Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No. 97383 v CLSM Pty Ltd
Medium Neutral Citation:	[2022] NSWCATCD 59
Hearing Date(s):	Heard on the papers
Date of Orders:	2 May 2022
Decision Date:	2 May 2022
Jurisdiction:	Consumer and Commercial Division
Before:	D Goldstein, Senior Member
Decision:	1. A hearing on costs is dispensed with pursuant to section 50(2) of the Civil and Administrative Tribunal Act 2013. 2. The Owners – Strata Plan 97383's costs application in SC 21/24112 is dismissed. Each party must bear their own costs. 3. In SC 21/48501 CLSM Pty Ltd must pay The Owners – Strata Plan 97383 costs of the proceedings such costs if not agreed to be assessed in accordance with the Legal Profession Uniform Law Application Act 2014
Catchwords:	STRATA TITLE – Application for costs – Special circumstances – Claim that has no tenable basis in fact or law – Case that is unarguable
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW) Legal Profession Uniform Law Application Act 2014 (NSW)
Cases Cited:	Cubic Metre Pty Ltd v C & E Critharis Constructions Pty Ltd [2019] NSWCATAP 130 DYH v Public Guardian (No 3) [2022] NSWCATAP 34 Michael's Excavations Pty Ltd v Whitehorse Trucks Pty Ltd (Costs) (Civil Claims) [2021] VCAT 712

	Re Minister for Immigration and Ethnic Affairs: Ex Parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6 Wynne Avenue Property Pty Limited v MJHQ Pty Limited [2018] NSWCATAP 197
Texts Cited:	Nil
Category:	Costs
Parties:	The Owners – Strata Plan No. 97383 (Applicant) CLSM Pty Ltd trading as Comfort Living Strata Management (Respondent)
Representation:	Solicitors: Bannermans Lawyers (Applicant) PBL Law Group (Respondent)
File Number(s):	SC 21/24112 & SC 21/48501
Publication Restriction:	Nil

REASONS FOR DECISION

1 Reasons for Decision were given in SC 21/24112 & SC 21/48501 (the 'proceedings') on 17 January 2022. Orders were made for the filing of submissions in the event that a party was minded to make a costs application.

2 Submissions were filed on 28 January by the solicitors for The Owners – Strata Plan 97383 (the 'OC'). On 11 February 2022 the solicitors for CLSM Pty Ltd trading as Comfort Living Strata Management (the 'Strata Manager') filed a response to the OC's submissions.

3 Both parties agreed to the costs application being determined on the basis of the parties' submissions without the need for a hearing. I will make the appropriate order.

4 The OC seeks an order that the Strata Manager pay its costs of the proceedings. The Strata Manager opposes the order sought by the OC and states that the Tribunal should make an order that each party pay its own costs.

Costs Jurisdiction

5 There is no dispute that s60 of the *Civil and Administrative Tribunal Act* 2013 ('CAT Act') applies to the OC's costs application. Section 60 of the CAT Act creates the general rule that each party to proceedings must pay their own costs: s60(1). I may order costs only "if satisfied that there are **special circumstances** warranting an award of costs" (emphasis added): s60(2). Section 60(3) sets out a non-exhaustive list of factors that may be considered in deciding whether there are special circumstances warranting an award of costs.

6 The term "special circumstances" is not defined by the CAT Act. It has been interpreted to mean circumstances that are out of the ordinary, but not necessarily extraordinary or exceptional. The discretion to award costs must be exercised judicially having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs.

The OC's case

7 The OC relies on ss60(3)(a) and (c) of the CAT Act as a basis for a costs order being made in its favour. Those provisions state:

> '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,
>
> (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,'

8 In its application the OC sought orders that the Strata Manager supply all records under s16 of the *Strata Schemes Management Act* 2015 and *'supply all financial records from start of the strata plan including detailed receipts, invoices, payment, bank statements for accounts and trusts to cover SP97383 and BMC*'

Consent order made

9 Before proceeding to consider the parties' submissions, it is appropriate to record the fact that order 2 in SC 21/24112 was:

> ‘by consent, pursuant to section 188 of the Strata Schemes Management Act 2015 CLSM Pty Ltd trading as Comfort Living Strata Management must provide all property, documents, bank account details, seals and other items in its possession with respect to The Owners - Strata Plan No.97383, to Beaumont Strata Management Pty Limited.’

10 In the Reasons for Decision at [3], it was stated that the consent order was made without admissions.

11 The hearing on 17 January 2022 was the final hearing. The proceedings had been listed for a 1 day hearing. Before17 January 2022 there had been a directions hearing on 29 June 2021 when directions were made to prepare the proceedings for hearing. The directions made were extended on 24 August 2021 and directions were made in SC 21/48501 on 14 December 2021.

Lai Qin

12 The Strata Manager has referred to the decision of Re Minister for Immigration and Ethnic Affairs: Ex Parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6 (‘Lai Qin’) stating that the OC has not demonstrated that it acted ‘so unreasonably that the other party should obtain costs’. The decision in Lai Qin has been considered on numerous occasions in the Tribunal. *In Cubic Metre Pty Ltd v C & E Critharis Constructions Pty Ltd* [2019] NSWCATAP 130 an Appeal Panel stated at [25] – [27]:

‘The relevant principles applicable to a costs application in proceedings which have not been heard on the merits are set out by the High Court in Re Minister for Immigration and Ethnic Affairs: Ex Parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6. The High Court per McHugh J held:

> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties … In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action …
>
> Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried…

> > > 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 the 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.
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> In *Ibrahim v PERI Australia Pty Ltd* [2013] NSWCA 328 the Court of Appeal set out the principles applicable to dealing with a costs application made when a dispute is finalised without there being a final adjudication on the merits. At [16]- [17], the then President of the Court of Appeal (with whom Leeming JA agreed) said:
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> > > 16 The primary judge, in determining whether a costs order ought to be made in the applicant's favour, on the discontinuance, reviewed the case law including, relevantly, Australian Securities Commission v Aust-Home Investments Ltd [1993] FCA 585; 44 FCR 194; Re Minister for Immigration & Ethnic Affairs; Ex parte Lai Qin [1997] HCA 6; 186 CLR 622; ONE.TEL Ltd v Deputy Commissioner of Taxation [2000] FCA 270; 101 FCR 548; Fordyce v Fordham [2006] NSWCA 274; 67 NSWLR 497; and Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 32.
> >
> > > 17 Although each of those cases related to different facts, the principles that are to be derived from them, in circumstances where a Court is requested to make a costs order, when proceedings have not been heard to termination include the following: whether a party acted reasonably in commencing the proceedings; whether a party had been successful in obtaining interlocutory relief; whether the party sued had acted reasonably; whether the responding party had acted reasonably in defending the proceedings; whether the proceedings terminated after interlocutory relief had been granted; and further, whether the primary judge was satisfied that the party seeking to terminate the proceedings prior to a full hearing had almost a certain chance of success.
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> In Transfield Services (Australia) Pty Limited v James Gaha [2012] NSWSC 865 Ball J at [27] noted that one instance where the court may be satisfied that the principles in Lai Qin are satisfied is where the consent orders agreed by the parties' amount, in effect, to capitulation by one of the parties.'

13 I find, having regard to the orders sought by the OC in its application and the orders made by consent which effectively concluded SC 21/24112, that the Strata Manager in effect capitulated to the OC as regards the orders sought by it. As a result I find that there is no basis for making *no* order as to the costs of the proceedings, on the basis of what was stated by McHugh J in Lai Qin.

14 The effect of the finding in the preceding paragraph is that the OC is able to proceed with its costs application subject to satisfying one or other of ss60(3)(a) and (c) of the CAT Act .

Section 60(3)(a)

15 To be successful in obtaining an order pursuant to this sub-section, the OC must establish that the Strata Manager conducted the proceedings in a way that unnecessarily disadvantaged it.

16 In considering this aspect of the costs application it is necessary to draw a distinction between and not conflate the Strata Manager's alleged conduct which caused the institution of the proceedings, and its alleged conduct *in the proceedings* which allegedly unnecessarily disadvantaged the OC.

17 Many of the OC's submissions in support of this aspect of the costs application relate to the alleged conduct of the Strata Manager which was external to the proceedings and to the conduct of the Strata Manager in separate proceedings, SC 21/4850.

18 The OC refers to submissions filed by the Strata Manager on 30 November 2021 claiming the OC was late in serving submissions. It is said that these submissions led to a chain of events which had the effect of disadvantaging the OC.

19 I have had regard to the parties' submissions and orders made by the Tribunal. The correct position is that the OC's evidence in Reply was to be filed by 2 November 2021, but it was served late on 16 November. The OC's submissions were to be filed on 16 November 2021 and were filed on that date.

20 I find that the disagreements that arose concerning [14] of the Strata Manager's submissions dated 30 November 2021 were insignificant and would not rise so high as to justify an order that the Strata Manager pay all of the OC's costs in SC 21/4850 because it had conducted the proceedings in a way that unnecessarily disadvantaged the OC.

21 For the reasons provided I reject the OC' application for a costs order against the Strata Manager in SC 21/24112 based on s60(3)(a) of the CAT Act

Section 60(3)(c)

22 The OC seeks an award of costs in SC 21/24112 on the basis that the Strata Manager has made a claim that has no tenable basis in fact or law. I interpret this sub section of the CAT Act to extend to a claim made in a defence to an application.

23 The question of the meaning of a claim that has no tenable basis was considered by an Appeal Panel in *DYH v Public Guardian (No 3)* [2022] NSWCATAP 34. At [20] – [22] the Appeal Panel stated:

> 'The Victorian case law considering an equivalent provision to s 60(3)(c) of the NCAT Act provides some helpful analysis. The Victorian Civil and Administrative Tribunal may also award costs if fair to do so having regard to "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" (Victorian Civil and Administrative Tribunal Act 1998 (Vic) ("VCAT Act"), s 103(3)(c)). The meaning and operation of s 103(3)(c) of the VCAT Act were considered by Senior Member Byard in Dennis Family Corporation Pty Ltd v Casey CC (Red Dot) [2008] VCAT 691. He said at [14]-[15]:
>
> > The relative strengths of the claims appear to refer to the strength of claims of one party compared to the strength of the claims of another. A difficult, doubtful or test case might be necessary to clarify the legal position of the parties. It is probably seldom that an order for costs would be made having regard to this consideration alone where there was a real issue to be tried and real justification for the claims made on either side. I take it that it is generally where there is a very weak case for one side, or none at all, that this consideration is likely to lead to an order for costs. I note that the wording says that the absence of a "tenable basis in law or fact" is a consideration included within the consideration of the relative strengths of the claims of the parties.
> >
> > This certainly cannot mean that an unsuccessful party should be required to pay costs because, at the end of the case, that party's claims have been found to be untenable in fact or law to the extent that they were not upheld and were not successful. That would amount to "costs following the event". It would compromise the general rule created in s 109(1).
>
> The Senior Member also commented (at [19]) that "'untenable' in the context of s 109(3)(c) means something like so weak as to be unarguable, rather than merely weak."
>
> In our view, the Senior Member's observations apply with equal force to s 60(3)(c) of the NCAT Act.

24 At [17] – [18] the Senior Member in Dennis Family Corporation Pty Ltd v Casey CC stated:

> 'I am not minded to go so far as to say that a weak case will necessarily indicate an order for costs. The word "untenable" is stronger than "weak". The Macquarie Dictionary, second revision, defines untenable as incapable of being held against attack, incapable of being maintained against argument, as an opinion, scheme etc.
>
> The ethical rules of the Bar, as I recall them, indicates that a barrister has a duty to do his or her best by the client even if the client has a weak case. On the other hand, a different duty applies if the case is so weak as to be unarguable or "untenable". It extends to a case that is so weak that it should not be argued or so weak that it would be an abuse to seek to maintain it.'

25 A more recent decision concerning the meaning of a claim that has no tenable basis was given in *Michael's Excavations Pty Ltd v Whitehorse Trucks Pty Ltd* (Costs) (Civil Claims) [2021] VCAT 712. Member B. Thomas stated at [17] in connection with no tenable basis in fact or law:

> *'Pizer* notes the following in respect of this factor:
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> The expression "no **tenable basis"** in fact or in law" means that a "substantial disparity between the strength of one claim and the weakness of its competitor must exist before an order for costs will be fair";
>
> The fact that one party was successful is not the only relevant factor when considering the relative strengths of the claims made the parties; and
>
> The question whether a party's case had any **tenable basis** in fact or in law must be considered prospectively rather than retrospectively after VCAT has made its decision.'

26 The Strata Manager has referred to the decision in *Wynne Avenue Property Pty Limited v MJHQ Pty Limited* [2018] NSWCATAP 197 which considers s60(3)(c) of the CAT Act in context of whether a potential defence was likely to succeed.

27 I am of the view that the decisions in *DYH v Public Guardian* and *Michael's Excavations Pty Ltd v Whitehorse Trucks Pty Ltd* are a more useful guide to what is meant by the word 'untenable' in s60(3)(c) of the CAT Act, because in *Wynne Avenue Property Pty Limited v MJHQ Pty Limited* the Appeal Panel was considering whether the words "likely to succeed" played any part in a consideration of the meaning of 60(3)(c), rather than specifically dealing with

the words of the section. As a result of the decision in *DYH v Public Guardian (No 3)* and the more recent decision *Michael's Excavations Pty Ltd v Whitehorse Trucks Pty Ltd,* I find that 'untenable' in the context of s 60(3)(c) of the CAT Act means preferably, a substantial disparity between the strength of one claim and the weakness of its competitor. The issue then is whether in considering the Strata Manager's position in response to the OC' case, there was a substantial disparity between strength of the OC's case and the weakness of the Strata Manager's case.

28 The OC's submissions in this regard are at [57] – [70]. The Strata Manager responds to these submissions at [34] – [42].

29 In SC 21/24112 the Strata Manager's position was expressed in its Outline of Submissions dated 30 November 2021 before the hearing. In those submissions the Strata Manager's defence rested on the following propositions:

(1) That it had not been terminated from its position as strata managing agent in accordance with s50(3) of the *Strata Schemes Management Act* 2015 ('SSMA') and it continued to act in that capacity;

(2) The Strata Management Statement ('SMS') relating to the OC required a Building Management Committee('BMC') to be created and the Strata Manager had been appointed as the strata manager of the BMC; and

(3) Clause 18.5 of the SMS stated that the two strata schemes, the OC and a commercial owners corporation, that existed in the same building must use the strata manger used by the BMC

30 The Strata Manager also states that since no evidence was tendered in the hearing, the Tribunal '*has no way of determining whether any defence would have been successful*'. In Lai Qin McHugh J. stated :

> 'The court cannot try a hypothetical action between the parties'

31 In my view the same position applies in connection with 60(3)(c) of the CAT Act when parties have settled the proceedings before a hearing on the merits. However in Lai Qin, his honour also went on to state that there may be cases where it would be apparent that the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. I find that in considering some applications for costs relying on s 60(3)(c) of the CAT Act, the Tribunal may in similar fashion be able to

conclude that one of the parties had made a claim that had no tenable basis in fact or law. However I find that these proceedings do not come with that category.

32 I agree with the gist of the Strata Manager's submission in that it would be necessary to consider all of the parties' submissions and evidence in order to reach a conclusion about whether or not there was a substantial disparity between the strength of the OC's claim and the weakness of the Strata Manager's position. That may amount to a full consideration of all the issues, submissions and evidence filed by the parties. I find that it is not appropriate to undertake that exercise on a costs application. As stated there may be cases where that question can be determined on a costs application where the issues are straight forward.

33 For the reasons provided I reject the OC' application for a costs order against the Strata Manager in SC 21/24112 based on s60(3)(c) of the CAT Act.

SC 21/48501

34 In these proceedings instituted by the Strata Manager on 24 November 2021 that it applied for an order that it be appointed as the strata managing agent of Strata Plan 97383 for I year. Later it applied to amend its case by substituting the OC as the applicant.

35 Its application was dismissed for reasons I provided on 17 January 2022.

36 The OC's costs application seeks the costs of these proceedings based on s60(3)(c) of the CAT Act. In addition ss60(3)(d),(e)and (f) are relied upon.

37 The Strata Manager's submissions do not address these proceedings separately in connection with the costs application brought by the OC.

38 I find that the Strata Manager's case in these proceedings viewed prospectively was very weak, to the point of being misconceived. At best the Strata Manager's case was weak as regards the strength of the OC''s case with a substantial disparity between the weakness of its claim and the strength of the OC's case. I find that the OC has made out a case for costs in these proceedings under s60(3)(c) of the CAT Act.

39 I find that the Strata Manager must pay the OC's costs of SC 21/48501, such costs if not agreed to be assessed in accordance with the *Legal Profession Uniform Law Application Act* 2014.

40 Since these proceedings were on foot for a short period of time, I would urge the parties to reach an agreement on the costs of the proceedings, rather than going to the time, trouble and expense of having the costs assessed.

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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