Civil and Administrative Tribunal

New South Wales

Case Name:	Martire v The Owners – Strata Plan No. 42159 (No 2)
Medium Neutral Citation:	[2022] NSWCATCD 3
Hearing Date(s):	On the papers
Date of Orders:	9 February 2022
Decision Date:	9 February 2022
Jurisdiction:	Consumer and Commercial Division
Before:	J Rose, General Member
Decision:	(1) Pursuant to s 50 of the Civil and Administrative Tribunal Act 2013 (NSW), a hearing on the question of costs is dispensed with. (2) Each party to these proceedings should pay their own costs of the proceedings.
Catchwords:	COSTS – Civil and Administrative Tribunal – whether special circumstances exist
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Public Health Act 2010 (NSW) Retirement Villages Act 1999 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Alexander James Pty Ltd v Pozetu Pty Ltd (No. 2) [2016] NSWCATAP 75 Allplastics Engineering Pty Ltd v Dornoch Ltd [2006] NSWCA 33 Cripps v G & M Mawson [2006] NSWCA 84 eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94 Hammond v Ozzy Cheapest Cars Pty Ltd [2015] NSWCATAP 65 Khalaf v Commissioner of Police, NSW Police Force [2019] NSWCATOD 178

	Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120 Northern Territory v Sangare (2019) 265 CLR 164 Obieta v Australian College of Professionals Pty Ltd [2014] NSWCATAP 38 Ohn v Walton (1995) 36 NSWLR 77 Oshlack v Richmond River City Council (1998) 193 CLR 72 Sydney Building Defects Inspections and Reports Pty Ltd v Thomas [2018] NSWCATCD 65 Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284 Wagg v Farthing (No 2) [2015] NSWCATAP 263
Texts Cited:	Nil
Category:	Costs
Parties:	Tony Martire (Applicant) The Owners – Strata Plan No 42159 (Respondent)
Representation:	Counsel: C Apostalakos (Applicant) C Cunio (Respondent) Solicitors: Diamond Conway Lawyers (Applicant) Strata Specialist Lawyers (Respondent)
File Number(s):	RV 20/51789
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This costs decision follows on from a decision that I made on 30 November 2021 (the primary decision) – which was to dismiss the applicant's application for particular orders under s 232 of the *Strata Schemes Management Act 2015* (NSW) (the SSM Act).

2 I have set out the background facts and the procedural history of the matter in the primary decision. I adopt those parts of the primary decision for the purposes of this decision.

3 The respondent (which I will refer to as the OC, as I did in the primary decision) indicated during the hearing that it wished to be heard separately on costs after the principal claim was determined. Consequently, on dismissing the application, I gave leave to the OC to file and serve written submissions in respect of the costs of the proceedings, and for the applicant to file and serve written submissions in response. In doing so, I also directed the parties to address in their submissions the issue whether the question of costs could be dealt with on the papers, without a further hearing, pursuant to s 50 of the *Civil and Administrative Tribunal Act 2013* (NSW) the CAT Act).

4 The OC subsequently lodged submissions on 7 December 2021, in which it sought an order that the applicant pay the OC's costs of and incidental to the proceedings as agreed or assessed. By his submissions in response, which were filed on 17 December 2021, the applicant submits that there should be no departure from the usual principle that each party should pay that party's own costs.

The power to award costs

5 The usual position with respect to costs in the Tribunal is as set out in s 60(1) of the CAT Act – namely, that each party to proceedings in the Tribunal is to pay their own costs. That usual position is modified by s 60(2), which permits the Tribunal to award costs in relation to proceedings before it "only if it is satisfied that there are special circumstances warranting an award of costs".

6 If special circumstances exist to warrant an award of costs, then the Tribunal has a discretion to award costs. As pointed out by the Tribunal in *Obieta v Australian College of Professionals Pty Ltd* [2014] NSWCATAP 38 at [81]:

> It does not follow that because some factors to which s 88(3) are made out that a costs order should then follow. It remains necessary for the Tribunal to weigh whether those circumstances are sufficient to amount to 'special' circumstances that justify departing from the ordinary rule that each party bear their own costs.

If sufficiently circumstances do exist, the Tribunal must then decide whether it should award costs to one party, in exercise of the discretion permitted by the subsection.

7 The issues to be determined by the Tribunal on a costs application of this nature are therefore twofold – in summary:

(1) Do special circumstances exist to engage the Tribunal's discretion to consider making an award of costs?

(2) If yes, should the Tribunal exercise its discretion to award costs in favour of the OC in these proceedings?

Dispensing with the requirement for a hearing

8 Section 50(1) of the CAT Act requires that there be a hearing for proceedings in the Tribunal except in 4 instances – one of which is that the Tribunal makes an order under the section dispensing with a hearing: s 50(1)(c). By s 50(2), The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal. Section 50(3) further states that the Tribunal may not make an order dispensing with a hearing unless the Tribunal has first afforded the parties an opportunity to make submissions about the proposed order, and has taken any such submissions into account.

9 I have afforded the parties an opportunity to make submissions about the proposed orders –on both the substantive costs question and dispensing with a hearing on costs. Both parties have agreed to the Tribunal making an order dispensing with an oral hearing in respect of the OC's application for costs. I have taken those submissions into account. Having done so, I am satisfied that the costs question can be adequately determined in the absence of the parties by considering the written submissions that the parties have lodged, together with the evidence and submissions provided to the Tribunal at the primary hearing.

10 I will therefore make an order dispensing with a hearing of the OC's claim for costs.

The requirement for "special circumstances"

11 For the purposes of s 60(2), "special circumstances" are circumstances that are out of the ordinary. They do not have to be extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11],

citing *Cripps v G & M Mawson* [2006] NSWCA 84 at [60]. See also *Wagg v Farthing (No 2)* [2015] NSWCATAP 263 at [6].

12 Section 60(3) sets out a range of factors which the Tribunal may have regard to in determining whether there are special circumstances warranting an award of costs. They include:

> "(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), [and]
>
> (g) any other matter that the Tribunal considers relevant."

13 The opening words of the subsection are permissive: they permits the Tribunal to take any one or more of those factors into account (the last one being open-ended) without requiring the Tribunal to do so.

14 Ultimately, it is a question of fact, having regard to the circumstances of the matter before the Tribunal, as to whether there are special circumstances warranting a departure from the ordinary rule that each party pay its own costs: *Khalaf v Commissioner of Police, NSW Police Force* [2019] NSWCATOD 178 at [31].

15 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. There are no scientific means by which the former can be ascertained. The evaluative process is necessarily one of impression informed by the particular provisions of section 60, which by sec 60(3)(f) incorporates also a consideration of section 36(3) of the Act (namely, the parties' duty to cooperate with the Tribunal to facilitate the just, quick and cheap resolution of the real issues in dispute in the proceedings: *Alexander James Pty Ltd v Pozetu Pty Ltd (No. 2)* [2016] NSWCATAP 75 at [14].

16 A party's success in the subject proceedings is relevant on the question of costs, although it is not determinative: *Hammond v Ozzy Cheapest Cars Pty Ltd* [2015] NSWCATAP 65. The Tribunal should act judicially in deciding whether to award costs: *Oshlack v Richmond River City Council* (1998) 193 CLR 72 at 81; *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [37].

The parties' submissions

17 Pointing to the factors in s 60(3), the OC argues that the following matters make out the special circumstances that would enable the Tribunal to exercise its discretion to award costs in the OC's favour:

(1) on factor (a): the various failures by the applicant to comply with the Tribunal's interlocutory orders (described in the OC's submissions) unnecessarily disadvantaged the OC, causing it to incur additional costs in chasing the applicant for compliance with those orders and giving the OC less time to prepare its response, and to prepare for the hearing;

(2) on factor (b): the applicant was responsible for prolonging unreasonably the time taken to complete the proceedings because of the "misconceived nature of the application and the named respondent" and his "consistent failure" to comply with the Tribunal's orders;

(3) on factor (c): the claims made by the applicant were "weak at best" and failed to meet the requisite standard of proof, having no tenable basis in law (both claims) or in fact (the proposal to tilt the solar panels);

(4) on factor (e): the claim relating to the validity of the 4 November resolution was misconceived, and the claim relating to the tilting of the solar panels was lacking in substance "given the failure of the applicant to provide any objective and cogent evidence concerning the glare issue he experienced or a specific order for the tilting of the solar panels the Tribunal could have made"; and

(5) on factor (f): the applicant's "consistent breaches of the Tribunal's orders amounted to a breach of the applicant's duty to co-operate with the Tribunal in facilitating the guiding principle in s 36 of the CAT Act, described above, which (in addition to the foregoing matters) "robbed the parties from the opportunity to resolve the dispute in the manner set out in orders 4-6 made by the Tribunal on 4 May 2021.

[Those orders required the applicant to arrange for a meeting with the solar panel installer for recommendations for alteration of the angle of the solar panels to eliminate the sunlight reflection into the applicant's premises without creating a knock on reflection issue for other adjacent owners, and to forward any recommendation to the OC, with the OC to

then advise the applicant whether or not it consents to the proposed change of angle of the solar panels.]

18 The applicant rebuts the OC's claim for costs by arguing (in summary):

(1) The applicant began the proceedings as a self-represented litigant. It was not unreasonable for him to first bring his claim under the *Retirement Villages Act 1999* (NSW) (the RV Act), instead of the SSM Act, given that the strata scheme operates as a retirement village. In any event, this error was rectified when the applicant engaged legal representation (which occurred at about the time of the directions hearing on 24 March 2021, when he was granted leave to be represented).

(2) The applicant acknowledges that he did not comply with orders made by the Tribunal on 11 February and 24 March 2021, which he says was through error on his part, but submits that this error did not constitute special circumstances as (firstly) the error was not unreasonable given the confusion over the premises being a retirement village and his being self-represented and not legally qualified; and (secondly) making a costs order on this basis would be inconsistent with the objects of the Tribunal in s 3 of the CAT Act, and would penalise the applicant.

(3) The applicant was precluded from complying with orders 4-6 made on 4 May 2021 because the relevant installer refused to meet with him, preventing him from obtaining agreed recommendations for submission to the OC.

(4) Complying with the orders made on 8 July and 17 August 2021 in a timely fashion was "severely hampered" by the lockdown restrictions imposed by the NSW Government at that time, which restricted the applicant's ability to meet with his solicitors and exchange large volumes of information with them.

(5) Consequently, the delays were (largely) out of the applicant's control. In any event, there was nothing in the evidence that was unknown to the OC. The delays in the applicant complying with the Tribunal's orders did not disadvantage the OC.

(6) Given the findings made in the primary decision – particularly that the 2 grounds raised by the applicant fell for determination within s 232 of the SSM Act - it cannot be said that the claim had no tenable basis in fact or law. On the solar cells alignment issue, the Tribunal acknowledged that there was a reflection issue and noted that the issue was not a sufficiently severe problem to require resolution by an order of the Tribunal, and that the proposed order would be disproportionately large and expensive. These findings are not sufficient to warrant a conclusion that the claims were without basis.

(7) For these reasons, special circumstances do not exist to give the Tribunal jurisdiction to depart from the usual position in s 60(1).

The background events

19 As noted in the principal decision and in the parties' costs submissions, the proceedings were initially commenced under the RV Act. The applicant was not represented at the time. The OC was represented by solicitors since at least the time of the first directions hearing, which was held on 11 February.

20 From the records on the Tribunal's file, the applicant retained his solicitor shortly before the directions hearing on 24 March. The applicant's solicitor had at that time encountered difficulty in seeking to communicate with the respondents (which at that time were described as being both the "strata committee" of the OC and the village manager, Huon Park at Your Service Pty Limited). He also needed to clarify the basis of the claim with the applicant. At that point, the Tribunal granted the applicant leave to be represented by a solicitor. In granting that leave, the Tribunal noted that the OC might seek costs against the applicant if the application was not successful (as ultimately proved to be the case).

21 As noted by the OC, the Tribunal made orders on 24 March for the applicant to provide copies of the documents that it intended to rely on at the hearing by 31 March. The order specified that the documents to be provided by that date

> "…will include the basis upon which the applicant is making their claim against each party named as a respondent as well as their evidence in support of the claim"

but the applicant did not provide any documents within that time. The matter was next listed for directions on 4 May 2021.

22 The basis of the applicant's claim was re-cast by his solicitor shortly before the directions hearing that took place on 4 May, to rely on s 232 of the SSM Act, instead of the RV Act. The claim was bifurcated by that application into 2 distinct claims, both relying on s 232. At this point, the proceedings were transferred from the retirement villages list to the strata list and the village manager was removed from the proceedings. The Tribunal made orders 4, 5 and 6 described above at that time, providing an opportunity for the possible settlement of the proceedings through an agreement that might involve a recommendation made by the respondent's solar panel installers, and made an order for both remaining parties to file and serve their evidence by the same

date, which was 29 June, and ordered that the proceedings be listed for hearing. On 17 May the registry fixed the matter for hearing on 17 August 2021.

23 In late June, the NSW government re-imposed a series of public health orders on the population under the *Public Health Act 2010* (NSW) (the PH Act), with the aim of stopping the spread of the COVID-19 virus. Those public health orders had the effect of "locking down" (as it came to be known) the population in the Greater Sydney region at their homes for several months, by prohibiting movement or gathering unless it was for permitted reasons, as a response to the outbreak of the Delta variant of the virus in Sydney at that time. The result was that litigants in the Tribunal, such as the applicant, were required to stay at home while dealing with their lawyers (who were also mostly kept at home) – often by just telephone, post or email. That "lockdown" continued up to and including early October, covering the final stages of preparation for these proceeding and the conduct of the hearing itself.

24 Neither party lodged any evidence by the 29 June deadline specified in those orders. The order for the service of evidence was subsequently amended by consent of the parties on 8 July, to extend the time for both parties to provide their evidence – one after the other, this time. The applicant was given until 12 July for his evidence in chief, while the OC was given until 9 August. The applicant was also allowed until 13 August to provide any documents in reply. The hearing schedule to take place on 17 August was not displaced by those orders.

25 Both parties ultimately served their evidence in advance of the hearing. Again, the applicant was late in doing so: he served his documents on the OC on 29 July, instead of by 12 July, however this did not prevent the OC from serving its documents on 9 August as directed. I accept the applicant's explanation that his delay in providing his documents to the OC was caused by the difficulties he experienced in communicating with his lawyers while the public health orders were in effect.

26 The hearing proceeded as scheduled on 17 August. No application was made by either party to adjourn or delay the hearing (as to which see [12]-[16] of the

original decision). As set out there, both parties then lodged written submissions on the matters in issue at the end of that hearing, ending on 7 September. The Tribunal's decision was then published on 30 November.

Consideration of the s 60(3) factors

(a) Conduct that unnecessarily disadvantaged another party

27 Having weighed and considered the parties' arguments about the above events, against the conduct of the hearing before me on 17 August, I am not persuaded by the OC that the applicant's delays or failures in complying with the Tribunal's orders for the service of his evidence unnecessarily disadvantaged the OC.

28 As to the OC's complaint about orders 4 and 6 made on 4 May 2021, the relevant order was for the applicant to "arrange for a meeting with the solar panel installer" for certain recommendations to be made. The evidence shows that the applicant did try to arrange such a meeting but the installer (who was not bound by the Tribunal's order) refused to participate, so no meeting was held. I do not consider the failure to hold that meeting in those circumstances to be "conduct" that can be laid at the applicant's feet. Consequently, I don't consider the fact that the OC's solicitor chased the applicant's solicitor about the meeting to be an unnecessary disadvantage that arose from the applicant's conduct.

29 The OC otherwise points to slippages in the applicant's compliance with Tribunal orders for the service of his evidence. I accept that the late service of the applicant's evidence and submissions gave the OC a shorter period of time in which to prepare its responses to that evidence and those submissions, but I am not satisfied on the evidence that it was disadvantaged by that shorter time in any material way. The evidence does not establish that the time spent by the OC's solicitors spent less time in the (albeit shorter) intervening period in preparing the OC's case than they otherwise would have, or that the conduct of the OC's defence was disadvantaged by that shorter preparation. To my observations at the hearing, the OC's solicitor conducted the OC's defence robustly and professionally.

30 I therefore do not accept that the OC was unnecessarily disadvantaged by the applicant's conduct of the proceedings in any substantive way.

(b) Prolonging unreasonably the time taken to complete the proceedings

31 The OC asserts that the applicant prolonged the time taken to complete the proceedings because of the misconceived nature of the application (ie, as initially filed) and the misnaming of the correct respondent.

32 It is not unexpected that a party – particularly an unrepresented party – might misconceive which particular remedy under which particular enactment might suit his or her circumstances, and which party should be the respondent to a claim to assert a right to that remedy. By way of analogy, the Tribunal noted in *Sydney Building Defects Inspections and Reports Pty Ltd v Thomas* [2018] NSWCATCD 65 at [29]-[31], a case that was dismissed for want of jurisdiction, that:

> [29] … it is common in Tribunal proceedings, particularly where parties are unrepresented, for applicants to misunderstand the nature of the Tribunal's powers and to seek orders which fall outside the scope of the Tribunal's jurisdiction. Determining the Tribunal's jurisdiction involves an understanding and analysis of the underlying legislative framework. This can be a difficult and technical legal exercise and the Tribunal would not expect unrepresented parties to do this easily. Indeed, in this instance it appears that that the respondents' solicitor also did not identify the jurisdictional issue, or at least bring it to the applicant's attention.
>
> …
>
> [31] A lack of jurisdiction is not a special circumstance for the purpose of a costs application. It also does not have bearing on the underlying merits of a claim. …

33 Jurisdiction is not the only issue where unrepresented parties might encounter difficulty in framing their claim and bringing it to the Tribunal. The sentiments expressed in that passage are also true in cases where parties – particularly unrepresented parties – initially misdiagnose the source of the Tribunal's jurisdiction. It is common in Tribunal proceedings for parties – particularly unrepresented parties – to make errors of this nature, so a degree of patience is required.

34 It is not universally unreasonable for an unrepresented party to initially seeks orders that do not relate to his or her circumstances because of a misunderstanding of those circumstances or the underlying legislative

framework that applies to those circumstances. The fact that a party initially sought to engage a similar – but ultimately unhelpful – provision that he or she has later stepped away from when the correct legislation was identified, is not unreasonable and does not of itself raise a special circumstance. Something more is required.

35 In the present case, I am not satisfied that the initial conception of the applicant's application or the naming of the respondent prolonged the time taken to complete the proceedings unreasonably. The strata scheme is conducted as a retirement village, and I consider that it was reasonable for the applicant (who was unrepresented at the time) to have initially considered that the RV Act was the correct source of power for his application. He named the "Strata Committee" of the strata plan as his respondent, instead of formally naming the OC, but that is a relatively minor error that could have been corrected at a directions hearing – and ultimately was corrected. There was a misdirection at the first directions hearing (on 11 February 2021) where the trading "name" of the village (which had been included by the registry as an additional respondent) was amended to name the company engaged by the OC to manage the village, Huon Park at Your Service Pty Limited. The evidence does not establish who may have instigated that amendment (i.e., the applicant or someone else). Even if it was the applicant, I am not satisfied that this misdirection was of any consequence as the company concerned was then removed as a party at the next directions hearing. The OC, by one name or another, remained a party to the proceedings at all relevant times.

36 Ultimately, however, I am not satisfied that these events prolonged the proceedings unreasonably. They did not prolong the time taken to complete the hearing of the proceedings, in the sense of elongating the hearing. The hearing was completed within the allocated 90 minutes without any significant reference to those events. If they prolonged the overall time taken to complete the interlocutory steps between the initial filing of the application and the allocation of a hearing date, through having 3 directions hearings to sort these issues out before the matter was listed for hearing, there is an adequate reason for that delay in my view. I don't consider that delay to be unreasonable in the particular circumstances of this case.

37 I now turn to the issue of the applicant's "consistent" delays or failures in complying with the Tribunal's orders. The applicant had lodged an initial bundle of supporting documents with his application, however I accept that there were subsequent failures on the applicant's part to comply with orders made by the Tribunal for the provision of information and/or further documents:

(1) The order made on 11 February 2021 that the applicant advise the Tribunal and the other parties of the sections and relevant legislation that will be relied on at the hearing (which had no specified date for compliance) was not complied with until about 3 May – about 3 months later.

(2) The orders made on 24 March and 4 May 2021, for the applicant to provide to the Tribunal and the other parties copies of the documents that he intended to rely on at the hearing by particular dates were also not complied with. The latter order was subsequently extended with the OC's consent on 8 July 2021, to 12 July, after the meeting to be arranged with the installer had failed to occur. [It should be noted that both parties were in default of that order at that time, as the initial order made on 4 May was for "all parties" to provide their evidence to each other and to the Tribunal by 29 June, and neither had done so.]

(3) The applicant's evidence was ultimately not provided to the OC until 29 July, or to the Tribunal until 10 August 2021.

38 The delays in serving the applicant's evidence did not delay (prolong) the setting of a hearing date, and did not lead to the hearing date being adjourned to a later date. The matter was adjourned at the directions hearing on 24 March to a (third) directions hearing on 4 May 2021 for reasons that were unrelated to the service of the applicant's evidence. The matter was then adjourned at that directions hearing for a hearing date to be set. On 17 May the Tribunal listed the matter for hearing on 17 August 2021. That hearing date was not affected when the orders were made on 8 July 2021, extending the time for service of both parties' evidence, and the matter proceeded to hearing on the allocated date.

39 Based on this analysis, I am not satisfied that the delays in the provision of the applicant's evidence as ordered on 24 March and 4 May 2021 prolonged the time taken to complete the proceedings.

(c) The relative strengths of the claims made by the parties

40 I do not accept the OC's submission that the claims made by the applicant were "weak at best".

41 On the facts that I found as set out in the primary decision, I was satisfied that the sunlight reflected off the OC's solar panels on the Park Club and Lodge buildings, and into the windows on the northern side of the applicant's lot, for up to an hour each day, for up to 5 months of the year, between April/May and August/September – typically between 12:40 and 1:40 PM each day (at [44]). I was also satisfied that the blinds along the northern side of the applicant's lot blocked sunlight reflecting off the Lodge building, but only *some* of the light reflecting off the Park Club Building, albeit in an unknown proportion (at [45]-[46]). I was also satisfied that the applicant's complaint about the reflection being caused by sunlight off those solar panels fell within s 232 of the SSM Act (at [83]). As I noted at [83]:

> "The bigger question is whether the Tribunal should exercise its discretion to make the order claimed to impose a requirement on the OC to undertake mandatory work for the purpose of settling or resolving that dispute. As note din the applicant's submissions, this requires the Tribunal to be satisfied that it should exercise its discretion to make an injunctive order that will achieve the outcome desired by the applicant in a way which complies with the SSM Act. It also requires the order to be sufficiently clear, so that the parties know "exactly in fact" what is required to be done."

42 The applicant's claim that the Tribunal make orders to tilt the solar panels failed on the issues of discretion and clarity in the proposed orders, but that does not mean that the grounds of the applicant's claim had no strength, or were weak.

43 As I set out at [21] of the original decision, the Court of Appeal recognised in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284 at [26] that s 232 of the SSM Act is expressed in broad terms. Indeed, a majority of the Court of Appeal in *Vickery* (Leeming at [149] and White JJA at [165]) considered that the scope of s 232 is wide enough to confer power on the Tribunal to hear and determine a claim for damages for common law nuisance. That particular claim was not pursued in these proceedings (it was expressly eschewed by the applicant's solicitor in his closing submissions) but there is no reason for me to find here that if a claim had been made in these proceedings for damages for nuisance based on the facts that were asserted, some of which were accepted, it would have been weak and would have failed.

44 In the circumstances of the claims made in the proceedings and the factual findings that I made I am satisfied that the claim made by the applicant had

adequate factual grounding. The issue leading to its failure was, as I have indicated, whether it demonstrated that the Tribunal should grant the particular discretionary remedy that was sought. I therefore do not consider that the applicant's claim concerning the glare that he was suffering was weak, or that it amounted to a special circumstance for the purposes of costs.

(d) The nature and complexity of the proceedings

45 The OC has not made any particular submissions on this ground. That said, it is clear that the factors surrounding the nature of the relief sought in the primary application, and the legal and factual issues thrown up by the proceedings more generally were not simple. The issues of the correct enactment (the RV Act and/or the SSM Act) and the nature of the Tribunal's jurisdiction under s 232 are examples of some of the complex issues that were thrown up by the proceedings.

46 It was appropriate for both parties to be represented by solicitors given the nature of the proceedings and the complexity of the issues raised in the proceedings. The Tribunal was certainly assisted by the involvement of solicitors for both parties.

47 That representation came at a cost to each party. The purpose of a costs order is to compensate the person in whose favour it is made, not to punish the person against whom the order is made: *Northern Territory v Sangare* (2019) 265 CLR 164 at [25]; *Ohn v Walton* (1995) 36 NSWLR 77 at 79; *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34].

48 I am satisfied that the nature and complexity of the proceedings, which led to the need for costs to be incurred through the engagement of solicitors for both parties, is a sufficiently special circumstance that should be taken into account in determining whether a costs order should be made in the proceedings.

(e) Whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance

49 This factor is closely related to factor (c), the relative strengths of the claims made by the parties.

50 Both complaints made by the applicant were validly brought within the scope of s 232 of the SSM Act. However, as I determined in the primary decision at [80]-[81], and for the reasons set out there, I am satisfied that the part of the applicant's claim that sought to invalidate the special resolution passed by a general meeting of the OC on 4 November 2019 was misconceived. This lends support to a finding of special circumstances for costs purposes.

51 Turning to the prayer for an order that the OC tilt the solar panels, I am not satisfied that the application was frivolous or vexatious or otherwise misconceived or lacking in substance. For the reasons that I have set out in the primary decision, and those set out at factor (c) above, I am satisfied that the applicant had a genuine dispute with the OC about the reflection of sunlight into his premises from the solar panel installations on the 2 buildings controlled by the OC. That dispute had substance, even though the Tribunal declined to make the discretionary order sought by applicant for the reasons set out at [87] of the primary decision.

(f) Whether a party had refused or failed to comply with the s 36(3) duty

52 As stated above, this factor concerns the parties' duties to cooperate with the Tribunal to facilitate the just, quick and cheap resolution of the real issues in dispute in the proceedings.

53 As noted in the applicant's submissions on costs, the opportunity to resolve the proceedings through the scheme established by orders 4-6 that were made on 4 May 2021 was not lost through any inaction or failure by the applicant to cooperate with the Tribunal. The evidence before the Tribunal demonstrates that the applicant took genuine steps to implement the scheme devised in those orders by actively seeking a meeting with the OC's solar panel installers for the purpose of obtaining recommendations to alter the angle of the solar panels to eliminate the reflection of sunlight from the panels into his premises without creating a knock-on reflection issue for adjacent owners. It was the installer, and not the applicant, who refused to participate in that meeting (see [61] of the primary decision). The applicant further wrote to the installer on 21 July, seeking a quote to carry out the work necessary to tilt the panels to the north and for any other suggestions, but again that request was denied by the

installer (see [62] of the primary decision]. Those events indicated that the applicant did seek to cooperate with Tribunal's desire to facilitate a just, quick and cheap resolution of the real issues in dispute concerning those matters.

54 The second ground relied on by the OC was the late service of the applicant's evidence. As I have set out above, I agree with the OC that the late service of that evidence did amount to a breach of orders made by the Tribunal in the interlocutory stages of the proceedings. However I am not satisfied on the evidence that the breach of those orders, of themselves, amounted to a breach of the applicant's duty to cooperate with the Tribunal to facilitate the purpose stated in s 36(3).

55 I accept the applicant's submissions that the applicant did seek to cooperate with the Tribunal in its facilitation of the purpose set out in s 36, but was instead frustrated by matters outside his control, including (firstly) the difficulties with ascertaining the correct respondent and correct enactment that I have addressed earlier in these reasons; (secondly) the response of the installer, just discussed; and (thirdly) and the imposition of "lockdown" orders (as they have come to be known) by the Minister for Health under the PH Act in late June 2021, which was not lifted until early October 2021.

56 The final preparations for the hearing of the proceedings, and the hearing itself, took place while that public health order was still current. I am satisfied in the circumstances that faced the population in general, and the applicant in particular, at that time that the applicant did seek to cooperate with the Tribunal as far as possible.

57 Consequently, I am not satisfied that the applicant failed or refused to comply with the duty imposed by s 36(3) of the CAT Act.

Are there special circumstances that warrant an award of costs?

58 The OC was successful in its defence of the proceedings. From the above analysis, there are some factors in this case that tend in favour of a finding of special circumstances to warrant an award of costs. They include the nature and complexity of the issues in the proceedings, and the misconceived nature of the claim that the 4 November 2019 special resolution should be set aside on the grounds raised by the applicant.

59 The other factors raised by the OC are, in my assessment, either neutral or tending against an award of costs. For example, it has not been established adequately that the delays in the conduct of the proceedings were unreasonable in the circumstances, or that the OC was disadvantaged in its conduct of its defence by any conduct on the part of the applicant. Further, I am satisfied that the substance of the applicant's dispute with the OC concerning the positioning of the solar panels, and the annoyance that the sunlight reflecting from those panels into his premises caused him, had merit even though the order he sought appeared excessive against that annoyance and was ultimately found to be too generalised to be workable.

60 Balancing those factors in the manner described in paragraphs [14] and [15] above, I am not satisfied that there are special circumstances in this case to warrant a costs order being made in this case, against the legislated intent set out in s 60(1) of the CAT Act, that each party to proceedings in the Tribunal is to pay the party's own costs.

61 That finding is enough to dispose of the application for costs. It is not strictly necessary for me to consider whether I would have exercised discretion in the OC's favour if I had found special circumstances existed, but I will indicate for completeness that if I needed to do so I would have also weighed those factors in the same way in exercise of that discretion, with the same outcome.

62 Accordingly, the orders of the Tribunal are:

(1) Pursuant to s 50 of the *Civil and Administrative Tribunal Act 2013* (NSW), a hearing on the question of costs is dispensed with.

(2) Each party to these proceedings should pay their own costs of the proceedings.

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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