Civil and Administrative Tribunal
New South Wales

Case Name:	Hamlin v Moll
Medium Neutral Citation:	[2020] NSWCATCD
Hearing Date(s):	29 October 2020 (on the papers)
Date of Orders:	30 October 2020
Date of Decision:	30 October 2020
Jurisdiction:	Consumer and Commercial Division
Before:	Graham Ellis SC, Senior Member
Decision:	1 The respondent, Tony Moll, is to pay the costs of the applicants, Jamie Hamlin and Elizabeth Saran, in these proceedings and the related proceedings with the reference HB 18/31022, as agreed or assessed, on the ordinary basis. 2 For the avoidance of doubt, order 1 does not replace or amend any earlier order for costs made in either these proceedings or the related proceedings with the reference HB 18/31022.
Catchwords:	COSTS - Party/Party - Validity of Rule 38 - General rule that costs follow the event - Whether to consider costs by reference to issues
Legislation Cited:	*Civil and Administrative Tribunal Act 2013* *Civil and Administrative Rules 2014*
Cases Cited:	*Bonita v Shen* [2016] NSWCATAP 159 *Bostik Australia v Liddiard (No 2)* [2009] NSWCA 304 *Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 373* *Latoudis v Casey* [1990] 170 CLR 534 *Markunsky v Zammit t/as Quality Constructions* [2016] NSWCATAP 253 *News v Cotes* [2019] NSWCATAP 186 *Nguyen v Perpetual Trustee Company Limited* [2015] NSWCATAP 264 *Oshlak v Richmond River Council* [1998] HCA 11

	Smith v Giro Construction Pty Ltd [2015] NSWCATAP 214 *Thompson v Chapman* [2016] NSWCATAP 6
Category:	Judgement on costs
Parties:	Jamie Hamlin and Elizabeth Saran (Applicants) Tony Moll (Respondent)
Representation:	Counsel: Mr J Adamopoulos (Applicants) Ms M Fraser (Respondent) Solicitors: Mr M Birch, Birch Partners (Applicants) Mr A Robinson, Fielding Robinson (Respondent)
File Number(s):	HB 19/44398
Publication Restriction:	Nil

REASONS FOR DECISION

Outline

1 The substantive proceedings between the parties raised a number of issues, related primarily to the aluminium windows and doors which the builder obtained and had installed for the owners. After a two-day hearing, the owners obtained an order that the builder pay them $71,161.04. Orders were also made to cater for an application for costs.

2 Four submissions have been provided to the Tribunal and they have been marked for identification as follows:

MFI 8	Owners' submissions dated 09 October 2020,
MFI 9	Builder's submissions dated 20 October 2020,
MFI 10	Owners' submissions dated 23 October 2020, and
MFI 11	Builder's submissions dated 23 October 2020.

Owners' submissions

3 The application for costs was based on two propositions: (1) costs should follow the event and the owners were the successful party, and (2) the owners had incurred significant costs by reason of procedural defaults by the builder.

4 Points made in support of the first of those propositions may be summarised as follows:

(1) The Tribunal has a discretion, which must be exercised judicially, but the starting point should that be that the owners, as the successful party, are entitled to an order for costs in their favour.

(2) While the Tribunal can make an order be reference to the relative success of the parties on the various issues that should only be done where the conduct of the successful party renders it unfair for that party to receive all its costs and usually only where there is a dominant or separable issue.

(3) The set-off claims, many of which were not in dispute, were small ($14,781.96) compared to the damages awarded ($71,161.04).

(4) The proceedings were only commenced after the builder failed to comply with a Rectification Order.

(5) The painting defect was only conceded late and the door and window defects, which were the dominant issue, were determined in favour of the owners.

(6) While the builder succeeded in relation to an asbestos claim, there was no expert evidence, the lay evidence was limited and the issue was not such as should be seen to detract from the owners overall success.

(7) The set-off claims for variations were not raised in the Points of Defence, were the subject of evidence from the builder shortly prior to the hearing, with the exception of one invoice, were based on invoices issues after the commencement of these proceedings, and were the subject of appropriate concessions by the owners.

(8) The owners achieved a large measure of success in relation to the remaining claims and succeeded on a repudiation issue, raised obliquely in the pleadings.

(9) Any success achieved by the builder was the result of evidence that was served belatedly.

(10) It was noted that the Appeal Panel, in *Markunsky v Zammit t/as Quality Constructions* [2016] NSWCATAP 253, awarded costs in favour of a party that only had a 'slender victory'.

5 In relation to the conduct of the builder, the following submissions were made:

(1) The proceedings were commenced more than two years ago, after the builder failed to comply with a Rectification Order.

(2) The late filing of the Points of Defence.

(3) The vacation of the 17 April 2019 hearing date which resulted in an indemnity costs order being made for costs thrown away.

(4) On 21 June 2019 the builder, having changed solicitors, did not appear and an order for indemnity costs was made on that occasion.

(5) An unsuccessful attempt was made to appeal that decision.

(6) After the proceedings were reinstated, the builder failed to comply with directions of the Tribunal on numerous occasions.

(7) After the proceedings were listed for hearing on 30-31 March 2020, evidence served late resulting in that hearing being aborted.

Builder's submissions

6 The first submission made for the builder was that rule 38 of the *Civil and Administrative Rules 2014* (the Rules) cannot prevail over section 60 of the *Civil and Administrative Tribunal Act 2013* (the Act) with the consequence that the owners are required to show special circumstances and, having not done so: *"There should be no order as to costs, and previous costs orders made in the proceedings should be vacated.*"

7 Next, the builder's submissions recounted the history of the proceedings and those paragraphs are summarised below:

11 May 16	Date of contract
26 Mar 18	Rectification order issued
11 Jul 18	Application filed (HB 18/31022)
05 Sep 18	Points of Claim filed
29 Oct 18	Points of Defence and cross-application filed
18 Feb 19	No appearance for builder, cross-application dismissed
17 Apr 19	Hearing adjourned at the request of the builder Builder order to pay costs thrown away on an indemnity basis

18 Jul 19	No appearance for builder, orders made (incl $11,915 costs)
11 Sep 19	Builder applied to set aside those orders
01 Oct 19	Orders made on 18 Jul 19 set aside (save for costs order)
30 Oct 19	Directions made
29 Nov 19	Builder sought an extension of time
05 Dec 19	The costs order was paid
17 Dec 19	Further directions made
Feb 20	Builder retained counsel
23 Mar 20	Builder advised Tribunal/owners of desire to file further evidence
24-29 Mar 20	Further evidence for builder filed and served
25 Mar 20	Builder's application to adjourn refused
30 Mar 20	Hearing adjourned at the request of the builder Builder order to pay costs thrown away by that adjournment
02 Jun 20	Owners denied leave to appeal that decision Costs of the appeal to be costs in the cause at first instance The owners' appeal to the Supreme Court was later settled (That settlement dealt with costs of both appeals)
03 Jul 20	Owners failed to serve evidence in reply by the due date
08 Jul 20	Owners evidence in reply provided to builder
13-14 Jul 20	Hearing

8 Thirdly, as to the outcome, it was submitted:

(1) The primary issue was not whether the windows were defective but whether rectification should be by the builder or by others.

(2) Had the owners accepted the builder's offer to rectify the windows, that issues would have fallen away prior to the hearing.

(3) There were successes and failures on both sides.

(4) The owners failed in relation to a claim relating to the removal of asbestos ($26,800) and a claim for the cost of accommodation ($14,285).

(5) As significant costs orders have already been made against the builder, there should be no order as to costs.

9 After the submissions in reply for the owners referred to In response to the builder's submission in relation to rule 38, reference was made to *Nguyen v Perpetual Trustee Company Limited* [2015] NSWCATAP 264 in relation to the validity of rule 38, the response for the builder was that section 35 does not assist the owners because section 25 only authorises the making of rules that are not inconsistent with the Act.

Consideration

10 It is noted that an argument that rule 38 was ultra vires was rejected in *Bonita v Shen* [2016] NSWCATAP 159 and that *Nguyen v Perpetual Trustee Company Limited* [2015] NSWCATAP 264 is another decision that support the validity of rule 38.

11 The argument presented for the builder in this case is that rule 38 is not valid because it is inconsistent with section 60 since section 25 only authorises making rules that are not inconsistent with the Act. Support for there being an inconsistency is said to be found in rule 38(2) commencing with the words: "*Despite section 60 …"*

12 The statutory regime in relation to the operation of section 60 and rule 38 is as follows.

13 First, section 60 falls within Part 4 of the Act and that part commences with section 35 which provides that: "*Each of the provision of this Part is subject to enabling legislation and the procedural rules*".

14 Secondly, subsection 4(4) specifies that: "*Any provisions of this Act that are expressed to be subject to the procedural rules have effect subject to any exceptions, limitations or restrictions specified by the procedural rules.*"

15 Thirdly, subsection 4(5) reads: *"Subject to section 17(3), procedural rules that make provision as referred to in subsection (4) are not inconsistent with this Act.*"

16 Fourthly, while it does not appear to be presently relevant, for the sake of completeness, it is noted that subsection 17(3) of the Act indicates that: "*The provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provisions of this Act of the procedural rules."*

17 Thus, while section 25 does suggest the Rules Committee may make rules "*not inconsistent with this Act*", section 25 does not render rule 38 invalid because the combined effect of section 35 and subsections 4(4) and 4(5) is to allow rule 38 to prevail over section 60 in cases such as the present case.

18 Since the Tribunal considers the question of costs in these proceedings falls to be determined by rule 38 rather than section 60, it is not necessary for the owners to establish special circumstances. Indeed, it could be said that the question is not whether the owners have established special circumstances but whether the Tribunal is satisfied there are special circumstances, since subsection 60(2) provides that "*The Tribunal may award costs in relation to proceedings before it only <u>if it is satisfied</u> that there are special circumstances warranting an award of costs.*" (emphasis added).

19 It is well established, by decisions such as *News v Cotes* [2019] NSWCATAP 186, *Bonita v Shen* [2016] NSWCATAP 159 and *Thompson v Chapman* [2016] NSWCATAP 6, that the starting point is that the usual order for costs should be in favour of the successful party and that an order for costs is to compensate the successful party for the costs incurred in the proceedings.

20 This principle, commonly summarised by the words "costs follow the event", applies unless there is some disentitling behaviour by the successful party: *Latoudis v Casey* [1990] 170 CLR 534 and *Oshlak v Richmond River Council* [1998] HCA 11. There does not appear to the Tribunal to be any disentitling conduct on the part of the owners in these proceedings. However, there does appear to be some disentitling conduct on the part of the builder, considered briefly below.

21 On the question of whether to consider the issues rather than just the outcome on the question of costs, the Tribunal notes the principles set out in *Bostik Australia v Liddiard (No 2)* [2009] NSWCA 304 at [38] (case citations omitted):

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 by this Court in Elite Protective Personnel Pty Ltd & Anor v Salmon (No 2) [2007] NSWCA 373. Those principles may be summarised as follows:

- *Where there are multiple issues in a case the Court 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*

- *In relation to trials it has been said that it may be appropriate to deprive a successful party of costs or a portion of the costs if the matters upon which that party was unsuccessful took up a significant part of the trial, either by way of evidence or argument*

- *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*

- *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*

- *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*

- *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

22 Consistent with those principles, the decision of the Appeal Panel in *Smith v Giro Construction Pty Ltd* [2015] NSWCATAP 214 at [27-28] suggests two propositions. First, that where there are multiple issues there is generally no attempt to differentiate between those on which a party succeeded and those on which it failed. Secondly, that a successful party should only be deprived of a costs order where the unsuccessful issues were dominant or severable, having regard to the significance of those unsuccessful issues to the outcome, the time they occupied at the hearing and (to the extent it can be determined) in preparation for that hearing.

23 In this instance, the issue relating to the removal of asbestos was separable but was plainly not dominant and did not involve a significant portion of either the documentary evidence filed before the hearing nor did it occupy significant time at the hearing. The rent issue, although also separable, involved even less evidence and hearing time. As a result, the Tribunal is not satisfied that there should be a departure from the general principle that costs follow the event. What has been referred to as the set-off claims were also not dominant in these proceedings.

24 The submission that these proceedings would not have been necessary had the owners accepted the builder's offer to rectify the windows overlooks the fact that the Tribunal made a money order and not a work order in relation to the windows with the result that the owners were justified in pursing their claim for damages.

25 No reasonable grounds have been demonstrated for revisiting any earlier costs order in that there does not appear to be any basis for suggesting the discretion in relation to costs was wrongly exercised or that subsequent

events have put a different complexion on what was the position at the time any such cost order was made.

26 Accordingly, the Tribunal considers the appropriate outcome in relation to costs is an order in favour of the owners, on the ordinary basis, providing an opportunity for those costs to be agreed in order to avoid the time and cost of the assessment process, covering both the earlier and the current file references, and not disturbing any prior orders in relation to costs.

27 In the alternative, if the Tribunal's finding that rule 38 is valid is incorrect and this application for costs is governed by section 60 rather than rile 38, the Tribunal is satisfied that there are special circumstances in this case.

28 Having regard to the circumstances of this matter, the Tribunal is satisfied that there are special circumstances in the following respects, having regard to paragraphs (b), (c) and (d) of subsection 60(3):

(1) The builder unreasonably prolonged these proceedings by reason of his 17 April 2019 request for an adjournment, failure to appear on 18 July 2019, seeking an extension of time on 29 November 2019, retaining counsel in February 2020 but not advising the Tribunal and the owners until 23 March (a week before the hearing) of the desire to rely on additional evidence (which had obviously been in the course of preparation as that evidence filed and served within the following week, some as early as the following day), and request for adjournment on 30 March 2020.

(2) The relative strengths of the primary issue of whether a work order or money order should be made against the builder and the low strength of the repudiation issue raised by the builder.

(3) The complexity of the proceedings which both parties considered such as to warrant not only retaining a solicitor but also briefing counsel.

Orders

29 For the reasons indicated above, the following orders are made:

(1) The respondent, Tony Moll, is to pay the costs of the applicants, Jamie Hamlin and Elizabeth Saran, in these proceedings and the related proceedings with the reference HB 18/31022, as agreed or assessed, on the ordinary basis.

(2) For the avoidance of doubt, order 1 does not replace or amend any earlier order for costs made in either these proceedings or the related proceedings with the reference HB 18/31022.

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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