QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Sovereign Homes Qld Pty Ltd v Edwards (No 2)* [2018] QCAT 410
PARTIES:	**SOVEREIGN HOMES QLD PTY LTD** (applicant) **v** **DONALD BRUCE EDWARDS** (respondent)
APPLICATION NO/S:	BDL253-15
MATTER TYPE:	Building matters
DELIVERED ON:	3 December 2018
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member King-Scott
ORDERS:	**The Tribunal orders that:**

1. **The respondent to pay the applicant $46,155.20 in respect of its claim plus interest of $32,770.63 by 4.00 pm on 11 January 2019;**
2. **The applicant to pay the respondent the sum of $79,938.30 in respect to the respondent's counter application plus interest of $25,625.27 by 4.00 pm on 11 January 2019;**
3. **The respondent pay 70% of the applicant's costs to be agreed and failing agreement to be assessed on the Magistrates Court scale appropriate to amounts exceeding $50,000 on a standard basis;**
4. **The applicant to pay the respondent 30% of his costs of the cross-application to be agreed and failing agreement to be assessed on the Magistrates Court scale appropriate to amounts exceeding $50,000 on a standard basis;**
5. **If the parties are unable to agree on the quantum of costs by 11 January 2019 then I direct that the costs be assessed by a cost assessor to be appointed by the Principal Registrar.**
6. **The parties are to pay the costs as agreed or assessed within 14 days of such agreement or assessment.**

CATCHWORDS: COSTS – building dispute – open offer to settle – result no more favourable – contractual right to costs on indemnity basis – both parties partially successful – apportionment of costs

INTEREST – AGREEMENTS TO PAY INTEREST – agreed interest at 18% - penalty or liquidated damages – not a penalty – builder retained and had benefit of insurance funds subsequently awarded to owner

Queensland Building and Construction Commission Act 1991 (Qld)
Queensland Building and Construction Commission Regulation 2003 (Qld)
Queensland Civil and Administrative Tribunal Act 2009 (Qld)

A L Builders Pty Ltd v Nicholas Fatseas and Tricia Fatseas (No 2) [2014] QCATA 319
ANZ Banking Group (New Zealand) Ltd v Gibson [1986] 1 NZLR 556
Bank of Western Australia Limited v Ponga unreported (Master Sanderson) SCt of WA; Library No 980697
Better Homes Queensland Pty Ltd v O'Reilly and Anor [2012] QCAT 424
Citibank Savings Ltd v Nicholson, unreported; FCt SCt of SA; 1 April 1998
Colburt v Beard (1992) 2 Qd R 67
Cotterell v Stratton [1872] LR 8 Ch App 295
Dunlop Pneumatic Tyre Co Limited v New Garage & Motor Co Ltd [1915] AC 79;
Gomba Holdings (UK) Ltd v Minories Finance Pty Ltd (No 2) [1992] 4 All ER 588
Lyons v Dreamstarter Pty Ltd [2012] QCATA 71
Re Shanahan (1941) 58 WN (NSW) 132
Rumball & Ors v Mortimore [2000] WASC 126
Sandtara Pty Ltd v Australian European Finance Corporation Ltd (1990) 20 NSWLR 82
Shercliffe v Engadine Acceptance Corporation Pty Ltd (No 2) (1982) 3 BPR 9207
Sovereign Homes Qld Pty Ltd v Edwards [2018] QCAT 276
Union Finance Association Ltd v Howarth (1903) 4 SR (NSW) 31
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Limited [2011] QCA 312

REPRESENTATION:

Applicant: P W Evans, solicitor of McKays Solicitors

Respondent: B J Saal, solicitor of Saal & Associates Lawyers

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

REASONS FOR DECISION

[1] I delivered my decision in this matter on 21 August 2018 following a 3 day hearing. The issues were complex and the evidence extensive.

Interest

[2] In my earlier reasons, I reserved the final calculation of interest until I heard argument on the form of final orders. I invited the parties to file written submissions in respect to interest and costs. They have complied.

[3] Sovereign claimed interest under Clause 32 of the Contract. Item 14 of the Schedule to the contract sets the rate of default interest at 18%. Sovereign claims $31,408.80.

[4] The Respondent Mr Edwards submits that at a contractual rate of 18% it is a penalty and therefore, void. He submits that there is no evidence that the rate was a genuine pre-estimate of the damages that Sovereign would suffer if it was not paid on time.

[5] Lord Dunedin in *Dunlop Pneumatic Tyre Co Limited v New Garage & Motor Co Ltd*[1] referred to the various propositions established by earlier cases as follows:

> 1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. The doctrine may be said to be found passim in nearly every case.
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> 2. The essence of a penalty as payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage…
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> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach…
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> 4. To assist this task of construction various tests have been suggested, which… may prove helpful, or even conclusive. Such are:
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> (a) It will be held to be a penalty if the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach…
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> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid… This though one of the most ancient instances is a true corollary to the last test…

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1 [1915] AC 79.

[6] Here the interest rate of 18% p.a. claimed as the default interest in the Housing Industry Association printed contract. It is true that Sovereign has not provided any evidence to justify the rate as a genuine pre-estimate of damage. However, it was not an issue raised in the written submissions following the hearing and, at the time, I commented that there appeared to be no objection by Mr Edwards to the methodology of the calculation. In the circumstances, I am not prepared to consider it a penalty.

[7] Sovereign has been kept out of its money for a long time and should be compensated by an award of interest. Mr Edwards submitted that I should take account of the delays that have occurred, which he submits were caused by Sovereign. I accept that there has been delay but as I have previously observed in my earlier reasons, I did not consider any delay was excessive, to the extent, as to warrant a reduction in the interest claimed.

[8] In my opinion an interest rate of 18% is reasonable and I allow that on the full amount owing. It is suggested that I should set off the amount allowed for defects. However, the contract provides that interest at the rate agreed may be charged on the amount outstanding from when it fell due for payment. That amounts to $46,155.20. Mr Edwards says interest should be calculated from18 December 2014, being 5 working days after receipt of the final claim. I accept that. On my calculations, interest from 18 December 2014 to 30 November 2018 at 18% amounts to $32,770.63.

[9] Mr Edwards then claims interest at 18% on the amounts he has been awarded. That rate of interest in clause 32 is for the benefit of the contractor and not the owner. He makes the claim on the amounts that were paid to the insurer being the Hail Event and the Rain Event. Section 77 of the *Queensland Building and Construction Commission Act 1991* permits this Tribunal to make orders in relation to a building dispute dealing with interest “at the rate, and calculated in the way, prescribed under a regulation". Section 34B of the *Queensland Building and Construction Commission Regulation 2003* provides for the calculation of interest at a rate agreed by the parties or at the rate of 10%.

[10] The substantial Hail Event claim was paid to Sovereign on 15 September 2015. It has had the benefit of those funds being $64,954.00[2] since that date. Although, Sovereign submits it was ready, willing and able to carry out the work from 9 August 2016 that does not detract from the fact that it had the benefit of the funds from that earlier date. It also had the benefit of the funds paid on 6 November 2015 for the Rain Event agreed at $1,344. Together, they amount to $66,298.00. With the defects claim the amount totals $79,983.30.

[11] Interest calculated at 10% from 15 September 2015 to date at 10% amounts to $25,625.27.

Costs

[12] Section 100 of the *Queensland Civil and Administrative Tribunal Act 2009* provides that each party should bear their own costs unless otherwise provided such as under an enabling act. Section 77 of the *Queensland Building & Construction Commission*

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[2] The difference between the sum of $69,717.00 is the cost incurred in attending with the loss assessor, preparing specifications and schedules and submitting the insurance claim: T1-13, line 25.

Act 1991 (Qld) displaces the usual order in Tribunal proceedings.[3] The general rule about costs is thereby incorporated into building disputes before the Tribunal.[4] The general rule is that a successful party is entitled to procure its costs against the other party. That is, costs should follow the event.

[13] That might not be appropriate in some instances, such as the delinquent behaviour of the winning party, or the pyrrhic nature of the win.[5] The Tribunal has a broad general discretion.

[14] Sovereign claims its costs on an indemnity basis on the District Court scale. It does so on the basis of Mr Edwards 'imprudent refusal' of multiple offers to settle but also on a contractual basis. Clause 33.1 of the contract provides that Sovereign is entitled to recover its debt collection costs including legal fees on a solicitor and client (indemnity) basis.

[15] Sovereign was placed in the position that Mr Edwards would not pay the outstanding final claim, although he gave every indication he would do so. Mr Edwards then reduced the claim and continued to do so, even where Sovereign requested at least the payment of the balance.[6] Sovereign's only remedy was to commence proceedings which it did. The matter was factually and legally complex, its complexity was exacerbated by the numerous issues and multiplicity of expert opinions. Mr Edwards pleaded and agitated unmeritorious issues which were only abandoned in the last day of the hearing. However, they did not take up as much time as the issue of the box gutter on which he was substantially successful.

[16] Sovereign made several offers to Mr Edwards. The first in March 2016 which was an offer of $12,000 in full and final settlement of proceedings. The second on 16 October 2017 to return to the site and perform the works for the rain and hail events as detailed and approved by its insurer. Finally, a *Calderbank* offer was made on 17 October 2017 where Sovereign offered to pay Mr Edwards $35,000 within 14 days. Both offers remained open only to 4.00 pm the following day. The end result of the litigation after setting off the respective claims, resulted in Mr Edwards obtaining a less favourable result than what was contained in the offer, albeit by a modest amount.

[17] Sovereign's retention of the insurance monies was a source of antagonism for Mr Edwards. Sovereign, as I have noted in my earlier reasons, sought to settle with Mr Edwards for an amount less than the insurance payout.[7] It would be in a stronger position in respect to its claim for indemnity costs had it offered to refund the full amount of the insurance monies at that time.

[18] Mr Edwards deposed in his affidavit that he was not prepared to make any decision about Sovereign's offers in October 2017 until the Tribunal handed down its decision. Such an attitude was not conducive to resolution of the matter or even some of the

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3 Section 100 QCAT Act; *Lyons v Dreamstarter Pty Ltd* [2012] QCATA 71.

4 *A L Builders Pty Ltd v Nicholas Fatseas and Tricia Fatseas (No 2)* [2014] QCATA 319.

5 See rules 681(1) and 684 Uniform Civil Procedure Rules 1999. Those rules do not apply to the QCAT Act but they do provide some assistance in determining when and what awards of costs should be made in the interests of justice. See QCAT Act s.102(1). *Colburt v Beard* (1992) 2 Qd R 67.

6 *Sovereign Homes Qld Pty Ltd v Edwards* [2018] QCAT 276 [30].

7 Ibid [79].

issues. The offers were made just over a week from the first hearing date so a substantial part of the costs would have been incurred. On the other hand, at that time, Mr Edwards would have been in a good position to assess his prospects and the reasonableness of the offer made. The mere failure to obtain a more favourable result than a *Calderbank* offer is not itself reason to order indemnity costs.[8]

[19] Under Clause 33 of the contract Sovereign is entitled to have its costs paid on a solicitor and own client basis. That is, on an indemnity basis. Owen J in *Rumball & Ors v Mortimore* [9]in speaking of contractual costs reviewed the authorities and said:

> 15 The Court has a broad discretion over the basis upon which it orders the costs of an action. However, where the parties to an action are also parties to a contract which contains plain and unambiguous provisions allowing for costs to be paid on a certain basis, the Court should ordinarily exercise its discretion in a manner consistent with the contractual provisions: see *Citibank Savings Ltd v Nicholson*, unreported; FCt SCt of SA; 1 April 1998; *Bank of Western Australia Limited v Ponga*; *Gomba Holdings (UK) Ltd v Minories Finance Pty Ltd (No 2)* [1992] 4 All ER 588. In *Citibank Savings* Williams J (with whom Cox and Mullighan JJ agreed) said, with particular reference to proceedings between mortgagee and mortgagor, at 3:
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> > "[T]he terms of any costs order in favour of a successful mortgagee should ordinarily reflect the terms of any special bargain contained in the mortgage contract ... [T]here will [however] be special occasions where policy considerations may call in question the enforceability of a particular contractual provision ..."
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> 16 In *ANZ Banking Group (New Zealand) Ltd v Gibson* [1986] 1 NZLR 556 the New Zealand Court of Appeal was dealing with a provision in a guarantee allowing for costs to be paid by a guarantor on a solicitor/client basis. Richardson J said, at 566:
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> > "The undertaking of the guarantee for payment of costs of enforcement on a solicitor/client basis is in my view an extending provision intended to entitle the Bank to indemnity with respect to legal expenses properly incurred by it in relation to a recovery action under the guarantee. Clearly that contractual obligation is enforceable unless contrary to public policy and I am unable to see how this contractual arrangement could be said to impede the administration of justice or otherwise be contrary to any discernible public policy considerations. To put the point affirmatively, why should a lender be out of pocket as a result of a failure to pay when the parties have expressly provided that they should be indemnified in the event of default by the other."
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> 17 In both *Citibank Savings* and *Gibson* the court made reference to "policy considerations" which may militate against the court exercising its discretion to make a costs order in accordance with the basis provided for in the contract. In general, a costs order will not allow a party to recover costs which were improperly or unreasonably incurred or improper or unreasonable in amount, notwithstanding what is provided for by the contract: see *Gomba Holdings* at 601 - 602. Furthermore, a mortgagee will forfeit his contractual right to his general costs of an action on the mortgage if his conduct has been "[so] ...

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8 *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Limited* [2011] QCA 312; *Better Homes Queensland Pty Ltd v O'Reilly and Anor* [2012] QCAT 424.

9 [2000] WASC 126.

> inequitable ... as [to] amount to violation or culpable neglect of his duty under the contract": per Lord Selbourne LC in *Cotterell v Stratton* [1872] LR 8 Ch App 295 at 302 (followed in *Union Finance Association Ltd v Howarth* (1903) 4 SR (NSW) 31; *Re Shanahan* (1941) 58 WN (NSW) 132; *Shercliffe v Engadine Acceptance Corporation Pty Ltd (No 2)* (1982) 3 BPR 9207; *Sandtara Pty Ltd v Australian European Finance Corporation Ltd* (1990) 20 NSWLR 82; *Gomba Holdings*; *Citibank Savings*).

[20] Although the policy considerations referred to in the above cases do not expressly apply to Sovereign, in my opinion the claims by a financier under a mortgage or guarantee do not fall within the same category as a claim by a builder in a contested building dispute. Most of the hearing time was spent on issues other than a debt recovery by Sovereign. Mr Edwards has raised and succeeded on some issues relating to defects in the works. I decline to award costs on an indemnity basis.

[21] It is not appropriate to fix costs in this matter so unless the parties can agree on costs they will have to be assessed. In all the circumstances, in the exercise of my discretion I propose to order that Mr Edwards pay 70% of Sovereign's costs on the Magistrates Court scale appropriate to amounts exceeding $50,000 on a standard basis. I propose to order Sovereign pay Mr Edwards 30% of his costs of the cross claim on the Magistrates Court scale appropriate to amounts exceeding $50,000 on a standard basis.

[22] I make the following orders:

(a) Mr Edwards to pay Sovereign $46,155.20 in respect of its claim plus interest of $32,770.63 by 4.00 pm on 11 January 2019;

(b) Sovereign to pay Mr Edwards the sum of $79,938.30 in respect to Mr Edwards' Counter-application plus interest of $25,625.27 by 4.00 pm on 11 January 2019;;

(c) Mr Edwards pay 70% of Sovereign's costs to be agreed and failing agreement to be assessed on the Magistrates Court scale appropriate to amounts exceeding $50,000 on a standard basis;

(d) Sovereign to pay Mr Edwards 30% of his costs of the cross-application to be agreed and failing agreement to be assessed on the Magistrates Court scale appropriate to amounts exceeding $50,000 on a standard basis;

(e) If the parties are unable to agree on the quantum of costs by 11 January 2019 then I direct that the costs be assessed by a cost assessor to be appointed by the Principal Registrar.

(f) The parties are to pay the costs as agreed or assessed within 14 days of such agreement or assessment.