



Civil and Administrative Tribunal  
New South Wales

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Case Name: Guo v The Owners Strata Plan No 70067 (No 2)

Medium Neutral Citation: [2018] NSWCATAP 303

Hearing Date(s): Submissions by Respondent dated 7 November 2018 and by Appellant dated 5 December 2018. On the papers.

Date of Orders: 19 December 2018

Decision Date: 19 December 2018

Jurisdiction: Appeal Panel

Before: Professor Ian Bailey AM SC, Senior Member  
G Sarginson, Senior Member

Decision: 1.A hearing on costs is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013. In AP 18/25774  
2.The Appellant pay the Respondent's costs of the appeal proceedings on the ordinary basis as agreed or assessed pursuant to the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014. In AP 18/234399  
3.The Appellant pay the Respondent's costs of the appeal proceedings on the ordinary basis as agreed or assessed pursuant to the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014.  
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Catchwords: Appeal – Strata Schemes – Costs of the appeal-special circumstances

Legislation Cited: Civil and Administrative Tribunal Act 2013  
Strata Schemes Management Act 2015

Cases Cited: Walsh v The Owners SP No 10349 [2017] NSWCATP 230  
Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120  
The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256.

Category: Principal judgment

Parties: Zhi Jun Guo Appellant  
The Owners –Strata Plan 70067 Respondent

Representation: Counsel:  
Appellant In Person  
Respondent B Johnson (Solicitor)

Solicitors:  
Appellant Self represented  
Respondent Sachs Gerace Broome

File Number(s): AP 18/25774 and AP 18/234399

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: SC 18/01482

Before: Senior Member L Wilson

File Number(s): SC 18/01482

## **REASONS FOR DECISION**

1 On 2 November 2018 the Appeal Panel made orders in these proceedings:

In AP 18/25774

1. To the extent necessary leave to appeal is refused.
2. Appeal dismissed.

In AP 18/34399

3. Leave to Appeal refused
4. Appeal dismissed
5. Application for Stay refused

In both Appeals

6 Any application for costs of the appeal along with submissions and documentation to be filed in the Tribunal and served on or before 14 days from the date of this decision.

7. Any reply to the costs application including submissions and documentation to be filed in the Tribunal and served on or before 14 days thereafter. The submissions are to address whether the decision on costs may be made on the papers.

- 2 On 9 November 2018 the Respondent filed an Application for Costs dated 7 November 2018 and Submissions in support seeking orders:

1. The Appellant pay the Respondents costs of proceedings numbered AP 18/25774 on the ordinary basis as agreed or assessed.

2. The Appellant pay the Respondents costs of proceedings numbered AP 18/34399 on the ordinary basis as agreed or assessed.

- 3 On 5 December 2018 the Appellant filed submissions in support of contentions that there are no special circumstances which warrant a costs award and that the application for costs should be dismissed. The terms of the Appellant's submissions seem to recognise that the Appeal Panel may make an order for costs if special circumstances are found to apply.

- 4 The Appeal Panel notes that neither party opposed the decision on costs being made on the papers.

### **Costs - Jurisdiction**

- 5 Rule 38A of the *Civil and Administrative Tribunal Rules 2014* provides:

38A Costs in internal appeals

(1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the *first instance costs provisions*) differed from those set out in section 60 of the Act because of the operation of:

- (a) enabling legislation, or
- (b) the Division Schedule for the Division of the Tribunal concerned, or
- (c) the procedural rules.

(2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

6 Section 60 of the *Civil and Administrative Tribunal Act 2013* provides:

#### 60 COSTS

- (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.
- (4) If costs are to be awarded by the Tribunal, the Tribunal may:
  - (a) determine by whom and to what extent costs are to be paid, and
  - (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014 ) or on any other basis.
- (5) In this section:

"costs" includes:

  - (a) the costs of, or incidental to, proceedings in the Tribunal, and
  - (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

7 These provisions permit the Tribunal, or the Appeal Panel, to make an order for costs if there are shown to be special circumstances which warrant an award of costs.

8 The principles applicable to whether or not "special circumstances" exist to warrant an order for costs are well established. The authorities are consistent in stating that "special circumstances" are circumstances that are out of the

ordinary; although they do not have to be extraordinary or exceptional circumstances. See *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]; *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 at [117]-[118].

9 The Respondent in its submissions identifies the relevant factors as being firstly those under subsections 60(3)(c) and (e) particularly as to whether the Appellant's claim was untenable in fact or law; or was misconceived and lacking in substance.

10 In the proceedings under appeal the Appellant only sought two declarations as orders. The jurisdiction of the Tribunal to make mere declarations had been addressed in a number of decisions in the Tribunal in particular the Appeal Panel decision in *Walsh v the Owners SP 934* [2017] NSWCATP 230.

11 At [22] the Appeal Panel noted that the Reply to the Appeal stated:

Not only was the Senior Member correct in the Senior Member's interpretation of the powers of the Tribunal, the Senior Member was bound by the Decision of the Appeal Panel in *Walsh v The Owners Strata Plan No 10349* [2017] NSWCATAP 230.

12 At [23] the Appeal Panel stated:

23 The Appeal Panel agrees that the Tribunal was bound by *Walsh*. Further the question as to the powers of the Tribunal to make declarations concerning rights under the SSMA was considered by the Supreme Court in *EB 9 & 10 Pty Ltd v The Owners SP 934* [2018] NSWSC 464 in which Kunc J at [41] stated:

First, it was submitted that the Court should take into account that when a specific proposal was to be acted upon by the defendant, the plaintiff would have the full panoply of rights afforded to it in NCAT (see Part 12 of the *Management Act*). The answer to this is that NCAT does not have the power to make declarations: see *Walsh v Owners Corporation SP No 10349* [2017] NSWCATAP 230 at [60]. The defendant did not suggest otherwise. A party in the position of the plaintiff is entitled to approach this Court to seek to persuade it that a declaration of right is the appropriate relief.

13 The Appeal Panel has no difficulty in concluding that the Appeal had no prospects of success. The Appellant in his submissions on costs seems to maintain the position that by some means the issues in the appeal were reasonably arguable. It might be said that the Appellant has a strong belief that there was a means by which the challenge to *Walsh* could be expressed on

some apparently tenable legal basis, however the basis of the challenge as crafted by the Appellant is simply without legal substance.

- 14 The Respondent also relies upon the factor in subsection 60(3)(d) as to the nature and complexity of the proceedings. The Appeal Panel at [1] described the proceedings as being “unnecessarily complicated”. The mere fact that the Appellant wrapped the proceedings and the appeal with a multitude of words and a plethora of pages does not justify the contention that there was any legal substance in the original proceedings and in the appeal. The Appellant’s submissions on costs are unfortunately based on the same fundamental misconceptions upon which the initial application and appeal were based.
- 15 The obvious and clear position from the outset was that the Tribunal did not have jurisdiction to make orders in the form of mere declarations. The strategy of the Appellant was clearly focussed on achieving some perceived advantage in the pursuit of relief under section 104 of the *Strata Schemes Management Act 2015* against the Respondent. The avenue down which the Appellant proceeded was however not paved with any jurisdictional foundation.
- 16 The Appeal Panel concludes that the pursuit by the Appellant of the original application and the appeal on the basis of obvious misconceptions and a clear lack of legal substance constitutes special circumstances.
- 17 The Respondent also relies upon correspondence from its solicitors to the Appellant dated 13 April 2018 and 6 August 2018 as providing evidence of further special circumstances.
- 18 The letter of 13 April 2018 referred to the Respondent’s submissions at first instance and stated:

As you will see, there is no power for the Tribunal to make the orders that you are seeking. Furthermore, the declarations that you are seeking are not accurate representations of the outcome of the 2017 proceedings. If you withdraw your application in writing to the Tribunal within seven days, our client will not seek a costs order against you in these proceedings. Should you fail to do so, our client reserves its right to tender this letter, and our previous letters to you on this matter, to the Tribunal in support of an application that you be ordered to pay our client’s costs of these proceedings.
- 19 The letter of 6 August 2018 referred to the Respondent’s submissions to the Appeal Panel and included

If you withdraw the appeal within seven days, our client will not seek an order for costs against you in the proceedings. However, if you fail to do so, our client intends to seek an order that you reimburse its costs of the appeal proceedings at the hearing of this matter and will rely upon this letter in support of that application.

- 20 The failure of the Appellant to accept the invitations by the Respondent to agree to the cost-free resolution of the initial proceedings and the Appeal proceedings, in the context of the Appeal Panel's conclusions as to the lack of substance of the Appellant's proceedings, should be recognised as further special circumstances warranting an order for costs. The Appellant was clearly on notice of the lack of substance of the appeals and was given the opportunity to withdraw the appeals without costs ramifications. Despite this, the Appellant chose to proceed with appeal proceedings that had no real prospect of success, for reasons that may be attributable to a misguided subjective belief in the righteousness of his position irrespective of clearly applicable legal principles.

## Orders

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

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In AP 18/25774

2. The Appellant pay the Respondent's costs of the proceedings on the ordinary basis as agreed or assessed pursuant to the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014.

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In AP 18/234399

3. The Appellant pay the Respondent's costs of the proceedings on the ordinary basis as agreed or assessed pursuant to the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014.

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

Registrar

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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