



Civil and Administrative Tribunal

New South Wales

Case Name: Huang v The Owners – Strata Plan No 7632 (No 2)

Medium Neutral Citation: [2021] NSWCATAP 67

Hearing Date(s): On the papers

Date of Orders: 19 March 2021

Decision Date: 19 March 2021

Jurisdiction: Appeal Panel

Before: The Hon F Marks, Principal Member
K Ransome, Senior Member

Decision: We order that the appellants pay the costs of the respondent of these appeals in an amount 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) in default of agreement.

Catchwords: COSTS – appeals – held appeal proceedings were without merit and endeavoured to re-agitate and relitigate matters previously decided adversely to the appellants – held constituted “special circumstances” justifying the making of a costs order.

Legislation Cited: Civil and Administrative Tribunal Act s60
Legal Profession Uniform Law Application Act 2014)
s3A

Cases Cited: Huang v The Owners Strata Plan No 7632 [2020]
NSWCATAP 278

Texts Cited: None cited

Category: Costs

Parties: Yu Huang (First Appellant)
Cui’e Zhao (Second Appellant)

The Owners – Strata Plan No 7632 (Respondent)

Representation: Solicitors:
Appellants (Self Represented)
Grace Lawyers Pty Ltd (Respondent)

File Number(s): 2020/00370936 (AP 20/31659); 2020/00371032 (AP 20/38595)

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 25 June 2020 and 19 August 2020

Before: G Blake AM SC Senior Member

File Number(s): SC 19/56987

REASONS FOR DECISION

- 1 Our decision in *Huang v The Owners Strata Plan No 7632* [2020] NSWCATAP 278 considered appeals brought by the appellants, Cui'e Zhao and Yu Huang, from decisions of the Tribunal which required them to remove unlawful common property work in a home unit owned by them and to reinstate works to a condition like those previously there and to pay the costs of the respondent, The Owners Strata Plan No 7632.
- 2 The appellants were not only unsuccessful in the proceedings from which those appeals were brought but had previously been unsuccessful in earlier proceedings in this Tribunal litigating the same underlying matters. We have set out the background to the extensive litigation between the appellants and the respondent body corporate in our decision. It is not necessary that we revisit these matters. Some flavour of the circumstances of the appeal may be gathered from the following extract from our decision

39 Throughout their submissions the appellants continually assert that the works carried out by them include the waterproofing of the bathrooms. However, apart from making these assertions the appellants have not provided any evidence that waterproofing work was carried out by the contractors retained by them. No reason has been advanced by them as to why they were unable to obtain any evidence corroborating these factual assertions. They were uniquely in a position to provide that information. If they wanted to establish these matters, they were under an obligation to provide some evidence to support their contention. Production of a quotation containing a reference to waterproofing the bathrooms is no proof that that work was actually carried out. This is particularly so, given the evidence in these proceedings that the work that was carried out on behalf of the appellants was of poor quality and did not appear to include waterproofing. We reject this submission.

- 3 In essence, we concluded that there was no merit in the appellant's appeals. In dismissing the appeals we reserved the question of costs. The respondent has exercised the liberty to apply for a costs order which we granted. These reasons for decision deal with that application.
- 4 With the consent of the parties we dispensed with a hearing of this costs application, and the consideration below is based on their written submissions.

Principles governing the awarding of costs

- 5 The determination of the appellant's costs application is governed by section 60 of the CAT Act, which we reproduce

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.
- 6 It will be seen that the prima facie position is that each party will bear its own costs unless the Tribunal is satisfied that there are “special circumstances.” It has been authoritatively established that in order to establish “special circumstances” it is not necessary to find that the circumstances are “extraordinary” or “exceptional.” Guidance is obviously provided by the provisions of subsection (3).
- 7 It is apposite to the determination of this application to again make reference to the circumstances which prevailed in the context of the appeal proceedings which we determined. As the respondent submitted, the appellants argued in the appeal that
 - (1) there had been a failure to assess building defects under the *Home Building Act*. We held that this was irrelevant
 - (2) there was inadequate reasoning as to why a lump sum of \$9020 had been ordered to be paid. We held that a quotation provided could properly be used as a basis for quantifying that sum
 - (3) there was inconsistency in the respondent being allowed to remove and reinstate one bathroom and the appellants being ordered to remove and reinstate both bathrooms at the same time. We held that the cost of \$9020 was for the respondent to complete the work to both bathrooms
 - (4) the floors of the bathrooms are not common property and were the property of the appellants. We held that tiles which had been removed by the appellants constituted common property
 - (5) the original flooring was not waterproofed. We held that the original construction of a waterproofing membrane was not relevant to a finding as to whether unauthorised works were conducted by the appellants

- (6) section 122 of the Strata Schemes Management Act did not permit the orders from which the appeals were brought. We rejected this submission as a matter of law
- (7) they wished to bring counterclaims and a cross-claim against the respondent. We held that such claims had never formed part of the proceedings before this Tribunal, and would need to be brought independently
- (8) matters which had been determined in proceedings which predated the proceedings from which the appeals were brought were erroneous. We held that the appellants were endeavouring to relitigate and re-agitate matters that had already been determined, are not the subject of the appeals and were irrelevant. We also held that the appellants had complicated and unnecessarily prolonged the appeal proceedings.

8 The respondent submitted that the appellants had approached the appeal as an opportunity “to make rolling disputes” about the first instance decision and earlier decisions many of which were unrelated to the appeal proceedings. It was put to unnecessary expense in order to address all of these irrelevant matters. In conducting themselves in this way the respondent submitted that the appellants had unreasonably prolonged the time taken to complete the appeal proceedings, particularly in circumstances where the appeals lacked merit. The respondent also submitted that the appeal proceedings were frivolous, vexatious and otherwise misconceived and lacking in substance. This was especially so as they continued to raise matters during the course of the appeal proceedings which had already been decided adversely against them, were irrelevant and without substance.

9 In their costs submissions the appellants said

- (1) the respondent had failed to repair the common property in their apartment since 2012, it had failed to complete incomplete work in their apartment since 2015, and sought to agitate when and if the respondent would pay damages to them for work carried out by the respondent in their apartment. This is another example of the appellants refusing to acknowledge the course of the considerable litigation in which they have been involved over a long period of time, and the fact that adverse findings have been made against them in proceedings which predated those which are the subject of the appeals, and in the proceedings from which the appeals were brought.
- (2) The proceedings had been unnecessarily prolonged by the respondent and its legal representatives. They complained that correspondence concerning rectification of work which they had had carried out in the apartment had not been answered, that the respondent had failed to

repair outstanding work since 5 February 2015, the respondent had made “errors in their claim” in prior Tribunal proceedings and the respondent had failed to properly identify certain unauthorised work. In traversing these matters the appellants are seeking to re-agitate matters which are the subject of adverse findings against them, and these allegations cannot be substantiated. We find that there is no merit in this particular submission.

- (3) In considering the relative merits of the claims of each party, “There is no law in Australia that the (respondent) has rights to encroach lot owners private property.” This is simply a misunderstanding of the provisions of the *Strata Schemes Management Act*, and a failure to acknowledge the validity of the several orders made against them by this Tribunal.
- (4) Their claims are not complex. Any complexity was caused by the respondent in resisting their desires. We reject this submission. In seeking to agitate matters which had no merit, and in seeking to re-agitate and relitigate matters which had already been adversely determined against them, the appellants created complexity where none need have existed.
- (5) We should require the respondent to provide itemised billing records, any costs agreement with their solicitors, and details of other matters including repair quotes and the like.

Consideration

- 10 It is clear from our reasons for decision that the appellants did endeavour to relitigate and re-agitate matters which had already been decided, or which were irrelevant. It is equally clear that the conduct of the appellants complicated the proceedings and prolonged them, exacerbated by the circumstances that their case lacked any tenable merit. We note that in the context of these appeal proceedings the appellants have again endeavoured to relitigate and re-agitate the same irrelevant matters.
- 11 The various matters which we have traversed fall within the provisions of section 60 (3) (b), (c), (d) and (e) of the Civil and Administrative Tribunal Act set out above.
- 12 In all the circumstances we conclude that these appeal proceedings are not ordinary proceedings, and that there are “special circumstances” which dictate that the respondent should be entitled to a costs order in its favour. We propose to order accordingly.

Order

- 13 We order that the appellants pay the costs of the respondent of these appeals in an amount 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) in default of agreement.

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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