Civil and Administrative Tribunal

New South Wales

Case Name:	Y E Holdings Pty Limited v The Owners - Strata Plan No. 80877
Medium Neutral Citation:	[2021] NSWCATCD 22
Hearing Date(s):	On the papers
Date of Orders:	21 June 2021
Decision Date:	21 June 2021
Jurisdiction:	Consumer and Commercial Division
Before:	G Blake AM SC, Senior Member
Decision:	(1) A hearing is dispensed with in relation to the costs of the proceedings. (2) The applicants are to pay the costs of the respondent of and incidental to the proceedings as agreed or assessed on the basis set out in the legal costs legislation (as defined in s 3A of the Legal Profession Uniform Law Application Act 2014 (NSW)).
Catchwords:	COSTS – whether there are special circumstances warranting an award of costs
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 50, 60 Legal Profession Uniform Law Application Act 2014 (NSW), s 3A Strata Schemes Development Act 2015 (NSW), Pt 10 Strata Schemes Management Act 2015 (NSW), ss 231, 232, 237
Cases Cited:	Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46 BDK v Department of Education and Communities [2015] NSWCATAP 129

	Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 (No 2) [2016] NSWCATAP 224 Brunsprop Pty Ltd v Joanne Hay & Wes Davies [2015] NSWCATAP 152 CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21 eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94 Rodny v Stricke [2020] NSWCATAP 20 The Owners – Strata Plan 5319 v Price [2020] NSWCATAP 245
Texts Cited:	None cited
Category:	Costs
Parties:	Y E Holdings Pty Limited (First Applicant) Keywi Pty Ltd (Second Applicant) McMatric Investments Pty Ltd (Third Applicant) The Owners - Strata Plan No 80877 (Respondent)
Representation:	Solicitors: Speirs Ryan (Respondent)
File Number(s):	SC 21/16322
Publication Restriction:	Nil

REASONS FOR DECISION

Overview

1 In these proceedings the first applicant, Y E Holdings Pty Limited, the second applicant, Keywi Pty Ltd, and the third applicant, McMatric Investments Pty Ltd (collectively called the applicants), sought orders under s 231 of the *Strata Schemes Management Act 2015* (NSW) (SSM Act) against the respondent, The Owners - Strata Plan No 80877.

2 On 4 May 2021, the Tribunal relevantly made orders dismissing the proceedings (the 4 May 2021 orders).

3 The respondent pursuant to orders 3(1) and (2) of the 4 May 2021 orders has applied for an order that the applicants pay its costs of and incidental to the proceedings.

4 I have decided to order that the applicants should pay the respondent's costs of and incidental to the proceedings as agreed or assessed.

The background

5 Strata Plan No 80877 (SP80877) was registered on 30 July 2008 and is a mixed residential and retail complex comprising 141 lots, with 9 commercial and retail lots and 132 residential lots, in two, reinforced-concrete, brick cavity walled, multi-level buildings known as Mascot Towers at Mascot. One building fronts Bourke Street; the other Church Avenue.

6 The applicants are the owners of the retail lots in SP80877 located on the ground floor of the Bourke Street building.

7 The first applicant is the owner of:

(1) retail lot 133, which it leased out for use as a restaurant;
(2) retail lot 138, which it leased out for use as a restaurant; and
(3) retail lot 139, which it leased out as a take away food outlet.

8 The second applicant is the owner of retail lot 140, which it leased out for use as a cafe.

9 The third applicant is the owner of retail lot 141, which it leased out for use as a hairdressing salon.

10 On or around 18 April 2019, significant structural cracks were identified in transfer beams at Mascot Towers.

11 Between late April 2019 and up until the evacuation of the building was ordered by Fire and Rescue NSW on 14 June 2019, new structural cracks and worsening of existing cracks were identified and, just prior to the evacuation, propping did not alleviate the cracking.

12 At some stage soon after the evacuation, the occupiers of the seven retail lots including lots 133, and 138 to 141 who were able to access their premises directly from the Bourke Street and Church Avenue boundaries of the land re-entered their premises and recommenced trading.

13 Between June and December 2019, the respondent engaged engineers to assess the building and engaged remedial builders, SBM, to commence rectification works.

14 In October 2019, Mills Oakley was engaged by the respondent to act in proceedings against the developer of a building adjacent to Mascot Towers, known as "Peak Towers", and other parties connected with the construction of that adjoining building. The "Peak Towers" proceedings were commenced on the basis that expert assessments and reports commissioned by the respondent indicated the Peak Towers construction had caused the ground underneath Mascot Towers to become unstable and this caused the subsequent cracking which triggered the evacuation on 14 June 2019.

15 In the process of expert assessment and procuring reports largely for the purpose of the "Peak Towers" proceedings, the respondent became aware of a significant number of additional defects, faults, omissions, and defective work arising from the original construction of the two buildings.

16 In about March 2020, the respondent was made aware of cracking in the decorative brick facade of Mascot Towers and commissioned a report from SJA Construction Services Pty Ltd to examine the brick facade. Subsequent investigations revealed that the facades were constructed of double brick, despite the facades being noted on approved building plans as being brick veneer. These same investigations also revealed that the facade when constructed may not have been adequately tied into the building structure at certain points.

17 In May 2020, the respondent authorised emergency works to be undertaken to secure parts of the facade.

18 On 21 May 2020, at an extraordinary general meeting, the respondent resolved to be subject to Part 10 of the *Strata Schemes Development Act 2015* (NSW) (SSD Act), and to investigate the possibility of a collective sale of the lots in SP80877 by either unanimous agreement or in accordance with Part 10 of the SSD Act.

19 In July 2020, the respondent obtained an additional report from Meinhardt Facade Technology to investigate and assess the cracking in the brick facade, the risks posed and what works would be required to mitigate these risks.

20 On 19 November 2020, at an extraordinary general meeting, the respondent resolved to obtain a further strata loan to continue to fund operation of SP80877 and rectification works but the owners also resolved to limit drawdown of that finance and to limit expenditure generally over the next six months whilst they undertook further investigations of any options to improve their circumstances, including the possibility of a collective sale of the lots in SP80877.

21 On 3 December 2020, SafeWork NSW issued the respondent with an improvement notice in respect of the risks related to the brick facade and requesting compliance with their directions to manage these risks by 18 December 2020 (the SafeWork notice). A copy of this notice was provided to the retail lot owners and occupiers on or about 10 December 2020.

22 Following negotiations with some retail lot owners and SafeWork NSW, the date for compliance with the SafeWork notice was extended to 29 January 2021 to enable the respondent to continue to investigate any proposed solution for compliance with this notice that might permit the retail lots to continue to trade.

23 On 18 January 2021, the respondent's solicitors sent a letter to the retail lot owners/occupiers outlining the following two options to comply with the SafeWork notice;

(1) Option A - the respondent would install at its cost "Class A" hoarding around the perimeter of the strata scheme to create an exclusion zone in compliance with the SafeWork notice. Retail lots would not be able to trade after installation of the Class A hoarding; or

(2) Option B - the respondent would also install "Class B" hoarding contemporaneously with or after the installation of "Class A" hoarding to create tunnel access to the retail lots, with the retail lots to pay the cost of the additional Class B hoarding.

24 The date for compliance with the SafeWork notice was again extended to 13 February 2021 and on 27 January 2021, the respondent's solicitors sent a letter to the retail lot owners/occupiers advising a further Option C permitting

retail lots to engage their own contractors to install “Class B” hoarding tunnels, provided they complied with reasonable conditions including but not limited to using licensed contractors, the scope of works being approved by its engineer, completed works being signed off by the engineer and the approval of relevant authorities. The installation of “Class B” hoarding by and at the cost of the retail lot owners/occupiers, being Option C, was able to be undertaken at any time after installation by the respondent of the “Class A” hoarding.

25 On 29 January 2021, the respondent received correspondence from Hamilton Locke, the applicants’ solicitors, requesting a copy of the reports referred to in the SafeWork notice.

26 The respondent’s solicitors continued to correspond with the applicants’ solicitors who indicated that the applicants agreed to Option B but did not agree with the respondent’s contractor’s quotes, proposed scope of works or contract.

27 On or around 9 February 2021, the owners and occupiers of retail lots 135, 136 and 137 paid the requested contribution towards the cost installation of “Class B’’ hoarding to enable access to their lots and this hoarding was installed by the respondent’s contractors contemporaneously with the “Class A’’ hoarding. Those retail lots have continued to trade.

28 On or around 19 February 2021, installation of the “Class A” hoarding on the boundary of the land adjacent to Bourke Street was completed.

29 Subsequently to 19 February 2021, the applicants have neither installed “Class B” hoarding nor paid the cost of the “Class B" hoarding to enable installation by the respondent’s contractors.

30 On 15 April 2021, the strata committee of the respondent held an Informal meeting for lot owners to provide an update on the investigations carried out so far into the collective sale process with a view to holding an extraordinary general meeting within the next several weeks to formally vote on whether to progress the matter further.

31 From 14 June 2019, being the date of evacuation, up until the hearing on 4 May 2021, the respondent had spent considerable time and funds on

rectification of the defects, the ongoing litigation and the continued management of SP80877. The full cost of rectification works as at 4 May 2021 was estimated at $38.5 million.

The history of the proceedings

32 On 14 April 2021, the applicants commenced proceedings SC 21/16322 against the respondent by filing a strata schemes interim application (the interim application) in which they:

(1) sought the following orders:

> "(a) an interim order or orders under section 237(1} and 237(2) of the Strata Schemes Management Act 2015 NSW) (the SSM Act) appointing Wellman Strata Management Pty Ltd (ABN 24 110 754 839) (the Compulsory Manager) to exercise all of the functions of the respondent owners corporation (the Corporation), including the functions of the chairperson, treasurer, secretary and strata committee, or alternatively, the Corporation's function of keeping the common property of the Mascot Towers strata scheme in a state of good and serviceable repair under section 106 of the SSM Act, for a period of 2 years, and
>
> (b) an interim or alternatively final order requiring the Corporation, and the Compulsory Manager to reinstate access to the Applicants' lots through the common property of the Mascot Towers strata scheme by the reconfiguration of the current hoarding 'Class A' hoarding constructed for the creation of an exclusion zone to 'Class B' hoarding."

(2) provided the following reasons for asking for these orders:

> "Please refer to the affidavit of Veno Panicker affirmed 12 April 2021 and Annexure A – Submissions"

(3) attached the document entitled "Annexure A – Submissions" which comprised 14 pages and 34 paragraphs.

33 On 22 April 2021, the applicants filed supplementary submissions in which they:

(1) submitted that the installation of "Class A" hoarding denies their fundamental right to access which constitutes ongoing nuisance and that their right to access should take precedence over any other competing rights in the respondent's management or administration of SP80877;

(2) in which they set out the following "amended orders":

> "(a) an interim order or orders under section 237(1) and 237(2) of the Strata Schemes Management Act 2015 (NSW) (the SSM Act) appointing Wellman Strata Management Pty Ltd (ABN 24 110 754 839) (the Compulsory Manager) to exercise all of the functions of the

respondent owners corporation (the Corporation), including the functions of the chairperson, treasurer, secretary and strata committee, or alternatively, final order that the Corporation's function of keeping the common property of the Mascot Towers strata scheme in a state of good and serviceable repair under section 106 of the SSM Act, for a period of 2 years,

(b) in the alternative, an interim order under section 237(1) and 237(2) of the SSM Act appointing the Compulsory Manager for three (3) months to exercise all the functions of the Corporation, including the functions of the Chairperson, treasurer, secretary and strata committee to manage the process in respect of anv extraordinary general meeting to consider a sale by wav of strata renewal proposal and management of anv such process, if approved bv more than 75% of the lot owners.

(c) an order requiring Strata United (the current Strata Manager), the Corporation and any lot owner to deliver all books, records or other property of the Corporation in their possession or control to the Compulsory Manager,

(d) an interim or alternatively final order requiring the Corporation, and the Compulsory Manager to reinstate access to the Applicants' lots through the common property of the Mascot Towers strata scheme by the reconfiguration of the current hoarding 'Class A' hoarding constructed for the creation of an exclusion zone to 'Class B' hoarding, and

(e) a final order that the Corporation pay the Applicants damages for the loss and damage that they have incurred by their exclusion from their lot property by the creation of an exclusion zone by the construction of a 'Class A' hoarding, rather than the creation of an exclusion zone by the construction of 'Class B' hoarding."

34 On 4 May 2021, at the hearing:

(1) the applicants:

(a) sought and were granted leave to amend their interim application to seek the following order:

> "a) "An interim or alternatively final order requiring the Corporation to reinstate access to the Applicants' lots through the common property of The Mascot Towers strata scheme by the reconfiguration of the current hoarding 'Class A' hoarding constructed for the creation of an exclusion zone to 'Class B' hoarding" ("Final Interim Order Sought")."

(b) relied on the following evidence:

(i) the affidavit of Veno Panicker affirmed on 12 April 2021 and exhibits VSP-1 and VSP-2;

(ii) the affidavit of Veno Panicker affirmed on 22 April 2021 comprising 38 paragraphs and exhibits VSP-3 and VSP-4;

(iii) the further affidavit of Veno Panicker affirmed on 22 April 2021;

(iv) the affidavit of Veno Panicker affirmed on 23 April 2021;

(2) the respondent:

(a) relied on the following evidence:

(i) nine documents which evidence the background to the proceedings;

(ii) the affidavit of Issac Lean affirmed on 30 April 2021 and exhibit IL-1;

(iii) the affidavit of Samantha Saw affirmed on 3 May 2021 and exhibit ss-1;

(b) written submissions dated 30 April 2021 in which it:

(i) addressed the following issues:

1 the orders sought by the applicants in the interim application;

2 the background;

3 the urgency considerations;

4 the dysfunction required for the making of an order for the compulsory management of a strata scheme under s 237 of the SSM Act;

5 the alleged denial of the applicants' fundamental right to access their lots and ongoing nuisance;

6 the jurisdiction of the Tribunal to make orders sought under s 232 of the SSM Act;

(ii) gives notice that if the Tribunal dismisses the applicants' application, it seeks an order that they pay its costs of the proceedings noting the "special circumstances" pursuant to s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

35 In dismissing the proceedings I applied the principles for an interlocutory injunction outlined in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46 and relevantly made the following findings:

(1) there was no serious question to be tried, as I was not satisfied that the respondent had sufficient funds with which to erect the proposed hoarding sought by the applicants and the relevant approval to do so;

(2) I was not satisfied on reasonable grounds that urgent considerations justified the making of the order. The applicants were on notice of the

requirement for the erection of hoarding and the potential exclusion of access on 10 December 2020 and yet provided no explanation for the delay in commencing the proceedings until 14 April 2021;

(3) there was no evidence provided to support an argument that damages would not be an adequate remedy;

(4) on the balance of convenience, an order for interim relief was not justified in the circumstances as the applicants were seeking final rather than interim orders.

The hearing on the papers

36 The respondent in support of its application for costs relies on its submissions on costs dated 17 May 2021.

37 The applicants have not filed any submissions in opposition to the respondent's application for costs in accordance with order 3(3) of the 4 May 2021 orders, or otherwise indicated that they oppose the application.

The issues

38 The following issues arise for determination:

(1) whether a hearing in relation to costs should be dispensed with;

(2) the costs of the proceedings.

Whether a hearing in relation to costs should be dispensed with

39 The respondent consents to an order dispensing with a hearing in relation to costs.

40 I am satisfied that the issues for determination in relation to the costs of the proceedings can be adequately determined in the absence of the parties by considering the written submissions of the respondent. Accordingly, I have decided pursuant to s 50(2) of the NCAT Act to make an order dispensing with a hearing in relation to the costs of the proceedings.

The costs of the proceedings

Introduction

41 The respondent's application for its costs of the proceedings is pursuant to s 60(2) of the NCAT Act.

42 Before considering the respondent's application, it is appropriate to set out the applicable statutory provisions, and summarise the relevant legal principles and the submissions of the respondent.

The applicable statutory provisions

43 Section 60 of the NCAT Act relevantly provides:

> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
>
> …
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> …
>
> (g) any other matter that the Tribunal considers relevant.
>
> (4) If costs are to be awarded by the Tribunal, the Tribunal may—
>
> (a) determine by whom and to what extent costs are to be paid, and
>
> (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.
>
> (5) In this section—
>
> costs includes—
>
> (a) the costs of, or incidental to, proceedings in the Tribunal, and

The relevant legal principles

44 "Special circumstances" in s 60(2) of the NCAT Act are circumstances that are out of the ordinary; they do not have to be extraordinary or exceptional circumstances: *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [32].

45 In considering whether special circumstances exist for the purposes of s 60(2) of the NCAT Act:

(1) each case will depend upon on its own particular facts and circumstances: *Brunsprop Pty Ltd v Joanne Hay & Wes Davies* [2015] NSWCATAP 152 at [27];

(2) the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs: *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48] ;

(3) mere success (or failure) of an application does not give rise to special circumstances: *The Owners – Strata Plan 5319 v Price* [2020] NSWCATAP 245 at [46];

(4) where special circumstances are found to exist, the Tribunal has a discretion to exercise in deciding what, if any, order should be made. Relevant to the exercise of that discretion are those facts upon which the finding of special circumstances was based. However, those findings do not constitute the whole of the relevant matters to be considered in deciding what, if any, order for costs should be made. Rather, the principles applicable to awarding costs generally must also be taken into account: *Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 (No 2)* [2016] NSWCATAP 224 at [24].

46 In *Rodny v Stricke* [2020] NSWCATAP 20 (*Rodny*) at [112] the Appeal Panel held that the withdrawal of an application, which had been the subject of lengthy preparation and the incurring of significant costs, shortly before the hearing was a matter that constituted special circumstances warranting an order for costs within s 60(2) of the NCAT Act.

47 As to the factor in s 60(3)(e) of the NCAT Act, in *BDK v Department of Education and Communities* [2015] NSWCATAP 129, in which the appellant was self-represented as she had been in the decision below, the Appeal Panel at [62]-[66], [72] said in relation to the identical expression in s 55(1)(b) of the NCAT Act:

> "62 It will be seen that this Tribunal's power is somewhat differently expressed. The Tribunal's power refers not only applies to proceedings that are "frivolous" or "vexatious", but then applies to proceedings that are "misconceived" or "lacking in substance". Section 55(1)(b) does not have a generic catch-all category of "abuse of process" to pick up conduct in relation to the issuance and pursuit of proceedings that might, arguably, fall outside the four specific categories set out there.
>
> 63 In *Alchin v Rail Corporation NSW* [2012] NSWADT 142 Judicial Member Wright SC (as he then was) examined the meaning of the predecessor provision to s 55(1)(b) – s 73(5)(g)(ii) of the Administrative Decisions Tribunal Act 1977. As to the meaning of "misconceived" and "lacking in substance", he said:

> 25 The expressions used in s 92(1)(a)(i) of the ADA, namely "misconceived" and "lacking in substance" are found not only in the ADA but also in s 73(5)(g) of the ADT Act and similar legislation in other states. With respect to a similar provision found in the Equal Opportunity Act 1984 (Vic), Ormiston JA in *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at [14] said:
>
> > "misconceived" and "lacking in substance" have not, so far as I am aware, been used in this context before though each expression is commonly used by lawyers, the one connoting a misunderstanding of legal principle and the other connoting an untenable proposition of law or fact. If one may discern, in these provisions, an attempt to express the powers of tribunals in non-technical language, then "misconceived" would represent a claim which did "not disclose a cause of action" …, whereas "lacking in substance" might be seen to represent a claim where the defendant could obtain summary judgment …
>
> 26 This approach of construing "misconceived" as including a misunderstanding of legal principle and "lacking in substance" as encompassing an untenable proposition of fact or law has been applied by the Tribunal in many decisions including, for example, *Keene v Director-General, Dept of Justice and Attorney-General* [2011] NSWADT 59 at [14], *McDonald v Central Coast Community Legal Centre* [2008] NSWADT 96 at [22] and *Stanborough v Woolworths Ltd* [2005] NSWADT 203 at [50].

64 In the present case, the Tribunal referred to the frequently-cited explanation of this term by Roden J in *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491:

> 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
>
> 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
>
> 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

65 It will be seen that Roden J's first category covers conduct that falls within the meaning of "frivolous", while his third category embraces the kind of cases to which the expressions "misconceived" and "lacking in substance" are directed (or, in the case of the UCPR categories, cases not disclosing a reasonable cause of action).

66 In our view a reasonably broad connotation should be given to the meaning of the four categories of conduct identified by s 55(1)(b). The intent of the provision, as we see it, is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass. While "misconceived" and "lacking in substance" may be seen as relatively specific terms, we think a flexible, purposive interpretation can be adopted in determining whether proceedings are "frivolous" or "vexatious", conscious always of the gravity for an applicant or plaintiff of summary dismissal of proceedings.

…

72 The question that arises here is whether the power to dismiss summarily a proceeding on the ground that it is "vexatious" can be applied to a proceeding that invokes an available legal right. It is clear, we consider, that the description "vexatious" has been applied to cases where the applicant or plaintiff was exercising an available legal right."

The submissions of the respondent

48 The respondent makes the following submissions:

(1) the proceedings were frivolous, vexatious and lacking in substance by reason that:

(a) the applicants did not seek leave to amend the orders sought in their interim application at any point except at the time of the hearing. As a result, it was required to spend considerable time and costs in responding to and refuting each order sought by the applicants in the interim application as filed and their further submissions filed on 22 April 2021, a large part of which became irrelevant as a result of the amended order ultimately sought by them at the hearing;

(b) the applicants filed submissions, four affidavits, four exhibits and further submissions in respect of the interim application, all of which it had to consider prior to filing submissions and evidence in response before the hearing. The order sought by the applicants at the hearing ultimately removed all aspects of previous orders sought relating to the appointment of a compulsory strata manager for SP80877, which formed a significant part of both parties' submissions and evidence filed in relation to the interim application;

(c) the applicants' conduct in the proceedings was vexatious as they constantly shifted the parameters of the orders sought in their interim application whilst simultaneously filing an extraordinary amount of evidence with the Tribunal. This evidence was largely unnecessary in respect of the order finally sought;

(d) the proceedings were frivolous as they failed to meet any urgency requirements necessitated by s 231(1) of the SSM Act and that effectively in substance a final order was being sought;

(2) the proceedings had no tenable basis in fact and law:

(a) for the reasons given by me in making the 4 May 2021 orders;

(b) by reason that the order sought at the hearing goes beyond the jurisdiction of the Tribunal. Whilst s 232 of the SSM Act provides the Tribunal with a broad jurisdiction to rectify complaints and settle disputes, the applicants largely sought relief on the basis of the alleged denial of proprietary right to access its lots, a right which is not governed by the SSM Act;

(3) the nature and complexity of the proceedings:

(a) it is abundantly clear that these proceedings and the circumstances surrounding SP80877 generally are complex and multi-faceted;

(b) the complexity of these proceedings and the seriousness of the potential outcome for the respondent if the orders sought in the interim application as filed were to be granted by the Tribunal supports the argument that an order for costs should be granted in favour of the respondent;

(c) the respondent had to spend considerable time and costs preparing evidence to support the opposition of the interim application. This complexity could have been significantly reduced if the applicants had pursued the order sought at the hearing on a substantive and final basis rather than requiring the respondent to respond to the interim application.

Consideration

Whether there are special circumstances warranting an award of costs in favour of the respondent

49 I am satisfied that there are special circumstances warranting an award of costs in favour of the respondent within s 60(2) of the NCAT Act for the following reasons:

(1) the applicants abandoned their claim for orders (a) to (c) and (e) of the amended orders outlined in their supplementary submissions which were a substantial part of the relief it claimed in the interim application, and which were the subject of a substantial amount of evidence, at the commencement of the hearing. This is a more cogent reason than found by the Appeal Panel in *Rodny* at [112] where an application, which had been the subject of lengthy preparation and the incurring of significant costs, was withdrawn shortly before the hearing;

(2) the proceedings had no tenable basis in fact within s 60(3)(e) of the NCAT Act as the evidence relied on by the applicants did not establish that there were urgent considerations within s 231(1) of the SSM Act for the making of the order sought at the hearing. In particular, the applicants had been on notice since 10 December 2020 of the likely removal of access to their lots, and of the removal of access to their lots since 19 February 2021, but failed to commence the proceedings until 14 April 2021 and to provide any explanation for this delay.

50 It is unnecessary to consider the other reasons advanced by the respondent as to why there are special circumstances warranting an award of costs in its favour within s 60(2) of the NCAT Act.

If so, whether the discretion should be exercised to award costs

51 Having been satisfied of the condition in s 60(2) of the NCAT Act that there are special circumstances warranting an award of costs in favour of the respondent, I am further satisfied that that the discretion under this subsection should be exercised to award of costs in its favour of the proceedings as agreed or assessed. There is no reason not to make such an award.

Orders

52 I make the following orders:

(1) a hearing is dispensed with in relation to the interim proceedings;

(2) the applicants are to pay the costs of the respondent of and incidental to the proceedings as agreed or assessed on the basis set out in the legal costs legislation (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014* (NSW)).

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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