



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners – Strata Plan No. 80412 v Vickery (No 2)

Medium Neutral Citation: [2019] NSWCATAP 97

Hearing Date(s): On the papers

Date of Orders: 23 April 2019

Decision Date: 23 April 2019

Jurisdiction: Appeal Panel

Before: M Harrowell, Principal Member
K Rosser, Principal Member

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

2 The appellant is to pay the respondent’s costs of the application for leave to appeal as agreed or assessed on an ordinary basis.

3 Save as provided above, the application for costs is dismissed.

Catchwords: COSTS – rr 38 and 38A Civil and Administrative Tribunal Rules 2014 – discretion – party unsuccessful on application for leave to appeal – usual order – successful party entitled to costs

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWSCATAP 256
The Owners – Strata Plan No. 80412 v Vickery [2019] NSWCATAP 71

Thompson v Chapman [2016] NSWCATAP 6

Texts Cited: Nil

Category: Costs

Parties: Appellant: The Owners – Strata Plan No. 80412
Respondent: Graham John v Vickery

Representation: Appellant: DD Feller SC (Counsel)
Respondent: D Jenkins (Counsel)

Solicitors:
Appellant: Vardenega Roberts
Respondent: Moray & Agnew

File Number(s): AP 18/51027

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal of New South Wales

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Date of Decision: 26 October 2018

Before: D Moss, General Member

File Number(s): SC 18/16266

REASONS FOR DECISION

Introduction

- 1 The Appeal Panel delivered reasons for decision in the principal appeal on 28 March 2019: *The Owners – Strata Plan No. 80412 v Vickery* [2019] NSWCATAP 71.
- 2 In that decision, the application for leave to appeal was dismissed and directions were made permitting the parties to make any application for costs.

Application for costs and submissions

- 3 The respondent applied for costs by submission dated 1 April 2019. The appellant filed submissions in reply dated 5 April 2019. On 11 April 2019, the respondent filed a reply submission.
- 4 The respondent seeks the following orders:
 - (1) A hearing on costs is dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).
 - (2) The appellant (respondent in the proceedings at first instance) is to pay the respondent's (applicant in the proceedings at first instance) costs of and incidental to the appellant's unsuccessful application to dismiss the respondent's claim in proceedings SC 18/16266, such costs to be as agreed or assessed on an indemnity basis.
 - (3) The appellant is to pay the respondent's costs of and incidental to be appellant's unsuccessful appeal in the present appeal proceedings, such costs to be as agreed or assessed on an ordinary basis.
 - (4) Pursuant to s 90 of the *Strata Schemes Management Act 2015* (NSW) (Management Act) the costs payable by the appellant to the respondent must be paid from contributions levied on all Lots of the scheme other than Lot 74 being the respondent's Lot.
- 5 The respondent says it was successful in resisting the application for leave to appeal. The proceedings concern a claim for damages for lost rent and other losses pursuant to s 106(5) of the Management Act. That claim is in excess of \$30,000 so the respondent contends r 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) (Rules) applies to their application for costs rather than s 60 of the NCAT Act.
- 6 The respondent says that there is a general discretion, that he was entirely successful and there is no reason to depart from the usual rule that costs should follow the event.
- 7 In relation to the need for a hearing, the respondent submits that an order should be made dispensing with a hearing and that a decision should be made "on the papers".
- 8 The respondent says that costs should be assessed on an ordinary basis, unless otherwise agreed, and that an order should be made under s 90 of the Management Act for the payment of costs from levies other than in respect of his lot.

- 9 In response, the appellant says the power to award costs is discretionary and not mandatory.
- 10 The appellant refers to the fact that the respondent's application has not been finally determined. Having regard to the challenges by the appellant, the outcome is uncertain, there being a number of substantial and reasonably arguable issues which, if successful will result in the respondent's claim being dismissed. These include matters of jurisdiction.
- 11 It was reasonable for the appellant to seek leave to appeal. If successful, the proceedings would have been truncated and this would have avoided unnecessary costs.
- 12 Consequently, the appellant says each party should pay their own costs of the unsuccessful application to dismiss the proceedings at first instance and in respect of the appeal. Alternatively, costs of each of the proceedings at first instance and on appeal should be costs in the cause.

Consideration

- 13 Both parties agree a hearing on the costs application is not required. Accordingly, by consent, an order should be made dispensing with a hearing pursuant to s 50(2) of the NCAT Act.
- 14 In our view, r 38 applies in determining costs of the application for leave to appeal.
- 15 This is because:
- (1) the amount claimed or in dispute in the proceedings at first instance is more than \$30,000: *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWSCATAP 256;
 - (2) r 38 applies to the proceedings at first instance;
 - (3) because r 38 is different from the provisions in s 60 of the NCAT Act by reason of the procedural rules, r 38A provides r 38 applies to any internal appeal.
- 16 If the application for leave to appeal had been successful, the respondent would have been prevented from recovering damages in excess of \$30,000. Because the amount in dispute was greater than \$30,000, r 38(2)(b) provides for a discretion to award costs despite s 60 of the NCAT Act.

- 17 Rule 38 provides a general discretion as to costs. Ordinarily, where this rule applies, a successful party is entitled to their costs: *Thompson v Chapman* [2016] NSWCATAP 6 at [69] and following.
- 18 In relation to the appeal proceedings, leave to appeal was sought, in effect, in order to have the proceedings summarily dismissed. This application failed.
- 19 There is no conduct of the successful party which could be regarded as disentitling conduct and therefore no reason to displace the usual order for costs. Accordingly, the respondent should be entitled to its costs on the appeal.
- 20 In relation to costs of the application at first instance, we do not propose to make any order. If a party seeks such an order it should be dealt with by the Tribunal at first instance, not as part of the application for leave to appeal. We do not have sufficient information concerning what happened at the original proceedings to be able to exercise any discretion and, in the absence of a decision being first made in the original proceedings at first instance, it is inappropriate for us to intervene.
- 21 Finally, an order is sought under s 90 of the Management Act that costs payable by the appellant to the respondent must be from contributions levied on all lots except the respondent's Lot 74.
- 22 Section 90 provides:

90 Contributions for legal costs awarded in proceedings between owners and owners corporation

(1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).

(2) The court may order in the proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order.

(3) The owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.

(4) This Division (other than provisions relating to the amount of contributions) applies to and in respect of contributions levied under this section in the same way as it applies to other contributions levied under this Division.

23 Subsection (2) provides a power to “the court” to make such an order. No reference is made to the Tribunal in the section. Otherwise, there is no power given to the Tribunal elsewhere in the Management Act to make such an order.

24 On the other hand, s 104 of the Management Act provides:

104 Restrictions on payment of expenses incurred in Tribunal proceedings

(1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.

(2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.

(3) In this section, a reference to **proceedings** includes a reference to proceedings on appeal from the Tribunal.

25 There is no basis to conclude that s 90 was intended to apply to proceedings in the Tribunal and no reason to construe the reference to “the court” as including the Tribunal. To the contrary, s 104 expressly regulates the position of proceedings in the Tribunal.

26 Further, s 104 operates according to its own terms and does not provide power to the Tribunal to make an order.

27 Accordingly, there is no power for the Tribunal to make the order sought and we decline to do so.

Orders

28 The Appeal Panel makes the following orders:

- (1) By consent, a hearing of the costs application is dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013*.
- (2) The appellant is to pay the respondent’s costs of the application for leave to appeal as agreed or assessed on an ordinary basis.
- (3) Save as provided above, the application for costs 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

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