

IN THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL  
APPEALS DIVISION

PRINCIPAL MEMBER ACTING JUDGE MARKS  
SENIOR MEMBER DEUTSCH

COPY

FRIDAY 18 NOVEMBER 2016

**AP 16/34460 - CPD HOLDINGS PTY LTD v JOHN & DANIELA BAGULEY**  
**AP 16/35505 - JOHN & DANIELA BAGULEY v CPD HOLDINGS PTY LTD**

**EX TEMPORE DECISION**

PRINCIPAL MEMBER MARKS: The builder CPD Holdings Pty Ltd brought proceedings claiming moneys under a building contract from the owners, Mr and Mrs Baguley in matter number HB13/20778.

The owners brought proceedings against the builder under the same building contract for the cost of completion and of rectification work in matter number HB13/27768.

After a two day hearing the builder's claim was settled on the basis that the owners would pay to it the sum of \$24,818 being some \$4,000 less than the builder had claimed.

It seems that even though the parties reached this agreement there was no agreement on costs. This is probably explainable because the parties agreed that the sum of \$24,818 would be set off against any moneys that the builder was required to pay the owners, there being no settlement of that claim.

The proceedings were adjourned to a further date for a two day hearing of the owners' claims. However, that hearing could not proceed because on the morning of the hearing the owners produced a new expert report and the builder needed time to consider it.

BIRCH: Sorry, Principal Member, have I misunderstood.

ARONSTAN: Right. Yeah.

BIRCH: I think you've got the chronology wrong. You said the builder's claim was settled and then the matter was adjourned for two day hearing. The builder's matter was settled after the two day hearing.

PRINCIPAL MEMBER MARKS: Okay. Thank you. I've said after a two day hearing the builder's claim was settled.

BIRCH: I think you then said that proceedings were adjourned for a two day hearing.

PRINCIPAL MEMBER MARKS: Yes. They were never adjourned.

BIRCH: No. That was the conclusion of them.

ARONSTAN: It was part--

PRINCIPAL MEMBER MARKS: So the proceedings had been adjourned. Previously adjourned. Okay. Thank you.

The proceedings had previously been adjourned to a further date for a two day hearing of the owners' claims.

BIRCH: No. No. Sorry. What happened was 9 and 10 December was adjourned.

PRINCIPAL MEMBER MARKS: Yes.

BIRCH: For two days.

PRINCIPAL MEMBER MARKS: Yes.

BIRCH: And that was in June.

PRINCIPAL MEMBER MARKS: Yes.

BIRCH: That was to hear both applications.

PRINCIPAL MEMBER MARKS: Yes.

BIRCH: At the end of the second day of hearing, in June, the builder's case was settled.

PRINCIPAL MEMBER MARKS: Yes.

BIRCH: And the Tribunal Member then decided the owners' case. It wasn't further adjourned. It was after the evidence had been dealt with and those two days.

PRINCIPAL MEMBER MARKS: So the matter had previously been adjourned, before the two day hearing?

BIRCH: It was in December. It was adjourned from the December date.

PRINCIPAL MEMBER MARKS: Yes.

BIRCH: Sorry, I'm not following what you're saying because just so that I'm clear and I'm sorry to interrupt you but when I was listening to you it didn't, it didn't, ring true.

PRINCIPAL MEMBER MARKS: Okay.

At some stage the proceedings had been adjourned to a further date and because they could not proceed at that time, and the basis of the adjournment is recorded by the Senior Member in the transcript, was that the owners had produced a new expert report and the builder needed time to consider it.

The adjournment was granted on the basis of a reservation of the costs of the builder thrown away by reason of the adjournment.

When the matter came on for hearing, for eventual hearing, the owners were awarded compensation of \$34,598 significantly below the claim initially formulated as being around \$90,000. This left a net amount payable by the builder to owners of \$9,780.

In a decision published on 11 July 2014 the senior member dealt with costs, that decision notes that both parties had had some success with their respective claims and referred also to the necessity of the adjournment "because of the owners election to rely on different expert evidence". The Senior Member expressed a preliminary view that each party should pay their own costs, except that the owners should pay the builder's costs thrown away due to the adjournment.

It appears that the parties were unable to reach sensible agreement concerning costs. Consideration of the costs issues was delayed because of

the institution of an appeal from the decision of the Senior Member, and that appeal does not appear to have been pursued to finality.

In a decision published on 16 June 2015 the Senior Member determined that because the owners had been successful in their claim they should be awarded costs.

The Senior Member declined to make any costs order in the claim brought by the builder and in particular determined that it was not appropriate to order the payment of the costs to the builder thrown away by reason of the adjournment.

An appeal was instituted from this costs decision.

The appeal panel in a Decision published on 12 May 2016 reported as *CPD Holdings Pty Ltd v Baguley* [2016] NSWCATAP 103 granted leave to appeal, especially with respect to the costs of the builder thrown away because of the adjournment, set aside the determination of each party to pay their own costs in the owners' proceedings and remitted the proceedings back to the Senior Member for further determination. In particular with respect to the costs of the builders claim the Appeal Panel found that the Senior Member failed to consider whether the builder "was almost certain to have succeeded if the matter had been fully tried".

The proceedings came back for determination of the costs before the Senior Member who dealt with the matter on the basis of such records as he had before him. In reasons published on 30 June 2016 the Senior Member determined that the builder should pay the costs of the owners in the proceedings initiated by them, less the costs thrown away by the builder by reason of the adjournment of the hearing set down which, as he had found, had to be adjourned because of the very late reliance on the new expert's

report.

We are considering these proceedings by way of appeal instituted by both parties from the decision of the Senior Member, being his second decision concerning the question of costs.

In our opinion the determination by the Senior Member that the builder should pay the costs of the owners in the proceedings, less the costs thrown away, is eminently sensible and an entirely appropriate exercise of the discretion which reposed in the Senior Member and should be upheld.

In the 30 June 2016 decision the Senior Member concluded that with respect to the claim of the builder each party should pay its own costs. This was said to be justified on the basis that although it was clear from an early stage in the proceedings that the builder had a legitimate claim for payment it was not clear how much it would have been entitled to until the matter concluded and this was overtaken by the settlement.

The Senior Member approached the matter on the basis that neither party had acted so unreasonably that it should result in a costs order contrary to the usual rule when matters settled. Furthermore, to determine entitlement to costs would involve the Senior Member trying an hypothetical action between the parties. In our opinion the adoption of this latter approach was incorrect.

It seems to us that a proper approach to the determination of these appeal proceedings involves a consideration of the following matters:

1. Despite the builder's claim having settled this occurred in the context of the overall proceedings between both parties. As the Senior Member said at para 22 of the decision under appeal,

"Furthermore, despite the comment that the builder was clearly

entitled to something it was never clear without hearing the matter how much of the \$31,182.20 claimed by the builder that he should receive. That would have only become clear after all issues in dispute and all evidence had been put to the Tribunal. The parties reached agreement on the builder's claim for their own reasons but without any decision on the costs of the claim."

2. In general terms costs should follow the event, except where circumstances dictate to the contrary.

3. Accordingly, the owners should be entitled to their costs of the claim against the builder. We agree that there is a sufficient basis for the Member to have determined that the owners should not have the benefit of a costs order for the costs thrown away by the adjournment.

4. The builder's claim should be seen in the context referred to above. It was settled without final adjudication on a compromised basis but within the overall context of the amount payable being offset against the owners' claim.

Accordingly, there was justification in determining that both parties should pay their own costs of the builder's claim because it was overtaken by, and complicated by, the owners' substantial claim.

In the upshot, we confirm the orders made by the Senior Member as being within discretion and on this basis both appeals should be dismissed.

In order to fully determine the matter we also determine that leave to appeal in both appeals should not be granted.

We note with concern that the parties have still not determined their costs. This should be attended to and finalised sensibly as soon as possible.

No order for costs was sought in either appeal proceedings and in all the circumstances no order for costs should be made.

The proceedings are now complete. We shall adjourn.