



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners – Strata Plan No 82306 v Anderson

Medium Neutral Citation: [2018] NSWCATCD 1

Hearing Date(s): On the papers

Date of Orders: 5 February 2018

Decision Date: 5 February 2018

Jurisdiction: Consumer and Commercial Division

Before: Wright J, President
M Harrowell, Principal Member
R Seiden SC, Principal Member

Decision: 1. Pursuant to s 50 of the NCAT Act, the Tribunal dispenses with an oral hearing.

2. The respondent is to pay the applicant’s costs of the proceedings on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014), as agreed or assessed.

Catchwords: NSW CIVIL AND ADMINISTRATIVE TRIBUNAL – COSTS – when enabling legislation provides for the making of a costs order – discretion to award costs under the Strata Schemes Management Act 1996 – principles as to when fixed sum costs orders are appropriate

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules (2014)
Interpretation Act 1987 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: 203 Castlereagh Street Pty Limited v Skybloo Holdings Pty Limited [2017] NSWCATAP 29
Bechara trading as Bechara and Company v Bates [2016] NSWCA 294
eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (No 2) [2015] NSWCA 422
Gleeson Anor t/as ANT Building v The Owners Strata Plan No 81893 [2016] NSWSCATAP 115
Hamod v State of NSW and Anor [2011] NSWCA 375
Health Care Complaints Commission v Philipiah [2013] NSWCA 342
Kostov v Zhang (No 2) [2016] NSWCA 279
Lucire v Health Care Complaints Commission (No 2) [2011] NSWCA 182
Ohn v Walton (1995) 36 NSWLR 77
Qasim v Health Care Complaints Commission [2015] NSWCA 282
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Category: Costs

Parties: Owners Corporation SP 82306 (Applicant)
Prudence Anderson (Respondent)

Representation: Solicitors:
Lawyers Chambers on Riley (Applicant)

File Number(s): SC 17/22766

REASONS FOR DECISION

Introduction

- 1 The applicant is the Owners Corporation in respect of Strata Plan No 82306. The respondent, Ms Anderson, is, and has at all material times been, the owner of lot 2 in the strata scheme to which that Strata Plan relates.
- 2 For the reasons set out in the principal judgment, dated 31 October 2017 (*The Owners – Strata Plan No 82306 v Anderson* [2017] NSWCATCD 85), the Tribunal ordered that the respondent pay a pecuniary penalty of \$2,500.00 to the Director General of the Department of Fair Trading, in respect of non-compliance with an earlier order of the Tribunal, made on 30 June 2016, by a Strata Scheme Adjudicator under the *Strata Schemes Management Act 1996*

(NSW) (the 1996 Act). The order to pay the pecuniary penalty was made subject to the condition that it ceases to have effect in the event that the respondent takes certain steps before 12 January 2018 to, in substance, remedy the breach of the order made on 30 June 2016.

- 3 The Tribunal also ordered that if the applicant wished to apply for costs of the application it was to give to the Tribunal and to the respondent, by 10 November 2017, written notice of its application, including submissions and evidence. Further, the Tribunal ordered that in the event that the respondent wished to oppose the making of a costs order against her, she was to give to the Tribunal and to the applicant, by 17 November 2017, any evidence and submissions upon which she wished to rely.
- 4 The Tribunal received the applicant's application for costs, along with evidence and submissions, on 10 November 2017. The applicant seeks a fixed order for costs, in the sum of \$19,601.69; or, in the alternative, an order for costs to be agreed or assessed on the ordinary (party/party) basis.
- 5 The Tribunal has not received evidence or submissions from the respondent. Nevertheless, the Tribunal is satisfied that the respondent had due notice of the applicant's costs application, as the applicant filed, on 22 January 2018, material confirming service to the respondent, by post and email, of its costs application and supporting materials.
- 6 It is therefore appropriate that the Tribunal now determine the costs application.

Determination of the costs application without an oral hearing

- 7 The parties were invited to make submissions on whether an oral hearing of the costs application was necessary. The Tribunal received submissions only from the applicant. The applicant contends that this is a suitable matter to be determined without an oral hearing and that such method of determination fulfils the guiding principles set out in s 36(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act): to facilitate the just, quick and cheap resolution of the issues in the proceedings.

8 Since the applicant seeks the determination of the matter without an oral hearing, and has filed its material in support, and the respondent has not opposed this course or sought to contest the application for costs, we are satisfied that the application can be satisfactorily determined in the absence of the parties. In these circumstances, we propose to make an order under s 50(2) of the NCAT Act dispensing with an oral hearing.

Consideration of the costs application

9 The first issue is to identify the source of power to make a costs order.

10 Section 60 of the NCAT Act 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.
- (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.

- 11 Section 60, like the other provisions of Pt 4 of the NCAT Act, is, however, expressly stated to be “subject to enabling legislation and the procedural rules”, by operation of s 35 of the NCAT Act. For present purposes, the “enabling legislation” is the Act under which the substantive proceedings were determined, and, since these are proceedings in the Consumer and Commercial Division, the relevant provision of the “procedural rules” is r 38 of the *Civil and Administrative Tribunal Rules 2014*. Given the terms of r 38, and the nature of the issues in the present matter, that rule is not applicable in this case.
- 12 In the decision dated 31 October 2017, an initial question arose as to the authority of the Tribunal to hear and determine an application for a civil penalty for non-compliance with an adjudicator’s orders, where the application was made after the repeal of the 1996 Act by the *Strata Schemes Management Act 2015* (NSW) (the 2015 Act), but the orders were made before the repeal of the 1996 Act.
- 13 For the reasons there stated, the Tribunal decided (at [67]) that, by virtue of s 30(1) of the *Interpretation Act 1987* (NSW) and notwithstanding the repeal of the 1996 Act, the Tribunal has authority to hear and determine an application for a civil penalty for contravention of an adjudicator’s order operative before the repeal of the 1996 Act, pursuant to s 202 of the 1996 Act. Accordingly, the enabling legislation in the present matter is the 1996 Act, and, in accordance with s 35 of the NCAT Act, s 60 must be read subject to the 1996 Act. It is therefore necessary to consider s 204 of the 1996 Act.
- 14 Section 204 of the 1996 Act relevantly provided:
- 204 Order as to costs**
- (1) The Tribunal may also make an order for the payment of costs when making an order requiring the payment of a pecuniary penalty under this Part.
- (2) Any costs awarded against a person on an application for an order under section 202 include the amount of the fee paid when the application for the original order was made.”
- 15 It is apparent that in exercising the discretion to make a costs order under s 204 of the 1996 Act, the starting point is not that each party bear its own

costs. Pursuant to s 204 of the 1996 Act, the Tribunal has an unfettered discretion to award costs.

- 16 The applicant contends, by analogy, that just as r 38 of the NCAT Rules modifies s 60 of the NCAT Act, so too does s 204; and therefore, contends that the starting position is that the applicant, having been successful in its substantive application for the order of a pecuniary penalty, is entitled to recover its costs. Paying due regard to s 35 of the NCAT Act, this submission should be accepted.
- 17 In *Qasim v Health Care Complaints Commission* [2015] NSWCA 282, a case concerning a complaint under the Health Practitioner Regulation National Law (NSW) (the National Law), the Court of Appeal considered whether the Tribunal had erred in law when exercising its power to award costs. The Tribunal had taken as its starting position, the proposition arising from s 60 of the NCAT Act, that each party pay its own costs. The Court of Appeal held that, in circumstances where clause 13 in Sch 5D of the National Law provided that the Tribunal “may order [relevant persons] to pay costs to another person as decided by the Tribunal”, the starting position, that each party bear their own costs, was misconceived. The Court of Appeal said at [85]:

In *Lucire v Health Care Complaints Commission (No 2)* [2011] NSWCA 182 at [46]-[48] this Court (Basten JA, McColl JA and Sackville AJA agreeing), following *Ohn v Walton* (1995) 36 NSWLR 77, held that a power in substantially the same terms was to be exercised for the purpose of indemnifying or compensating the person in whose favour a costs order was to be made, and not for the purpose of punishing the person against whom it is made. That being so, ordinarily costs should follow the event unless there are reasons to conclude otherwise. *Lucire* was followed in *Health Care Complaints Commission v Philipiah* [2013] NSWCA 342 at [42]. (This position is in contrast to that under s 60 of the CAT Act which provides by subs (1) that each party to proceedings in the Tribunal is to pay its own costs and that the Tribunal may award costs in relation to proceedings “only if it is satisfied that there are special circumstances warranting an award of costs”.)

- 18 Where, as here, the Tribunal has made an order under s 202 of the 1996 Act, then, in light of s 204 of the 1996 Act, to which s 60 of the NCAT Act is subject, when approaching the exercise of discretion to award costs, the Tribunal must approach the task on the basis that the costs order is to indemnify or compensate the person in whose favour it is to be made; and so, ordinarily, costs should follow the event.

- 19 Here, there has been no disentitling conduct on the part of the applicant or other operative factors and costs should therefore follow the event. Nor were there any circumstances that would make it appropriate to order that costs be paid on any basis other than the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014).
- 20 The Tribunal considers it appropriate for the respondent to pay the applicant's costs of the application for a pecuniary penalty on that basis.

Fixed order as to costs

- 21 The applicant contends that the appropriate order for costs is to make an order for a fixed sum, having regard to the likely length and complexity of the assessment process, the likelihood that the additional costs of a formal assessment process would disadvantage the successful party, and any conduct of the unsuccessful party that unnecessarily contributed to the costs of the proceedings: *Gleeson Anor t/as ANT Building v The Owners Strata Plan No 81893* [2016] NSWSCATAP 115.
- 22 In considering whether to make a fixed sum costs order we are mindful that whenever the Tribunal is exercising any power given to it by the NCAT Act or interpreting any provision of the NCAT Act, the Tribunal is to give effect to the guiding principle, which is facilitation of the just, quick and cheap resolution to the real issues in proceedings: s 36(1) and (2) of the NCAT Act. Even though the costs order here is made pursuant to s 204 of the 1996 Act, the Tribunal is nevertheless exercising authority conferred by the NCAT Act. Section 28 of the NCAT Act provides that the Tribunal has the jurisdiction and functions conferred or imposed on it by or under the NCAT Act or any other legislation, and so the guiding principle is relevant.
- 23 In *203 Castlereagh Street Pty Limited v Skybloo Holdings Pty Limited* [2017] NSWCATAP 29 the Tribunal considered the following cases concerning whether a fixed sum costs order should be made: *Hamod v State of New South Wales* [2011] NSWCA 375 at [813] and [816]; *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (No 2)* [2015] NSWCA 422 at [8] and [30]; *Kostov v Zhang (No 2)* [2016] NSWCA 279 at [19] and [22]. The factors that were taken

into account, in determining whether a fixed sum costs order or an assessment would be more appropriate, included the following (at [40]):

- (1) A fixed sum costs order involves a departure from the usual process by which costs are assessed in accordance with the statutory procedures now relevantly found in the Legal Profession Uniform Law Application Act 2014 (NSW) and the Legal Profession Uniform Law (NSW).
- (2) Fixed sum may be appropriate where:
 - (a) The sum of costs in question is relatively modest.
 - (b) The party obliged to pay would not be able to meet liability resulting from assessment.
 - (c) Assessment would be protracted and expensive.
 - (d) The relevant responsibility of the parties for the costs incurred.
 - (e) The degree of any disproportion between the issue litigated and the costs claims.
 - (f) The complexity of the proceedings in relation to their costs.
- (3) Calculation should be based on an informed assessment of the actual costs e.g. costs estimates and bills. The approach should be logical, fair and reasonable.

24 In *Bechara trading as Bechara and Company v Bates* [2016] NSWCA 294, the following points were highlighted by Beazley P, Meagher JA and Payne JA at [12] – [15]:

- (1) The power to award a lump-sum should only be exercised when the Court considers that it can do so fairly between the parties and where an appropriate sum can be determined from the available materials.
- (2) The same detail as a formal assessment is not required.
- (3) The power may also be exercised where a party's conduct has unnecessarily contributed to the costs of the proceedings, especially where the costs incurred have been disproportionate as a result of the proceedings.
- (4) The courts typically apply a discount when determining a fixed sum.

25 In terms of the operative factors in this case:

- (1) The applicant seeks a sum of approximately \$20,000 as evidenced by the solicitor's time sheets and disbursements (counsel's fees). No evidence is provided of what might be the likely outcome on an assessment.
- (2) As compared to the amount at issue in the principal judgment, this is a significant sum. As noted above, an important issue in the proceedings was whether the Tribunal had jurisdiction to order a pecuniary penalty.

This took up the majority of the hearing time and the bulk of the submissions. This was through no fault of either party and was a product of the repeal of the 1996 Act, the enactment of the 2015 Act and the complexity of the transitional provisions. Before the Tribunal could make any order as to a pecuniary penalty, it was required to be satisfied that it had jurisdiction to do so; accordingly, the costs could not be avoided.

- (3) There will undoubtedly be additional costs associated with an assessment of costs, but the assessment process ought not be complex, or protracted, given that the hearing of the principal judgment was completed in less than a day and the small number of issues.
- (4) On an assessment, it is likely that there will be some discount applied to the costs actually incurred, in the event of an order that costs are to be paid on what was formerly called the party/party basis, and now is referred to as “the ordinary basis” in r 42.2 of the Uniform Civil Procedure Rules 2005, or (more clumsily) “the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014)” in s 60(4)(b) of the NCAT Act.
- (5) The respondent did not appear at the hearing and therefore failed to comply with her duty to co-operate with the Tribunal, to give effect to the guiding principle: s 36(3) of the NCAT Act. Nevertheless, it has not been suggested by the applicant that this somehow added appreciably to the costs of the hearing.

26 On balance, the Tribunal declines to make a fixed order as to costs, primarily for the reason that the costs assessment process is not likely to be complex or protracted, and we are not in any position to judge what an appropriate discount might be for a fixed sum order commensurate with costs on the ordinary basis, which is the appropriate basis in this case.

Orders

- 27 Pursuant to s 50 of the NCAT Act, the Tribunal dispenses with a hearing.
- 28 The respondent is to pay the applicant’s costs of the proceedings on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014), as agreed or assessed..

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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