Land and Environment Court

New South Wales

Case Name:	Drake v Randwick City Council
Medium Neutral Citation:	[2021] NSWLEC 98
Hearing Date(s):	On the papers
Date of Orders:	16 September 2021
Decision Date:	16 September 2021
Jurisdiction:	Class 4
Before:	Moore J
Decision:	See orders at [35]
Catchwords:	COSTS - Applicant commences Class 4 proceedings seeking declaratory relief - proceedings concerned application of cl 4.1A of the Randwick Local Environmental Plan 2012 to nominated development proposal plans - Applicant subsequently amends relief - amended relief seeks abstract judicial advice concerning cl 4.1A - not appropriate to give judicial advice sought – related Class 1 proceedings based on cl 4.1A fail because design merit proceedings fail - Class 4 proceedings dismissed - no reason to depart from presumption that costs follow the event - Applicant to pay Respondent's costs of Class 4 proceedings - Applicant to pay Respondent's costs of Class 4 costs consideration
Legislation Cited:	Civil Procedure Act 2005, s 98 Land and Environment Court Act 1979, ss 56A and 57 Randwick Local Environmental Plan 2012, cl 4.1A Uniform Civil Procedure Rules 2005
Cases Cited:	Albert Square NSW Pty Ltd v Randwick City Council [2021] NSWLEC 1401 Drake v Randwick City Council [2021] NSWLEC 97

	Kelly v Randwick City Council; Drake v Randwick City Council [2021] NSWLEC 68 Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6
Category:	Costs
Parties:	Lea Ellen Cecilia 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):	365534 of 2020
Publication Restriction:	No

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JUDGMENT

Introduction

1 On 24 December 2020, Ms Drake commenced these Class 4 proceedings against Randwick City Council (the Council) seeking two declarations and costs. The proceedings arose from proposed development at 27 Adams Avenue, Malabar (the site). Ms Drake is a co-owner of the site. The Council was the consent authority for the proposed development.

2 The declaratory relief sought in the Summons was in the following terms:

> 1 A declaration that the development described in plans referred to in the Schedule One hereto in relation to land situated at 27 Adams Avenue, Malabar ("the Land") is development for a "dual occupancy (attached)" within the meaning of that phrase in the *Randwick Local Environmental Plan* 2012 ("RLEP 2012") and is development that is permissible with development consent granted thereunder.
>
> 2 A declaration that subdivision of the Land pursuant to the provisions of the *Strata Schemes (Development) Act* 2015 as set out in the proposed plan of subdivision referred to in Schedule 2 hereof is permissible with development consent granted pursuant to the RLEP 2012.

3 It is not necessary to set out the details of the plans listed in Schedules 1 and 2 to the Summons. However, they were specific to the proposed development on the site for which consent was sought by Mr Kelly and for the subdivision of which Ms Drake sought consent (if Mr Kelly's development was approved).

4 An affidavit from Ms Drake, dated 24 December 2020, was filed in support of the Summons. The various plans were noted in the affidavit as relating to the development application which had been lodged on 9 July 2020 for the development of a dual occupancy (attached) on the site. The affidavit noted that amended plans for the proposed development on the site were also lodged shortly prior to the commencement of her Class 4 proceedings.

5 Another co-owner, Mr Kelly, commenced Class 1 proceedings against the deemed refusal by the Council of the development application to construct a dual occupancy (attached) on the site. Those Class 1 proceedings were commenced on 22 December 2020.

6 Ms Drake, separately, sought development consent to strata subdivide the dual occupancy (attached) which was the subject of Mr Kelly's Class 1 appeal.

7 On 10 February 2021, Ms Drake commenced Class 1 proceedings appealing against the deemed refusal by the Council of her strata subdivision application.

8 On 9 April 2021, Ms Drake's Class 4 proceedings came before Robson J, as the List Judge, as a consequence of a Notice of Motion filed on her behalf seeking leave to rely on an Amended Summons. In lieu of the terms in which the original Summons had been couched as set out above, the proposed Amended Summons framed the relief sought in abstract terms. Leave to amend was not opposed by the Council and, as a consequence, because Robson J was dealing with the matter as No 41 in a busy Friday List, his Honour granted the leave sought. The relief sought in the now Amended Summons was in the following terms:

> 1 A declaration that the expressions:
>
> a. "size of any lot" where those words appear in clause 4.1A(3) of the Randwick Local Environmental Plan 2012 ("RLEP"); and
>
> b. "size of each lot" where those words appear in clause 4.1A(4) of RLEP mean:
>
> I, the "floor area" of the relevant lot, as that expression is defined in the Strata Schemes Development Act 2015; and
>
> ii. if the relevant lot has more than one part, the aggregate of the "floor area" of each of the parts that make up the whole of that lot."

9 In order to ensure that all relevant matters concerning the proposed developments on the site were addressed in a timely fashion, the two Class 1 proceedings were set down to be heard together on 7 and 8 June 2021, with the Class 4 proceedings being set down to follow, on 9 June 2021, after the completion of the Class 1 hearings. All three matters were allocated to me by the Chief Judge.

10 In my decision concerning the two Class 1 appeals (*Kelly v Randwick City Council; Drake v Randwick City Council* [2021] NSWLEC 68), I explained, at [16] to [22], why there was no substantive hearing in Ms Drake's Class 4 proceedings. This element of my Class 1 decision was 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 SC (for Mr Kelly and Ms Drake) 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 SC (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 Randwick Local Environmental Plan 2012 (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 delivered 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.

11 For reasons set out in my Class 1 decision, I concluded that Mr Kelly's proposed dual occupancy (attached) development on the site did not warrant being granted development approval. I therefore dismissed his Class 1 appeal.

12 I then explained, at [159] and [160], why the consequential effect of the dismissal of Mr Kelly's appeal mandated the dismissal of Ms Drake's Class 1 appeal. I said:

> 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.

13 After I dismissed the Kelly and Drake Class 1 proceedings, the Class 4 proceedings were set down before the List Judge on 9 July 2021. On that date, the Class 4 proceedings were dismissed by Pain J, with the question of costs in those proceedings being referred to me for determination.

14 When the Class 4 matter was before Pain J for finalisation, 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.

15 Mr Astill subsequently provided written submissions on 23 July 2021, addressing costs issues in both proceedings.

16 Simultaneously with the delivery of this decision, I have also delivered my costs judgment in Ms Drake's Class 1 proceedings (*Drake v Randwick City Council* [2021] NSWLEC 97).

The costs determination process

Introduction

17 As noted above, written submissions from Mr Astill were filed on 23 July 2021. 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.

The relevant statutory provisions

18 The only statutory provisions requiring consideration on costs in Ms Drake's Class 4 proceedings are 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). The first of those provisions is in the following terms:

> **98 Courts powers as to costs**
>
> (1) Subject to rules of court and to this or any other Act—
>
> (a) costs are in the discretion of the court, and
>
> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
>
> (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

19 The second of these provisions is in the following terms:

> **42.1 General rule that costs follow the event**
>
> Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.

The written submissions

20 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

21 The written submissions provided by Mr Astill for the Council, in support of the Council's Class 4 costs application were in the following terms.

> **Class 4 Proceedings**
>
> 7. Section 98 of the *Civil Procedure Act* 2005 provides the Court with a wide discretion as to costs, albeit one that is subject to the rules of court. Pursuant to UCPR 42.1 the general position is that costs follow the event in class 4 proceedings.
>
> 8. It was entirely a matter for the applicant Ms Drake to commence and pursue the Class 4 Proceedings, including the manner of pleading her case. The Council had no option (apart from submitting) but to join issue and prepare its defence. There was significant preparation required including briefing senior and junior counsel and preparing written submissions.
>
> 9. That, in relation to the Class 4 proceedings, both:

a. Moore J declined to hear them due to Ms Drake's defective pleading, and

b. ultimately they became redundant due to the outcome in the Class 1 Appeals (and were dismissed),

should not affect the outcome that costs follow the event. Specifically, neither of these events was in any way attributable to any act of the Council that would adversely affect its entitlement to costs.

10. Given the presumption is that costs follows the event, it is incumbent on Ms Drake to articulate arguments to displace it. The Council will need to make further submissions in reply to those the Council anticipates Ms Drake will make in this regard.

22 As can be seen from Mr Astill's paragraph 10 above, he indicated that the Council would reserve any more detailed submissions until its response to the submissions which would be advanced on Ms Drake's behalf seeking to resist the making of a costs order in the Council's favour in the Class 4 proceedings.

The submissions for Ms Drake

23 The written submissions provided by Mr Tomasetti for Ms Drake, opposing the Council being awarded costs in the Class 4 proceedings, were in the following terms.

Relevant Statutory Provisions

1. s 98 of the Civil Procedure Act 2005 provides that costs are in the discretion of the Court.

2. UCPR 42.1 provides that the Court is to order that the costs follow the event unless it appears to the Court that some other order should be made.

42.1 General rule that costs follow the event

Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.

Relevant Principles

3. In *Latoudis v Casey* [1990] HCA 59; 170 CLR 534, the High Court considered the proper approach to be applied by a court of summary jurisdiction in exercising a statutory discretion to award costs in criminal proceedings which had terminated in favour of a defendant: see at 537 (Mason CJ). In answering that question, a court must look at the matter primarily from the perspective of the successful party. To do so conforms to fundamental principle. In civil proceedings, costs are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings.

4. Where there was no successful party in the proceedings, as a general rule, there should be no order as to costs: *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 McHugh J at 624-625.

> "The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided."

His Honour added:

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

5. The Court should not resolve the issue of costs by engaging in something in the nature of a hypothetical trial: *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194 at 201.

Relevant facts

6. On 8 July 2020 the development application was made seeking consent for construction of a dual occupancy (attached) at 27 Adams Avenue Malabar ("**Dual Occupancy DA**"). Council did not determine the development application.

7. On 22 December 2020 the applicant appealed.

8. On 22 December 2020 the development application seeking consent to strata subdivision of 27 Adams Avenue, Malabar ("**Strata Subdivision DA**") was made.

9. The Class 4 proceedings were filed on 24 December 2020 seeking a declaration as to the true construction of Clause 4.1A. In the context of the appeals and the decisions in:

a. *Kelly v Randwick City Counci1;*

b. *Kingsford Property Developments v Randwick City Council; and*

c. *MMP 888 Pty Ltd v Randwick City Council*

the Class 4 proceedings did not raise a hypothetical question. The decision in *MMP 888* meant that the law was in an uncertain state.

10. Randwick Council contended that the Strata Subdivision was prohibited notwithstanding the decisions in *Kelly, Kingsford Property Developments* and *MMP 888*.

11. The declaratory relief sought was twofold:

a. A declaration that the dual occupancy (attached) which was the subject of the Dual Occupancy Class 1 appeal *"is development for a "dual occupancy (attached)" within the meaning of that phrase in the Randwick Local Environmental Plan 2012 ("RLEP 2012") and is development that is permissible with development consent granted thereunder"*.

b. A declaration that strata subdivision of the site known as 27 Adams Avenue Malabar in accordance with the proposed strata plan referred to in the Summons *"is permissible with development consent granted pursuant to the RLEP 2012."*

12. On 5 March 2021 Randwick Council filed a statement of facts and contentions in the Strata Subdivision Class 1 proceedings contending for a meaning of Clause 4.1A which was contrary to *Kelly, Kingsford Property Developments* and *MMP 888.*

13. On 12 March 2021, Pain J. listed the Class 4 proceedings for hearing on 9 June 2021 and made directions.

14. On 26 March 2021, the Court raised a concern that the declaratory relief sought by the applicant impermissibly sought "*judicial advice*". Rather than join issue with the matters raised by the Court, the applicant's counsel immediately offered to amend the Summons. The Court required the applicant to file a Notice of Motion to amend the Summons.

15. On 9 April 2021, Robson J. granted leave to the applicant to file and serve the amended summons.

16. On 7 and 8 June 2021 case management was agreed between the parties and the Court. After the site inspection on the morning of 7 June 2021, the trial in the Dual Occupancy Class 1 proceedings would commence. When the trial in the Dual Occupancy Class 1 proceedings had concluded on 8 July 2021, the trial in the Strata Class 1 proceedings would commence and the meaning of Clause 4.1A was to be traversed in the Class 4 proceedings on 9 June 2021.

17. It was on this basis that the trial of the Strata Class 1 proceedings was concluded on Tuesday, 8 June 2021.

18. At the commencement of proceedings on 9 June 2021 the Court proposed that the parties agree that the hearing of the Class 4 proceedings which had been listed for that day, be vacated and the Class 4 proceedings be adjourned to the Friday after judgement was to be delivered in the Dual Occupancy Class 1 proceedings. The Court further proposed the Strata Class 1 proceedings be reopened for argument concerning the true construction of Clause 4.1A. The parties agreed.

19. No judgement was ever made in the Class 4 proceeding as the Court declined to hear it.

20. On 9 July 2021 Pain J. made an order by consent dismissing the Summons and made various directions, also with the consent of both parties, concerning costs.

21. Neither the applicant nor the respondent surrendered to the other. The parties had prepared themselves for argument but, in the face of the Court's disposition, consented to have the Class 4 proceedings dismissed.

22. The Court, of its own motion, had refused to hear argument concerning the true construction of Clause 4.1A, at least in the Class 4 proceedings, taking the view that the parties were "*seeking judicial advice*". No point is served by arguing now whether that proposition was correct, but the observations of Mahoney J. In *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 are apposite:

> "The power of the Supreme Court of this State to make declarations is a beneficial power. In *Forster v. Jododex Australia Pty. Ltd* (1972) 46 A.L.J.R. 701, at p. 705 adopted the description of it as being a very wide one, and "*almost unlimited*". In *Commonwealth v. Sterling Nicholas Duty Free Pty. Ltd.* (1972) 46 A.L.J.R. 241., a case involving

> the delimiting in advance by declaration of the power of the Commonwealth and its officers to restrict the activities of a company which desired to carry on business in a particular way, Barwick C.J. said at p 243: The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion, the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the Court to declare he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case, not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction."

23. The Court presented both parties with a firm pathway – the parties cannot proceed with this Class 4 action and should determine the question in the Strata Subdivision Class 1 proceedings. Proceedings were briefly adjourned to allow the parties to discuss that proposal. Each agreed, without admission, to adopt that course.

24. So it was that the Class 4 proceedings became "*futile*" using the term adopted by McHugh J. in [4] above. Usually then, the Court will make no order as to the cost of the proceedings.

25. There was no "*event*" as referred to in UCPR rule 42.1 by reference to which the Court can determine that either party would have been successful: *Lai Qin* @ 624 - 625.

The Council's Conduct has been Unreasonable

26. The applicant needed to have the true construction of cl 4.1A resolved by a judge of the Court. The law was in a confused state. There were three decisions (now four) each in point and each by Commissioners of the Court, but one of which was not consistent with the other two decisions. See *MMP 888 Pty Ltd v Randwick City Council* per Horton C. A decision by a judge of the Court was called for.

27. The Council caused this state of uncertainty by refusing to apply the law as to the true meaning of cl 4.1A in accordance with two consistent decisions of the Court. It did not appeal the decisions in either case.

28. Instead, it refused to accept the correctness of the Court's decisions in *Kelly* and *Kingsford* and argued in *MP888* before Commissioner Horton that the two decisions ought not to be followed.

29. That was unreasonable conduct on the part of the Council.

30. The Council is a model litigant: *Logue v. Shoalhaven Council* [1979] 1 NSWLR 537 and *Mahatharensa v. State Rail Authority* [2008] NSWCA 201. The Council is a statutory body representing the Crown and, as such, it is a part of the executive government. It should conduct itself, in the conduct of litigation, in the manner expected of the executive government. There is an expectation that the government will act and be seen to act as a model litigant.

31. In *Cantarella* it was stated by Mahoney J:

> In *Eastern Trust Co. v. McKenzie, Mann & Co. Ltd*. [1915] A.C. 750, at pp. 759, 760 the position was stated by their Lordships of the Privy Council in general terms:

> "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.
>
> The duty of the Crown in such a case is well stated by Lord Abinger in *Deare v. Attorney-General* (1835) 1 Y. & C. Ex. 197, at p. 208; 160 E.R. 80, at p. 85. After pointing out that the Crown always appears (in England) by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say [p85]:
>
> > "It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point of difficulty that requires judicial decision has occurred."
>
> This is, perhaps, merely one aspect of what was described by Griffith C.J., in *Melbourne Steamship Co. Ltd. v. Moorehead* (1912) 15 C.L.R. 333, at p. 342. as "the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary."

32. To not accept as correct the decisions in *Kelly* and *Kingsford Property Developments* and yet refuse to appeal and then to apply the law contrary to the decisions in *Kelly* and *Kingsford Property Developments* was not the behaviour of a model litigant. To argue that *Kelly* and *Kingsford Property Developments* were wrongly decided in *MP 888* and in *Albert Square* was also unreasonable. To argue in the Strata Subdivision Class 1 proceedings that *Kelly* and *Kingsford Property Developments* were wrongly decided was unreasonable.

33. The conduct of the litigation by and on behalf of all parties must be examined. The reasonableness of their behaviour must be assessed, in order to decide if costs are to be ordered, and, if so, on what basis: In *Ray Fitzpatrick Pty Ltd v Minister for Planning (No 5)* [2008] NSWLEC 183 Sheahan J at [39]. On this basis, the Court should order the Council to pay the applicant's costs of the proceedings. The Council has acted unreasonably. The action was only brought about by the Council refusing to accept the correctness of two decisions in *Kelly* and *Kingsford Property Developments*. The Court has had to determine the question four times now as recently as in *Albert Square NSW Pty Ltd v Randwick City Council* [2021] NSWLEC 1401.

34. The Council persuaded Commissioner Horton in *MMP 888* to a contrary view of the construction of Clause 4.1A causing a controversy which ought never have arisen. The orderly way to resolve the matter was to appeal the Court's decision or comply with Clause 4.1A as determined by the Court.

35. The Class 4 proceedings arose from a real controversy concerning the meaning of Clause 4.1A. The controversy impacted upon the applicant financially and concerned the applicant's entitlement ever to obtain a consent for strata subdivision of her land. The controversy also concerned other citizens who might seek to obtain consent for strata subdivisions in the *R2 Low Density Residential Zone* in the City of Randwick relying on Clause 4.1A. They were concluded by each of the parties agreeing (no doubt for different reasons) to dismissal of the Summons without a trial.

36. The applicant has behaved reasonably. The Council has not. It should pay the costs of the proceedings. Alternatively, there should be no order as to costs.

The Council's submissions in reply

24 Mr Astill's reply submissions for the Council were brief. They were in the following terms:

Reply to AS4

6. The AS4 seek to argue that the Applicant should escape the default provision of UCPR 42.1 principally on the basis that the Respondent's Conduct has been unreasonable (from AS4 [26] to the end of AS4).

7. The sole basis on which this characterisation is asserted is that the Respondent refused to follow the earlier decisions in *Kelly* and *Kingsford* and instead promoted the ratio of the decision in *MMP888*.

8. The inconsistency of the Applicant's position in this regard is obvious. She asserts that it was reasonable for her to promote the ratio of the decisions in *Kelly* and *Kingsford*, but it was unreasonable for the Respondent to argue the contrary based on *MMP888*. In this regard the Applicant concedes (AS4 [9]) that *the law was in an uncertain state*.

9. The Court would be unconvinced that the Respondent's conduct was unreasonable or otherwise such that it would be disentitled to a costs order in its favour, for the reasons set out in RS from [7]-[10]. The reasons for the Court refusing to hear the Class 4 proceedings were in no way attributable to anything done or said, or omitted to be done or said, by the Respondent.

10. Whilst it is true that the parties agreed for the Class 4 proceedings to be dismissed by consent by Pain J (see AS4 [20]-[21]) the Respondent made it perfectly clear that it intended to seek costs, and directions were made for that purpose.

Consideration

25 Although at the time Ms Drake commenced her Class 4 proceedings there was a position of conflicting Commissioners' decisions as to the correct interpretation of cl 4.1A of the LEP, authoritative resolution of that issue depended on having an appropriate vehicle for its determination.

26 The form of the Class 4 proceedings commenced by Ms Drake referring to specific plans was capable of being such a vehicle. As originally pleaded, they

provided an opportunity for a judicial declaration as to the appropriate interpretation of cl 4.1A of the LEP in the context of those plans. On the other hand, Ms Drake's Class 1 proceedings, had they required to be determined, would have only resulted in a further merit-derived determination of the issue, to add to the then list (now expanded by Espinosa C's decision in *Albert Square NSW Pty Ltd v Randwick City Council* [2021] NSWLEC 1401 of merit decisions on the topic (Class 1 decisions by Commissioners and Judges having equal status).

27 Absent either a Class 4 declaration or an appeal on a question of law pursuant to either ss 56A or 57 of the *Land and Environment Court Act 1979* (depending on whether the merit decision appealed was that by a Commissioner or by a Judge), interpretation of cl 4.1A of the LEP will remain to be addressed on a merit appeal by merit appeal basis.

28 For present costs application purposes, however, these are abstract issues. The reason is simple. When Ms Drake applied, in April 2021, to turn her Class 4 proceeding from one founded on the specifics of the proposed development on the site to one seeking judicial advice in the abstract, she transmuted her Class 4 proceedings into ones where it was not appropriate to proceed to determination. It was for this reason that I had adopted the course of permitting the reopening of Ms Drake's Class 1 proceedings in order to entertain submissions in those proceedings on the permissibility of her proposed strata subdivision application.

29 As it transpired, that application was doomed to failure because Mr Kelly's proposed dual occupancy (attached) was unacceptable on its merits. That outcome, as earlier noted, rendered Ms Drake's Class 1 appeal futile.

30 The combined result of the lack of success of Mr Kelly's design and Ms Drake's April 2021 decision to amend her Class 4 pleadings to render them inappropriate for determination meant that there was no proper basis upon which I might need to reach a conclusion as to what I considered to be the appropriate interpretation of cl 4.1A of the LEP.

31 For the purposes of determining a costs outcome for Ms Drake's Class 4 proceedings, despite Mr Tomasetti’s valiant attempt to submit that it should be

otherwise, the necessary termination of Ms Drake's Class 4 proceedings must be regarded as triggering the presumption in r 42.1 of the UCPR without there being any reason to depart from that presumptive position. Put simply, in this regard, Ms Drake's change in pleadings in April 2021 resulted in her own downfall in these Class 4 proceedings.

32 Reaching this conclusion does not require any hypothetical merit determination of any matter arising from cl 4.1A of the LEP. To do so would be contrary to 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.

33 The necessary result is that Ms Drake is to be required to pay the Council's costs of her Class 4 proceedings.

Costs

34 Costs of costs applications in Class 4 proceedings follow the event. As the Council has been successful in its costs application in Ms Drake's Class 4 proceedings, it is appropriate to order that Ms Drake pay the Council's costs associated with this costs' consideration.

Orders

35 The orders of the Court are:

(1) The Applicant is to pay the Respondent's costs in Matter No 365534 of 2020; and

(2) The Applicant is to pay the Respondent's costs of this costs' consideration in that matter.

****