

**Gleeson & Anor t/as ANT Building v The Owners – Strata Plan No 81893 - [2016]
NSWCATAP 115**

Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:	Gleeson & Anor t/as ANT Building v The Owners – Strata Plan No 81893 [2016] NSWCATAP 115
Hearing dates:	On the papers
Date of orders:	31 May 2016
Decision date:	31 May 2016
Jurisdiction:	Appeal Panel
Before:	D Patten, Principal Member M Harrowell, Principal Member
Decision:	(1) Pursuant to section 50 (2) of the Civil and Administrative Tribunal Act, 2013 a hearing of the respondent's application in connection with the costs of the proceedings before the Tribunal at first instance is dispensed with. (2) The application for the Appeal Panel to fix the costs of the respondent payable pursuant to Order 4 made by the Appeal Panel on 3 February 2016 is refused. (3) The Appeal Panel directs that the costs payable pursuant to Order 4 made by the Appeal Panel on 3 February 2016, if not agreed, are to be assessed as provided in the Legal Profession Uniform Law Application Act 2014 .
Catchwords:	Costs- appropriate order in respect of proceedings at first instance
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 Civil and Administrative Tribunal Rules, 2014 Civil Procedure Act, 2005 Legal Profession Uniform Law Application Act 2014 .
Cases Cited:	Wentworth v Wentworth (21 February 1996 – unreported)
Texts Cited:	Ritchie's Uniform Civil Procedure NSW
Category:	Costs
Parties:	Anthony Joseph Gleeson & Ana Maria Gleeson t/as ANT Building (Appellant) The Owners – Strata Plan No 81893 (Respondent)
Representation:	Solicitors: Makinson d'Apice Lawyers (appellants) Carneys Lawyers (respondent)
File Number(s):	AP 15/13452 and AP 15/34642
Decision under appeal	Court or tribunal: Civil and Administrative Tribunal Jurisdiction: Consumer and Commercial Division Citation: Not applicable Date of Decision: 13 February 2015 Before: N Correy, Senior Member File Number(s): HB 12/09956

Reasons for Decision

Introduction

1. On 3 February 2016 the Appeal Panel published reasons for decision and made orders in this appeal being *Gleeson & Anor t/a ANT Building v The Owners – Strata Plan No 81893* [2016] [NSWCATAP 27](#) (principal reasons).

2. One of the issues which the Appeal Panel determined was that the Tribunal’s original determination of who should pay the costs of the proceedings below should be set aside: see principal reasons at [86]. Consequently, upon conclusion of the appeal it was necessary for the Appeal Panel to determine what orders should be made in connection with costs of the proceedings at first instance. In this regard on 3 February 2016 the Appeal Panel made orders 4 and 5 which were in the following terms:
 4. Subject to the appellants filing any submissions pursuant to the directions in the following order, the appellants are to pay the cost of the respondent in the proceedings below, such costs to be as agreed or assessed on a party/party basis.

 5. In respect of the costs of the proceedings below, the Appeal Panel makes the following directions:
 - (a) the appellants are to file any submissions and material in relation to the question of costs of the proceedings below within 14 days from the date this decision is published;

 - (b) the respondent is to file any submissions and material in relation to the costs of the proceedings below in reply within 21 days from the date this decision is published;

 - (c) The appellants are to file any submissions in reply to the respondent’s submissions within 28 days from the date this decision is published;

 - (d) The party submissions are to include any submissions as to why the question of costs cannot be determined on the papers without a hearing.

3. Subsequently to these orders, the respondent to the appeal (the Owners Corporation) provided to the Tribunal two letters dated 26 February 2016 and 29 March 2016.

4. In the first letter the respondent asks “that the Tribunal decide the quantum of costs based on the material that has already been provided to it”.

5. The second letter was addressed to Senior Member Correy (the member who presided at the proceedings at first instance) and in effect inquires whether or not the Senior member would undertake an assessment process of the type contemplated in the order for costs made 13 February 2015.

6. The Appeal Panel notes that Senior Member Correy has ceased to be a member of the Tribunal.

7. Consequently, the correspondence has been referred to the Appeal Panel to consider in the context of the orders which the appeal panel made on 3 February 2016.
8. That correspondence, from the respondents lawyers Carneys Lawyers, referred to submissions originally made by the Owners Corporation to the Tribunal at first instance in an extensive bundle of documents provided as part of those submissions setting out the costs which had been incurred by the Owners Corporation in respect of the proceedings before the Tribunal. In essence, those submissions contemplate that the Tribunal would assess and fix the amount of costs payable by the appellant in respect of the proceedings at first instance.
9. Attached to the letter dated 26 March 2016 was an email from the appellant's lawyers, Makinson d'Apice to the respondent's lawyers dated 23 February 2016. In that email the appellant's lawyers said:

Our clients will not be making any submissions or filing any material in relation to the question of costs. Accordingly, the original decision in the proceedings below remains.

I will be confirming this with the Appeal Panel today, for completeness.

Regards

10. The question for resolution by the Appeal Panel is whether Order 4 made on 3 February 2016 should be varied and substituted by an order fixing the amount of costs.
11. While the respondent has said in its email that it will be making no submissions and that "*the original decision in the proceedings below remains*", the Appeal Panel takes this submission to be that Order 4 should not be varied and any costs should be agreed or assessed in accordance with the processes available under the [Legal Profession Uniform Law Application Act 2014](#).
12. The effect of this correspondence is that the respondent (Owners Corporation), who is otherwise by Order 4 made by the Appeal Panel entitled to be paid its costs of the proceedings below as agreed or assessed, is asking either Senior Member Correy or the Appeal Panel to make an order fixing the costs.

Submissions

13. The submissions made by the respondent as to why the Tribunal or Appeal Panel should fix the costs (which are found in the two letters identified above) are short and can be summarised as follows:

1. The respondent relies on material already filed with the Tribunal and served on the respondents contained in a folder delivered to the Tribunal in March 2015 (as part of the original costs application which the Tribunal erroneously determined despite a stay granted by the Appeal Panel at that time being in force)
 2. The respondent says that the appellant has confirmed it does not wish to make any submissions or file any material in reply;
 3. By reason of the stay granted by the Appeal Panel in 2015, the monies otherwise payable by the appellant had been retained in the respondent's trust account pending determination of the appeal and have not been available to carry out necessary rectification work
 4. The respondent submits that having regard to the cost and stress to the Owners Corporation of the litigation and having regard to the fact that the repair work program will far exceed the amount of the award made by the Tribunal and because there has been a delay in the Owners Corporation been able to utilise the judgement sum because of the appeal, costs should be assessed so that rectification works can proceed.
14. As to what amount should be awarded, the respondent says that it is entitled to the costs of the proceedings at first instance in the sum of \$311,943.41. This claim is supported by detailed written submissions which cross-reference various tabulated documents including time records of the respondent's lawyers, fee notes from barristers and invoices for various disbursements associated with the costs of preparation and presentation of the respondent's case.

Consideration

15. Order 4 made by the Appeal Panel provides for the assessment of costs if not agreed. Absent any order by the Appeal Panel fixing the amount of costs, the respondent would be required to have the costs assessed. In this regard s [60\(4\)\(b\)](#) of the [Civil and Administrative Tribunal Act](#), 2013 (NCAT Act) provides the Tribunal may:
- (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](#)).
16. This is a formal process which requires application to the Supreme Court of New South Wales, and the preparation of necessary documents. The process allows for a respondent to a costs application to make submissions.
17. It would seem from the position adopted by the appellant (who would be the respondent in any costs application) that the appellant says the Appeal Panel should adopt this approach and maintain the orders previously made. Having said that, the appellant has chosen not to make any submissions in response to the application made by the respondent that the Appeal Panel or the

Senior Member who originally heard the proceedings should make a determination and fix the costs.

18. There is no doubt that the Appeal Panel (and the Tribunal) has power to fix the amount of costs: see s [60\(4\)](#) of the [NCAT Act](#) . There is also no doubt that because the amount in issue in the original proceedings before the Tribunal was greater than \$30,000 that there is a general discretion in connection with the award of costs which the Tribunal (or the Appeal Panel when exercising the powers of the Tribunal in consequence of any decision made on appeal) may exercise: see r [38](#) of the [Civil and Administrative Tribunal Rules](#) , 2014 and s [81\(2\)](#) of the [NCAT Act](#) .
19. The question is whether or not such an order should be made in the present circumstances.
20. In relation to the Senior Member now making such a determination, in our view such a course is inappropriate because the member has ceased to be a member of the Tribunal. While a former member of the Tribunal may be able to continue or complete a matter after they have ceased to be a member (see cl(8)(2) of Schedule [2](#) of the [NCAT Act](#)), having regard to the length of time which has passed since the Senior Member ceased to be a member of the Tribunal it would be inappropriate for the Appeal Panel to make such directions in circumstances where the availability of the Senior Member is unknown and where the task of the member to familiarise himself with the history of the proceedings, including what has transpired on appeal would likely delay a final resolution.
21. In relation to the Appeal Panel making such a determination to fix the amount of costs, in our view it is not appropriate to make such an order. The reasons are as follows.
22. By analogy with the powers given to a court under s [98](#) of the [Civil Procedure Act](#) , 2005, (see Ritchie's Uniform Civil Procedure NSW at [s 98.60]) the exercise of a discretion to make such an order may be desirable:
 1. due to the likely length and complexity of the of the assessment process;
 2. due to the likelihood that the additional costs of formal assessment would disadvantage the successful party, for example because of the potential inability of the unsuccessful party to pay the costs in any event; or
 3. where a party's conduct has unnecessarily contributed to the costs of the proceedings, especially where the costs incurred have been disproportionate to the result of the proceedings.
23. On the other hand, Clarke JA of the Court of Appeal of the Supreme Court of New South Wales said in *Wentworth v Wentworth* (21 February 1996 – unreported) at page 23, the exercise of specific powers to award costs in a fixed sum is peculiarly within the discretion of the trial Judge and while

an appellate court may exercise the power to make a special order it should only do so in circumstances where it has sufficient information at its disposal to allow it to make an assessment of what is fair and just by way of costs.

24. In the present case, the respondent has made unchallenged submissions in respect of circumstances which it says justifies the Appeal Panel making an order fixing costs.
25. In relation to the submissions suggesting that the appeal had the effect of delaying the respondent access to the amount originally awarded by the Tribunal in consequence of the stay imposed by the Appeal Panel and that the cost of rectification work will be greater than the amount of this award in any event, in our opinion these factors do not warrant the Appeal Panel exercising a power to fix costs. They have no bearing on the issue of whether the Appeal Panel should now fix an amount for costs.
26. The respondent submitted that the costs of the proceedings and the stress caused by the proceedings are also factors which support the Appeal Panel fixing costs in the present case. The respondent says that a resolution of the cost issue should be given "*utmost priority so that urgent rectification works can proceed*".
27. While recovery of costs may significantly assist the respondent in completing any necessary repairs, the Appeal Panel must have regard to the fact that the amount of the award in favour of the respondent was varied by the Appeal Panel to an amount of \$293,228.18. Secondly, an amount of \$311,943.41 is claimed for costs which is in excess of the value of the award. Thirdly, from reading the detailed submissions on costs, it is apparent that some of the costs arose from obtaining multiple reports from various witnesses. In this regard the respondent's submission filed in March 2015 records at [7]:

Mr Hutton a hydraulic expert was engaged to view and report his findings on the construction of the hydraulics which was attached to Mr Palombo's report. Mr Hutton completed a second report included in the applicant's final Joint Report.
28. Any award of costs is compensation for the successful party in respect of the costs incurred in connection with the proceedings. It is not compensation to allow the affected party to carry out any rectification work in circumstances where the damages award in their favour was less than what the actual work might cost.
29. Without knowledge of what occurred at the original hearing and at the directions hearing of the proceedings at first instance and without access to the documents recording the circumstances in which the work undertaken by the lawyers and experts occurred (for example the communications between lawyers and experts) it is not possible or practical for the Appeal Panel to assess the costs of those proceedings and determine whether or not they are fair and reasonable.

30. In these circumstances, the Appeal Panel is not prepared to make an order fixing the amount of costs. Rather, costs should be assessed in the conventional way using the processes available under the [Legal Profession Uniform Law Application Act 2014](#).

Orders

31. The Appeal Panel makes the following orders:

1. Pursuant to section 50 (2) of the [Civil and Administrative Tribunal Act](#), 2013 a hearing of the respondents application in connection with the costs of the proceedings before the Tribunal at first instance is dispensed with .
2. The application for the Appeal Panel to fix the costs of the respondent payable pursuant to Order 4 made by the Appeal Panel on 3 February 2016 is refused.
3. The Appeal Panel directs that the costs payable pursuant to Order 4 made by the Appeal Panel on 3 February 2016, if not agreed, are to be assessed as provided in the [Legal Profession Uniform Law Application Act 2014](#).

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 May 2016