Civil and Administrative Tribunal
New South Wales

Case Name:	Kako v Home Design & Construction (NSW) Pty Ltd
Medium Neutral Citation:	[NSW] NSWCATCD
Hearing Date(s):	On the papers.
Date of Orders:	31 October 2023
Date of Decision:	31 October 2023
Jurisdiction:	Consumer and Commercial Division
Before:	L. Wilson, Senior Member
Decision:	1. The Tribunal makes an order dispensing with a hearing on the question of costs. 2. Nader Kako pay Home Design & Construction (NSW) Pty Ltd's costs of HB22/37293 on the ordinary basis, as agreed or assessed.
Catchwords:	Home building – Costs – Usual order for costs Home building – Calderbank offer – Indemnity costs
Legislation Cited:	Civil and Administrative Tribunal Rules 2014, r.38
Category:	Costs
Parties:	Nader Kako (applicant) Home Design & Construction (NSW) Pty Ltd (respondent)
Representation:	Counsel: N. Li (applicant) Solicitors: Memcorp Lawyers Pty Ltd (applicant) Birch Partners Lawyers (respondent)
File Number(s):	HB22/37293
Publication Restriction:	Nil

REASONS FOR DECISION

1 On 7 September 2023 the Tribunal made the following orders in the substantive proceedings which was a home building application brought by a homeowner (applicant) against a builder (respondent):

> 1. The case is dismissed.
>
> 2. The applicant is to pay the costs of the respondent in these proceedings, namely HB22/37923, such costs to be agreed or assessed on an ordinary basis.
>
> 3. The respondent's name is amended to Home Design & Construction (NSW) Pty Ltd.
>
> 4. If either party seeks a different costs order to that in Order 2, the following directions apply:
>
> (a) The party must file and serve any cost application, including submissions and any evidence in support, by 22 September 2023.
>
> (b) The other party (opposing the costs application) is to file and serve any submissions and evidence in reply by 6 October 2023.
>
> (c) Any submissions are to include submissions on the issue of whether an order should be made pursuant to s 50(2) of the Civil and Administrative Tribunal Act, dispensing with a hearing of the costs application.
>
> 5. In the event an application is made pursuant to Order 4, Order 2 shall cease to have effect.

2 Pursuant to Order 4(a) the homeowner made a cost application which sought an order that each party pay their own costs. Consequently Order 2 ceased to have effect.

3 At 5:38pm on 5 October 2023 the builder, through its solicitor, sought an extension to Order 4(b) of one week. That was opposed by the homeowner. The Tribunal nevertheless extended the date for compliance with Order 4(b) to 16 October 2023.

4 On about 16 October 2023 the builder provided what were expected to be its submissions and evidence opposing the cost application of the homeowner, but were in fact a cost application for an order different to that proposed by the

Tribunal in the Orders of 7 September 2023. As a result the Tribunal issued these directions to the parties:

> Orders:
>
> 1. The builder has until 5pm on 20 Oct 2023 to confirm if it is seeking an order different to Order 2 made on 7 September 2023 and if it is, to provide written submissions by that same date setting out:
>
> (a) why it did not make an application by 22 Sept 2023 pursuant to Order 4(a) nor seek an extension of time to do so;
>
> (b) why, having not made a cost application until 18 Oct despite being ordered to do so by 22 Sept, it should be entitled to seek a cost order different to that proposed in Order 2;
>
> (c) an application for a further extension of time to rely on submissions in reply to the homeowner's cost application which were to be filed by 16 October 2023 which were filed on 18 October 2023.
>
> (d) if the different cost order is pressed (indemnity costs from 1 May) why the costs of the cost application should not be considered separately to the costs of the substantive proceedings.
>
> 2. If the builder presses its cost application (indemnity costs from 1 May) the homeowner may, by 5pm on 25 Oct 2023, provide further written submissions addressing the issues raised above and the builder's cost application. It is noted the homeowner did not, as directed, express his attitude to the question of costs being determined on the papers and should do so if it provides further submissions.
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> Reasons:
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> On 7 September 2023 the Tribunal made orders including:
>
> "2. The applicant is to pay the costs of the respondent in these proceedings, namely HB22/37923, such costs to be agreed or assessed on an ordinary basis.
>
> …
>
> 4. If either party seeks a different costs order to that in Order 2, the following directions apply:
>
> (a) The party must file and serve any cost application, including submissions and any evidence in support, by 22 September 2023.
>
> (b) The other party (opposing the costs application) is to file and serve any submissions and evidence in reply by 6 October 2023.
>
> (c) Any submissions are to include submissions on the issue of whether an order should be made pursuant to s 50(2) of the Civil and Administrative Tribunal Act, dispensing with a hearing of the costs application.

5. In the event an application is made pursuant to Order 4, Order 2 shall cease to have effect."

The homeowner made a cost application on 22 September. The builder did not make a cost application.

The builder sought, and was granted, an extension of time to provide its submissions opposing the homeowner's cost application from 6 Oct to 16 Oct. Despite this the builder did not provide its cost submissions until 18 Oct and within them sought a cost order different to that which the Tribunal proposed. If the builder sought a different cost order it was to make that application by 22 Sept.

The builder's non-compliance may be causing a disadvantage to the homeowner and is not assisting the Tribunal to resolve the remaining issue of costs in a quick, just or cheap manner. The builder needs to reflect on this forthwith, and comply with the orders made above.

5 The builder provided the following response to the Tribunal the following day:

I refer to the orders made on 18 October 2023 and adopting the equivalently numbered orders, I respectfully, reply as follows:

1. The builder has until 5pm on 20 Oct 2023 to confirm if it is seeking an order different to Order 2 made on 7 September 2023 and if it is, to provide written submissions by that same date setting out:

(a) why it did not make an application by 22 Sept 2023 pursuant to Order 4(a) nor seek an extension of time to do so:

(i) The Builder is seeking an order that the Homeowner should pay the Builder's costs of the proceedings on the ordinary basis up to and including 1 May 2023 and thereafter upon the indemnity basis. In the alternative, the Tribunal may make any order the Tribunal considers appropriate.

(ii) On 23 August 2023, the Tribunal reserved its decision. On that date, I advised the Senior Member that I would be absent overseas for 5 weeks with me leaving Australia on 1 September 2023. My recollection is the Senior Member acknowledged my impending absence by saying words to the effect of, "safe travels."

(iii) During my absence and on 7 September 2023, the Tribunal published its

reserved decision, including inter alia order 4.

(iv) On 22 September 2023, the Homeowner served its written submissions re costs (seeking an order that there be no order as to costs with the intent that each party is to pay their own costs).

(v) On 4 October 2023, my employed solicitor wrote to the Homeowner's lawyer by email, advising of my absence overseas and requesting him to obtain instructions whether the Homeowner will consent to amend the timetable to require compliance with order 4(b) by 16 October 2023. On 5 October 2023, the Homeowner's lawyer responded by email advising the Homeowner would not consent and if the Builder sought to vary the Tribunal's orders, the Builder should make application to the Tribunal.

(vi) On 5 October 2023, my employed solicitor wrote to the Senior Member by email, advising my circumstances and requesting an extension until 16 October 2023. The email was sent to the Sydney registry's email address (ccdsydney@ncat.nsw.gov.au). On 9 October 2023, the same email was also sent to the Senior Member at the Penrith registry (ccdpenrith@ncat.nsw.gov.au). The Homeowner's lawyer was copied into each of the above emails.

(vii) I returned to work on 9 October 2023 but was unaware of my employed solicitor's email to the Senior Member of the same date.

(viii) On 11 October 2023 the Tribunal provided to me a copy of the Tribunal's orders amending the date for compliance with order 4(b) to 16 October 2023.

(b) why, having not made a cost application until 18 Oct despite being ordered to do so by 22 Sept, it should be entitled to seek a cost order different to that proposed in Order 2

(i) The cost application was made in the Builder's written submissions dated 11 October 2023.

(ii) The Builder's submissions were served upon the Homeowner's lawyers

by email on 11 October 2023 (5 days prior to the extended date for compliance).

(iii) The Builder's submissions were posted by express post to the Tribunal on 11 October 2023 and were received by the Tribunal on 12 October 2023 (see tracking notice attached). The submissions were not emailed to the Tribunal because I have over an extended period, received numerous notifications from the Tribunal in unrelated matters, that the Tribunal will not accept documents/submissions by email and those documents must be filed with the Tribunal in hard copy.

(iv) My office is in Hurstville and I cannot easily without 30 minutes travel each way, attend a Tribunal registry;

(v) I have the sole carriage and control of this matter on behalf of the Builder. As the Senior Member would be aware, I appeared as advocate for the Builder at the two days of hearing. I was unable on behalf of the Builder to comply with order 4(a) because I was absent overseas. The Tribunal set a timetable that I was unable to comply with.

(vi) At the time the Tribunal made its orders, it was unaware of any offers that had been made by the parties in the proceedings.

(vii) I acknowledge this was one of the purposes of the Tribunal making Order 4(a), however, the import of order 4(a) was not understood by my employed solicitor.

(viii) It is clear from the offer contained in my letter to the Builder's lawyers dated 2 May 2023, the offer should be considered by the Tribunal in determining what costs order the Tribunal should make.

(ix) The Tribunal is tasked with taking such measures as are reasonably practicable to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in proceedings and to ensure that all relevant material is disclosed to the Tribunal so as to

enable it to determine all of the relevant facts in issue in any proceedings (s. 38(5)(c) and (6)(a) CATA).

(x) The Builder submits to deny the Builder the opportunity to seek a different cost order at this stage of the proceedings would be to deny the Builder procedural fairness.

(xi) The Tribunal has granted an extension of time until 25 October 2023 for the Homeowner to make submissions in response to the Builder's application/submissions re part indemnity costs. Any prejudice that may have been suffered by the Homeowner (although the Builder submits no prejudice has been suffered) has been cured by the extension of time.

(c) an application for a further extension of time to rely on submissions in reply to the homeowner's cost application which were to be filed by 16 October 2023 which were filed on 18 October 2023

(i) I repeat my submissions at 1(b)(i)-(iii) above.

(ii) The Builder's submissions were only emailed to the Tribunal on 18 October 2023 as a result of a request from "Steve?" from the registry on that date. I am advised by my employed solicitor that Steve advised her the Tribunal had not received the Builder's submissions. It is unfair to say the submissions were filed on 18 October 2023, when they were posted to the Tribunal on 11 October 2023.

(d) if the different cost order is pressed (indemnity costs from 1 May) why the costs of the cost application should not be considered separately to the costs of the substantive proceedings

(i) I repeat my submissions at 1(a)(ii)-(viii) and (b) above.

Whether to dispense with a hearing

6 Order 4(c) directed the parties to express their attitude to the Tribunal determining the question of costs on the papers (without a further hearing).

7 In paragraph 29 of its cost application the builder's consented to "the dispensing of a formal hearing on costs and for the cost application to be determined by the Tribunal on the papers".

8 In paragraph 2 of the homeowner's reply submissions the homeowner consented to the Tribunal dealing with the issue of costs on the papers.

9 The Tribunal makes an order dispensing with a hearing on the question of costs as it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal

The parties' positions

10 The homeowner made a cost application which sought an order that each party pay their own costs.

11 The builder, not by 22 September and only in reply submissions, sought an order that the homeowner pay its costs on an ordinary basis until 1 May 2023 after which time it sought costs on an indemnity basis. The Tribunal considered this further cost application, despite the fact it was not made by 22 September as directed, because the homeowner did not oppose the Tribunal considering it and addressed the cost application in his reply submissions dated 25 October 2023.

12 Both parties conceded that Rule 38 (as opposed to s.60 of the NCAT Act) applied to this cost application.

The parties' submissions

13 The homeowner made a cost application on 22 September 2023 (HO cost application).

14 The builder made a cost application, which shall be considered, on or about 16 October 2023 (B cost application). This was accompanied by 12 pages of evidence.

15 The homeowner provided submissions in reply on 26 October which were dated 25 October 2023 (HO reply subs).

16 To the extent necessary, both parties are granted an extension of time to rely on the above three documents.

Repetition of the Tribunal's observations in the substantive proceedings

17 The Tribunal made the following observations from [107]ff in the substantive decision:

> Costs
>
> The homeowner sought a money order from the Tribunal that was more than $30,000, namely $187,000 subsequently amended to $215,000 and ultimately $144,000. Rule 38 of the NCAT Rules therefore applies.
>
> Rule 38 essentially means costs will follow the event. The event is which party was successful in the proceedings. In *Palm Lake Resort Pty Ltd v King and Metcalfe* [2021] NSWCATAP 195 the Appeal Panel explained at [86] and [87]:
>
> > The starting point for exercise of costs discretion on the usual principles is that costs follow the event. "The event" is usually the overall outcome of the proceedings – did the successful party have to go to the Tribunal (in this case) to get what it achieved, rather than being offered at least that relief. If there are distinct issues on which the party seeking relief did not succeed, that may be taken into account in the exercise of costs discretion. Appeal Panel decisions have made no order as to costs (to the intent that each party paid its or their own costs of the appeal) where there has been a measure of success on both sides: Johnson t/as One Tree Constructions v Lukeman [2017] NSWCATAP 45 at [25]-[29]; applied in Oppidan Homes PL v Yang [2017] NSWCATAP 67.
>
> > For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered. The principles are explored in Latoudis v Casey (1990) 170 CLR 534, Oshlack v Richmond River Council (1998) 193 CLR 72 and in this Tribunal in Thompson v Chapman [2016] NSWCATAP 6 and Bonita v Shen [2016] NSWCATAP 159, citing earlier consistent authority. The principles have resonance with at least some of the "special circumstances" in CATA s 63 [sic – should be 60] that are required to justify a costs order when rule 38A does not apply.
>
> The Appeal Panel referred to *Oshlack* which includes, at [67]:
>
> > The expression the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. 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 expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

In *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 the relevant principles to apply were summarised at [38] in the joint judgment of Beazley, Ipp and Basten JJA. In that passage their Honours said:

> "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 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: Waters v P C Henderson (Aust) Pty Ltd (Court of Appeal, 6 July 1994, unreported) .
>
> • 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: Sabah Yazgi v Permanent Custodians Ltd (No 2) [2007] NSWCA 306 at [24]. A similar approach is adopted on appeal.
>
> • …
>
> • 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: New South Wales v Stanley [2007] NSWCA 330 at [18] per Hislop J (with whom Beazley and Tobias JJA agreed).
>
> • 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: James v Surf Road Nominees Pty Ltd (No 2) [2005] NSWCA 296 at [34].
>
> • 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: James v Surf Road Nominees Pty Ltd (No 2), citing Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd (1993) 26 IPR 261 at 272."

> The homeowner has not been successful in this application. His claim has been dismissed. Therefore he must pay the builder's legal costs unless there are reasons not to make such an order.
>
> Order 2 will be set aside if either party makes an application for a different cost order, on or before 22 September 2023. If either party makes a cost application, the other party must, on or before 6 October 2023, provide written submissions about the cost application.
>
> Both parties must, in any cost application or cost submissions, express their attitude to the Tribunal dispensing with a hearing on costs, that is to say, determining the cost application on the papers.

Consideration of the homeowner's application

18 The basis of the homeowner's application that each party pay its own costs is that he claimed that there "has been a measure of mixed success": para 6, HO cost appln. The Tribunal does not accept the homeowner "obtained a successful vindication of his claim": para 7, HO cost appln. The homeowner's claim, which was for a money order in the amount $215,000, was dismissed.

19 The only defects which were accepted by the Tribunal were those on which the parties' experts agreed. In contested issues the homeowner was unsuccessful.

20 The Tribunal does not agree with the homeowner's categorisation of the builder's refinement of its defence as a "capitulation". The Tribunal encourages parties to focus on the real issues in dispute and to make concessions and come to agreements. The Tribunal would not order a party who refines its case to pay the other party's costs, on the basis that the party had not pressed certain aspects of its original claim.

21 It must be observed, as the builder observed in para 13(c) of its cost application, that the homeowner also did not press his claim for interest, which is the same "capitulation" the homeowner referred to in para 8 as a basis for finding neither party was successful.

22 The Tribunal does not accept the homeowner's proposition that the parties obtained mixed success in the outcome of the substantive proceedings. The homeowner had sought a money order of $215,000. The builder sought to defend the claim against it by a set-off of monies owed to it. The builder was

successful in setting off the entire money order the Tribunal awarded the homeowner. The homeowner was not successful in obtaining a work order (which he rigorously opposed) or a money order in any amount. The homeowner's claim was dismissed. There is no success in that, mixed or otherwise.

23 The Tribunal would not, given costs follow the event, order the parties to pay their own legal costs. To do so would unfairly burden the builder who achieved success in completely defending the proceedings.

Consideration of the builder's claim for indemnity costs

24 The basis of the builder's claim for indemnity costs from 2 May 2023 was a *Calderbank* offer it made the homeowner on that day.

25 The builder explained, in paragraph 17 that one of the options in the 2 May Calderbank offer "provided for the Builder to pay to the Homeowner $20,000, the Builder releasing the Homeowner from any further claims (including unpaid variations and contract sum), each party to pay their own costs and effectively for the Homeowner to have any defects (identified in the Joint Report) rectified at the Homeowner's cost."

26 The Tribunal accepts the builder's submissions in paragraph 17 that this option provided a much better outcome than the homeowner obtained from the Tribunal and the homeowner does not contest that.

27 The Tribunal accepts the builder's submission that this option "was made in accordance with the principles enunciated in *Calderbank v Calderbank* [1975] All ER 333 and was a… genuine effort and compromise by the Builder to bring both proceedings to an end": para 18, B cost appln.

28 The 2 May offer is attached to the builder's cost application.

29 The builder made these submissions in support of an indemnity cost order from 2 May 2023 (paras 24 to 27):

Indemnity costs

24. In *Re Earth Civil Australia v Bluemine (No 2)* [2021] NSWSC 1161 at [98]-[99] per Ward CJ in Eq (as her Honour then was). Her Honour set out the relevant factors to be taken into consideration when considering whether the rejection or non-acceptance of the offer was unreasonable:

> 98 The factors relevant to take into consideration when considering whether the rejection or non-acceptance of the offer was unreasonable (as summarised in Favotto at [20]-[30]) include: (i) the stage of the proceeding at which the offer was received; (ii) the time allowed to the offeree to consider the offer; (iii) the extent of the compromise offered; (iv) the offeree's prospects of success assessed as at the date of the offer; (v) the clarity with which the terms of the offer were expressed; and (vi) whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it (see Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298 at [25] per Warren CJ, Maxwell P and Harper AJA; Commissioner of State Revenue v Challenger Listed Investments Ltd (No 2) [2011] VSCA 398 at [8] per Buchanan and Tate JJA and Sifris AJA; Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2) [2011] NSWCA 344 at [12] per Basten JA (with whom McColl and Campbell JJA agreed).
>
> 99 Where a Calderbank offer is unreasonably rejected, and the offeror succeeds in litigation, costs may be made on an indemnity basis at least from the date of the offer or thereabouts. Whether such an order will be made will be determined in the exercise of the Court's discretion (see Becker v Queensland Investment Corp (No 2) [2009] ACTSC 147 at [12] per Refshauge J).

25. The Builder submits it has satisfied each of the four factors set out by Her Honour at [98] above.

26. The Builder accepts the final decision as to whether the Tribunal should make an order for indemnity costs is not mandatory but is a discretionary matter for the Tribunal after taking into account all of the relevant factors.

27. The Builder submits the Tribunal would be satisfied after considering all of the relevant factors relating to the offer made on 2 May 2023, the Builder did make a reasonable offer of settlement in accordance with the principles enunciated in *Calderbank v Calderbank* [1975] All ER 333 and the Homeowner unreasonably rejected the offer.

30 The homeowner submitted that it was not unreasonable for him to reject the offers made on 2 May and 18 August (the day after the first day of the final hearing). The Tribunal is not considering the 18 August offer as a basis for ordering the homeowner pay indemnity costs.

31 The homeowner submitted that the reason the Tribunal should find his rejection of the 2 May offer was reasonable was because "(i) the stage of the proceedings

at which the offer was received, (iii) the extent of the compromise offered and (iv) the offeree's prospects of success assessed as at the date of the offer from paragraph 98 of *Re Earth Civil Australia v Bluemine (No 2)* [2021] NSWSC 1161 relevant to both offers": para 4 reply subs.

32 The homeowner then submitted (paras 5 to 11):

> At the time that the offer dated to may 2023 was made, the builder had not laid any lay evidence in these proceedings. The first lay evidence adduced by the builder was the statement of Klara Yousif dated 9 June 2023.
>
> At the time the offer was made and during the offer period (2 May 2023 to 11 May 2023) The builder had no case against Mr Kako as to a claim by the builder for a money order in the amount of $80,402 as asserted in the offer letter.
>
> Mr Kako was entitled to rely on the statement given by Walsh JA in Currie v Dempsey (1967) 69 SR (NSW) 116 at 125 as to Builder's burden of proof:
>
> > In my opinion, [the legal burden of proof] lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his course of action, e.g., if its existence is a condition president to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but his one which, if established, will constitute a good defence, that is, and 'avoidance' of the claim which, prima facie, the plaintiff has.
>
> The builder, weather as cross claimant (as it was at the time), or relying on a set off (being a confess and avoid) had the legal burden of proof. The building needed to give evidence of the alleged underpayment as a cross claimant because it wasn't essential element in his cause of action or the builder needed to give evidence of the alleged underpayment because it was an allegation which, if established, will constitute a good defence that is, an avoidance of the claim which, prima facie, the plaintiff has.
>
> At the time that the builder made the offer and until the expiry of the offer, the builder had negligible prospects of success on the builders claim for a money order in the amount of $80,402.00.
>
> In the offer letter, the builder also claimed interest, which the builder abandoned at trial.
>
> Therefore at the time that the builder made its offer and during the offer period, Mr Kako had excellent prospects of success to recover at least a work order or a money order in at least the amount admitted by the builder in its joint report (which exceeded the $20,000 offer by the builder) and also recovered costs against the builder.

33 The Tribunal questions whether the homeowner's rejection was reasonable. As at May 2023 the builder's claim for unpaid payments was well known. As the Tribunal said at [42]:

> This cross claim (withdrawn on the first day of the hearing) was lodged by the director herself. The homeowner has known since at least 5 September 2022 that the builder wanted him to pay it $80,402. The homeowner's explanation for waiting almost one year - and to just five days before the final hearing - to put on any evidence about the alleged $60,000 cash payment reduces its plausibility… By 28 October 2022 when the homeowner filed his first statement he knew the builder was counter suing him for $80,402 unpaid monies yet he said nothing about the $60,000 cash payment he claims to have made several years earlier. This increases the implausibility of his version of events.

34 Further at [57] the Tribunal noted:

> The director was not cross examined about the cross claim she filed on 5 September 2022 which clearly stated the builder was suing the homeowner for $80,402 that the builder said was still outstanding since the build ended. She was not cross examined about concocting that cross claim because she knew she had received $60,000 in about March or April 2020.

35 Further at [101] the Tribunal summarised:

> The amount owed to the builder under the contract was conceded by the homeowner in the amount $61,324 (but the homeowner said he paid all but $1,324 of it in cash and submitted set off was not available in home building claims in the Tribunal).

36 As at May 2023 the homeowner knew the builder was pursuing him for $80,402 which the builder claimed was unpaid since February or March 2020. The builder needed no evidence about this if the homeowner conceded it was due and payable, which he did to the amount of $61,324 (but not the remaining $19,078). This would be a matter of obtaining instructions rather than evidence. A reasonable party in the homeowner's shoes in May 2023 would have considered the offer knowing the builder was entitled to at least $61,324. Parties can agree to facts and are encouraged to do so. If facts are agreed no evidence is needed to prove them. The Tribunal does not accept the builder needed to have filed all of its evidence by the time the builder made the offer so that the homeowner could reasonably assess the defence or case against him.

37 The offer was made over three months prior to the final hearing which is when the majority of legal costs are incurred. This was a reasonable time to make the offer. It would have been known to the homeowner then, as it was at the final hearing, that he was contractually bound to pay the builder over $61,000 and this should have been considered by him at the time he received the offer.

38 Nonetheless it may be that the cases of both parties, leaving aside any concessions, were not fully known as at May 2023 and therefore it was not unreasonable for the homeowner to reject the offer.

39 The making of a valid Calderbank offer (*Calderbank v Calderbank* [1975] 3 All ER 333), that is, an offer made to a party as favourable or more favourable than the result ultimately obtained by that party, does not automatically result in an indemnity costs order (*Commonwealth v Gretton* [2008] NSWCA 117 at [43]) but is a circumstance the Court may take into account in exercising its discretion to award indemnity costs.

40 Clearly the homeowner thought he was on sound footing to press ahead for his claim, despite conceding he owed the builder at least $61,000 and therefore needing a money order of at least $61,000 to "succeed" in the litigation. In fact the homeowner thought the builder should pay him up to $215,000, which proved wrong.

41 In hindsight the homeowner should have accepted the $20,000 offered to him in May and saved himself the costs of the litigation thereafter. But in the exercise of its discretion the Tribunal declines to award the builder indemnity costs from 2 May 2023 on this occasion. The homeowner must certainly pay the builder's costs on the ordinary basis, but the Tribunal does not exercise its discretion to order the homeowner to pay on an indemnity basis.

42 The costs of the proceedings include the making of these cost applications.

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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