



Civil and Administrative Tribunal

New South Wales

Case Name: Northern Beaches Council v Independent Liquor and Gaming Authority

Medium Neutral Citation: [2017] NSWCATAD 122

Hearing Date(s): 11 April 2017

Date of Orders: 20 April 2017

Decision Date: 20 April 2017

Before: Hennessy LCM, Deputy President

Decision:

1. Harbour City Ferries Pty Ltd's application for the proceedings to be dismissed as misconceived or lacking in substance is dismissed.
2. Harbour City Ferries Pty Ltd's application for costs is dismissed.
3. The proceedings are dismissed because Northern Beaches Council has withdrawn the proceedings.

Catchwords: COSTS – general rule that each party pays own costs – discretion to award costs in special circumstances – third party applied to be joined and applied for proceedings to be dismissed for want of jurisdiction– where Applicant obtained legal advice in a timely manner and withdrew proceedings – where joined party refused to consent to withdrawal and incurred further costs – no special circumstances justifying an order that Applicant pay joined party's costs

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 60
Administrative Decisions Review Act 1997 (NSW)

Cases Cited: Bayne v NSW Department of Premier and Cabinet
[2016] NSWCATAD 233

Category: Procedural and other rulings

Parties: Northern Beaches Council (Applicant)
Independent Liquor & Gaming Authority (First Respondent)
Harbour City Ferries Pty Ltd (Second Respondent)

Representation: Counsel:
D Beaufils (Applicant)

Solicitors:
Wilshire Webb Staunton Beattie Lawyers (Applicant)
Crown Solicitor's Office (First Respondent)
JDK Legal (Second Respondent)

File Number(s): 2017/00049471

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 1 The Applicant, Northern Beaches Council, accepts that the Tribunal has no jurisdiction to hear its application and has purported to withdraw it. The Second Respondent, Harbour City Ferries Pty Ltd, objects to the withdrawal and submits that the Tribunal should dismiss the application as lacking in substance or misconceived and order the Council to pay its costs.
- 2 The fact that the Tribunal has no jurisdiction does not constitute special circumstances justifying an order for costs in this case. The Council acted in a reasonable and timely manner by withdrawing the application before the second directions hearing. By refusing to consent to the withdrawal and to the vacation of the second directions hearing, Harbour City Ferries incurred further costs unnecessarily.

Background

- 3 On 14 December 2016 the Independent Liquor and Gaming Authority (ILGA) granted four applications made by Harbour City Ferries for “on-premises liquor licences – vessel class”. The licences allow Harbour City Ferries to sell liquor for consumption by patrons on four ferries subject to various conditions. The Council had made a submission to ILGA opposing the granting of the liquor licences.

- 4 At the end of ILGA's statement of reasons readers were advised that certain people who are aggrieved by the decision "may apply to NCAT for an administrative review under the *Administrative Decisions Review Act 1997* (NSW)". On 16 February 2017 the Council applied to the Tribunal for a review of that decision.
- 5 The application was listed for a directions hearing on 28 March 2017. ILGA made a submitting appearance. Harbour City Ferries applied to be joined as a party and for the application to be dismissed on the ground that the Tribunal did not have jurisdiction. Harbour City Ferries also sought an order that the Council pay its costs of the proceedings and of the application for dismissal. Harbour City Ferries provided the Tribunal and the Council with a brief written submission supporting their applications.
- 6 The Tribunal joined Harbour City Ferries as a Second Respondent and directed the Council to give to the Tribunal and the other parties submissions in relation to jurisdiction by 10 April 2017. The matter was listed for further directions on 11 April 2017. At 3.10 pm on 10 April 2017 the Council emailed the Tribunal advising that it would be withdrawing the applications and seeking to vacate the Directions Hearing. The Council confirmed those matters at the second Directions Hearing. Harbour City Ferries objected to the withdrawal and applied for costs on the basis that:
 - (1) Harbour City Ferries had emailed the Council on 24 March 2017 (four days before the first directions hearing) setting out the relevant legislation and expressing the view that the Tribunal did not have jurisdiction.
 - (2) The 24 March 2017 email sought written confirmation from the Council that by midday the following Monday, 27 March 2017, the Council would withdraw the application at the first directions hearing on 28 March.
 - (3) The 24 March 2017 email foreshadowed that if the application was not withdrawn, Harbour City Ferries may apply for costs.
 - (4) At 2.58 pm on 10 April 2017, the Council's lawyers emailed Harbour City Ferries advising that they had been instructed to discontinue the proceedings and that they would contact the Registry and file a Notice of Discontinuance. The email also suggested that the directions hearing listed for the following day be vacated.
 - (5) At 4.17 pm on 10 April 2017, the lawyers for Harbour City Ferries email the Council's lawyers advising that, in their view, the proceedings

should be dismissed rather than discontinued and indicating that if the Council did not offer to pay their costs they would be applying for costs at the second directions hearing.

- (6) At 3.59 pm on 10 April 2017 the lawyers for Harbour City Ferries emailed the Tribunal and the Council's lawyers to say that they did not consent to the directions hearing being vacated.
- 7 The Council provided evidence that on 15 February 2017 an officer of ILGA emailed the Council's lawyer advising that the decision could only be reviewed by NCAT. ILGA also gave that advice to other people who inquired about their appeal rights. The Council became aware that there was an issue as to the Tribunal's jurisdiction on 24 March 2017 when they received an email from Harbour City Ferries.

Consideration

- 8 The general rule is that each party pays their own costs. The Tribunal may award costs "only if it is satisfied that there are special circumstances warranting an award of costs": *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), s 60(1). Section 60(3) lists the matters to which the Tribunal may have regard when determining whether there are special circumstances. The matter on which Harbour City Ferries relies is that "the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance": NCAT Act, s 60(3)(e).
- 9 The proceedings are misconceived because the Tribunal has no jurisdiction. But that does not necessarily mean that a costs order should be made. As the Tribunal noted in *Bayne v NSW Department of Premier and Cabinet* [2016] NSWCATAD 233 at [14] and [15]:
 14. It does not necessarily follow that because some factors under s 60(3) are established, a costs order should be made. It is still "necessary for the Tribunal to weigh whether those circumstances are sufficient to amount to 'special' circumstances that justify departing from the ordinary rule that each party bear their own costs": *Obieta v Australian College of Professionals Pty Ltd* [2014] NSWCATAP 38 at [81].
 15. The discretion to award costs must be exercised judicially having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs (*eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [37] and [48]; *Nguyen & Anor v Perpetual Trustee Company Ltd*; *Perpetual Trustee Company Ltd v Nguyen & Anor (no 2)* [2016] NSWCATAP 168 at [16]).
- 10 There are no special circumstances justifying a costs order in this case.

11 The Council received an email from an officer of ILGA advising that the decision could be reviewed by NCAT. The Council applied for review of the decision. The Council did not have enough time between Friday 24 March 2017, when Harbour City Ferries expressed the view that NCAT did not have jurisdiction, and Tuesday 28 March 2017, when the first directions hearing was held, to obtain legal advice. I also find that the Council acted in a timely and reasonable manner by advising Harbour City Ferries on 10 April 2017 that it would discontinue the proceedings and that the directions hearing listed for the following day should be vacated. Rather than consenting to the withdrawal, Harbour Ferries incurred further costs and required the Council to incur further costs, by insisting that the directions hearing proceed.

Orders

1. Harbour City Ferries Pty Ltd's application for the proceedings to be dismissed as misconceived or lacking in substance is dismissed.
2. Harbour City Ferries Pty Ltd's application for costs is dismissed.
3. The proceedings are dismissed because Northern Beaches Council has withdrawn the proceedings.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.