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Case number **2022/00428316**

Previous case number

HB 22/27691

LUKE HARENZA
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27 May 2025

Case title

LUKE HARENZA v SICEWOOD PTY LTD
Application under Home Building Act 1989

Please find enclosed a copy of the written statement of reasons for the decision of the Tribunal made on 31 July 2023.

Registrar
ddang0



Civil and Administrative Tribunal New South Wales

Case Name: **Harenza v Sicewood Pty Limited**

Medium Neutral Citation: [2025] NSW CATCD

Hearing Date(s): On the papers

Date of Orders: 27 May 2025

Date of Decision: 27 May 2025

Jurisdiction: Consumer and Commercial Division

Before: S A McDonald, Senior Member

Decision: In Case No. 2022/00428316, the Tribunal orders that the Builder is to pay the Owner's costs of the application on a party/party basis as agreed or assessed.

Catchwords: Costs – Rule 38 – whether special circumstances – merits when each party succeeds on some issues

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014

Cases Cited: *Bostik Australia Pty Ltd v Liddiard* (No. 2) [2009] NSWCA 304 at [38]
Sydney City Council v Geflick and Ors (No. 2) [2006] NSWCA 374 at [27]
James v Surf Road Nominees Pty Ltd (No. 2) [2005] NSWCA 296 at [34]
Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd [1993] FCA 259
Doppstadt D Australia Pty Ltd v Lovick & Sun Developments Pty Ltd (No. 2) [2014] NSWCA 219

Category: Costs

Parties: Luke Harenza, Applicant in HB 22/27691 (Case No. 2022/00428316) (**Owner**)

Sicewood Pty Limited ACN 105 200 940,
Respondent in HB 22/27691 (Case No.
2022/00428316) (**Builder**)

Representation: Birch Partners, Lawyers for the Owner
Adams & Partners, Lawyers for the Builder

File Number(s): HB 22/27691 (Case No. 2022/00428316)

Publication Restriction: Unreserved

REASONS FOR DECISION

Introduction

1 On 8 August 2024 the Tribunal ordered in these two proceedings:

In respect of HB 22/27691 (Case No. 2022/00428316):

- (1) The Builder is to pay the Owner the sum of \$55,295.39 on or before 3 September 2024; and
- (2) The Builder is to pay the Owner's costs of the application on a party/party basis as agreed or assessed.

In respect of HB 22/48483 (Case No. 2022/00401752):

- (1) The Tribunal ordered that the Owner is to pay the Builder the sum of \$21,600.61 on or before 3 September 2024 and made no order as to costs.

Appeal Panel

2 Thereafter an appeal was lodged in respect of Case No. 2022/00428316 which came before the Appeal Panel as Case No. 2024/00328782 on or about 20 September 2024.

3 On 20 September 2024, the following orders and/or directions were made by the Appeal Panel and by consent of the parties:

- (1) The order in respect of costs in Case No. 2022/00428316 dated 8 August 2024 is set aside and issue will be re-determined in the Consumer and Commercial Division; and
- (2) The appeal is otherwise dismissed in accordance with s.55(1)(a) of the Civil and Administrative Tribunal Act 2013 (NSW) as the Appellant has withdrawn the appeal.

- 4 Thereafter, on 30 October 2024 the following directions were made in respect of the redetermination of costs in Case No. 2022/00428316 in the Consumer and Commercial Division, namely and by consent:
- (1) Any application for costs including any evidence or submissions in support of the costs application is to be lodged with the Tribunal and given to the other party by 22 November 2024;
 - (2) Any reply to any application for costs including any evidence or submissions in support is to be lodged with the Tribunal and given to the other party by 6 December 2024;
 - (3) The Tribunal notes that the parties consent to the Tribunal dispensing with the hearing in relation to the application for costs pursuant to s.50(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) and that the application for costs can be adequately determined on the papers without the need for an oral hearing.

Submissions

- 5 The following written submissions on costs were received by the Tribunal in response to the Tribunal's timetable dated 30 October 2024:
- (1) Owner's submissions of Birch Partners dated 19 November 2023 (3 pages);
 - (2) Builder's submissions of Adams & Partners dated 25 November 2024 (5 pages);
 - (3) Builder's submissions in response of Adams & Partners dated 11 December 2024.
- 6 There are some relevant points which flow from these submissions in these two applications:

- (1) First, the only source of contention in respect of costs appears to be in Case No. 2022/00428316 where the Owner was awarded the sum of \$55,295.39 from a total initial claim of \$278,151.35, being \$193,200.00 to rectify and complete works and \$84,951.35 for overpayment;
- (2) Secondly, there appears to be no dispute arising from the Tribunal declining to make a costs order in respect of the Builder's application being Case No. 2022/00401752 in which the Owner was ordered to pay the Builder the sum of \$21,600.61; and
- (3) Thirdly, on 8 August 2024 when the Tribunal's reasons for decision were originally published in these two applications, the Tribunal ordered in the Owner's application (being Case No. 2022/00428316) that the Builder was to pay the Owner's costs of the application on a party/party basis as agreed or assessed, as the sum determined by the Tribunal exceeded \$30,000.00 and Rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) permitted the Tribunal to award costs in such proceedings, despite s.60 of the Civil and Administrative Tribunal Act 2014 (NSW) [158].

Builder's Submissions

7 Without wishing to simplify the Builder's submissions dated 25 November 2024, the Builder's submissions may be summarised as follows:

- (1) In the Owner's proceedings, the Owner only succeeded in 5 of the 15 items in dispute and the total amount awarded by the Tribunal for the claim for defective or incomplete home building was \$50,282.48 from the total claim of \$193,000.20 for that category of loss;
- (2) Mathematically therefore the Builder submitted that the Owner only succeeded in 19.87% of his total claim for defective or incomplete works in dollar terms, which was only modest success;

- (3) The successful party in the event therefore was not the Owner, but the Builder;
 - (4) The Tribunal rejected the majority of the Owner's claims for overpayment because the Owner's evidence was insufficient to allow the Tribunal to adjudicate on the claims;
 - (5) The Owner had an inflated claim of which only a small proportion bore prospects of success and therefore the Builder, being successful in defending approximately 80% of the Owner's claim seeks costs against the Owner; or
 - (6) Alternatively, the Builder should not be ordered to pay the Owner's costs in relation to claims where the Owner failed to put on evidence to establish his case on the balance of probabilities but having regard to the limited success achieved by the Owner and the difficulty that may arise in apportioning costs to individual items where the Owner succeeded, the appropriate order is that there be no order as to costs in the Owner's application.
- 8 The Builder did submit in relation to the Builder's claim that the Owner was only entitled to reimbursement in the sum of \$5,012.91 and the balance for the Owner's claim for overpayment which totalled \$84,951.35 was dismissed.
- 9 However, the Tribunal does not have regard to this submission as these costs were in the Builder's application, Case No. 2022/00401752, in respect of which no costs order was made. This order does not appear to have been the subject of the appeal and no directions were made by the Tribunal for written submissions on the costs order in that application.

Owner's Submissions

- 10 The Owner's submissions were succinct and addressed initially the well-established principle that pursuant to s.60(1) of the Act, each party to proceedings in the Tribunal is to pay their own costs. Pursuant to s.60(2) of the Act, 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.
- 11 Then s.60(3) of the Act outlines some of the "special circumstances" in s.60(3)(a)-(g) which may apply. Importantly, the "special circumstances" outlined in those paragraphs are not exhaustive and the Tribunal has found from time to time that other circumstances, or combinations of circumstances, satisfy the definition of "special circumstances" for the purposes of s.60(3) of the Act.
- 12 The Owner then referred to Rule 38(2) of the *Civil and Administrative Tribunal Rules 2014* (NSW) which state that despite s.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 the amount claimed or in dispute in the proceedings is more than \$30,000.00.
- 13 The Owner then submitted that because the amount claimed or in dispute in the Owner's application exceeded \$30,000.00, therefore Rule 38(2)(b) applied. And even though the amount ultimately found to be payable by the Builder to the Owner was significantly less than the original amount claimed, it still exceeded \$30,000.00 for the purposes of Rule 38(2)(b) of the Act.
- 14 The Owner submitted that he did not engage in any disentitling conduct and that there were no adverse findings in the Tribunal's reasons for decision dated 8 August 2024 sufficient to vary from this well-established regime. The Owner further submitted that notwithstanding his claim may have been reduced at hearing, he nevertheless was forced to commence proceedings to recover any sum from the Builder.

- 15 The Owner submitted that in effect the original order made by the Tribunal on 8 August 2024, namely that the Builder should pay the Owner's costs of Case No. 2022/00428316 on a party/party basis as agreed or assessed, was the correct order.

Builder's Submissions in Reply

- 16 The Builder made further brief submissions in reply dated 11 December 2024 in respect of costs.
- 17 The Builder joined issue with the Owner who stated in his submissions that he was compelled to commence proceedings due to the failures of the Builder to rectify the defective home building works. The Builder submitted:
- (1) That submission was incorrect and not supported by evidence and that there was no evidence at hearing where the Owner requested the Builder to rectify defects in the home building works or where the Builder failed or refused to rectify any defects following the Owner's request;
 - (2) Reiterated that the Owner only succeeded in 5 of the 15 defective items in dispute at the hearing and was only awarded \$50,282.48 from defective or incomplete claims of \$193,200.00; and
 - (3) Noted that the Owner was largely unsuccessful in pursuing the Builder for the overpayment claim of \$84,951.35 as the Tribunal had only awarded \$5,012.91 for that component of the Owner's claim.
- 18 The Builder reiterated that it was substantially successful in defending the Owner's application and that the successful party was not the Owner and therefore the appropriate order was for the Owner to pay the Builder's costs as agreed or assessed, or in the alternative, that there be no order as to costs.

Legislation

- 19 Section 60(3) of the Act sets out in a non-exhaustive manner what the Tribunal may have regard to in determining whether there are special circumstances. These include:

- “(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.”

- 20 Section 36(3) of the Act refers to the guiding principle of the Tribunal namely, that each party and its solicitor are under a duty to co-operate with the Tribunal to facilitate the “*just, quick and cheap resolution*” of the real issues in the proceedings.

- 21 Rule 38 of the *Civil and Administrative Tribunal Rules*, which applies only to the Consumer and Commercial Division, states:

- “(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 \$30,000.00.”

Consideration

- 22 As stated above, the primary rule for costs in the Tribunal is that the parties to the litigation are responsible for their own costs: s.60(1) of the Act.
- 23 The Tribunal has the discretion to award costs if it is satisfied that there are “special circumstances” that warrant an order for costs: s.60(2) of the Act.
- 24 Section 60(3) of the Act sets out in a non-exhaustive manner what the Tribunal may have regard to in determining whether there are special circumstances. These are outlined in full above.
- 25 The onus is on the party seeking a variation to the costs order to prove on the balance of probabilities that there are special circumstances warranting an award of costs in their favour if s.60 of the Act is relied upon, and in so doing to clarify which paragraph of s.60(3)(a)-(g) of the Act is relied upon.
- 26 If no paragraph of s.60(3)(a)-(g) of the Act is relied upon then the party seeking a variation to the costs order should be precise and clear on the other matters or conduct upon which it relies to persuade the Tribunal to make such an order and, where relevant, adduce evidence of the alleged conduct. That may occur by correspondence (including settlement or Calderbank offers) or a short affidavit deposing to the specific circumstances.
- 27 It is clear from the written submissions and from the directions made by the Appeal Panel that the moving party in this instance is the Builder. The Builder was apparently aggrieved with the Tribunal’s original order in the Owner’s application that it should pay the Owner’s costs on a party/party basis and as agreed or assessed.
- 28 In perusing the Builder’s submissions and submissions in response carefully, no weight appears to be put on any specific paragraph in s.60(3)(a)-(g) of the Act.

- 29 Rather, the Builder relies upon Rule 38(2)(b) to state that where the amount claimed or in dispute is more than \$30,000.00, the costs will normally “follow the event”. The Builder’s submissions then went further, dividing up the number of items upon which the Owner was successful (9 of 26 items) and the agreed quantum for those items (about 20% of the original sum claimed) and submitted that the Builder was the ‘successful’ party in defending the Owner’s claim.
- 30 There are two problems with this. First, success cannot be defined by defending some – even a majority - of the Owner’s claims and unsuccessfully defending other claims, when it was open to the Builder at any time up until the hearing to compromise or settle those claims upon which the Builder failed. This may have put the Builder in a more advantageous situation to make such a submission on costs.
- 31 The Tribunal notes that no settlement offers, Calderbank letters, ‘without prejudice’ correspondence, notices of offer of compromise or evidence of any sort were submitted by the Builder in support of this aspect of its costs’ submission.
- 32 Secondly, once the Builder considered that costs should ‘follow the event’ where Rule 38 was engaged and that any analysis of that issue favoured the Builder, the Builder then quoted a number of cases relevant to courts in which there was either a mixed outcome of the issues in dispute in proceedings or the question of apportionment of costs on an issue-by-issue basis was a matter of discretion by the court. The cases quoted by the Builder included *Bostik Australia Pty Ltd v Liddiard* (No. 2) [2009] NSWCA 304 at [38]; *Sydney City Council v Geftlick and Ors* (No. 2) [2006] NSWCA 374 at [27]; *James v Surf Road Nominees Pty Ltd* (No. 2) [2005] NSWCA 296 at [34] and *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* [1993] FCA 259.
- 33 There is little doubt that in courts, costs are discretionary and follow the event and courts are therefore at liberty to elect to apportion costs between different issues in making a determine about the overall appropriate costs order for a matter. However, the Tribunal has material restrictions on that freedom as its

starting point is s.60 of the Act and Rule 38 of the Civil and Administrative Tribunal Rules 2014: see *Doppstadt D Australia Pty Ltd v Lovick & Sun Developments Pty Ltd* (No. 2) [2014] NSWCA 219.

- 34 For these reasons, the Tribunal does not consider itself to be at liberty to divide up the relevant success or failure of the Builder on an issue-by-issue basis and award costs in proportion to that.
- 35 None of the authorities cited by the Builder were either Tribunal or Appeal Panel authorities in which such an approach was cited or endorsed. They were predominantly superior court decisions.
- 36 Notwithstanding the Builder's submissions, the Tribunal considers that in respect of the Owner's proceeding, the successful party was the Owner notwithstanding that his claim was materially reduced. The Owner had a claim against the Builder and prosecuted it. He was successful, albeit for a lesser sum than he originally sought. But the Owner was the successful party in Case No. 2022/00428316.
- 37 For these reasons, the Tribunal proposes to make the order which was originally made in the Owner's application in respect of costs, namely that the Builder is to pay the Owner's costs of the application in Case No. 2022/00428316 on a party/party basis and as agreed or assessed.
- 38 For completeness, and for the reasons outlined in paragraphs [6] above, the Tribunal does not propose to make any costs order in respect of Case No. 2022/00401752.

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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.