



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners – SP No 91684 v Liu (No 2); The Owners – SP No 90189 v Liu (No 2)

Medium Neutral Citation: [2022] NSWCATAP 74

Hearing Date(s): On the papers

Date of Orders: 18 March 2022

Decision Date: 18 March 2022

Jurisdiction: Appeal Panel

Before: R C Titterton OAM, Senior Member
J Kearney, Senior Member

Decision: 1. In matter 2021/00262738:

(a) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Tribunal dispenses with a hearing in respect of the application for costs;

(b) The appellant is to pay the respondent's costs of the appeal on the ordinary basis

2. In matter 2021/00262728:

(a) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Tribunal dispenses with a hearing in respect of the application for costs;

(b) The appellant is to pay the respondent's costs of the appeal on the ordinary basis.

Catchwords: PRACTICE AND PROCEDURE – Application for costs – special circumstances

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW) – s 60

Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018 – s 137A
Interpretation Act 1987 (NSW) – ss 32 and 34
Strata Schemes Management Act 2015 (NSW) – s 150

Cases Cited: Alexander James Pty Ltd v Pozetu Pty Ltd (No 2) [2016] NSWCATAP 75
Brodyn Pty Ltd v Owners Corporation – Strata Plan 73019 (No 2) [2016] NSWCATAP 224
Cooper v The Owners - Strata Plan 58068 (2020) 103 NSWLR 160; [2020] NSWCA 250
Edwards v Commissioner for Fair Trading, Department of Customer Service (Costs) [2019] NSWCATAP 249
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94.

Category: Costs

Parties: In 2021/00262728:

Appellant: The Owners - SP No 90189 and
Respondent: Ava Dongmei Liu

In 2021/00262738

Appellant: The Owners - SP No 91684 and
Respondent: Ava Dongmei Liu

Representation: Counsel in 2021/00262728 and 2021/00262738:

D Knoll (Appellants)
M Cobb-Clark (Respondent)

Solicitors in 2021/00262728 and 2021/00262738:

Grace Lawyers (Appellants)
Sachs Gerace Lawyers (Respondent)

File Number(s): 2021/00262728 and 2021/00262738

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division
Citation: Not applicable
Date of Decision: 17 August 2021
Before: C Paull, Senior Member
File Number(s): SC 21/41841 and SC 21/41842

REASONS FOR DECISION

Introduction

- 1 On 5 January 2022 the Appeal Panel published orders and reasons for decision in respect of these two appeals: *The Owners – SP No 91684 v Liu*; *The Owners – SP No 90189 v Liu* [2022] NSWCATAP 1 (Primary Decision).
- 2 The respondent, Ava Dongmei Liu, has applied for costs of both the appeal proceedings, such costs to be paid on the ordinary basis. These reasons relate to that application. As before, we will provide a single set of reasons which apply to both appeals.

Background

- 3 These two appeals were heard together. In each appeal, the appellant is the owners corporation of a strata plan. The respondent is the same person for each appeal. She is a lot owner in each of the strata plans.
- 4 In May 2020, each owners corporation passed a special resolution to amend the existing by-laws relating to short-term rental accommodation.
- 5 The respondent brought proceedings in the Consumer and Commercial Division of the Tribunal to challenge the by-laws in each strata plan.
- 6 On 17 August 2021, the Tribunal decided the by-laws in each strata scheme were invalid. The owners corporation in each strata plan appealed from that decision.
- 7 We heard the appeals together and dismissed the appeals. Orders were made permitting the respondent to make an application in respect of costs. Both parties provided submissions in respect of costs.

- 8 The orders we made were framed in such a way that if either party opposed the matter of costs being dealt with on the papers they should address that matter in their submissions. The respondent consented to the application for costs being dealt with on the papers. The appellants' submissions were silent on the issue. Having regard to the orders made and the submissions, we are satisfied that a further hearing is not necessary. Accordingly, we will make an order under s 50(2) of the *Civil and Administrative Tribunal Act* (NSW) (NCAT Act) in each matter dispensing with a hearing.
- 9 Both parties submit, correctly, that s 60 of the NCAT Act is the appropriate provision under which this application for costs is to be determined.
- 10 The starting point is that s 60(1) which provides that each party is to bear its own costs. Section 60(2) provides the Tribunal with a discretion to award costs if it is satisfied that there are special circumstances warranting such an order. In deciding whether there are special circumstances, the Tribunal may have regard to the factors in s 60(3) which reads as follows:
- (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
 - (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
 - (d) the nature and complexity of the proceedings,
 - (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
 - (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
 - (g) any other matter that the Tribunal considers relevant.
- 11 The general approach to the application of s 60 is well settled and described in numerous published decisions, one example of which is *Edwards v Commissioner for Fair Trading, Department of Customer Service (Costs)* [2019] NSWCATAP 249 where it was stated:

9. Special circumstances are circumstances that are out of the ordinary, but need not be those which are exceptional or extraordinary. These principles are well established and have been consistently applied in this Tribunal: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]; *Commissioner for Fair Trading v Edward Lees Imports Pty Ltd (No 2)* [2019] NSWCATAP 222 at [8]; *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [32].

10. A party's success on appeal is relevant to the question of costs, although it is not determinative: *Hammond v Ozzy Cheapest Cars Pty Ltd t/as Ozzy Car Sales* [2015] NSWCATAP 65. The Tribunal's discretion to award costs must be exercised judicially and not capriciously: *Oshlack v Richmond River City Council* (1998) 193 CLR 72 at 81; *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [37].

- 12 In *Alexander James Pty Ltd v Pozetu Pty Ltd (No 2)* [2016] NSWCATAP 75 at [14] the Appeal Panel stated:

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...

Submissions of parties

- 13 The respondent submits there are two features of these appeals which create special circumstances justifying an order for costs in her favour.
- 14 The first is that the respondent submitted that it was always open to the Appellant to convene an extraordinary general meeting to pass new by-laws which did not contravene the *Strata Schemes Management Act 2015* (NSW) (SSMA). This, it was said, would have avoided the appeal and the associated costs. This engages s 60(3)(g) " ... *any other matter the Tribunal considers relevant*".
- 15 Each appellant submits that the ability of an owners corporation to convene a general meeting is not of itself a special circumstance and we should not find special circumstances exist for this reason.
- 16 We agree with this submission. The fact that this litigation may have been avoided by some extra curial steps such as holding a general meeting, does not impress us as a circumstance we should characterise as "special". Many types of litigation might be obviated by such steps. In our view, each appellant was entitled to have the Tribunal's decision at first instance tested on appeal, but the fact that it may have had an alternative pathway available does not,

without more, make the circumstances special. Further, the outcome of a vote at a general meeting is uncertain. There is no suggestion that the appellants did not have an arguable case. The submission may have had more impact in that circumstance.

- 17 In any event, the appellants say the Appeal Panel accepted one of its arguments relating to severance – namely that the Member had not considered s 32 of the *Interpretation Act 1987* (NSW) – and so, it argued, until that issue was resolved it would have been premature for a general meeting to be convened. We do not accept this submission because in fact we decided that although s 32 was not referred to by the Member, we were not persuaded that the Member fell into error (refer [78] of the Primary Decision).
- 18 The second circumstance which the respondent submits creates a special circumstance justifying an order for costs in her favour is the nature and complexity of the proceedings. This engages s 60(3)(d) of the NCAT Act.
- 19 The appellants say that complexity in and of itself is not a special circumstance. It says that the questions of law involved were not so complex that would make the dispute out of the ordinary.
- 20 In our view, the nature and complexity of these appeals do establish special circumstances. First, the legal issues raised were not simple or straight forward. They included the proper test for the application of s 150 of the SSMA which has been described by the Court of Appeal as “*fraught with difficulty*” (see the remarks of Basten JA at [24] in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250; 103 NSWLR 160 at [24]).
- 21 Although we had the benefit of *Cooper*, there was considerable debate about the differing views of the members of the Court of Appeal in that case.
- 22 The appeals also involved other difficult legal issues such as the use of extrinsic material in the interpretation of statutes (including s 34 of the *Interpretation Act 1987* (NSW)) and severance. In our view, it would not have been practical for either party to have conducted the appeals without legal representation. In the circumstances, we were able to deal with the appeal most efficiently because both parties were legally represented.

23 Further, the appeals raised, for the first time as far as we are aware, the application of new legislative provisions being amendments to the SSMA by the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018* (NSW) which affects the short term rental market in NSW and so potentially have wide reaching effects.

24 Having decided that a special circumstances exists, the next issue is whether we should, in the exercise of our discretion, award costs. In *Brodyn Pty Ltd v Owners Corporation – Strata Plan 73019 (No 2)* [2016] NSWCATAP 224 the Appeal Panel said:

24 Further, where special circumstances are found to exist, the Tribunal has a discretion to exercise in deciding what, if any, order should be made. Relevant to the exercise of that discretion are those facts upon which the finding of special circumstances was based. However, those findings do not constitute the whole of the relevant matters to be considered in deciding what, if any, order for costs should be made. Rather, the principles applicable to awarding costs generally must also be taken into account. These include:

(1) Costs are compensatory: see *Latoudis v Casey* (1990) 170 CLR 334;

(2) That an unsuccessful party bears the costs of the successful party: *Oshlack v Richmond River Council* [1998] HCA 11 at [134];

...

26 Overall, the Tribunal is to exercise its discretion in a manner that is fair and reasonable having regard to the circumstances of the particular case.

25 We additionally note that the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs: *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94.

26 In our view, having found that special circumstances are established, and having considered the principles applicable to awarding costs generally including that costs are compensatory and that an unsuccessful party bears the costs of the successful party, given the complexity of the issues in the appeals we consider that this is a matter in which costs should be awarded.

Orders

27 The Appeal Panel makes the following orders:

(1) In matter 2021/00262738:

- (a) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 the Tribunal dispenses with a hearing in respect of the application for costs.
 - (b) The appellant is to pay the respondent's costs of the appeal on the ordinary basis
- (2) In matter 2021/00262728:
- (a) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the Tribunal dispenses with a hearing in respect of the application for costs.
 - (b) The appellant is to pay the respondent's costs of the appeal on the ordinary basis.

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

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