BCS Strata Management Pty Ltd v The Owners Corporation SP 61759 - [2016] NSWCATAP 275

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:	**BCS Strata Management Pty Ltd v The Owners Corporation SP 61759 [2016] NSWCATAP 275**
Hearing dates:	On the papers, last submission filed 16 December 2016
Date of orders:	31 August 2017
Decision date:	13 November 2016
Jurisdiction:	Appeal Panel
Before:	J Harris SC, Senior Member DAC Robertson, Senior Member
Decision:	1. Confirm Order 2 made on 30 November 2016 that the respondent is to pay the appellant's costs of the appeal. 2. No order as to the costs of application GEN 15/31589. 3. No order as to the costs of the submissions on costs.
Catchwords:	COSTS – Appeal on multiple issues – appellant succeeds on one issue – not a case for the allocation of costs between issues - Calderbank letter – in all circumstances reasonable for applicant not to accept
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW)
Cases Cited:	Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 Bowe n Investments v Tabcorp Holdings Ltd (No.2) [2008] FCAFC 107 Calderbank v Calderbank [1975] 3 All ER 333 Markinsky v Zammit [2016] NSWCATAP 253 Priestley v Priestley (No 2) [2016] NSWSC 1259
Category:	Costs
Parties:	BCS Strata Management Pty Ltd (Appellant) Owners Corporation Strata Plan 61759 (Respondent)
Representation:	Appellant: Grace Lawyers

	Respondent: Dr Redelman, Chairperson
File Number(s):	AP 16/22999
Decision under appeal	Court or tribunal: Civil and Administrative Tribunal Jurisdiction: Consumer and Commercial Division Citation: Nil Date of Decision: 14 April 2016 Before: C Campbell, General Member File Number(s): GEN 15/31589

REASONS FOR DECISION

1. In this matter the Appeal Panel delivered its decision on 13 November 2016 [2016] NSWCATAP 257 . The appeal was allowed in part. The decision of the Tribunal was set aside and an order made in substitution that the appellant pay the respondent the sum of $3,575.00 immediately. Those orders involved a reduction of the amount payable pursuant to the decision at first instance from $38,314.00.

2. In the principal decision the Appeal Panel ordered that the respondent pay the appellant's costs of the appeal but granted the parties leave to file written submissions submitting that the Appeal Panel should make a different order in respect of the costs of the application or the appeal.

3. Both parties have lodged written submissions. The respondent seeks to vary the order made in respect of the costs of the appeal. The appellant seeks an order that the respondent pay the costs of the application at first instance.

The applicable principles

4. Section 60 of the Civil and Administrative Tribunal Act provides:

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.

5. Rules 38 and 38A of the Civil and Administrative Tribunal Rules 2014 (the Rules) provide:

38 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.

38A Costs in internal appeals

(1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out in section 60 of the Act because of the operation of:

(a) enabling legislation, or

(b) the Division Schedule for the Division of the Tribunal concerned, or

(c) the procedural rules.

(2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

6. The proceedings at first instance were brought in the Consumer and Commercial Division of the Tribunal and involved a claim for more than $30,000. Therefore, pursuant to rule 38, special circumstances were not necessary before the Tribunal at first instance and the Appeal Panel on appeal may make an award of costs in respect of the application at first instance.

7. The appeal was filed on 13 May 2016. Because rule 38 applied at first instance and the appeal was filed after 1 January 2016, rule 38A applied to the appeal so as to apply rule 38 to questions of costs of the appeal. Rules 38 and 38A remove the need for special circumstances before an order for costs may be made in respect of an appeal where the amount in issue on the appeal exceeds $30,000. The amount in issue on the appeal is the amount by which the appeal might affect the position of the parties. In *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 an Appeal Panel held, at [57] :

... having regard to the specific wording of r 38, it appears to us that in applying r38(2)(b):

The determinative factor is the amount in dispute in each appeal, not the amount in dispute in the proceedings at first instance;

The phrase "in dispute" is to be construed as meaning truly in dispute or at issue or, inversely, not unrealistically in dispute;

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;

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.

8. On this appeal the amount in issue was in excess of $30,000. By the decision under appeal the respondent was awarded a judgment in the amount of $38,314, the appellant sought to set the whole judgment aside and, in any event, by the substantive decision on the appeal, the judgment in favour of the respondent was reduced by more than $30,000. Thus rules 38 and 38A combined

have the effect that special circumstances are not necessary before the Appeal Panel may make an award in respect of the costs of the appeal.

Costs of the Appeal

9. The respondent submits that it should not be ordered to pay the appellant's costs of the appeal. The bases upon which the respondent submits that it should not be ordered to pay the appellant's costs are twofold. The respondent's first submission is that the appellant appealed on numerous grounds and, that "on the majority of these grounds the Tribunal made no finding or, as to the kernel of the appellant's argument on quantum (that the tiles were ordered by SPMA [the architect] as the respondent's agent) found against the appellant".

10. The second argument raised by the respondent consists in large measure, if not entirely, of an attempt to re-argue the case and suggest that the Appeal Panel's decision was not correct. The submission is cloaked as a submission that "the respondent acted reasonably in defending the decision of the Tribunal below". It may be accepted that the issues argued on the appeal were not straightforward but, as noted in the principal judgment, the appellant has had significant success in the appeal. It is not appropriate on the consideration of questions of costs to entertain argument in relation to the principal decision.

11. In respect of its first submission, the respondent relied upon the decision of Rares J in *Bowen Investments v Tabcorp Holdings Ltd (No.2)* [2008] FCAFC 107. In that case his Honour held that the interests of justice would not be served by making an order that the appellant receive its full costs of the appeal in circumstances where "both [the appellant] and the respondent incurred unnecessary cost pursuing issues and arguments that had no substantive impact on the outcome of the litigation. It would be unjust to require the respondent to pay for the wasted costs of this exercise."

12. We note that Rares J was in dissent on that issue. The majority of the Court in that case, Finkelstein and Gordon JJ, held that, although the successful appellant should be deprived of 30% of its costs of the trial by reason of the fact that it had pursued arguments and causes of action upon which it did not succeed, the appellant should not be deprived of any portion of its costs of the appeal. Their Honours held that:

> "It is true that the appellant did make passing reference to some of the claims in which it was unsuccessful at trial. But the principal issue raised on the appeal, and the issue that was fully argued before the Full Court, was the correct manner in which damages should be assessed for the breach of the lease that was found by the trial Judge to have occurred. On that issue the appellant was wholly successful, even if it did not identify each and every argument upon which its success depended. Anyway, a successful party should not be punished for not identifying the successful argument, when its failure to do so did not really add to the length of the hearing."

13. In our view it is fair to say that, although the appellant did file written submissions and submissions in reply raising a number of issues which the Appeal Panel did not determine, part of

the reason for that outcome was that at the hearing of the appeal (and only at the hearing of the appeal) Mr Le Page, who appeared for the respondent, explicitly limited the bases upon which he sought to support the decision of the Tribunal at first instance. We refer to paragraphs 11 and 12 of the principal decision.

14. The appellant raised as a ground of appeal the proposition that there was no evidence for the finding that the appellant was a trustee of the moneys from which the payments were made. That ground of appeal and the submissions relating to it were withdrawn at the hearing of the appeal, but occupied only three paragraphs in the appellant's submissions and six paragraphs (out of 45) of the respondent's submissions.

15. We do not consider that the additional issues extended the hearing of the appeal to any extent.

16. *Bowen & Tabcorp* was considered by White J in *Priestley v Priestley (No.2)* [2016] NSWSC 1259 in which after a lengthy survey of the authorities his Honour concluded [at 53]:

> "The Court of Appeal has made it clear that special costs orders can be made where an otherwise successful party has failed on a particular issue or group of issues that is clearly dominant. The expression used is issues that are 'clearly dominant or separable'."

17. In *Markinsky v Zammit* [2016] NSWCATAP 253 at [29] an Appeal Panel of the Tribunal held that:

> In proceedings in which multiple issues are contested...the conventional approach is that costs will follow the event, that is, in accordance with the outcome of the proceedings as a whole without an attempt being made to differentiate between particular issues on which the successful party overall may not have succeeded: *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38] ; *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [32] . But a court or tribunal may make a different order, particularly if the successful party overall raises an issue unreasonably or otherwise acts in such a manner that would make it unfair for them to receive all their costs: *Rozniak v Government Insurance Office* (1997) 41 NSWLR 608. More usually, however, a court or tribunal will only deprive a party successful overall of costs in relation to a particular issue when that issue was a dominant issue or clearly separable: *Monie v Commonwealth (No 2)* [2008] NSWCA 15 at [64], [65] .

18. In our view there was no clearly separable issue on which the respondent could be said to have succeeded. It cannot be said that the appellant's pursuit of arguments which were withdrawn or not ultimately resolved significantly increased the costs of the proceedings or extended the length of the hearing at all. In the circumstances we consider that the order in respect of the costs of the appeal incorporated in the principal judgment should stand.

Costs of the Original Application

19. The appellant also sought an order for the costs of the original application. Although the Owners Corporation was successful in obtaining a monetary judgment in the proceedings, the appellant relied upon a "Calderbank letter" sent by the solicitors for the appellant (as respondent below) on

29 June 2015 following a conciliation hearing before the Tribunal on 12 June 2015. The hearing of the application at first instance took place on 22 October and 9 November 2015.

20. The letter of 29 June 2015 relied upon by the appellant was marked "without prejudice save as to costs" and was stated to be an offer made in accordance with the principles set out in *Calderbank v Calderbank* [1975] 3 All ER 333 and "the Australian authorities adopting such principles". In the letter the appellant's solicitors stated:

> "As discussed at the conciliation hearing, while our client has accepted its error in making the last payment claim to Andersal Pty Limited (Andersal), as a matter of fact and law the owners corporation has not suffered loss in the manner alleged and, further, such alleged losses are not recoverable against our client.
>
> ...There are other aspects of the claim being made against our client that are flawed, including that your project manager approved the disputed tile order and that the owners corporation has not in fact proven its case. The latter issue was expressly identified by the Tribunal Member at the conciliation hearing.

21. After stating that the solicitors were of the opinion that "there are good prospects of the proceedings being dismissed", the letter stated:

> "Notwithstanding and taking into account the cost to both parties of continuing with the legal proceedings to finality, our client is prepared to make a commercial settlement offer as follows:
>
> 1. the proceedings dismissed;
>
> 2. each party pays its own costs of the proceedings to date;
>
> 3. our client pays to the owners corporation an amount in the sum of $4,200.00 in full and final settlement; and
>
> 4. the owners corporation enters into a deed, releasing our client from all liability in relation to the matters the subject of the proceedings."

22. The appellant suggests that the respondent's rejection of the Calderbank offer was unreasonable and that the respondent should "provide [the appellant] with a full indemnity for the costs [the appellant] incurred in defending the application at first instance."

23. The appellant also sought costs of the second day of hearing on the basis that the second hearing day was only necessitated by the cross-examination of the appellant's general manager by the Chair Person of the Owners Corporation.

24. We will address these two issues raised by the appellant in turn.

The Calderbank offer

25. The amount offered by the appellant to the Owners Corporation was $4,200.00 which was offered in full and final settlement of the Owners Corporation's claim. The offer required that each party pay its own costs.

26. In those circumstances it is significant that the amount awarded to the Owners Corporation, by the decision as varied by the principal judgment, was $3,575.00. Thus the amount offered by the appellant was $625.00 more than the ultimate judgment. Although the offer was made at a relatively early stage of the proceedings, there had been a conciliation conference. There is no evidence before the Appeal Panel concerning the extent to which the Owners Corporation had incurred costs by that date.

27. We also note that the Owners Corporation responded to the offer seeking further information. In its response, dated 2 July 2015, the Owners Corporation stated, "we have not had the position of BCS made clear to us… There may be significant financial consequences to SP 61759 if we pursue a claim that is not largely successful. Accordingly we need a better understanding of your client's position". The response then set out eleven questions. It may be accepted that many of those questions were irrelevant to the issues between the parties or proceeded on false assumptions as to the significance of various matters. However the questions were not entirely irrelevant and did raise some legitimate questions.

28. The appellant, which attached the Owners Corporation's response to its submissions to establish that the Calderbank letter had been received by the Owners Corporation, did not provide any evidence of whether, and if so in what terms, it answered the Owners Corporation's questions.

29. We do not consider that it was unreasonable of the respondent not to accept the offer. It is not clear on the evidence before us that the offer was in fact better than the result the Owners Corporation ultimately achieved. Although the offer was in excess of the amount ultimately awarded to the Owners Corporation, there is no indication before the Appeal Panel what costs the Owners Corporation might have incurred by that time. By virtue of Rule 38(2)(b), given that the amount in issue in the proceedings exceeded $30,000, the Owners Corporation would presumptively have been entitled to the payment of its costs without establishing the existence of special circumstances.

30. We recognise that the appellant did not seek the costs of the hearing at first instance and was not legally represented at the hearing at first instance. Nevertheless in circumstances where the Calderbank letter did not offer a significant compromise on the appellant's part, being inclusive of costs and barely $600 more than the compensation awarded, and the Owners Corporation had not rejected the offer out of hand but had sought clarification of the appellant's case, we are of the view that it was not unreasonable for the Owners Corporation not to accept the offer and we find that the Calderbank letter does not warrant an order for costs in the appellant's favour.

Costs of the second day of hearing

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31. In respect of the appellant's submission that the Owners Corporation should pay the costs of the second day of the hearing below, we note that the respondent was represented at the hearing by its Chair Person, Dr Redelman, who is not legally qualified.

32. The transcript discloses that the proceedings had been fixed for hearing for 3 hours on the basis that there would be no cross-examination of witnesses. When Dr Redelman indicated at the commencement of the hearing that she did seek to ask some questions of Mr Freeman, who was a director and the General Manager, Strata Excellence and Regulatory of the appellant, the Tribunal Member stated "there might be costs implications as well if the matter has to be adjourned part heard". [Appeal Book page 42, line 19 to 20] and "there may be costs implications because of this, Dr Redelman do you understand that?"

33. The cross-examination then commenced, according to the transcript [Appeal Book page 44], at 1.42 pm, and concluded after about an hour at 2.45 pm as recorded by the Member [Appeal Book page 72]. Although the cross-examination may have been unnecessary, it is apparent from the fact that the matter was stood over part heard and that the submissions on the second day occupied 57 pages of transcript, that the cross-examination of Mr Freeman was not the sole reason that the matter was not completed on the first day.

34. If the appellant had considered that the extension of the hearing had warranted an application for the payment of the costs of the second day, given the Member's comments at the commencement of the hearing concerning costs occasioned by cross-examination, that application might legitimately have been made to the Tribunal Member regardless of the outcome of the proceedings.

35. In the circumstances we are not satisfied that the hearing was unduly extended or the costs increased by the cross-examination of Mr Freeman. Taking into account the fact that the respondent did not have legal representation at the hearing, we do not consider that the cross-examination of Mr Freeman justifies an order for costs in favour of the appellant in relation to the second day of the initial hearing.

36. Accordingly we confirm the order made in the principal judgment that the respondent is to pay the appellant's costs of the appeal. We further order that there be no order as to the costs of the application.

37. In relation to the submissions on costs, as both parties made submissions that we should change our orders, and neither application has been successful, we consider it appropriate to order that there be no order as to the costs of the submissions on costs.

38. The orders of the Appeal Panel will be:

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1. Confirm Order 2 made on 30 November 2016 that the respondent is to pay the appellant's costs of the appeal.

2. No order as to the costs of application GEN 15/31589.

3. No order as to the costs of the submissions on costs.

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.

Principal Registrar

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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

Decision last updated: 31 August 2017