



Civil and Administrative Tribunal
New South Wales

Case Name: Antoniak v The Owners – Strata Plan No 71808

Medium Neutral Citation: [2021] NSWCATAP 136

Hearing Date(s): On the papers

Date of Orders: 17 May 2021

Decision Date: 17 May 2021

Jurisdiction: Appeal Panel

Before: Cowdroy AO QC ADCJ, Principal Member
S Goodman SC, Senior Member

Decision: The Appeal Panel orders:
(1) Pursuant to section 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) that a hearing be dispensed with;
(2) That leave to bring the appeal be refused;
(3) That the appeal be otherwise dismissed.

Catchwords: APPEALS — from exercise of discretion — failure to exercise discretion — costs order — award of costs

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

Cases Cited: Collins v Urban [2014] NSWCATAP 17
Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59
The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2) [2020] NSWCATAP 273
Young v Hones (No 2) [2014] NSWCA 338

Texts Cited: Nil

Category: Principal judgment

Parties: Benjamin Antoniak (First Appellant)
Khoa Nguyen (Second Appellant)

The Owners – Strata Plan No 71808 (Respondent)

Representation: Solicitors:
Appellants (self-represented)
ClarkeKann Lawyers (Respondent)

File Number(s): 2021/00056068

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not reported

Date of Decision: 11 January 2021

Before: L Wilson, Senior Member

File Number(s): SC 19/53025

REASONS FOR DECISION

Introduction

- 1 By Notice of Appeal filed on 28 January 2021 the appellants appeal the decision of the Tribunal made on 11 January 2021 by which the Tribunal ordered that, in the absence of special circumstances, no order should be made in respect of the costs of the proceedings. Accordingly, the only order which is challenged is the costs order.
- 2 The appellants say that the costs order is not fair and equitable; that the costs order has disadvantaged the appellants. They claim that there are special circumstances justifying an order for costs and allege that they are entitled to a “return of Legal Court Fees” arising out of an agreement between the parties at the hearing on 18 December 2019 that the losing party would pay for “cost fees for winner party”. The appellants also allege that the respondent delayed the proceedings for more than a year and on five occasions did not comply with the directions made by the Tribunal and that the owner’s corporation and the ex-strata manager were uncooperative, which “forced the applicants to seek help

from Fair Trading, [l]awyers and [the] Tribunal, which came to... out-of-pocket expenses [of] \$22,839.74 (contributed by 17 owners)". The appellants also allege that:

"[The] Owners [Corporation] Ex Strata manager and OC spent \$50,530.64 on legal cost[s] against the [applicants] (17 owners). This amount was taken from Owners (total 64) strata levies. The Tribunal decision has forced 17 owners double payment of legal costs i.e. NCAT + share of costs spent by OC for NCAT case."

- 3 The appellants have provided details of the costs which they incurred in the proceedings and have attached invoices from lawyers concerning costs incurred and copies of emails relating to the proceedings. The appellants have also provided details of the directions which they allege the respondent did not comply with.
- 4 The respondent filed a Reply on 24 February 2021 which opposes the orders sought. The respondent submits that no question of law or other satisfactory reason has been identified in relation to why the costs order should be set aside. It is submitted that leave to bring the appeal should not be granted since no issue of principle, matter of public importance, clear injustice or error has been identified, nor have factual errors been shown, nor is the result unfair.

Observations

- 5 The Appeal Panel observes that these proceedings arose out of a dispute between owners of strata title units in Strata Plan No 71808. The Appeal Panel has listened to the audio recording of the hearing. It records that the Tribunal upheld the appellants' claim for the appointment of a new strata manager pursuant to s 237 of the Strata Schemes Management Act 2015 (NSW). The Tribunal ordered that a new manager be appointed forthwith. Accordingly, the action of the strata owners was found to be justified and their claim was upheld.
- 6 The Tribunal, when making the orders, gave the parties the opportunity to make submissions as to costs. Having done so, the Tribunal nevertheless directed that there should be no special order as to costs. This order is now challenged by this appeal.

Leave to appeal

- 7 This appeal has been instituted under s 80 of the Civil and Administrative Tribunal Act 2013 (NSW) (“the Act”). It is an internal appeal as provided by s 80(2)(b). Pursuant to Part 6 of Schedule 4 to the Act, an Appeal Panel may grant leave under s 80(2)(b) of the Act only if satisfied that the appellant may have suffered a substantial miscarriage of justice because:
- (a) the decision of the Tribunal under appeal was not fair and equitable; or
 - (b) the decision of the Tribunal under appeal was against the weight of evidence; or
 - (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).
- 8 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel considered the requirements for the grant of leave. At [84] the Appeal Panel held:
- “(1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
- (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
- (a) issues of principle;
 - (b) questions of public importance or matters of administration or policy which might have general application; or
 - (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal’s decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
 - (d) a factual error that was unreasonably arrived at and clearly mistaken; or
 - (e) The Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,
- ...
- 9 In summary, it must be demonstrated that an appellant may have suffered a substantial miscarriage of justice because the decision of the Tribunal under appeal was not fair and workable, or the decision under appeal was against the

weight of evidence, or new evidence has arisen that was not reasonably available at the time of the hearing.

Statutory provisions relating to costs awards

10 Section 60 of the Act makes provision for an award of costs in this Tribunal.

Section 60 relevantly provides:

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.

...

11 In summary, the usual rule in the Tribunal is that each party pays its own costs of the proceedings. An award of costs may be made provided that there are special circumstances warranting an award of costs, for the reasons set out in s 60(3). The mere fact that a party has been successful does not constitute sufficient reason to warrant the making of an order for costs in that party's favour.

Statutory discretion to award costs

12 The power to award costs is a discretionary power vested in the decision-maker. As was observed by the High Court of Australia in *Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59, an award of costs is discretionary.

- 13 A challenge to the exercise of discretion is not a simple matter. In *Young v Hones (No 2)* [2014] NSWCA 338 at [15], the Court of Appeal stated:

“What must be shown is error in the *House v R* sense (*House v R* [1936] HCA 40; (1936) 55 CLR 499 at 505), namely that the primary judge: made an error of legal principle; made a material error of fact; took into account some irrelevant considerations; failed to take into account, or to give sufficient weight to, some relevant matter; or arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred (even though the error in question may not explicitly appear on the face of the reasoning). It is not sufficient merely to show that the primary judge was arguably wrong: *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]. Nor is it to the point that the appellate Court might have arrived at a different result had it exercised the relevant discretion at first instance (*House v R* at 504-505).”

- 14 The critical issue before the Tribunal was whether an order should be made under the Strata Schemes Management Act to replace the existing strata manager. It is clear from the oral reasons of the Tribunal that the Tribunal considered that such an order should be made. Following the making of the order, the Tribunal informed the parties that the usual rule in the Tribunal is that no order for costs be made in favour of either party: that is, that each party shall pay its own costs.
- 15 The submissions of the appellants provide detailed reasons in support of their application and note that 17 (later 26) of the strata unit owners contributed to the costs of the proceedings. The submissions refer to the detailed attempts that have been made to try to resolve the differences between the appellants and the respondent through NSW Fair Trading. Unfortunately such attempts were futile. The cost imposed for each of the participating unit holders was approximately \$1,300.
- 16 Despite the expenditure and the successful result for the appellants, the obstacle in the Tribunal making an award in favour of the appellants for costs arises from the provisions of s 60 of the Act. That is, “special circumstances” must be established before such an award may be made. In *The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2)* [2020] NSWCATAP 273 at [10]–[15] the Appeal Panel set out its observations concerning the content of “special circumstances”. At [13] the Appeal Panel said:

“The exercise of the discretion requires the Tribunal ‘to weigh whether those circumstances are sufficient to amount to “special” circumstances that justify

departing from the general rule that each party bear their own costs': *BPU v New South Wales Trustee and Guardian (Costs)* [2016] NSWCATAP 87 at [9]; *Obieta v Australian College of Professionals Pty Ltd* [2014] NSWCATAP 38 at [81]; *Khalaf v Commissioner of Police* [2019] NSWCATOD 178 at [29]; *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [35]."

- 17 Although the appellants were successful, and incurred considerable costs in achieving a satisfactory result, the Appeal Panel is unable to determine that "special circumstances" exist. The fact that there may have been a private agreement between the parties made on 18 December 2019 that costs would be paid by the losing party, it does not appear that this claim was pursued before the Tribunal. It was no doubt for this reason that the Tribunal declined to make an order for costs in the appellants' favour. The Appeal Panel notes there are no details concerning the existence of such agreement.
- 18 The decision of the Tribunal was a discretionary one and in the absence of any obvious error of the kind referred to in *House v R* (1936) 55 CLR 499; [1936] HCA 40, it is not for the Appeal Panel to interfere with the discretion of the primary decision-maker.
- 19 It follows that in the absence of special circumstances, the provisions of s 60(3) of the Act were not enlivened before the original decision-maker and the Appeal Panel is unable to find any error in the exercise of the discretion of the Tribunal. In these circumstances, there is no miscarriage of justice which would warrant the grant of leave to bring the appeal.

Orders

- 20 The Tribunal orders:
- (1) Pursuant to section 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) that a hearing be dispensed with;
 - (2) That leave to bring the appeal be refused;
 - (3) That the appeal be otherwise dismissed.

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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