Civil and Administrative Tribunal
New South Wales

Case Name:	Kursun v Gareffa (No 2)
Medium Neutral Citation:	[2017] NSWCAT
Hearing Date(s):	On the papers
Date of Orders:	4 April 2017
Date of Decision:	4 April 2017
Jurisdiction:	Consumer and Commercial Division
Before:	D G Charles, Senior Member
Decision:	No order as to costs with the intent that each party is to bear their own costs of and incidental to the proceedings.
Catchwords:	COSTS – application of discretion - Rule 38 of NCAT Rules s 60 of NCAT Act – each party partially successful – effect of respondent's Calderbank letters – whether assessment of costs should be ordered.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014
Cases Cited:	Ruddock v Vardalis (No 2) (2001)115 FCR 229 Calderbank v Calderbank [1975] 3 All ER 333 Seller v Jones [2014] NSWCA 19 Rickard Constructions v Rickard Hails Moretti [2005] NSWSC 481 Elite Protective Personnel v Salmon [2007] NSWCA 322 Jones v Bradley (No 2) [2003] NSWCA 258 Old v McInnes and Hodgkinson [2011] NSWCA 410
Category:	Principal judgment
Parties:	Vincenza Kursun (applicant) Paul Gareffa (respondent)
Representation:	Counsel: Timothy Bland (applicant) Nicholas Allan (respondent)

File Number(s): HB 15/35331

Publication Restriction: Unrestricted

JUDGMENT

1 On 17 January 2017 my Orders and Reasons in the proceedings constituted by File No HB 15/35331 were published. I ordered that the respondent builder pay the applicant home owner the sum of $10,781.38 and then made other orders and directions in respect of any submissions as to the costs of the proceedings.

2 The parties have now exercised their liberty (under orders 2 and 3) to apply for their costs of and incidental to the proceedings.

3 Both parties provided written submissions in support of their applications for costs pursuant to directions 4 and 5 made on 17 January 2017. The parties confirmed that they consent to the Tribunal determining their applications for costs without an oral hearing; i.e. on the basis of the papers lodged with the Tribunal.

4 The starting point is that parties to proceedings in the Tribunal are to pay their own costs: see s 60 of the Civil and Administrative Tribunal Act (NSW) 2013 (the NCAT Act). Section 60(2) provides costs are awarded only if the Tribunal is satisfied that there are 'special circumstances warranting an award of costs'.

5 However, s 60 is subject to other provisions of the NCAT Act. This includes the Civil and Administrative Tribunal Rules (NSW) 2014 made pursuant to the NCAT Act. Relevantly, Rule 38 states:

> "(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:

> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10 (2) of Schedule 4 to the Act in relation to the proceedings, or
> (b) the amount claimed or in dispute in the proceedings is more than $30,000".

6 The proceedings were heard in the Consumer and Commercial Division of the Tribunal, so that Rule 38 applies. This means that I have the discretion to award costs in these proceedings irrespective of whether or not there are 'special circumstances' because the amount ($37,713.00) claimed by the applicant was more than $30,000.00.

7 The discretion to award costs is broad and unfettered, save that it must be exercised judicially: see, for example, Ruddock v Vardalis (No 2) (2001)115 FCR 229. The usual principle in determining costs is that a successful party should be awarded costs in its favour (i.e. that costs 'follow the event'). I am not convinced that the applicant's failure to obtain an award for rectification costs which exceeds $30,000.00 is sufficient for me to depart from the usual principle that costs follow the event. The purpose of the costs' order is not to punish the other party but rather to compensate the successful party. I am satisfied that the applicant brought a claim in good faith exceeding $30,000.00.

8 As well as the formal hearing before me on 8 and 9 November 2016, there was a preliminary application heard on 13 October 2015. The preliminary application (i.e. for the respondent to be removed as a party to the proceedings on the basis that there was no viable claim to be made against the respondent by the applicant) was refused by another member of the Tribunal.

9 Furthermore, the applicant was successful on most issues during the formal hearing. As set out in the Reasons published on 17 January 2017, there were findings that the respondent was a party to a building contract with the applicant for residential building work at the applicant's Woodcroft NSW dwelling; that the residential building work carried out during the period from in or about March 2015 to in or about July 2015 was defective and incomplete; that the respondent had breached the said building contract and the statutory

warranties in the Home Building Act 1989 (the "HB Act"); and that the applicant had suffered loss and damage in consequence of breaches of the said building contract and the statutory warranties in the HB Act. While her damages were assessed at $10,781.38 being a lesser amount than that claimed by her in the application, this was because, as stated in the Reasons published on 17 January 2017, I preferred the independent expert evidence of Mr Bournelis as the basis of assessment of the home owner's damages.

10 The applicant submits that the respondent should pay the costs of the proceedings and that those costs should be assessed on the indemnity basis, not to punish the respondent but rather to put the applicant in the position she would have been in had the applicant not been 'forced' into the proceedings: see paragraph 8 of the applicant's submissions on costs dated 14 February 2017.

11 The applicant further submits that an order for costs on the indemnity basis is warranted because after the Tribunal's refusal to entertain the preliminary application on 13 October 2015 the respondent thereafter chose to run a case (i.e. that the respondent was not a party to the building contract) which was 'fatally flawed', had no real prospects of success, and constituted a 'relevant delinquency': Seller v Jones [2014] NSWCA 19, [58].

12 Nevertheless, the applicant's overall success in the proceedings must be put in the context of a series of correspondence from the respondent's solicitors to the applicant's solicitors making offers of settlement in the two months preceding the formal hearing. This correspondence was marked, in accordance with the principles in Calderbank v Calderbank [1975] 3 All ER 333, as 'WITHOUT PREJUDICE SAVE AS TO COSTS'.

13 On 26 September 2016 the respondent sent the applicant a letter (the "first Calderbank letter") offering to settle the applicant's claim on the basis that he pay her $13,000.00 and that each party pay her or his own costs.

14 The applicant did not accept the offer contained in the first Calderbank letter.

15 On 31 October 2016 the respondent sent a further letter (the "second Calderbank letter"), noting that the offer in the first Calderbank letter had lapsed, but now offering to pay the applicant $30,000.00 'in full and final settlement of (the applicant's) claim'. The respondent's offer in the second Calderbank letter remained open for acceptance until close of business on 7 November 2016.

16 The applicant did not accept the offer contained in the second Calderbank letter.

17 Four (4) days before the commencement of the hearing (i.e. on 4 November 2016), the respondent sent the applicant a third letter (the "third Calderbank letter") rejecting an Offer of Compromise made by the applicant, but now offering to pay the applicant $30,100.00.00 'in full and final settlement of (the applicant's) claim.' This offer was described as a 'final offer' and expressed to remain open for acceptance up to and including close of business on 7 November 2016.

18 The applicant did not accept the offer contained in the third Calderbank letter.

19 During the hearing I recommended that the parties continue their attempts to settle the proceedings. This recommendation prompted a further offer from the respondent on 8 November 2016 (i.e. the evening of the first day of the hearing). Even though the offer contained in the third Calderbank letter had lapsed the previous evening, the respondent confirmed that the offer remained open for acceptance before the hearing resumed on 9 November 2016 (the "fourth Calderbank letter").

20 The applicant did not accept the offer contained in the fourth Calderbank letter. The hearing resumed on 9 November 2016, the evidence was completed and the parties sought for me to determine all issues in dispute between them.

21 The respondent seeks an order that the applicant pay his costs of the proceedings, as are agreed or otherwise assessed on the ordinary basis: see

paragraphs 1 and 8 of the respondent's submissions on costs dated 14 February 2017

22 I do not think it can be said that had the applicant accepted the offer contained in the first Calderbank letter, she would necessarily have been better off than by pressing her application to decision by the Tribunal. The offer contained in the first Calderbank letter ($13,000.00) was inclusive of costs. That is not a basis for me to disregard the offer when considering the respondent's application for costs: Elite Protective Personnel v Salmon [2007] NSWCA 322, [6]. Nevertheless, when one takes into consideration the legal costs which the applicant had already incurred in the proceedings, including the costs of and incidental to the preliminary application and the costs of and incidental to preparation of the lay and expert evidence, I cannot be satisfied that the applicant would have been better off accepting the amount offered in the first Calderbank letter.

23 I find that it was not unreasonable for the applicant to decline acceptance of the offer contained in the first Calderbank letter.

24 The respondent further submits that it was unreasonable for the applicant to have rejected the offers contained in the second, third and fourth Calderbank letters because the offers ($30,000.00, $30,100.00 and $30,100.00, respectively) go well beyond the figures of the respondent's own expert and are in fact much closer to the figures of the applicant's expert. It is put on behalf of the respondent that an order for costs in his favour is not to reward him but to recognise that he wanted to settle the case and avoid legal costs, and to compensate him because he could not, in the end, avoid those costs: see paragraph 10 of the respondent's submissions on costs dated 14 February 2017.

25 Allowing for the applicant's costs (to be assessed on the ordinary basis) which had been incurred to 31 October 2016 and also given the risk that the expert evidence of the other party might be preferred by the Tribunal, I accept the respondent's submission that it was unreasonable for the applicant to have

rejected the offers contained in the second, third and fourth Calderbank letters.

26 I do not accept the applicant's submission that the Calderbank letters: *"are not proper offers capable of being understood"*: see paragraph 1 of the applicant's submissions dated 23 February 2017. The Calderbank letters (including the first letter) refer to the differences in the figures for rectification costs arrived at by the applicant's expert, Mr Dietrich ($37,712.85), on the one hand, and by the respondent's expert, Mr Bournelis ($7,841.00), on the other hand. The letters reason that Mr Dietrich's figure was too high and that the applicant could not be confident about it.

27 The general function of a Calderbank letter is to promote settlement of disputes, in addition to its more particular application (albeit not pressed by the respondent on this application) in claims for indemnity costs: Rickard Constructions v Rickard Hails Moretti [2005] NSWSC 481, [12].

28 The Tribunal encourages the settlement of matters for reasons both of public policy and private interest. The Tribunal's guiding principle is the just quick and cheap resolution of the real issues in the proceedings: see s 36 (1) of the NCAT Act. I consider that the second, third and fourth Calderbank letters, were provided to the applicant in the context of the parties' statutory obligations to co-operate with each other and with the Tribunal (s 36(3)) in giving effect to the Tribunal's guiding principle. This is particularly so in respect of the offer contained in the fourth Calderbank letter, as that letter was sent by the respondent's lawyers at the end of the first day of the formal hearing when, consistent with my obligation (s 37) to promote alternative dispute resolution processes, I had urged the parties to make further attempts to resolve their disputes before they incurred the costs of a second day of the hearing. I recognise that the offers of $30,000.00, $30,100.00 and $30,100.00, respectively, were 'without prejudice' concessions as regards the respondent's liability to the applicant and also that the offers made a sensible attempt to resolve a disputed quantum issue.

29 I am therefore satisfied that the second, third and fourth Calderbank letters have the effect of disentitling the applicant to her costs of the proceedings from 1 November 2016 as she persisted in the litigation to a smaller result.

30 As I have found that the applicant's decision to decline the offers contained in the second, third and fourth Calderbank letters was not reasonable, I must also determine whether an order for costs against the applicant is warranted in the circumstances and if so on what terms. The respondent seeks an order that the applicant pay his costs of the proceedings, as are agreed or otherwise assessed on the ordinary basis. For the reasons referred to, I do not agree that the respondent should have an order in those terms. This is because I think that the applicant is otherwise entitled to her costs of and incidental to the proceedings up to and including 31 October 2016, and (in the absence of agreement) such costs to be assessed on the ordinary basis.

31 There is no doubt that the making of an offer in a Calderbank letter ("Calderbank offer") does not automatically result in a favourable costs order. This is the case notwithstanding that the ultimate judgement of the Tribunal is more favourable to the party making the offer than the terms of the offer. The party making a Calderbank offer still carries the onus of satisfying the Tribunal that it should exercise the costs' discretion in that party's favour : Jones v Bradley (No 2) [2003] NSWCA 258, [5]; Old v McInnes and Hodgkinson [2011] NSWCA 410, [22].

32 The concessions on liability in the respondent's Calderbank offers were 'without prejudice save as to costs'. It was therefore open to the respondent to press his arguments at the formal hearing as regards liability; i.e. as to the identity of the contracting party and as to responsibility for the variation to the scope of works on 20 March 2015. I am satisfied that the respondent's arguments in respect of his liability to the applicant raised plausible contentions requiring consideration and the weighing of evidence at a formal hearing on all issues in dispute. It cannot be said that there was no tenable basis for the respondent's claims denying liability or that they were otherwise misconceived or lacking in substance. In the preliminary application the presiding member deferred to the final hearing questions of particular

responsibility for the work: see Reasons of Member C Marzilli, 16 October 2015, at paragraphs (i) and (j). In my Reasons for Decision published on 17 January 2017 I remarked on the extensive evidence and arguments (at [32]). At the formal hearing, I was required to weigh evidence on liability (at [42] – [53]) and this was not a straightforward matter.

33 While it was reasonable for the respondent to press the liability issues at the formal hearing it would also be unfair to order that the respondent should have all of his costs assessed on the ordinary basis since 1 November 2016 in circumstances where the applicant was successful on the issues in dispute other than quantum. During the hearing the evidence (including cross examination) of Mr Bournelis and Mr Dietrich and the parties' submissions regarding the quantum issue occupied about 50% of the Tribunal's time. In my opinion, any determination of costs in favour of the respondent should be referrable to that consideration.

34 The respondent submits that the costs' result in this case should be fair and non-technical. I agree. The effect of my reasons as set out above is that the applicant is entitled to her costs on the ordinary basis up to 31 October 2016, that the respondent is entitled to 50% of his costs on the ordinary basis from 1 November 2016, and that otherwise both parties bear their own costs of and incidental to the proceedings. This would involve an offsetting of competing entitlements: one the one hand, the applicant's costs of the preliminary application (a two hour hearing) and the costs of and incidental to preparation for hearing (including the preparation of lay and expert evidence) up to 31 October 2016; and on the other hand, 50% of the respondent's costs since 1 November 2016 of preparing for a two day hearing, conducting a two day hearing and thereafter providing written submissions to the Tribunal as regards relevant findings of fact and law and as to costs.

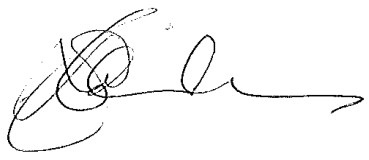
35 It may well be that the parties are able to agree that the amount of one party's costs' entitlement is about equal to the amount of the other party's costs' entitlement. In my opinion, a balancing out of the entitlements is a not inconceivable outcome following assessments by a costs' assessor. It would also be a fair outcome, taking into account that each party had partial success

in the proceedings. Of course, in the absence of agreement, there would have to be assessments done by a costs' assessor. This would mean further delay and additional expense to the parties.

36 All matters considered I think that this is an appropriate case for the Tribunal to exercise its discretion (s 60(4) NCAT Act) to determine the costs of the parties without ordering assessment(s) under the applicable costs' assessment legislation. The practice and procedure of the Tribunal is to be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings: see section 36(4) of the NCAT Act. I determine that it would be disproportionate and contrary to the Tribunal's guiding principle to add delay and further expense to what has already occurred by ordering the costs' entitlements of the parties as found by me in these Reasons to be the subject of a further assessment process under the applicable costs' assessment legislation.

37 I find that the amounts of the costs' entitlements of the parties are equal to each other with the effect that there is no order as to costs; i.e. each party is to bear his or her own costs of and incidental to the proceedings.

38 Order made accordingly.



D G Charles
Senior Member
Civil and Administrative Tribunal of New South Wales

4 April 2017

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