



Civil and Administrative Tribunal New South Wales

Case Name: **Patel v Globe Ventures Aust Pty Ltd (No 2)**

Medium Neutral Citation: [2025] NSWCATCD

Hearing Date(s): On the papers

Date of Orders: 30 June 2025

Date of Decision: 30 June 2025

Jurisdiction: Consumer and Commercial Division

Before: G Sarginson, Deputy President

Decision: (1) A hearing on the issue of costs is dispensed with under s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).

(2) The respondent is to pay the applicant's costs of the proceedings, as agreed or assessed.

Catchwords: COSTS – r 38 Civil and Administrative Tribunal Rules 2014 (NSW) – owner the successful party – owner unsuccessful on some defect items – proportionate costs order inappropriate – order each party bear is own costs inappropriate – respondent to pay applicant's costs as agreed or assessed

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Home Building Act 1989 (NSW)

Cases Cited: Bostik Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304
Correa v Whittingham (No 2) [2013] NSWCA 471
Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2) [2014] NSWCA 219
Hogan v Trustee of the Roman Catholic Church (No 2) [2006] NSWSC 74
Moseley v AB (No 2) [2017] NSWSC 1812
Northern Territory v Sangare [2019] HCA 25; (2019) 265 CLR 164

Oshlack v Richmond River Council [1998] HCA 11;
(1998) 193 CLR 72
Smith's Snackfood Co Ltd v Chief Commissioner of
State Revenue (NSW) [2013] NSWCA 470
The Owners-Strata Plan No 63341 v Malachite
Holdings Pty Ltd [2018] NSWCATAP 256
Tomanovic v Global Mortgage Equity Corporation
Pty Ltd (No 2) [2011] NSWCA 256

Texts Cited: None cited

Category: Costs

Parties: Dhara Chintan Patel (Applicant)
Globe Ventures Aust Pty Ltd (Respondent)

Representation: Solicitors:
Birch Partners (Applicant)
NOH Lawyers (Respondent)

File Number(s): 2023/00393587

Publication Restriction: Nil

REASONS FOR DECISION

- 1 This is a costs application arising from the substantive decision dated 12 December 2024. The costs application has been made in accordance with the procedural orders in the substantive decision.
- 2 In this decision, any reference to “the homeowner,” is a reference to the applicant. Any reference to “the builder” is a reference to the respondent.
- 3 This cost decision is to be read in conjunction with the substantive decision.
- 4 The substantive proceedings involved an application under the *Home Building Act 1989* (NSW) (HB Act) brought by a homeowner against a builder. The proceedings were filed on 29 May 2023. In the application filed with the Tribunal, the homeowner sought “an order to do work or services as stated below to the approximate value of \$100,000”. The homeowner believes that there were building defects, including the defects causing water ingress.
- 5 In the course of the proceedings, parties were granted leave to be legally represented. The homeowner was legally represented. The builder was self-represented until the costs submissions, which were prepared by a lawyer.
- 6 The homeowner filed and served Points Of Claim in September 2023. The Points Of Claim identify that the owner was seeking damages or a work order under s 48O of the HB Act. The homeowner also sought damages for the cost of moving out of the premises, and renting alternative accommodation, whilst rectification work was performed.
- 7 The homeowner relied upon an expert building consultant report of Mr Xue. Mr Xue identified five (5) building defects, and asserted that the total cost of rectifying the defects would be \$253,823.
- 8 The builder obtained an expert report by a building consultant, Mr Connell. There was significant disagreement between Mr Xue and Mr Connell of the issue of defects, method of rectification, and the cost of rectification.

- 9 The builder also obtained an engineering report of Mr Kumar, on the issue of water ingress (in particular, the garage).
- 10 At the hearing, Mr Xue, Mr Connell and Mr Kumar conferred and prepared joint expert reports. There remained significant divergence between them on the issues of defect; method of rectification; and cost of rectification. In essence, Mr Connell believed that there were few defects caused by the works performed by the builder pursuant to the scope of works under the contract, and of the defects that did exist, the cost of rectification was moderate. Mr Kumar believed that any water ingress issues were not caused by the builder.
- 11 In the substantive decision, the Tribunal relevantly found that the builder has breached the statutory warranties under s18B of the HB Act. Of the five defect items, the homeowner succeeded on two items. However, those two items of defects were significant, particularly in respect of water ingress into the garage.
- 12 The Tribunal found that there was water ingress into the garage, and that Mr Xue's method of rectification should be accepted on the garage defect item. The Tribunal found that the front façade of the building was not constructed in accordance with the plans and specifications. The Tribunal found that Mr Xue's method of rectification should be accepted. The other defect items were not established.
- 13 On the issue of remedy, the Tribunal noted that there was a discrepancy between the Points of Claim; the opening written submissions of the owners; and the closing written submissions. At different times, the owner had sought the remedy for of damages the cost of rectifying defective work, and at other times had only sought a work order that the builder return to site and rectify the defects.
- 14 The Tribunal found that, in circumstances where the homeowner had made a submission that a work order was appropriate, there was not a sufficient basis to depart from the "preferred outcome" under s 48MA of the HB Act that the builder return to site and rectify defects. Accordingly, a work order was made

under s 48O of the HB Act for the two defect items; moderate damages were awarded for the cost of renting alternative accommodation whilst the rectification work was performed (\$1,120); and the proceedings were otherwise dismissed.

- 15 In the substantive decision, the Tribunal made procedural directions parties to file and serve cost submissions. Both parties have done so. The Tribunal has read and considered those submissions.
- 16 The homeowner's cost submissions are, in essence, that the amount claimed or in dispute was over \$30,000 in the proceedings, and the homeowner was the successful party.
- 17 The builders submissions prepared by a lawyer, NOH Legal. The builder submits that the owner was not the successful party, and was "largely unsuccessful" in the proceedings because it failed on a number of defect items. The builder submits that each part should bear its own costs.
- 18 The builder's submissions also contain various criticisms of the homeowner and re-agitate certain issues that were either determined in the proceedings or are fresh issues extant to determination of the issue of costs . To the extent that the submissions are not relevant to determination of the issue of costs, they are ignored. To the extent they are relevant, they have been taken into account.
- 19 The homeowner filed and served submissions in reply. The homeowner submits that the builder contested all issues, and the homeowner was successful party having succeeded in obtaining work order that was significant. The homeowner further submitted that the defect items upon which the homeowner failed were not dominant and separable, and so no apportionment of costs should be made.

Consideration

- 20 Neither party seeks a hearing on the issue of costs. The Tribunal is satisfied that the written cost submissions of the parties provides each party with a

reasonable opportunity to put forward their arguments on the issue of costs. The Tribunal dispenses with a hearing on the issue of costs under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

- 21 Under r 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (NCAT Rules), the Tribunal can make a costs order in favour of a party even though no “special circumstances” have been demonstrated under s 60(2) of the NCAT Act, if the amount “claimed or in dispute” exceeds \$30,000.
- 22 In this matter, Tribunal is satisfied that the amount “claimed or in dispute” exceeds \$30,000. There was a momentary amount claimed through the proceedings by way of damages, and that the amount exceeded \$30,000. Although the homeowner made submissions that a work order should be made, rather than an award of damages, this does not mean the amount “claimed or in dispute” in the proceedings did not exceed \$30,000 and cause the proceedings to be considered under the provisions of s 60(1) – (3) of the NCAT Act (*The Owners-Strata Plan No 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 at [91]-[92]). The quantification of the cost of rectification by Mr Xue causes the proceedings to engage r 38 of the NCAT Act.
- 23 Accordingly, the Tribunal does not need to be satisfied that there are “special circumstances” sufficient to cause the Tribunal to exercise its discretion in favour of making a costs order in favour of the homeowner.
- 24 Rather, common-law costs principles apply.
- 25 The starting point is that the successful party entitled to its costs of the proceedings to compensate it for its legal costs in bringing the proceedings, unless there is an appropriate reason to depart from that principle *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at [67], [134]; *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 at [25].
- 26 Costs decisions involve the assessment of discretionary matters, but that discretion needs to be exercised in a judicial (rather than capricious) manner.

The overriding principle in any order for costs is that of doing justice between the parties in the particular case (*Moseley v AB (No 2)* [2017] NSWSC 1812 at [65]-[66]).

27 The homeowner was the successful party. The homeowner succeeded in obtaining a work order to rectify building defects, and an award of damages for the cost of moving out of the premises whilst rectification work was being performed. The work order made involved a significant amount of work. Although the homeowner did not prove all defects, the Tribunal is satisfied it was successful in the proceedings, and its success went beyond a work order that was inconsequential, negligible or moderate.

28 In circumstances where there had been mixed success of the parties on different issues, the potential costs orders are as follows:

(a) The builder pay the homeowner's costs of the proceedings, as agreed are assessed.

(b) There be a proportionate costs order, with the owner obtaining a percentage of their costs to reflect the issues upon which they were successful; and not receive costs for the issues upon which they were unsuccessful. A successful party can be deprived of its costs on a legal or factual issue upon which it was unsuccessful if that issue was clearly dominant or separable (*Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]). Where there has been a mixed outcome in proceedings, and it is appropriate to entertain the process of apportioning costs as between different issues in the proceedings, in general such an exercise will be carried out on a relatively broad brush basis, and largely as a matter of impression and evaluation (*Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 at [19]-[21]). An issue or group of issues is "clearly dominant" when it is clearly dominant in the proceedings as a whole: *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)*

[2011] NSWCA 256 at [107]; *Correa v Whittingham (No 2)* [2013] NSWCA 471 at [26]–[30]; *Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue (NSW)* [2013] NSWCA 470 at [229]–[232].

- (c) Each party bear its own costs if the Tribunal regards that as appropriate in circumstances where both parties have had substantial success: *Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74 at [40].

- 29 The Tribunal is not satisfied that the building defect items upon which the homeowner failed were dominant or separable, such that a proportionate costs order should be made. There may be circumstances in a home building matter where, because of the manner in which the case is conducted or because a homeowner only succeeded in obtaining a work order (or damages order) for insignificant defect items, or items where the builder's expert was accepted over the owners expert, that a proportionate costs order is appropriate. Each cost dispute depends on its own facts. However, in view of the defect items that the owner succeeded upon, and the ambit of the work order that was made, this is not an appropriate matter for a proportionate costs order.
- 30 The Tribunal is not satisfied that an order should be made that each party bear its own costs by reason of mixed success on various issues. Again, considering the significance of the work order that the homeowner obtained, the failure of the homeowner to succeed on some defect items is not sufficient for the Tribunal to conclude that an appropriate exercises of its costs discretion is that each party bear its own costs.
- 31 The appropriate order is that the builder pay the homeowners costs of the proceedings, as agreed or assessed.

ORDERS

- (1) A hearing on the issue of costs is dispensed with under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

- (2) The respondent is to pay the applicant's costs of the proceedings, as agreed or assessed.

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



The image shows a handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. To the right of the signature is a circular official seal. The seal features the text "NSW CIVIL & ADMINISTRATIVE" around the top inner edge and "TRIBUNAL" around the bottom inner edge. In the center of the seal is the coat of arms of New South Wales, which includes a shield supported by a kangaroo and a billygoat, with a sun rising over a landscape.