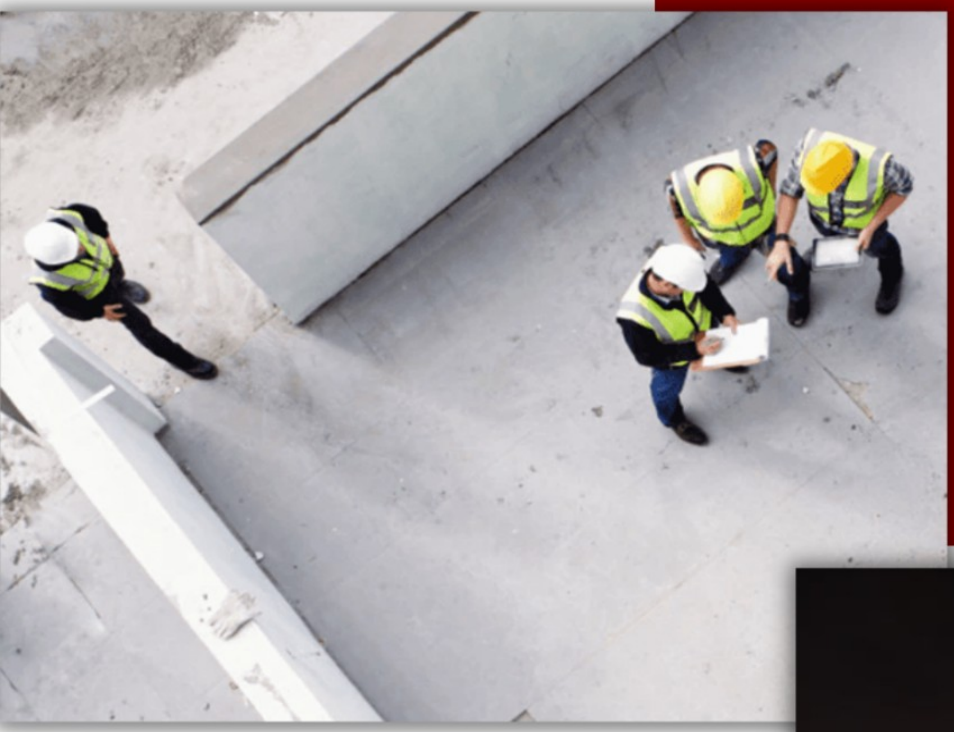
A Postscript to our ‘Facts Win Matters’ Owners Corporation Cost Recovery

After Patrick Stephenson’s recent achievement, we asked him to provide his insights.



Newsletter

July 2023: Issue 1

In this newsletter, we discuss NCAT’s recent “costs” Determination: *The Owners - Strata Plan No 125 v Megabelva Pty Ltd* [2023] NSWCATAD. We look at the principles that underpin an award of costs and why our recent costs application was successful.

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A recent post discussed a "win" we had for a Client (Owners Corporation) in NCAT. In summary, a lot owner within a strata plan installed non-compliant hardwood flooring in contravention of the By-Laws of the Strata Scheme, and the firm obtained orders requiring the owner to bring the flooring within compliance of the same. That matter was back before NCAT as we'd sought recovery of our client's costs and were successful in obtaining orders to that effect.[1]

In this newsletter we discuss NCATs recent "costs" Determination. Our Newsletters in 2022 included the principles that underpin an award of costs for 'Owners Corporation' in NCAT proceedings. In this Newsletter we look again at those principles and why our recent costs application was successful, and also continue the discussion from newsletters in 2022 as to costs in Owners Corporation matters.

Underpinning our wins for our client is our communications processes with the client. In summary, providing a detailed and accurate assessment of prospects: the strengths and weaknesses of the application and the likelihood of success. Those communications then enable an accurate "Calderbank" offer of settlement to be issued, which either facilitates an efficient settlement or supports an affirming indemnity costs order.

As to the issue of costs, the first issue to be dealt with was meeting the requirement of s60(2) of *the Civil and Administrative Tribunal Act 2013* (**Act**) and establishing 'special circumstances'. We relied on two matters being, that the Defendant's case has no tenable basis in fact or law (the test in s60(3)(c) of the Act) and the service of a 'Calderbank' offer which was unreasonably refused (which pursuant to s60(3)(g) of the Act constituted '*any other matter that the Tribunal considers relevant').*

In turn we had served evidence from a neighbour attesting to the significant impact upon the 'peaceful enjoyment' of their lot caused by noise transferred through the hardwood flooring and prepared a chronology of events, by laws and historical correspondence which showed that no approval consistent with the By Laws had been obtained for the flooring, and as such the Defendant's case was untenable.

The 'Calderbank' offer was served once the parties had completed the service of their evidence and our client's significant compromise was to offer to forego the legal costs incurred to prosecute the claim before NCAT, on the condition that the Defendant brought the hardwood flooring within compliance of the By-Laws.

The Senior Member found the Defendant had displayed a contumelious disregard for the By-Laws and the amenity of others in the building.[2] Also, that the 'Calderbank' was reasonable based on the evidence of noise transmission.[3]

[1] *The Owners - Strata Plan No 125 v Megabelva Pty Ltd* [2023] NSWCATAD.
[2] Ibid [10].
[3] Ibid [14].

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The Costs orders made was costs on an ordinary basis to the date of 'Calderbank' offer and indemnity costs thereafter.[4] Those orders its said respectfully, reflect the efforts made as to the factual and expert evidence, accurate advice as to prospects and a well-positioned 'Calderbank' offer, all meeting our communication processes.

Again, a very well done to Patrick who prepared and argued the matter.

[4] Ibid [15].

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