



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners - Strata Plan No. 47027 v Peter Clisdell Pty Ltd (No. 2)

Medium Neutral Citation: [2018] NSWCATAP 46

Hearing Date(s): On the papers

Date of Orders: 15 February 2018

Decision Date: 15 February 2018

Jurisdiction: Appeal Panel

Before: M Harrowell, Principal Member
G K Burton SC, Senior Member

Decision: (1) Pursuant to s 50 (2) of the Civil and Administrative Tribunal Act 2013, a hearing is dispensed with.

(2) The application by the respondent that Ms McGinn pay the costs of the respondent is dismissed.

Catchwords: Costs - special circumstances, proceedings dismissed as incompetent, cost claimed where no legal representation at hearing, exercise of discretion where substantive issues raised on appeal not resolved.

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

Cases Cited: 203 Castlereagh Street Pty Ltd v Skybloo Holdings Pty Ltd (No 3) [2015] NSWCATAP
Brodyn Pty Ltd v Owners Corporation – Strata Plan 73019 (No 2) [2016] NSWCATAP 224
Carre v Owners Corporation - SP 53020 [2003] NSWSC 397
Owners Corporation SP 47027 v Peter Clisdell Pty Ltd [2017] NSWCATAP 188
Foss v Harbottle [1843] to Hare 461; EngR 478

Kondos & Anor v Citadin Pty Ltd [2003] NSWADTAP 7
Megerditchian v Kurmond Homes Pty Ltd [2014]
NSWCATAP 120

Texts Cited: Nil

Category: Costs

Parties: The Owners - Strata Plan No 47027 (Appellant)
Peter Clisdell Pty Ltd (Respondent)

Representation: Sophia McGinn (Appellant)
Polczynski Lawyers (Respondent)

File Number(s): AP 17/16314

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Before: G Meadows, Senior Member

File Number(s): SC 17/13846; SC 17/13849

REASONS FOR DECISION

Introduction

- 1 On 20 September 2017, the Appeal Panel dismissed an appeal by the Owners Corporation against its managing agent, Peter Clisdell Pty Ltd. It published reasons for decision being *Owners Corporation SP 47027 v Peter Clisdell Pty Ltd* [2017] NSWCATAP 188.
- 2 The appeal had been filed by Ms Sophia McGinn who claimed she had an entitlement to commence proceedings on behalf of the Owners Corporation as she was an interested person within the meaning of s 226(1) of the *Strata Schemes Management Act, 2015* (SSMA). She claimed entitlement to do so as “an officer of the owners corporation”, one of the classes of people identified as an interested person within the meaning of s 226.
- 3 The Appeal Panel concluded that:

- (1) s 226 of the SSMA did not provide an authority to Ms McGinn to commence proceedings on behalf of the Owners Corporation;
- (2) While an owners corporation may pass a resolution authorising a person to take action on its behalf, there was no evidence of such a resolution in favour of Ms McGinn; and
- (3) While orders might be made by a Court permitting a person to commence on behalf of an owners corporation as an exception to the rule in *Foss v Harbottle* [1843] to Hare 461, this had not occurred.

4 Consequently, the appeal was dismissed as incompetent.

5 In doing so, at [48]-[50] we said:

48 Our preliminary view is that each party should pay its, his or her own costs.

49 At the hearing of the appeal each of the parties was not legally represented. The issues presented by both sides were convoluted and much time was taken up by both parties dealing with matters irrelevant to the central issue for determination.

50 Should either party contend to the contrary, we shall make directions to allow a short period of time for submissions to be made.

6 Pursuant to leave given by the Appeal Panel, the respondent made an application for costs and provided submissions dated 26 September 2017.

7 Ms McGinn filed submissions in reply dated 30 September 2017.

8 The respondent sought an order for costs against Ms McGinn personally. In essence, the respondent says that it has incurred costs in the proceedings at first instance, being:

- (1) an interim application that was dismissed and subject to this appeal;
- (2) the substantive application which was, apparently, subsequently dismissed by Principal Member Rosser, a decision not the subject of this appeal;

as well as costs of the appeal.

9 The respondent says that s 60 of the Civil and Administrative Tribunal Act, 2013 (NCAT Act) applies. That is, the Appeal Panel has power to award costs if there are special circumstances.

10 By reference to the matters in s 60(3), the respondent says that Ms McGinn's application was misconceived or lacking in substance, that the claim had no tenable basis in law or fact and that Ms McGinn had been put on notice "that

she most likely does not have authority to commence any proceedings". In this regard the respondent refers to correspondence sent by its solicitor to Ms McGinn together with various directions and statements made by Senior Member Meadows who conducted various directions hearings.

- 11 The respondent also says Ms McGinn was put on notice that, if her application was dismissed, a costs order would be sought against her personally. This letter was Annexure B to the respondent's submissions, being a letter from JS Mueller & Co, Lawyers to Ms McGinn dated 3 April 2017. That letter referred to the substantive application which, at that time, remained unresolved. The letter said:

We confirm what we stated at the directions hearing in relation to the substantive application, which is that if the matter is not withdrawn and we need to attend any further directions hearing or a hearing, we will seek a personal costs order against you as:

(a) You have no authority to bring or pursue the application in the name of the Owners Corporation; and

(b) The application is misconceived, as Tribunal Member Meadows advised you. The Tribunal does not have power to make the orders you seek.

Further, if you bring any further application without proper authority and that application is dismissed for that reason, we will also seek a costs order against you personally.

- 12 A second email dated 27 April 2017, to like effect, was sent in relation to the substantive proceedings which then remained unresolved.

- 13 Against this background, the respondent says at para 3.4 of its submissions:

There has been nothing further the Respondent could have done to stop all 3 fatally flawed proceedings. The Respondent has had to expend significant money to protect its position despite the fatal flaws, and Ms McGinn been put on notice of those fatal flaws.

- 14 In making these submissions, the respondent said at para 3.5 of its submissions:

It is correct that neither party was represented at the hearing. However the Respondent had legal representation:

3.5.1 at the directions hearing in the Substantive Proceedings;

3.5.2 at the directions hearing of the Interim Application;

3.5.3 at the directions hearing of this appeal; and

3.5.4 to prepare submissions relied on by the Respondent in all of those proceedings

- 15 Consequently, the respondent said a costs order should be made in its favour and that there is power to make an order against Ms McGinn personally under s 60(4) which allows the Tribunal to “*determine by whom and to what extent costs are to be paid*”.
- 16 The respondent then says the application for costs should be dealt with on the papers, particularly as a further hearing will result in additional costs.
- 17 In reply, Ms McGinn says no order should be made against her.
- 18 Firstly, she says that the interim application, which was the subject of the appeal, was only dismissed on the basis there was no urgency. While the Tribunal may have expressed doubts about her ability to commence the proceedings, there was no ruling in regard to authority, a matter made clear in the Tribunal’s reasons.
- 19 Secondly, Ms McGinn refers to the decision of Principal Member Rosser made on 24 May 2017. There Ms McGinn says the Tribunal dismissed an application for costs because the Tribunal was “*not satisfied that [the applicant’s] failure to provide evidence that she had been authorised to bring the application of itself constitute special circumstances warranting an order for costs.*”
- 20 Thirdly, Ms McGinn says the respondent was not represented at the hearing of the appeal and “*there is no utility for the respondent to claim costs*”.
- 21 In making these submissions, Ms McGinn makes counter-allegations against the solicitor for the respondent, Mr Moir. These allegations seem to centre upon circumstances that occurred at various annual general meetings. Ms McGinn then says “*the interests of justice require costs to be made against Mr Moir in favour of the applicant*”.
- 22 In relation to the purported application by Ms McGinn that her costs be paid, we do not propose to deal with this matter further. The application was not made in time, in accordance with the Appeal Panel’s directions, no evidence has been provided to support the allegations and the application has no apparent relevance to the appeal and the basis upon which it was dismissed.

23 In relation to the need for a hearing on costs, the appellant seeks to raise the history of the proceedings at first instance as a justification for the need for a hearing of the costs issue on appeal. In this regard she says at para 16:

16 The merits of the interim and substantive issues need to be resolved if the costs application is allowed to proceed, therefore, a hearing is warranted.

17 During the hearing on 22 June 2017, both Tribunal members introduced a number of grounds in relation to the issues that were not submitted by the parties.

18 Therefore, a hearing is warranted in the circumstances.

Consideration

24 Neither party submitted that s 60 of the NCAT Act did not confer on the Tribunal power to make an order for costs against an individual in the present circumstances.

25 In this regard, costs orders might be made against a party who commences proceedings without authority: see *203 Castlereagh Street Pty Ltd v Skybloo Holdings Pty Ltd* (No 3) [2015] NSWCATAP 240 at [94] and the decision of *Kondos & Anor v Citadin Pty Ltd* [2003] NSWADTAP 7 referred to therein.

26 The question is whether special circumstances exist, and, if so, whether an order for costs should be made in the present case.

27 Firstly, we should deal with the question of whether an order should be made under s 50(2) of the NCAT Act, dispensing with a hearing. Ms McGinn opposes this course.

28 In our view, the reasons that she offers do not justify a further hearing and further cost. Resolution of the costs application does not require a consideration of whether or not issues raised in the substantive application and/or whether her complaints about the conduct of the Owners Corporation at first instance were well-founded. As is clear from our decision dismissing the appeal, this was because the appeal was incompetent, having been commenced by Ms McGinn on behalf of the Owners Corporation without any authority.

29 It is obvious from all the proceedings that have been commenced that substantial time, and probably cost, has been incurred by the parties in the various rounds of litigation that have taken place. This should not be

compounded by a further, unnecessary hearing. The parties have had an opportunity to provide written submissions and material in relation to any application for costs. In the circumstances of this case there is nothing raised which requires a hearing in order to resolve these issues.

- 30 Accordingly, an order should be made dispensing with a hearing.
- 31 The second matter we should deal with is the application for costs by the respondent which apparently seeks an order from the Appeal Panel in relation to the proceedings at first instance. We do not propose to make such an order because any application should be made to the Tribunal at first instance and the circumstances of this appeal make it inappropriate for us to make rulings concerning the conduct of the parties and what orders for costs should be made in those proceedings.
- 32 In relation to costs of the appeal, the Appeal Panel must be satisfied that there are special circumstances in order to make an order for costs. Otherwise, s 60(1) provides that each party is to pay its own costs. The expression “*special circumstances*” means circumstances that are out of the ordinary but not necessarily extraordinary or exceptional: see eg *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].
- 33 Section 60(3) sets out the factors relevant in determining whether such circumstances exist. The factors relied upon by the respondent from s 60(3) are:
- (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,
...
 - (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
...
 - (g) any other matter that the Tribunal considers relevant
- 34 In considering the respondent’s submissions, we should also have regard to the fact that Ms McGinn is apparently not a lawyer and the nature of the proceedings brought in the Tribunal is that claims are often made which have no merit and ultimately fail.

35 In relation to the first ground, no tenable basis in fact or law, we do not accept this ground is made out. As we explained in our principal decision, a party with authority can bring a claim on behalf of an Owners Corporation. Even without such authority a party can be authorised by a Court to do so. In any event, the issue dealt with on appeal was the extent of the authority conferred by s 236 on an interested person to take proceedings.

36 In this regard we note that, prior to appeal, there had been a call over and directions hearing on 2 May 2017. At [8]- [9] of the directions made the following was recorded:

8 The Appeal Panel notes is (sic) an agreed fact that no resolution has been passed by the Owners Corporation in general meeting or the executive committee to commence the appeal proceedings as Ms McGinn says she is authorised to do so under s 226 (1)(b) of the SSMA 2015.

9 The issues for determination are:

a. Whether leave should be granted to amend the Notice of Appeal to appeal the order dismissing the substantive application on 1 May 2017.

b. Whether the appeal has been properly instituted by the Owners Corporation.

c. Whether leave should be granted to appeal the dismissal of the interim application for the respondent's agent to deliver up the books and records of the Owners Corporation.

d. Whether order to should be set aside and a declaration to the effect that "the Tribunal has power to impose a penalty pursuant to s 181 of the SSMA 2015".

e. Whether the appeal should otherwise be dismissed because the substantive application of appeal (sic) was dismissed on 1 May 2017.

37 The issue raised was a matter of statutory construction about which neither of the parties directed the Appeal Panel to earlier authorities that might suggest the issue had already been resolved.

38 In relation to the proceedings otherwise being misconceived, it seems to us this submission should not be accepted. As we found, s 236 did not authorise Ms McGinn to commence the appeal in the name of the Owners Corporation. She did not otherwise prove she had authority to commence the appeal. However, in the absence of a ruling on the construction of s 236, it could not be said the matter raised was frivolous, vexatious or lacking in substance. Further, as the proceedings were resolved on a question of competence of the appeal, there was no determination of the substantive issues raised by the Notice of Appeal

concerning various meetings, the proper management of the Owners Corporation and who was entitled to the books and records of the Owners Corporation.

- 39 Lastly, the respondent relies on correspondence stating that, if an application was pursued without authority, the respondent would seek its legal costs. The failure to accept an offer or continue with proceedings may be a relevant factor under s60(g) of the NCAT Act.
- 40 In the present case, we note the offers relied on were not made in connection with the appeal. Rather, they seem to relate to the proceedings at first instance being proceedings number SC 17/13849, being the substantive application which remained unresolved at the time the offers were made. Secondly, they do not, by their terms, offer any proposal for settlement. Rather, they are on terms that, if proceedings are persisted with, an application for costs will be made.
- 41 In our opinion, where the issue raised on appeal related to the construction of s 236 of the SSMA and what authority an officer of the Owners Corporation might have, something more than a statement that costs will be sought because there is no authority to commence proceedings and that s 236 does not grant such authority would usually be required in order for such a letter to operate as special circumstances. This is particularly so in the context where it is sent to a person who is not a lawyer and is not legally represented.
- 42 An applicant may have a fundamental misunderstanding of the law and the manner in which it operates. However, this does not mean that the failure to heed a warning that a claim might fail makes pursuit of that claim a matter which relevantly constitutes special circumstances. The nature of the Tribunal is to allow those with grievances a ready point of access to justice to have their disputes resolved in a just, quick and cheap manner. In the context of this case, where the Appeal Panel was informed that the Owners Corporation was having different meetings on different days convened by different people who asserted authority to do so, and where the SSMA grants power to the Tribunal to resolve disputes concerning the administration of strata schemes, we are not satisfied that the pursuit of this issue constituted special circumstances.

43 Further, even if we were satisfied special circumstances existed, we are not satisfied that any order for costs should be made. In *Brodyn Pty Ltd v Owners Corporation – Strata Plan 73019 (No 2)* [2016] NSWCATAP 224 the Appeal Panel said:

24 Further, where special circumstances are found to exist, the Tribunal has a discretion to exercise in deciding what, if any, order should be made. Relevant to the exercise of that discretion are those facts upon which the finding of special circumstances was based. However, those findings do not constitute the whole of the relevant matters to be considered in deciding what, if any, order for costs should be made. Rather, the principles applicable to awarding costs generally must also be taken into account. These include:

(1) Costs are compensatory: see *Latoudis v Casey* (1990) 170 CLR 334;

(2) That an unsuccessful party bears the costs of the successful party: *Oshlack v Richmond River Council* [1998] HCA 11 at [134];

(3) Whether, by reason of the relative success of the parties on different issues and the time taken to determine those that an order for costs based on issues should be made; see eg *Bostick Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304.

25 Further, in some circumstances where s 60 of the NCAT Act regulates an award for costs, a limited order for costs might be made to reflect the fact that only some aspects of the appeal should properly be categorised as out of the ordinary and to make a general order for costs in favour of a successful party might be inappropriate having regard to principle that absent special circumstances each party is to pay their own costs. See eg *McPherson v Mace (No 2)* [2016] NSWCATAP 198.

26 Overall, the Tribunal is to exercise its discretion in a manner that is fair and reasonable having regard to the circumstances of the particular case.

44 In the present case, as conceded by the respondent's lawyer in its submissions, the respondent was not legally represented at the hearing of the appeal. Further, as we indicated in our principal reasons, the parties' submissions were convoluted. The position adopted by the parties at the hearing suggested substantial disputes within the Owners Corporation and with its managing agent concerning the administration of the strata scheme. These issues were not resolved in the appeal but no doubt have received the attention of lawyers who were engaged.

45 If the submission of the respondent in its simplest form was accepted, the appeal proceedings could never have succeeded because there was no doubt the appeal was incompetent. Consequently, this was the only issue which needed to be dealt with in the disposition of the appeal. However, an order for costs would result in Ms McGinn being made liable to pay any costs incurred in

obtaining advice on the substantial issues raised by the appellant in the Notice of Appeal, namely, the proper functioning of the Owners Corporation.

46 In our view, such an order for costs might work an injustice on Ms McGinn and, in effect, punish her by making her liable for costs of the respondent in obtaining advice about issues which the respondent said could never arise in the appeal as the proceedings were incompetent and on which the respondent may not have succeeded if the appeal was found to be competent.

47 Accordingly, we decline to make any order for costs in the appeal.

Orders

48 The Appeal Panel makes the following orders:

- (1) Pursuant to s 50 (2) of the Civil and Administrative Tribunal Act 2013, a hearing is dispensed with.
- (2) The application by the respondent that Ms McGinn pay the costs of the respondent is 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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.