Civil and Administrative Tribunal

New South Wales

Case Name:	Rodny v Stricke
Medium Neutral Citation:	[2020] NSWCATAP 20
Hearing Date(s):	12 November 2019
Date of Orders:	10 February 2020
Decision Date:	10 February 2020
Jurisdiction:	Appeal Panel
Before:	D Robertson, Senior Member J McAteer, Senior Member
Decision:	(1) Leave to appeal is granted. (2) Pursuant to s 80(3) of the Civil and Administrative Act 2013 (NSW) the appeal is to be dealt with by way of a new hearing. (3) The order made on 2 August 2019 in application SC 17/45456 is confirmed and the appeal is dismissed. (4) Any application in respect of the costs of the appeal is to be made by written submissions filed and served within 14 days of the date of publication of this decision. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act. (5) If either party files submissions in accordance with order 4 above the other party may file and serve submissions in response within a further 14 days. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act.
Catchwords:	COSTS – Civil and Administrative Tribunal Act 2013 s 60 – special circumstances – delay in filing evidence –

	withdrawal of application shortly before hearing when application for adjournment refused – special circumstances established
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Champion Homes Pty Ltd v Guirgis [2018] NSWCATAP 54 Collins v Urban [2014] NSWCATAP 17 Dehsabzi v The Owners Strata Plan number 83556 [2019] NSWCATAP 65 Grimshaw v Dunbar [1953] 1 QB 408 House v The King (1936) 55 CLR 499 Megerditchian v Kurmond Homes Pty Ltd (2014) NSWCATAP 120 Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin (1997) 186 CLR 622 Rodny v Stricke [2018] NSWCATAP 136 Rodny v Stricke (No 2) [2018] NSWCATAP 188 Rodny & Communications Power Inc (Aust) Pty Ltd v Stricke & Ors [2019] NSWCATAP 150 Taylor v Taylor (1979) 143 CLR 1
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Laurence Rodny and Communications Power Incorporated (Aust) Pty Ltd (Appellants) Angela Stricke, Helen Meddings, Natalie Stoianoff, David Kallaway, Vlad Sofreski and The Owners - Strata Plan No 56911 (Respondents)
Representation:	Counsel: C Birch SC (Appellants) J Knackstredt (Respondents) Solicitors: Strata Specialist Lawyers (Appellants) Clyde & Co (Respondents)
File Number(s):	AP 19/39058
Publication Restriction:	Nil

Decision under appeal:

Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	2 August 2019
Before:	P Moran, Senior Member
File Number(s):	SC 17/45456

REASONS FOR DECISION

1 1. The appellants appeal against an order that they pay the respondents' costs of proceedings brought by the appellants in the Consumer and Commercial Division of the Tribunal.

Background to the appeal

2 The appellants are the owners of lots in Strata Plan No 56911, a strata scheme of 20 lots in Kent Street, Sydney.

3 The Owners Corporation of the strata scheme is the sixth respondent. The first to fifth respondents are (or were at the time of commencement of the appellants' application) members of the strata committee of the Owners Corporation.

4 In their application, filed on 20 October 2017, the appellants sought orders against the respondents under the *Strata Schemes Management Act 2015* (NSW), including orders for the removal of the strata committee members and officers or alternatively an order appointing a strata managing agent for the Owners Corporation.

5 The appellants attached to their application a lengthy statement of the "reasons for asking for the … orders". It is not necessary to outline the allegations in detail but the complaints included:

(1) that the members of the strata committee had held private meetings or exchanged correspondence without notice being given to owners and without keeping proper minutes of meetings;

(2) that decisions had been made by the strata committee that had conferred "unauthorised or undisclosed benefits upon a member of the committee, or had been made to ratify such benefits"; and

(3) that members of the strata committee had "given instructions to third parties, to confer advantages on themselves, without reference to the Committee, the strata manager or the general meeting".

6 To enable an understanding of the circumstances giving rise to the decision the subject of the appeal and the grounds upon which the appellants seek to challenge that decision it is convenient to set out a chronology of the proceedings. The respondents attached to their Reply to Appeal a chronology of proceedings which was not disputed by the appellants.

7 The chronology which follows is largely extracted from the respondents' chronology, supplemented and corrected, where appropriate, by further detail apparent from documents included in the Appeal Book filed in accordance with directions of the Tribunal.

8 As noted above, the appellants' application was filed on 20 October 2017.

9 Directions were made on 29 November 2017 requiring the appellants to file their evidence by 19 January 2018.

10 Issues arose between the parties concerning legal representation. Each side raised objection to the solicitors retained by the other.

11 On 29 January 2018 a Senior Member of the Tribunal determined that each party should have leave to be legally represented but that the appellants should not be represented by the appellants' preferred solicitor, Mr David Le Page of Le Page Lawyers, or a member of his firm.

12 Also on 29 January 2018 the parties agreed that the appellants should have an extension of time for the filing of evidence to 20 February 2018.

13 On 19 February 2018 the appellants lodged a Notice of Appeal against the Senior Member's decision of 29 January 2018 and sought a stay of the original decision pending the appeal.

14 On 5 April 2018 the proceedings were listed for a two day hearing on 13 and 14 June 2018.

15 On 26 April 2018 the respondents wrote to the Tribunal seeking an adjournment of that hearing pending the determination of the appeal. It is apparent that the hearing listed on 13 and 14 June 2018 was vacated, but the material before the Appeal Panel does not disclose how or when that occurred.

16 On 31 May 2018 the Appeal Panel delivered a decision dismissing the appellants' appeal against the decision of 29 January 2018, to the extent that it denied to the appellants leave to be represented by Le Page Lawyers (*Rodny v Stricke* [2018] NSWCATAP 136).

17 On 6 June 2018 Mr Le Page wrote to the Tribunal contending that the Tribunal had failed to perform its duty to resolve all issues in the proceedings and asking that the Appeal Panel relist the proceedings in order to resolve the issues raised. That application did not challenge the decision that Mr Le Page should not represent the appellants. The application was determined on the papers and dismissed by the Appeal Panel on 3 August 2018 (*Rodny v Stricke* (No 2) [2018] NSWCATAP 188).

18 On 5 July 2018 the appellants were granted a further extension to file their evidence until 2 August 2018.

19 On 16 July 2018 the application was listed for hearing for two days on 7 and 8 November 2018.

20 On 31 July 2018 the appellants were granted a further extension to file their evidence until 30 August 2018.

21 On 11 September 2018 the appellants were granted a further extension to provide their evidence until 13 September 2018.

22 On 20 September 2018 the appellants were granted an extension to 20 September 2018 to provide their evidence and on that date served 9 volumes of evidence. The time for the respondents to file their evidence was extended to 18 October 2018.

23 On 29 October 2018 a Senior Member of the Tribunal vacated the hearing fixed for 7 and 8 November 2018 and granted the respondents an extension of time for filing their evidence until 26 November 2018. The Senior Member stated in her Reasons for Decision:

> This matter has a long history. The application was filed over one year ago on 20 October 2017 and the Principal Member, among others, has had cause to remind the parties and their representatives of their obligation to assist the Tribunal to resolve matters in a quick, just and cheap fashion. It does not appear this obligation is being fulfilled by the parties and their representatives and the Tribunal repeats the Principal Member's reminder in Order 12 made on 6 July 2018 that the parties may have leave to be represented revoked if the representatives are not complying with their obligation in s.36(3)
>
> Directions were made on 29 November 2017 to prepare this matter for final hearing. They were extended on 29 January 2018. They were extended again on 6 July 2018. They were extended again on 11 and 20 September 2018. They have not been complied with, and the matter is listed pursuant to direction 10 made by the Principal Member. It is an extraordinary thing that the applicants, who should know their case before filing, took almost 12 months from lodgement to provide its evidence and ready the matter for final hearing.

24 In her reasons the Senior Member expressly reminded the parties of the Consumer and Commercial Division Guideline "Adjournments" (dated January 2018).

25 On 19 November 2018 the proceedings were fixed for hearing on 27 and 28 March 2019.

26 On 30 November 2018 the respondents wrote to the Tribunal seeking a one week extension for the filing of their evidence.

27 On 7 December 2018 the time for the respondents to file their evidence was extended to 10 December 2018.

28 The respondents filed their evidence on 10 December 2018.

29 On 26 March 2019 the solicitor for the appellants wrote to the Tribunal seeking an adjournment of the hearing fixed for 27 and 28 March on the basis that the mother of the appellants' senior counsel had passed away the previous night.

30 On 27 March 2019 the hearing was vacated and the parties were directed to advise the Tribunal and each other by 10 April 2019 of their witnesses' and representatives' unavailable dates for hearing and the names of the other parties' witnesses required for cross-examination.

31 On 2 April 2019 the respondents' solicitors emailed the appellants' solicitors advising that 27 to 31 May 2019 was the first available window where all of the respondents' witnesses and representatives were available for a three day hearing. The appellants apparently did not respond.

32 On 10 April 2019 the appellants' solicitor notified the Tribunal and the respondents' solicitor by email that the appellants required 11 witnesses for cross-examination and that the appellants' only available dates for a three day hearing were from 1 – 5 July 2019. The appellants' solicitor indicated that the appellants had dates available in May and June 2019 for a non-consecutive hearing, that is two days together and a third day at another time.

33 The respondents' solicitor responded to that email on 10 April 2019 informing the Tribunal that the respondents' only available dates were 27 to 31 May 2019.

34 By a further email on 10 April 2019 the appellants' solicitor informed the Tribunal that "apart from the availability of counsel" he himself would be overseas on leave on 27 to 31 May 2019 and that he had had "carriage of the substantive aspect of this application at all relevant times".

35 By an email dated 18 April 2019 the respondents' solicitor informed the Tribunal that counsel briefed for the respondents was no longer available on 27 and 31 May and explained the unsuitability of dates outside the week previously identified as being a consequence of the fact that two witnesses were going to be travelling overseas for extended periods.

36 On 3 May 2019 Principal Member Rosser fixed the hearing of the proceedings for 28, 29 and 30 May 2019. The Principal Member provided short reasons for that decision as follows:

> It appears that the reason the applicant is unavailable between 27 and 31 May is the solicitor and counsel unavailability. These are not sufficient reasons to postpone the listing of the hearing beyond the end of May. The matter has been before the Tribunal for some 18 months and the hearing was adjourned on the last occasion at the request of the applicant. There is sufficient time between now and late May for another solicitor to be instructed and alternative counsel to be briefed.

37 On 6 May 2019 the appellants' solicitor emailed a letter to the Tribunal requesting that the hearing be adjourned due to the unavailability of their solicitor and counsel. The letter identified dates in the first half of June when senior and junior counsel and the solicitor were now available.

38 On 9 May 2019 Principal Member Rosser dismissed the appellants' application for an adjournment for reasons expressed as follows:

> 1. The Tribunal is unable to accommodate a three day hearing on the dates specified by the applicant.
>
> 2. The applicant has provided no evidence to support a conclusion that alternative counsel cannot be briefed.
>
> 3. In circumstances where the proceedings have been on foot for an extended period of time and where the Tribunal has allocated three days for a final hearing after taking steps to arrange for a Tribunal Member to be available to hear the matter, a further adjournment is not appropriate, even if the applicant may put to the cost of briefing alternative counsel.
>
> 4. If the applicant is not ready to proceed, it is open to the applicant to withdraw the applicant [sic] and re-commence proceedings at a time when he is ready to proceed.

39 On 21 May 2019 the appellants lodged a Notice of Appeal seeking leave to appeal against the refusal of an adjournment and sought a stay. That application for leave to appeal was refused by Deputy President Westgarth on 23 May 2019 with reasons given ex tempore. Written reasons were subsequently provided in a response to a request pursuant to s 62 of the *Civil and Administrative Tribunal Act 2013* (NSW) and were published on 19 June 2019 (*Rodny & Communications Power Inc. (Aust) Pty Ltd v Stricke & Ors* [2019] NSWCATAP 150).

40 In those written reasons, which appear to be a transcription of the reasons given ex tempore, the Deputy President stated:

> 7. It is necessary for the appellant in a case like this to establish that there are substantial reasons to review the decision under appeal. Circumstances justifying leave may be an error of principle resulting in a substantial injustice and more generally leave should not be granted unless a substantial injustice would result. In this particular case the argument is put that this is a complex matter and the appellants would suffer a substantial injustice if they were required to appear next week and prosecute their application in the absence of their solicitor who is overseas and their counsel who are unavailable.
>
> 8. In considering the overall injustice to the appellant, I am also obliged to consider some broader factors. One is the history of this matter which goes back a long way and involved a diversion last year into an appeal concerning legal representation issues. There was an attempt to set the matter down for hearing late last year which was aborted I am told due to the provision of evidence late in the proceedings. The third relevant factor is the fact that the hearing was set down in March of this year but had to be vacated on the morning of the hearing by reason of the death of senior counsel's mother. That was obviously a very sad event for which neither side can be blamed.
>
> 9. My concerns therefore are influenced by the lengthy history of the matter but more particularly by recent events. Both sides were required after 27 March, or whatever the date was when the March hearing was vacated, to advise the tribunal and each other of available dates and there has been an exchange of emails to which my attention was drawn in which the parties

indicated their availability. The tribunal ultimately selected dates that were available to the respondents but it turns out were not suitable to the appellants.

10. It has been some time since the appellants were aware firstly of the likelihood that a date would be chosen that would not meet their suitability and secondly once they did know of the dates chosen there could have been attempts made by the appellants to find alternative lawyers and counsel once it was apparent that briefed counsel were unavailable and the solicitor was going overseas on a planned trip apparently well-known some months ago to him.

11. The material supplied by Mr Cunio does refer to attempts made to find alternate lawyers, in particular paragraph 30 of his statutory declaration. I agree with the comments made by counsel for the respondents that that paragraph is rather sparse and does not give any detail and therefore any comfort as to the extent to which alternative counsel were sought and to the extent that alternative counsel were limited by those who would only act on the instructions of a solicitor, or what attempts were made to obtain an alternative solicitor. Paragraph 30 says attempts were made but there is no detail set out.

12. One cannot be left but with an impression that from a date at least sometime in early May and perhaps even earlier it would have been apparent to the appellants that firstly a date was going to be selected which might not suit their counsel who they knew was not available until July and then when the date was selected one cannot help but think that the reaction by the appellants was inadequate in terms of making alternative arrangements. Therefore there is some basis for the conclusion that if the matter proceeds next week the appellants will be handicapped. To some extent, in my view that is a matter of their own making.

13. If I refuse to give leave there is still a small amount of time for new lawyers to be briefed, secondly there is the possibility of the appellants appearing without representation. In the tribunal legal representation is only permitted in most cases but not all, with leave. There is a general practice that parties do represent themselves so that possibility remains open to the appellants. The third possibility is the appellants may withdraw the application and the tribunal will then dismiss the application, and the appellants would still be free to proceed to file a fresh application.

14. If I were to refuse the application for leave to appeal thus enabling the hearing to continue that does not preclude or place any limits upon the member who hears the case from dealing with an application for an adjournment and deciding that application on its own merits.

15. Now I did refer to the history of this matter and it is relevant to draw attention to s 36 of the NCAT Act which describes the guiding principle for the conduct of proceedings in the tribunal which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

16. These proceedings have been going on far too long in my view and need to come to a point where they can be resolved. The guiding principles also refer to the fact that the tribunal should proceed without undue formality and I draw that to the parties attention because that is reflective of the fact that in many cases parties do appear for themselves without legal representation. The informality is designed so as to assist the inexperienced lay person in not being tripped up by undue formality or the rules of evidence which do not apply in the tribunal.

> 17. Although Ms Power has put forward the proposition that the appellants will suffer an injustice if the case proceeds which I think she described as a substantial injustice, I have two responses to that. One is that I acknowledge that the appellants may be less effective in the prosecution of their case on their own than they would have been with lawyers but I am not convinced that there will be a substantial injustice were the appellants forced to run the hearing next week without legal representation and secondly, to some extent in my view the injustice has largely arisen through the inactivities on the appellant's side and it would be inappropriate to reward that inactivity by granting an adjournment of the hearing.
>
> 18. I have already indicated what choices the appellants have in the event that I refuse leave. So taking those choices into account the ethos which I have described in s 36 and 37 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act), my view about the level of the injustice and how it has come about, I am of the opinion that the case still has the potential to proceed in a fashion which offers procedural fairness and natural justice to both parties. The final factor is that I have the impression that there has been some unwillingness to really search hard for alternative counsel because of the additional cost that will be incurred by briefing new people afresh. That has to be weighed against the fact that if an adjournment is granted there will be some wasted costs on the other side and some additional cost in the future when the hearing does take place even if it is the same lawyers that are involved.
>
> 19. Having regard to the principles that I set out earlier or alluded to at least in the *Rodny v Stricke* case from last year I am not satisfied that I should grant leave and therefore the application is refused.

41 On 23 May 2018 the solicitors for the appellants wrote to the Tribunal advising that they were instructed to withdraw the application and that the appellants intended to file a fresh application in substantially identical form.

42 On 24 May 2019 the Tribunal made orders:

> 1. The application is dismissed in accordance with Section 55(1)(a) of the Civil and Administrative Tribunal Act 2013 as the Applicant has withdrawn the application.
>
> 2. If the Respondent seeks costs they must file and serve Submissions in support within 14 days.
>
> 3. The Applicant must file and serve Submissions opposing an order for costs within 14 days thereafter.
>
> 4. The Submissions must address whether costs can be decided on the papers without a hearing. See s 50 NCAT Act.

43 The respondents filed submissions on 6 June 2019 seeking their costs of the proceedings and that the costs be paid on the indemnity basis.

44 Those submissions recorded that the respondents did not object to the costs issues being decided on the papers.

45 The appellants filed a response to the respondents' application on 21 June 2019 opposing the orders sought and seeking orders either that there be no order as to costs or an order that each party pay their own costs. The appellants submitted that:

> "All costs incurred by the parties to date are costs in the cause of the refiled application filed on 23 May 2019. The applicants have made it clear that they rely on the same evidence in the refiled application as in the old, and therefore all costs in this application will be the same costs incurred by the parties in the refiled application and are not thrown away."

46 The appellants submitted that it would be "manifestly unreasonable and unjust" to order the appellants to pay the respondents' costs of the proceedings in circumstances where those costs would have had to be incurred in any event for the "refiled proceedings".

47 The appellants recorded under the heading 'Determination on the Papers':

> "the applicants do not consent to this application being determined on the papers and respectfully request a hearing of the application".

48 In circumstances which are not made clear on the evidence before us, the Tribunal fixed the costs application for hearing before a Senior Member of the Tribunal on 5 July 2019. On that date neither party appeared.

49 At the hearing of the appeal, the appellants filed and read, by leave, an affidavit from Mr Cunio, the appellants' solicitor, in which he stated that he had made enquiries and searches at his office and that he believed that "no notification was received by my office prior to 5 July of a hearing on that date of the respondents' costs application."

50 Mr Cunio also attested that a solicitor representing the respondents had informed the Member presiding at the call over of the appeal that the respondents' solicitors had not received notice of the hearing on 5 July 2019.

51 Although Mr Knackstredt, who appeared for the respondents at the hearing of the appeal, did not concede that the appellants had not received notice of the hearing on 5 July 2019, his own written submissions acknowledged that the respondents had not received notice of the hearing.

52 We are satisfied in the circumstances that neither party received notification of the hearing. It does not appear that either party has made any enquiries of the

Tribunal's Registry to ascertain how that might have occurred. It seems likely that, through some oversight, notice of the hearing was not forwarded to the parties.

The Decision the subject of Appeal

53 In the absence of any appearance by the parties, the Senior Member listed to hear the matter on 5 July 2019 made an order pursuant to s 50 of the NCAT Act dispensing with a hearing in respect of the respondents' costs application.

54 Section 50 of the NCAT Act provides:

> **50 When hearings are required**
>
> (1) A hearing is required for proceedings in the Tribunal except:
>
> (a) in proceedings for the granting of leave for an external or internal appeal, or
>
> (b) in connection with the use of any resolution processes in proceedings, or
>
> (c) if the Tribunal makes an order under this section dispensing with a hearing, or
>
> (d) in such other circumstances as may be prescribed by the procedural rules.
>
> (2) The Tribunal may make an order dispensing with a hearing if 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.
>
> (3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first:
>
> (a) afforded the parties an opportunity to make submissions about the proposed order, and
>
> (b) taken any such submissions into account.
>
> (4) The Tribunal may determine proceedings in which a hearing is not required based on the written submissions or any other documents or material that have been lodged with or provided to the Tribunal in accordance with the requirements of this Act, enabling legislation and the procedural rules.
>
> (5) This section does not prevent the Tribunal from holding a hearing even if it is not required.

55 In paragraphs 8 and 9 of his decision the Senior Member stated:

> 8. The Tribunal has afforded the parties the opportunity to make submissions as to whether or not the issue of costs can be decided on the papers without a hearing, by order 4 made by the Tribunal on 24 May 2019.
>
> 9. Having received and considered the submissions of each of the parties, and there being no appearance by or on behalf of the Applicants on 5 July

despite their written submissions requiring a hearing, I order a hearing of the costs application be dispensed with.

56 Having made an order dispensing with a hearing the Senior Member determined that the appellants should pay the respondents' costs including the costs of the application for costs but declined to order that those costs be payable on any indemnity basis.

57 Section 60 of the NCAT Act provides:

> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:
>
> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> (f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),
>
> (g) any other matter that the Tribunal considers relevant.
>
> (4) If costs are to be awarded by the Tribunal, the Tribunal may:
>
> (a) determine by whom and to what extent costs are to be paid, and
>
> (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) or on any other basis.
>
> (5) In this section:
>
> costs includes:
>
> (a) the costs of, or incidental to, proceedings in the Tribunal, and
>
> (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

58 The Senior Member determined that there were special circumstances warranting an award of costs as required by s 60 of the NCAT Act. In so finding the Senior Member referred to the factors set out in s 60(3) of the NCAT Act as matters that the Tribunal may have regard to in determining whether there are special circumstances warranting an award of costs. The Senior Member referred in particular to the factors set out in s 60(3)(b), that is whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings, and s 60(3)(g), that is, any other matter that the Tribunal considers relevant.

59 In respect of s 60(3)(b) the Senior Member stated:

> 41. Section 36 of the Act clearly states that the guiding principle to be applied to the practice and procedure of matters before the Tribunal is the facilitation of the quick, just and cheap resolution of the real issues in the proceedings. Parties to proceedings before the Tribunal, and their legal representatives, have an obligation under s 36(3) to co-operate with the Tribunal to give effect to this guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with its directions and orders.
>
> 42. Persons or corporations who lodge Applications in the Tribunal, especially if the nature of the relief sought involves extensive evidence gathering, ought to ensure that such evidence is available and obtained, or at least capable of being obtained and finalised within a short period of time, prior to their Application being filed. Parties appearing before this Tribunal need to recognise that, in giving effect to the "guiding principle" referred to in s 36, when proceedings are first listed for directions in the absence of resolution orders will be made – as they were here – for the parties to provide to the Tribunal, and to the opposing party, copies of all documents on which they intend to rely. For Applicants, that date is usually within a few weeks of the date of te making of the orders.
>
> 43. Australian Legal Practitioners who, on the instructions of their clients, seek leave to represent a party in proceedings before this Tribunal should, before doing so:
>
> > (i) be aware of the "guiding principle" referred to in s 36 of the Act,
> >
> > (ii) be aware of their obligation under s 36(3) to co-operate with the Tribunal to give effect to the guiding principle,
> >
> > (ii) advise their client of the "guiding principle" and the clients obligation under subsection (3) to co-operate with the Tribunal to give effect to it,
> >
> > (iv) ensure that evidence and documents in support of that parties case is either immediately available or will shortly be available in the knowledge that the Tribunal will – usually at the first directions hearing – make orders for the exchange of evidence and documents. If there is likely to be any material delay in the gathering of documentation in support of a case, or in the obtaining of evidence, it is incumbent on the party or – if represented – the legal representative to inform the

> Tribunal member at the directions hearing of such issues so that a realistic timetable can be set.
>
> 44. …It is, I find, out of the ordinary and hence an occasion of special circumstances where the Applicants were in proceedings they instituted ordered to provide their evidence by 19 January 2018 yet sought, and were granted, extensions on 29 January, 6 July, 11 September and 20 September 2018 for the provision of such evidence.

60 The Senior Member rejected a submission on behalf of the appellants that the delay in preparation of the evidence was caused as a result of the issues raised between the parties concerning their respective legal representation and in particular the appeal by the appellants against the order that they not be represented by Mr Le Page.

61 The Senior Member stated at [46]:

> As indicated earlier in these Reasons, Applicants who wish to commence proceedings in this Tribunal ought already have, or be close to having, their evidence available prior to the filing of an Application. That obligation is heightened if an Applicant has sought the assistance of an Australian Legal Practitioner prior to the filing of an Application, or engages an Australian Legal Practitioner after the Application is filed. Continued preparation of the Applicants evidence whilst the Appeal was being determined could have been submitted to the Tribunal and served, and would have permitted the Respondent to obtain or finalise evidence by way of response well before 20 September 2018 – the date when the Applicants evidence was served. The Appeal did not involve a challenge to the nature of the relief sought in the Application. It was an Appeal limited to the question of representation. Its outcome had no bearing on what evidence the Applicants were required to produce in support of their claim. The failure to progress evidence preparation during the Appeal process, I find, prolonged unreasonably the time taken to complete the proceedings thereby constituting special circumstances warranting an order for costs.

62 The Senior Member further determined that the withdrawal of the application by the appellants on 23 May 2019 immediately after the refusal of leave to appeal against the refusal of an adjournment was another relevant matter constituting special circumstances. The Senior Member held at [50]:

> The withdrawal of the Application by the Applicants on 23 May 2019 when, at that point, the evidence of both parties had been submitted to the Tribunal and served on each other and the matter was otherwise ready to proceed – other than the issue of suitability of the dates to the Applicants legal practitioners and Counsel – were special circumstances warranting an award of costs. In making this finding I have had regard to s 60(3)(b) and (g). There has been, I find, unreasonable prolonging by the Applicants of the time taken to complete the proceedings. I consider that the withdrawal of the proceedings on 23 May 2019 without explanation, other than the fact that the Deputy President had refused leave to appeal the Tribunal's confirmation of the 29-30 May 2019 hearing dates, is a matter I consider relevant under s 60(3)(g).

63 The Senior Member did not accept submissions by the respondents that the "comfortable majority" of the 6,000 odd pages of evidence served by the appellants was for the most part irrelevant to the issues in dispute and that the application and the material served in support of it did not establish grounds for any order under s 237 or s 238 of the *Strata Schemes Management Act 2015* (NSW) with the result that the application had no tenable basis or was otherwise misconceived or lacking in substance.

64 The Senior Member determined that in the absence of a hearing on the merits and consideration of the evidence it was not appropriate in determining a costs application to consider the merits of the dispute or the apparent relevance of evidence to the issues in dispute. In this context the Senior Member referred to *Dehsabzi v The Owners Strata Plan number 83556* [2019] NSWCATAP 65 at [14] and *Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622.

65 The Senior Member also rejected a submission on the part of the appellants that, as they had commenced fresh proceedings seeking the same relief, the costs incurred by the respondents in the proceedings would not be thrown away.

66 The Senior Member stated, at [60]:

> I reject that submission and do not consider it to be a matter that the Tribunal should consider relevant in its determination as to whether special circumstances exist that warrant an order for costs being made. This for the following reasons:
>
> > (1) The proceedings in respect of which the costs application is made have been withdrawn then dismissed.
> >
> > (2) The application is not made in ongoing proceedings such as in circumstances where an Application is amended or a hearing is adjourned in circumstances where the party resisting a costs application argues that it is only the moving parties costs thrown away by reason of the amendment, or costs thrown away by reason of the adjournment, that ought be the subject of an order.
> >
> > (3) There is no evidence as to what orders have been made in respect of the refiled Application.
> >
> > (4) On the determination of the refiled Application the parties thereto will be at liberty to seek orders including – if s 62(2) [sic] of the Act is satisfied – orders as to costs.

The Notice of Appeal

67 The appellants' Notice of Appeal stated thirteen grounds of appeal as follows:

> The Tribunal erred as to a question of law in that it:
>
> (1) Misapplied Section 60 of the *Civil and Administrative Act 2013* ("the NCAT Act");
>
> (2) Failed to have proper regard to Section 36 of the NCAT Act;
>
> (3) Failed to properly apply established legal principles with respect to the determination of the issue of costs;
>
> (4) Failed to properly exercise its discretion with respect to the proposed cost order;
>
> (5) Failed to determine the costs issue on the basis of the uncontested facts and available evidence;
>
> (6) Made findings on the basis of no evidence, or in the alternative, insufficient evidence;
>
> (7) Made findings that the appellants' conduct caused delay of the determination of the proceedings and consequential increase in costs, which amounted to special circumstances pursuant to Section 60 of the NCAT Act;
>
> (8) Made findings as to the earlier challenge to Mr Le Page's representation which were patently erroneous;
>
> (9) Made findings that the withdrawal of the application by the appellants amounted to special circumstances pursuant to Section 60 of the NCAT Act;
>
> (10) Determined, without reason or on a proper basis, that proceedings in the Tribunal ought to be finalised within two to four months;
>
> (11) Placed undue weight upon the questionable principles, that applicants who wish to commence proceedings in the Tribunal ought to have, or be close to having their evidence available prior to the filing of an application;
>
> (12) Failed to take due account of the fact that costs should not be awarded on the basis that the appellants commenced fresh proceedings in the Tribunal seeking substantially the same orders and therefore costs would not be thrown away;
>
> (13) Denied the appellants procedural fairness by failing to hold a hearing of the application and providing no notice of that hearing.

68 In their Notice of Appeal the appellants also identified grounds on which they sought leave to appeal on the basis that the decision was unfair and inequitable and had led to the appellants suffering a substantial miscarriage of justice. The grounds on which the appellants sought leave to appeal effectively restated Grounds 1, 2, 5, 12 and 13.

69 The decision in respect of costs is an ancillary decision as defined in s 4 of the NCAT Act. An appeal is available in respect of ancillary decisions as of right on

a question of law and with leave on any other grounds: s 80(2)(b) of the NCAT Act. As this is an appeal from a decision of the Consumer and Commercial Division, the Appeal Panel may grant leave under s 80(2)(b) only if satisfied that the appellant may have suffered a substantial miscarriage of justice because:

> (a) the decision of the Tribunal under appeal was not fair and equitable, or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

70 We note that most of the grounds of appeal do not raise questions of law but rather seek to cavil with the Senior Member's exercise of discretion. In written submissions filed in support of the appeal the appellants effectively limited themselves to Ground 13, that is that the appellants were denied procedural fairness.

71 In written submissions, Mr Birch SC, who appeared for the appellants, characterised the decision to dispense with a hearing pursuant to s 50 of the NCAT Act as "irregular".

72 The substance of the submission was that the decision to dispense with an oral hearing was founded upon a "fundamental mistake of fact namely that the [appellants] had been afforded the opportunity of an oral hearing and, for whatever reason, had simply failed to take up that opportunity".

73 We note that that submission goes beyond an allegation of denial of procedural fairness and may not strictly be encompassed within the grounds of appeal. Nevertheless, the respondents dealt with that submission in their written submissions and did not object to the point being raised. We consider that the respondents were fairly on notice of the submission, and, to the extent necessary, will permit the appellants to amend their grounds of appeal to raise the submission.

Consideration

74 We are of the view that the Senior Member did make an error of law in the exercise of his discretion pursuant to s 50 of the NCAT Act.

75 The Senior Member determined that the question of costs should be determined without a hearing on the explicit basis that the appellants had been given the opportunity to attend an oral hearing and had failed to attend.

76 As we have determined above, the appellants did not in fact have the opportunity to attend an oral hearing as they had not been notified of the hearing.

77 In those circumstances we consider that the Senior Member's exercise of the discretion to dispense with the requirement for a hearing miscarried. The decision to dispense with a hearing is a discretionary decision to which the principles laid down by the High Court in *House v The King* (1936) 55 CLR 499 at 504-505 are applicable.

78 In that case the High Court said:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

79 We are satisfied that, in proceeding on the basis that the appellants had failed to take advantage of the opportunity to attend a hearing, when in fact the appellants had not been notified of the hearing, and therefore had not been accorded the opportunity to attend the hearing, the Senior Member proceeded on an erroneous basis and a mistaken understanding of the facts.

80 We acknowledge that the Senior Member might, regardless that the appellants had requested a hearing, have nevertheless determined that the issue of costs should be determined on the parties' written submissions and without a hearing.

81 However, an appropriate exercise of that discretion could not be made in circumstances where the Senior Member understood erroneously that the appellants had failed to take an opportunity to attend the hearing.

82 In their written submissions the respondents relied upon the statement of Murphy J in *Taylor v Taylor* (1979) 143 CLR 1 at 20-21:

> A rule may be recognized that where (in the exercise of federal jurisdiction) an order has been made against a person who, through his own fault (or without the fault of the court or the other party) has not availed himself of an opportunity to be heard, the court may in its discretion set aside the order and allow the matter to be reheard. Such a rule may properly be characterized as a federal common law rule of judicial power. This rule should be excluded only by unmistakable language, that is, express words or necessary implication. Section 79 a does not contain language unmistakably evincing an intention to exclude such a common law rule. The discretion to reopen should be applied only with caution. Factors to be considered are the presence or absence of some real explanation for failure to use the opportunity to be heard, delay, acquiescence, prejudice to the other party.

83 The respondents submitted that: “there is no good reason not to apply this reasoning in the Tribunal”.

84 We note that Murphy J dissented in that case. Both Gibbs J, with whom Stephen J agreed, (at [4]) and Mason J, with whom Aickin J agreed, (at [16]) cited the statement of Jenkins LJ in *Grimshaw v Dunbar* [1953] 1 QB 408 at 416:

> … a party to an action is prima facie entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. Prima facie that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case — no doubt on suitable terms as to costs, …

85 As we have determined that the appellants’ failure to attend the hearing fixed before the Senior Member was a result of the absence of notice, the reasoning of Murphy J, that a decision made in the absence of a party who “through his own fault” has failed to attend a hearing should only be set aside with caution and on good cause being shown, is not applicable.

86 Rather, consistently with the principles set out in *Grimshaw v Dunbar*, the determination made in the (accidental) absence of the appellants is, provided

the respondents would not be unfairly prejudiced, presumptively liable to be set aside. The respondents have not pointed to any unfair prejudice which would arise if the Senior Member's decision was set aside.

87 We note that the decision to dispense with a hearing was an interlocutory decision of the Tribunal and the appellants require the leave of the Appeal Panel to appeal against that decision: s 80(2)(a) of the NCAT Act.

88 The principles governing the grant of leave to appeal an interlocutory decision were considered by the Appeal Panel in *Champion Homes Pty Ltd v Guirgis* [2018] NSWCATAP 54. At [34] - [35] the Appeal Panel said:

> 34 … there is no specification in the NCAT Act as to the circumstances in which leave should be granted in respect of interlocutory decisions. Rather, there is a discretion to be exercised and general principles apply to the grant of leave to appeal such decisions.
>
> 35 As stated in various decisions of the Tribunal and its predecessor, the Administrative Decisions Tribunal, the principles to be applied are to be derived from the principles applicable to leave applications in courts: see for instance, *Johnston v Department of Education and Training* (GD) [2007] NSWADTAP 6 and *BHM v BHN & Ors* [2014] NSWCATAP 26. These principles include the following:
>
> > (1) It is unnecessary and unwise to lay down rigid rules of practice or exhaustive criteria governing the grant of leave to appeal: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 175; [1981] HCA 39;
> >
> > (2) However, the requirement for leave is a filter restricting access to the appeal process: *Coulter v R* (1988) 164 CLR 350; [1988] HCA 3 at 359 per Deane and Gaudron JJ;
> >
> > (3) Leave should only be granted where there are substantial reasons to allow an appellate review: *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] 104 FCR 564;
> >
> > (4) Circumstances justifying leave may be an error of principle resulting in substantial injustice: *Minogue v Williams* [2000] FCA 125. However, these concepts may not be cumulative;
> >
> > (5) There is a difference between the exercise of a discretion concerning a matter of practice and procedure and an exercise of a discretion that determines substantive rights: *Adam P Brown* per Aickin, Wilson and Brennan JJ at 177 citing with approval Jordan CJ in *In re Will of FB Gilbert (dec)* (1946) 46 SR (NSW) 318 at 323;
> >
> > (6) Where an interlocutory decision effectively determines the substantive rights of the parties, that may be a significant factor in favour of granting leave to appeal: *Eltran Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 195 per Spender J at [14]-[15], referring to *Ex parte Bucknell* (1936) 56 CLR 221 at 225-6;

(7) In connection with a matter of practice and procedure, restraint should be applied in reviewing such decisions, especially if an application for leave is made during the course of a hearing: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21], referring to *Adam P Brown* and in *In re Will of FB Gilbert (dec)*;

(8) Leave should not be granted unless a substantial injustice would result and the decision is attended with sufficient doubt to warrant it being reconsidered by the appeal body. What is sufficient is dependent on the particular case: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-9;

(9) Lastly, subject to the above, the matters set out in *Collins* [*Collins v Urban* [2014] NSWCATAP 17] at [84 (1)-(2)] are also relevant to the exercise of a discretion to grant leave.

89 The matters set out in *Collins v Urban* [2014] NSWCATAP 17 at [84(1)-(2)], referred to in *Champion Homes* at [35(9)], were:

(1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];

(2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,

BHP Billiton Ltd v Dunning [2013] NSWCA 421 at [20] and the authorities cited there, *SAB v SEM* [2013] NSWSC 253 at [8] and [9] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];

90 We are satisfied that it is appropriate to grant leave to appeal against the decision to dispense with a hearing. The decision was founded upon a factual error that was clearly mistaken. We will grant leave to appeal, and set aside the

Senior Member's decision to dispense with a hearing. It must follow that the Senior Member's decision concerning costs should also be set aside.

91 However, we do not consider it appropriate to remit the question of costs to the Consumer and Commercial Division. Section 80(3) of the NCAT Act provides:

> (3) The Appeal Panel may:
>
> (a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and
>
> (b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.

92 As is customary in internal appeals in the Tribunal, directions made by the Tribunal for the preparation of the appeal included the following note:

> "(2) At the hearing the Appeal Panel may proceed, if appropriate, to deal with the appeal by way of a new hearing, under the *Civil and Administrative Act 2013* (NSW), section 80(3). The parties should be prepared to put before the Appeal Panel any fresh evidence as well as any evidence that was before the Tribunal at first instance and make any submissions in relation to the original application that they want to make."

93 At the hearing of the appeal we invited counsel for the parties to address any matters that they wished to put before the Appeal Panel in the event that we determined that the Senior Member's decision should be set aside.

94 We have concluded that we should, pursuant to s 80(3) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act), deal with the appeal by way of a new hearing, on the basis of the material provided by the parties for the purposes of the appeal, including the written submissions in relation to the respondents' application for costs filed by the parties at first instance and the oral submissions of counsel at the hearing of the appeal.

Determination of the Appeal by way of a New Hearing

95 To make an award of costs in favour of the respondents we must be satisfied there are special circumstances warranting an award of costs.

The Parties' Submissions concerning the Respondents' Application for Costs

96 In their written submissions filed at first instance in respect of their application for costs, the respondents relied upon four matters said to constitute special circumstances:

(1) "The proceedings have been characterised by delay (and consequential increased costs) caused by the [appellants]."

(2) "A comfortable majority of the 6,000-odd pages of evidence served by the [appellants] on 20 September 2018 complains about historical decisions taken by the Owners Corporation to either carry out or not carry out work on the common property. These matters were, for the most part, irrelevant to the issues in dispute and were therefore productive of little more than delay and increased costs".

(3) "The application and material served in support of it do not establish grounds for any orders under ss 237 or 238 of the *Strata Schemes Management Act 2015* (NSW)".

(4) "The [appellants] have withdrawn the proceedings in circumstances where they had unsuccessfully sought to have the hearing date vacated, and have now filed identical proceedings in order to circumvent those orders made by the Tribunal".

97 In their written submissions filed at first instance in response to the respondents' application for costs, the appellants submitted that there were not special circumstances warranting an award of costs. Critically, in respect of delay, the appellants submitted that:

> There is no rule or requirement for any applicant to file and serve their evidence with the application. Instructions were taken from the [appellants] prior to the filing of the application and evidence prepared following the [appellants'] change of lawyers after the Appeal Panel decision"

and:

> "It was reasonable in circumstances where the engagement of the [appellants'] solicitor was being challenged by the respondents, that no further action was taken by them to prepare their evidence while the Appeal Panel determined the appeal of the interlocutory decision of the Tribunal in relation to representation".

98 In respect of the relevance of the appellants' evidence and the proposition that the appellants' case was misconceived, the appellants pointed out that the application had not been heard or determined and relied upon the decisions in *Dehsabzi* and *ex parte Lai Qin*, referred to above.

99 In response to the submission that the appellants had sought to circumvent the orders of the Tribunal (and in respect of the submission that the appellants' withdrawal of the application was a further cause of delay) the appellants submitted that, in withdrawing the application and filing a further application, the appellants had simply responded to the suggestion of the Tribunal, in the

reasons for refusal of the adjournment, that it was open to them to withdraw the application and re-commence at a time when they were ready to proceed.

100 In oral submissions before the Appeal Panel, Dr Birch laid emphasis on the comments made by both Principal Member Rosser and Deputy President Westgarth to the effect that "it was open to the appellants to withdraw the application and re-commence". He submitted that the appellants had merely done what they were told to do.

101 Dr Birch also submitted that it would have been inappropriate for Mr Le Page or his firm to engage in work to prepare evidence for the appellants' case when there was an order, the subject of appeal, that Mr Le Page and his firm did not have leave to represent the appellants.

Consideration of the Respondents' Application for Costs

102 Special circumstances are circumstances that are out of the ordinary. They do not have to be extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* (2014) NSWCATAP 120 at [11].

103 As noted above, the respondents relied upon four matters which they asserted constituted special circumstances warranting an order for costs.

(1) Delay

104 We accept that the delay by the appellants in preparing and filing their evidence was excessive and constituted special circumstances. We agree with the proposition stated by the Senior Member in the decision under appeal at [42]-[43] which we have set out above at [59].

105 Dr Birch submitted that it was unreasonable to expect a party to gather all of the evidence necessary for its case prior to commencing proceedings. He submitted that that might result in a party incurring significant expense in preparing evidence in respect of matters that may not ultimately be disputed or in circumstances where the institution of proceedings might result in the parties reaching a settlement.

106 In our view that submission over-states the degree of preparation which the Tribunal reasonably expects. A party is not required to have all its evidence prepared prior to commencing proceedings, but parties are expected to have

made sufficient enquiries and investigations to confirm that the necessary evidence will be available and to gain an informed understanding of the amount of time that will be required for the preparation of the evidence. As the Senior Member noted at [43(iv)], if there are good reasons why the preparation of evidence will be prolonged or delayed, that is a matter that should be raised with the Tribunal at the first directions hearing so that a realistic timetable can be set.

107 We accept that it may not have been appropriate for Mr Le Page or his firm to be involved in the preparation of evidence while the question whether he would be given leave to represent the appellants remained a live issue. But that question was resolved against the appellants by the Appeal Panel decision on 31 May 2018. There is no reason apparent on the material available to us why the appellants then took until 20 September 2018 to prepare their evidence. The appellants sought and obtained a further four extensions to the timetable for the filing of their evidence after 31 May 2018 and the delay in the appellants filing their evidence between 31 May 2018 and 20 September 2018 resulted in the vacation of the hearing fixed for 7 and 8 November 2018.

(2) and (3) Relevance of the appellants' evidence and the strength of the appellants' case

108 Despite the direction of the Appeal Panel that the parties have available all material on which they wished to rely in the event the Appeal Panel decided to deal with the matter by way of new hearing, the parties did not put before the Appeal Panel the evidence filed by the appellants on 20 September 2018. We are thus not in a position to consider whether the respondents' characterisation of the evidence and the strength of the appellants' case is correct.

109 In any event, we accept the appellants' submission that it would not be appropriate to seek to assess the relevance of the evidence or the strength of the appellants' case in circumstances where there has been no hearing on the merits. As the Appeal Panel stated in *Dehsabzi* at [14]:

> It is not appropriate for the Appeal Panel to embark upon a determination of the substantive issues in an appeal which has been withdrawn for the purpose of determining costs. When a matter has been decided without a hearing and there has been no hearing on the merits, the factor that usually determines costs, being the success of one of the parties, is absent. In *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia Ex Parte Lai*

> *Qin* (‘Lai Qin’), McHugh J described circumstances in which the discretion to make a costs order may be exercised in the absence of a hearing on the merits. One circumstance described by McHugh J is where one of the parties has acted so unreasonably that the other party should be awarded costs. Another circumstance described is where although both parties have acted reasonably, "one party was almost certain to have succeeded if the matter had been fully tried". His Honour goes on to note that "such cases are likely to be rare."

(4) Withdrawal of the application

110 We consider that the appellants’ withdrawal of their application less than a week before the three day hearing for which the matter had been fixed also constituted special circumstances warranting an order for costs.

111 We do not accept the respondents’ characterisation of the appellants’ decision to withdraw their application as “seeking to circumvent the orders of the Tribunal”. Such a characterisation is inappropriate when both Principal Member Rosser and the Deputy President explicitly acknowledged that that was a course open to the appellants.

112 Nevertheless, the withdrawal of an application, which has been the subject of lengthy preparation and the incurring of significant costs, shortly before the hearing is, in our view, a matter that constitutes special circumstances warranting an order for costs.

113 There will be circumstances in which the withdrawal of proceedings is justified by factors out of the moving party’s control. An example is where the proceedings have become futile by reason of a legislative amendment or a change of position by the defendant/respondent or a third party. As McHugh J stated in *ex parte Lai Qin* at [625]:

> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

114 The reason for the appellants’ decision to withdraw their application was, as they explicitly acknowledged, that they had been unable to have the hearing adjourned and elected to withdraw the proceedings and commence fresh proceedings rather than proceed with the hearing on the dates allocated.

115 The appellants' submissions seeking to justify their decision to withdraw their application were generally directed to the matters which they had relied upon in seeking the adjournment. As such, those submissions effectively constituted an attempt to re-argue the adjournment application.

116 It would not be appropriate for us to re-visit the arguments in respect of the adjournment application. Those arguments were not considered sufficient by the Principal Member or the Deputy President.

117 We note in particular that among the reasons given for the refusal of the adjournment was the absence of evidence (or adequate evidence) to demonstrate that alternative counsel could not be briefed: see in particular the decision of Deputy President Westgarth at [11] and [12], which we have set out at [40] above.

118 In our view there is no basis to conclude that the decision to withdraw the application was forced upon the appellants by extraneous factors beyond their control or responsibility.

119 We consider that the appellants' submission that they were merely doing what the Principal Member and Deputy President had suggested involves a misunderstanding of the relevant comments.

120 The proposition that the appellants could withdraw the proceedings and file fresh proceedings was not offered as a cost free way out of the appellants' dilemma. Rather, as we understand the decisions, the possibility of fresh proceedings was mentioned to demonstrate that the appellants would not be irretrievably prejudiced (in the sense of losing the ability to enforce their claims) by the refusal of an adjournment.

121 There is no basis in either decision to warrant the appellants failing to understand that the withdrawal of their application would be likely to have the consequence that they would be liable to pay the respondents' costs of the proceedings.

122 The appellants submitted at the hearing before the Appeal Panel that, as they commenced fresh proceedings seeking the same relief, any costs incurred by

the respondents had not been thrown away and that in those circumstances, it was not reasonable to require the appellants to pay the respondents' costs.

123 The appellants did not put material before the Appeal Panel to enable us to assess that submission. The respondents did not concede that the fresh application was proceeding in such a way that the costs incurred by the respondents in relation to the original application would not be wasted.

124 The appellants also acknowledged that the costs incurred by the respondents in relation to the initial application would not be recoverable as costs of the subsequent application in the event that the appellants were unsuccessful in the subsequent application.

125 The appellants submitted that, for that reason, the appropriate course would be to adjourn the costs application for determination, after resolution of the second application, by the Member allocated to determine the second application. We do not consider that that would be an appropriate course. It was not a course that was raised by the appellants at first instance and we have not been given information to enable us to assess within what time frame the subsequent proceedings might be determined and for what length of time the costs application would be likely to remain adjourned.

126 To permit an applicant to withdraw their application just before the dates fixed for the hearing of the application and adjourn the question of costs until after the resolution of fresh proceedings raising the same issues would create a perverse incentive to applicants who, for whatever reason, do not find it convenient to have their application heard on the dates fixed. We do not consider it appropriate to adjourn the respondents' application for costs.

127 Accordingly, although we have concluded that the Senior Member's decision to proceed without a hearing should be set aside, we have reached the same ultimate conclusion and will confirm the orders made on 2 August 2019.

128 We did not receive submissions concerning the costs of the appeal. To make an order concerning the costs of the appeal we would be required to be satisfied that there are special circumstances warranting an order for costs in respect of the appeal. In light of our conclusion that the decision to dispense

with a hearing involved an error of law we are tentatively of the view that an order for costs would not be warranted in respect of the appeal. However we will give the parties an opportunity to make an application for an order for costs. Such application should be filed and served within 14 days of the publication of this decision and be accompanied by an outline of submissions which should address the question whether the application can be determined on the papers and without an oral hearing. In the event either party files an application for costs, the other party may file and serve a written outline of submissions in response within a further 14 days, which should address the question whether the application can be determined on the papers and without an oral hearing.

Orders

129 Our orders will be:

(1) Leave to appeal is granted.

(2) Pursuant to s 80(3) of the Civil and Administrative Act 2013 (NSW) the appeal is to be dealt with by way of a new hearing.

(3) The order made on 2 August 2019 in application SC 17/45456 is confirmed and the appeal is dismissed.

(4) Any application in respect of the costs of the appeal is to be made by written submissions filed and served within 14 days of the date of publication of this decision. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act.

(5) If either party files submissions in accordance with order 4 above the other party may file and serve submissions in response within a further 14 days. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.