
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : KOSOVICH and SINGH [2021] WASAT 144

MEMBER : MR J O'SULLIVAN, SENIOR MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 8 NOVEMBER 2021

FILE NO/S : CC 657 of 2021

BETWEEN : ROBERT PAUL KOSOVICH
Applicant

AND

AJIT SINGH
First Respondent

THE OWNERS OF 1-25/90 GILBERTSON ROAD,
KARDINYA STRATA PLAN 11145
Second Respondent

Catchwords:

Costs of withdrawn *Strata Titles Act 1985* (WA) application - Section 87(2) of the *State Administrative Tribunal Act 2004* (WA) - Discretion to be exercised pursuant to s 87(2) of the *State Administration Tribunal Act 2004* (WA)

Legislation:

State Administration Tribunal Act 2004 (WA), s 4, s 46, s 46(1), s 46(3), s 46(5), s47, s 48, s 87, s 87(1), s 87(2), s 87(3), s 88

Strata Titles Act 1985 (WA), s 197(1)

Vexatious Proceedings Restriction Act 2002 (WA), s 3

Result:

Application for costs dismissed

Category: B

Representation:

Counsel:

Applicant : N/A

First Respondent : N/A

Second Respondent : N/A

Solicitors:

Applicant : N/A

First Respondent : N/A

Second Respondent : N/A

Case(s) referred to in decision(s):

Cachia v Hanes & Anor [1994] HCA 14 (1994) 179 CLR 403

Chew and Director General of the Department of Education and Training
[2006] WASAT 248

Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75

Le v Williams [2004] NSWSC 645

Maludra Pty Ltd & Ors and Owners of Windsor Towers & Ors
[2012] WASAT 160

Pearce & Anor and Germain [2007] WASAT 291(S)

Springmist Pty Ltd and Shire of Augusta-Margaret River
[2005] WASAT 143(S)

Strickland v Commonwealth Director of Public Prosecutions
(2018) 226 CLR 325

Western Australian Planning Commission v Questdale Holdings Pty Ltd
[2016] WASCA 32

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Mr Robert Paul Kosovich is the owner of Lot 1 of
1-25/90 Gilbertson Road, Kardinya Strata Plan 11145 (the Scheme).

2 On 5 May 2021, Mr Kosovich commenced proceedings in the
Tribunal against the owner of Lot 2 of the Scheme, Mr Ajit Singh,
pursuant to s 197(1) of the *Strata Titles Act 1985* (WA) (the ST Act)
alleging defects with the water pipes in Lot 2 and seeking an order that
amongst other things Mr Singh, engage a suitably qualified person to
inspect and repair the defects.

3 Mr Kosovich's complaint was that noise and vibration were
emanating from the plumbing in Lot 2.

4 On 22 June 2021, the Tribunal made orders joining The Owners of
1-25/90 Gilbertson Road Kardinya Strata Plan 11145 (Strata Company)
and requiring at least one member of the council of the Strata Company
attend any future hearing. The Tribunal also made an order that by
13 July 2021, Mr Kosovich file and serve 'an expert report on the cause
of the problem which is the subject of the application'.

5 On 13 July 2021, Mr Kosovich provided to the Tribunal and
Mr Singh an expert report from a plumber, Mr Joel Talbot, which
purported to 'illustrate the potential causes of a bang and pipe vibration
being heard within Lot 1 and emanating from the common wall
between Lot 1 and Lot 2'. Mr Talbot said that the noise may be caused
by the following:

- Plumbing fittings or pipes within Lot 1;
- Plumbing fittings or pipes within Lot 2;
- Plumbing fittings within any other lot; or
- The common property including pipes in the roof space of lots,
wall cavities and the common supply line.

6 Mr Talbot noted that 'some lots are unable to isolate their supply
due to faulty shut-off valves in the common supply line'. He said,
'Lot 1 has previously had this rectified at the owner's expense and
[he] was informed that this was a common problem within
90 Gilbertson Road at the time'.

7 Ultimately, Mr Talbot concluded that to fully diagnose the problem, full access is required to all lots and the common property, as only then can a full investigation be performed to identify the exact source. Mr Talbot pointed out that the Strata Company will be required to organise such access and coordinate access to individual lots and the common property ensuring they are available for investigation and subsequent repair.

8 At the next directions hearing on 20 July 2021 no one appeared on behalf of the Strata Company. The matter was adjourned to a further directions hearing on 17 August 2021.

9 On 21 July 2021, Mr Kosovich emailed the Tribunal discontinuing the proceedings. Mr Kosovich cites two reasons for the discontinuance. The first involved the apparent reluctance of the Strata Company to join the proceedings thus indicating further investigations will be extremely difficult. The second referenced the 'obvious difficulties in locating the exact source of the noise as evidenced by the experience to date and the expert report'.

10 Mr Kosovich added that 'while the noise remains, it had been reduced by the repairs performed on Lot 2 and there appears to be no fault which could cause further damage'.

11 By email dated 22 July 2021, the Tribunal asked Mr Singh if he opposed the application being withdrawn. Mr Singh responded that he is seeking compensation for the considerable costs incurred and therefore opposes the application being withdrawn.

12 On 17 August 2021, the Tribunal made orders pursuant to s 46(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) granting Mr Kosovich leave to withdraw the proceedings. Orders were also made programming Mr Singh's application for costs.

Statutory framework

Withdrawal or dismissal of proceedings

13 By s 46(1) of the SAT Act, an applicant may, with the Tribunal's leave, withdraw or agree to the withdrawal of the proceedings or a part of a proceedings. By s 46(5) of the SAT Act, the Tribunal may make an order under s 46 on the application of a party or on its own initiative.

14 By s 47 the Tribunal may order that proceedings be dismissed or struck out and may make appropriate orders if satisfied that the

proceedings are frivolous, vexatious, misconceived or lacking in substance, being used for an improper purpose or is otherwise an abuse of process.

- 15 Section 48 empowers the Tribunal, amongst other things to order that proceedings be dismissed or struck out if the Tribunal believes that an applicant is proceeding in a way that unnecessarily disadvantages the other party by conduct including the vexatious conduct of the proceedings.

Costs

- 16 Section 87 of the SAT Act provides:

Costs of parties and others

- (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
- (2) Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.
- (3) The power of the Tribunal to make an order for the payment by a party of the costs of another party includes the power to make an order for the payment of an amount to compensate the other party for any expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought.
- (4) Without limiting anything else that may be considered in making an order for the payment by a party of the costs of another party where the matter that is the subject of the proceeding comes within the Tribunal's review jurisdiction, the Tribunal is to have regard to -
 - (a) whether the party (in bringing or conducting the proceeding before the decision maker in which the decision under review was made) genuinely attempted to enable and assist the decision maker to make a decision on its merits;
 - (b) whether the party (being the decision maker) genuinely attempted to make a decision on its merits.

- (5) The rules may deal with the effect of certain offers to settle, and responses, if any, to the offer, on the making of an order for the payment by a party of the costs of another party.
- (6) The Tribunal may order that the representative of a party, rather than the party, in the representative's own capacity compensate that or any other party for costs incurred because the representative acted in, or delayed, the proceeding in a way that resulted in unnecessary costs.

17 Section 88 of the SAT Act deals with costs, other than the costs of a party, to proceeding. It provides:

Costs of proceeding

- (1) In this section -

costs of a proceeding means costs of, or incidental to, a proceeding of the Tribunal, other than costs of a party.
- (2) The Tribunal may order that all or any of the costs of a proceeding be paid by a party.
- (3) If the matter that is the subject of the proceeding comes within the Tribunal's review jurisdiction, the Tribunal cannot make an order under this section against a party unless -
 - (a) the party brought or conducted the proceeding frivolously or vexatiously; or
 - (b) section 87(4) applies to the party; or
 - (c) circumstances have arisen in which the Tribunal could make an order under section 46, 47 or 48.

Costs - s 87 of the SAT Act

18 The first thing to notice is that absent anything to the contrary in the enabling act (the ST Act), by operation of s 87(1) of the SAT Act each party in proceedings before the Tribunal is to bear his or her own costs unless the Tribunal otherwise orders.

19 As Murphy JA (Martin CJ and Corboy J agreeing) acknowledged in *Western Australian Planning Commission v Questdale Holdings Pty Ltd*:¹

... Section 46 of the SAT Act evinces no presumption that a withdrawing party should pay the other party's costs. Rather the

¹*Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; [65].

presumptive position under s 87(1) of the SAT Act applies unless the other party can establish that the discretion to award costs under s 87(2) of the SAT Act should be exercised in its favour. There is no onus on the withdrawing party to show why it should not pay the other party's costs.

20 The Court of Appeal went on to observe that although s 87(2) of the SAT Act does not expressly say that the discretion is to be exercised if it is fair and reasonable in all the circumstances of the case to do so, the judicial nature of the exercise and the scheme of the SAT Act indicate that, broadly speaking, that is the legislative intention.²

21 The Tribunal's power to award costs in s 87(2) is to be construed in the context that the legal rationale for an order for costs is not to punish the persons against whom the order is made, but to compensate or reimburse the person in whose favour it is made. This rationale is evident in s 87(3) of the SAT Act.³

22 Even in a statutory context where the presumptive position is that no order for costs should be made, generally speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that the party in whose favour an order is sought should be reimbursed for the costs he/she has incurred. Thus, the onus is on the party seeking an order in its favour.⁴

23 As is evident from the width of the language in s 87(2) and is implicit from the power conferred by s 88 of the SAT Act, the Tribunal may order costs under s 87(2) against an applicant who withdraws his/her proceedings in accordance with s 46.⁵

24 Section 88 also by necessary implications indicates that in its original jurisdiction, in an application for costs against a party, conduct of the kind referred to in s 46(3), s 47 and s 48 will be relevant to the Tribunal's exercise of discretion under s 87(2).⁶

25 The principles set down by the Court of Appeal in *Western Australian Planning Commission v Questdale Holdings Pty Ltd*⁷ are consistent with a number of decisions of the Tribunal.

² *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; [49].

³ *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; [51].

⁴ *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; [51].

⁵ *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; [64].

⁶ *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; [64].

⁷ *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32.

26 In *Chew and Director General of the Department of Education and Training*,⁸ the Tribunal remarked that in exercising the discretion conferred on it by s 87(2):

We take the view that in proceedings under the Act, the Tribunal should not generally make an award for costs unless a party has conducted itself in such a way as to unnecessarily prolong the hearing; has acted unreasonably or inappropriately in its conduct of the proceedings, has been capricious; or the proceedings in some other way constitute an abuse of process. The Tribunal might also make an order as to costs where a matter has been brought vexatiously or for improper purposes.

27 The terms capricious, vexatious and abuse of process are not defined in the SAT Act.

28 The term 'capricious' relevantly means:⁹

subject to, led by, or indicative of caprice or whim.

29 The term 'caprice' means:¹⁰

a sudden change of mind without apparent or adequate motive, whim.

30 Section 4 of the SAT Act says a person brings or conducts a proceedings 'vexatiously' if it would result in the proceedings being vexatious proceedings as defined in s 3 of the *Vexatious Proceedings Restriction Act 2002* (WA), which provides:

vexatious proceedings means proceedings -

- (a) which are an abuse of the process of a court or a tribunal; or
- (b) instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose; or
- (c) instituted or pursued without reasonable ground; or
- (d) conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.

31 It is not possible to describe exhaustively what will constitute an abuse of process as the doctrine cannot be confined to closed categories.¹¹ Nonetheless, the three main categories include:¹²

⁸ *Chew and Director General of the Department of Education and Training* [2006] WASAT 248; [85].

⁹ *The Macquarie Dictionary* (6th edition, 2013), page 226.

¹⁰ *The Macquarie Dictionary* (6th edition, 2013), page 226.

¹¹ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; [28].

- a) the invocation of the Tribunal's procedures for an illegitimate purpose;
- b) the use of the Tribunal's procedures is unjustifiably oppressive to one of the parties; or
- c) the use of the Tribunal's procedures would bring the administration of justice into disrepute.

32 In *Pearce & Anor and Germain*¹³ the Tribunal observed:

... Where, however, there is a genuine dispute between the parties to a lease, their respective rights are unclear and one or both seek determination of their rights in the Tribunal, the starting point remains that each party should expect to pay their own costs, unless there are circumstances of the type identified in *Chew*.

33 Upon a party establishing an entitlement to an order for costs, the question that then arises is whether the costs sought are compensable. Traditionally, so far as costs in court proceedings are concerned money paid and liabilities incurred for professional legal services does not include compensation for time spent by a litigant who is not a lawyer preparing and conducting his or her case.¹⁴

34 However, the ambit of the compensable costs available under s 87(3) of the SAT Act to a litigant, even one who is not a lawyer, is not limited to the traditional notion of legal costs and extends to other expenses and loss in connection with the conduct of proceedings before the Tribunal. These costs may, in an appropriate case, include the costs of a non-lawyer advocate, the expenses of a party having to travel to a hearing, or some amount which compensates a party for the inconvenience or expense of his or her participation in the proceedings.¹⁵

The Parties' submissions

35 Mr Singh contends that he should not have been included as a respondent and that the Strata Company should have been the primary and only respondent. Mr Singh says further that this was

¹² *Strickland v Commonwealth Director of Public Prosecutions* (2018) 226 CLR 325; [256]-[263]; see also Civil Procedure, Western Australia; 3036-3037.

¹³ *Pearce & Anor and Germain* [2007] WASAT 291(S); [24].

¹⁴ *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143(S); [55]-[56]; see also *Cachia v Hanes & Anor* [1994] HCA 14 (1994) 179 CLR 403.

¹⁵ *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143; [64]-[65].

acknowledged by the Tribunal at the directions hearing on 20 July 2021.

36 Implicity, Mr Singh argues that Mr Kosovich initiated proceedings against him, when he ought to have known that the noise and vibration was emanating from the plumbing within the common property which is the responsibility of the Strata Company.

37 Mr Singh claims costs of \$2,454.78. This consists of:

1. Travel costs to Lot 2 from his home to investigate the problem on five occasions (\$103.68).
2. Plumbing services to replace the taps in Lot 2 (\$330).
3. Listing and marketing costs associated with the sale of Lot 2 that were wasted as a consequence of Lot 2 being taken off the market (\$1,571.10).
4. Four SAT teleconference appearances (\$300).
5. Preparation and submission of documents for SAT proceedings (\$150).

38 In opposing the application for costs Mr Kosovich did not expressly address the question of costs. He did, however, annex a number of pieces of correspondence seemingly directed to establishing that he acted reasonably in initiating the proceedings against Mr Singh in the Tribunal.

Disposition

39 Mr Singh's application for costs gives rise to two questions:

- a) Has Mr Singh discharged his onus in establishing that he should be awarded costs given all the circumstances of this case?

and

- b) If the answer to question 1 is yes, which if any, of the items claimed is compensable pursuant to s 87(3) of the SAT Act?

40 For the reasons that follow I am not satisfied that Mr Singh is entitled to an order that Mr Kosovich pay his costs in the proceedings.

41 As I explained earlier, Mr Singh contends that Mr Kosovich
should not have included him as a respondent and that the
Strata Company should have been the primary and only respondent.

42 Mr Singh purports to draw support for this proposition from a
statement attributed to Senior Member Aitken during a directions
hearing on 20 July 2021. Senior Member Aitken is alleged to have said
specifically that Mr Singh's inclusion as respondent was not necessary.

43 I have listened to the recording of the directions hearing on 20 July
2021. Senior Member Aitken said:

... the boundaries of your lots in your scheme I think are the inner
surface of the external walls, the undersurface of the ceiling and the
undersurface of the floor – which means all the walls, all the space
above the ceiling and anywhere outside of the building is all common
property. And I think from what you're alleging Mr Kosovich it is very
likely that the problem with the plumbing is actually within the
common property which means it is the strata company that is liable.

Mr Kosovich replied 'that's right' adding that Mr Singh has done
probably the best he can do and the noise has improved but
it continues.

44 Senior Member Aitken then asked Mr Kosovich whether he
wanted to keep Mr Singh as a respondent and whether he was satisfied
his grievance is with the Strata Company? Importantly at no time did
Senior Member Aitken say that Mr Singh's inclusion as a respondent
was unnecessary or that he should not have been included as
a respondent.

45 Having reviewed the application and the relevant documents, it is
apparent Mr Kosovich initiated proceedings in the Tribunal on the basis
that he understood that Lot 2 was the source of the banging in the
plumbing. This was not surprising given Lot 1 and Lot 2 adjoin one
another.

46 Contemporaneous emails support the conclusion that after
proceedings were commenced the replacement of the taps in Lot 2
resulted in a reduction in the noise heard in Lot 1.

47 The situation materially changed upon the receipt of the plumbing
report. In many respects the plumbing report asked more questions
than it answered. From Mr Kosovich's perspective, the report gave rise
to multiple lines of further inquiry that required the co-operation of the

Strata Company which, according to Mr Kosovich, despite being included as a respondent, had shown no interest in being involved.

48 The noise in Lot 1 having been partially ameliorated by the replacement of the taps in Lot 2 together with the fact that the situation was now far more complicated than first thought, Mr Kosovich promptly sought leave to withdraw the proceedings.

49 Bearing in mind that Parliament has mandated that strata disputes should be determined in a forum where the presumptive position is that each party is to bear its own costs, Mr Singh bears the onus of establishing that an award of costs in his favour is fair and reasonable in all the circumstances of the case.

50 Having regard to the background to which I have already referred and applying the principle set out in *Chew*, I am unable to conclude that Mr Kosovich has acted unnecessarily to prolong the proceedings; has acted unreasonably or inappropriately in his conduct of the proceedings; has been capricious; or has initiated proceedings that in some other way constitute an abuse of process. Nor can it be said that the proceedings were brought or conducted vexatiously.

51 As I have already explained, after initiating proceedings, Mr Kosovich received some relief as a consequence of the taps in Lot 2 being replaced. Moreover, the plumbing report provided by Mr Talbot did not exclude the fittings and fixtures in Lot 2 as a potential source of the problem going forward.

52 Taps within the cubic space of a lot under a strata scheme are part of a lot even if fixed to a wall which is common property.¹⁶

53 I have also taken into account that Mr Kosovich is not legally represented. While each case will depend on its own facts, where the dispute or the legislative regime is complex, an unrepresented litigant may not readily appreciate the deficiencies that bedevil his or her case. Of course, this does not mean an unrepresented litigant is free to initiate or defend proceedings with impunity so far as costs are concerned.

54 For example, where an unrepresented litigant has been put on notice concerning the deficiencies in his or her case and persists in advancing or defending the proceedings nonetheless, that may be a circumstance the Tribunal takes into account when considering whether

¹⁶ *Le v Williams* [2004] NSWSC 645; [54]-[55]; See also *Maludra Pty Ltd & Ors and Owners of Windsor Towers & Ors* [2012] WASAT 160; [100].

to depart from the presumptive position that each party bear their own costs.

55 No such issue arises in this case. First and foremost, it has not been demonstrated that Mr Kosovich did not have reasonable grounds to initiate proceedings against Mr Singh. Second, upon appreciating the complexity of the matter going forward, Mr Kosovich promptly withdrew the proceedings.

The costs claimed

56 Having concluded that Mr Singh has not discharged his onus by establishing that the presumptive position pursuant to s 87(1) of the SAT Act that each party bear its own costs should be departed from, in my view, it is unnecessary to determine whether the items claimed by Mr Singh are compensable.

Orders

1. The First Respondent's application for costs is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MR J O'Sullivan, SENIOR MEMBER

9 NOVEMBER 2021