Civil and Administrative Tribunal

New South Wales

Case Name:	Promina Design & Construction Pty Ltd v The Owners - Strata Plan No 97449 (No 4)
Medium Neutral Citation:	[2023] NSWCATAP 338
Hearing Date(s):	On the papers
Date of Orders:	21 December 2023
Decision Date:	21 December 2023
Jurisdiction:	Appeal Panel
Before:	D Robertson, Senior Member E Bishop SC, Senior Member
Decision:	1. A hearing with respect to the question of costs is dispensed with pursuant to section 50 of the Civil and Administrative Tribunal Act 2013 (NSW). 2. The respondent's application for the costs of the appeal is dismissed.
Catchwords:	COSTS – Civil and Administrative Tribunal Rules rr 38 and 38A – Amount claimed or in dispute – Civil and Administrative Tribunal Act s 60 – Special circumstances
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) s60 Civil and Administrative Tribunal Rules 2014 (NSW) rr 38, 38A Home Building Act 1989 (NSW)
Cases Cited:	Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 Cripps v G & M Dawson Pty Ltd [2006] NSWCA 81 James v Department of Justice (Corrective Services NSW) (No 2) [2022] NSWCATAP 216 McIntosh v National Australia Bank (1988) 17 FCR 482 Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120

	Promina Design & Construction Pty Ltd v The Owners – Strata Plan No. 97449 (No 2) [2023] NSWCATAP 164 Promina Design & Construction Pty Ltd v The Owners—Strata Plan No 97449 [2023] NSWCATAP 252 Singh v Khan [2019] NSWCATAP 45 The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256
Texts Cited:	Nil
Category:	Costs
Parties:	Promina Design & Construction Pty Ltd (Appellant) The Owners – Strata Plan No 97449 (Respondent)
Representation:	Counsel: T Smartt (Appellant) Solicitors: Centurion Lawyers (Appellant) Khoury Lawyers (Respondent)
File Number(s):	2023/00116958
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	14 March 2023
Before:	G Ellis SC, Senior Member
File Number(s):	HB 22/47176

REASONS FOR DECISION

Introduction

1 The substantive decision in this appeal was published on 5 September 2023 (*Promina Design & Construction Pty Ltd v The Owners—Strata Plan No 97449* [2023] NSWCATAP 252) (the Substantive Decision). We granted the appellant

leave to appeal but dismissed the appeal. We made directions for the filing of submissions by any party seeking an order for costs. We required the parties to indicate in their submissions whether the question of costs could be determined on the basis of the written submissions and without a hearing.

2 The respondent filed submissions on 8 September 2023 seeking an order for costs. The respondent agreed that the question of costs could be determined without a further hearing.

3 The appellant filed submissions in response on 20 October 2023 opposing an order for costs. The respondent did not address the question whether the question of costs could be determined without a further hearing.

4 Having reviewed the submissions, we are satisfied that the question of costs can be determined on the basis of the written submissions and without a further hearing and, as neither party has opposed that course, we will make an order pursuant to s 50 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) dispensing with a hearing.

5 Section 60 of the NCAT Act provides:

> **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.

6 Rules 38 and 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) provide exceptions to the rule laid down in s 60, those rules provide:

38 Costs in Consumer and Commercial Division of the Tribunal

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—

(a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or

(b) the amount claimed or in dispute in the proceedings is more than $30,000.

38A Costs in internal appeals

(1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out in section 60 of the Act because of the operation of—

(a) enabling legislation, or

(b) the Division Schedule for the Division of the Tribunal concerned, or

(c) the procedural rules.

(2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

Respondent's submissions

7 The respondent's submissions sought costs on two alternative bases. First, the respondent submitted that rules 38 and 38A of the Rules applied to the appeal

so that the usual rules in relation to costs applied, that is costs should follow the event. The respondent submitted in the alternative that, if rules 38 and 38A were not applicable, there were nevertheless special circumstances warranting the making of an order that the appellant pay the respondent's costs.

8 The respondent identified what it submitted were the special circumstances as follows:

> "26. The Respondent respectfully submits that due consideration and regarding should be given to section 60(3). There are a number of special circumstances relevant to the Appeal application including:
>
> a) the strength of the Appeal application was weak; and
>
> b) the merits of the substantive appeal are weak, or as Principal Member Suthers stated there are 'significant obstacles to its success;'
>
> c) the Respondent has been deprived of pursuing its clam through the District Court in a timely manner given the appeal that has been raised:
>
> d) the respondent has been put to unnecessary expense in responding to the Appeal;
>
> e) the nature of the claim concerned statutory interpretation that had already been resolved/settled in previous case law and legislation. As such the claim was untenable.
>
> 27. Further the Respondent submits that consideration be given to section 60(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings. The Respondent commenced these proceedings in the Tribunal and a transfer order was made due to the quantum claimed. Due to the Appeal being lodged, the Respondent has had to wait for its matter to be dealt with, which ultimately means lengthier delays in a final determination being made.
>
> 28. In addition, it is clear that the Appellant had attempted to either limit the Respondent to the jurisdictional limit of NCAT (depriving the Respondent of over $200,000 of its claim), or alternatively have the proceedings dismissed such that the Respondent would be out of time to recommence. Put simply, the Appellant was aware (or ought to have been aware) that the prospects of its claim were poor. Yet it chose to continue the application in any event."

Appellant's submissions

9 The appellant submitted in response that rule 38 was not applicable and that there were not special circumstances warranting an order for costs. The appellant submitted:

> "17. The respondent argues that the applicant has 'conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings' because the applicant appealed against an order and failed: RS [27]. That is not what this phrase means. If the applicant's interpretation were accepted, it would mean that every losing party has engaged in this conduct. Contrary to the respondent's submissions, this phrase refers to delinquency in

> the conduct of proceedings that has caused unnecessary cost. There is no such delinquency and the submission should be rejected.
>
> 18. The respondent otherwise argues that the appeal was 'untenable'. That is a serious allegation that the respondent has not established. It is true that the appeal failed. But the arguments advanced by the applicant were cogent, and as is evident from the written submissions filed by the applicant, were accompanied by a significant amount of research, detail and engagement with the relevant authorities. The applicant's claim does not merit the description of having 'no tenable basis in fact or law'."

Consideration

Rules 38 and 38A

10 Clearly, the requirements of rule 38A are satisfied in relation to this appeal. The amount in dispute in the proceedings in the Consumer and Commercial Division (now transferred to the District Court) exceeded $30,000. Therefore rule 38 is to be applied in relation to the appeal.

11 So applied, rule 38 provides that special circumstances are not necessary before an order may be made in respect of the costs of the appeal if the amount claimed or in dispute on the appeal exceeds $30,000: *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 (*Tricare)* at [37] – [42].

12 The respondent's submission was that:

> "If the Appellant was successful, the effect would have been to limit the Respondent to the jurisdictional limit of NCAT, being $500,000. This is compared to the expert report which supported the Respondent's transfer application which opined that the cost to rectify the defects was $711,590. Accordingly, the effect of the decision to transfer has affected each of the parties' respective rights by $211,590, plainly more than $30,000."

13 The respondent relied upon the statement of the Appeal Panel in *Tricare* at [57]:

> "Adapting these principles to the circumstances of the present appeals and having regard to the specific wording of r 38, it appears to us that in applying r 38(2)(b):
>
> (1) The determinative factor is the amount in dispute in each appeal, not the amount in dispute in the proceedings at first instance;
>
> (2) The phrase "in dispute" is to be construed as meaning truly in dispute or at issue or, inversely, not unrealistically in dispute;
>
> (3) Whether "the amount … in dispute" in each appeal is more than $30,000 depends on whether there is a realistic prospect that in each appeal the wealth of the appealing party would be changed by more than $30,000 or, put another way, whether the right claimed by the appealing party, but denied by the

> decision at first instance, prejudices that party to an amount in excess of $30,000;
>
> (4) The fact that the value of the property the subject of any appeal exceeds $30,000 does not, of itself, mean that "the amount … in dispute" in that appeal is greater than $30,000."

14 In response, the appellant's submissions referred to *Tricare* at [43]:

> "In the case of an internal appeal, the "amount claimed … in the proceedings" can be determined by considering what orders the appellant seeks on the appeal. If those orders sought include an order that the respondent pay a sum of more than $30,000, expressly or impliedly, then the Tribunal should conclude that the amount claimed in those proceedings was more than $30,000. If the substantive orders sought do not involve any express or implied claim to any amount, it is difficult to see how there is any "amount claimed" for the purposes of r 38(2)(b)."

15 The appellant also referred to the decision of Principal Member Suthers in *Promina Design & Construction Pty Ltd v The Owners – Strata Plan No. 97449 (No 2)* [2023] NSWCATAP 164 (*Promina (No 2)*) at [12]:

> "The respondent's submissions were primarily directed to the application of the usual costs considerations where s 60 of the Act is inapplicable, as it took the view that r 38A is engaged. It is not. There was no amount claimed or in dispute in the appeal, which relates solely to the order transferring the first instance proceedings to the District Court."

16 The appellant further referred to the Appeal Panel decision in *Singh v Khan* [2019] NSWCATAP 45 where, after setting out an extract from paragraph [57] of the decision in *Tricare*, the Appeal Panel held, at [13]:

> "That passage makes it clear that, in order that rule 38(2)(b) apply to appeal proceedings it is necessary that the amount in dispute in the appeal itself exceed $30,000. We note that it would be an unusual case where an interlocutory order the subject of an interlocutory appeal could be shown to be likely to affect the wealth of the appealing party by more than $30,000."

17 In *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 the Appeal Panel held, at [95] – [97]:

> "95 On the other hand, it seems to us that where there is a claim for relief that may, as a consequence of that relief being granted, result in the loss of a property or other civil right to a value greater than $30,000, it could not be said that there are proceedings in which the amount claimed or the amount in dispute is greater than $30,000 within the meaning of the rule. Similarly, the fact that it is necessary to evaluate evidence about the value of particular property or determine other rights as part of determining whether there is an entitlement to relief does not mean "the amount claimed" or "the amount in dispute" in the proceedings is more than $30,000. Where the relief sought is not dependent on a finding that a particular amount is payable or not payable, it could not be said that "the amount claimed or in dispute in the proceedings is more than $30,000".

> 96 Rather, in such proceedings, the evaluation of the evidence of value or amount is for the purpose of determining whether to grant relief, not to ascertain the amount which is to be the subject of a specific order.
>
> 97 That is, in claims where the relief does not give rise to a money award or relief from an obligation to pay a specific amount the rule does not operate."

18 We do not consider that there is an amount claimed or in dispute in the appeal proceedings exceeding $30,000.

19 The issue in the appeal proceedings was whether the decision to transfer the first instance proceedings to the District Court should be set aside. That issue raised no claim or dispute regarding any sum of money.

20 The fact that the proceedings were transferred to the District Court may have exposed the appellant to judgment in a greater amount than could have been awarded in the Tribunal, but the decision to transfer the proceedings did not involve the determination of any claim or dispute regarding the liability of the appellant to the respondent.

Special circumstances

21 "Special circumstances" are circumstances that are out of the ordinary, but they need not be exceptional or extraordinary: *Cripps v G & M Dawson Pty Ltd* [2006] NSWCA 81, per Santow J at [60]; *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].

22 Sub-section 60(3) of the NCAT Act provides guidance concerning what constitutes special circumstances. The respondent's submissions did not directly identify any particular paragraphs of sub-s 60(3) other than paragraph (a), that is causing unnecessary disadvantage.

23 The proposition relied upon by the respondent in submitting that the appellant had caused unnecessary disadvantage is that the filing of the appeal has delayed determination of the respondent's claim. As paragraph 60(3)(b) indicates, special circumstances may arise where a party "has been responsible for prolonging unnecessarily the time taken to complete the proceedings".

24 Merely lodging an appeal which proves unsuccessful cannot be sufficient, of itself, to constitute special circumstances, otherwise there would be special circumstances in every unsuccessful appeal.

25 The respondent's submissions concerning delay and disadvantage are effectively founded upon the proposition that the appellant should not have brought the appeal. That is also the proposition underlying the other matters raised by the respondent.

26 Again, it is not sufficient to constitute special circumstances that an appeal has failed. As the terms of paragraphs (c) and (e) suggest, merely bringing a weak case is not sufficient. The facts which paragraphs 60(3)(c) and (e) indicate may constitute special circumstances are that the appellant's claims, ie the grounds of appeal, had no tenable basis in fact or law, or that the proceedings were misconceived or lacking in substance.

27 In *James v Department of Justice (Corrective Services NSW) (No 2)* [2022] NSWCATAP 216 (*James (No 2))*, at [13] – [14], the Appeal Panel dealt with a submission to similar effect to that maintained by the respondent:

> "13 The respondent's submissions in this regard amounted, ultimately, to no more than the proposition that, the appeal having failed, it was thereby shown to have no tenable basis.
>
> 14 Section 60 (3) (c) requires more than this. As the Appeal Panel held in *DYH v Public Guardian (No 3)* [2022] NSWCATAP 34 at [17] – [19]:
>
> > 17 The power to award costs in s 60 of the NCAT Act is to be understood in the context of the Act as a whole. One of the objects of the NCAT Act is "to ensure that the Tribunal is accessible and responsive to the needs of all of its users" (NCAT Act, s 3). A large proportion of its users are not legally trained and the general rule (which is modified for the Administrative and Equal Opportunity Division) is that a party has the carriage of the party's own case and is not entitled to be represented by any person, unless the Tribunal grants leave (NCAT Act, s 45(1); Sch 3, cl 9). The Tribunal is also obliged to ensure that the parties understand the nature of the proceedings and, if requested to do so, explain procedural matters to the parties (NCAT Act, s 38(5)).
> >
> > 18 The general rule set out in s 60(1) of the NCAT Act, that each party pay the party's own costs, 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], citing *Stonnington City Council v Blue Emporium Pty Ltd* [2004] VCAT 1441 at [13]). The concern with access to justice, evinced in s 60(1), indicates that the Tribunal should not award costs too readily on the basis that one party's claim was stronger than the other party's claim (see NCAT Act, s 60(3)(c)). The relative strengths of the parties' claims is one factor to be taken into account, but a finding that a party's claim is weak does not necessarily mean that there are special circumstances warranting an award of

> costs (see *Choi v University of Technology Sydney* [2020] NSWCATAP 18 at [45]).
>
> 19 In this context, we consider that the power to award costs is to be exercised with some tolerance for self-represented litigants who do not understand legal concepts. That includes a lack of understanding of the rules governing the admission of fresh evidence and the question of what constitutes error for the purposes of an appeal. That approach is consistent with the principle that the discretion to award costs is to be exercised judicially "having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs" (*Feng v OzWood (Australia) Pty Ltd* [2020] NSWCATAP 42 at [8])."

Equally, the fact that a claim has failed does not establish that it was misconceived or lacking in substance. As the Appeal Panel held in *James (No 2)*, at [24] – [26]:

> 24 In *Zucker v Burbank Montague Pty Ltd* [2018] NSWCATAP 135 at [44] the Appeal Panel held that:
>
> > 44 A finding that a claim is "not proved on the balance of probabilities" is not the same as a finding that a claim is "not tenable in fact or law". They are different concepts. The expression "no tenable basis in fact or law" relates to the common law tests developed and applied in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125. For a claim to have no tenable basis in fact or law it must be so obviously untenable that it cannot possibly succeed: *General Steel* at 130. "Manifestly groundless" or "clearly untenable" are equivalent expressions. In our view, for the purpose of s 60(3)(c), it matters not whether a conclusion that a claim has no tenable basis in fact or law is reached in connection with an application for summary dismissal or after a full hearing on the merits.
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> 25 In that case, at [50], the Appeal Panel adopted the statement of Ipp JA in *The Owners Corporation of Strata Plan 4521 v Zouk & Anor* [2007] NSWCA 231 at [45] that "lacking in substance" means "'not reasonably arguable'. That is, a meaning not dissimilar to 'frivolous, vexatious, misconceived'".
>
> 26 We do not consider that the appeal could properly be described as frivolous, vexatious, misconceived or lacking in substance in the sense outlined by the Appeal Panel in *Zucker v Burbank Montague Pty Ltd.* The grounds of appeal were not established, and it may fairly be said that the appeal had weak prospects of success. However, as the Appeal Panel stated in *DYH v Public Guardian (No 3)* [2022] NSWCATAP 34, at [18], the concern with access to justice evinced in s 60 (1) indicates that the Tribunal should not award costs too readily on the basis that one party's claim was stronger than the other party's claim, and a finding that a party's claim is weak does not necessarily mean that there are special circumstances warranting an award of costs."

28 We recognise that, as Principal Member Suthers held in *Promina (No 2),* there were obvious obstacles to the appellant succeeding in the appeal, not the least of which was that the appellant's submissions suggested that a number of Court of Appeal decisions had proceeded on an erroneous basis.

29 However, neither of those matters obviate the proposition maintained by the appellant in submissions on the appeal that the argument maintained in the appellant's submissions, at least in relation to the issue identified in our substantive decision as "the first issue", had not previously been the subject of direct determination.

30 The appellant's submissions in relation to the first issue were supportable on the basis of what might be described as a strictly literal interpretation of section 48K of the *Home Building Act 1989* (NSW) (HBA). See para [23] of the appellant's submissions on the appeal, quoted at [46] of the Substantive Decision.

31 It is fair to say that the drafting of section 48K is clumsy, but, as we have held in the Substantive Decision, it is not intractable and, when s 48K is construed in accordance with the principles of statutory interpretation, including having regard to the context and objects of the legislation, the interpretation suggested by the appellant cannot be sustained. However, that does not mean that the submissions made by the appellant in relation to the first issue were "misconceived or lacking in substance".

32 It is also the case that there were what might reasonably have been thought to have been conflicting authorities concerning what we identified in the substantive appeal decision as "the third issue". The fact that we found the decision in *McIntosh v National Australia Bank* (1988) 17 FCR 482 distinguishable does not indicate that the appellant's submissions concerning the third issue were without merit, let alone misconceived and lacking in substance.

33 It was the case, as we have held in the Substantive Decision, that parts of the appellant's submissions in respect of what we identified in the Substantive Decision as "the second issue" disclosed a lack of understanding of the settled law concerning the operation of ss 18E and 48K of the HBA. In this regard we refer to paragraphs [86], [98] and [100] of the Substantive Decision. However, success on the second issue was not essential to the appellant's prospects of success in the appeal and, in any event, we do not find that, taken as a whole,

the appellant's submissions in respect of the second issue were "without tenable basis in fact or law", or "misconceived or lacking in substance".

34 It must not be overlooked that the appellant was granted leave to appeal, and that the first instance decision was upheld on a different basis to that expressed in the reasons given at first instance.

35 We recognise that s 60(3) is not an exhaustive enumeration of the matters that may be taken into account in determining whether there are special circumstances, but the matters enumerated in s 60(3) do indicate that bringing a weak case does not, of itself, constitute special circumstances.

Conclusion

36 Rule 38 does apply in respect of the appeal so as to avoid the need for special circumstances before the Appeal Panel may make an order for costs. We are not persuaded that there are special circumstances warranting an order for costs in this case. Accordingly, the respondent's application for costs is dismissed.

ORDERS

37 Our orders are:

(1) A hearing with respect to the question of costs is dispensed with pursuant to section 50 of the *Civil and Administrative Tribunal Act 2013* (NSW).

(2) The respondent's application for the 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