Civil and Administrative Tribunal

New South Wales

Case Name:	Bright Build Pty Limited v The Owners – Strata Plan No 94514
Medium Neutral Citation:	[2021] NSWCATAP 163
Hearing Date(s):	On the papers
Date of Orders:	02 June 2021
Decision Date:	2 June 2021
Jurisdiction:	Appeal Panel
Before:	G K Burton SC, Senior Member A R Boxall, Senior Member
Decision:	(1) Leave to appeal is granted, to the extent that leave is required. (2) The appeal is allowed. (3) In lieu of Order 1 made 4 September 2020 in HB 18/47472, order as follows: (a) the first and third respondents are to pay the applicant's costs of the proceedings on the ordinary basis as agreed or assessed up to and including 11 March 2019; (b) the applicant is to pay the first and third respondents' costs of the proceedings on the indemnity basis as agreed or assessed after 11 March 2019 including costs incurred in relation to the costs orders made in the proceedings.
Catchwords:	HOME BUILDING - basis of costs orders with remaining areas of dispute but largely by consent - effect of calderbank offer
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 60, 80, 81, Sch 4 cl 12 Civil and Administrative Tribunal Rules 2014 (NSW), rr 38, 38A

	Home Building Act 1989 (NSW) s 3A
Cases Cited:	AAI Ltd t/as GIO v McGiffen (2016) 77 MVR 348, [2016] NSWCA 229 Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 Allianz Australia Insurance Ltd v Cervantes (2012) 61 MVR 443, [2012] NSWCA 244 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 Bonita v Shen [2016] NSWCATAP 159 CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578, [2000] FCA 1343 Collins v Urban [2014] NSWCATAP 17 Croghan v Blacktown CC [2019] NSWCA 248 Craig v South Australia (1995) 184 CLR 163, [1995] HCA 58 Eadie v Harvey [2017] NSWCATAP 201 El-Wasfi v NSW; Kassas v NSW (No 2) [2018] NSWCA 27 Ericon Buildings PL v Owners SP 96597 [2020] NSWCATAP 265 Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2) (2005) 13 VR 435, [2005] VSCA 298 House v The King (1936) 55 CLR 499, [1936] HCA 40 Jegatheeswaran v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 263, [2001] FCA 865 Johnson t/as One Tree Constructions v Lukeman [2017] NSWCATAP 45 Knox v Bollen [2018] NSWCATAP 106 Ku-ring-gai Council v Chan [2017] NSWCA 226 OC SP 68751 v CA DP 270281 [2015] NSWCATCD 99 Latoudis v Casey (1990) 170 CLR 534 Lee v Commissioner of Police, NSW Police Force [2017] NSWSC 1849 Legal Profession Complaints Committee v Rayney [2017] WASCA 78 Mifsud v Campbell (1991) 21 NSWLR 725 at 728 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, [2013] HCA 18 Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541, [2018] HCA 30 NSW Land and Housing Corp v Orr (2019) 100 NSWLR 578, [2019] NSWCA 231

	Oppidan Homes PL v Yang [2017] NSWCATAP 67 Oshlack v Richmond River Council (1998) 193 CLR 72 Owen v Kim [2017] NSWCATAP 26 Pholi v Wearne [2014] NSWCATAP 78 Pilbara Infrastructure Pty Ltd v Economic Regulation Authority [2014] WASC 346 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Rodger v De Gelder (2015) 71 MVR 514, [2015] NSWCA 211 at [86] Rozenblit v Vainer (2018) 262 CLR 478, [2018] HCA 23 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Sanofi v Parke Davis PL [No 1] (1982) 149 CLR 147 Soulemezis v Dudley (Holdings) PL (1987) 10 NSWLR 247 (CA) Thompson v Chapman [2016] NSWCATAP 6 Wainohu v NSW (2011) 243 CLR 181 Wehi v Minister for Immigration and Border Protection [2018] FCA 1176
Texts Cited:	None cited
Category:	Costs
Parties:	Bright Build PL, Saade Constructions PL, Saade Construction Group PL (Appellants) Owners SP 94514 (Respondent)
Representation:	Counsel: M Klooster (Appellants) Solicitors: G & S Law Group (Appellants) Bannermans Lawyers (Respondent)
File Number(s):	2020/00371063 (AP 20/41286)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal NSW
Jurisdiction:	Consumer and Commercial Division

Citation:	[2020] NSWCATCD
Date of Decision:	4 September 2020
Before:	G Meadows, Senior Member
File Number(s):	HB 18/47472

JUDGMENT

Factual and legal background to appeal

1 In the primary proceedings filed 6 November 2018 (at the end of the limitation period for minor works), the applicant owners corporation (OC) of a residential apartment building in Burwood, NSW sought (among other matters) work orders against the first respondent and/or the second respondent (the alleged builder) and the third respondent who then owned the land and was the developer as defined in s 3A of the *Home Building Act 1989* (NSW) (HBA).

2 It was accepted by date of final hearing that the builder was the first respondent and the second respondent, although apparently commonly-represented with the other respondents, took no further part in the proceedings and should not be a party to the proceedings although not formally removed. The proceedings against the second respondent were formally dismissed on 4 September 2020 with no order as to costs of the second respondent. No appeal is brought in respect of that costs order.

3 Accordingly, when we refer to the appellants, the respondents below and the builder and developer we refer to the active parties in the proceedings other than the applicant OC, who was the respondent to this costs appeal.

4 On 5 February 2019 the OC served a proposed deed of settlement. That deed provided for contractual obligations in respect of remediation and discontinuance of the NCAT proceedings in respect of defects covered by the proposed deed.

5 Following communications in which the builder and developer disagreed with the scope of obligations under the proposed deed, the builder and developer served what is known as a "calderbank letter" dated 27 February 2019 (named

after one of the principal English cases in which the principles as to use of such letters began to be developed fully).

6 The calderbank letter contained an offer that was expressed to be "without prejudice save as to costs". It was expressed to be open for acceptance 4.30pm on 13 March 2019 (about 14 days after date of email service). If the offer in it was not accepted and the matter proceeded to hearing, it was expressed to be relied upon in a claim for indemnity costs on the basis of the principles concerning such letters (the relevant English authorities were named). It was expressed to be immediately binding on written acceptance.

7 The offer, which also included draft consent orders, without admission offered to remediate (with appropriate insurance in place) all the alleged defects in three named expert reports even though the builder and developer said that a number of them was disputed as to existence and remediation method, some had already been rectified and some had been conceded by the OC expert not to be defects. A mechanism and timing was offered for resolving scope of works including any matters not agreed between the experts, with commencement and completion periods of three and six months respectively after that scope was resolved. Costs of the proceedings were reserved for agreement or later resolution. The draft consent orders made clear that the "discontinuance" was subject to the expressed liberty to restore as the mechanism for any areas of dispute as to scope of works and costs of the proceedings.

8 The offer referred to the solicitor's "client". The solicitor's clients were the three respondents and remained so throughout the proceedings, as already said. The consent work and other orders that formed part of the offer provided only for the builder to be responsible for direct remediation obligations. However: the letter referred to the best interests of all parties in reaching a commercial settlement at an early stage; the terms of the offer in the letter itself was said to be immediately binding on written acceptance and referred to "the client" in the sense described above and to the expert in the same sense; the terms of the offer imposed on "the client" in the sense just described the contractual obligations (immediate on written acceptance) concerning remediation; the

attached consent orders were one clause separate from those other obligations.

9 The offer was rejected on 11 March 2019 with a counter-offer to return to the OC's proposed deed of 5 February 2019. Among other criticisms of the offer the position described in the previous paragraph was pointed out together with the co-ordinate statutory warranty obligation on the developer under HBA s 18C. It was said that this was in contrast to the obligation, in the OC's draft deed, of the developer to indemnify the OC for the builder's obligations of remediation.

10 The OC's response also said that the OC would not agree to a work order at all being made in the Tribunal because it was now considered, on received expert outline costings, that the cost of the remediation could exceed the Tribunal's monetary jurisdictional limit under HBA s 48K(1) of $500,000 if there was alleged non-compliance with the work order and the proceedings were renewed to seek a money order under Sch 4 para 8 of the *Civil and Administrative Tribunal Act 2013* (NSW) (CATA). Having pointed out that the deed obligations circumvented this issue, the OC's solicitor said he was instructed to seek that the proceedings be transferred to the Supreme Court if the deed was not signed within the next seven days.

11 The subsequent communications in evidence indicated contest over the monetary value of the works that were the subject of the proceedings and a proposed settlement conference on 18 March 2019. The evidence does not disclose if the transfer application was made but the proceedings remained in the Tribunal.

12 By the date of final hearing on 12 and 13 August 2019, in which the active parties were legally represented by leave, the parties had agreed in relation to many items as to their being defective and as to the method of rectification. By this point, although in contest at date of the offers below, there was agreement that the outcome of the proceedings would be the making of a work order in respect of both builder and developer, with some minor variations on the wording.

13 That work order was agreed to incorporate the agreed defects and form of remediation, including where necessary obtaining approval for an alternative solution to the performance requirement in the National Construction Code (NCC), together with the primary Member's determination of the remaining matters in dispute after hearing the expert evidence.

14 The detailed work order with an elaborate series of schedules, including the primary Member's determination of disputed matters and adjustments to wording of the agreed matters, was published on 11 March 2020. Those orders contained provision for written submissions on costs, for a determination on the papers.

15 The costs determination was published 4 September 2020. The primary Member, in Order 1, ordered the builder and developer to pay the OC's costs of the proceedings, which infers on the ordinary basis as agreed or assessed. Order 2 recorded no costs order in favour of or against the second respondent.

16 In this appeal the builder and developer appeal against Order 1. The appeal has been determined after provision of extensive submissions and other material, including the transcript of the liability aspects of the primary proceedings and material for the primary costs determination.

17 Leave for legal representation on the appeal was granted on 14 October 2020.

18 The authorities provide that it is the case to make by a party who seeks to upset the usual order that each party pays its own costs on a compromise of proceedings without a determination on the merits. Otherwise, the application of the usual costs principles would involve the parties in the costs they have avoided by the consent resolution.

19 A costs order on a consent resolution may be justified, for example, because a party has acted so unreasonably prior to or in the proceedings that the other party should obtain the costs of the proceedings that it was forced to pursue to obtain the relief ultimately obtained by compromise, or because, after sustained litigated contest, one party has effectively surrendered to the other, or because (in rare instances) the court or tribunal has confidence that one party almost certainly would have succeeded even though both acted

reasonably: *Re Minister Immigration & Ethnic Affairs; ex parte Lai Quin* (1997) 186 CLR 622 at 624-625; *ASC v Australian Home Investments Ltd* (1993) 44 FCR 194 at 201; *One.Tel Ltd v Dep Commr of Taxation* (2000) 101 FCR 548, [2000] FCA 270 at 553 [6]; *ASIC v Rich* [2003] NSWSC 297; *Steffen v ANZ Banking Group Ltd* [2009] NSWSC 883 at [29], [32]-[38]; *Boensch v Pascoe* [2010] NSWSC 1172; *Knox v Bollen* [2018] NSWCATAP 106 at [45]-[46].

20 The foregoing authorities include application of the principle to interlocutory steps that are the subject of a consent resolution, particularly if prior to consent they were conducted in an adversarial fashion. Absent an agreement of the parties or other clear guidance, they do not appear to include application to a partial resolution of the proceedings with the balance remaining in contest and requiring a curial determination, particularly where the consent aspect is incorporated into the same ordered outcome as the determined aspect.

21 As already mentioned, a touchstone of when it is appropriate to depart from the usual position of no order as to costs on a negotiated resolution is reasonableness (or otherwise) in commencing and continuing the litigation. In this process, variance of the negotiated outcome from offers embodied in what are called "calderbank letters" or other matters that can be taken into account on costs is a factor.

22 The principles governing calderbank offers, as with formal processes in court rules for offers of compromise, operate generally in relation to disputes, including those that contain an outcome embodying both conclusions reached by consent and by determination after contest.

23 The principles governing calderbank offers were set out in the reasons of the Appeal Panel in *Thompson v Chapman* [2016] NSWCATAP 6 at [91] in reliance upon authority in the NSW CA and Supreme Court there cited, to which can be added *Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2)* (2005) 13 VR 435, [2005] VSCA 298, *El-Wasfi v NSW; Kassas v NSW (No 2)* [2018] NSWCA 27 and *Croghan v Blacktown CC* [2019] NSWCA 248 and authority there discussed.

24 In summary: the offer must constitute a real and genuine compromise; rejection must be unreasonable in the circumstances; reasonableness of rejection is to

be assessed at the time the offer is made, not with the armchair of hindsight; relevant factors in assessing unreasonableness include the stage of the proceedings when the offer was made, time allowed to consider the offer, extent of compromise in the offer, the offeree's prospects in the litigation at the time the offer was made, clarity of terms of the offer, and whether an application for indemnity costs was foreshadowed in the event of rejection.

25 Absent submissions showing authority compelling the contrary, and consistent with the requirement of adequate time to consider the offer, any special costs orders made when an offer in a calderbank letter is taken into account ought logically to date from the expiry of the offer period, or from the date of the offer being rejected if that (as here) occurs within the offer period, rather than from the date of the offer itself.

Reasons for primary costs decision

26 In his reasons of 4 September 2020 the primary Member recited the parties' competing contentions and referred to the extensive evidence on costs and other negotiations before him. He rejected the suitability of the OC's proposed settlement deed and upheld the legal acceptability of the builder's and developer's calderbank offer. The terms of these findings are set out in the next section of these reasons on the grounds of appeal.

27 The primary Member then relevantly found as follows in his primary reasons:

> (1) "I am not persuaded that it was unreasonable for the [OC] to refuse the calderbank offer because the [OC] was entitled to continue to push for a settlement on its terms even if unreasonable items as referred to [in its proposed deed of settlement] were to be deleted." (at [25])
>
> (2) Having said that there were some matters in which it was not really clear whether agreement had been reached or not by reference to a specific paragraph of his previous reasons of 11 March 2020 that dealt with an expert report post-dating the OC's proposed deed and the builder and developer's calderbank letter, the primary Member said at [26] "I do not find that either party was responsible for failing to reach agreement and so to that extent at least refusal of the parties to accept the offers referred to above was not unreasonable".

28 Having then rejected allocation of costs to separate issues as set out in the next section of these reasons, the primary Member at [29] "For the reasons above" made an order that the builder and the developer pay the OC's costs of the proceedings. One cannot find an explicit reason in the preceding

paragraphs of the primary reasons under "Consideration and Determination".. By reference to the repetition, in [18], of the OC's submission that "the [OC] was successful and in keeping with standard common law principles the appropriate costs order should" effectively follow the result, it may be that the implicit reason was that the ordinary costs consequence of substantial success in the proceedings led to this conclusion. We deal below with how that interacts with the findings in [25] and [26].

Grounds of appeal

29 The appeal from the costs order was filed within time on 28 September 2020.

30 The notice of appeal identified the following as grounds of appeal, either as errors of law, or as errors of fact and law or errors of fact, for which leave to appeal was sought:

(1) The primary Member erred in law in his finding at [25] in failing to provide reasons or adequate reasons "as to why it was unreasonable for the [OC] to accept the terms of the calderbank offer".

(2) The primary Member erred in law and thereby his exercise of discretion in awarding costs as he did miscarried, for the reasons in the following paragraphs.

(3) The primary Member erred in law in his finding at [25] by taking into account irrelevant considerations, being an implied finding (without supporting evidence) that the OC intended to delete unreasonable items in its proposed deed of settlement (or, we interpret, had the opportunity to do so) or the finding that the OC was entitled to push for a settlement on its terms, having made the findings at [23] and [24] that we set out below.

(4) The primary Member erred in law, having rejected at [24] the OC's reasons for rejecting the calderbank offer, by failing to take into account relevant (called "material") considerations, being: "That the terms of the calderbank offer was an offer to submit to a work order to carry out every single item of defective work forming part of the [OC]'s claim"; "That the calderbank offer would have resolved the entire substantive proceedings without the need for a hearing on all issues"; "That the [OC] obtained a much more favourable outcome than the terms contained in the calderbank offer"; the findings at [23] and [24] set out below; the OC's conduct generally in the proceedings and at final hearing; the guiding principle of facilitating the just, quick and cheap resolution of the real issues in the proceedings under s 36 of the *Civil and Administrative Tribunal Act 2013* (NSW) (CATA).

(5) The primary Member erred in law in his finding at [25] by acting on a wrong principle that the OC was entitled to continue to push for a settlement which contained unreasonable terms.

(6) The primary Member erred in law in that his conclusion at [25] was irrational or illogical, or alternatively did not relate intelligibly to the statutory purpose of the costs power, in the circumstances of the findings at [23] and [24] and that the OC's offer was never withdrawn (or, we interpret, amended to remove the unreasonable terms found in it at [23]).

(7) Leave to appeal ought to be granted because the finding at [25] was not fair and equitable and was against the weight of evidence.

31 The notice of appeal sought the substitution of primary costs orders which recognised the effect of non-acceptance of the first and third respondents' calderbank offer.

32 There was no appeal, and no cross-appeal, from the primary Member's findings that it was not unreasonable of the builder and developer to refuse to enter into the OC's proposed deed of settlement in February 2019 because it contained items that made it not a settlement of "genuine and reasonable disputes between the parties" (primary costs reasons at [23]).

33 There was also no appeal, and no cross-appeal, from the primary Member's findings that agreed with the builder and developer's submissions "refuting the [OC's] assertion that it was 'legally impossible' for the [OC] to accept the Calderbank offer. In my opinion the [OC]'s submissions in relation to renewal of proceedings, the issue of costs and the nature and extent of the works are not persuasive for the reasons given by [the builder and developer]" (at [24] of the primary costs reasons).

34 There was no appeal from the primary Member's findings at [28]: "Although it is clear that the [OC] succeeded by agreement in relation to a number of its claims and succeeded in relation to other items according to my determination while failing in regard to other items also according to my determination, in my view this this not a matter in which particular issues can be separate so as to provide for separate costs orders".

35 In written submissions on the appeal the leave grounds were not pressed.

36 No fresh or further evidence was identified to us.

37 We do not read the grounds of appeal as focused on [25] of the primary reasons to the exclusion of [26] as the OC invited us to do. Both paragraphs deal with the same topic - reasonableness of rejection of the calderbank offer - as the basis for the exercise of costs discretion, which the appeal says has miscarried for the same errors of law that are within both paragraphs if they are errors.

38 In its written submissions on appeal the OC in para 18 said that it did not file a cross-appeal challenging the primary Member's findings in [24] because that paragraph's reasons were "effectively superseded by the real basis" on which the primary Member made his findings, namely, that the parties were both reasonable in rejecting each other's offers (at [26]) and as a result costs followed the event (at [28]). We deal with that "real basis" elsewhere.

39 In para 19 the OC invited us, under CATA s 81(1)(b), to "make such order as [the Panel] considers appropriate in relation to [24] including ordering a variation of [24] to declare that the terms of the proposed [word omitted] were actually 'legally impossible'".

40 We do not think that we can vary the primary Member's reasons under the proferred provision or otherwise. We can, if asked to do so under a proper notice of appeal and after providing procedural fairness to debate the point properly put forward, determine whether the primary Member's reasons indicate an appellable error and, if so, to correct it by appropriate orders supported by our own reasons. We have not been properly asked to do this by the OC and decline to do so.

41 We also note that the power invoked in CATA s 81(1)(b), which we have set out later in these reasons, is a power to deal with what happens as a result of a successful appeal, not a basis for adding to the grounds of another party's appeal, who does not wish to challenge the relevant finding and indeed says it is correct, or for treating an appeal as if it had been properly instituted and pursued.

Applicable legal principles for appeals

42 CATA s 80 provides as follows:

"(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

Note. Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).

(2) Any internal appeal may be made —

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(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."

43 Clause 12 of Schedule 4 to CATA states:

"An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied 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)."

44 A Division decision is a primary decision of the Consumer and Commercial Division. The primary decision here is such a decision.

45 CATA s 4(1) contains the following relevant definitions to the nature of the decision from which an appeal is brought:

"ancillary decision of the Tribunal means a decision made by the Tribunal under legislation (other than an interlocutory decision of the Tribunal) that is preliminary to, or consequential on, a decision determining proceedings, including—

(a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter, and

(b) a decision concerning the awarding of costs in proceedings."

"'interlocutory decision' of the Tribunal means a decision made by the Tribunal under legislation concerning any of the following—

(a) the granting of a stay or adjournment,

(b) the prohibition or restriction of the disclosure, broadcast or publication of matters,

(c) the issue of a summons,

(d) the extension of time for any matter (including for the lodgment of an application or appeal),

(e) an evidential matter,

(f) the disqualification of any member,

(g) the joinder or misjoinder of a party to proceedings,

(h) the summary dismissal of proceedings,

(h1) the granting of leave for a person to represent a party to proceedings,

(i) any other interlocutory issue before the Tribunal."

46 In *Ericon Buildings PL v Owners SP 96597* [2020] NSWCATAP 265 at [26] the Appeal Panel, in the course of refusing leave to appeal a procedural order, focused at [9]-[10] on the required connection of an ancillary decision with a decision determining proceedings, not a decision which the party alleged should have been made to determine the proceedings. In that case, the orders under appeal noted a consent to judgment that had not been accepted by the applicant and set a timetable for a foreshadowed transfer application on which the transfer could be contested on the basis there was a tender of the maximum amount of the Tribunal's jurisdiction. Those orders were found to be interlocutory in character and therefore to require leave to appeal under CATA s 80(2)(a). Leave to appeal was refused at [13]-[18] because no decision that was said to be in error had actually been made; "for completeness", among other matters the Panel expressed the view at [19]-[27] that the Tribunal would be entitled to take into account the possibility that the Tribunal's jurisdiction on a work order was not limited to a value of $500,000 and at [28]-[36] that there was no tender of the Tribunal's maximum jurisdiction of $500,000 by actual payment.

47 The *Ericon* characterisation is consistent with the orthodox test, implicit in the statutory definitions cited above, that an interlocutory decision does not finally determine the rights of the parties in respect of the relief claimed in the proceedings: see, eg, *Sanofi v Parke Davis PL [No 1]* (1982) 149 CLR 147 at 152.

48 A question of law may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not taking into account a relevant consideration, which includes not making a finding on an ingredient or central issue required to make out a claimed entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 at [45], applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179.

49 These categories are not exhaustive of errors of law that give rise to an appeal as of right. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel enunciated the following as specifically included:

(1) whether the Tribunal provided adequate reasons;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

(4) whether there was a failure to afford procedural fairness;

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

(7) whether there was no evidence to support a finding of fact; and

(8) whether the decision was legally unreasonable.

50 In relation to adequacy of reasons, it is essential to expose the reasons for resolving a point critical to the contest between the parties: *Soulemezis v Dudley (Holdings) PL* (1987) 10 NSWLR 247 (CA) at 259, 270-272, 280-281; *Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at [40]; *Wainohu v NSW* (2011) 243 CLR 181 at [58]; *NSW Land and Housing Corp v Orr* (2019) 100 NSWLR 578, [2019] NSWCA 231 at [65]-[77]; CATA s 62(3).

51 A failure to deal with evidence may in the appropriate circumstances be characterised as a failure to have regard to a relevant consideration or a failure to have regard to critical evidence. It is generally not mandatory to consider particular evidence: *Rodger v De Gelder* (2015) 71 MVR 514, [2015] NSWCA 211 at [86]; *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443, [2012] NSWCA 244 at [15] per Basten JA (McColl and Macfarlan JJA

agreeing). However, by s 38(6)(a) of the CATA, the Tribunal "is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings." This obligation includes an obligation to have regard to material which has been disclosed to the Tribunal and which is relevant to the facts in issue, at least where that material is of some significance. Further, at common law, where a decision-maker ignores evidence which is critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the decision-maker, this is an error of law because the reasons are thereby rendered inadequate: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62]-[63]; *Eadie v Harvey* [2017] NSWCATAP 201 at [61]-[62].

52 The "no evidence" ground must identify that there is no, or substantially inadequate, evidence to support a "critical" or an "ultimate" fact in order to constitute a jurisdictional error (a form of error of law): *AAI Ltd t/as GIO v McGiffen* (2016) 77 MVR 34, [2016] NSWCA 229 at [81]; *Jegatheeswaran v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 263, [2001] FCA 865 at [52]-[56].

53 Legal unreasonableness can be concluded if the Panel comes to the view that no reasonable tribunal could have reached the primary decision on the material before it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [2013] HCA 18 at 364 [68]). A failure properly to exercise a statutory discretion may be legally unreasonable if, upon the facts, the result is unreasonable or plainly unjust: *Li* at 367 [76]). There is an analogy with the principle in *House v The King* (1936) 55 CLR 499, [1936] HCA 40 at 505 that an appellate court may infer that there has been a failure properly to exercise a discretion "if upon the facts [the result] is unreasonable or plainly unjust" and legal unreasonableness as a ground of judicial review: *Li* at 367 [76]. Further, there is some authority to the effect that unreasonableness as a ground of review may apply to factual findings, although this has not been finally resolved: see *Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 at [153]; *Wehi v Minister for Immigration and Border*

Protection [2018] FCA 1176 at [29]; *Legal Profession Complaints Committee v Rayney* [2017] WASCA 78 at [193].

54 Turning to errors of fact, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, an Appeal Panel stated at [76]–[79] and [84(2)] as follows:

> "74 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
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> 75 As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
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> > 1 If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
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> > 2 The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].
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> > …
>
> 78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.
>
> 79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].

> 84 The general principles derived from these cases can be summarised as follows: …
>
> > (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."

55 The question of what constitutes significant new evidence not reasonably available at the time the proceedings under appeal were being dealt with was considered by an Appeal Panel in *Owen v Kim* [2017] NSWCATAP 26. In that appeal the Appeal Panel stated at [37]–[39]:

> "37 In *Owners - SP 76269 v Draybi Bros Pty Ltd* [2014] NSWCATAP 29 the Appeal Panel stated at [109] in connection with cl 12(1)(c) of Schedule 4 to the *Civil and Administrative Tribunal Act*:
>
> > 'In order to fall within this paragraph the appellant must be able to point to evidence which:
> >
> > (1) is significant; and
> >
> > (2) has arisen and is new in the sense that it was not reasonably available at the time the proceedings below were being heard.'
>
> 38 In *Leisure Brothers Pty Ltd v Smith* [2017] NSWCATAP 11 the Appeal Panel stated at [40]:
>
> > 'The meaning of this clause was considered by the Appeal Panel in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111. At [23] – [24] the Appeal Panel said:
> >
> > > '23 Unlike the WIM Act, the expression "reasonably available" is not qualified by the words "to the party". This difference suggests that the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. For example, in *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 at

> [114] the Appeal Panel refused leave because, although the appellant may not have been aware of the evidence (being an email), it could have obtained the evidence by summons. In *Prestige Auto Centre Pty Ltd v Apurva Mishra* [2014] NSWCATAP 81 at [17] the Appeal Panel granted leave because the respondent to the appeal had fraudulently altered evidence. The party seeking leave under cl 12(1)(c) could not reasonably have had available to them the evidence that the report in question had been fraudulently altered at the time the proceedings were being dealt with by the Tribunal. That fact was not known to the appellant at the time of the hearing and could not reasonably be known due to fraud.
>
> 24 Each of these cases illustrates that something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).'

39 As stated at [27] in Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown:

> 'the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.'"

56 In *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 an Appeal Panel stated at [10]:

> "An appeal does not provide a losing party with the opportunity to run their case again except in the narrow circumstances which we have described. Mr Ryan has not satisfied us that those circumstances apply to his case and we refuse permission for him to appeal."

57 Even if the appellant establishes that it may have suffered a substantial miscarriage of justice within cl 12 of Sch 4 to CATA, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]). The matters summarised in *Collins v Urban*, above, at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.

58 In dealing with errors of law and errors of fact, the Panel must be cognisant that the two can intermingle. The Panel must also be alert that, under Australian law, there is a different approach to matters between two situations.

59 The first of these is where the particular decision has involved evaluation from findings of primary facts and the drawing of inferences therefrom on which reasonable minds may differ but which must be accepted as legally correct unless overturned or varied on appeal.

60 The second situation arises where there has been an exercise by the primary decision-maker of a discretion or choice embodied in the statute or law being applied, including as to whether relief is to be granted or refused and the form of relief: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [2018] HCA 30 at [18], [20], [26], [30]-[32], [43]-[45], [48]-[49], [55]-[56], [85]-[87], [127]-[128], [153]-[155].

61 In appellate review of the exercise of a discretion, a reviewing court or tribunal must be cognisant that reasonable minds may differ on the correct exercise of discretion from alternatives all of which are within the range of reason. Unless the factors identified in *House v The King* (1936) 55 CLR 499, [1936] HCA 40 at 505 are satisfied, the fact that the reviewing court or tribunal may have chosen a different alternative is not sufficient to upset the exercise of discretion. Those factors were stated as follows:

> "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."

Error of law

62 The present appeal was against only the costs order made on 4 September 2020 concerning the first and third respondents, not the consent orders nor the orders made after contest. In some jurisdictions an appeal against costs alone would require leave: see *Supreme Court Act 1970* (NSW) s 101(2)(c).

63 In our view the effect of CATA s 80(2) with the definition of "ancillary decision" set out above is that this appeal is brought as of right in respect of an alleged error of law.

64 Although the largest part of the orders was by consent, there remained significant items that were determined after contested hearing, including

concurrent expert evidence, by the primary member. There was also no contest as to the appropriateness of a global costs order in the circumstances.

65 It therefore does not seem appropriate to approach the matter by invoking the test set out above concerning costs where there is a consent resolution. This was but a larger instance of the position often encountered, particularly where experts conclave and their evidence has significant impact on the outcome, that some matters will be by consent and some by determination after contest, and that each will be reflected in the orders, whether or not the orders are expressly divided into the two groups as they were here.

66 Here the appropriate test appears to be that concerning whether it was reasonable for the OC not to accept the builder's calderbank offer within the time limited for acceptance after 27 February 2019. This is the thrust of the builder and developer's challenge to the exercise of discretion as being grounded in errors of law. It focuses on the exercise of discretion for reasons expounded in [25] and [26] of the primary reasons in the context of the unchallenged findings at [23] and [24] of the primary reasons.

67 It is clear from the substantive primary determination on 11 March 2020 and from the evidence before us that the OC did not do as well as the offer in the calderbank letter in terms of the scope of works that were required to be remedied. This is the case whether or not one takes into account the changes to the scope of alleged defects after February and March 2019 or the lack of clarity in what was agreed in an expert report that post-dated the calderbank offer. There is no evidence to which our attention has been drawn that the OC at the point of its own offer and the builder and developer's calderbank offer was contemplating an amendment to add further claims or that it notified any such intention including in response to the calderbank letter.

68 The OC did exceed the scope of the calderbank offer in terms of a Tribunal work order against both the builder and the developer but the effect of this is problematic given the calderbank offer was of similar obligations on both to which the actual work order was an addition, as described at the start of these reasons.

69 None of the matters in the preceding two paragraphs - which were relevant considerations on the authorities described earlier in these reasons to the exercise of costs discretion - appears to be taken into account in the primary decision unless they are encompassed within the findings in [24] of the primary reasons.

70 There is no consideration in the primary costs reasons of the other matters set out earlier in these reasons, being the state of preparation of the proceedings and the time to consider the offer, the extent of compromise in the offer, the offeree's prospects in the litigation at the time the offer was made, clarity of terms of the offer, and whether an application for indemnity costs was foreshadowed in the event of rejection.

71 Those considerations are centrally relevant because the purpose of the principles governing the effect of calderbank offers is to compensate the offeror for the costs of having to continue to litigate the proceedings, to a less successful contested conclusion for the rejecting party than what the rejecting party was offered, when there was sufficient information and time for the rejecting party to assess prospective contested outcomes against the genuine compromise outcome being offered.

72 Rather, as the appellant OC's submissions indicate, the primary member appears to have focused on whether or not it was either party's fault that the proceedings continued rather than resolving. This, with respect, is an irrelevant consideration. Parties can rationally determine to "take their chances" and/or make further counter-offers, including taking the opportunity to modify the terms of previous offers, but that is irrelevant to assessing their conduct in relation to the particular offer relied upon.

73 A calderbank offer fits within the usual rules as to the compensatory nature of costs orders: see, eg, *Latoudis v Casey* (1990) 170 CLR 534 at 543, 567 and the authority cited in the last part of these reasons. The usual costs consequences are reflected in costs orders for the party achieving relief up to the offer period lapsing, because it had to pursue the claim to obtain relief to that point. That rationale ceases to apply because the party could have achieved more at that point by accepting the offer than by pressing on.

74 Accordingly, in our view the appeal should succeed because the exercise of discretion in the primary costs decision in Order 1 concerning costs as between the builder and developer on the one part and the OC on the other part miscarried and needs to be set aside for errors of law in its exercise.

Leave to appeal

75 As said earlier, the grounds in the notice of appeal that required leave (as opposed to any required grant of leave for the entire appeal, which we have said we regard as unnecessary) were not pressed in submissions.

Appropriate relief on appeal

76 CATA s 81 provides as follows:

> "(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,
>
> (c) the decision under appeal to be quashed or set aside,
>
> (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
>
> (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.
>
> (2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance."

77 In our view it would be contrary to the guiding principle in CATA s 36 and the objective in CATA s 3(d) not to set aside the costs order appealed against and not to determine the question of costs at first instance. To do otherwise would require the parties to return to the Tribunal to argue a costs order. There is no indication from either party in the papers on which this appeal is being determined as to further evidence which if tendered would make a sufficient difference to justify the additional time and cost of remission. The volume of material put before us on a costs appeal speaks otherwise.

78 We accordingly shall determine the primary costs order on the material before us and substitute that for the current primary costs Order 1 made 4 September 2020.

79 It is clear that the builder "beat the offer" in its calderbank letter on the scope of defects to be remediated. That letter offered an effective capitulation to the OC's claim as it then stood. The OC did not obtain as good a result on final determination on that aspect as the offer in the builder's calderbank letter.

80 As said earlier, there is no evidence to which our attention has been drawn that the OC at the point of its own offer and the builder and developer's calderbank offer was contemplating an amendment to add further claimed defective work or that it notified any such intention including in response to the calderbank letter.

81 The OC said that it "beat the offer" in terms of obtaining a scope of works and detailed construction programme for the defects to be remedied. We do not agree. The offer was for the parties' experts to agree the scope of works for all then-claimed defects and, failing agreement, for a Tribunal determination. This is the process that occurred.

82 The OC said that it "beat the offer" by obtaining a work order against the developer as well as the builder. Again, we do not agree that in substance this was any different from what was offered in the calderbank letter. We consider the terms of that letter, which have been described at the start of these reasons, encompassed the builder and developer (and the second respondent as well) in direct contractual obligations in respect of the remediation process for all then-claimed defects. To this the work order against the builder, who was the identified builder, was an integral part but not a limiting part.

83 The OC said that it "beat the offer" by obtaining an indemnity from the builder and developer for loss or damage during the undertaking of the works and an obligation in the work order that the builder and developer pay the reasonable costs of the OC's experts. We disagree. Although the original building contract was not in evidence before us, in the usual course it would contain such an indemnity that extended to the remediation works. Although costs were reserved in the calderbank offer, in an offer where the builder and developer

agreed to remediate all then-claimed defects and set up a mechanism for ascertaining scope of works, it is hard to see a substantive distinction between the reasonable costs awarded under reserved costs (if contested) for the OC's experts' assessment of found defects and the reasonable costs of remediation scope of works from what would be provided under the work order on 11 March 2020. In any event, if one takes an overall assessment of the outcome under the calderbank offer and the work order, on the available evidence such matters would not throw out the balance in favour of the offer because of the difference between defects covered by the offer and the fewer defects covered by the work order.

84 The evidence suggests that as at the end of February 2019 the proceedings were in a state of preparation that enabled the OC to assess its prospects in the litigation against what it was being offered. Indeed, the specification of alleged defects to be rectified by reference to expert reports in which some items were disputed confirms that position.

85 The unchallenged finding at [24] of the primary costs reasons infers that the terms of the calderbank offer were sufficiently clear. In our view, the correct interpretation of "client" only reinforces that position.

86 There was no suggestion, and in the circumstances of preparation and exchange of offers that was occurring nor could there be a suggestion, that there was a lack of time properly to consider the offer before it lapsed, or that it was not sufficiently clear that the offer would be relied upon in an application for indemnity costs in the event of rejection of the offer. The detailed rejection letter of 11 March 2019 reinforces that conclusion.

87 Accordingly, we come to the view that it was unreasonable for the OC not to accept the builder's calderbank offer dated 27 February 2019.

88 Consistent with what has been stated earlier, the costs reward for beating the offer should date from after the date of rejection of the offer on 11 March 2019.

Costs of appeal

89 Leave to all parties to be legally represented in the appeal proceedings was granted, on 14 October 2020.

90 CATA rule 38A of the *Civil and Administrative Tribunal Rules 2014* (NSW) applies the same costs rules as applied in the Division when there is a departure under the Division rules (such as under Rule 38) from CATA s 60.

91 Rule 38 applies when the amount claimed or in dispute in the proceedings exceeds $30,000. In *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 at [37]-[38], the Appeal Panel found that "'[P]roceedings'" refers to the process set in motion, or commenced, by lodging an application or notice of appeal. That process includes the steps taken by the Tribunal to hear and determine whether to grant the relief sought in the application or notice of appeal, as well as any interlocutory or ancillary steps. Proceedings are defined by the subject matter raised in the application or notice of appeal. The participants in proceedings are limited to the parties determined in accordance with [CATA s 44 and the Rules]".

92 In *Knox v Bollen* [2018] NSWCATAP 106 at [67]-74], the Appeal Panel explained that the *Allen* decision was in the context where a number of proceedings against the same respondent were, consistent with the guiding principle in CATA s 36, heard together. The decision in *Allen* that, absent consolidation, two proceedings between the same parties, effectively being defences to each other's claims and cross-claims against each other, remained separate proceedings did not prevent their characterisation for the purposes of rule 38 and rule 38A as part of the same proceedings. This was particularly the case where, as found in *Allen* at [57], the test for whether the amount in dispute was more than $30,000 depended upon "whether there is a realistic prospect that in each appeal the wealth of the [relevant] party would be changed by more than $30,000 or, put another way, whether the right claimed by the [relevant] party, but denied by the decision at first instance, prejudices that party to an amount in excess of $30,000".

93 The starting point for exercise of costs discretion on the usual principles is that costs follow the event. “The event” is usually the overall outcome of the proceedings – did the successful party have to go to the Tribunal (in this case) to get what it achieved, rather than being offered at least that relief. If there are distinct issues on which the party seeking relief did not succeed, that may be

taken into account in the exercise of costs discretion. Appeal Panel decisions have made no order as to costs (to the intent that each party paid its or their own costs of the appeal) where there has been a measure of success on both sides: *Johnson t/as One Tree Constructions v Lukeman* [2017] NSWCATAP 45 at [25]-[29]; applied in *Oppidan Homes PL v Yang* [2017] NSWCATAP 67.

94 We consider that the outcome and reasons in *Johnson* and *Oppidan* do not qualify the application of orthodox principles for exercise of costs discretion in the present circumstances. The exercise of discretion in *Johnson* was in relation to the costs on appeal only: *Johnson* at [4]. The clear mixed outcome on appeal grounds meant that the original decision was maintained in a central respect but the original claim was otherwise to be the subject of a re-hearing. The outcome in *Oppidan* reflected the outcome of the primary hearing which involved claims by both parties.

95 Here the appellant builder and developer have achieved the result they sought on the appeal. They were commonly represented. They are entitled to their costs of the appeal.

96 In our view, costs should be ordered on the ordinary basis as agreed or assessed.

97 For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered. The principles are explored in *Latoudis v Casey* (1990) 170 CLR 534, *Oshlack v Richmond River Council* (1998) 193 CLR 72 and in this Tribunal in *Thompson v Chapman* [2016] NSWCATAP 6 and *Bonita v Shen* [2016] NSWCATAP 159, citing earlier consistent authority. The principles have resonance with at least some of the "special circumstances" in CATA s 63 that are required to justify a costs order when rule 38A does not apply.

98 On the appeal, each party pursued, as was their right, their view of the appropriate order as to the costs at first instance. Each party co-operated with the Tribunal. There was no indication of any significant misconduct.

Orders

99 The orders we accordingly make are as follows:

(1) Leave to appeal is granted, to the extent that leave is required.

(2) The appeal is allowed.

(3) In lieu of Order 1 made 4 September 2020 in HB 18/47472, order as follows:

(a) the first and third respondents are to pay the applicant's costs of the proceedings on the ordinary basis as agreed or assessed up to and including 11 March 2019;

(b) the applicant is to pay the first and third respondents' costs of the proceedings on the indemnity basis as agreed or assessed after 11 March 2019 including costs incurred in relation to the costs orders made in the proceedings.

****

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