

AUSTRALIA / JUDGMENT

# Amin Homes Hadiqat Woolgen Pty Ltd v Anwar

**[2026] NSWSC 735****COURT**

Supreme Court

**DECIDED**

24 September 2026

**BEFORE**

Pike J

**CASE / FILE NUMBER**

2023/00239222

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**Source record****Supreme Court  
New South Wales****Medium Neutral Citation:** Amin Homes Hadiqat Woolgen Pty Ltd v Anwar [2026] NSWSC 735**Hearing dates:** 17 September 2026**Date of orders:** 24 September 2026**Decision date:** 24 September 2026**Jurisdiction:** Equity - Real Property List**Before:** Pike J**Decision:** (1) The defendants pay Birchgrove Legal the sum of \$9,110 (inclusive of GST).  
(2) The defendants and Birchgrove Legal pay their own costs of the motion filed 9 June 2026.**Catchwords:** COSTS — subpoenas — motion seeking access to documents produced under subpoena — costs and expenses of compliance — privilege claims belonging principally to former client — former solicitors no longer acting for plaintiff — whether former solicitors were a necessary party to the motion — whether conduct of former solicitors disentitled them to compliance costs — assessment of reasonable loss or expense on a broad brush basis**Legislation Cited:** Uniform Civil Procedure Rules 2005 (NSW), rr 33.11, 42.33**Cases Cited:** The Checkout Pty Ltd v Cordell Jigsaw Productions Pty Ltd (No 8) [2021] NSWSC 703**Texts Cited:** Nil**Category:** Procedural rulings

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**Parties:** Amin Homes Hadiqat Woolgen Pty Ltd (Plaintiff)  
Nadeem Anwar (First Defendant)  
Rabiya Zaghham (Second Defendant)  
BG Legal Consultants Pty Ltd (t/as Birchgrove Legal) (Respondent on motion)

**Representation:**

**Counsel:** M Connor (Applicant on motion)  
B Millington (Respondent on motion)

**Solicitors:** Marsdens Law Group (First and Second Defendants/Applicants on motion)  
Birchgrove Legal (Respondent on motion)

**File Number(s):** 2023/00239222

**Publication restriction:** Nil

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## JUDGMENT

This is a dispute about the costs of compliance with a subpoena issued at the request of Nadeem Anwar and Rabiya Zaghham (the defendants) to the former solicitors (Birchgrove Legal) of Amin Homes Hadiqat Woolgen Pty Ltd (the plaintiff), together with the costs of a motion filed by the defendants in connection with access to documents produced in response to that subpoena, over which a claim for privilege was made.

By any standards, the quantum of costs in dispute is not large. At most, it is in the order of \$30,000.

As is so often the case where there is a dispute about costs, and the amount at issue is not very large, considerable costs are then incurred in preparing for and subsequently arguing, about who should pay the underlying costs. The present case is no different and is perhaps at the extreme end of the spectrum.

When the matter was listed before me on 6 August 2026, and the likely quantum of costs in dispute between the parties became apparent, I sought to indicate to the parties that the Court would deal with the question of costs on a final basis in an efficient way, so as to minimise the further costs. I made directions for the matter to be ready for argument on 10 September 2026. However, due to the sudden unavailability of counsel for one party on that day, the argument could not proceed. Prior to 10 September 2026, I had received a court book from the parties totalling 541 pages. This included two affidavits on behalf of the defendants, and four affidavits on behalf of Birchgrove Legal. Written submissions from each of the defendants and Birchgrove Legal, totalling approximately 30 pages were included in the court book.

Shortly prior to the hearing on 17 September 2026, I received an entirely updated court book, which now totalled 550 pages. The additional pages were made up of additional correspondence sought to be relied upon on the costs argument.

I then heard oral argument for a little over an hour on 17 September 2026. I had intended to give an ex tempore decision, but was unable to do so given that I had a hearing commencing at 10am that morning.

Whilst I do not diminish the importance of the issue to the parties to the motion, questions of proportionality need to be kept firmly in mind.

### **A brief background**

These proceedings were commenced as long ago as July 2023. The plaintiff seeks to recover from the defendants amounts paid to them by the plaintiff by way of deposit and other amounts in relation to a contract for the sale of land (as varied) for a property at Leppington. The contract between the plaintiff and the defendants did not complete and the land was sold by the defendants to a third party.

On 18 March 2026, the defendants filed and served a subpoena issued to Birchgrove Legal which required production of:

- i) Any documents and/or conveyancing files held on behalf of the Plaintiff, Amin Homes Hadiqat Woolgen Pty Ltd and/or MH Affordable Homes on Woolgen Park Pty Ltd (MHAH) in respect of the land situated at 11 Woolgen Park Road, Leppington in the State of New South Wales (the Property) for the period 1 January 2021 to date (the Relevant Period).
- ii) Any contracts, agreements or deeds entered into or contemplated (including draft versions) by the Plaintiff and/or MHAH in respect of the transfer, assignment or novation of any interest in the Property for the Relevant Period.

On the same day the subpoena was served on the plaintiff.

Birchgrove Legal is a firm of solicitors which previously acted for the plaintiff, predominantly in respect of conveyancing matters.

In response to the subpoena, Birchgrove Legal ultimately produced a packet of partly redacted documents marked S-4, and a packet of documents said to be privileged, marked S-5.

On 9 June 2026, the defendants filed a motion naming Birchgrove Legal as the respondent seeking the following relief:

the production of unredacted copies of the documents contained within packet S-4; and

the parties are granted general access to the documents in packet S-5.

Prior to this occurring, there was a considerable amount of correspondence between the defendants' legal representatives and Birchgrove Legal. It is not necessary to provide a detailed chronology in relation to that correspondence. The following relatively brief summary suffices.

Birchgrove Legal initially engaged in correspondence with the defendants' solicitors in relation to the relevance of the subpoenaed documents. A copy of the pleadings was requested. This was initially refused but subsequently provided by the defendants' solicitors in order to avoid an argument on the point.

The parties then engaged in correspondence seeking to narrow the scope of the subpoena. The defendants did not agree to narrow the scope.

Birchgrove Legal then reviewed over 2,000 documents to identify those that were responsive to the subpoena and to confirm whether any potential claim of privilege arose. Two packets of documents were subsequently prepared, known as packets S-4 and S-5. Packet S-4 contains non-privileged documents and redacted partially privileged documents, and packet S-5 contains wholly privileged documents or complete copies of documents over which a partial claim for privilege was made. Those two packets were produced in response to the subpoena on 5 May 2026.

It is clear that, at that time, Birchgrove Legal was not acting for the plaintiff either in the proceedings generally, or in relation to the production of documents in response to the subpoena or any privilege claims in relation to those documents. The evidence suggests that there was no communication between Birchgrove Legal and the plaintiff prior to the production of documents.

On 6 May 2026, the defendants' solicitors wrote to Birchgrove Legal noting that they had attended at the return of subpoena listing earlier that day and that there had been no appearance on behalf of Birchgrove Legal at the listing. The letter also went on to assert that it appeared to the defendants' solicitors that Birchgrove Legal had asserted "a claim for producer privilege over Packet S-5", which the defendants' solicitors stated was "misconceived, noting that there [was] no basis upon which [Birchgrove Legal's] client could make any claim for privilege over the materials produced in respect of a third party in response to the Subpoena."

The letter also put Birchgrove Legal on notice that if the claim for privilege "[was] not withdrawn" they anticipated receiving instructions to file a notice of motion seeking general access to the material provided.

After receipt of this letter, Birchgrove Legal contacted representatives of the plaintiff to seek instructions on whether the plaintiff sought to maintain privilege over the documents produced in packet S-5. Instructions were received that the plaintiff wished to maintain privilege over those documents, and that it would be instructing its then solicitors, Lyons Law Group (Lyons Law) to defend the claim for privilege.

On 12 May 2026, Birchgrove Legal wrote to the defendants' solicitors, in the following terms:

1. We refer to the abovementioned proceeding, previous correspondence between our offices and the definitions adopted therein.
2. We refer to your letter to us dated 6 May 2026 and write to respond as follows.

3. As previously indicated, we disagree with the position adopted in your letter that that we are unable to claim privilege over the materials produced pursuant to the Subpoena.
4. We understand that you intend to file a notice of motion seeking general access to the material produced in Packet S-5.
5. The material produced in Packet S-5 can be broadly categorised as follows:
  - a. documents over which our client may assert privilege (for ex: documents that include communications between us and our client, etc.); and
  - b. documents which otherwise contain privileged information in relation to our client's matter (for ex: internal communication between our firm with respect to our client's matter, communications between our firm and third parties with respect to our client's matter, etc.)
6. We are not presently instructed that our clients intend to waive privilege over the documents described in 5.a. above. Further, we are not presently instructed to consent to privilege being waived over the documents described in 5.b. above.
7. Nevertheless, to assist you in understanding the basis on which privilege is claimed over those documents, we have prepared a schedule of documents to assist you in discerning the basis on which privilege is claimed over the documents described in 5.b. above. That schedule is enclosed.
8. Further, and for clarity, we acted for Amin Homes Hadiqat Woolgen (ACN 648 134 374) (previously known as MA Signature Homes Pty Ltd) (Amin Homes) on the purchase of the Property (as defined in the Subpoena). We also acted for MH Affordable Homes on Woolgen Park Pty Ltd (ACN 626 654108) (MH Woolgen) on a proposed sale agreement between Amin Homes and MH Woolgen.

We will shortly write to you with respect to our costs of complying with the Subpoena.

All our rights are otherwise reserved.

(Emphasis added.)

The attached schedule listed some 128 documents. The schedule included the following text prior to the documents being listed:

### **Subpoena Packet S-5 - Schedule of Documents**

The documents enumerated in this schedule are in the custody of BG Legal Consultants Pty Ltd (t/as Birchgrove Legal), being the recipient of the subpoena issued by the Defendants on 18 March 2026.

The documents enumerated in this schedule were produced in response to the Subpoena in one folder and was marked as privileged. That folder has been marked Packet S-5.

Birchgrove Legal:

- (a) claims client-legal privilege over these documents on the grounds set out in this Schedule; and
- (b) asserts confidentiality over these documents on the grounds set out in this Schedule.

Client legal privilege is claimed pursuant to ss 118 and/or 119 of the Evidence Act (NSW). The dominant purpose of each communication identified below was in relation to obtaining legal advice or use in actual or reasonable anticipation litigation.

Confidentiality has been maintained and no waiver (expressed or implied) has occurred.

(Emphasis added.)

Whilst the schedule included headings for “Document Title”, “Document Type” and “Basis”, in a number of cases only very general titles were given – for example “21-2361.msg” and “21-2361.Documents Lodged.msg”. The “Basis” stated appears to be either “Privileged communication within Birchgrove Legal for the dominant purpose of Birchgrove Legal providing the plaintiff with legal advice” or “Privileged communication between Birchgrove Legal and a third party for the dominant purpose of Birchgrove Legal providing the plaintiff with legal advice”.

The defendants’ solicitors subsequently wrote to Birchgrove Legal contending that the schedule was deficient. On 21 May 2026, Birchgrove Legal responded to the effect that they were “presently in the process of obtaining instructions from our client on the carriage of the privilege dispute”. On 25 May 2026, the defendants’ solicitors wrote a letter requesting a response to the 15 May letter. No substantive response was received.

The motion was filed on 9 June 2026.

On 10 June 2026, the Court made orders listing the motion for directions at 9.30am on 30 June 2026 before the Registrar in Equity, and requiring, relevantly, Birchgrove Legal to be in a position to explain at the hearing succinctly to the Court why the relief was opposed, including if there was any aspect of the relief that was not opposed.

On 15 June 2026, Birchgrove Legal wrote to the defendants’ solicitors contending that the motion was misconceived, was liable to be struck out and should otherwise be withdrawn. The letter relevantly stated:

We note that our firm does not hold instructions to act for our clients in respect of the privilege claim. We confirm that the firm currently acting for the clients in this proceeding act for our clients in respect of the privilege claim and have been notified of the Motion as well as of the Subpoena.

The letter also contended that the plaintiff, rather than Birchgrove Legal, was the proper respondent to the motion. A further letter was sent by Birchgrove Legal to the defendants’ solicitors dated 23 June 2026 requesting a response to the 15 June letter.

On 30 June 2026, a solicitor from Lyons Law appeared at the directions for the motion, purporting to hold instructions to appear on behalf of both the plaintiff and Birchgrove Legal. On this occasion, orders were made for the plaintiff to file and serve any affidavit regarding privilege by 14 July 2026 and the proceedings were stood over to 29 July 2026. The plaintiff was ordered to pay the defendants' costs of that day.

On 17 July 2026, Lyons Law filed a notice of ceasing to act on behalf of the plaintiff.

On 20 July 2026, the motion was stood over to the Real Property List Judge on 6 August 2026.

On 28 July 2026, the defendants' solicitors received correspondence from a new law firm, Cordoba Legal (Cordoba) advising that they had been instructed to act on behalf of the plaintiff.

On the same day, the defendants' solicitors received correspondence from Birchgrove Legal that stated relevantly, that:

Birchgrove Legal had fully complied with the subpoena;

Birchgrove Legal was not the proper respondent to the motion; and

the pursuit of the privilege claim was a matter for the plaintiff.

On 31 July 2026, the defendants' solicitors sent an open letter of offer to the plaintiff's solicitors regarding the motion.

On 3 August 2026, Birchgrove Legal filed a submitting appearance and also served an affidavit on the question of costs.

On 5 August 2026, the plaintiff accepted the offer in relation to the motion.

On the morning of 6 August 2026, Cordoba appeared on behalf of the plaintiff and Birchgrove Legal appeared with respect to the motion. Orders were then agreed by consent whereby general access was granted to packets S-4 and S-5, the motion was stood over to 27 August 2026 with directions being made for any material in respect of costs to be filed and served.

The hearing of the costs dispute was then stood over to 10 September 2026, and again to 17 September 2026 in the circumstances I have outlined above.

#### Respective positions

Against that background, two issues arise for determination:

what costs, if any, are Birchgrove Legal entitled to for their reasonable costs of compliance with the subpoena; and

who should pay the costs of the motion.

In relation to the first issue, Birchgrove Legal seeks an order that the defendants pay its reasonable costs of compliance with the subpoena in the sum of \$21,700. The defendants contend that the Court should not award any costs of compliance because of what the defendants describe as disentitling conduct. Alternatively, it is contended that if the Court is minded to award Birchgrove Legal some costs of compliance, it would fix the amount in a sum not exceeding \$2,500 (inclusive of GST).

On the second issue, Birchgrove Legal seeks an order that the defendants pay its costs of the motion fixed in the sum of \$10,600. The defendants contend that the appropriate costs order is that Birchgrove Legal should pay the costs of the motion. It is contended that the defendants ultimately obtained the relief sought in the motion and costs should follow the event.

As set out above, I have had the benefit of nearly 600 pages of material in relation to the costs dispute. This included extensive written submissions from both Birchgrove Legal and the defendants together with oral submissions on 17 September 2026.

I have had regard to all of the material in determining what costs orders should be made. I do not propose to recite all of the submissions and material in these reasons, but rather propose to deal succinctly with the orders that I make and the reasons for those orders.

### **Compliance costs**

It was not in dispute that under r 33.11(1) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), the Court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with a subpoena. Under r 33.11(2) of the UCPR, the Court may fix that amount. Rule 42.33 of the UCPR provides that, unless the Court otherwise orders, an order must not be made under r 33.11 unless the Court is satisfied that the parties concerned have attempted, but failed, to agree on the amount to be paid. This last requirement is clearly satisfied in the present case.

There was no suggestion that costs calculated by reference to the hourly rates of the practitioners involved, were by their nature, incapable of constituting reasonable loss or expense within the meaning of r 33.11 of the UCPR.

I deal first with the contention of the defendants that Birchgrove Legal has somehow engaged in disentitling conduct. For the following reasons, I reject that contention.

As I understood the submissions made by the defendants, Birchgrove Legal is criticised for the approach it took in producing packets S-4 and S-5 to the Court. Reliance in this regard is based on the decision of Stevenson J in *The Checkout Pty Ltd v Cordell Jigsaw Productions Pty Ltd* (No 8) [2021] NSWSC 703 at [21]-[27], where his Honour stated that it was not appropriate for a subpoenaed party to redact documents prior to producing them to the Court. The appropriate procedure in such a case is to produce the documents in an unredacted form and then seek leave from the Court to redact the documents. Those statements by Stevenson J were made in the context of redaction on the grounds of confidentiality or relevance.

I do not regard anything said by his Honour as providing a basis to criticise the approach taken by Birchgrove Legal in the present case. His Honour made clear at [23] that, where there is a legally recognised claim to withhold documents, for example, privilege, the allegedly privileged parts may be “withheld by redaction until that claim is tested”. That is what Birchgrove Legal did in the present case. In packet S-4 it produced the documents over which no claim for privilege was made. Insofar as there was a partial claim for privilege over a document, a redacted version of the document was produced in packet S-4 and a complete (unredacted) copy of the document produced in packet S-5. I do not regard any of this as being in any way conduct out of the ordinary.

A further aspect of the allegedly disentitling conduct appears to be a contention that Birchgrove Legal improperly opposed access for almost six months. I do not accept this contention. Birchgrove Legal’s position was made relatively clear in the letter of 12 May 2026. In any event, it was also made clear after the motion had been filed. Whilst, as I state below, a submitting appearance should have been filed by Birchgrove Legal earlier than it was, I do not regard any of this conduct as disentitling Birchgrove Legal to its costs of compliance with the subpoena.

The defendants also relied on the fact that, before producing the documents, Birchgrove Legal had neither obtained instructions confirming that the plaintiff wished to maintain the claims of privilege nor required the plaintiff to review those claims. I do not accept that either matter provides a basis for denying Birchgrove Legal its reasonable compliance costs. Although Birchgrove Legal did not seek the plaintiff’s instructions before producing the documents, it subsequently did so, and the plaintiff confirmed that it wished to maintain privilege.

Birchgrove Legal was not acting for the plaintiff, either in the proceedings or in relation to any claim for privilege regarding the documents produced. In those circumstances, I do not think it was incumbent upon Birchgrove Legal to require the plaintiff to review and agree with the claim for privilege prior to the documents being produced. Birchgrove Legal was perfectly entitled to adopt the course that it did, of doing what it was required to do in order to maintain any claim for privilege that the plaintiff may have, and then leave it to the plaintiff to either make the claim or not.

The proper course was for the plaintiff, once the documents had been produced, to indicate whether it wished to maintain the claim for privilege. This did not occur, it would seem, until about 30 June 2026, after the motion had been filed.

Further, complaint is made that Birchgrove Legal failed to appear and produce documents on numerous occasions between 31 March and 5 May 2026, despite being required to do so under the compulsion of the subpoena. It is clear on the correspondence that Birchgrove Legal was not in a position to produce documents prior to 5 May 2026. The parties had been engaged in correspondence prior to then as I have set out above. I do not regard the failure of Birchgrove Legal to appear on the earlier return of the subpoena as a basis for denying it the costs of compliance with the subpoena. Had they appeared and indicated to the Court that they were not yet in a position to respond to the subpoena, this would only have added to the costs incurred by

Birchgrove Legal.

I now turn to consider what amount should be allowed by way of reasonable loss and expense. A detailed bill of costs has been prepared to support the amount claimed. The amount claimed appears to be a reduction on the amount which Birchgrove Legal contends was in fact expended in producing the documents. The costs may be broken down into stages, as follows:

costs incurred after the service of subpoena and prior to the provision of the pleadings - \$1,410;

costs incurred after provision of the pleadings and attempts to limit the scope of subpoena - \$5,645;

costs of reviewing documents, identifying potentially privileged material, and preparing and uploading the subpoena packets - \$6,110;

costs incurred after the production of the documents and prior to filing of the notice of motion - \$10,570.

Against this, the defendants' solicitor has made an affidavit which contends that, in his view, the appropriate costs of compliance with the subpoena are \$2,500 based on three hours for a junior solicitor and one hour for a partner.

I approach the question of the costs of compliance on a broad brush basis.

In circumstances where over 2,000 documents were required to be reviewed, I am satisfied that the costs that appear to have been incurred in actually reviewing and producing the documents should be allowed. These amount to \$6,110.

In relation to the costs incurred prior to the documents being reviewed, I am satisfied that an amount of \$1,000 should be allowed and no more. There is no reason why such extensive correspondence should have been engaged in, given the nature of the documents sought in the subpoena which were relatively straightforward.

In relation to the costs incurred subsequent to the production of documents in response to the subpoena, and prior to the filing of the motion, again I propose to allow a sum of \$1,000 on account of this category. In my view, the costs actually incurred, of over \$10,500, are not reasonable.

There are two matters that I would emphasise in this regard.

First, having reviewed the claims for privilege that were in fact made, it is quite difficult from the schedule provided, to make any assessment as to whether the claims were valid ones. The schedule does not really permit the issuing party to understand the basis on which the claims for privilege have been made. From the description of the documents, it is difficult to conceive how a claim could ever have been properly made in respect of a number of the documents. None of the claims were ultimately maintained and nothing was said on the hearing to seek to justify all of the claims.

Second, the costs that were incurred in relation to correspondence, seem to me to be at least partly due to the lack of precision in the letters from Birchgrove Legal as to exactly what privilege was being claimed, and on whose behalf. For example, the letter of 12 May 2026 appears to suggest, on one view of it, that some privilege was being claimed on behalf of Birchgrove Legal in addition to the claims being made on behalf of the plaintiff.

In relation to the final component of the costs claimed, namely the costs of preparing the affidavit, I propose to again allow \$1,000.

The total that I therefore allow for the reasonable costs of compliance is \$9,110 (inclusive of GST).

#### Costs of the motion

The principles in relation to costs are well known and need not be repeated. The Court has a broad discretion.

I do not think it is correct in the circumstances of the present case to approach the question of costs on the basis that the defendants have been successful in obtaining the relief sought and therefore the costs should follow the event. To do so would fundamentally mischaracterise what has occurred.

In my view, it was clear from the correspondence exchanged prior to the motion being filed, that the primary claim for privilege that was being maintained by Birchgrove Legal was on behalf of its former client, namely the plaintiff. So much should, in any event, have been apparent given paragraph 1 of the subpoena sought production of client files. Although Birchgrove Legal had physical possession of the unredacted documents, those unredacted documents had been provided to the Court in packet S-5.

In circumstances where it appears that the defendants were having difficulty in getting the plaintiff to engage either in the proceedings generally or in relation to the subpoena, it was appropriate for at least the plaintiff to be made a party to the motion.

Whatever doubt there may have been as to whether Birchgrove Legal was in fact making its own separate claim for privilege was, in my view, dispelled by the letter sent by Birchgrove Legal shortly after the motion was filed.

From this point on, on any view, Birchgrove Legal was no longer a necessary party to the motion. Whether and to what extent a claim for privilege was maintained was a matter for the plaintiff.

The short point is that it was not for Birchgrove Legal to resist the substantive relief sought in the motion; that was a matter for the plaintiff. The plaintiff was required to indicate whether it wished to maintain the claims of privilege and ultimately did not do so. That outcome does not mean that the defendants succeeded against Birchgrove Legal or that Birchgrove Legal should be ordered to pay the defendants' costs merely because it was named as a respondent to the motion.

There is therefore no basis, in my view, for a costs order to be made in favour of the defendants and against Birchgrove Legal.

Turning to the counter proposition, whether the defendants should be ordered to pay Birchgrove Legal's costs of the motion, it seems to me to be quite clear that once the motion had been filed, and Birchgrove Legal provided its letter dated 15 June 2026, a submitting appearance should have been filed by Birchgrove Legal. Indeed, counsel for Birchgrove Legal appearing on the motion did not contend to the contrary.

Turning to the costs incurred in relation to the motion prior to then, it seems to me that in large part, the motion was filed against Birchgrove Legal because of the uncertainty, having regard to the prior correspondence, of the basis on which the claims for privilege were made. As I have set out above, it seems to me that at least the plaintiff should, in the circumstances, have been a respondent to the motion. Having regard to the correspondence from Birchgrove Legal, including the letter of 12 May 2026 and the accompanying schedule, it is at least possible that Birchgrove Legal was in fact making a claim for privilege in its own right. In these circumstances I do not think that the defendants can be criticised for filing the motion and naming Birchgrove Legal as a respondent.

In these circumstances it seems to me that the appropriate order in relation to the costs of the motion is each party pay their own costs of the motion filed 9 June 2026.

## Orders

The Court orders that:

The defendants pay Birchgrove Legal the sum of \$9,110 (inclusive of GST).

The defendants and Birchgrove Legal pay their own costs of the motion filed 9 June 2026.

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24 September 2026

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