Civil and Administrative Tribunal
New South Wales

Case Name:	Tanios v Baserite Constructions Pty Ltd (No 2)
Medium Neutral Citation:	[2021] NSWCATCD
Hearing Date(s):	On the papers
Date of Orders:	25 November 2021
Date of Decision:	25 November 2021
Jurisdiction:	Consumer and Commercial Division
Before:	D G Charles, Senior Member
Decision:	1. Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW), in respect of the application by John Tanios for his costs of the proceedings constituted by File Nos. HB 20/33320, HB 20/40203 and AP 19/49553, the Tribunal dispenses with a hearing requiring the parties to be present and proceeds to determine the costs application on the basis of the papers lodged with the Tribunal in accordance with orders 3, 4 and 5 of the Tribunal made on 10 August 2021. 2. In the proceedings constituted by file nos HB 20/33320 and HB 20/40203, Baserite Constructions Pty Ltd is to pay the costs of John Tanios on the ordinary basis up to and including 8 December 2020 and thereafter on the indemnity basis as agreed or as assessed in accordance with the applicable costs assessment legislation. 3. In the proceedings constituted by file no AP 19/49553, Baserite Constructions Pty Ltd is to pay the costs of John Tanios on the ordinary basis as agreed or as assessed in accordance with the applicable costs assessment legislation.
Catchwords:	COSTS – exercise of discretion under Rules 38 & 38A

- indemnity costs – effect of Calderbank offers

Legislation Cited:	Home Building Act 1989 NSW Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW)
Cases Cited:	Northern Territory v Sangare [2019] HCA 25; (2019) 265 CLR 164 at [24] Williams v Lewer [1974] 2 NSWLR 91 Wright v Foresight Constructions Pty Ltd [2011] NSWCA 327 Latoudis v Casey (1990) 170 CLR 534 Oshlack Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 Thompson v Chapman [2016] NSWCATAP 6 Rekrut and Scott v Champion Home Sales Pty Ltd [2018] NSWCATAP 97 Nguyen v Perpetual Trustee Co Ltd; Perpetual Trustee Co Ltd v Nguyen [2015] NSWCATAP 264 Calderbank v Calderbank [1975] 3 All ER 333 Mendonca v Tonna [2017] NSWCATAP 176 Maitland Hospital v Fisher [No 2] (1992) 27 NSWLR 721 Multicon Engineering Pty Limited v Federal Airports Corporation (1996) 138 ALR 425 Hadid v Australis Media Ltd [1999] NSWSC 32 Rickard Constructions v Rickard Hails Moretti [2005] NSWSC 481 Jones v Bradley (No 2) [2003] NSWCA 258 Old v McInnes and Hodgkinson [2011] NSWCA 410 SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323 Miwa Siantan Properties Pty Ltd (No 2) [2011] NSWCA 344 Nu Line Construction Group Pty Ltd v Fowler [2012] NSWSC 816 Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353
Texts Cited:	None
Category:	Costs
Parties:	John Tanios (Applicant in HB 20/33320, Respondent in HB 20/40203, Respondent in AP 19/49553) Baserite Constructions Pty Ltd (Applicant in HB 20/40203, Respondent in HB 20/33320, Appellant in AP/49553)

Representation:	Counsel: R Jedrzejczyk (for John Tanios) M McMahon (for Baserite Constructions Pty Ltd) Solicitors: White Knight Lawyers (for John Tanios)
File Number(s):	HB 20/33320; HB 20/40203; AP 19/49553
Publication Restriction:	Unrestricted

REASONS FOR DECISION

Introduction

1 On 10 August 2021, I made Orders in two (2) proceedings: firstly, the proceedings (**File No. HB 20/33320 or Owner's Claim**) brought by Mr John Tanios as home owner (**Owner**) of residential premises at Concord NSW, against the respondent, Baserite Constructions Pty Ltd (**Builder**); and secondly, the cross application (**File No. HB 20/40203** or **Builder's Claim**) brought by the Builder as applicant against the Owner as respondent. I gave written reasons (**Reason for Decision dated 10 August 2021**) to accompany the Orders in both proceedings.

2 The Owner was wholly successful in both proceedings. In the Owner's Claim, which had been made under the *Home Building* Act 1989 NSW, the Builder was ordered to pay the Owner $180,144 as damages for the Builder's breach of the **Work Agreement**, as found in the Reasons for Decision dated 10 August 2021. The Builder's Claim was dismissed.

3 There is relevant procedural history leading to the Owner's Claim in File No HB 2033320, which is set out in [11] – [33] of the Reasons for Decision dated 10 August 2021. The Owner's Claim was, in fact, prosecuted in proceedings which had been remitted to the Tribunal's Consumer and Commercial Division by the Appeal Panel under orders made in the **Appeal Decision** of 6 May 2020. The **Appeal Proceedings** had been brought by the Builder as appellant and were constituted as **File No AP 19/49553**.

4 Leave was granted to the parties to make any applications for costs after they had received the Reasons for Decision dated 10 August 2021. Orders and Directions (see Orders 3, 4 and 5) were made facilitating an opportunity for written submissions by a costs applicant and written submissions in reply.

5 Further, in the Appeal Decision at [83] – [88], the Appeal Panel described the basis for its order as to costs in the Appeal Proceedings; i.e. costs on the

ordinary basis, as agreed or as assessed. Relevantly, Order 4 of the Appeal Decision dated 6 May 2020 stated:

> (The) costs of the appeal, as to who is to pay the costs, of the appeal to abide the outcome of the further primary hearing but to be on the ordinary basis as agreed or assessed.

6 The Tribunal has now received written submissions on costs dated 6 September 2021 from the Owner's legal representatives (**Costs Submission**), seeking an order for costs against the Builder, including costs on the indemnity basis, in File Nos HB 20/33320 and HB 20/40203, and an order for costs against the Builder on the ordinary basis in File No AP 19/49553.

7 In his case for indemnity costs, the Owners relies upon offers of compromise made in correspondence of the Owner's legal representatives to the Builder's legal representatives dated 1 July 2020 and 9 December 2020, respectively, and each marked 'Without Prejudice Save as to Costs' (**Calderbank Offers**).

8 In the Reasons for Decision dated 10 August 2021 at [129], I encouraged the parties and their legal representatives to liaise co-operatively with a view to agreeing upon the appropriate costs orders in File Nos HB 20/33320, HB 20/40203 and AP 19/49553. In this regard, the Owner's legal representatives sent email correspondence to the Builder's legal representatives on 27 August 2021 with proposed costs orders in light of my Reasons for Decision dated 10 August 2021. Apparently, the Builder and/or its legal representatives did not respond to the email correspondence: see Costs Submission at [10].

9 In any case, the time has now passed for compliance with Order 4 made in the Reasons for Decision dated 10 August 2021; being a direction which afforded the Builder with an opportunity to file and serve submission in reply to the Costs Submission. The Tribunal has received no written submissions on costs for or on behalf of the Builder.

Should an order be made dispensing with the hearing of the costs application?

10 Order 5 of the Orders accompanying the Reasons for Decision dated 10 August 2021 asked for the parties' submissions to address whether the Tribunal should dispense with a formal hearing on the question of costs. The Owner agreed that the Tribunal should dispense with a formal hearing: Costs Submission at [31] – [32]. As indicated, no submissions were received at all from the Builder in answer to the Owner's Costs Submission.

11 I am satisfied that the issues for determination in the Owner's application for costs in the three proceedings, including the Appeal Proceedings, can be adequately determined in the absence of the parties by considering the relevant legal principles as to costs in the light of the outcome of the proceedings in File Nos HB 20/33320 and HB 20/40203 and their procedural history in light of the Appeal Proceedings, the Renewal Proceedings and the Original Proceedings, the Appeal Decision dated 6 May 2020, the Reasons for Decision dated 10 August 2021, the Owner's Costs Submission dated 6 September 2021, and the Calderbank Offers attached to the Costs Submission.

12 I am further satisfied that the parties have been afforded procedural fairness in the Tribunal's consideration and determination of the Owner's costs application in the three proceedings.

13 I find that making an order under s 50(2) of the *Civil and Administrative Tribunal* Act 2013 NSW (**NCAT Act**) would avoid the parties being put to the unnecessary expense of an oral hearing on the question of costs.

14 Accordingly, I find that this is an appropriate case to exercise the Tribunal's discretion under s 50(2) of the NCAT Act to dispense with a formal hearing requiring the parties to be present and to proceed to determine the Owner's application for costs in the three proceedings 'on the papers'.

15 This **Costs Decision** should be read in conjunction with the Appeal Decision dated 6 May 2020 and the Reasons for Decision dated 10 August 2021.

What are the relevant costs principles governing the Owner's application for costs in the three proceedings?

16 For the purposes of the Costs Decision, the starting point is that parties to proceedings in the Tribunal are to pay their own costs: see s 60(1) of the NCAT Act. Subsection 60(2) provides costs are awarded only if the Tribunal is satisfied that there are: *"special circumstances warranting an award of costs"*. Subsections 60(3)(a) – (g) of the NCAT Act then set out various matters which the Tribunal may have regard to in determining whether there are special circumstances warranting an award of costs.

17 Rule 38 of the *Civil and Administrative Tribunal* Rules 2014 (NSW) (**NCAT Rules**) relates to costs in this Division of the Tribunal, the Consumer and Commercial Division. As s 60 is found in Part 4 of the NCAT Act, it is affected by s 35 of the Act which says that each of the provisions of Part 4 is subject to enabling legislation and the procedural rules. "Procedural rules" are defined in s 4(1) to include the NCAT Rules. In this way, r 38(2) says that despite s 60 of the NCAT Act, the Tribunal may award costs in the absence of special circumstances warranting such an award if the amount claimed is more than $10,000.00 but not more than $30,000.00 and the Tribunal has made an order under cl 10(2) of Sch4 of the NCAT Act in relation to the proceedings, or the amount claimed or in dispute in the proceedings is more than $30,000.00.

18 Rule 38A of the NCAT Rules provides that proceedings before the Tribunal's Appeal Panel are subject to the same costs rules which apply at first instance, such that if r 38 applied to the first instance proceedings on appeal, then r 38(2) is engaged in the proceedings on appeal in the same way it was engaged in the proceedings at first instance.

19 In this way, the usual position under s 60 of the NCAT Act is modified by r 38 and r 38A of the NCAT Rules and the Tribunal may award costs without 'special circumstances'.

20 The discretion to award costs is broad and unfettered, save that it must be exercised on a principled and judicial basis, avoiding arbitrariness and serving

the need for consistency: see, for example, *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 at [24], and also *"according to rules of reason and justice, not according to private opinion … or even benevolence … or sympathy"*: *Williams v Lewer* [1974] 2 NSWLR 91 at [95]. The Tribunal's power is "unfettered" in the manner described in *Wright v Foresight Constructions Pty Ltd* [2011] NSWCA 327 at [36]:

> A power conferred in these terms is "unfettered" in the sense that the Tribunal may make such order as it thinks appropriate, so long as it acts in accordance with the subject matter, scope and purpose of the power. In relation to the award of costs in litigation, the accepted purpose is where costs are awarded in favour of one party, to compensate that party for the expense incurred in respect of the litigation.

21 The usual principles in determining costs are that a successful party should be awarded costs in its favour (i.e. that costs 'follow the event') and that the purpose of a costs order is to compensate or indemnify a successful party against the expenses to which it has been put: see *Latoudis v Casey* (1990) 170 CLR 534. The High Court has stated that an award of costs is made, not for the benefit of a losing party, but for the successful party: *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72. In that case, McHugh J (in dissent but with the tacit agreement on this issue with other members of the Court) said at [67]:

> The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended by, the unsuccessful party the successful party would not have incurred the expenses which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

22 The Tribunal may determine by whom and to what extent costs are to be paid, and may order costs on either the ordinary basis or an indemnity basis: s 60(4) of the NCAT Act. Absent special order, a costs order implicitly contemplates costs assessed on the ordinary basis. On the ordinary basis, a party is entitled to recover a fair and reasonable amount for the legal costs and disbursements that were reasonably incurred in the conduct of the

proceedings. Costs on the indemnity basis means that all costs are allowed other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount.

23 As stated above, in the exercise of the Tribunal's discretion as to costs, the usual position is that costs follow the event. Statements by the Tribunal's Appeal Panel of the general principles to be applied are found in cases like *Thompson v Chapman* [2016] NSWCATAP 6 at [69] – [72] and *Rekrut and Scott v Champion Home Sales Pty Ltd* [2018] NSWCATAP 97 at [20] – [23]. However, notwithstanding whether r 38 and r 38A of the NCAT Rules apply in any proceedings, the Tribunal retains the discretion as to whether or not it will award costs even in circumstances where costs ordinarily follow the event: see *Nguyen v Perpetual Trustee Co Ltd; Perpetual Trustee Co Ltd v Nguyen* [2015] NSWCATAP 264 where the Tribunal's Appeal Panel stated at [95]:

> While the discretion to award costs under Rule 38 is unfettered, in our view costs should generally 'follow the event' recognising however that factors may exist that militate against the successful party recovering all of its costs: Oshlack v Richmond River Council [1998] HCA 11; 193 CLR 72 at [134]. Fairness dictates that the unsuccessful party typically bears the liability for costs unless it is demonstrated that some other order is appropriate…

24 Further, the Tribunal's discretion to award indemnity costs is exercised in limited circumstances and it must be the subject of careful reasoning: see *Mendonca v Tonna* [2017] NSWCATAP 176 at [59] – [60], [62] – [64] and the cases cited therein by the Appeal Panel.

25 A basis on which an order for indemnity costs may be made is where during the course of proceedings an offer of compromise is made which was no worse than the result ultimately achieved by the party against whom the indemnity costs order is sought: *Maitland Hospital v Fisher [No 2]* (1992) 27 NSWLR 721; *Multicon Engineering Pty Limited v Federal Airports Corporation* (1996) 138 ALR 425; *Hadid v Australis Media Ltd* [1999] NSWSC 32.

26 An offer of compromise may be in the form of a 'Calderbank' letter; i.e. correspondence marked, in accordance with the principles in *Calderbank v Calderbank* [1975] 3 All ER 333, as 'Without prejudice save as to costs'. The

general function of a Calderbank letter is to promote settlement of disputes, in addition to its more particular application in claims for indemnity costs: *Rickard Constructions v Rickard Hails Moretti* [2005] NSWSC 481, [12].

27 Furthermore, the making of an offer in a Calderbank letter does not automatically result in a favourable costs order, even if the ultimate judgement of the Tribunal is more favourable to the party making the offer than the terms of the offer. The party relying upon a Calderbank letter still carries the onus of satisfying the Tribunal that it should exercise the discretion as to costs in that party's favour: *Jones v Bradley (No 2)* [2003] NSWCA 258, [5]; *Old v McInnes and Hodgkinson* [2011] NSWCA 410, [22].

28 Moreover, in determining whether to make an indemnity costs order where a party relies upon a Calderbank letter, the Tribunal is to have regard to the relevant principles identified in *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323, *Miwa Siantan Properties Pty Ltd (No 2)* [2011] NSWCA 344, and *Nu Line Construction Group Pty Ltd v Fowler* [2012] NSWSC 816. Such principles are:

(i) There must be a real and genuine element of compromise;

(ii) The refusal must be unreasonable;

(iii) The reasonableness in rejecting an offer must be considered at the time the offer is made, not with the benefit of hindsight;

(iv) Relevant factors in relation to whether the rejection was reasonable include the stage of the proceedings at which the offer was received, the time allowed to consider the offer, the extent of compromise offered, the offeree's prospects of success (assessed at the date of the offer), the clarity with which the terms of the offer were

expressed and whether the offer foreshadowed an application for indemnity costs in the event of rejection.

Consideration

29 In File Nos HB 20/33320 and HB 20/40203, the amount in issue clearly exceeded $30,000.00. I am satisfied that r 38(2) of the NCAT Rules applies in those proceedings.

30 By reason of r 38A of the NCAT Rules, r 38(2) also applied in the Appeal Proceedings, as elucidated upon in the Appeal Decision at [82] – [88].

31 It is, therefore, not necessary for special circumstances to exist for the Tribunal to exercise its discretion to order costs in the three proceedings.

32 I determine that there are no factors in the proceedings which would warrant a departure from, or militate against, the usual principle that costs follow the event. Indeed, the Appeal Panel ordered costs on the ordinary basis as agreed or assessed, while leaving open who should pay the costs, pending the outcome of the "further primary hearing"; i.e. the outcome of the Owner's Claim in File No HB 20/33320.

33 The Owner was wholly successful in File No HB 20/33320 as well as in File No HB 20/40203 (the Builder's cross application lodged on 21 September 2020), all as stated in the Reasons for Decision dated 10 August 2021.

34 I am satisfied that the parties and/or their legal representatives did not engage in disentitling conduct as would prevent the Tribunal, in the exercise of its discretion, from making any orders for costs in the Owner's favour in the proceedings constituted by File Nos HB 20/33320 and HB 20/40203. The Owner complied with the Tribunal's directions as to the provision of his written evidence. He did not conduct the proceedings in a manner which unnecessarily disadvantaged the Builder. He did not unreasonably prolong or delay the proceedings.

35 I find that the Owner is entitled to an order for costs in each of the three proceeding on the ordinary basis. In the Appeal Proceedings (File No AP 19/49533) costs on the ordinary basis is mandated (see Appeal Decision, order 4) and the Owner is entitled to the costs order because the Owner was successful in the "primary" proceedings constituted by File No HB 20/33320.

36 The further consideration in the proceedings constituted by File Nos HB 20/33320 and HB 20/40203, is whether costs on the indemnity basis in those two proceedings should be ordered having regard to the Owner's Calderbank Offers in his solicitors' correspondence dated, respectively, 1 July 2020 (**First Calderbank Offer**) and 9 December 2020 (**Second Calderbank Offer**).

37 Both of the Calderbank Offers made to the Builder offered it full and final settlement of all claims and liabilities bearing on the disputes between the Owner and the Builder, including costs, on the basis of a payment without admissions of liability by the Builder to the Owner of $110,000 (**Settlement Sum**) and mutual releases. While it is the case that the First Calderbank Offer was made to the Builder well in advance of the hearing (which commenced on 14 December 2020 and was completed on 20 May 2021), it is also true that the nature and extent of the matters in dispute between the Owner and the Builder following the Appeal Panel handing down the Appeal Decision on 6 May 2020 had not, at that time, been fully articulated in evidence, pleadings and submissions. The First Calderbank Offer was also made prior to the Builder's cross application, which was lodged with the Tribunal on 21 September 2020. Indeed in its response to the First Calderbank Offer, the Builder's legal representative (see email correspondence sent on 30 July 2021) referred to her client's quantum meruit claim, which, in fact, became the subject of the Builder's claim in File No HB 20/40203.

38 I am not satisfied in the circumstances, that it was unreasonable for the Builder to reject the First Calderbank Offer.

39 However, I find that the respective positions of the Owner and the Builder, including the material evidence and the pertinent facts matters and

circumstances, were at the time of the Second Calderbank Offer well understood by the Builder. The Second Calderbank Offer was made in the week prior to the first day of the hearing in File Nos HB 20/33320 and HB 20/40203, when the Builder had the benefit of all of the filed pleadings, evidence and submissions.

40 I am satisfied that the Builder knew, or at least ought to have known, at the time of the Second Calderbank Offer that there were significant difficulties for it in establishing its case based upon quantum meruit principles in File No HB 20/40203 and also in resisting the Owner's Claim for damages based upon a breach of the Work Agreement.

41 It is fair to say that the Second Calderbank Offer was a genuine attempt on the part of the Owner to settle the proceedings in order to avoid significant legal costs and disbursements associated with preparing for, and conducting, proceedings which had been specially fixed for hearing in the Tribunal and in fact required two full hearing days. I do not think that the Owner's Second Calderbank Offer can be stigmatised as being derisory, in the sense of requiring capitulation by the party to whom it was addressed. This is because the Settlement Sum offered was inclusive of costs and also amounted to forbearance by the Owner on approximately 40% of his damages claim for the Builder's breach of the Work Agreement.

42 The Second Calderbank Offer was open for acceptance until the morning of the first day of the hearing (i.e. on 14 December 2020). I find that such time was a reasonable period for acceptance. I am further satisfied that the terms of the Second Calderbank Offer were clear and that such Offer foreshadowed by its reference to the principles of *Calderbank v Calderbank* [1975] 2 All ER 333, that there would be an application for indemnity costs in the event of the Builder's rejection of the Second Calderbank Offer. The power to make an indemnity costs order is an important management tool, because it promotes the making of settlement offers and discourages the litigation of cases where there are no reasonable prospects of success: *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at [111]. This is important in the Tribunal in the

context of the statutory duty incumbent on parties and their lawyers to co-operate with the Tribunal in giving effect to its guiding principle of the just, quick and cheap resolution of the real issues in the proceedings: NCAT Act, s 36(3).

43 In the circumstances, I am satisfied that the Builder's refusal to accept the Second Calderbank Offer on or before 9:00 am on Monday 14 December 2020 was unreasonable. Therefore, I find that the Owner's costs in the proceedings constituted by File Nos HB 20/33320 and HB 20/40203 following the Second Calderbank Offer made on 9 December 2020 should be on the indemnity basis.

Orders

44 For the foregoing reasons, the orders of the Tribunal are:

(1) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW), in respect of the application by John Tanios for his costs of the proceedings constituted by File Nos. HB 20/33320, HB 20/40203 and AP 19/49553, the Tribunal dispenses with a hearing requiring the parties to be present and proceeds to determine the costs application on the basis of the papers lodged with the Tribunal in accordance with orders 3, 4 and 5 of the Tribunal made on 10 August 2021;

(2) In the proceedings constituted by file nos HB 20/33320 and HB 20/40203, Baserite Constructions Pty Ltd is to pay the costs of John Tanios on the ordinary basis up to and including 8 December 2020 and thereafter on the indemnity basis as agreed or as assessed in accordance with the applicable costs assessment legislation;

(3) In the proceedings constituted by file no AP 19/49553, Baserite Constructions Pty Ltd is to pay the costs of John Tanios on the ordinary basis as agreed or as assessed in accordance with the applicable costs assessment legislation.

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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