Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 76700 v Trentelman (No 2)
Medium Neutral Citation:	[2021] NSWCATAP 268
Hearing Date(s):	On the papers
Date of Orders:	10 September 2021
Decision Date:	10 September 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J McAteer, Senior Member
Decision:	(1) A hearing on costs is dispensed with. (2) The appellant is to pay the respondent's costs of the application to extend time to appeal as agreed or assessed. (3) Pursuant to s 90 of the Strata Schemes Management Act 2015 (NSW) such costs must only be paid from contributions levied in respect of lots other than the respondent's lot.
Catchwords:	COSTS - no question of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 60 Civil and Administrative Tribunal Rules 2014 (NSW), rr 38, 38A Strata Schemes Management Act 2015 (NSW), s 90
Cases Cited:	Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 GPM Constructions Pty Limited v Baker (No 2) [2018] NSWCATAP 163 Lee v The Owners Strata Plan No. 56120 (2021) NSWCATCD 8 Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2) [2011] NSWCA 344

	The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256 The Owners – Strata Plan No 76700 v Trentelman [2021] NSWCATAP 205 Thompson v Chapman [2016] NSWCATAP 6
Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 76700 (Appellant) Natalia Trentelman (Respondent)
Representation:	Counsel: T Davie (Respondent) Solicitors: I A McNight (Appellant) Bannermans Lawyers (Respondent)
File Number(s):	2021/00108268
Publication Restriction:	None cited
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	11 March 2019
Before:	P Boyce, Senior Member
File Number(s):	SC 18/32379

REASONS FOR DECISION

1 This is an application for costs of the appellant's unsuccessful application for an extension of time to appeal from a costs order of the Tribunal.

2 Both parties consent to an order dispensing with an oral hearing of the costs application. We are satisfied that the issues for determination can be adequately determined in the absence of the parties by considering their

written submissions and other documents lodged provided to the us, and so will order that an oral hearing be dispensed with.

3 Our reasons for refusing the application are set out in *The Owners – Strata Plan No 76700 v Trentelman* [2021] NSWCATAP 205. This decision on costs assumes familiarity with those reasons.

4 As explained in *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 an Appeal Panel may award costs in appeal proceedings even in the absence of special circumstances if the amount claimed or in dispute on the appeal is more than $30,000.

5 The costs the subject of the costs order which was the subject of the appeal had been assessed in the sum of $87,786.50 at some time prior to 5 November 2020.

6 The respondent submitted that had the application for an extension of time been granted, and the appeal upheld, the appellant was seeking relief from any obligation to pay any of that sum.

7 It follows that, the respondent submitted, the amount claimed or in dispute in the application was greater than $30,000 and thus, despite section 60 of the *Civil and Administrative Tribunal Act 2013* (NSW), we may and should award costs in proceedings even in the absence of special circumstances per rr 38 and 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) (the "NCAT Rules") as explained in *Allen*.

8 The appellant submitted that the respondent's submissions did not represent the correct approach to be adopted with respect to r 38. The appellant submitted that the appeal (should we have ordered time to be extended) involved the integrity of the costs order made by the Tribunal, the appeal did not involve the determination per se of whether the costs amount was owed or otherwise as that had already been determined by the costs order. The appellant cited *Lee v The Owners Strata Plan No. 56120* (2021) NSWCATCD 8 in support of this submission.

9 In *Lee* the applicants sought an order pursuant to s 237 of the *Strata Schemes Management Act 2015* (NSW) for the appointment by the Tribunal of a strata

managing agent. The Tribunal was persuaded that such an order should be made.

10 The successful applicants then applied for costs of the application.

11 Citing *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256, and in particular reliance on [5] of the reasons in that case, the Tribunal held that r 38(2)(b) of the NCAT Rules did not apply and thus the applicants needed to establish special circumstances warranting an award of costs.

12 In *Malachite* the Appeal Panel said, at [5]:

> "5 Rule 38(2)(b) does not apply to proceedings:
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> (1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or
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> (2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:
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> (a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or
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> (b) the relief sought does not depend on there being a finding that a specific amount of money is owed."

13 In *Lee* the Tribunal held (at [52]) that as the application before it only sought an order that *could* result in the payment of more than $30,000, and did not depend upon a finding that such an amount *was* owed, the case fell within the principle set out in *Malachite* at [5] (which we have quoted above) with the result that costs fell to be determined by s 60 of the NCAT Act rather than r 38(2)(b).

14 We disagree with the appellant's submission that its appeal (had time to appeal been extended) did not involve the determination of whether the costs amount ($87,786.50) was owed.

15 In the appellant's Notice of Appeal, the appellant set out the orders it said we, the Appeal Panel, should make (assuming the appeal was upheld). The second order sought was that the costs order the subject of the appeal be

"quashed" and, in lieu thereof, we order that each party pay its and her own costs of the proceedings before the Tribunal.

16 Thus, in a very direct way, the appellant was seeking relief from being required to pay the respondent $87,786.50 and, in that way, the amount in dispute in the appeal was greater than $30,000. Unlike in Lee, such an order *would* have affected the amount owed, rather than *could* have affected the amount owed.

17 As was said in *Malachite* at [90], in a passage which applies in the case before us:

> "In cases where an amount is claimed by an applicant, an award of money may be made. In cases where an applicant seeks relief from payment, no amount is claimed as an order for payment is not sought. *Rather, an order is made for relief from payment. However, "the amount in dispute" is the specific amount from which relief from payment is sought*, there being a dispute about whether the applicant for relief is liable to pay the particular sum or should otherwise be relieved from the obligation to pay. In each case, "the amount" is identified and, where it is greater than $30,000, r 38(2)(b) is engaged."
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> (Our emphasis).

18 Translated to this case, the principal order sought by the appellant was an order which would have the effect of relieving the appellant from any obligation to pay the specific sum of $87,786.50. It follows that the amount in dispute on the appeal was that sum. Thus, the operation of s 60 is displaced in this case and the respondent is not required to establish that special circumstances exist warranting an award of costs in its favour.

19 The general principles which apply in these circumstances are general law principles relaying to costs, the most relevant being those summarised in *Thompson v Chapman* [2016] NSWCATAP 6 in the following passage:

> "69 The starting point in exercising such discretion is that the "usual order for costs" is that a successful party should be entitled to an order for costs in their favour: see *Latoudis v Casey* [1990] 170 CLR 534 per Mason CJ at 554 and *Oshlack v Richmond River Council* per McHugh J at 97.
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> 70 The reason for such an order is that it is appropriate for the party who incurred costs caused by the other party in litigation to be reimbursed. Further, an award of costs is by way of an indemnity to the successful party and not as punishment of the unsuccessful party: see *Latoudis v Casey* per Mason CJ at 543 and McHugh J at 567 and in *Oshlack v Richmond River Council* per Brennan CJ at 75.
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> 71 Where there is a general discretion for costs there is no absolute rule that, absent disentitling conduct, a successful party is to be compensated by the unsuccessful party nor is there any rule that a successful party might not be

ordered to bear the costs of an unsuccessful party: see *Oshlack v Richmond River Council* per Gaudron and Gummo JJ at 88 and Kirby J at 121 – 123.

72 The factors to be considered in awarding costs in a particular case are not to be confined as to do so would constrain the general discretion. However it is clear from the authorities that factors that might influence whether the usual order for costs should apply and, if so, to what extent include:

(1) Whether, by reason of the relative success of the parties on different issues and the time taken to determine those that an order for costs based on issues should be made: see for example *Bostick Australia Pty Ltd v Liddiard (No 2)* [2009] NSWSCA 304; and

(2) Whether, by reason of the nature of the proceedings the usual rule should otherwise be displaced in whole or in part: see *Oshlack v Richmond River Council* per Gaudron and Gummo JJ at 41 – 44."

20 We note that in *Lee* the Tribunal was succinct in stating the more relevant principles as follows:

"49 When rule 38 applies there is a general discretion to award costs and it is well established, by decisions such as *News v Cotes* [2019] NSWCATAP 186, *Bonita v Shen* [2016] NSWCATAP 159 and *Thompson v Chapman* [2016] NSWCATAP 6, that: (1) the starting point is that the usual order for costs should be in favour of the successful party, (2) the award is to compensate the successful party for the costs incurred in the proceedings, and (3) departure from the usual order is permissible if the circumstances favour that course of action.

50 Simply stated, when rule 38 applies, the usual order is that costs follow the event unless there is disentitling behaviour by the successful party: *Latoudis v Casey* [1990] 170 CLR 534, *Oshlak v Richmond River Council* [1998] HCA 11."

21 The appellant submitted that the following circumstances permitted departure from the starting point that the usual order for costs should be in favour of the successful party:

"15 It was open to the Respondent to take separate proceedings to enforce the order, a step which she has taken (see *Trentelman v The Owners - Strata Plan No. 76700* (2021) NSWCATCD dated 11 June 2021).

16. The decision to award costs is a matter of discretion (see generally *LMA Contractors Limited v Changizi* (2017) NSWCA TAP 145, citing *Thompson v Chapman* (2016) NSWCATAP 6).

17. The Appellant lodged the appeal upon conclusion of the Supreme Court proceedings referred to in paragraph 25(1) and (2).

18. It did so, in effect, on behalf of the owners in the strata scheme pursuant to section 254 of the *Strata Schemes Management Act 2015* (the "Act").

19. In the Appeal Panel's decision in *Trentelman v The Owners - Strata Plan No. 76700* (2021) NSWCA TAP 222 it was observed that the owners in the strata scheme were not joined (and therefore playing no part) in the original

proceedings involving the application for an order for a reallocation of unit entitlements (being the genesis of the subject costs order).

20. Owners will ultimately bear the impost of the costs order.

21. Their lack of participation in crucial events involving the strata scheme was thoroughly canvassed in the Supreme Court proceedings (see paragraph 17 above).

22. The impact of the costs order will be borne by the owners (see the nature of the relationship between owners and an owners corporation in the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) HCA 36). This will be by virtue of section 90 of the Act.

23. It is submitted that the totality of the circumstances subsisting in exercising a discretion to award costs."

22 In our view none of those circumstances warrant a departure from the usual order that costs should be in favour of the successful party i.e. the respondent in this case.

23 The respondent took the steps she was entitled to take to assess her costs and enforce the Tribunal's costs order. She incurred the costs and expense of doing so, we note, in the absence of any appeal by the appellant from the Tribunal's costs order. Why that amounted to disentitling conduct was not explained.

24 As we found in our principal decision, the appellant had not established any justification for not lodging its appeal within time, and was, in effect, not justified in delaying doing so until the conclusion of the Supreme Court proceedings. The fact that the appellant lodged her appeal without justification after the conclusion of the Supreme Court proceedings is not a factor favouring the appellant.

25 The fact that the appellant, being an owners corporation, was bringing an appeal on behalf of its unit owners is not to the point. The appellant is a special type of body corporate [to which the *Corporations Act 2001* (Cth) does not apply by reason of s 8(2) of the *Strata Schemes Management Act 2015* (NSW)] which is a legal entity able to sue and be sued. It is controlled by a strata committee whose office holders are elected. Decisions by the strata committee are decisions of the owners corporation. Its actions are therefore determined by decisions taken by the strata committee and there is no warrant to deprive

those actions of the same consequences as the actions taken by boards of directors of the usual type of corporation or actions taken by individuals.

26 The fact that owners corporations are ultimately funded by unit holders does alter the fact that owners corporations act for the benefit of those unit holders and act on their behalf. Thus, where the owners corporation attracts a liability for costs in litigation there is no warrant to absolve unit holders from funding that liability.

27 To suggest otherwise would have the consequence that owners corporations such as the appellant could commence whatever litigation they wished without fear of any adverse costs orders, whilst at the same time being able to seek costs orders against their opponent if that opponent was a corporation or individual. Such an unjust situation only needs to be stated to be rejected.

28 Therefore, we do not accept the appellant's submissions and see no reason why we should depart from the usual order that costs should be in favour of the successful party.

29 We note the respondent, in its alternative submissions, relied on certain factors warranting an award of costs should s 60 apply, but we need not decide that matter.

30 The appellant also submitted that it should be awarded indemnity costs of the application to extend time from 10 June 2021 because it made an offer on that date to the appellant and the result of the appeal for the respondent was better than the terms of the offer.

31 There is no dispute that we have power to make an indemnity costs order if such is warranted.

32 The general principles applicable were set out by the Appeal Panel in *GPM Constructions Pty Limited v Baker (No 2)* [2018] NSWCATAP 163 as follows:

> "14 Whether the failure to accept an offer of settlement enlivens the jurisdiction to award indemnity costs or not was recently considered by the Appeal Panel in *Mison v Bennett Property (NSW) Pty Ltd* [2018] NSWCATAP 138 as follows:
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> > 30. There is no presumption that a party who rejects an offer of compromise and does not obtain an outcome more favourable than the offer will be ordered to pay indemnity costs from the date of the

offer: *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [19] (Santow JA, Stein AJA agreeing). In *Miwa Pty Ltd v Siantan Properties Pte Ltd (No. 2)* [2011] NSWCA 344 at [8], Basten JA identified two questions relevant to whether costs should be awarded on an indemnity basis. They are whether:

1. there was a genuine offer of compromise; and

2. it was unreasonable for the offeree not to accept it.

31. In relation to the first issue, for an offer of compromise to be valid, an offer must involve "a real and genuine element of compromise": see, for example, *Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd* [2012] NSWCA 192 at [109] (*Prosperity Advisers*); *Miwa Pty Ltd v SiantanProperties Pte Ltd (No 2)* [2011] NSWCA 344 at [9]; *Barakat v Bazdarova* [2012] NSWCA 140 at [51(e)].

32. Whether a settlement offer is "real" or "genuine" does not depend on the intentions of the party making the offer. As stated by Giles J in *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 368:

> 'Compromise connotes that a party gives something away. A plaintiff with a strong case, or a plaintiff with a firm belief in the strength of its case, is perfectly entitled to discount its claim by only a dollar, but it does not in any real sense give anything away, and I do not think that it can claim to have placed itself in a more favourable position in relation to costs unless it does so.'

33. Further, an offer of compromise must not be derisory, requiring capitulation by the party to whom it is addressed: *Prosperity Advisers* at [109]. In view of this, an offer to accept payment of the claim in full would not usually qualify as an offer of compromise: *Richardson v Hough* [1999] NSWSC 448.

15 In *Miwa Pty Ltd v Siantan Properties Pte Ltd (No. 2)* [2011] NSWCA 344, Basten JA (with whom McColl and Campbell JJA agreed) adopted the non-exclusive list of factors identified by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298; (2005) 13 VR 435 at [25]:

(1) the stage of the proceeding at which the offer was received;

(2) the time allowed to the offeree to consider the offer;

(3) the extent of the compromise offered;

(4) the offeree's prospects of success, assessed as at the date of the offer;

(5) the clarity with which the terms of the offer were expressed;

whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it."

33 The respondent's offer was made on 10 June 2021, a little under two months after the Notice of Appeal had been filed, a little over one month after the first directions hearing, a little under one month after the respondent filed her Reply

to Appeal, a couple of weeks after the due date for the appellant to have filed and served the material upon which it intended to rely on the appeal and 12 days before the hearing of the appeal.

34 The offer was to the effect that:

(1) the appellant pay the respondent $87,786.50 in full and final settlement of the judgment debt dated 9 November 2020 within 7 days of the acceptance of the offer;

(2) the respondent would forego any interest that had accumulated on that judgment debt following its registration;

(3) the appeal would be withdrawn with no orders as to costs; and

(4) the parties would enter into a brief deed reflecting the above terms.

35 The appellant was given until the close of business on 18 June 2021 to consider the offer (after which it was deemed to be withdrawn).

36 The extent of the compromise was said to be about $3,000, being the foregoing of interest which had accrued on the (Local Court judgment) of $87,786.50 since that judgment had been registered.

37 The offer was clear in its terms, and the appellant did not submit otherwise.

38 The offer did not say so in terms, but its substance was clear that an application for indemnity costs would be made in the event the offer was not accepted and the result for the respondent on the appeal was better than the terms of the offer.

39 The offer made a number of assertions about the weakness of the appellant's appeal, to the general effect that the appeal lacked any merit.

40 The respondent submitted that she drew the appellant's attention to the fact that there was no evidence to explain the excessive delay in commencing the appeal (in its Reply) and, in her offer, expressed the opinion that the appeal would fail because there was no explanation for the delay in commencing the appeal.

41 The latter submission was overstated. What the offer said was somewhat more limited. It said:

> "The assertions that new evidence has come to light which had not been put before the original decision maker is disingenuous and misconceived, nor does it explain your client's excessive delay to commence the appeal."

42 As one can see, the statement about an explanation for the delay was limited to whether the "new evidence" explained the delay, not the broader proposition that there was no explanation for the delay at all. More particularly, the offer did not, in substance, do more than make assertions about the strength of the appeal. It did not, for example, explain that one reason why the appeal would fail (in the respondent's view) was because of the various principles described in the authorities to which we referred at [36]-[42] of our principal decision, and particularly [37]-[38] which dealt with the explanation for the delay.

43 It is not necessary that offers such as these set out with some specificity the bases upon which it was asserted that the offeree should accept the compromise offered – see *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 at [13] – but in our opinion, in this case, some explanation was called for given the limited time given to accept the offer, the nature of the appellant as an owners corporation (generally being a not-for profit entity governed by lay persons) and the modest compromise offered.

44 The time given to consider and accept the offer was relatively short, being about one week, and in our view, this was overly short for an organisation such as an owners corporation to seek and receive advice concerning the offer, to convene the strata committee to consider that advice, and then to provide instructions.

45 The offer did involve an element of compromise, but the compromise was not great, it representing a compromise of about 3.5% of the amount owed to the respondent at that point in time.

46 In our view the relatively small compromise, the short period of time given to consider the offer and the lack of any real explanation (as opposed to assertion) of the perceived weaknesses of the appeal lead us to the conclusion that we are not persuaded by the respondent that it was unreasonable of the appellant not to have accepted the offer within the time permitted.

47 The final matter to determine on this application is whether an order under s 90 of the *Strata Schemes Management Act 2015* (NSW) should be made. That section says:

> **90 Contributions for legal costs awarded in proceedings between owners and owners corporation**
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> (1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).
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> (2) The court may order in the proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order.
>
> (3) The owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.
>
> (4) This Division (other than provisions relating to the amount of contributions) applies to and in respect of contributions levied under this section in the same way as it applies to other contributions levied under this Division.

48 The Tribunal made such an order in its costs orders which were the subject of the appeal. Neither party made any submissions on this provision, but it is almost self-evident that the successful respondent should not herself have to pay a proportion of the costs payable by the appellant to herself by reason of being a lot owner. Accordingly, we shall make a similar order to that made by the Tribunal.

Orders

49 We make the following orders:

(1) A hearing on costs is dispensed with.

(2) The appellant is to pay the respondent's costs of the application to extend time to appeal as agreed or assessed.

(3) Pursuant to s 90 of the Strata Schemes Management Act 2015 (NSW) such costs must only be paid from contributions levied in respect of lots other than the respondent's lot.

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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