Land and Environment Court

New South Wales

Case Name:	Drake v Randwick City Council
Medium Neutral Citation:	[2021] NSWLEC 97
Hearing Date(s):	On the papers
Date of Orders:	16 September 2021
Decision Date:	16 September 2021
Jurisdiction:	Class 1
Before:	Moore J
Decision:	See orders at [33]
Catchwords:	COSTS - Class 1 strata subdivision appeal - strata subdivision appeal contingent on successful outcome in Class 1 dual occupancy (attached) development appeal - development appeal unsuccessful - strata subdivision appeal necessarily dismissed as a consequence - Respondent applies for costs of day of strata subdivision appeal addressing jurisdictional issues - no determination of jurisdictional issues - inappropriate to conduct hypothetical determination of jurisdictional issues in strata subdivision appeal - no basis to award Respondent costs for jurisdictional hearing day. COSTS - costs of costs applications in Class 1 ordinarily follow the event - no basis to depart from that principle - Respondent pay Applicant's costs of Class 1 costs application
Legislation Cited:	Civil Procedure Act 2005, s 98 Land and Environment Court Rules 2007, r 3.7 Randwick Local Environmental Plan 2012, cl 4.1A Uniform Civil Procedure Rules 2005, r 42.1
Cases Cited:	Albert Square NSW Pty Ltd v Randwick City Council [2021] NSWLEC 1401

	Drake v Randwick City Council [2021] NSWLEC 98 Grant v Kiama Municipal Council [2006] NSWLEC 70 Kelly v Randwick City Council; Drake v Randwick City Council [2021] NSWLEC 68 Port Stephens Council v Sansom (2007) 156 LGERA 125; [2007] NSWCA 299 Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6
Category:	Costs
Parties:	Lea Drake (Applicant) Randwick City Council (Respondent)
Representation:	Counsel: Mr P Tomasetti SC (Applicant) (Respondent on costs application) Mr M Astill, barrister (Respondent) (Applicant on costs application) Solicitors: Mr C Kelly (Applicant) (Respondent on costs application) Randwick City Council (Respondent) (Applicant on costs application)
File Number(s):	38001 of 2021
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JUDGMENT

Introduction

1 On 7, 8 and 9 June 2021, I heard two Class 1 development appeals concerning proposed development which had been refused by Randwick City Council (the Council). The first of them concerned an application by Mr Craig Kelly seeking development consent for the construction of a dual occupancy (attached) at 27 Adams Avenue, Malabar (the site). The second merit appeal was a contingent one brought by Ms Lea Drake, a co-owner of the site with Mr Kelly, seeking consent to strata subdivide Mr Kelly's proposed dual occupancy (attached), assuming that development consent was granted for that project.

2 On 2 July 2021, I delivered my decision in these two Class 1 appeals. In the appeal brought by Mr Kelly, I determined that his proposed dual occupancy (attached) did not merit being granted development consent. As a consequence, his appeal was dismissed. As Ms Drake's Class 1 appeal was necessarily contingent on Mr Kelly's Class 1 appeal being successful, Ms Drake's appeal was also dismissed. My reasons were published in *Kelly v Randwick City Council; Drake v Randwick City Council* [2021] NSWLEC 68.

3 It is appropriate to note that, during the three days of the hearing, the issues involved in each of the merit appeals were canvassed. However, given that Ms Drake's appeal lacked foundation as a consequence of Mr Kelly's appeal failing, it was unnecessary, in my decision, to address the dispute between

Ms Drake and the Council as to whether or not strata subdivision of such a proposed dual occupancy (attached) was permissible.

4 I noted, at [159] and [160] in my reasons for decision, the following concerning Ms Drake's appeal:

> 159 As I have concluded that Mr Kelly's development application for the construction of his proposed dual occupancy (attached) should be refused on a proper consideration of the design of the proposed development assessed against the Council's planning controls, it necessarily follows that Ms Drake's strata title subdivision application must be refused. It is therefore appropriate to dismiss Ms Drake's appeal in her Class 1 proceedings.
>
> 160 The outcome of Mr Kelly's appeal means that it is inappropriate that I undertake any hypothetical determination of the issue between the parties concerning the proper construction of cl 4.1A(4)(a) of the LEP. Further adjudication on that issue (noting that there have been several conflicting decisions given as to how the provision should be construed) must await a development application for a dual occupancy (attached) which is capable of being approved on its merits, and where such an application also seeks its strata subdivision (whether in the same development application or, as here, in a separate development application being a matter of irrelevance) and where the Council contends that the minimum allotment size (cl 4.1A(4)(a) of the LEP) is not satisfied.

5 I observe that, since I wrote the above passage, a further decision concerning the permissibility or otherwise of strata subdivision of a dual occupancy (attached) in the Council's local government area has been delivered by Espinosa C. In that decision, *Albert Square NSW Pty Ltd v Randwick City Council* [2021] NSWLEC 1401, the Commissioner held that cl 4.1A of the Randwick Local Environmental Plan 2012 (the LEP) did not act in the fashion proposed by the Council to act as a prohibition on such strata subdivision.

6 This means that there are now four decisions of Commissioners on this point, rather than three - with no uniformity of outcome on the permissibility of such strata subdivision applications to be seen arising from those decisions. The position thus remains, as I observed in the paragraphs cited from my decision of 2 July 2021, the issue of permissibility will not be resolved one way or the other until an opportunity arises for its determination on appeal on a question of law.

The present costs application

Introduction

7 Ms Drake had also commenced Class 4 proceedings seeking to address the Council's contention that the proposed strata subdivision was prohibited by cl 4.1A of the LEP. Those proceedings were commenced, initially, by a Summons seeking specific interpretation of the provisions with respect to nominated plans arising in the context of the proposed dual occupancy (attached) on the site and its subsequent proposed strata subdivision. Those Class 4 proceedings were subsequently converted into ones of a general nature seeking judicial advice on the interpretation of cl 4.1A of the LEP, an inappropriate process. My explanation of this approach was set out at [16] to [22] of my 2 July 2021 decision in the following terms:

> 16 I first read the terms of the Amended Summons in the Class 4 proceedings after the conclusion, on 8 June 2021, of the joint hearing of the two Class 1 appeals. I had reserved my decision in the two Class 1 matters at the end of those hearings.
>
> 17 After reading the terms of the Amended Summons in the Class 4 proceedings, I formed the view that what was now being sought was, effectively, judicial advice in the abstract concerning the interpretation of cl 4.1A of the LEP, an entirely inappropriate course and one not undertaken in proceedings in this Court.
>
> 18 During the joint hearing of the two Class 1 matters, it was revealed that the Council raised no merit objections to Ms Drake's proposed strata subdivision of the development for which Mr Kelly sought consent.
>
> 19 However, the Council did press that its interpretation of cl 4.1A of the LEP precluded the granting of consent to Ms Drake's proposed strata subdivision. The parties had agreed that submissions on this point would be made in Ms Drake's Class 4 proceedings, with my determination of Ms Drake's Class 1 appeal to await positive outcomes in Mr Kelly's Class 1 proceedings and her Class 4 proceedings.
>
> 20 The Court listed Ms Drake's Class 4 proceedings, and her Class 1 proceedings, for Wednesday 9 June 2021. At the commencement of the hearing on that day, I advised Mr Tomasetti that, having read the Amended Summons and concluding that it sought judicial advice in a purely theoretical fashion entirely unrelated to Ms Drake's proposed strata subdivision of 27 Adams Avenue, I was not prepared to hear and determine the Class 4 proceedings on that basis.
>
> 21 I indicated, however, that I proposed to reopen Ms Drake's Class 1 proceedings and hear submissions from him and from Mr Hemmings (now appearing for the Council on what he had understood would be Class 4 proceedings), on the matters of interpretation of cl 4.1A of the LEP.
>
> 22 After a short adjournment, I was advised that the parties agreed to me proceeding on this basis. As consequence, I adjourned the Class 4

> proceedings, to be relisted before the List Judge on the Friday after I deliver my decision in the two Class 1 proceedings. The hearing on 9 June 2021 in Ms Drake's Class 1 proceedings then continued. As noted later, limited new evidence was tendered in these proceedings. After hearing from Mr Tomasetti, Mr Hemmings and Mr Tomasetti in reply, I reserved my decision (again) in Ms Drake's Class 1 proceedings.

8 As a consequence, I declined to hear the Class 4 proceedings but reopened Ms Drake's Class 1 proceedings to permit that issue to be addressed in the specific context of the Council's refusal of her development application seeking strata subdivision of the proposed development at the site. The necessary outcome of her Class 1 proceedings as a consequence of the failure of Mr Kelly's Class 1 proceedings has earlier been set out.

9 The Class 4 proceedings were set down before the List Judge for finalisation.

10 When the Class 4 matter was before Pain J for finalisation (by dismissal, by consent, except as to costs), her Honour made timetabling directions for the parties to provide me with written submissions concerning costs in those proceedings. This timetable was considered by those representing the Council as encompassing costs submissions in not only the Class 4 proceedings, but also Ms Drake's unsuccessful Class 1 proceedings. Simultaneously with the delivery of this decision, I have also delivered my costs judgment in the Class 4 proceedings (*Drake v Randwick City Council* [2021] NSWLEC 98).

11 Mr Astill, the Council's barrister, subsequently provided written submissions dated 23 July 2021, addressing costs issues in both proceedings.

12 When those submissions were received, I had my associate advise Ms McGrath, the Council's in-house solicitor, that, although I had reserved costs in Ms Drake's Class 1 proceedings, it would be necessary for the Council to make an application for costs in those proceedings if such an outcome was to be sought by the Council.

The Class 1 Notice of Motion

13 The Council subsequently filed a Notice of Motion in Ms Drake's Class 1 proceedings seeking its costs of the hearing on 9 June 2021, when Ms Drake's Class 1 strata subdivision appeal was reopened to permit Mr Hemmings SC to address the legal construction issue arising from cl 4.1 A of the LEP (being the

only matter in dispute in those Class 1 proceedings). The substantive order sought by the Council's Notice of Motion is in the following terms:

> The Applicant pay the respondent's costs of the hearing of 9 June 2021.

The affidavit in support of the motion

14 An affidavit dated 28 July 2021, was deposed by Ms McGrath, the Council's in-house solicitor. It is appropriate to set out, in their entirety, the relevant paragraphs of this affidavit. They are in the following terms:

> 2 The applicant commenced the subject class 1 proceedings in respect of the development application for strata subdivision of the property known as 27 Adams Avenue, Malabar (the **subject appeal) .**
>
> 3 Two related proceedings also filed
>
> a) a class 1 appeal by Mr Kelly in respect of a development application made by him to erect a dual occupancy on the subject land **(Dual Occupancy Class 1**);
>
> and
>
> b) Class 4 proceedings by the applicant in relation to the permissibility of the proposed strata subdivision **(Class 4).**
>
> 4. The three sets of proceedings were listed sequentially from 7 June to 9 June 2021.
>
> 5 Dual occupancy class 1 was heard on 7 and 8 June and some evidence was heard in respect of the subject appeal, during the course of that hearing. The Class 4 appeal was listed to commence on 9 June but His Honour Justice Moore declined to hear that appeal and reserved the matter. His Honour allowed the subject appeal to be reopened, with the consent of the parties on that day.
>
> 6 His Honour reserved his decisions in the subject appeal and the dual occupancy class 1.
>
> 7 Judgment in the subject appeal was handed down on 2 July 2021. The appeal was dismissed and the development application for strata subdivision of a dual occupancy development was determined by refusal as a consequence of the refusal the development application that for the proposed dual occupancy.
>
> 8 The Respondent incurred costs in respect of the preparation of the subject appeal which were incurred unnecessarily as a consequence of the dismissal of the dual occupancy class 1.

Determination of the costs applications on the papers

15 As Mr Astill's written submissions had addressed the Council's costs' positions in both Ms Drake's proceedings, I had my Associate send a further e-mail to Mr Kelly and Ms McGrath proposing that both costs applications be dealt with on the basis of written submissions and proposing a slightly extended timetable

for the provision of written submissions on behalf of Ms Drake in both matters and for any reply submissions on behalf of the Council in each matter.

16 Mr Kelly, for Ms Drake, and Ms McGrath, for the Council, responded later that day indicating agreement to that process and to the extension to the timetable.

Costs in Class 1 proceedings

17 The Land and Environment Court Rules 2007 (the Court Rules) set aside the conventional civil litigation costs position that would otherwise apply as a consequence of the combination of s 98(1) of the *Civil Procedure Act 2005* (the Civil Procedure Act) and r 42.1 of the Uniform Civil Procedure Rules 2005 (the UCPR) operating together. This position arises as a consequence of the fact that s 98(1) of the Civil Procedure Act makes its operation (and hence the operation of r 42.1 of the UCPR) subject to any rules of court which provide for a different costs' regime. It is unnecessary to set out the terms of the conventionally applying provisions as a consequence.

18 The Court Rules, through r 3.7, operate to displace the presumption that costs will follow the event in, amongst other proceedings, Class 1 development merit appeals. These special provisions in the Court Rules permit that costs orders can only be made in such development appeals if it is "fair and reasonable" to do so. This approach is based on what is described as the "no discouragement rule" (see *Port Stephens Council v Sansom* (2007) 156 LGERA 125; [2007] NSWCA 299).

19 For present purposes, as later explained, it is not necessary to set out the terms of r 3.7 of the Court Rules or to undertake any assessment of the matters in dispute in Ms Drake's Class 1 proceedings when tested against the various matters set out in that rule or any of the other potential bases upon which a costs determination might be made in Class 1 proceedings. It is sufficient, for present purposes, to note that the various bases set out in the Court Rules as to what might give rise to a "fair and reasonable" conclusion do not constitute a closed list of circumstances where the making of a costs order might be appropriate (see further discussion by Preston CJ in *Grant v Kiama Municipal Council* [2006] NSWLEC 70).

The costs determination process

Introduction

20 As earlier indicated, written submissions from Mr Astill had been filed. Written submissions in reply for Ms Drake were received from Mr Tomasetti SC on 19 August 2021. Further submissions from Mr Astill responding to those made by Mr Tomasetti were received on 25 August 2021.

21 The written submissions on behalf of the Council and on behalf of Ms Drake, in both the Class 1 and Class 4 costs issues, were comparatively brief. It is appropriate to set them out in full, relevantly, in each of the costs matters requiring determination.

The Council's submissions

22 Short written submissions were provided by Mr Astill, barrister for the Council, in support of the Council's Notice of Motion. It is unnecessary to set out the introductory elements to the submissions made by Mr Astill. His submissions in support of a costs order in the Council's favour in these proceedings were the following terms:

> **Class 1 Proceedings**
>
> 11. Section 98 of the *Civil Procedure Act* 2005 still applies but in class 1 proceedings the applicable rule is 3.7 of the *Land and Environment Court Rules* 2007. UCPR 42.1 does not apply.
>
> 12. Pursuant to R 3.7(2) and (3) relevantly (underlining added)–
>
> > (2) The Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.
> >
> > (3) Circumstances in which the Court might consider the making of a costs order to be fair and reasonable include (without limitation) the following—
> >
> > > (a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question—
> > >
> > > > (i) in one way was, or was potentially, determinative of the proceedings, and
> > > >
> > > > (ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings,
> > >
> > > (b) ....

13. The Council says that the Court would see fit to make a costs order in its favour for the third day of the hearing on two bases-

a. principally that it is fair and reasonable to do so in reliance on R3.7(2) and the chapeau to R3.7(3), and

b. that the question on that day was of a similar nature to that referred to in R3.7(3)(a).

14. As to the first base, the Council draws to attention that the matters listed in sub-paragraphs (a) – (f) of R3.7(3) are examples only and expressly do not limit the breadth of the general discretion.

15. In that respect the fact that the matter in R3.7(3)(a)(ii) is not strictly satisfied does not affect the broad discretion that the Court has under the Rule.

16. Although the third day of the hearing was technically a continuation of the Strata Class 1 hearing (after leave to reopen was given), in substance it was a hearing of the legal issue that the Applicant had raised in the Class 4 proceedings.

17. Senior counsel for the Council who had been retained for the Class 4 proceedings appeared (with junior counsel who had been retained for both matters) and the written submissions prepared by both parties for the Class 4 were relied upon, as supplemented by oral addresses.

18. The Applicant commenced the Class 4 Proceedings, it can be assumed, in full expectation of the likelihood that a costs order would follow the outcome. That the issue raised in the Class 4 Proceedings was heard within the Strata Class 1 Proceedings should not affect this expectation or outcome.

19. The hearing on day three ceased to have the *character of a merits review*, and as such it is *fair and reasonable* for a costs order in relation to the *question of law* that was litigated on that day.

20. As the Court has recently noted, whilst examples of cases can be found where costs have, and have not, been awarded, each case turns on the facts and circumstances of each particular proceedings.

21. The Court should not undertake a hypothetical determination of the issue raised to see whether or not, absent the determinative refusal of the Dual Occupancy Class 1, the Applicant would have succeeded.

22. However this is clearly not a case where the Applicant has *elected not to pursue an action because he or she has achieved the relief sought in the action either by settlement or by extra-curial means.* The contrary is true; the Applicant has *failed* to achieve the objective because the Dual Occupancy Class 1 was dismissed.

23. The Council does not seek any costs order in respect of the Dual Occupancy Class 1 proceedings. However, the Strata Class 1 Proceedings, effectively were doomed to fail as a consequence of that dismissal, and as the only issue of substance in the Strata Class 1 Proceedings was the legal issue, costs should follow the event.

24. In that regard however, the Council does not seek an order for the costs of the whole of the Strata Class 1 Proceedings, only those incurred on day 3 of the hearing.

25. Finally, the Council notes that the Court allowed Ms Drake a considerable indulgence in permitting reopening of the Strata Class 1 Proceedings. Rather than simply dismissing the Class 4 proceedings Moore J allowed the issue to be fully ventilated, but within the Strata Class 1 Proceedings. That indulgence should not adversely affect the Council's entitlement to costs of litigating the issue.

26. Had Ms Drake not pleaded in a defective manner the third day of the hearing would have proceeded as planned, being the hearing of the Class 4 Proceedings and costs would have followed the event. Her defective pleading and the indulgence given to her by the Court should not deprive the Council of its costs of that day.

27. In all the circumstances this is entirely fair, and it is also reasonable.

The submissions for Ms Drake

23 The submissions made by Mr Tomasetti resisting a costs order in favour of the Council in Ms Drake's Class 1 proceedings were in the following terms:

Land and Environment Court Rules 2007 (Each a "Rule)

1. Rule 3.7 (2) provides that the Court is not to make an order for the payment of costs in Class 1 proceedings unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances. Rule 3.7(3) sets out a non-exhaustive list of "*circumstances in which the Court might consider the making of a costs order to be fair and reasonable*".

2. It is not fair or reasonable to make an order as to costs against the applicant . In accordance with Rule 3.7 (2), the Court should exercise its discretion as to costs of the proceedings by making no order.

3 I adopt the nomenclature which the respondent has used in its cost's submissions in the Class 4 proceedings between the parties. That is to say:

a. The Class 1 proceedings between Craig Kelly and Randwick City Council, Case No 2020/362912, will be referred to as the "Dual Occupancy Class 1" appeal or proceedings.

b. The Class 1 proceedings between Lea Drake and Randwick City Council, Case No 2021/38001, will be referred to as the "Strata Class 1" appeal or proceedings: and

c. The Class 4 proceedings between Lea Drake and Randwick City Council, Case No 2020/365534, will be referred to as the "Class 4" appeal or proceedings.

Other expressions used in the applicant's costs submissions in the Class 4 proceedings will be used to convey the same meaning in these submissions.

4. The applicant appealed Randwick Council's deemed refusal to grant consent to the strata subdivision of the site at 27 Adams Avenue, Malabar.

5. It was common ground that the strata subdivision should be approved if the proposed dual occupancy development was approved.

6. The applicant was proceeding in the face of conflicting Commissioner decisions as to the proper construction of Clause 4.1A of the LEP.

The Clause 4.1A Dispute

7. There have now been 4 decisions on the clause:

Decision No.	Decision	Date of Decision
1	C Kelly v Randwick City Council [2018] NSW LEC 1322	3 July 2018
2	Kingsford Property Developments v Randwick City Council [2019] NSWLEC 1486	15 October 2019
3	MMP 888 Pty Ltd v Randwick City Council [2019] NSWLEC 1646, a decision delivered 13 December 2019	30 December 2019
4	Albert Square NSW Pty Ltd v Randwick City Council [2021] NSWLEC 1401	12 July 2021 (commenced 19 November 2020)

8. Notwithstanding Decisions 1 and 2, Council continued to argue for a different outcome in the *MMP 888* proceedings. The refusal to apply the two decisions of the Court created a disorderly situation contrary to one important objective of the EPA Act - the need for orderly planning in the State. Decision 4 listed above was not published on 9 June 2021. However, Commissioner Espinosa has followed the reasoning in Decisions 1 and 2.

9. In the proceedings before Commissioner Espinosa the Council again argued for a construction of Clause 4.1A which was rejected by the Court.

10. The position adopted by the applicant in the Strata Class 1 proceedings, was entirely fair and reasonable.

The Dual Occupancy Class 1 Proceedings

11. Mr Kelly conducted the Dual Occupancy Class 1 appeal in a fair and reasonable way.

12. Costs are, correctly, not claimed by the Council in the Dual Occupancy Class 1 appeal.

13. The Dual Occupancy Class 1 appeal was regrettably unsuccessful on one important ground, but the merits otherwise went in Mr. Kelly's favour.

14. The reason why the Dual Occupancy Class 1 appeal was dismissed are set out in [140] to [157] of the judgement. The Low-Density Residential Zone ("R2 Zone") in the Randwick LEP 2012, includes an objective to "*recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.*"

15. His Honour found, amongst other findings, that:

a. *"Adams Avenue and the precinct within which it is located are in transition"*. [1]

b. *The "necessity to have regard to Mr Kelly's proposal in the more confined context of the streetscape of Adams Avenue" …. is "**determinative**….on a factual basis"*. (Emphasis added) [154]

c. *"Mr Kelly's proposed design, if approved, would be completely alien in a streetscape sense as the **desired future character** of Adams Avenue takes its necessary cues from the newer, contemporary duplex developments such as those immediately opposite."* (Emphasis added) [155]

d. *"Although the terms of section 4.15 (3A)) of the EPA Act are beneficial and facultative, importing some flexibility in the approach to be adopted to the application of the DCP's controls, that flexibility cannot provide a basis to permit what would be the complete setting aside of **a control designed to achieve compliance with the third objective for the R2 zone**."* (Emphasis added) [156]

e. There had been *"consistent application"* by Randwick Council of certain DCP objectives *"in defining the desired future character streetscape for Adams Avenue by not departing from control 6.1(v) of the DCP*. [156]

f. The R2 zone objectives in the Randwick LEP (particularly the third of them) are to be understood in the light of that *"consistent application"*. [156]

g. Whilst having regard to the R2 zone objectives (particularly the third of them) in the Randwick LEP 2012 in the process of assessing Mr Kelly's proposed design, that *"consistent application"* by Randwick Council *"is to be given significant (indeed, in my opinion on the facts, **determinative**) weight."* (Emphasis added) [156]

16. These factual conclusions were each open to the Court although the decision in *Woollahra Municipal Council v SJD DB2 Pty Ltd* [2020] NSW LEC 115 [46]1 was in hindsight relevant when considering whether Mr Kelly's conduct of the Dual Occupancy Class 1 appeal was reasonable.

17. The "*desired future character of the neighbourhood*" where used in a statement of the objectives of a zone in the *Woollahra Local Environmental Plan* ("WLEP") is not further informed by a statement of what is the "*desired future character of the area*" in the R2 Zone at Malabar.

18. Mr. Kelly acted reasonably in advancing the case that he did. He argued the desired future character of the area was informed by existing development

beyond just Adams Avenue. There was nothing unreasonable in that argument although the Court did not accept it.

19. The Dual Occupancy Class 1 proceedings were determined by refusal of development consent. Had it been determined otherwise the Strata Class 1 appeal would have likely succeeded with minimal cost to the parties.

20. In summary then:

a. The Class 1 appeals were each conducted such that there were no circumstances arising that made it fair or reasonable to make a costs order against the applicant. Applying Rule 3.7(2) no costs order should be made in those proceedings.

b. The Dual Occupancy Class 1 appeal was determined on its merits. As a result, there being no merit issue in the Strata Class 1 appeal and only a legal issue, that appeal was also determined by refusing consent.

c. Having regard to the decisions of three Commissioners of the Court referred to above, there is no basis on which the Court should conclude that the interpretation of the terms of Clause 4.1A for which the applicant argued in the Strata Class 1 appeal was unreasonable.

d. For all these reasons, the Court should exercise its discretion to decide that no costs order should be made against the applicant.

The Council's submissions in reply

24 Mr Astill's submissions in response to Mr Tomasetti's submissions (referenced as AS1) on behalf of Ms Drake in the Class 1 costs application made by the Council were succinct. They were in the following terms:

Reply to AS1

3. The AS1 from [11]-[19] (and most of [20]) seek to make the point that Mr Kelly acted reasonably in the Dual Occupancy Class 1 proceedings.

4. The Respondent does not seek to debate this, and it may be assumed for present purposes to be correct. No costs order is sought against Mr Kelly in those proceedings, or at all.

5. However, it is entirely beside the point for the reasons set out in RS generally but particularly from [16]-[19]. Specifically the hearing on the third day ceased to have the character of a merits review; it was a hearing of the issue raised in the Class 4 proceedings.

Consideration

25 Although Ms Drake's Class 1 proceedings were rendered futile because of the unacceptability of the design advanced in Mr Kelly's Class 1 merit appeal, that failure provides no basis upon which the Council could infer what might have been the outcome of Ms Drake's Class 1 merit appeal had Mr Kelly's merit appeal been successful. It therefore follows that this costs application on behalf of the Council was always going to be the subject of the special costs' regime

applied by r 3.7 of the Court Rules (whatever its outcome). It is in that context that the Council's costs application is to be determined.

26 Although the decision of the High Court in *Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6 (*Lai Qin*) applies to circumstances where a question concerning costs arises in proceedings that are otherwise discontinued, I am satisfied that the approach to be taken in circumstances such as these require, by analogy, application of the *Lai Qin* principle.

27 In such circumstances, the principle can simply be stated as being that it is entirely inappropriate to embark upon some hypothetical examination of the merits of the matters that were in contest and that, unless there had been what amounted to a complete capitulation, the circumstances of the discontinuation should not give rise to any merit assessment of those disputed matters.

28 In Ms Drake's Class 1 proceedings, there was a fully argued contest in which counsel for Ms Drake and counsel for the Council explained why the proposed strata subdivision was permissible (on the construction of cl 4.1A of the LEP advanced on behalf of Ms Drake) or prohibited (as was the position advanced on behalf of the Council).

29 In dismissing Ms Drake's appeal, I was careful to explain, as earlier set out, that I was not to be taken as expressing any opinion, one way or the other, as to the correct interpretation of this provision of the LEP. Similarly, in these costs proceedings, I am not to be taken to be expressing any view of what remains an unresolved issue of how cl 4.1A of the LEP is to be applied in circumstances where there is a contest between an applicant and the Council as to its interpretation.

30 In the circumstances where there has been no determination, in Ms Drake's Class 1 proceedings, of the matters in dispute between the parties, the position is clearly entirely consistent, by analogy, with that of a discontinuance.

31 There is no basis upon which I could assess whether or not any of the potentially costs-entitling circumstances in Class 1 proceedings arise without embarking on a hypothetical merit determination of Ms Drake's Class 1 appeal.

Such an approach would be entirely inappropriate as it would amount, effectively, to giving judicial advice in a hypothetical sense in these circumstances. It would also be contrary to the application of *Lai Qin* to these circumstances. It necessarily follows that the Council's Notice of Motion seeking its costs of Ms Drake's Class 1 proceedings must be dismissed.

Costs

32 Costs of costs applications in Class 1 proceedings do conventionally follow the event, as such proceedings are to be regarded as falling within the scope of r 3.7(2)(a) of the Court Rules as giving rise solely to legal issues. As the Council has been unsuccessful in its costs application in Ms Drake's Class 1 proceedings, the Council is to pay Ms Drake's costs associated this costs application.

Orders

33 The orders of the Court are:

(1) The Respondent's costs application in Matter No 38001 of 2021 is dismissed; and

(2) The Respondent is to pay the Applicant's costs of the costs application.

****