



Civil and Administrative Tribunal
New South Wales

Case Name: Dehsabzi v The Owners – Strata Plan No. 83556

Medium Neutral Citation: [2019] NSWCATAP 65

Hearing Date(s): 20 March 2019

Date of Orders: 25 March 2019

Decision Date: 25 March 2019

Jurisdiction: Appeal Panel

Before: T Simon, Principal Member
D Goldstein, Senior Member

Decision: (1) A hearing on costs is dispensed with under s 50(2) of the Civil and Administrative Tribunal Act 2013.

(2) The application by The Owners - Strata Plan No. 83556 for an order that Pamir Gulyar Dehsabzi pay its costs of the appeal is dismissed.

(3) Each party is to pay his and its own costs of the appeal.

Catchwords: COSTS - appeal withdrawn - whether special circumstances exist for an award of costs

Legislation Cited: Civil and Administrative Tribunal Act 2013
Strata Schemes Management Act 2015 (NSW)
Civil and Administrative Tribunal Rules

Cases Cited: Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 68
Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia Ex Parte Lai Qin Durrant t/a Canberra Sheds and Outdoor Storage v Bliss [2018] NSWCATAP 43
Pines Resort Management Pty Ltd t/as Gateway

Lifestyle the Pines v Marsh [2019] NSWCATAP 12
Guo v Tejani [2019] NSWCATAP 50

Texts Cited: None cited

Category: Costs

Parties: Pamir Gulyar Dehsabzi (Appellant)
The Owners – Strata Plan No. 83556 (Respondent)

Representation: Solicitors:
G Pickering (Appellant)
K Kanjian (Respondent)

File Number(s): AP 18/53659

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Date of Decision: 3 December 2018

Before: D Robertson, Senior Member

File Number(s): SC 18/23902

REASONS FOR DECISION

1 The appellant appealed a decision of the Tribunal made on 22 November 2018. The appellant had been seeking an order pursuant to s232 of the *Strata Schemes Management Act 2015 (NSW)* that the Owners Corporation consent to his application for a complying development certificate so that he could use his lot for the operation of a pizza restaurant. That application was dismissed and the appellant was also ordered to pay the respondent's costs. The appellant appealed the decision of the Tribunal on 18 December 2018 and subsequently sent an email on 28 February 2019 to the Appeal Panel seeking to withdraw the appeal. The Appeal Panel dismissed the appeal on 12 March 2019 and made directions in relation to costs.

- 2 The Appeal Panel has received the following submissions and documents on costs from the parties.
- (a) Submissions on costs from the respondent received on 13 March 2019;
 - (b) Submissions and documents on costs from the appellant dated 18 March 2019; and
 - (c) Submissions in reply from the respondent dated 19 March 2019.
- 3 In its written submissions received on 13 March 2019 the respondent stated that in light of the withdrawal of the appeal it is entitled to an award of costs on the ordinary basis. The appellant submits that no order as to costs should be made by the Appeal Panel.
- 4 Section 50 of the *Civil and Administrative Tribunal Act (NSW) 2013* ('NCAT Act') relevantly provides:
- '50 When hearings are required
- (1) A hearing is required for proceedings in the Tribunal except:
 - ...
 - (c) if the Tribunal makes an order under this section dispensing with a hearing, or
 - ...
 - (2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.
 - (3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first:
 - (a) afforded the parties an opportunity to make submissions about the proposed order, and
 - (b) taken any such submissions into account.
 - (4) The Tribunal may determine proceedings in which a hearing is not required based on the written submissions or any other documents or material that have been lodged with or provided to the Tribunal in accordance with the requirements of this Act, enabling legislation and the procedural rules.'
- 5 The appeal directions made on 12 March 2019 allowed the parties to make submissions as to any objections to the costs application being decided on the papers. The parties have had an opportunity to make submissions about the proposed order. The respondent in its submissions in chief consented to the decision being made on the papers. There are no other submissions from the

parties on this point. The parties failed to appear at the hearing on 20 March 2019. From that, we infer that the appellant consented to the decision being made on the papers.

- 6 The Tribunal is satisfied that the issue of costs can be adequately determined in the absence of the parties by considering their written submission and that the parties have consented to this course.
- 7 In an appeal, s38A of the NCAT Act sets out that "*first instance costs provisions*" apply to an appeal. Section 60 of NCAT Act requires parties to pay their own costs unless the Tribunal is satisfied that special circumstances warrant an award of costs. Rule 38 (2) of the *Civil and Administrative Tribunal Rules*, dispenses with the threshold test of "special circumstances" imposed by s60(2) of the NCAT Act and does not apply where the amount claimed or in dispute in the proceedings is in excess of \$30,000.
- 8 Neither party disputes that the amount in dispute in the appeal was less than \$30,000. Costs in the initial proceedings were also determined on the basis that the amount in dispute was not more than \$30,000. The Appeal Panel may only award costs in "special circumstances" as set out in s60(3) of the NCAT Act.
- 9 In *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 68 the Appeal Panel found at [11] that "special circumstances" are "circumstances that that are out of the ordinary" but the circumstances do not have to be "extraordinary or exceptional".
- 10 The respondent makes submissions that as was found by the Senior Member in connection with the first instance proceedings, the Appeal proceedings were "particularly complex" and required the assistance of legal representatives for preparation and presentation of the case. It also submits that the appeal was made to secure a commercial and strategic advantage for the appellant and it was put to significant expense to defend the appeal. As a result the respondent briefed Counsel at an early stage. The submissions state that the respondent was required unnecessarily to do work and incur costs to meet the appeal, and that was wasted effort and expenditure.

- 11 The respondent also submits that these proceedings first came for directions before the Appeal Panel on 15 January 2019 when directions were made for the exchange of documents. The appellant was required to provide his documents by 12 February 2019. He did not comply with the relevant directions and instead later proceeded to withdraw the appeal.
- 12 It is our view that in the circumstances referred to, it could not be said that the respondent been put to any great lengths to respond to the documents filed by the appellant, namely his Notice of Appeal. The respondent filed a Reply to Appeal on 23 January. However, the substance of that reply is very brief.
- 13 The respondent also makes submissions that by abandoning the appeal the appellant has accepted the correctness of the Tribunal decision. We reject that submission.
- 14 It is not appropriate for the Appeal Panel to embark upon a determination of the substantive issues in an appeal which has been withdrawn for the purpose of determining costs. When a matter has been decided without a hearing and there has been no hearing on the merits, the factor that usually determines costs, being the success of one of the parties, is absent. In [1997] HCA 6 [*Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia Ex Parte Lai Qin* ('Lai Qin'), McHugh J described circumstances in which the discretion to make a costs order may be exercised in the absence of a hearing on the merits. One circumstance described by McHugh J is where one of the parties has acted so unreasonably that the other party should be awarded costs [at 624]. Another circumstance described is where although both parties have acted reasonably, "one party was almost certain to have succeeded if the matter had been fully tried" [at 625]. His Honour goes on to note that "such cases are likely to be rare."
- 15 The appellant submits that the appeal was not withdrawn because he accepted the correctness of the Tribunal decision, rather after the hearing the parties engaged in negotiations and he put to the respondent a "full" development application. The fact that the appellant had not put a "full" application for development had been one of the reasons that the proceedings at first instance had been dismissed. The appellant alleges that the respondent had refused to

consider that request until he withdrew his appeal and agreed to pay the costs of the appeal. The respondent disputes that it has refused to consider the “full” development application on that basis, and submits that it is considering the “full” development application, and that is a separate matter to this appeal.

16 Whatever the case, it is clear in our view that the appellant did not withdraw the appeal because he accepted the correctness of the Tribunal decision; rather it was because other matters had overtaken the practical utility of an appeal that the appeal was withdrawn.

17 We are not satisfied on the material before us that the respondent would have completely succeeded had the appeal proceeded. The appellant has not delayed the proceedings and did not put on submissions for the respondent to respond to. In the Notice of Appeal the appellant set out 6 grounds which he described as errors of law. The errors relied upon are not out of the ordinary.

18 Further as was found in the matter of *Durran t/a Canberra Sheds and Outdoor Storage v Bliss* [2018] NSWCATAP 43 at [49] the fact that costs have “been incurred does not of itself indicate circumstances out of the ordinary. Further, the fact one party has been given leave to be legally represented and has appointed a lawyer does not mean special circumstances are established in the present case.”

19 In *Pines Resort Management Pty Ltd t/as Gateway Lifestyle the Pines v Marsh* [2019] NSWCATAP 12 the Appeal Panel considered a costs application pursuant to s60 of the NCAT Act where an appeal had been withdrawn and dismissed, stating at [18]:

‘As accepted by the respondent, it is generally inappropriate for the Tribunal to embark on a theoretical examination of the appeal to determine questions of costs where the appeal has been withdrawn prior to a final hearing.’

20 In *Guo v Tejani* [2019] NSWCATAP 50 an Appeal Panel considered an application for costs based on s60 of the NCAT Act when the appeal had been withdrawn. The order made was that each party was to pay its own costs in circumstances where there was a lengthy call over, a stay application of some complication, but where the respondent had not filed its Reply. In this Appeal as stated at [12], the respondent’s Reply was very brief.

21 Having considered the respondent's costs application, and the authorities cited, we are not satisfied that special circumstances which are out of the ordinary have been established. It follows that the application for costs should be dismissed.

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

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