Civil and Administrative Tribunal
New South Wales

Case Name:	Unilodge Australia Pty Ltd v The Owners Corporation Strata Plan 54026 (No. 2)
Medium Neutral Citation:	[2020] NCATCD
Hearing Date(s):	On the papers
Date of Orders:	24 November 2020
Date of Decision:	24 November 202
Jurisdiction:	Consumer and Commercial Division
Before:	T Simon, Principal Member

Decision:

(1) A hearing on costs is dispensed with pursuant to s 50(1)(c) of the Civil and Administrative Tribunal Act 2013.

(2) The respondent is to pay the costs of each of the applicant's costs in the substantive application SC 19/28957 as agreed or assessed.

(3) The costs application in relation to the interim application SC 19/28952 is dismissed.

Catchwords:	COSTS
Legislation Cited:	Civil and Administrative Tribunal Act (NSW) 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353 EB 9 & 10 Pty Ltd V The Owners SP 934 [2018]

	NSWSC 464 Malachite Holdings Pty Ltd [2018] NSWCATAP 256 Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 68 Owners-Strata Plan No 14593 v Soares [2019] NSWCATAP The Owners Corporation Strata Plan No. 63341 v Walsh v The Owners SP No 10349 [2017] NSWCATAP 230 Paraskevopoulos v Bajic (No. 2) [2018] NSWCATCD 40 Re Minister for Immigration; Ex Parte Lai Qin (1997) 186 CLR 622
Category:	Principal judgment
Parties:	Unilodge Australia Pty Limited (applicant) Sydney Campus Apartments Pty Limited (applicant) The Owners Strata Plan 54026 (respondent)
Representation:	Counsel: P. W. Gray SC and R.C. Gratian (applicants) P Doyle Gray (respondent) Solicitors: Swaab (applicants) Kreisson (respondent)
File Number(s):	SC 19/28952 and SC 19/28957
Publication Restriction:	Nil

REASONS FOR THE DECISION

Background to the matter

1 On 21 June 2019, the applicants, UniLodge Australia Pty Ltd and Sydney Campus Apartments Pty Ltd made applications against the respondent Owners Corporation. The applicant's sought orders pursuant to s 237 of the *Strata Schemes Management Act* 2015 (Strata Act) for the appointment of a compulsory strata manager, as well as orders pursuant to ss 24 and 25 invalidating various resolutions passed by the Owners Corporation. The application for urgent interim relief (SC 19/28952) was in substantially similar form to the application for final relief (SC 19/28957). On 29 April 2020 the Tribunal made orders appointing a compulsory manager to exercise all the functions of the Owners Corporation and orders for the invalidation of the resolutions. The interim application was dismissed.

2 Directions were also made for the parties to provide submissions and documents in relation to costs. The Tribunal has received the following submissions and documents from the parties on costs:

(1) On 15 May 2020, submissions and documents were received form the applicants.

(2) On 12 June 2020, submissions and documents were received from the Owners Corporation.

(3) On 26 June 2020 the applicants' provided its submissions in reply in relation to costs.

3 For the reasons set out below and having considered all the submissions on costs, the Tribunal is satisfied that the respondents should pay the costs of the applicants in relation to the substantive application as agreed or assessed.

Dispensing with the Hearing

4 Section 50 of the Civil and Administrative Tribunal Act (NSW) 2013 (NCAT Act) relevantly provides:

> **50 When hearings are required**
>
> (1) A hearing is required for proceedings in the Tribunal except:
> …
> (c) if the Tribunal makes an order under this section dispensing with a hearing, or
> …
> (2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.
>
> (3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first:
>
> (a) afforded the parties an opportunity to make submissions about the proposed order, and
> (b) taken any such submissions into account.
>
> (4) The Tribunal may determine proceedings in which a hearing is not required based on the written submissions or any other documents or material that have been lodged with or provided to the Tribunal in accordance with the requirements of this Act, enabling legislation and the procedural rules.
> …

5 The Tribunal's directions for submissions on costs asked the parties to address s 50 of the NCAT Act. Both parties consented to the application being determined on the papers. The Tribunal is satisfied the parties have had the opportunity to make submissions about a hearing on the papers. The Tribunal is satisfied that the issue of costs can adequately be determined in the absence of the parties by considering the written submissions of the parties. The parties would be put to unnecessary expense if a hearing on costs were held.

The Substantive application

6 The applicants are seeking costs in the application (including the interim application). The applicants seek a costs order on an indemnity basis, or alternatively on an indemnity basis from 31 July 2019. The applicants also submit that the Tribunal should make a further order reflective of the effect of s 104 of the Strata Act, that the Owners Corporation must not pay any part of its costs and expenses of these proceedings (including payment of the applicants' costs) from its administrative fund or capital works fund, and must not levy any contribution in respect of its costs on UniLodge.

7 Section 60 of the NCAT Act requires parties to pay their own costs unless the Tribunal is satisfied that special circumstances warrant an award of costs. Rule 38 (2) of the *Civil and Administrative Tribunal Rules*, dispenses with the threshold test of "special circumstances" imposed by section 60 (2) of the NCAT Act and does not apply where the amount claimed or in dispute in the proceedings is in excess of $30,000.

8 Rule 38(2)(b) applies when the 'amount claimed or in dispute' is more than $30,000. The meaning of the expression "the amount claimed or in dispute is more than $30,000" was considered in *The Owners Corporation Strata Plan No. 63341 V Malachite Holdings Pty Ltd* [2018] NSWCATAP 256. All parties have proceeded in their respective submissions on the basis that the Tribunal would need to determine special circumstances and the Tribunal is satisfied that rule 38 does not apply to these applications and that for costs to be awarded it would need to find special circumstances.

9 Section 60(3) of the *Civil and Administrative Tribunal Act* 2013 set out a non-exhaustive list of matter that the Tribunal may have regard to when determining whether 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.

10 In *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 68 the Appeal Panel found at [11] that "special circumstances" are "circumstances that that are out of the ordinary" but the circumstances do not have to be "extraordinary or exceptional".

11 The Tribunal finds special circumstances in the substantive application for the reasons that follow.

Defence lacking in substance

12 The Tribunal resolved each issue in the proceedings in favour of the applicants and rejected the Owners Corporation's submissions, particularly its submissions regarding the refusal of proxies: see the Tribunal reasons at [44]-[49]. In relation to the 'authentication' of proxies and company nominees that were rejected the Tribunal found there was "no basis' for that assertion by the Owners Corporation: see [48]. However. The Tribunal does not find that the respondent's defence in this regard was untenable in fact or law, and was not without basis. The circumstances of this case and the arrangement of the applicants in relation to the proxies were unusual. While the applicants were ultimately unsuccessful, given the complexity of the arrangement of Sydney Campus Apartments in relation to statutory declarations and proxy instruments, the Tribunal does not find that this aspect of the defence was untenable or without basis.

13 However, the Tribunal does find that the respondent's defence in relation to the significant delay in the repair of the awning had no basis. The Tribunal found that the repair to the awning above the public footpath adjacent to the

strata scheme must be undertaken, noting the Owners Corporation's strict duty to maintain and repair common property under s 106 of the Strata Act. The Tribunal found that there was a “serious and prolonged” failure of the Owners Corporation to undertake the works and relevantly stated:

> 53 The Tribunal also accepts that the scheme is not functioning satisfactorily because the Owners Corporation have failed to repair common property, in particular the awning above a public footpath adjacent to the Strata Scheme. In effect the scheme has been polarized into factions. The applicants allege that the Owners Corporation has failed to carry necessary repairs and maintenance, to the windows and the facade, at the same time as the awning work which would save the Owners Corporation some $1.5 million in the long run.
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> 54 Section 106 of the SSMA requires an owners corporation to:
>
> > properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> 55 Since July 2015 the awning has required repair and has not been repaired. The evidence reveals that there has been considerable time spent obtaining expert engineering advice, and detailed works and funding proposals, to remedy the awning.
>
> 56 A Notice of Intention to Give an Order was issued by the City of Sydney Council on 20 April 2017, warning of 'catastrophic failure' of the awning. The Owners Corporation’s previous solicitor, Muellers, advised the Owners Corporation to embark upon the repair of the awing as required by the Council letter of April 2017.
>
> 57 Each party blames the other for the delay, but what is clear is that in the situation of conflict in the Owners Corporation has been the reason for the failure to finalise the repair to the awning which clearly requires undertaking (and neither party denies).
>
> 58 By 22 November 2019, all that was being done about the awning was only to accept a fee proposal from Landlay to "carry out an assessment of the awning and preparation of a report" and in relation to the windows and facade, not to do any actual remedial work but only to "carry out an assessment" and "prepare a report" on the condition of the windows. It is noted from the evidence that such assessments had already been undertaken.
>
> 59 The serious and prolonged failure by the Owners Corporation to carry out the urgent repair to the awning in these circumstances is evidence that the scheme is not functioning satisfactorily.

14 In those circumstances the Tribunal finds that the respondents defence in relation to the awning had 'no tenable basis in fact or law’.

Respondent's unreasonably prolonging the proceedings

15 Further, the Owners Corporation repeatedly failed to comply with the Tribunal's orders over a period of more than two months, particularly in respect of the order that it file Points of Defence.

16 The application for urgent interim relief came before the Tribunal on 19 July 2019. The Tribunal decided that the interim application should be heard at the same time as the application for final relief. The hearing was scheduled on 9 and 10 September 2019.

17 On 2 September 2019, a week before the hearing fixed for 9 and 10 September 2019, the Owners Corporation made an application that the Tribunal proceedings be transferred to the Supreme Court (on the basis of an alleged lack of jurisdiction of the Tribunal and apprehended bias) or, alternatively, that the hearing be vacated (because the Owners Corporation wanted more time to prepare its evidence). The Owners Corporation had not filed the Points of Defence it had been ordered to file by 9 August 2019, nor had it completed its evidence.

18 That application was heard by the Tribunal on 4 September 2019. On 6 September 2019, the Tribunal refused to transfer proceedings to the Supreme Court but did agree to vacate the hearing date and grant a short adjournment to the Owners Corporation. The Tribunal extended the time for the Owners Corporation to file its Points of Defence and evidence to 30 September 2019. On 27 September 2019, the substantive proceedings were fixed for a two-day hearing on 4 and 5 December 2019. The Points of Defence were not filed until 18 October 2019.

19 On 17 September 2019, the Owners Corporation filed a Notice of Appeal to the Appeal Panel, appealing the interlocutory decision made on 6 September 2020. On 29 November 2019, leave to appeal from the 6 September interlocutory decision was refused by the Appeal Panel and the Owners Corporation's appeal was dismissed. The Appeal Panel also ordered that the Owners Corporation pay the costs of the Appeal.

20 The respondent makes submissions that the adjournment was necessitated by a delay in the applicants complying with order 5 made on 19 July 2019 which required the Owners Corporation to notify all lot owners of the proceedings. However, there was no suggestion that the respondent had not received the documents, only that other lot owners or interested parties may not have yet received them and on its own that may not have necessitated a adjournment. The Tribunal is satisfied that it was ultimately the respondent's failure to comply with directions to provide a defence and the lateness in bringing the transfer application which resulted in the hearing set down for 9 and 10 September having to be adjourned. The Owners Corporation filed the application to transfer the proceedings to the Supreme Court less than a week prior to the hearing which had been fixed more than six weeks earlier. This was despite the proceedings having already been on foot for more than two months and the Owners Corporation having had ample opportunity to make any challenge to the Tribunal's jurisdiction well before then.

21 The Tribunal is satisfied that the Owners Corporation has unreasonably prolonged the time taken to complete the proceedings: see ss 60(3)(b) and (f) of NCAT Act 2013

The Open Offer

22 The applicants have provided a letter dated 31 July 2019, from the applicants' solicitors to the respondents titled 'OPEN OFFER'. The offer provided that the applicants were prepared to settle the whole of the proceedings on the basis that Whelan Property Group, the Owners Corporation's chosen strata manager, and who had been appointed by the Owners Corporation three weeks earlier on 11 July 2019, be appointed as compulsory strata manager of the Owner's Corporation for a period of 18 months, to exercise all functions of the Owners Corporation.

23 The offer was open for acceptance until 5 pm on 9 August 2019 and was expressed as an open offer 'which may be relied upon at the pending hearing''. The letter also stated that, in the event it was not accepted by the

Owners Corporation, it would be tendered on the question of costs at the final hearing as giving rise to 'special circumstances '. Ultimately, it was the Strata Manager chosen by the applicants who was appointed as the compulsory strata manager. The respondents makes submissions that it was the appointment of a compulsory manager that they were defending and that such an appointment is a serious matter. The Tribunal finds that in circumstances where the respondents were defending the proxies and compulsory management is a significant matter, the rejection of the offer in itself does not constitute 'special circumstances'.

Conclusion on Special Circumstances

24 Having considered the matters overall the Tribunal is satisfied that there are special circumstances which warrant the making of a costs order, in particular the applicants defence regarding the failure to repair and the respondents prolonging of the proceedings.

The Interim Application

25 The Tribunal is not satisfied that special circumstances apply in relation to the interim application. The orders sought in the interim application were substantially the same form as the substantive. The Tribunal did not grant the applicants interim relief sought and ultimately dismissed the interim application with the finalisation of the substantive application. The applicant makes submissions that the interim application resulted in the matter being dealt with urgently, however that only ever required a request to the Tribunal for an urgent hearing and not an application for interim orders. The Tribunal finds no special circumstances which would warrant the making of a costs order on the interim application.

Indemnity Costs

26 The applicants seek indemnity costs. The applicants make submissions that they made their offer to the Owners Corporation on 31 July 2019, at a point in

time when the issues involved in the dispute ought to have been readily apparent to the Owners Corporation.

27 The applicants make submissions that indemnity costs are an important case management tool, in that their availability has the effect of limiting the litigation of cases where there are no reasonable prospects of success see *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353. In that regard, indemnity costs may be awarded where a hopeless defence is maintained or where a party has conducted the proceedings in a way that has caused unreasonable delay and expense.' The Tribunal has already found that at least in relation to the proxies the defence was not hopeless and on that basis does not find that it should grant indemnity costs. Further, the Tribunal found in its reasons for decision that much of the documents that had been filed by the parties were irrelevant to the proceedings. That included documents filed by the applicant. It is also noted that the applicant alleges that it was necessary to file the documents because of the respondents failure to properly articulate its defence, however those assertions are not supported.

28 The applicant submits that costs may also be ordered on an indemnity basis in favour of a party who has, made a settlement offer that is better than the result obtained by the other party. They refer to the decision in *Paraskevopoulos v Bajic (No. 2)* [2018] NSWCATCD 40, where the Tribunal summarised at [26]-[28] the applicable principles for it to award indemnity costs following failure to accept a Calderbank offer:

(1) there must be a real and genuine element of compromise;

(2) the refusal must be unreasonable;

(3) the reasonableness in rejecting an offer must be considered at the time the offer is made, not with the benefit of hindsight; and

(4) relevant factors in relation to whether the rejection was reasonable include the stage of the proceedings at which the offer was received,

the time allowed to consider the offer, the extent of compromise offered, the offeree's prospects of success (assessed at the date of the offer), the clarity with which the terms of the offer were expressed and whether the offer foreshadowed an application for indemnity costs in the event of rejection.

29 The applicant submits that the Owners Corporation's failure to accept an offer at the time it was put to them was unreasonable. They state it was a significant compromise on the part of the applicants, who had sought in their application the appointment of a strata manager chosen by them to be independent from the possible influence of the current strata committee. The applicant also submits that the Owners Corporation was given ample time to consider the offer and it was expressly foreshadowed in the offer that it would be tendered on the question of costs at the final hearing in the event of rejection.

30 The applicant submits that the Owners Corporation's conduct in continuing to defend the proceedings and causing unreasonable delay and expense of itself warrants an order for indemnity costs of the whole of the proceedings. They make submissions that in the alternative, the Owners Corporation's failure to accept the offer warrants an order that the Owners Corporation pay the applicants' costs on an indemnity basis from 31 July 2019: see *Re Minister for Immigration; Ex Parte Lai Qin* (1997) 186 CLR 622 at 624-625 per McHugh J.

31 The Tribunal is not satisfied to award costs on an indemnity basis. As identified in the primary reasons, much of the material filed by the parties was not relevant, including material filed by the applicant. Further, the Tribunal has found that the defence in relation to the proxies was not untenable and that the refusal of the offer was not unreasonable in the circumstances. Accordingly, the Tribunal is not satisfied that it should make a costs order on an indemnity basis and the costs are awarded as agreed or assessed.

Section 104 of the Strata Schemes Management Act 2015

32 The applicants also seek an order reflective of the effect of s 104 of the Strata Act that the Owners Corporation must not pay any part of its costs and expenses of these proceedings (including payment of the applicants' costs) from its administrative fund or capital works fund, and must not levy any contribution in respect of its costs on UniLodge.

33 The applicants seek that the Tribunal make a finding consistent with s 104(1) of the Strata Act.

34 It is clear from the wording in s 104(1) that the Owners Corporation cannot "levy a contribution on another party who is successful in the proceedings". Consequently, section 104 would preclude the Owners Corporation from levying a contribution of its legal costs against parties who are successful in proceedings. Section 104 of the Strata Act is not an order making power and as the Appeal Panel in *Walsh v The Owners SP No 10349* [2017] NSWCATAP 230 stated, the Tribunal does not have power to make a declaratory order. That position was confirmed in an unrelated decision of the Supreme Court in *EB 9 & 10 Pty Ltd V The Owners SP 934* [2018] NSWSC 464.

35 The Appeal Panel in the *Owners-Strata Plan No 14593 v Soares* [2019] NSWCATAP 35 stated at [56].

> In substance the appellant has not been successful in the appeal. The respondents did not seek any costs order in their favour. However, as we indicated to Ms Crittenden during the course of the proceedings it is appropriate that we ensure that section 104 of the Act which is in the following terms, applies;
>
> ….
>
> It would be unfair in all the circumstances if the respondents were required to contribute to any levy raised by the Owners Corporation with respect to any costs and disbursements incurred in connection with these appeal proceedings. Accordingly, the respondents having been successful overall in the proceedings, we observe that no such contribution should be required of them.

36 While the Tribunal accepts that Soares correctly applied s 104, it is clear that the remarks were simply an observation, which is all they could be, as

findings can only be made in the context of making orders. The scheme is presently under compulsory management and if any issue arises as to how amounts are levied they can be dealt with by way of application.

37 In that regard the Tribunal make no orders or findings in regard to s104 of the Strata Act and only make the observations as above.

38 The orders are made accordingly.

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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