



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners - Strata Plan No 70871 v Turek

Medium Neutral Citation: [2022] NSWCATAP 83

Hearing Date(s): On the papers

Date of Orders: 28 March 2022

Decision Date: 28 March 2022

Jurisdiction: Appeal Panel

Before: G Sarginson, Senior Member
A Boxall, Senior Member

Decision: (1) An oral hearing is dispensed with under s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW).
(2) The costs application is dismissed.
(3) There is no order as to costs with a view that each party bear its own costs of the proceedings in Matter AP 2021/248651.

Catchwords: COSTS---withdrawal of proceedings---whether special circumstances established

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW).
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Schemes Management Regulations 2016 (NSW)

Cases Cited: 2 Elizabeth Bay Road Pty Ltd v The Owners-Strata Plan No 73943 [2014] NSWCA 409
ACCC v Dataline.Net.Au. Pty Ltd [2007] FCAFC 146; (2007) 244 ALR 300
Dehsabzi v The Owners-Strata Plan No 83556 [2019] NSWCATAP 65
Durrant t/as Canberra Sheds and Outdoor Storage v Bliss [2018] NSWCATAP 43
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP

Megerditchian v Kurmond Homes Pty Ltd [2014]
NSWCATAP 120

Obieta v Australian College of Professionals Pty Ltd
[2014] NSWCATAP 38

PD Holdings Pty Ltd t/as The Bathroom Exchange v
Baguley [2015] NSWCATAP 21

Re Minister for Immigration and Ethnic Affairs: Ex Parte
Lai Qin (1997) 186 CLR 622; [1997] HCA

Rodny v Stricke [2020] NSWCATAP 20

The Owners-Strata Plan No 63731 v B & G Trading Pty
Ltd (No 2) [2020] NSWCATAP 273

The Owners-Strata Plan No 7081 v Turek [2020]
NSWSC 1027

Turek v The Owners-Strata Plan No 70871 [2020]
NSWCATAP 14

Turek v The Owners-Strata Plan No 70871 [2020]
NSWCATAP 28

Turek v The Owners-Strata Plan No 70871 (No 2)
[2020] NSWCATAP 89

Walsh v The Owners-Strata Plan No 10349 [2017]
NSWCATAP 230

Texts Cited:	None cited
Category:	Costs
Parties:	The Owners - Strata Plan No 70871 (Appellant) Michael Turek and Louise Turek (Respondent)
Representation:	Solicitors: Bannermans Lawyers (Appellant) Hones Lawyers (Respondent)
File Number(s):	2021/00248651
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	[2021] NSWCATCD 79
Date of Decision:	3 August 2021

Before: C. Paull, Senior Member

File Number(s): SC 19/19280

REASONS FOR DECISION

- 1 The Appellant is the owners' corporation constituted under section 8 of the *Strata Schemes Management Act 2015* (NSW) ('the SSM Act') for the strata scheme set out in Strata Plan No 70781, which comprises 58 residential and 3 commercial lots located in Chippendale NSW.
- 2 The Respondents are the proprietors of one of the commercial lots, Lot 59.
- 3 In this decision, any reference to 'the owners corporation' is a reference to the Appellant; and any reference to 'the Lot owner' is a reference to the Respondents.
- 4 There has been since 2018 a dispute between the parties concerning the location at which the Respondents store the waste bins referable to their activities conducted on Lot 59.
- 5 The Respondents proposed a special use by-law in relation to the storage of the waste bins. When this was not adopted, the Respondents sought an order for a licence under section 131 of the SSM Act concerning the storage of the bins on common property.
- 6 The Tribunal proceedings first involved an interlocutory costs decision arising from an adjournment of the hearing, which was the subject of a successful appeal to the Appeal Panel; and then a subsequent costs application in the appeal (*Turek v The Owners-Strata Plan No 70871* [2020] NSWCATAP 14).
- 7 The proceedings continued in the Tribunal.
- 8 The application for grant of a licence to use common property was heard by the Tribunal on 1 November 2019, when relevantly it ordered that:
 - (1) The Respondents provide by 22 November 2019 a draft licence for the proposed use of waste bins; and

- (2) The Appellant arrange an extraordinary general meeting of the Appellant to consider the draft licence, such meeting to take place on or before 17 January 2020.
- 9 In conformity with the orders, the Respondents provided a draft licence and the Appellant considered it on 17 January 2020.
- 10 In parallel with this process, the Appellant appealed to the Tribunal's Appeal Panel in respect of the orders of 1 November 2019. On 28 February 2020, the Appeal Panel dismissed the appeal (*Turek v The Owners-Strata Plan No 70871* [2020] NSWCATAP 28) and awarded costs (*Turek v The Owners-Strata Plan No 70871 (No 2)* [2020] NSWCATAP 89).
- 11 The Appellant appealed against this decision to the Supreme Court of New South Wales. The Court allowed the appeal in part, ordered that the costs of the hearing on 1 November 2019 be reserved, and set aside the Appeal Panel's costs order (*The Owners-Strata Plan No 7081 v Turek* [2020] NSWSC 1027).
- 12 The matter was remitted back to the Tribunal. The owners corporation made an interlocutory application that the Tribunal dismiss the proceedings because the owners corporation had not formally "refused" to grant the licence sought under section 131 (2) (b) of the SSMA.
- 13 On 30 November 2020 the Tribunal dismissed the interlocutory application by the owners corporation, with written reasons provided. The matter was set down for hearing.
- 14 The matter proceeded to a substantive hearing on 30 March 2021, at which the Tribunal reserved its decision.
- 15 On 3 August 2021 the Tribunal issued its decision in the substantive proceedings. Pursuant to section 131 of the SSM Act, the Tribunal granted the Respondents the right to operate for 10 years under the draft licence submitted to the extraordinary general meeting on 17 January 2020 in consideration of the payment of a monthly licence fee of \$50 per month, payable one month in advance. Written reasons were provided comprising of 20 pages.
- 16 On 31 August 2021, the Appellant filed a Notice of Appeal with the Appeal Panel, seeking the following orders:

- (1) That the orders of 30 November 2020 and 3 August 2021 be set aside;
 - (2) That application SC19/19280 (being the application to which the orders of 3 August 2021 relate) be dismissed;
 - (3) That the Respondents pay the Appellant's costs with respect to proceedings SC19/29289 and SC19/19280; and
 - (4) That the Respondents pay the costs of the appeal.
- 17 At a directions hearing on 13 October 2021, the Appeal Panel made orders to the following effect:
- (1) The Respondents were to provide their Reply to Appeal by 24 November 2021;
 - (2) The Appellant was by 17 November 2021 to advise whether it had decided to proceed with the appeal;
 - (3) By 8 December 2021, the Appellant is to provide evidence, submissions and any relevant transcript of the first instance hearing.
 - (4) By 22 December 2021, the Respondents are to provide evidence, submissions and any relevant transcript of the first instance hearing.
 - (5) By 17 January 2022, the Appellant is to provide any written submissions in reply.
 - (6) The Appeal is listed for hearing on 1 February 2022.
 - (7) Any issue as to whether the time for filing the notice of appeal should be extended is to be determined at the time of the hearing.
- 18 On 16 November 2021, the solicitor for the Appellant informed the Tribunal and the solicitors representing the Respondents that the Appellant had decided to withdraw the appeal. Under section 55 (1) (a) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act') proceedings may be dismissed if they are withdrawn.
- 19 On 6 December 2021, the Respondents filed an application:
- (1) Seeking an order for costs in respect of the appeal, such costs to be levied against the units in the strata scheme owned by a particular unit holder; and
 - (2) Seeking an order under section 104 of the SSM Act that the Appellants not seek any contribution to those costs from the Respondents in their capacity as the owners of units in the strata scheme; and
 - (3) Incorporating various submissions in support of their application.
- 20 On 10 December 2021, the Appellants replied:
- (1) Seeking the dismissal of the costs application;

- (2) Seeking an order that the parties pay their own costs; and
 - (3) Incorporating various submissions in support of their reply.
- 21 The parties agree in their written submissions that this application may be dealt with in the absence of the parties on the basis of written submissions pursuant to section 50 (2) of the NCAT Act. We are satisfied that it is appropriate to dispense with an oral hearing on the issue of costs.

Consideration

- 22 The starting point is section 60 of the NCAT Act, which provides relevantly as follows:

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.
- 23 That is to say, the default setting in relation to costs in matters before the Tribunal is – subject to particular exceptions that are specific to certain limited categories of proceedings but are not relevant here – is that each party bears its own costs. One general exception is provided in section 60(2) for where the Tribunal is satisfied that there are special circumstances that warrant an award of costs, and section 60(3) lists a number of considerations to which the Tribunal may have regard in determining whether there are special circumstances.

24 Section 60 of the NCAT Act has been considered in numerous cases, from which several general propositions can be distilled:

- (1) The words “special circumstances” refer to circumstances that are out of the ordinary, but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]; *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [23]-[31]; and *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48];
- (2) That one or more of the considerations listed in section 60(3) is made out is not of itself sufficient to require that a costs order be made: *Obieta v Australian College of Professionals Pty Ltd* [2014] NSWCATAP 38 at [81];
- (3) In addition to one or more “special circumstances” being established by the party that seeks the costs order in its favour, the party must also establish that the “special circumstances” warrant the Tribunal from departing from the general rule under section 60 (1) of the NCAT Act that each party bears its own costs. The exercise of discretion involves weighing whether the “special circumstances” are sufficient to depart from the general rule. It is the party seeking the costs order who bears the onus of persuading the Tribunal that (a) there are “special circumstance” and (b) those “special circumstances” are sufficient to justify departure from the general rule (*The Owners-Strata Plan No 63731 v B & G Trading Pty Ltd (No 2)* [2020] NSWCATAP 273 at [6]-[15]); and
- (4) Each situation must be assessed on a case by case basis to see whether or not special circumstances exist so as to warrant the award of costs: *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48].

25 The Respondents say that special circumstances exist sufficient justify a costs order in their favour, because:

- (1) Section 103(1) of the SSM Act provides that:

An owners corporation or strata committee of an owners corporation must not obtain legal services for which any payment may be required unless a resolution approving the obtaining of those services is passed at a general meeting of the owners corporation;
- (2) For the Appellant to cause a firm of solicitors to prepare and file the Notice of Appeal in this matter on 31 August 2021 self-evidently required it to obtain legal services, and:
 - (a) The terms of – in the event, defeated - Motion 2 in the Minutes of Strata Committee Meeting for the Appellant dated 28 September 2021, provided at Tab 5 of the Respondent’s Bundle of Tender Documents filed on 9 December 2021, together with
 - (b) The letter dated 13 September 2021 from Bannermans Lawyers to the Secretary of the Appellant, provided at Tab 6 of the

Respondent's Bundle of Tender Documents filed on 9 December 2021,

indicate that Appellant and its solicitors were in agreement that the solicitors would be remunerated for their work in connection with the appeal;

- (3) The engagement of the solicitors to begin and conduct the Appeal was at no time authorised by either the Appellant itself or its strata committee;
- (4) Rather, the appeal was begun on the instructions of one member of the strata committee, without appropriate authority to do so;
- (5) This absence of approval for the appeal was not remedied by either the strata committee or a resolution of a general meeting of the Appellant; indeed, a general meeting in fact resolved not to ratify the decision made to begin the Appeal and engage the Solicitors;
- (6) The initiation of the appeal without proper authorisation amounts to a special circumstance such as to support the Tribunal making a costs order in favour of the Respondents; and
- (7) The involvement of the committee member in question in initiating the appeal without authority makes it appropriate for the Tribunal to order that costs be levied against his unit entitlements in the strata scheme, rather than for the costs to be borne by all Lot owners.

26 The Appellant says in summary that:

- (1) Because of the brief 28-day period allowed under Rule 25(4)(c) of the *Civil and Administrative Tribunal Rules 2014* (NSW) for the commencement of the appeal, it was necessary to do so without the authority of a general meeting of the Appellant;
- (2) In any event, the strata committee approved the filing of the Appeal;
- (3) Following the Appellant's general meeting on 29 October 2021, which resolved not to ratify the decision to commence the Appeal, the Appellant's solicitors provided notice on 16 November 2021 withdrawing the appeal; and
- (4) Since nothing in the Tribunal's orders of 13 October 2021 required the Respondents to file:
 - (a) Its reply to appeal 24 November 2021, or
 - (b) Its evidence and submissions until 22 December 2021,the Respondents were not put in the position of having to incur legal costs before they were notified of the withdrawal.

27 The Tribunal is not satisfied that the circumstances surrounding the authorisation and initiation of the appeal by the Appellant are such as to amount to “special circumstances” for purposes of section 60(2) of the NCAT Act for the following reasons:

(1) It may well be that these circumstances amount to a failure by the Appellant to comply with certain requirements of the SSM Act concerning the internal management of the Appellant. That, however, is essentially a matter between the Appellant, its officers and members, and potentially the government agencies charged with the oversight of owners’ corporations. There is no compelling reason to conclude that such a failure should translate into special circumstances for the purposes of section 60(2). The considerations in section 60(3) direct the Tribunal’s attention to the nature and quality of the proceedings and the conduct of the Appellant vis-à-vis the Respondents, not in relation to the unit holders in the strata scheme as such.

(2) This conclusion is consistent with the approach that underlies section 103(4) of the SSM Act. This sub-section provides as follows:

A failure by an owners corporation or the strata committee of an owners corporation to obtain an approval under this section does not affect the validity of any proceedings or other legal action taken by the owners corporation.

In doing so, it clearly seeks to isolate proceedings commenced in breach of section 103 from the consequences of that breach for the owners’ corporation and unit holders concerned. Whatever the internal consequences for the corporation, its officers and members, sub-section 103(4) provides that these have no bearing on the corporation’s legal relationship with other persons arising out of the proceedings.

(3) Even if one considers it as a little disingenuous – a respondent to an Appeal in a matter which has been hard-fought for several years is unlikely to leave the preparation of his response until the last moment - the Appellant’s assertion that the Respondents need not have incurred any legal costs in relation to the Appeal by 16 November 2021 when it was withdrawn, is a relevant consideration. If the Respondents had been required to prepare their case in full before 16 November 2021, then there may have been some argument for an award of costs. They were not so required, however, and at least until then they were tactically in a position to keep their costs low. Hence it does not follow that the Appellant’s conduct in launching (and then withdrawing) its appeal has the elements of unreasonableness or unfairness which some considerations in section 60(3) contemplate.

(4) While:

- (a) Clearly, the relationship between the Respondents and the Appellant (or at least some unit holders in the strata scheme) had not been a harmonious one, and
- (b) It is conceivable that the nature of this relationship could colour the decision to initiate the appeal,

there is nothing manifestly unreasonable in the Appellant commencing the appeal. The matter's history – two hearings in the Tribunal's Commercial and Consumer Division, one hearing before the Appeal Panel and an appeal to the Supreme Court – suggests that the merits may have been rather more delicately balanced than the strongly entrenched positions of, respectively, the Respondents and some at least of the other unit holders might indicate.

- (5) The combined effect of section 103(2) of the SSM Act and Regulation 26(1) under the *Strata Schemes Management Regulations 2016* (NSW) (*'the SSM Regulations'*) is to permit an owners' corporation to obtain legal services if:
 - (a) It is of the opinion of the owners corporation or strata committee that urgent action is necessary to protect the interests of the owners' corporation, and
 - (b) The cost of the legal services does not exceed \$15,000.
- (6) The Appellant refers in its submission to the 28-day period for filing the appeal, which does indicate that the matter was not without some urgency. The expected legal costs involved in pursuing the appeal are not clear from the solicitors' letter of 13 September 2021, so that there is at least the possibility open that the solicitors' engagement to begin the appeal was not in breach of section 103.
- (7) The Appellant's submissions include copies of emails from strata committee members of the owners corporation dated 1 September 2021 instructing the Appellant's Solicitors "continue" the appeal. For the purpose of this costs application it is unnecessary for us to express a concluded view as to whether a formal Motion passed at a meeting of the strata committee (and evidenced by Minutes of the meeting) is necessary to comply with Regulation 26 (1) of the *SSM Regulations*.
- (8) Proceedings that have been commenced without proper approval under the SSM Act are not invalid or a nullity; and retrospective approval to commence litigation can be given by way of a resolution passed at a meeting of the owners corporation (*2 Elizabeth Bay Road Pty Ltd v The Owners-Strata Plan No 73943* [2014] NSWCA 409).

28 Withdrawal of Appeal proceedings, may in some circumstances, constitute sufficient "special circumstances" to justify a costs order (*Rodny v Stricke* [2020] NSWCATAP 20). In other circumstances, withdrawal of proceedings is

not sufficient to constitute sufficient “special circumstances” to justify a costs order (*Durran t/as Canberra Sheds and Outdoor Storage v Bliss* [2018] NSWCATAP 43; *Dehsabzi v The Owners-Strata Plan No 83556* [2019] NSWCATAP 65). However, it is clear that the mere fact that proceedings are withdrawn is not, of itself, a sufficient “special circumstance” to justify a costs order. In this matter, the Appeal was withdrawn at a relatively early stage, which weighs against departure from the principle in section 60 (1) of the NCAT Act that each party pay its own costs.

29 Finally, the Tribunal turns to section 104(1) of the SSM Act. This provides that:

An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.

30 The Appeal Panel has jurisdiction to deal with the issue of costs of the appeal. However, it is not appropriate for us to make an order under s 241 of the SSM Act preventing the owners corporation from taking action in breach of section 104 (1) of the SSM Act for the following reasons:

- (1) We are not empowered under s 81 of the NCAT Act to make the orders sought, in circumstances where the costs application has been dismissed and there is no remittal of proceedings to the Tribunal.
- (2) In any event, the order sought is premature. No action has yet been taken by the owners corporation regarding the levying of contributions arising from the legal costs incurred by the owners corporation in the appeal proceedings we are dealing with and there is nothing to indicate what, if any, action will be taken. There is no current dispute between the parties in respect of this issue, and whether or not there will be a future dispute is merely speculative;
- (3) The submissions of the parties do not deal with the section 104 (1) issue;
- (4) Neither the Tribunal or the Appeal Panel has power to make declarations as distinct from findings in the context of other remedies under the SSM Act (*Walsh v The Owners-Strata Plan No 10349* [2017] NSWCATAP 230 at [60]-[61]);
- (5) In the context of the power to make an injunctive order, it is usually inappropriate to make an order that a party comply with the law in the future or not be in breach of its future statutory obligations (*ACCC v Dataline.Net.Au. Pty Ltd* [2007] FCAFC 146; (2007) 244 ALR 300);
- (6) If there is a dispute about this issue in the future (i.e. the owners corporation issues a levy contribution that the Lot owner says is in breach of s 104 (1) of the SSM Act) the Lot owner has the right to take

proceedings in the Tribunal and the Tribunal is the appropriate forum to deal with any such dispute.

- 31 Our view is that in the particular circumstances of this matter it is strongly arguable that the Respondents were “successful in the proceedings” within section 104 (1) of the SSM Act; either on the basis that the Appellants withdrew the appeal and for the purpose of s 104(1) of the SSM Act the Respondents “succeeded” because no orders were made against them; or because of the conduct of the Appellants in the bringing of the appeal proceedings and maintaining them for a period of time was such that under the principles expressed in *Re Minister for Immigration and Ethnic Affairs: Ex Parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6 the Respondents should not bear the expenses of contributing by way of a levy to the costs of the Appellant in these appeal proceedings.
- 32 Considering the history of disputation between the parties and the amount of legal costs that each party has likely expended, it would be regrettable if there was a future dispute between the parties involving s 104 (1) of the SSM Act that led to Tribunal proceedings. However, for reasons expressed previously, that is not an issue for us to finally determine.
- 33 As we have not made a costs order in favour of the Respondents, the order sought regarding costs being born by a specific strata committee member requires no consideration.

ORDERS

- (1) An oral hearing is dispensed with under s 50 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW).
- (2) The costs application is dismissed.
- (3) There is no order as to costs with a view that each party bear its own costs of the proceedings in Matter AP 2021/248651.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

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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