

**Owners Corporation SP 79417 v Trajcevski (No.2) - [2017] NSWCATAP 173**

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*Civil and Administrative Tribunal*

*New South Wales*

<b>Medium Neutral Citation:</b>	<b>Owners Corporation SP 79417 v Trajcevski (No.2) [2017] NSWCATAP 173</b>
<b>Hearing dates:</b>	Heard on the papers
<b>Date of orders:</b>	16 August 2017
<b>Decision date:</b>	16 August 2017
<b>Jurisdiction:</b>	Appeal Panel
<b>Before:</b>	P. Callahan SC, Principal Member D. Goldstein, Senior Member
<b>Decision:</b>	The Owners – Strata Plan No. 79417 must pay the respondents’ costs of and incidental to these appeal proceedings such costs if not agreed to be assessed on the basis set out in the legal costs legislation as defined in section 3A of the <a href="#">Legal Profession Uniform Law Application Act 2014</a> .
<b>Catchwords:</b>	Indemnity costs – whether the applicant had prospects of success at the relevant time
<b>Legislation Cited:</b>	<a href="#">Civil and Administrative Tribunal Act 2013</a> , <a href="#">Civil and Administrative Tribunal Rules 2014</a> , <a href="#">Home Building Act 1989</a> , <a href="#">Legal Profession Uniform Law Application Act 2014</a> .
<b>Cases Cited:</b>	<a href="#">Augustus v Mohammed (No.2) [2016] NSWCATAP 165</a> , <a href="#">Dean v Stockland Property Management Pty Ltd (No 2) [2010] NSWCA 141</a> , <a href="#">Edwards v CohenHandler Pty Ltd (No. 2) [2017] NSWCATAP 81</a> , <a href="#">eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94</a> , <a href="#">Owners Corporation SP 79417 v Trajcevski [2017] NSWCATAP 101</a> , <a href="#">Thompson v Chapman [2016] NSWCATAP 6</a> .
<b>Category:</b>	Costs
<b>Parties:</b>	The Owners – Strata Plan No. 79417:Appellant:

**Representation:** Solicitors:  
Birch Partners (Respondents)

**File Number(s):** AP 16/26346

**Decision under appeal** Court or tribunal:  
Civil and Administrative Tribunal  
Jurisdiction:  
Consumer and Commercial Division  
Citation:  
[2016] NSWCATCD  
Date of Decision:  
29 April 2016  
Before:  
P Boyce, Senior Member  
File Number(s):  
HB 14/36424

## Reasons for Decision

1. In these proceedings the decision of the Appeal Panel was given on 8 May 2017. (*Owners Corporation SP 79417 v Trajcevski* [2017] NSWCATAP 101 -the 'first appeal decision') The appellant's application for leave to Appeal was refused and its Appeal was dismissed.
2. Orders were made for the filing of submissions on costs.
3. The respondent, by submissions dated 15 May 2017, applied for the costs of the Appeal on an indemnity basis. The appellant has not filed costs submissions.

## 4. Costs jurisdiction

5. Section 60 of the *Civil and Administrative Tribunal Act 2013* (the 'Act') provides that:

### 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. Rule 38A of the *Civil and Administrative Tribunal Rules 2014* states:

**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.'

7. Part 4 of the Act deals with Practice and Procedure. Section 60 of the Act is in Part 4. Section 35 of the Act which is also in Part 4 states:

Each of the provisions of this Part is subject to enabling legislation and the procedural rules.

8. The effect of Section 35 of the Act makes it clear, in our view, that section 60 of the Act is subject to Rule 38A.

9. The appeal in these proceedings was lodged on 30 May 2016. The procedural rule which applied to the proceedings at first instance was Rule 38 of the *Civil and Administrative Tribunal Rules 2014* which states:

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.'

10. The proceedings at first instance were brought under the *Home Building Act 1989*. Pursuant to section 3 of Schedule 4 of the Act, proceedings under the *Home Building Act* are allocated to the Commercial and Consumer Division of the Tribunal. The amount claimed by the appellant in the proceedings at first instance was \$400,000.00.

11. By reason of the matters stated in the preceding paragraph, Rule 38 applied to the proceedings at first instance. The provisions of Rule 38 are different to the content of section 60 of the Act. By reason of this fact, pursuant to Rule 38A(2) we must apply Rule 38 when deciding whether to award costs in relation to this Appeal.

12. In applying Rule 38 when making a costs decision the appeal Panel is not constrained by the need to find special circumstances. The position regarding the exercise of the Tribunal's discretion under Rule 38 is as stated by the Appeal Panel in *Thompson v Chapman* [2016] NSWCATAP 6 at [76] :

In short, the proper exercise of the discretion requires the Tribunal to do justice between the parties and to exercise the discretion having regard to relevant considerations and in a manner which is not arbitrary or capricious: see *Oshlack v Richmond River Council* per Gaudron and Gummow JJ at [22] and McHugh J at 65.

13. The respondents' have applied for their costs on an indemnity basis. Their submissions for indemnity costs rely on the following factors;
  1. Indemnity costs were awarded in the first instance proceedings;
  2. The appellant sought to re-agitate most of the issues on which it was unsuccessful in the first instance proceedings;
  3. The Appeal Panel should take into account the fact that an adverse costs order was made against the appellant at first instance having regard to *Edwards v CohenHandler Pty Ltd (No. 2)* [2017] NSWCATAP 81;
  4. The respondents were obliged to respond to all grounds raised by the appellant. The end result was the appellant was wholly unsuccessful;
  5. There should be a deterrent factor for an unsuccessful appellant.
14. The case of *Edwards v CohenHandler Pty Ltd* turned on its own facts and related to a consideration of whether there were 'special circumstances' present for the purposes of section 60 of the Act. It was in that context that the Appeal Panel at [12] stated that Appeal Panels have often taken account of the fact that an adverse costs order was made at first instance against the party that has lost the appeal. Nonetheless, that factor is not determinative in the consideration of an application for indemnity costs.
15. An award for indemnity costs may be appropriate where a party has resisted or prosecuted proceedings in circumstances where that person should have known that there was no real prospect of success. In *Dean v Stockland Property Management Pty Ltd (No 2)* [2010] NSWCA 141 (Giles JA, Handley AJA and Whealy J) at [42] and [43] JA the Court stated:

In the exercise of the general discretion, costs on the indemnity basis may be ordered if it appears that proceedings have been commenced or continued in circumstances where a party should have known that there was no real prospect of success (see, for example, *Founta in Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397 at 400-1; *Re Bond Corp Holdings Ltd* (1990) 1 WAR 465 at 478, (1990) 1 ACSR 350 at 363-4). This applies to a party resisting an appeal.

Care must be taken, however, lest parties be unduly deterred from bringing or defending proceedings for fear that they will retrospectively be found to have not been justified in doing so. Uncertainty in outcome is not enough, and what appears certain at the time of judgment does not necessarily have that character at an earlier time. Factual dispute may remain alive on appeal, although in a different guise from trial. As Harper J said in *Ugly Tribe Co Pty Ltd v Sikiola* [2001] VSC 189 at [11], speaking of a compromise (in the sense of balancing) of the interests of successful and unsuccessful litigants, it –

“ ... is perhaps justifiable on the basis that potential litigants must not be unnecessarily discouraged from bringing their disputes to the courts. After all success can seldom be

guaranteed, if only because - where the facts are in dispute, as they generally are - it is seldom possible to predict with certainty what findings of fact will be made. In these circumstances, an honest plaintiff or defendant might be discouraged from bringing or defending a claim were an adverse result to be followed by an order that the losing party indemnify, or go close to providing an indemnity to, the successful party against the latter's costs.” ’

16. Despite the fact that the appellant was unsuccessful, we do not find that at the time the appeal was lodged that the main ground of its Appeal which occupied the most time at the Appeal hearing, namely the ‘first duty issue’ as referred to in the Reasons For Decision, was unarguable or had no real prospects of success. To an extent, the first duty issue was an understandable complaint following the history of the prior proceedings set out in the first appeal decision at [25] to [29].

17. In *Augustus v Mohammed (No.2)* [2016] NSWCATAP 165 at [8] an Appeal Panel stated:

Generally speaking, and apart from situations of unaccepted settlement offers, an award of indemnity costs will require a measure of misconduct on the part of the unsuccessful party (see e.g. Ritchie’s Uniform Civil Procedure NSW [42.5.5] and [42.5.7] and *Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd (1985) 36 NSWLR 242 at 245-247*).

The facts of these proceedings do not warrant any finding of misconduct on the part of the appellant.

18. The respondents have submitted that there should be a deterrent interest in the awarding of costs, explained as being that ‘*an appellant should carefully weigh up prior to initiating an appeal, whether it has any real prospect of being successful*’. This submission regarding an appellant having to weigh up its prospects of success is in our view relevant to the possible award of indemnity costs, as discussed in *Dean v Stockland Property Management Pty Ltd*.

19. In *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [44] an Appeal Panel stated:

Whilst indemnity costs may be awarded to indicate disapproval of the conduct of a party, the award of costs on the indemnity basis remains compensatory (*Gallagher International Ltd v Tlais Enterprises Ltd* [2008] EWHC 2046 at [27]).

20. We agree with the passage cited from *eMove Pty Ltd v Naomi Dickinson*. In our view deterrence as such is not a determinative consideration in making an award of indemnity costs.

21. We find that the appellant's conduct of this appeal does not justify making an order for indemnity costs in the respondents' favour as sought. The application for indemnity costs is rejected.
  
22. The respondents have not explicitly applied for an order for costs on the usual basis. Nonetheless it is implicit in their application that such an order is sought in the event that their indemnity costs application is unsuccessful. Moreover it is appropriate to determine their costs application on that basis in order to give effect to the guiding principle contained in section 36(1) of the Act.
  
23. The respondents were the successful party in the appeal proceedings. We accept that as was stated in *Thompson v Chapman* the starting position should be that they are entitled to recover their costs of and incidental to the appeal proceedings in circumstances where there has been no submission that there has been disentitling conduct on their part to cause the discretion to award costs in their favour not to be exercised.
  
24. We find that the respondents are entitled to their costs of the Appeal on the ordinary basis. We will order the appellant to pay the respondents' costs of and incidental to these appeal proceedings, such costs, if not agreed, 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*.

*Order.*

- i. The Owners – Strata Plan No. 79417 must pay the respondents' costs of and incidental to these appeal proceedings such costs if not agreed 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*.

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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.

