



Civil and Administrative Tribunal

New South Wales

Case Name: Gelder v The Owners - Strata Plan No 38308

Medium Neutral Citation: [2021] NSWCATAP 109

Hearing Date(s): On the papers

Date of Orders: 29 April 2021

Decision Date: 29 April 2021

Jurisdiction: Appeal Panel

Before: S Westgarth, Deputy President
S Goodman SC, Senior Member

Decision: (1) An order that the Respondent pay the Appellant's costs of and incidental to the proceedings, on the ordinary basis, such costs if not agreed to be assessed on the basis set out in the legal costs legislation, (as defined in s 3A of the Legal Profession Uniform Law Application Act 2014 (NSW)).
(2) An order that the Respondent not levy a contribution on Lot 2 (the Appellant's lot) for the Respondent's costs and expenses in these proceedings, including costs payable under the preceding order and that the Respondent not pay any part of its costs or expenses of these proceedings, including the costs payable under the preceding order from its administrative fund or capital works fund or from any levy that includes money contributed by the Appellant with the intention that the Respondent promptly raise a special contribution for such costs and expenses and such contribution not be levied on the owner of Lot 2.
(3) An order that the Respondent pay the Appellant's costs of and incidental to the proceedings at first instance in the Consumer & Commercial Division on the ordinary basis, such costs if not agreed to be assessed

on the basis set out in the legal costs legislation, (as defined in s 3A of the Legal Profession Uniform Law Application Act 2014 (NSW)).

(4) An order that the Respondent not levy a contribution on Lot 2 for the Respondent's costs and expenses in the Tribunal proceedings at first instance, including costs payable under the preceding order and that the Owners Corporation not pay any part of its costs or expenses of these proceedings, including the costs payable under the preceding order from its administrative fund or capital works fund or from any levy that includes money contributed by the Appellant with the intention that the Respondent promptly raise a special contribution for such costs and expenses and such contribution not be levied on the owner of Lot 2.

Catchwords: COSTS - costs of appeal and at first instance, special circumstances.

Legislation Cited: Civil & Administrative Tribunal Act 2013 (NSW)
Legal Profession Uniform Law Application Act 2014
Strata Schemes Management Act 2015 (NSW)

Cases Cited: eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 914

Texts Cited: Nil

Category: Principal judgment

Parties: Michelle Gelder (Appellant)
The Owners – Strata Plan No 38308 (Respondent)

Representation: Counsel:
DD Knoll AM (Appellant)

Solicitors:
DEA Lawyers (Appellant)
Bannermans Solicitors (Respondent)

File Number(s): 2020/00370931 (AP 20/31209)

Publication Restriction: Nil

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Court or Tribunal: New South Wales Civil & Administrative Tribunal

Jurisdiction: Consumer & Commercial Division
Citation: Not applicable
Date of Decision: 8 July 2020
Before: C Paull, Senior Member
File Number(s): SC 19/48418; SC 20/06550

REASONS FOR DECISION

Background

- 1 The Appellant (a lot owner) and the Respondent (the Owners Corporation) both bought proceedings in the Consumer & Commercial Division of the Tribunal which resulted in a decision (the Decision) published on 8 July 2020. The Appellant was unsuccessful. However, the Appellant brought an appeal and the appeal was upheld. We published our Decision in respect of the appeal last year (see *Gelder v The Owners – Strata Plan no 38308* [2020] NSWCATAP 227) and made directions for the parties to file and serve any costs application and written submissions in accordance with the timetable set out in those directions. The directions included the requirement for the parties to indicate whether they consented to an order dispensing with an oral hearing of the costs application and, if they do not consent, to provide submissions as to why an oral hearing should be conducted rather than the application being determined on the papers.
- 2 Subsequently, submissions were received from the Appellant, from the Respondent and further submissions in reply from the Appellant. Both parties consented to the costs application being determined on the papers. We are satisfied that we may determine the costs application “on the papers” and that a hearing is not required. An order to that effect is made.

The Appellant’s Submissions

- 3 The Appellant applies for orders for costs in terms which may be summarised as follows:

Appeal Proceedings

- (1) An order that the Respondent pay the Appellant's costs of and incidental to the proceedings, on the ordinary basis, such costs if not agreed to be assessed on the basis set out in the legal costs legislation, (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014 (NSW)*).
- (2) An order that the Respondent not levy a contribution on Lot 2 (the Appellant's lot) for the Respondent's costs and expenses in these proceedings, including costs payable under the preceding order and that the Respondent not pay any part of its costs or expenses of these proceedings, including the costs payable under the preceding order from its administrative fund or capital works fund or from any levy that includes money contributed by the Appellant with the intention that the Respondent promptly raise a special contribution for such costs and expenses and such contribution not be levied on the owner of Lot 2.

Proceedings at First Instance

- (1) An order that the Respondent pay the Appellant's costs of and incidental to the above proceedings at first instance in the Consumer & Commercial Division on the ordinary basis, such costs if not agreed to be assessed on the basis set out in the legal costs legislation, (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014 (NSW)*).
- (2) An order that the Respondent not levy a contribution on Lot 2 for the Respondent's costs and expenses in the Tribunal proceedings at first instance, including costs payable under the preceding order and that the Owners Corporation not pay any part of its costs or expenses of these proceedings, including the costs payable under the preceding order from its administrative fund or capital works fund or from any levy that includes money contributed by the Appellant with the intention that the Respondent promptly raise a special contribution for such costs and expenses and such contribution not be levied on the owner of Lot 2.

4 It can be seen that the orders sought by the Appellant are to the effect that the Appellant not only seeks an order that the Respondent pay the costs incurred by her (including on terms that the Appellant does not indirectly contribute to the Respondent in respect of those costs) but also an order that in respect of the costs incurred by the Respondent that those costs be levied on lot owners other than the Appellant. There was no submission disputing the power of the Tribunal to make such orders. We are satisfied that we have such power and that such orders are reflective of the obligations contained in s 104 of the *Strata Schemes Management Act 2015 (NSW)* (the SSM Act).

5 The submissions provided by the Appellant in support of her application for the above cost orders may be summarised as follows:

- (1) Section 60 of the Civil & Administrative Tribunal Act 2013 (the NCAT Act) governs the award of costs of Tribunal proceedings and provides that the Tribunal may award costs if there are special circumstances.
- (2) Matters relevant to determining whether there are special circumstances are set out in s 60(3) of the NCAT Act and those matters are not exhaustive.
- (3) The Appellant accepts that rule 38 of the Civil and Administrative Tribunal Rules 2014 has no application and therefore the costs order she seeks must be based upon the requirement to establish special circumstances warranting an award of costs.
- (4) The question of costs in respect of the proceedings on appeal and also at first instance need to be considered separately.
- (5) Whether or not there are special circumstances will depend on the particular facts of each case.
- (6) In respect of the appeal, the Appellant relies on s 60(3)(c), (d), (e) and (g) of the NCAT Act.
- (7) The Appellant was successful on every single ground of appeal. The Respondent made submissions, none of which could have resulted in success for the Respondent and in those circumstances pressing on, when the errors made by the Tribunal were obvious and indefensible should result in an order that the Respondent pay the Appellant's costs: s 60(3)(c) and (e).
- (8) The Appeal Panel found the Tribunal's Decision to order the amendment of special bylaw 1 was legally unreasonable (see [84] to [91]). The Decision at first instance was so legally unreasonable that it was indefensible and the Respondent should have realised that to be the case and consented to the orders sought in the appeal or proposed a reasonable compromise. It did neither. An argument that is fundamentally flawed is relevantly not reasonably arguable. It was plainly lacking in substance.
- (9) The Respondent's position was itself entirely unreasonable. It had sought that the Appellant be required to remove her air-conditioners that were installed wholly within her exclusive-use private courtyard. The Respondent pursued excisions of the Appellant's proprietary rights without any need to do so and sought to saddle the Appellant with an obligation to indemnify the Respondent against liabilities arising from damage to property, death or injury of any person arising out of the exercise by others of the rights contained in the Respondent's bylaw.
- (10) The Tribunal held that the Respondent unreasonably insisted on the Appellant signing a deed of access and that the Appellant was justified in refusing to sign that deed.

- (11) The above matters are special circumstances warranting an award of costs under s 60(3)(c), (e) and (g).
- (12) Further, and in the alternative, on 7 September 2020 the Appellant made an offer to settle the proceedings which the Respondent unreasonably refused to accept. The letter of offer proposed an alternative form of amended special bylaw and also proposed an order that each party pay its own costs of the appeal and of the Tribunal proceedings at first instance. The offer put the Respondent on notice that if the offer was not accepted the Appellant would rely on it in an application that the Respondent pay her costs of and incidental to the proceedings. The offer was a reasonable compromise and included a significant concession in relation to costs because the Appellant had been put to significant expense of defending the Respondent's application and bringing her own application to defend her proprietary rights that were under attack by the Respondent. The Respondent, in refusing to accept that offer, acted unreasonably and this too is a special circumstance warranting an award of costs under s 60(3)(g).
- (13) The Respondent applied for its costs in the first instance proceedings and the Tribunal dismissed that application. By reason of the Appeal Panel's Decision it is now apparent that the Tribunal's decision was legally unreasonable and the Respondent's position below was equally unreasonable. The costs of the proceedings below should be awarded to the Appellant because the Respondent throughout this dispute has acted in an unreasonable, disingenuous and heavy-handed matter.
- (14) On 30 January 2020, the solicitors acting for the Appellant sent a letter to the Respondent's solicitors. That letter set out certain proposals to settle the dispute. From the terms of the letter the Respondent was on notice from that point in time of the significant difficulties with the proposed amended special bylaw, but it unreasonably pressed on.
- (15) The Appellant's position as set out in the letter of 30 January 2020 has been vindicated. These matters are special circumstances warranting an award of costs under s 60(3)(c), (e) and (g).

The Respondent's Submissions

6 The Respondent's submissions on costs may be summarised as follows:

- (1) The Respondent submits that there are no special circumstances in the current appeal proceedings nor any special circumstances in the proceedings at first instance that would justify the Appeal Panel judicially exercising its discretion to award the Appellant her costs in either set of proceedings.
- (2) Even if there are special circumstances, the Appeal Panel retains a discretion as to whether or not to award costs. The discretion must be exercised judicially. This involves having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear

their own costs (*eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 914 at [48] and [49]).

- (3) The Respondent submits that its opposition to the Appellant's appeal did not constitute "special circumstance". There was nothing "out of the ordinary" in the Respondent exercising its right to respond to the appeal.
- (4) The Respondent has continued to minimise the issues in dispute including putting forward various offers before and during the Tribunal proceedings as well as no longer pursuing removal of the Appellant's air-conditioning units. In contrast, the Appellant's conduct increased the issues (and costs) in dispute as she has continually changed her position with respect to the air-conditioning units, has lodged a caveat on common property and appealed the Tribunal's decision at a directions hearing as well as lodging a cross-claim when the Respondent had made it clear it was willing to retrospectively approve her air-conditioning units.
- (5) The Appellant's offer of 7 September 2020 did not offer a reasonable compromise and the non-acceptance of that offer by the Respondent was entirely reasonable.
- (6) No special circumstances in the appeal arise.
- (7) With respect to the proceedings at first instance, the Respondent made a number of settlement offers to resolve the proceedings. These included letters of 21 January 2020, 11 March 2020, 20 March 2020 and 25 March 2020.
- (8) The Appellant's success is not of itself, a special circumstance warranting an award of costs. With respect to the proceedings at first instance the Appellant did not seek costs and did not comply with order 7 made by the Tribunal. That order was to the effect that the parties were given leave until 31 July 2020 to apply for costs.
- (9) The appropriate order is for the Appellant's costs application to be dismissed and for each party to pay their own costs of all proceedings.

Submissions in Reply

7 The Appellant's submissions in reply may be summarised as follows:

- (1) Notwithstanding the Respondent's submission it remains the case that the Respondent's submissions in opposition to the appeal were rejected by the Appeal Panel. Although the Respondent may have made detailed submissions, the fact is that the submissions lacked substance.
- (2) The complaint that the Appellant did not seek costs at first instance is explained by the fact that the Tribunal incorrectly found against her

Consideration

8 The general position with respect to proceedings in the Tribunal is that each party to proceedings is to pay the party's own costs (see s 60(1) of the NCAT

Act). However, 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” (s 60(2)). Further s 60(3) provides that, in determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to those matters listed in subparagraphs (a) to (g) (the last of which refers to any other matter that the Tribunal considers relevant).

- 9 In this case the Appellant has submitted that there are special circumstances warranting an award of costs, both with respect to the appeal costs and costs at first instance and the Appellant has relied upon subsections (c) (which concerns whether a party has made a claim that has no tenable basis in fact or law), (d) (which refers to the nature and complexity of the proceedings), (e) (which refers to proceedings that were misconceived or lacking in substance), and to (g).
- 10 The proceedings at first instance and on appeal concerned a dispute over valuable property rights in a strata scheme. The issues concerned whether the Appellant’s rights of exclusive use over a courtyard within common property should be affected by the passing of an amended bylaw including by provisions concerning future rights of access, the installation, maintenance and repair of air-conditioning units and indemnity obligations which may arise from the exercise of rights of access. In our view, the proceedings were clearly of a complex nature and the issues were of significance to the parties, particularly to the Appellant. It is not surprising that the parties sought and obtained leave to have legal representation. Section 45 of the NCAT Act provides that a party to proceedings in the Tribunal has the carriage of the party’s own case and is not entitled to be represented by any person but the section also provides that a party may be represented “only if the Tribunal grants leave”. In this case, solicitors and counsel represented the parties both in the appeal and at first instance.
- 11 Although the correspondence tendered in support of the cost submissions reveals attempts to resolve the dispute between the parties, the fact remains that at first instance the Respondent sought and obtained an order for the making of a bylaw which we, sitting as the Appeal Panel, held was

unreasonable and was therefore set aside. We held that the Appellant's refusal to consent to the bylaw and to sign a deed of access was not unreasonable and indeed was justified.

Appeal Costs

- 12 We will deal firstly with the costs incurred with respect to the appeal. The principles concerning the identification of special circumstances have been the subject of many decisions within the Tribunal. The decision in *eMove Pty Ltd* was drawn to our attention. In that case the Appeal Panel held that special circumstances are circumstances that are out of the ordinary. They do not have to be extraordinary or exceptional (see [48]). That view is one with which we respectfully agree and note it is consistent with many other Appeal Panel decisions of the Tribunal.
- 13 In our view, the complexity of the dispute between the parties and its significance to the parties could be fairly described as out of the ordinary. The nature of the dispute and its importance to the parties is a matter we consider relevant to the determination of special circumstances. Those characteristics are matters falling within s 60(3)(g). In addition, the dispute can be fairly described as falling within subsection (d) by reason of its complexity and importance. We are also satisfied that the dispute can be categorised as falling within the provisions of subsection (c). This is because we held that the submissions of Respondent were to be rejected having regard to our view that the Tribunal's decision at first instance was legally unreasonable. We also held that the finding that the Appellant had unreasonably refused consent to the bylaw was unreasonable having regard to the late amendment to the bylaw. In our view the Appellant was comprehensively successful in the appeal and, for the reasons above given, we are of the opinion that special circumstances exist warranting an award of costs.

Costs at First Instance

- 14 Order 7 of the Tribunal at first instance was to the effect that the parties were given leave until 31 July 2020 to apply for costs. By order 6, the Appellant's application was dismissed. In her initiating application the Appellant sought a costs order but by reason of order 6 her costs application was not dealt with.

- 15 We are of the view that for the same reasons as we have described with respect to costs of the appeal, in respect of the proceedings at first instance special circumstances exist warranting an award of costs. In other words, we are of the opinion that the proceedings at first instance were complex, of significance to the parties and that the Respondent's position lacked substance.
- 16 The attempts to settle the dispute as evidenced by the correspondence drawn to our attention do not assist the Respondent because the Respondent put forward a case at first instance which was overturned on appeal and therefore we are of the opinion that the attempts to resolve the dispute as evidenced in the correspondence do not alter the characterisation of the Respondent's case before the Tribunal.
- 17 Although the Respondent submits that the Appellant did not seek costs at first instance, that submission does not appear to be accurate as the Appellant's application did seek costs. Having lost below with an order that the application be dismissed, the Appellant is, in our view, entitled to seek from the Appeal Panel consideration of her costs application made at first instance. We are satisfied that it is appropriate to award costs at first instance, on the basis of the fact that special circumstances exist warranting an award of costs with respect to the first instance proceeding.
- 18 In conclusion, it is our view that the Appellant has satisfied us that the orders sought should be made. Accordingly, the following orders are made:
- (1) An order that the Respondent pay the Appellant's costs of and incidental to the proceedings, on the ordinary basis, such costs if not agreed to be assessed on the basis set out in the legal costs legislation, (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014 (NSW)*).
 - (2) An order that the Respondent not levy a contribution on Lot 2 (the Appellant's lot) for the Respondent's costs and expenses in these proceedings, including costs payable under the preceding order and that the Respondent not pay any part of its costs or expenses of these proceedings, including the costs payable under the preceding order from its administrative fund or capital works fund or from any levy that includes money contributed by the Appellant with the intention that the Respondent promptly raise a special contribution for such costs and expenses and such contribution not be levied on the owner of Lot 2.

- (3) An order that the Respondent pay the Appellant's costs of and incidental to the proceedings at first instance in the Consumer & Commercial Division on the ordinary basis, such costs if not agreed to be assessed on the basis set out in the legal costs legislation, (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014 (NSW)*).
- (4) An order that the Respondent not levy a contribution on Lot 2 for the Respondent's costs and expenses in the Tribunal proceedings at first instance, including costs payable under the preceding order and that the Owners Corporation not pay any part of its costs or expenses of these proceedings, including the costs payable under the preceding order from its administrative fund or capital works fund or from any levy that includes money contributed by the Appellant with the intention that the Respondent promptly raise a special contribution for such costs and expenses and such contribution not be levied on the owner of Lot 2.

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.

Registrar

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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