



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners — Strata Plan No. 94514 v Bright Built Pty Ltd and Saade Construction Pty Ltd and Saade Construction Group Pty Ltd

Medium Neutral Citation: [2020] NSWCATCD 4

Hearing Date(s): On the papers (Costs)

Date of Orders: 04 September 2020

Decision Date: 4 September 2020

Jurisdiction: Consumer and Commercial Division

Before: G Meadows Senior Member

Decision:

1. The First and Third Respondents pay the Applicant's costs of the proceedings;
2. No costs order in favour of or against the Second Respondent.

Catchwords: HOME BUILDING — costs applications — confusion over correct identification of respondents — substantive proceedings largely settled by agreement — remaining issues determined by Tribunal — Offers of Settlement — Calderbank Offer —

Legislation Cited: Civil and Administrative Tribunal Act 2013

Category: Costs

Parties: The Owners — Strata Plan No. 94514 — Applicant; Bright Built Pty Ltd — First Respondent; Saade Constructions Pty Ltd — Second Respondent; Saade Construction Group Pty Ltd — Third Respondent.

Representation: Counsel:
Michael Klooster — Respondents

Solicitors:
Bannermans Lawyers — Applicant;
GS Law Group — Respondents

File Number(s): HB 18/47472

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 Saade Construction Group Pty Ltd was the developer and Bright Built Pty Ltd was the builder of the premises in Burwood. I refer to these companies as the third respondent and the first respondent respectively.
- 2 The second respondent, Saade Constructions Pty Ltd was an associated company but at least by the time the hearing commenced it was agreed that it should not be a party to these proceedings and it was not involved in the development and building of the premises at any time.
- 3 As was made clear in the substantive determination and reasons published on 11 March 2020, the hearing proceeded on the basis that the facts in the previous paragraph were accurate but the applicant owners corporation did not formally seek that the second respondent be removed as a party.
- 4 The substantive orders related to the determination of the remaining general building defects still in dispute and to the precise terms of a proposed work order the terms of which had mostly been agreed.
- 5 It is clear that there were numerous defects in the remedial works were and were to be quite substantial. It is also clear that the parties had engaged in lengthy and consistent attempts to settle the proceedings prior to the hearing and that those efforts were partly but not entirely successful.
- 6 As I noted at paragraph 7 in the substantive reasons, the form of the Tribunal's determination was to be based on a number of documents, some of which were agreed and others with some items still in dispute to be determined by the Tribunal.

- 7 The published reasons included directions for any party to make an application for costs. The applicant on the one hand and the first and third respondents (the respondents) on the other each provided submissions effectively seeking costs orders.
- 8 The parties agreed that the costs decision should be made on the papers.

The Parties' Submissions

The Respondents' Initial Submissions

- 9 The respondents' first submissions were drafted by their counsel, Mr Klooster, who first pointed out that the first order made by me on 11 March 2020 ordered all three respondents to comply with the terms of a work order which was Attachment 1 to the reasons. As the respondents correctly suggest, for the reasons given in paragraphs 2 and 3 above, the second respondent was not intended to and should not have been included in that order. I will therefore amend Order 1 made on 11 March 2020 pursuant to sec. 63 of the *Civil and Administrative Tribunal Act 2013* (CAT Act).
- 10 The bulk of the respondents' submissions related to the efforts of the parties to resolve the issues prior to the hearing, the making of an offer by the applicant as embodied in a Deed of Settlement and the making of an offer by the respondents in the form of a Calderbank offer.
- 11 In support of the submissions the respondents provided a quite detailed affidavit of Mr Anthony Sukkar, the respondents' solicitor, setting out his description and explanation of the efforts to settle the proceedings, accompanied by a large bundle of annexures marked "A" to "V".
- 12 The annexures include a great deal of the correspondence between the parties in relation to their attempts to settle the proceedings.
- 13 The respondents submit that it was reasonable of them to refuse to agree to the Deed of Settlement and unreasonable of the applicant to press the Deed of Settlement, and it was also unreasonable of the applicant to reject the Calderbank offer.
- 14 Based on their submissions, the respondents seek the following orders:

- (1) The Applicant pay the Second Respondent's costs of the proceedings on an ordinary basis up to and including 27 February 2019 and on an indemnity basis thereafter;
- (2) The First and Third¹ Respondents pay the Applicant's costs of the proceedings on an ordinary basis up to and including 27 February 2019;
- (3) That the Applicant pay the First and Third Respondent's costs of the proceedings on an indemnity basis on and from 28 February 2019, or alternatively on the ordinary basis.

The Applicant's Submissions

- 15 The applicant's submissions were prepared by Mr Craig Blackwell, the applicant's solicitor with carriage of the matter and the applicant's advocate during the hearing.
- 16 Mr Blackwell's submissions were accompanied by two statements made by him on 02 April 2020 and 15 April 2020, including annexures.
- 17 Mr Blackwell responded and replied to the respondents' initial submissions, seeking to demonstrate why it was not unreasonable to reject the Calderbank offer and indeed arguing that the Calderbank offer could not have been accepted because of factual and legal errors included therein.
- 18 Mr Blackwell also submitted that the applicant was successful and in keeping with the standard common law principles the appropriate costs orders should be:
 - (1) The First and Third Respondents pay the Applicant's costs of the proceedings;
 - (2) No costs order in favour of or against the Second Respondent.

The Respondents' Submissions in Reply

- 19 Mr Klooster first submitted that there was little factual dispute in relation to the chronology of settlement attempts.
- 20 The submissions then sought to provide additional argument and detail as to why the applicant's Deed of Settlement was not a reasonable settlement offer and then to establish that the criticisms of the Calderbank offer made by the

¹ At paragraph 1.6 of the respondents' submissions, proposed orders (a) and (b) refer to the "Second Respondent" which is clearly an inadvertent error and the proposed orders should refer to the "Third Respondent". As noted, the Second Respondent was never formally removed as a party.

applicant were misguided and that it was therefore unreasonable of the applicant to reject the Calderbank offer.

- 21 The respondents' submissions in reply set out in brief form the relevant legal principles in relation to costs and Calderbank offers.

Consideration and Determination

- 22 It is appropriate to amend the orders made on 11 March 2020 as follows:

“1. The **first and third** respondents are to comply with the terms of the work order included as Attachment 1.

...

6. The application against Saade Constructions Pty Ltd is dismissed.”

[Additional words in **bold**]

- 23 I am persuaded by the submissions of the respondents that the applicant's proposed Deed of Settlement included a number of items which should not properly be in a document settling the disputes between the parties, such as including the second respondent as a party, costs of expert reports not relied on, claims for repairs which are maintenance matters and claims for the costs of further inspections. I agree with the respondents' submission that the proposed Deed of Settlement reads like a “wish list” rather than incorporating settlement of genuine and reasonable disputes between the parties and that therefore it was not unreasonable of the respondents to refuse to enter into that Deed.
- 24 in relation to the Calderbank offer, I again agree with the respondents' submissions refuting the applicant's assertion that it was “legally impossible” for the applicant to accept the Calderbank offer. In my opinion the applicant's submissions in relation to renewal of the proceedings, the issue of costs and the nature and extent of the works are not persuasive for the reasons given by the respondents.
- 25 Nevertheless, I am not persuaded that it was unreasonable for the applicant to refuse the Calderbank offer because the applicant was entitled to continue to push for a settlement on its terms even if unreasonable items as referred to in paragraph 23 above were to be deleted.

- 26 There were some matters in which it was not really clear whether agreement had been reached or not – see paragraph 9 of the substantive reasons. I do not find that either party was responsible for failing to reach agreement and so to that extent at least refusal of the parties to accept the offers referred to above was not unreasonable.
- 27 I accept the submission of the applicant that no separate costs order should be made in favour of the second respondent. At all times, the three respondents (which were clearly related companies in the sense that at least Mr Saade was involved with each of them) were represented by the same legal practitioners and no evidence or submissions were provided to me which would persuade me that additional costs were incurred by the second respondent.
- 28 Although it is clear that the applicant succeeded by agreement in relation to a number of its claims and succeeded in relation to other items according to my determination while failing in regard to other items also according to my determination, in my view this is not a matter in which particular issues can be separated so as to provide for separate costs orders.
- 29 For the reasons above, I make the following costs orders:
- (1) The First and Third Respondents pay the Applicant's costs of the proceedings;
 - (2) No costs order in favour of or against the Second Respondent.

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 is for the NSW Civil & Administrative Tribunal, featuring the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem with a shield and a sun.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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