Civil and Administrative Tribunal
New South Wales

Case Name(s):	Clientel Development Pty Ltd v Taylor
Medium Neutral Citation:	[2020] NSWCATCD
Hearing Date(s):	On the papers, submissions close 25 January 2021
Date of Decision:	2 February 2021
Jurisdiction:	Consumer and Commercial Division
Before:	S Thode, Senior Member
Decision:	1. Each party to pay its own costs of the applications.
Catchwords:	Costs
Legislation Cited:	*Civil and Administrative Tribunal Act 2013; Home Building Act 1989*
Cases Cited:	
Category:	Principal judgment
Parties:	Clientel Developments Pty Ltd (Applicant) Bianca Taylor (Respondent)
Representation:	Birch Partners (Applicant) Coleman Greig Lawyers (Respondent);
File Number(s):	HB 20/30880; HB 18/52740
Publication Restriction:	Nil

REASONS FOR DECISION

Background

1 In previous proceedings HB 18/46172 the respondent claimed $500,000 for breach of statutory warranties pursuant to section 18B of the Home Building Act 1989 (the Act). The applicant filed cross application HB 18/52740 seeking an amount outstanding under the residential building contract in the sum of $20,830. For convenience the applicant shall be referred to as the builder and the respondent as the homeowner.

2 The matter was listed for a one day hearing on 7 November 2019 and on 9 January 2020 the Tribunal published its orders. The homeowner was ordered to pay the builder $12,034.80. The homeowner's application HB 18/46172 was dismissed. The homeowner appealed the Tribunal's decisions in relation to both her own claim and the builder's claim. The appeal was listed on 25 May 2020 and on 17 July 2020 the Appeal Panel published its orders, inter alia ordering that HB 18/52740 (the builder's claim) be remitted to a differently constituted Tribunal to determine the homeowner's defence of set off against the amount found in favour of the builder. The decision on costs in HB 18/52740 was also remitted to the Tribunal for redetermination.

3 It is submitted that the effect of the Appeal Panel's decision was that the homeowner's appeal in respect of her own application was unsuccessful. The only basis on which the homeowner was successful in appealing the Tribunal's decision in respect of the builder's claim concerned her set-off defence. The matter was remitted to consider if the homeowner was entitled to a defence of set off for any damages for defective work.

4 The issue that I determined in the remitted proceedings was the value of defective work carried out by the builder and whether the amount, if found in favour of the homeowner, reduces or extinguishes the amount of $12,034.80 found in favour of the builder in HB 18/52740.

5 Ultimately I arrived at an award of $14,286.25 by way of defence and set off in favour of the homeowner and this entirely extinguished the award previously made in favour of the builder and accordingly the builder's application was dismissed.

COSTS

6 As the builder's application was dismissed, the homeowner was the successful party and ordinarily costs follow the event. However, because the builder's claim as made did not exceed $30,000, Rule 38 of the Civil and Administrative Tribunal Rules 2014 applies and the homeowner must establish special circumstances if an order for costs is sought.

> 38 Costs in Consumer and Commercial Division of the Tribunal
> (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.

7 The parties were invited to provide submissions on the question of costs. The last of those submissions was received on 25 January 2021.

The homeowner's submissions

8 I refer to the homeowner's written submissions dated 16 December 2020. The homeowner consents to the issue of costs being determined on the papers and without a hearing pursuant to section 50(2) of the Civil and Administrative Tribunal Act 2013 (the Act).

9 The homeowner seeks the following costs orders: in respect of the builder's proceedings HB 18/52740 an order that the builder pay the homeowner's costs; and in the alternative, no order as to costs. In respect of the remitted hearing proceedings before the Tribunal the homeowner seeks an order that

the builder pay the homeowner's costs and in the alternative the builder pay 80% of the homeowner's costs.

10 It is submitted that the homeowner on the remitted proceedings was entitled to set off the amount of $14,286 for defective works. This meant that the builder's award in the proceedings below in the sum of $12,034.80 was entirely extinguished. The builder was therefore wholly unsuccessful in the builder's claim. Further the Tribunal also found that the owner is entitled to the ownership of the PC items valued at $4580. Accordingly the Tribunal ordered that the builder's claim be dismissed.

11 The homeowner submits that there are special circumstances in the proceedings below which the Tribunal can have regard to and that warrant an order for costs in her favour. In particular, the homeowner submits that the builder's claim was misconceived; the builder conducted the proceedings in a way that unnecessarily disadvantaged the homeowner; and other special circumstances.

The builder's claim was misconceived

12 It is submitted that the builder's claim sought the sum of $8265.25 from the owner by reason of unpaid invoices, plus expectation costs in sum of $10,153.50. The homeowner filed a defence to the builder's claim disputing the builder's entitlement and further the homeowner claimed a set off in the sum of $61,284 for damages for defective work. It is submitted that it was clear from the outset that the homeowner's set off defence was greater than the entire value of the builder's claim. It is submitted that the joint expert report relied upon in the proceedings below included a number of significant concessions on part of the builder's expert which could only be favourable to the homeowner's set off defence.

13 It is submitted that several letters from Coleman and Greig Lawyers dated 16 May 2019, 30 October 2019, 23 March 2020 and 28 July 2020 issued to the builder's solicitor expressly set out reasons why the builder's claim would fail, particularly by reference to the homeowner's set off defence and the joint

expert report. The builder had been put on notice of the fact that its claim was wholly unmeritorious.

14 Ultimately it is submitted that the builder was wholly unsuccessful in its claim against the homeowner. It follows that the Tribunal ought to make no order for costs in favour of the builder. It should be noted that the homeowner was ordered to pay the builder's costs in the homeowner's claim. It would be an "unfair" result to not permit the homeowner's costs on the builder's claim given the ultimate finding in the remitted proceedings.

The builder conducted the proceedings in a way that unnecessarily disadvantaged the homeowner.

15 The parties were ordered to submit a second joint scott schedule for the purpose of the remitted proceedings. The homeowner filed with the Tribunal and served on the builder's solicitor the version of the second joint scott schedule received from the parties' experts. The homeowner relied on this version of the second joint scott schedule in preparation for the remitted hearing.

16 Notwithstanding the second joint scott schedule being prepared following a second conclave, the builder's solicitor attempted to argue against concessions the builder's own expert gave as favourable evidence on the question of defects.

17 That submission was devoid of merit and presumably had such a position not been advanced the balanced view would have been to simply accept the expert's findings on agreed defective items.

18 It is submitted that the fact that the builder did not concede on the builder's claim or at the remitted proceedings any amount of the set off, forced the homeowner to appeal and have the matter remitted. If there was an acknowledgement on the builder's claim and or the remitted proceedings there would have been no need to take the proceedings as far as they have come. It ought to be noted that the builder's solicitor submitted during the

hearing that the homeowner still had to prove that the defects were caused by the builder. That submission was rejected noting that the remitted proceedings was to deal with the discrete question of quantum and not liability. The builder's approach towards the builder's claim and the remitted proceedings was entirely misconceived.

Other special circumstances

19 In the proceedings below the builder was awarded the sum of $12,034.80. In the remitted proceedings therefore the homeowner was only required to meet the threshold of $12,034.80 for it to succeed on its set off defence notwithstanding that the homeowner's set off defence exceeded that value. Ultimately the Tribunal determined that the owner was entitled to a set off in the same of $14,286.25 and that she was entitled to the collection of the PC items. This far exceeded the builder's total award in the proceedings below. The homeowner was wholly successful in the remitted proceedings and the builder was wholly unsuccessful. It is submitted that the Tribunal ought to make an order for costs in favour of the homeowner.

Offers made by the homeowner

20 On 23 March 2020 the homeowner's solicitor served a Calderbank letter on the builder's solicitor containing an offer were both parties would pay their own costs of the appeal proceedings, the owner's claim and the builder's claim; the builder would agree to set aside the orders in the proceedings below and the homeowner would withdraw the appeal proceedings. The offer was open for 8 days and contained detailed reasons why the offer was a genuine compromise, it also included a warning of an intention to claim indemnity costs. It is submitted that if the builder had accepted the 23 March offer it would have been in a more favourable position as it would not have incurred the costs of the appeal and the remitted proceedings.

21 In a second Calderbank letter dated 11 November 2020 the owner offered that the builder would refund the sum of $12,034.80; both parties would pay their own costs and release each other from all future claims and the builder

would undertake not to enforce the order as made in the homeowner's claim and the builder's claim. The homeowner submits that it has made two Calderbank offers on effectively the same terms as the outcome ultimately achieved by the parties. It is submitted that the Tribunal ought to find that the offers made represented real and genuine offers of compromise that provided the builder with a real benefit and it was ultimately unreasonable for the builder not to accept. The offer was a genuine compromise because the set off amount was greater than the quantum of the builder's entitlement and resulted in the original award made in favour of the builder being extinguished.

22 It is submitted that for the reasons set out the homeowner has established special circumstances and the Tribunal should make an order that the builder pay the homeowner's costs in the builder's proceedings and that the builder pay the homeowner's costs in the remitted proceedings.

The builder's submissions

23 I refer to written submissions filed with the Tribunal on 25 January 2021. It is submitted that the homeowner was wholly unsuccessful in her application HB 18/46172 and a costs order made in favour of the builder in those proceedings which remains undisturbed. It is submitted that the builder is entitled to receive its costs in those proceedings upon the usual basis in the amount agreed between the parties or assessed.

24 It is submitted that the homeowner was only partially successful in the builder's application HB 18/52740 because she was not successful in obtaining a refund of moneys she had already paid to the builder.

25 The homeowner was only partially successful in her appeal in that only one of eight grounds of appeal were successful and the builder was only ordered to pay the amount equal to 20% of the homeowner's costs upon the usual basis on an agreed amount or assessed.

26 In its original application HB 18/52740 the builder claimed an order requiring the owner to pay the builder $18,418.75. The amount being claimed by way of set off by the homeowner does not form any part of the consideration as to whether the amount claimed or in dispute is more than $30,000 therefore before the Tribunal can make any costs order in favour of a party the Tribunal must be satisfied that there are special circumstances.

27 The builder submits there are no special circumstances.

28 It is submitted that the builder's claim was not misconceived. The owner claimed a set off in the amount of $61,284 however the Tribunal eventually determined the correct amount to set off was $14,286.25. Notwithstanding the homeowner's submissions, it was never clear "that the homeowner's set off was greater than the entire value of the builder's claim". It is submitted that the owners set off was exaggerated by claiming $61,284. The homeowner persisted in claiming this amount even in the remitted hearing which was in the end substantially unsuccessful.

29 The homeowner's solicitor's Calderbank letters do not advance the homeowner's case as submitted. The builder's application was at least successful in having the amended contract sum determined as well is the amount of the payments made by the homeowner in part payment of the amended contract sum. It is further submitted that the homeowner was unsuccessful in having the Tribunal order the builder to refund any of the amounts paid by the homeowner on account of the amended contract sum. These findings were crucial to determination of the success or otherwise of the homeowner's defence of set off. For these reasons the builder was not wholly unsuccessful in its claim against the homeowner.

30 The builder did not conduct proceedings in a way that unnecessarily disadvantaged the owner. The second joint scott schedule was effectively identical to the first joint scott schedule. The homeowner's submissions failed to accept that the Tribunal made findings which did not accept the homeowners expert's findings in a number of material respects, in particular

the asbestos claim and the claim in respect of the defective pan and cistern were not successful and the Tribunal awarded an amount less than the amount claimed by the homeowner's expert in the second joint scott schedule. The Tribunal eventually found the owner was entitled to a set off for defective works in the amount of $10,390. Only after adding 25% margins and 10% GST did the set off amount total $14,286.25 which was in excess of the amount of $12,034.80 awarded to the builder in the original proceedings. The builder submits the difference between the two amounts is negligible and does not assist the homeowner in her submissions. Contrary to the homeowner's submission the builder was vindicated in pressing on with its claim.

31 It is submitted that there are no other special circumstances. The builder submits on proper analysis the homeowner was unsuccessful as she was awarded a set off of only $14,286.25 including margins and GST, as compared to her original claim of $61,284. The builder submits the owner has not shown any special circumstances that would convince the Tribunal to make a costs order in favour of either party.

32 In respect of the offer made on 23 March 2020, the offer included a condition that the builder pay its own costs in proceedings HB 18/46172. Those proceedings occupied most of the respective hearing times and the builder was successful in having the homeowner's claim wholly dismissed. Furthermore, the builder was subsequently ordered to pay only 20% of the homeowner's costs of the appeal. The builder did not act unreasonably in refusing to accept this offer. The builder received a far better outcome by contesting the homeowner's appeal.

33 In respect of the letter dated 11 November 2020, the builder repeats his submissions. It is submitted that the Tribunal should make an order that the parties pay their own costs in proceedings HB 18/52740 and the remitted proceedings HB 20/30880.

Consideration

Jurisdiction

34 Section 60(1) of the Civil and Administrative Tribunal Act 2013 (the NCAT Act) requires parties to pay their own costs unless the Tribunal is satisfied that special circumstances warrant an award of costs: s 60(2) of the NCAT Act. It is common ground that the homeowner must establish special circumstances.

Should an order for costs be made in the homeowner's favour?

35 The authorities as to what constitutes "special circumstances" are well settled. In CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21 an Appeal Panel stated that special circumstances do not need to be exceptional or extraordinary. At paragraph [32] of that decision the Appeal Panel stated:

> 'The authorities are consistent in stating that "special circumstances" are circumstances that are out of the ordinary; they do not have to be extraordinary or exceptional circumstances. Accordingly the question for decision is whether the conduct of the appeal by CPD is out of the ordinary and warrants the Appeal Panel ordering CPD to pay Mr and Mrs Baguely's costs.'

36 For the reasons that follow I am not of the view that the homeowner has established special circumstances or that the conduct of the hearings by the builder is "out of the ordinary" or warrants the Tribunal making an order for costs in the proceedings.

37 It is abundantly clear that both parties inflated their respective claims and that neither party conducted these proceedings with a commercial outcome in mind. The letter of Coleman Grieg Lawyers served as late as 28 July 2020 maintains the assertion that the claim for damages for defective work exceeds $60,000. It was ultimately found that the defects amounted to only $10,390. Only after adding 25% margins and 10% GST did the set off amount total $14,286.25 which was in excess of the amount of $12,034.80 awarded to the builder in the original proceedings.

38 The question I must determine is whether the builder's application was misconceived, or whether it conducted the proceedings in a way that unnecessarily prolonged the proceedings; or whether the rejection of the Calderbank letters amounted to special circumstances.

39 In respect of the first argument I am not of the view that the builder's application was misconceived. The builder was served with a claim for damages for defective work exceeding $60,000. It was entirely within reason that the builder filed a cross application seeking monies outstanding in the sum of $8265.25 plus expectation costs in the sum of $10,153.50. Although the builder's expert made a number of concessions in the joint scott schedule it was reasonable of the builder to expect that the defects claim would be substantially whittled away, if the proceedings were properly defended and as a result of the usual contest of building expert witnesses. The conduct of the proceedings by the builder ultimately proved fruitful. He was awarded $12,034.80 in respect of his claim and the homeowner's claim was dismissed. In addition, the homeowner was ordered to pay the builder's costs in her application HB 18/46172 and that costs order made in favour of the builder in those proceedings remains undisturbed.

40 The builder's application was at least successful in having the amended contract sum determined as well is the amount of the payments made by the owner in part payment of the amended contract sum. As stated above the builder's application was not wholly unsuccessful and it stood to reason to file a cross-application against the homeowner's inflated defects claim. I find that the builder's application was not misconceived but a reasonable response to the homeowner's defects claim. I am also not persuaded that the remitted proceedings could be considered an application "misconceived" by the builder as application HB 20/30880 arose as a result of the homeowner's partially successful appeal and was remitted by order of the Appeal Panel.

41 Secondly I am not of the view that the builder conducted the proceedings in a manner that unnecessarily disadvantaged the homeowner. It is submitted that the builder's solicitor attempted to argue against concessions the builder's

own expert gave as favourable evidence on the questions of defects. This was indeed the case. However there is no evidence before me that the attempt by the builder's solicitor to argue against his own expert in any way prolonged the proceedings. The remitted proceedings HB 20/30880 was set down for a single directions hearing on 3 August 2020. The matter was heard for three hours on 30 September 2020 and whilst it was briefly attempted by the builder's solicitor to resile from the second joint conclave report this issue was dealt with briefly during opening and did not prolong hearing time. Nor do I understand the solicitor and counsel for the owner to argue that by reason of the position taken by the builder's solicitor they were required to file extra evidence or produce extra submissions at cost to the homeowner.

42 It is submitted by the owner that there are other special circumstances by reason of the Calderbank offers made by the homeowner. I refer to the letter dated 23 March 2020. The homeowner offered that both parties would pay their own costs of the appeal proceedings, the homeowner's claim and the builder's claim. On the basis of that offer the builder would have had to relinquish a costs order that was already made in his favour. I am not provided with a precise amount of costs incurred, but I understand from submissions made at the hearing that the costs incurred by both sides were substantial. Giving up the costs order would therefore have been a significant compromise made on behalf of the builder with a lesser compromise offered in return. I therefore do not agree with the homeowner's submission that had the builder accepted the 23 March offer it would have been a more favourable position as it would not have incurred the costs of the appeal and the remitted proceedings. As it transpired the builder has secured a costs order in the homeowners' proceedings, where he did not have to establish special circumstances, and was ordered to pay only 20% of the appeal proceedings. The builder had to consider the offer of compromise as at the time of the offer on 23 March 2020 and at that stage he had a costs order in his favour. I am satisfied that the offer of 23 March 2020 did not put the builder into a more favourable position and that it was reasonable for it to reject the offer.

43 I briefly refer to the homeowner's argument that because the homeowner was ordered to pay the builder's costs in the homeowner's claim, it would be an "unfair" result to not permit the homeowner's costs on the builder's claim given the ultimate finding in the remitted proceedings. I reject that argument. The application brought by the homeowner, exceeding a claim as made in the sum of $30,000, was considered on common law costs principles. It was not necessary for the builder to establish special circumstances. It is in my view of no probative value to state merely because the builder was successful in its cost application in the homeowner's claim, it would be "unfair" not to allow the homeowner's costs on the builder's claim. I am not satisfied that facts or the proper interpretation of Rule 38 would support such a submission and no authority has been advanced to support such a proposition.

44 In the absence of special circumstances, the appropriate order is that each party pay its own costs of and incidental to the builder's proceedings and the remitted proceedings.

45 In the absence of a finding of special circumstances, it is unnecessary to determine an amount of costs payable, and whether a percentage of the homeowner's costs should be paid.

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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