



Civil and Administrative Tribunal
New South Wales

Case Name: Grasso v The Owners Strata Plan No. 52399

Medium Neutral Citation: [2022] NSWCATAP 91

Hearing Date(s): On the papers

Date of Orders: 30 March 2022

Decision Date: 30 March 2022

Jurisdiction: Appeal Panel

Before: The Hon D A Cowdroy AO QC, Principal Member
A Suthers, Principal Member

Decision: (1) A hearing of the costs application is dispensed with.
(2) The respondent's application for costs is dismissed;

Catchwords: APPEALS – costs of respondent where appeal
withdrawn

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Alexander James Pty Ltd v Pozetu Pty Ltd (No.2)
[2016] NSWCATAP 75
Allen v Tricare (Hastings) Ltd [2017] NSWCATAP 25
Council of the Law Society of New South Wales v Levitt
[2017] NSWCATOD 126
Cripps v G & M Mawson [2006] NSWCA 84
eMove Pty Ltd v Naomi Dickinson (2015) NSWCATAP
94
Gaynor v Burns [2015] NSWCATAP 150
Grasso and Ors v Owners Corporation SP 52399 (not
reported)
Hamod v State of New South Wales (2002) 188 ALR
659; [2002] FCA 424; [2002] FCAFC 97
Nguyen v Perpetual Trustee Co Ltd [2015] NSWCATAP
264

Oshlak v Richmond River Council [1998] HCA 11;
(1998) 193 CLR 72
Re Minister for Immigration and Ethnic Affairs; Ex parte
Lai Qin (1997) 186 CLR 62 at 65; [1997] HCA 6
Sahade v Owners SP No 62022 [2015] NSWATAP 225
The Owners – Strata Plan No 63731 v B&G Trading Pty
Ltd (No2) [2020] NSWCATAP 273

Texts Cited: None cited

Category: Costs

Parties: Geoffrey Grasso (First Appellant)
Dan Muresan (Second Appellant)
Silvino Wilfredo (Third Appellant)

The Owners – Strata Plan No 52399 (First Respondent)
Anthony Power (Second Respondent)
Ravi Ranade (Third Respondent)
Romero Maris Claudia Trebilcock (Fourth Respondent)
Anne Power (Fifth Respondent)
Raj Calisa (Sixth Respondent)

Representation: Solicitors:
Appellants (self-represented)
Madison Marcus (Respondent)

File Number(s): 2021/00269493

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 10 August 2021

Before: C Paull, Senior Member

File Number(s): SC 20/48416

REASONS FOR DECISION

- 1 The appellants are owners of strata title units in the respondent strata scheme. They took proceedings against the respondent seeking orders pursuant to the provisions of s 237 of the *Strata Schemes Management Act 2015* (NSW)(SSMA) that a different strata manager be appointed in view of certain issues which arose relating to the administration of the strata title unit building, and for other ancillary orders relating to the conduct of the strata scheme.
- 2 On 10 August 2021, the Tribunal delivered its decision in the proceedings: *Grasso and Ors v Owners Corporation SP 52399* (not reported). The Tribunal, in accordance with its orders dated 27 August 2021 dismissed the proceedings. In doing so it found that whilst there may have been some discrepancies in the administration of the strata scheme, such deficiencies did not render the scheme dysfunctional such as to require the exercise of the jurisdiction provided under s 237 of the SSMA.
- 3 The unsuccessful applicants raised numerous grounds of appeal, by notice of appeal filed on 21 September 2021. However, as a result of negotiations between the appellants (hereafter referred to collectively as “the appellant”) and the respondent, the appellant agreed to withdraw the appeal.
- 4 In consequence of such withdrawal, the respondent seeks an order that its costs of the proceedings be paid by the appellant. Such claim is resisted.
- 5 In directions preparing the application for determination, the Appeal Panel directed the lodgement of submissions, including submissions as to whether a hearing of the application ought be dispensed with.

Submissions

- 6 The appellant has filed voluminous written submissions dated 16 February 2022, in which numerous submissions are made in opposition to the respondent’s claim for costs.
- 7 The respondents have filed voluminous written submissions dated 24 February 2022.
- 8 Having reviewed those submissions, we are satisfied that the issues for determination can be adequately determined in the absence of the parties by

considering their written submissions. We will dispense with a hearing of the application.

Power to award costs

9 Section 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT act) 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.

10 This is not a matter where rr 38 & 38A of the Civil and Administrative Tribunal Rules 2014 apply. Therefore, the usual rule applying in the Tribunal is that each party pays its own costs, unless special circumstances are shown to exist: see *Gaynor v Burns* [2015] NSWCATAP 150 at [16] – [19]; *Allen v*

Tricare (Hastings) Ltd [2017] NSWCATAP 25; *Council of the Law Society of New South Wales v Levitt* [2017] NSWCATOD 126 at [17].

- 11 Accordingly, “special circumstances” must be found warranting an order for costs. In *eMove Pty Ltd v Naomi Dickinson* (2015) NSWCATAP 94 at [48], where the Appeal Panel said:

“[48]. The authorities considering the meaning of the expression “special circumstances” were recently reviewed in *CPD Holdings Pty Ltd trading as The Bathroom Exchange v Baguley* (2015) NSWCATAP 21 at [23] – (31). From those authorities, it can be seen that “special circumstances” are circumstances that are out of the ordinary, they do not to be extraordinary or exceptional. 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 ordinary 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.”

- 12 Certain principles have been established concerning an award of cost as follows:

- (1) An application for costs can only succeed before the Tribunal if it can be shown that “the circumstances are out of the ordinary. They do not have to be extraordinary or exceptional.”: Santow JA in *Cripps v G & M Mawson* [2006] NSWCA 84 at [60] in relation to s 88 (1) of the *Administrative Decisions Tribunal Act 1997*, which, by analogy, is a useful statement applicable in this Tribunal;
- (2) “An assessment whether circumstances are “special” involves the exercise of a value judgement carried out by way of comparison between what is not “special”, and what is special.”: See *Alexander James Pty Ltd v Pozetu Pty Ltd (No.2)* [2016] NSWCATAP 75 at [14];
- (3) the nature and complexity of the appeal proceedings is the relevant consideration; not the nature and complexity of the proceedings at first instance: see *Sahade v Owners SP No 62022* [2015] NSWATAP 225 at [38];
- (4) the power to award costs is a discretionary power vested in the decision maker: see *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 62 at 65; [1997] HCA 6;
- (5) the exercise the discretion requires a tribunal “to weigh whether those circumstances are sufficient to amount to “special circumstances that justify departing from the general rule that each party bear its own costs”: see *The Owners – Strata Plan No 63731 v B&G Trading Pty Ltd (No2)* [2020] NSWCATAP 273 at [13];
- (6) an order for costs is intended to compensate the successful party: it is not intended to be punitive in nature: *Oshlak v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72; *Hamod v State of New South Wales* (2002) 188 ALR 659; [2002] FCA 424; [2002] FCAFC 97; and

- (7) the discretion to award costs is to be exercised judicially: *Nguyen v Perpetual Trustee Co Ltd* [2015] NSWCATAP 264 at [94].

Application of principles

- 13 The submissions of the appellant filed in support of the proposed appeal challenged numerous factual findings of the Tribunal. In respect of Ground 1 of its proposed appeal, the appellant nominated 31 such assertions. Ground 2 nominated a further 31 grounds of appeal. In respect of ground three, 6 grounds of appeal were identified; and as to ground 4, nine grounds of appeal were identified. Mostly, the challenges were to the factual findings, the appellant claiming that the Tribunal ignored certain evidence.
- 14 The appeal was resolved following negotiations between the parties. Without prejudice discussions, except as to costs, commenced as early as 1 November 2021; approximately six weeks after filing of the Notice of Appeal.
- 15 The respondent's submissions refer to various internal matters within the administration of the strata scheme. It appears that there was an agreement with the appellant leading to the withdrawal of the appeal if instead of a compulsorily ordered manager, a different strata manager was appointed at the next general meeting. This occurred and the appeal was withdrawn. However, the respondent submits that it has incurred substantial legal costs.
- 16 The appellant submits that it has at all times conducted itself properly, legally "and in accordance with the scope of the orders of the Tribunal." The appellant refers to the history of the prolonged proceedings and of the fact that the appellant has paid \$12,500 plus GST for legal advice.
- 17 The appellant points the fact that the respondent was ordered to make submissions on costs by 8 October 2021, but no submissions were provided. On 15 December 2021 J. Moir of Madison Marcus (legal representative for the respondent) wrote to the appellant stating, inter alia,
- "If we can discuss and you are satisfied and wish to withdraw, the owners corp will likely consent to the withdrawal with no order as to costs".
- 18 Further, the appellant states that it offered the respondent the option of seeking an adjournment on 20 December 2021, namely one month prior to the hearing and before it was necessary for them to provide submissions. The appellant

states that at a hearing on 20 January 2022, the respondent's consented to an adjournment and the eventual withdrawal of the appeal, and that such consent was given unconditionally.

Observations

19 On an application for costs, the Appeal Panel cannot usefully speculate whether the appeal is likely to have succeeded. It may be that some of the issues raised by the Notice of Appeal might have been successful, and others dismissed. However, this is pure speculation. On the material before us, it is impossible to conclude that the appeal was hopeless. Nor was there simply an apparent capitulation by the appellant. Rather, the appellant appears to have reassessed its position after negotiations prior to the next general meeting.

20 In these circumstances, the Appeal Panel considers that the principle referred to by McHugh J in *Ex parte Lai Quin*, at [65], is apposite when his Honour said:

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases. [Footnotes omitted].

21 There is no evidence that:

- (1) the appellant has conducted the proceedings in a way that unnecessarily disadvantaged the respondent;
- (2) the appellant has unreasonably prolonged the time for completion of the proceeding;
- (3) the claim of the appellant could be said to be untenable;
- (4) the proceeding was particularly unusual or complex in terms of matters brought under the SSMA; or
- (5) the proceeding was frivolous, vexatious or otherwise misconceived or lacking in substance.

22 The appellant has not been shown to have acted in a capricious or unreasonable manner; it was entitled to exercise its right to appeal the decision of the Tribunal. Such a challenge is not unusual and is certainly not "special". Further, within a relatively short period, approximately six weeks after filing the notice of appeal, it entered into settlement negotiations.

Finding

23 The Appeal Panel is unable to find that “special circumstances” exist. It follows that there is no basis for making an award of costs as sought by the respondent.

Order

24 The Appeal Panel orders that:

- (1) A hearing of the costs application is dispensed with.
- (2) The respondent’s application for costs be dismissed.

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

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.