Civil and Administrative Tribunal

New South Wales

Case Name:	Gleeson v The Owners – Strata Plan No 48226 (No 2)
Medium Neutral Citation:	[2018] NSWCATAP 268
Hearing Date(s):	On the papers
Date of Orders:	14 November 2018
Decision Date:	14 November 2018
Jurisdiction:	Appeal Panel
Before:	R Titterton, Principal Member G Sarginson, Senior Member
Decision:	(1) A hearing on the issue of costs is dispensed with. (2) The appellants' application for costs is dismissed.
Catchwords:	COSTS – relevant costs rule on appeal where applicants claimed that respondent had unreasonably refused to repeal by-laws – r 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) does not apply – s 60 of the Civil and Administrative Tribunal Act 2013 (NSW) does apply
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Gleeson v The Owners – Strata Plan No 48226 [2018] NSWCATAP 204 Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355 The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256
Texts Cited:	Nil

Category:	Costs
Parties:	Paul Gleeson (First Appellant) Michael Trovato (Second Appellant) Ranjit Kaur (Third Appellant) K Singh (Fourth Appellant) Wing Sze Yeung (Fifth Appellant) Stephanie Messina (Sixth Appellant) Lisa Sutton (Seventh Appellant) Katraina See-Kay Lui (Eighth Appellant) Leonard Pinto Messias (Ninth Appellant) The Owners – Strata Plan No 48226 (Respondent)
Representation:	Solicitors: J S Meuller & Co, Lawyers (All Appellants) Jane Crittenden Lawyer (Respondent)
File Number(s):	AP18/16658
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	13 March 2018
Before:	G Meadows, Senior Member
File Number(s):	SC 17/36625

REASONS FOR DECISION

Summary

1 In our decision of 31 August 2018 (*Gleeson v The Owners – Strata Plan No 48226* [2018] NSWCATAP 204) (the primary decision), we allowed the appeal and remitted the matter to the Consumer and Commercial Division of the Tribunal (the Tribunal) to be determined in accordance with our reasons and otherwise according to law.

2 In the primary decision, we directed the parties to file submissions as to costs, including whether costs could be determined on the papers and without a hearing.

3 For the following reasons, we have decided to dismiss the respondent's application for costs.

Costs of proceedings before the Tribunal

4 In addition to the costs of the appeal, the appellants seek costs in relation to the proceedings before the Tribunal. The appellants submit that, in appeal proceedings, the Appeal Panel is able to award the costs of the proceedings giving rise to the appeal as well as the costs of the appeal itself.

5 In this respect, the appellants rely on *Oshlack v Richmond River Council* [1998] HCA 11 at [97]. In *Oshlack,* McHugh J (with whom Brennan CJ expressly agreed), in the passage relied on, stated (footnote omitted):

> Nor can it make any difference to the existence or application of a "public interest litigation" principle that it is inappropriate in some cases for a public authority to litigate the issue. If the principle exists, it must be applicable in cases where a private person is the contradictor as well as cases where a public authority alone or with a private litigant is successful in the litigation. In the present case, both the Council and the successful private litigant were refused orders for costs. The point is that, if characterisation as "public interest litigation" becomes the foundation of an exception to the usual order as to costs, injustice must result to public authorities or private litigants and sometimes, as in this case, to both. That injustice is aggravated if, as Mr Basten contends, a successful applicant is nevertheless entitled to his or her costs even though the proceedings are characterised as "public interest litigation".

6 We do not accept that passage is authority for the proposition submitted by the appellants.

7 As we understand the position, no application for costs was made in the proceedings before the Tribunal. It follows that there is no costs order for the Appeal Panel to consider. The application for this Appeal Panel to order costs in the Tribunal proceedings is misconceived. That matter may be dealt with when the application is remitted to the Tribunal.

The primary decision

8 We do not propose to repeat our reasons. In summary, while the appellants raised ten grounds of appeal, we found it necessary to deal only with two.

9 The first was the Tribunal erred in finding that the decision and order made by Strata Schemes Adjudicator Thane on 7 March 2006 did not give rise to an issue estoppel or res judicata, either of which operated to preclude the respondent from bringing and maintaining its application before the Tribunal.

10 We decided this issue in favour of the respondent: see pars [12] to [31] and, in particular, pars [21] to [31], of the primary decision.

11 The second ground was that the Tribunal erred by failing into account adequately or at all the appellants' "key" submissions that any refusal by them to the repealing of by-laws 13 and 54 was not unreasonable because:

(1) they paid valuable consideration for acquiring rights of exclusive use and enjoyment of certain car spaces under those two by-laws; and

(2) the respondent did not offer to pay them any compensation in consideration for consenting to the repeal of by-Laws 13 and 54.

12 This issue we resolved in favour of the appellants. At [51] we accepted the appellants' submission that the Tribunal's failure to deal with their key considerations was a denial of procedural fairness and a constructive failure to exercise jurisdiction. At [53] we found that the evidence and submissions of the appellants that:

- lot owners who purchased into the strata scheme after by-laws 13 and 54 were registered had paid valuable consideration for a Lot that included exclusive use of a car parking space;
- the Council had not taken any action, or proposed to take any action, against the owners corporation for breach of the development consent conditions relating to parking; and
- the respondent had not offered to compensate lot owners in respect of the proposed repeal of by-laws 13 and 54,

were clearly pertinent to the mandatory considerations under s 149(2) of the *Strata Schemes Management Act 2015* (NSW), and whether or not the Tribunal should exercise its discretion under s 149(1) of that Act. We found that the reasons of the Tribunal did not reflect a proper consideration of such issues in the statutory context of s 149.

Preliminary matter

13 On 30 October 2018, the Appeal Panel (differently constituted) published reasons for decision in matter AP 18/23049: *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256.

14 Given the matters considered in that decision, we invited further submissions from the parties. The appellant filed submissions on 8 November 2018. In short, the appellants submit that *Malachite* has minimal impact because there are special circumstances which justify the making of a costs order in the appellants' favour which do not rely on that rule.

15 No submissions were received from the respondent in relation to this issue.

Appellants' other submissions on costs

16 The appellants' application for costs is put in two ways.

17 The first basis is that the amount in dispute in the Tribunal was more than $30,000.00, as a result of which rr 38 and 38A of the Civil and Administrative Tribunal Rules 2014 are engaged, and costs should follow the event.

18 The second basis, in the alternative, is that there are special circumstances warranting an award of costs within the meaning of s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) because:

(1) the respondent's defence of the appeal in the Appeal Panel proceedings was untenable as it was clear that Tribunal did not give adequate reasons for his decision as a result of which it was inevitable that the appeal would be successful;

(2) the Tribunal proceedings were complex and the appellants were compelled to obtain legal representation and incur the attendant cost of that representation;

(3) the respondent conducted the Appeal Panel Proceedings in a way that unnecessarily disadvantaged the appellants by serving its Reply to Appeal over three weeks late (on the day before the appellants' evidence and submissions were due) and its submission in the appeal on the night before the hearing of the appeal.

19 The respondent filed no submissions as to costs at all.

Is this a matter where the amount in dispute is more than $30,000.00?

20 The first issue to consider is whether or not this is a matter where the amount in dispute is more than $30,000.00.

21 The appellants contend that the amount in dispute in the Tribunal Proceedings is more than $30,000 within the meaning of r 38 in the NCAT Rules, as that rule was interpreted in *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25. They submit that in that decision the Appeal Panel observed that:

(1) the determinative factor was the amount in dispute in the appeal or the value of the matter at issue in the proceedings;

(2) the inclusion of the words "or in dispute" after "the amount claimed" in r 38 indicates that amounts may be in dispute in proceedings even if there is not a specific claim for an order for payment of an amount in the proceedings; and

(3) whether "the amount in dispute" in an appeal is more than $30,000 depends on whether there is a realistic prospect that in the appeal the wealth of the appellants would be changed by more than $30,000.00.

22 The appellants rely on the application of *Tricare* in decisions including *The Owners Corporation Strata Plan SP63341 v Malachite Holdings Pty Ltd and Anderson*,, Unreported, Senior Member Ross, 23 April 2018, SC 17/12035 and *GS & CS Holdings Pty Ltd v The Owners - Strata Plan No 63227,* Unreported, Senior Member McDonald, 11 April 2018, File No SC 17/09252 and SC 17/25321. In the former case, the Tribunal held that held that r 38 applied to an application to change the unit entitlements among the lots in a strata scheme even though no specific monetary sum was claimed or in dispute in the proceedings. In the latter case, the Tribunal held that r 38 applied to an application by a lot owner to compel an owners corporation to carry out repairs to common property even though no money order was claimed in the proceedings.

23 The appellants submit that r 38 is involved because the central issue in the appeal was the correctness of the order by the Tribunal for the repeal of by-laws 13 and 54, and whether that order should be set aside and the by-laws reinstated on the grounds that the order was attended by error. The appellants submit that by-Laws 13 and 54 granted to each of the appellants a right to the exclusive use and enjoyment of a common property car space, and was a right which:

(1) each of the appellants or their predecessors paid $12,000 to acquire;

(2) the loss of which would adversely impact the market values of the apartments owned by the appellants;

(3) is collectively worth at least $84,000.00, being seven car spaces the right to the exclusive use and enjoyment of each having a value of at least $12,000.00. In this respect the appellants rely on Exhibit "KY1" to the Affidavit of the Fifth Appellant.

24 Therefore, the appellants submit that their success in the appeal resulted in them regaining their right to the exclusive use and enjoyment of the car spaces which right had a collective value of more than $30,000.00, and that the wealth of the appellants would be changed by more than $30,000 depending on the outcome of the appeal.

25 We do not accept the appellants' submission.

26 As noted, the Appeal Panel recently published its decision in *Malachite*. The Appeal Panel considered whether r 38(2)(b) applied in circumstances where no amount was claimed in the proceedings for more than $30,000. Rather, the order sought by the Owners Corporation was that the unit entitlements of the various Lots should be reallocated. As a preliminary matter, the Appeal Panel noted at [72] that *Tricare* was not determinative of the issue, as it was unnecessary for the Appeal Panel to resolve the issue of whether the expression "the amount claimed or in dispute in the proceedings" used in r 38(2)(b) included a reference to a right of possession valued at an amount in excess of $30,000, which might be lost by a tenant or occupant if an order for possession was made against them in favour of an applicant.

27 After referring to *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, the Appeal Panel stated at [87] that the meaning of the rule needed to be considered:

- in the context of the NCAT Act and the fact that r 38 operated as an exception to s 60 of the NCAT Act;
- in light of the enabling legislation by which the Tribunal is given jurisdiction to hear and determine particular disputes.

28 The Appeal Panel further observed at [95] that:

- where there is a claim for relief that may, as a consequence of that relief being granted, result in the loss of a property or other civil right to a value greater than $30,000, it could not be said that there are proceedings in which the amount claimed or the amount in dispute is greater than $30,000 within the meaning of the rule;

- the fact that it was necessary to evaluate evidence about the value of particular property or determine other rights as part of determining whether there is an entitlement to relief does not mean "the amount claimed" or "the amount in dispute" in the proceedings is more than $30,000;
- where the relief sought is not dependent on a finding that a particular amount is payable or not payable, it could not be said that "the amount claimed or in dispute in the proceedings is more than $30,000".

29 The Appeal Panel concluded at [99] that r 38(2)(b):

- operates when "the amount claimed or in dispute" can be identified in the proceedings;
- does not require an exercise in the valuation of the right being affected by the order sought in order to determine whether the costs rule applies or to engage in some collateral evaluative process;
- does not operate because a party raises an issue in proceedings that might be capable of being assigned a monetary value or which might involve the assessment of value as part of determining the relief which is claimed.

30 The Appeal Panel's overall conclusion as to the application of r 38(2)(b) appear at pars [109], [110] and [111]. Relevantly for this appeal, the Appeal Panel stated at [111]:

> Rule 38(2)(b) does not apply to proceedings:
>
> (1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or
>
> (2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:
>
> > (a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or
> >
> > (b) the relief sought does not depend on there being a finding that a specific amount of money is owed.

31 This was a matter where the claim for relief in the proceedings was that a by-law should be made to repeal other by-laws. The claim was not a claim for an order for money to be paid or an order be relieved from paying a specific sum; it was a claim no direct relief was sought and no order could be made in the requiring payment or relief from payment of an amount more than $30,000, or where the relief sought depended on there being a finding that a specific amount of money is owed.

32 Accordingly, we do not accept the appellants' submission that it is entitled to an award of costs by reason of the application of r 38(2)(b).

33 Rule 38 is not applicable.

Are the appellants otherwise entitled to an order for costs pursuant to s 60 of the NCAT Act?

34 We turn now to the appellants' alternative submission that they are entitled to an award of costs pursuant to s 60 of the NCAT Act.

35 We accept the appellants' statement of the general principle, namely that special circumstances means circumstances which are out of the ordinary, but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].

36 Section 60 relevantly provides:

> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:
>
> > (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
> >
> > (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
> >
> > (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
> >
> > (d) the nature and complexity of the proceedings,
> >
> > (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
> >
> > (f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),
> >
> > (g) any other matter that the Tribunal considers relevant.

37 The matters that the appellants rely on each of ss 60(3)(a), (c) and (d) for the following reasons.

38 The appellants rely on s 60(3)(a) by reason of the respondent's delay in delivering its Reply or submissions as ordered. The appellants submit that the respondent's "gross and unexplained delay" meant that they did not know the

respondent's position prior to the appeal hearing. As the Reply was delivered "the night before the hearing", they say that they did not have an adequate opportunity to consider the substantive bases on which the respondent contested the appeal. The appellants say that this resulted in additional expenses.

39 We note these matters, but we are not persuaded that, of themselves, these are special circumstances warranting an award of costs.

40 As to s 60(3)(c), the appellants contend that the respondent's defence of the appeal was untenable and could not possibly succeed, in that it was clear that the Tribunal had not provided adequate reasons for decision.

41 We accept that we made observations in the primary decision about the adequacy of the Tribunal's reasons, and remitted the matter on that basis. But this appeal ground was one of ten grounds of appeal. Considerable time was spent in both written and oral submissions in appeal ground (1), the res judicata / issue estoppel point. For the reasons we explained at [22] to [30] of the primary decision, we considered that the Tribunal was correct to reject the submission that it was prevented from hearing and determining the respondent's application by reason of the doctrine of res judicata or issue estoppel.

42 We are not persuaded that, of themselves, these matters constitute special circumstances warranting an award of costs.

43 As to s 60(3)(d), the appellants submit that the appeal involved "complicated questions of law", and the adequacy of the Tribunal's reasons. They submit that the complexity of the proceedings resulted in the delivery of a Notice of Appeal which raised 10 grounds of appeal and a tender bundle of 400 pages. They also rely on the fact that they were "compelled" to obtain legal representation to ensure its case was adequately presented.

44 We are not persuaded that there is any substance in this submission.

45 Finally, we note that in their submissions of 8 November 2018, the appellants submit that:

(4) There were ten grounds of appeal agitated to which the Appeal panel considered only a few grounds sufficient to dispose of the appeal (point 60 in the decision in AP18/16658). The Appeal Panel therefore deemed it not necessary to consider any of the other grounds which may have concluded proceedings by dismissing the respondent's case as there was no evidence to substantiate the main claim, no case to begin with, rather than remitting the case for a further hearing. The respondents lead senior member into error when it was clear no evidence existed and to which the respondents who bear the burden of proof failed to make good on their claim.

(5) It would be reasonable to assume that the appellants would be financially exhausted by the process and it's unfair for the successful party to have to continue to pay their own costs while continuing to pay the respondents costs through contributions for those costs levied on the Appellants by the respondents.

(6) The matter of the appellants continuing with proper legal representation in such a complex case is now jeopardised due this miscarriage of justice they endured at the fault of the respondents. This ultimately results in the appellants being disadvantaged more now than had this matter being decided correctly at the first hearing.

46 We see nothing in these additional submissions which cause us to consider that costs should be awarded to the appellants.

Conclusion

47 We are not persuaded that, any of the matters relied on by the appellants, either individually or cumulatively constitute special circumstances warranting an award of costs.

48 Accordingly, the application for costs is dismissed.

Orders

(1) A hearing on the issue of costs is dispensed with.

(2) The appellants' application for costs is 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