summary.
[36] Paragraph 3.3.2 of the Applicant's Summary.
[37] Paragraph 3.3.3 of the Applicant's Summary.
[38] Page 30, lines 22 – 24 of the Transcript.

costs, separately and distinctly from the Plaintiff".[39] His Honour also took into account the fact that "*this is the first application for leave to appeal under s s 77A(1) of the MHFP Act".*[40] Balancing these factors against the reasons stated in paragraph 19 above, Johnson J did not find that any good reason to depart from the usual rule that costs should follow the event.

24. *Finally,* the Applicant asserts that "*Being a signatory to the United Nations Convention on the rights of Persons with Disabilities, the State is bound to consider access to justice for persons with disabilities, to provide liberty and security of the person by ensuring freedom from cruel and inhumane treatment".*[41] The Applicant submits that the Costs Order was the "*result of the appeal against the MHRT who failed to observe intentional standards of protecting the rights of persons with disabilities"* and was a "*plainly unreasonable and unjust exercise of discretion of the court".* [42]

25. The Applicant did not make any submissions on these issues at the time he was heard on costs in the Proceedings.[43] Furthermore, no principle of law or equity requires his Honour to have considered the alleged failure of the MHRT to take into account the International Covenant on the Rights of Persons with Disabilities in the exercise of his discretion to award costs.

26. The Respondent submits that Johnson J appropriately considered all relevant facts and principles in coming to his determination. His Honour did not make any error of principle in the exercise of the discretion, did not consider any irrelevant matters or make any other manifest mistake.[44] The Applicant does not have a fairly arguable case to seek leave to appeal the Costs Order.

27. Moreover, given that the explanation for delay is less than satisfactory, and the Respondent has suffered substantial prejudice, the Applicant must show that the case has more substantial

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[39] *Adams By Her Next Friend O'Grady v State of New South Wales (No. 2)* [2008] NSWSC 1394 at [7].
[40] *A v MHRT* at [90].
[41] Paragraph 3.3.4 of the Applicant's Summary.
[42] Paragraph 3.3.4 of the Applicant's Summary.
[43] Page 30, lines 22 – 27 of the Transcript.
[44] *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 644. See also *Maiden v Maiden* (1909) 7 CLR 727 at742 (Issacs J).

merit than merely being fairly arguable.[45] The present grounds of appeal are not "fairly arguable" and cannot be considered substantially more meritorious.

The extent of any prejudice suffered by the Respondent

28. The Respondent is entitled to rely on a presumption of prejudice.[46] However, if he seeks to rely upon actual prejudice, the Respondent bears the burden of proving the considerations that tell against the granting of the extension.[47]

29. It has been stated that one object of fixing time under the Rules is to *"to achieve a time table for the conduct of litigation in order to achieve finality of judicial determinations".*[48] The Respondent relied on the timetable set by the Rules and took steps to enforce the Costs Order. In particular, the solicitors for the Respondent have:[49]

(a) had the costs of the Proceedings assessed;

(b) filed certificates of assessment in the Local Court;

(c) obtained judgment against the Applicant for the outstanding amount of $32,874.50;

(d) prepared an Examination Notice;

(e) filed an Order for Examination;

(f) attended the Local Court on numerous occasions for the examination of the Applicant;

(g) filed a notice of motion in the Local Court seeking a garnishee order; and

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[45] *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at 65[14] (Hodgson JA with whom Ipp JA agreed).
[46] *Whiting v JDS Engineering & Labour Services Pty Ltd* [2010] NSWCA 28 at [23].
[47] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 547 (Toohey and Gummow JJ).
[48] *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 263.
[49] See paragraph 3 of the Sato Affidavit.

(h) filed a notice of motion in the Local Court seeking the issue of a warrant for the appellant's arrest for examination.

30. In taking steps to enforce the Costs Order, the Respondent has incurred costs of $16,439.40.[50] Such steps would not have been taken if the Applicant had filed the Summons within the time set by the Rules. The Respondent has suffered actual prejudice.

31. Each of the factors identified by Basten JA in *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 weigh against a grant of further time. In all the circumstances, the Court should not award the Applicant further time to file the Summons.

Leave to Appeal

32. The Applicant requires leave to appeal the Costs Order.[51]

33. For the reasons stated in paragraphs 16 to 27, the Costs Order did not involve any error of principle or result in any substantial injustice. Johnson J considered and applied the relevant principles.[52] The Applicant should not be granted leave to appeal the Costs Order.

ABSENCE OF THE PUBLIC AND WITHOUT THE ATTENDANCE OF ANY PERSON

34. The Respondent consents to the application for leave being dealt with in the absence of the public and without the attendance of any person.

LIST OF AUTHORITIES AND LEGISLATION

1. Rules 51.10 and 51.2 of the *Uniform Civil Procedure Rules 2005* (NSW).

2. Section 101(2)(c) of the *Supreme Court Act 1970* (NSW)

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[50] Paragraph 4 of the Sato Affidavit.
[51] Section 101(2)(c) of the *Supreme Court Act 1970* (NSW).
[52] *A v MHRT* at [85] to [90].

3. *Adams By Her Next Friend O'Grady v State of New South Wales (No. 2)* [2008] NSWSC 1394

4. *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541

5. *Gallo v Dawson* (1990) 93 ALR 479

6. *Jaffari v Grabowski* [2012] NSWCA 425

7. *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61

8. *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642

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