



## Supreme Court

### New South Wales

Medium Neutral Citation:	Kimber v The Owners Strata Plan No. 48216 [2016] NSWSC 1397
Hearing dates:	29 September 2016
Date of orders:	30 September 2016
Decision date:	30 September 2016
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Dismiss the summons.  (2) Refuse leave to the plaintiff to appeal against the decision of the New South Wales Civil and Administrative Tribunal, constituted by Senior Member Boyce, made on 25 May 2016 that she pay the defendant's costs for the period 11 March 2016 until 13 April 2016 as agreed or assessed on the ordinary basis.  (3) Order the plaintiff to pay the defendant's costs of the proceedings.
Catchwords:	COSTS – appeal – application for leave to appeal decision of NSW Civil and Administrative Tribunal – no error of law identified in decision of Tribunal – application dismissed
Legislation Cited:	<a href="#">Civil and Administrative Tribunal Act 2013 (NSW)</a> , ss 50, 55, 60, 83 <a href="#">Uniform Civil Procedure Rules</a> (2005) NSW, r 5.12.
Cases Cited:	Kimber v The Owners Strata Plan No. 48216 <a href="#">[2016] FCA 1090</a> .
Category:	Principal judgment
Parties:	Janelle Kimber The Owners Strata Plan No. 48216 (Defendant)
Representation:	Counsel: Plaintiff in person S Heimanis (solicitor) (Defendant)  Solicitors: Plaintiff in person Grace Lawyers (Defendant)
File Number(s):	2016/190018
Decision under appeal	Court or tribunal: New South Wales Civil and Administrative Tribunal Jurisdiction: Consumer and Commercial Division Citation: 2016 NSWCAT Date of Decision: 25 May 2016 Before: P Boyce, Senior Member File Number(s): SCS 15/58745

## Judgment

### Introduction

1. By summons filed on 22 June 2016 Janelle Kimber, the plaintiff, seeks the following orders:

“For Leave to Appeal to be granted with the appropriate extension of time considered.

to allow the plaintiff to appeal the whole of the decision made on 25 May 2016 by Senior Tribunal Member Boyce of NSW Civil & Administrative Tribunal.

for a date to be set for after 27 July 2016 to accommodate the existing interlocutory Application Directions Hearing set down for 27 July 2016 in the Federal Court where the plaintiff will be raising this NCAT ‘related matter’ with ‘core matters’ now proceeding in that court, seeking to transfer this ‘costs appeal’ into the Federal Court according to [s 32 and 22 of the [Federal Court of Australia Act 1976 \(Cth\)](#) ]

For costs and damages to be awarded to the plaintiff.”

2. The order in respect of which leave to appeal is sought was made on 25 May 2016. The summons was filed on 22 June 2016. Under *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), r [51.12\(1\)\(a\)](#), the time within which the summons is to be filed is 28 days from the material date. Accordingly, the defendant accepted that the summons was filed within time and that no extension was necessary.
3. The Owners Corporation SP No. 48216, the defendant, opposed the relief claimed in the summons. It opposed the second prayer for relief on two bases: first, that no question of law arose; and secondly, that no error in the decision had been shown. It opposed the third prayer for relief on the basis that there was no utility in transferring these proceedings to the Federal Court since they fall squarely within this Court’s jurisdiction and can conveniently be dealt with in this Court. The defendant also opposed the fourth prayer and sought an order that the summons be dismissed with costs.
4. As the plaintiff indicated that she wished her appeal to be deal with in the Duty List on 29 September 2016 I proceeded to hear the matter. In these circumstances the third prayer for relief is otiose.

#### *Relevant legislative provisions*

5. Section [50](#) of the [Civil and Administrative Tribunal Act 2013 \(NSW\)](#) (NCAT Act) provides in part:

##### **When hearings are required**

(1) A hearing is required for proceedings in the Tribunal except:

...

(c) if the Tribunal makes an order under this section dispensing with a hearing, or

(2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.

(3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first:

- (a) afforded the parties an opportunity to make submissions about the proposed order, and
- (b) taken any such submissions into account.

(4) The Tribunal may determine proceedings in which a hearing is not required based on the written submissions or any other documents or material that have been lodged with or provided to the Tribunal in accordance with the requirements of this Act, enabling legislation and the procedural rules.

...

6. Section [55](#) of the [NCAT Act](#) provides in part:

**Dismissal of proceedings**

(1) The Tribunal may dismiss at any stage any proceedings before it in any of the following circumstances:

- (a) if the applicant or appellant (or, if there is more than one applicant or appellant, each applicant or appellant) withdraws the application or appeal to which the proceedings relate,

...

7. Section [60](#) of the [NCAT Act](#) provides:

**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.

...

8. Section 83 of the NCAT Act provides in part:

**Appeals against appealable decisions**

(i) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.

...

(3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following:

(a) an order affirming, varying or setting aside the decision of the Tribunal,

(b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.

...

*Background*

9. Both parties adduced substantial evidence about various disputes between them arising from the plaintiff's ownership of a unit in the defendant's strata plan. These disputes have led to proceedings in the Local Court as well as proceedings for the bankruptcy of the plaintiff in the Federal Court based on a judgment obtained in the Local Court. These disputes form part of the background to the present application but their details are not germane to the determination of these proceedings. Accordingly I do not propose to summarise them. Indeed, I regard the evidence of this historical narrative as largely irrelevant to the relief claimed. I propose to summarise only those matters which I consider to be relevant to this Court's jurisdiction under s 83 of the NCAT Act.

10. On 22 June 2015 the plaintiff lodged an application with the New South Wales Civil and Administrative Tribunal (the Tribunal) seeking the following orders:

"a. To resolve a dispute regarding an orchestrated bankruptcy notice and costs order.

b. To prevent the [defendant] charging interest for late payment of contributions.

c. To vary the time at which the annual general meeting is required to be held.

d. To require agent or office bearer of executive committee to supply documents to inspect.

e. To appoint a strata managing agent.”

11. Adjudicator Cohen considered the written submissions of the plaintiff and the defendant and dismissed the plaintiff's application on 18 September 2015 (the Adjudicator's Decision). The following extracts from the Adjudicator's reasons are sufficient for present purposes to indicate the basis on which the application was dismissed:

“[11] As the Respondent contends with much force, the application is voluminous and difficult to follow, and that the inference may be drawn that it is employed by the applicant for the collateral purpose of seeking to deter the Respondent from pursuing the Applicant for the recovery of the debt due.

...

[15] The Adjudicator finds that the Applicant has confused and conflated the mere making of allegations with the advancement of cogent proof to the necessary standard on the balance of probabilities.

[16] Further, each of the orders sought by the Applicant either are:

(1) beyond the power conferred upon the Adjudicator and that part of the application must be dismissed as incompetent, seeking as they do that the Adjudicator interfere in the orders made by the Local Court in proceeding 2009/0035975, as to which see orders 1 & 2 above; or

(2) without a proper basis for the exercise of the discretion conferred on the Adjudicator, as either no advanced has been advanced to prove the facts alleged on the balance of probabilities, or such evidence as has been advanced is so little probative value that it must be rejected, as to which see orders 3 & 4 above; or

(3) no jurisdiction conferred upon the Adjudicator is attracted by reason that necessary jurisdictional facts are not proved, as to which see order 5 above where the Applicant has neither provided no particulars of an alternative strata manager proposed to be appointed nor provided the consent prescribed by s. 162(4)(b) of the Management Act for such appointment to be made.

[17] The Adjudicator finds that the Applicant has failed to advance any, or any reasonable, evidence to substantiate the allegations made, and that for this reason the application was ordered to be dismissed”.

12. On 26 October 2015 the plaintiff filed an application for an extension of time to appeal against the Adjudicator's Decision. An extension of time was granted and directions were made for the filing and service of evidence and submissions. The plaintiff's appeal was originally listed for hearing on 10 February 2016 but the date was vacated because the plaintiff had failed to comply with directions.

13. On 10 February 2016 the Executive Committee of the defendant voted in favour of retaining Grace Lawyers to act on its behalf in the Tribunal proceedings. By letter dated 19 February 2016 Grace Lawyers informed the plaintiff that they had been formally engaged.

14. Further directions were made by the Tribunal, which listed the hearing of the appeal for 23 March 2016.
15. On 2 March 2016 the defendant applied to the Tribunal for leave to be legally represented. On 10 March 2016 the defendant's solicitors wrote to the plaintiff and outlined the deficiencies in her application for leave and contended that there were no prospects of success. They invited her to withdraw her appeal and warned that if she did not withdraw her appeal and the hearing proceeded, they would seek an order that she pay the defendant's costs pursuant to s 60 of the [NCAT Act](#). On 11 March 2016 the Tribunal granted leave to the parties to be legally represented.
16. On 22 March 2016 the plaintiff withdrew her appeal. The Tribunal accordingly dismissed the appeal pursuant to s 55 (1)(a) of the [NCAT Act](#). The defendant's solicitors wrote to the Tribunal and sought an order for costs. The hearing date of 23 March 2016, which was originally for the hearing of the appeal, was specified as a directions hearing for the costs application. On that day, the plaintiff was given leave to appear by telephone. Directions were made which required the parties to file and serve submissions on the issue of costs and also on the question whether the application for costs could be dealt with on the papers or whether a further hearing was required.
17. The plaintiff had difficulty complying with the directions that she file and serve her submissions by 20 April 2016. Accordingly she asked the Tribunal for an extension of time. On 19 April 2016 Senior Member Boyce gave her an extension to file and serve her submissions until 4 May 2016. The Tribunal's reasons record that she filed her submissions on that day.
18. Both parties lodged written submissions on the costs application and on whether a further hearing was required or whether the matter could be dealt with on the papers. The defendant consented to the matter of costs being dealt with on the papers. The plaintiff pressed for a hearing of the costs application and objected to its being heard on the papers.

*The decision of the Tribunal on 25 May 2016*

19. On 25 May 2016 the Tribunal (Senior Member Boyce) ordered the plaintiff to pay the defendant's costs of the appeal for the period from 11 March 2016 (being the date on which the defendant sought leave to be legally represented) to 13 April 2016 (being the date on which the defendant lodged its submissions with the Tribunal). The costs were assessed at \$4,833.27.
20. The Tribunal in its reasons recited the relevant statutory provisions in a manner which is not the subject of complaint. The Tribunal noted the procedural history and referred to the submissions made by the parties. As to whether a hearing on costs ought be dispensed with the Tribunal said:

“[13] Although the appellant seeks to have a hearing in relation to costs, she has made no submissions as to why an order should not be made dispensing with a hearing. The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering

written submissions. The Tribunal must give the parties the opportunity to make submissions about dispensing with a hearing and take those submissions into account if the hearing is to be dealt with on the papers. In the absence of those submissions by the appellant the Tribunal must make a determination as to whether it is satisfied that it can adequately determine the application for costs in the absence of the parties.

[14] The Tribunal is satisfied that the parties have been afforded the opportunity to make submissions as to costs and those written submissions are before the Tribunal. The Tribunal notes the appellant's objection; however without reasons supporting the objection the Tribunal can see no utility in having a hearing in regard to costs, particularly having regard to the appellant's withdrawal of the matter on the day before the hearing date. Under the circumstances the Tribunal is proceeding pursuant to the guiding principles as set out in section 36 of CATA in facilitating the just quick and cheap resolution of the real issues in relation to the costs by determining the matter on the papers without the additional costs to parties to attend the Tribunal to ventilate the matter.

[15] The Tribunal dispenses with a hearing and the matter is determined on the papers.”

21. The Tribunal proceeded to address the defendant's application for costs. Senior Member Boyce set out the relevant principles and identified the bases on which the defendant contended a costs order ought be made, including that: the plaintiff had prolonged the hearing through non-compliance with directions; her claim was “hopeless”; the proceedings are frivolous; and she had been warned of the possibility that the defendant would apply for costs. The Tribunal also set out the plaintiff's arguments in opposition to the costs order, which included that she believed that the Tribunal was a no-costs jurisdiction; and that the defendant's lawyers had been instructed by the strata manager rather than the owners as a group.
22. The Tribunal found special circumstances on the basis of the plaintiff's failures to comply with directions; her withdrawal of the appeal; her lack of prospects of success; and her failure to comply with guidelines.
23. The Tribunal exercised its discretion to order the plaintiff to pay the defendant's costs. However, it limited those costs to the period from 11 March 2016 to 13 April 2016 which covered the period from the time of the grant of leave to the defendant to be legally represented to the time at which the defendant's submissions were filed.

#### *Proceedings in the Federal Court*

24. On 7 May 2014 judgment was entered in the Local Court against the plaintiff in favour of the defendant in the sum of \$10,767 for recovery expenses and professional costs. On the basis of this judgment, the defendant sought that a bankruptcy notice be issued to the plaintiff. This notice was issued on 19 February 2016 and was personally served on the plaintiff on 17 March 2016. On 18 April 2016 the defendant lodged a creditor's petition on the basis of the bankruptcy notice and sought a sequestration order against the plaintiff.



25. On 20 April 2016 the plaintiff filed an application to set aside the bankruptcy notice. Orders were made which extended the time for compliance with the bankruptcy notice to 4 May 2016. On 4 May 2016, the bankruptcy notice not having been complied with, the Court dismissed the defendant's application to set it aside and discharged the order made on 20 April 2016.
26. On 20 May 2016 the plaintiff filed a notice of grounds of opposition to the creditor's petition in the Federal Circuit Court and sought a review in the Federal Court of the orders made on 4 May 2016. On 8 September 2016 Perry J ordered that the plaintiff's application for review be summarily dismissed: *Kimber v The Owners Strata Plan No. 48216* [2016] FCA 1090. The creditor's petition was listed for a directions hearing on 19 September 2016. The evidence does not reveal the further course of those proceedings.

*The application for leave to appeal: prayer 2 of the summons*

27. Section 83 of the NCAT Act confers a right on a plaintiff to apply for leave to appeal from a decision of the Tribunal on a question of law. Accordingly, it is only with respect to questions of law that this Court has jurisdiction to grant leave under s 83.
28. The plaintiff made several complaints about the Tribunal's conduct. She claimed to be entitled to a hearing on the question of costs and contended that the Tribunal's refusal to grant her an oral hearing was a denial of natural justice. As the plaintiff did not tender a copy of her written submissions to the Tribunal dated 12 May 2016, the only material before me as to what they contained is the Tribunal's reasons. These reasons record that the plaintiff objected to the matter being dealt with on the papers but did not provide reasons why an oral hearing was required. The Tribunal had a discretion to deal with the question on the papers. The plaintiff has failed to identify any basis on which it could be said that its discretion miscarried. Indeed, the Tribunal referred to and set out the relevant statutory provisions and addressed them in terms.
29. The plaintiff argued that it was unjust that she be ordered to pay the defendant's costs since the defendant ought not to have been legally represented when she was not herself legally represented. She has, however, failed to identify any basis on which it could be said that the Tribunal's decision in the exercise of its discretion to grant leave to the defendant to be legally represented in the Tribunal miscarried. The time limitation placed by the Tribunal on the costs order is a powerful indication that the Tribunal was particularly cognisant of the unfairness of imposing a costs order on a party where leave had not been granted to the opposing party to be legally represented. The Tribunal was scrupulous to confine the costs order to the relevant period.
30. The plaintiff was critical of the defendant for retaining its solicitors and sought to impugn their retainer and costs agreement. These allegations are not germane to any question of law raised by the plaintiff against the costs order.
31. The plaintiff made several allegations in the course of her submissions to which I will refer for completeness but which do not appear to me to be germane to the present proceedings. For example, she alleged that the conduct of the defendant in issuing one or more bankruptcy notices

in the Federal Court was designed to overwhelm her at a time when she was endeavouring to prosecute her appeal in the Tribunal. She described herself in oral submissions as “overwhelmed with arbitrary procedures coming at me left, right and centre”. I have included a summary of the bankruptcy proceedings in the narrative above to show the extent to which they were extant at the time of the proceedings before the Tribunal. The plaintiff was served with the bankruptcy notice on 17 March 2016 and withdrew her appeal in the Tribunal on 22 March 2016. I do not consider there to have been any impropriety in the defendant’s conduct in serving the bankruptcy notice at this time. Nor am I satisfied that there was necessarily any connection between the plaintiff’s withdrawal of her appeal and the receipt of the bankruptcy notice.

32. I note that the evidence establishes that the plaintiff was granted extensions of time by the Tribunal for putting on her evidence and submissions. Hearing dates were vacated to suit her convenience and, at least on one occasion, she was permitted to participate in a directions hearing by telephone. Moreover, when she withdrew her allegation there was no indication that she was doing so as a result of any untoward duress. I am not satisfied that she was denied any opportunity to be heard. She did not have a right to an oral hearing; she had a right to make submissions as to why she ought have an oral hearing. The evidence established that she was afforded that opportunity. Indeed the Tribunal does not appear to have refused any application made by the plaintiff for an extension of time, or for an indulgence.
33. It was evident from the plaintiff’s submissions and from her evidence in this Court that she is suffering considerable distress as a result of the various disputes with the defendant. Her distress has been aggravated by the costs order. Nonetheless she has failed to identify any question of law which could ground this Court’s jurisdiction to set it aside. No error, much less a legal error has been identified or made out.

*The application for transfer to the Federal Court: prayer 3 of the summons*

34. The plaintiff indicated, when the matter was heard, that she wanted her substantive application for leave to appeal to be dealt with by this Court on 29 September 2016. In these circumstances, there was nothing remaining to be transferred to the Federal Court. Accordingly I take it that the plaintiff abandoned her request for transfer.

*Claim for damages: prayer 4 of the summons*

35. The plaintiff included a claim for damages and costs in prayer 4 of the summons. The basis for any claim for damages was not articulated. It did not appear to be pressed. If the plaintiff seeks to claim damages, it ought not be done by way of summons. Such claims are made by statement of claim in which the material allegations are set out. No basis for any such claim was articulated at the hearing or in the written submissions, although, as referred to above, I accept that the plaintiff has suffered considerable distress as a result of her various disputes with the defendant.

*Conclusion*

36. The plaintiff has failed to make out any claim for relief in the summons, which, accordingly, ought be dismissed. The defendant sought an order for the costs of the proceedings. The plaintiff has not identified any basis on which I ought depart from the usual rule that costs ought follow the event.

*Orders*

37. I make the following orders:

1. Dismiss the summons.
2. Refuse leave to the plaintiff to appeal against the decision of the New South Wales Civil and Administrative Tribunal, constituted by Senior Member Boyce, made on 25 May 2016 that she pay the defendant's costs for the period 11 March 2016 until 13 April 2016 as agreed or assessed on the ordinary basis.
3. Order the plaintiff to pay the defendant's costs of the proceedings.

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Decision last updated: 30 September 2016