Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 21563 v Rutherford
Medium Neutral Citation:	[2023] NSWCATAP 326
Hearing Date(s):	22 August 2023
Date of Orders:	12 December 2023
Decision Date:	12 December 2023
Jurisdiction:	Appeal Panel
Before:	D Robertson, Senior Member G Sarginson, Senior Member
Decision:	1. To the extent necessary grant leave to appeal; 2. Allow the appeal; 3. Vary order (1) made on 30 May 2023 in proceedings SC 22/47837 by substituting the sum of $7,019.64 for the sum of $10,169.29; 4. Set aside the decision on costs made on 12 July 2023 in proceedings SC 22/47837; 5. Remit to the Consumer and Commercial Division of the Tribunal all questions of costs of proceedings SC 22/47837 for consideration in light of this decision. 6. Either party may, within 14 days of the date of publication of these reasons, file and serve submissions, not exceeding five pages, and any evidence relied upon in support, seeking an order in relation to the costs of the appeal. 7. If either party files submissions pursuant to order (6), the other party may file and serve submissions not exceeding five pages in response to any such submissions, and any evidence relied upon in support, within a further 14 days. 8. Any submissions filed in accordance with orders (6) and (7) should address the issue whether the question of costs can be determined on the basis of the written

submissions and without a further hearing.
9. If neither party files submissions in accordance with order (6) there will be no order in relation to the costs of the appeal.

Catchwords:	LAND LAW – Strata title – Duty to maintain and repair common property – Liability of owners corporation for foreseeable losses sustained by reason of a failure to maintain and repair common property - Strata Schemes Management Regulation 2016 clause 60 – Parties to pay their own costs associated with a mediation – Whether damages for failure to repair and maintain common property may include legal costs associated with a mediation seeking to resolve a dispute concerning the maintenance of common property
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Interpretation Act 1987 (NSW) Crimes (Appeal and Review) Act 2001 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW) s 106 Strata Schemes Management Regulation 2016 (NSW) reg 60
Cases Cited:	Abigroup Ltd v Sandtara Pty Ltd [2002] NSWCA 45 Anderson v Bowles (1951) 84 CLR 310; [1951] HCA 61 Avenhouse v Hornsby SC (1998) 44 NSWLR 1 Blue Circle Industries Plc v Ministry of Defence [1999] Ch 289; [1998] EWCA Civ 945 Collins v Urban [2014] NSWCATAP 17 Cominos v Di Rico [2016] NSWCATAP 138 Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; 77 ALJR 1088 Fifteenth Eestin Nominees Pty Ltd v Rosenberg (No 2) (2009) 24 VR 155; [2009] VSCA 178 Fligg v The Owners Strata Plan 53457 [2012] NSWSC 230 Gray v Sirtex Medical Limited (2011) 193 FCR 1; [2011] FCAFC 40 McIntyre v Perkes (1988) NSWLR 417 Mead & Anor v Allianz Australia Insurance Ltd [2007] NSWSC 500 Milisits v South Australia [2017] SASC 186 Newcastle City Council v Wieland (2009) 74 NSWLR

	173; [2009] NSWCA 113 Nicita v Owners of Strata Plan 64837 [2010] NSWSC 68 Owners - Strata Plan No 61162 v Lipman [2014] NSWSC 622 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Provident Capital Pty Ltd v Papa (No 2) [2013] NSWCA 156 Queanbeyan Leagues Club Ltd v Poldune Pty Ltd and Ors [2000] NSWSC 1100 Rock v Henderson [2021] NSWCA 155 Ross v Caunters [1980] 1 Ch 297 Russell v The Trustees of Roman Catholic Church for the Archdiocese of Sydney (2008) 72 NSWLR 559; [2008] NSWCA 217 State of NSW v Cuthbertson (2018) 99 NSWLR 120; [2018] NSWCA 320 Talacko v Talacko [2009] VSC 446
Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 21563 (Appellant) Katherine Yvonne Rutherford (Respondent)
Representation:	Counsel: M Forgacs (Respondent) Solicitors: Grace Lawyers (Appellant) JS Mueller & Co (Respondent)
File Number(s):	2023/00205759
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	30 May 2023
Before:	G K Burton SC, Senior Member

File Number(s): SC 22/47837

REASONS FOR DECISION

Introduction

1 The issue in this appeal is whether legal costs incurred in participating in a pre-litigation mediation between the parties conducted by NSW Fair Trading, prior to Tribunal litigation between the parties in the same dispute, are recoverable as damages under ss 106(5) and 232 of the *Strata Schemes Management Act 2015* (NSW) (SSMA).

2 The appellant is the owners corporation of Strata Plan No 21563. The respondent is the owner of Lot 3 in that strata plan.

3 Commencing in 2020 the respondent experienced issues with water penetration into her unit. The respondent informed the owners corporation via the strata manager. The appellant retained contractors who commenced remedial work. On 9 December 2020 the respondent let her unit to a tenant. In February and March 2021 the respondent's tenant complained of delays in the remedial work and the fact that the remedial work had deprived her of the use of the shower.

4 The tenant stopped paying rent on 16 March 2021, and vacated the premises on 1 April 2021.

5 The remedial works in the respondent's lot were not completed until 11 June 2021. The respondent signed a tenancy agreement with a new tenant on 6 July 2021.

6 The respondent consulted solicitors in May 2022. Those solicitors issued a letter of demand to the owners corporation on 26 May 2022.

7 On 8 September 2022 the respondent, accompanied by her solicitor and her father, attended a mediation convened by Fair Trading NSW. The owners corporation was represented by its strata manager. The mediation was unsuccessful and the respondent filed proceedings in the Tribunal on 26 October 2022.

8 In her application the respondent sought an order that:

> "The [owners corporation] pays damages to the Applicant within 28 days for the following reasonably foreseeable losses suffered by the Applicant as a result of contraventions of section 106 of the SSMA by the Respondent pursuant to section 106(5) of the SSMA:
>
> (a) loss of rental income incurred by the Applicant for the period 16 March 2021 to 7 July 2021 calculated in the sum of $5,537.14 at the rate of $340.00 per week and interest as a result of the Applicant's tenant vacating Lot 3 and discontinuing paying rent;
>
> (b) costs incurred in the sum of $330.00 and interest for the cost of the replacement of the carpet damaged by water ingress caused by defects in the common property in connection with Lot 3;
>
> (c) costs incurred in the sum of $80.00 and interest for the cost of carrying out cleaning in Lot 3 as a result of property damage to Lot 3 caused by common property defects;
>
> (d) costs incurred in the sum of $357.50 and interest for the Applicant's property management re-letting fee as a result of the previous tenant vacating Lot 3 and the Applicant having to find a new tenant due to the property damage to Lot 3 caused by the common property defects; and
>
> (e) legal costs incurred by the Applicant in obtaining advice concerning its dispute with the Respondent and in attempts to resolve that dispute."

9 The respondent also sought orders requiring the appellant to withdraw a claim in respect of an invoice for plumbing services relating to waterproofing repairs and remove the invoiced amount and an "arrears notice fee" from the appellant's ledgers. That issue was resolved before the hearing by the appellant amending its ledgers.

10 Section 106 of the SSMA relevantly provides:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> …
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> …

11 As the Tribunal noted, at [25], the owners corporation's primary defence to the claim was that the proceedings were commenced outside the time limit imposed by s 106(6).

12 The Tribunal determined, at [24]:

> "It was further not seriously in contention that the types of loss claimed by the owner were reasonably foreseeable and not too remote within the meaning of SSMA s 106(5): as to authority on those various types of loss, see … As to pre-litigation advice and expert reports, see *Fligg v Owners SP 53457* [2012] NSWSC 230 and *Nicita v Owners SP 64837* [2010] NSWSC 68 (esp at [21]). It would be a difficult proposition to have argued to the contrary given the photographic evidence of damage resulting from water entry, the notification of the difficulties caused for the existing tenancy and re-letting and the resistance to the owner's claims. I would have so found if there had been serious contention."

13 With respect to s 106(6) the Tribunal held, at [26] and [29] – [34]:

> "29 Focus on the actual loss claimed is consistent with the Court of Appeal's acceptance in *Tezel* [*The Owners – Strata Plan No 74232 v Tezel* [2023] NSWCA 35] that the time bar in SSMA s 106(5) applies to and must be separately assessed against each type of reasonably foreseeable loss claimed:
>
> > '45 Both parties accepted that a breach of s 106(1) may be of a continuing nature. However, as Senior Counsel for the applicant submitted, it does not follow from acceptance of that possibility (which was the case here) that "the loss" occurs on a rolling basis so as to reset the point of first awareness. Senior Counsel for the applicant drew an analogy in this respect with cases such as *Hawkins v Clayton* (1986) 5 NSWLR 109 and *Scarcella v Lettice* (2000) 51 NSWLR 302; [2000] NSWCA 289, which Austin J considered in *Clutha Ltd v Millar* [2002] NSWSC 362 ("*Clutha*"). Those cases, which concerned the limitation period for negligence in s 14(1)(b) of the *Limitation Act 1969* (NSW) (which runs from when the cause of action first accrues), considered whether a fresh cause of action in negligence arose from a further loss suffered during the limitation period (so as to overcome the difficulty that the cause of action was otherwise time-barred). On the reasoning in those decisions, a fresh cause of action would only arise if a fresh breach caused loss going beyond the loss resulting from the barred cause of action: see *Clutha* at [29]-[36].
> >
> > 46 Noting the necessity to be careful about reasoning by analogy from differently formulated limitation provisions, the point that Senior Counsel for the applicant sought to make for the purposes of s 106(6) was that where the loss remained the same (here, lost rent), knowledge of that loss did not reset for each day that the breach continued. This was the upshot of the "non-binding observation" in the reasons of the Appeal Panel (constituted by Armstrong J, Hennessey ADCJ and T Simon) in *The Owners – Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 at [63], following the remittal of the matter from the Court of Appeal, to which Senior Counsel for the applicant drew attention. After considering whether a continuing breach of the s 106(1)

duty gave rise to separate causes of action each day, the Appeal Panel concluded that "a lot owner is not entitled to bring proceedings under s 106(5) on each day the statutory duty is breached and the owner incurs loss": at [63].

47 The differences of language on which the respondent relied, between the use of "loss" in s 106(5) and (6) and other provisions of the SSM Act which refer to actions for "damage to … property" (s 106(4) and s 132(1)) or "damage to a lot or any of its contents" (s 122(6)) and the approach in other limitation provisions (such as s 14(1)(b) of the *Limitation Act*), do not call for a contrary conclusion. Differences in language may have significance and should be given effect as a general proposition, but the differences do not assist the construction of s 106(6) for which the respondent contends. I accept the applicant's submissions in that regard.

48 Additionally, the respondent sought to emphasise s 106(4), submitting that the construction the Court adopted has to produce a coherent outcome with that subsection. Again, I do not consider that s 106(4) assists the respondent. As I have noted above, s 106(4) operates as a qualification on the owners corporation's obligation to comply with the duty in s 106(1). The owners corporation may "defer compliance" if it has taken action against a lot owner or another person in relation to the damage and that action is incomplete, and provided a failure to comply with the duty does not have safety consequences for a building, structure or common property in the strata scheme. The fact that an owners corporation defers compliance on that basis under s 106(4) would not relevantly impact upon a lot owner's entitlement to bring an action under s 106(5) of the SSM Act, noting that the lot owner has two years in which to do so.

49 The construction of s 106(6) that I have adopted is consistent with its terms, read in the context of s 106 and in the broader context of the legislation of which it forms part. Applying that construction to the present case, the loss that the respondent suffered as a result of the owners corporation's breach of s 106(1) was lost rent. The time at which she first became aware of that loss was in 2016. The two-year period started to run from that point.'

30 Here the loss of rent clearly commenced, and the owner first became aware, well within the two year period before filing of the claim.

31 Likewise, the loss in respect of other claimed expenses to replace the carpet and to clean and pay a re-letting fee arose, as did the owner's first awareness, well within the two-year period before filing of the claim.

32 Advice prior to litigation similarly arose with similar awareness.

33 There was no substantive challenge to the owner's quantum evidence and no competing evidence. This included no suggestion that the owner's sitting tenant would not have held over at the then current rent of $340pw.

34 Accordingly, the owner is entitled to the money order claimed."

14 The Tribunal made orders:

"(1) Order that Owners SP 21563 (OC) on or before 27 June 2023 pay Katherine Yvonne Rutherford $10,169.29 as damages for loss suffered as a

result of contravention by the OC of its duties under s 106 of the Strata Schemes Management Act 2015 (NSW)

(2) Order that the amount awarded in order 1 and pursuant to any costs order in favour of the applicant are to be paid from contributions levied in relation to lots in SP 21563 except for Lot 3 (the applicant's lot) with such contributions being proportional to the unit entitlements of lots except for Lot 3.

(3) Note as a provisional conclusion and subject to consideration of any further submissions on this topic that, pursuant to the operation of s 104 of the Strata Schemes Management Act 2015 (NSW), costs and expenses of the OC in the proceedings are to be paid by the OC from contributions levied in relation to lots in SP 21563 except for Lot 3 with such contributions being proportional to the unit entitlements of lots except for Lot 3."

15 The Tribunal also made orders for the exchange of submissions concerning costs.

16 By a separate decision published on 12 July 2023 the Tribunal ordered the appellant to pay the respondent's costs of the proceedings. The Tribunal noted that the parties accepted that rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) did not apply so that, pursuant to s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), special circumstances were necessary before the Tribunal could make an order for costs.

17 The Tribunal determined that there were special circumstances, for two reasons:

(1) First, the owners' "persistence with no articulated defence, until the limitation defence was raised in early 2023" (costs decision at [11]); and

(2) Secondly, by reason of the appellant's failure to accept a *Calderbank* offer made by the respondent on 28 October 2022, which the Tribunal determined it was unreasonable for the owners corporation not to have accepted.

18 The appellant filed its Notice of Appeal on 27 March 2023.

Scope and Nature of Internal Appeals

19 Internal appeals against decisions of the Tribunal, other than interlocutory decisions, may be made as of right on a question of law, and otherwise with leave (that is, the permission) of the Appeal Panel: NCAT Act s 80(2).

20 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons where they are required;

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

(3) Whether a wrong principle of law had been applied;

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

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

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

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

21 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited by cl 12(1) of Sch 4 to the NCAT Act. In such cases, the Appeal Panel must first be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

22 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) in Sch 4 may have been suffered where:

> " … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance."

23 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Sch 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

24 In *Collins v Urban*, the Appeal Panel stated at [84] that:

> "(1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact, … [and]
>
> (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed."

Grounds of Appeal

25 The appellant's Notice of Appeal sought to appeal on a question of law and also sought leave to appeal. Leave to appeal was sought on the basis that the decision was not fair and equitable, and that the decision was against the weight of evidence.

26 The appellant filed an Amended Notice of Appeal on 7 July 2023, pursuant to leave granted by the Appeal Panel (differently constituted) on 7 July 2023.

27 In its written submissions in support of the appeal the appellant sought to further amend its Notice of Appeal. The proposed Further Amended Notice of Appeal withdrew two grounds of appeal (those numbered 3 and 4 in the original Notice of Appeal), and one sub-ground (1(b)) and also withdrew one ground on which the appellant had sought leave to appeal.

28 The Proposed Further Amended Notice of Appeal also added, to the orders sought on the appeal, a further order setting aside the costs decision, and an additional ground 1A:

> "1A The Tribunal below erred as a matter of law in failing to determine the proper construction of and apply clause 60 of the *Strata Schemes Management Regulation 2016* (NSW)"

29 The respondent opposed the appellant having leave to amend the Notice of Appeal to raise ground 1A. The respondent did not oppose the other amendments to the Amended Notice of Appeal. The respondent did not identify any prejudice arising from the proposed amendment to raise ground 1A, other than costs.

30 At the commencement of the hearing, the Appeal Panel granted the appellant leave to rely upon the Further Amended Notice of Appeal and reserved the question whether that leave should be subject to an order that the appellant pay the costs thrown away.

31 As amended, the Further Amended Notice of Appeal raised three grounds of appeal:

> "1 The Tribunal below erred as a matter of mixed fact and law … in finding the legal costs claimed by the applicant was not seriously in contention when:
>
> (a) It was expressly put into dispute that the legal costs claimed were in relation to cost of the mediation conducted by the NSW Office of Fair Trading and that such legal costs could not be recovered by virtue of the operation of Regulation 60 of the *Strata Schemes Management Regulation 2016* (NSW);
>
> 1A. The Tribunal below erred as a matter of law in failing to determine the proper construction of and apply clause 60 of the *Strata Schemes Management Regulation 2016* (NSW).
>
> 2. In the alternative, the Tribunal below erred as a matter of law in failing to give adequate reasons for the finding … that the legal costs claimed by the applicant was not seriously in contention in the circumstances described in [1] above and/or recoverable in the circumstances of the case."

32 The appellant also sought leave to appeal in respect of ground 1(a)

33 As clarified at the commencement of the hearing of the appeal, the appellant challenges only the amount awarded as damages for breach of s 106 of the SSMA in respect of the legal costs which the appellant submits were associated with the pre-litigation mediation conducted by NSW Fair Trading pursuant to the provisions of Part 12 Division 2 of the SSMA.

34 We note that Mr Forgacs, of counsel, who appeared for the respondent, did not concede that any of the legal costs incurred by the respondent, other than the cost of attending the mediation, were "costs associated with the mediation".

35 Mr Ton, solicitor, who appeared for the appellant, founded the appeal squarely on the provisions of clause 60 of the Strata Schemes Management Regulation 2016 (NSW) (reg 60) which provides:

> **60 Costs**
>
> The parties to a mediation are to pay their own costs associated with the mediation.

36 As clarified at the hearing by Mr Ton, we understand the appellant's grounds of appeal to be:

(1) The Tribunal erred with respect to a question of law by failing to engage with and determine a clearly articulated argument, that is, that the effect of reg 60 was that legal costs associated with the mediation could not be the subject of compensation pursuant to s 106(5).

(2) That to the extent that the Tribunal did deal with that submission, it made an error with respect to a question of law by failing to provide adequate reasons for not accepting the submission.

(3) That the award of damages pursuant to s 106(5) in respect of the legal costs associated with the mediation involved an error with respect to a question of law because reg 60 precluded the award of damages in respect of costs associated with the mediation.

37 We note that, to the extent that the Further Amended Notice of Appeal seeks to set aside the costs decision, that is solely on the basis that, if the appeal succeeds, the question of costs was determined on a false basis.

38 Mr Ton referred the Appeal Panel to the transcript of the hearing before the Senior Member in which, he submitted, the application of reg 60 was clearly raised. We did not understand Mr Forgacs to suggest that the application of reg 60 had not been clearly articulated before the Tribunal.

39 In our view it is clear that the Tribunal did fail to consider a clearly articulated submission. Such a failure constitutes a constructive failure to exercise jurisdiction, which is an error with respect to a question of law: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088.

40 In light of this conclusion, it is not necessary to consider whether the Tribunal's reasons were adequate.

41 Section 81 of the NCAT Act provides:

81 Determination of internal appeals

(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—

(a) the appeal to be allowed or dismissed,

(b) the decision under appeal to be confirmed, affirmed or varied,

(c) the decision under appeal to be quashed or set aside,

(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

42 Before we can uphold the appeal and set aside or vary the Tribunal's decision, the appellant must establish that the failure to deal with the submission was material to the outcome of the proceedings. In other words, to succeed on its appeal, the appellant must establish that its submissions concerning the operation of reg 60 were correct. Neither the failure to deal with the submission nor the provision of inadequate reasons for rejecting the submission would be sufficient reason to set aside the decision if, in fact, the submissions regarding the operation of reg 60 were without any substance and would fail in any event.

43 Accordingly, the critical issue is whether reg 60 prevents the award of damages for breach of s 106 of the SSMA in respect of costs associated with a mediation seeking to resolve a dispute concerning an owners corporations' compliance with its obligations under s 106.

44 The legal costs which the Tribunal included in the sum awarded were identified by the Tribunal as "pre-litigation legal advice" in the amount of $3,856.75. The evidence included five tax invoices from the respondent's solicitors, JS Mueller & Co. The total of those invoices was $4281.75. The appellant pointed out in its submissions that the amount awarded by the Tribunal in respect of this head of loss was the amount referred to in the respondent's written outline of submissions. The respondent did not, either in written submissions or at the hearing, seek to explain the discrepancy.

45 The appellant submitted that only the first of the five invoices, dated 17 May 2022 in the amount of $650 plus GST, which was for drafting and issuing the letter of demand, was clearly not costs associated with the mediation. The appellant maintained that the balance of the invoices was costs associated with the mediation and, by reason of reg 60, could not be subject of an award of damages pursuant to s 106(5) and 232 of the SSMA.

46 In paragraph [24] of the decision (extracted at [12] above), the Tribunal, in justifying the inclusion, as part of the compensation for breach of s 106, of the legal costs incurred by the respondent in respect of "pre-litigation advice", referred to *Fligg v The Owners Strata Plan 53457* [2012] NSWSC 230 (*Fligg*) and *Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68 (*Nicita*).

47 The appellant submitted:

> "16. The appellant's submission below was that the *Nicita* decision should be distinguished as the Court did not consider the effect of clause 60 of the *Strata Schemes Management Regulation*s 2016 (NSW). This is supported by a contextual analysis of the strata legislation. The appellant also relied upon *Anderson v Bowles* (1951) 84 CLR 310, in support of proposition that there had been a legislative determination overriding any ability to recover Fair Trading mediation costs as damages.
>
> 17. It is accepted at general law, it is possible in a proper case to claim costs that are not of the proceedings, as distinct from costs associated with litigation, as special damages. However, such costs can still be assessed by reference to their reasonableness in being incurred and amount. The *Nicita* (and *Fligg*) decision is consistent with but not exhaustive of the position at general law (in neither decision did not the Court set out in any substantive detail the legal reasoning behind its decision). In closing argument in the proceedings below, the Senior Member appeared to tend towards reading down clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) so that it did not affect the general law position.
>
> 18. However, the statutory and regulatory context of the *Nicita* decision and the introduction of the equivalent to clause 60 in the previous strata regulation is of significance to the resolution of this appeal ground as follows:
>
> a. The *Nicita* decision was made on 16 February 2010. At the time the *Nicita* decision was made, there was no equivalent to clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) contained in either the strata legislation or regulation;
>
> b. On 1 September 2010 the *Strata Schemes Management Regulation 2010* (NSW) came into effect. That Regulation included for the first time clause 25, which stated as follows:
>
> The parties to a mediation are to pay their own costs associated with the mediation.

c. It is submitted the timing of introduction of clause 25 is not coincidental and clearly was intended to alter the general law position in respect to the recovery of costs associated with Fair Trading mediation as special damages. To interpret clause 25 otherwise is to give the clause no meaning;

d. Clause 25 was repeated in clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however there was also an express discouragement of the use of lawyers in clause 59(1) of 2016 Regulations. This altered the previous position where lawyers could attend as a matter of right (see clause 24 of the 2010 Regulations). It is submitted it is clear the intention of the clause 60 (and clause 25 before it), in context, is to encourage rather than discourage strata disputes to be settled by way of Fair Trading mediation without the involvement or cost of lawyers. If a party considers it is at risk of having such legal costs claimed against it, then it would be in that party(s) commercial interest to refuse to participate in mediation at all. This consideration was raised by the Tribunal below, albeit for a different purpose;

e. It is noted in the *Fligg* decision, which was made on 15 March 2012, the lot owner attended a Fair Trading mediation with the owners corporation and made no claim for the costs of same as 'damages' or at all.

19. In the above circumstances, it is submitted the principle arising out of *Anderson v Bowles* (1951) 84 CLR 310 is directly on point and supports the construction propounded by the appellant."

48 The principle arising out of the High Court decision in *Anderson v Bowles* (1951) 84 CLR 310; [1951] HCA 61 (*Anderson v Bowles*) was identified by Basten JA, with whom Giles and Campbell J JA agreed, in *Russell v The Trustees of Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559; [2008] NSWCA 217, at [48]:

"48 There is, however, a different basis upon which the claim was properly rejected. To permit a party to recover by way of damages an expense which the law requires that he or she bear personally, absent some contractual entitlement to the contrary, would be inappropriate. Thus, in *Anderson v Bowles* [1951] HCA 61; 84 CLR 310 the High Court considered whether a landlord suing to recover damages for the failure to deliver up the demised premises at the termination of the tenancy could claim the cost of ejectment proceedings brought to recover possession from the lessee. The relevant statutory provision precluded the Court in the ejectment proceedings awarding costs. The joint judgment in the High Court (Dixon, Williams, Fullagar and Kitto JJ) held at 323:

'This is a legislative declaration that the parties to proceedings for the recovery of possession or proceedings arising thereout shall not be liable to one another for the costs of those proceedings. In the face of this legislative declaration can costs be properly included in the damages or mesne profits? It is a general rule that where it is sought to include costs incurred in other proceedings in the damages arising upon a cause of action, costs shall not be included, if as a matter of

judicial determination or by a positive rule of law they are treated as costs which should be borne by the party suing. Accordingly it is not possible to recover as part of such damages the difference between party and party costs awarded to the plaintiff in the original litigation and the costs as between solicitor and client which he has incurred: *Barnett v. Eccles Corporation* [(1900) 2 QB 423 at p 428]. Further, if costs are expressly withheld by the court in the original proceeding none can be recovered in the action for damages brought by the plaintiff from whom they were so withheld….

The legislature having determined that costs shall not be recoverable in proceedings of the character now in question, it would be contrary to the principles which these cases exemplify if they were included in the damages and thus were made recoverable by a side wind.'"

49 The respondent submitted:

"**Reasons other than those given by the Tribunal**

15. … [Regulation] 60 of the *Strata Schemes Management Regulation 2016* (NSW) does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.

…

17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:

57 Application of Part

This Part applies to a mediation conducted under section 218 of the Act.

58 Directions of Secretary

Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.

18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 … is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first

set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
>
> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 …, are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested … would be to adopt an erroneous approach to statutory interpretation."

50 The appellant submitted in reply:

> 13. As the appellant understands it, what is being put at RS [16] - [18] is that Clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) should be interpreted as being a fetter on the ability of the Secretary to give direction about the practice and procedure for a mediation. It is submitted this interpretation does not make sense, does not find any support in the text of any of the provisions pointed to by the respondent, and ought to be rejected.

No authority is cited to support the approach to interpretation that is put. Each of the clauses are self-contained. Clause 59 curtails the right a party to have a representative (i.e. lawyer) attend a mediation. It is clearly directed at the parties and not the Secretary. Clause 60 is similarly directed at the parties. There is nothing in the *Schemes Management Regulations 2016* (NSW) or for that matter the *Strata Schemes Management Act 2015* (NSW) that confers power on the Secretary to impose costs on either party in respect to mediation, so the interpretation urged by the respondent does not have any proper foundation.

14. In response to RS [19], it is agreed that ultimately the issue is the proper construction and application of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however the relevant principle arising from *Anderson v Bowles* is that the legislature can make a determination that precludes from recovery a head of damage that might otherwise be recoverable at general law. Clause 60 is such a legislative determination when read in context, including the history of the strata management regulations in respect to mediation.

15. In response to RS [20] -- [22], the reliance on *Hawkins v Permarig Pty Ltd* … is misconceived for the following reasons:

a. The decision related to an appeal of a decision to strike out a claim for legal costs as damages arising from a breach of contract claim. It was not a final determination of the issue;

b. RS [20] does not accurately extract the regulation being considered and omits the material part that is against the respondent's position in these proceedings. Section 4.1.23(1) is as follows:

> '(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding. ' [emphasis added]

c. It was the fact the statutory provision being considered in the *Hawkins* decision was expressly limited to proceedings in that particular Court that resulted to a finding the plaintiff was arguably able to claim those legal costs as damages in a separately claim. Further, the majority of the Court of Appeal in the *Hawkins* decision at [38] distinguished this *Anderson v Bowles* decision on the basis the provision considered in the latter decision was expressed generally as opposed to the provision in the former decision being expressly limited in effect to the proceedings in a particular Court …;

d. It is submitted when the *Hawkins* decision is read properly and in the context of the actual words of the provision being considered, it supports the appellant's position.

16. in response to RS [23], the point is not that the Appeal Panel must necessarily find in this appeal that clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was introduced to reverse the *Nicita* decision, but rather:

a. The *Nicita* decision is an example of the position at general law;

b. The *Nicita* decision was made before clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) (and indeed clause 59 and other provisions) and is not binding authority as a consequence (again noting in the *Fligg* decision relied upon by the respondent there

was no claim for mediation cost at a time when the equivalent to c!ause 60 was in effect);

c. It is self-evident the insertion of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was to change the general law position, whether it was expressed in the *Nicita* decision or in other decisions. Clause 60 cannot be interpreted as having no effect as to do so would be to give it no meaning.

It is noted the respondent does not point to a legislative intent for clause 60 that would support her position. The legislative intent when read in context is to encourage parties in strata disputes to resolve disputes by mediation and without incurring or being threatened with legal costs. This aligns with the intent of Tribunal proceedings. It would have a chilling effect on the willingness of parties to attend and resolve dispute at mediations if it were the case one party (but not the other) could seek to recover their legal costs as "damages". It would also encourage an applicant to incur legal costs unnecessarily or make ambit claims knowing legal costs relating to the mediation could be recovered as "damages" without being subject to the requirement of special circumstances under Section 60 of the *Civil and Administrative Tribunal Act 2015* (NSW). This is particularly so in the context where the respondent party to the mediation would be precluded from giving evidence about unreasonable or other disentitling conduct during the course of the mediation."

Consideration

51 The appellant limited its challenge, to the award of costs as damages, to the costs which the appellant asserted were costs associated with the mediation. The appellant did not maintain that the Tribunal erred in awarding, as compensation pursuant to s 106(5), the legal costs associated with the letter of demand issued in May 2022.

52 The general principle applied in the courts is that a successful plaintiff cannot recover, as damages, expenses which are properly characterised as costs of and incidental to the proceedings.

53 In *Ross v Caunters* [1980] 1 Ch 297 at 323 Sir Robert Megarry V-C refused to award solicitors' costs as damages. He said:

> "It also seems to me that there is ample authority for saying that a successful plaintiff cannot obtain, in the guise of damages, any costs which, on a party and party taxation of costs, are disallowed by the taxing master. It is not enough for the plaintiff to claim that such costs were incurred by him as a result of the defendants' negligence. I think that this is sufficiently established by *Cockburn v Edwards* [1881] l8 Ch.D. 449. I am saying nothing about damages which fall outside the particular form in which they are claimed in this case, namely, the legal expenses of investigating the plaintiff's claim up to the date of the issue of the writ. It seems to me that both on authority and on principle those legal expenses can be recovered by the plaintiff only as costs, and not in the form of damages. Insofar as the plaintiff can persuade the taxing master that the items incurred should be allowed as costs on a party and party

> taxation, then the plaintiff can recover them; but so far as they are not allowed by the taxing master, then I think that they cannot be recovered in the shape of damages."

54 That passage was referred to in *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch 289; [1998] EWCA Civ 945 in support of a submission that certain fees paid to the plaintiff's solicitors could not be recovered as special damages but rather should be claimed as costs and subject to taxation as such.

55 The *Blue Circle* case arose out of the escape of radioactive waste which contaminated the plaintiff's land. The nature of the legal costs sought to be recovered as special damages was described by the trial judge as follows:

> "As one would expect (and as the allocation of staff suggests), Denton Hall [the plaintiff's solicitors] had in mind the possibility of litigation from the outset, and well before the writ was issued in October l993. A substantial amount of research and preparation work needed to be done in order to familiarise those involved with the relevant law and technical matters. This was required for the litigation as well as for general advice. It is also apparent that Denton Hall were instructed to oversee and co-ordinate all aspects of BCL's response to the contamination incident. Virtually every letter written by BCL was drafted or reviewed by them. Accordingly, much of Denton Hall's work was not so much legal advice or drafting, but of the nature of management work. While one can understand BCL wishing to entrust this to Denton Hall with the prospect of litigation in mind, it was not strictly necessary, and it was certainly a much more expensive way of doing it than use of in-house employees. I think it is right to distinguish between such general management costs, and those costs relating to matters where specific legal advice or input was required, such as advice on BCL's legal responsibilities, and on the preparation of the various applications needed in connection with the work. The latter were a direct and necessary consequence of the contamination incident. The former were not."

56 The trial judge, "doing the best I can on the material available" awarded the plaintiff 20% of the total legal fees charged by the solicitors on the basis that that proportion of the fees was "reasonably attributable to the clean-up operation"

57 The plaintiff submitted "that the costs allowed by the judge were not costs of or incidental to the action. They were administration costs incurred in investigating and putting right the contamination. Thus they were properly claimed as special damages."

58 Aldous LJ accepted that submission, holding:

> "In my view the judge was right to conclude that the Denton Hall costs he allowed were not properly termed costs of the action. It follows that he rightly allowed them to be claimed as special damages."

59 A critical distinction is whether the expenses incurred are legal "costs of, and incidental to the proceedings" between the same parties. As the Full Federal Court stated in *Gray v Sirtex Medical Limited* (2011) 193 FCR 1; [2011] FCAFC 40 (Gray) at [15]-[18]:

> "15 A distinction has long been drawn between damages and legal costs, such that a successful plaintiff cannot recover its costs of the proceedings from the defendant as damages, even though the defendant's wrongful act caused the plaintiff to incur those costs: *Cockburn v Edwards* (1881) 18 Ch D 449 per Jessel MR at 459, per Brett LJ at 462 and per Cotton LJ at 463; *Ross v Caunters* [1980] 1 Ch 297 at 324E-G: *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 365F-366B; *Seavision Investments S.A. v Evennett & Clarkson Puckle Ltd* (*The "Tiburon"*) [1992] 2 Lloyd's Rep 26 at 34; *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* [2000] NSWSC 1100 at [45] and [46]; *McGregor on Damages*, 18th ed (Sweet & Maxwell, London, 2009) at [17-003]. A plaintiff's ability to recover its costs of the proceedings from a defendant depends instead upon the exercise of a judicial discretion; and the amount (if any) that the plaintiff recovers is not assessed in the same way as damages, but "taxed" according to the applicable rules of Court. As Jessel MR put it in *Cockburn* at 459.8:
>
> > ... it is not according to law to give to a party by way of damages the costs as between solicitor and client of the litigation in which the damages are recovered. The law gives a successful litigant his costs as between party and party, and he cannot be said to sustain damage by not getting them as between solicitor and client.
>
> 16 Neither may a successful plaintiff or defendant recover the difference between the legal costs awarded in its favour, or withheld, as the case may be, in one civil proceeding and the legal costs it actually incurred in that proceeding, as damages in a subsequent civil action against the same opponent: *Anderson v Bowles* [1951] HCA 61; (1951) 84 CLR 310 at 323.4-8 and 324.2; *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 690.4-5; *Barnett v Corporation of Eccles* [1900] 2 QB 423 at 427.8, 428.5*; Ritchie v British Insulated Callender's Cables (Aust) Pty Ltd* (1960) 77 WN(NSW) 299 at 300.4-10 (RHC); *Berry v British Transport Commission* [1962] 1 QB 306 at 317.1, 319.2-4, 320.9-321.4, 322.1, 329.6, 329.7-330.1, 336.4, 336.7-9; *Lonrho Plc v Fayed (No. 5)* [1993] 1 WLR 1489 at 1497G-H, 1505G-H, 1510D-F; *Penn v Bristol & West Building Society* [1997] EWCA Civ 1416; [1997] 1 WLR 1356 at 1364H; *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR I at 36G-37C; *Queanbeyan Leagues Club* at [45] and [46]; *Grainger v Williams* [2009] WASCA 60 at [104] and [203]. Whether and to what extent a party is entitled to recover its costs from the opponent is regarded as having been finally determined in the first proceeding. Otherwise, most successful plaintiffs could bring a second action against the defendant to recover the costs they failed to obtain upon taxation as damages flowing from the original wrong: *Berry* at 323.5-6 and 328.2.
>
> 17 As Scott LJ stated in *Seavision Investments S.A. v Norman Thomas Evennett and Clarkson Puckle Ltd (The "Tiburon")* [1992] 2 Lloyd's Rep 26 at 34.24-52 (RHC):
>
> > It is often the case that the costs of litigation would, if ordinary principles governing the recoverability of damages were applicable,

> represent recoverable damages. This is so not only in contract cases but also in tort cases. If A sues B on a negligence claim, whether in contract or in tort, the incurring by A of the costs of and incidental to the action will often, perhaps usually, be a foreseeable consequence of the negligent act. But it is, I believe, well settled that the recovery by A from B must be by way of an order for costs made in exercise of the s 51(1) discretionary power.
>
> The recovery by A of the costs of an action in which A sues B and C in the alternative is, in my judgment, no different.
>
> ... to notice that items of cost fall within the boundaries set by the rules relating to remoteness of damage does not change the nature of those items or remove them from the clutch of the discretionary power conferred by [the UK equivalent of Section 43]. The items are costs of the proceedings and, if they are to be recovered from [one of two defendants], must be the subject of an order for costs (see [the UK equivalent of Rule 6]).
>
> 18 The reasons of Parker LJ at 33.9 were to the same effect."

60 However, as was recognised in *Gray* at [35]-[37], a different principle applies if there are separate proceedings involving different parties. A party's unrecovered legal costs incurred in one set of proceedings may be recovered as damages against a third party in subsequent proceedings (see also *Provident Capital Pty Ltd v Papa (No 2)* [2013] NSWCA 156 at [13]-[14]).

61 Costs involving the same parties where litigation has occurred and no costs order was made (either because the relevant Court or Tribunal had no power to award costs; or because it exercised its discretion not to award costs) are not recoverable as damages in a second set of proceedings between the same parties (*Avenhouse v Hornsby SC* (1998) 44 NSWLR 1; *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd and Ors* [2000] NSWSC 1100 at [37]-[40]).

62 In *State of NSW v Cuthbertson* (2018) 99 NSWLR 120; [2018] NSWCA 320 (*Cuthbertson*), the NSW Court of Appeal applied the principles in *Anderson v Bowles* to hold that legal costs incurred in defending criminal proceedings which could not be recovered by reason of s 70 of the *Crimes (Appeal and Review) Act 2001* (NSW) could not be awarded as damages in subsequent proceedings for the tort of wrongful arrest; although they could be awarded for the tort of malicious prosecution. As Beazley P stated at [63]-[66]:

> In my opinion, the rationale for refusing costs in later civil proceedings in *Anderson v Bowles* is equally applicable to this case. This is so, notwithstanding that the earlier proceedings in the present case were criminal proceedings and, unlike in *Anderson v Bowles* where there was no power to

> award costs in the underlying possession proceedings, the District Court has power to award costs in the limited circumstances prescribed in the Crimes (Appeal and Review) Act, s 70.
>
> As the plurality in *Anderson v Bowles* pointed out, where the legislature has specifically turned its attention to the circumstances in which costs may be awarded and determined that no costs were to be awarded, it would be contrary to principle for those costs to be recovered "[*as*] *a sidewind*" by way of damages in later and different proceedings.
>
> That would be the case here if a party could pursue costs in civil proceedings that may or may not have been awarded, in whole or in part, in the criminal proceedings. The circumstances in which costs may be awarded in criminal proceedings is significantly circumscribed. In summary, those circumstances are directed to impropriety or unreasonableness in investigating the charges, or in initiating or conducting the prosecution in the Local Court, including on the basis of bad faith. Those constraints evince a clear legislative purpose that costs may only be awarded in the circumstances for which the legislature has provided.
>
> In my opinion, a party cannot avoid those constraints by claiming damages for costs incurred in conducting a criminal appeal by claiming those costs in later civil proceedings. The clear legislative intention of s 70 is to limit the circumstances in which costs in favour of a party who successfully appeals a conviction may be ordered and for the appeal to be the forum in which that determination is made.

63 The Court of Appeal also pointed out that it could not be said that the costs incurred in defending criminal proceedings of resisting arrest are the "natural and probably consequence" of the tortious conduct of wrongful arrest. Harm suffered in resisting arrest, such as physical injury or property damage is a natural and probable consequence of the wrong, but not the costs incurred in defending a failed prosecution (*Cuthbertson* at [46]-[47]; [114]; [135]-[136]; [161]).

64 In *Rock v Henderson* [2021] NSWCA 155, the NSW Court of Appeal reiterated that the tort of malicious prosecution is an exception to the principle in *Anderson v Bowles*, so that legal costs and expenses incurred in defending the prosecution and other losses are recoverable as damages in subsequent civil proceedings (at [3]; [18]-[26]).

65 There may also be an independent contractual right to recover legal expenses incurred under the terms of contract, or lease, between the parties which is distinguishable from the principle in *Anderson v Bowles* (*Abigroup Ltd v Sandtara Pty Ltd* [2002] NSWCA 45 at [7]-[14]).

66 The distinction between the costs of proceedings and other legal costs not "costs of or incidental to" the proceedings has greater significance in the Tribunal where the award of costs is governed by s 60 of the NCAT Act, which 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.
>
> …
>
> (5) In this section—
>
> costs includes—
>
> (a) the costs of, or incidental to, proceedings in the Tribunal, and
>
> (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

67 The term "costs of and incidental to proceedings" extends to the costs of such preparatory steps as are shown to be reasonably connected with the proceeding. In *Fifteenth Eestin Nominees Pty Ltd v Rosenberg (No 2)* (2009) 24 VR 155; [2009] VSCA 178 Maxwell P and Neave and Redlich JJA stated:

> 9 Under s 24 of the *Supreme Court Act 1986* (Vic), 'the costs of and incidental to all matters' are in the discretion of the Court, which has full power to determine 'by whom and to what extent the costs are to be paid'. As this statutory language suggests, an order for 'the costs of the proceeding' is synonymous with — and has the same effect as — an order for 'the costs of and incidental to the proceeding'. That has been the conventional understanding, and the consistent approach of the Taxing Master of this Court, for many years. When one party is ordered to pay the other party's costs of a proceeding, that liability extends to the costs of such preparatory steps as are shown to be reasonably connected with the proceeding. That is so whether or not the words 'and incidental to' are included in the order.

68 In *Talacko v Talacko* [2009] VSC 446 Osborn J held that:

> 7 The phrase 'of and incidental to' is usefully discussed by Sir Robert Megarry, the Vice Chancellor in *Re Gibson's Settlement Trusts* [1981] Ch 179. On the one hand the phrase extends the award of costs to costs incurred in connection with matters in the court. On the other hand it requires such costs to be subordinate to or causally linked to such a matter.
>
> 8 In the present case on the one hand the phrase extends the costs to those preparatory to the hearing, on the other hand it limits costs of the prior proceeding recoverable to those which were in fact preparatory to the hearing. Those costs would ordinarily include the costs of the preparation of evidence and documentation utilised in the hearing, and in this respect I note that the

> hearing proceeded by way of evidence given in the first instance by way of affidavit.
>
> …"

69 See also *Cominos v Di Rico* [2016] NSWCATAP 138, at [57], where the Appeal Panel referred to *McIntyre v Perkes* (1988) NSWLR 417 at 426.

70 It is also well accepted that the costs of proceedings includes the costs of a failed court ordered mediation. In *Newcastle City Council v Wieland* (2009) 74 NSWLR 173; [2009] NSWCA 113 the issue for determination was whether an agreement to pay the costs of the proceedings included the costs of mediation. Ipp JA, with whom Beazley and Hodgson JJA agreed, held:

> "41 As to matters of policy … there are compelling policy reasons why costs of mediation should be included in the costs of the proceedings. These are discussed in two cases that I mention below.
>
> 42 In *Higgins v Nicol (No 2)* (1972) 21 FLR 34, Joske J observed at (57-58):
>
> > "I see no reason why [the costs of attempting to arrive at a compromise] should not be regarded as part of the course of the hearing and be allowed for on a party and party taxation just as much and in the same way as the calling and examination of witnesses is part of the course of the hearing and is allowed for on taxation. What is to happen when, as happened in this very case, suggestions for a settlement come from the court itself?"
>
> 43 Mansfield J in *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629 expressed the same notion (at [92]):
>
> > "I do not accept the proposition … that costs of negotiations to explore compromise of a claim should never be allowed on a party and party taxation. There is a substantial public interest, as well as private interest, in the resolution of disputes by negotiation or by mediation. It is not a common feature of litigious claims that the parties are required to consider, and often to participate in, pre-trial mediation. The Rules prescribe powers and procedures to that effect. Negotiation and mediation may resolve a dispute entirely. Apart from the benefit to the parties of such resolution, such an outcome saves the costs associated with the trial and releases judicial and court resources to deal with other matters. Negotiation and mediation often also partly resolve a dispute so as to enable the focus of the parties in litigation to be more confined, again with consequential savings of time and expense to the parties and to the benefit of the public. In my view, steps taken by the parties to confine the areas of their dispute will often be able to be categorised as necessary or proper for the attainment of justice. They will often facilitate the presentation of the case so as to enable a just result to be achieved in an expeditious and economic manner. Even if those processes do not in fact result in any consensual outcome, either totally or in relation to certain issues or matters which then do not require proof, it does not follow that the

processes themselves were not necessary or proper for the purpose of [whether those costs are allowed on taxation]."

44 Mansfield J went on to say (at [93]):

> "I do not consider that the line drawn by Holroyd J in *Mackay v Hamilton* [1905] VLR 457 at 460 - 461 between costs: "...incurred by a party for the simple purpose of making a settlement ... [and] costs incurred in fighting or prosecuting the action until from one cause or another it has to stop" is one which should continue to be rigidly given effect to. Indeed, his Honour recognised that costs incurred in seeking to procure a settlement may overlap with costs which would have been necessary for the prosecution of the action, and made allowance for that. But, in my view, in the light of the more modern approach to litigation discussed above, that sharply drawn line no longer exists."

His Honour proceeded to order that the party liable for costs pay the costs involved in negotiating a settlement.

45 The remarks of Joske J in *Higgins v Nicol (No 2)* and Mansfield J in *Charlick Trading Pty Ltd v Australian National Railways Commission* expose the policy considerations that support the notion that the ordinary costs of the proceedings should include the costs of mediation."

71 In *Milisits v South Australia* [2017] SASC 186 the Master, Judge Bochner, held, at [8], that:

> "The authorities make it clear that the costs of mediation may be included in the costs of an action, whether or not the mediation was ordered by the Court."

72 Her Honour concluded in that case that the terms of the mediation agreement entered into by the parties led to a different result. That is also the basis upon which Ipp JA in *Newcastle City Council v Wieland* distinguished the judgment of Bergin J in *Mead & Anor v Allianz Australia Insurance Ltd* [2007] NSWSC 500. See also *Owners - Strata Plan No 61162 v Lipman* [2014] NSWSC 622, where McDougall J stated, at [85]:

> "The whole point of the decision in *Mead* is that the parties' mediation agreement, on its proper construction, recorded the intention and agreement of the parties that the costs of the mediation should be treated as separate from the costs of the proceedings."

73 The Tribunal relied upon *Fligg* and *Nicita* in support of the decision to award, as damages pursuant to s 106(5) of the SSMA, the legal costs incurred by the appellant.

74 In those decisions two judges of the Supreme Court awarded, as damages for breach of the duty to repair and maintain common property, legal costs

incurred by the lot owner in seeking compliance by their owners corporation with that duty.

75 *Fligg* involved an application pursuant to s 62 of the *Strata Schemes Management Act 1996* (NSW) (SSMA 1996), the predecessor to s 106 of the SSMA. Mrs Fligg purchased her apartment in mid-2008. She experienced water penetration into the unit and consulted a solicitor, Mr Abbott, who corresponded on her behalf with the owners corporation. Because the response was unsatisfactory, Mrs Fligg retained her own builder, Mr Worthington, to examine the problems and their causes. This was found (at [31]) to have been a "coherent and proportionate response to the Owners Corporation's dealings with her up until that point."

76 The owners corporation then retained remedial builders, but Mrs Fligg became concerned about the way the owners corporation's contractor was undertaking remedial works and retained a further expert, Mr Zhirul (because Mr Worthington was not available), and directed the owners corporation's contractor to stop work. Slattery J considered her concerns were "reasonable, in the circumstances" (at [39]).

77 Between July 2009 and May 2010 Mrs Fligg engaged a different solicitor, Mr Le Page, who in turn engaged a consulting engineer, Mr McMillan, to provide advice. Slattery J found (at [40]) that Mrs Fligg's engagement of both Mr Le Page and Mr McMillan "was appropriate and reasonable in the circumstances."

78 In January 2010 the parties attended a mediation convened by the Consumer Trader and Tenancy Tribunal where an agreement was reached.

79 However, the issues between the parties were not resolved, and Mrs Fligg returned to Mr Abbott who "then took steps that became a prelude to the … litigation" (at [57]). Four months later, Mrs Fligg commenced proceedings in the Supreme Court. As Slattery J held, that period showed "that she was not hasty in seeking out litigation. Rather, she was met during this period with inaction or poor communication."

80 The Supreme Court proceedings had some complexity. It is necessary to provide detail of this to understand the findings of the Court which are relevant to the appeal in this matter.

81 Mrs Fligg had sought orders that the owners corporation repair common property; damages for loss of value of her Lot; damages for loss of amenity, distress and inconvenience and damage to her personal property; claims for exemplary and aggravated damages; interest and costs.

82 By the time the proceedings came on for hearing, the issues had been narrowed to the questions whether Mrs Fligg could recover "out-of-pocket expenses", identified as the fees of Mr Worthington and Mr McMillan and Mr LePage's fees, and certain questions "in relation to the costs of the proceedings". Mrs Fligg had abandoned most of her claims for damages by the time the hearing commenced. The parties had also agreed (after a conclave of the expert witnesses) as to a scope of works to rectify the water ingress issues. That agreement occurred two days prior to the hearing date. The Court made consent orders for the owners corporation to conduct remedial works.

83 The Court also determined that the claim for damages regarding loss of value of the Lot should be heard as a separate issue after the remediation works were performed, because, if the remediation works were successful, it was likely there would be no loss of value of the Lot. The Court severed this issue from the proceedings and listed that aspect of the proceedings for a further directions hearing 3 months after the date on which the works were to be completed (para [73]).

84 The issues that Slattery J was determining were the issues that the parties had agreed required determination, being whether Mrs Fligg was entitled to "out of pocket expenses" that had been "reasonably incurred", and was further entitled to legal costs. There is no detailed discussion in the decision as to what Mrs Fligg's cause of action was that would entitle her to "out of pocket expenses", and the decision repeatedly uses the phrase "out of pocket expenses" rather than "damages".

85 There is also no detailed discussion of the distinction between "out of pocket expenses" and "costs of, and incidental to the proceedings", although the

decision implicitly accepts that there is a dividing line between the two concepts. The findings regarding whether Mrs Fligg's pre-litigation "out of pocket expenses" were reasonably incurred are very brief (paras [77]-[83]).

86 In relation to the issue of out-of-pocket expenses, Slattery J held:

> "80 The Court has already found … that Mrs Fligg's engagement of Mr David Le Page and Mr McMillan … was appropriate and reasonable in the circumstances. The Owners Corporation attempts to answer this finding by saying that Mr McMillan subsequently advised that Watergate's original works would be effective if carried through, as he ultimately did. The Owners Corporation contends that the onus is on the plaintiff to establish that she had a reasonable basis to interrupt Watergate's work and retain Mr Le Page and Mr McMillan, an onus that the Owners Corporation contends she has not discharged. Indeed, the defendant says that the plaintiff doubted the effectiveness of Watergate's work on the basis of her own inexpert opinion that further tiling of her balcony would cause a problem and that Mr McMillan was really engaged only on her solicitor's advice.
>
> 81 In my view, the defendant's points are answered by the wider context considered earlier in these reasons. The reasonableness of her conduct must be assessed at the moment that Mrs Fligg decided to stop the work and immediately afterwards. At that time she was fully supported by Mr Zhirul and by Mr McMillan who both queried aspects of the work proceeding. … As the relevant part of the work was being done in Mrs Fligg's apartment, and she would suffer if it was wrong, she was reasonably entitled to have the benefit of Mr McMillan's investigation and assurance before the work was finalised.
>
> 82 Moreover, there is something of a false issue in relation to Mr McMillan's and Mr Le Page's fees. The Owners Corporation appears to blame Mrs Fligg for stopping the work and incurring Mr Le Page and Mr McMillan's costs. However, the work that Mrs Fligg stopped had to be redone in any event because it was defective. Presumably, if the work had not been stopped and Mr McMillan engaged the Owners Corporation's costs of redoing the defective work would have been even greater.
>
> 83 But in any event part of Mr Le Page's disputed fees are associated with engaging Mr McMillan and should also be recovered. But they are also part of the plaintiff's legal fees during the period that she did not engage Mr Abbott. She was entitled to legal representation throughout this complicated building dispute and can recover her legal costs, including those paid to Mr Le Page."

87 In respect of costs his Honour determined that, although the substantive issues had been resolved without a hearing, Mrs Fligg had had no reasonable alternative to commencing the proceedings and almost certainly would have succeeded, and accordingly awarded costs in her favour. His Honour reduced the costs awarded by 20% by reason of Mrs Fligg's abandonment of claims for damages for loss of amenity and distress and for exemplary and aggravated damages. Notably, the amount awarded in respect of Mr Le Page's costs was

not discounted. His Honour also awarded interest upon the amounts ordered to be paid in respect out-of-pocket costs, including the fees paid to Mr LePage.

88 *Nicita v Owners Strata Plan 64837* [2010] NSWSC 68 also involved an application pursuant to s 62 of the SSMA 1996. The plaintiff, Ms Nicita, owned a unit in the defendant Strata Plan No 64837. She experienced ongoing water ingress from 2005. The owners corporation had failed by 2008 to take meaningful or effective action and, as Bryson J held, at [9] – [10]:

> "9 … The plaintiff, acting altogether reasonably, engaged solicitors to seek to obtain compliance by the Owners Corporation with its obligations with respect to common property. The plaintiff sought to obtain mediation through the agency of the Office of Fair Trading, but the Owners Corporation was not prepared to participate.
>
> 10 Eventually the plaintiff commenced these proceedings on 3 July 2009. Before doing so however she went through a remarkably elaborate and, from a retrospective view, patient course of attempts to obtain compliance by the Owners Corporation with its statutory obligation."

89 His Honour ordered the owners corporation to carry out remedial works and awarded the plaintiff damages which included loss of rent and the cost of repairs to her apartment.

90 The amount awarded in damages also included $4,866 in respect of solicitor's costs and $160 in respect of the DFT mediation fee. In that regard his Honour stated:

> "21 I will also award as damages the legal costs and mediation fee incurred by the plaintiff in her attempt to bring the defendant to mediation and obtain resolution before commencing proceedings. I find that these were reasonable steps towards resolving the continuing loss caused by the breach of duty; in relation to a small home unit building with only five units, and in relation to the readily soluble controversy which existed in the present case, resort to mediation was in my judgment an altogether reasonable course, whether or not it produced a successful outcome; among such a small group of people agreed resolution was very much to be sought after and attempts to bring it about were reasonable conduct caused by the breach of duty. …"

91 His Honour also ordered the defendant to pay the plaintiff's costs of the proceedings. It is apparent that Bryson J regarded the legal costs in respect of which he awarded damages and the mediation fee as not qualifying as costs of the proceedings.

92 In our view both *Fligg* and *Nicita* can be explained on the basis that the legal costs (and mediation fee) the subject of the award of compensation were not found to be costs of and incidental to the respective proceedings.

93 The legal costs awarded in *Fligg*, that is Mr Le Page's fees, were incurred before the parties attended a mediation at which an agreement was reached. The litigation arose out of the breakdown of that agreement. It is apparent that Bryson J in *Nicita* distinguished between the costs of the proceedings, which he awarded separately, and the costs of (unsuccessfully) seeking to arrange a mediation.

94 In neither *Fligg* nor *Nicita* was consideration whether legal costs could be included in the award of damages affected by any provision such as s 60 of the NCAT Act. Section 60 requires a distinction to be drawn between the award of the costs of and incidental to the proceedings, where special circumstances must be established, and the payment of out of pocket expenses as part of compensation awarded.

95 Consistently with the principle outlined by the High Court in *Anderson v Bowles*, the limitations upon the award of costs in the Tribunal should not be circumvented by characterising "costs of, and incidental to, proceedings" (which may involve obtaining legal advice and obtaining expert evidence) as an element of damages for breach of duty under s 106 of the SSMA. As discussed previously, there is a critical distinction between "costs of and incidental to the proceedings"; and expenses incurred that do not constitute "costs of and incidental to the proceedings".

96 If the particular expenses are not "costs of, and incidental to the proceedings" then they may be recoverable as damages by reason of breach of the duty under s 106 of the SSMA, subject to the other limitations on the award of damages for breach of duty under s 106 of the SSMA, including whether the type of loss is a "reasonably foreseeable loss suffered by the owner as a result of contravention of this section by the owners corporation" (s 106(5) of the SSMA); and whether the proceedings have been brought within the limitation period in s 106(6) of the SSMA. A further limitation occurs by reason of reg 60.

97 The distinction between whether the relevant expenses incurred are "costs of and incidental" to the Tribunal proceedings, or are not, will involve assessment of the particular facts and circumstances of the dispute. However, it is a distinction that must be made. A successful party to litigation in the Tribunal cannot simply avoid the provisions of s 60 of the NCAT Act (which are subject to rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW)) by characterising what are, in fact, costs of and incidental to the Tribunal proceedings, as damages arising under s 106(5) of the SSMA.

98 In our view, costs of attending and participating in a mediation between the parties held under Division 2 of Part 12 of the SSMA, that is a precursor to commencing proceedings in the Tribunal, will usually be a cost of, or incidental to, the Tribunal proceedings.

99 Section 218 of the SSMA states as follows:

> **218 Matters that may be subject to mediation**
>
> (1) A person may apply to the Secretary for mediation of any matter for which an order may be sought from the Tribunal under this Act.
>
> (2) On receipt of an application for mediation, the Secretary must, if the Secretary thinks the circumstances of the case are appropriate, arrange for mediation in accordance with the regulations.
>
> (3) The Secretary may dismiss an application for mediation if the Secretary believes that the application is frivolous, vexatious, misconceived or lacking in substance.

100 Section 227 of the SSMA states:

> **227 Certain applications cannot be accepted without prior mediation**
>
> (1) A registrar must not accept an application made to the Tribunal under this Act unless—
>
> (a) mediation by the Secretary under Division 2 or otherwise has been attempted but was not successful, or
>
> (b) a party refused to participate in the mediation, or
>
> (c) the registrar considers that mediation is unnecessary or inappropriate in the circumstances.
>
> (2) The registrar must inform an applicant that the applicant should arrange for mediation if the registrar rejects an application under this section.
>
> (3) The applicant may arrange for mediation under Division 2 or otherwise.
>
> (4) This section does not apply to applications for the following orders—

> (a) an order to appoint, or requiring the appointment of, a strata managing agent,
>
> (b) an order varying or revoking an order that varies or revokes another order by the Tribunal,
>
> (c) an order with respect to waiving, varying or extinguishing a restriction relating to the initial period,
>
> (d) an order allocating unit entitlements,
>
> (e) an order with respect to access to a lot by the owners corporation to inspect or repair common property,
>
> (f) an order seeking provision of records to an owners corporation by a former strata managing agent for the strata scheme,
>
> (g) an order with respect to the inspection of records of an owners corporation,
>
> (h) an order imposing a monetary penalty and any associated order as to the payment of costs.

101 If the dispute is a type where the parties must participate (or attempt to participate) in a mediation before commencing Tribunal proceedings (subject to the discretion of the Registrar to accept an application without mediation) then it logically follows that attendance at the mediation is incidental to the commencement of Tribunal proceedings.

102 In relation to costs associated with a mediation under the SSMA, reg 60 is a further limitation on the Tribunal's powers. We agree with the appellant's submission that, if reg 60 is valid, it has the effect that costs associated with a mediation under s 218 of the SSMA cannot be the subject of an award of damages under s 106(5); nor are such costs recoverable as costs of, or incidental to, the proceedings. That is the effect of the High Court decision in *Anderson v Bowles*.

103 We consider that the decision in *Hawkins v Permarig* is distinguishable. That was not a case where the appellants (the plaintiffs at first instance) were seeking to recover costs incurred in endeavouring to enforce the obligation and entitlement the subject of the claim. The costs which the appellants sought to recover as damages for breach of contract were costs incurred by the appellants in proceedings in the Queensland Planning and Environment Court to enforce the obligations of the defendant (Permarig) under the relevant planning legislation (the *Integrated Planning Act 1997* (Qld)). The appellants had acquired land from Permarig upon which, by reason of Permarig's failure

to comply with conditions imposed by the local council on an approval for subdivision of the land, they were unable to build. Action to enforce the conditions could only be taken in the Planning and Environment Court.

104 Section 4.1.23(1) of the *Integrated Planning Act* provided:

> "Each party to a proceeding in the [Planning and Environment Court] must bear the party's own costs for the proceeding."

105 The appellants were successful in the Planning and Environment Court but, by virtue of s 4.1.23(1), could not seek an order for costs in those proceedings. The Queensland Court of Appeal, McPherson JA and White JA, Mc Murdo P dissenting, held that that section did not prevent the appellants from claiming the costs incurred in the Planning and Environment Court proceeding as damages for breach of contract in separate proceedings in the Supreme Court.

106 White J held, at [38]:

> "[38] The proceedings commenced in the Supreme Court for damages for breach of contract and duty by the appellants do not arise in any relevant sense from the proceeding in the Planning and Environment Court. The expression used in s. 4.1.23(1) not only identifies those to whom it is addressed by describing them as "each party to a proceeding in the court" but it also confines the prohibition on the award of costs to orders which the Planning and Environment Court might make."

107 McPherson JA agreed with White J and added some further comments, which included the paragraphs cited by the respondent in para [20] of her submissions, set out above (at [49])

108 We do not accept the respondent's submission that reg 60 "is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions." There is no basis in either the text or context of the regulation to conclude that reg 60 should be interpreted as being solely a constraint on the Secretary's power to give directions.

109 The proposition that the regulation is directed to the allocation of the costs at the time of the mediation is practically, if not literally, meaningless. There is no occasion to consider who is to bear the costs of a mediation unless the mediation is unsuccessful and a party subsequently seeks those costs upon the resolution of the dispute in a court or tribunal, or the parties reach

agreement at the mediation on terms which include one party paying the other's costs, in which case, as occurred in *Mead* and in *Milisitis,* the question arises whether the agreement should be construed as including the costs of the mediation.

110 Even if reg 60 should be construed as prohibiting the parties from agreeing as part of the resolution of the dispute that one party will pay the costs of the successful mediation, there is no reason why it should be limited to that purpose. In our view reg 60 clearly denies to the Tribunal and any court the power to make an order with respect to the costs of a mediation.

111 In our view, the words of reg 60 are abundantly clear. They stipulate that parties to a mediation are to pay their own costs associated with the mediation. Accordingly, the parties to a mediation under s 218 of the SSMA are to bear their own costs. By reason of the principle in *Anderson v Bowles* and the other authorities discussed in this decision, those costs cannot be subsequently claimed as damages.

Inconsistency

112 Section 271 of the SSMA empowers the making of regulations "not inconsistent with this Act". If reg 60 were inconsistent with s 106 of the SSMA, it would be invalid to the extent of the inconsistency. However, we do not consider that those provisions are inconsistent. Mr Forgacs' submission was that, because the costs associated with the mediation were a foreseeable loss suffered as a result of a contravention of s 106, a regulation which had the effect of denying the respondent the capacity to recover that loss must be inconsistent with s 106(5) which provides that a lot owner may recover "any reasonably foreseeable loss" suffered by the owner as a result of a breach of the obligations in s 106(1) and (2).

113 We do not consider that the costs of the mediation in this case could properly be described as a reasonably foreseeable loss arising from the owners corporation's breach of s 106.

114 In *Nicita* the plaintiff had incurred legal costs and mediation fees in seeking to persuade the owners corporation to fulfil its obligation to repair the common property. The problems were not resolved, and Bryson J made orders requiring

the owners corporation to rectify the issues. In this case, the issues giving rise to the respondent's claim had been resolved over 12 months before the mediation, and the mediation itself took place only seven weeks before the respondent commenced proceedings. It is also necessary to note that the respondent was required by s 227 of the SSMA to at least attempt mediation before commencing proceedings in the Tribunal.

115 The costs associated with the mediation were properly characterised as costs of the proceedings. As such s 106(5) is not applicable and reg 60 cannot be said to be inconsistent with section 106(5). It is not necessary to determine whether, in a case where the costs of mediation would not form part of the costs of the proceedings, reg 60 would be inconsistent with section 106(5) to the extent that it prevented the recovery of those costs as compensation for reasonably foreseeable loss arising from a failure to comply with s 106. Even if that were the case, reg 60 could be read down to exclude such cases pursuant to s 32 of the *Interpretation Act 1987* (NSW).

116 Accordingly, we find that the Tribunal erred with respect to a question of law in awarding the respondent, as damages pursuant to section 106(5) of the SSMA, the legal costs associated with the mediation.

The appropriate orders

117 The fee notes reflecting the costs which the Tribunal awarded to the respondent as compensation were in evidence. The appellant did not suggest that the earliest of those fee notes, that is the fee note relating to relating to the issue of a letter of demand, was associated with the mediation, but the appellant maintained that all other fee notes were so associated.

118 We consider that the term "costs associated with the mediation" includes fees payable to a solicitor for:

(1) Arranging the mediation;

(2) Advising a party in relation to the mediation and obtaining instructions in relation to the mediation;

(3) Preparing for the mediation, including preparing documents such as a position paper or a schedule of damages to be presented at the mediation;

(4) Attending the mediation; and

(5) Advising in relation to the outcome of the mediation.

119 The detail provided with each of the respondent's solicitors' invoices is sufficient to indicate clearly that the only entries on the later invoices which might arguably not constitute costs associated with the mediation are two entries relating to the day of the mediation:

> "Telephone call to Katherine and Lindsay post mediation to provide advice and next steps"; and
>
> "Email to Katherine and Lindsay regarding summary of mediation and next steps."

120 To the extent those legal costs involved advising in relation to the outcome of the mediation, as we have noted above, we would consider those costs to be costs associated with the mediation. However, it might be arguable that advice concerning the "next steps", which presumably involved commencing proceedings in the Tribunal, would not constitute costs associated with the mediation. Almost by definition, such "next steps" would not involve mediation.

121 Mr Forgacs submitted that it was for the appellant, as the party relying upon the prohibition, to establish that the prohibition was applicable and that, in the absence of evidence to clarify the relevant work, it should not be assumed that it was work associated with the mediation. However, we consider that at least an evidentiary onus lay upon the respondent to ensure that the relevant legal costs were properly characterised. In the absence of any clear indication what costs incurred after the mediation involved advice beyond explaining and summarising the outcome of the mediation, we consider that the respondent failed to establish that the telephone and email sent on the day of the mediation were not costs associated with the mediation.

122 The appellant did not have the capacity to assess the content of the relevant advice or the capacity to lead evidence to establish whether the relevant advice was associated with the mediation. Only the respondent had that capacity. The failure to lead such evidence reinforces the inference that the advice given on the day of the mediation was associated with the mediation.

123 The parties' representatives agreed in the course of the hearing that, if we accepted the appellant's submissions concerning the effect of reg 60 and the characterisation of the legal fees included in the judgment sum, the correct

amount of the judgment in favour of the respondent would be $7,019.64. Accordingly, the outcome of the appeal should be that the amount of the judgment in favour of the respondent is reduced to $7,019.64.

124 Although, in our view, there may be reason to question whether the amount of $715 charged by the respondent's solicitors for reviewing documents and drafting a letter of demand is not itself costs of, or incidental to, the proceedings, and therefore not a proper subject of an award of damages, the appellant did not seek to appeal against the inclusion in the amount awarded of the legal costs not associated with the mediation. Accordingly, we do not disturb the decision to the extent that it included that amount in the judgment sum.

125 We are satisfied that the decision of the Tribunal to order payment to the respondent of the costs associated with the mediation was not fair and equitable and against the weight of evidence and that the appellant will suffer a substantial miscarriage of justice if that decision is not reversed. If we had not concluded that the Tribunal had made an error with respect to a question of law, we would nevertheless have granted leave to appeal to raise that issue.

126 The consequence of our conclusion concerning the appeal in respect of the substantive decision is that the costs decision must be set aside. The Appeal Panel is not in a position to determine the appropriate allocation of the costs of the first instance proceedings, if only because we have not been provided with a copy of the *Calderbank* letter upon which the Tribunal relied.

127 Consequently, that issue must be remitted for determination to the Consumer and Commercial Division of the Tribunal, preferably constituted by the same member.

128 We will make directions for the exchange of submissions concerning the costs of the appeal. We note in that context, that the parties accepted that rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) did not apply to the first instance proceedings. Since rule 38 did not apply at first instance, rule 38A does not apply to the appeal, and special circumstances are necessary before we could make an order in respect of the costs of the appeal.

129 We have effectively upheld grounds 1(a) and 1A raised by the Further Amended Notice of Appeal. Ground 1A, in reality, did no more than re-state ground 1(a) in different words. We do not consider that the inclusion of ground 1A could have caused any additional costs or any costs to be thrown away. Accordingly, we do not make any order in relation to costs thrown away by reason of the further amendment of the Notice of Appeal at the commencement of the hearing.

ORDERS

130 Our orders are:

(1) To the extent necessary grant leave to appeal;

(2) Allow the appeal;

(3) Vary order (1) made on 30 May 2023 in proceedings SC 22/47837 by substituting the sum of $7,019.64 for the sum of $10,169.29;

(4) Set aside the decision on costs made on 12 July 2023 in proceedings SC 22/47837;

(5) Remit to the Consumer and Commercial Division of the Tribunal all questions of costs of proceedings SC 22/47837 for consideration in light of this decision.

(6) Either party may, within 14 days of the date of publication of these reasons, file and serve submissions, not exceeding five pages, and any evidence relied upon in support, seeking an order in relation to the costs of the appeal.

(7) If either party files submissions pursuant to order (6), the other party may file and serve submissions not exceeding five pages in response to any such submissions, and any evidence relied upon in support, within a further 14 days.

(8) Any submissions filed in accordance with orders (6) and (7) should address the issue whether the question of costs can be determined on the basis of the written submissions and without a further hearing.

(9) If neither party files submissions in accordance with order (6) there will be no order in relation to the costs of the appeal.

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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