



Civil and Administrative Tribunal  
New South Wales

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Case Name: Li v Kerollos Property Pty Limited ACN 162 903 335

Medium Neutral Citation: [2022] NSWCATAP 307

Hearing Date(s): On the papers

Date of Orders: 20 September 2022

Decision Date: 20 September 2022

Jurisdiction: Appeal Panel

Before: I R Coleman SC ADCJ, Principal Member

Decision: (1) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) the NSW Civil and Administrative Tribunal dispenses with a hearing of the Respondent's application for the costs of the appeal.  
(2) The Appellants are to pay the Respondent's costs of and incidental to the appeal as agreed or assessed on a party and party basis.  
(3) The name of the First Appellant is amended to Ying Kit Li.

Catchwords: APPEAL – Costs of discontinued appeal - whether special circumstances established pursuant to s 60(2) of the Civil and Administrative Tribunal Act 2013 (NSW)

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

Cases Cited: Australian Securities Commission v Aust-Home Investments Ltd [1993] FCA 585; (1993) 44 FCR 194  
Brunsprop Pty Limited v Joanne Hay & Wes Davies [2015] NSWCATAP 152  
Edwards Madigan Torzillo Briggs Pty Ltd v Stack [2003] NSWCA 302  
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94

Giza Pty Limited v AXA Trustees Limited (No 2) [2001] NSWADT 164  
Kadielski v Guca 1 Pty Limited [2018] NSWCATAP 223  
Lake Burrendong State Park Trust v Thompson [2011] NSWSC 1554  
Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin [1997] HCA 6; (1997) 186 CLR 622  
MSP Consulting and Building Constructions Pty Ltd v Karkoulis (No 2) [2016] NSWCATAP 183  
One Tel Ltd v Deputy Commissioner of Taxation [2000] FCA 270  
Yelda v Sydney Water Corporation; Yelda v Vitality Works Pty Ltd [2021] NSWCATAD 177

Category: Principal judgment

Parties: Ying Kit Li (First Appellant)  
Mei Man Yeung (Second Appellant)  
Kerollos Property Pty Limited ACN 162 903 335 (Respondent)

Representation: Solicitors:  
Brander Smith McKnight (Appellants)  
G & S Law Group (Respondent)

File Number(s): 2022/00198659

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 09 June 2022

Before: C Campbell, General Member

File Number(s): SC 21/42363

## REASONS FOR DECISION

- 1 By Notice of Appeal filed 7 July 2022 Ying Kit Li and Mei Man Yeung (**Appellants**) appealed against orders made by the Tribunal on 9 June 2022 seeking that “the application is dismissed”.

2 On 18 July 2022 the Appellants amended their Notice of Appeal seeking that “the application is dismissed” and that the Respondent pay the Appellants’ costs of the appeal and of the proceedings at first instance.

3 On 9 August 2022 the Respondent filed a Reply to the appeal seeking its dismissal. In its Reply, the Respondent asserted with respect to the orders challenged on appeal that:

“The orders were made following a hearing of the Respondent’s evidence and the consent position of the Owners of SP76312. Reason [sic] were not given because they were not requested by any of the parties and the Appellant declined to make submissions or submit any evidence. The Respondent seeks costs of the appeal on an indemnity basis or any basis the Appeal Panel thinks fit.”

4 With respect to the Appellants’ grounds of appeal, the Respondent asserted that:

“(i) the Amended Notice of Appeal is incompetent;

(ii) there is no basis in amended appeal, in law or fact, to set aside all of the orders as claimed. The only argument put forward is (in) respect of s149, the other orders are not subject to any issues raised in the amendment [sic] Notice of Appeal;

(iii) the Appellant’s complaint about lack of reasons has no merit in circumstances where the Appellant never sought any reasons, nor did they submit any evidence, nor did they make submissions despite being invited to do so;

(iv) in circumstances where the Tribunal below only heard evidence from the Respondent and there was no opposition to that evidence or submissions made there could be no error of law established or any merit in the Amended Notice of Appeal.”

5 Subsequent to the service of the Respondent’s Reply, in circumstances to which further reference is made below, the Appellants discontinued their appeal.

6 Although the Appellants’ Amended Notice of Appeal sought orders for costs, as did the Respondent’s Reply, only the Respondent continues to seek an order for the costs of the appeal. The Respondent filed submissions in support of its costs claim on or about 30 August 2022. The Appellants filed submissions in opposition to the Respondent’s claim on 5 September 2022.

### **Dispensing with a hearing**

- 7 Neither party suggests that an oral hearing of the present application is necessary or appropriate. Other than to increase the costs of the proceedings, no useful purpose would be served by having a hearing in the current circumstances. The Tribunal will order that, pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**) a hearing be dispensed with and the matter proceed on the papers.
- 8 The Tribunal is satisfied that, pursuant to s 50(3) of the CAT Act, the parties have had the opportunity to make submissions with respect to an order dispensing with a hearing. Both parties have, sensibly, consented to an order dispensing with a hearing. The written submissions of the parties enable the Tribunal to adequately determine the Respondent's costs application.

### **The orders appealed against**

- 9 The orders of the Tribunal at first instance of 9 June 2022 were made in proceedings in which the present Respondent was the Applicant and the Owners of Strata Plan 76312 and the present Appellants were the First and Second Respondents respectively.
- 10 The parties to the original application, which was made pursuant to the provisions of the *Strata Schemes Management Act 2015* (NSW) filed on 11 October 2021 were the present Respondent as Applicant and the Strata Plan Owners as Respondent. Prior to the making of the orders of 9 June 2022 the Appellants also became parties to the proceedings. The order of the Tribunal of 9 June 2022 was that:

“By consent and in full and final settlement of these proceedings the Tribunal makes orders in accordance with the Consent Orders signed by the Applicant and the Respondent and dated today's date, a copy of which is annexed to these Orders and placed on the Tribunal file.”

- 11 It is unnecessary for present purposes to refer to the substance of the orders made by the Tribunal. Having become parties to the proceedings, the Appellants were bound by the Tribunal's orders.

### **Principles governing the applications**

- 12 It is not in contest that the present applications are governed by the provisions of s 60 of the CAT Act. Section 60(1) provides that each party pay the party's

own costs. Section 60(2) provides that 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”. Section 60(3) provides a non-exclusive list of matters to which the Tribunal may have regard in determining whether there are special circumstances warranting an award of costs. Reference will be made to a number of those provisions in the course of these reasons.

- 13 What constitutes “special circumstances” has been considered in a number of cases. In *Kadsielski v Guca 1 Pty Ltd* [2018] NSWCATAP 223, at [14] the Appeal Panel held that special circumstances are “out of the ordinary” but do not need to be “extraordinary or exceptional”. Each case depends on its own particular facts (*Gizah Pty Limited v AXA Trustees Limited (No 2)* [2001] NSWADT 164), and depends on the circumstances of the particular case (*Brunstrop Pty Limited v Joanne Hay & Wes Davies* [2015] NSWCATAP 152). 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).

### **The submissions of the Appellants**

- 14 The Appellants submitted (5) that:

“(a) these proceedings have not been determined by the NCAT Appeal Unit and was withdrawn prior to the first hearing;

(b) the Respondent was legally represented for a short AVL Callover on 27 July 2022;

(c) the Respondent’s reply to grounds for appeal consisted of two paragraphs;

(d) no evidence was prepared;

(e) no written submissions were prepared;

(f) no in person appearance was required and, the amount in dispute is less than \$10,000.”

- 15 It was then submitted (6) that “As such, each party should bear their own costs”.

## **The submissions of the Respondent**

- 16 The Respondent submitted (6) that “In the Tribunal below costs were not sought because, ultimately, the Appellant made no submission and submitted no evidence. Notwithstanding this the Appellant still lodged this appeal”. As the appeal has been withdrawn, and the only issue for determination is the Respondent’s application for the costs of the appeal, it is unnecessary to engage with this submission.
- 17 The Respondent submitted that both the original and amended Notices of Appeal were “without merit” (7).
- 18 The Respondent submitted (9) that it filed and served a Reply on 8 August 2022 setting out the basis on which it contended that the appeal had no merit. It was further submitted that “While the Reply was succinct it required detailed consideration of the solicitor and counsel of the Respondent to established [sic] that the amended appeal had no merit at all”.
- 19 It was submitted, accurately, that subsequent to the filing of the Respondent’s Reply, the appeal was withdrawn. It was further submitted (9) that the circumstances established that the appeal was “total [sic] misconceived and lacking in sustained [sic] as set out in the Reply”. It was further submitted that the relevant Owners Corporation was not joined “which clearly made the appeal in any event hopeless”.
- 20 The Respondent complained (10) about the conduct of the Appellants, in seeking to have the appeal withdrawn in the way they did. The Respondent ultimately submitted that there were special circumstances warranting an award of costs, particular reliance being placed on s60(3)(a), (b), (c), (e) and (f) of the CAT Act. It was further submitted pursuant to s 60(3)(g) that the Appellants’ conduct had caused the Respondent further costs by failing to comply with NCAT policy number 6.

## **Consideration**

- 21 The submission of the Appellants that the proceedings have not been determined on the merits by the Appeal Panel does not, in the present circumstances, assist their case. There not having been a determination of the merits of the appeal, the Appeal Panel is “necessarily deprived” of that factor

when considering the costs of the appeal (*Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* [1997] HCA 6; (1997) 186 CLR 622).

- 22 The Appeal Panel cannot, and will not, determine a “hypothetical” appeal (*Australian Securities Commission v Aust-Home Investments Ltd* [1993] FCA 585; (1993) 44 FCR 194). However, this is a case where the Appellants have effectively surrendered to the Respondent (*One Tel Ltd v Deputy Commissioner of Taxation* [2000] FCA 270). The effect of the discontinuance or withdrawal of the Appellants’ appeal is that the Respondent retains the benefit of the decision of the Tribunal at first instance and secured a “substantial victory” and the Appellants suffered a “substantial loss” (*Edwards Madigan Torzillo Briggs Pty Ltd v Stack* [2003] NSWCA 302).
- 23 In *Lake Burrendong State Park Trust v Thompson* [2011] NSWSC 1554, at [83] Hallen AsJ (as Hallen J then was) said that, “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 costs discretion will usually mean the court will make no order as to costs of the proceedings”. The Appellants have not demonstrated that commencing their appeal was reasonable.
- 24 The nature and extent and duration of the legal representation of the Respondent is irrelevant for present purposes. If costs are awarded, that may be material to an assessment of the costs which are properly payable by the Appellants. The Appellants attempt to rely upon the brevity of the Respondent’s reply to the grounds of appeal is disingenuous. As set out above, and unlike many replies to Notices of Appeal, the Respondent in this case pleaded squarely the bases upon which it submitted that the Appellants’ appeal was misconceived. It is not insignificant that, sensibly, shortly after the Respondent’s Reply was received, the Appellants discontinued their appeal.
- 25 In the absence of a party seeking leave to adduce further evidence, there would be no cause to prepare evidence in the appeal. The absence of written submissions for the substantive appeal or appearances at an appeal hearing

are irrelevant for present purposes and go solely to the quantum of any costs which may be awarded.

- 26 The Respondent's submissions with respect to the absence of merit of the Appellant's appeal resonate with the Tribunal. Successful appeals against orders made by consent in circumstances not involving fraud or other conduct which would enliven appellate intervention are rare. Nothing emerging from the grounds of appeal in either of the Appellants' Notices of Appeal, or anything submitted on their behalf identifies any basis upon which the consent orders in this appeal were likely to have been disturbed if the Appellants had prosecuted their appeal.
- 27 How the appeal could have had any utility in circumstances where the Owners Corporation, which was a party to the orders at first instance, was not a party to the appeal has not been explained by the Appellants.
- 28 The Appellants' discourtesy about which the Respondent properly complained (10) reflects little credit on them, and, although not relevant for present purposes, may assume relevance in the assessment of any costs which the Tribunal may award the Respondent.
- 29 The Appeal Panel does not accept that the Respondent was "unnecessarily disadvantaged" by the Appellants' conduct of the proceedings as submitted by it in reliance upon s 60(3)(a) of the CAT Act. Nor, with respect to the Respondent, does the Tribunal find that the Appellants have been responsible for "prolonging unreasonably the time taken to complete the proceedings" pursuant to s 60(3)(b) of the CAT Act.
- 30 The Respondent submitted that the Appellants' appeal had "no tenable basis in fact or law" as contemplated by s60(3)(c) of the CAT Act. As was recognised in *Yelda v Sydney Water Corporation; Yelda v Vitality Works Pty Ltd* [2021] NSWCATAD 177, at [27] a finding in those terms involves a "high threshold to reach". The mere fact that the Appellants withdrew their appeal does not demonstrate that it had no tenable basis in fact or law (*MSP Consulting and Building Constructions Pty Ltd v Karkoulis (No 2)* [2016] NSWCATAP 183).



- 31 Nothing emerging from either of the Appellants' Notices of Appeal raises any matter of law or fact which could have enlivened appellate intervention. The fact that the Appellants are displeased by orders to which they consented does not provide a basis in fact or law for their appeal. Having not joined a party to the consent orders in the appeal, even if the appeal had some possible foundation, its potential utility is not apparent. This finding alone would be sufficient to establish special circumstances warranting an award of costs.
- 32 The Appeal Panel accepts, although it is in substance the same matter, that the proceedings were "misconceived or lacking in substance" as envisaged by s 60(3)(e) of the CAT Act.
- 33 Although the Appellants may have failed to comply with s 36(3) of the CAT Act, the Tribunal does not rely, or need to rely, upon that matter pursuant to s 60(3)(f) of the CAT Act.
- 34 In the circumstances identified above, the Appellants have acted unreasonably in appealing against the orders of the Tribunal at first instance. The Appeal Panel is comfortably satisfied that the Respondent has established special circumstances pursuant to s 60(2) of the CAT Act and is entitled to an award of costs.

### **Indemnity or party and party costs**

- 35 By its Reply to the Appellants' Notices of Appeal, the Respondent sought an order for indemnity costs of the proceedings. The Respondent made no submissions in support of an award of indemnity costs. In the absence of such submissions, the Appeal Panel is unable to make the findings which would be necessary to enliven the jurisdiction to award indemnity costs. It is relevant in this context that the Appellants have had no opportunity to be heard in opposition to such an order, and are entitled to have assumed that, no submissions being made in that regard, the Respondent was not pursuing an award of indemnity costs.
- 36 The orders of the Appeal Panel are:
- (1) Pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) the NSW Civil and Administrative Tribunal dispenses with a hearing of the Respondent's application for the costs of the appeal.

- (2) The Appellants are to pay the Respondent's costs of and incidental to the appeal as agreed or assessed on a party and party basis.
- (3) The name of the First Appellant is amended to Ying Kit Li.

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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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