



Civil and Administrative Tribunal New South Wales

Case Name: Lu v Community Association DP 270682 (No. 2)

Medium Neutral Citation: [2022] NSWCATCD

Hearing Date(s): 4 April 2022 (on the papers)

Date of Orders: 6 April 2022 [amended 7 April 2022]

Date of Decision: 6 April 2022 [amended 7 April 2022]

Jurisdiction: Consumer and Commercial Division

Before: Graham Ellis SC, Senior Member

Pursuant to Section 63 of the Civil and Administrative Tribunal Act 2013, orders published on 6 April 2022 are amended to read as follows:

Decision:

1. The Tribunal dispenses with a hearing on the question of costs, pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013*.
2. The applicant is to pay the costs of the respondent, on the ordinary basis, as agreed or assessed, on and from 4 February 2022.

Catchwords: COSTS – Whether special circumstances – Whether order for costs is warranted

Legislation Cited: Civil and Administrative Tribunal Act 2013
Community Land Management Act 1989

Cases Cited: Cripps v G & M Mawson [2006] NSWCA 84
eMove Pty Ltd v Dickinson [2015] NSWCATAP 94
Fitzpatrick Investments Pty Ltd v Chief Commissioner for State Revenue [2015] NSWCATAD 103
Megerditchian v Kumond Homes Pty Ltd [2014] NSWCATAP 120

Texts Cited: Nil

Category: Costs

Parties: Guitang Lu - Applicant
Community Association DP 270682 - Respondent

Representation: Applicant – Self-represented
Respondent – JS Mueller & Co Lawyers

File Number(s): SCS 21/32569

Publication Restriction: Nil

REASONS FOR DECISION

Outline

- 1 This is an application for costs by a successful respondent. The terms applicant and respondent, used in the reasons published on 1 March 2022, have been maintained to avoid the confusion which can arise if the respondent is referred to as the applicant because of its application for costs.
- 2 Having considered the relevant law and having regard to the submissions of the parties, the Tribunal determined that (1) that there were special circumstances, and (2) that those circumstances warranted an order for the applicant to pay the costs of the respondent on and from 4 February 2022.

Background

- 3 The applicant, who is one of 26 lot owners in a community association, sought the appointment of a managing agent by the Tribunal on the basis that the management structure was not functioning properly. His application was based on allegations there had been more than 20 breaches of the *Community Land Management Act 1989* (CLMA) and/or by-laws together with other matters said to have arisen from the conduct of other lot owners.
- 4 Those numerous allegations of breaches were maintained despite the appointment of a new managing agent shortly prior to the hearing. None of what were collectively referred to as the conduct matters were found to have been established by the applicant whose approach to communication, desire to get his own way, unwillingness to accept the majority decision and preference to escalate matters rather than resolve them were noted by the Tribunal. It is important to note that what has been referred to as the breaches and the conduct matters were not separate and distinct because some of the allegations made in relation to conduct matters, which were not established, formed the basis of an allegation there had been a breach.
- 5 Seven additional orders were sought in the applicant's submissions despite them not being either included in the application or the subject of an

application to amend that application. However, those orders were not pressed at the hearing.

Relevant law

- 6 The effect of s 60 of the *Civil and Administrative Tribunal Act 2013* is that s 60(1) provides that “*Each party to proceedings in the Tribunal is to pay the party’s own costs*” but s 60(2) relaxes that default position by providing 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*”.
- 7 The following non-exhaustive list of considerations is set out in s 60(3):
- (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 the Tribunal considers relevant.
- 8 Although it common for parties to focus upon whether any of those individual considerations apply, the Tribunal is required to make a global assessment of whether there are special circumstances, having regard to the matters set out in subsection 60(3).
- 9 It is well-established that the adjective “*special*” requires circumstances that are out of the ordinary but do not need to be extraordinary or exceptional: *Megerditchian v Kumond Homes Pty Ltd* [2014] NSWCATAP 120, adopting what was said in *Cripps v G & M Mawson* [2006] NSWCA 84 at [60].
- 10 Since s 60(2) commences with the words “*The Tribunal may award costs ...*”, it is clear the Tribunal has a discretion which must be exercised. It is necessary to consider not only whether there are special circumstances but also whether those circumstances warrant an award of costs: *Fitzpatrick*

Investments Pty Ltd v Chief Commissioner for State Revenue [2015] NSWCATAD 103 at [21].

- 11 Accordingly, where an order for costs is sought, any submissions should address two issues: whether there are special circumstances and, if so, whether those circumstances warrant an award of costs.
- 12 Plainly, the discretion to award costs must be exercised judicially: *eMove Pty Ltd v Dickinson* [2015] NSWCATAP 94 at [48].

Respondent's submissions

- 13 The contentions made on behalf of the respondent may be summarised as follows:
 - (1) The applicant's claims in relation to the conduct matters had no tenable basis as matters he raised were a function of his own behaviour.
 - (2) The applicant's conduct of the proceedings was such as to render it difficult for the respondent to deal with his allegations without legal representation by reason of numerous, detailed allegations.
 - (3) The proceedings should not have been continued after a new managing agent was appointed but the applicant continued to seek an order that the managing agent he preferred should be appointed.
 - (4) The Tribunal found that the applicant had not proved either that the association was not functioning satisfactorily or that there was conduct which warranted the appointment of a new managing agent by the Tribunal.
 - (5) The applicant should have withdrawn his application following the association's decision to appoint of a new managing agent on 3 February 2022 with the result that the proceedings were unnecessarily prolonged.

- (6) The applicant himself was at least significantly involved in the conduct matters and that he was the cause of them.
- (7) There was a lack of insight on the part of the applicant who, as a legal practitioner, should have realised he was unlikely to succeed.
- (8) The applicant's approach during the hearing did not advance his case in that the respondent's evidence was unshaken by cross-examination and he did no more than read previously prepared written submissions.
- (9) As a result, the association was put to unnecessary expense by these proceedings.
- (10) There was no substantive failure on the part of the association and any technical breaches were not admitted.

Applicant's submissions

- 14 Early in the applicant's submissions he raised the question of whether the respondent had resolved to appoint a lawyer. Although containing an apology for not having disclosed at the Tribunal's directions hearing on 7 September 2021 that his occupation is legal practitioner, and an apology to "*anyone involved in this proceeding if my behaviour has inadvertently hurt or harmed anyone*", the bulk of the applicant's written submissions were devoted to re-asserting factual matters already determined by the Tribunal.
- 15 It was further submitted that the admission of minutes of a meeting held in February 2022, which were admitted only to establish that a new managing agent had been appointed, both misled the Tribunal and disadvantaged him. That submission overlooks the fact that the Tribunal made it clear that the admission of those minutes as only being permitted in order to establish that a new managing agent had been appointed and it was open to the applicant to make any submissions on that aspect during the hearing.

16 It was suggested that it was a mitigating factor that he had suggested a change of managing agent on 15 April 2021 and that mitigating factors, as indicated in the applicant's submissions, demonstrated that he had been unfairly disadvantaged with the contended result that each party should be ordered to bear their own costs.

Consideration

17 Having reviewed both the conduct of the proceedings and the submissions of the parties, the Tribunal is satisfied, having regard to the matters set out in s 60(3), that there are special circumstances for the following reasons.

18 **First, the applicant's conduct,** notably raising numerous **allegations** of breaches of the CLMA and/or by-laws, not only rendered it necessary for the respondent to obtain legal representation but also added to the time required to both prepare and conduct the proceedings. Some of the alleged breaches were pettifoggery, suggestive of the application of unlimited time by the applicant which necessarily had cost consequences for the respondent.

19 **Secondly, continuing the proceedings** after a new managing agent was appointed on 3 February 2022 unnecessarily prolonged the proceedings.

20 **Thirdly, the strength of the claims** made by the applicant were low in two respects: (1) **the conduct** allegations reflected adversely on the conduct of the applicant rather than the conduct of others, and (2) when his own 15 April 2021 suggestion that a new managing agent be appointed was followed in February 2022, **the identity of the managing agent** was not a sufficient basis for the applicant to continue these proceedings and there was no established basis for a transfer of power from lot owners to a managing agent.

21 **Fourthly, the** proceedings were rendered complex by the **numerous matters of detail raised** by the applicant and his detailed, persistent pursuit of matters such as in relation to his claim for damages of \$185.90.

22 It is therefore necessary to consider whether those circumstances warrant an order for costs. The Tribunal considers those special circumstances warrant an order for costs by reason of the applicant's continuation of these proceedings after the appointment of a new manager on 3 February 2022.

23 That was a course he had suggested in April the previous year and continuing the proceedings after that date only left issues of (1) the identity of the managing agent and (2) the transfer of the decision-making power from the lot owners to the managing agent. There was no reason advanced why the managing agent nominated by the applicant should be preferred to the newly appointed managing agent, and the transfer of control of the association from the lot owners to the managing agent was not indicated by the conduct of others but was contra-indicated by the conduct of the applicant.

Orders

24 Both parties consented to the question of costs being determined on the paper. For the reasons set out above, the following orders are made:

- (1) The Tribunal dispenses with a hearing on the question of costs, pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013*.
- (2) The applicant is to pay the costs of the respondent, on the ordinary basis, as agreed or assessed, on and from 4 February 2022.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

The image shows a handwritten signature in black ink, followed by the official seal of the NSW Civil & Administrative Tribunal. The seal is circular with the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem.