Civil and Administrative Tribunal

New South Wales

Case Name:	Brenchley v Clissold
Medium Neutral Citation:	[2021] NSWCATAP 319
Hearing Date(s):	Decision on the papers
Date of Orders:	20 October 2021
Decision Date:	20 October 2021
Jurisdiction:	Appeal Panel
Before:	Cowdroy AO QC ADCJ, Principal Member D Goldstein, Senior Member
Decision:	The Appeal Panel orders that: 1) A hearing on costs is dispensed with pursuant to section 50(2) of the Civil and Administrative Tribunal Act 2013. 2) The first respondent's application for costs be dismissed. 3) Each party to the appeal is to pay its own costs.
Catchwords:	COSTS – Whether special circumstances existed – Costs where appeal is withdrawn without a hearing on the merits
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 Strata Schemes Development Act 2015 Strata Schemes Management Act 2015
Cases Cited:	Alexander James Pty Ltd v Pozetu Pty Ltd (No 2) (2016] NSWCATAP 75 Allen v Tricare (Hastings) Ltd [2017) NSWCATAP 25 Augustus v Mohammed (No 2) CATAP 165

	Council of the Law Society of New South Wales v Levitt [2017] NSWCATOD 126 CPD Holdings Pty Ltd t/a The Bathroom Exchange v Baguley (2015] NSWCATAP 21 Durran t/a Canberra Sheds and Outdoor Storage v Bliss [2018) NSWCATAP 43 Gaynor v Burns [2015] NSWCATAP 150 Hamod v State of NSW (2002) 188 ALR 659; [2002) FCA 424; [2002) FCAFC 97 Jabulani Pty Ltd v Walkabout 11 Pty Ltd [2016] NSW CA 267 Ngyuen v Perpetual Trustee Co Ltd [2015] NSWCATAP 264 Oshlak v Richmond River Council [1998) HCA 11; (1998) 193 CLR 72 Re-Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin [1997) HCA's 6; (1997) 186 CLR 622 SCC (Sam Construction Company) Pty Ltd v Wingate [2017] NSWCATAP 222
Category:	Costs
Parties:	Anthony Brenchley& Ors (Appellants) Keith Barry Clissold (First Respondent) The Owners – Strata Plan No 80609 (Second Respondent)
Representation:	Counsel: Mr T. Rollo (First Respondent) Solicitors : David Andrews, Makinson & D'Apice (Appellants) Carroll & O'Dea: (First Respondent)
File Number(s):	2020/00371080
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	[2020] NSWCATCD
Date of Decision:	08 September 2020
Before:	C Paul, Senior Member

File Number(s): SC18/49404 SC1920511

REASONS FOR DECISION

1 On 10 August 2021 by consent orders were made by the Appeal Panel pursuant to which the Appeal Panel noted that the appellants sought to withdraw their appeal and the appeal was dismissed in accordance with section 55 (1) (a) of the *Civil and Administrative Tribunal Act* 2013 (NSW) ("the Act").

2 The orders provided for an application for costs made by either party and directed a timetable for the filing and serving of material. Both the appellants and the first respondent have now filed submissions. The appellants submit that the Appeal Panel should not make a costs order. The first respondent seeks a costs order in his favour and an order that the appellants pay the second respondent's costs. The parties involved are the appellants, Mr Brenchley and three lot owners, the first respondent ("Clissold") and the second respondent ("Owners Corporation"). The Owners Corporation has not sought an order for costs.

3 The appellants and the first respondent have had the opportunity to file submissions in support of the cost orders that they seek. Neither of them have requested to be heard on the question of costs. In these circumstances, we consider that it is appropriate to make an order dispensing with a hearing on costs pursuant to section 50(2) of the Act.

Nature of Dispute

4 The dispute between the parties concerned differences which arose between owners of the strata units in an apartment building the subject of the *Strata Schemes Management Act* 2015. The dispute became bitter and protracted. There are five home units in the strata scheme and the appellants and Clissold own the entirety of the lot holdings.

5 Proceedings were also instituted by the appellants in the Supreme Court of New South Wales Real Property List in 2020/344370 in December 2020 in which the appellants sought orders for winding up and termination of the strata

scheme pursuant to the provisions of the *Strata Schemes Development Act* 2015. It was claimed the basis for such proceedings was the fact that the building the subject of the strata scheme was so damaged that it could not be occupied and had been in such condition since 2017 and that the cost to repair the building exceeded its value.

6 The appeal in this Tribunal was scheduled to be heard on 21 January 2021. It was adjourned to enable the completion of an audit which was ordered of the Tribunal orders dated 8 September 2020.

7 The appeal was again listed for hearing on 10 August 2021. However, on 6 August 2021 the Supreme Court provisionally listed the proceedings before it for final hearing on 24 November 2021.

8 The Tribunal at first instance found against the appellants. In consequence, the unsuccessful appellants appealed to the Appeal Panel of the Tribunal. Hearings have taken place on 23rd of October 2020, namely the appellants' stay application; an abortive hearing took place on 21 January 2021; a further application on 16 April 2021; a hearing which was adjourned by consent on 28 May 2021; and a further application on 25 June 2021. The hearing was finally set down for determination on 10 August 2021, when the consent orders to which we have referred were made.

Power to Award Costs

9 Section 60 of the Act empowers the Tribunal to award costs and relevantly provides:

> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the parties 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 and 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 conduct of the proceedings in a way that unnecessarily disadvantaged and other 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 is made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) whether the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refusal failed to comply with a duty imposed by section 36 (3),

(g) any other matter that the Tribunal considers relevant.

10 Whilst the usual rule in the Tribunal is that each party pays its own cost, where special circumstances are shown to exist, costs may be awarded: see *Council of the Law Society of* New *South Wales v Levitt* [2017] NSWCATOD 126 at [17]; *Gaynor v Burns* [2015] NSWCATAP 150 at [16] – (19]; *Allen v Tricare (Hastings) Ltd [*2017) NSWCATAP 25. Further, as was considered in *Ngyuen v Perpetual Trustee Co Ltd* [2015] NSWCATAP 264 at [94), the discretion to award costs must be exercised judicially.

11 Rule 38 of the *Civil and Administrative Tribunal Rules* 2014 ("the Rules") provides for costs in the Consumer and Commercial Division of the Tribunal as follows:

38 Costs in Consumer and Commercial Division of the Tribunal

(1) 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 proceedings, or

(b) the amount claimed or in dispute in the proceedings is more than $30,000.

12 Rule 38A provides for costs in internal appeals as follows:

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 cost provisions*) differed from those set out in section 60 the Act because 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 cost provisions when deciding whether to award costs in relation to the internal appeal.

13 Rule 38A applies to appeals lodged after 1 January 2016 and because the operation of "procedural rules" in that Schedule 4,cl 3 of the Act allocates such proceedings to the Consumer and Commercial Division, it follows that costs may be awarded irrespective of whether special circumstances apply.

14 In *Allen v Tricare* no specific amount was claimed because of the nature of the proceedings. Accordingly the Tribunal did not accept that "the amount… In dispute in the proceedings is more than $30,000 as appears in rule 38". At (56] the Tribunal referred to the decision of the New South Wales Court of Appeal in *Jabulani Pty Ltd v Walkabout 11 Pty Ltd* [2016] NSWCA 267 where the Court of Appeal considered authorities relating to section 101(2)(r)(i) of the Supreme Court Act which referred to *"an appeal… that involves a matter and issue amounting to or the value of $100,000 or more*". The Court said at (80] relevantly:

> "(2) under section 101 (2) (r) (i) the determinative factor is not the amount of the judgement, nor the amount of the original claim, but the value of the matter at issue in the appeal: *Dunn v Ross Lamb Motors* (1978) 1 NSW LR 26 at 28; *Jensen v Ray* [2011] NSWCA 247 at [7] per Brereton J with whom Campbell JA and Sackville a JA agreed; *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWA 164 at (13] per Basten JA with whom Tobias a JA agreed."

15 In *Allen v Tricare* the Tribunal followed the principles referred to above and at [57] (3), the Tribunal said:

> "(3) Whether "the amount… In dispute" in each appeal is more than $30,000 depends on whether there is a realistic prospect that in each appeal the wealth of the appealing party would be changed by more than $30,000 or put another way, whether the right claimed by the appealing party, but denied by the decision at first instance, prejudices that party to amount in excess of $30,000."

16 The Appeal Panel has no evidence of the value by which the appellants may been benefited or prejudiced by the decision appealed from. Nor does the Appeal Panel have any means of determining whether the appellants' claim can be calculated on some basis to constitute more than $30,000. In these circumstances, it concludes that the provisions of rules 38 and 38A have no

application. It follows that the cost provisions contained in section 60 of the Act are to be applied by the Appeal Panel.

Appellants' submissions

No Order for Costs

17 The appellants submit that in view of the orders made in the Supreme Court on 6 August 2021, the appeal in this Tribunal would have served no utility, since the Supreme Court will determine whether the strata scheme should be wound up. The appellants state that Clissold does not oppose termination: Rather, the dispute between the appellants and Clissold relates to the orders accompanying the orders termination, namely timing and steps involved for the winding up.

18 The appellants submit that on 6 August 2021 they proposed a commercial solution to Clissold and to the Owners Corporation suggesting that the appeal in this Tribunal be withdrawn thereby saving time and expense. The respondents refused to accept such offer. Accordingly in accordance with the spirit of section 36 of the Act, the appellant decided to withdraw this appeal.

19 The appellants submit that special circumstances do not exist: that each party has incurred expenditure but that does not take the case out of the ordinary: see *Durran t/a Canberra Sheds and Outdoor Storage v Bliss* [2018) NSWCATAP 43 at (49]. The appellants also refer to the observations of McHugh J in *Re-Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* [1997) HCA's 6; (1997) 186 CLR 622, particularly to the passage where his Honour referred to the fact that where it appears that both parties have acted reasonably in the conduct of litigation until it became settled, or its further prosecution became futile, " the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings."

20 Based upon the foregoing, the appellants submit that they have acted reasonably in the bringing, conducting and withdrawing the appeal in the circumstances of the pending hearing of the Supreme Court proceedings.

21 The appellants take issue with the submissions of the first respondent concerning the fact of the existence of the Supreme Court proceedings in these

proceedings. The appellants state that the appeal proceedings were commenced well before the Supreme Court proceedings were commenced and whilst the appeal proceedings contemplates the continuation of the strata scheme, the Supreme Court proceedings would result in such proceedings being otiose.

22 As to prolonging the proceedings, the appellants submit that they were ready to argue the appeal on 21 January 2021 and that the appeal did not proceed because the Appeal Panel was concerned that the Owners Corporation had not completed the audit which it was directed to undertake pursuant to the Tribunal's orders of 8 September 2020. Between 21 January and 28 May 2021 the appellants, at the insistence of Clissold, completed the audit. The appellants' stay application was made in view of the perceived need to terminate the strata scheme.

23 The appellants reject the assertion by the first respondent that the proceedings are frivolous or misconceived and submit that it would be contrary to the warning in *Lai Quin* for the Appeal Panel to undertake a hypothetical hearing of the appeal in order to try to determine the appropriate order for costs.

24 The appellants submit the late withdraw the proceedings took place only after the Supreme Court proceedings were listed for hearing and that the conduct did not cause any delay.

25 The appellants submissions also referred to Clissold's submissions concerning the application section 104 (1) of the *Strata Schemes Management Act*. The submissions will be considered hereunder.

First respondent's submissions:

Appellant to Pay Costs

26 Clissold, in his written submissions:

(a) recites much of the history of the litigation in its submissions and submits that the inability of the Strata Manager to progress the audit referred to above was wholly attributable to the appellants because their solicitors failed to hand over documents. As a result the conduct in prolonging the proceedings was unreasonable;

(b) states that the appeal was hopeless and it never had any conceivable prospect of succeeding. The appellants' appeal and submissions do not disclose a reasonably arguable appeal;

(c) states that the appeal was commenced by the filing of a Notice of Appeal on 6 October 2020 and 10 months later was discontinued by email dated 6 August 2021;

(d) states that under section 104(1) of the *Strata Schemes Management Act*, an Owners Corporation cannot,

> '… In respect of its costs and expenses and proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.'

(e) states by virtue of the withdrawal and dismissal of the appeal, he has been successful: accordingly The Owners Corporation could not levy contribution against him for its costs of the appeal;

(f) states, however section 104 (2) which provides the mechanisms for raising levies, is predicated upon the Owners Corporation being unsuccessful: and this did not occur.

27 The remainder of the submissions relate to the interaction between the Owners Corporation and the right to claim levies which is not an issue in these proceedings.

Findings

28 The Appeal Panel notes that the withdrawal of these proceedings followed the setting down in the Supreme Court of the appellants' application for a winding up of the strata scheme. If that application is successful, the whole of the proceedings before this Tribunal would have been of no utility.

29 The Appeal Panel also notes that, following the setting down of the Supreme Court proceedings, the appellants invited the respondents to agree to discontinue the proceedings. They did not agree. The reason for their doing so is not known.

30 An order for costs is not intended to be punitive: Rather it is compensatory: see *Hamod v State of NSW* (2002) 188 ALR 659; [2002) FCA 424; [2002) FCAFC 97; see also *Oshlak v Richmond River Council* [1998) HCA 11; (1998) 193 CLR 72.

31 As to Clissold's assertion that the appellant unduly prolonged the proceedings, the Appeal Panel is not satisfied that this is established: the reason for the appeal proceedings being instituted was to challenge the Tribunal's decision.

The Notice of Appeal was filed in late 2020; the hearing was listed for January 2021 but was adjourned. The reason for the adjournment cannot be determined with accuracy on this appeal. Thereafter the Supreme Court proceedings were instituted.

32 There is no evidence before the Appeal Panel whether any negotiations or discussions took place once the Supreme Court proceedings were instituted. However, it must have been obvious to all parties that by virtue of such an application, the proceedings in this Tribunal should have been adjourned pending determination of the Supreme Court proceedings. This must follow from the fact that the appellants were seeking a winding up of the scheme, and the continuation of the proceedings in this Tribunal, when the very foundation for the relief that could be granted in this Tribunal was at risk.

33 The Appeal Panel does not consider that any of the grounds said to constitute "special circumstances" exist. Special circumstances are those which are unusual or out of the ordinary, although they do not have to be exceptional or extraordinary: see *CPD Holdings Pty Ltd t/a The Bathroom Exchange v Baguley* (2015] NSWCATAP 21; *Augustus v Mohammed* (*No 2*) CATAP 165. See also *SCC (Sam Construction Company) Pty Ltd v Wingate* [2017] NSWCATAP 222 at [19].

34 The test to be applied in determining whether the circumstances are "special" were described in *Alexander James Pty Ltd v Pozetu Pty Ltd (No 2)* (2016] NSWCATAP 75 at (14) where the Appeal Panel stated:

> "An assessment whether circumstances are "special" involves the exercise of a value judgement carried out by way of comparison between what is not "special", and what is special. There are no scientific means by which the former can be ascertained. The evaluative process is necessarily one of impression is informed by the particular provisions of section 60 which by section 60 (3) (f) incorporates also a consideration of section 36 (3) of the Act .

35 The appeal was properly instituted in accordance with the right of a party as provided by section 80 of the Act. The length of time taken between the institution of the appeal and its dismissal is not excessive and there have been valid reasons explained why the dismissal has come about. The Appeal Panel does not find any "special" or "exceptional" circumstances in the conduct of the appeal.

Orders

36 The Appeal Panel orders that:

(1) The first respondent's application for costs be dismissed.

(2) Each party to the appeal is to pay its own costs.

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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.
Registrar