Civil and Administrative Tribunal
New South Wales

Case Name:	Avci v Inchurch Automotive Pty Ltd t/a Parramatta Motor Group
Medium Neutral Citation:	[2019] NSWCAT
Hearing Date(s):	25 March 2019: costs submissions closed 4 June
Date of Orders:	26 June 2019
Date of Decision:	26 June 2019
Jurisdiction:	Consumer and Commercial Division
Before:	P French, General Member
Decision:	1. A hearing on the issue of costs is dispensed with pursuant to section 50(1)(c) of the Civil and Administrative Tribunal Act 2013. 2. Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group must pay Melisa Avci the lump sum of $7,246.91 in costs on an indemnity basis on or before 12 July 2019.
Catchwords:	COSTS – indemnity costs – lump sum order - where applicant has been wholly successful – where response to the application had no reasonable prospects of success
Legislation Cited:	Australian Consumer Law (NSW): 54 Civil and Administrative Tribunal Act 2013: s 60 Civil and Administrative Tribunal Rules 2014: r 38 Legal Profession Uniform Law Application Act 2014
Cases Cited:	Baulderstone Homibrook Engineering Pty Ltd v Gordian Runoff Ltd (No. 2) [2009] NSWCA 12 Degnam Pty Ltd Iin Liq) v Wright (No 2) [1983] 2 NSWLR 354 Leichhardt Municipal Council v Green [2004] NSWCA 341 Mendonca v Tonna [2017] NSWCATAP 176 Ng v Chong [2005] NSWSC 385. Olshack v Richmond River Council (1998) 193 CLR

	72 Wentworth v Rogers (No.5) (1986) NSWLR 534. Wright v Foresight Constructions Pty Ltd [2011] NSWCA 327
Category:	Costs
Parties:	Melisa Avci (Applicant) Inchurch Automotive Pty Ltd t/as Parramatta Motor Group (First respondent) FCA Australia Pty Ltd (Second respondent)
Representation:	Mal Zraika, solicitor (for applicant) John Hitti, Service Manager (for first respondent) Shuvhra Kaushic, Manager, Customer Care (for second respondent)
File Number(s):	MV 18/36392
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Melisa Avci (**the applicant**) for an order from the Tribunal pursuant to Rule 38 of the *Civil and Administrative Tribunal Rules* 2014 (**NCAT Rules**) that would require the either Inchurch Automotive Pty Ltd t/as Parramatta Motor Group (the **first respondent**) and/or FCA Australia Pty Ltd (the **second respondent**) to pay her costs of the proceeding in a lump sum on an indemnity basis in the amount of $7,246.91.

2 For the reasons set out following I am satisfied that the applicant is entitled to the order she seeks and that the order should be made against the retailer of the motor vehicle, which is the first respondent.

Procedural history

3 The substantive application was heard on 25 March 2019 and final orders and reasons were published to the parties on 3 May 2019. There has been no appeal from those orders within the 28 day period allowed.

4 The proceedings concerned the first respondent's supply to the applicant of a new motor vehicle (a Jeep) for her personal use. The motor vehicle was manufactured by the second respondent.

5 The applicant successfully contended that in supplying the motor vehicle to her the first and second respondents failed to comply with the guarantee as to acceptable quality contained in section 54 of the Australian Consumer Law (NSW) (**ACL**) and that this was a major failure that entitled her to reject the motor vehicle and obtain a refund of its purchase price. The applicant also successfully contended that she was entitled to be compensated for certain consequential losses that she suffered as a result of her purchase of the motor vehicle including interest and other charges she incurred, or would incur, under loan contract with a dealer linked credit provider which provided her with the funds to purchase the motor vehicle

6 The orders disposing of the substantive application directed the applicant to make any application for costs within 14 days of the date of the orders. The first and second respondents were directed to file any response to any application for costs within 28 days of those orders.

7 The parties were also directed to indicate in their submissions if they were content for the Tribunal dispense with a hearing in relation to any application for costs, and if there was an objection to the Tribunal doing so, to set out the reasons in support of the objection.

Costs application and submissions

8 The applicant filed an application for costs supported by submissions as directed by the Tribunal. She indicated in her submissions that she was content for the Tribunal to dispense with a hearing on the question of costs.

9 Neither respondent has made any submission in response to this application. It is however clear from the Tribunal's file record that both respondents received a copy of the Tribunal's orders and reasons published on 3 May 2019 to their registered addresses. In the absence of any indication to the contrary, I will therefore proceed on the basis that neither respondent seeks to contest the applicant's application for costs, and on the basis that neither respondent has any objection to the issue of costs being determined on the papers.

Applicable law

10 The primary provision regulating costs in proceedings before the Tribunal is found in section 60 of the *Civil and Administrative Tribunal Act* 2013. "Costs" is defined to include, relevantly, 'the costs of, or incidental to, proceedings in the Tribunal': section 60(5). If costs are to be awarded by the Tribunal, the Tribunal may determine by whom and to what extent costs are to be paid and 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: section 60(4).

11 The primary rule applicable to proceedings before the Tribunal is that each party is to bear its own costs (section 60(1)) unless there are special circumstances that warrant an award of costs (section 60(2)). However, this rule is subject to exceptions.

12 The exception that is applicable in this case is found in Rule 38 of the NCAT Rules which applies to proceedings for the exercise of Tribunal functions that are allocated to the Consumer and Commercial Division: Rule 38(1). Despite section 60 of the Act, the Tribunal may award costs in proceedings to which Rule 38 applies even in the absence of special circumstances warranting such an award if, relevantly, the amount claimed or in dispute in the proceedings is more than $30,000.00: Rule 38(2)(b).

13 In this case the amount in dispute, which was the purchase price the applicant paid for the motor vehicle, and the consequential losses she claimed to have suffered as a result of that purchase, was well in excess of $30,000.00. In its disposition of the substantial application the Tribunal made orders benefiting the applicant which had a total monetary value of $56,349.57.

14 Rule 38 confers discretion on the Tribunal to award costs, which includes the discretion to refuse to do so. That discretion is unfettered but it must be exercised judicially having regard to established principle. Generally, costs follow the event (or outcome) of the claim. However, there may be a departure from this principle if a claimant is only partially successful, or has engaged in some disentitling conduct, or for other reasons: *Olshack v Richmond River Council* (1998) 193 CLR 72 at [67] and [69]; *Wright v Foresight Constructions Pty Ltd* [2011] NSWCA 327 at [36].

15 The applicant's applies for costs on an indemnity basis. That is, she seeks to recover from the first and/or second respondents the whole of the legal costs she incurred in the conduct of the proceedings, not just her party/party costs.

16 Indemnity costs orders are only made in limited circumstances. The discretion to do so must be the subject of careful reasoning and caution should be

exercised in making such an award: *Mendonca v Tonna* [2017] NSWCATAP 176 at [59]: applying *Degnam Pty Ltd Iin Liq) v Wright (No 2)* [1983] 2 NSWLR 354, *Leichhardt Municipal Council v Green* [2004] NSWCA 341and *Ng v Chong* [2005] NSWSC 385.

17 One of the limited circumstances in which an indemnity costs order may be made is where a litigant defends and continues proceedings, in circumstances where the defence has no reasonable prospect of success: cf *Baulderstone Homibrook Engineering Pty Ltd v Gordian Runoff Ltd (No. 2)* [2009] NSWCA 12 at [4]. However this is a stringent test. The defence must be "without substance", "groundless", "fanciful or hopeless" or so weak as to be futile: *Mendonca v Tonna* [2017] NSWCATAP 176 at [60]. Mere weakness of a defence will not be sufficient to warrant an exercise of the discretion to award indemnity costs: *Wentworth v Rogers (No.5)* (1986) NSWLR 534.

Consideration

18 Neither party has sought a formal hearing on the question of costs. I therefore dispense with such a hearing pursuant to section 50(1)(c) of the NCAT Act.

19 None of the exceptions to the usual rule that costs follow the event arise in the circumstances of this case. The applicant has been wholly successful in obtaining the orders she sought and she has engaged in no disentitling conduct in her conduct of her case. She did not succeed in full or at all on every point of claim she made, but the less successful and unsuccessful parts of the claim were certainly arguable, and they were peripheral to the central dispute and outcome of the case. I note that neither respondent makes any argument to the contrary. For these reasons, the discretion conferred by Rule 38 to award costs in this case is to be exercised in the applicant's favour.

20 I am also satisfied that this is an appropriate case in which to award the applicant her costs on an indemnity basis. The applicant is entitled to such an order because of the manifestly unreasonable conduct of the first and second respondents in failing to provide the applicant with the remedy to which she was clearly entitled when she notified them that she rejected the motor vehicle.

That compelled the applicant to institute this proceeding, in the context of which, both respondents raised and continued a manifestly hopeless defence, which asserted a right to repair the motor vehicle.

21 The detailed facts of the case are set out in my substantive decision and it is unnecessary to repeat them here. Suffice to state that the motor vehicle suffered catastrophic engine failure within a short time of its purchase which could only be remedied by the replacement of the engine. By that time the motor vehicle's exterior paintwork had also been seriously damaged by the first respondent in two failed attempts to apply a protective coating. When advised by the first respondent of the engine failure the applicant notified both respondents in unequivocal terms that she rejected the motor vehicle, did not want it repaired, did not want it returned to her by the first respondent, and that she sought the refund of its purchase price.

22 At least with respect to the engine failure, there could hardly be a clearer case of a major failure to comply with the guarantee as to acceptable quality. No reasonable consumer would have acquired a brand new motor vehicle at a cost in excess of $50,000.00 if they knew it would suffer catastrophic engine failure within just a few weeks of its purchase. That being so the applicant was entitled to reject the motor vehicle for the reasons she stated (section 259(3) of the ACL) and elect to return it to the first respondent (section 263(3) of the ACL). The first respondent was bound by that election to accept the return of the motor vehicle and to refund its purchase price to the applicant (section 263(4).

23 The first respondent is a large motor dealership and the second respondent is a major motor vehicle manufacturer and distributer. Both may reasonably be taken to know what their obligations to the applicant were under the ACL in the circumstances. However, both took a course of action contrary to those obligations. They asserted a right to repair the motor vehicle, repaired it without the applicant's consent, and they have sought to compel her to accept its return.

24 The defence both respondents relied upon in these proceedings was that the motor vehicle was capable of, and had been, 'repaired' by its reconstitution with a new engine. For the reasons I explain in the substantive decision, even if I were to have accepted that the reconstitution of the motor vehicle with a new engine was a 'repair' (which I did not) this would have no impact on the applicant's right to reject the motor vehicle and obtain a refund of its purchase price. In other words, as I have said, this was a hopeless defence.

25 In all of these circumstances, I consider the first and second respondents' conduct before and after the applicant's institution of these proceedings baffling and bordering on the outrageous. It is appropriate that they compensate the applicant the whole of the legal costs she has incurred in obtaining the remedy to which she was so obviously entitled.

26 For completeness, I note that neither the first or second respondent had made any submission opposing an indemnity costs order being made.

27 The applicant asks for an order that her costs be paid on a lump sum basis in the amount of $7,246.91. As I have noted above, section 60 confers power on the Tribunal to determine costs be awarded in a particular amount.

28 The applicant has attached to her costs application detailed supporting evidence of the legal costs she has incurred in the conduct of the proceeding in the form of itemised accounts rendered on her by her solicitor. I have carefully perused those accounts. I can discern no extravagance or unreasonableness in the costs rendered on the applicant. I also consider the lump sum amount contended for proportionate to the type and complexity of the case.

29 I note that both respondents have also been provided with the documentary evidence of the costs the applicant has incurred and that neither has made any objection to the costs claimed.

30 I am therefore satisfied that a lump sum costs order should be made in the applicant's favour in the amount of $7,246.91.

31 The applicant purchased the motor vehicle from the first respondent. As retailer, the first respondent was responsible for accepting the return of the motor vehicle and refunding the applicant its purchase price in the circumstances of this case. It is therefore appropriate that the costs order be made against the first respondent.

Conclusion

32 For the foregoing reasons, the applicant is entitled to an order that will require the first respondent to pay her a lump sum of$7,246.91 in costs on an indemnity basis. This payment is to be made on or before 12 July 2019.

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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