



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2)

Medium Neutral Citation: [2020] NSWCATAP 273

Hearing Date(s): On the papers

Date of Orders: December 2020

Decision Date: 17 December 2020

Jurisdiction: Appeal Panel

Before: T Simon, Principal Member
G Curtin SC, Senior Member

Decision: (1) A hearing on costs is dispensed with.
(2) The second and third respondents are to pay the appellant’s costs of the appeal as agreed or assessed.

Catchwords: COSTS – s 60 of the Civil and Administrative Tribunal Act 2013 (NSW) – special circumstances – complexity of proceedings – statutory construction - issue not previously decided by Appeal Panel

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 60

Cases Cited: Alliance Motor Auctions Pty Ltd v Saman [2018] NSWCATAP 137
BPU v New South Wales Trustee and Guardian (Costs) [2016] NSWCATAP 87
Commissioner for Fair Trading v Edward Lees Imports Pty Ltd (No 2) [2019] NSWCATAP 222
CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21
Cripps v G & M Dawson Pty Ltd [2006] NSWCA 81
Edwards v Commissioner for Fair Trading, Department of Customer Service (Costs) [2019] NSWCATAP 249
Feng v OzWood (Australia) Pty Ltd [2020] NSWCATAP

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Fitzpatrick Investments Pty Ltd v Chief Commissioner of State Revenue [2015] NSWCATAD 103

Khalafv Commissioner of Police [2019] NSWCATOD 178

Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120

Obieta v Australian College of Professionals Pty Ltd (2014) NSWCATAP 38

Sahade v Owners SP No 62022 [2015] NSWCATAP 225

Styles v Wollondilly Shire Council [2017] NSWCATAP 108

The Owners - Strata Plan 20211 v Rosenthal [2019] NSWCATAP 49

The Owners - Strata Plan No 55773 v Roden (Costs) [2020] NSWCATAP 197

The Owners - Strata Plan No 58068 v Cooper (Costs) [2020] NSWCATAP 198

The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd [2020] NSWCATAP 202

Wynne Avenue Property Ltd v MJHQ Pty Ltd (No 2) [2019] NSWCATAP 68

Youssef v NSW Legal Services Commissioner (Costs) [2020] NSWCATOD 115

Texts Cited:

Nil

Category:

Costs

Parties:

The Owners – Strata Plan No 63731 (Appellant)
B & G Trading Pty Ltd (First Respondent)
The Bunker 2017 Pty Ltd (Second Respondent)
SRSJ Management Pty Ltd (Third Respondent)

Representation:

Counsel:

D Meyerowitz-Katz (Appellant)
B Bradley and F Anwar (Second and Third Respondents)

Solicitors:

Grace Lawyers Pty Ltd (Appellant)
First Respondent (Self-Represented)
Wilshire Webb Staunton Beattie (Second and Third Respondents)

Respondents)
File Number(s): AP 20/05842
Publication Restriction: Nil
Decision under appeal:
Court or Tribunal: Civil and Administrative Tribunal
Jurisdiction: Consumer and Commercial Division
Citation: N/A
Date of Decision: 7 January 2020
Before: G Sarginson, Senior Member
File Number(s): SC 18/13363

REASONS FOR DECISION

- 1 In *The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd* [2020] NSWCATAP 202 we upheld the appellant’s appeal, set aside the Tribunal’s orders and ordered the respondents to restore certain common property.
- 2 The appellant now seeks an order that the second and third respondents pay the appellant’s costs of the appeal.
- 3 All parties agreed that s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the “NCAT Act”) applied to the application for costs. All parties agreed that an order should be made pursuant to s 50(2) of the NCAT Act, dispensing with a hearing on the question of costs.
- 4 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.

Costs Principles

- 5 Section 60 of the NCAT Act relevantly says:

- (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.

6 The general rule set out in s 60(1) was:

“... designed to promote access to justice generally and to minimise the overall level of costs in tribunal proceedings as far as is practicable: *Choi v University of Technology Sydney* [2020] NSWCATAP 18 at [41].¹”

7 In *Feng v OzWood (Australia) Pty Ltd* [2020] NSWCATAP 42 the Appeal Panel said, at [8], that the discretion to award costs had to be exercised judicially:

“...having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs. (See *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48]; *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [23]–[31]; *Nguyen & Anor v Perpetual Trustee Company Ltd*; *Perpetual Trustee Company Ltd v Nguyen & Anor (no 2)* [2016] NSWCATAP 168 at [16].)”

8 Section 60(2) says that the Appeal Panel may award costs to a party “only if” satisfied there are special circumstances warranting an award of costs.

9 Section 60(3) sets out a non-exclusionary list of factors to which an Appeal Panel may have regard in determining whether special circumstances warranting an award of costs exist.

¹ *Youssef v NSW Legal Services Commissioner (Costs)* [2020] NSWCATOD 115 at [107].

- 10 “Special circumstances” are circumstances that are out of the ordinary, but need not be those which are exceptional or extraordinary: *Cripps v G & M Dawson Pty Ltd* [2006] NSWCA 81 at [60] (Santow J); *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]; *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [32]; *Commissioner for Fair Trading v Edward Lees Imports Pty Ltd (No 2)* [2019] NSWCATAP 222 at [8]; *Edwards v Commissioner for Fair Trading, Department of Customer Service (Costs)* [2019] NSWCATAP 249 at [9]; *Youssef v NSW Legal Services Commissioner (Costs)* [2020] NSWCATOD 115 at [107].
- 11 However, it does not follow that a costs order should be made simply because one or more of the factors in s 60(3) are made out.
- 12 Even if satisfied that there are special circumstances, the Appeal Panel must further be satisfied that they are circumstances “warranting an award of costs” – *Fitzpatrick Investments Pty Ltd v Chief Commissioner of State Revenue* [2015] NSWCATAD 103 at [21]; *Youssef* at [108].
- 13 The exercise of the discretion requires the Tribunal “to weigh whether those circumstances are sufficient to amount to ‘special’ circumstances that justify departing from the general rule that each party bear their own costs”: *BPU v New South Wales Trustee and Guardian (Costs)* [2016] NSWCATAP 87 at [9]; *Obieta v Australian College of Professionals Pty Ltd* (2014) NSWCATAP 38 at [81]; *Khalaf v Commissioner of Police* [2019] NSWCATOD 178 at [29]; *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [35].
- 14 He who asserts must prove, and so the party seeking the costs order bears the onus of proving that special circumstances exist - *Styles v Wollondilly Shire Council* [2017] NSWCATAP 108 at [5] under the heading “Costs”.
- 15 Whether special circumstances exist is a question of fact and each case must be assessed according to its circumstances: *Wynne Avenue Property Ltd v MJHQ Pty Ltd (No 2)* [2019] NSWCATAP 68 at [57]; *The Owners - Strata Plan 20211 v Rosenthal* [2019] NSWCATAP 49 at [15].

Appellant's Submissions

- 16 The appellant submits that both the nature and the complexity of the appeal proceedings give rise to special circumstances warranting an award of costs in this appeal.
- 17 The appellant submits that this appeal had an exceptionally commercial character compared with most such appeals. The appeal concerned works done to a commercial lot with the intention of exploiting it for commercial ends. All parties were sophisticated parties represented by solicitors and by senior and junior counsel on the appeal, leave having been granted for that representation.
- 18 The appellant submits that, in contrast to the typical matters that come before the Appeal Panel, the appeal was of a commercial character and the parties conducted it as though it were commercial litigation. The appellant submitted that the policy considerations in favour of a "no costs" jurisdiction have less weight in such circumstances than they otherwise would.
- 19 The appellant submitted that this appeal concerned novel and complex questions of construction, both of the by-laws of the appellant's strata scheme and of certain provisions of the *Strata Schemes Management Act 2015* (NSW) ("SSMA 2015"). We shall return to those matters further below. The appellant submitted that, in that sense, this appeal was on all fours with the recent decisions of *The Owners - Strata Plan No 55773 v Roden (Costs)* [2020] NSWCATAP 197 and *The Owners - Strata Plan No 58068 v Cooper (Costs)* [2020] NSWCATAP 198 in that the Appeal Panels found "special circumstances" to exist by reason of the novelty and complexity of the legal questions that arose in those appeals - *Roden* at [39]-[40], [51]; *Cooper* at [58], [60]-[62], [72]-[74].
- 20 The appellant submitted that there were no previous decisions of the Appeal Panel nor any Court that had considered the novel and complex questions we were required to answer.
- 21 The appellant submitted that it followed that this appeal was one in which the involvement of legal representatives would be considered "appropriate, if not necessary": *Sahade v Owners SP No 62022* [2015] NSWCATAP 225 at [38].

We note that in that same paragraph the Appeal Panel said that the mere fact that leave was granted to a party to be legally represented in an appeal is not of itself sufficient to establish special circumstances warranting an award for costs.

- 22 Accordingly, the appellant submitted, special circumstances warranting an award of costs was established, and costs should follow the event of the appeal.

Respondent's Submissions

- 23 The second and third respondents submitted there were no special circumstances warranting a departure from the general rule set out in s 60(1) of the NCAT Act that that each party to the appeal should pay its own costs.
- 24 The respondents submitted that the appellant had successfully contended before the Tribunal that the case was not of sufficient nature (sic) or complexity to justify an award of costs. The issues on appeal were more defined in nature, more limited and more focused than before the Tribunal and were not any more complex.
- 25 The respondents submitted that the appeal did not bear the "nature" of commercial litigation but was limited to matters ordinarily the subject of a strata scheme dispute. The mere fact that a party in a strata scheme owned a commercial lot could not give rise to special circumstances warranting an award of costs. The respondent submitted that the cost burden of the proceedings in total had been disproportionate because the respondents had borne their cost burden alone, whilst the costs of the appellant had been shared by the remaining 140 or so lot owners.
- 26 The respondents submitted that complexity is not of itself a special circumstance: *Rosenthal* at [19], and such complexity was not out of the ordinary in strata law matters. The fact that the appeal concerned an orthodox process of statutory interpretation was a strong indicator of the ordinariness of the appeal.
- 27 In reply to the reliance by the appellant, at least by analogy, on *Roden* and *Cooper*, the respondents submitted that in those matters the Appeal Panel was

required to consider both issues of invalidity under s 150 of the SSMA 2015 and whether a specific bylaw contravened s 139 of the SSMA 2015. Issues of validity can be (though are not always) complex (as they were found to be in *Roden* and *Cooper*) and can require interrogation of transitional provisions (as they did in those matters). The degree of complexity is a question of fact.

- 28 The respondents submitted that such complexity (as existed in *Roden* and *Cooper*) is not found in the present appeal. Indeed, the issue of validity did not arise on appeal. Rather, the present appeal involved an orthodox application of statutory construction principles to certain provisions of the SSMA 2015, as is often required in strata disputes.
- 29 The respondents submitted that even if the Appeal Panel was satisfied that complexity was made out, the Appeal Panel must weigh that fact against all other relevant circumstances to determine whether special circumstances existed that justify departing from the ordinary rule that each party bear their own costs. The respondents submitted no such special circumstances existed in the present appeal.
- 30 The respondents submitted that there was no submission by the appellant that the position taken by the respondents on the appeal had no tenable basis in fact or law, and there was no disentitling conduct in the manner in which the appeal was conducted by the respondent.

Decision

- 31 In our opinion there should be an order for the costs of the appeal in favour of the appellant.
- 32 The issues on the appeal were complex and were out of the ordinary because of the absence of any earlier Appeal Panel or court decision on those issues. It is true, as the respondents submitted, that an orthodox process of statutory construction was applied, but this did not mean that the application of those principles to the statutory provisions in issue was simple. In our view it was a complex exercise as we think the length and content of our reasons would attest.

- 33 Ultimately we had to consider a number of complex matters which included: which of the relevant provisions of the SSMA 2015 were the leading provisions and which were the subordinate provisions; consideration of the pre-existing law and legislative history; consideration of how ss 108 – 111 of the SSMA 2015 could work harmoniously within the statutory scheme including in light of the terms of various other provisions including ss 141 – 143 and s 153 of the SSMA 2015; the differences between statutory provisions being “invalid” or being “of no force or effect”; and consideration of the effect of the transitional provisions applying to the SSMA 2015.
- 34 The substantive questions we decided were novel and there were no earlier court of Appeal Panel decisions on point nor on points sufficiently close to the issues we decided as to be of some assistance.
- 35 There was a substantial difference of opinion between the parties to the appeal as to the issues we decided. The parties themselves considered the issues sufficiently complex or of sufficient importance to not only seek leave to be legally represented (which was granted) but also to retain senior counsel to argue the appeal and prepare written submissions in advance of the appeal with the assistance of junior counsel.
- 36 We do not think that the fact the appeal had some commercial flavour to be a special circumstance warranting an award of costs or being a consideration toward that end. The Consumer and Commercial Division of the Tribunal, which heard this matter at first instance, routinely hears commercial matters, and Appeal Panels hearing appeals from those matters hear “commercial” appeals. In that regard, this appeal is not out of the ordinary.
- 37 We also do not think that the fact that the appellant had successfully contended before the Tribunal that the case was not of sufficient nature (sic) or complexity to justify an award of costs, nor that the issues on appeal were more defined in nature, more limited and more focused than before the Tribunal, is relevant. The only application for costs is in relation to the appeal and it is only the appeal with which we are concerned.
- 38 We do not accept the respondents’ submission that the appeal was limited to matters ordinarily the subject of a strata scheme dispute. In our view the issues

we were called upon to decided were out of the ordinary in terms of strata scheme disputes that regularly come before the Tribunal and Appeal Panel. True it is that strata scheme matters sometimes include matters of statutory construction, but the matters we were called upon to decide were, in our opinion, an order of magnitude greater than those matters in terms of complexity.

- 39 We also do not accept that there has been some disproportionate cost burden borne by the respondents. The appellant is a special type of body corporate established under the strata scheme legislation, as the respondents are body corporates established under the corporation's legislation. In a sense, lot owners are the equivalent of shareholders. If that analogy is correct then, to compare apples with apples, we would need to know the number of shareholders of the respondents if we were to take into consideration (as the respondents suggest) the number of lot owners. But we do not think that that information, even if known, would be relevant. The number of legal entities ultimately bearing a costs burden is not, in our view, relevant (other than perhaps in exceptional cases) to the question of costs.
- 40 We accept the respondents' submission that the position taken by them on the appeal was tenable, and that the respondents had not engaged in any discrediting conduct in the manner in which the appeal was conducted. In our view the respondents' position on the appeal and the submissions made were fairly arguable and skilfully put, as was the case for the appellant.
- 41 Those skilful submissions certainly made the issues on the appeal more defined in nature, more limited and more focused than perhaps they had been before the Tribunal, and accordingly our task was made easier in that respect than perhaps it might have been. But the issues, now clearly identified and refined, remained novel and complex, and our task was made more difficult by the absence of any binding or persuasive authorities on the substantive issues.
- 42 In all of those circumstances we consider that the nature and the complexity of the appeal proceedings amounted to special circumstances warranting an award of costs in this appeal.

Orders

43 We make the following orders:

- (1) A hearing on costs is dispensed with.
- (2) The second and third respondents are to pay the appellant's costs of the appeal as agreed or assessed.

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

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