Civil and Administrative Tribunal
New South Wales

Case Name:	Vahora v Clarendon Homes (NSW) Pty Ltd
Medium Neutral Citation:	[2020] NSWCATCD
Hearing Date(s):	On the papers
Date of Orders:	29 January 2020
Date of Decision:	29 January 2020
Jurisdiction:	Consumer and Commercial Division
Before:	K Rosser, Principal Member
Decision:	1. A hearing on costs is dispensed with in accordance with s 50(2) of the Civil and Administrative Tribunal Act 2013. 2. Clarendon Homes (NSW) Pty Ltd is to pay Shoaib Vahora's and Sana Shoaib Vahora's costs of and incidental to proceedings HB 17/25706 on the ordinary basis, as agreed or assessed. 3. Order 2 above does not apply to costs of and incidental to the directions hearing on 1 March 2019 and the preparation of the Amended Points of claim and Amended Scott Schedule referred to in the orders made on 1 March 2018.
Catchwords:	Costs – Rule 38 – successful party – exercise of discretion
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Fair Trading Act 1987 Home Building Act 1989
Cases Cited:	Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2) [2009] NSWCA 12 BNT Constructions Pty Ltd v Allen [2017] NSWCATAP 186 Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 373 Gretton v Commonwealth of Australia [2007] NSWSC 149

	Hawkesbury District Health Service Ltd v Chaker (No 2) [2011] NSWCA 30 James v Surf Road Nominees Pty Ltd (No 2) [2005] NSWCA 296 Macourt v Clark (No 2) [2012] NSWCA 411 Miwa Pty Ltd v Siantan Properties Pte Ltd (No. 2) [2011] NSWCA 344 Ruddock v Vadarlis [2001] FCA 1865 SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323 Sydney Ferries v Morton (No 2) [2010] NSWCA 238 Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2) (2011) 288 ALR 385
Texts Cited:	Nil
Category:	Costs
Parties:	Shoaib Vahora and Sana Shoaib Vahora - Applicants Clarendon Homes (NSW) Pty Ltd - Respondent
Representation:	Birch Partners Lawyers for the Applicants HWL Ebsworth Lawyers for the Respondent
File Number(s):	HB 17/25706
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 These reasons for decision are in respect of an application for costs made by the Vahoras (the owners) following the determination of an application brought by them against Clarendon Homes (NSW) Pty Ltd (the builder).

2 The application was brought as a building claim within the Tribunal's jurisdiction under s 48K of the *Home Building Act* 1989 (the HB Act). It was subsequently amended to include an Australian Consumer Law (ACL) claim brought under the *Fair Trading Act* 1987 (the FT Act). The application was determined by Senior Member F Corsaro SC on 3 July 2019.

3 The owners seek an order for costs on the usual basis until 19 November 2018 and on an indemnity basis thereafter. The builder seeks an order that the parties pay their own costs or, in the alternative, an order that the builder pay either 25% or 50% of the owners' costs. The builder opposes the making of a costs order on an indemnity basis.

4 Due to the unavailability of Senior Member Corsaro, the proceedings were reconstituted to me in November 2019 to determine the costs application. As required by s 52(3) of the *Civil and Administrative Tribunal Act* 2013 (the NCAT Act), I have had regard to the evidence and submissions provided to the Tribunal and the decision made in the substantive proceedings before the Tribunal was reconstituted.

Background

5 The background to the dispute between the parties is set out in the reasons for decision published on 3 July 2019.

6 In relation to the substance of the application, the Tribunal made the following orders:

> 1. The Respondent Clarendon Homes (NSW) Pty Ltd to immediately pay the Applicants, Shoaib Vahora and Sana Shohaib Vahora the sum of $42,837.08 inclusive of GST.

7 In relation to the issue of costs, Senior Member Corsaro ordered:

> 2. on the issue of costs
>
> (a) any application for costs of the proceedings to be made written submissions filed and served within 14 days of the date of this decision. Such submissions should address the question of whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act;
>
> (b) if either party files submissions in accordance with order 6 (sic) above the other party may file and serve submissions in response within a further 14 days. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act.

Submissions

8 The owners filed submissions on costs on 5 July 2019. The builder filed submissions on costs on 23 July 2019.

9 Both parties agreed that costs could be determined on the basis of the written submissions.

Owners' submissions

10 In summary, the owners submitted that:

(1) The owners made two offers of settlement in the form of Calderbank letters dated 19 November 2019 and 10 December 2018.

(2) In the settlement offer dated 19 November 2018, the owners offered to settlement on the basis of payment by the builder to the owners of $39,000 plus costs to be paid until 19 November 2018 on the usual basis as agreed or assessed. In the alternative, the owners offered to settle on the basis of a work order, plus an order for costs.

(3) The builder responded to the 19 November 2018 offer with a counter offer that the builder pay the owner $15,000, with no order for costs and the dismissal of the proceedings.

(4) On 10 December 2018, the owner offered to settle for $37,000 plus an order for 75% of their costs.

(5) Each of the owners' offers was to settle for an amount less than the amount owners were awarded by the Tribunal.

(6) The owners' offers were genuine offers of compromise.

(7) It was unreasonable of the builder not to have accepted the offers.

(8) The builder should be ordered to pay the owners' costs on the usual basis up to 19 November 2018 and on an indemnity basis thereafter.

Builder's submissions

11 In summary, the builder submits that:

(1) When the owners commenced the proceedings, they sought an order for $313,500.

(2) At the first directions hearing, the owners informed the Tribunal that they claimed $200,000.

(3) In final submissions, the owners claimed $95,029.26.

(4) The owners achieved a result much less than they sought.

(5) The owners filed and served extensive evidence, which was not relied on at the final hearing. The builder filed and served evidence in response.

(6) In March 2018, the owners changed a substantial part of their case by introducing a claim based on representation, which had not been pleaded before that time.

(7) The Tribunal has already dealt with the costs regarding those amendments.

(8) The owners did not finalise their claim until Further Amended Points of Claim were filed on 10 August 2018, a month before the hearing.

(9) The owners' evidence regarding the representation claim was not properly evinced until the hearing, when the Tribunal granted the owners leave to give further evidence regarding the representations.

(10) The owners did not have any evidence of the quantum of Item 7(t) of the Scott Schedule until the Friday before the hearing. The quantum was eventually agreed between the experts at $17,000.

(11) The owners' case was not fully known until the hearing, apart from the final amount claimed.

(12) The owners had some success but the builder was also successful in defending the majority of the claim.

(13) The owners achieved 13.6% of the original amount claimed, 21.4% of the claim stipulated at the first directions hearing and 45% of the amount claimed in the owners' final submissions.

(14) The builder was successful in defending 55% of the final amount claimed.

(15) The builder was more successful than the owners.

(16) Based on the level of success of each of the parties, the fact that the builder had to consider extensive evidence from the owners which was

not relied on at the hearing and the lateness of some of the owners' evidence, the overall justice of the case requires a different costs order.

(17) The Tribunal should order the parties to pay their own costs, or in the alternative that the builder pay 25% of the owners' costs, or in the alternative, that the builder pay 50% of the owners' costs.

(18) At the time the owners' settlement offers were made, it was not unreasonable for the builder not to accept them. Although the hearing had concluded, there was no certainty as to exactly what the owners were claiming so the builder could not make a proper assessment of the offers. The builder did not know the exact amount of the claim it had to meet until final submissions were received. The offers were in reality not a compromise.

(19) It is for the owners to persuade the Tribunal that the rejection of their offers was unreasonable. They have not done so.

(20) If the Tribunal finds that the owners' offers were valid and that it was unreasonable to reject them, costs should be awarded on an indemnity basis after 19 November 2018.

(21) The Tribunal made a costs order in favour of the builder in March 2018 so any legal work conducted on behalf of the owners covered by the earlier costs order should not be included in any order made by the Tribunal.

Issues

12 The issues to be determined are:

(1) Should an order be made dispensing with a hearing of the costs application in accordance with s 50(2) of the *Civil and Administrative Tribunal Act* 2013 (the NCAT Act)?

(2) What costs provisions and legal principles apply to the costs application?

(3) Should the owners be awarded costs?

(4) If so, on what basis should any order for costs be made?

Consideration

Should an order be made dispensing with a hearing, in accordance with s 50(2) of the NCAT Act?

13 Section 50 of the NCAT Act relevantly provides:

> **50 When hearings are required**
>
> (1) A hearing is required for proceedings in the Tribunal except:
> …
> (c) if the Tribunal makes an order under this section dispensing with a hearing, or
> …
> (2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.
> (3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first:
> (a) afforded the parties an opportunity to make submissions about the proposed order, and
> (b) taken any such submissions into account.
> (4) The Tribunal may determine proceedings in which a hearing is not required based on the written submissions or any other documents or material that have been lodged with or provided to the Tribunal in accordance with the requirements of this Act, enabling legislation and the procedural rules.
> …

14 The parties were given an opportunity to make submissions concerning whether costs could be determined on the papers. As noted above, the parties consented to costs being determined on the papers. In addition, I am satisfied that the issue of costs can be adequately determined in the absence of the parties by considering the parties' written submissions.

15 An order in accordance with s 50(2) of the NCAT Act has accordingly been made.

What costs provisions and legal principles apply to the costs application?

16 The general rule in relation to costs in the Tribunal is that unless special circumstances are established, the parties pay their own costs: s 60(1) of the NCAT Act.

17 However, cl 38 of the *Civil and Administrative Tribunal Rules* 2014 (the Rules) modifies the application of s 60 in proceedings before the Consumer and Commercial Division of the Tribunal. Clause 38(2)(a) provides that in proceedings where the amount claimed or in dispute is more than $30,000, the Tribunal may award costs in the absence of special circumstances.

18 In this case, the amount claimed by the owners was more than $30,000. Clause 38 of the NCAT Rules therefore applies.

19 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].

20 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 disentitling 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.

21 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. However, a different costs order can 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.

22 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".

23 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].

24 Subject to [29] below, I have decided to make a costs order in favour of the owners, without reducing it because of the owners' degree of success or for any other reason.

25 First, I am satisfied that the owners were the successful party in respect of their application as a whole. They were awarded $42,837.08, which represents a significant proportion of the amount that was finally claimed.

26 Second, the owners' claim in respect of defective work played a dominant part in the proceedings. Senior Member Corsaro's reasons for decision indicate that a significant number of claimed defects were agreed between the parties' experts prior to and at the hearing. The owners were successful in relation to six of the nine claimed defects that remained in dispute. This included Item 7(t), which concerns floor level height and was the subject of the representation claim. The fact that the owners did not press a rent claim and one Scott Schedule item and were unsuccessful in relation to four of the claimed defects in dispute is not a basis upon which to reduce the award of costs.

27 Third, while the owners were ultimately unsuccessful in their claim for general damages for breach of s 18 of the ACL, the material before me does not suggest that this particular issue occupied much time at the hearing or in submissions. I conclude that the issue of general damages for breach of s 18 of the ACL played a minor part in the proceedings as a whole.

28 Fourth, I am not satisfied that the fact that the final amount the owners claimed was not clear until written submissions were provided is a basis to either deprive them of costs or to reduce costs. Nor am I satisfied that the fact that the owners' claim changed over the course of the proceedings is a

reason to deprive the owners of costs or to apportion costs. There is nothing particularly unusual about either situation, particular in circumstances where, as in this case, the owners were initially self-represented. To the extent that the builder incurred costs thrown away because of the amendment of the owners' claim after the owners became legally represented, this issue was dealt with in the costs order the Tribunal made on 1 March 2018.

29 In relation to the orders made on 1 March 2018, I note that at the directions hearing held on that date the Tribunal allowed the owners to file and serve Amended Points of Claim and to "complete their lay evidence including any amended Scott Schedule". It is clear that the owners sought these orders because, having engaged legal representation, their solicitor needed to get their case in order. As at 1 March 2018, the proceedings had been before the Tribunal for almost nine months and procedural directions had been made at directions hearings on two earlier occasions. I have concluded that the owners' conduct of the proceedings during the time that they were self-represented is not such as to deprive them of an order for costs or a basis on which costs should be discounted. However, I am satisfied that it is a reason for the builder not to have to pay the owners' costs of preparing the Amended Points of Claim or the Amended Scott Schedule referred to in the orders made on 1 March 2018.

On what basis should any order for costs be made?

30 The owners seek an order that the builder pay the costs of the proceedings on an indemnity basis after 19 November 2018. This is because the builder refused settlement offers made in Calderbank letters dated 19 November and 10 December 2018.

31 It is open to the Tribunal to consider the effect of a Calderbank letter in accordance with common law principles in determining the exercise of its discretion.

32 In *Miwa Pty Ltd v Siantan Properties Pte Ltd (No. 2)* [2011] NSWCA 344 Basten JA identified two questions which are relevant to a Calderbank offer.

They are whether there was a genuine offer of compromise and whether it was unreasonable of the offeree not to accept it.

33 As to the first question, I am satisfied that the settlement offers made in this case represented a genuine offer of compromise. The owners offered to settle for $39,000 and then $37,000 and the Tribunal awarded the owner $42,837.08.

34 However, the determination of whether or not the rejection of an offer was reasonable is an evaluative judgment requiring a consideration of the facts and circumstances specific to the case: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [19]. Further, reasonableness is not to be determined with hindsight. Rather, the strength or otherwise of the applicants' claim should be considered as at the time of the offer: *Gretton v Commonwealth of Australia* [2007] NSWSC 149.

35 The mere fact that a genuine offer of compromise made in a Calderbank letter is not accepted does not automatically mean that the offeror is entitled to an order for costs on an indemnity basis. As stated by Giles J in *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37]:

> …. All the circumstances must be considered, and while the policy informing the regard had to a Calderbank letter is promotion of settlement of disputes an offeree can reasonably fail to accept an offer without suffering in costs. In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure: see for example, John S Hayes & Associates Pty Ltd v Kimberley-Clarke Australia Pty Ltd (1994) 52 FLR 201; MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd (1996) 70 FLR 235.

36 The onus of establishing that a different costs order should be made falls on the owners. The owners asserted that it was unreasonable of the builder not to accept their offers: [16(d)] of the owners' costs submissions. However, the owners did not explain why the rejection of the offers was unreasonable as at the time of the offers. The owners have not discharged their onus. Furthermore, there is force the builder's submission that in circumstances where the owners did not articulate the final sum they were seeking until their

post-hearing written submissions, the builder was not in a position to properly evaluate the offers.

37 The application for costs to be ordered on an indemnity basis is refused. Costs are to be paid on the usual basis.

Orders

(1) A hearing on costs is dispensed with in accordance with s 50(2) of the Civil and Administrative Tribunal Act 2013.

(2) Clarendon Homes (NSW) Pty Ltd is to pay Shoaib Vahora's and Sana Shoaib Vahora's costs of and incidental to proceedings HB 17/25706 on the ordinary basis, as agreed or assessed.

(3) Order 2 above does not apply to costs of and incidental to the directions hearing on 1 March 2019 and the preparation of the Amended Points of claim and Amended Scott Schedule referred to in the orders made on 1 March 2018.

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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