



**Civil and Administrative Tribunal
New South Wales**

Case Name: **Patel v Noori Homes Pty Ltd**

Medium Neutral Citation: [2023] NSWCATCD

Hearing Date(s): On the papers

Date of Orders: 3 April 2023

Date of Decision: 3 April 2023

Jurisdiction: Consumer and Commercial Division

Before: H. Woods Senior Member

Decision:

Matter HB21/13119:

(1) The applicants are to pay the respondent's cost thrown away by reason of the filing of the Amended Points of Claim.

(2) The respondent is otherwise ordered to pay the applicant's cost as agreed or assessed.

Matter HB 21/17292

(3) The applicant is to pay the respondents costs as agreed or assessed

COSTS — Party/Party — General rule that costs follow the event — Application of the rule and discretion

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)

Cases Cited:

Dimitropoulos v Capitol Constructions Pty Ltd; Capitol Constructions Pty Ltd v Dimitropoulos (No2) [2018] NSWCATAP 148
Commonwealth of Australia v Gretton [2008] NSWCA 117
Nadilo v Eagleton [2021] NSWCA 232
Thompson v Chapman [2016] NSWCATAP 6

Category:

Costs

Parties:

HB 21/13119
Mithilesh Patel (Applicant)
Noori Homes Pty Ltd (Respondent)

HB 21/17292
Noori Construction Pty Ltd (aka Noori Homes Pty Ltd) (Applicant)
Mithilesh and Sneha Patel (respondents)

Representation:

Counsel:
Mr Tiliakos for Noori Homes Pty Ltd

Solicitors:
Birch Partners for Mithilesh and Sneha Patel
Harrington Legal for Noori Homes Pty Ltd

File Number(s):

HB 21/13119 and HB 21/17292

Publication Restriction:

Nil

REASONS FOR DECISION

Introduction

- 1 These reasons deal with the question of cost following the Tribunal's primary decision given on 1 February 2023.
- 2 The dispute concerned residential building work performed by Noori Homes Pty Ltd (previously known as Noori Constructions Pty Ltd) as the builder (the Builder) for Mithilesh and Sneha Patel (the Homeowners)
- 3 In matter HB 21/13119, the Homeowners claimed compensation for the cost to remedy defective work and complete incomplete work, plus removalist and rental cost. In matter HB21/17292, the Builder claimed \$1,067.23 as the unpaid balance owing on a tax invoice and delayed damages of \$143,450.00.
- 4 In matter HB21/13119, the Tribunal ordered that the Builder pay Mr and Mrs Patel the sum of \$120,088.45. In matter HB21/17292, the Tribunal ordered that the application be dismissed.
- 5 The Tribunal also made orders that the filing of written submissions in support of any application for costs, with any submissions to include submissions as to whether a hearing on the question of cost can be dispensed with and whether the question of cost can be determined on the papers.
- 6 The Homeowners filed submissions dated 2 February 2023 seeking an order that the Builder pay the Homeowners costs in each matter. The Builder filed submissions dated 15 February 2023 seeking that the Tribunal make no order as to cost in each matter. The Homeowners filed submissions in reply.

Whether to dispense with a hearing in respect of costs

- 7 Section 50 *Civil and Administrative Tribunal Act 2013* (the NCAT ACT) sets out the circumstances in which the Tribunal can dispense with a hearing and proceed to determine a matter, including a costs application, having regard to submissions filed with the Tribunal.

- 8 Both parties agreed to dispense with a further hearing in respect of costs and for costs to be determined on the papers.
- 9 I am satisfied that the parties have been afforded an opportunity to make submissions on whether a hearing on the question of costs should be dispensed with and whether the question of costs can be determined on the papers.
- 10 Having considered the submissions filed by the parties, I am satisfied that the question of costs can be adequately determined in the absence of the parties by considering the written submissions and other documents or material lodged with or provided to the Tribunal.
- 11 Pursuant to Section 50(4) of the NCAT Act, the Tribunal exercises its discretion to determine the question of costs on the papers.

Costs in the Tribunal

- 12 Section 60 of the NCAT Act provides that each party to proceedings in the Tribunal is to pay the party's own costs, save that the Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
- 13 Section 60 further provides that if costs (being costs are to be awarded by the Tribunal, the Tribunal may: (a) determine by whom and to what extent costs are to be paid, and (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis, and that costs includes " the costs of, or incidental to, proceedings in the Tribunal..."
- 14 Rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the NCAT Rules) provides that in respect of proceedings in the Consumer and Commercial Division of the Tribunal, that despite s 60 of the NCAT Act, the Tribunal may award costs in the absence of special circumstances, if the amount claimed or in dispute in the proceedings is more than \$30,000.00.

- 15 The effect of the above provisions is that, unless Rule 38 applies or there are special circumstances, each party should pay their own costs. If Rule 38 applies, the Tribunal can award costs in the absence of special circumstances.
- 16 Further, pursuant to subsection 60 (5), Costs includes "costs" relevantly includes "(a) the costs of, or incidental to, proceedings in the Tribunal..."
- 17 The parties also agreed, and I find, that the amount in dispute in respect of each matter was more than \$30,000.00 and rule 38 of *the Civil and Administrative Tribunal Rules* (CATR) applies such that the Tribunal can award cost in the absence of special circumstances.
- 18 In *Thompson v Chapman* [2016] NSWCATAP 6 the Appeal Panel held the following in relation to the exercise of the discretion to award costs where rule 38 applied:

67 Rather, in circumstances where there is a general discretion to award costs, the correct statement of principle is that the Tribunal in exercising its discretion is to have regard to the nature of the proceedings before it and all relevant factors arising in connection with those proceedings for the purpose of determining what order for costs, if any, should be made.

68 Each of Regulation 20 of the CTTT Regulation and Rule 38 provide a general discretion in respect to the award of costs.

69 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.

70 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.

71 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.

72 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.

...

76 In short, the proper exercise of the discretion requires the Tribunal to do justice between the parties and to exercise the discretion having regard to relevant considerations and in a manner which is not arbitrary or capricious: see *Oshlack v Richmond River Council* per Gaudron and Gummo JJ at [22] and *McHugh J* at 65.

- 19 In *Dimitropoulos v Capitol Constructions Pty Ltd; Capitol Constructions Pty Ltd v Dimitropoulos (No2)* [2018] NSWCATAP 148 (8 June 2018), the Appeal Panel summarised the principles derived from the Court of Appeals consideration of the making a costs order to reflect time taken in dealing with a particular issue in which an otherwise successful party failed:

In *Bostick Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 the Court of Appeal noted at [38] that the principles governing the making of an order as to costs so as to reflect the time taken in dealing with a particular issue in which the successful party in the proceedings or on the appeal did not succeed were reviewed in *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373. We paraphrase the Court of Appeal's summary of the relevant principles as follows.

First, where there are multiple issues in a case, the Court (here the Tribunal) generally does not attempt to differentiate between the issues on which a party was successful and those on which it failed. Unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it

failed: *Waters v P C Henderson (Aust) Pty Ltd* (Court of Appeal, 6 July 1994, unreported).

Secondly, if the appellant loses on a separate issue argued on the appeal which has increased the time taken in hearing the appeal, then a special order for costs may be appropriate which deprives the appellant of the costs of that issue: *Sydney City Council v Geftlick & Ors (No 2)* [2006] NSWCA 374 at [27].

Thirdly, whether an order contrary to the general rule that costs follow the event should be made depends on the circumstances of the case viewed against the wide discretionary powers of the court, which powers should be liberally construed: *State of New South Wales v Stanley* [2007] NSWCA 330 at [18].

Fourthly, a separable issue can relate to “any disputed question of fact or law” before a court on which a party fails, notwithstanding that they are otherwise successful in terms of the ultimate outcome of the matter: *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 at [34].

Fifthly, where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion and mathematical precision is illusory. The exercise of the discretion depends upon matters of impression and evaluation: *James v Surf Road Nominees Pty Ltd (No 2)* at [38], citing *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* [1993] FCA 259; (1993) 26 IPR 261 at 272.

20 In *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121], Hodgson JA said at [121]:

121 In my opinion, underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs. Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant’s responsibility because the plaintiff was caused to incur costs by the defendant’s failure otherwise to accord to the plaintiff that to which the plaintiff was entitled; while if a defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the plaintiff was not entitled: *c Ohn Walton* (1995) 36 NSWLR 77 at 79 per Gleeson CJ. Departures from the general rule that costs follow the event are broadly based on a similar approach.

21 In *Nadilo v Eagleton* [2021] NSWCA 232, Brereton JA with whom Meagher JA agreed, said at [6]:

The power to award costs is an important aspect of rendering justice between litigants and underlying the general rule that costs follow the event, and the qualifications to it, is the idea that costs should be borne in a way that is fair, having regard to the responsibility of each party for the incurring by the other of the costs.

Consideration

22 Having regard to the authorities referred to above, the starting point ought to be that the costs follow the event.

23 The Builder, as the unsuccessful party in both matters, however, submits that there should be no order as to costs. The effect of such an order would be that each party pays its own costs.

24 I will therefore deal with the matters raised by the Boulder in its submission.

The history of offers made and not accepted.

25 The Builder points to various offers and submits that the conduct of the applicant in not accepting the offers or otherwise in how it responded to the offers was such that each party should pay its own costs.

26 Although the Builder's submissions referred to various without prejudice offers, it cannot be said that the Builder did better than any of those offers such that it was open for the Builder to submit that the Tribunal ought to find that it was unreasonable for the Homeowners not to have accepted any of those offers or that the fact of the offers or that they weren't accepted ought to mean that costs ought not follow the event.

27 I am also not satisfied that the Builder's submissions otherwise point to any conduct by the Homeowners that was so unreasonable that it is open to the Tribunal to find that the cost ought not follow the event.

Case preparation

28 The Builder refers to the conduct of the Homeowners in respect of the general preparation of the matter, including delays in the provision of expert evidence.

In my view, those matters were dealt with as the case was prepared, and it is not appropriate to now go back through the history of the case management to determine whether there should be some alteration to the usual costs order.

Adjournment of hearing after first day and leave granted to Homeowners to file and serve an amended points of claim

29 The Builder refers to the adjournment of the hearing on 11 November 2021 and the Tribunal's directions for the Homeowners to file an amended points of claim.

30 Given that the hearing proceeded with the expert evidence and continued to late on the further hearing date of 23 May 2022, I am not satisfied that the granting of leave for the Homeowners to file their amended claim required an additional hearing date or any additional hearing time.

31 Having said that, it seems to me that it is likely that costs would have been thrown away by the fact of the filing of the amended points of claim and it seems to me the appropriate order is that the Homeowners ought to pay the Builder's costs thrown away by reason of the filing of the Amended Points of Claim following the first day of hearing of 11 November 2021 (the Amended Points of Claim).

The Applicants were not successful on some items of alleged defective work and the claim for removalist costs.

32 The Builder also points the fact that the Homeowners abandoned several items of defective work, were unsuccessful in respect of one item that remained in dispute and were unsuccessful on their claim for relocation costs.

33 In my view none of the items of defective work which were abandoned or the item the Homeowners were unsuccessful in respect of, nor the claim for relocation costs were clearly dominant nor separable, nor did they cause an increase in hearing time such that there should be some alteration to the usual order as to costs.

34 The Tribunal's orders will therefore be:

In respect of matter HB21/13119:

- (1) The applicants are to pay the respondent's cost thrown away by reason of the filing of the Amended Points of Claim.
- (2) The respondent is otherwise ordered to pay the applicant's cost as agreed or assessed.

In respect of matter HB 21/17292

- (3) The applicant us to pay the respondents costs as agreed or assessed

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

