



Civil and Administrative Tribunal
New South Wales

Case Name: Neighbourhood Association DP No 285853 v
Kannapiran

Medium Neutral Citation: [2021] NSWCATAP 92

Hearing Date(s): 29 March 2021

Date of Orders: 16 April 2021

Decision Date: 16 April 2021

Jurisdiction: Appeal Panel

Before: T Simon, Principal Member
S Goodman SC, Senior Member

Decision: (1) The appeal is allowed.
(2) The order made by the Tribunal on 10 November 2020 is varied as follows:
1. The respondents are to pay the appellant's costs of the proceedings before the Tribunal on the ordinary basis as agreed or 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).
(3) If the appellant wishes to make submissions as costs of this appeal:
(a) the appellant is to provide written submissions to the Appeal Panel and the respondents on or before 16 April 2021 and is to indicate in those submissions whether the appellant consents to costs being determined on the papers pursuant to section 50 of the Civil and Administrative Tribunal Act;
(b) the respondents are to provide written submissions in response to the Appeal Panel on or before 23 April 2021 and is to indicate in those submissions whether the respondent consents to costs being determined on the papers pursuant to section 50 of the Civil and

Administrative Tribunal Act;
(c) the appellant is to provide any submissions in reply to the Appeal Panel and the respondent on or before 30 April 2021.

Catchwords: APPEAL – procedural fairness – application determined on a basis not raised with parties or sought or addressed by them

COSTS – principles as to when fixed sum costs order should be made – need for sufficient material

Legislation Cited: Civil and Administrative Tribunal Act 2013
Legal Profession Uniform Law Application Act 2014
Strata Schemes Management Act 2015

Cases Cited: 203 Castlereagh Street Pty Limited v Skybloo Holdings Pty Ltd Limited [2017] NSWCATAP 29
Bechara (t/as Bechara and Co) v Bates [2016] NSWCA 294
Hamod v State of New South Wales [2011] NSWCA 375
Kioa v West (1985) 159 CLR 550
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Stevanovski v CLR Plumbing Pty Ltd [2017] NSWCATAP 180
Wilson v Dash (No 2) [2018] NSWCATAP 155

Texts Cited: Nil

Category: Principal judgment

Parties: Neighbourhood Association DP No 285853 (Appellant)

Arjunan Chinna Kannapiran and Thangam Kannapiran (Respondents)

Representation: Solicitors:

Grace Lawyers (Appellant)

Respondents (Self-represented)

File Number(s): 2020/00371268 (AP 20/54049)

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 10 November 2020

Before: Graham Ellis SC, Senior Member

File Number(s): SCS 20/20812

REASONS FOR DECISION

Introduction

- 1 The appellant Neighbourhood Association has appealed a decision of the Tribunal made on 10 November 2020 in which the Tribunal made a costs order in its favour against the respondent lot owners.
- 2 The Neighbourhood Association contends that the Tribunal erred in making a fixed sum costs order in the amount of \$3,000 instead of an order that the lot owners pay its costs as agreed or assessed.
- 3 For the reasons set out below the appeal is allowed.

Documents

- 4 The Appeal Panel has received the following submissions and documents relating to the appeal from the parties:
 - (1) Notice of Appeal received from the Neighbourhood Association on 9 December 2020;
 - (2) Reply to the Appeal by the lot owners received on 22 December 2020;
 - (3) the Neighbourhood Association's Appeal Book received on 10 March 2021 which includes, amongst other things, the submissions as to costs made before the Tribunal, by:
 - (a) the lot owners, dated 2 November 2020;
 - (b) the Neighbourhood Association, undated;

- (4) the lot owners' various submissions and documents received and dated 11 and 21 January 2021, 9 February 2021, and 24 March 2021.
- 5 The Appeal Panel also has before it a copy of the directions made by the Appeal Panel and a copy of the original application that was made by the lot owners to the Tribunal.
- 6 The decision of the Tribunal is an internally appealable decision and an appeal can be made from it as of right where there is an error of law and with the leave of the Appeal Panel on specified grounds: see, s 80(1) and (2)(b) of the *Civil and Administrative Tribunal Act 2013 (NCAT Act)*. The Notice of Appeal was lodged within the 28-day time period specified in cl 25 of the *Civil and Administrative Tribunal Rules 2014*.

Background

- 7 On 10 May 2020, the lot owners filed an application with the Tribunal, seeking orders under ss 82 and 87 of the *Strata Schemes Management Act 2015*.
- 8 On 28 September 2020, that application was heard.
- 9 On 1 October 2020, the Tribunal published its decision and reasons for decision (**substantive decision**). The Tribunal also made directions for the exchange of written submissions regarding costs.
- 10 Both parties provided written submissions. In its submissions, the Neighbourhood Association sought an order that the lot owners pay its costs on the ordinary basis, as agreed or assessed.
- 11 On 10 November 2020, the Tribunal published its decision on costs, being the decision now under appeal (**costs decision**), in which the Tribunal:
 - (1) found that its discretion to make an award of costs was enlivened because there were 'special circumstances' within the meaning of that expression in s 60 of the NCAT Act;
 - (2) exercised that discretion by making a costs order in favour of the Neighbourhood Association in a fixed amount of \$3,000.
- 12 The essence of the Tribunal's decision as to how its discretion should be exercised is found in paragraphs [25] to [30] of its Reasons, which are reproduced below:

25. The usual order would provide for the costs to be assessed unless then (sic) parties are able to agree on what amount should be paid in respect of costs. However, it (sic) this case, the Tribunal is not satisfied that course should be followed.

26. Having regard to the matters raised by the applicant in these proceedings, it is difficult to see that they required legal representation. Furthermore, the Tribunal is not satisfied that the respondent's case has been conducted in a manner proportionate due to the lack of complexity of the subject matter of the proceedings. By way of example, the respondent's submissions on costs included a table that tediously detailed every issue and every finding when it was sufficient to observe that the applicants did not succeed on any of the issues they raised.

27. The Tribunal is not satisfied that its discretion in relation to costs should be exercised in a manner that sanctions a party (1) electing to use a solicitor, (2) that solicitor then running up a substantial amount of costs, and (3) expecting the other party to pay for such costs. Accordingly, while the Tribunal is satisfied that the respondent is entitled to an order for costs, it is not satisfied the respondent is entitled to costs based on an assessment of a reasonable amount by reference to what the respondent has been charged by its solicitors.

28. A principled application of the discretion in relation to costs favours awarding the respondent costs but only awarding a reasonable amount in respect of these costs. Paragraph (a) of subsection 60(4) empowers the Tribunal to determine to what extent costs are to be paid and paragraph (b) entitles the Tribunal to assess costs on a basis other than via the cost assessment process. Making a determination of the amount of costs also carries the advantage of saving the parties the time and cost of the process of assessment.

29. Allowing eight hours for considering the applicants' documents, eight hours for preparing the respondent's documents, nothing for the directions hearing, nothing for the adjourned 06 August 2020 hearing, one hour for the hearing and four hours for preparing submissions on costs gives a total of 29 hours. Adopting a rate of \$100 for a person such as a managing agent or strata manager, gives \$2,900 and adding \$100 for photocopying and postage gives a total of \$3,000 which the Tribunal considers to be reasonable in the circumstances of this case.

30. It is noted that the same amount would be obtained by taking the 54 hours the applicants suggested was spent on these proceedings, adding four hours for the preparation of submission on costs to give 58 hours, then applying a more modest hourly rate of \$50 to give \$2,900 and again adding \$100 for photocopying and postage.

- 13 On 11 November 2020, the lot owners filed a notice of appeal (proceedings AP 20/47427), in which they appealed against the substantive decision and the costs decision.
- 14 On 26 November 2020, the Tribunal dismissed appeal proceedings AP 20/47427 because of a failure by the lot owners to pay the filing fee for the appeal.

- 15 On 8 October 2020, the lot owners lodged a set aside application (numbered 20/42587) seeking an order under s 53(4) of the NCAT Act setting aside the substantive decision. The set aside application, which was initially dismissed on a different grounds, was subsequently reinstated on 22 December 2021 and directions were made for the parties to make submissions in relation to the setting aside of both the substantive decision and the costs decision. On 22 January 2021, the set aside proceedings were determined on the papers and dismissed by the Tribunal.
- 16 On 9 December 2020, the Neighbourhood Association filed its Notice of Appeal. That Notice of Appeal was dismissed on 24 December 2020 for non-attendance by the Neighbourhood Association at a directions hearing on 22 December 2020.
- 17 On 29 January 2021, the Neighbourhood Association's appeal was reinstated (as proceeding AP 20/54049).
- 18 On 12 February 2021, further appeal proceedings 21/05283 which were filed by the lot owners were dismissed by the Tribunal, again because the lot owners had failed to pay the filing fee.

Application to pursue the lot owners' appeals

- 19 At the beginning of the hearing it became clear that the lot owners wished to agitate issues raised in the appeals which they had filed but which had been dismissed on 26 November 2020 and 12 February 2021. In those circumstances we heard argument as to whether leave ought to be given to allow this to occur. We also considered whether the appeal should be adjourned. We decided that no such leave or adjournment should be granted for the following reasons:
 - (1) s 36(1) of the NCAT Act requires that the Appeal Panel act so as to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
 - (2) it would be inconsistent with that requirement to allow the lot owners to agitate issues raised in their dismissed appeals in circumstances where:
 - (a) each of those appeals was dismissed because of a failure to pay the filing fee;
 - (b) there had been no application to reinstate either appeal;

- (c) no such request had come prior to the hearing;
- (d) no appeal had been made in relation to the set aside application.
- (e) if leave were to be given to pursue either appeal, an adjournment would be needed;
- (f) the appellants objected to leave being granted or an adjournment, and were ready and prepared to proceed with the appeal hearing. They had complied with directions to provide documents and were ready to proceed.

The Neighbourhood Association's Grounds of Appeal

20 The Neighbourhood Association does not seek to disturb the Tribunal's findings that its costs discretion had been enlivened by the presence of 'special circumstances' and that a costs order should be made. Its appeal focuses upon the Tribunal's order fixing costs at \$3,000 rather than an order that costs be as agreed or assessed.

21 The Neighbourhood Association contends that the Tribunal made the following errors:

- (1) a failure to afford procedural fairness;
- (2) a failure to consider the principles applicable to the making of fixed costs orders set out in *Hamod v State of New South Wales* [2011] NSWCA 375 and affirmed in *203 Castlereagh Street Pty Limited v Skybloo Holdings Pty Ltd Limited* [2017] NSWCATAP 29;
- (3) fixing an amount of costs in the absence of evidence as to the quantum of costs that had been incurred by the Neighbourhood Association;
- (4) making a fixed costs order when no such order had been sought by the Neighbourhood Association and it had sought an order that costs be as agreed or assessed.

22 In the alternative, the Neighbourhood Association seeks leave to appeal.

Failure to afford procedural fairness

23 It is well-established that the Tribunal must afford procedural fairness to the parties to proceedings before it.

24 As set out above, the Tribunal invited written submissions on the issue of costs and such submissions were received. However, the question of whether a fixed sum order should be made was not raised by the Tribunal with the parties, or raised (or addressed) by the parties in their submissions.

- 25 In making its decision to award costs on a basis not advanced by either party and which neither party was provided an opportunity to address, the Tribunal failed to afford procedural fairness to the parties: see *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J; *Stevanovski v CLR Plumbing Pty Ltd* [2017] NSWCATAP 180 at [29].
- 26 A failure by the Tribunal to afford procedural fairness is an error of law: see *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13(4)]; *Stevanovski* at [28].

Other grounds of appeal

- 27 Whilst the above conclusion is sufficient to dispose of the appeal and it is strictly unnecessary to deal with the other grounds of appeal, the Appeal Panel makes the following observations with respect to those other grounds.
- 28 The principles concerning when a fixed sum costs order might be made by the Tribunal were considered by an Appeal Panel in *203 Castlereagh Street Pty Ltd* at [39]-[41]:

39. The principles concerning when a Court might make a gross sum costs order are set out in a number of recent Court of Appeal decisions, including: *Hamod v State of New South Wales* [2011] NSWCA 375 at [813]ff; *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (No 2)* [2015] NSWCA 422 at [8]ff and [30]; and *Kostov v Zhang (No 2)* [2016] NSWCA 279 at [19]ff.

40. These principles, relevantly adapted to the circumstances of the Tribunal, include:

- (1) A fixed sum costs order involves a departure from the usual process by which costs are assessed in accordance with the statutory procedures now relevantly found in the *Legal Profession Uniform Law Application Act 2014* (NSW) (especially Pt 7 dealing with “ordered costs”) and the *Legal Profession Uniform Law (NSW)*, *eInduct Systems* at [8];
- (2) A fixed sum costs order may be appropriate where:
 - (a) the sum of costs in question is relatively modest, *eInduct Systems* at [30];
 - (b) a party obliged to pay the costs would not be able to meet a liability of the order likely to result from the assessment, *Hamod* at [813], [816] and [817], *eInduct Systems* at [30];
 - (c) the assessment of costs would be protracted and expensive, *Hamod* at [813] and [817]; and/or
 - (d) the case was complex, *Hamod* at [815]-[817];

(3) Sections 36(1) and (4) of the NCAT Act (which can be seen as equivalent to those in ss 56(1), 57(1)(d) and 60 of the CP Act) suggest that the following factors merit particular consideration:

- (a) the relative responsibility of the parties for the costs incurred;
- (b) the degree of any disproportion between the issue litigated and the costs claimed;
- (c) the complexity of the proceedings in relation to their cost; and
- (d) the capacity of the unsuccessful party to satisfy any costs liability,

Hamod at [816], *Kostov* at [22].

(4) An order for fixed sum costs should be based on an informed assessment of the actual costs, having regard to the information before the Tribunal. Furthermore, the approach taken to estimate the costs must be logical, fair and reasonable. This may involve an impressionistic discount of the costs actually incurred in order to take into account the contingencies that would be relevant in any formal costs assessment, *Hamod* at [820];

(5) The power to make a fixed sum costs order should only be exercised when the Tribunal considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available, *Hamod* at [813], *Kostov* at [23];

41. Examples of the type of material that should be available if a fixed sum costs order is to be made can be found in the decisions in *Colquhoun v District Court of New South Wales (No 2)* [2015] NSWCA 54 at [7] and *SAB Closed 1 Pty Ltd v Bees & Honey Pty Ltd; Bees & Honey Pty Ltd v SAB Closed 1 Pty Ltd* [2015] NSWSC 1162 at [10]. The types of supporting material usually required include:

- (1) the timing and nature of costs incurred, including details of the work done, the hours worked, the hourly rates actually charged and, in the case of counsel's fees, similar details concerning the work done by counsel;
- (2) the rates at which counsel, other lawyers and other professional advocates, if relevant, charge; and
- (3) the amount likely to be recoverable on assessment in the event that that took place, which may be established by "objective arm's length evidence from a costs assessor" (to use the language of Stevenson J in *SAB Closed 1* at [10].

29 The New South Wales Court of Appeal cases considered in paragraph [39] may be supplemented by *Bechara (t/as Bechara and Co) v Bates* [2016] NSWCA 294, at [12] - [18].

- 30 Of particular relevance to the present proceeding are the statements in the above authorities that an order for fixed sum costs should only be made when the Tribunal considers that the materials before it allow it to do so fairly, and this will usually require supporting material on the kind described in *203 Castlereagh Street* at [41]. An example of a refusal to make a fixed sum costs order because of the insufficiency of such materials is the Appeal Panel decision in *Wilson v Dash (No 2)* [2018] NSWCATAP 155.
- 31 In the present case at paragraphs [29] and [30] of the Tribunal's Reasons (which are reproduced above), the Tribunal set out a series of calculations which produced a figure of \$3,000 for costs.
- 32 However, there was no evidence before the Tribunal as to the components of a calculation of costs and in particular no evidence supporting the figures used by the Tribunal. As noted above, the only materials before the Tribunal on the question of costs were the undated submissions of the Neighbourhood Association and the submissions of the lot owners dated 2 November 2020. Those submissions did not provide a basis for the calculations made by the Tribunal.
- 33 The Tribunal erred in law in making such findings of fact in the absence of supporting evidence.

Leave to appeal

- 34 As the Appeal Panel has decided that the Tribunal erred in law, it is unnecessary to consider the Neighbourhood Association's application for leave to appeal.

Disposition

- 35 For the reasons set out above, the appeal should be allowed. We also find that the ordinary order for costs to be agreeing or assessed should be made. There was no challenge to the Tribunal's finding that 'special circumstances' exist. Also there was no application made for a fixed costs order in the costs proceedings before the Tribunal or submissions before the Appeal Panel that would warrant a departure from the usual process by which costs are assessed.

- 36 The appropriate order is that the respondents pay the appellant's costs of the proceedings before the Tribunal on the ordinary basis as agreed or 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*).
- 37 The Neighbourhood Association sought an opportunity to make submissions concerning costs of the appeal in the event it was successful. Such an opportunity should be provided.

Orders

38 The Appeal Panel makes the following orders:

- (1) The appeal is allowed.
- (2) The order made by the Tribunal on 10 November 2020 is varied as follows:
 1. The respondents are to pay the appellant's costs of the proceedings before the Tribunal on the ordinary basis as agreed or 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*).
- (3) If the appellant wishes to make submissions as costs of this appeal:
 - (a) the appellant is to provide written submissions to the Appeal Panel and the respondents on or before 16 April 2021 and is to indicate in those submissions whether the appellant consents to costs being determined on the papers pursuant to section 50 of the *Civil and Administrative Tribunal Act*;
 - (b) the respondents are to provide written submissions in response to the Appeal Panel on or before 23 April 2021 and is to indicate in those submissions whether the respondent consents to costs being determined on the papers pursuant to section 50 of the *Civil and Administrative Tribunal Act*;
 - (c) the appellant is to provide any submissions in reply to the Appeal Panel and the respondent on or before 30 April 2021.

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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