Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 58068 v Cooper (Costs)
Medium Neutral Citation:	[2020] NSWCATAP 198
Hearing Date(s):	On the papers
Date of Orders:	29 September 2020
Decision Date:	29 September 2020
Jurisdiction:	Appeal Panel
Before:	Armstrong J, President M Harrowell, Deputy President
Decision:	(1) By consent, an order is made pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) dispensing with a hearing of the application for costs. (2) In each of the applications SC19/24722 and SC19/18982, the Coopers are to pay 70% of the costs of The Owners Strata Plan No 58068, such costs to be as agreed or assessed on an ordinary basis. (3) In respect of this appeal, the respondents are to pay the costs of the appellant, such costs to be as agreed or assessed on an ordinary basis.
Catchwords:	COSTS – s 60 of the Civil and Administrative Tribunal Act 2013 – special circumstances – statutory construction – complexity of proceedings – issue not previously decided by Appeal Panel – overruling of previous first instance decisions
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bostick Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304 Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59 Megerditchian v Kurmond Homes Pty Ltd [2014]

	NSWCATAP 120 Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 The Owners – Strata Plan No 55773 v Roden; Spiers v The Owners – Strata 77953 [2020] NSWCATAP 95 The Owners – Strata Plan No 58068 v Cooper [2020] NSWCATAP 96 Yardy v Owners Corporation SP 57237 [2018] NSWCATCD 19
Texts Cited:	Nil
Category:	Costs
Parties:	The Owners – Strata Plan No 58068 (Appellant) Johanna Anwar Cooper and Leo Bernard Cooper (Respondents)
Representation:	Counsel: G A Sirtes SC with L M Johnston (Appellant) V F Kerr SC (Respondents) Solicitors: DEA Lawyers (Appellant) Bannermans Lawyers (Respondents)
File Number(s):	AP 19/55887
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	[2019] NSWCATCD
Before:	G K Burton SC, Senior Member
File Number(s):	SC 19/18982, SC 19/27422

REASONS FOR DECISION

Introduction and background

1 These reasons relate to an application for costs by the appellant, The Owners – Strata Plan No 58068 (Owners Corporation). The Owners Corporation was successful in its appeal against a decision of the Tribunal concerning the Respondents (the Coopers) and the keeping of Ms Cooper's dog called Angus in their lot which forms part of Strata Plan No 58068.

2 Initially, the Coopers had succeeded in having a by-law preventing the keeping of animals (by-law 14) declared invalid. The Tribunal at first instance in proceedings brought by Ms Cooper and her husband, being application number SC 19/27422, had made a declaration pursuant to s 150 of the *Strata Schemes Management Act 2015* (NSW) (SSMA) that the by-law was invalid because it was harsh, unconscionable or oppressive in contravention of s 139(1). There had been related proceedings, including a penalty application, brought by the Owners Corporation against the Coopers seeking to enforce the by-law following service by the Owners Corporation of a notice upon the Coopers requiring removal of the dog. These proceedings were application number SC 19/18982. The Tribunal at first instance dismissed the Owners Corporation's application.

3 The Tribunal's decision was made on 19 November 2019, the Tribunal publishing reasons for its decision: *The Owners – Strata Plan No 58068 v/ats Cooper* [2019] NSWCATCD 62. In its decision of 19 November 2019, the Tribunal made directions for the filing and service of submissions on costs. Subsequently, the Tribunal made an order for costs in favour of the Coopers, the terms of which are presently irrelevant. That costs decision was made on 6 February 2020.

4 The Appeal Panel heard the substantive appeal on 2 April 2020. On 27 May 2020, the Tribunal made orders setting aside the Tribunal's decision at first instance and published reasons for decision: The Owners – Strata Plan No 58068 v Cooper [2020] NSWCATAP 96 (Principal Reasons). The following orders were made:

> In SC19/24722 and SC19/18982:

1. The appeal is allowed.

2. Orders 1, 2 and 3 of the Tribunal made on 21 November 2019 are set aside.

3. Orders 1 and 2 of the Tribunal made on 6 February 2020 are set aside.

In SC 19/24722:

4. An order pursuant to s 156 of the *Strata Schemes Management Act 2015* (NSW) that the respondents, Johanna Anwar Cooper and Leo Bernard Cooper, remove or cause to be removed the miniature schnauzer dog called 'Angus' from their lot in strata scheme 58058 within 28 days of these orders, and keep such animal away from their lot and common property.

In SC19/18982:

5. 5

The appellant is to advise the Appeal Panel within 7 days whether it seeks an order for remittal of the proceedings in so far as it relates to the application for a civil penalty contravention under Div 4 of Pt 7 of the *Strata Schemes Management Act 2015* (NSW) concerning the notice to comply given by the appellant to the first respondent Johanna Cooper on 18 March 2019.

In SC19/18982, SC19/24722, AP20/55887:

6. In respect of costs, we make the following directions:

(i) Any applicant for costs (costs applicant) is to file and serve such application and relevant submissions and evidence within 14 days from the date of these orders;

(ii) Any reply, including evidence and submissions, to the applicant is to be filed and served within 21 days from the date of these orders;

(iii) The cost applicant is to file and serve any response within 28 days from the date of these orders;

(iv) The submissions are to include submissions about whether an order dispensing with a hearing should be made under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

5 These orders had the effect of setting aside the declaration that the by-law in respect of the keeping of animals was invalid, ordering the Coopers to remove Ms Cooper's dog, setting aside the costs orders made in favour of the Coopers in the proceedings at first instance, and permitting the parties to make submissions in respect of costs.

6 In respect of that part of application SC 19/18982, which related to the imposition of a penalty upon Ms Cooper, and order 5 made by the Appeal Panel in respect of that claim, the Owners Corporation did not pursue this matter.

Submissions

7 In accordance with directions made by the Appeal Panel, being order 6 made 27 May 2020, the parties filed written submissions in support of their respective positions.

8 Both parties agreed that s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) applied to the costs application. Both parties agreed that an order should be made pursuant to s 50(2) of the NCAT Act, dispensing with a hearing. We are satisfied the application for costs can be adequately dealt with on the papers, without a hearing, the parties having had the opportunity to file and serve evidence and submissions in support of their respective positions. Accordingly we will make an order dispensing with the hearing.

Appellant's submissions on costs

9 The Owners Corporation sought the following orders in relation to costs:

(1) The respondents pay the costs of and incidental to the appeal including the submissions on costs, as agreed or assessed.

(2) The respondents pay the costs of and incidental to the proceedings at first instance, including the submissions on costs.

(3) Alternatively to (2), the respondents pay the costs of and incidental to the summons issued by the appellant in the proceedings at first instance.

10 The Owners Corporation relied on two pieces of evidence in support of its application.

11 First was email correspondence between Ms Cooper and her conveyancing solicitor prior to the Coopers purchasing their lot. This document was produced on summons to the Tribunal at first instance. The email recorded Ms Cooper saying she was aware of a no pets by-law and asked her lawyer "can they really enforce that as owners?". The Owners Corporation referred to this document as the "Pre-Purchase Email".

12 The second document was a letter dated 18 October 2018 from the Coopers' solicitors, Bannermans, to the Owners Corporation (October Letter). Amongst other things, this letter set out the circumstances of the dog Angus, the dog's history of living in strata schemes, the fact the Tribunal had declared a by-law similar to by-law 14 harsh, unconscionable and oppressive in its decision in *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD 19 (*Yardy*), and that Ms Cooper was willing to address reasonable concerns of the Owners Corporation regarding the keeping of the animal, including "transporting it through common property, disposal of waste, noise etc".

13 In respect of the proceedings at first instance and on appeal, the Owners Corporation said it should have its cost for four reasons:

(1) the proceedings are significantly more complex than proceedings ordinarily before the Tribunal or the Appeal Panel;

(2) the Owners Corporation has always been the "natural respondent" having been required to take action to defend the by-law in the face of a wilful breach and then former challenge in the Tribunal. In essence, the challenge has been to maintain the "status quo";

(3) the Coopers have put "every conceivable point in issue in the proceedings below and on the appeal" which has significantly increased the time and cost of the proceedings; and

(4) the Owners Corporation's position has been "overwhelmingly affirmed by the Appeal Decision".

14 The Owners Corporation also said there was an additional aspect of costs arising from its issue of a summons to the Coopers.

15 In relation to the appeal proceedings the Owners Corporation provided the following submissions.

16 As to complexity, the Owners Corporation says that the proceedings at first instance and on appeal involve both a complex question of statutory interpretation, the impact of certain transitional provisions in the SSMA and their application to the particular facts of the case. At first instance there was a claim and cross claim. In respect of the appeal proceedings, the Owners Corporation says that the present appeal, and the appeal in *Roden v The Owners-Strata Plan No 55773* [2019] NSWCATCD 61 (*Roden*), were the first occasions on which the Appeal Panel had considered the proper interpretation

of s 139(1) of the SSMA, following its introduction when the SSMA commenced in 2016.

17 The proceedings were vigorously contested by both parties. Senior Counsel was briefed by both parties in the proceedings at first instance and on appeal. Lengthy submissions were filed, the hearing at first instance occupying one day and the matter taking a further day before the Appeal Panel.

18 The complexity, and the resources expended in the proceedings, make the circumstances out of the ordinary having regard to s 60(3)(d) of the NCAT Act.

19 Secondly, the Owners Corporation has been forced to commence proceedings because of a "series of deliberate, self-interested decisions of the [Coopers]". Reference is made to the findings of the Appeal Panel in our primary decision at [139]. In effect, the Owners Corporation was required to commence enforcement proceedings having regard to the conduct of the Coopers which the Owners Corporation characterised as "deliberately antagonising conduct". This, when coupled with the fact "the owners had voted overwhelmingly to maintain the by-law meant the Owners Corporation was charged to defend it for the benefit of the owners as a whole". Failure to do so could have led to a position similar to that in *Roden*, in which a by-law had been passed to deal with the situation of past non-compliance. In short, the Owners Corporation had been put to significant expense by in order to maintain the existing by-law reason of the action of "one co-owner, who knowingly bought into a pet free building".

20 In this regard, reference was made to the Pre-Purchase Email.

21 As to the October Letter, by its terms and its reference to the decision in *Yardy*, the Coopers made clear that there was no invitation to discuss the issue of the keeping of the dog Angus. Rather the October Letter constituted "a high-handed declaration that brooked no compromise".

22 Simply because the proceedings were brought in the Tribunal should not deprive the Owners Corporation of its costs in circumstances where the litigation brought by the Coopers proved fruitless.

23 These facts should lead the Appeal Panel to conclude, both on appeal and in the proceedings at first instance, that the Coopers took a "contemptuous approach" to the by-laws and advocated a "change in the status quo from the position of compliance".

24 Consequently, the Owners Corporation says by reason of the matters in subs 60(3)(a), (b), (d) and (g) of the NCAT Act it has been unnecessarily disadvantaged by the manner in which the Coopers have conducted the proceedings, the proceedings have been made more complex, the proceedings have taken a longer time to resolve, and the Owners Corporation "has been shoehorned into expensive and time-consuming measures" in preserving the status quo.

25 The Owners Corporation also says the Coopers took every conceivable point, reference being made to the written submissions filed in the appeal. By reference to those submissions, the Owners Corporation says the Coopers spent considerable time discussing the Tribunal's decisions of *Yardy* and *Roden*, the concept of "ordinary property rights", and addressed issues not raised on the appeal by the Owners Corporation. The submissions did not seek to defend the decision of the Tribunal at first instance and the reasoning therein. Rather, the Coopers advocated the position accepted by the Tribunal in *Yardy* and *Roden*. In doing so the Coopers asserted many of the claims of the Owners Corporation raise questions of fact and therefore leave was required.

26 Lastly, the Coopers challenged the application to adduce fresh evidence, a matter which did not feature prominently in the written submissions. However this challenge occupied "a significant amount of the Coopers' submissions at the hearing of the appeal and was the subject of further written submissions following the hearing. As the matter never arose at first instance because of the manner in which the Coopers had conducted those proceedings, the Owners Corporation said these facts contribute to the circumstances justifying a finding of special circumstances in connection with the appeal.

27 The Owners Corporation says that it enjoyed overwhelming success in the appeal in respect of its arguments advanced at first instance and subsequently

in the appeal. This, the Owners Corporation said, was relevant having regard to s 60(3)(c) and the relative strengths of the claims of the parties.

28 The Owners Corporation submits our primary decision substantially follows the submissions made by it, including in respect of ordinary rights, community standards, and the need for a balanced consideration of the rights of all lot owners. By reference to these matters, and the facts as found by the Appeal Panel in its primary decision, the Owners Corporation says its position has been vindicated "on every significant point in issue".

29 In connection with the costs of the proceedings at first instance, the Owners Corporation relies on essentially the same matters as in the appeal.

30 In addition, the Owners Corporation submits that the position in relation to its issue of the summons is different. The summons required production of the Coopers' solicitor file in connection with the purchase of their lot in the strata scheme.

31 Here, the Owners Corporation says that the Coopers raised a claim for legal professional privilege and also challenged the summons on the basis it had not been issued for a legitimate forensic purpose. The Coopers had resisted the summons by making a "blanket claim" for privilege in respect of the solicitor's file. Having done so, the Coopers did not inspect the documents produced, ultimately conceding they could not or would not maintain any claim for privilege, such concession being made on the first at the hearing. The claim for privilege was never articulated nor was any evidence filed in support of the claim. Consequently, "proper procedure for establishing a claim for privilege" had not been followed.

32 The summons had been issued by the Owners Corporation because the Coopers had put in issue their knowledge of the by-law at the time they purchased their apartment. In this regard a witness statement was filed by Ms Cooper that she was unaware of the by-law at the time of exchange of contracts. It was not until the "eve of the hearing" that Ms Cooper corrected her evidence. Reliance is placed on the Pre-Purchase Email.

33 The Owners Corporation submits that it incurred significant costs in a matter ultimately conceded by the Coopers. These facts constitute special circumstances in connection with the issue of the summons.

Respondent's submissions on costs

34 The Coopers identified various facts which they said were relevant to the determination of the costs application. These were:

(1) Ms Cooper kept her dog on the premises in contravention of by-law 14. However, there was evidence of other pets being kept in the building and off pets "being tolerated if hidden".

(2) Between 22 November 2018 and 18 March 2019 the Owners Corporation gave three notices to Ms Cooper requiring the removal of her dog. These notices form the basis of the application to the Tribunal for the imposition of a penalty for contravention of by-law 14 as permitted by s 147(1) of the SSMA. These proceedings, SC 19/18982, were commenced on 18 April 2019.

(3) Ms Cooper's proceedings, SC 19/27422, were commenced on 13 June 2019. In essence this was a "cross-claim in defence of the proceedings" brought by the Owners Corporation.

(4) As at 13 June 2019, there was one relevant decision of the Tribunal concerning the validity of a "no pets" by-law, namely *Yardy*. Facts of that case were not relevantly different to those in the present proceedings.

(5) The proceedings at first instance were heard on 26 September 2019. One week prior, the Tribunal's decision in *Roden* was published. Again, this decision declared a "no pets" by-law invalid, the facts of that case being not relevantly different.

35 Consequently, it could not be said the Coopers proceedings were not properly brought.

36 Aside from any special order for costs in respect of the summons issued by the Owners Corporation in the proceedings at first instance, both costs of the first instance proceedings and the appeal are dependent on whether there are special circumstances warranting an award for costs.

37 The Coopers concede the proceedings are complex. However, they say on three occasions the Tribunal had previously found a by-law prohibiting the keeping of animals was harsh, unconscionable or oppressive.

38 Whether the proceedings as a whole were significantly more complex than other proceedings which ordinarily come before the Tribunal is not readily

measurable. In this regard, the Coopers say that once the issue of invalidity under s 139(1) is determined, the penalty issues and other orders sought by the Owners Corporation were not of themselves complex.

39 In any event, the fact of complexity does not of itself constitute special circumstances. Rather, a party is "ordinarily entitled to avail itself of the costs free jurisdiction of the Tribunal" and the mere fact of complexity would tend to give rise to a "prejudice" or risk of costs because of circumstances over which a party against whom costs were sought had no control.

40 As to the submission that the Owners Corporation was the "natural respondent", the Coopers took issue with language such as "deliberately antagonising", "high-handed" and "consistently contemptuous" found in the Owners Corporation's submissions.

41 The Coopers said that the declaration of invalidity was in response to the relief sought by the Owners Corporation, namely a monetary penalty and an order for removal of the dog. Language such as "no choice" and other emotive language does not assist the Owners Corporation. A lot owner is entitled to seek a change to the by-law "without the risk of having Tribunal proceedings being brought against it as retribution". It was the Owners Corporation's choice to commence proceedings to enforce the by-law and seek removal of the dog. While it was entitled to do so, that does not mean it was the "natural respondent".

42 Otherwise, the characterisation of a party in proceedings that might otherwise be undertaken in court proceedings is irrelevant when considering the position in the Tribunal.

43 As to the submission that the Owners Corporation needed to take action because the Coopers acted in defiance of breach notices and therefore the Owners Corporation is entitled to costs, this submission suggests that the imposition of a costs order is punitive in nature. If punishment was to be imposed, this is a matter to be considered in connection with the monetary penalty proceedings only, a matter not pursued by the Owners Corporation. The submissions associated with the fact penalty proceedings were

commenced “ought not be treated as a backdoor means of imposing monetary penalties” in the present circumstances.

44 In relation to the Coopers taking “every conceivable point”, the Coopers say this submission reeks of hypocrisy.

45 The Coopers submit that they always accepted a question of law arose in considering whether the Tribunal erred in declaring by-law 14 harsh, unconscionable or oppressive.

46 However, the Coopers say that some of the grounds clearly required leave. While the Appeal Panel did not finally need to determine these matters, the Coopers were entitled to respond to all issues raised by the appellant which they did in their submissions. Any criticism arising from complexity ought properly be directed towards the Owners Corporation “for agitating 10 grounds of appeal when there was really only one ground of appeal raising an issue of law that would needed to be determined”. Otherwise the grounds raised were an “unnecessary diversion” although one which the Coopers could not ignore.

47 As to the basis upon which the Coopers responded to the appeal, they are entitled to rely on the decisions in *Yardy* and *Roden* as well as make submissions concerning the decision at first instance. Consequently, it could not be said the Coopers took every conceivable point or acted in a manner which unnecessarily prolonged proceedings or otherwise constitute special circumstances warranting an order for costs either in the proceedings at first instance or on appeal. Further, the decision made at first instance and the earlier decisions of *Yardy* and *Roden* demonstrate that the position of the Coopers was, in the circumstances, a reasonable one to adopt.

48 The Coopers separately dealt with the question of the costs of the summons in the proceedings at first instance.

49 Here, the Coopers say that the Tribunal at first instance rejected the claim for costs of the summons. The Coopers say the Appeal Panel did not determine this issue and should have regard to the reasoning of the Tribunal, the Appeal Panel having determined not to separately deal with the appeal in relation to the costs decision at first instance.

50 In short, the Coopers say the costs application of the Owners Corporation should be rejected as it is a challenge to the Tribunal's refusal to make an order which, being an ancillary decision, requires leave. Secondly, the Tribunal's decision at first instance was in connection with the exercise of a discretion and no error is disclosed sufficient to justify appellate intervention. Further, and in any event, the reasons of the Tribunal in its costs decision at [14]-[17] are correct and should be adopted by the Appeal Panel.

Consideration

51 It is common ground that s 60 of the NCAT Act applies.

52 Section 60(1) provides that each party is to pay their own costs of proceedings before the Tribunal, including the Appeal Panel. However, the Tribunal, including the Appeal Panel, may award costs if there are special circumstances: NCAT Act, s 60(2). The expression "special circumstances" means out of the ordinary but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 12 at [11].

53 The matters relevant to determining whether there are special circumstances are set out in s 60(3) of the NCAT Act. This subsection provides:

> 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.

54 The question of costs in respect of the proceedings at first instance and on appeal needs to be considered separately. This is because

(1) what constitutes special circumstances is in part dependant on the issues raised and the conduct of the parties in the particular proceedings; and

(2) costs are compensatory: *Latoudis v Casey* (1990) 170 CLR 534 McHugh J at 567; [1990] HCA 59; and

(3) if special circumstances are established, any discretion must be exercised in the context of the particular proceedings.

Costs of proceedings at first instance

55 The proceeding at first instance involved a claim and counter claim. The applications raised the following issues:

(1) Whether Ms Cooper contravened a by-law in keeping a dog on her lot property;

(2) Whether Ms Cooper failed to comply with a notice to comply with the by-law in respect of the keeping animals issued by the Owners Corporation under s 146(1) of the SSMA;

(3) Whether, by reason of failure to comply with that notice, Ms Cooper should be ordered to pay a monetary penalty under s 147(1) of the SSMA;

(4) Whether the by-law prohibiting keeping of animals was unenforceable by reason of s 139(1) of the SSMA and, if so, whether an order declaring the by-law to be invalid should be made under s 150 of the SSMA.

56 In respect of these applications, the history of the strata scheme, the by-laws referable to that scheme, the Coopers ownership of their lot, and the circumstances in which their dog Angus came to be on lot property and/or common property, were matters relevant to their resolution.

57 In respect of the penalty application, the Owners Corporation was unsuccessful. While the proceedings might have been remitted by the Appeal Panel in connection with this matter, no orders were finally sought and no challenge was otherwise made in a court to the order dismissing the penalty application. Issues relevant to the penalty application included the contravention of the by-law, the issue of a notice to comply and the application for the imposition of a penalty. On its own, this application was relatively straight forward and would not be considered out of the ordinary.

58 On the other hand, the application in connection with having the by-law declared invalid raised complex questions of statutory construction, a matter

about which both parties agree in their submissions. The proceedings at first instance involved the analysis of a number of decisions made by the Tribunal at first instance concerning the proper construction of s 139(1) of the SSMA, the nature and extent of the power afforded to an owners corporation to make by-laws in respect of lot and common property, and a consideration of the interaction of this section with the power given in s 150 of the SSMA to make an order declaring a by-law invalid.

59 The parties made a number of submissions which were unnecessarily colourful in their language and made assertions about the conduct of their opponent. We are not satisfied that there has been any inappropriate conduct by either party in the proceedings which has unnecessarily prolonged the proceeding or disadvantaged the party or otherwise caused the proceedings to be protracted. Also, we do not accept, by reason of the Owners Corporation ultimately succeeding in the proceedings, it could be said that the Coopers' case was untenable or weak. Clearly the decisions at first instance favoured their position.

60 The real issue in this costs application is whether special circumstances exist by reason of the complexity of the proceedings at first instance and, if so, whether a costs order should be made.

61 In our view, the statutory construction point concerning the operation of s 139(1), and how that section is to be interpreted in the context of the SSMA, were circumstances which are properly described as out of the ordinary in the sense used in *Megerditchian*. As such we are satisfied there is a power to award costs in respect of the proceedings at first instance.

62 The Coopers submitted that they had an entitlement to avail themselves of a costs-free jurisdiction, and that by reason of s 60(1), namely that each party should pay the party's own costs, no order for costs should be made. However, in our view, the issues raised, the fact both parties engaged Counsel, and the complexity, are matters which warrant a finding of special circumstances so as to enliven the Tribunal's power to award costs.

63 The next question is how should our discretion in connection with costs be exercised?

64 As we pointed out in the Principal Reasons, determining whether a by-law is harsh, oppressive or unconscionable can involve a consideration of the facts relating to the person who makes a relevant application. In the present case, it was necessary to consider the circumstances of the Coopers, the acquisition of their lot and how they came to bring their dog into the strata scheme. These facts were relevant to both the issue raised by Ms Cooper in her application for her declaration and in the application by the Owners Corporation seeking removal of the dog and the imposition of a penalty.

65 Consequently, allowance should be made for the costs of the Owners Corporation in providing its evidence concerning the history of the strata scheme, the circumstances in which the Coopers acquired their lot, the history of the (relevant) meetings of the Owners Corporation and the conduct of the Coopers.

66 Another factor in favour of the Owners Corporation being entitled to an order that it be paid its costs at first instance arises from the circumstances surrounding the issue of the summons. The Coopers' response to the summons and claim for privilege, and their ultimate withdrawal or failure to pursue such a claim, had the result of the Owners Corporation incurring additional costs.

67 On the other hand, as we set out above, the Owners Corporation was unsuccessful in the penalty application. In such applications the rules of evidence apply. The Owners Corporation did not challenge that decision in a court. Further, it did not seek to have the application dealt with by way of remittal from the Appeal Panel. In our view some allowance should be made for the fact that the Owners Corporation were unsuccessful in its penalty application and that the Coopers might be entitled to some of their costs referable to that issue.

68 It is possible for us to make an order for costs on an issues basis: see e.g. *Bostick Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]-[39]. However, having regard to overlapping factual considerations, we do not think it appropriate to take such approach in the present case.

69 Rather, the Owners Corporation should be allowed 70% of its costs, as agreed or assessed on an ordinary basis. In our view such an award will make due allowance for those parts of its case in which it was unsuccessful, and to allow for the fact that some of the issues in the proceedings were relatively straight forward and would not ordinarily entitled a successful party to recover their costs.

Costs of appeal

70 There was no dispute that the issues in appeal were complex.

71 The appeal was determined in circumstances where the Tribunal constituted by this Appeal Panel and Senior Member Wilson was reserved in the appeals now reported as *The Owners – Strata Plan No 55773 v Roden; Spiers v The Owners – Strata 77953* [2020] NSWCATAP 95 (Roden Appeal). At that time there had been no decisions of the Appeal Panel concerning the operation of s 139(1) of the SSMA in the context of by-laws prohibiting the keeping of animals or by-laws regulating the number of animals that can be kept. Also, as far as we are aware, there have been no decisions of any court regarding challenges to by-laws prohibiting the keeping of animals under s 139(1) of the SSMA.

72 Consequently, having regard to the fact of complexity, the fact the Appeal Panel had not previously determined like cases, and having regarding to the issues raised, we are also satisfied that special circumstances exist to enliven the power of the Appeal Panel to make the order for costs in the appeal under s 60(2) of the NCAT Act.

73 As noted in the Principal Reasons, the appeal proceedings, substantially, if not wholly, concentrated on the issue of statutory construction and whether the by-law was harsh, oppressive or unconscionable. Otherwise, there was no right of appeal to the Appeal Panel against the dismissal of the penalty application (see s 32(3)(d) of the NCAT Act) and that was not a matter arising in the substantive appeal. The only issue in connection with the dismissal of the penalty application was whether the proceedings should be remitted, a matter not pursued by the Owners Corporation in the appeal proceedings.

74 The appellant was successful in the appeal and, because there were special circumstances, an order for costs should be made in its favour.

Orders

75 We make the following orders:

(1) By consent, an order is made pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) dispensing with a hearing of the application for costs.

(2) In each of the applications SC19/24722 and SC19/18982, the Coopers are to pay 70% of the costs of The Owners Strata Plan No 58068, such costs to be as agreed or assessed on an ordinary basis.

(3) In respect of this appeal, the respondents are to pay the costs of the appellant, such costs to be as agreed or assessed on an ordinary basis.

****

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