Civil and Administrative Tribunal

New South Wales

Case Name:	Khoury v The Owners – Strata Plan No 4115
Medium Neutral Citation:	[2020] NSWCATAP 241
Hearing Date(s):	9 November 2020
Date of Orders:	18 November 2020
Decision Date:	18 November 2020
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member R Titterton OAM, Senior Member
Decision:	Appeal dismissed
Catchwords:	COSTS – party/party – disbursements – disbursements of respondent paid out of strata manager's trust fund from funds deposited by appellants pursuant to special by-law – whether disbursements were the appellants' costs of the proceedings – not the appellants' costs of the proceedings – authority of respondent to use trust funds to pay its disbursements doubted
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 60(2)
Cases Cited:	Cohen v Woolworths Ltd [2018] NSWCATCD 11 Hammond v Ozzy's Cheapest Cars Pty Ltd t/as Ozzy Car Sales [2015] NSWCATAP 65 Profitability Consulting Pty Ltd v Thorpe [2018] NSWCATAP 41
Texts Cited:	Halsbury's Laws of Australia, online edition
Category:	Principal judgment
Parties:	Rodney Khoury (First Appellant) Rose Khoury (Second Appellant)

	The Owners – Strata Plan No. 4115 (Respondent)
Representation:	Solicitors: R Khoury (Appellants) Cordato Partners Lawyers
File Number(s):	AP 20/38326
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	10 August 2020
Before:	D Charles, Senior Member
File Number(s):	SC 20/15331, SC 20/15334, SC 20/15337, SC 20/15338

REASONS FOR DECISION

1 The appellants are each a lot owner in a strata scheme at Balmain. The respondent is the owners corporation for that scheme.

2 The appellants desired to make structural alterations to their lots, being lots 24 and 24 respectively. Such alterations were, in this case, governed by the provisions of Special By-Laws 2 and 10 of the by-laws applying to the strata scheme.

3 By applications lodged with the Tribunal on 3 April 2020, the respondent sought interim and substantive relief pursuant to ss 231 and 232 of the *Strata Schemes Management Act 2015* (NSW) against each appellant in relation to the proposed alterations. In relation to Lot 23 there was an application for interim orders (SC 20/15337) and substantive relief (SC 20/15338), and similarly for Lot 24 (SC 20/15331 and SC 20/15334 respectively).

4 All parties brought much common sense to their dispute and the various proceedings were resolved by consent. Final consent orders were made by the Tribunal on 16 June 2020.

5 Both parties applied for costs. Both applications were rejected. The appellants appeal from the rejection of their application for costs.

6 For the reasons that follow we dismiss the appeal.

Background

7 Special By-Law 10, cl 2, of the by-laws applying to this strata scheme, states:

> "Before commencing the Works, the Owner Is to pay into the trust account of the strata manager of the Owners Corporation an amount which is estimated to cover the cost of the consultants engaged and to be engaged by the Owners Corporation to advise in relation to the Works. Those consultants include a structural engineer, an acoustic consultant, a fire consultant and a lawyer."

8 Pursuant to that clause the appellants deposited funds into the trust account referred to in Special By-Law 10 and have made further contributions as required from time to time.

9 On 30 April 2020, the parties had the Tribunal make the following consent order:

> "The parties are to arrange for their respective engineer and builder to meet for the purpose of assessing compliance with those requirements of the special by-law to be satisfied prior to commencement of the works, at a mutually convenient time within 14 days of the date of these orders."

10 The builder referred to in that Order was the appellants' builder, Cubic Construction Management Pty Ltd, and the engineer was the respondent's engineer, SDA Structures Pty Ltd ("SDA").

11 The contemplated meeting took place, together with other work by both Cubic and SDA. That meeting and work was a significant contributing factor to the parties being able to resolve their dispute.

12 Relevantly for this appeal, SDA rendered two invoices to ACE Body Corporate Management (the trading name of Jakes Global Services Pty Ltd, the strata managing agent for the respondent) ("ACE"). The first was dated 30 May 2020

and was for $4,125.00. The second was dated 17 July 2020 and was for $1,168.75.[1]

13 In addition, ACE issued an invoice to the appellants dated 8 April 2020 for the sum of $2,814.58.

14 The relevant factual context in which these invoices arose, and the work described therein, was explained in the respondent's written submissions as follows:

(1) The invoices in question relate to the subject matter of the proceedings.

(2) The respondent appointed SDA as its representative for the purposes of the consent order (quoted at [9] above), and the SDA invoices are for professional services rendered by SDA for carrying out that work.

(3) The invoices issued by SDA and ACE were invoices issued by persons engaged by the respondent.

(4) The invoice issued by ACE was for work done to issue Notices to Comply (to the appellants) and to make the applications to the Tribunal for orders for compliance which were sought as a consequence of the non-compliances.

(5) SDA was engaged to assist the respondent to carry out consent order 2 made on 30 April 2020.

(6) The respondent drew down upon the funds deposited in the trust account of the strata manager in payment of the ACE invoice and the SDA invoices.

15 The result is that the funds used to pay the invoices issued by SDA and ACE originated from the appellants.

16 Before the Tribunal the appellants submitted that they had (in substance) paid those invoices, those payments were costs in the proceedings, and they should be awarded those costs.

17 The Tribunal disagreed.

18 The Tribunal correctly noted that the starting point in any application for costs was that parties to proceedings in the Tribunal are to pay their own costs and

[1] The SDA invoice dated 17 July was not the subject of the decision of the Tribunal, it not having been received by the appellants until after the Tribunal's decision. Eschewing technicalities and legal form, minimising formality, applying the procedural rules so as to facilitate the just, quick and cheap resolution of the real issues in the proceedings, with the proper and appropriate consent of the respondent and noting that no issue arises with this invoice that did not arise with the others, we have included this invoice for consideration in this appeal.

that costs are awarded only if the Tribunal is satisfied that there are "special circumstances warranting an award of costs" per s 60(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act").

19 The Tribunal said that:

> "The onus is upon the costs' applicant to establish that there are "special circumstances" in a proceeding which warrant the making of a costs order. There is also a further consideration in respect of the respondents' application for costs in the correspondence of 2 July 2020. Some items (part of the amount of $2,814.58 in respect of the ACE Invoice dated 8 April 2020, and $4,125.00 in respect of the SDA Invoice of 30 May 2020) appear to relate to matters which are not the costs of the proceedings.

20 The Tribunal then referred to various principles of law relating to "special circumstances" and then held that it was not satisfied:

> "… that there are special circumstances which warrant an award of costs to any of the parties in the proceedings."

21 There followed reasons in relation to the respondent's application for costs, and reliance upon ss 60(3)(c) and (d) of the NCAT Act.

22 In relation to the appellants' application for costs the Tribunal said:

> "[30] Nor is the circumstance of the applicant withdrawing the applications in and of itself a special circumstance which warrants any costs orders being made in favour of the respondents against the Owners Corporation. Section 55(1)(a) of the NCAT Act allows a party to unilaterally withdraw from proceedings in the Tribunal without the consent of the other party. In any event, I agree with the submissions of the Owners Corporation that the reimbursement sought by the respondents in respect of the ACE Invoice of 8 April 2020 and the SDA Invoice of 30 May 2020 are not costs of the proceedings and therefore do not arise on an application for costs under s 60 of the NCAT Act.
>
> [31] Nevertheless, even if I had been satisfied that there were special circumstances within s 60(2) of the NCAT Act, this is a case where there are discretionary considerations which, in my opinion, militate against any adverse costs order in the proceedings. In this respect, I am satisfied that the parties acted consistently with their statutory obligation (s 36(3), NCAT Act) to cooperate with the Tribunal in giving effect to the Tribunal's guiding principle of the just, quick and cheap resolution of the real issues in the proceedings. The parties complied with Order 2 made on 30 April 2020 which ultimately led to an agreement allowing works to proceed on Lots 23 and 24 and also paved the way for the applicant's withdrawal of the applications it had lodged on 3 April 2020. This course of events undoubtedly enabled a saving of time and resources for the parties; but it also assisted the Tribunal in the proper management of its finite resources in terms of the allocation of hearing time to all matters in its Strata and other Lists.
>
> [32] For the foregoing reasons, my determination in respect of the parties' applications for costs is that consistent with s 60(1) of the NCAT Act and in the

> exercise of the Tribunal's general discretion as to costs, each party is to bear their own costs of the proceedings."

23 Thus, the Tribunal's reasoning was that:

(1) there were no special circumstances which warranted an award of costs to the appellants, the ACE invoice and first SDA invoice were not (the appellants') "costs of the proceedings" in any event; and

(2) even if there were special circumstances and the costs were costs of the proceedings, the Tribunal would not have exercised its discretion to award costs because there were factors which militated against such an order (namely the parties' adherence to their statutory obligation to co-operate with the Tribunal in giving effect to the Tribunal's guiding principle of the just, quick and cheap resolution of the real issues in the proceedings).

24 The Tribunal also said that some items in each invoice appeared to relate to matters which were not the costs of the proceedings, but which parts were not identified.

25 The appellants appeal from that decision.

The Appeal

26 The Tribunal held that the SDA and ACE invoices were not (the appellants') costs of the proceedings, without explaining why that was so.

27 In this appeal the respondent submitted that:

> "The word 'costs' is not a word defined in the Act. The references in section 60 to 'costs' and 'costs in relation to the proceedings' must be taken to bear their normal meaning, which is to say, legal costs incurred by a party in the proceedings."

28 However, the submission that "costs of the proceedings" must be taken to mean legal costs (meaning lawyer's fees but excluding disbursements) incurred by a party is incorrect.

29 In *Hammond v Ozzy's Cheapest Cars Pty Ltd t/as Ozzy Car Sales* [2015] NSWCATAP 65 the Appeal Panel said at [107]:

> "Under s 60(5)(b), '*costs*' includes the costs of, or incidental to, proceedings in the Tribunal and 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. Otherwise, '*costs*' is not defined in the Act. Given the general prohibition on the awarding of costs in s 60(1) and the absence of any definition, apart from the inclusive illustrations in s 60(5) which refer to '*costs*' without elaborating upon that term, we are of the view that **the word '*costs*' in s 60 refers to the types of costs recoverable in legal proceedings and**

> **that the legal principles relating to what '*costs*' may be ordered to be paid by a Court apply in relation to the Tribunal**, except to the extent that they are modified by the Act or other applicable legislation. As we understand it, there is no applicable statutory modification in this case. Accordingly, '*costs*' that the Tribunal can order to be paid under s 60(2) will not include compensation for time spent by a litigant who is not a lawyer in preparing and conducting his or her case: *Cachia v Hanes* (1994) 179 CLR 403 at 409."
>
> [Our emphasis]

30 The types of costs which may be recovered in legal proceedings in a court include disbursements incurred for the purpose of the proceedings. Thus, in *Hammond*, the Appeal Panel awarded the appellants the filing fee for the Notice of Appeal and the cost of printing and photocopying a large volume of material for the hearing.

31 In *Profitability Consulting Pty Ltd v Thorpe* [2018] NSWCATAP 41, the Appeal Panel (constituted by a single Member) held that:

> "[20] A self-represented party can recover expenses that they would have been able to recover had they been represented: *Farquar & Farquar (No. 2)* [2008] FamCA 682 at [8].
>
> [21] In Dal Pont, *Law of Costs*, (LexisNexis Butterworth, 3rd ed, 2013) at 1.8, the nature of a disbursement was described as:
>
> > '[A] payment made on behalf of a client. ... Essentially disbursements refer to money which, for the purposes of the ... proceeding, have been actually paid out to other people, such as witnesses, counsel, professional advisers and so forth, and so can be distinguished from "costs" ... that are intended to cover remuneration for the exercise of professional legal skill by a lawyer. ... Expressed another way, these types of disbursements ... are money paid on behalf of a client of a lawyer to a third party that can properly be included in the bill of costs.'"

32 Citing *Profitability*, the Tribunal held in *Cohen v Woolworths Ltd* [2018] NSWCATCD 11 at [64] that:

> "The cost of an expert report is a legal cost within the meaning of sub-section 60(5) because it is a type of disbursement that would normally be paid out by a solicitor in the conduct of litigation."

33 Halsbury's Laws of Australia, online edition, after noting that the word "costs" is used to refer to the remuneration of a lawyer for professional services rendered to a client (at [325-9400]) states, at [325-9405] (footnotes omitted):

> "The amount of costs includes what are otherwise termed disbursements, both for the purposes of solicitor-client costs and party-party costs. Disbursements are those payments which have been made in pursuance of the professional duty undertaken by the solicitor which he or she is bound to perform, or have been sanctioned as professional payments by the

> general practice and custom of the profession. The term refers to money which, for the purposes of the retainer or proceeding, has been actually paid out to other people, such as witnesses, counsel, professional advisers, and so can be distinguished from 'costs' strictly speaking, which cover remuneration for the exercise of professional legal skill by a lawyer

34 As the respondent admitted the matters set out at (1)-(5) of [14] above, it is difficult to see how the invoices were not costs of the proceedings as they were invoices were for work done by professional advisers for the purposes of the proceedings and thus were disbursements incurred for the purposes of the proceedings.

35 However, they were not costs of the appellants because the appellants did not retain SDA or ACE; nor did the appellants retain SDA and ACE for the purposes of these proceedings.

36 The twist in this case, and the explanation for the application by the appellants, is that the respondent paid those invoices from funds deposited to the trust account of the strata manager in reliance on the authority provided by Special By-Law 10, cl 2. But that does not make those costs the appellants' *costs of the proceedings*. They were or appear to be the respondent's costs of the proceedings, albeit paid from funds provided by the appellants. We note that not all of the work done which is the subject of the invoices may have been for the purpose of the proceedings, although it seems the majority was for that purpose.

37 We doubt that cl 2 of that Special By-law provides authority for those invoices to be paid from those trust funds as cl 2 says that those funds are to cover the costs of consultants "to advise in relation to the Works", an expression we doubt covers work concerned with litigation.

38 However, the meaning of cl 2 and whether the respondent was entitled to pay the SDA and ACE invoices from the trust funds was not an issue in the proceedings and was not argued before the Tribunal nor before us. In those circumstances we should not decide that matter.

39 It is pertinent to note however that the Tribunal also rejected the respondent's application for costs, and there is no appeal from that order. Therefore, to the extent the respondent incurred costs (as disbursements) for professional

advisers (SDA and ACE) for the purpose of the proceedings, which the matters set out at [14] above would seem to indicate for at least part of the invoices, the Tribunal ruled that the respondent was not entitled to recover those costs from the appellants. Thus, the only possible authority for the respondent to use the trust funds to pay those invoices lies in cl 2 of Special By-Law 10.

40 This is acknowledged by the respondent. At [18] of its written submissions dated 30 October 2020 the respondent said:

> "The respondent drew down upon the funds deposited in the trust account of the strata manager in payment of the ACE Invoice and the SDA Invoices, in accordance with paragraph 2 of Special By-Law 10. The appellant does not dispute that it was proper to do so."

41 We doubt the correctness of that submission. As for the first sentence we have expressed our doubts above.

42 As for the second sentence, cl 2 of Special By-Law 10 was not in issue in the proceedings, and we have seen no material where that express concession was made. Silence on that matter by the appellants, when cl 2 was not in issue, does not amount to the appellants not disputing it was proper for the respondent to pay those invoices from the trust funds.

43 Therefore, in conclusion, we agree with the Tribunal's finding that the invoices were not the *appellants'* costs of the proceedings, albeit for different reasons to those of the Tribunal.

44 That conclusion disposes of the appeal and it is therefore not necessary to consider the other grounds of appeal. The appellants' remedy, if they have one, lies in the meaning of cl 2 of Special By-Law 10 – whether the whole or part of the SDA and ACE invoices fell within or outside cl 2 - a matter which would have to be litigated in fresh proceedings.

45 However, if our conclusion that the costs claimed were not the appellants' costs of the proceedings is wrong, we would have found that there was no error apparent to us in the Tribunal's reasons for finding there were no special circumstances warranting an order for costs nor any error apparent in the Tribunal's residual discretionary decision not to award costs. Thus, the appeal would have failed on those grounds as well.

46 It follows that the appeal must be dismissed.

Orders

(1) Appeal 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