



## Civil and Administrative Tribunal New South Wales

Case Name: **Pan v St George Design & Construction Pty Ltd (No 2)**

Medium Neutral Citation: [2025] NSWCATCD

Hearing Date(s): On the papers

Date of Orders: 28 August 2025

Date of Decision: 28 August 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) Order 3 of the Tribunal dated 28 May 2025 is varied to read: “The respondent is to pay the applicants’ costs of the proceedings on the ordinary basis as agreed or assessed, other than in respect of the costs order made by the Tribunal on 9 February 2024.

(3) The Tribunal affirms the costs order made on 9 February 2024

Catchwords: COSTS - r 38 Civil and Administrative Tribunal Rules 2014 (NSW) – Calderbank offer – whether unreasonably refused

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)  
Civil and Administrative Tribunal Rules 2014 (NSW)  
Health Practitioner Regulation National Law 2009 (NSW)  
Home Building Act 1989 (NSW)

Cases Cited: Allianz v Waterbrook [2009] NSWCA 224; (2009) 15 ANZ Insurance Cases 224  
Arian v Nguyen (2001) 33 MVR 37; [2001] NSWCA 5

Bostik Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304  
Douglass v Lawton Pty Ltd (No 2) [2007] NSWCA 90  
Eko Investments Pty Ltd v Austruc Constructions Ltd [2009] NSWSC 371  
Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 373  
Harper v Harper (No 2) [2025] NSWSC 360  
Hogan v Trustee of the Roman Catholic Church (No 2) [2006] NSWSC 74  
Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd (No 2) [2024] NSWCA 274  
Monie v Commonwealth of Australia (No 2) [2008] NSWCA 15  
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11  
Puri v Medical Council Of New South Wales (No 2) [2024] NSWCATOD 122  
Ritter v Godfrey [1920] 2 KB 47  
State of New South Wales v Stanley [2007] NSWCA 330  
Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2) [2011] NSWCA 256  
Vella v Mir (No 3) [2020] NSWCATAP 17  
Waterman v Gerling (Costs) [2005] NSWSC 1111  
Yazgi v Permanent Custodians Ltd (No 2) (2007) 13 BPR 24; [2007] NSWCA 306

Texts Cited: None cited

Category: Costs

Parties: Geoffrey Pan and Huiqing Zheng (Applicants)  
St George Design & Construction Pty Ltd (Respondent)

Representation: Solicitors:  
Birch Partners (Applicants)  
Fortis Law (Respondent)

File Number(s): 2023/00406855

Publication Restriction: Nil

## REASONS FOR DECISION

- 1 This is an application to vary the costs order made in the substantive decision.
- 2 The substantive decision is dated 28 May 2025. Written reasons were provided comprising of 64 pages. This costs decision is to be read in conjunction with the substantive decision.
- 3 The substantive decision involved a dispute under the *Home Building Act 1989* (NSW) (HB Act). The applicants are homeowners and the respondent is a licensed builder.
- 4 The applicants are successors in title who purchased the dwelling in about April 2021. The respondent constructed the dwelling.
- 5 The applicants brought proceedings in the Tribunal for breach of statutory warranties under s 18B of the HB Act, by way of the extension of those statutory warranties to successors in title during the relevant limitation period.
- 6 After a contested hearing, the Tribunal:
  - (1) Rejected the builder's defence under the principles in *Allianz v Waterbrook* [2009] NSWCA 224; (2009) 15 ANZ Insurance Cases 224 that a pre-purchase building inspection report was sufficient to sever the casual nexus between any breach of statutory warranties and loss or damage of the owners.
  - (2) Found that a defect in respect of water ingress involving the balcony/front façade and front window involved a major defect under s 18E of the HB Act.
  - (3) Found that a defect in respect of water ingress involving the dining room window was a major defect under s 18E of the HB Act.

- (4) Found that a defect in respect of water ingress into the living room corner was a major defect under s 18E of the HB Act.
- (5) Rejected the owners claim that alleged failed waterproofing over the garage was a major defect under s 18E of the HB Act.
- (6) Found that inadequate falls to tiling in the bathroom of the granny flat and absence of a water stop angle in the shower area was a major defect under s 18E of the HB Act.
- (7) Found that a work order under s 48O of the HB Act for the builder to rectify defects was the appropriate remedy. Of the 4 defect items, the Tribunal accepted the method of rectification of the owners expert over the builder's expert on most of the items.
- (8) Found that Rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (NCAT Rules) applied to the proceedings.
- (9) Made an order that the builder pay the owners' costs as agreed or assessed, but imposed a condition that any party may apply to vary the costs order in the manner set out in the orders.

7 The builder has made an application to vary the costs order.

8 The builder filed and served submissions in chief and documents on 4 June 2025.

9 The owners' filed and served costs submissions on 5 June 2025.

10 The builder filed and served costs submissions in reply (and further documents) on 10 June 2025.

11 Neither party opposes the Tribunal considering the costs application under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

## **Position of the Parties**

- 12 The builder submits the appropriate costs orders are either:
- (1) Builder pay the owners' costs to 16 July 2023 on the ordinary basis; and owners pay the builders costs from 17 July 2023 on an indemnity basis. The builder relies upon a Calderbank offer; or
  - (2) Each party bear their own costs, except for and adjournment application granted on 9 February 2024 for which the owners should pay the builder's "costs thrown away".
- 13 The owners submit that the costs order should remain that the builder pay their costs of the proceedings, but it be clarified that costs are on a party/party or 'ordinary' basis.

## **Builder's Costs Submissions in Chief**

- 14 The builder does not dispute that r 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) applies to the proceedings.
- 15 The builder's submissions refer to the principles applicable to *Calderbank* offers, and attach a copy of various correspondence .
- 16 There are 2 letters from the builder to the owners headed "Without prejudice save as to costs".
- 17 The first is 23 June 2023. It does not contain an offer. It refers to alleged "fundamental problems" in the owners claim, and asserts (a) the owners are precluded from litigating for non-major defects by reason of s 18E of the HB Act; (b) the findings set out in the pre-purchase inspection report of Mr Xue of Jims Building Services is "materially deficient" and "speculative"; and (c) there is "no reliable evidence" of major defects. The letter "invites" the owners to "conduct a proper review of you evidence and provide us with a Scott Schedule

setting out only alleged defects which are considered to be major defects as defined by s 18E(4) of the HBA”.

18 The second is dated 17 July 2023. That letter states the proceedings have been listed for hearing on 19 September 2023. The offer put in ‘*Calderbank*’ terms is that the builder will:

- (1) “Investigate” the major defects identified in the Jim’s Building Inspection” report dated 16 April 2021 (items 2.01 to 2.10) to “determine the cause and extent of any defective and non-complying work undertaken” by the builder;
- (2) Undertake “all necessary” remedial work found in respect of major defects identified in the report of Jim’s Building Inspections to “an acceptable industry standard;” and
- (3) The owners proceedings are withdrawn under s 48I(2) of the HB Act, with no order as to costs, and the parties “are to enter into a formal deed of release which reflects the above terms and the completion of the investigation and remedial works” by the builder “within a reasonable period of time”.

19 The offer was open for 14 days.

20 The owners responded to that letter on 28 July 2023. The letter is under their own names, and not a firm of Solicitors. The owners rejected the builder’s offer of 17 July 2023. Reasons are given. Those reasons include the builder not complying with a work order issued by NSW Fair Trading on 5 December 2022 and previously making “empty promises”. The owners made an offer that they would accept \$120,000 in full and final settlement of the dispute. That offer was open for 14 days.

21 The builder’s submissions also contain interlocutory orders of the Tribunal.

- 22 On 28 August 2023, Ziegler SM refused the owners' application for an adjournment of the hearing on 19 September 2023. Written reasons were provided. No costs order was made.
- 23 On 12 September 2023, Robertson SM refused the owners' second application for an adjournment of the hearing on 19 September 2023. Written reasons were provided. No costs order was made.
- 24 On 19 September 2023, Goldstein SM adjourned the hearing, and made procedural directions that included the builder having the opportunity to file and serve further evidence in response to the evidence of the owners; evidence in reply; and joint expert report. Both parties were granted leave for legal representation. There was no order that any party pay the other party's costs by reason of the adjournment.
- 25 On 9 February 2024, Rosser PM (at a procedural direction hearing caused by non-compliance) adjourned the hearing that had been set down on 5 March 2024. The owners were granted leave to reply on the expert report of Mr Xue dated 21 December 2023 and the Points of Claim lodged on 16 January 2024. There was an extension of the timetable for previous procedural directions regarding the filing and serving of evidence and a joint expert report. Rosser PM made further direction for the preparation of the matter for hearing, including a joint Tender Bundle.
- 26 Importantly, Rosser PM made the following order:
- “7. The applicants are to pay the respondent's costs thrown away of and incidental to the granting of leave to rely on Mr Xue's report and the adjournment of the hearing on 5 March 2024, on the ordinary basis, as agreed or assessed.”
- 27 The builder submits that the owners unreasonably refused to accept the builder's *Calderbank* letter of 17 July 2023, such that the builder should pay the owners costs to 17 July 2023, but after that the owners pay the builder's costs on an indemnity basis.

28 Further, the builder submits that there are “special circumstances” under s 60(3) of the NCAT Act such that the Tribunal should make an order in favour of the builder. The “special circumstances” under s 60(2) of the NCAT Act are that (a) the builder incurred costs by reason of the adjournment of two hearing dates; (b) the owners continued to press “non-major defects”; and (c) the owners continued to press “a money order pursuant to s 48MA (sic) of the HBA, in which the Tribunal did not make”.

### **Owners’ Costs Submissions**

29 The owners submit that it was reasonable for the owners to reject the Calderbank offer of 23 June 2023. The owners further submit that:

- (1) The builder’s submissions make no reference to its failed *Allianz v Waterbrook* [2009] NSWCA 224; (2009) 15 ANZ Insurance Cases 224 (*Allianz v Waterbrook*) defence.
- (2) The hearing was adjourned on 19 September 2023 because the builder raised the *Allianz v Waterbrook* defence for the first time.

### **Builder’s Costs Submissions in Reply**

30 The builder repeats its submission that the *Calderbank* offer of 17 July 2023 (read in conjunction with the letter of 23 June 2023) was unreasonably rejected. The builder submits that the “ordinary costs rules apply” but “the matters raised by the respondent mean the Tribunal should find there are “special circumstances” under s 60(2) of the NCAT Act to award the builder costs; or in the alternative that each party bear its own costs other than the costs thrown away by reason of the adjournment orders made by Rosser PM.

31 The builder also submits that it was reasonable for it to raise the *Allianz v Waterbrook* defence. The builder refers to various periods in the litigation where the owners were represented by different law firms.

## Consideration

- 32 It is appropriate to dispense with a hearing under s 50(2) of the NCAT Act and determine the issue of costs on the papers.
- 33 The submissions of the builder do not reflect the applicable costs principles, because the submissions conflate r 38 of the NCAT Rules and Sections 60(2)-(3) of the NCAT Act.
- 34 As the Tribunal pointed out in paragraphs [209]-[210] of the substantive decision, the starting point is s 60 of the NCAT Act. However, there is an exception to the principle that parties are to bear their own costs unless 'special circumstances' are established (ss 60(1)-(3) of the NCAT Act).
- 35 The exception is where r 38 of the NCAT Rules applies. Rule 38 of the NCAT Act states as follows:

### **38 Costs in Consumer and Commercial Division of the Tribunal**

(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.

- 36 If r 38 of the NCAT Rules applies, then costs may be determined without reference to the principles under ss 60(1)-(3) of the NCAT Act. The Tribunal does not mix r 38 of the NCAT Rules and ss 60(1)-(3) of the NCAT Act to discrete parts of the proceedings.
- 37 Rather, when r 38 of the NCAT Act applies, the principle that costs follow the event is the starting point. A helpful summary of the principles (although in the

context of Clause 13 of Sch. 5D of the *Health Practitioner Regulation National Law 2009* (NSW)) is set out in *Puri v Medical Council Of New South Wales (No 2)* [2024] NSWCATOD 122 at [13]-[15].

38 Further, in *Vella v Mir (No 3)* [2020] NSWCATAP 17, the Appeal Panel stated at [28]-[30]:

“ [28] Clause 38 gives the Tribunal a wide discretion to make an order for costs. It does not specify the factors the Tribunal must take into account in exercising the discretion, although the discretion to make such an order must be exercised judicially: see, for example, *Ruddock v Vadarlis* [2001] FCA 1865 at [9].

[29] Where an application has been heard and determined on the merits and Clause 38 applies, the appropriate starting point for the exercise of the discretion is not that the parties are to pay their own costs. Rather, it is the well-established position at common law; that is, that the purpose of making a costs order is to provide compensation to the party in whose favour the order is made for the expense the party has been put to in prosecuting or defending legal proceedings. In general terms, this means that a party who is successful is entitled to an order for costs in its favour, subject to exceptions generally involving misconduct on the part of that party: *Latoudis v Casey* [1990] 170 CLR 534 ; *Oshlak v Richmond River Council* [1998] HCA 11 .

[30] In *BNT Constructions Pty Ltd v Allen* [2017] NSWCATAP 186 the Appeal Panel, having set aside a costs order made in the Consumer and Commercial Division, decided to re-exercise the costs discretion. Clause 38 was the applicable costs provision in that case. At [67] the Appeal Panel noted the following principles relevant to the exercise of the discretion:

- (1) the starting point is that a successful party should be entitled to an order for costs in his favour;
- (2) an award of costs is by way of an indemnity and not as punishment;
- (3) there is no absolute rule that, absent disentitling conduct, a successful party is to be compensated by the unsuccessful party;
- (4) the factors to be considered are not to be confined as to do so would constrain the general discretion;
- (5) the relative success of the parties on different issues and the time taken to determine them may be relevant;
- (6) the nature of the proceedings is relevant;
- (7) the proper exercise of the discretion requires a decision maker to do justice between the parties and to exercise the discretion having regard to relevant considerations and in a manner which is not arbitrary and capricious.”

- 39 The successful party is entitled to its costs unless there is an appropriate reason to depart from that principle (*Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11).
- 40 The onus lies on the losing party to establish a basis for any departure from the general rule: *Waterman v Gerling (Costs)* [2005] NSWSC 1111 at [10].
- 41 However, the discretionary power of a Court (or the Tribunal when r 38 of the NCAT Rules applies) to determine the appropriate costs order is wide and is to be liberally construed in order to achieve justice in the particular case (*State of New South Wales v Stanley* [2007] NSWCA 330 at [18]; *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373 at [8]).
- 42 Circumstances where there is departure from the principle that the successful party is entitled to be awarded its costs of the proceedings include:
- (1) Unreasonable rejection of a *Calderbank* offer by the successful party.
  - (2) Mixed success on different issues by both parties such that a proportionate costs order should be made (*Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 at [38]; *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [63]–[66]; *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd (No 2)* [2024] NSWCA 274 at [20]); or an order that each party bear its own costs (*Hogan v Trustee of the Roman Catholic Church (No 2)* [2006] NSWSC 74 at [40]).
  - (3) Disentitling conduct by the successful party (*Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* [2011] NSWCA 256 at [97]–[98]; *Ritter v Godfrey* [1920] 2 KB 47). An example of disentitling conduct is where the successful party’s conduct caused unnecessary expense or delay (*Douglass v Lawton Pty Ltd (No 2)* [2007] NSWCA 90).
  - (4) The party achieves only very minor, or nominal, success in comparison to the extent of claims made (*Eko Investments Pty Ltd v Austrac*

*Constructions Ltd* [2009] NSWSC 371 at [18]-[23]; *Yazgi v Permanent Custodians Ltd (No 2)* (2007) 13 BPR 24; [2007] NSWCA 306 at [24].

- (5) An earlier interlocutory costs order against the successful party.

### *Was the Calderbank Offer Unreasonably Rejected?*

- 43 The *Calderbank* principles are well established. A concise summary of those principles was set out in *Harper v Harper (No 2)* [2025] NSWSC 360 at [49]-[53]:

“The failure by a party to accept an offer of compromise which is a Calderbank offer where that party does not achieve a judgment more favourable than the offer is one of the circumstances in which the court may exercise its discretion under r 42.1 of the UCPR to make some order other than costs following the event on the ordinary basis. However, merely because the party to whom the offer was made does not ultimately obtain a more favourable judgment does not automatically lead to a favourable costs order, or raise a presumption that such an order should be made: *E Group Security* at [57].

The onus is on the party making a Calderbank offer to satisfy the court that it should exercise the costs discretion in its favour, in particular that (a) the Calderbank offer embodies a genuine compromise and (b) it was unreasonable for the other party not to accept it, which is an evaluative judgment to be made by reference to the terms of the offer and all the relevant surrounding circumstances at the time that it was made, and not with the benefit of hindsight: *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 at [8], [11], [16]; *Wheatley v Lakshmanan (No 2)* [2022] NSWSC 851 at [97]; *E Group Security* at [57]-[58].

Relevant factors in determining whether the rejection of an offer was unreasonable include (a) the stage of the proceeding at which the offer was received; (b) the time allowed to the offeree to consider the offer; (c) the extent of the compromise offered; (d) the offeree’s prospects of success, assessed at the date of the offer; (e) the clarity with which the terms of the offer were expressed; and (f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it: *Hazeldene’s Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298 at [25]; *Miwa* at [12]; *Wheatley* at [98]; *E Group Security* at [59]. A finding of unreasonableness should not be made other than on clear grounds: *E Group Security* at [58].

In relation to (d), what is required is an objective assessment of the offeree’s prospects of success as at the date of the offer: *Hazeldene’s Chicken Farm* at [30].

The practice of treating Calderbank offers in this way is informed by the public policy objective of providing an incentive to the parties to end their litigation as soon as possible and discouraging wasteful and unreasonable behaviour by

litigants: *Commonwealth Bank of Australia v Gretton* [2008] NSWCA 117 at [41]. However, the mere fact that the offer is a reasonable one does not make it unreasonable for the offeree to have rejected it: *Gretton* at [74] and [120].”

44 In this matter, the builder has failed to establish the owners unreasonably refused to accept the offer of 17 July 2023 (when read in conjunction with the letter of 23 June 2023) for the following reasons:

- (1) The builder was not clearly offering to perform any work to rectify defects. Rather, what the builder was offering to do was to “investigate” and then, only if the builder thought that there were major defects set out in the report of Mr Xue dated 16 April 2021, rectify those defects. The offer empowered the builder to “determine the cause and extent” of any defects. It follows that if the builder did not believe it caused any major defects, it did not have to rectify. That offer was vague, uncertain and entirely dependent upon the opinion of the builder.
- (2) The offer was contingent upon the parties entering into a Deed at some future time. However, no terms of the Deed were identified. Again, the terms of the offer were vague and uncertain.
- (3) It cannot be said that had the offer been accepted, the owners would have been in a better position (or no worse position) than the work orders ultimately made by the Tribunal. By the time the Tribunal determined the matter at a contested hearing, the owners had obtained a second and more comprehensive report of Mr Xue, and the builder had obtained an expert report by Mr Roberts. The Tribunal found in favour of the owners on most of the defect issues and accepted the proposed method of rectification by Mr Xue on most of the defect issues. That was clearly a much better outcome for the owners than accepting an offer that the builder “investigate” and only repair the defects set out in Mr Xue’s first report that the builder thought were major defects, as well as enter into a Deed with unspecified terms.

*Any Other Reason to Depart from the Principle that the Builder Pay the Owners Costs?*

- 45 There is no basis established for making a proportional costs order, nor is there any basis for making an order that each party bear its own costs.
- 46 The owners succeeded on most of the issues in dispute, and the builder failed on its *Allianz v Waterbrook* causation argument, which consumed a significant amount of hearing time and submissions.
- 47 The builder's arguments that the owners unsuccessfully pressed "non-major defects" is not reflected in the findings of the Tribunal in the substantive decision.
- 48 The builder's submission that the fact the owners obtained a work order under s 48O of the HB Act rather than an award of damages is a matter to be held against the owners is rejected. The Tribunal dealt with this issue at paragraphs [204]-[206] of the substantive decision. The fact that the owners ultimately only sought a work order, rather than pressing for an order for damages, does not constitute disentitling conduct in the circumstances of this matter.
- 49 In a HB Act matter, it is open to the Tribunal to make remedial orders that include ordering the builder to rectify defects; or make an order for damages (s 48O of the HB Act). Section 48MA of the HB Act states the 'preferred outcome' is that the builder be ordered to rectify, but that principle can be departed from in appropriate circumstances. The fact that the owners ultimately chose to press for a work order rather than argue the Tribunal should depart from the 'preferred outcome' was not unusual or unorthodox. It does not, in the circumstances of this matter, constitute disentitling conduct, such as the builder incurring unnecessary or unreasonable costs to defend an issue which was unsuccessful, or withdrawn, or not pressed. The builder obtained expert evidence, and that evidence included the method of rectification for any defects.
- 50 With one exception, the interlocutory history of the proceedings does not raise any issue that causes the Tribunal to depart from the principles that costs follow

the event, and the owners, as the successful party, are entitled to a costs order in their favour.

- 51 The one exception is the interlocutory costs order made by Rosser PM on 9 February 2024. In the substantive decision, the Tribunal overlooked that costs order. There is no basis to vary or set aside that interlocutory order. If no interlocutory costs order is made, the usual principle is that costs of the interlocutory dispute are costs in the cause. However, in this matter there was an interlocutory costs order made. It is surprising that the owners' Solicitor did not concede that there had been an interlocutory costs order made against the owners, and the final costs orders should take into account that order.

## **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) Order 3 of the Tribunal dated 28 May 2025 is varied to read: "The respondent is to pay the applicants' costs of the proceedings on the ordinary basis as agreed or assessed, other than in respect of the costs order made by the Tribunal on 9 February 2024.
- (3) The Tribunal affirms the costs order made on 9 February 2024.

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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

