



Civil and Administrative Tribunal

New South Wales

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Case Name: The Owners - Strata Plan No. 36965 v Alexander (No. 2)

Medium Neutral Citation: [2022] NSWCATAP 81

Hearing Date(s): On the papers

Date of Orders: 25 March 2022

Decision Date: 25 March 2022

Jurisdiction: Appeal Panel

Before: M Harrowell, Deputy President  
A Bell SC, Senior Member

Decision: 1. A hearing of the costs application is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).  
2. The application for costs is dismissed.

Catchwords: COSTS – appeal out of time – no special circumstances warranting an award of costs.

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

Cases Cited: Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120  
Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130  
The Owners-Strata Plan 36965 v Alexander [2021] NSWCATAP 407

Texts Cited: None

Category: Costs

Parties: The Owners – Strata Plan 36965 (Appellant)  
Jennifer Alexander (Respondent)

Representation: Solicitors:  
Appellant (Self-represented) (A.Gough)  
Everyday Legal (Respondent)

File Number(s): 2021/00139572

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 30 March 2021

Before: K. Rickards, Tribunal Member

File Number(s): SC20/47590

## REASONS FOR DECISION

### Introduction

- 1 On 15 December 2021 we dismissed an appeal by the appellant (Owners Corporation) concerning the keeping of a dog and whether it was an assistance animal. We published reasons for our decision: *The Owners-Strata Plan 36965 v Alexander* [2021] NSWCATAP 407 (principal reasons).
- 2 The principal reasons did not deal with costs of the appeal.
- 3 The respondent (Ms Alexander) subsequently made an application for costs of the appeal in submissions dated 21 December 2021. The respondent said there are special circumstances warranting an award of costs and the Appeal Panel should make an order in her favour pursuant to s 60(2) of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act).
- 4 The order sought is that the Owners Corporation pay the costs of Ms Alexander fixed at \$16,264.60.

5 Both parties agreed that the application for costs should be dealt with on the papers, without a further hearing so we will make an order under s 50(2) of the NCAT Act dispensing with a hearing.

### **Consideration**

6 Section 60(1), which applies to this appeal, provides that each party is to pay their own costs of the proceedings. However, despite s 60(1), the Tribunal may make an award for costs if it is satisfied there are special circumstances warranting such an award: s 60(2) NCAT Act. Special circumstances mean circumstances out of the ordinary but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].

7 Section 60(3) sets out matters to which the Tribunal may have regard in determining whether there are special circumstances.

8 The respondent relies on the following matters in s 60(3):

(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).

### *Submissions*

9 The respondent's submissions regarding these matters can be summarised as follows:

(1) The appellant failed to comply with directions, in particular it failed to provide a sound recording or transcript of the hearing at first instance, the appeal proceedings being adjourned on 10 August 2021 for this purpose with costs of the adjournment being reserved. In addition, the appellant failed to particularise the orders sought.

(2) The respondent made an offer of compromise, being that she would pay five two hour dog training sessions focused on controlling/ addressing

the alleged excessive barking issues and on the basis the appellant would pay 60% of the respondent's legal costs.

- (3) The Appeal Panel found that there was no satisfactory explanation for the quite extensive delay in lodging a notice of appeal and no urgent steps were taken by the appellant to do so.
  - (4) The Appeal Panel found the first ground of appeal, namely that the dog Luna was not an "assistance animal" had no prospects of success.
  - (5) As to the second ground, that the Tribunal at first instance failed to address the claim that the respondent had breached bylaw 5.1 and that the Tribunal had failed to give weight to evidence of neighbours concerning the dog's barking, the Appeal Panel found there was no serious prospect that the appellant could demonstrate in may have suffered a substantial miscarriage of justice.
  - (6) In effect, the "Appeal was defeated on all grounds".
  - (7) The proceedings were complex as there was a need to make submissions on potential constitutional issues and by reason of the appellant seeking to introduce new evidence and/or changing or withdrawing orders sought.
  - (8) Further, none of the orders sought by the appellant addressed the allegation of noise. The respondent says that the orders sought were invalid and, accordingly, the proceedings were misconceived, frivolous and vexatious.
  - (9) By "continuing to insist on the removal of Luna ... merely on the basis she was a dog was contrary to the legislated changes in the Strata Schemes Management Act 2015 (NSW) (SSM Act) ... and reveals the appellant's appeal is frivolous and vexatious".
- 10 In summary, the respondent submitted that the appeal was brought out of time "without proper excuse", the proceedings were unreasonably delayed by non-compliance or failure to comply with directions and the orders sought were invalid on grounds that were without merit. It was submitted that these facts amount to special circumstances which warrant an award costs and cost should be fixed at an amount of \$16,264.60 in accordance with the evidence of time charges made by the respondent's solicitor contained in the solicitor's tax invoice dated 21 December 2021.

### *Analysis*

- 11 We do not accept that the proceedings were unreasonably prolonged or that the appellant failed to comply with its duty under s 36(3) of the NCAT Act.

- 12 While the appeal was lodged out of time, this of itself does not demonstrate the proceedings were unreasonably prolonged. Rather, the late appeal simply necessitated an application for an extension of time. Such applications, particularly where people are not legally represented, are not of themselves a reason to find special circumstances warranting an award of costs. While there was non-compliance with Tribunal directions, again this did not prolong the proceedings nor did it affect our ability to determine the appeal on the date fixed for hearing.
- 13 As to the adjournment of the appeal on 10 August 2021, this was for two reasons. One was the late receipt of the respondent's submissions by the appellant. The second was because the Appeal Panel identified the need to allow the parties to make submissions concerning a potential jurisdictional issue, namely whether a federal matter was raised about which the Tribunal could not adjudicate because of the Constitution. While the adjournment did delay finalisation of the appeal, the circumstances in which it occurred, particularly the content of the respondent's reply submissions and the Appeal Panel raising the jurisdictional matter, do not warrant the making of a cost order against the appellant in this case.
- 14 While there was some complexity concerning question of whether these proceedings gave rise to a federal matter, it is to be remembered that the respondent made a submission that this Tribunal had no jurisdiction to determine the dispute. It failed on this submission for the reasons set out in the principal reasons. Consequently, this is not a matter supporting an award for costs in favour of the respondent.
- 15 As to the relative strength of the parties' cases and whether the proceedings were frivolous, vexatious or lacking in substance, these matters must be considered in the context of each ground of appeal.
- 16 It can be accepted from what we said in the principal reasons that the first ground of appeal was weak in a legal sense having regard to the decision of the Full Court of the Federal Court of Australia in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 about who can provide training. On the other hand, the barking of the dog (a matter recognised by the Tribunal in the

decision at first instance as a continuing issue) did raise a question concerning adequacy of training.

- 17 The second ground concerned the Tribunal dealing with the noise complaint. As we indicated, the Tribunal's "reasons were brief" in relation to this matter. In doing so we said at [31]:

The Tribunal found the noise issue had not been "completely addressed", indicating that the Tribunal did weigh the evidence in relation to barking but concluded that no orders were warranted in that regard under s 158 of the SSM Act at that time.

- 18 We went on to say that we would not grant leave as we did not consider there was any serious prospect that the appellant may have suffered a substantial miscarriage of justice. This determination formed part of our reasoning process as to why time should not be extended to lodge the appeal, the appeal being substantially out of time.
- 19 Despite this conclusion, as we said in the principal reason at [31], the reasons for the decision of the Tribunal at first instance were "brief".
- 20 Against this fact is the claim that Luna had been barking, a matter about which some lot owners in the strata scheme were complaining and a matter which the appellant sought to have addressed by this appeal. The fact there was continuing barking is supported by the offer of compromise by the respondent to affect further training "focused on controlling barking".
- 21 These matters demonstrate that there was, at least, a genuine dispute about noise and its effect on other lot owners. For this reason we do not accept that the proceedings were frivolous, vexatious or lacking in substance. Rather, the proceedings were dismissed as the appeal was lodged late and the circumstances did not warrant an extension of time on discretionary grounds.
- 22 Finally, in relation to the offer of compromise, we are not satisfied its refusal was unreasonable. Acceptance would have required the appellant to pay 60% of the respondent's costs in circumstances where s 60(1) otherwise provides each party is to pay their own costs.
- 23 It follows that we are not satisfied that there are special circumstances warranting an award of costs and the application is dismissed.

## **Conclusion**

24 The Appeal Panel makes the following orders:

- (1) A hearing of the costs application is dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).
- (2) The application for costs is dismissed.

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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

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