



Civil and Administrative Tribunal New South Wales

Case Name: **Toms v Dev Constructions (NSW) Pty Ltd (No 4);
Dev Constructions (NSW) Pty Ltd v Toms (No 4)**

Medium Neutral Citation: [2024] NSWCATCD

Hearing Date(s): On the papers

Date of Orders: 12 March 2024

Date of Decision: 12 March 2024

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision:

- 1 Alexy Toms and Sheeja Abraham are to pay \$91,257.25 to Dev Constructions (NSW) Pty Ltd immediately.
- 2 A hearing of the costs of the two proceedings is dispensed with.
- 3 Alexy Toms and Sheeja Abraham are to pay the costs of Dev Constructions (NSW) Pty Ltd in proceedings 2023/00373378 (formerly HB 23/44431) other than the costs relating to its refusal to grant them access to their property between March and May 2022 on the ordinary basis as agreed or assessed in accordance with the applicable costs legislation.
- 4 Dev Constructions (NSW) Pty Ltd is to pay 50% of the costs of Alexy Toms and Sheeja

Abraham in proceedings 2023/00373706
(formerly HB 23/44435) as agreed or assessed
in accordance with the applicable costs
legislation.

Catchwords: COSTS — application for costs by the builder –
principles – builder awarded costs in its proceedings
– owners awarded 50% of costs in their proceedings

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW),
s 50
Civil and Administrative Tribunal Rules 2014 (NSW),
r 38

Cases Cited: Thompson v Chapman [2016] NSWCATAP 6
Vella v Mir (No 3) [2020] NSWCATAP 17

Texts Cited: None cited

Category: Costs

Parties: 2023/00373706:
Alexy Toms and Sheeja Abraham (Applicants)
Dev Constructions (NSW) Pty Ltd (Respondent)

2023/00373378:
Dev Constructions (NSW) Pty Ltd (Applicant)
Alexy Toms and Sheeja Abraham (Respondents)

Representation: Counsel:
Alexy Toms and Sheeja Abraham (self represented)
A Lim (Dev Constructions (NSW) Pty Ltd)

Solicitors:
Birch Partners (Dev Constructions (NSW) Pty Ltd)

File Number(s): 2023/00373706 (formerly HB 23/44435);
2023/00373378 (formerly HB 23/44431)

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 5 On 29 January 2024, I made procedural orders in these two proceedings for determining the amount of the money order in favour of the builder and the making of an application for costs by any party (the 29 January 2024 orders) and published reasons for decision (the principal decision).
- 6 Pursuant to order 1 of the 29 January 2024 orders, the parties have agreed that the amount of the money order in favour of the builder is \$91,257.25.
- 7 Pursuant to order 2 of the 29 January 2024 orders, the builder has applied for an order that the owners pay the costs of the two proceedings on the ordinary basis as agreed or assessed.
- 8 I have decided that the owners should pay the amount of \$91,257.25 to the builder immediately and the builder's costs of proceedings 2023/00373378 (formerly HB 23/44431) other than the costs relating to its refusal to grant them access to their property between March and May 2022 on the ordinary basis as agreed or assessed, and the builder should pay 50% of the owners' costs of proceedings 2023/00373706 (formerly HB 23/44435) as agreed or assessed.
- 9 These reasons for decision should be read with, and use the same abbreviations as in, the principal decision.

The hearing on the papers

- 10 The builder relies on the following documents:
 - (1) its undated submissions on costs (the builder's costs submissions);
 - (2) its reply submissions on costs dated 4 March 2024 (the builder's reply costs submissions);

- 11 The owners rely on the response/objection dated 26 February 2024 of Mr Toms (the owners' costs submissions).

The history of the two proceedings

- 12 A selective history of the two proceedings is set out in the principal decision at [7]-[12].

- 13 On 15 March 2022, the Tribunal relevantly made the following procedural orders:

“1. By Determination of member, on 15 March 2022 the hearing was adjourned to a date to be fixed by the Registrar.

2. Both parties shall send to the other party and the Tribunal, a copy of all documents including expert reports, witness statements, scott schedule, on which the party intends to rely at the hearing by 10-May-2022.

3. Each party shall send to the other party the Tribunal, a copy of all documents including expert reports, witness statements, scott schedule, on which the party intends to rely in response at the hearing by 21-Jun-2022.

4. The parties' experts shall consult each other with a view to narrowing points of difference between them and identifying remaining points of difference and shall file with the Tribunal and provide to the parties a report setting out all agreed points and all remaining points of difference on or before 19-Jul-2022.”

- 14 On 9 May 2022, the Tribunal made the following procedural orders (the 9 May 2022 orders):

“1. The timetable made by the Tribunal on 15-Mar-2022 is amended.

2. Time for compliance with direction 2 is extended to 06-Jun-2022.

3. Dev Constructions (NSW) Pty Ltd is to provide Alexy Thoms Sheeja Abraham and any representatives they nominate in writing with reasonable access to [address omitted] for the purpose of enabling the preparation of experts reports, a Scott Schedule and any other documentary evidence that Alexy Thoms and Sheeja Abraham intend to rely on at the hearing.

4. The Tribunal has made Order 3 because it is satisfied, on the basis of the affidavit provided by Alexy Thoms, that Dev Constructions (NSW) Pty Ltd has failed to allow the Alexy Thoms and Sheeja Abraham access to the premises in order to facilitate their production of documents that are necessary to comply with the Directions made by the Tribunal on 15-Mar-2022. The Tribunal is satisfied (sic) both that it is necessary for Alexy Thoms and Sheeja Abraham to have access to the premises to enable the preparation of an Expert Report

and Scott Schedule and that the granting of an order for access is consistent with the Tribunal's guiding principle under s 36 of the Civil and Administrative Tribunal Act 2013 (NSW).

5. For the purpose of these directions, "reasonable access to the property" shall be any access to the property requested by Alexy Thoms and Sheeja Abraham provided that:

(a) such access is solely for the purpose referred to at Order 3; and

(b) Dev Constructions (NSW) Pty Ltd is given at least 24 hours notice prior to the date and time at which access is required.

6. Notice of a request for access to the premises may be given by email or post.

7. The issue of costs is reserved."

15 On 9 May 2022, the Tribunal made the following further procedural orders (the 9 May 2022 further orders):

1. The Tribunal has received correspondence from Dev Constructions (NSW) Pty Ltd in connection with an extension of time and orders for access made on 09-May-2022.

2. Dev Constructions (NSW) Pty Ltd objects to an order that it provide access to the premises on the basis that it is unsafe to do so.

3. This matter is listed for a directions hearing on 31-May-2022 for:

(a) Further orders in relation to access to the site; and

(b) Further amendments to the timetable made by the Tribunal on 15-Mar-2022 (if required).

4. On or before 16-May-2022, Dev Constructions (NSW) Pty Ltd is to provide the Tribunal and Alexy Thoms and Sheeja Abraham (either in person or by post) with copies of any documents it wishes to rely on at the directions hearing in relation to allegations that the site is unsafe.

5. On or before 23-May-2022, Alexy Thoms and Sheeja Abraham are to provide the Tribunal and Dev Constructions (NSW) Pty Ltd (either in person or by post) with copies of any documents they wish to rely on at the directions hearing in reply to any material filed under Direction 4.

6. At the directions hearing on 31-May-2022, Alexy Thoms and Sheeja Abraham are to have a list of dates and times prior on which their experts could be available to inspect the premises.

7. Order 3 of the Tribunal made on 09-May-2022 is stayed pending the outcome of the directions hearing on 31-May-2022."

- 16 On 16 May 2022, the builder filed the document entitled “points of claim unsafe site access 16-05-23” and accompanying documents (the 16 May 2022 builder statement).
- 17 On 23 May 2022, the owners filed the document entitled “reply to objection” dated 23 May 2022 and accompanying documents of Mr Toms (the 23 May 2022 owners statement).
- 18 On 31 May 2022, the Tribunal relevantly made the following procedural orders (the 31 May 2022 orders):

“1. By Determination of member, on 31 May 2022 the hearing was adjourned to a further directions hearing on a date to be fixed by the Divisional Registrar.

2. These orders and directions are made in file no HB 21/48836 (application of the Builder, Dev Constructions (NSW) Pty Ltd) and in file HB 21/45601 (application of the Home Owners, Alexy Thoms and Sheeja Abraham). Both files are to be listed together.

3. On 14 June 2022 between the hours of 10:00 am and 1:00 pm the Builder is to allow access to the building site at Old Toongabbie NSW the subject of the proceedings, to the Home Owners' expert Mr Paul O'Connell of CSI Inspections for the purpose of Mr O'Connell completing his expert report and Scott Schedule in the Home Owners' case.

4. The time for compliance with direction 3 made on 15 March 2022 is extended to 21 June 2022.

5. The time for compliance with direction 4 made on 15 March 2022 is extended to 2 August 2022.

6. The costs of today's directions hearing are reserved.

...”

- 19 On 5 February 2024, the builder’s solicitor sent an email to the Registry attaching the agreed calculations of the parties which provides that the amount owing by the owners to the builder is \$90,241.59 as at 29 January 2024 and thereafter \$23.62 per day.

The issues

- 20 The following issues arise for determination:

- (1) issue 1: what should be the amount of the money order in favour of the builder;
- (2) issue 2: whether a hearing in relation to the costs of the two proceedings should be dispensed with;
- (3) issue 3: the costs of the two proceedings.

Issue 1: what should be the amount of the money order in favour of the builder

21 I am satisfied that the amount of the money order in favour of the builder is \$91,257.25 (being the total of \$90,241.59 and 43 days at \$23.62 per day).

Issue 2: whether a hearing in relation to the costs of the proceedings should be dispensed with

22 In their respective submissions on costs, the builder and the owners have consented to the issue of the costs of the two proceedings being dealt with on the papers.

23 I am satisfied that the issues for determination in relation to the costs of the two proceedings can be adequately determined in the absence of the parties by considering the evidence of the owners and the written submissions of the parties. Accordingly, I have decided pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) to make an order dispensing with a hearing in relation to the costs of the two proceedings.

The costs of the two proceedings

Introduction

24 I note that neither the builder nor the owners challenges my finding in the principal decision at [61] that r 38(2)(b) of the NCAT Rules is applicable to the two proceedings.

25 Before considering this issue, it is appropriate to set out the relevant legal principles, the evidence of the owners and the written submissions of the parties.

The relevant legal principles

26 The general principles concerning the awarding of costs under r 38(2)(b) of the NCAT Rules were considered by the Appeal Panel in *Vella v Mir (No 3)* [2020] NSWCATAP 17 (*Vella (No 3)*) at [28]-[33]:

“[28] Clause 38 gives the Tribunal a wide discretion to make an order for costs. It does not specify the factors the Tribunal must take into account in exercising the discretion, although the discretion to make such an order must be exercised judicially: see, for example, *Ruddock v Vadarlis* [2001] FCA 1865 at [9].

[29] Where an application has been heard and determined on the merits and Clause 38 applies, the appropriate starting point for the exercise of the discretion is not that the parties are to pay their own costs. Rather, it is the well-established position at common law; that is, that the purpose of making a costs order is to provide compensation to the party in whose favour the order is made for the expense the party has been put to in prosecuting or defending legal proceedings. In general terms, this means that a party who is successful is entitled to an order for costs in its favour, subject to exceptions generally involving misconduct on the part of that party: *Latoudis v Casey* [1990] 170 CLR 534; *Oshlak v Richmond River Council* [1998] HCA 11.

[30] In *BNT Constructions Pty Ltd v Allen* [2017] NSWCATAP 186 the Appeal Panel, having set aside a costs order made in the Consumer and Commercial Division, decided to re-exercise the costs discretion. Clause 38 was the applicable costs provision in that case. At [67] the Appeal Panel noted the following principles relevant to the exercise of the discretion:

- (1) the starting point is that a successful party should be entitled to an order for costs in his favour;
- (2) an award of costs is by way of an indemnity and not as punishment;
- (3) there is no absolute rule that, absent disentiing conduct, a successful party is to be compensated by the unsuccessful party;
- (4) the factors to be considered are not to be confined as to do so would constrain the general discretion;
- (5) the relative success of the parties on different issues and the time taken to determine them may be relevant;
- (6) the nature of the proceedings is relevant;

(7) the proper exercise of the discretion requires a decision maker to do justice between the parties and to exercise the discretion having regard to relevant considerations and in a manner which is not arbitrary and capricious.

[31] Generally, costs are awarded in favour of the successful party based on the outcome of the proceedings as a whole, without differentiating between particular issues on which the party may not have been successful. That said, a different costs order may be made if the losing party succeeds on significant issues: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [31]–[36]; *Sydney Ferries v Morton (No 2)* [2010] NSWCA 238 at [10]–[12]. The dollar amount of a particular claim does not determine its dominance in the proceedings. Rather, regard must be had to all of the work involved in prosecuting and defending the parties' various claims, including but not limited to the time taken up at the hearing.

[32] In *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* (2011) 288 ALR 385, Campbell JA (with Macfarlan JA and Young JA agreeing) held at [107] that an issue or group of issues is "clearly dominant" when it is clearly dominant in the proceedings as a whole. In that case, the approach by counsel to analysing the percentage of costs between the parties - counting the proportion of paragraphs and pages devoted to each factual topic - was held at [84] to be "a highly artificial way of proceeding" which gave "a false air of mathematical precision".

[33] In relation to separable issues, a successful party's entitlement to the whole of the costs of the proceedings should not be discounted to allow for another party's success in a separate issue that played a very minor part in the proceedings as a whole: *Macourt v Clark (No 2)* [2012] NSWCA 411 at [7]. Further, in *Hawkesbury District Health Service Ltd v Chaker (No 2)* [2011] NSWCA 30 at [14], the Court of Appeal held that the severability of one issue on which the successful party failed is not, without more, sufficient to warrant departure from the general approach. The exercise of discretion will often depend upon matters of impression and evaluation: *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373 at [11]."

The evidence of the owners

27 The following documents are annexed to the owners' costs submissions:

- (1) the letter of their lawyers dated 5 September 2022 to the builder containing an offer to settle the two proceedings by the owners paying \$33,750.00 to the builder;
- (2) the letter of their lawyers dated 27 October 2022 to the builder containing an offer to settle the two proceedings by the owners paying \$40,000.00 to the builder;
- (3) the 9 May 2022 orders;

- (4) the tax invoice of their lawyers dated 12 July 2023 for \$55,102.30 for their costs for acting for the owners in the two proceedings;
- (5) the three tax invoices of their expert dated 12 April 2022, 23 June 2022 and 1 August 2022 totalling \$7,550.00 for his costs for acting for the owners in the two proceedings.

The written submissions of the parties

28 In the builder's costs submissions, the builder made the following submissions:

- (1) it referred to *Vella (No 3)* at [28]-[30];
- (2) taking both proceedings as a whole, it has been substantially successful. Although it is accepted that there is no absolute rule, the consideration should start (and end) at the starting point that it should be entitled to an order for costs in its favour;
- (3) even considering each of the proceedings separately, it has been successful on almost all of its claim taken to final hearing, and as compared to the amount claimed in the application, has been awarded over 80% of its claim. The owners have been awarded less than 10% of their money claim, a result which, although greater than purely nominal damages cannot be considered substantial success;
- (4) the nature of the proceedings is such that separate costs orders for each of the proceedings would be unwieldy and lead to justice between the parties not being done, as appropriate allocation of the costs of the hearing day and submissions would require a consideration of the relative success of the parties on different issues and the time taken to determine them;
- (5) in light of these principles, the appropriate exercise of the discretion is to make a single costs order for both proceedings, considered as a whole, and reflecting the overall success in the proceedings.

29 In the owners' costs submissions, the owners made the following submissions:

- (1) each party should bear their own costs of and incidental to the two proceedings;
- (2) neither the builder nor they can successfully assert total or overwhelming success rather a "mixed success";
- (3) they did not unreasonably resist the builder's application;
- (4) the conduct of the builder precipitated these proceedings;
- (5) they were partially successful in claiming general damages and in resisting the builder's claim;
- (6) their settlement offers demonstrated that they wanted to settle the two proceedings and avoid legal costs;
- (7) the builder was responsible for them incurring costs relating to inspection of their property in May 2022;
- (8) they incurred their own legal costs for the two proceedings;
- (9) they referred to the legal principles governing costs applications in *Thompson v Chapman* [2016] NSWCATAP 6 (*Thompson*) at [68]-[72].

30 In the builder's reply costs submissions, the builder made the following submissions:

- (1) there is no basis for the submission that a rejection of settlement offers is 'disentitling conduct', especially when the owners did not do better than their offers;
- (2) that the owners incurred costs is again no basis to resist a costs order.

Consideration

- 31 There is no relevant difference between the principles in *Vella (No 3)* at [28]-[33] and *Thompson* at [68]-[72].
- 32 Part of the evidence of the owners is not relevant to the determination of this issue. Their offers of settlement were less than the amount of the money order in favour of the builder. The fact that they incurred legal costs and expenses relating to their engagement of their expert is not relevant as to whether they should pay the costs of the builder.
- 33 I am satisfied that there were costs incurred by the owners by the refusal of the builder to provide them access to their property in the period from March to May 2022. It follows that the builder should not recover any costs and pay the owners' costs relating to its refusal to grant the owners access to their property between March and May 2022. For the avoidance of doubt, these costs include the costs relating to the 9 May 2022 orders, the 9 May 2022 further orders, the 16 May 2022 builder statement, the 23 May 2022 owners statement, and the 31 May 2022 orders.
- 34 Having regard to the principles in *Vella (No 3)* at [28]-[30], I am satisfied that in proceedings 2023/00373378 (formerly HB 23/44431) costs should follow the event and the owners should pay the builder's costs other than the costs relating to its refusal to grant the owners access to their property between March and May 2022.
- 35 Having regard to the principles in *Vella (No 3)* at [28]-[33], I am satisfied that in proceedings 2023/00373706 (formerly HB 23/44435) there were two main issues, being the amount owing under the contract and whether the builder was liable in damages for delay. The builder was successful on the first main issue and the owners were successful on the second main issue. The builder should pay 50% of the owners' costs. For the avoidance of doubt, 50% of the owners' costs include all their costs relating to the builder's refusal to grant them access to their property between March and May 2022.

Orders

36 I make the following orders:

- (1) Alexy Toms and Sheeja Abraham are to pay \$91,257.25 to Dev Constructions (NSW) Pty Ltd immediately;
- (2) a hearing of the costs of the two proceedings is dispensed with;
- (3) Alexy Toms and Sheeja Abraham are to pay the costs of Dev Constructions (NSW) Pty Ltd in proceedings 2023/00373378 (formerly HB 23/44431) other than the costs relating to its refusal to grant them access to their property between March and May 2022 on the ordinary basis as agreed or assessed in accordance with the applicable costs legislation;
- (4) Dev Constructions (NSW) Pty Ltd is to pay 50% of the costs of Alexy Toms and Sheeja Abraham in proceedings 2023/00373706 (formerly HB 23/44435) as agreed or assessed in accordance with the applicable costs legislation.

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

The image shows a handwritten signature in black ink, which appears to be 'JP', written over a circular official seal. The seal features the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem depicting a coat of arms.