



Civil and Administrative Tribunal New South Wales

Case Name: The Owners-Strata Plan No 79417 v Trajcevski and ors

Medium Neutral Citation: [2016] NSWCAT

Hearing Date(s): On the papers

Date of Decision: 20 July 2016

Jurisdiction: Consumer and Commercial Division

Before: P Boyce, Senior Member

Decision: 1. The applicant, The Owners-Strata Plan No 79417, is to pay the respondents, Michael Trajcevski, Snez Trajcevski and Traj Developments Pty Ltd, their costs as agreed or assessed on an indemnity basis from 20 August 2014.

Catchwords: HOME BUILDING – costs - discretion to award indemnity costs

Legislation Cited: *Home Building Act 1989*
Consumer, Trader and Tenancy Tribunal Act 2001
Consumer, Trader and Tenancy Tribunal Regulation 2009
Civil and Administrative Tribunal Act 2013
Civil and Administrative Tribunal Rules 2014
Civil Procedure Act 2005

Cases Cited: *Ultra Modern Developments Pty Ltd v Fitzgibbon* (Home Building) [2013] NSWCTTT 82
Oshlack v Richmond River Council (1998) CLR 72
Thompson v Chapman [2016] NSWCATAP 6 (7 January 2016)
Latoudis v Casey [1990] HCA 59
ABB Engineering Construction Pty Ltd v Abigroup Contractors Pty Ltd BC200305610
Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff (Formerly GIO Ltd) & Ors [2006] NSWSC583
Pratley Constructions v Racine (Domestic Building) [2005] VCAT547

AGC v Yager [1984] VicRp 40; [1984] VR483
PRZ Investments Pty Ltd v National Golf Holdings Ltd
[2102] VSCA 24
Colgate-Palmolive Company and Colgate-Palmolive Pty Ltd v Cussons Pty Ltd; Cussons Pty Ltd v Colgate-Palmolive Company and Colgate-Palmolive Pty Ltd
[1993] FCA 536; (1993) 46FCR225
Wentworth v Rogers [1999] NSWCA 403

Category: Costs

Parties: The Owners-Strata Plan 79417 (Applicant)
Michael Trajcevski, Snez Trajcevski and Traj
Developments Pty Ltd (Respondents)

Representation: Counsel:
Mr Carlos Mobellan (Applicant)
Mr Michael Birch, Solicitor (Respondents)

Solicitors:
Prime Lawyers (Applicant)
Hancock Alldis & Roskov (Respondents)

File Number(s): HB 14/36424

Publication Restriction: Unrestricted

REASONS FOR DECISION

Application

- 1 On 29 April 2016 the Tribunal made orders dismissing the substantive application.
- 2 The Orders included that the issue of costs was reserved and:
 - (a) Any application for costs by a party is to be supported by evidence and submissions and is to be filed with the Tribunal and served on the other party on or before 15 May 2016;
 - (b) If there is no application for costs by 15 May 2016 there will be no order as to costs;

- (c) Any evidence and submission in response to an application for costs from the party opposing the application for costs is to be filed with the Tribunal and served on the other party on or before 30 May 2016.
- (d) The parties are to advise the Tribunal in their respective submission if they consent to the issue of costs being determined [and] dealt with on the papers.
- (e) Alternatively the parties are to make submission as to why such an order should not be made pursuant to section 50 of the *Civil and Administrative Tribunal Act 2013*.

3 On 4 May 2016 the respondents made an application for costs.

4 The applicant has not made an application for costs.

Jurisdiction and legislation

5 The substantive application was filed before 17 June 2014 and the matter was determined after 1 January 2014.

6 In their submission the respondents set out the savings and transitional provisions set out in Clause 7(3)(b), Schedule 1 of the *Civil and Administrative Tribunal Act 2013* ("CATA") apply in matters of pending proceedings of abolished tribunal to be determined by NCAT as follows:

Subdivision 2 Determination of pending proceedings

7 Pending proceedings before existing tribunals transfer to NCAT

(1) Unheard proceedings in an existing tribunal are taken, on and from the establishment day, to have been duly commenced in NCAT and may be heard and determined instead by NCAT.

(2) In relation to part heard proceedings in an existing tribunal, the person or persons constituting the tribunal for those proceedings:

(a) are to continue, on and from the establishment day, to hear the matter, and to determine the matter, sitting as NCAT, and

(b) are taken to have been duly appointed as members of NCAT for the purposes of determining the matter even if the person or persons have not been appointed as members of NCAT by or under another provision of this Act, and

(c) may have regard to any record of the proceedings before the existing tribunal, including a record of any evidence taken in the proceedings before the existing tribunal.

(3) For the purposes of subclauses (1) and (2):

(a) NCAT has and may exercise all the functions that the relevant existing tribunal had immediately before its abolition, and

(b) the provisions of any Act, statutory rule or other law that would have applied to or in respect of the proceedings had this Act and the relevant amending Acts not been enacted continue to apply

7 The *Consumer, Trader and Tenancy Tribunal Act 2001* (“CTTT Act”) provides at s 53:

53 Costs

(1) Subject to this section and the regulations, the parties in any proceedings are to pay their own costs.

(2) The Tribunal may, in accordance with the regulations, award costs in relation to any proceedings.

(3) If costs are to be awarded by the Tribunal in accordance with the regulations, 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 Division 11 of Part 3.2 of the *Legal Profession Act 2104* or on any other basis.

(4) In this section, **costs** includes the costs of, or incidental to, proceedings.

(5) This section does not apply in relation to proceedings under the *Strata Schemes Management Act 1996* or the *Community Land Management Act 1989*.

8 Regulation 21 *Consumer, Trader and Tenancy Tribunal Regulation 2009* (“CTTT Reg”) provides:

21 Costs generally

(1) This clause applies to the awarding of costs by the Tribunal as provided by section 53 of the Act.

(2) The Tribunal may award costs in relation to proceedings in respect of which the amount claimed or in dispute is not more than \$10,000, or in respect of which no amount is claimed or in dispute, only if the Tribunal is satisfied that there are exceptional circumstances that warrant the awarding of costs.

(3) In any proceedings in respect of which the amount claimed or in dispute is more than \$10,000 but not more than \$30,000, the Tribunal may award costs in relation to the proceedings only if:

(a) the Tribunal is satisfied that there are exceptional circumstances that warrant the awarding of costs, or

(b) the Tribunal has made an order under section 30 (2) of the Act in relation to the proceedings.

(4) In any proceedings in respect of which the amount claimed or in dispute is more than \$30,000, the Tribunal may award costs in relation to the proceedings in such circumstances as it thinks fit.

(5) Despite any other provision of this clause, the Tribunal may order:

(a) that the costs of proceedings on an application for rehearing of a matter are, if the applicant fails to attend the hearing of the application, to be paid wholly or in part by the applicant, or

(b) that the costs of any proceedings that the Tribunal considers to be frivolous, vexatious, misconceived or lacking in substance, or that otherwise should not be heard or proceeded with, be paid wholly or in part by the person who instituted the proceedings.

(6) The amount of any costs under subclause (5) is to be substantiated in accordance with directions given by the Chairperson or, in the absence of such directions, in such manner as the Tribunal thinks fit.

9 The *Civil and Administrative Tribunal Act 2013* (“CATA”) provides at s 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, whether a party has refused or failed to comply with the duty imposed by section 36 (3),

(f) 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 Division 11 of Part 3.2 of the Legal Profession Act 2104 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.

10 The *Civil and Administrative Tribunal Rules 2014* at rule 38 provides:

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.

11 CATA provides at s36 that:

Guiding principle to be applied to practice and procedure

(1) The ***guiding principle*** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The Tribunal must seek to give effect to the guiding principle when it:

(a) exercises any power given to it by this Act or the procedural rules,
or

(b) interprets any provision of this Act or the procedural rules.

(3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:

(a) a party to proceedings in the Tribunal,

(b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.

(4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings

(5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.

Submissions

12 The respondents made submission in support of their application for costs on 4 May 2016.

13 The applicant has made no submissions in response to the respondents' submission or at all.

14 The respondent consents to their application for costs being dealt with on the papers.

Respondents' submissions and Tribunal findings

- 15 The respondents seek an order for indemnity costs against the applicant.
- 16 The Tribunal is satisfied that section 50 of the CATA has been complied with in that:
- (a) The issue of costs can be adequately determined in the absence of the parties by consideration of the written submissions lodged with or provided to the Tribunal.
 - (b) It has afforded the parties an opportunity to make submissions about the proposed costs order; and,
 - (c) Taken those submissions into account.
- 17 The Tribunal determines that a hearing is not required based on the written submissions. The application for costs is determined on the papers.
- 18 As referred to above, the respondents make submissions that the CTTT provisions apply as a consequence of the savings and Transitional Provisions of CATA.
- 19 The application was filed after 1 January 2014 and therefore the proper provisions are section 60(2) and (3) of the CATA and also Rule 38 of the Rules.
- 20 The quantum of the claim by the applicant was not identified in the original application, but was included in the amount of \$400,000 in the amended application filed on 28 July 2014.
- 21 As such the provisions of rule 38(2)(b) is enlivened to dispel the exclusionary provision that special circumstances must exist to dispel the general rule that each party should pay their own costs. There is no necessity for special

circumstances to be present in order to award costs. The claim exceeded \$30,000 and Rule 38 applies.

22 In *Ultra Modern Developments Pty Ltd v Fitzgibbon (Home Building)* [2013] NSWCTTT 82, Acting Senior Member Thode found that section 53(1) of the CTTT Act

creates a presumption that each party pay its own costs. Once that presumption has been displaced, the working of clause 20(4) of the Act [being the Regulations in that matter] provides to the Tribunal a wide discretion to award costs in such circumstances as it thinks fit. The general rule as to costs may be varied if the amount in issue is over \$30,000.00.

23 The respondents contend that the general rule as to costs is that the ordinary course of litigation costs follows the event.

24 The general rule expressed in *Oshlack v Richmond River Council* (1998) CLR 72 is that a successful party has a reasonable expectation of being awarded costs against the unsuccessful party. The usual principles that should apply in the exercise of discretion are that costs should follow the event.

25 The Tribunal has a general discretion under rule 38 to award costs. Where there is a general discretion to award costs the correct principle is that the Tribunal in exercising discretion should have regard to the nature of all relevant factors: *Thompson v Chapman* [2016] NSWCATAP 6 (7 January 2016) @ [72].

26 The purposes of a costs order is to compensate or indemnify a successful party against the expenses to which it has been put (*Latoudis v Casey* [1990] HCA 59).

27 In *Thompson v Chapman* at [71] the Appeal Panel said:

71. Where there is a general discretion for costs there is no absolute rule that, absent disentitling conduct, a successful party is to be compensated by the unsuccessful party nor is there any rule that a successful party might not be ordered to bear the costs of an unsuccessful party: *Oshlack v Richmond River Council* per Gaudron and Gummo JJ at 88 and Kirby J at 121-123.

28 The respondents contend that in *ABB Engineering Construction Pty Ltd v Abigroup Contractors Pty Ltd* BC200305610 per Einstein J at 14, His Honour carried out an extensive review of the authorities distilling a number of principles relevant to the determination of costs, in particular:

A successful litigant is generally entitled to an award of costs. Costs are not awarded to punish an unsuccessful party. The primary purpose for an award of costs is to indemnify the successful party. If litigation had not been brought...by the unsuccessful party the successful party would not have incurred the expense it did. As between the parties fairness dictates that the unsuccessful party typically bears the cost of the unsuccessful litigation. The traditional exceptions to the usual order as to costs focus on conduct of the successful party that disentitles it to the beneficial exercise of the discretion. In *Anglo Cyprian Trade Agencies v Paphos Wine Industries*, Devlon J referred to "misconduct" by the successful party as the basis for departure from the usual order. In that case, this conduct was construed to be misconduct relating to the litigation in circumstances leading up to it.

29 Where an applicant has totally failed in its claim the respondent submits that there is no reason to displace the usual order.

30 The respondents contend that indemnity costs should be awarded against the applicant. The respondents base their submission for indemnity costs on the basis that their solicitor had corresponded with the applicant, in particular a letter dated 20 August 2014, advising the applicants that their claim was statute barred and invited the applicants to withdraw their claim. The applicants were also put on notice in that letter that the respondents would make an application for indemnity costs and tender the letter in support of their claim.

31 In *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff (Formerly GIO Ltd) & Ors* [2006] NSWSC583 (19 June 2006) where Einstein J says at [19]-[21] that section 56(5) of the *Civil Procedure Act 2005* (a provision with similar effect to section 36 of CATA) expands the circumstances in which an indemnity costs order may be made and that in order to establish a basis for an indemnity cost order, it is necessary to establish by evidence relevant delinquency, abuse of process, ulterior purpose or unreasonableness on the part of Baulderstone.

- 32 In *Pratley Constructions v Racine* (Domestic Building) [2005] VCAT547 (18 March 2005) Senior Member Young of VCAT considered similar Victorian legislation to section 36 where he found that a proceeding conducted highhandedly or improperly: *AGC v Yager* [1984] VicRp 40; [1984] VR483 at 502, *PRZ Investments Pty Ltd v National Golf Holdings Ltd* [2102] VSCA 24 at [36] satisfied the Victorian requirement that a party conducted proceedings so as to not disadvantage the other party by not complying with orders of the Tribunal, causing or requiring an adjournment or vexatiously conducting the proceedings.
- 33 In *Colgate-Palmolive Company and Colgate-Palmolive Pty Ltd v Cussons Pty Ltd; Cussons Pty Ltd v Colgate-Palmolive Company and Colgate-Palmolive Pty Ltd* [1993] FCA 536; (1993) 46FCR225 (10 November 1993) Shepherd J sets out some circumstances where an order for indemnity costs will be made, including where proceedings were commenced or continued in wilful disregard of known facts or clearly established law or the making of allegations which ought never to be made or to undue prolongation of a case by groundless contentions (also see *Wentworth v Rogers* [1999] NSWCA 403 for indemnity costs awarded for unreasonable delay and expense)
- 34 The Tribunal is satisfied that the relevant legislation section 60(2) and (3) of the CATA and also Rule 38 of the Rules. That is, the Tribunal may award costs.
- 35 In the ordinary course, the Tribunal is satisfied that it can exercise its discretion under Rule 38 that the respondents are entitled to an award of costs in their favour against the applicant.
- 36 The respondents' support their contention that they are entitled to indemnity costs as set out in the submissions referred to in this decision.
- 37 The application by the applicant was the last of other applications brought against the respondents in respect of the building work. None of the other

applications had been successful in orders being made against the respondents or any one of them.

- 38 The applicant was on notice given by the respondents that its claim was filed outside the relevant statutory period and that if the matter were unsuccessfully prosecuted then the consequence would be an application against the applicant for indemnity costs.
- 39 The principle in *Colgate* is applied and the Tribunal will exercise its discretion to award indemnity costs in favour of the respondents against the applicant from the date of the respondents' offer of 20 August 2014.
- 40 The respondents costs payable by the applicant are to be as agreed or assessed on an indemnity basis from 20 August 2014.

Final Orders

41 The Tribunal orders:

- (1) The applicant, The Owners-Strata Plan No 79417, is to pay the respondents Michael Trajcevski, Snez Trajcevski and Traj Developments Pty Ltd their costs as agreed or assessed on an indemnity basis from 20 August 2014;

(signed)

P. Boyce
Senior Member
Civil and Administrative Tribunal of New South Wales

20 July 2016