Civil and Administrative Tribunal
New South Wales

Case Name:	NSW Land & Housing Corporation v Martin
Medium Neutral Citation:	[2017] NSWCATCD
Hearing Date(s):	31 October 2017
Date of Decision:	15 November 2017
Jurisdiction:	Consumer and Commercial Division
Before:	L Pearson, Principal Member
Decision:	1. These proceedings are adjourned until the criminal proceedings against Ms Martin are concluded. 2. The proceedings may be resumed by written advice from NSW Land & Housing Corporation that the matter be listed for directions.
Catchwords:	SOCIAL HOUSING: Application for termination of residential tenancy agreement – Whether proceedings should be stayed pending finalisation of criminal proceedings
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Evidence Act 1995 Residential Tenancies Act 2010
Cases Cited:	Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352 Commissioner of Federal Police v Zhao [2015] HCA 5 Franken v NSW Land & Housing Corporation [2016] NSWCATAP 154 McMahon v Gould (1982) 7 ACLR 202 NSW Land & Housing Corporation v Byrne [2016] NSWCATCD
Category:	Procedural and other rulings
Parties:	NSW Land and Housing Corporation (Applicant) Donna Martin (Respondent)

Representation:	Counsel: C McMeniman (Applicant) M McMahon (Respondent) Solicitors: Legal Aid NSW
File Number(s):	SH 17/12995
Publication Restriction:	Nil

REASONS FOR DECISION

1 Ms Donna Martin is tenant of premises in Ballina pursuant to a residential tenancy agreement with NSW Land & Housing Corporation (the landlord) dated 29 August 2000. Following an incident at neighbouring premises on the night of 24 February 2017, in which two neighbours were allegedly assaulted, Ms Martin was charged with affray. NSW Police have commenced criminal proceedings against her and against her son Broby Martin, and Ms Kasey Piper.

2 The landlord applied on 20 March 2017 for an order under s 90 of the *Residential Tenancies Act* 2010 (the RT Act) to terminate the residential tenancy agreement. Ms Martin's legal representatives applied for an adjournment of the proceedings, which had been listed for hearing on 20 July 2017, until the completion of the criminal proceedings. That application was opposed. The adjournment application was heard on 13 July 2017, and dismissed. Ms Martin lodged an internal appeal. On 19 July 2017 by consent the appeal was allowed, and the order made on 13 July 2017 set aside.

3 On remittal to the Consumer and Commercial Division Ms Martin renewed her application for an adjournment of the proceedings until the completion of the criminal proceedings. The application was heard on 31 October 2017.

Background

4 The parties advised that the criminal proceedings are next listed for mention on 17 December 2017. Ms Martin has been charged on 28 August 2017 with further offences, one relating to the evidence before the Tribunal. Ms Martin has not yet entered a plea. The hearing of the criminal proceedings is likely to be in the first half of, or close to mid, 2018. Mr Broby Martin and his partner Ms Kasey Piper have also been charged, Broby Martin with more serious offences. Mr Broby Martin is presently in custody. Neither has entered a plea.

5 Both parties have provided, at the request of the Tribunal, a list of the witnesses whose evidence they anticipate will be relied on at the hearing of the application for a termination order. The landlord has listed 8 names, including three police officers, and the two neighbouring residents. The landlord has provided statements and supporting documents from its witnesses. Ms Martin has listed 5 names, including Ms Martin, Broby Martin and Kasey Piper. They have not yet provided statements in the Tribunal proceedings because of concerns it may prejudice their criminal law proceedings. Ms Martin has provided a statutory declaration of 14 August 2017 outlining the background to issues with the neighbours, and her family and financial circumstances.

6 The landlord confirmed that, while it is not pressing the matter of whether Ms Martin's son Broby Martin was an occupant of the residential premises on 24-25 February 2017, it is pressing that he was lawfully on the premises on those dates. As summarised by the landlord's representative, the landlord contends that Ms Martin has breached s 90 of the RT Act because Ms Martin did not stop or de-escalate the situation, actively encouraged Mr Broby Martin, and was vicariously liable for the actions of any person lawfully on the premises .

Ms Martin's submissions

7 Ms Martin relies on the principles stated by Wootten J in *McMahon v Gould* (1982) 7 ACLR 202 to be considered when deciding whether or not to grant a stay of proceedings (references omitted):

(a)Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court;

(b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds;

(c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with;

(d) Neither an accused nor the Crown are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;

(e) The court's task is one of "the balancing of justice between the parties", taking account of all relevant factors;

(f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors;

(g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding. I return to this subject below;

(h) However, the so-called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding;

(i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings;

(j) In this regard factors which may be relevant include:

(i) the possibility of publicity that might reach and influence jurors in the civil proceedings;
(ii) the proximity of the criminal hearing;
(iii) the possibility of miscarriage of justice eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses;
(iv) the burden on the defendant of preparing for both sets of proceedings concurrently;
(v) whether the defendant has already disclosed his defence to the allegations;
(vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him;

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant's obligation to the plaintiff;

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed.

8 Ms Martin further relies on the decision of the High Court in *Commissioner of Federal Police v Zhao* [2015] HCA 5, where the Court noted at [17]:

> In the present matter, the Court of Appeal considered that if the proceedings were not stayed, the prosecution would be informed, in advance of the second respondent's trial, of his defence because he could not realistically defend the forfeiture proceedings without telegraphing his likely defence. The result would be that the prosecution would be advantaged in a manner which fundamentally alters its position vis-a-vis the second respondent and renders the trial unfair. …

9 Ms Martin submits that:

(1) the interests of justice are not served by requiring her to defend civil proceedings before the criminal proceedings, concerning substantially the same subject matter, are finalised;

(2) there is a real and not merely notional danger of injustice in the criminal proceedings if the Tribunal proceedings are not adjourned, because Ms Martin will lose her right to silence and expose or "telegraph" her defence to the prosecution which would result in the prosecution being advantaged in a manner that would fundamentally alter its position vis-à-vis the respondent. The landlord's witnesses include the relevant police officers who would have a trial run of their evidence including cross examination;

(3) there is a real risk of injustice to Broby Martin and Kasey Piper who are also yet to enter a plea in respect of their charges arising out of the same incident;

(4) given the number of witnesses proposed it is estimated that the Tribunal proceedings would take at least 1 week, and the practical reality may be that there may not be much difference in time between the two listings;

(5) there is the possibility of a miscarriage of justice as described in (j)(iii) in *McMahon v Gould*;

(6) Ms Martin has not disclosed her defence; and

(7) Ms Martin has lived at the premises for 22 years with four children, one of whom has an intellectual disability, and save for the current application has complied with her obligations under the residential tenancy agreement including paying rent and caring for the property. There is no evidence of problems after 25 February 2017 or of ongoing risk to neighbours, and while she continues to comply with her obligations under the residential tenancy agreement the landlord suffers no prejudice if the adjournment is granted.

10 Ms Martin submits that the grant of a certificate under s 128 of the *Evidence Act* 1995 would not suffice to remove the risk of prejudice because while the prosecution would not be able to use Ms Martin's evidence or any information or document obtained as a consequence of the respondent giving the evidence, the prosecution would still have access to that information and could lay new charges, amend its charges, or prepare its case with the knowledge of the defence to be raised.

11 Similarly, s 64(1) of the *Civil and Administrative Tribunal Act* 2013 (the NCAT Act) does not provide adequate protection as it only relates to the publishing of information, and it is unlikely that an order made under s 64 would apply to the sharing of information under the landlord's Memorandum of Understanding with NSW Police.

The landlord's submissions

12 The landlord submits that having regard to the circumstances and the guiding principle in s 36 of the NCAT Act the application should be refused.

13 The landlord submits that Ms Martin has not established a real or notional danger that she may suffer prejudice in the criminal proceedings if the Tribunal matter proceeds to a hearing. No such prejudice arises because:

(1) The matter is before the Tribunal, not a jury;

(2) There is no evidence of adverse publicity;

(3) The Tribunal may make an order pursuant to s64 of the NCAT Act to restrict publication of evidence, and it is relevant that the civil proceedings are brought by the landlord and the criminal proceedings by NSW Police, so there is not the same prosecuting authority as was the case in *Zhao*;

(4) Having regard to the orders that could be made pursuant to s64 there is no possibility of miscarriage of justice by disclosure of a defence enabling fabrication of evidence by prosecution witnesses;

(5) There is no hearing date set for the criminal proceedings and if the Tribunal grants the adjournment the hearing of these proceedings would be delayed indefinitely;

(6) The allegations against Ms Martin relate to serious matters that have significant ongoing negative effect on neighbours of the premises, and an indefinite delay would have an adverse impact on other tenants living in the public housing area in which the premises are located;

(7) Ms Martin is not burdened by preparing for both proceedings, and has been legally represented throughout;

(8) The first decision on the adjournment application found that there were no matters raised as to what real prejudice might be suffered or that Ms Martin has shown that the ordinary rights of the applicant landlord should be interfered with to have the civil application determined; and

(9) A s 128 certificate if granted would work with an order under s 64 of the NCAT Act.

Relevant legislation

14 Section 90 of the RT Act provides:

90 Serious damage or injury by tenant or other occupant

(1) The Tribunal may, on application by a landlord, make a termination order if it is satisfied that the tenant, or any person who although not a tenant is occupying or jointly occupying the residential premises, has intentionally or recklessly caused or permitted:

(a) serious damage to the residential premises or any neighbouring property (including any property available for use by the tenant in common with others), or

(b) injury to the landlord, the landlord's agent, an employee or contractor of the landlord or the landlord's agent, or an occupier or person on neighbouring property or premises used in common with the tenant.

(2) The termination order may specify that the order for possession takes effect immediately.

(3) A landlord may make an application under this section without giving the tenant a termination notice.

(4) The Tribunal may make a termination order under this section that takes effect before the end of the fixed term if the residential tenancy agreement is a fixed term agreement.

(5) In this section:

neighbouring property means:

(a) property adjoining or adjacent to the residential premises, or

(b) property owned by the landlord in the general locality of the residential premises.

15 Section 64 of the NCAT Act provides:

64 Tribunal may restrict disclosures concerning proceedings

(1) If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders:

(a) an order prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),

(b) an order prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal,

(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,

(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.

(2) The Tribunal cannot make an order under this section that is inconsistent with section 65.

(3) The Tribunal may from time to time vary or revoke an order made under subsection (1).

(4) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.

16 Section 128 of the *Evidence Act* 1995 provides:

128 Privilege in respect of self-incrimination in other proceedings

(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(b) is liable to a civil penalty.

(2) The court must determine whether or not there are reasonable grounds for the objection.

(3) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the evidence, and is to inform the witness:

(a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and

(b) that the court will give a certificate under this section if:

(i) the witness willingly gives the evidence without being required to do so under subsection (4), or

(ii) the witness gives the evidence after being required to do so under subsection (4), and

(c) of the effect of such a certificate.

(4) The court may require the witness to give the evidence if the court is satisfied that:

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The court is also to cause a witness to be given a certificate under this section if:

(a) the objection has been overruled, and

(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:

(a) evidence given by a person in respect of which a certificate under this section has been given, and

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Note.
This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an “Australian Court” instead of a “NSW court”.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

> (9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.
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> (10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
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> > (a) did an act the doing of which is a fact in issue, or
> >
> > (b) had a state of mind the existence of which is a fact in issue.
>
> (11) A reference in this section to doing an act includes a reference to failing to act.
>
> (12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

Consideration

17 In *Franken v NSW Land & Housing Corporation* [2016] NSWCATAP 154 the Appeal Panel considered the principles stated by Wootten J in *McMahon v Gould*, and summarised the approach to be adopted in the following terms:

> 74As is clear from the above, there is no universal right of a respondent to have civil proceedings postponed until after the hearing of criminal proceedings. To the contrary, the obligation is upon a respondent in the civil proceedings to show "it is just and convenient that the (applicant's) ordinary rights should be interfered with". As to the "right to silence", a respondent to civil proceedings must show there is a "real and not merely notional danger of injustice in the criminal proceedings". In this regard the High Court said in *Zhao* at [35]:
>
> > Courts will not grant a stay of civil proceedings merely because related charges have been brought against a person and criminal proceedings are pending. More is required. To warrant a stay of the forfeiture proceedings, it must be apparent that the person whose property is in question is at risk of prejudice in the conduct of his or her defence in the criminal trial.

18 In considering whether there is a real and not merely notional danger of injustice in the criminal proceedings if these proceedings are not adjourned, it is relevant that the criminal proceedings against Ms Martin arise out of the same incident as is the focus of the landlord's application under s 90 of the RT Act. In that respect this matter is similar to that in *NSW Land & Housing Corporation v Byrne* [2016] NSWCATCD, a decision of Senior Member

Meadows relied upon in the first application for an adjournment. On the basis of the allegations made in the application, for the landlord to succeed in obtaining a termination of the tenancy it would rely on the same evidence as that to be alleged in the criminal proceedings. The witnesses proposed to be called by the landlord in these proceedings include three police officers who attended on the night of the incident, and the two neighbours, and those witnesses would presumably be called in the prosecution.

19 I agree with the respo0ndent's submission that in the context where the issues are substantially the same and there is commonality of witnesses, there is the risk that in defending the termination proceedings Ms Martin could expose or telegraph her defence to the prosecution in the criminal proceedings. That would result in the prosecution being advantaged in a manner which would fundamentally alter its position vis-à-vis Ms Martin, as noted in *Zhao* at [17].

20 The landlord submits that an order under s 64 of the NCAT Act would protect Ms Martin's right to non-incrimination. I do not accept that s 64 would protect the rights of Ms Martin, for the reasons given by SM Meadows in *NSW Land & Housing v Byrne* at [34]:

> …That order does not, or would not, make the evidence given by the respondent inadmissible in the criminal proceedings. The section does not suggest that result in terms. As the respondent points out in her submissions, the term "publish" is not defined in the CAT Act and it is not at all clear that it would include the giving of evidence in a criminal trial. Nor is it clear that an application could not be brought by the prosecution seeking an amendment or revocation of a non-publication order by the presiding judge or another judicial officer. The purpose of the section is simply to prevent non-parties obtaining access to the material the subject of such an order. Should that material be made available to the prosecuting authority (for example by anonymous delivery), it does not seem to me that the prosecution would be prevented from relying on that material in the criminal proceedings or by using it to obtain other material, so-called indirect evidence for example.

21 The landlord submits that unlike the position in *Zhao* the applicant in these proceedings is not the prosecuting authority. Ms Martin relies in response on the practice of exchange of information between the landlord and NSW Police pursuant to a Memorandum of Understanding. Whether or not evidence or

information obtained in the course of the present proceedings falls within the scope of the Memorandum of Understanding, I am satisfied that at a practical level the evidence once given would be known to at least the likely prosecution witnesses, if not formally to the prosecuting authority.

22 The Tribunal Member hearing the landlord's application could, if the requirements of s 128 were met, grant a certificate under s 128 of the *Evidence Act* 1995, which applies to these proceedings by virtue of s 38(3)(b) of the NCAT Act. That would depend on how the evidence arose in the course of the hearing of the Tribunal proceedings, whether in cross examination or evidence in chief, and also on the actions of the parties and the Tribunal at the time. A certificate under s 128 would limit the use to which the evidence to which it applied could be put (s 128(7)). However the grant of a certificate would not necessarily limit the uses to which a prosecutor may be able to put that evidence in preparing the prosecution itself, and in anticipating possible defences that might be raised. As was the case in *NSW Land & Housing v Byrne*, I am satisfied that at least potentially a s 128 certificate could not provide in the circumstances of these proceedings appropriate protection of Ms Martin's rights.

23 In the hearing and determination of the termination proceedings all the relevant evidence would be considered, in the application of the relevant provisions of the RT Act including s 154E of that Act. On the basis of the limited evidence before me, I accept that Ms Martin would face difficulties if the termination proceedings are determined before the criminal charges are dealt with. In particular, in her statutory declaration of 14 August 2017 Ms Martin expresses the belief that if evicted she would not be able to receive social housing assistance and may have to be separated from her three youngest children and her 22 year old son who has an intellectual disability. While she has legal assistance, she would still be required to prepare for and defend both proceedings.

24 The effect on the landlord must be considered and weighed against the effect on Ms Martin. The landlord submits that the allegations against Ms Martin

relate to serious matters that have significant, ongoing effect on neighbours of the premises, and that Ms Martin has a lengthy history of antisocial behaviour. The Neighbourhood Impact Statement (NIS) relied upon by the landlord to support that submission was prepared in June 2017, and notes that there is on Ms Martin's client file a history of antisocial behaviour dating back to 2005, and previous orders to abide by the terms of the residential tenancy agreement; and that there are many applicants on the waiting list for the accommodation provided in the residential premises. Ms Martin acknowledges in her statutory declaration that there have been problems between the neighbours, and comments that the issues raised in the NIS pre-date January 2015. She states she is up to date with rent, and there have been no notices for breach of the tenancy agreement since orders made by the Tribunal in January 2015. On balance, and without diminishing the seriousness of the matters that are the basis of both proceedings, in circumstances where the landlord has not provided evidence of any incidents or issues since the February 2017 incident I am not persuaded that the its obligations to other tenants and applicants for housing would outweigh the potential impact on Ms Martin and her children should the termination proceedings be heard before the criminal proceedings, so as to require that they be heard first.

Conclusion

25 Ms Martin is not entitled as of right to have the termination proceedings stayed because of the pending criminal proceedings. As submitted by the landlord, there is no reason why the Tribunal cannot take into account evidence and make findings on matters indicating criminal conduct, acknowledging the different evidentiary requirements and lesser standard of proof: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352. The issue is whether there is a real not merely notional danger of injustice in the criminal proceedings, in which Ms Martin would be entitled to her right to silence, if the termination proceedings are heard and determined first. Having considered the relevant factors as identified by the parties by reference to the principles in *McMahon v Gould*, on

balance I am satisfied that there is such a danger. I am also satisfied that in the particular context of these proceedings, an order under s 64 of the NCAT Act, and possibly s 128 of the *Evidence* Act, is unlikely to provide adequate protection of Ms Martin's rights. The appropriate course is to adjourn these proceedings until the criminal proceedings against Ms Martin are concluded.

26 The orders of the Tribunal are:

(1) These proceedings are adjourned until the criminal proceedings against Ms Martin are concluded.

(2) The proceedings may be resumed by written advice from NSW Land & Housing Corporation that the matter be listed for directions.

(signed)

L Pearson
Principal Member
Civil and Administrative Tribunal of NSW

15 November 2017

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