



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners Strata Plan No 79633 v Graorovska (No 2)

Medium Neutral Citation: [2022] NSWCATAP 245

Hearing Date(s): On the papers

Date of Orders: 26 July 2022

Decision Date: 26 July 2022

Jurisdiction: Appeal Panel

Before: G Sarginson, Senior Member
D Ziegler, Senior Member

Decision: (1) An oral hearing on costs is dispensed with under s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW).

(2) The Owners-Strata Plan No 79633 is to pay the costs of Violeta Graorovska in Appeal Panel proceedings AP 2021/00338769 and AP 2021/00365972 as agreed or assessed on the ordinary basis as set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014).

Catchwords: COSTS---Special circumstances---Whether established

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

Cases Cited: Anderson v The Owners-Strata Plan No 610304 (No 2) [2019] NSWCATAP 108
Ellis v The Owners-Strata Plan 80605 [2018] NSWCATAP 174
Grandview Pty Ltd v Bacon (No 2) [2021] NSWCATAP 164

Islam v Metricon Homes Pty Ltd [2018] NSWCATAP 116

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

The Owners-Strata Plan No 70871 v Turek [2022] NSWCATAP 83

The Owners-Strata Plan No 74698 v Jacinta Investments Pty Ltd [2021] NSWCATAP 387

Texts Cited: None cited

Category: Costs

Parties: The Owners-Strata Plan No 79633 (Appellant)
Violeta Graorovska (Respondent)

Representation: Solicitors:
Bannermans Lawyers (Appellant)
PBL Law Group (Respondent)

File Number(s): 2021/00338769; 2021/00365972

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not Applicable

Date of Decision: 29 October 2021

Before: G. Ellis SC, Senior Member

File Number(s): SC 21/15634; SC 21/19101

REASONS FOR DECISION

- 1 This is a costs application arising out of a decision of the Appeal Panel dated 11 May 2022.
- 2 The dispute arose under the *Strata Schemes Management Act 2015* (NSW). The owners' corporation appealed orders of the Tribunal that the owners' corporation perform works to common property. The substance of the appeal

was that the Senior Member who conducted the hearing denied procedural fairness to the owners' corporation by reason of excessive judicial intervention; and additionally misunderstood the evidence of the respective building consultant experts of the parties.

- 3 All grounds of appeal were dismissed.
- 4 In the substantive decision, the Appeal Panel made orders and directions to deal with any costs application by Ms Graorovska ('the Lot owner') who was the successful party in the appeal proceedings.
- 5 The Lot owner filed submissions with the Tribunal on 24 May 2022 and served a copy of those submissions on the strata manager of the owners' corporation by email on 24 May 2022. The costs submissions and documents of the Lot owner:
 - (1) Seek an order that the owners' corporation pay her costs of the Appeal Panel proceedings "as agreed or assessed or alternatively as the Appeal Panel sees fit."
 - (2) Seek further orders under s 104 of the SSM Act that the owners' corporation (a) cannot impose a levy on the Lot owner for the costs and expenses incurred by the owners' corporation in the appeal proceedings; and (b) pay any part of its costs or expenses in bring the appeal proceedings from the administrative fund or capital works fund; but may issue a special levy on owners other than Ms Graorovska.
 - (3) Assert the legal costs of the Lot owner in the appeal are \$16,500 fees to PBL Lawyers and \$2,210 "preparation, printing and delivery" costs.
 - (4) Submit that there are "special circumstances" under s 60 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act') for various reasons, including that the grounds of appeal were manifestly weak and misguided.
 - (5) Submit that she should not have to bear the costs and expenses of contributing to the costs and expenses incurred by the owners' corporation in bringing the appeal; nor should the owners' corporation be able to draw amounts from the administrative fund or capital works fund in respect of the appeal.
 - (6) Attach correspondence between the legal representatives of the parties regarding offers of settlement.
- 6 It appears that the costs submissions and documents were prepared by the Lot owner herself, rather than by the Solicitors who had acted for her in the Tribunal proceedings and Appeal Panel proceedings (PBL Law Group).

- 7 The owners' corporation did not file and serve costs submissions in accordance with the directions made in the decision of 11 May 2022.
- 8 After the period for submissions had closed, the Appeal Panel registry made enquiries with the Solicitors for the owners' corporation as to whether they had filed and served submissions.
- 9 The Solicitor for the owners' corporation then belatedly sought to file and serve costs submissions. The Appeal Panel issued procedural directions that the Solicitor for the owners' corporation file and serve an affidavit explaining the delay; and provide a copy of submissions. The procedural directions also provided for the Lot owner to make submissions in reply to the extension of time application; and provide her submission in reply in the event that the Appeal Panel extended time for submissions.
- 10 The Solicitor for the owners' corporation, Mr Bannerman, filed and served a brief affidavit dated 11 July 2022. That affidavit states that the reason the owners' corporation did not file and serve its costs submissions was that the Lot owner had stated she was no longer legally represented; and she did not serve a copy of the submissions on the Solicitors of the owners' corporation.
- 11 The reasons for the delay are unsatisfactory, in circumstances where the strata manager could have passed on the Lot owner's submissions to the Solicitors for the owners' corporation; the strata committee could have passed on the submissions; and the Solicitors for the owners' corporation could have made enquires with the Lot owner; or their client (the owners' corporation); or the Appeal Panel Registry to confirm whether or not the Lot owner had filed and served costs submissions.
- 12 Although the reasons for the delay are unsatisfactory, we have decided to extend the time for the owners' corporation to file and serve its costs submissions to ensure there is no doubt that the owners' corporation has had a reasonable opportunity to be heard on the issue of costs; and where the extension does not cause unfairness or prejudice to the Lot owner.
- 13 The owners' corporation's costs submissions are dated 11 July 2022 and comprise of 38 paragraphs. The submissions are not page numbered. The

owners' corporation submits that there are no "special circumstances" sufficient to award costs in favour of the Lot owner, because it had a reasonably arguable case on appeal. The owners' corporation further submits that there is no appropriate basis to make orders under s 104 of the *Strata Schemes Management Act 2015* (NSW)

- 14 The Lot owner's submissions in reply are dated 18 July 2022. Most of the submissions are, in substance, a repetition of matters that were set out in the submissions in chief. In addition, the Lot owner made submissions that, by reason of the conduct of the owners' corporation, it was unlikely that the work orders made by the Tribunal (the time period for compliance having been extended by the Appeal Panel) would be complied with.
- 15 The events after the decision of the Appeal Panel pertaining to whether or not the orders of the Tribunal will be complied with are irrelevant to the issue of the costs of the appeal; and have not been considered.

CONSIDERATION

- 16 By reason of Regulation 38A of the *Civil and Administrative Tribunal Rules 2014* (NSW), the applicant must establish "special circumstances" under s 60 (2) of the NCAT Act to obtain a costs order in her favour in the appeal proceedings.
- 17 Section 60 of the NCAT Act states 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.

(4) If costs are to be awarded by the Tribunal, the Tribunal may—

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(5) In this section —

Costs, includes —

(a) the costs of, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

18 The applicable principles as to whether “special circumstances” sufficient to award costs exist have been considered in a plethora of Appeal Panel decisions. A concise summary of the principles is contained in *The Owners-Strata Plan No 63731 v B & G Trading Pty Ltd* (No 2) [2020] NSWCATAP 273 at [6]-[15]:

The general rule set out in s 60(1) was:

“... designed to promote access to justice generally and to minimise the overall level of costs in tribunal proceedings as far as is practicable: *Choi v University of Technology Sydney* [2020] NSWCATAP 18 at [41].

In *Feng v OzWood (Australia) Pty Ltd* [2020] NSWCATAP 42 the Appeal Panel said, at [8], that the discretion to award costs had to be exercised judicially:

“...having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs. (See *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48]; *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [23]–[31]; *Nguyen & Anor v*

Perpetual Trustee Company Ltd; Perpetual Trustee Company Ltd v Nguyen & Anor (no 2) [2016] NSWCATAP 168 at [16].)

Section 60(2) says that the Appeal Panel may award costs to a party “only if” satisfied there are special circumstances warranting an award of costs.

Section 60(3) sets out a non-exclusionary list of factors to which an Appeal Panel may have regard in determining whether special circumstances warranting an award of costs exist.

“Special circumstances” are circumstances that are out of the ordinary, but need not be those which are exceptional or extraordinary: *Cripps v G & M Dawson Pty Ltd* [2006] NSWCA 81 at [60] (Santow J); *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 [32]; *Commissioner for Fair Trading v Edward Lees Imports Pty Ltd (No 2)* [2019] NSWCATAP 222 at [8]; *Edwards v Commissioner for Fair Trading, Department of Customer Service (Costs)* [2019] NSWCATAP 249 at [9]; *Youssef v NSW Legal Services Commissioner (Costs)* [2020] NSWCATOD 115 at [107].

However, it does not follow that a costs order should be made simply because one or more of the factors in s 60(3) are made out.

Even if satisfied that there are special circumstances, the Appeal Panel must further be satisfied that they are circumstances “warranting an award of costs” – *Fitzpatrick Investments Pty Ltd v Chief Commissioner of State Revenue* [2015] NSWCATAD 103 at [21]; *Youssef* at [108].

The exercise of the discretion requires the Tribunal “to weigh whether those circumstances are sufficient to amount to ‘special’ circumstances that justify departing from the general rule that each party bear their own costs”: *BPU v New South Wales Trustee and Guardian (Costs)* [2016] NSWCATAP 87 at [9]; *Obieta v Australian College of Professionals Pty Ltd (2014)* NSWCATAP 38 at [81]; *Khalafv Commissioner of Police* [2019] NSWCATOD 178 at [29]; *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [35].

He who asserts must prove, and so the party seeking the costs order bears the onus of proving that special circumstances exist - *Styles v Wollondilly Shire Council* [2017] NSWCATAP 108 at [5] under the heading “Costs”.

Whether special circumstances exist is a question of fact and each case must be assessed according to its circumstances: *Wynne Avenue Property Ltd v MJHQ Pty Ltd (No 2)* [2019] NSWCATAP 68 at [57]; *The Owners - Strata Plan 20211 v Rosenthal* [2019] NSWCATAP 49 at [15].

- 19 In this matter we are satisfied that there are “special circumstances” sufficient to persuade us to depart from the usual principle under s 60 (1) of the NCAT Act that each party pay its own costs.

- 20 We are satisfied that the appeal grounds advanced by the owners' corporation were manifestly weak under s 60 (3) (c) of the NCAT Act and accordingly lacked substance under s 60 (3) (e) of the NCAT Act.
- 21 The majority of the appeal grounds advanced by the owners' corporation were based on the conduct of the Senior Member who presided at the Tribunal hearing. The owners' corporation made serious allegations that the conduct of the Senior Member was so inappropriate that it breached the NCAT Code of Conduct for Members, in addition to denying procedural fairness to the owners' corporation. The owners' corporation also made allegations that the Solicitor for the Lot owner "coached" or influenced her evidence at the hearing.
- 22 There was no substance to any such allegations, for the reasons that were comprehensively discussed in our decision dated 11 May 2022. The arguments advanced for denial of procedural fairness (an error on a question of law) and on leave to appeal grounds under Cl. 12 of Sch. 4 of the NCAT Act were clearly and obviously weak.
- 23 Considering that the owners' corporation was legally represented throughout the Tribunal and Appeal Panel proceedings by Bannermans Lawyers, the owners' corporation (and its legal representatives) must have known, or should have known, that the invocation of such serious ethical and procedural fairness matters should only have occurred if there was a proper basis for doing so.
- 24 The submissions of the Lot owner made various assertions that certain members of the strata committee had a "personal vendetta" against her and by reason of this had acted to the detriment of the owners' corporation. It is inappropriate and unnecessary for us to consider and make findings about such allegations in the context of this costs application.
- 25 It is also unnecessary for us to consider the offers of settlement made by the parties as we are satisfied that "special circumstances" have been established in any event. No submission was made that there had been any unreasonable rejection of a '*Calderbank*' type offer.

What Type of Costs Order Should Be Made?

- 26 For reasons previously discussed, we are satisfied that the owners' corporation should pay the Lot owner's costs of the appeal proceedings.
- 27 The Lot owner's submissions did not seek costs on an indemnity basis or make specific reference to costs being awarded on an indemnity basis. We do not regard a generic reference to "as the Appeal Panel sees fit" as sufficient to genuinely raise an application for costs on an indemnity basis in circumstances where the issue is not referred to in the Lot owner's costs submissions.
- 28 Had an indemnity costs order been sought, we would have closely considered whether the nature of the allegations made by the owners' corporation involved delinquent conduct such that an indemnity costs order should be made (*Grandview Pty Ltd v Bacon (No 2)* [2021] NSWCATAP 164 at [17]-[18]).
- 29 The Appeal Panel has the power under s 60 of the NCAT Act to make an award of costs in a fixed sum rather than that costs be as agreed or assessed. Applicable principles are discussed by the Appeal Panel in *Islam v Metricon Homes Pty Ltd* [2018] NSWCATAP 116 at [40]-[54]; *Ellis v The Owners-Strata Plan 80605* [2018] NSWCATAP 174 at [44]-[48]; and *Anderson v The Owners-Strata Plan No 610304 (No 2)* [2019] NSWCATAP 108 at [26]-[30].
- 30 The costs submissions of the Lot owner do not clearly seek a lump sum costs order. In any event, the Lot owner's submissions and documents did not contain invoices and other source documents from which the Appeal Panel could determine costs from the materials available, such as an itemised invoice from PBL Lawyers.
- 31 We are satisfied that the appropriate costs order is that the owners' corporation pay the Lot owner's costs of the Appeal Panel proceedings as agreed or assessed on the ordinary basis.

Section 104 of the Strata Schemes Management Act 2014 (NSW)

- 32 Section 104 of the SSM Act states as follows:

104 Restrictions on payment of expenses incurred in Tribunal proceedings

(1) 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.

(2) An owners' corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund but may make a levy for the purpose.

(3) In this section, a reference to proceedings includes a reference to proceedings on appeal from the Tribunal.

- 33 Absent a "dispute" under s 232 (1) of the SSM Act because the owners' corporation has acted in contravention of s 104, the Tribunal has no power to make orders to enforce the obligation under s 104 (*The Owners-Strata Plan No 74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387 at [179]-[180].
- 34 The order sought is equivalent to one of the orders sought in *The Owners-Strata Plan No 70871 v Turek* [2022] NSWCATAP 83 ('*Turek*'). The only relevant difference is that in *Turek* the appeal was withdrawn and dismissed under s 55 (1) (a) of the NCAT Act, whereas in this matter the appeal was dismissed on the merits.
- 35 However, for similar reasons as expressed in *Turek* at [30]-[32] no order is made concerning s 104 of the SSM Act. In essence, what the Lot owner is seeking is a pre-emptive injunctive order that the owners' corporation comply with s 104 of the SSM Act. It is premature and inappropriate to make such an order because there is currently no "dispute" as to whether the owners' corporation has failed to comply with the provision; or may fail to comply with the provision. Undoubtedly, the Lot owner was the successful party in the Appeal Panel proceedings. The owners' corporation is bound to comply with its obligations under s 104 of the SSM Act. If it fails to do so, the Lot owner has the right to take future proceedings in the Tribunal.
- 36 As in *Turek*, we express the view that it would be regrettable if the owners' corporation did not comply with its obligations under s 104 of the SSM Act leading to future Tribunal litigation.

ORDERS

- (1) An oral hearing on costs is dispensed with under s 50 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

- (2) The Owners-Strata Plan No 79633 is to pay the costs of Violeta Graorovska in Appeal Panel proceedings AP 2021/00338769 and AP 2021/00365972 as agreed or assessed on the ordinary basis as set out in the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*).

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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