Civil and Administrative Tribunal
New South Wales

Case Name:	Taylor v Clientel Developments Pty Ltd Clientel Developments Pty Ltd v Taylor [No. 2]
Medium Neutral Citation:	[2020]NSWCATCA
Hearing Date(s):	13 February 2020
Date of Orders:	13 February 2020
Date of Decision:	13 February 2020
Jurisdiction:	Consumer and Commercial Division
Before:	Jeffery Smith, Senior Member
Decision:	1 An order is made pursuant to the provisions of the Civil and Administrative Tribunal Act 2013 s 50(2) dispensing with a hearing in this application. 2 The homeowner shall pay the builder's costs in both applications as agreed or assessed on the usual basis.
Legislation Cited:	Civil and Administrative Tribunal Act 2013
Cases Cited:	*Degman Pty Ltd (in liq) v Wright (No 2)* [1983]2 NSWLR 354 *Thompson v Chapman* [2016]NSWCATAP 6 *Kain v Mobbs (No 2)* [2008]NSWSC 599 *Oshlack v Richmond River Council* [1998[HCA 11 *Latoudis v Casey* [1990]HCA 59.
Category:	Costs
Parties:	Bianca Taylor, homeowner Clientel Developments Pty Ltd, builder
Representation:	Solicitors:

	Mr Birch for the builder Mr Kallipolitis for the homeowner
File Number(s):	HB 18/46172 and HB 18/52740
Publication Restriction:	Nil

REASONS FOR DECISION

Background

3 The two substantive matters were heard on 7 November 2019 and my decision in both matters was published on 9 January 2020. At that time leave was granted for any party seeking a costs order to file submissions by 24 January 2020 and for the other party to file submissions in reply by 12 February 2020.

4 Both parties filed written submissions in accordance with the directions and both agreed that the issue for determination should be dealt with "on the papers". Having read the parties' submissions and having the original file to refer to I am satisfied that the issues for determination can adequately be dealt with in the absence of the parties and accordingly an order is made dispensing with a hearing.

The builder's submission

5 The builder made relevant submissions to the following effect.

6 The parties were granted leave by the Tribunal on 16 November 2018 to be represented by an Australian Legal Practitioner.

7 Rule 38(2) of the Civil and Administrative Tribunal Rules provides that when the amount claimed or in dispute exceeds $30,000 the Tribunal may make a costs order and accordingly in the circumstances of this case there is no requirement for the Tribunal to make a finding of "special circumstances" in order to make a costs order.

8 Various offers were made by the builder to settle the dispute but those offers were not accepted. On 7 November 2019 (the morning of the hearing) the builder made an offer of settlement in open court, which was also refused by the homeowner.

9 On 9 January 2020 the builder made an offer to settle the costs issue on the basis that the homeowner pays the builder's costs on the usual basis up to 6 November 2019 and on an indemnity basis from that date. That offer was also refused.

10 In both applications the outcome received by the builder was better than it would have received if the offer of 7 November 2019 was accepted. The homeowner's failure to accept the offer made by the builder was unreasonable.

11 Accordingly the Tribunal should make an order that the homeowner pay the builder's costs on the usual basis up to 6 November 2019 and on an indemnity basis thereafter, or in the alternative that the homeowner should pay the builder's costs on the usual basis.

The homeowner's submission

12 The homeowner's relevant submission was that the builder bears the onus of satisfying the Tribunal by reference to relevant facts and circumstances that the builder is entitled to the exercise of the Tribunal's discretion in its favour, which it has not done.

13 The homeowner submitted that there are no special circumstances warranting an award of costs pursuant to the provisions of s 60(2) and that Rule 38(2) provides only that there is a discretion to award costs in the circumstances that the amount in dispute exceeds $30,000. It follows on the homeowner's submission that the Tribunal is not obliged to exercise that discretion in favour of the builder.

14 Reliance was placed in the decision of *Oshlack v Richmond River Council*, for which no reference was provided, for the proposition that the usual rule that although costs will be normally be awarded as compensation to the successful party, that is not invariably the case.

15 The following additional principles were relied on;

(1) The purpose of a costs order is compensatory and not to punish the person against whom it is made (*Allplastics Engineering Pty Ltd* [2006] NSWCA 33 – an incomplete reference it is noted),

(2) The power to award indemnity costs is unfettered but must be exercised after careful reasoning (*Degman Pty Ltd (in liq) v Wright (No 2)* [1983]2 NSWLR 354),

(3) The offer of settlement made on 7 November 2019 was not considered by the homeowner to be a genuine offer as it merely required the homeowner to abandon the proceedings (*Kain v Mobbs (No 2)* [2008]NSWSC 599). Furthermore there was insufficient time for the homeowner to consider the offer.

(4) The decision by the homeowner to reject the offer was therefore not an unreasonable one.

16 Further, it was submitted that if the Tribunal determined that the builder was entitled to its costs on its own application it should not be granted a costs order in relation to the defence of the homeowner's claim.

17 In regard to this submission reliance was place in the provisions of s 60 and the absence of the establishment of any special circumstances giving rise to an award of costs.

18 The homeowner's submission therefore was that, having regard to the general principle that parties in the Tribunal are ordinarily to bear their own costs, the Tribunal should make no order as to costs.

Consideration

19 Both matters were heard together and the evidence in one considered as evidence in both. The homeowner sought orders for payment of $33,766.12 and the builder sought orders for payment of $18,418.75. Accordingly the amount in dispute was at all times more than $30,000.

20 It follows that the provisions of Rule 38(2) apply and the Tribunal may award costs without making any finding of "special circumstances" as that term is used in s 60 of the Act. Accordingly it is not necessary in the circumstances of this case for the Tribunal to embark on a consideration of whether or not "special circumstances" exist.

21 The decision to award costs or not is a separate decision to that of deciding the basis upon which any costs should be calculated.

22 The principles that apply to making a costs order under Rule 38 was considered by the Tribunal's Appeal Panel in *Thompson v Chapman* [2016]NSWCATAP 6 where it was said at [68]-[71]

> Each of Regulation 20 of the CTTT Regulation and Rule 38 provide a general discretion in respect to the award of costs.
> The starting point in exercising such discretion is that the "*usual order for costs*" is that a successful party should be entitled to an order for costs in their favour: see *Latoudis v Casey* [1990] HCA 59; [1990] 170 CLR 534 per Mason CJ at 554 and *Oshlack v Richmond River Council* per McHugh J at 97.
> The reason for such an order is that it is appropriate for the party who incurred costs caused by the other party in litigation to be reimbursed. Further, an award of costs is by way of an indemnity to the successful party and not as punishment of the unsuccessful party: see *Latoudis v Casey* per Mason CJ at 543 and McHugh J at 567 and in *Oshlack v Richmond River Council* per Brennan CJ at 75.
> Where there is a general discretion for costs there is no absolute rule that, absent disentitling conduct, a successful party is to be compensated by the unsuccessful party nor is there any rule that a successful party might not be ordered to bear the costs of an unsuccessful party: see *Oshlack v Richmond River Council* per Gaudron and Gummo JJ at 88 and Kirby J at 121 – 123.
> The factors to be considered in awarding costs in a particular case are not to be confined as to do so would constrain the general discretion. However it is clear from the authorities that factors that might influence whether the usual order for costs should apply and, if so, to what extent include:
> (1) Whether, by reason of the relative success of the parties on different issues and the time taken to determine those that an order for costs based on issues should be made: see for example *Bostick Australia Pty Ltd v Liddiard* (No 2) [2009] NSWSCA 304; and
> (2) Whether, by reason of the nature of the proceedings the usual rule should otherwise be displaced in whole or in part:

see *Oshlack v Richmond River Council* per Gaudron and Gummo JJ at 41 – 44.

23 The homeowner's submission that the awarding of costs is discretionary is correct and it also correct to say that whilst awarding costs to the successful party is usual there is no hard and fast rule that must be the case.

24 The purpose of a costs order as stated above is to compensate the successful party for the reasonable costs incurred in conducting the litigation and is not intended as punishment of the unsuccessful party (*Latoudis v Casey* [1990]HCA 59).

25 The decision of the High Court in *Oshlack v Richmond River Council* [1998]HCA 11 is authority for the proposition that the ordinary rule should not be displaced unless the other party has been involved in any disentitling conduct. There has been no suggestion that the builder engaged in any conduct that would disentitle it from an award of costs.

26 In this case the builder sought orders for $18,418.75 but was ultimately awarded only $12,034.80. That is, the builder was substantially successful in bringing the application by which it was able to obtain orders in that sum which were otherwise unobtainable. On the well-established compensatory principles I am satisfied the Tribunal should exercise its discretion in the usual manner and award the builder its costs.

27 In the homeowner's claim the homeowner claimed $33,766.12. The builder was ultimately 100% successful in defending that claim. Again on the usual principle of compensating the successful party who would otherwise have been unable to obtain that outcome I am satisfied the Tribunal should exercise its discretion to award costs to the builder in defending that claim.

28 Turning to the basis on which costs should be awarded.

29 The builder suggests that it is entitled to costs on an indemnity basis as an offer of settlement was made on 7 November 2019 which was unreasonably

rejected by the homeowner. The builder's submission was that the offer was for an outcome for the homeowner that was better than that which was ultimately achieved. That is true and it goes to the issue of whether or not the refusal of the offer was reasonable.

30 However, the offer was made just after 9.15am on the morning of the hearing (I noted the time in my notes and referred to it in my published reasons). The offer was specifically said to be open only until 10.05am, a period of 50 minutes.

31 I am not satisfied that an offer on the morning of the hearing can be reasonably be expected to get full consideration in less than one hour when the parties and their legal advisers are about to embark on the hearing.

32 Hence I am not satisfied the refusal of the offer in those circumstances was unreasonable.

33 Accordingly, whilst the builder is entitled, for the reasons given above, to an order for its costs, it is not in my view entitled to have those costs calculated on an indemnity basis.

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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