



Civil and Administrative Tribunal  
New South Wales

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Case Name: Macey's Group Pty Ltd v The Owners – Strata Plan No 33591

Medium Neutral Citation: [2021] NSWCATAP 88

Hearing Date(s): On the papers

Date of Orders: 12 April 2021

Decision Date: 12 April 2021

Jurisdiction: Appeal Panel

Before: M Harrowell, Deputy President  
J Kearney, Senior Member

Decision: 

1. By consent, pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Appeal Panel dispenses with a hearing of the costs application.
2. The application for costs in connection with the proceedings at first instance is dismissed.
3. The respondent is to pay to the appellant the appellant's costs of the appeal, as agreed or assessed on an ordinary basis.

Catchwords: COSTS – Section 60 of the Civil and Administrative Tribunal Act 2013 (NSW) – special circumstances

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)  
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Lonergan v The Owners – Strata Plan No. 16519 (No. 2) [2020] NSWCATAP 283  
Macey's Group Pty Ltd v Owners – Strata Plan No 33591 [2021] NSWCATAP 7  
Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120  
Owners of “Shin Kobe Maru” v Empire Shipping Company Inc [1994] HCA 5; [1994] 181 CLR 404

The Owners – Strata Plan No. 74385 v Pullicin (Cost)  
[2020] NSWCATAP 249

Texts Cited: Nil

Category: Principal judgment

Parties: Macey's Group Pty Ltd (Appellant)  
The Owners - Strata Plan No 33591 (Respondent)

Representation: Counsel:  
D Hand (Appellant)

Solicitors:  
Catenate Consultant Lawyers (Appellant)  
Strata Title Lawyers (Respondent)

File Number(s): 2020/00370840 (AP 20/25730)

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Date of Decision: 12 May 2020

Before: G K Burton SC, Senior Member

File Number(s): SC 19/32320

## REASONS FOR DECISION

### Introduction

1 On 18 January 2021 we made a decision to allow an appeal in connection with an order made under s 149 of the *Strata Schemes Management Act, 2015 (NSW)* (SSMA). That decision concerned a common property rights by-law permitting use of parking spaces which benefitted the appellant and whether the appellant had unreasonably refused to consent to its repeal. We published reasons for that decision: *Macey's Group Pty Ltd v Owners – Strata Plan No 33591* [2021] NSWCATAP 7.

- 2 The parties were given liberty to make any application in connection with costs, the proceedings otherwise being regulated by s 60 of the Civil and Administrative Tribunal Act 2013 (NSW) NCAT Act). This section provides that a party is to pay their own costs although the Tribunal may award costs if satisfied there are special circumstances. Special circumstances mean those out of the ordinary but not extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120
- 3 The appellant has applied for a costs order in its favour, both in respect of the proceedings at first instance and the appeal. Costs are sought on an ordinary basis.
- 4 The respondent says there are no special circumstances warranting the making of an order for costs and s 60(1) should apply, that is each party should pay their own costs.

### **Submissions**

- 5 The appellant relies on three factors said to warrant the making of an order for costs in the appeal. These are:
  - (1) The nature and complexity of the appeal: s 60(3)(d);
  - (2) the strengths of the appellant's appeal: s 60(3)(c);
  - (3) the substantial interests that were the subject of the appeal: s 60(3)(d).

#### *The nature and complexity of the appeal: s 60(3)(d)*

- 6 The matters of complexity were said to be the proper construction of the NCAT Act, the law of leases, the availability of the remedy of rectification, the unenforceability of an agreement and a lease that was void for uncertainty and the operation of the provisions of the SSMA.
- 7 The appellant submits "it would have been very difficult for a person who was not a lawyer to have prepared the appeal, and to have provided meaningful submissions to the Appeal Panel".

#### *The strengths of the appellant's appeal: s 60(3)(c)*

- 8 The appellant relies on the Appeal Panel's finding that the appellant had not unreasonably refused to consent to the repeal of a by-law and "the

unchallenged critical finding that the lease contemplated by the special resolution was unenforceable”.

- 9 The appellant said it succeeded on three of six grounds, and that this success is a matter to be weighed in the exercise of the cost discretion.

*The substantial interests that were the subject of the appeal: s 60(3)(d)*

- 10 The appellant refers to the “substantial rights conferred on the appellant by the parking by-law” which was the subject of the dispute. Reference was made to the evidence from the proceedings at first instance that the appellant would not have purchased the marina business, for which the disputed parking spaces were utilised, without the right to occupy those spaces.
- 11 The appellant submits that individually and collectively, these matters amount to special circumstances warranting an order for costs.

*Special circumstances in proceedings at first instance*

- 12 In relation to the proceedings at first instance, the appellant again relies on complexity of the proceedings and the substantial rights which have been affected.
- 13 Regarding complexity, the need for legal assistance is again referred to by the appellant. Similarly, the appellant relies on the same submission concerning the substantial rights affected by the dispute.
- 14 In addition, the appellant relies on the respondent’s refusal to attempt to reach a negotiated outcome. In support of this submission the appellant provided a chronology of events and correspondence between the lawyers for the appellant and representatives of the respondent. The submissions include references to parts of the correspondence concerning the respondent requiring repeal of the disputed by-law, the limited preparedness to negotiate and the subsequent making of a Calderbank offer.
- 15 The Calderbank offer was contained in a letter dated 28 October 2019. The letter has been provided with the appellant’s submissions. The terms of that offer were that the appellant would give written consent to rescinding the disputed by-law on various terms including that the respondent would not seek payment of rent or other fees (other than standard strata levies) and the

respondent would not alter the unit entitlements or seek additional charges for as long as the appellant owned the lot to which the disputed by-law attached.

- 16 Relevantly, this correspondence did not deal with the issue of whether the lease proposed in the mediation agreement was unenforceable in terms as found by the Tribunal at first instance and not challenged in the appeal before us. Rather, the negotiations through the correspondence appeared to centre upon different terms to that which had been agreed at the mediation.
- 17 Of this exchange, the appellant submits that the correspondence “demonstrates that the appellant’s attempts to reach a negotiated outcome were rejected by the [respondent], which insisted that the only basis on which it was prepared to settle the matter was if the appellant capitulated to its demands to consent to the repeal of the by-law”. In short, the appellant says the respondent failed to negotiate and these circumstances constitute unreasonable conduct which amounts to special circumstances.
- 18 In reply, having restated its primary position that there were no special circumstances warranting an award for costs, the respondent made submissions under the following headings:
- (1) the complexity of the proceedings;
  - (2) strengths of the appellant’s appeal;
  - (3) substantial rights conferred by the by-law;
  - (4) refusal to negotiate.

*The complexity of the proceedings*

- 19 The respondent says the mere fact the appellants elected to obtain legal representation and were given leave to be legally represented is not of itself a fact which demonstrates complexity.
- 20 The respondent says it was unrepresented in the proceedings at first instance and says the matter was not unduly complicated. It was only after the appeal was lodged that the respondent sought representation.
- 21 The respondent says the mere fact of complexity does not, of itself, constitute special circumstances. Rather, the appellant has failed to demonstrate any relevant complexity.

### *Strengths of the appellant's appeal*

- 22 As to the strengths of the appellant's case, the respondent says that its original application "had a tenable basis in fact and law". Mediation had occurred, an agreement had been reached and orders were sought from the Tribunal as permitted by the SSMA.
- 23 As to the fact of success on three of six grounds, this is a matter to be weighed in determining whether special circumstances exist. However, success of itself does not constitute special circumstances. In this regard it is necessary for the Tribunal to consider the context of the proceedings.
- 24 On appeal, the respondent notes that while it was unsuccessful, it already had an order in its favour from the Tribunal at first instance. Consequently "it was entirely reasonable for the [respondent] to defend itself given the decision in favour from [the Tribunal]". Reference by the appellant to the Notice of Appeal provides no assistance in determining the relative strength of the parties' positions.

### *Substantial rights conferred by the by-law*

- 25 The respondent says that the appellant's reference to its substantial rights arising from the disputed by-law and its dispute about those rights does not mean the proceedings were out of the ordinary such to warrant an order for costs. Reference is made to earlier submissions under the heading complexity.
- 26 The respondent says there is nothing out of the ordinary about disputes concerning by-laws.
- 27 The respondent submits that the nature of the right is an irrelevant consideration for the purpose of s 60(3)(g) of the NCAT Act.

### *Refusal to negotiate*

- 28 As to the refusal to negotiate, the respondent submits the appellant's analysis of the correspondence concerning negotiations is an exercise in cherry picking.
- 29 The respondent says it was reasonable in rejecting the settlement offer put forward because it was "inadequate at law" in terms of the form of the offer and the requirements for a Calderbank letter. In any event, what occurred was a

failed negotiation but there was no basis to conclude there were circumstances warranting an award for costs.

- 30 As to the proceedings at first instance, the respondent also submits that the Appeal Panel has no power to make an order for costs and it may only make an order for costs in relation to the appeal. Reliance is placed on the decisions of the Appeal Panel in *The Owners – Strata Plan No. 74385 v Pullicin (Cost)* [2020] NSWCATAP 249, cited in a second Appeal Panel decision of *Lonergan v The Owners – Strata Plan No. 16519 (No. 2)* [2020] NSWCATAP 283.

### **Consideration**

- 31 Both parties agree that a hearing of the application for costs should be dispensed with and that the question of costs can be determined on the papers. We will make that order.
- 32 The appellant contends there are special circumstances warranting an order for costs. Section 60(3) of the NCAT Act sets out the factors to which the Tribunal may have regard in determining whether there are special circumstances warranting an award of costs. This section provides:
- (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.
- 33 It is convenient to deal with the claim for costs in the proceedings at first instance separately to the claim for costs in the appeal.

### *Costs of proceedings at first instance*

- 34 First, we should deal with the submission that we have no authority to make an order in respect of costs of the proceedings at first instance.
- 35 The respondent relied on the decisions in *Pullicin* and *Lonergan*, as authority for the proposition that the Appeal Panel has no power to make an order for costs in relation to the proceedings at first instance. In both those cases, the Appeal Panel determined it had no such authority because no order had been made in the proceedings at first instance. In this regard, in the case of *Pullicin*, the proceedings at first instance had been adjourned part heard and no final orders for costs to have been made: *Pullicin* at [9]. The position of the Appeal Panel in *Lonergan* appears confined to arguments advanced in that appeal based on s 60(5) of the NCAT Act, although the Appeal Panel did decline to determine the application for costs in respect of the proceedings at first instance.
- 36 In so far as either of those decisions stands for a broader proposition as to the powers of the Appeal Panel, respectfully, we do not agree. In our view an Appeal Panel may make orders for costs in respect of proceedings at first instance when setting aside a decision of the Tribunal at first instance, even where an application for costs has not first been made and determined by the Tribunal sitting at first instance.
- 37 Our reasons are as follows.
- 38 The jurisdiction of the Appeal Panel in respect of internal appeals is found in s 32 of the NCAT Act. This section provides:

#### **32 Internal appeal jurisdiction of Tribunal**

- (1) The Tribunal has internal appeal jurisdiction over—
- (a) any decision made by the Tribunal in proceedings for a general decision or administrative review decision, and
  - (b) any decision made by a registrar of a kind that is declared by this Act or the procedural rules to be internally appealable for the purposes of this section.
- (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its internal appeal jurisdiction—



- (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,
- (b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

39 That is, the internal appeal jurisdiction is enlivened when a decision is made by the Consumer and Commercial Division exercising its general jurisdiction under s 29 of the NCAT Act.

40 The order making powers given to the Appeal Panel in determining an internal appeal are found in s 81. Section 81 provides:

### **81 Determination of internal appeals**

(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—

- (a) the appeal to be allowed or dismissed,
- (b) the decision under appeal to be confirmed, affirmed or varied,
- (c) the decision under appeal to be quashed or set aside,
- (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
- (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

41 As made clear in s 81(1), “[i]n determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate (emphasis added) in light of its decision on the appeal”. The power to make orders includes orders in respect of the matters in s 81(1)(a)-(e), but is not limited to orders in respect of those matters.

42 In doing so, as pointed out in *Pullicin* at [8], s 81(2) permits the Appeal Panel to “exercise all functions (emphasis added) that are conferred or imposed by [the

NCAT Act] or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied on at first instance”.

43 The powers of the Tribunal at first instance include the power to make interlocutory orders and ancillary orders: s 29(2)(a) NCAT Act. Interlocutory and ancillary orders are defined in s 4 NCAT Act. Costs orders are orders within these definitions although some costs orders may be ancillary and some may be interlocutory: see the exclusory language of the definition of ancillary order.

44 One of the functions of the Tribunal at first instance conferred or imposed by the NCAT Act and any enabling legislation is to determine any question of costs. It follows that such function can be exercised by the Appeal Panel on appeal.

45 The reference in s 81(1)(b)-(d) to “decision under appeal” does not operate to confine the power to determine what ancillary or interlocutory orders should be made, s 81(1) making clear that the order making powers include but “are “not limited to” making orders in respect of the identified subject matter in those subsections.

46 As the High Court said in *Owners of “Shin Kobe Maru” v Empire Shipping Company Inc* [1994] HCA 5; [1994] 181 CLR 404 at 421:

It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

47 In our view, the words “decision under appeal” and the context in which they are used in s 81(1) of the NCAT Act, are not words that operate to constrain the general grant of power to “make such orders as [the Appeal Panel] considers appropriate in light of its decision on the appeal (emphasis added)”, including any consequential costs decision in light of its decision on the appeal.

48 Similarly, s 81(2) does not, by its terms, constrain the generality of the order making power granted under s 81(1). Rather, it makes clear that in confirming, affirming or varying, or making a decision in substitution for the decision under

appeal, the Appeal Panel may exercise all functions given to the Tribunal at first instance, including on grounds not raised in the proceedings at first instance, thereby removing the need for remittal where a new ground arises in the appeal. In this regard the expression “function” includes any “Division function”, not just a “substantive Division function” as those expressions are defined in Sch 4 cl 1 of the NCAT Act.

49 Seen in this way, s 81(2) extends, rather than confines the power of the Appeal Panel in finally resolving proceedings in the Tribunal.

50 Contrary to *Pullicin* at [8], in our view the expression “in connection with the conduct or resolution of such proceedings” found in s 32(2)(b) of the NCAT Act does not otherwise confine the powers given by s 81. Rather, s 32(2) makes clear that the Appeal Panel can make interlocutory and ancillary orders in appeal proceedings and that it may exercise functions conferred or imposed on the Tribunal “by or under the [NCAT Act] or the enabling legislation in connection with (emphasis added) the conduct or resolution of such proceedings”. This is quite consistent with the grant of a general order making powers found in s 81 of the NCAT Act, s 81 conferring a function on the Appeal Panel to make a decision in the appeal, namely to make an order that “it considers appropriate”.

51 Our interpretation of these provisions is consistent with the objects of the NCAT Act found in s 3(d), the guiding principle found in s 36 of the NCAT Act and requirement “to give effect to the guiding principle when [interpreting] any provision of [the NCAT] Act or the procedural rules”: s 36(2)(b).

52 An interpretation to the contrary would result in unnecessary remittal of proceedings to determine outstanding interlocutory and ancillary matters and prevent the Appeal Panel from ensuring the just, quick and cheap resolution of the real issues in dispute. Indeed, it would prevent the Appeal Panel making any ancillary order necessary in consequence of the orders made in the substantive appeal in respect of the proceedings at first instance if a decision on such a matter had not first been made. This would be so even where such an ancillary order could only be made in consequence of the decision made on appeal.

- 53 Whether or not an Appeal Panel should do so, and/or is in a position to do so, is a different matter. However, in our view the power of the Appeal Panel to make consequential orders in respect of the proceedings at first instance, including in respect of costs is clear.
- 54 Further, to the extent that these powers are not broad enough to encompass the making of a costs order in an appeal in respect of proceedings at first instance, the Tribunal when sitting as the Appeal Panel may “decide to deal with an internal appeal by way of a new hearing if it considers the grounds for the appeal warrant a new hearing”. In doing so, this power also permits the Appeal Panel to make decisions about all matters that arise in the proceedings at first instance including costs.
- 55 It follows, we are satisfied we have power to determine the application for costs of the proceedings at first instance in the present case.
- 56 However, in relation to the proceedings at first instance, we are not satisfied that there are special circumstances warranting an order for costs. In its simplest terms, the original application was to enforce a mediation agreement. Ultimately that application failed because the Tribunal determined a proposed lease, which was an essential element of the settlement reached at mediation, was unenforceable. Consequently it declined to make orders consistent with the mediation agreement, a matter not challenged on appeal.
- 57 Despite the fact this application failed, there was nothing out of the ordinary about the application made. Indeed, the without prejudice correspondence to which we have been referred demonstrates that the appellant was seeking to change the nature of the mediation settlement from one where there would be a lease for which it would pay an annual rental as a condition of consenting to repeal of the disputed by-law to one where it would have an ongoing right with no fee payable, the only cost to it being a share of any relevant strata levies: see e.g. appellant’s bundle page 8 condition i.
- 58 In these circumstances, the respondent seeking an order from the Tribunal was not out of the ordinary. To the contrary, this is exactly the sort of dispute the SSMA contemplates will be brought to the Tribunal where the parties have participated in mediation with relevant officers from Fair Trading.

- 59 Otherwise, the complexity in these proceedings and the issues ultimately on which the appeal was resolved arose from the decision at first instance, the Tribunal determining that the matter should be dealt with under s 149 of the SSMA and by way of the imposition of conditional orders. While this might be out of the ordinary in respect of an application originally made to enforce a mediation agreement, it does not seem to us to be a matter which should lead to the making of a costs order in the present case.
- 60 As to the failure to negotiate, the respondent was entitled to make an application to the Tribunal to enforce the mediation agreement. Our attention has not been drawn to any correspondence that would suggest its position was untenable or that proceedings were unreasonably maintained, the issue of unenforceability of the agreement apparently arising in the context of the proceedings when being determined by the Tribunal. Again there is nothing out of the ordinary about this.
- 61 The mere fact a party is given leave to be legally represented does not, as made clear in other Appeal Panel decisions, make the proceedings out of the ordinary.
- 62 It follows that we are not satisfied that there are special circumstances warranting an order for costs in the proceedings at first instance and that part of the application is dismissed.

*Costs of proceedings on appeal*

- 63 In relation to costs of the appeal, we think special circumstances are established.
- 64 Despite there being no offers between the parties to try and resolve the proceedings, it seems to us that the proceedings on appeal were more complex having regard to the orders made by the Tribunal. The proceedings changed in the nature from the enforcement of the mediation agreement to the consideration of whether the Tribunal had authority to make an order to repeal by-law based on unreasonable refusal of the appellant.
- 65 In the appeal, the findings concerning the validity of the mediation agreement were not challenged by the respondent. On the other hand, prima facie, the

respondent was entitled to rely on an order which it had. This was an unusual case in that the parties did not point to any earlier decisions of the Tribunal concerning its power to make an order to repeal a by-law in circumstances where an unenforceable agreement had been made that otherwise contemplated such a repeal.

66 It was a case where lawyers were properly permitted to represent parties in the appeal. While the appeal did not take excessive time, the nature of the appeal and the issues raised were, in our view, complex and out of the ordinary.

67 In these circumstances, we are satisfied that an order for costs should be made in connection with the appeal.

### **Orders**

68 The Appeal Panel makes the following orders:

- (1) By consent, pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Appeal Panel dispenses with a hearing of the costs application.
- (2) The application for costs in connection with the proceedings at first instance is dismissed.
- (3) The respondent is to pay to the appellant the appellant's costs of the appeal, as agreed or assessed on an ordinary basis.

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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.

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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