Civil and Administrative Tribunal

New South Wales

Case Name:	Shoal Bay Developments Pty Ltd v Community Association DP 270468
Medium Neutral Citation:	[2020] NSWCATAP 115
Hearing Date(s):	On the papers
Date of Orders:	19 June 2020
Decision Date:	19 June 2020
Jurisdiction:	Appeal Panel
Before:	Dr R Dubler SC, Senior Member M Gracie, Senior Member
Decision:	(1) Leave to appeal is refused. (2) The appeal is dismissed. (3) Order that the appellants pay the respondent's costs of the appeal, on the ordinary basis, as agreed or assessed. (4) If a party seeks a different costs order, order 3 above ceases to have effect and the following orders apply: (5) Any application for a different costs order is to filed and served within 14 days of the publication of these orders and is to be supported by evidence and submissions not exceeding five pages in length including submissions as to whether or not a hearing on the question of costs should be dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013. (6) Any response to the costs application(s) is to be filed and served 14 days thereafter and is to be supported by evidence and submissions not exceeding five pages in length including submissions as to whether or not a hearing on the question of costs should be dispensed with pursuant to s 50(2) of the

Civil and Administrative Tribunal Act 2013.
(7) Submissions in reply are to be filed and served within 7 days of receipt of submissions in response.

Catchwords: APPEAL - leave to appeal - leave refused - costs - exercise of discretion - withdrawal of application - no hearing on the merits - special circumstances - no question of law - no demonstrated error - no substantial miscarriage of justice - costs of the appeal

Legislation Cited:
Civil and Administrative Tribunal Act 2013
Civil and Administrative Tribunal Rules 2014
Community Land Management Act 1989
Strata Schemes Management Act 1996
Uniform Civil Procedure Rules 2005

Cases Cited:
Aon Risk Services Ltd v Australian National University (2009) 239 CLR 175
Arambewela v Castle Projects Pty Ltd [2018] NSWCATAP 14
Azzi v Phan [2017] NSWCATAP 215
BHP Billiton Ltd v Dunning [2013] NSWCA 421
Briginshaw v Bringinshaw (1938) 60 CLR 336
Channell v Graham [2017] NSWCATAP 129
Collins v Urban [2014] NSWCATAP 17
D Constructions v Walsh [2020] NSWCATAP 92
Gassman & Anor v Peck [2017] NSWCATAP 66
Green v Schneller [2002] NSWSC 202
Harrem Pty Ltd v Tebb & Anor [2008] NSWSC 510
House v King (1936) 55 CLR 499
Hunter Development Corporation v Save Our Rail NSW Incorporated (No 2) [2016] NSWCA 375
Khanna v Bond Realty Pty Ltd [2019] NSWCA 128
Kiama Council v Grant [2006] NSWLEC 96
Latoudis v Casey (1990) 170 CLR 534
Oshlack v Richmond River Council (1998) 193 CLR 72
Owners Corporation SP 82076 v Taricon Pty Ltd NSWCATCD 61
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia: Ex parte Lai Qin [1997] HCA 6
Solomons v Valley Motor Auctions [2017] NSWCATAP 31

	The Owners Corporation Strata Plan No 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256 The Owners Corporation of Strata Plan 4521 v Zouk & Anor [2007] NSWCA 23 Zucker v Burbank Montague Pty Ltd [2018] NSWCATAP 135
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Shoal Bay Developments Pty Ltd (First Appellant) Snoogal Pty Ltd (Second Appellant) Community Association DP 270468 (Respondent)
Representation:	Solicitors: David A Vitnell (Appellants) JS Mueller & Co Lawyers (Respondent)
File Number(s):	AP 20/07646
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	22 January 2020
Before:	K Ross, Senior Member
File Number(s):	SCS 19/09853

REASONS FOR DECISION

Introduction

1 This is an appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (CAT Act) of a decision made in the Consumer and Commercial Division of the Tribunal (CCD) on 22 January 2020 to order that the appellants pay the respondent's costs of the proceedings, on the ordinary basis, as agreed or assessed.

2 For the reasons set out below, we have decided to refuse leave to appeal and dismiss the appeal.

Background

3 On 25 February 2019 the appellants, who are lot owners in a community scheme (**Lot Owners**), filed an application in the CCD against the respondent Community Association seeking orders under section 83 of the *Community Land Management Act* 1989 (CLM Act).

4 The Lot Owners sought orders that the contributions levied by the respondent for water and sewer services and water usage were excessive and claimed a reduction in the levy to $nil and a refund of the difference to them.

5 The matter proceeded for hearing on 6 November 2019 at which both parties were legally represented. The Reasons for Decision of the Tribunal (**Reasons**) record at [4] that "at the beginning of the hearing the Lot Owners' counsel indicated that the Lot Owners conceded that the Limitation Act applied to the claim."

6 Also, the Reasons record at [5] that the Tribunal raised a preliminary question with the parties as to whether section 83 of the CLM Act empowered the Tribunal to make the orders sought by the Lot Owners.

7 The hearing proceeded and directions were made for the filing and service of written submissions. The decision was reserved.

8 On 8 November 2019 the Lot Owners informed the Tribunal that the application was withdrawn and accordingly it was dismissed under section 55 (1) (a) of the CAT Act.

9 The respondent then sought orders for their costs. This was opposed by the Lot Owners.

10 It is the Tribunal's decision ordering the Lots Owners to pay the respondent's costs that is the subject of the present appeal.

Summary of the Decision

11 In its Reasons the Tribunal rejected the respondent's contention that Rule 38 of the Civil and Administrative Tribunal Rules 2014 (**Rules**) applied on the basis

that the amount claimed by the Lot Owners was more than $30,000. If Rule 38 applied, then costs may be ordered by the Tribunal, even in the absence of any "special circumstances" which are otherwise required to be entitled to a costs order in proceedings in the Tribunal.

12 The Tribunal found that Rule 38 did not apply because the Lot Owners were in effect seeking orders for which no direct relief was sought and no orders could be made by the Tribunal under section 83 of the CLM Act requiring the payment or any relief from payment, of any sum irrespective of whether it was more than $30,000. In so finding, the Tribunal had regard to the reasoning of the Appeal Panel in *The Owners Corporation Strata Plan No 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 at [111] (2) (*Malachite Holdings*) which the Tribunal described as "akin" to the circumstances under consideration (at [14]).

13 In the absence of Rule 38 applying, the Tribunal considered whether there were "special circumstances" which may nonetheless apply to warrant a departure from the usual position in the Tribunal that parties pay their own costs. The Tribunal considered the powers for making an order for costs under section 60 of the CAT Act.

14 The Tribunal found that section 60(3)(a) of the CAT Act applied in circumstances where the parties were legally represented and the respondent was put to the cost of defending an application that was withdrawn after the hearing. The Tribunal concluded at [17] that the "withdrawal of the application at such a late stage is out of the ordinary and amounts to special circumstances."

15 The Tribunal also found that section 60 (3) (c) of the CAT Act applied because "having heard the Tribunal's concerns about its power to make the orders sought, and the arguments and submissions of the Community Association, the applicants capitulated. I am satisfied that the Lot Owners' claim had no tenable basis in law" (at [19). The Tribunal found that this also constituted "special circumstances" empowering it to exercise a discretion as to whether to make a costs order.

16 In exercising its discretion under section 60 of the CAT Act, the Tribunal found that even though the respondent did not raise any concerns or put the Lot Owners on notice of any jurisdictional issue about the Tribunal's power to make the orders sought under section 83 of the CLM Act, overall and having been put to the cost of defending proceedings which were "not tenable, only to have them withdrawn after the hearing", the Lot Owners were ordered to pay the respondent's costs "on the usual basis" (at [27]).

Appeal Grounds

17 The Lot Owners accepted in the Notice of Appeal filed on 17 February 2020 that leave to appeal is required. No issue of law has been identified in the Notice of Appeal or the outline attached as Annexure "A".

18 The Notice of Appeal raised two ground of appeal.

19 The first is that the Tribunal erred in finding that there were "special circumstances" warranting an award of costs in favour of the respondent.

20 The second contends that the Tribunal erred in the exercise of its discretion.

Appellants' Submissions

21 The Lot Owners provided a form of submission at Annexure "A" to the Notice of Appeal and extensive written submissions filed on 27 March 2020.

22 The written submissions filed on 27 March 2020 introduced an issue not raised in the Notice of Appeal. The Lot Owners submitted that by dismissing the proceedings on 8 November 2019, the Tribunal became *functus officio* and had no power to make directions or any decision with respect to costs from that date. No Amended Notice of Appeal was filed by the Lot Owners to raise this issue. The Lot Owners did not seek leave to raise this new ground in its written submissions.

23 The Lot Owners also contended that the Tribunal's decision was not fair and equitable and that it was made against the weight of the evidence.

24 In relation to the fair and equitable ground, two reasons were submitted.

25 First, the Lot Owners submitted that the proper exercise of the Tribunal's discretion required it to order payment of their costs "from the date that the

parties were alerted to the jurisdictional issue": citing *Owners Corporation SP 82076 v Taricon Pty Ltd* NSWCATCD 61 at [19]. The first occasion the jurisdictional issue was raised was at the hearing. Relying upon several Court of Appeal authorities (cited in footnote 58 of their written submissions in chief), it was submitted that "the ambush theory of litigation is dead". The Lot Owners submitted that it was incumbent upon the respondent to avoid wasteful litigation by bringing the jurisdictional issue to the attention of the Lot Owners "as soon as possible": citing *Harrem Pty Ltd v Tebb & Anor* [2008] NSWSC 510 per Palmer J at [19].

26 Secondly, the Lot Owners contended that the orders for costs made by the Tribunal was punitive and not compensatory, relying on several decisions including the High Court decisions of *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [25] and *Latoudis v Casey* (1990) 170 CLR 534; 543. The grounds for this submission was that the effect of the decision was to make the Lot Owners liable for "around 60% of the actual legal costs of the Respondent" and then "a further 32% of the remaining 40% of actual legal costs incurred by the respondent based on unit entitlement."

27 In relation to the decision being against the weight of the evidence, it was submitted that in balancing the factors under consideration set out in section 60(3) of the CAT Act, the Tribunal failed to properly exercise its discretion by affording appropriate weight to those factors.

28 In particular, the Lot Owners submitted that the Tribunal erred in finding that under section 60(3)(a) of the CAT Act, the evidence permitted a finding that the Lot Owners conducted their case in a way that unnecessarily disadvantaged the respondent.

29 In anticipation that the respondent would seek to challenge on the appeal the Tribunal's finding that Rule 38 did not apply, the Lot Owners also made submissions seeking to confirm the correctness of that part of the Reasons.

30 The Lot Owners also provided extensive submissions in reply filed on 4 May 2020. In those submissions, the Lot Owners repeated and expanded on the matters raised in its submissions in chief and which have been set out above. However, after providing a detailed reply to the respondent's submissions, the

Lot Owners then introduced for the first time and at the very end of its submissions a contention that leave to appeal was *not* required because the appeal involved questions of law. This was an entirely new approach to the way in which the appeal had been conducted by both parties up to that time.

31 The totality of the written submissions filed on behalf of the Lot Owners (not including the three page submission attached to the Notice of Appeal) was 28 pages. As we set out below, having regard to the "overriding principle" in section 36 of the CAT Act, the issues raised on this appeal which solely concerns costs does not justify such lengthy submissions which also raised issues not identified in the Notice of Appeal and failed to succinctly deal with the real issues for our consideration.

Respondent's Submissions

32 The respondent filed submissions and supporting material on 16 April 2020. Those submissions of 20 pages were also unduly lengthy.

33 The respondent opposed the granting of leave to appeal for two reasons, namely:

(1) The Lot Owners have not demonstrated that they have suffered a substantial miscarriage of justice because the decision was either not fair and equitable or against the weight of evidence: citing *Collins v Urban* [2014] NSWCATAP 17 at [84] (*Collins v Urban*); and

(2) The appeal does not involve any issue of principle, questions of public importance or an injustice which are reasonably clear: again citing *Collins v Urban* at [84].

34 The respondent submitted that Rule 38 of the Rules applied so that the Tribunal did not have to be satisfied that there were "special circumstances" to exercise its discretion to award costs. This was on the basis that the Lot owners sought to be relieved from that component of contributions levied by the respondent on the Lot Owners for Hunter Water Expenses and to reduce from such contributions in the total sum of $269,742.62 to nil. Accordingly, the respondent contended that the amount claimed or in dispute in the proceedings exceeded $30,000.

35 The respondent contended that the appeal did not identify any error in the Tribunal's finding that there were special circumstances to warrant an award of costs.

36 The respondent submitted that the appeal did not identify any error in the Tribunal's exercise of its discretion of the type explained in the *House v King* (1936) 55 CLR 499. The respondent submitted that the discretion was correctly exercised for the reasons found by the Tribunal and for several additional reasons which it submitted "unnecessarily disadvantaged the respondent". These additional reasons focused upon the way in which the Lot Owners amended several times their application which, it was submitted, prolonged the proceedings and thereby unnecessarily disadvantaged the respondent.

Statutory Basis of the Appeal

37 The decision to award costs is an ancillary decision within the meaning of the CAT Act: see the definition of “ancillary” in s 4(1). Consequently, s 80(2)(b) applies and there is a right of appeal on a question of law and otherwise leave to appeal is required.

38 The Notice of Appeal does not raise a question of law for our determination. The only issues raised by the Notice of Appeal are whether the Tribunal wrongly found the existence of “special circumstances” and erred in the exercise of its discretion in awarding costs in favour of the respondent. The Lot Owners acknowledged in the Notice of Appeal and the outline submission in Annexure "A" that leave to appeal is necessary.

39 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the CCD are limited to those set out in cl 12(1) of Schedule 4 of the CAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(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).

40 Even if an appellant from a decision of the CCD has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80 (2)(b) of the CAT Act.

41 In *Collins v Urban*, after discussing the decision of the NSW Court of Appeal in *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 (especially at [19]-[21]), the Appeal Panel held at [84] (omitting citations):

> "84.(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.
>
> (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 ...."

Consideration - A Question of Law

42 As stated above, quite inexplicably, the Lot Owners introduced an entirely new basis for its appeal for the first time at the end of their written submissions in reply by asserting that the appeal raised a question of law.

43 The Lot Owners submitted:

> "This appeal is predicated on questions of law which arise from the decision of Senior Member Ross. Namely, there was a failure to provide proper reasons for findings of fact; a wrong principle of law has been applied; the Tribunal failed to take into account relevant considerations; findings of fact were made absent evidence in support; and the decision was so unreasonable that no reasonable decision-maker would have made it".

44 No attempt was made to amend the Notice of Appeal, to seek leave to raise this ground of appeal, to explain why it was not raised earlier or how the Lot Owners proposed to allow the respondent any opportunity to respond to this fundamentally new contention raised at such a late stage.

45 We are also of the opinion, without expressing any concluded view since we have not received submissions from the respondent, that there is no merit in the proposition that the matters identified by the Lot Owners raise any question of law.

46 On 5 May 2020 the respondent filed a submission in response objecting to the Lot Owners "impermissibly" seeking to raise "errors of law" not identified in the Notice of Appeal or their submissions in chief and to "lead fresh evidence, which was not before Senior Member Ross ...".

47 This caused the Lot Owners to inform the Tribunal in an email dated 6 May 2020 that they "strongly object to the filing of the submission in reply by the Respondent in circumstances where there are no orders for such submissions to be filed."

48 The attitude of the Lot Owners is surprising. Having themselves raised a fundamentally new matter without notice and without leave, they opposed the respondent making a submission which did no more than (quite properly) object to the new matters raised by the Lot Owners.

49 We are mindful that there has been no opportunity for the respondent to provide substantive submissions in response. There would be a clear and obvious prejudice in permitting the Lot Owners to now argue these new matters without affording the respondent the opportunity of a substantive right of reply.

50 We are of the opinion that it would be incompatible with the "guiding principle" in section 36 of the CAT Act to now adjourn this appeal and delay its determination to require a further exchange of written submissions, noting the already lengthy and complex submissions that have been served by both parties. In exercising any powers, the "guiding principle" in the CAT Act requires us "to facilitate the just, quick and cheap resolution of the real issues in the proceedings": section 36(1). In our opinion also, any further submissions

from the parties and to require them to incur yet more costs associated with that process would also be disproportionate to the importance and complexity of these proceedings: section 36(4).

51 We refuse the attempt by the Lot Owners to raise these new matters and to fundamentally alter the way in which the appeal has been conducted by both parties.

Consideration - Leave to Appeal

Was the Tribunal functus?

52 We now deal with another new ground raised by the Lot Owners.

53 This was not put as a question of law in the Lot Owners' submissions. Neither was it raised in the Notice of Appeal or argued before the Tribunal.

54 The Lot Owners submitted in their submissions in chief that since section 61 of the CAT Act provides that a "decision" (as defined in section 5(1)(a)) "takes effect on the date on which it is given", the jurisdiction of the Tribunal was "exhausted" from the date it dismissed the proceedings on 8 November 2019 under section 55(1)(a), after the Lot Owners withdrew their application.

55 We accept that an order made under section 55(1)(a) is a "decision" coming within the definition of section 5(1)(a) of the CAT Act. We do not agree that such a decision by reason of section 61 of the CAT Act necessarily renders a decision-maker *functus.* Section 61 provides no more than the decision has *effect* from the date on which it is made. Section 61 does not seek to remove or limit the jurisdiction or powers of the Tribunal consequent upon the making of a "decision" and only concerns itself with when such a decision takes effect.

56 Further, even though the dismissal takes "effect" at the time the decision is made, section 60 preserves the Tribunal's power to award costs. The power to award costs properly only arises when a proceeding is determined which may include a dismissal. This is clear from the factors for a Tribunal's consideration in section 60(3) of the CAT Act. These factors can only be properly ascertained and considered in the Tribunal's exercise of its discretion with respect to costs after a decision is made, including an order dismissing proceedings.

57 In our opinion, Section 61 should not be taken to limit or curtail the power of the Tribunal to award costs under section 60 consequent upon an order dismissing a proceeding under section 55(1)(a) of the CAT Act. To do so would distort and obstruct the sensible conduct of proceedings in the Tribunal.

58 Further, there is nothing in the CAT Act to suggest that the legislature intended limiting the Tribunal's powers in the manner contended by the Lot Owners. Section 61 does not expressly or implicitly purport to prevent a Tribunal from dealing with costs of proceedings consequent upon a withdrawal and a dismissal of proceedings. As always, when applying the principles of statutory construction, regard must be had to the majority judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* I1998] HCA 28; (1998) 194 CLR 355. As stated by McHugh, Gummow, Kirby and Hayne JJ at [69], (omitting citations and endnotes):

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'.
> In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed."

59 In *The Owners Corporation of Strata Plan 4521 v Zouk & Anor* [2007] NSWCA 23 Ipp JA (with whom Beazley and Bryson JJA agreed), considered section 192 of the former *Strata Schemes Management Act* 1996 (NSW) and held (at [28]-[29]):

> "28. Section 192 does not require an order for payment of costs to be made contemporaneously with the dismissal of the appeal. The power is to make an order for the payment of costs "in relation" to an order dismissing an appeal. Logically, such an order can only be made *after* an order has been made dismissing the appeal.
>
> "29. Section 192 does not provide expressly that a costs order may only be made "when" ... the appeal is dismissed... s 92 circumscribes the Tribunal's power to order costs. But neither such a policy nor the words of s 192 supports a construction that limits the time at which the Tribunal is empowered to make costs orders. Moreover, there is no practical reason or policy that is derived from the general interests of justice to limit the Tribunal's power in this regard."

60 As always, these matters depend on the nature and effect of the decision that has been made.

61 There is no tension or inconsistency in the operation of section 55 in dismissing the proceedings and section 60 which empowers the Tribunal to award costs "in relation to proceedings before it". There is no temporal limitation requiring a decision with respect to costs to be made before a proceeding is dismissed. These were proceedings that were "before" the Tribunal. The costs orders were made "in relation to" those proceedings consequent upon the Tribunal dismissing the application. We do not accept the Lot Owner's submission that the proceeding has to be "before it" (ie the Tribunal) in the sense that this must be prior to the proceedings being dismissed.

62 The submission on behalf of the Lot Owners is also rather curious. The jurisdictional argument that the Tribunal was *functus officio* was never raised in the case management of the appeal at the directions hearing on 5 March 2020, in the Notice of Appeal or in the Application for a Stay and submissions in support filed on 21 February 2020 (and which was withdrawn by the Lot Owners on 27 February 2020). The Lot Owners' submissions on "ambush litigation" contend that "where legal representatives keep to themselves ... [a] deadly point, they run the risk that costs will not be awarded in their favour" (citing *Green v Schneller* [2002] NSWSC 202 at [32]). The submissions against ambush litigation, which they describe as an "unacceptable and illegitimate" practice, can be applied to the misconceived submission they are seeking to now raise without notice and without leave.

63 In the absence of the Lot Owners seeking leave to raise this new ground and filing an Amended Notice of Appeal or offering any evidence to explain the failure to have properly raised this "deadly point" earlier (see *Aon Risk Services Ltd v Australian National University* (2009) HCA 27; 239 CLR 175), we refuse leave to raise this new ground on the appeal.

Respondent's Attempt to Rely on Rule 38

64 The respondent's submissions have sought to re-agitate on the appeal its submission before the Tribunal that Rule 38 applied. In light of our conclusion that the appeal should be dismissed, it is not necessary for us to deal with this contention.

65 In any event we are satisfied that the decision of the Tribunal which applied the reasoning of the Appeal Panel in *Malachite Holdings* was correct. The Tribunal found that no order could be made in the proceedings requiring payment or relief in respect of any sum so that the threshold sum of $30,000 to attract the operation of Rule 38 would not be triggered. Also, there is no unqualified right to costs being awarded under Rule 38 even in the absence of "special circumstances." Rule 38 does not state how the discretion as to costs should be exercised.

66 In any event, in our opinion the Tribunal correctly had regard to the provisions of section 60 of the CAT Act in its decision and in considering whether "special circumstances" applied under that section to award costs.

Was there an "ambush"?

67 We are not satisfied that the Lot Owners have established any basis for their submission there was any deliberate intent or deceit by the respondent in "knowingly" withholding "the issue of jurisdiction up their sleeve seeking to obtain a tactical advantage over the Applicants ...".

68 This is a serious allegation raised against the respondent and its legal representatives.

69 In response, the respondent submitted (relevantly) that:

(1) it was the Senior Member and not the respondent who first raised the jurisdictional issue (referring to paragraph [5] of the Reasons);

(2) the Lot Owner's wrongfully assert that the "central pillar" of the respondent's case was the jurisdictional claim;

(3) the Lot Owners were in no way disadvantaged by these issues being raised at the hearing for the first time because the Tribunal afforded them the opportunity to provide written submissions on this issue and instead of doing so, the Lot Owners "capitulated and withdrew their application".

70 Beyond mere assertion, there is no evidence that the respondent intentionally or deliberately lured the Lot Owners into an "ambush". The respondent asserts to the contrary. On the evidence before us and having regard to [5] of the Reasons, we accept the respondent's contention. It is always a difficult stance for a claimant to attribute fault to a respondent on the basis that it did not advise the claimant of the law, especially a fundamental jurisdictional point

when both parties were legally represented. In any event, it appears that it was the Tribunal at the commencement of the hearing who first raised this issue and not the respondent, who then (not surprisingly) also seized on the point.

71 Having regard to the principles explained by the High Court in *Briginshaw v Bringinshaw* [1938] HCA 34; 60 CLR 336 (*Briginshaw*), we are not satisfied that the Lot Owners have established deliberately deceitful conduct by the respondent in relation to the allegation that it "ambushed" the Lot Owners. Dixon J (as his Honour then was) explained in *Briginshaw* at 362 the test in relation to the requisite standard of proof for us to apply as follows:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters " reasonable satisfaction " should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

72 We do not accept that there is any basis to establish that the respondent ambushed the Lot Owners when the matter came on for hearing before the Tribunal.

Whether the decision was punitive or not fair and equitable

73 The Lot Owners contend that the Tribunal's order to award costs in favour of the respondent was "manifestly punitive in form and substance against the appellants". The Lot Owners also submit that it would not be "fair and equitable" and contrary to "settled jurisprudence" to order them to pay the respondent's costs.

74 We disagree for the reasons which follow.

Fresh Evidence

75 The respondent noted in its submissions in reply dated 5 May 2020 that the Lot Owners have sought to rely upon "fresh evidence" without leave, which includes a Certificate issued under section 26 of the CLM Act recording particulars of an insurance policy held by the respondent which provides cover up to $50,000 for "legal expenses" and which was not in evidence before the Tribunal. This document is part of Annexure A to the Lot Owners' written submissions in reply, which also contains some other documents relating to this insurance issue.

76 There are several reasons for us exercising our discretion to not allow the Lot Owners attempt to rely upon the "fresh evidence" in Annexure A:

(1) We accept the respondent's statement that the document was not in evidence before the Tribunal. This seems to be consistent with the written submissions on costs made by the Lot Owners and the fact that the Tribunal's Reasons make no reference to it;

(2) The Lot Owners have not sought leave to tender this "fresh evidence" on the appeal. They have not explained why it was not reasonably available to them earlier or why they were unable or decided not to put it into evidence for the Tribunal's consideration;

(3) The respondent has opposed the attempt by the Lot Owners to rely upon it;

(4) If we allowed the Lot Owners to rely upon this "fresh evidence", for the same reasons we have expressed above, as a matter of procedural fairness it would require us to adjourn the determination of this appeal to permit the respondent to provide a substantive submission dealing with this new evidence. To further delay this appeal in the present circumstances would not be compatible with the "overriding principle" to which we must have regard in Section 36 of the CAT Act;

(5) We do not know the actual terms of the policy and the scope of the cover. Possibly any indemnity would only apply in the case of unrecovered legal costs. Nor do we know if the respondent's costs exceed $50,000 and if so, by how much;

(6) The policy is to protect the respondent not the Lot Owners. For us to have regard to the existence of insurance to exercise our discretion to not award costs against an unsuccessful party where the circumstances - as in this case - would otherwise justify such an order, would create an undesirable situation. Insured parties would in effect not be entitled to costs orders in their favour. Also, insurers would in effect be expected to pay a successful parties' costs. The general principle is that the existence of insurance coverage does not preclude a party in litigation from seeking to recover loss or damage which may be covered by such an insurance policy. Clearly, such a shift in public policy in determining liability for costs in litigation without some clear or express legislative intent is not how section 60 of the CAT Act would be intended to operate.

Purpose of the Costs Order

77 The Lot Owners submit that they will be responsible for payment of "around 70%" of the actual costs incurred by the respondent by reason of a costs order when they were already responsible for 32.2% of its costs based on their unit entitlement of that percentage in the Community Association. As we

understood the submission, it was contended that this results in a punitive costs order.

78 We disagree. First, this situation is no different to that pertaining to Owners Corporations and orders for costs often made by the Tribunal against lot owners. Lot owners who have had costs awarded against them will generally still have a liability to pay its share of the Owners Corporation's or the Community Association's unrecovered costs. No authority was cited for the proposition that this should affect the nature of any costs order that should be made against an unsuccessful lot owner.

79 Second, section 60 refers to the "party's" costs of a proceeding. The Community Association as a party to proceedings is entitled, just like any other party, to its costs if the Tribunal determines that there are "special circumstances" having regard to the factors set out in section 60(3) of the CAT Act.

80 The Lot Owners submit that "Senior Member Ross erred in considering the purpose of a costs order as being solely compensatory" (citing [26(1)] of the Tribunal's Reasons). The Lot Owners then submit that the "purpose of an order for costs is to compensate the party in whose favour it is and not to punish the person against whom the order is made."

81 Doing our best to understand these rather contrary propositions, we have had careful regard to the Tribunal's Reasons and are satisfied that the Tribunal made it clear that the "Community Association is entitled to be *compensated* for the costs incurred ..." (at [27]) (our emphasis). There is no indication that the Tribunal imposed its order for costs with an intention or to operate in any way that was punitive.

Withdrawal of the Application

82 The legal principles which apply to proceedings which have been withdrawn or discontinued without a hearing on the merits further support the conclusion reached by the Tribunal in ordering the Lot Owners to pay the respondent's costs.

83 The Lot Owners relied upon an extract from *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia: Ex parte Lai Qin* [1997] HCA 6 per McHugh J (*Lai Qin)*. The Lot Owners set out part of his Honours' reasons in a heavily edited extract (with their own emphasis added) as follows:

> "The power to order costs is a discretionary power ... When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order ... 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 ... 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".

84 That selective approach by the Lot Owners in their extract of the reasons of his Honour is apt to mislead. His Honour actually found in that case that there "seems no reason to depart from the general rule that a successful party is entitled to the costs of the summons". That was because the matter did proceed to a hearing on the merits.

85 We have therefore set out the relevant part of his Honour 's reasons in full (except for citations) and we have italicised the critical parts of the judgment excluded from the Lot Owners' extract:

> "In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. *Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order*. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.
>
> *In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action.* The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. *In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.*
>
> *Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in The South East Queensland Electricity Board v Australian Telecommunications Commission where his Honour ordered the respondent to pay 80 per cent of the applicant's*

> *taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.*
>
> 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[7].

86 A reading of his Honour's reasons when set out in full does not support the proposition for which it was advanced on behalf of the Lot Owners in the circumstances of this appeal.

87 The Tribunal expressed the view in its Reasons that the application brought by the Lot owners was "not tenable", a conclusion which the respondent does not dispute and appear to embrace not just by their withdrawal of the proceedings after the Tribunal expressed some tentative views about section 83 of the CLM Act but also by the express acceptance in their submissions on appeal that the jurisdictional point was "deadly" to their prospects of success.

88 Where a party in effect capitulates or surrenders to the other, the usual order is that the capitulating/surrendering party pays the other party's costs. Capitulation can take different forms. Withdrawing proceedings may, as in this case, be a capitulation.

89 The submissions by the Lot Owners correctly point out that neither the CAT Act nor the Rules contain a specific provision dealing with costs when an application is withdrawn. On that basis, the Lot Owners contend that the respondent's reliance on a range of Appeal Panel decisions awarding costs when proceedings were discontinued, are "misplaced". These decisions include *Channell v Graham* [2017] NSWCATAP 129 (*Channell*); *Azzi v Phan* [2017] NSWCATAP 215 (*Azzi)* and *Arambewela v Castle Projects Pty Ltd* [2018] NSWCATAP 14 (*Arambewela)*. The Lot Owners contend that those decisions followed a line of reasoning from *Solomons v Valley Motor Auctions* [2017] NSWCATAP 31 at [18] where the Appeal Panel had regard to the question of costs in the context of the *Uniform Civil Procedure Rules* 2005 (UCPR) and in particular r 42.19 which provides that *prima facie,* a discontinuing party should pay the other party's costs. The Lot Owners contend, somewhat brazenly, that the "application of such a principle of law in

Channell, Azzi and *Arambewella* is wrong and amounts to an error of law." The Lot Owners submitted that the relevant principles are those set out in *Lai Qin.*

90 The decisions of the Appeal Panel that the Lot Owners describe as "wrong," merely had regard to the UCPR to assist in their reasoning process where the CAT Act and Rules did not expressly provide for the situation under consideration. They had regard to the principles underlying UCPR 42.19 but did not find that they were bound to apply it.

91 The Lot Owners also submitted that the two principles discussed by McHugh J in *Lai Qin* apply where there has been no determination of the merits of a case. The first is where one party has acted so unreasonably that the other party may obtain its costs. The second is that where both parties have acted reasonably, one party was almost certain to have succeeded had the matter been fully tried.

92 In our view the main consideration must be section 60 of the CAT Act and a consideration of whether "special circumstances" applied under that section. The Tribunal found that the withdrawal of the application at such a late stage was out of the ordinary and constituted a special circumstance: at [17]. It also found there was no tenable basis for the application and this constituted a special circumstance which also enlivened the discretion to award costs.

93 The appellant has failed to demonstrate that such conclusion was wrong. Further, the appellant has failed to demonstrate, for the reasons which follow, that the discretion to therefore award costs was wrong. We disagree that such an award was inconsistent with any of the principles stated by McHugh J in *Lai Qin.* In particular, we note the Tribunal stated (at [19]) that it had the benefit of hearing all of the evidence during the hearing which was completed before it. This meant the Tribunal was well-placed to conclude that the application had no tenable basis in law.

94 The Tribunal did not need to make any assessment of the relative merits of the parties' claims in the sense referred to in *Lai Qin* (or *Gassman & Anor v Peck* [2017] NSWCATAP 66) referred to by the respondent where there was a surrender before the hearing. In our opinion, there was no determination on the merits because a threshold jurisdictional issue was raised by the Tribunal at

the outset of the hearing so that there was no need for an "assessment" of the substantive merits of the parties' competing positions. Rather there was a recognition by the Lot Owners after the hearing and which they unquestionably now accept, that there was no prospect of them succeeding on their application given the jurisdictional issue causing them to withdraw their application.

95 In *Kiama Council v Grant [2006]* NSWLEC 96 (approved by the Court of Appeal in *Hunter Development Corporation v Save Our Rail NSW Incorporated (No 2)* [2016] NSWCA 375 at [78], [81] and [82]), after reviewing the relevant authorities, Preston CJ held at [80]:

> "[80] The principles that emerge from these cases are that in a civil enforcement or judicial review case where there has been no hearing on the merits:
>
> (a) where one party effectively surrenders to the other party by:
>
> (i) discontinuing without the consent of the other party; or
>
> (ii) giving undertakings to the Court or submitting to the Court making orders against the party substantially in the terms or to the effect claimed by the other party;
>
> the proper exercise of the costs discretion will ordinarily be to make the usual order as to costs, unless there is disentitling conduct on the part of the other party; and
>
> (b) where some supervening event or settlement so removes or modifies the subject of the dispute that no issue remains except that of costs, the proper exercise of the costs discretion will ordinarily be to make no order as to costs unless:
>
> (i) one of the parties has acted so unreasonably that the other party should obtain the costs of the action; or
>
> (ii) even if both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried so that the party should obtain the costs of the action.

96 As a matter of general principle and policy, in *Khanna v Bond Realty Pty Ltd* [2019] NSWCA 128, Bell P and Gleeson JA held at [31]:

> "There was and is no good reason why a party that has prepared to meet a notice of motion should be deprived of its costs if a party that has filed it withdraws it in the course of argument. Whilst costs will not always be ordered in such circumstances (see *Re Minister for Immigration & Ethnic Affairs; ex parte Lai Qin* [1997] HCA 6; (1997) 186 CLR 622 at 624-625; see also *Nichols v NFS Agribusiness Pty Ltd* [2018] NSWCA 84), that is not an invariable rule and there was no error of principle in the primary judge's decision to award costs ... ."

97 Recently in *D Constructions v Walsh* [2020] NSWCATAP 92, the Appeal Panel considered the above two authorities in the context of a withdrawal by an appellant in an appeal. After noting that unlike discontinuances in court proceedings to which the UCPR applies (ie UCPR 42.19 and 42.20) and noting that there is no similar provision in section 55 of the CAT Act or in the Rules, the Appeal Panel held at [29]-[30]:

> "29. Be that as it may, the effect of a dismissal under s 55 of the NCAT Act is similar to the effect of a discontinuance elsewhere. The proceedings are brought to an end without a hearing on the merits.
>
> 30. It will be apparent, of course, that a dismissal of an appeal following the withdrawal of the appeal by an appellant may be a surrender per Preston CJ's first category of case, or it may be the result of a supervening event or settlement referred to in the second category. Thus, the relevant circumstance is not so much the form the surrender may take (be it a withdrawal, dismissal by consent, discontinuance etc), but the reason for or circumstances giving rise to it. Thus, a dismissal following a settlement reached between the parties would be considered differently to a dismissal which was tantamount to a surrender."

98 There is no evidence or submission that the proceedings were withdrawn because of a supervening event or because there was a settlement of between the parties. The Lot Owners apparently withdrew their application on the basis, which they accept in their submissions, that the jurisdictional issue was a "deadly point" which they could not overcome.

99 Therefore, we are satisfied that the Tribunal made the order dismissing the application under s 55(1) of the CAT Act on the correct basis, namely the withdrawal only occurred after the hearing and before any determination on the merits because the proceedings "were not tenable" (at [27]). Applying the above legal principles, the Lot Owners capitulated/surrendered and the Tribunal was correct to order them to pay the respondent's costs.

Exercise of the Discretion

100 In our opinion, there was no error in the exercise of the Tribunal's discretion in the sense required in *House v King* (1936) 55 CLR 499; namely some error in exercising the discretion from which we may infer, having regard to the facts, that the exercise of the discretion was wrong in principle, unreasonable or unjust. To the contrary, we find that the conclusions and findings of the Tribunal were sound and open on the evidence.

101 In its Reasons the Tribunal carefully set out the parties' respective submissions on costs, the evidence to which it had regard and demonstrated a clear process of reasoning in reaching its findings. The Tribunal identified the various matters under consideration and the relative weight given to each of those matters in the balancing exercise undertaken by it.

102 We reject the submission that the Tribunal failed to afford proper weight to the jurisdictional issue without hearing evidence or submissions on the matter. The Lot Owners accept that there was "a deadly jurisdictional point" against them. The contention that the Tribunal failed to give proper weight to the alleged "ambush" tactics of the respondent has been previously rejected by us. The alleged failure to afford proper weight to the "punitive effect" of the costs order has also been rejected by us above.

Conclusion

103 For the reasons set out above, we are not satisfied that the Tribunal's decision may have caused a substantial miscarriage of justice on the basis that it was either not fair or equitable or that it was against the weight of the evidence. There was no demonstrated error in the exercise of the Tribunal's discretion. The findings made by the Tribunal were sound and reasonably open to it and accorded with the principles of law to apply when there has been a capitulation by a party and no determination on the merits.

104 Even if we had been satisfied that the Lot Owners had established one or more of the factors set out in cl 12(1) of Schedule 4 of the CAT Act, we would not in this case grant leave to appeal because we are not satisfied that the criteria for the granting of such leave set out in *Collins v Urban* at [84] have been established.

Costs of the Appeal

105 For the various reasons we have set out above, we have refused leave to appeal. The Lot Owners did not establish any basis under either cl 12 (1) of Schedule 4 of the CAT Act or the criteria set out in *Collins v Urban* at [84] to warrant the granting of leave.

106 The Lot Owners submitted that if the appeal is upheld, no costs order for the appeal should be made, citing the decision of McHugh J in *Lai Qin*.

107 The respondent submits if the costs orders of the Tribunal remain undisturbed, then the appeal should be dismissed with costs.

108 We do not wish to incur the parties in further expense or delay in these proceedings. We have therefore set out our provisional view with respect to costs.

109 Section 60 governs the question of costs of this appeal because the Tribunal found that Rule 38 did not apply to the proceedings before it. That finding remains undisturbed.

110 By reason of section 60, the respondent will only be entitled to a favourable costs order if we are satisfied that there are "special circumstances" which would justify the making of such an order.

111 Broad guidance to determining whether such circumstances exist is provided in the provisions of subsection (3), although by reason of subsection (3)(g) the matters set out are not circumscribed. The requirement which must govern the exercise of discretion is that the circumstances which apply to the proceedings with respect to which a costs order is sought are "special."

112 In *Zucker v Burbank Montague Pty Ltd [2018] NSWCATAP 135* the Appeal Panel described what are "special circumstances" in concise terms, which have been applied generally in this Tribunal at [37]

> " 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], citing Santow JA in *Cripps v G & M Mawson* [2006] NSWCA 84 at [60].

113 In the reasons we have set out above, in several respects we regard the conduct of the Lot Owners as having been something which could not be described as "ordinary" and which must be characterised as "extraordinary."

114 Of course, each case needs to be considered on its own merits. In determining whether special circumstances exist which would justify the making of an adverse costs order we have taken into account a number of matters.

115 One relevant factor is raised by section 60(3)(a): *where a party has conducted proceedings in a way that unnecessarily disadvantaged the other party.* In our opinion, this is satisfied when an appellant - as in this case - so dramatically

departs from the basis on which it filed an appeal, accepting that leave was required, and then resiling from that plainly correct position without seeking leave or filing an Amended Notice of Appeal and doing so only *after* the respondent had filed its submissions. Compounding that conduct, the Lot Owners then quite unreasonably opposed the respondent's entirely justifiable response by filing a submission opposing the Lot Owners' attempt to fundamentally alter the nature of its appeal.

116 Included in this undesirable conduct of their appeal, the Lot Owners sought to adduce fresh evidence, again after the respondent had provided its written submissions, without notice, without explanation and without seeking leave. The Lot Owners also opposed the respondent's entirely reasonable response in filing a submission to notify its opposition to us having regard to that "fresh evidence" given the circumstances in which it was adduced.

117 The attempt to change the basis of the appeal to an appeal as of right and to also adduce fresh evidence without leave and without amending the Notice of Appeal unnecessarily disadvantaged the respondent, requiring it to again oppose these belated attempts. This had the potential to cause this appeal to require a further round of submissions if we had allowed the Lot Owners to rely upon these new matters.

118 Another factor is set out in section 60(3)(b): *where a party has been responsible for prolonging unreasonably the time taken to complete the proceedings.* The unnecessarily prolix submissions by the Lot Owners comprising some three pages as an Annexure to the Notice of Appeal and then a further 28 pages comprising detailed and substantive written submissions in chief and in reply, have caused us to take an inordinate amount of time in dealing with multiple issues raised by the Lot Owners, which were often repeated or lacked focus and many of which, as we have found, were unsustainable and lacking in merit.

119 Having regard to section 60(3)(c), being the *relative strengths of each party's claims and whether any claims are untenable in fact or law*, the Lot Owners also alleged that the respondent's conduct in "ambushing" them was deliberate and in effect deceitful when there was no tenable basis for drawing that

inference or making that assertion. Further, in our view the intention that the Tribunal's discretion as to costs miscarried was not tenable in fact or law and there was no tenable basis for contending that leave to appeal ought be granted.

120 Having regard to section 60(3)(d), *the nature and complexity of the proceedings*, an appeal where leave is required should not acquire the complexity and associated costs for the parties in what is ordinarily - and should have been in this case - a relatively straightforward challenge to a decision of the Tribunal on a discretionary matter concerning costs. That is even more so when the Lot Owners have themselves acknowledged that the withdrawal of the application at such a late stage of the proceedings was caused by their failure to have earlier recognised a threshold jurisdictional impediment to them succeeding in their application. Instead, the Lot Owners unreasonably sought to attribute the blame for that on the respondent.

121 Another factor is raised by section 60(3)(e) of the CAT Act: *whether the proceedings were frivolous, vexatious, misconceived or lacking in substance*. We have described as "misconceived" the submissions by the Lot Owners that the Tribunal was *functus officio* when it dismissed the proceedings under section 55(1)(a) of the CAT Act. That submission by the Lot Owners, as we have found for the reasons set out above, was without substance, and was never raised by the Lot Owners in its submissions on costs made to the Tribunal. Also, the belated attempt to change the nature of the appeal by characterising it as a question of law and to adduce new evidence without leave had no proper basis.

122 Given that this attempt was made so late and it would have so profoundly changed the nature of the appeal, as we have stated above, it also offended the "guiding principle" set out in section 36 of the CAT Act. Section 60(3)(f) of the CAT Act permits consideration of *whether a party has complied with the duty imposed by section 36.* The Lot Owners together with their legal representatives have not complied with their statutory obligations to give effect to the "guiding principle" in section 36. Properly advised, the Lot Owners should not have undertaken their attempt to change the nature of the appeal

and adduce fresh evidence when and in the way they did which was without notice, without leave and without merit - and by then opposing the respondent filing a very direct, short and entirely reasonable notice of objection.

123 The respondent was required to object to that attempt by the Lot Owners to depart from the nature of the appeal which it had already addressed in its written submissions and after those submissions were filed and served. A disingenuous attempt so late in the proceedings to raise a clearly impermissible point does not have the same character as a point on an appeal about which competing arguments can be put, although ultimately to be found lacking in legal merit. Conducting proceedings in such a way, as we have stated above impedes our ability to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" as required by section 36 of the CAT Act. This is more so when, as in this case, both parties were legally represented.

124 We are presently of the view that one or more of the provisions of section 60(3)(a)(f) have been satisfied to justify the making of a costs order against the Lot Owners.

125 For these reasons we provisionally find that special circumstances apply to the appeal proceedings as provided in section 60(2) of the CAT Act. Subject to any submissions which we may receive in accordance with the orders below, costs should follow the event and the appellants should pay the respondent's costs of the appeal.

Orders

(1) Leave to appeal is refused.

(2) The appeal is dismissed.

(3) Order that the appellants pay the respondent's costs of the appeal, on the ordinary basis, as agreed or assessed.

(4) If a party seeks a different costs order, order 3 above ceases to have effect and the following orders apply:

(5) Any application for a different costs order is to filed and served within 14 days of the publication of these orders and is to be supported by evidence and submissions not exceeding five pages in length including submissions as to whether or not a hearing on the question of costs

should be dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013*.

(6) Any response to the costs application(s) is to be filed and served 14 days thereafter and is to be supported by evidence and submissions not exceeding five pages in length including submissions as to whether or not a hearing on the question of costs should be dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013*.

(7) Submissions in reply are to be filed and served within 7 days of receipt of submissions in response.

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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