



Civil and Administrative Tribunal
New South Wales

Case Name: Strata 778 Pty Ltd v Enright

Medium Neutral Citation: [2019] NSWCATAP 106

Hearing Date(s): 1 April 2019

Date of Orders: 26 April 2019

Decision Date: 26 April 2019

Jurisdiction: Appeal Panel

Before: T. Simon. Principal Member
G Sarginson. Senior Member

Decision: (1) Leave to amend the appeal is allowed
(2) The appeal is allowed
(3) Order 3 made by the Tribunal in matters COM 17/25689 and COM 17/16207 on 29 November 2018 is set aside and the matter is remitted for reconsideration by the Tribunal as it was originally constituted, to determine the issue of costs, interest and the disbursement of the bond in accordance with these reasons.

Directions for Costs; Payment of Bond; and Interest in the Tribunal

(4) The lessor is to provide to the Tribunal and the lessee, either in person or by post, submissions and documents in relation to the application for costs; payment of the bond; and interest by 10 May 2019.

(5) The lessee is to provide to the Tribunal and the lessor, either in person or by post, submissions and documents in relation to the application for costs; payment of the bond; and interest by 24 May 2019.

(6) The lessor is to provide to the Tribunal and the lessee, either in person or by post, submissions and

documents in relation to the application for costs; payment of the bond; and interest in reply by 7 June 2019.

(7) Parties are to address, in their submissions, whether the hearing on costs; payment of the bond; and interest can be dispensed with under s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) and the matter be heard on the papers. If either party seeks to be heard in person, they should advise the Registry prior to 7 June 2019, setting out the reasons why and the Registry would advise of the outcome in due course.

Note: Submissions are to be limited to no more than 3 pages.

Directions for Costs in the Appeal

(8) The appellant is to provide to the Appeal Panel and the respondent, either in person or by post, submissions and documents in relation to the application for costs in the appeal by 10 May 2019.

(9) The respondent is to provide to the appeal panel and the appellant, either in person or by post, submissions and documents in relation to costs in the appeal by 24 May 2019.

(10) The lessor is to provide to the Tribunal and the lessee, either in person or by post, submissions and documents in relation to the costs in the appeal by 7 June 2019.

(11) The Appeal Panel intends to hear the costs application on the papers and dispense with a hearing under s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) and the matter heard on the papers. If either party seeks to be heard in person, they should advise the Registry prior to 7 June 2019, setting out the reasons why and the Registry would advise of the outcome in due course.

Catchwords:

COSTS – retail lease – adequacy of reasons – special circumstances – procedural fairness

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)

Civil Procedure Act 2005 (NSW)
Retail Lease Act 1994 (NSW)

Cases Cited: Oshlack v Richmond River City Council [1993] HCA 11;
(1998) 193 CLR 72
Thompson v Chapman [2016] NSWCATAP 6
The Owners Corporation Strata Plan No 63341 v
Malachite Holdings Pty Ltd [2018] NSWCATAP 256
Monie v Commonwealth (No 2) NSWCA 15
Prendergast v Western Murray Irrigation Ltd [2014]
NSWCATAP 69
Legend Signage Pty Ltd v Australian Managed Print
Solutions Pty Ltd [2018] NSWCATAP 269
Rockwell Constructions Pty Ltd v Llamas [2018]
NSWCATAP 262

Texts Cited: None cited

Category: Principal judgment

Parties: Strata 778 Pty Ltd (Appellant)
Christian Francis Enright (Respondent)

Representation: Solicitors:
K Kata (Appellant)
S Swan (Respondent)

File Number(s): AP18/54523

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: 29 November 2018

Before: D. Bluth, Senior Member

File Number(s): COM 17/25698 and COM 17/16207

REASONS FOR DECISION

- 1 The appellant appeals a decision of the Tribunal relating to two applications about a retail lease. In this decision reference to “the lessor” is reference to the appellant; and reference to “the lessee” is reference to the respondent.
- 2 An initial application to the Tribunal was made by the lessee on 6 April 2017 for unconscionable conduct. A further application was made by the lessor on 5 June 2017 seeking orders for damages totalling an amount of \$93,343.58 for breach of the lease by the lessee. The lessor had also sought an order for costs, interest and payment of the bond. The amount claimed by the lessor included rent arrears and damages for the lessee’s failure to make good the premises on termination. On 29 November 2018 the Tribunal made orders for a total amount of \$18,381.92 for the outstanding rent and damages and declined to make an order as to costs. No orders were made regarding payment of the bond, or interest. The lessee’s claim was dismissed.
- 3 For the reasons set out below we have allowed the appeal and remitted the matter to the Tribunal as originally constituted to decide the issue of costs, interest and disbursement of the bond.
- 4 The lessor appealed the decision of the Tribunal on 24 December 2018. The appellant was initially appealing in relation to the costs decision. The matter was listed for call over before the Appeal Panel on 17 January 2019. The appellant had sought an amendment to the appeal on 11 January 2019. The amendment also sought orders in relation to the disbursement of the bond being held with the Office of the Small Business Commissioner. No formal leave was granted for the amendment in the directions made by the Appeal Panel on 17 January 2019. However, we accept that the respondent has been on notice since 11 January 2019 about the amendment in relation to the issue of the bond; and we allow leave for the appellant to amend the application. The amendment causes no prejudice or unfairness, because the respondent has been on notice of the issue a considerable period prior to the appeal hearing, and has dealt with the issue in submissions.
- 5 The appellant also made an application for a further amendment of the application on 14 February 2019. That amendment relates to the Tribunal’s

failure to award interest. We shall deal with leave to amend the appeal on that ground below.

- 6 The Appeal Panel received the following submissions and documents relating to the appeal from the parties.
 - (1) 'Notice of Appeal' together with submissions received 24 December 2018;
 - (2) 'Amendment to the Appeal' and affidavit of Nic Kat received 11 January 2019.
 - (3) 'Further Amendment to the Appeal' together with submissions received 14 February 2019.0
 - (4) Reply to Appeal together with submissions received 14 March 2019
 - (5) Appellant's submission in reply received 27 March 2019.
 - (6) On 3 April 2019, after the hearing, the appellant forwarded further submissions to the Appeal Registry. No leave had been granted for the filing of submissions after the hearing and the documents do not disclose on what basis leave should be granted. We have not considered those submissions.
 - (7) The Appeal Panel was also provided with the two initial applications made to the Tribunal by the parties, the directions of the appeal panel and the initial decision of the Tribunal.

Scope and nature of internal appeals

- 7 Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80 (2) *Civil and Administrative Tribunal Act* 2013 (NSW) ('the NCAT Act').
- 8 Failure to correctly apply legal principles and failure to consider a cause of action that was claimed are errors of law that do not require leave: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [14]-[21].
- 9 We are satisfied that the grounds of appeal involve errors of law.
- 10 The appeal has been filed within the relevant time period in r 25 (4) of the NCAT Rules.
- 11 The grounds of appeal involve the issues of:
 - (i) Costs
 - (ii) Payment of the bond
 - (iii) Pre-judgement interest

Costs

- 12 At paragraph 56 of the reasons the Tribunal stated the following in relation to its decision on costs:

Given the nature of this dispute, the efforts on both sides not to deal with the real issues between them, the Tribunal is of the view that the usual provisions will apply as to costs that each party is to bear their own costs.

- 13 The appellant submits that the Tribunal did not relevantly consider r 38 of the *Civil and Administrative Tribunal Rules 2014 (NSW)*, ('the NCAT Rules'). Section 60 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act) requires parties to pay their own costs unless the Tribunal is satisfied that special circumstances warrant an award of costs. However, r 38 (2) of the NCAT Rules dispenses with the threshold test of "special circumstances" imposed by s60(2) of the NCAT Act if the amount claimed or in dispute in the proceedings is in excess of \$30,000 in the Consumer and Commercial Division of the Tribunal

- 14 It can be inferred from the reasons that the Tribunal applied s60(1) of the NCAT Act as that is the usual provision that each party pay their own costs. The respondent did not dispute that r 38 of the NCAT Rules had not been considered by the Tribunal. Instead, the respondent's legal representative made submissions that given the amount ultimately awarded was less than \$30,000, the appellants claim had always been inflated and the ultimate decision on costs was the correct one. We reject that submission. In respect of the claim by the appellant, it sought a specific money order that exceeded the amount of \$30,000 and in those circumstances r 38 of the NCAT Rules applied to its claim irrespective of any dispute as to the merits of the appellant's claims: *The Owners Corporation Strata Plan No 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 at [109]

- 15 r 38 of the NCAT Rules relevantly provides:

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:

....

(b) the amount claimed or in dispute in the proceedings is more than \$30,000.

- 16 In the 'Points of Claim' that were attached to the lessor's application the amount being claimed by the lessor totalled an amount of \$93,343.58. Those amounts claimed were dealt with by the Tribunal in paragraphs 46 to 55 of the reasons for decision. In those circumstances r 38 of the NCAT Rules did apply. It is unclear to us from the reasons for decision or the lessee's application if the amount that was claimed or in dispute in the lessee's application was over \$30,000, but there is no doubt that r 38 of the NCAT Rules applied to the lessor's application in the Tribunal.
- 17 Special circumstances are not required for r 38 of the NCAT Rules and consequently the starting point for the award of costs is "the ordinary rule", being that a successful party is entitled to the costs: see *Oshlack v Richmond River City Council* [1993] HCA 11; (1998) 193 CLR 72 per McHugh J at 97 and *Thompson v Chapman* [2016] NSWCATAP 6 at [69]. However, there may be appropriate reasons to depart from the principle that costs follow the event, such as if there was disentitling conduct by the successful party (*Oshlack* at [40] and [69]) or the successful party failed on issues which were clearly dominant or separable: *Monie v Commonwealth* (No 2) NSWCA 15 at [63]-[66].
- 18 The Appeal Panel is satisfied that the failure of the Tribunal to properly consider and apply r 38 of the NCAT Rules has resulted in an error of law and both applications should be remitted to the Senior Member who heard the matter to be re-considered applying the correct legal principles. It is not appropriate for the Appeal Panel to determine the issue of costs in the proceedings below. The Appeal Panel does not have the benefit of a transcript of evidence, nor did it hear witnesses give evidence. Moreover, both parties agreed that they had not had the opportunity to address the Tribunal on costs after the decision was made in the substantive applications.
- 19 The appropriate course of action is for remittal of the proceedings back to the original presiding Senior Member to re-determine the issue of costs.
- 20 The Appeal Panel will make directions for the exchange of documents and submissions relied on in relation to costs and for the remittal of the matter to consider costs in both applications and in accordance with these reasons. The Tribunal will also need to consider the amount claimed in the lessee's

application and the parties will need to address that matter in their submissions.

- 21 Considering the procedural history of the matter and the scope of the remittal, it may be appropriate for the original Member to determine the issue of costs on the papers in accordance with s 50 (2) of the NCAT Act. We have made directions to facilitate that outcome on remittal, subject to any submissions of the parties to the original Senior Member that they seek to orally be heard on the issue of costs and determination by the original Senior Member that costs can appropriately be determined without further oral argument.
- 22 The Appeal Panel has also made directions regarding how the remitted matter is to be dealt with regarding the issues of payment of the bond and interest, which are considered further in our reasons.

Bond

- 23 The appellant, in its amended appeal filed on 11 January 2019, submits an error in the Tribunal's decision on the basis that the Tribunal failed to make orders about release of the bond despite the lessor seeking orders for it. It is not explicit in the directions of the Appeal Panel made on 17 January 2019 that leave was granted for amendment of the appeal. It appears that the release of the bond was dealt with in relation to the stay application. The respondent was on notice that it was a ground of appeal and has dealt with it in submissions. The Appeal Panel is satisfied to grant leave in relation to the amendment of the appeal relating to the bond.
- 24 At paragraph 13 of the points of claim lodged by the lessor with its application to the Tribunal, the lessor sought an order that the bond monies be released to them and applied to the judgement amount.
- 25 There is no order made by the Tribunal in relation to the bond, nor is it dealt with in the reasons for decision. S 72 (1)(f)(iv) of the *Retail Lease Act 1994* (NSW) ('the RL Act') allows the Tribunal to make an order about the bond. No reasons are given as to why the application for the order for the bond was not dealt with. Section 16I of the Act allows the Secretary to release of the bond if the Tribunal has made an order. However, the bond was not released because of the filing of this appeal.

- 26 It is a well-established principle that failure to consider a claim clearly made in proceedings is an error of law: *Legend Signage Pty Ltd v Australian Managed Print Solutions Pty Ltd* [2018] NSWCATAP 269, at [16]. Failure to give any, or adequate, reasons is also an error of law: *Rockwell Constructions Pty Ltd v Llamas* [2018] NSWCATAP 262 at [17]-[18]. The Appeal Panel finds an error of law in that the Tribunal failed to provide any reasons or make an order in relation to the application for an order for the bond. There has been some dispute between the parties about the immediate disbursement of the bond against the money orders.
- 27 In circumstances where the appellant seeks that payment of the bond is also to include a component of the appellant's costs at first instance, we do not regard it as appropriate to exercise our discretion under s 81 of the NCAT Act to make an order for payment of the bond at this stage. No authorities were provided to us that there is the power to make an order that part of the bond be paid, and part of the bond held by the NSW Small Business Commissioner. It is also not clear whether or not the appellant will be seeking a lump sum costs order in the proceedings before the Tribunal at first instance, or whether a lump sum order will be made.
- 28 Accordingly, it is appropriate that, in respect of any order regarding disbursement of the retail lease bond, that such an issue is dealt with by the original presiding Member rather than the Appeal Panel. The Tribunal can consider how the bond should be disbursed once the issues of costs and interest have been determined.

Interest

- 29 The appellant alleges that the Tribunal failed to calculate interest in accordance with the orders it sought in the 'Points of Claim'. This ground was only raised in an amended appeal received after the call over date on 14 February 2019. The appellant requires leave to amend the grounds of appeal in the Notice of Appeal to include such a claim. The appellant could provide no explanation as to why there had been such a delay in seeking the amendment, except to say that the legal representatives were not aware that leave to amend was required. It is noted that the respondent has addressed the issue in their

submissions and it could not be said that leave to amend the appeal would disadvantage the respondent and so we are satisfied that leave should be granted to allow the appellant to amend the grounds of appeal to include the issue of interest.

30 Section 72A of the Act states the following:

(1) When the Tribunal orders on a retail tenancy claim or an unconscionable conduct claim that a person pay money to another person, the Tribunal may order that there is to be included, in the amount ordered to be paid, interest at a specified rate on the whole or any part of that amount for the whole or any part of the period between when the cause of action arose and when the order takes effect.

(2) If the whole or part of an amount claimed under a retail tenancy claim or an unconscionable conduct claim is paid during proceedings in the Tribunal on the claim, prior to or without an order for payment being made in respect of the claim, the Tribunal may order that interest be paid at a specified rate on the whole or any part of the money paid for the whole or any part of the period between when the cause of action arose and the date of the payment.

(3) The rate of interest specified by the Tribunal under this section must not exceed the rate at which interest is payable on a judgment debt of the District Court.

(4) This section does not:

(a) authorise the giving of interest on interest , or

(b) apply in relation to any debt on which interest is payable as of right whether by virtue of any agreement or otherwise, or

(c) affect the damages recoverable for the dishonour of a bill of exchange.

....

31 Section 100 and 101 of the *Civil Procedure Act 2005* (NSW) apply to interest before and after a judgement. However, they apply to judgements of a Court and not the Tribunal. By reason of s 4 and sch 1 of the *Civil Procedure Act 2005* (NSW) ('the CPA'), the CPA does not apply to the Tribunal (other than in the context of proceedings considered by a Court under the federal diversity jurisdiction provisions of Part 3A of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act').

32 The only relevant provision of the NCAT Rules dealing with interest is post judgment interest under r 39 of the NCAT Rules.

33 r 39 of the NCAT Rules sets out the provisions of interest on the judgment debt as follows:

39 INTEREST ON JUDGMENT DEBT

(1) This rule applies if a party to proceedings has made a successful civil claim against another party for the payment or recovery of any debt, demand or damages (whether liquidated or unliquidated).

(2) Interest is payable on the outstanding balance for the time being of money adjudged by the Tribunal to be payable and which, being due, and remains unpaid.

(3) Such interest is payable at a rate equal to the rate for the time being prescribed for the purposes of section 101 of the Civil Procedure Act 2005.

34 An award of interest could only have been charged on the amount that had been adjudged by the Tribunal as owing, in this case, on the \$18,381.96 that was awarded to be paid on 29 November 2019. No order could have been made on the basis of r 39 at the time the Tribunal had made the decision. The lessor's pleadings and submissions to the Tribunal consistently refer to section 100 of the *Civil Procedure Act* which deals with interest up to judgement.

35 In submissions to the Appeal Panel, the appellant claims that during the proceedings the lessor consistently claimed interest for unpaid monies against the first and second respondent. The applicant refers to the following:

(1) In the 'Points of Claim' that were attached to the lessors application, it had sought interest at paragraph 13 as follows:

In addition to the above, the applicant seeks costs and interest calculated pursuant to s100 Civil Procedure Act 2005 (NSW)

(2) At page 11 of submissions that were filed with the Tribunal on 18 April 2018 the applicant had made the following submissions:

In addition, the applicant submits that based on the facts and circumstances stated above that pursuant to ss72, 72A of the Retail Leases Act NO 1994 No 46 r 38 of the Civil and Administrative Tribunal Rules 2014 and s60 of the Civil and Administrative Tribunal Act 2013 No 2 the Tribunal make the following orders

....

7) an order that the Respondents pay interest calculated pursuant to s.100 Civil Procedure Act 2005 (NSW)

36 The appellant made the following remarks in its submissions to the Appeal Panel on 14 February 2019:

9. Although the Tribunal ordered that the First Respondent is to pay the Appellant the sum of \$18,381.96 as claimed by the Appellant, the Tribunal failed to consider the Appellants application for interest and did not give the Appellant an opportunity to make submissions.

- 37 The appellant then continued through alternative grounds on which the interest may be considered.
- 38 Section 38(5) of the NCAT Act requires the Tribunal to take such measures as are reasonably practicable to ensure that the parties understand the nature of the proceedings, are heard and have their submissions considered. The appellant was legally represented in the proceedings. We accept that s72A of the Act was only mentioned in the submissions in passing and we also accept that the wrong section was pleaded in relation to the lessor's claim for interest. However, the Tribunal did have the power to award pre-judgment interest under s 72A of the RL Act. We are satisfied that the 'Points of Claim' raised a claim for pre-judgment interest with sufficient clarity that it should have been considered and dealt with by the Tribunal. In circumstances where the respondent has been given an opportunity to deal with the grounds of appeal in relation to interest and there is an error of law in that the Tribunal has not given any reasons in relation to the claim for interest, the Appeal Panel grants leave for the amendment of the appeal and allows the grounds of appeal as it is an error of law that the Tribunal simply did not deal with the orders sought.

Other Matters

- 39 The appellant in submissions refers to the 'second respondent' David McCabe and seeks orders in relation to him. The decision of the Tribunal involved only Christian Enright, the only lessee noted on the lease. David Allen McCabe is noted as the guarantor. The initial application made by the lessor to the Tribunal noted both Christian Enright and David McCabe as the respondent. Ms Megan McCabe and David McCabe represented the lessee at the hearing as agents. The Notice of Appeal notes only Christian Francis Enright as the respondent. Mr McCabe is not named as a respondent on the appeal although he is referred to in the appellant's submissions. Even in the further amended appeal dated 14 February 2019, is not clearly articulated what the ground of appeal is. The submissions refer to Mr McCabe as a second respondent and for costs to be awarded against him the alternative. This was not raised as an actual ground of appeal and was not addressed by the appellant's legal representative at the appeal hearing as a ground of appeal. On that basis in so

far as any amendment of the appeal is being sought in relation to this ground it is declined.

- 40 It is also noted that the appellant is seeking the costs of this appeal and directions have also been made for written submissions to the Appeal Panel in that regard.

Conclusion and orders

- 41 The matter is to be remitted to the Tribunal as originally constituted to decide the matter and the following orders and directions are made:

- (1) Leave to amend the appeal is allowed
- (2) The appeal is allowed
- (3) Order 3 made by the Tribunal in matters COM 17/25689 and COM 17/16207 on 29 November 2018 is set aside and the matter is remitted for reconsideration by the Tribunal as it was originally constituted, to determine the issue of costs, interest and the disbursement of the of the bond in accordance with these reasons.

Directions for Costs in the Tribunal

- (1) The lessor is to provide to the Tribunal and the lessee, either in person or by post, submissions and documents in relation to the application for costs; payment of the bond; and interest by 10 May 2019.
- (2) The lessee is to provide to the Tribunal and the lessor, either in person or by post, submissions and documents in relation to the application for costs; payment of the bond; and interest by 24 May 2019.
- (3) The lessor is to provide to the Tribunal and the lessee, either in person or by post, submissions and documents in relation to the application for costs; payment of the bond; and interest in reply by 7 June 2019.
- (4) Parties are to address, in their submissions, whether the hearing on costs and interest can be dispensed with under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) and the matter be heard on the papers. If either party seeks to be heard in person, they should advise the Registry prior to 7 June 2019, setting out the reasons why and the Registry would advise of the outcome in due course.

Note: Submissions are to be limited to no more than 3 pages.

Directions for Costs in the Appeal

- (1) The appellant is to provide to the Appeal Panel and the respondent, either in person or by post, submissions and documents in relation to the application for costs in the appeal by 10 May 2019.

- (2) The respondent is to provide to the appeal panel and the appellant, either in person or by post, submissions and documents in relation to costs in the appeal by 24 May 2019.
- (3) The lessor is to provide to the Tribunal and the lessee, either in person or by post, submissions and documents in relation to the costs in the appeal by 7 June 2019.
- (4) The Appeal Panel intends to hear the costs application on the papers and dispense with a hearing under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) and the matter heard on the papers. If either party seeks to be heard in person, they should advise the Registry prior to 7 June 2019, setting out the reasons why and the Registry would advise of the outcome in due course.

Note: Submissions in relation to costs are to be limited to 3 pages.

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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