



Civil and Administrative Tribunal

New South Wales

---

Case Name: Nelson v The Owners – Strata Plan No.49504; The Owners – Strata Plan No.49504 v Nelson

Medium Neutral Citation: [2020] NSWCATAP 194

Hearing Date(s): 1 September 2020

Date of Orders: 18 September 2020

Decision Date: 18 September 2020

Jurisdiction: Appeal Panel

Before: Armstrong J, President  
M Harrowell, Deputy President

Decision: 1. Leave to file appeal AP 20/26058 is extended to 16 June 2020.

2. In respect of appeal AP 20/26058, leave to appeal is refused and the appeal is otherwise dismissed.

3. In respect of appeal AP 20/32367, leave to appeal is refused and the appeal is otherwise dismissed.

4. The Appeal Panel makes no order for costs.

Catchwords: LAND LAW – Strata title – contravention of by law – failure to comply with notice to remove animals – order for removal under s 157 of the Strata Schemes Management Act 2015

PRACTICE AND PROCEDURE – costs – s 60 of the Civil and Administrative Tribunal Act 2013 – no special circumstances

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)  
Civil and Administrative Rules 2014 (NSW)  
Companion Animals Act 1998 (NSW)

Disability Discrimination Act 1992 (Cth)  
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Collins v Urban (2014) NSWCATAP 17  
House v R [1936] HCA 40; (1936) 55 CLR 499  
Megerditchian v Kurmond Homes Pty Ltd [2014]  
NSWCATAP 120

Texts Cited: Nil

Category: Principal judgment

Parties: AP 20/26058  
Appellant: Yasmin Castrillo Nelson  
Respondent: The Owners – Strata Plan No.49504

AP 20/32367  
Appellant: The Owners – Strata Plan No.49504  
Respondent: Yasmin Castrillo Nelson

Representation: AP 20/26058

Representation:  
Appellant: In person  
Respondent: Ms P Khoury (solicitor)

Solicitors:  
Respondent: Khoury Lawyers

AP 20/32367

Representation:  
Appellant: Ms P Khoury (solicitor)  
Respondent: In person

Solicitors:  
Appellant: Khoury Lawyers

File Number(s): AP 20/26058  
AP 20/32367

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: 15 May 2020  
Before: S De Jersey  
File Number(s): SC 20/02328

## REASONS FOR DECISION

- 1 Ms Nelson is the owner of lot 3 in strata plan SP49504 which she purchased several years ago.
- 2 That strata scheme was registered on 7 March 1995. One of its by-laws, by-law 16 provides:

Subject to section 49(4), an owner or occupier of a lot must not, without the approval in writing of the owners corporation, keep any animal on the lot or common property. The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property.
- 3 Despite this by-law, and without approval of the owners corporation, Ms Nelson has brought on to her lot two cats. Apparently the owners corporation first became aware of the cats on 17 December 2018. On 9 October 2019 the owners corporation served on Ms Nelson a notice issued under s 153 of the *Strata Schemes Management Act 2015 (NSW) (SSMA)*. That notice was to comply with the by-law and remove her animals. The owners corporation said that the odour of the animals was permeating the building, including common property areas and was infecting the stairwell area and other areas on the building.
- 4 The owners corporation filed an application in the Tribunal on about 15 January 2020 seeking an order for removal of the cats pursuant to s 156 of the SSMA. In addition, the owners corporation asked for the Tribunal impose a penalty under s 147 of the SSMA because Ms Nelson had failed to remove the cats in following a notice to comply with a by-law being issued under s 146 of the SSMA.

5 Ms Nelson then applied to the owners corporation for permission to keep the cats. However, that application was refused at a meeting of the strata committee of the owners corporation on 25 February 2020. The minutes of the meeting recorded the reasons for refusing permission to keep the cats as follows:

“The offensive cat’s excrement odour over a prolonged period has affected residents negatively. The odour is such that the external door is left open and is a security risk.

There is always a bad smell in the hallway caused by the cats.

Unfortunately the cats are creating an odour issue in the common area as well as the tenants flat. This is affecting other people in the building as well as the value of the owners flats.”

6 Ms Nelson did not seek to have this decision reviewed by the owners corporation in general meeting. Nor did she make any application under s 157 of the SSMA to the Tribunal. Section 157(1) provides:

The Tribunal may, on application by the owner or occupier (with the consent of the owner) of a lot in a strata scheme, make an order declaring that the applicant may keep an animal on the lot or common property.

7 Subsection 157(2) provides that the Tribunal must not make an order unless it is satisfied that there is a by-law permitting the keeping of animals with the consent of the owners corporation which cannot unreasonably be withheld and that the owners corporation has in fact unreasonably withheld its approval.

8 Directions were made for the parties to file and serve evidence in relation to the application.

9 The application was heard by the Tribunal on 7 May 2020.

10 Pursuant to s 156 of the SSMA, the Tribunal made orders for removal of the cats, this to occur by 7 May 2020 (removal order). Otherwise, the Tribunal dismissed the penalty application, having found that the owners corporation failed to attach to the notice issued under s 146 of the SSMA, a copy of the relevant by-laws as required by s 146(2) of the SSMA being the section under which the notice was issued. The Tribunal provided reasons for its decision.

11 The owners corporation subsequently applied for an order that Ms Nelson pay its costs of the application. The application for costs was dismissed by order made 8 July 2020 (cost decision). The Tribunal provided written reasons (costs

reasons). In short the Tribunal determined that s 60 of the Civil and Administrative Act 2013 (NSW) (NCAT Act) applied and that the owners corporation had not established special circumstances to justify the making of an order for costs. Ms Nelson has appealed the removal order (Nelson appeal) and the owners corporation has appealed the costs decision (costs appeal).

### **Nelson appeal**

12 The Nelson appeal was lodged on 16 June 2020. Prior to this time, Ms Nelson had also made an application to stay the removal order on 1 June 2020. The stay application was previously refused.

13 The Nelson appeal was out of time. The Notice of Appeal left blank the section where an appellant is required to indicate whether she is seeking an extension of time. Despite this fact, and while the owners corporation objected to the grant of an extension of time, we are satisfied time should be extended. This is because the application for stay was made in time, the delay is minimal (the appeal should have been filed on 3 June 2020), the appellant was self-represented, and the respondent could not point to any relevant prejudice.

14 According, we will make an order to extend time.

15 The grounds of appeal in section B of the Notice of Appeal provided:

The two cats have been resident at this address for some time prior to any complaint. One cat since 2012 and the second cat since 2016. There was not one single complaint received until a new resident moved in and coerced others to complain. The fine is totally unjustified and caused untold financial stress and exacerbated the mental health issues which are of a concern regarding the appellant. It appears that the letter of support from the clinical psychologist was not given enough weight in the decision making process.

16 In respect of the order sought, the appellant said:

The cats to remain as companion animals to aid in the process of recovery from PTSD and bipolar disorder.”

17 In relation to leave to appeal, the appellant said that the decision was not fair and equitable as “it had caused an immeasurable amount of increased anxiety and stress for somebody already recovering from serious mental health issues including PTSD, bipolar and anxiety”. Reference was then made to the strata manager refusing to mediate. In addition, Ms Nelson said the decision was against the weight of evidence, insufficient weight being given to a clinical

psychologist report which had been provided at the original hearing and “unsubstantiated and false allegations from a resident who it now seems may have recently moved out of the building”.

- 18 In relation to her grounds of appeal referring to the imposition of a penalty, no penalty was imposed and it is unnecessary to deal with this aspect of this appeal any further.

### **Costs appeal**

- 19 The owners corporation’s Notice of Appeal against the costs decision was filed on 29 July 2020. The Appeal was filed in time.
- 20 The grounds of appeal were as follows:
- (1) The Tribunal did not fully consider the submissions on costs attached to the Notice of Appeal;
  - (2) The Tribunal erred in its determination on costs;
  - (3) The strength of the owners corporation’s claims, evidence and matters raised at the hearing were not given enough weight;
  - (4) The Member has not given due consideration to the factors set out in s 60 of the NCAT Act with respect to costs.
- 21 The owners corporation sought an order that Ms Nelson pay its costs of the proceedings at first instance as agreed or assessed.

### **Consideration**

- 22 In each appeal, there is a right of appeal on a question of law. Otherwise leave to appeal is required: s 80(2)(b) of the NCAT Act. Because the decisions were made in the Consumer and Commercial Division of the Tribunal, Sch 4 cl 12(1) limits the circumstance in which the Appeal Panel can grant leave. An applicant for leave must show that they may have suffered a substantial miscarriage of justice because the decision was not fair and equitable, against the weight of evidence, or there was significant new evidence that was not reasonably available at the time of the original hearing.
- 23 The appeals were heard on 1 September 2020. The hearing was conducted by telephone, due to restrictions arising from the Covid-19 pandemic.
- 24 Ms Nelson represented herself. Ms Khoury, solicitor, appeared on behalf on the owners corporation with leave.

- 25 Directions had been made prior to the hearing of the appeal for the parties to file and serve evidence in support of their respective positions, including evidence provided to the Tribunal at first instance and a sound recording/transcript of proceedings if relied upon.
- 26 In the case of the owners corporation a bundle of documents was provided as well as written submissions. In the case of Ms Nelson no material was provided. In particular, the psychologist's report which she referred to in her Notice of Appeal was not included in her material.
- 27 Despite this failure the Appeal Panel was read a copy of the psychologist's report by Ms Khoury, it being accepted that this evidence was before the Tribunal in the proceeding at the first instance.
- 28 In addition to the written material to which we have referred, the parties made oral submissions at the hearing of the appeal.
- 29 It is convenient to deal with the appeals separately.

#### *Nelson appeal*

- 30 In her oral submissions, Ms Nelson said that the Tribunal failed to acknowledge or consider the report from her psychologist.
- 31 She also said the strata scheme had a rat infestation and was otherwise untidy and not properly cleaned. She complained another resident was permitted to keep a dog that was barking and that the decision to permit that owner to keep her dog while refusing her permission to keep cats was biased.
- 32 She acknowledged that the only evidence she provided to the Tribunal was the letter from her psychologist that referred to her cats as "therapeutic animals".
- 33 Because Ms Nelson was self-represented, and because she had made reference to a companion animal in her Notice of Appeal, we raised with the parties s 139(5) of the SSMA. This section provides:

#### **By-law cannot prevent keeping of an assistance animal.**

A by-law has no force or effect to the extent that its purpose to prohibit or restrict the keeping on a lot of an assistance animal (as referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth) used by an owner or occupier of a lot as a assistance animal or the use of the assistance animal by that person on a lot or common property."

34 We drew to the attention of the parties that, if the cats were assistance animals for the purposes of that subsection, the by-law would not operate. Having discussed the content of s 9 of the *Disability Discrimination Act 1992* (Cth), the appellant said that the cats had been toilet trained by her, however there was no evidence that they had otherwise been trained as an assistance animal or otherwise met requirements of s 9. Subsection 9(2) provides:

(2) For the purposes of this Act, an assistance animal is a dog or other animal:

(a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons with a disability to alleviate the effect of the disability; or

(b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or

(c) trained:

(i) to assist a person with a disability to alleviate the effect of the disability; and

(ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

35 While Ms Nelson said the cats were beneficial to her in dealing with her health issues, she did not suggest she had been discriminated against by the owners corporation or that such a claim had been made in the proceedings at first instance. In addition it was not suggested she had made an application to the Tribunal to challenge the decision of the strata committee to refuse her application to keep her cats.

36 In its reasons, the Tribunal found that Ms Nelson had been keeping cats for a number of years, one cat since 2012 and the second cat since 2016. The Tribunal accepted that the owners corporation had been corresponding with Ms Nelson for some years concerning the cats, that the cats caused smells in common property areas and had been disturbing the comfort of other lot owners and occupiers.

37 The Tribunal then concluded:

The relevant provision of the Act for an order to remove an animal not permitted under the by-laws is section 156. As there was no issue that they has been no approval, I am satisfied that the 2 cats are being kept by the respondent in breach of By-law 16 and therefore should be removed. As the cats are not approved, I do not consider it is relevant on the owners corporation application whether they are causing a smell or not. They are not



approved and it is the task of the Tribunal to uphold the law of the Act. Accordingly I make the order removing them.”

If the respondent seeks to keep the cats on her lot, and she considers the applicant’s refusal to consent to the cats to be unreasonable then it is incumbent on her to file an application with the Tribunal to seek the appropriate remedy which is available under section 157 of the NCAT Act. That is not the application today; today’s application is the application of the owners corporation. The parties are to note that the order removing the cats will cease to have effect if the keeping of the cats is subsequently authorised in accordance with By-law 16 – section 156(2) of the Act.

- 38 In its reasons, the Tribunal made reference to “a medical certificate which explains the importance [to Ms Nelson] of cats to her mental health and a photograph of 2 cleaning products”. Despite objection, this evidence was permitted in the proceedings at first instance, the medical certificate being the psychologist’s report to which we earlier referred.
- 39 While not expressly dealt with in the written reasons for the decision, it is implicit in the decision that the Tribunal considered this material but did not think that it gave rise to circumstances that should cause the Tribunal to decline to make an order for removal of the cats due to non-compliance with the by-law. In this regard, the transcript records no submission was made by Ms Nelson concerning the cats being assistance animals. The only submission made was that the cats were “companion cats” and that they are indoor cats and “sometimes... play in [Ms Nelson’s] little garden when [she is] at home”; see respondents bundle (RB Tab 14 page 169.8).
- 40 However, there is nothing in the *Companion Animals Act 1998* (NSW) which would render by-law 16 unenforceable.
- 41 In these circumstances, in our view there was no error made by the Tribunal in making an order for removal of the cats. While the cats had been kept on the premises for some time, the fact remains that no approval had been obtained prior to the issue of the notice under s 156 of the SSMA and they were found to be causing inappropriate odours and affecting other lot owners and occupiers. While an application to the owners corporation was made by Mrs Nelson subsequent to the application being made to the Tribunal for an order removing the cats, reasons for refusing permission to keep the cats was provided by the strata committee as recorded in the minutes to which we have referred. There was no challenge to that decision, either through the process of seeking a

different decision from the owners corporation in general meeting or by making an application to the Tribunal as permitted by s 157 of the SSMA. It follows that the Nelson appeal should be dismissed.

*Costs appeal*

- 42 In so far as this appeal suggests that the discretion of the Tribunal may have miscarried in the sense of *House v R* [1936] HCA 40; (1936) 55 CLR 499 (*House v The King*) at 504-5, this raises a question of law. Otherwise leave to appeal is sought.
- 43 First, the owners corporation said the decision was not fair and equitable because the Tribunal “did not consider the evidence and strength of the owners corporation’s claim against Ms Nelson”. The owners corporation had been successful in its application and the owners corporation says the Tribunal did not appear to assess these submissions against the claims, evidence and submissions served by the owners corporation and relied on in the proceedings.
- 44 Second, the owners corporation said the decision was against the weight of evidence. Here the owners corporation referred to the evidence from the proceedings at first instance, the report obtained concerning odours emanating from Ms Nelson’s unit, the fact a notice to comply with the by-laws had been issued and that Ms Nelson had failed to comply. In addition, the owners corporation referred to the conduct of Ms Nelson in failing to provide her evidence as directed by the Tribunal.
- 45 In its submissions in support of the costs application (RB Tab 7) provided to the Tribunal at first instance, the primary position was that the Tribunal should not depart from the principle “that costs should be awarded in this matter and that ordinarily costs follow the event”; cost submissions at [7]. Reference was made to the conduct of Ms Nelson leading up to the commencement of the proceedings. The owners corporation submitted to the Tribunal that subs 60(3)(b) and (c) of the NCAT Act were engaged and there were special circumstances warranting the Tribunal in making an order for costs.
- 46 In the costs reasons, the Tribunal noted the issues had been continuing since 2016, there had been many meetings to try and resolve the issues, that legal

representation had been obtained by the owners corporation, and costs had been incurred in obtaining a consulting company to provide evidence concerning the odours emanating from the carpet in the stairwell and the source of those odours.

47 However, the Tribunal rejected the costs application and determined it was inappropriate to make the costs orders sought for the following reasons:

- (1) The owners corporation was not wholly successful, the penalty application being dismissed (costs reasons [at 9])
- (2) Ms Nelson was entitled to defend the proceedings and was partially successful in defeating the penalty application (costs reasons [9]);
- (3) There was no requirement on the respondent to provide any documentary evidence and the respondent was entitled to rely on oral evidence. Any failure to provide documentary prior to the hearing was not, in the circumstances of this case, sufficient reason to find special circumstances warranting an order for costs (costs reasons [9]).
- (4) The fact that the dispute had been going on for some years did not make it unusual or special – it being common for such issues to take some time to come before the Tribunal. To this extent the owners corporation could have lodged an application earlier (costs reasons [10]);
- (5) The fact leave is given to a party under s 45 of the NCAT Act for legal representation and that party is subsequently successful, does not mandate that a unsuccessful party will be liable for those legal costs (costs reasons [11]);
- (6) The facts of the case were not complex in law or in fact (reasons [11]);
- (7) An experienced strata manager could have conducted the case on behalf of the owners corporation (costs reasons [11]).

48 For these reasons, the Tribunal was not satisfied there were special circumstances warranting making an order for costs.

49 In oral submissions in the costs appeal, the owners corporation reiterated its submissions that not enough weight was given to the evidence to which it referred to in its costs submissions, Ms Nelson's position was weak and/or had no tenable basis, and having regard to the nature and complexity of the proceedings special circumstances existed which warranted a making an order for costs. The owners corporation relied on s 60(b), (c) and (d) of the NCAT Act as factors warranting a finding of special circumstances and therefore an order for costs.

- 50 Ms Nelson replied opposing the owners corporation appeal and saying that the Tribunal was correct in not making an order for costs against her.
- 51 Section 60 of the NCAT Act applies to the proceedings at first instance. Section 60(1) provides that each party to proceedings is to pay their own costs. However, the Tribunal may award costs if satisfied there are special circumstances warranting such an award: s 60(2) NCAT Act.
- 52 Special circumstances means circumstances which are out of the ordinary but not necessarily extraordinary or exceptional: see eg *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].
- 53 Section 60(3) of the NCAT Act sets out matters to which the Tribunal may have regard in determining if special circumstances exist. Relevantly, the factors in subs (b), (c) and (d) are:
- (b) whether a party has been responsible for prolonging unreasonable 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.
- 54 The Tribunal, in the costs reasons, dealt with all the these matters in rejecting the submission that special circumstances existed.
- 55 None of the submissions we have received on appeal would suggest the discretion has miscarried, being an error of the type in *House v The King*. The Tribunal evaluated the history of the proceedings, the conduct of the parties during the course of the proceedings, the relative strength of each party's positions, and the complexity of the proceedings, and determined that there was nothing out of the ordinary.
- 56 Accordingly, no error of law is established.
- 57 In so far as leave to appeal is sought, we are not satisfied that the owners corporation may have suffered a substantial miscarriage of justice. It could not be said that the "evidence in its totality preponderates so strongly against the conclusion found by the Tribunal at first instance that it can be said that the conclusion was not one that a reasonable Tribunal member could make"; *Collins v Urban* [2014] NSWCATAP 17 at [77]. Nor do we think that it could be

said that there is a significant possibility that a different and more favourable result would have been achieved in the circumstances of this case: *Collins* [78].

58 While there was a long running history to the dispute of keeping of the cats, the Tribunal correctly recorded that the proceedings were not commenced for many years. While leave was granted to the owners corporation to be legally represented, the Tribunal correctly pointed out that this does not lead to an order for costs or an entitlement to costs. Rather, s 60 must be applied according to its terms.

59 The history of the proceedings before the Tribunal revealed that the order sought for the removal of the animals was not, in the circumstances of this case, out of the ordinary. The application did not take excessive time to resolve and its resolution was not prolonged by the conduct of Ms Nelson. The claim was not, on its facts or in a legal sense, complex and, in any event, the owners corporation was unsuccessful in part of its claim in seeking an imposition of a penalty.

60 In these circumstances, no error in the Tribunal's cost decision is established, leave to appeal on grounds other than a question of law should be refused and the appeal should be otherwise dismissed.

### **Costs of the appeals**

61 The owners corporation sought costs of the appeal.

62 Section 60 applies to the appeal, rule 38 and rule 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) not applying in the present circumstances.

63 Again, there are no circumstances out of the ordinary warranting an order for costs. Both parties have been unsuccessful in their appeals. The issues raised in the appeals overlap. Both appeals involved a consideration of the history of the disputes between the parties, the conduct of the proceedings at first instance, the issues raised in those proceedings and the orders made which have been the subject of challenge. There is no other reason why the position in s 60(1), namely each party is to pay their own costs, should be displaced.

64 Accordingly, there will be no order for costs.

## ORDERS

65 The Appeal Panel makes the following orders:

- (1) Leave to file appeal AP 20/26058 is extended to 16 June 2020.
- (2) In respect of appeal AP 20/26058, leave to appeal is refused and the appeal is otherwise dismissed.
- (3) In respect of appeal AP 20/32367, leave to appeal is refused and the appeal is otherwise dismissed.
- (4) The Appeal Panel make no order for costs.

\*\*\*\*\*

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.