Court of Appeal
Supreme Court

New South Wales

Case Name:	Trentelman v The Owners – Strata Plan No 76700
Medium Neutral Citation:	[2021] NSWCA 62
Hearing Date(s):	19 April 2021
Decision Date:	19 April 2021
Before:	Leeming JA
Decision:	1. Grant liberty to apply in respect of the interlocutory regime on 2 business days' notice. 2. Dismiss paragraph 2 of the notice of motion filed 13 April 2021. 3. Reserve the question of costs of paragraph 2 of the Notice of Motion filed 13 April 2021.
Catchwords:	PRACTICE - stay of execution pending appeal - appropriateness of interlocutory relief - appeal concedely reasonably arguable - whether appellant had established significantly greater prospect of success - balance of convenience - application for stay pending appeal refused
Legislation Cited:	Real Property Act 1900 (NSW)
Cases Cited:	Alexander v Cambridge Credit Corporation Ltd (Receivers appointed) (1985) 2 NSWLR 685 DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728; [2011] NSWCA 348 Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 Kalifair Pty Ltd v Digi-Tech (Australia) Ltd [2002] 55 NSWLR 737; [2002] NSWCA 383 Lee v Lee [2019] HCA 28 Sidhu v Van Dyke [2014] 251 CLR 505; [2014] HCA 19 Trentelman v the Owners – Strata Plan 76700 [2021] NSWSC 155 Yeshiva Synagogue Inc v Karimbla Properties (No 10)

	Pty Ltd [2017] NSWCA 331
Category:	Procedural rulings
Parties:	Natalia Trentelman (Applicant) The Owners – Strata Plan No. 76700 (Respondent)
Representation:	Counsel: M Ashhurst SC (Applicant) E Peden SC, J Mee (Respondent Solicitors: Bannermans (Applicant) Strata Advisory Services (Respondent)
File Number(s):	2021/102010
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Citation:	[2021] NSWSC 155
Date of Decision:	16 February 2021
Before:	Parker J
File Number(s):	2018/312426; 2018/328341

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

EX TEMPORE JUDGMENT

1 **HIS HONOUR**: By notice of motion dated 13 April 2021, Ms Natalia Trentelman applies for a further stay of execution of declaratory and, more particularly, injunctive relief issuing from the Equity Division on 6 April 2021. The interim stay ordered by the primary judge, from whose substantive orders Ms

Trentelman has filed a notice of appeal, also on 13 April 2021, expires tomorrow evening.

2 The dispute in the Equity Division arose from two separate proceedings between Ms Trentelman and the owners corporation known as the Owners – Strata Plan No. 76700.

3 The subject matter of the dispute is land contained on Lot 53, which is owned by Ms Trentelman, on which a swimming pool has been constructed. The dispute also extends to access to the pool by the owners corporation and persons authorised by it.

4 I have been told that the buildings owned by the lot owners of the owners corporation originally functioned as a motel. The premises are now known as "Cabarita Lakes Apartments" and are located at Bogangar on the far North Coast of New South Wales, midway between Byron Bay and Tweed Heads.

5 The pool was described without objection in the parties' submissions as a "reasonably large small resort pool." A photograph maybe seen in the substantive judgment of the primary judge: *Trentelman v the Owners – Strata Plan 76700* [2021] NSWSC 155 at [234]. Next to the swimming pool the subject of the litigation, there are parking spaces which, presumably, are used by lot owners and their tenants which adjoin Lot 53. Previously, there was an easement in favour of many (but not all) of the lot owners for the use of the swimming pool. That easement expired in October 2017.

6 The dispute arose out of events in 2014, in which Mr and Ms Trentelman sought the carriage of a resolution converting certain lots they owned into ordinary (non-strata) blocks of land held under the *Real Property Act 1900 (NSW)*.

7 As the primary judge put it at [18]:

> "The necessary resolution was passed at the Annual General Meeting ('AGM') of the Strata Corporation in July 2014. On behalf of the Strata Corporation in these proceedings, it is alleged that in order to secure passage of the resolution, the Trentelmans promised to 'give the pool' to the apartment building lot owners."

8 The documents associated with that resolution included something described in the reasons for judgment at first instance as the “Pool Notation” which stated,

> “The in ground pool and auxiliary structures (shed, concrete, fencing et cetera) located within lot 53 cubic space are common property. All other structures located within lot 53 cubic space form part of lot 53.”

9 One of the two proceedings before the primary judge was Ms Trentelman’s application concerning the validity of the Pool Notation. The other, in which the owners corporation was the Plaintiff and Ms Trentelman the defendant, concerned the owners corporation’s claimed entitlement, either as a matter of contract, or as a matter of equitable estoppel, to obtain relief in relation to either ownership of or access to the pool. That very brief summary is sufficient for present purposes; the history is set out in some more detail at [17]-[26] of the reasons of the primary judge.

10 The proceedings were heard over a number of days in 2020. There was a moderately complex procedural history concerning the hearing which the primary judge described at [12]-[16]. The first day of the hearing was 9 March, with written submissions concluding on 17 December 2020. The primary judge reserved and delivered a substantial judgment on 26 February 2021. So far as is presently relevant, dealing with the second proceeding, his Honour rejected the owners corporation’s claims in contract, but upheld its claim as a matter of equitable estoppel. The substantial challenge by Ms Trentelman’s appeal is to the essential elements of the reasoning underlying the accepted claim in equitable estoppel.

11 At the forefront of the parties’ submissions today were events which took place on 15 and 16 March 2021. At that stage, the substantive judgment had been handed down, but orders reflecting his Honour’s findings had not been made.

12 The evidence before me on the events of 15 and 16 March is affidavit evidence of Ms Trentelman on the one hand, and Mr Byron Daniel Williams and Ms Dominique Williams on the other hand. Ms Williams is the secretary of the owners corporation. The pair among other things perform caretaking duties at the complex.

13 The primary judge said that he was unable to make detailed findings about those events and it will be necessary to return to them when dealing with the balance of convenience. Both sides accept that physical blows were laid, and that injuries were suffered. It will have been clear to the parties and those advising them that it is appalling that matters have come to this in a dispute about access to a swimming pool. As I explained during the hearing, my preliminary view was that, putting entirely to one side whether one or both sides contributed to the altercation, it could only have come about because there was some uncertainty about what the position was (because a substantive judgment had been handed down but orders had not been made) and that whatever be the outcome of the hearing before me today, there would be no such resulting uncertainty. Only because one if not both sides resorted to self-help remedies and because there was a divergent understanding of the parties' respective rights could the entirely regrettable events of 16 March 2021 have come about. When I raised that matter with the parties I did not understand there to be any dissent from the inference I have drawn. The underlying matters are the subject of a hearing in the Local Court on 5 May 2021.

14 The primary judge made final orders, and granted some further interlocutory relief, on 6 April 2021. Orders 1 to 7 made on that date are as follows:

> "1. Declare that, as from 18 October 2017, the plaintiff has been entitled in equity to an easement over the land owned by the defendant in lot 53 within strata scheme 76700 in the terms of the Transfer Granting Easement referred to in order 3.
>
> 2. Order that, until registration of the Transfer Granting Easement referred to in order 3, the defendant, by herself or her occupiers, invitees, agents, employees or contractors, not by themselves or by item, lock or structure, prevent access to the Pool or Facilities by the plaintiff or by persons authorised by the plaintiff.
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> 3. Order that:
>
> a. forthwith, the defendant prepare, execute and provide to the plaintiff a duly executed and registrable form of Transfer Granting Easement, completed with the following details:
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> i. the servient tenement is the whole of lot 53 in strata plan of subdivision 91510;
>
> ii. the dominant tenement is the common property in Strata Scheme 76700;
>
> iii. the transferor is the defendant;

iv. the description of the easement is “right to use the burdened land for the purpose of recreational use of the Pool Structure and for other purposes reasonably incidental to that use, as more particularly described in Annexure A”;

v. the transferee is the plaintiff;

vi. the terms of the easement are those set out in Annexure A to these orders;

b. upon receipt of the Transfer Granting Easement from the defendant, the plaintiff execute it, together with a consent to the removal from the title to lot 53 of the Pool Notation (as that term is defined in the judgment of the Court delivered on 26 February 2021);

c. upon receipt of the duly executed Transfer Granting Easement and consent to the removal of the Pool Notation, the defendant arrange for the lodgement for registration of the Transfer Granting Easement within 14 days and for the removal of the Pool Notation as soon as reasonably practicable.

4. Direct that these orders be entered forthwith.

5. Reserve the question of costs.

6. On the undertaking of the defendant to apply to have the appeal proceedings expedited and to prosecute those proceedings with reasonable dispatch, order that the operation of order 3 be stayed until further order of this Court or of the Court of Appeal.

7. On the undertaking by the defendant to pay any damage which may result to the plaintiff from the grant of this stay, I stay the operation of declaration 1 and order 2 for a period of 14 days.”

15 For present purposes it is Order 2 that is of greatest significance. That is an order which enjoins Ms Trentelman from keeping the Owners Corporation or persons authorised by the owners corporation out of the pool and the facilities. That order is not presently in force. It was stayed for 14 days by reason of Order 7. The stay comes to an end tomorrow evening, and the result is that unless further orders are made before then, the injunction in Order 2 will have effect from Wednesday. In the circumstances accompanying this application, it seems desirable to say explicitly what no doubt both parties have been told, namely, that a breach of Order 2 when it is in force will prima facie amount to a contempt of Court and render the person in breach liable to various forms of execution, which ultimately can extend to imprisonment.

16 The ultimate conclusion reached by the primary judge was that the owners corporation was entitled to a formal registered easement. That is the subject of Order 3, but because, I infer, that involves drafting documents and lodging them for registration with the Registrar General, that step has been stayed by

reason of Order 6 until further order of this Court or of the Court of Appeal. It is for that reason that it is the interim stay which expires tomorrow evening of Order 2, rather than the interlocutory stay of Order 3, which is of central importance to the application before me today.

17 I was assisted by concise and succinct written and oral submissions by Mr Ashhurst of senior counsel for Ms Trentelman, and Ms Peden of senior counsel who appeared with Ms Mee for the Owners Corporation. Constructively, both sides agreed as to the applicable principles governing the application for a further stay pending the determination of the appeal. I should note that both sides have also, constructively, agreed to an accelerated time-table the result of which is that the appeal which Ms Trentelman filed last week, and a cross appeal, which the owners corporation will shortly file dealing with an aspect of the case in which it was unsuccessful, will be heard by the Court of Appeal on 7 July 2021. The Court of Appeal on that date may determine the matter then and there or, perhaps more likely, will reserve its decision for judgment to be delivered at a later date. But the subject of the dispute before me today is merely what access if any should be given to the owners corporation and those authorised by it to the pool within the period from Wednesday this week until the determination of the appeal and cross appeal which the parties have filed or will shortly file. That is to say, all that is being determined by me is access for a period of slightly more than two months plus the time if any while the Court of Appeal judgment is reserved.

18 In *Alexander v Cambridge Credit Corporation Ltd (Receivers appointed)* (1985) 2 NSWLR 685 at 694 and 695, the Court of Appeal articulated principles which more recently were reiterated by this Court in *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* [2002] 55 NSWLR 737; [2002] NSWCA 383 at [17]:

> "In our opinion it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant … demonstrates a reason or appropriate case to warrant the exercise of discretion in his favour …The Court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair. In the exercise of its discretion the Court will weigh considerations such as the balance of convenience and the competing rights of the parties … Two further principles may be mentioned. The first is that where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay … where it is

> apparent that unless a stay is granted an appeal will be rendered nugatory this will be a substantial factor in favour of the grant of a stay."

19 More recently, both parties directed me to the judgment of Basten JA in *Yeshiva Synagogue Inc v Karimbla Properties (No 10) Pty Ltd* [2017] NSWCA 331 at [15]-[17]:

> "[15] The established basis upon which this Court may intervene to grant such relief pending an appeal is, in broad terms, to prevent the subject matter of the appeal being destroyed or substantially impaired in such a way as to render a successful appeal nugatory. A common example may be found in cases where an appellant resists payment of a sum in accordance with the judgment under appeal on the basis that the money will probably be irrecoverable notwithstanding success on the appeal.
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> [16] More broadly, the Court is exercising a discretionary power and will need to weigh the hardship and inconvenience likely to be caused to each party by granting or not granting the order sought. The relevant circumstances are likely to include the period for which the relief will need to operate, the promptness with which the applicant for relief has come to the Court and the strength of the proposed appeal.
>
> [17] So far as the last matter is concerned, the inquiry is usually constrained to a determination whether the appeal is reasonably arguable. With respect to the prospects of success on an appeal, the Court stated in *Alexander v Cambridge Credit Corporation Ltd (Receivers appointed)*:
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> > '… although courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them considering the specific terms of a stay that will be appropriate fairly to adjust the interests of the parties, from making some preliminary assessment about whether the appellant has an arguable case.'"

20 The starting point of analysis is, as was mentioned in those cases, that on an application such as the present, a single Judge of Appeal does not ordinarily go beyond the question as to whether the appeal is reasonably arguable. Ms Peden candidly accepted that the appeal was reasonably arguable. Mr Ashhurst however contended that this was one of those cases where it should be found that the prospects of success were so strong that it went beyond what was reasonably arguable and contributed to Ms Trentelman's entitlement to interlocutory relief. In his written submissions, the two bases were put as follows:

> "9. The primary judge's reasoning for distinguishing the statement of principle that his Honour recorded at paragraph [285] of the judgment (not being that the Respondent's acts of detriment had occurred prior to the anticipated negotiations and had benefited the Appellant) is with respect not

> supported by any authority and contrary to the principle that what binds the conscience of the defendant is not the unperformed promise but rather the knowledge of the defendant that the claimant was entitled to believe that it had (or must receive) an interest in land. On the primary judge's findings as to the inchoate nature of the interest involved and, more importantly, that formal negotiations as to the terms of any interest were yet to take place, there could not have been any such knowledge by the Defendant.
>
> 10. In addition to the primary error on the necessary elements of proprietary estoppel referred to at [9] above is the additional error that the primary judge 'inferred' reliance when there were alternative reasons why the Motion 10 may have been passed that did not require reliance by the members of the Respondent on the representation as to continued use and the fact that the primary judge would seem to have misconstrued Motion 10."

21 In relation to the question of reliance, Mr Ashhurst was critical of the reasoning at [302], which was in the following form:

> "Plainly the Trentelmans decided in advance of the meeting to offer access to the pool as a "sweetener". In fact, although they did not expressly say this to the meeting, they had decided not to proceed with the original development anyway. Presumably they judged that they needed to make a more substantial concession to the owners, and offered continuing access to the pool for that purpose. The representation was thus calculated to induce a favourable vote, and a favourable vote eventuated. I think that it is sufficient to establish an inference of reliance in fact".

22 Mr Ashhurst said that the owners corporation had only called evidence of a minority of lot owners (some 19%), and not all of those had said that they had relied upon what had been said concerning the swimming pool. Accepting as I do that this aspect of the appeal is reasonably arguable, I do not accept that its strength exceeds the ordinary principles applicable to appeals. The submission which Mr Ashhurst made to me appears very substantially to reiterate the unsuccessful submission on this point made to the primary judge, and contrary what was said to me, I am unpersuaded that there is any error in what was said in [297] concerning the effect of *Sidhu v Van Dyke* [2014] 251 CLR 505; [2014] HCA 19 as to the ability for a discharge of a defendant discharging the onus that there had been no reliance taking place by inference, and that a representation need not be the exclusive reason for incurring a detriment but need only be a "contributing cause" or a "contributing factor". That is to say, although there were other matters offered by Mr and Mrs Trentelman in 2014 in order to secure the resolution by which their land would cease to be subject to the strata plan, I do not for the purposes of the application today accept the

strict dichotomy propounded by Mr Ashhurst between access to the pool and the other matters.

23 The second way in which it was contended that Ms Trentelman had a case which is stronger than one which was merely reasonably arguable turned upon the reasoning of the primary judge at [291], which in turn rejected a submission that has been made to his Honour based upon *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; [2011] NSWCA 348. The point was that at the time the representation was made, the terms of the easement to which the primary judge ultimately considered to the owners corporation was entitled, had not come close to having been formulated. This therefore, so it was said should result in the dismissal of the claim for the same reason as had occurred in *DHJPM*. The primary judge at [291] rejected this submission, saying that there was "no relevant analogy", in so far as (a) this was not the case of ongoing commercial negotiations between two parties; rather it was a case where something was proffered in exchange for immediately necessary statutory approval, and (b) his Honour's view that the events of the present case were not properly to be characterised as having occurred in a "commercial context". Once again, I am unpersuaded that this aspect of the appeal has been established to be sufficiently strong to go beyond what is reasonably arguable for the purposes of exercising the discretion as to a stay of execution.

24 In reaching those conclusions I am in substance disinclined, for present purposes, to accept one aspect of the rebuttal proffered by Ms Peden, which was based upon the findings in [171] to the effect that his Honour was "generally unimpressed with the reliability of the Trentelmans' evidence". It seems to me that the grounds of appeal and more particularly the way in which they have been articulated in support of this application are intended to avoid the need to apply the principles associated with *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 and *Lee v Lee* [2019] HCA 28 in impugning factual findings to which the demeanour of a party or witness has contributed.

25 For those reasons, I reject Mr Ashhurst's preliminary submission that this was a case where I should, on an inevitably preliminary basis, form a view as to the

strengths of the appeal over and above what is reasonably arguable. I also note for completeness that although Ms Peden had stated an intention to file a cross-appeal, and it seems that to that extent the owners corporation prospects of ultimately obtaining orders in its favour can only be enhanced, no party made submissions in relation to that and so I put the prospective cross-appeal to one side.

26 It follows that this application, no differently from the overwhelming majority of applications for stays of execution, turns principally on considerations of balance of convenience.

27 The starting point is that a respondent who has succeeded in obtaining final orders after a trial is prima facie entitled to the "fruits of judgment", but that an appellant need not show special circumstances and need only make out a case that a stay of execution is appropriate. I turn therefore to the various ways in which Ms Trentelman has advanced in support of her submission that a further stay of execution for the next approximately three months is appropriate.

28 First, Ms Trentelman gives evidence that she is concerned that if the swimming pool is made available to the owners corporation, then she will lose the "permanent" tenant who lives in one of the three townhouses on her lot (Lot 53), and also that she is concerned that she will "be unable to lease the other townhouse".

29 I interpose here that, entirely appropriately, there was no application for cross-examination of any of the deponents whose evidence was read in support or in opposition to the application. As I pointed out when this paragraph was read, while her evidence of being concerned is unchallenged, it is unsupported by any other corroborating evidence (for example, of a conversation with the permanent tenant as to the permanent tenant's intentions, or conversations with prospective tenants of the other townhouse, or actual difficulties that were encountered when lot owners had the right to use the pool). Further, it is significant that all that will be determined by me today is whether Lot 53 can insist upon exclusive access to the pool *for the period of the next some three months*. That is to say, the existing right of the owner of Lot 53 and those authorised by her to use the swimming pool is unaffected.

Further, all that will be determined today is whether Lot 53's enjoyment of the swimming pool is exclusive or must be shared with those authorised by the owners corporation. The evidence as to Ms Trentelman's concern does not descend to the very limited issue concerning access to the pool which is the subject of this application.

30 Secondly, Ms Trentelman is concerned for her safety and for the safety of her lessees following the events which involve violence in March of this year. As I said at the outset, there is competing evidence as to precisely what occurred and who is at fault for those regrettable events in March. Substantially similar evidence was adduced before the primary judge on 6 April 2021 and his Honour said in the second judgment, which was the judgment dealing with both final and interlocutory relief: *Trentelman v The Owners - Strata Plan 76700 (No 2)* [2021] NSWSC 377 at [52] that "it was not possible to make findings on exactly what happened on 16 March". I was not invited to make findings as to precisely what had happened. As noted, there are diametrically opposed accounts. No witness was cross-examined, and there are applications in the nature of apprehended violence orders from each deponent directed to each other deponent to be heard in the Local Court on 5 May 2021. It is inappropriate that I make any such findings.

31 However, in order for the physical violence which undoubtedly occurred on 16 March 2021 to go in support of the balance of convenience as Ms Trentelman submits, it would be necessary for her to establish that the failure to grant a stay would likely give rise to a further opportunity for physical violence, in circumstances where the legal position attaining between the Trentelmans and the owners' corporation was made clear by reason of this Court's orders and reasons for judgment. I am unpersuaded that this is so. Accordingly, I do not consider that the events of 16 March 2021 contribute materially to the balance of convenience. I accept completely what was put by Mr Ashhurst, namely, that there is "bad blood" between the Trentelmans and Mr and Mrs Williams, the caretakers in the owners corporation. That is not limited to this litigation, it extends, on the evidence before me, to a debt of some $60,000 owing by Ms Trentelman to the owners corporation in relation to various levies, which also on the evidence before me is the subject of pending

dispute in NCAT. Substantially however, on this point, I have reached the same conclusion as the primary judge did on the substantially the same evidence in his second judgment at [51]-[54]:

> "[51] As counsel for Mrs Trentelman acknowledged, the Strata Corporation was prima facie entitled to the fruits of its victory. And the Trentelmans were wrong in asserting that there was no basis for the residents to be able [to] use the pool until the easement was registered.
>
> [52] It was not possible to make findings on exactly what happened on 16 March. It appears however that the Corporation's representatives may have acted wrongly by taking matters into their own hands. But I considered that any such misconduct should not operate to deprive the Corporation of its corporate rights. Those rights are for the benefit of the residents as a whole and it would be wrong to penalise all of the residents whether or not they were involved, or acted improperly.
>
> [53] Clearly it was convenient to stay the operation of the order requiring Mrs Trentelman to prepare, execute and register a transfer granting easement until the appeal has been decided. But I did not consider that there was any valid ground for staying the operation of the declaration and injunction in the meantime.
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> [54] In particular, I did not think that any irreparable prejudice would be suffered by Mrs Trentelman if the residents were able to use the pool. Regrettable as the incident on 16 March had been, there was no reason to think that it would be repeated once the Court had ruled that the residents had an enforceable equitable right to use the pool. It was not easy to see what loss Mrs Trentelman would suffer from their doing so. Certainly it would not render the hearing of the appeal nugatory."

32 Thirdly, Mr Ashhurst observed that there had been no delay whatsoever by his client, who has very promptly and well before the expiration of the time permitted under statute and the rules, commenced proceedings in this Court and brought this application for stay of execution. As much may be accepted. Mr Ashhurst also submitted that on the other hand there have been substantial delay on the part of the owners corporation bearing in mind that the events giving rise to its claimed contractual or equitable entitlements took place so long ago as 2014. However, for present purposes I do not see that there has been any disentitling conduct on the part of the owners corporation. The relevant time scale for today's purposes did not commence back in 2014; rather, the question is what has happened immediately after the delivery of reasons and the making of orders at first instance.

33 Fourthly, it is put that the owners corporation is unable to pay compensation to Mrs Trentelman in the event that her appeal succeeds and it has attained

shared access to the swimming pool over the approximately three months or so which will be the subject of the period between now and the determination of the appeal. I do not accept that that is made out on the evidence. There is evidence before me of substantial liquid funds being held by the owners corporation coupled with an ability to borrow. Further, there may be (perhaps depending upon the outcome of the proceedings in NCAT, the details of which are not before me) an entitlement to set off any payment against the outstanding indebtedness by Mrs Trentelman to the owners corporation. Finally on this point, although there was no evidence as to what the compensation might be, I would not expect it would be very great.

34 In further opposition to the stay of execution, Ms Williams adduced evidence of the economic advantages to lot owners of access to the pool, both in terms of the sale value of the lots and their attractiveness for purchasers and tenants. Mr Ashhurst said against this that the relevant balancing was between owners corporation, rather than lot owners. It is not necessary for me to rely on what is put in relation to the advantages to lot owners in order to conclude, as I do, that Ms Trentelman has not made out that this is an appropriate case for a further stay of execution.

35 Although I have attempted to deal with all of the matters relied upon by Ms Trentelman in support of her application, it is fair to say that the most prominent two factors were her concerns that she would lose tenants and her concern based upon the events of 16 March 2021. Bearing that in mind, it seems to me that it is desirable that there be as little doubt as possible about the current position relating to access to the pool between this Wednesday and the determination of the appeal. I do not make any direction about this still less an order, but there would be considerable merit – and I have before me evidence that a recurring question asked by people occupying the lots in the strata plan is whether they can have access to the pool – for the owners corporation to display prominently in its common property, and to notify all lot owners, something along the following lines:

> "Access to the pool on Lot 53 extends to the owners corporation and persons authorised by it, pursuant to orders made by the Supreme Court of New South Wales on 6 April 2021, with effect from 21 April 2021. Those orders are subject to an appeal which is listed for hearing on 7 July 2021. If the appeal

> fails, an easement will be registered giving the right to use the pool. If the appeal succeeds, the owner of Lot 53 will be entitled to prevent access to the pool. In the meantime, the orders are subject to review by the Supreme Court of New South Wales."

36 The reason for a notice along those lines to be made widely available will be obvious. It is easier to read a notice than to read the inevitably long reasons of courts resolving submissions to them. And it seems desirable, especially from the point of view of tenants of Lot 53, and potential purchaser of lots, that it be made clear that the position that will attain for the next little while is merely an interlocutory one and one that is dependent upon the outcome of the appeal to be heard on 7 July 2021.

37 Consistently with the above, I will grant liberty to apply in respect of the interlocutory regime on two business days' notice. Otherwise however I will not make the only outstanding order on the notice of motion which is order 2. The effect of my not doing so is that the operation of orders 1 and 2 made by the Court constituted by Parker J on 6 April 2021 will take effect from Wednesday 21 April 2021.

38 For those reasons the orders that I make are:

1. Grant liberty to apply in respect of the interlocutory regime on two business days' notice.

2. Dismiss paragraph 2 of the notice of motion filed 13 April 2021.

[Discussion concerning costs.]

39 **HIS HONOUR**: Application is made by the owners corporation for its costs of today. The outcome of today is a highly expedited hearing, on 7 July 2021, of an appeal which was filed on 13 April and a cross-appeal which has not yet been filed. It will have been necessary to approach the Court today in any event. True it is, as Ms Mee submits, that the substantive topic today, the exercise of discretion concerning a stay of execution, is discrete and separate from the outcome of the appeal. However, the unusual events which give rise to this application, in particular the events of 15 and 16 March 2021, and the granting of liberty to apply, suggest that the wisest course is to delay determining the costs discretion, against the possibility, I stress it is no more than that, that there may be a need for some further application. The Court

which ultimately hears and determines the appeal will be just as well placed to determine the costs of today as am I. For those reasons I reserve the question of costs of paragraph 2 of the notice of motion.

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