



Civil and Administrative Tribunal  
New South Wales

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Case Name: Turek v The Owners - Strata Plan No 70871

Medium Neutral Citation: [2020] NSWCATAP 14

Hearing Date(s): On the papers

Date of Orders: 29 January 2020

Decision Date: 29 January 2020

Jurisdiction: Appeal Panel

Before: S Westgarth, Deputy President  
G Sarginson, Senior Member

Decision: (1) A hearing on costs is dispensed with.  
(2) The applications by the parties for an order for costs of the appeal to be made are dismissed.

Catchwords: Costs – costs on appeal – special circumstances

Legislation Cited: Civil and Administrative Tribunal Act 2013 NSW

Cases Cited: CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015]NSWCATAP21  
Tricare(Hastings) Ltd v Allen [2015] NSWCAP 344 .

Texts Cited: None cited

Category: Principal judgment

Parties: Michael Turek (First Appellant)  
Louise Turek (Second Appellant)  
The Owners Strata Plan 70871 (Respondent)

Representation: Counsel:  
R Notley (Appellants)

Solicitors:  
Hones Lawyers (Appellants)

Bannermans Lawyers (Respondent)

File Number(s): AP 19/43498

Publication Restriction: Unrestricted

Decision under appeal:

Court or Tribunal: Civil & Administrative Tribunal

Jurisdiction: Consumer & Commercial Division

Citation: N/A

Date of Decision: 27 August 2019

Before: G Burton SC, Senior Member

File Number(s): SC 19/19280

## **REASONS FOR DECISION**

### **Background**

- 1 This decision concerns whether we should make an order for costs of the appeal to be paid by one of the parties. We heard the appeal on 5 December 2019 and delivered an extempore decision. At the request of one of the parties a written Statement of Reasons has since been provided.
- 2 The Appellants are lot owners in a strata scheme and the Respondent to the appeal is the Owners Corporation. In the decision under appeal the Tribunal, at first instance, made an order granting an adjournment requested by the Appellants and also made costs orders. The appeal concerned the costs orders.
- 3 On 5 December 2019, we made orders to the following effect:
  - (1) The appeal is upheld for the purposes of setting aside the order made on 27 August 2019 that the Appellants pay the Respondent's costs of the interim application heard on 12 July 2019, and
  - (2) Otherwise the appeal is dismissed.
  - (3) In respect of the costs of the Respondent incurred in relation to the interim application heard on 12 July 2019, those costs will be costs in the cause in the substantive proceedings in the Consumer & Commercial Division.

- (4) We made directions for the parties to exchange submissions in respect of costs of the appeal. The Respondent was directed to file and serve submissions on costs within 21 days and the Appellants to follow within 21 days thereafter. Both parties were given the opportunity to make a submission as to whether a further oral hearing was sought on the issue of costs.
- 4 Both parties have filed submissions and have consented to the Appeal Panel determining costs of the appeal on the papers without the necessity of a hearing. Accordingly, we propose to order that a hearing on the question of costs of the appeal be dispensed with under s 50 of the *Civil & Administrative Tribunal Act, 2013* (NSW) (the NCAT Act).
- 5 The issue before us concerned two costs orders made on 27th August 2019. The first concerned a costs order made in respect of costs of an application heard on 12 July 2019. The Tribunal had ordered that those costs be paid by the Appellants. We upheld the appeal in that respect and ordered that those costs will be costs in the cause.
- 6 The second aspect of the costs orders under appeal concerned the order that the Appellants pay the Respondent's costs thrown away by reason of the adjournment granted on 27 August. We dismissed that aspect of the appeal with the result that the order in that respect made on 27 August 2019 remains in place.
- 7 In short, the Appellants have been partly successful (in overturning one order as to costs) but have also been unsuccessful in not overturning the other aspect of the costs orders.

### **The Respondent's Submissions as to Costs of the Appeal**

- 8 The Respondent's submissions may be summarised as follows:
- (1) The Respondent seeks an order pursuant to s 60 of the NCAT Act that its costs of the appeal be paid by the Appellants.
  - (2) The Respondent submits that the Appellants lodged a baseless appeal causing the Respondent to incur legal costs, that the conduct of the Appellants unnecessarily disadvantaged the Respondent and that the appeal was frivolous, vexatious and lacking in substance.
  - (3) Much of the material relied upon by the Appellants in their appeal concerned the dispute between the parties as to whether a by-law had been provided or not. However, at the hearing of the appeal, counsel for the Appellants conceded that the issue concerning the by-law was

irrelevant to the appeal. As a consequence, the Respondent incurred costs and inconvenience in providing evidence in response to the allegations concerning the by-law.

- (4) Special circumstances under s 60 of the NCAT Act exist. In particular, the appeal had no tenable basis and by s 60(3)(c) special circumstances can be constituted by a claim that has no tenable basis.
- (5) The Respondent also relies upon s 60(3)(d) by which special circumstances may exist by reason of the nature and complexity of proceedings. The Respondent says that the appeal involved complex issues.
- (6) The Respondent also relies upon s 60(3)(e) which concerns proceedings which are frivolous or vexatious or otherwise misconceived or lacking in substance. The Respondent says that the allegations concerning the by-law (which were not relied on) are capable of characterising the appeal as lacking in substance.

### **Appellants' Submissions**

9 The submissions of the Appellants may be summarised as follows:

- (1) The Appellants seek an order under s 60 that there be an order that their costs of the appeal be paid by the Respondent.
- (2) In respect of the order for costs of the hearing on 12 July 2019 (being the aspect concerning costs on which the Appellants were successful) the Appellants argue that the Member was misled because what had happened on 12 July had not been clearly conveyed to him. The Appellants submit that the conduct of the Respondents on 27 August constituted having a "second bite of the cherry" by revisiting the costs decision made in July. That conduct, so the Appellants submit, constitutes special circumstances under s 60(3)(a) being conduct which has unnecessarily disadvantaged another party.
- (3) The Appellants also submit that the Respondent's submissions on costs do not justify an order for the awarding of costs in favour of the Respondent as there are no special circumstances that arise warranting the Tribunal to exercise its discretion to award costs.
- (4) The Appellants submit that the appeal was not baseless (as the Respondent asserts). In fact, the appeal was partly upheld.
- (5) The Appellants further submit that their conduct did not unnecessarily disadvantage the Respondent. The appeal was conducted in a timely manner.
- (6) The Appellants further submit that procedural fairness dictate that the Appellants "have a right of recourse to correct the record regarding the experience of the waste bin by-law. The Appellant (sic) had to obtain redress to correct the record".

- (7) The Appellants submit that the Respondent's submissions on costs should not persuade the Appeal Panel that there are special circumstances justifying an order for costs.
- (8) The Appellants submit, in the alternative, that it would be appropriate for each party to pay their own costs.

### **Decision**

- 10 We are of the opinion that there should be no order for either party to pay the other's costs of the appeal. The result will be that each party should pay their own costs. Our reasons for coming to this decision are set out in the following paragraphs.
- 11 The Appellants were partly successful. They appealed in respect of two costs orders and one of those was set aside. In respect of the other costs order (which was not overturned on appeal) their submissions included material not relevant to the appeal. The Appellants put forward submissions concerning the dispute over the by-law and in their submissions have sought to justify that course by stating that the Appellants have a "right of recourse to correct the record regarding the existence of the waste bin by-law". However, Mr Notley agreed (appropriately in our view) that that material was not relevant to the appeal. There is, in our view, no right to correct the record. The authority for this view is *Tricare (Hastings) Limited v Allen* [2015] NSWCATAP 344 at [10] where the court stated that an appeal must relate to orders, not its reasons. This is consistent with s80 of the NCAT Act ( which states that an appeal may be made against a decision) and s5 ( which in substance defines a decision in terms of various types of orders or refusals to make an order ). The appeal was limited to addressing whether the costs orders should stand and the reference to the by-law history was not relevant.
- 12 The general position with respect to costs in the Tribunal is that each party to proceedings in the Tribunal is to pay their own costs (see s 60(1)). However, the Tribunal may award costs only if it is satisfied that there are special circumstances warranting an award of costs: see s 60(2) and noting that there are other exceptions to this subsection not presently relevant.
- 13 Section 60(3) states that in determining whether there are special circumstances warranting an award of costs the Tribunal may have regard to

the matters enumerated in subsections (a) to (g). The parties have, in their submissions, correctly identified the meaning of “special circumstances” in the context of considering applications under s 60. Special circumstances have been held to be circumstances that are out of the ordinary but they do not have to be extraordinary or exceptional circumstances (see *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21.

- 14 Although the Appellants included material within the appeal concerning the history of the by-law which was not relevant, we do not think that that conduct unnecessarily disadvantaged the Respondent to an extent that one could say that special circumstances exist warranting an award of costs. The hearing of the appeal did not dwell on the irrelevant material and overall the appeal proceeded in a timely manner.
- 15 The other grounds for arguing the existence of special circumstances submitted by the Respondent are not, in our view, sufficient to justify an award of costs. The appeal could not be said to be frivolous or misconceived or lacking in substance as is evidenced by the fact that the Appellants were partly successful. The other bases referred to by the Respondent in its submissions fall short of being fairly described as special circumstances.
- 16 We also reject the Appellants’ submissions that there should be a costs order in their favour and we agree with the Appellants’ alternative submission that there should be no order as to costs with the intent that each party is to pay their own costs of the appeal. Although the Tribunal may have been misinformed as to what the Tribunal had decided on 12th July there is insufficient evidence to conclude that the conduct of those appearing before the Tribunal constituted having a “second bite at the cherry”.
- 17 Accordingly, the orders are:
  - (1) A hearing on costs is dispensed with.
  - (2) The applications by the parties for an order for costs of the appeal to be made are dismissed.

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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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