Civil and Administrative Tribunal

New South Wales

Case Name:	Huang v The Owners – Strata Plan No 7632
Medium Neutral Citation:	[2020] NSWCATAP 278
Hearing Date(s):	On the papers
Date of Orders:	21 December 2020
Decision Date:	21 December 2020
Jurisdiction:	Appeal Panel
Before:	The Hon F Marks Principal Member K Ransome Senior Member
Decision:	(1) The time for instituting the appeals is extended to the extent that the appeals are deemed to have been filed within time (2) Each of the appeals is dismissed (3) Costs are reserved with liberty to apply which should be exercised within 42 days of this date.
Catchwords:	STRATA TITLE- appeals from orders of Tribunal requiring appellants to remove work carried out by them on common property without authority and to pay legal costs of body corporate - finding that work was carried out on common property upheld-adverse costs order upheld- appeals dismissed
Legislation Cited:	Civil and Administrative Tribunal Act 2013 s 60 Conveyancing (Strata Titles) Act 1961 Strata Schemes Development Act 2015 s 6 Strata Schemes Freehold Development Act 1973 s 5(2) Strata Schemes Management Act 2015 ss 124(1)(a),132(1)(a), 227, Home Building Act s18E
Cases Cited:	The Owners SP 35042 v Seiwa Australia Pty Ltd [2007]

	NSWCA 272
Texts Cited:	None cited
Category:	Principal judgment
Parties:	In AP 20/31659: Yu Huang (First Appellant) Cui'e Zhao (Second Appellant) The Owners – Strata Plan No 7632 (Respondent) In AP 20/38595: Yu Huang (Appellant) The Owners – Strata Plan No 7632 (Respondent)
Representation:	Solicitors: Appellants (Self Represented) Grace Lawyers Pty Ltd (Respondent)
File Number(s):	AP 20/31659; AP 20/38595
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	25 June 2020 and 19 August 2020
Before:	G Blake AM SC Senior Member
File Number(s):	SC 19/56987

REASONS FOR DECISION

Background

1 In these appeal proceedings the appellants, Cui'e Zhao and Yu Huang, have brought an appeal from a decision of the Tribunal which required them to remove unlawful common property work in a home unit owned by them and to reinstate works like those previously there. This unit is part of a strata scheme of which the respondent, The Owners – Strata Plan No 7632, is the owners

corporation responsible for the management of that strata scheme. We shall refer to this decision as “the reinstatement decision”. The appellants also appeal from a subsequent decision of the Tribunal in which they were ordered to pay the costs of the respondent in those proceedings. We shall refer to this decision as “the costs decision”.

2 The appeals were filed one day out of time. The appellants have provided an explanation for this, and the respondent does not oppose the grant of an extension of time in which to initiate the appeals. We extend the time accordingly.

3 The parties consented to the appeals being dealt with “on the papers” and without an oral hearing pursuant to section 50 (2) of the *Civil and Administrative Tribunal Act 2013* (“the CAT Act”). The parties have filed a large volume of documentation and submissions.

4 The documents filed in these proceedings disclose the factual background to the decisions from which the appeal is brought. The appellants have, since about 13 July 2011, owned lot 17 in the relevant strata plan which consists of 18 residential lots situated over 3 floors of a 3- story building. Lot 17 is on the top floor, immediately above lot 11. The strata plan was registered on 10 October 1973.

5 In September 2014 the respondent engaged a contractor to undertake waterproofing works to a shower recess in the main bathroom and another shower recess in an ensuite bathroom within lot 17, because of a leak of water into Lot 11 from the ceiling area. Between November 2014 and February 2015, the appellants engaged in discussions with the respondent through its strata managing agent to renovate both bathrooms in lot 17. At the same time the appellants had direct discussions with the contractor who had been retained by the respondent.

6 On 5 February 2015 an employee of the respondent’s contractor accidentally damaged a small water pipe near the common property bathroom wall in lot 17, causing a minor water leak. The respondent sent a plumber to repair the water pipe on 8 February 2015, but the appellants refused access. Whilst the parties remained in dispute about the repair of the broken water pipe the appellants,

without the consent of the respondent, engaged another contractor to totally renovate both bathrooms in lot 17. There was a subsequent dispute about payment for the renovation works and loss of rent claimed by the appellants. The appellants brought proceedings in the Local Court against the owners corporation to recover these monies, but those proceedings were dismissed.

7 Since 6 February 2017 the respondent has unsuccessfully sought to reach agreement with the appellants to regularise the bathroom renovations which had been carried out without consent so as to comply with the provisions of the strata legislation. It asked the appellants to provide plans and specifications, that the renovations be brought into compliance with applicable Australian Standards and in a proper and workmanlike manner, for certification that the work had been carried out properly, for access to the unit to enable inspection to ensure that the works had been completed, that a common property rights by-law in usual form be entered into, that the respondent's costs be paid and the work be completed before the appellants attempted to sell or dispose of lot 17. The respondent was unable to negotiate agreement with the appellants to enable this to occur.

8 Significantly, since March 2017 there have been allegations that water has leaked into Lot 11 which is located immediately underneath lot 17.

9 On 15 June 2017 the respondent lodged an application in this Tribunal seeking a number of orders directed to the removal by the appellants of the works that had been carried out in the main and ensuite bathrooms without consent and that the appellants pay the respondent compensation for the cost of repairing the damage sustained to the common property.

10 This application came on for hearing in this Tribunal before Mr G Meadows, Senior Member, who issued a decision with reasons therefor on 15 March 2018. By that decision the appellants were required at their own cost to remove all unlawful common property works in both bathrooms as particularly described in the Orders, to obtain appropriate certification that the work had been completed in a proper and workmanlike manner and in compliance with industry standards, and that the appellants provide the respondent's representatives with access to their unit.

11 In his reasons for decision the Senior Member found that the appellants had renovated the bathroom and ensuite bathroom “including completely replacing the tiles on the walls and floor and replacing certain fittings in those rooms” without prior approval from the respondent. He also accepted expert opinion expressed in reports which became evidence in the proceeding, including an assertion that the works carried out by the appellants were not fully compliant with all relevant codes and “good trade practices”.

12 There is in evidence before us a report of an expert building consultant Dougal Kennedy dated 21 April 2016 who had been retained by the respondent’s solicitors. That report was accepted by Senior Member Meadows and by Senior Member Blake AM SC who made the subsequent reinstatement decision the subject of this appeal. For present purposes it is sufficient to note that Mr Kennedy said, with reference to the work the appellants had carried out, that there was no evidence of any waterproofing membrane having been placed under the tiles in the bathrooms and that new tiles had been adhered to the original tiles “contrary to good and tradesmen like practice.” These observations were not referred to specifically in the reasons for decision of Senior Member Meadows. We add for completeness that Senior Member Meadows was not satisfied on the evidence that the respondent had demonstrated that the water that had entered lot 11 had originated in lot 17.

13 On 19 December 2019 the respondent filed an application in this Tribunal seeking orders that it be granted access to Lot 17 for the purpose of removing the unauthorised additions and alterations to the common property in the bathrooms and to reinstate that common property, and that the appellants pay for the cost involved. The application sought alternative orders in similar terms as those sought in the earlier proceedings. The basis of the application was that the respondents had failed to comply with the orders made in the earlier proceedings before Senior Member Meadows.

14 Those later proceedings were heard by Senior Member Blake who published a decision on 25 June 2020 in which orders were made in favour of the respondent, but not precisely in the terms sought. The appellants were ordered at their own cost to remove all unlawful common property works in the main

and ensuite bathrooms of lot 17, those works being particularised in the orders. The works were to be completed by qualified and licensed contractors in a proper and workmanlike manner "immediately" and quotes and appropriate certification was to be provided by the appellants to the respondent. The respondent was granted access to the lot. If those orders had not been complied with by 25 September 2020 the appellants were to grant access to the lot to the respondent to enable it to carry out the necessary works to remove the unauthorised additions and/or alterations to the common property, reinstate the common property and pay the sum of $9020 for the cost thereof to the respondent.

15 On 19 August 2020, after considering the submissions made by both parties, Senior Member Blake ordered that the appellants pay the respondent its costs of the Tribunal proceedings.

16 The appellants have appealed from both the reinstatement and costs decisions, and these reasons deal with the disposal of those appeals.

The reinstatement decision under appeal

17 It is convenient to describe a number of issues which were considered in the decision under appeal.

Whether the respondent authorised the commencement of the proceedings

18 During the course of the proceedings the appellants alleged that the respondent had not authorised their commencement. They also alleged for the first time that one of them had been precluded from attending the meeting which had authorised the commencement of the proceedings. The Senior Member declined to deal with this latter point. On the basis of material contained in the minutes of an EGM the Senior Member held that the proceedings had been properly authorised.

Whether the Tribunal had jurisdiction because no mediation had been attempted

19 The Senior Member rejected the construction of section 227 of the *Strata Schemes Management Act* 2015 ("the SSM Act") contended for by the appellants and held that the Tribunal had jurisdiction and power notwithstanding that mediation had not occurred.

Whether orders should be made for the removal of the unauthorised works and reinstatement of the common property in the bathroom and ensuite bathroom of lot 17

20 In determining to make orders against the interests of the appellants the Senior Member

(1) noted evidence given before him by Ms Sharon Booth a member of the respondent's strata committee that complaints had been received by the respondent of further water leaks into Lot 11 on 21 June 2018, 22 August 2018 and 4 November 2019, and

(2) the respondent had notified the appellants on 5 November 2019 about the further leaks and on 7 November 2019 the appellants had replied that it was the respondent's responsibility to fix the leaks, and

(3) the respondent had not received any insurance claim monies in relation to the cost of rectification of the unauthorised works but had received $120,107.06 on 6 February 2017 for the recovery of the cost of other works.

(4) noted evidence given by Mr Hinzmann, a trades contractor on behalf of the respondent. He had inspected lots 11 and 17 on 29 June 2018, and when testing the main shower of lot 17 formed the opinion that there appeared to be no waterproofing membrane around the bathroom floor waste indicating that it had not been waterproofed. He had also observed water leaking from the shower onto the bathroom floor. Photographs of the floor waste depicted the build-up of water in the cement tiled bed. Water testing to see whether water was leaking from lot 17 bathrooms into Lot 11 was inconclusive "as the shower had recently been used."

(5) noted that on 19 February 2020 Mr Hinzmann was shown photographs of the ceiling of lot 11, observed damage to the duct box which was consistent with damage previously observed and formed the opinion that water continues to leak from the bathrooms of lot 17 into Lot 11. He provided a quotation for $9020 for waterproofing the bathroom and shower floor of lot 17

(6) held that the appellants were bound by the findings of Senior Member Meadows that they had carried out works to the common property in the bathroom and ensuite bathroom of lot 17 without the authority of the respondent and that those works did not comply with relevant codes or good trade practices

(7) rejected submissions made by the appellants that the work which they had had carried out in the bathroom and ensuite bathroom of lot 17 involved full waterproofing and that the works carried out by them had complied with the orders of Senior Member Meadows, on the basis that there was no evidence to sustain any of those submissions

(8) found that the appellants had damaged the common property in the bathroom and ensuite of lot 17 in carrying out the unauthorised works

and that the evidence of leaking of water into Lot 11 was “persuasive evidence” of this continuing damage.

21 Based upon the evidence and findings summarised above, the Senior Member held that it was appropriate to exercise the discretion which existed under sections 132(1)(a) and 124(1)(a) of the SSM Act and to make the orders which are the subject of the reinstatement decision appeal.

The grounds of appeal against the reinstatement decision

22 The Notice of Appeal seeks that the orders made by the Senior Member be set aside. The appellants have listed six Grounds of Appeal which, in summary form, are that

(1) there was a failure to assess building defects in accordance with section 18E of the *Home Building Act 1989*

(2) there was inadequate reasoning as to why a lump sum of $9020 was ordered to be payable, particularly when the appellants had not had an opportunity to see a copy of the detailed scope of works

(3) there was inconsistency in the respondent being allowed to remove and reinstate one bathroom in lot 17 and the appellants being ordered to remove and reinstate both bathrooms at the same time

(4) although explained in the Grounds in an obscure manner, the decision incorrectly directed responsibility for the repair of the bathrooms of lot 17 to the respondent, because the floors of the bathrooms were not common property and were the property of the appellants. In addition, the original flooring in the bathrooms of lot 17 did not contain waterproofing, and it was the total responsibility of the respondent to the exclusion of the appellants to make good the waterproofing of the bathrooms.

The appellants’ submissions

23 The appellants provided 20 pages of written submissions and 48 pages of attachments.

24 The appellants by way of background information alleged that water first commenced leaking from their unit into Lot 11 in 2012. The respondent obtained a plumbing inspection report and quotation which was approved in September 2014. It was while this work was being carried out that damage was caused to the water pipe. The appellants allege that from that time on their unit became uninhabitable. In their submissions they deny that they refused entry to the respondent’s contractors to complete the repair to what we assume is

the main bathroom. They also allege that the respondent has "never offered to come back to repair the damage of 19 Sep 2014, never offered to come back to restore/complete our damaged bathrooms left behind by their tradesmen for more than 5 years, since 5 Feb 2015 till now".

25 In his reasons for decision of 15 March 2018 Senior Member Meadows referred to submissions made by the appellants to the same effect as set out above. He concluded:

> I find, and it is not directly disputed by the (appellants in these proceedings) that (they) renovated their bathroom and ensuite, including completely replacing the tiles on the walls and floor and replacing certain fittings in those rooms. I find also that the (appellants) performed those works, or had them performed, without obtaining prior or any approval from the owners corporation and without going through the usual procedure in relation to obtaining a special by-law……
>
> I find that the works conducted by the (appellants) beyond the repair of one water pipe and the waterproofing of the shower recesses was undertaken by the (appellants) for their own reasons, unrelated to the original works being conducted by the (respondent in these proceedings) and that they alone bear any responsibility for added time, expense and possible losses resulting from those works.
>
> I find also that the owners corporation has attempted over the past years to satisfy itself that the subject works could be subsequently approved, provided they can be properly certified and indemnity arrangements made. It is in my opinion both striking and unusual that the (appellants) have not availed themselves of those offers, which would have resolved all issues between the parties.

26 Those findings have never been the subject of an appeal or any other process by which their force, validity and effect have been called into question. They remain binding on the appellants as was acknowledged in the reinstatement decision and they remain binding for the purpose of these appeal proceedings. To the extent that the factual assertions made by the appellants are inconsistent with the above findings, we reject them.

27 In their submissions the appellants refer to the receipt by the respondent of insurance monies referable to a claim for repairs made by it on its insurer. The appellants allege, and the respondent denies, that these insurance monies covered in part the repair work carried out by the respondent to their bathrooms. Whether and to what extent this is true is not relevant to the determination of the underlying dispute in these proceedings, namely whether the respondent should be able to remedy the unauthorised works carried out

by the appellants, the appellants directed to permit access to the premises to enable this to be done, and whether the appellants should be required to pay monies towards the cost. The Senior Member so held in the reinstatement decision, and we agree. This submission is rejected.

28 In their submissions the appellants allege for the first time in any proceedings between them and the respondent that by reason of the provisions of *Conveyancing (Strata Titles) Act* 1961, which was the legislative provision applying when the strata scheme was registered in 1973, the boundary of a lot in a strata scheme was the "centre of a floor, wall or ceiling." On this basis they seem to be asserting that anything affixed to the floor is part of the lot and is not common property. This submission misreads the legislation.

29 The appellants are correct in their assertion that under the Conveyancing (Strata Titles) Act the boundary between separate lots or between lots and common property was the centreline of the dividing structures being walls, floors or ceilings. The *Strata Schemes Freehold Development Act 1973* commenced on 1 July 1974 and replaced the Conveyancing (Strata Titles) Act. Upon commencement of the Strata Schemes Freehold Development Act on 1 July 1974, the boundary between common and lot property became the inner face of the walls, the upper surface of the floors and the lower surface of the ceilings (s 5(2)) and, under the transitional provisions, the new definition applied to previously registered schemes. That definition has been carried over into the *Strata Schemes Development Act* (s 6).

30 In relation to some older strata schemes, the plan may show a note indicating that the boundary between common and lot property is the centre of a structure. In that case the boundary remains as described in the Conveyancing (Strata Titles) Act. We have not been provided with any plan showing such a notation in relation to Strata Plan No. 7632. The boundary of lot and common property in this strata scheme is therefore the upper surface of the original tiles that were removed (see *The Owners SP 35042 v Seiwa Australia Pty Ltd* [2007] NSWCA 272).

31 The removal of the original tiles and the affixing of new tiles is therefore unauthorised common property work. We reject the appellants' submission.

That submission formed the basis of a number of assertions made by the appellants, all of which must fail.

32 The appellants submit that there is evidence that would indicate that the main bathroom was not waterproofed because the “Building Code of Australia” was not released until 1988 and prior to that date the installation of waterproof membranes was optional. Whether and to what extent any building code applied is irrelevant to a determination as to whether the main bathroom as originally constructed contained a waterproofing membrane. In any event whether or not it did is irrelevant. The issue is whether the appellants have carried out unauthorised work to the common property.

33 Furthermore, on the evidence as accepted in the reinstatement decision, there was a finding that water continued to leak from lot 17 into lot 11. The appellants have not produced any evidence to the contrary, and indeed, seem to acquiesce in this finding. Whatever the cause, it is something which needs to be rectified and the respondent is anxious to do this. It has only been precluded from doing so by the conduct of the appellants in refusing access to their premises and in having themselves carried out unauthorised works which have been found to be defective. We reject this submission as having any relevance to the determination of these proceedings.

34 The appellants submit that section 122 of the SSMA Act does not permit the making of the orders the subject of this appeal. They say that except in the case of an emergency the lot owner must consent to giving the owners corporation access to lot property, but then add that this can be achieved by way of a “Tribunal access order”. They also state that the range of works which can be permitted under this section is “limited” including “generally to building defect rectification works”.

35 It is clear that section 124 of the SSM Act gives this Tribunal jurisdiction and power to make orders empowering the respondent to gain entry to the appellant’s lot for the purpose of carrying out work as referred to in section 122.

> 124 Orders by Tribunal relating to entry to carry out work or inspections
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> (1) The Tribunal may, on application by an owners corporation for a strata scheme, make an order requiring the occupier of a lot or part of a lot in the scheme to allow access to the lot for any of the following purposes—

(a) to enable the owners corporation to carry out work referred to in section 118, 119, 120 or 122 or to determine whether such work needs to be carried out,

(b) to enable an entry or inspection referred to in section 122 or 123 or Part 11 to be carried out.

(2) This section does not limit the power of an owners corporation to enter a lot under this Division in an emergency without applying for an order.

36 Section 122 provides as follows

122 Power of owners corporation to enter property in order to carry out work

(1) An owners corporation for a strata scheme may, by its agents, employees or contractors, enter on any part of the parcel of the scheme for the purpose of carrying out the following work—

(a) work required or authorised to be carried out by the owners corporation in accordance with this Act (including work relating to window safety devices and rectification work carried out under Part 11),

(b) work required to be carried out by the owners corporation by a notice given to it by a public authority,

(c) work required or authorised to be carried out by the owners corporation by an order under this Act.

(2) An owners corporation for a strata scheme may, by its agents, employees or contractors, enter on any part of the parcel for the purpose of determining whether any work is required to be carried out by the owners corporation in accordance with this Act.

(3) In an emergency, the owners corporation may enter any part of the parcel for those purposes at any time.

(4) In a case that is not an emergency, the owners corporation may enter any part of the parcel for those purposes with the consent of any occupier of that part of the parcel or, if the occupier does not consent, in accordance with an order of the Tribunal under this Division.

(5) A person must not obstruct or hinder an owners corporation in the exercise of its functions under this section.

Maximum penalty—5 penalty units.

(6) An owners corporation is liable for any damage to a lot or any of its contents caused by or arising out of the carrying out of any work, or the exercise of a power of entry, referred to in this section unless the damage arose because the owners corporation was obstructed or hindered.

37 It is clear that by reason of the combined operation of sub-sections 122(1)(c) and (4) that the respondent is empowered to gain access to the appellants' lot and that by section 124 this Tribunal was empowered to make such an order.

38 We reject this submission of the appellants.

39 Throughout their submissions the appellants continually assert that the works carried out by them include the waterproofing of the bathrooms. However, apart from making these assertions the appellants have not provided any evidence that waterproofing work was carried out by the contractors retained by them. No reason has been advanced by them as to why they were unable to obtain any evidence corroborating these factual assertions. They were uniquely in a position to provide that information. If they wanted to establish these matters, they were under an obligation to provide some evidence to support their contention. Production of a quotation containing a reference to waterproofing the bathrooms is no proof that that work was actually carried out. This is particularly so, given the evidence in these proceedings that the work that was carried out on behalf of the appellants was of poor quality and did not appear to include waterproofing. We reject this submission.

40 The appellants submit that the reinstatement decision was in error in assessing that the appellants should pay the respondent $9020 to complete the work for both bathrooms, when a quotation upon which the assessment of this work was based was for $9020 for the main bathroom and $3487 for the ensuite bathroom. However, there was no reason why the Senior Member should not have used the basis of this quotation as a conservative estimate of the cost of carrying out the work. The fact that the respondent was prepared to accept this amount for the cost of carrying out rectification works to both bathrooms was to the advantage of the appellants. On this basis we cannot see any reason to vary this amount on appeal. The quotation was provided by a qualified trades person and prima facie is an appropriate basis for the amount ordered to be paid. We reject this submission.

41 The appellants submitted that the Senior Member had erred "when assessing building defects in accordance with section 18E of the *Home Building Act 1989*". That section sets time limits for the initiation of proceedings to enforce statutory warranties which are provided by Part 2C of that Act. Those statutory warranties only come into effect with the commencement of the operation of that Act. If the appellants are referring to statutory warranties relating to the original construction of the bathroom floors in lot 17, this took place prior to or in 1973 and this legislation clearly does not apply. If the appellants are referring

to some other construction work, they have not specified what it is. There is no reference to this legislation in the reinstatement decision. We reject this submission on the basis that there is no apparent relevance to these proceedings.

The appellant's "counterclaims and cross-claim"

42 In their submissions the appellants sought to claim compensation from the respondent for "damages and penalties for their misleading and our mental suffering and distress over last 2.5 years, including the cost of seeing psychiatrist and medication".

43 Such a claim has never formed part of the proceedings before this Tribunal. If the appellants seek to make such a claim it will need to be made independently and before a court or tribunal having jurisdiction to deal with it.

44 We will not permit the appellants to canvass any such claim in the context of these appeal proceedings which are limited to our consideration of the appeals before us. We reject the submissions concerning these matters.

The costs decision under appeal

45 In his reasons for decision the Senior Member referred to the provisions of section 60 of the CAT Act, which we reproduce

> 60 Costs
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
>
> > (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
> >
> > (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
> >
> > (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
> >
> > (d) the nature and complexity of the proceedings,
> >
> > (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36(3),

(g) any other matter that the Tribunal considers relevant.

(4) If costs are to be awarded by the Tribunal, the Tribunal may—

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(5) In this section—

costs includes —

(a) the costs of, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

46 The respondent sought a costs order in its favour asserting that there were "special circumstances" which warranted the making of such an order. It relied on a number of the provisions contained in subsection (3). A costs order was made, confined only to two of those provisions.

47 The Senior Member first identified necessity to find that there were "special circumstances" by reference to orthodox established legal principles which required something "out of the ordinary", but not necessarily "extraordinary or exceptional" circumstances.

48 The Senior Member found that

(1) the appellants were responsible for prolonging unreasonably the time taken to complete the proceedings because they had sought to relitigate matters which had been determined by Senior Member Meadows

(2) the claims brought by the appellants had no tenable basis in fact or law

and in the aggregate that these constituted special circumstances warranting an award of costs.

49 In their submissions the appellants resisted the making of a costs order against them because they asserted that the reinstatement decision was wrong and had no proper basis. Furthermore, they said that the Senior Member was in error in exercising his discretion when the fundamental direction of section 60, as contained within subsection (1) was that each party should bear its own costs.

50 The question for determination is whether the Senior Member fell into error in the manner in which, and the reasons given why he exercised his discretion in favour of the respondent. The reasons for decision carefully describe each of the provisions of subsection (3) of section 60 and rejected all of them save for the two matters referred to above. In reality, the application brought by the respondent against the appellants was relevantly confined by the factual findings made previously by Senior Member Meadows, and the sole reason for bringing it was the failure of the appellants to comply with the orders made in those earlier proceedings. It is clear from the reasons for decision that the appellants did endeavour to relitigate and re-agitate matters which had already been decided, or which were irrelevant. It is equally clear that the conduct of the appellants complicated the proceedings and prolonged them, exacerbated by the circumstances that their case lacked any tenable merit. We note that in the context of these appeal proceedings the appellants have again endeavoured to relitigate and re-agitate the same irrelevant matters.

51 We find that the decision of the Senior Member to award costs in the proceedings below in favour of the respondent on the basis that there were "special circumstances" as described in the Decision was within discretion, and there is no basis for interfering with the costs order on appeal.

Conclusion as to disposal of the appeals

52 It follows that both appeals should be dismissed on the basis that they lack merit. It is arguable that some of the grounds of appeal involved questions of law and mixed questions of fact and law. We propose to dispose of the appeal proceedings on the basis that there was, overall, an appeal as of right. Because we have concluded that there is no merit in the appeals themselves, there is no necessity to deal with the grounds of appeal differentially by reference to whether or not leave to appeal is required.

Costs

53 Whilst there was reference in the copious submissions to the question of costs, we do not apprehend that this was a matter argued substantially by both parties. Accordingly, we propose to reserve the question of costs and grant

liberty to apply, which should be exercised within a period of 42 days, given the forthcoming seasonal summer break.

Orders

54 We make the following orders

(1) The time for instituting the appeals is extended to the extent that the appeals are deemed to have been filed within time

(2) Each of the appeals is dismissed

(3) Costs are reserved with liberty to apply which should be exercised within 42 days of this date.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

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

Amendments

21 December 2020 - Case title & parties corrected.