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Application to the Tribunal concerning MICHAEL LEE SELLECK & ASHEETA SELLECK - UNITED HOMES AND CONSTRUCTION PTY LTD

Applicant: Michael Lee Selleck and Asheeta Selleck
Respondent: United Homes and Construction Pty Ltd

On 24-Jun-2019 the following orders were made:

1. An order is made by consent of the parties that the respondent shall perform the following work for the applicants, namely that scope set out at items 2-19 inclusive of the schedule of proposed orders filed by the applicant in these proceedings at pages 190 and 191 and constituting Exhibit 1.
2. By consent the work shall commence on or before 26 June 2019.
3. By consent the work shall be completed on or before 9 August 2019.
4. In addition, and by consent, the respondent shall pay 50% of the cost of up to two progress inspections to be performed by Mario Bournelis, capped at a cost of \$770 each, if requested by the applicant. Each inspection will be followed by a short written report with photographs provided to both parties to document the work referred to therein.
5. By order of the Tribunal the respondent shall pay the applicants' costs in these proceedings, as agreed or assessed, on a party/party basis from 20 February 2019 (the date from which leave to be legally represented was granted) to 18 June 2019 (the date of the offer of settlement) and on an indemnity basis thereafter.

BRIEF REASONS

At the commencement of the hearing the respondent's representative advised that all issues for which orders were sought, with the exception of item 22, were agreed. After a short adjournment item 22 was also agreed but on the basis that the respondent would pay only 50% of any costs incurred in the inspections (subject to the capped cost of each).

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Accordingly all issues in dispute were finally resolved by agreement of the parties. The applicant then sought a costs order. Consent orders were made to resolve those matters that were agreed.

Costs.

This was a claim for residential building work to be performed by the respondent for the applicants. The only evidence available as to the value of the work for which orders were sought was a costing provided by the applicants' expert and filed in the proceedings (p 156 of Exhibit 1). The cost calculated by the applicants' expert was \$34,477.

As the amount in dispute was more than the \$30,000 limit referred to under the Civil and Administrative Tribunal Rules, r 38, I am satisfied that the Tribunal has jurisdiction to make a costs order without the necessity of determining "special circumstances" as that term is used in the Civil and Administrative Tribunal Act s 60(2).

The normal rule in making a costs order in circumstances where the parties have reached agreement is that each party bear their own costs. However, that presumptive position can be displaced in circumstances where one party has acted unreasonably or where the outcome was so clear that one party was almost certain to succeed. In those circumstances the Tribunal does have a discretion to award costs.

In this case the only documentary evidence provided to the Tribunal was provided by the applicants. They provided expert evidence to establish the veracity of the alleged defects and the nature of the work necessary to rectify the defects. They also provided a valuation of the work in the event that the Tribunal elected to make a money order rather than a work order.

No evidence at all was provided by the respondent and the respondent did not, on the day of the hearing, contest the orders sought by the applicants.

It is absolutely clear that had the matter gone ahead to a hearing in those circumstances the only possible outcome would have been that orders would have been made in favour of the applicants in identical or near identical terms to those ultimately agreed by the parties.

I am therefore satisfied that the Tribunal does have the discretion to make a costs order. In these circumstances the Tribunal follows the convention exercised in other Courts. That is, costs are normally awarded, not to punish the unsuccessful party, but to compensate the successful party for the unnecessary cost of the litigation.

In this case the respondent ultimately agreed to a work order. However, the opportunity to do so earlier was provided yet the respondent failed to avail himself of the opportunity to accept such an outcome. This necessitated the applicants pursuing their rights through litigation. They had been granted leave to be legally represented. They needed to prepare their case for hearing, provide their documents and attend the hearing today with their legal representative. Some or all of those costs could have been avoided if the respondent had reached agreement sooner rather than waiting until the opening of the hearing today.

I am satisfied therefore that the applicants should be compensated for their costs incurred in pursuing the litigation in circumstances where the parties ultimately reached agreement but not until the hearing commenced.

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The final question for determination is on what basis should the costs be calculated. The applicants' submission was that an open offer of settlement was made on 18 June 2019 which was for agreement on the proposed orders No 2 - 19 and an order for costs in the sum of \$15,000. That offer was not accepted by the respondent which necessitated the matter going forward today. In the outcome the applicants' were successful in achieving all issues set out in the offer. The offer included an offer to settle costs for \$15000 in circumstances where it was shown the applicants' had incurred costs considerably higher than that sum.

That is, the respondent if he had accepted that offer would have been in a better position than he was ultimately by allowing the matter to progress to the point of hearing and then reaching agreement.

In those circumstances the costs to which the applicants' are entitled should be on a party/party basis up to 18 June 2019 and on an indemnity basis thereafter.

Jeffery Smith, Senior Member

24/06/19

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