



Civil and Administrative Tribunal

New South Wales

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Case Name: Loneragan v The Owners - Strata Plan No 16519 (No 2)

Medium Neutral Citation: [2020] NSWCATAP 283

Hearing Date(s): On the papers

Date of Orders: 22 December 2020

Decision Date: 22 December 2020

Jurisdiction: Appeal Panel

Before: A Britton, Principal Member  
M Gracie, Senior Member

Decision: (1) Mr Loneragan must pay the Owners Corporation's costs in the appeal, as agreed or assessed.  
(2) The Appeal Panel declines to determine the Owners Corporation's costs application for the proceedings at first instance.

Catchwords: COSTS — operation of r 38A of the Civil and Administrative Tribunal Rules 2014 — whether “the amount ... in dispute” in the appeal exceeded \$30,000

APPEAL— whether Appeal Panel has the power to award costs in relation to proceedings at first instance in circumstances where the Tribunal did not make a decision in relation to costs

Legislation Cited: None cited

Cases Cited: Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25  
Latoudis v Casey [1990] 170 CLR 534, [1990] HCA 59  
Loneragan v The Owners - Strata Plan No 16519 [2020] NSWCATAP 177  
Oshlak v Richmond River Council [1998] 193 CLR 72; [1998] HCA 11

The Owners – Strata Plan No 74835 v Pullicin (Costs)  
[2020] NSWCATAP 49  
Thomson v Chapman [2016] NSWCATAP 6

Texts Cited: None cited

Category: Costs

Parties: Hugo Loneragan (Appellant)  
The Owners Strata Plan No 16519 (Respondent)

Representation: Solicitors:  
Strata Specialist Lawyers (Appellant)  
Strata Title Lawyers (Respondent)

File Number(s): AP 20/05435

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 21 January 2020

Before: G Blake SC, Senior Member

File Number(s): SC 19/48890

## REASONS FOR DECISION

- 1 In a decision made on 25 August 2020, we dismissed an appeal brought by Mr Hugo Loneragan against a decision made by the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (NCAT): *Loneragan v The Owners - Strata Plan No 16519* [2020] NSWCATAP 177. The respondent, The Owners - Strata Plan No 16519 (“Owners Corporation”), now applies for costs in respect of the proceedings at first instance and the appeal. Mr Loneragan opposes both applications.

- 2 The Owners Corporation contends that the applicable costs provision is rule 38A of the Civil and Administrative Tribunal Rules 2014 ("the Rules") because "the amount ... in dispute" in the appeal exceeded \$30,000. In the alternative, the Owners Corporation contends that if the Appeal Panel determines that the applicable cost provision is s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("NCAT Act"), "special circumstances" are established which warrant an order for costs.
- 3 Mr Loneragan disagrees that "the amount ... in dispute" in the appeal exceeded \$30,000 and contends, therefore, that costs cannot be awarded under s 38A of the Rules. In addition, he disputes that special circumstances are established which warrant an order for costs under s 60 of the NCAT Act.
- 4 As permitted by s 50 of the NCAT Act, we determined the applications for costs made by the Owners Corporation "on the papers" because we were satisfied that the issues could be adequately determined by considering the parties' written submissions. Both parties consented to that course.
- 5 For the reasons that follow, we order Mr Loneragan to pay the Owners Corporation's costs of the appeal. In addition, we decline to determine the Owners Corporation's application for costs of the proceedings at first instance.

**Was the "amount ... in dispute" in the appeal more than \$30,000?**

- 6 The NCAT Rules provide that where, as in this matter, the initiating proceedings are brought in the Consumer and Commercial Division of NCAT, the Tribunal may award costs "even in the absence of special circumstances", if "the amount claimed, or in dispute" is more than \$30,000: r 38(2) of the Rules.
- 7 Rule 38 states:

Costs in Consumer and Commercial Division of the Tribunal

- (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
- (2) Despite section 60 of the Act, the Tribunal **may award costs in proceedings to which this rule applies even in the absence of special circumstances** warranting such an award if—

(a) The **amount claimed or in dispute in the proceedings is more than \$10,000 but not more than \$30,000** and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or

(b) The amount claimed or in dispute in the proceedings is more than \$30,000.

(Emphasis added)

- 8 The costs provision applicable at first instance applies in respect of the appeal: r 38A(2) of the Rules. Where the applicable rule at first instance is r 38(2), it does not automatically follow that that sub-rule will apply in the appeal. It must be established that para. (a) or (b) of r 38(2) are satisfied in respect of the appeal. In this matter, the question to be determined is whether the requirements of s 60(2)(b) is satisfied, specifically, whether “the amount ... in dispute” in the appeal is more than \$30,000.
- 9 In *Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 (“Allen”)*, the Appeal Panel considered the meaning of the phrase “amount ... in dispute in the proceedings” stating that it appeared that in applying r 38(2)(b):
- (1) The determinative factor is the amount in dispute in each appeal, not the amount in dispute in the proceedings at first instance;
  - (2) The phrase “in dispute” is to be construed as meaning truly in dispute or at issue or, inversely, not unrealistically in dispute;
  - (3) Whether “the amount ... in dispute” in each appeal is more than \$30,000 depends on whether there is a realistic prospect that in each appeal the wealth of the appealing party would be changed by more than \$30,000 or, put another way, whether the right claimed by the appealing party, but denied by the decision at first instance, prejudices that party to an amount in excess of \$30,000;
  - (4) The fact that the value of the property the subject of any appeal exceeds \$30,000 does not, of itself, mean that “the amount ... in dispute” in that appeal is greater than \$30,000.
- 10 In the decision under appeal, the Tribunal dismissed Mr Loneragan’s application for orders under the *Strata Schemes Management Act 2015* (NSW) (“SSM Act”) including one that the Owners Corporation refrain from replacing the roof of “Ormiston”, one of two buildings of the subject strata plan. Mr Loneragan held two of the 11 lots in that scheme.
- 11 The trigger for Mr Loneragan’s initiating application to NCAT was the decision made by the Owners Corporation to replace the roof of Ormiston at an estimated cost of \$400,000. At its 2019 annual general meeting, the Owners

Corporation carried a resolution requiring all lot owners, including Mr Loneragan to contribute towards a special levy of \$400,000 (“Special Levy Resolution”). Mr Loneragan opposed that resolution, contending that the roof did not require replacement and could and should be repaired. He estimated the cost of repair to be \$48,600.

12 In the Notice of Appeal, Mr Loneragan sought the following orders:

“(1) Pursuant to Section 232 and 241 of the Strata Schemes Management Act 2015 (the Act) the respondent must:

(a) Not undertake the replacement of the roof as referred to in motion 6 of the minutes of the annual general meeting of the respondent dated 22 October 2019, and the third motion referred to in the minutes of the strata committee of the respondent dated 22 October 2019; and

(b) Undertake the repair and maintenance of the roof in accordance with the recommendations of AGC Roof Maintenance Pty Ltd dated 27 November 2019.

(2) Pursuant to section 87, 232, and 241 of the Act, the contribution raised in motion 6 of the minutes of the annual general meeting of the Respondent dated 22 October 2019, be set aside or varied to nil.

(3) In the alternative to order 1 and 3, pursuant to sections 87, 232 and 241 of the Act, the contribution raised in motion 6 of the minutes of the annual general meeting of the respondent dated 22 October 2019, be varied for payment by all lots other than lots 10 and 11.”

13 The Owners Corporation submits that it is significant that in the appeal Mr Loneragan did not simply seek orders to quash or to set aside the decision under appeal but rather sought substantive relief under ss 81(1)(d), 81(1)(e) and 81(2) of the NCAT Act. It asserts that there can be no argument that the amount in dispute exceeded \$30,000, pointing out that the amount of the Special Resolution Levy Mr Loneragan sought to have set aside (requested orders 1 and 2), or varied so that he was excused from the requirement to make that payment (requested order 3), was \$400,000.

14 Mr Loneragan on the other hand contends that it is significant that the requested orders he sought in the appeal, did not specify a monetary amount. Rather, he sought to have the Special Levy Resolution declared invalid or set aside. It follows he contends that the amount in dispute did not exceed \$30,000.

### *Consideration*

- 15 As a consequence of the Special Resolution Levy, Mr Loneragan was required to pay \$72,727 towards that levy:  $\$400,000 \div 11 \times 2$ . If Mr Loneragan had been successful in the appeal and we had made requested orders 1(a), 2 or 3, he would not have been required to pay that amount. If, in addition we had made requested order 1(b), Mr Loneragan would have been required to contribute towards repairs in the lesser sum of \$4,418.18:  $\$48,600 \div 11 \times 2$ . (If, as the Owners Corporation asserts, Mr Loneragan holds a 25% entitlement of the strata scheme it may be that the amounts payable would be slightly higher than these estimates. Nothing turns on this.)
- 16 Applying that analysis, it is abundantly clear that there was “a realistic prospect” that had Mr Loneragan been successful in the appeal his “wealth” would be changed by more than \$30,000. Either he would have been excused from the requirement to pay his share of the special levy, \$72,727, or have been excused from that requirement and required to pay \$4,418.18 towards repairs. In each scenario, self-evidently, the amount in dispute was more than \$30,000. It follows that the discretion to award costs under r 38(2)(b) can be exercised.
- 17 The principles guiding the exercise of the discretion to award costs are well-established. The purpose of making a costs order is to provide compensation to the party in whose favour the order is made for the expense the party has been put to in prosecuting or defending legal proceedings. In general terms, this means that the successful party is entitled to an order for costs in its favour: *Latoudis v Casey* [1990] 170 CLR 534, [1990] HCA 59; *Oshlak v Richmond River Council* [1998] 193 CLR 72; [1998] HCA 11 (“Oshlak”). While there is a general discretion for costs, there is no absolute rule that, absent disentitling conduct, a successful party is to be compensated by the unsuccessful party, and nor is there any rule that a successful party might not be ordered to bear the costs of an unsuccessful party: *Thomson v Chapman* [2016] NSWCATAP 6 at [71]. The proper exercise of the discretion requires the Appeal Panel to do justice between the parties and to exercise the discretion having regard to relevant considerations, and in a manner which is not arbitrary or capricious: *Oshlak* at [22].

- 18 Mr Loneragan did not suggest that in its conduct of the appeal the Owners Corporation engaged in any disentitling conduct. Nor did he nominate any other consideration which might tend against the exercise of the discretion to award costs. We have decided it is appropriate to exercise that discretion and to order Mr Loneragan to pay the Owners Corporation's costs in the appeal, as agreed or assessed.

**Can the Appeal Panel make an order for the costs of the proceedings at first instance?**

- 19 The Owners Corporation did not make an application for costs to the Tribunal for the proceedings at first instance. It requests that we determine its application for the costs of those proceedings.

- 20 The question of whether an Appeal Panel can award costs in relation to proceedings at first instance, where no decision in relation to costs was made by the Tribunal was considered in *The Owners – Strata Plan No 74835 v Pullicin (Costs)* [2020] NSWCATAP 49 (“Pullicin”). After considering at [5]-[8] the statutory framework governing NCAT's internal appeal jurisdiction, the Appeal Panel concluded at [9] that it lacked the power to determine an application for costs in relation to the proceedings at first instance:

These provisions give the Appeal Panel power to exercise functions, such as making a costs order, but only in relation to “the conduct or resolution of” the appeal proceedings. There was no decision about costs at first instance. The proceedings were adjourned, part heard. Consequently, .. the Appeal Panel does not have power to make such an order. Any outstanding issues relating to costs need to be determined by the Tribunal at first instance.

- 21 The Owners Corporation contends that *Pullicin* was wrongly decided and the conclusion reached by the Appeal Panel is inconsistent with s 60(5)(b) of the NCAT Act. Section 60(5)(b) defines the term “costs” in s 60 to include “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”.
- 22 The Owners Corporation argument fails to engage with the analysis of the Appeal Panel in *Pullicin* concerning the scope of the Appeal Panel's power in relation to matters that were not the subject of any decision by the Tribunal at first instance. Section 60(5)(b) of the NCAT Act does nothing more than clarify that the power to award costs in s 60 of the NCAT Act applies to both “the

proceedings giving rise to the ... appeal ” and “the appeal” itself. It does not address whether the Appeal Panel has power to award costs in relation to the former in circumstances where the Tribunal did not make an order for costs.

- 23 We are not persuaded *Pullicin* was “plainly wrong”. We decline to determine the Owners Corporation’s costs application for the proceedings at first instance.

### **Orders**

24 We make the following orders:

- (1) Mr Loneragan must pay the Owners Corporation’s costs in the appeal, as agreed or assessed.
- (2) The Appeal Panel declines to determine the Owners Corporation’s costs application for the proceedings at first instance.

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

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