Civil and Administrative Tribunal

New South Wales

Case Name:	Davenport v The Owners – Strata Plan 536; The Owners – Strata Plan 536 v Davenport (No 2)
Medium Neutral Citation:	[2019] NSWCATAP 55
Hearing Date(s):	On the papers
Date of Orders:	13 March 2019
Decision Date:	13 March 2019
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member J Kearney, Senior Member
Decision:	(1) A hearing is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act, 2013. (2) The applications for costs are dismissed.
Catchwords:	COSTS – s 60 Civil and Administrative Tribunal Act, 2013 – special circumstances – new evidence first produced on appeal – no conduct of parties responsible for failure to provide evidence at original hearing – parties raising irrelevant and unnecessary issues.
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 (NSW) Strata Schemes Management Act, 2015 (NSW)
Cases Cited:	Davenport v The Owners – Strata Plan 536;; The Owners – Strata Plan 536 v Davenport [2018] NSWCATAP 301 The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256 Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120 Miwa Pty Ltd v Siantan Properties Pty Ltd (No. 2) [2011] NSWCA 344

Texts Cited:	Nil
Category:	Costs
Parties:	In appeal AP18/08518 Carolyn Anne Davenport (Appellant) The Owners – Strata Plan 536 (Respondent) In appeal AP 18/22843 The Owners – Strata Plan 536 (Appellant) Carolyn Anne Davenport Respondent)
Representation:	In appeal AP 18/08518 Counsel H Durham (Appellant) T Hollo (Respondent) Solicitors: Philip Davenport (Appellant) In appeal AP 18/22843 Counsel: T Hollo (Appellant) H Durham (Respondent) Solicitors: Philip Davenport (Respondent)
File Number(s):	AP18/08518, AP18/22843
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	24 January 2018
Before:	G Meadows, Senior Member

File Number(s): SC 17/14533, SC 17/24903

REASONS FOR DECISION

Introduction

1 These two appeals are in respect of proceedings under the Strata Schemes Management Act, 2015, being proceedings SC 17/14533 and SC 17/24903. They concern a dispute between The Owners – Strata Plan No. 536 and Ms Davenport about a balcony built on common property accessible from Lot 1, which Ms Davenport owned.

2 As there were two appeals, it is convenient to refer to the parties as Ms Davenport and the Owners Corporation.

3 On 19 December 2018 we published a decision allowing an appeal by Ms Davenport against orders made by the Tribunal, which orders permitted the Owners Corporation to demolish the balcony rather than to carry out repairs.

4 We set aside those orders and made orders requiring the Owners Corporation to carry out work to repair the balcony. We also made an order to invalidate a resolution passed by the Owners Corporation on 13 September 2016 to remove the balcony and make good the building in accordance with its general appearance.

5 We published reasons for our decision: *Davenport v The Owners – Strata Plan 536;; The Owners – Strata Plan 536 v Davenport* [2018] NSWCATAP 30 (Principal Reasons).

6 In addition, on 19 December 2018 we made orders permitting either party to apply for costs. In doing so we made directions for the filing and service of any submissions by each of the parties

7 Ms Davenport subsequently applied for the following orders:

(1) That the Owners Corporation pay Ms Davenport's costs of appeals AP 18/08518 and AP 18/22843 and the costs of the proceedings below, namely SC 17/14533 and SC 17/24903, as agreed or assessed.

(2) That those costs be payable on an indemnity basis.

(3) That pursuant to s 90(2) of the *Strata Schemes Management Act, 2015 (NSW)* (Management Act), the cost payable by the Owners Corporation under the above orders be paid from contributions levied solely against lots other than Lot 1.

(4) That, in accordance with s 104 of the Management Act, the Owners Corporation not levy Ms Davenport for any contribution towards the costs and expenses in any of the proceedings referred to above.

Consideration

8 The parties filed written submissions as to their respective positions.

9 Ms Davenport raised 16 matters which she said constituted special circumstances (see para 7(a)-(p) of her submissions in chief). We will return to these matters below. However, we do not propose to set out all the submissions in detail.

10 The Owners Corporation opposed the making of an order for costs. The principal reason for doing so was that the significant new evidence admitted by the Appeal Panel on day 2 of the hearing of the appeal, namely that the balcony had in fact been approved by the Woollahra Municipal Council (Counsel), was the primary reason for the Appeal Panel determining to set aside the orders of the Tribunal at first instance. There was no responsibility which could be attributed to the Owners Corporation in connection with the failure of the relevant documentation to be produced by the Council. Consequently, the position adopted by the Owners Corporation was reasonable. Further, in the absence of approval of the construction of the balcony by the Owners Corporation and/or the Council, the Owners Corporation was entitled to demolish the balcony and reinstate the common property to its original condition. In this regard the Owners Corporation relied on the Principal Reasons at [63].

11 Ms Davenport filed submissions in reply. Also filed with those submissions was an affidavit from Mr Davenport, the solicitor for Ms Davenport, setting out various matters of history in the dispute between the parties, including what had occurred in connection with levies to carry out works to the balcony, meetings of the Owners Corporation and the asserted wrongful exclusion of Ms Davenport from participating in those meetings. These matters were said to

support the finding of relevant special circumstances and/or justify the making of an order for costs.

12 Neither party opposes the issue of costs being dealt with on the papers, without a hearing. Accordingly, we should also make an order dispensing with a hearing pursuant to s 50(2) of the NCAT Act.

13 Both parties agree that costs in relation to the proceedings at first instance are to be determined in accordance with the provisions of s 60 of the NCAT Act. Rule 38 of the Civil and Administrative Tribunal Rules, 2014 (NSW) does not apply to the proceedings at first instance as there is no amount claimed or in dispute: see *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256. Consequently, that rule cannot apply to the proceedings on appeal: see r 38A.

14 Section 60(1) provides that each party is to pay their own costs. However, s 60(2) provides the Tribunal may make an order for costs if satisfied there are special circumstances warranting such an order. Special circumstances means circumstances out of the ordinary, but not necessarily extraordinary or exceptional: see *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]. Factors relevant to a determination of whether special circumstances exist are set out in s 60(3) of the NCAT Act.

15 At [31] - [32] of the Principle Reasons we said:

> 31. The real issues in dispute, that need to be determined in order to resolve this appeal, are the following:
>
> (1) Was the balcony an illegal structure and does it form part of the common property of the strata scheme?
>
> (2) If it is common property, was the respondent obliged to repair the structure at its cost?
>
> (3) Is resolution 11 validly passed, thereby enabling the respondent to demolish the balcony and reinstate the premises to that which existed at the time the strata plan was registered under the 1961 Act or in some other configuration of the building?
>
> 32 In resolving these issues, there is a preliminary matter that needs to be determined, namely whether the appellant should be given leave to adduce fresh evidence in the form of the documents produced by the Council concerning construction of the balcony. It is also convenient to first deal with the issue of the respondent's general obligations under the 2015 Management Act to repair and maintain, in order to put in context the relevance of the issue of illegality.

16 We determined that the new evidence should be allowed, because it was not evidence reasonably available at the time the proceedings under appeal were dealt with: Principal Reasons at [46]-[63]. We did so because we formed the view that the production by Council was insufficient (at [59]) and that while Mr Davenport (on behalf of Ms Davenport) had subsequently made enquiries which identified the possible existence of the material, the failure to produce could not be properly attributed to any conduct by Ms Davenport.

17 As made clear in our reasons at [64] and following, this new evidence significantly altered the factual matrix in which the issue of approval was to be determined, particularly having regard to the fact that no records were available of the Owners Corporation dating back to 1966, being the time at which we found a building application seeking Council approval to build the balcony was submitted by Ms Fine, the then joint owner of Lot 1: Principal Reasons at [79].

18 A consideration of these matters was essential to the resolution of the appeals. If the balcony had not been approved, as we indicated at [35]-[45], it was reasonably clear on existing authorities that the Owners Corporation would have been entitled to pass an ordinary resolution to demolish the balcony and reinstate it. On the other hand, if originally approved and the Owners Corporation did not wish to repair the balcony, an examination of resolution 11 was necessary to determine its validity. This is because a special resolution complying with s 106 of the Management Act was required to permit its subsequent demolition rather than repair: Principal Reasons at [145]-[172]. Again, as we pointed out in the reasons, there were existing authorities dealing with how this issue should be resolved.

19 The only feature of these facts that might be considered out of the ordinary was that the new evidence only came to light on day 2 of the appeal which had originally been fixed for 1/2 day only.

20 Ms Davenport contends that the Owners Corporation “waited almost 50 years before taking any action in respect of the balcony”, that they resolved to demolish the balcony despite legal advice to the contrary and did so in circumstances where they did not know or did not make enquiries about whether Council had approved the original construction.

21 She submits that the assertion by the Owners Corporation that its resolution to demolish the balcony did not operate oppressively against her had no tenable basis in fact or law and that it demonstrates the owners Corporation "contumelious disregard for a fundamental and significant right, namely Ms Davenport's equitable proprietary interest in the balcony".

22 We do not accept these submissions. The use of florid language does not enhance the submission and distracts from the real issue to be considered.

23 As is evident from the history of ownership, in the early days of the strata scheme all lots were owned jointly. The records of what occurred in general meeting of the then body corporate during this time are unavailable. It is now clear the balcony has been in existence since the 1960s, when its construction was approved by Council following an application by Ms Fine. However, it is clear these matters were not known at the time the balcony fell into disrepair. Indeed, the uncertainty of when the balcony was constructed and whether it was approved was recognised by both parties in the original proceedings and in these appeal proceedings up until the new evidence was located.

24 It is hardly remarkable that the Owners Corporation would not take steps to demolish an existing structure until it fell into a state of disrepair and/or was thought to represent a hazard. However, once the state of disrepair came to light, it was quite usual for the Owners Corporation to determine what obligations it had in respect of the balcony and to take action through general meeting, whether to repair the balcony or otherwise. It appears to have done so on the then known facts and in the absence of available records of the strata scheme relating back to the 1960s concluded the structure was illegal. It appears to have made a decision to demolish the balcony based on the differential cost of repair versus removal and reinstatement.

25 A dispute arose about these matters. Again it is unremarkable that the owner of Lot 1, who had bought the property on the assumption she had existing rights to use the common property (even in the absence of a special bylaw), would assert it was appropriate to repair and not demolish the structure. These are exactly the sorts of disputes which the Management Act permits the Tribunal to

determine and which the NCAT Act, by s 60, says is to occur in circumstances where each party is to pay their own costs.

26 To suggest that the position of the Owners Corporation was in these circumstances untenable has no merit. The findings made by the Tribunal in the proceedings at first instance, on the evidence then available, themselves support a conclusion the position adopted by the Owners Corporation was a tenable position. These findings were overturned by us because of the new evidence, which was not provided by the appellant until after day 1 of the appeal hearing, many months after the proceedings at first instance were heard and determined and after the hearing of the appeal proceedings was commenced, on day 2.

27 Ms Davenport submits that the claim by the Owners Corporation in its application could never have succeeded in any event. That claim related to Ms Davenport being retrospectively authorised to erect the balcony and to be responsible for its maintenance and insurance.

28 The issue of whether such an order could be made was unnecessary to resolve in the appeals. Properly understood, it can be seen as an application to require Ms Davenport, as the owner of Lot 1, to obtain approval for an unauthorised structure and to be responsible for its ongoing repair and maintenance. It is an order that was sought in the alternative to an order for demolition. It was an order sought on the assumption that the balcony had not originally been approved by the Owners Corporation (or the earlier body corporate) and/or the Council.

29 It is inappropriate for us to make rulings on a hypothetical basis about whether or not such an application could have succeeded. Suffice to say, if we had formed the view that the balcony had not been approved, the alternative remedy founding proposed order 3 of the original application, namely an order permitting the removal of the balcony was an order which could have been made. It follows that we do not accept the application filed by the Owners Corporation was, in these circumstances, untenable.

30 The next issue raised by Ms Davenport is the need for various interlocutory applications and the failure of the Owners Corporation to withhold taking any

action in connection with demolition of the balcony pending hearing of the original applications. It would appear from the submissions we received no costs orders were made in favour of Ms Davenport in relation to these interlocutory applications.

31 We have not been provided with submissions concerning what occurred at this time. However, if any order for costs was made when these applications were dealt with by the Tribunal at first instance, the orders we have made do not affect such costs orders.

32 In this regard, it has come to our attention that order 3 made on 19 December 2018 in these appeals does not identify the particular orders which we set aside, namely those orders made by the Tribunal on 24 January 2018. Accordingly, order 3 should be amended under s 63 of the NCAT Act to correct this error. Order 3 should read as follows:

> 3. The orders made on 24 January 2018 in applications SC 17/14533 and SC 17/24903 a set aside.

33 To the extent the Tribunal did not make any costs order at the time the interlocutory applications were made, it is inappropriate for us to do so now in the absence of relevant information concerning the interlocutory applications, including the evidence file and what occurred at any hearing.

34 Further, and in any event, on the material we do have there was clearly competing views about the need to carry out repairs on an urgent basis due to the state of the balcony as asserted by the Owners Corporation and a contention by Ms Davenport that it was appropriate for the status quo to be maintained pending a hearing of the appeal. Such steps are an ordinary incident of disputes under the Management Act. The fact that such interlocutory applications might be settled is not an indicator of circumstances that might make the present case out of the ordinary. Certainly the photographic material we were provided with during the course of the hearing shows the presence of scaffolding and other propping of the balcony and there was expert evidence in the appeal bundle concerning the defects of the balcony which suggested that some remedial action was required to make safe the balcony, at least on a short-term basis.

35 Consequently, we do not accept there are special circumstances justifying the making of an order for costs in respect of the interlocutory applications.

36 In relation to general complexity and the need for legal representation, the appeals were ultimately resolved on a question of fact determined in consequence of the provision of new evidence. This issue of fact was resolved against the Owners Corporation. However, this does not make the proceedings out of the ordinary.

37 The fact legal representation was granted is not, of itself, a matter constituting special circumstances or warranting the making of an order for costs.

38 Consequently, we are not satisfied an order for costs should be made on this basis.

39 The last issue to deal with is the offers of compromise. Two offers are relied upon.

40 The first is an offer "renewed" in a letter sent around 17 June 2017, contained in Vol 1 p 168 of the bundle of documents, which offer was said to have remained open and was never withdrawn. In that letter, Ms Davenport offered to agree to a special by-law on terms that the Owners Corporation repair the balcony and she be responsible for ongoing repairs and maintenance thereafter. The second was open offer was made at the hearing on 17 April 2018. Inter alia, the offer was that Ms Davenport contributes $50,000 to repair the balcony.

41 Ms Davenport says that the failure to accept either of these offers and the fact that the Owners Corporation "are now worse off" constitute special circumstances warranting an award for costs.

42 We do not accept this submission. The offers were made prior to discovery and presentation of the new evidence. In these circumstances we are not satisfied the conduct in failing to accept any of these offers was unreasonable: *Miwa Pty Ltd v Siantan Properties Pty Ltd (No. 2)* [2011] NSWCA 344 at [8].

43 It is regrettable that the documents ultimately produced by the Council did not come to light at a much earlier time in the proceedings. This was no fault of either party. However, having regard to the position in s 60(1) that "Each party

to proceedings in the Tribunal is to pay the party's own costs" we are not satisfied special circumstances have been established which would warrant the making of an order for costs.

Orders

44 The Appeal Panel makes the following orders:

(1) A hearing is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act, 2013.

(2) The applications for costs are dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar