



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Krimbogiannis v Fallshaw (Investments) Pty Ltd [2016] NSWCATCD 49
Hearing dates:	Heard on the Papers
Decision date:	27 May 2016
Jurisdiction:	Consumer and Commercial Division
Before:	D Goldstein, Senior Member
Decision:	<p>1. Pursuant to section 63 of the Civil and Administrative Tribunal Act 2013 the Registrar of the Consumer and Commercial Division of the Civil and Administrative Tribunal is to correct order 3 of the Tribunal's Notice of Order dated 18 December 2015 by the addition of the words "and in District Court of NSW proceedings 2012/126027."</p> <p>2. In COM 14/20620 and in COM 14/45236 Fallshaw (Investments) Pty Ltd must pay Andrew Krimbogiannis Connie Krimbogiannis and Arthur Krimbogiannis their costs of these proceedings such costs if not agreed to be assessed on a party/party basis pursuant to the provisions of the Legal Profession Uniform Law Application Act 2014.</p>
Catchwords:	Slip Rule - usual order for costs
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Retail Leases Act 1994
Cases Cited:	L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2) 151 CLR 590 Oshlack v Richmond River Council (1998) 193 CLR 72 Storey & Keers Pty Ltd and another v Johnstone 9 NSWLR 446
Category:	Costs
Parties:	Andrew Krimbogiannis Connie Krimbogiannis and Arthur Krimbogiannis (applicants) Fallshaw (Investments) Pty Ltd (respondent)
Representation:	Counsel: Mr D Knoll for the applicants Solicitors: Konstan Lawyers for the applicants

File Number(s): COM 14/20620COM 14/45236

Publication restriction: Unrestricted

REASONS FOR DECISION

- 1 On 18 December 2015 a final decision was given in these proceedings in the applicants' favour. Orders were made concerning any costs application that might be made. On 23 December 2015 orders were made varying the time for the parties to file and serve submissions regarding costs.
- 2 In response to a request for an amendment of order 3 given on 18 December 2015, on 23 December 2015 I ordered the applicants to state in their submissions whether the relief sought included an indemnity for adverse costs orders in District Court Proceedings 2012/26027.
- 3 An appeal was filed against the final decision. On 29 April 2016 the Notice of Appeal was dismissed by the consent of the parties.
- 4 The applicants have filed and served their outline of submissions in relation to costs.
- 5 The solicitors for the respondent have stated that the respondent would not be serving submissions in respect of the cost application.
- 6 In the final decision the applicant's claim was described as follows in paragraph 4:

'In these proceedings the applicants, whom I will call the lessees, seek to recover the sum of \$133,685.32 from the respondent whom I will call the lessor. The sum of \$133,685.32 relates to legal fees the lessees say they have paid due to the lessor's conduct in connection with the delivery door. In addition the lessee's also claim to be indemnified in an amount in excess of \$200,000 in connection with legal fees that they will become obliged to pay because of a costs order made against them in the Court of Appeal proceedings as referred to above.'
- 7 The applicants were successful in that they obtained orders 2 and 3 which were:

'Fallshaw (Investments) Pty Ltd must pay Andrew Krimbogiannis Connie Krimbogiannis and Arthur Krinbogiannis the sum of \$133,685.32 immediately.

Fallshaw (Investments) Pty Ltd must pay Andrew Krimbogiannis Connie Krimbogiannis and Arthur Krinbogiannis the amount they are required to pay The Owners - Strata Plan 21702 as costs, either agreed or as assessed, in Court of Appeal proceedings 2013/277696.'
- 8 Section 60 of the *Civil and Administrative Tribunal Act 2013* (the 'Act') provides that:

'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.'

9 I only have the jurisdiction to award costs under section 60 if I am satisfied that there are special circumstances warranting an award of costs.

10 Rule 38 of the Civil and Administrative Tribunal Rules 2014 provides:

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.'

11 By reason of Rule 38(2)(b) above, I have the discretion to award costs in these proceedings by reason of the fact that pursuant to section 3 of Schedule 4 of the Act, proceedings under the *Retail Leases Act 1994* are allocated to the Commercial and Consumer Division of the Tribunal and the amount claimed in these proceedings was \$133,685.32.

12 The applicants have also made submissions regarding the costs that they are exposed to in District Court proceedings 2012/26027. In the final decision of 18 December 2015 reference was made at paragraph 3(b) to litigation in the District Court. Reference was also made to the proceedings in the Court of Appeal in paragraph 3(c) and at various paragraphs thereafter.

13 The Court of Appeal decision set aside the decision of the District Court dated 28 May 2013 in proceedings 2012/126027 and the order of the District Court that the Owners – Strata Plan 21702 (the 'Owners Corporation') pay the applicants' costs of the District Court proceedings.

14 In relation to the District Court costs Basten JA stated at paragraph 25;

'There is, however, a live issue as to whether the applicant should, even though successful on the construction of s 62, receive its costs in the District Court, or part thereof. Counsel for the respondents indicated that if the matter were live, they would wish to challenge an adverse costs order on the basis that the owners' corporation had raised several grounds of appeal which were rejected by the primary judge and which had not been the subject of challenge in this Court. Accordingly, it is appropriate to set aside the costs order made in the District Court, but it is not open to this Court to make an order in its place. This matter has been winding a somewhat leisurely way through the procedures available under the Strata Schemes Management Act, including before an adjudicator and before the Tribunal, before reaching the District Court. If it were possible for this Court to halt further expense, it would wish to do so. However, that course is not possible, although it may be hoped that there will be no great incentive to return to the District Court to reargue questions of costs there.'

15 Despite Basten JA's hope that '*there will be no great incentive to return to the District Court to reargue questions of costs there*' that is precisely what occurred.

16 In a District Court decision dated 9 December 2015 in proceedings 2012/126027 Judge Gibson on the Owners Corporation's application made a costs order in its favour. The order was that the applicants in these proceedings were to pay:

- (a) 90% of the Owners Corporation's costs of the District Court proceedings before Levy SC DCJ; and
- (b) 100% of the Owners Corporation's costs in the proceedings the subject of the 9 December 2015 decision.

17 The applicants now seek an order for the costs they have been exposed to by reason of Judge Gibson's decision in the District Court on 9 December 2015.

18 The orders that I made on 18 December 2015 did not deal with the costs of the District Court proceedings, no doubt because at the conclusion of the hearing and at the time that final submissions were made on 16 September 2016, the issue of costs in the District Court as a consequence of the Court of Appeal decision dated 5 December 2014 had not crystallised. The District Court's costs decision on 9 December 2015 was given 9 days before the final decision in these proceedings.

19 No doubt because no action had been taken on the question of the District Court costs since the Court of Appeal decision dated 5 December 2014, the issue was not, so far as I am aware, pressed in the applicants' submissions.

20 The applicants' now seek the amendment of Order 3 made on 18 December 2015 in the form of the addition of 'and in District Court of NSW proceedings 2012/126027'.

21 The Tribunal has no general power to amend its decisions. There is however section 63 of the Act which states:

63 Power to correct errors in decisions of Tribunal

(1) 'If, after the making of a decision by the Tribunal, the President or the member who presided at the proceedings is satisfied that there is an obvious error in the text of a notice of the decision or a written statement of reasons for the decision, he or she may direct a registrar to alter the text of the notice or statement in accordance with the directions of the President or the member.

(2) If the text of a notice or statement is so altered, the altered text is taken to be the notice of the Tribunal's decision or the statement of its reasons, as the case may be, and notice of the alteration is to be given to the parties in the proceedings in such manner as the President or member may direct.

(3) Examples of obvious errors in the text of a notice of a decision or a statement of reasons for a decision are where:

- (a) there is an obvious clerical or typographical error in the text of the notice or statement, or
- (b) there is an error arising from an accidental slip or omission, or
- (c) there is a defect of form, or
- (d) there is an inconsistency between the stated decision and the stated reasons.'

22 The applicants submit that paragraph 56 of their Further Amended Points of Claim sought an order that the respondent indemnify them for the costs of the Owners Corporation that they have to pay, but which had not been assessed. I accept that to be the case and in that regard the applicants' claim for indemnity against the Owners Corporation's costs was always before the Tribunal.

23 The issue is whether the amendment that the applicants seek will come within section 63 of the Act.

24 In *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* 151 CLR 590 there was an omission in that a Notice of appeal to the NSW Court of Appeal and to the High Court failed to seek an order for the payment of interest in the event that the appeal was upheld, as it ultimately was in the High Court.

25 In *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* it was accepted that the failure to advert to the interest issue was an accidental omission on the part of counsel.

26 The High Court stated at a paragraph 6:

'Order 29, r. 11 is in the traditional form of a slip rule. It reflects the inherent jurisdiction of a court "at any time to correct an error in a decree or order arising from a slip or accidental omission" (see *Milson v. Carter* (1893) AC 638, at p 640). In terms, the rule provides, inter alia, that "an error arising in a judgment or order from an accidental slip or omission, may at any time be corrected by the Court or a Justice on motion or summons". The rule extends to authorize an omission resulting from the inadvertence of a party's legal representative (see *Fritz v. Hobson* (1880) 14 ChD 542, at pp 561-562; *Chessum & Sons v. Gordon* (1901) 1 KB 694, at p 698; *In re Inchcape (Earl)* (1942) Ch 394, at pp 397-398; *Coppins v. Helmers & Brambles Constructions; Coppins v. Helmers & Brambles Constructions Pty. Ltd.* (1969) 2 NSWLR 279, at pp 281-282; *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* (1973) 1 WLR 300, at p 304; (1973) 1 All ER 569, at p 571). This is so, regardless of whether the order has been drawn up, passed and entered (see *Milson v. Carter* (1893) AC, at p 640; *Fritz v. Hobson* (1880) 14 Ch D, at p 560). (at p595) the hearing'

27 Later the Court stated:

'The question whether the Council should be ordered to pay interest on any damages which the applicants proved they had sustained was a subsidiary or consequential question which only arose when the substantial issue between the parties as to liability and resulting damages had been determined. It should, of course, have been mentioned in the notices of appeal. Nevertheless, in the circumstances, we consider that it is competent for this Court, pursuant to the slip rule, to amend the Court's previous order to make provision for interest upon the damages, to which the applicants have been held to be entitled, for the period between the date on which judgment was given in the Supreme court and the date on which the orders were made in this Court on appeal.'

28 In *Storey & Keers Pty Ltd and another v Johnstone* 9 NSWLR 446 McHugh JA at 453F stated:

'In general the test of whether a mistake or omission is accidental is that applied by Lord Herschell in *Hatton v Harris* (at 558) if the matter had been drawn to the court's attention would the correction at once have been made?'

29 The amendment that the applicants seek is identical in principle to order 3 that was made in their favour and is in fact an extension thereof. Order 3 provided:

'Fallshaw (Investments) Pty Ltd must pay Andrew Krimbogiannis Connie Krimbogiannis and Arthur Krinbogiannis the amount they are required to pay The Owners - Strata Plan 21702 as costs, either agreed or as assessed, in Court of Appeal proceedings 2013/277696'

30 Applying the test applied by Lord Herschell in *Hatton v Harris* the answer must be without any doubt that the correction sought by the addition of the words 'and in District Court of NSW proceedings 2012/126027' would have been made immediately had it been raised for example in a discussion with counsel about the orders that the Tribunal proposed to make.

31 In my view the correction sought by the applicants comes within section 63 of the Act and is consistent with the authorities that I have referred to.

32 For the reasons provided, I will make an order that pursuant to section 63 of the Act that the Registrar of the Consumer and Commercial Division of the Civil and Administrative Tribunal is to correct order 3 of the Tribunal's Notice of Order dated 18 December 2015 by the addition of the words 'and in District Court of NSW proceedings 2012/126027'.

33 Returning to the issue of the costs of the proceedings, by reason of Rule 38(2)(b) of the Civil and Administrative Tribunal Rules I have the jurisdiction and discretion to award costs in these proceedings. The applicants have been successful in the proceedings and in my view are entitled to their costs of these proceedings.

34 The general law position is that a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party. *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] and at [134].

35 At paragraph 67 of the judgement, Gaudron and Gummow J J stated:

'The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party [96]. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.'

36 At paragraph 134(2) of the judgement, Kirby J stated:

'2. Notwithstanding the width of the statutory language by which the discretion was conferred on the trial court, it came to be said in civil non-jury trials that a successful party, in the absence of special circumstances, had a reasonable expectation of obtaining an order for costs in its favour unless "for some reason connected with the case" a different order was specially warranted [199]. Any departure from this expectation would require that there should be material upon which the adverse discretion could be properly exercised [200]. It could not be exercised by reference to idiosyncratic notions or to facts and circumstances irrelevant to the case. Yet, until the discretion had been exercised and a costs order made in favour of a successful party, that party had no right to the order of costs, notwithstanding its success in the litigation

[201]

- 37 In these proceedings there is no reason why the applicants should not be awarded their costs of and incidental to the proceedings. I will make an order in their favour for those costs.
- 38 The applicants also claim the costs of COM 14/45236 in which they were the respondents and were also successful in that the claim in COM 14/45236 was dismissed. In COM 14/45236 the respondent sought an amount of \$46,523.94 against the applicants. In relation to the issue of the costs of these proceedings, by reason of Rule 38(2)(b) of the Civil and Administrative Tribunal Rules I also have the jurisdiction and discretion to award costs.
- 39 The applicants were successful in proceedings COM 14/45236 and in my view are entitled to their costs of these proceedings on the same basis and for the same reasons as in COM 14/20620. I will make a costs order in their favour in these proceedings.

D Goldstein

Senior Member

Civil and Administrative Tribunal of New South Wales

27 May 2016

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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Decision last updated: 22 July 2016