



Civil and Administrative Tribunal
New South Wales

Case Name: Scott-Young v The Owners - Strata Plan 77303

Medium Neutral Citation: [2022] NSWCATAP 289

Hearing Date(s): On the papers

Date of Orders: 7 September 2022

Decision Date: 7 September 2022

Jurisdiction: Appeal Panel

Before: K Ransome, Senior Member
D Fairlie, Senior member

Decision: 1. Pursuant to s50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) dispense with a hearing on the question of costs

2. The respondent's (costs applicant's) application for costs of the appeal is dismissed

Catchwords: COSTS - costs on appeal - whether special circumstances established

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

Cases Cited: Monument Building Group Pty Limited v Kapila (No 2) [2021] NSWCATAP 339
One - Tel Pty Limited v Deputy Commissioner of Taxation [2000] FCA 270
Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin [1997] HCA 6; (1997)186 CLR 622
STAR Training Academy v Commissioner for Police (No 2) [2022] NSWCATAP 98
Zonneville v Minister for Education & Early Childhood Learning (No 2) [2022] NSWCATAP 87

Texts Cited: Nil

Category: Costs

Parties: Heather and Murdoch Scott-Young (Appellants) (Costs Respondents)
The Owners - Strata Plan 77303 (Respondent) (Costs Applicant)

Representation: Solicitors:
Appellants-Costs Respondents (Self-represented)
Kerin Benson Lawyers Pty Ltd (Respondent - Costs Applicant)

File Number(s): 2022/00161266

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: [2022] NSWCATCD

Date of Decision: 10 May 2022

Before: S Hanstein, General Member

File Number(s): SC21/40869

REASONS FOR DECISION

OVERVIEW

1 This is an application by a respondent to an internal appeal to recover its costs following the appellants withdrawing the appeal before the hearing.

BACKGROUND

2 On 10 May 2022 the Tribunal published its Reasons for Decision (the “Decision”) and made orders in proceedings commenced in the Consumer and Commercial Division by Heather and Murdoch Scott-Young (the “Costs Respondents) against the Owners - Strata Plan No.77303 (the “Costs Applicant”).

3 It appears from the Decision (the Appeal Panel was not provided with the initial Application or the Reply), that the Costs Respondents, who are owners of a lot in Strata Plan No.77303, had sought orders under the *Strata Schemes Management Act 2015* (NSW), (the “SSM Act”), including an order for the appointment of a compulsory strata manager. The Costs Applicant opposed those orders. The matter was heard on 24 January 2022.

4 On 10 May 2022 the Tribunal made the following order:

Within two months of the date of these orders, the Owners Corporation is to:

- (1) Repair the light in lot 2
- (2) Repair the driveway lights.

and noted in the Decision that:

With the exception of the two items of repair, I am not satisfied that any other of the orders sought should be made.

5 On 3 June 2022 the Costs Respondents filed a Notice of Appeal against the Decision. They said that the Decision was against the weight of evidence and requested the Appeal Panel to make the same orders that they had sought in the Tribunal proceedings. They also said that the Decision would set a precedent for other strata schemes.

6 On 22 June 2022, Principal Member Suthers listed the appeal for hearing on 4 August 2022. He also made the usual orders and timetable on setting down an appeal for hearing, as well as granting leave to the parties to be legally represented (in the case of the Costs Applicant this was on the condition that the appointment of lawyers was approved at a meeting of the Costs Applicant’s strata committee). Neither party had engaged lawyers in the Tribunal proceedings.

7 On 24 June 2022, the Registrar issued a direction in the following terms:

The Appellant has made a request to withdraw the application (we take this to mean the appeal itself).

The Respondent should advise the Tribunal by close of business 28 June 2022 if they have any objection to the matter being withdrawn and to make any other submissions about the request to withdraw.

Both parties should also make any submissions about whether they object to an order being made dispensing with a hearing or if they consent to the application being dealt with on the papers (see s50(2) of the Civil and

Administrative Tribunal Act 2013). Submissions on this issue must be lodged with the Tribunal and given to the other party by close of business 28 June 2022.

Written notice of the outcome of the request will be sent to all parties to the proceedings.

- 8 On 28 June 2022 the Costs Applicant, by its solicitors, sent an email to the Registry enclosing a Reply to Appeal and a minutes of the strata committee ratifying the decision to engage solicitors. Also attached was a document dated 28 June 2022 entitled Respondent's Submission on Withdrawal and Costs (the "Costs Applicant's Submission"). The covering email said that these documents had been served on the Costs Respondents.
- 9 The Costs Applicant's Submission noted that the Costs Applicant did not object to the Costs Respondents' request to withdraw the application, except for the question of costs. The submission said that the Costs Applicant had incurred costs in obtaining legal advice on its prospects of defending the appeal and in filing its Reply. It sought an order that its costs be paid within 30 days, or in the alternative, that it be entitled to file submissions on costs and that the Costs Applicant's Submission be accepted as that submission. The Costs Applicant's Submission outlined in detail the reasons why the Costs Applicant considered that it should be entitled to its costs.
- 10 The Costs Applicant also noted that it did not object to the withdrawal of the appeal being considered on the papers, nor did it object to any question of costs being considered on the papers.
- 11 The Costs Respondents do not appear to have made a submission in response to the Registrar's direction. In any event on 30 June 2022 Principal Member Suthers noted the following orders he had made on 28 June 2022:

On 28 June 2022 the following orders (and/or directions) were made:

 - 1 a. A hearing of the application to withdraw the appeal is dispensed with.
 - b. The appeal has been withdrawn and is dismissed.
 - c. The hearing on 4 August is vacated and the parties are excused.
- 12 This order did not deal with the Costs Applicant's application for its costs. However, we may infer that the Costs Applicant's primary submission that its costs be paid within 30 days was rejected, but that the Costs Applicant's

Submission was accepted as the submission supporting its costs application. In any event on 26 July 2022 Principal Member Suthers made the following further order:

1 The Tribunal notes the Respondent's application for costs of the, now withdrawn, appeal. The Appellants are to lodge with the Appeal Registry and to give to the Respondent any written submissions in reply by 08 August 2022.

2 Noting that the Respondent consents to the question of costs being determined on the papers, the Appellants should make any submissions about whether they object to an order being made dispensing with a hearing or if they consent to the hearing being dealt with on the papers (see s 50(2) of the Civil and Administrative Tribunal Act 2013). Submissions on this issue must be contained within the submissions as directed by order 1, above.

13 The Costs Respondents filed their submission in relation to costs on 8 August 2022.

THE COSTS APPLICANT'S SUBMISSION

14 The Costs Applicant's Submission said that the Costs Respondents should pay the Costs Applicant's costs because there were "special circumstances", which displaced the usual rule set out in s60(1) of the *Civil and Administrative Tribunal Act 2013 (NSW)* (the "NCAT Act"), that each party should pay the party's own costs. The relevant special circumstances were the following subsections in s60(3) of the NCAT Act:

(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;

and

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance;

15 In support of the submission that the appeal had no tenable basis in fact or law, the Costs Applicant said that the Notice of Appeal did not expressly state what were the Costs Respondents' grounds of appeal, and to the extent that they could be inferred from the Notice, the grounds were weak.

16 Further the Costs applicant said that the assertion that the Decision was against the weight of the evidence ignored the fact that Tribunal had considered and made findings in relation to each of the 56 issues in contention in the Tribunal proceedings. Also, the allegation that the decision would constitute a precedent, was not a relevant consideration.

17 In support of the submission that the appeal was vexatious, frivolous or otherwise misconceived, the Costs Applicant said that the orders sought in the Notice of Appeal were in similar terms to those sought in the Tribunal proceedings, and in reality the appeal amounted to no more than an attempt to have the Appeal Panel rehear the issues that the Tribunal had already considered and dismissed.

18 Lastly, the Costs Applicant said that it should be entitled not only to the costs of the appeal, but also to its costs in the Tribunal proceedings. It relied for this submission on s81(2) of the NCAT Act which provides that:

The Appeal panel may exercise all of the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when, confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

19 As far as we could ascertain, the Costs Applicant's Submission did not point to any specific facts and circumstances in relation to the Tribunal proceedings justifying an award of costs in its favour, apart from the fact it was the successful party.

THE COSTS RESPONDENTS' SUBMISSION

20 In their submission in response the Costs Respondents consented to the Appeal Panel determining the costs application on the papers. They said that they withdrew their appeal because they could not afford to pay for legal representation. Otherwise they did not respond to the substance of the Costs Applicant's Submission. Instead, they raised two further arguments to support their contention that they should not be ordered to pay the Costs Applicant's costs. First, they said that the Cost Applicant's Submission was filed late and should not be considered by the Appeal Panel. Secondly, they said that the Costs Applicant did not have the authority to engage lawyers because there had been no resolution to approve legal services passed at a general meeting of the Costs Applicant.

OUR DECISION

DECISION ON THE PAPERS

21 We are satisfied that the cost issues for determination can be adequately determined in the absence of the parties by considering their written submissions, and accordingly we dispense with a hearing in person. We note that both parties had consented to the Appeal Panel proceeding in this manner.

PRELIMINARY ISSUES

22 There are a number of preliminary issues which we need to deal with. First there is the Costs Applicant's argument that it should be entitled to its costs of the Tribunal proceedings as well as to its costs of the appeal. This argument formed part of the Costs Applicant's Submission, which, as we have noted, was filed on 28 June 2022. Following the directions made by Principal Member Suthers on 26 July 2022, it may be that it was no longer pressed. However, to the extent that it remains a live issue, the argument must be rejected.

23 The Tribunal did not award costs to the Costs Applicant and there is nothing in the Decision to suggest that it had even sought an order for its costs. Thus there was no relevant decision in relation to costs made by the Tribunal which could be the subject of an appeal, and s80(1) of the NCAT Act has no application in these circumstances.

24 Turning next to the Costs Respondents' submission that the Costs Applicant's Submission should not be considered by the Appeal Panel because it was filed late, we note that covering email to the Registry from the Costs Applicant's solicitor bears the notation *Sent: Tuesday 28 June 2022 4:35 pm*. The Costs Applicant's Submission was filed in response to the Registrar's 24 June 2022 direction calling for submissions on the Costs Respondents' withdrawal application by "close of business on 28 June 2022". The Costs Respondents say that this direction required submissions to be filed during the hours when the Tribunal's Registries are open to the public, that is between 8:30 am and 4:30 pm.

25 We do not accept this submission. Even if we were to accept that the document was received 5 minutes after the designated time, the subsequent directions from Principal Member Suthers dated 26 July 2022, allowing the

Costs Respondents to make their submissions in reply by 8 August, make it clear that they had been afforded ample time to consider the Costs Applicant's Submission and to respond to it. They have suffered no prejudice.

- 26 We also reject the Costs Respondents' argument that the Costs Applicant's Submission should not be considered because the Costs Applicant did not have the authority to engage lawyers.
- 27 Section 103 of the SSM Act provides that:
- (1) An owners corporation or strata committee of an owners corporation must not obtain legal services for which payment may be required unless a resolution approving the obtaining of those services is passed at a general meeting of the owners corporation.
 - (2) An owners corporation or strata committee may obtaining legal services without obtaining approval under this section if - -
 - (a) It is of the opinion that urgent action is necessary to protect the interests of the owners corporation, and
 - (b) The cost of the legal services does not exceed \$10,000, or another amount prescribed by the regulations for the purposes of this section.
- 28 On 22 June 2022 Principal Member Suthers set down the appeal for hearing on 4 August 2022 and granted the parties leave to be legally represented (subject, in the case of the Costs Applicant, to approval by its strata committee). The strata committee passed the relevant resolution on 26 June 2022.
- 29 We consider that these circumstances justified the Costs Applicant forming the opinion that urgent action was necessary to protect its interests as the appeal was to be heard within six weeks. Thus it was entitled to rely on s103(2) of the SSM Act and was not obliged to seek approval from a general meeting of the Costs Applicant when engaging lawyers.

WERE THERE SPECIAL CIRCUMSTANCES?

- 30 The real issue to be determined in these proceedings is whether the appeal and its subsequent withdrawal, entitled the Costs Applicant to its costs of the appeal. Section 60(1) of the NCAT Act provides that each party to Tribunal proceedings is to pay the party's own costs. However s60(2) qualifies this general rule by providing that the Tribunal may award costs if it is satisfied that

there are special circumstances warranting an award of costs. Section 60(3)(a) - (g) then sets out the matters to which the Tribunal may have regard when determining whether they are special circumstances. As noted above, the Costs Applicant relies on s60(3)(c) and s60(3)(e).

- 31 There have been three recent Appeal Panel decisions where special circumstances in relation to costs in appeal proceedings have been considered. These are *Zonneville v Minister for Education & Early Childhood Learning (No 2)* [2022] NSWCATAP 87, *STAR Training Academy Pty Limited v Commissioner for Police (No 2)* [2022] NSWCATAP 98 and *Monument Building Group Pty Limited v Kapila (No 2)* [2021] NSWCATAP 339.
- 32 In each of these matters, the respondents' cost applications were brought after there had been a hearing on the merits of the appeal and the appeal had been dismissed. That is not the case here. This appeal was withdrawn before the hearing, and even before the parties had lodged their submissions and evidence. Thus we did not find these decisions to be of great assistance to us.
- 33 Under the general law, where proceedings are determined without a hearing on the merits, there is usually no order for costs made: *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 164 CLR 622 (*Lai Qin*). This rule may be displaced, where, amongst other circumstances, one party has in effect "surrendered" to the other: *One Tel Pty Limited v Deputy Commissioner of Taxation* [2000] FCA 270 at [6]. However, this rule must be considered in conjunction with the Tribunal's own specific cost rules which we have set out above.
- 34 The Costs Applicant's Submission was that the appeal had no tenable basis in fact or law and that it was frivolous, vexatious, or otherwise misconceived or lacking in substance. Whilst the Notice of Appeal is, in our view, a rather rambling and repetitive document, it nevertheless states clearly enough that the Costs Respondents believed that the Decision was against the weight of the evidence. Further, the Notice of Appeal sets out the evidence that the Costs Respondents say that the Tribunal should have had regard to, and for that reason, leave to appeal should be granted. We are not able to conclude

from our consideration of this Notice, that the appeal has no tenable basis in fact or law.

- 35 We are also unable to conclude that the appeal was frivolous, vexatious or otherwise misconceived merely because the Notice of Appeal sought the same orders that the Costs Respondents had sought in the Tribunal proceedings. Notices of Appeal are commonly framed in this way.
- 36 The Decision makes it clear that the Member rejected the Costs Respondents' arguments except for two relatively minor matters. Nevertheless the Decision does not make any finding that any of the Costs Respondents' submissions were untenable or misconceived or lacking in substance. The Member simply made findings on the evidence before him.
- 37 In these circumstances, although the Costs Respondents' prospects of success in the appeal may not have been strong, we are not able to say that the appeal was doomed to fail. To adopt the words of McHugh J in *Lai Qin*:

Having read the Tribunal's decision in support of the application,it seems to me that although the prosecutrix had an arguable case, she did not have strong prospects of success. If I had to make a prediction, about the outcome of her application, I think it that it probably would have failed. However as I have said it is not the function of a court on a costs application - in most cases at all events - to make a prediction as to the outcome of a hypothetical case. It is enough that the applicant has acted reasonably.

- 38 Thus we are not able to be satisfied that the matters to which we were directed to by the Costs Applicant, amount to special circumstances warranting us to make a costs order in its favour. We add that in relation to the general law position regarding costs applications in the absence of a hearing on the merits, we are also unable to conclude that the Costs Respondents' decision to withdraw their appeal because they could not afford legal representation, amounted to a surrender.

ORDERS

- 39 We make the following orders:
- (1) Pursuant to s50(2) of the Civil and Administrative Tribunal Act 2013 (NSW), we dispense with a hearing on the question of costs.
 - (2) The respondent's (cost applicant's) application for costs of the appeal is dismissed.

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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