



Civil and Administrative Tribunal
New South Wales

Case Name: J's Absolute Services Pty Ltd v The Owners – Strata Plan No 67246

Medium Neutral Citation: [2021] NSWCATAP 315

Hearing Date(s): 12 August 2021

Date of Orders: 12 October 2021

Decision Date: 12 October 2021

Jurisdiction: Appeal Panel

Before: K Ransome, Senior Member
AR Boxall, Senior Member

Decision: (1) Appeal allowed.

(2) Order 2 made on 19 May 2021 in matter SC 20/42682 is set aside.

(3) Each party is to pay their own costs in matter SC 20/42682 and of the appeal.

Catchwords: COSTS — Party/Party — exceptions to general rule that costs follow the event — denial of procedural fairness - whether special circumstances warranting an award of costs

Legislation Cited: Civil and Administrative Tribunal Act 2013 No 2 ss 4, 36, 45, 60, 80, Schedule 4, clause 12
Civil and Administrative Tribunal Rules 2014 rules 3, 6, 25, 38, 38A
Strata Schemes Management Act 2015

Cases Cited: Bauskis v Liew [2013] NSWCA 297
Cominos v Di Rico [2016] NSWCATP 5
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94

Hamod v State of New South Wales [2011] NSWCA
367

Megerditchian v Kurmond Homes Pty Ltd [2014]
NSWCATP 120

Prendergast v Western Murray Irrigation Ltd [2014]
NSWCATAP 69

Stratton Finance Pty Limited v Webb [2014] FCAFC
110

Category: Costs

Parties: Appellant: J's Absolute Services Pty Ltd
Respondent: The Owners – Strata Plan No 67246

Representation: Solicitors:
R Li (Appellant)
G Lewis (Respondent)

File Number(s): 2021/00172996

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 19 May 2021

Before: G Meadows, Senior Member

File Number(s): SC 20/42682

REASONS FOR DECISION

Introduction and preliminary matters

1 This is an appeal from a decision made on 19 May 2021 in the Tribunal's Consumer and Commercial Division which:

- (1) Dismissed an application by the Appellant under the *Strata Schemes Management Act 2015* for certain orders against the Respondent concerning the interpretation of a by-law applicable to Strata Plan No 67246 (the **Strata Plan**), which relates to a building in Sussex Street, Sydney (the **Building**); and

- (2) Ordered that the Appellant pay the Respondent's costs of and incidental to that application, such costs to be agreed or assessed.
- 2 The Appellant does not appeal against the substantive decision dismissing its application. Rather, it appeals against the award of costs only, which for convenience these reasons will refer to as the **costs decision**.
- 3 Section 4(1) of the *Civil and Administrative Tribunal Act 2013* (the **NCAT Act**) defines an "ancillary decision" as follows:

ancillary decision of the Tribunal means a decision made by the Tribunal under legislation (other than an interlocutory decision of the Tribunal) that is preliminary to, or consequential on, a decision determining proceedings, including—

- (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter, and
- (b) a decision concerning the awarding of costs in proceedings.

The costs decision was self-evidently one made by the Tribunal that was consequential upon the substantive decision which determined the proceedings and in any event clearly falls within paragraph (b) of the definition of "ancillary decision". It is thus an ancillary decision within the meaning of the NCAT Act.

- 4 Section 80(2) of the NCAT Act provides as follows:

Any internal appeal may be made—

- (a) in the case of an interlocutory decision of the Tribunal at first instance— with the leave of the Appeal Panel, and
- (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

What follows is that since the costs decision is an ancillary decision of the Tribunal it is one against which, subject to Schedule 4 of the NCAT Act, an internal appeal may be made as of right on a question of law or otherwise with the leave of the Appeal Panel.

- 5 Clause 12(1) of Schedule 4 of the NCAT Act limits the circumstances in which the Appeal Panel may give leave for an appeal under section 80(2)(b), if the Division of the Tribunal which made the original decision is, as is the case here, its Consumer and Commercial Division. Relevantly, that clause provides as follows:

An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied 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).

Where, however, the relevant appeal concerns a question of law, those restrictions are not relevant. These reasons will return in more detail below to the question whether the appeal is one in respect of which leave is required, and if so whether the conditions in clause 12(1) are met.

- 6 Rule 25(4) of the *Civil and Administrative Tribunal Rules 2014* (the **NCAT Rules**) provides relevantly as follows:

Unless the Tribunal grants an extension under section 41 of the Act, an external or internal appeal must be lodged—

- (a) in the case where the enabling legislation specifies the period within which the appeal is to be made—within the period specified, or
- (b) in the case of an internal appeal against a decision made in residential proceedings—within 14 days from the day on which the appellant was notified of the decision or given reasons for the decision (whichever is the later), or
- (c) in any other case—within 28 days from the day on which the appellant was notified of the decision to be appealed or given reasons for the decision (whichever is the later).

- 7 Nothing in the *Strata Schemes Management Act 2015* makes any provision as to the time within which internal appeals from decisions made concerning that act must be made. A decision concerning that act is not a “*residential proceeding*” as that expression is defined in Rule 3(1) of the NCAT Rules. The relevant period for lodging an appeal was therefore 28 days.
- 8 The decision under appeal was made on 19 May 2021. The appeal was received by the Tribunal on 16 June 2021. Oral reasons were provided by the Presiding Member when he gave his decision, and so the period of 28 days commenced, in accordance with the combined operation of NCAT Rules 25(4) and 6(2), on 20 May 2021 and expired on 16 June 2021. The appeal was, therefore, made within time.

The decision below

- 9 Substantively, the dispute concerned the interpretation of by-law 28(6) of the Strata Plan's by-laws:
- (1) This provided relevantly that the caretaker of the Building “... *may, at the caretaker's expense, erect or procure the erection of all reasonable signs in or about the common property for the purpose of promoting the letting, property management and sales service of the caretaker, subject to the consent of the Owners' Corporation which will not be unreasonably withheld*”;
 - (2) The Appellant was the caretaker of the Building;
 - (3) The Appellant sought consent to the erection within the Building of signs promoting the services of members of a wider group of companies of which the Appellant was a member;
 - (4) The Respondent did not consent to the proposal, for reasons which included that the proposed signs promoted the services of persons other than the Appellant. Rather:
 - (a) It resolved on 24 June 2020 to invite the Appellant to make a commercial proposal to the Respondent for its consideration concerning a commercial arrangement, and
 - (b) on or about 7 July 2020 it wrote to the Appellant requiring that it cease displaying advertising in the Building for its associated company's services.
 - (5) An unsuccessful mediation ensued, consequent upon which on 24 September 2020 the Respondent again requested the submission of a commercial proposal.
 - (6) On 15 October 2020, the Appellant commenced proceedings before the Tribunal, seeking an order from the Tribunal to the effect that the erection of the signs came within the regime set out in by-law 28(6).
 - (7) On 14 December 2020, the Respondent (through its solicitors) wrote to the Appellant:
 - (a) Pointing out what it considered to be the weakness of the Appellant's arguments;
 - (b) Inviting the submission of a commercial proposal for displaying advertising;
 - (c) Offering to settle the proceedings, on the basis of their withdrawal by the Appellant and without seeking a costs order against the Appellant; and
 - (d) Including the following paragraph:

“In the event that the above offer is not accepted, we intend to rely on this letter in support of an application that you pay our client's legal costs of the proceedings as agreed or assessed”.

- (8) On 1 February 2021, the Respondent (through its solicitors) again wrote to the Appellant:
- (a) Setting out the broad parameters of a commercial arrangement in relation to the display of advertising which would, in principle, be acceptable to the Respondent; and
 - (b) Including the following paragraph:
“In the event that the above framework is not agreed, our client intends to rely on this letter in support of an application that the applicant pay our client’s legal costs of the proceedings as agreed or assessed”.
- 10 The matter proceeded to a hearing on 19 May 2021, when the Tribunal dismissed the application. It did so on the basis that the by-law only contemplated the erection of signs concerning the services of the caretaker, not those offered by related corporations to the caretaker. In doing so, the Tribunal also decided to award costs against the Appellant, taking the view that in the context of the proceedings special circumstances existed warranting such an award.
- 11 There are no written reasons. There is, however, a transcript of the hearing, which reveals the course of events concerning the application for (and award of) costs and includes the Presiding Member’s oral *ex tempore* reasons.
- 12 The question of costs arose relatively late in the hearing, after evidence and submissions on the substantive issue had been completed, but before the Tribunal gave its decision. The solicitor representing the Respondent took the opportunity presented by the completion of substantive submissions to foreshadow that he would seek costs if successful: Transcript, paragraph [90]. The Presiding Member noted this and then proceeded at paragraph [97] to give his decision dismissing the substantive claim and his *ex tempore* reasons for doing so.
- 13 He then invited the Respondent’s solicitor to make his costs submissions. These are found at paragraph [98], and are in summary as follows:
- (1) The Respondent sought costs on the ordinary basis until 14 December 2020, and thereafter on an indemnity basis.
 - (2) The first reason for doing so was that the Appellant failed to serve Points of Claim as directed by the Tribunal on 8 December 2020.
 - (3) The second was that by its letter of 14 December 2020 the Respondent alerted the Appellant to the inadequacies of its case and made an offer

to settle the action by allowing the Appellant to withdraw its claim without any order as to costs, but this was not accepted by the Appellant.

- 14 The Presiding Member at paragraph [99] then invited the Appellant's representative to reply on costs. His reply is found in paragraph [100]. According to the transcript some parts of it were inaudible, but:
- (1) Initially he replies concerning the Points of Claim; his comments here are inaudible;
 - (2) He then observes as follows:

“... the second thing I'm doing self-defence and so the NCAT is the place [inaudible 00:52:55] and the dispute resolution resulting place, so the Owner's Corporation has engaged lawyers so that's pretty unfair to the ordinary person”; and
 - (3) He then comments on certain financial aspects of the offer made by the Respondents in their letter of 1 February 2021.
- 15 The Respondent's solicitor then reiterated at paragraph [103] the essence of his client's position:
- “At the 14th December it was open to the applicant to withdraw the application without consequence, that offer was rejected and we rely on it on the question of costs”.
- 16 The Presiding Member sought at [104] any response which the Appellant's representative had. This, at [105], was as follows:
- “It's what I mentioned. I'm the ordinary person so I have no clue about the law, I just try my best and do self-defence myself. So any mistake I have made in the past is minor, it's not a key point for the costing”,
- 17 The Presiding Member then gave his decision on costs and his reasons, at paragraph [106]:
- (1) The Member recognises that the starting point in the Tribunal is that each party bears its own costs, but that there are various exceptions to that position;
 - (2) He identifies the relevant exception as being that which allows costs to be awarded where special circumstances apply sufficient to warrant an award of costs;
 - (3) He then summarises the approach typically adopted by the Tribunal on the question, which is that “special circumstances” for these purposes are circumstances that are out of the ordinary, but not necessarily ones that are exceptional or extraordinary: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATP 120;

- (4) He notes the frequently asymmetric nature of strata disputes, where one party is typically a body corporate, the Owner's Corporation, which as a legal construct will necessarily require representation in some form by a natural person, while the others are more often natural persons who do not;
- (5) He observes that the dispute is not a straightforward argument about the reasonableness or otherwise of an Owner Corporation's decision, but rather raises a complex legal argument in respect of which legal representation is appropriate;
- (6) He observes that the Appellant's argument was clearly misconceived, since the relevant by-law did not in its terms contemplate advertising by persons other than the caretaker itself;
- (7) He notes that the Respondent pointed this out to the Appellant and offered to settle the case without an order for costs if the Appellant withdrew its application;
- (8) He further notes that the Appellant did not do so, nor did it seek legal advice in relation to its claim or this offer; the Member observes here as follows:

"It is implicit in such an application that if you don't agree, and if it's not reasonable to disagree, then the Owner's Corporation will bring an application for costs, I think that's what has occurred on this occasion, and I believe that Mr Yang [the Appellant's representative] could easily have obtained legal advice in relation to his application"; and
- (9) Finally, he concludes that together, these considerations amount to special circumstances warranting an award of costs.

The Appellant's and the Respondent's written submissions

18 The Appellant and the Respondent both provided lengthy and detailed written submissions on the appeal. We found these to be of considerable assistance in our consideration of the appeal but, in the interests of brevity will not set out a summary of them. Suffice it to say that our views set out below were reached after consideration of those submissions.

The Notices of Appeal

19 The initial Notice of Appeal appears originally to have been prepared by the Appellant itself, perhaps with some limited legal input. However, the Appellant's essential arguments appear to be summarised in Section 6A, in relation to the question whether (and if so on what basis) leave to appeal is sought.

20 The Appellant stated as follows:

"There was an error of law as special circumstances warranting an award of costs did not exist so it was not open to the Member to award costs. However,

if the Tribunal considers that there was an error of fact, or mixed fact and law, then leave for appeal should be granted as a costs award is the exception rather than the rule and that it would be unjust to allow the awarding of costs without review because a) the applicant was self-represented, b) the appeal is on a narrow issue which can be dealt with by the Tribunal expeditiously, c) when weighed against the potential injustice on the applicant the appeal should be allowed”.

- 21 From this, two lines of argument emerge: the first is that the Tribunal incorrectly identified the existence of special circumstances, and the second is that in the context of the costs application and decision, the Appellant was placed at an unfair disadvantage by having to argue a costs issue without legal representation.
- 22 The first theme was taken up at length in the Appellant’s Amended Notice of Appeal dated 7 July 2021. The second was not. It re-emerged, however, in the Appellant’s detailed written submissions lodged on 16 July 2021, where at paragraph [11] the Appellant’s now lawyers observe as follows:

“The Appellant further submits that the Member did not afford the Appellant procedural fairness in allowing for a costs application which the Appellant was not made aware of and did not prepare for, and subsequently making orders based on the aforementioned costs application”.

- 23 The Amended Notice of Appeal also claims that:
- (1) Whether special circumstances existed for purposes of section 60(1) was a question of law; and
 - (2) The Tribunal’s decision to award costs against the Appellant on the basis of special circumstances was erroneous.

Is leave required?

- 24 As noted in [4] above, leave to appeal is not required if the appeal concerns a question of law. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, the Appeal Panel set out at [13] a non-exclusive list of questions of law:
- (1) Whether there has been a failure to provide proper reasons;
 - (2) Whether the Tribunal identified the wrong issue or asked the wrong question;
 - (3) Whether a wrong principle of law had been applied;
 - (4) Whether there was a failure to afford procedural fairness;
 - (5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

- (6) Whether the Tribunal took into account an irrelevant consideration;
 - (7) Whether there was no evidence to support a finding of fact; and
 - (8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.
- 25 The first iteration of the Notice of Appeal (although strangely not the second, as the Respondent points out in its submissions) raises, and the Appellant's written submissions dated on or about 16 July 2021 clearly express, concerns that the hearing at first instance, at least to the extent that it dealt with questions of costs, failed to afford the Appellant an appropriate measure of procedural fairness in relation to the application for costs.
- 26 The Respondent was manifestly aware of this theme in the Appellant's claims, since its written submissions dated 2 August 2021 at paragraphs [58] to [64] address the issue in some depth. We are not, therefore, of the view that by treating the Appellant's grounds of appeal as including a claim of error of law based on lack of procedural fairness we allow the appeal to stray into areas of which the Respondent lacked notice or which it was not afforded the opportunity to address.
- 27 The Tribunal's own procedural guiding principles set out in section 36(1) of the NCAT Act are "*to facilitate the just, quick and cheap resolution of the real issues in the proceedings*". These clearly require it, when appropriate, to temper the procedural wind to the shorn lamb.
- 28 In the present case, we are satisfied consistent with these principles that underlying the changing (and at times less than ideally expressed) notices of appeal is a continuing allegation that the Appellant was not afforded procedural fairness at first instance in relation to the costs application.
- 29 The appeal therefore may be made without leave on this ground.

Was the Appellant afforded procedural fairness?

- 30 That leads directly to the substantive question: was the Appellant afforded procedural fairness in relation to the costs application?
- 31 The transcript, as far as it concerns the question of costs, reveals participants coming from two distinct linguistic and conceptual universes. The first universe is that of lawyers, to whom costs orders, special circumstances and

Calderbank offers are all familiar concepts, and the significance inherent in the words “... we intend to rely on this letter in support of an application that you pay our client’s legal costs...” is self-evident.

- 32 The second is that of the non-legally represented. This group is unlikely to be familiar with section 60 of the NCAT Act or Calderbank offers. Equally, it is unlikely to be familiar with the Federal Court’s decision in *Stratton Finance Pty Limited v Webb* [2014] FCAFC 110, which at [80] counsels prudence in importing concepts such as Calderbank offers into no-costs jurisdictions. Its members are, moreover, encouraged by the Tribunal’s **Introducing NCAT** factsheet, to participate in proceedings before the Tribunal without representation and in the expectation that they will not be liable for costs.

Relevantly, the factsheet says:

In the high volume jurisdictions of NCAT, parties are encouraged to represent themselves in proceedings, although representation may be permitted with leave of the Tribunal

and:

Each party generally pays their own costs.

The Consumer and Commercial Division’s own published guidelines on costs unsurprisingly convey a similar message, albeit with more detail as to the circumstances in which the general rule can be reversed.

- 33 The Tribunal at first instance, when presented with the Respondent’s costs application, had several options open to it:
- (1) First, it could adjourn the application for several weeks, to allow the Appellant the opportunity to seek legal advice (and, if it so wished, legal representation) concerning the application and its consequences;
 - (2) Secondly, it could provide the Appellant’s representative with a brief and objective precis of the issues which the representative would need to consider in responding to the costs application, while allowing the representative an appropriate adjournment to consider his reply in the light of this guidance; or
 - (3) Thirdly, it could require the Appellant’s representative to respond immediately to the application without adjournment, an opportunity to prepare or guidance.
- 34 In the event, the Tribunal opted for the third approach. In doing so, the Member referred, as noted in [17(8)] above, to it being implicit in the correspondence

from the Respondent's lawyers that a costs application might be made. The consequence, in the Member's view, was that the Appellant was the author of its own embarrassment by failing to take the hint and instruct lawyers to advise on costs issues. This was in the context of proceedings before a Tribunal which provides the public written guidance in [32] above to parties.

- 35 That the Appellant's representative was aware of the Tribunal's general position on representation and costs can reasonably be inferred from paragraphs [100] and [104] of the transcript, as does his surprise at being expected to mount an argument on such an issue.
- 36 That the Tribunal has a duty to ensure fair treatment for unrepresented parties is clear, as an earlier Appeal Panel's decision in *Cominos v Di Rico* [2016] NSWCATP 5 indicates at [12] to [13]:

[12] The Appeal Panel must give effect to the *guiding principle* when exercising functions under the CAT Act, which is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). This is reinforced by s 38(4) which provides that the Tribunal is required to act with "as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."

[13] It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal. The Appeal Panel has taken such an approach in a number of cases, for instance, *Khan v Kang* [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. However, this must be balanced against the obligation to act fairly and impartially (*Bauskis v Liew* [2013] NSWCA 297 at [68] citing *Hamod v State of New South Wales* [2011] NSWCA 367 at [309]-[316]). Relevantly, s 38(2) provides that that Tribunal "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice."

- 37 The decision of the Court of Appeal in *Hamod v State of New South Wales* [2011] NSWCA 367, as approved in *Bauskis v Liew* [2013] NSWCA 297 at [66] to [70], includes amongst this duty an obligation "... *in the case of a self-represented litigant* "... *to give sufficient information as to the practice and procedure of the Court to ensure that there is a fair trial to both parties ...*" without, variously, failing "*to ensure a fair trial for all parties*" (at [68]), "*advising the unrepresented party as to how his or her rights should be exercised*" (at

[69]) or (at [70]) ceasing to “... *remain at all times the impartial adjudicator of the matter*”.

38 We consider that, in proceeding as it did to hear and determine the Respondent’s costs application without affording the Appellant either:

- (1) Objective guidance as to the legal issues at stake, and a reasonable adjournment in which to consider them; or
- (2) An opportunity to seek legal advice and representation on the question of costs,

the Tribunal did not afford the Appellant the degree or quality of procedural fairness which the decisions referred to above require.

39 We therefore allow the appeal and set aside the order that the Appellant pay the Respondent’s costs as assessed or agreed.

Disposition of the appeal

40 Section 81(1)(e) allows the Appeal Panel to remit the matter to the Tribunal for further hearing. Alternatively, rather than remitting the determination of the matter to the Tribunal, the Appeal Panel may decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing (s 80(3) NCAT Act).

41 We have decided to deal with the application by way of a new hearing, essentially because we consider that the grounds for the Tribunal exercising a discretion in favour of a costs order are unconvincing, and that the delay, cost and disruption involved in further revisiting the issue do not serve either:

- (1) the Tribunal’s guiding principles set out in section 36(1) of the NCAT Act, being “*to facilitate the just, quick and cheap resolution of the real issues in the proceedings*”; or
- (2) the gloss on those principles provided in section 36(4) of the NCAT Act, which introduces a notion of proportionality, determined by reference to the importance and complexity of the subject matter of the proceedings, into the application of those principles:

(4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.

42 Furthermore, there is ample evidence before us upon which we can make a decision without the need for further evidence from the parties.

43 The costs rules set out in section 60 of the NCAT Act exemplify the balancing required of the Tribunal, between the potentially conflicting objectives of, on the one hand, fairness of outcome and, on the other, access to justice. The concept of special circumstances in section 60(1) is the primary device which allows that balance to be struck in relation to costs, and this is facilitated by section 60(3) of the NCAT Act. This section provides as follows:

(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.

44 Three considerations in this list are possibly present:

- (1) The Appellant's claims were obviously misconceived, although that is hardly unusual in claims by non-legally represented applicants before the Tribunal; rather, it is a fact of life in the Tribunal, and in the context of the present claim does not in the Appeal Panel's view alone support a finding of special circumstances;
- (2) The Member at first instance considered that the dispute was not straightforward, but rather raised a complex legal argument in respect of which legal representation is appropriate; with respect we disagree - the issue was dispatched by means of an entirely straightforward application of elementary principles of corporate personality which raised no complex issues; and
- (3) By failing to file its Points of Claim, the Appellant failed to comply with a direction of the Tribunal and thus disadvantaged the Respondent; we agree, however, with the Appellant's observations to the effect that:
 - (a) correspondence between the Appellant and the Respondent in fact outlined the elements of the Appellant's claim, and allowed the Respondent ample opportunity to address them; and

- (b) the fact of this correspondence taking neither the form nor the description of “Points of Claim” was, in view of (a), not a reasonable basis on which to find special circumstances.

45 If the Tribunal is satisfied that special circumstances exist, it has a discretion to award costs. It is not obliged to do so. As the Appeal Panel observed in *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48]:

Further, the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs. Each situation must, of course, be assessed on a case by case basis to see whether or not special circumstances exist so as to warrant the award of costs.

It does not follow that a costs order should be made because some factors are made out, and the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs should not be departed from lightly.

46 In the present case, we are not satisfied that there is a sufficient basis to make a finding of special circumstances, and accordingly decide that each party should bear its own costs of the proceedings.

Costs of the appeal

47 The issue of costs of the appeal was raised in submissions and was the subject of submissions at the hearing of the appeal. The Appellant did not expressly seek its costs of the appeal but opposed the awarding of costs to the Respondent, although we note did make brief submissions to the effect that the conduct of the Respondent in the appeal amounted to special circumstances by which we infer that the Appellant sought its costs of the appeal if successful.

48 Rule 38A of the NCAT Rules provides that the Appeal Panel for an internal appeal must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal. The applicable provision is therefore s 60 of the NCAT Act and we must be satisfied that there are special circumstances warranting an award of costs.

49 After consideration of the matters set out above concerning whether there are special circumstances warranting an award of costs, we do not find any such

special circumstances and order that each party pay their own costs of the appeal.

Orders

- (1) Appeal allowed.
- (2) Order 2 made on 19 May 2021 in matter SC 20/42682 is set aside.
- (3) Each party is to pay their own costs in matter SC 20/42682 and of the appeal.

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

Amendments

12 October 2021 - Appellant's Representative - Name amended

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.