

Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: [Agdiran v Owners Corporation SP83475 \(No.2\) \[2016\] NSWCATAP 119](#)

Hearing dates: Decided on the papers

Date of orders: 08 June 2016

Decision date: 08 June 2016

Jurisdiction: Appeal Panel

Before: P Callaghan SC, Principal Member
K Rosser, Senior Member

Decision: The application for costs is dismissed.

Catchwords: COSTS – no special circumstances

Legislation Cited: [Civil and Administrative Tribunal Act 2013](#)
[Civil and Administrative Rules 2014](#)
[Home Building Act 1989](#)

Cases Cited: [Agdiran v Owners Corporation SP83475 \[2016\] NSWCATAP 58](#)
[eMove Pty Ltd v Dickinson \[2013\] NSWCATAP 94](#)

Texts Cited: Nil

Category: Costs

Parties: Yusuf Agdiran (Appellant)
Owners Corporation SP83475 (Respondent)

Representation: Appellant: Nil
Respondent: Maguire & McInerney Lawyers

File Number(s): AP 15/43328

Decision under appeal

Court or tribunal: Civil and Administrative Tribunal
Jurisdiction: Consumer and Commercial Division
Citation: Nil
Date of Decision: 07 July 2015
Before: D Barnetson, General Member
File Number(s): HB 14/27792

reasons for decision

- In [Agdiran v Owners Corporation SP83475](#) [2016] NSWCATAP 58 (“the appeal decision”) this Appeal Panel made the following orders:
 - The appeal is dismissed.
 - The Application for Leave to Appeal is dismissed.
 - The order appealed from is affirmed.
 - The stay in respect of the order appealed from is terminated.
 - The proceedings are remitted to the Consumer and Commercial Division of this Tribunal for any extant issue as to the costs of the proceedings in that Division to be dealt with.
 - Any application by the Respondent for costs of the appeal is to be made with supporting submissions to be filed and served within 14 days of the publication of this decision and any submissions by the Appellant in response are to be filed and served within 14 days after service of the Respondent’s application and submissions. Any such application will then be determined on the papers.
- The order appealed from was that the Appellant (the respondent in the Consumer and Commercial Division) pay to the Owners Corporation \$228,509.00 for breaches of the warranties under the [Home Building Act 1989](#).
- The appeal decision was published on 8 March 2016. By Submissions on Costs dated 21 March 2016, the Respondent has sought costs of the appeal and the Respondent’s solicitors advise that a copy of the submissions was served on the Appellant’s solicitors on 21 March 2016. No submissions have been received from the Appellant.
- This appeal was instituted before 1 January 2016, so r 38A of the [Civil and Administrative Tribunal Rules 2014](#) does not apply and the applicable provision concerning costs is s 60 of the [Civil and Administrative Tribunal Act 2013](#) which relevantly provides:
 - Each party to proceedings in the Tribunal is to pay the party’s own costs.
 - 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.
 - In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:
 - whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
 - whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
 - 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,
 - the nature and complexity of the proceedings,
 - whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
 - whether a party has refused or failed to comply with the duty imposed by section 36(3),
 - any other matter that the Tribunal considers relevant.
 - Section 36(3) of the [NCAT Act](#), referred to in s 60(3)(f), provides:
 - (3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:
 - a party to proceedings in the Tribunal,
 - an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.
- The Respondent submits that the following considerations weigh in favour of a costs order in favour of the Respondent:
 - The Appeal was untenable;
 - The Appellant’s conduct in bringing and maintaining the appeal was unreasonable;
 - The Appeal Panel found that certain of the grounds were of ‘no merit’ [Reasons [16]] and ‘baseless’ [Reasons [17]];
 - The factual foundation for the alleged errors of law advanced by the Appellant were found not to exist;
 - The Appellant failed to comply with the *guiding principle* and not address the real issues in a manner that would achieve the just, quick and cheap resolution of the dispute;
 - The Appellant adduced on appeal substantial expert evidence of the manner and cost of rectification which was irrelevant to any error of law [Reasons [32]];
 - Each of the parties were legally represented;
 - The amount in dispute was substantial.
- In assessing these submissions we bear in mind in particular what was said in [eMove Pty Ltd v Dickinson](#) [2015] NSWCATAP 94 at [48] with reference to earlier authority:

“...‘special circumstances’ are circumstances that are out of the ordinary, they do not have to be extraordinary or exceptional. Further, the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs. Each situation must, of course, be assessed on a case by case basis to see whether or not special circumstances exist so as to warrant an order of costs.”
- The Appellant had solicitors and Counsel acting for him in the appeal. Counsel on his behalf made extensive submissions in writing and orally at the appeal hearing. Ultimately, none of those submissions was upheld and the appeal and the application for leave to appeal were dismissed. Nevertheless, such a result in the appeal would not on its own constitute a special or unusual circumstance. Nor does consideration of the particular points put forward on behalf of the Respondent persuade us that they individually or collectively constitute relevant “special circumstances”. We will explain that conclusion by way of short comments on each of those points, using the same lettering as in paragraph 6 of this decision:
 - We would not classify the appeal as “untenable”. For example, the first ground of appeal, challenging the adequacy of the reasons in the decision under appeal, was the subject of considerable attention at the hearing and in the appeal decision at [10] to [14].
 - (b), (e) We could not say that in exercising, with the aid of legal representation, his rights under s 80 of the [NCAT Act](#) to appeal and seek leave to appeal the Appellant’s conduct was “unreasonable”, let alone involved some transgression of s36(3) of the [NCAT Act](#).
 - (c) The citation, without context, of the epithets “no merit” and “baseless” from the appeal decision does not add weight to the Appellant’s submissions. They were expressions used in the context of considering (and rejecting) two of the grounds on which it was submitted on behalf of the Appellant that there had been a failure to afford to the Appellant procedural fairness in the subject proceedings. For example, one of these grounds involved an allegation the Appellant had not been notified of the date fixed for hearing of the subject proceedings; the word “baseless” was used in this sentence in the appeal decision at [17]: “Other considerations apart, (that) complaint seems to an extent baseless as the Builder actually attended the hearing on 19 June 2015.”
 - (d) It is correct that some findings of fact adverse to the Appellant were made in the appeal decision. Those findings were particularly in relation to the allegation of denial of procedural fairness. Nevertheless, we do not see that it was inappropriate for the Appellant, through his legal representatives, to have raised those factual allegations.
 - (f) The appeal decision dealt at [30] and [31] with an expert report which the Appellant produced at the appeal hearing, particularly in support of a submission that this was relevant new evidence. The detail of that report was not a matter of moment in the appeal hearing or the appeal decision.
 - (g),(h) In an internal appeal such as this, and in the circumstances of this appeal, the fact of legal representation and the quantum of the amount in issue do not constitute unusual circumstances.
- Accordingly, we reject the Respondent’s application for costs and we order that the application is dismissed.

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

Decision last updated: 29 May 2018

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Agdiran v Owners Corporation SP83475 [2016] NSWCATAP 58	Civil and Administrative Tribunal New South Wales - Appeal Panel	8 Mar 2016	

Cases citing this decision

Name	Court	Date	Citations
The Owners – Strata Plan No. 55236 v Community Association DP No. 270003 (No. 2) [2018] NSWCATCD 37	Civil and Administrative Tribunal New South Wales - Consumer and Commercial Division	3 Aug 2018	2 citations

Cases cited by this decision

Name	Court	Date	Citations
Agdiran v Owners Corporation SP83475 [2016] NSWCATAP 58	Civil and Administrative Tribunal New South Wales - Appeal Panel	8 Mar 2016	2 citations
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94	Civil and Administrative Tribunal New South Wales - Appeal Panel	22 May 2015	1 citation: Para 48
Unknown case title [2013] NSWCATAP 94	Civil and Administrative Tribunal New South Wales - Appeal Panel	2013	1 citation

Legislation cited by this decision

Name	Citations
Civil and Administrative Tribunal Act 2013 (NSW)	7 citations: Section 36(3), 60, 60(3)(f), 60
Civil and Administrative Tribunal Rules 2014 (NSW)	1 citation: Rule 38A
Home Building Act 1989 (NSW)	2 citations

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