



Civil and Administrative Tribunal  
New South Wales

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Case Name: Foong v Scutella

Medium Neutral Citation: [2021] NSWCATAP 294

Hearing Date(s): On the papers

Date of Orders: 29 September 2021

Decision Date: 29 September 2021

Jurisdiction: Appeal Panel

Before: S Westgarth, Deputy President  
J Currie, Senior Member

Decision: (1) A hearing on the question of costs of the appeal is dispensed with.  
(2) The Appellants are to pay the costs of the First and Second Respondents incurred in the appeal in a sum as agreed or in the absence of agreement as assessed.

Catchwords: APPEAL-NCAT-costs –special circumstances-nature and complexity of proceedings.

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

Cases Cited: CEU v University of Technology Sydney [2017] NSWCA 280  
CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21  
Cripps & Anor v G&M Dawson Pty Ltd & Anor [2006] NSWCA 81  
Oshlack v Richmond River Council [1998] HCA 11

Category: Costs

Parties: Joseph Foong, Chuk Ha Foo, Steven Lau, Williamto Hong, Ruly Ganardi (Appellants)

Craig Scutella (First Respondent)  
Owners SP No 56443 (Second Respondent)  
Lloyd Wong, Ferdinand Bullo, Ricky Thoo, Silvia Inan,  
Erlyne Rusley, Thomas Anusic, Eng Seoh Ho, Howen  
Enterprise Pty Ltd, Victoria Lu, Hung Ying Fung Lu,  
Ping Heng Lee, Ruinan Luo, Siv Phan Tew, Rachel  
Yeung, Lini Lai, Juliano Lai, Edward Chow Yun Wah,  
Mike Ah-Koon (Third to Nineteenth Respondents)

Representation:

Counsel:  
N Newton (Appellants)

Solicitors:  
Madison Markus Law Firm (Appellants)  
Grace Lawyers (Respondent)  
Bannerman Solicitors (First Respondent)  
Holding Redlich Solicitors (Second Respondent)

File Number(s): AP 20/42909 (2020/371089)

Decision under appeal:

Court or Tribunal: New South Wales Civil & Administrative Tribunal

Jurisdiction: Consumer & Commercial Division

Citation: Not applicable

Date of Decision: 09 September 2020

Before: SA McDonald (Senior Member)

File Number(s): SC 20/11026

## **REASONS FOR DECISION**

### **Background**

- 1 This decision concerns applications for costs orders brought by the First and Second Respondent to the appeal.
- 2 At first instance, the Tribunal had appointed a compulsory manager of the Owners Corporation which is now the Second Respondent. A number of lot owners appealed that decision and on 23 July 2021 we dismissed the appeal,

and made directions for the Respondents to seek costs of the appeal, and for the Appellants to file submissions in opposition.

- 3 It is relevant to record that the background circumstances leading to the appointment of the compulsory manager were complex. The Second Respondent is a very large strata title owners corporation consisting of three separate towers of approximately 30 plus floors, 323 residential apartments as well as commercial and retail lots. The Owners Corporation had been under compulsory management for a number of years and a question in the appeal was whether the compulsory manager's appointment could be extended beyond the period of the initial appointment of two years. Significant repair and maintenance works had been commenced but not completed, and significant levies had been raised and further levies proposed. In addition, there had been no meeting as required by s 238(6) of the Strata Schemes Management Act (the Strata Act) and a question arose as to whether the Tribunal was precluded from making a further appointment after the initial appointment in the absence of such a meeting.
- 4 The First Respondent (a lot owner) who was the Applicant at first instance seeks costs of the appeal. In addition, the Second Respondent also seeks an order for costs of the appeal.
- 5 The Appellants oppose costs orders being made.
- 6 The parties agree to this decision being made on the papers and a hearing on costs dispensed with. We are satisfied that the issues can be determined in the absence of the parties by considering the written submissions. The other Respondents (the Third to Nineteenth Respondents) have played no active role in the appeal and do not seek costs.

### **The First Respondent's submissions**

- 7 The First Respondent relies upon s 60(2) and (3) of the *Civil & Administrative Tribunal Act 2013*. Section 60 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.

(4) If costs are to be awarded by the Tribunal, the Tribunal may--

- (a) determine by whom and to what extent costs are to be paid, and
- (b) order costs to be 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) or on any other basis.

(5) In this section-- "costs" includes--

- (a) the costs of, or incidental to, proceedings in the Tribunal, and
- (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

8 The First Respondent submits that there are special circumstances warranting an award of costs and submits that it is sufficient that the circumstances constituting "special circumstances" are out of the ordinary but they do not have to be extraordinary or exceptional (relying upon *Cripps & Anor v G&M Dawson Pty Ltd & Anor* [2006] NSWCA 81). Similar views were expressed in *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 and in *CEU v University of Technology Sydney* [2017] NSWCA 280.

9 The First Respondent in particular relies upon ss 60(3)(a), (c), (d), (e) and (g).

### **The Second Respondent's Submissions**

10 The Second Respondent submits that the appeal raised complex legal and factual considerations by reason of the nature of the central issue (ie. the appointment of a compulsory manager) and by reason of the size of the property constituting the Owners Corporation. There was also a history of dysfunctionality and compulsory management to be taken into account. Questions of law arose having regard to the provisions of s 236 of the Strata Act and the requirement for a meeting under s 237(6).

### **Appellants' submissions**

11 The Appellants' submission is that both sides had an arguable case and that special circumstances cannot be established. The Appellants' submissions deal with the provisions of s 60(3) and submit that none of those provisions demonstrate the existence of special circumstances in this case. Further, the Appellants submit that the Second Respondent (the Owners Corporation) did not have to involve itself in the proceedings or spend costs.

### **Consideration**

12 We have not outlined in the above paragraphs the full extent of the submissions of the parties, because we are of the opinion that the question of costs can be resolved entirely by reference to s 60(3)(d) which refers to the nature and complexity of the proceedings. Our reasons for this view are set out in the following paragraphs.

13 The general position with respect to disputes in the Tribunal is contained in s 60(1) which provides that each party to proceedings in the Tribunal is to pay the party's own costs. However, as the submissions record the Tribunal has power to make an award for costs "only if it is satisfied that there are special circumstances warranting an award of costs" (s 60(2)). In our view in this appeal there are set special circumstances warranting an award of costs by reason of the nature and complexity of the proceedings.

14 The appeal concerned the appointment of a compulsory manager to the Second Respondent in relatively unusual circumstances. There had been a

long history of prior appointments of compulsory managers and the case for the reappointment of the strata manager was based upon the continuing need to complete its program of restoring the affairs of the Second Respondent in the light of dysfunctionality occurring prior to the appointment of the existing strata manager. Further there had been no meeting as required by s 237(7). The nature of the of the proceedings could, in our opinion, be fairly described as out of the ordinary because of the size, extent and complexity of the affairs of the Owners Corporation and the potential significant consequences, not only to the active parties, but also to all other lot owners, if the orders made at first instance were set aside.

- 15 In short, in our view, the appeal involved significant complexity as well as having substantial consequences to the parties. The provisions of s 60(2) are engaged because we find that there are special circumstances warranting an award of costs having regard to the nature and complexity of the proceedings.
- 16 There were other submissions made concerning the conduct of the Appellants and arguments to the effect that some of the grounds of appeal were untenable. There is no need for us to express any view with respect to those other grounds.
- 17 It is important to bear in mind that costs are awarded to indemnify a successful party not by way of punishment of an unsuccessful party but to indemnify the successful party to some extent against their outlays on costs (see *Oshlack v Richmond River Council* [1998] HCA 11). It is unnecessary to attribute any criticism to the Appellants in the conduct of this appeal. Rather, it is our view that both the First and Second Respondents were entitled, by reason of the nature and complexity of the appeal, to engage legal representation and that, given our finding of the existence of special circumstances warranting an award of costs, they should be compensated for those costs.
- 18 The Appellants made some criticism of the Second Respondent for being involved in the appeal. In our view the Second Respondent was entitled to be represented and to be heard on the appeal. Its obligations to lot owners were more extensive than the obligations (if any) applicable to the First Respondent.

## **ORDERS**

19 For the above reasons, we make the following orders:

- (1) A hearing on the question of costs of the appeal is dispensed with.
- (2) The Appellants are to pay the costs of the First and Second Respondents incurred in the appeal in a sum as agreed or in the absence of agreement as assessed.

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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

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