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# New South Wales Civil and Administrative Tribunal - Consumer and Commercial Division

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## Blair v The Owners-Strata Plan No 71656 and Mitchell [2016] NSWCATCD 8 (20 January 2016)

Last Updated: 7 April 2016

Civil and Administrative Tribunal  
New South Wales

Case Name:	Blair v The Owners-Strata Plan No 71656 and Mitchell
Medium Neutral Citation:	<a href="#">[2016] NSWCATCD 8</a>
Hearing Date(s):	Costs on the papers
Decision Date:	20 January 2016
Jurisdiction:	Consumer and Commercial Division
Before:	Geoffrey Meadows, Senior Member
Decision:	1. The appellant is to pay the legal costs of the first respondent on the ordinary basis as agreed or assessed pursuant to the <a href="#">Legal Profession Act 2004</a> or if that is not the appropriate legislation, pursuant to the Legal Profession Uniform Law Application Act 2014, specific Part 4.3 Division 7 of the Legal Profession Uniform Law (NSW) No. 16a.
Catchwords:	STRATA AND COMMUNITY SCHEMES—costs—Consumer and Commercial Division—applicable legislation—costs not awarded
Legislation Cited:	Civil & Administrative Tribunal Act 2013 <a href="#">Legal Profession Act 2004</a> Legal Profession Uniform Law Application Act 2014 No 16 Legal Profession Uniform Law (NSW) No. 16a
Cases Cited:	Gallo v Dawson <a href="#">[1990] HCA 30</a> ; <a href="#">(1990) 93 ALR 479</a> ; <a href="#">(1990) 64 ALJR 458</a> Gaynor v Burns <a href="#">[2015] NSWCATAP 150</a> Jackson v NSW Land and Housing Corporation <a href="#">[2014] NSWCATAP 22</a>

Category:	Costs
Parties:	Tracey Blair (applicant); Owners Corporation Strata Plan 71656 and Anne and William Mitchell (respondents)
Representation:	J. S. Mueller & Co (Applicant) Pobi Lawyers (Respondent)
File Number(s):	SCS 14/50879
Publication Restriction:	Nil

## **REASONS FOR DECISION**

### **The Claim**

1. On 23 September 2014 Adjudicator Corley dismissed an adjudication application brought by the appellant. On 5 May 2015, I dismissed this appeal against Adjudicator Corley's decision. The reasons for that determination are set out in the brief reasons published on that date. Essentially, the appellant had been unable to demonstrate an Adjudicator had power to remove a properly appointed strata manager prior to the expiry of the agreement appointing that manager. Other issues were also discussed on that day as summarised in my published reasons. Those reasons should be read in conjunction with this decision and reasons.
2. Following the decision on 5 May 2015, the respondent applied for an award of its legal costs, supported by written submissions sent on 21 May 2015 but not stamped "received" until 25 May 2015. I note that 21 May 2015 was a Thursday and if the submissions were not delivered the following day, the next working day was Monday 25 May 2015. I note the letter sending the submissions was dated 21 May 2015. Although the submissions are therefore late, and there is no explanation as to why they were not physically received until 25 May 2015, I am satisfied there is no prejudice to the applicant in accepting and reading the respondent's submissions, given the period of time that has passed.
3. On 9 June 2015, the appellant sent an email to the Registry, noting that a copy of the respondent's submissions were provided to her on 1 June 2015 and that, as they were therefore out of time, and that "I trust there is nothing further required by me". There does not appear to have been any reply from the Registry to that email. No further correspondence was received from the appellant prior to 4 December 2015. On that date (and it is not clear from the Tribunal file what precipitated the correspondence) the Tribunal wrote to the appellant advising that I had determined to accept the respondent's costs submissions dated 21 May 2015 and inviting any submissions in reply to be provided no later than 18 December 2015.
4. There then followed a flurry of correspondence starting with a request by the appellant for an extension of time, opposed by the respondent. I do not propose to summarise this correspondence, except to note that the request for an extension of time was withdrawn, and the appellant provided submissions on 18 December 2015. I accept and read those submissions.

### **First Respondent's Submissions**

5. The first respondent's submissions are brief but cogent. First setting out the relevant legislative provision, being s 60 of the Civil and Administrative Tribunal Act 2013 (CAT Act) the first respondent submits that the proceedings were misconceived or lacking in substance, principally on the basis that there was no basis for an Adjudicator to make the order sought in the original adjudication application.
6. Similarly, the orders sought in relation to ss 140 and 149 were outside the scope of the original application and could not be raised in the appeal. The order sought in relation to s 158 of the CAT Act was not pressed in the appeal but in any case, as there was no by-law sought or refused by the Owners Corporation, that application was also misconceived and lacking in substance.
7. The first respondent also noted "other relevant matters" relating to the history of dispute between the appellant and the first respondent, which are not necessary to summarise here.
8. On those bases, the first respondent submits that its costs of the proceedings be paid by the appellant.
9. The first respondent continues by way of separate submissions, under the heading "The Power to Award Costs – Reg 38 CATR" that the Tribunal has the power to award costs pursuant to Rule [not Regulation] 38 of the Civil and Administrative Tribunal Rules 2014 (CAT Rules) even in the absence of "special circumstances" as required by s 60 of the CAT Act.
10. The first respondent notes that the power just referred to applies if the "amount claimed or dispute" exceeds \$30,000.00. The first respondent submits that included in that amount is the total of \$73,275.00 sought in special levies, and that Rule 38 is therefor enlivened.
11. Finally, the first respondent submits that the "ordinary rule" should apply, that a successful defendant will be awarded costs.

### **Appellant's Submissions**

12. The bulk of the appellant's submissions relate to a submission "that the First Respondent's submissions on costs be dismissed for being out of time".
13. With great respect to the appellant, the parties were not invited to provide submissions as to whether any party's submissions should be accepted or otherwise. However, I note the appellant has provided carefully reasoned and detailed submissions in that regard, including by reference to s 41 of the CAT Act (providing for the granting of extensions of time) and Rule 8 of the CAT Rules, and the relevant legal principles to be applied. In particular, the appellant submits the first respondent was required to seek an extension of time in writing, and was required to support that request with an adequate explanation for its delay. The appellant submits that time limits, or at least this particular time limit, "should be strictly enforced in favour of the Appellant".
14. The appellant also submits that allowing "the First Respondent's submissions on costs to proceed from 7 months after the date of the decision of the Member unfairly prejudices the Appellant, works an injustice to the Appellant and is contrary to the guiding principle for the CATA".

15. In response to the first respondent's submissions on the proceedings being misconceived or lacking in substance, the appellant submits that:
- (1) The Adjudicator in the original application, and the Member on appeal, did not make a finding that the appellant's appeal was misconceived and lacking in substance;
  - (2) The appellant's appeal raised complex factual and legal issues; and
  - (3) The appellant never received any correspondence from the first respondent's solicitors explaining why the appeal would be unsuccessful and inviting the appellant to withdraw the appeal.
16. Therefore, submits the appellant, in all of the circumstances it is not appropriate for a costs order to be made in favour of the first respondent.

## Legislation

17. The awarding of legal costs in the Tribunal and specifically in matters heard in the Consumer and Commercial Division of the Tribunal are governed by s 60 of the CAT Act and Rule 38 of the CAT Rules, as follows:

### 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.

### **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.

### **Consideration and Determination**

18. I deal first with the appellant's submissions that the first respondent's submissions on costs be dismissed for being out of time.
19. On one view, the parties have not been given leave to argue that point. The submissions were to be made only in relation any application for costs. However, it is appropriate to consider the appellant's lengthy and detailed submissions. I do so in the absence of any submissions in reply by the first respondent, because I have come to the conclusion that the appellant's submissions should not be accepted. Were I in any doubt in that regard, I would have requested such submissions in reply from the first respondent, should it wish to provide them.
20. The basis of the appellant's submissions is that the first respondent did not provide its submissions by the date set by the Tribunal, being 22 May 2015, but instead they were provided on 25 May 2015, and were accepted by the Tribunal without any formal decision made to extend the time pursuant to s 41 of the CAT Act and no explanation for the failure being provided by the first respondent. The appellant also provides extensive submissions in relation to the legal principles to be applied in such circumstances.
21. In my opinion, this is not a persuasive submission, for the following reasons.
22. First, the first respondent apparently (and this is not disputed) forwarded its submissions under cover of a letter dated 21 May 2015. That date was a Thursday. It is not possible to determine just when the submissions may have been delivered to the Tribunal's letter box or to the Registry, but the submissions were date stamped as received on 25 May 2015. It is possible (but cannot be determined) that the submission were delivered during 22 May 2015 but were not collected and sorted until 25 May 2015, the following Monday.
23. Second, even if the submissions were not received until Monday 25 May 2015, such a delay is not significant or unreasonable and should it be required I would have no hesitation in granting an extension of time for that purpose pursuant to s 41 of the CAT Act, if the first respondent had been required to respond to the appellant's submissions on this issue and to request such an extension of time in writing.

24. I am not persuaded by the appellant's submissions in referring to Gallo v Dawson and Jackson v NSW Land and Housing Corporation [\[2014\] NSWCATAP 22](#). Indeed, the latter case, which itself relied on the former case, stated:

"[21] ... That is not to say, however, that exceptions should not be made where the interests of justice so require. The express power in s 41 of the Act to grant extensions of time allows the Tribunal to prevent the rigid enforcement of time limits becoming an instrument of injustice. ..."

In my opinion, refusing an extension of 1 day, in circumstances in which it appears the first respondent intended to and attempted to provide its submissions by the due date, would be such a "rigid enforcement" and would lead to the injustice that the first respondent would be denied its right to seek costs pursuant to the CAT Act.

25. Third, in the circumstances which prevailed in these proceedings, following the substantive decision, it appears the Tribunal neglected to respond to the appellant's emails dated 9 June 2015 and 24 August 2015. The reasons for those failures are not clear from the Tribunal file.
26. Fourth, it is not appropriate for the appellant to conclude that no further action was required without confirmation from the Tribunal (although I would be reluctant to refuse the appellant's right to make submissions for that reason alone).
27. Furthermore, and most importantly in my view, the appellant has suffered no prejudice, having been given leave to file her own submissions in reply and having in fact obtained legal advice and provided such submissions.
28. For those reasons, the first respondent's submissions are not "dismissed".
29. The decision made on 05 May 2015 was in the following terms:

"1. The appeal is dismissed because:

- Having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established."

That decision is produced automatically by the Tribunal's automated computer system, depending on selections made by the Presiding Member, at the conclusion of the hearing.

30. The decision continues, under the heading "Reasons" which were drafted specifically by me, also at the conclusion of the hearing. As noted above, those reasons should be read in conjunction with this decision and reasons. The automated decision set out in the previous paragraph, does not actually state why the Tribunal was not satisfied the required grounds had been established. That information is, or at least should be, contained in the reasons that follow.
31. In circumstances where the applicant for costs (the respondent in this instance) asserts that the grounds supporting such an award are first, that the appeal was misconceived and lacking in substance and second, the conduct of the appellant, it must be clear that the substantive decision was made on those bases. In my opinion, it is not possible for a party to claim costs unless the Tribunal has made findings that the appeal was misconceived and lacking in substance and that a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings (in this case).

32. It is also my opinion that it is not permissible for a party to argue, after the decision, that those findings could or should have been made if in fact they were not made in the substantive decision. Although an application for costs can be made following a substantive decision, that decision is complete and cannot be changed, unless pursuant to s 63 of the CAT Act or an application is made for the application to be reinstated or the decision to be set aside or an appeal is filed.
33. Turning to the substantive decision and reasons, it is obvious that there was no finding, in terms, that the appeal was “misconceived and lacking in substance”—that is, those words were not used. However, there can be no doubt that that was the basis for my decision. This is clear, unequivocally clear, in my opinion, given the following paragraphs:

During discussions today, I enquired of the appellant how this appeal was related to the adjudication. In particular, I sought information as to how there could be an appeal against the decision that an adjudicator had no power to revoke (or "remove") an appointed strata manager whose term had not yet expired. I also sought information on the nature of the appeals against the repairs, the levies and the by-law decisions.

The appellant was unable to point to any provision under the Act conferring power on an adjudicator to remove an appointed strata manager. I advised the appellant that in that case (with which I agreed) I would dismiss the appeal to that extent.

The appellant sought to promote an argument that the adjudication application was in reality for the appointment of a compulsory strata manager and so the appeal could be maintained. This argument could not succeed because the adjudication application was in terms for the removal of the current strata manager, none of the required information to appoint a new strata manager was included (such as a letter of consent and details of the terms of a prospective manager) and neither party in the adjudication had argued in relation to a new appointment.

The appellant then stated that in relation to the other orders sought in the appeal, referring to the same sections of the Act as referred to in the adjudication application, are really in the nature of a fresh application. The order sought in relation to s 158 was not actively pressed before me today. The orders sought in relation to ss 140 and 149 were really in relation to whether the actions of the strata manager were legal or authorised. Section 149 provides for orders that levies are too high or too low, or that the levies should be paid in a different manner. Those were not the orders being sought in this appeal.

The appellant then suggested that to the extent the appeal raised fresh issues, it should be transferred to an adjudicator. There is no power for me to do so.

For those reasons, the appeal is dismissed.

34. On the basis of those paragraphs, I find that the substantive decision was made at least partly on the ground that the appeal was misconceived and lacking in substance.
35. In my opinion, the substantive reasons demonstrate “special circumstances” for the purpose of s 60(2) of the CAT Act and therefore I **may** award costs pursuant to s (60)(2) of the CAT Act: see, for example, *Gaynor v Burns* [\[2015\] NSWCATAP 150](#) at [\[57\]](#) – [\[59\]](#).

36. Turning to the first respondent's submission in relation to the alleged conduct of the appellant, the conduct referred to, or rather described, in the first respondent's submissions, under the heading "Other Relevant Matters", relates to a claim that the original application for an Adjudicator's order was the third such application made by the appellant, that it was brought 2 days after the appellant was served with a statement of claim filed in the Local Court and that the appellant's conduct "indicates a clear unwillingness on the appellant's part to accept any decision, whether it be by a Tribunal, an Adjudicator or a duly appointed strata managing agent, which is not to her personal satisfaction". On that basis, the first respondent submitted, "a costs order should be made against the appellant as an indication by the Tribunal that litigation without substance and without merit must come at a cost".
37. I do not accept the first respondent's submissions in relation to the appellant's conduct. As summarised above, the first respondent's submissions refer to conduct of the appellant outside the current proceedings, in bringing numerous claims. Section 60(3)(a), in relation to conduct, refers to conduct "of the proceedings" and I am not persuaded that the appellant's conduct of these proceedings was such as to attract a costs order against her. There is possibly some overlap between the various subsections of s 60(3) but in my view that does not mean it is appropriate to attempt to stack up as many such subsections as may be linguistically possible.
38. Although I have found that "special circumstances" exist in these proceedings, enlivening my power to make a costs order, whether such an order should or will be made is still a matter of discretion. The fact that there special circumstances does not mean that the order must be made, it is still discretionary.
39. In my view, the order should be made for the following reasons:
- (1) It was obvious and must have been obvious from a cursory reading of the relevant division of the [Strata Schemes Management Act 1996](#), (SSM Act) that there was no power for an Adjudicator to make the orders or some of them sought by the appellant;
  - (2) It was obvious and must have been obvious, from the SSM Act, as above, that the Tribunal, on an appeal, could not make the order or orders sought by the appellant;
  - (3) The appellant sought to change the nature of the proceedings from an appeal to a fresh application for different orders when there was no power to do so; and
  - (4) The appellant conceded, in effect, that she could make no relevant submissions or arguments to support her case at the hearing of the appeal.
40. For the reasons above, I order that the appellant is to pay the legal costs of the first respondent on the ordinary basis as agreed or assessed pursuant to the [Legal Profession Act 2004](#) or if that is not the appropriate legislation, pursuant to the *Legal Profession Uniform Law Application Act 2014*, specifically Part 4.3 Division 7 of the *Legal Profession Uniform Law (NSW) No. 16a*.

**Geoffrey Meadows**

**Senior Member**



**Civil and Administrative Tribunal of New South Wales**

**20 January 2016**

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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