

AUSTRALIA / JUDGMENT

Deva v Lu

[2026] NSWLEC 114**COURT**

Land and Environment Court

DECIDED

01 September 2026

BEFORE

Pritchard J

CASE / FILE NUMBER

2025/00196193

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Land and Environment Court

New South Wales

Medium Neutral Citation: Deva v Lu [2026] NSWLEC 114**Hearing dates:** 6 August 2026**Date of orders:** 1/09/2026**Decision date:** 01 September 2026**Jurisdiction:** Class 4**Before:** Pritchard J**Decision:** The Court makes no order as to costs.

Catchwords: COSTS – applications pursuant to s 98 of the Civil Procedure Act 2005 that the Court make an order for costs of the substantive proceedings – Class 4 judicial review and civil enforcement proceedings – complying development certificate – consent orders requiring parties to carry out certain works but otherwise dismissing the proceedings – whether party acted unreasonably – reasonableness of commencement of proceedings – whether party surrendered or capitulated – no order as to costs

Legislation Cited: Civil Procedure Act 2005 (NSW) s 98
Environmental Planning and Assessment Act 1979 (NSW) ss 4.2, 4.31
State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (NSW) ss 3.2, 3.8, 3.9, 3.12, 3.15, Pt 3, Sch 6
Uniform Civil Procedure Rules 2005 (NSW) r 42.20

Cases Cited:	Australian Securities Commission v Aust-Home (2000) 101 FCR 548; [2000] FCA 270 Investments Ltd (1993) 44 FCR 194; [1993] FCA 585 Australiawide Airlines Ltd v Aspirion Pty Ltd [2006] NSWCA 365 Benjamin & Khoury Pty Ltd v Rahme (No 4) [2023] NSWSC 1162 Ford v Child Support Registrar [2009] FCA 328 Janssen v Qureshi (2022) 252 LGERA 50; [2022] NSWLEC 39 Jenkins v Hope [1896] 1 Ch 278 Kiama Council v Grant (2006) 143 LGERA 441; [2006] NSWLEC 96 Nadilo v Eagleton (2021) 250 LGERA 89; [2021] NSWCA 232 Nichols v NFS Agribusiness Pty Ltd (2018) 97 NSWLR 681; [2018] NSWCA 84 ONE.TEL Ltd v Deputy Commissioner of Taxation Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11 Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6 Rossi v Living Choice Australia Ltd [2015] NSWCA 244
Category:	Costs
Parties:	
Applicants:	Anand Deva (Applicant 1) Preeti Joshi (Applicant 2)
Respondents:	Zhen Lu (Respondent 1) Yousuf Awada (Respondent 2) Ho Studio Pty Ltd (Respondent 3)
Representation:	
Counsel:	N Eastman SC with A Hannam M Harker (Respondents)
Solicitor:	J Green (Applicants) J Huang (Respondent 1)
File Number(s):	2025/00196193
Publication restriction:	Nil

JUDGMENT

Introduction

On 22 May 2025, Mr Anand Deva (the first applicant) and Ms Preeti Joshi (the second applicant) (together, the applicants) commenced Class 4 proceedings in relation to a development comprising the demolition of existing structures and the construction of a new two storey dwelling with swimming pool at 6 Bulkara Road, Bellevue Hill (the property). The applicants sought:

a declaration pursuant to s 4.31 of the Environmental Planning and Assessment Act 1979 (EPA Act) that complying development certificate CDC 268854 (4424/03), as modified, issued by the second respondent Yousuf Awada (the second respondent) to the third respondent Ho Studio Pty

Ltd (the third respondent) on 24 February 2025 (the CDC), be declared invalid and of no effect, and an order restraining the first respondent Zhen Lu (the first respondent), by himself, his servants or his agents from acting upon, or carrying out any works in purported reliance on the CDC (referred to herein as the judicial review claim); and

a declaration that in breach of s 4.2 of the EPA Act, the first respondent has carried out works not in accordance with the CDC, any other development consent or complying development consent, and as exempt development, that have caused various forms of damage and an order requiring the first respondent, at its cost, to carry out adequate engineering and other works to ensure that there will be no further damage (referred to herein as the civil enforcement claim).

On 15 April 2026, the active parties signed consent orders (the consent orders). On 16 April 2026, I made orders in chambers by consent:

vacating the final hearing (order 1);

requiring the applicants to carry out certain works (orders 7 to 8 and 11);

requiring the first respondent to carry out certain works (orders 9, 13 and 15);

otherwise dismissing the summons (order 16); and

giving the parties liberty to apply for a costs order by 8 May 2026 (order 17).

A copy of the consent orders is at Annexure A to these reasons for judgment.

On 7 May 2026, the applicants filed a notice of motion seeking an order pursuant to s 98 of the Civil Procedure Act 2005 (NSW) (CPA) that the first respondent pay their costs of the proceedings (the applicants' costs motion).

On 8 May 2026, the first respondent filed a notice of motion seeking an order pursuant to s 98 of the CPA that the applicants pay the first respondent's costs of and incidental to the applicants' claims for judicial review (the first respondent's costs motion).

The two costs motions are the subject of these reasons for judgment.

Background

The first respondent is the registered proprietor of 6 Bulkara Road which is Lot 2 in DP 532144 (6 Bulkara Rd).

The applicants reside at 8 and 8A Bulkara Road which are Lots 1 and 3 in DP 532144 (8 Bulkara Rd and 8A Bulkara Rd respectively). The second applicant Preeti Joshi is the registered proprietor of 8 Bulkara Rd. 8 Bulkara Rd is located to the north of the applicants' property, and 8A Bulkara Rd is a battle axe predominantly to the west of the applicants' property.

In about early January 2024, the first respondent engaged Archiview Pty Ltd to prepare architectural plans for a proposed development on 6 Bulkara Rd involving the demolition of existing structures and the construction of a new two-storey dwelling with swimming pool.

On 18 July 2024, the second respondent issued a complying development certificate under Part 4 of the EPA Act numbered CDC 4424/01 for the demolition of existing structures and construction of a new two-storey dwelling with swimming pool at 6 Bulkara Rd. CDC 4424/01 approved a non-trafficable roof with landscaping and fixed windows on the first-floor. The third respondent was the applicant for the complying development certificate.

The second respondent has since modified the CDC on two occasions; first on 5 November 2024 (4424/02) again approving a non-trafficable roof and landscaping on the first-floor, although with operable windows or doors leading to the non-trafficable roof, and a change in facade and layout and location of pool. The most recent modification on 24 February 2025 (4424/03) also involved a change in facade and layout and location of pool. It approved a non-trafficable roof on the first-floor of a smaller footprint, landscaping and fixed windows leading to non-trafficable roof, and stamped architectural plans which did not show a roof terrace above the first-floor. That is the decision of 24 February 2025 which is the subject of the judicial review claim in these Class 4 proceedings.

The non-trafficable roof approved in each of the three CDCs is shown in the plans reproduced below.

The first CDC approved a non-trafficable roof shown below:

The second CDC also approved a non-trafficable roof shown below:

The third CDC approved a smaller, but also non-trafficable roof as shown below:

In or about February 2025, works commenced at 6 Bulkara Rd in purported reliance on the third CDC, CDC 4424/03.

On 12 February 2025 and 18 February 2025, the first applicant Mr Deva alleged to Mr Yunfan Wu (Mr Wu) of the first respondent's builder, Cassidis Design & Build Pty Ltd (Cassidis) that damage had occurred to 8 Bulkara Rd, including damage to the concrete pathway along the southern boundary of 8 Bulkara Rd, the side entry gate, cracking on the main house, cracking in the brickwork of the pool house, and cracking in the retaining wall near the pool house (along the western boundary).

The first applicant testified that on about 18 February 2025, Mr Wu “confirmed that he would do all the repairs including pool house brickwork, retaining wall near pool house and cracks in the main house”. In his affidavit of 6 September 2025, the first applicant (at [20]), referred to an email of 18 February 2025:

In that email I referred to damage sustained to the side entry gate to our home, and to the fact that the Builder had confirmed he would repair this immediately since it prevented us from accessing the side of our house. During a conversation on site, the Builder had confirmed that he would do all the repairs including pool house brickwork, retaining wall near pool house and cracks in the main house.

The following day, the certifier, the second respondent Mr Awada, carried out an inspection. Correspondence followed, including an email sent on 19 February 2025 by the second respondent to the first applicant stating “I believe you have discussed the damage with the builder and worked out an agreement”; and a response on 20 February 2025 by the first applicant “[a]lso noting for the record that the boundary fence, pavement, sandstone step, side gate and cracks to main building and pool house will now be repaired by the builder”.

The first applicant subsequently engaged a structural engineer who recommended demolition and reconstruction of the pathway.

On 11 March 2025, Woollahra Municipal Council (Council) determined to reject a development application, DA54/2025/1, lodged by the third respondent on 25 February 2025 in relation to 6 Bulkara Rd for alteration and/or additions to existing dwelling house and alteration and additions to a new two-storey dwelling house including the addition of a trafficable roof terrace with new PV panels, widening of driveway and removal of trees (DA54/2025/1).

On 8 April 2025, Mr Wu “recommend[ed] holding off on replacing the entire footpath until the new boundary fence is installed”. On 9 April 2025, the first applicant replied to Mr Wu in part:

As to the timing of replacement of both the pavement and the fence, which you have confirmed will be at your cost, I do understand that this would be better done towards the conclusion of your project but I will also be guided by the conclusion of the engineers as to the stability of the retaining wall.

Also on 9 April 2025, the first respondent lodged a development application, DA89/2025/1 for the proposed development at 6 Bulkara Rd which included the addition of a rooftop terrace (DA89/2025/1). On the same day, DA89/2025/1 was placed on exhibition. On 24 April 2025, the first applicant lodged an objection to DA89/2025/1 stating in part: “I have emails from the builder promising to repair the damage at the conclusion of the build”.

On 8 May 2025, the first applicant told Council (but not Mr Wu or the first respondent) that he intended to challenge the CDC in the Land and Environment Court.

On 13 May 2025, the applicants’ solicitors wrote to the second respondent raising concerns about the CDC issued on 18 July 2024 and acknowledging that a DA had been lodged for the rooftop terrace. On 20 May 2025, a similar letter was sent to the first respondent, except this time identifying that the issue was with the CDC issued on 24 February 2025 and giving close of business on 21 May 2025 as a deadline to respond.

On 19 May 2025, the first respondent’s solicitors replied relevantly that “Cassidis has reached agreement with your client in respect of repairing the damaged [sic] incurred on your client’s property”.

On 20 May 2025, the first applicants’ solicitors wrote to the first respondent’s solicitors asserting that the modified CDC was invalid and that the damage “had not yet been rectified”.

On 22 May 2025, the applicants filed a summons commencing these Class 4 proceedings seeking judicial review of the decision of the second respondent on 24 February 2025 to issue the CDC, as well as for civil enforcement relief under s 9.45 of the EPA Act (the summons). The grounds of challenge were that the CDC approved:

a rooftop terrace which cannot be complying development (ground 1);

a building containing walls on the rooftop level that exceeded the maximum building height (ground 2);

a building exceeding the maximum FSR for the site (ground 3);

a first-floor terrace that did not comply with certain standards (ground 4); and

a first-floor terrace that did not include privacy screens (ground 5).

Aside from the FSR ground (ground 3), the grounds related either to the alleged rooftop terrace (grounds 1 and 2) or the alleged first-floor terrace (grounds 4 and 5).

On 25 June 2025, the first respondent provided a response to the summons. In relation to the claims about damage, and after setting out some of the correspondence between the first applicant and the builder Cassidis, the first respondent's solicitors stated:

...Mr Lu is somewhat perplexed that your clients have taken the drastic step of commencing civil enforcement proceedings.

If some element of the agreement between your clients and Cassidis is unacceptable to your clients, Mr Lu is willing to work with your clients and the builder to resolve that. That requires your client first identifying what part of the arrangements for repairs they are unhappy about.

Again, that is something that could have been addressed without the need for proceedings had your clients made an approach to Mr Lu outlining their concerns with the arrangements earlier than 2 days before commencing proceedings.

The first respondent's solicitors' letter set out why each of the grounds for judicial review in the summons would fail; explained why no roof terrace and no first-floor terrace were approved by the CDC and therefore grounds 1, 2, 4, and 5 could not be made out; and made an offer according to the principles in *Calderbank v Calderbank* [1] to resolve the judicial review part of the proceedings on the basis that the first respondent would provide an undertaking to the applicants "not to construct a roof terrace under the modified CDC" and "to install plantings across the first-floor non-trafficable roof to provide your clients with certainty that it will be non-trafficable". The letter confirmed that the first respondent "has never applied for a CDC for a rooftop terrace; nor does he intend to build a rooftop terrace pursuant to a CDC"; that no rooftop or first-floor terrace was approved by the CDC; and that "the first-floor roof form shown on the first-floor is non-trafficable and intended to be non-trafficable; any privacy concerns arise from the use of a roof area that cannot be used".

The offer was not accepted, the first applicants' solicitors responding that they "reject your commentary".

On 27 June 2025 and 3 July 2025, the second and third respondents filed submitting appearances save as to costs.

On 5 August 2025, DA89/2025/1 was refused. Also on 5 August 2025, Council issued a Stop Work Order to the first respondent.

On 22 August 2025, the applicants filed an amended summons (the amended summons) seeking declaratory relief and consequential orders to the following effect:

a declaration pursuant to s 4.31 of the EPA Act that CDC 268854 (4424/03) issued by the second respondent to the third respondent on 24 February 2025 for the demolition of existing structures and construction of a new two-storey dwelling with swimming pool at 6 Bulkara Road, Bellevue Hill NSW be declared invalid and of no effect (Order 1);

an order restraining the first respondent, by himself, his servants, or his agents from acting upon, or carrying out any acts in purported reliance on the CDC (Order 2);

a declaration that in breach of s 4.2 of the EPA Act, the first respondent has carried out works not in accordance with: a. the CDC; b. any other development consent or complying development certificate; and c. as exempt development, at 6 Bulkara Road, Bellevue Hill NSW including works that caused damage to the applicants' property at 8 and 8A Bulkara Rd, being:

- d. construction of inadequate and improperly certified retaining walls on the northern boundary of 6 Bulkara Road, Bellevue Hill NSW (contained in Lot 2 DP532144) at a height of 900mm;
- e. inadequate engineering treatment, including shoring or retaining walls to support the change in level boundary in the location of the pool on the northern boundary of 6 Bulkara Road, Bellevue Hill NSW (contained in Lot 2 DP532144);
- f. installation of a rainwater tank on the rear boundary of 6 Bulkara Road, Bellevue Hill NSW (contained in Lot 2 DP532144) not in accordance with the plans approved under CDC 268854 (4424/03), as modified; and
- g. works that have caused:
 - i. the undermining of the southern side pathway of 8 Bulkara Road, Bellevue Hill, NSW (contained in Lots 1 DP 532144), causing the concrete path to crack and settle;
 - ii. the lateral displacement of an existing sandstone block retaining wall located along the eastern boundary of 8 Bulkara Road and within the property of 8 Bulkara Road, Bellevue Hill, NSW (contained in Lot 1 DP 532144);
 - iii. damage to the boundary fences between:

1. 6 Bulkara Road, Bellevue Hill, NSW (contained in Lot 2 DP532144) and 8 Bulkara Road, Bellevue Hill, NSW (contained in Lot 1 DP 532144); and
 2. 6 Bulkara Road, Bellevue Hill, NSW (contained in Lot 2 DP532144) and 8A Bulkara Road, Bellevue Hill, NSW (contained in Lot 3 DP 532144).
- iv. damage to the front side gate and cracking in the brickwork adjacent to the front side gate of 8 Bulkara Road, Bellevue Hill, NSW (contained in Lot 1 DP 532144), indicating movement and possible subsidence resulting from undermined footing support;
- v. cracking in the sandstone block steps located on the southern face of the residential premises at 8 Bulkara Road, Bellevue Hill, NSW (contained in Lot 1 DP 532144), indicating movement and possible subsidence resulting from undermined footing support;
- vi. cracking in the rendered brick foundation wall on the southern facade of the residential premises at 8 Bulkara Road, Bellevue Hill, NSW (contained in Lot 1 DP 532144), indicating movement and possible subsidence resulting from undermined footing support; and
- vii. cracking in the rendering of the pool house located on the southern boundary of 8A Bulkara Road, Bellevue Hill (contained in Lot 3 DP532144).

(Order 3)

an order requiring the first respondent, at its cost, to:

- a. carry out adequate engineering and other works on the northern and western boundaries of 6 Bulkara Road, Bellevue Hill NSW (contained in Lot 2 DP532144) within 28 days of the date of the orders to ensure that there will be no further damage to the property located at 8 and 8a Bulkara Road, Bellevue Hill (contained in Lots 1 and 3 DP532144) and provide a report to the applicants within 28 days of completion of the works from an independent engineer certifying that those works have been carried out;
- b. remove the rainwater tank located on the western boundary of Bulkara Road, Bellevue Hill NSW (contained in Lot 2 DP532144) within 28 days of the date of the orders; and
- c. rectify the damage caused to the dwelling house, pool house and property at 8 and 8a Bulkara Road, Bellevue Hill (contained in Lots 1 and 3 DP532144) by the unauthorised works carried out at 6 Bulkara Road, Bellevue Hill NSW (contained in Lot 2 DP532144) within 28 days of the date of the orders.

(Order 4)

The amended summons identifies in relation to the judicial review claim the following grounds:

Ground 1 – Development of roof terrace as complying development not permitted – breach of s 3.2(1)(a) of the Codes SEPP;

Ground 2 – Maximum building height exceeded – breach of s 3.8 of the Codes SEPP;

Ground 3 – Maximum gross floor exceeded – breach of s 3.9(1) of the Codes SEPP;

Ground 4 – Development standards for first-floor terrace not met – breaches of s 3.12(2) and (3) of the Codes SEPP;

Ground 5 – Amenity development standards for first-floor rear terrace not met – breach of s 3.15(3) of the Codes SEPP; and

Ground 6 – CDC Mod 3 not able to be issued under Part 3 of Codes SEPP.

In relation to the civil enforcement claim, the amended summons identifies the following grounds:

Ground 1 – retaining wall height exceeded;

Ground 2 – unlawful installation of rainwater tank; and

Ground 3 – breaches of Schedule 6 Parts 2, 8 and 10 of the Codes SEPP.

On 2 September 2025, the first respondent's offer was made again.

On 8 September 2025, the first respondent filed a response to the amended summons.

On 12 September 2025, the applicants filed points of claim in relation to the civil enforcement claim.

On 26 September 2025, the first respondent offered to extend his undertaking to an undertaking not to use the first-floor terrace as a trafficable area.

On 8 October 2025, the first respondent filed points of defence denying the grounds of civil enforcement raised in the points of claim. In his points of defence, the first respondent pleaded that relief should not be ordered in respect of the civil enforcement claims, including in circumstances where “existing agreements are in place ... as to the repair of the alleged damage, and the applicants now seek to depart from those agreements”. The first respondent also raised an argument of estoppel premised on the existence of that agreement.

On 22 October 2025, the applicants filed points of reply to the points of defence to the civil enforcement claim. In their points of reply, the applicants denied that there was any existing agreement as to the repair of any of the damage. They provided particulars of various communications in relation to the repairs and their timing, but denied that they constituted an agreement.

On 25 February 2026, a third development application, DA439/2025/1, was approved.

On 12 December 2025, the proceedings were set down for final hearing on 21 to 22 April 2026. On 15 April 2026, the active parties signed the consent orders, including order 1 vacating the final hearing.

On 7 May 2026, the applicants filed their notice of motion seeking an order pursuant to s 98 of the CPA that the first respondent pay their costs of the proceedings. On 8 May 2026, the first respondent filed his notice of motion seeking an order pursuant to s 98 of the CPA that the applicants pay his costs of and incidental to the applicants' claim for judicial review.

On 15 May 2026 Preston CJ of LEC made the following orders in relation to the applications for costs:

In respect of the applicants' application for costs:

The first respondent is to file and serve any evidence and submissions by 28 May 2026.

The applicants are to file and serve any evidence and submissions in reply by 18 June 2026.

In respect of the first respondent's application for costs:

The applicants are to file and serve their evidence and submissions by 4 June 2026.

The first respondent is to file and serve any evidence and submissions in reply by 25 June 2026.

Both costs applications are listed for a 1 day hearing on 6 August 2026.

The parties have liberty to restore on three working days' notice.

The hearing of the two costs motions was listed before me on 6 August 2026.

Evidence and written submissions

The applicants' costs motion

In support of their motion for costs, the applicants read an affidavit of Julia Margaret Green affirmed 7 May 2026 and tendered Exhibit JMG-1 thereto, and read an affidavit of Julia Margaret Green affirmed 4 June 2026 and tendered Exhibit JMG-2 thereto.

In response to the applicants' motion for costs, the first respondent read an affidavit of Jianhua ("Justin") Huang affirmed 8 May 2026 and tendered Exhibit JH-1 thereto, read an affidavit of Jianhua ("Justin") Huang affirmed 29 May 2026 and tendered Exhibit JH-2 thereto, and read an affidavit of Jinhua ("Justin") Huang affirmed 7 July 2026 and tendered Exhibit JH-3 thereto.

The first respondent also tendered the following evidence that was filed in the substantive proceedings:

paragraphs 17 to 25 of the affidavit of Anand Deva dated 6 September 2025 and pages 203 to 205, 342 and 343 from Exhibit AD-1 thereto; and

pages 1 and 2 from Exhibit YW-1 to the affidavit of Yunfan Wu dated 8 October 2025.

The applicants relied on written submissions dated 7 May 2026.

The first respondent relied on written submissions dated 1 June 2026.

The applicants relied on written submissions in reply dated 18 June 2026.

The first respondent's costs motion

In support of his motion for costs, the first respondent relied on the same evidence as in relation to the applicants' motion for costs.

In response to the first respondent's application for costs, the applicants relied on the same evidence as in relation to their motion for costs.

The first respondent relied on written submissions dated 13 May 2026.

The applicants relied on written submissions dated 4 June 2026.

The first respondent relied on written submissions in reply dated 7 July 2026.

Relevant legislative provisions and principles

Section 98 of the CPA provides in relation to the Court's powers as to costs:

98 Courts powers as to costs

- (1) Subject to rules of court and to this or any other Act—
 - (a) costs are in the discretion of the court, and
 - (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
 - (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.
- ...
- (3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.
- (4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to—
 - (a) costs up to, or from, a specified stage of the proceedings, or
 - (b) a specified proportion of the assessed costs, or
 - (c) a specified gross sum instead of assessed costs, or
 - (d) such proportion of the assessed costs as does not exceed a specified amount.
- ...

The general power in s 98 is subject to the more specific provision in r 42.20(1) of the Uniform Civil Procedure Rules 2005 (UCPR) which provides:

- (1) If the court makes an order for the dismissal of proceedings, either generally or in relation to a particular cause of action or in relation to the whole or part of any claim, then, unless the court orders otherwise, the plaintiff must pay the defendant's costs of the proceedings to the extent to which they have been dismissed.

Legal principles

In *ONE.TEL Ltd v Deputy Commissioner of Taxation* [2] (One.Tel) Burchett J said at 553 of the distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs:

In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the court's discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs. In *Ex Parte Lai Qin*, McHugh J was careful to state (at CLR 624) that the principles with which he was concerned were those that “govern an application for costs when a party elects not to pursue an action because he or she has achieved the relief sought in the action either by settlement or by extra-curial means”.

In *Kiama Council v Grant*, [3] Preston CJ of LEC observed at [55] that the distinction drawn by Burchett J in *One.Tel* between the two types of cases could be used to explain the decisions in the Court to order or not to order costs in civil enforcement or judicial review proceedings in Class 4 of the Court's jurisdiction. At [80], the chief judge said:

[80] The principles that emerge from these cases are that in a civil enforcement or judicial review case where there has been no hearing on the merits:

(a) where one party effectively surrenders to the other party by:

(i) discontinuing without the consent of the other party; or

(ii) giving undertakings to the Court or submitting to the Court making orders against the party substantially in the terms or to the effect claimed by the other party; the proper exercise of the costs discretion will ordinarily be to make the usual order as to costs, unless there is disentitling conduct on the part of the other party; and

(b) where some supervening event or settlement so removes or modifies the subject of the dispute that no issue remains except that of costs, the proper exercise of the costs discretion will ordinarily be to make no order as to costs unless:

- (i) one of the parties has acted so unreasonably that the other party should obtain the costs of the action; or
- (ii) even if both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried so that the party should obtain the costs of the action.

A well-accepted form of disentitling conduct is where a party “obtains relief which the unsuccessful party had already offered in settlement of the dispute”: *Oshlack v Richmond River Council* [4] (*Oshlack*) at [69] (McHugh J). [5]

In *Nichols v NFS Agribusiness Pty Ltd* [6] (*Nichols*) Payne JA said at [30]:

- [30] If both parties to a proceeding which has been settled without a hearing on the merits have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings.

Nadilo v Eagleton [7] (*Nadilo*) involved an application by the applicant in Class 4 proceedings for an order that the respondents pay her costs after the parties agreed to consent orders, including an order that the proceedings be dismissed. The Court upheld an appeal in respect of the decision of the primary judge that each party pay their own costs. Brereton JA (Meagher JA agreeing) said at [7] and [9] to [10] (citations omitted):

- [7] UCPR, r 42.20, does not create a presumption, but is merely a default position. It reflects the general rule that costs follow the event: *prima facie*, if proceedings are dismissed, the plaintiff has lost. In exercising the discretion to “order otherwise”, the general rationale for costs orders provides important context, as does whether the formal disposition of the proceedings by dismissal truly reflects “the event”. Thus one circumstance in which the discretion to “order otherwise” may be exercised is where a discontinuance or dismissal is consequent upon a plaintiff having obtained practical extra-curial success, rendering the further prosecution of the proceedings pointless.

...

- [9] In *ONE.TEL Ltd v Commissioner of Taxation*, Burchett J explained that the approach endorsed in *Lai Qin* is applicable in cases involving compromise, where there is no clearly successful party, as distinguished from cases in which one party, after litigating for some time, effectively surrenders to the other, rendering further litigation unnecessary; and that in the latter type of case, the outcome is sufficient to justify an “order otherwise” without it being necessary to demonstrate unreasonableness:

...

- [10] In the present case also, there was a “clear winner”. The practical result of the case is that the machinery is now noise compliant, and the respondents are bound by order of the Court to keep it compliant in the future. There was no question of compromise; the respondents

simply ultimately surrendered: they undertook the works required to render the offending machinery compliant, and had it certified as compliant. Once they did so, the applicant had achieved what she had always sought in the proceedings, rendering further prosecution of the proceedings pointless.”

In Nadilo Preston CJ of LEC said at [85] and [93] that the applicants’ success is to be evaluated by looking to the substance of the outcomes sought and obtained by the applicant:

[85] The primary judge did seek to evaluate the applicant’s success in the proceedings, but did so by asking the wrong questions. The applicant’s success was to be evaluated not by a close comparison of the precise terms of the orders made by the Court by consent of the parties and the prayers for relief in the summons, but by looking to the substance of the outcomes sought and obtained by the applicant.

...

[93] The proper inquiry was to look to the substance not the form of the relief sought in the summons. When this is done, it can be clearly seen that the applicant succeeded in achieving in substance the relief she had sought. The present matter involved “a clear winner”, to use the words of Burchett J in *ONE.TEL Ltd v Commissioner of Taxation* (2000) 101 FCR 548 at [7].

In approaching the task of determining whether one party has effectively surrendered to the other, it is not permissible for the Court to undertake a hypothetical trial of the matter under the guise of a costs application in order to determine the likely outcome of the litigation: *Benjamin & Khoury Pty Ltd v Rahme* (No 4) [8] at [8], [76] (Chen J), citing inter alia *Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* [9] (Lai Qin) where McHugh J said at 624 (citation omitted):

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided.

See also *Australian Securities Commission v Aust-Home Investments Ltd* [10] where Hill J said at 200:

The relevance of this material must, however, be considered. I should say that both parties recoiled from submitting that I should, in the guise of determining how costs should be borne as between the parties, actually decide the merits of the original application. It should be noted that no witness was cross-examined and that a trial on the merits would undoubtedly have required me to form some view as to the credit of Mr and Mrs Bunt. It cannot, I think, be accepted that because Cooper J directed that affidavit evidence be adduced on the question of costs, his Honour contemplated that that evidence would involve contesting the merits of the initial application.

In *Janssen v Qureshi* [11] Pain J at [64] to [66] said in relation to the commencement of proceedings without notice as follows:

[66] The only evidence of direct communication between the parties before the commencement of proceedings was an oral conversation in May 2021. Commencement of proceedings without direct notice to the Respondents occurred on 15 September 2021. Doing so deprived them of an opportunity to respond by, for example, delaying building work related to the section of wall in dispute. I agree with the Respondents' submission that commencing legal proceedings against a neighbour including seeking an *ex parte* interim injunction is a substantial step that should not be undertaken without direct notice to them, unless the circumstances truly justify an *ex parte* application. The Applicants sought to demonstrate that commencement without notice was reasonable because of the Respondents' builder's and PCA's responses to their solicitor's letters conveying that work could proceed on the basis of the construction certificate, and the application for a crane permit. I don't need to resolve whether the builder was an agent for the Respondents. For the reasons given by the Respondents those circumstances do not remove the important pre-litigation step of notifying the intended respondents to litigation of the intention to commence proceedings in order to give them an opportunity to respond with the possibility of avoiding litigation. Work was not so imminent that no notice was justified.

[65] Further, no pre-litigation demand was made directly of the Respondents, a matter identified in *Nichols* as relevant context to take into account when considering costs. The Applicants very promptly provided an undertaking on 16 September 2021 that certain work would not be undertaken. Additional undertakings were given on 8 October 2021 and 5 November 2021. The Respondents wrote a letter dated 6 October 2021 to the Applicants which set out the entirety of their case. All these circumstances suggest strongly that the Respondents should have had the opportunity to negotiate with the Applicants before proceedings were commenced without notice to them.

The applicants' motion for their costs of the proceedings

Applicants' submissions on motion for their costs of the proceedings

The applicants submitted that the Court should order otherwise than to require them to pay the first respondent's costs of the proceedings, notwithstanding that the consent orders included an order for the dismissal of the proceedings. They submitted that r 42.20(1) does not create a presumption, but is a starting point which may be displaced by a discretionary decision: *Australia-wide Airlines Ltd v Aspirion Pty Ltd* [12] at [53] (Bryson JA) (Basten and McColl JJA agreeing). They submitted that one circumstance that has been accepted as bearing upon whether a court should order otherwise than that the plaintiff pay the defendant's costs of dismissed proceedings is where a party litigates for a period and then, in effect, surrenders or capitulates to the other. That will usually be a basis to award costs against the party that surrendered or capitulated.

The applicants submitted that the formal disposition of the proceedings by dismissal (order 16) did not truly reflect “the event” (Nadilo at [7]) such that it would be inappropriate to order pursuant to the “default position” in r 42.20(1) of the UCPR that the applicants pay the first respondent’s costs of the proceedings. To the contrary, in agreeing to the entry of the consent orders, the first respondent effectively surrendered to the applicants, or capitulated, in the proceedings as a whole. That the first respondent effectively surrendered or capitulated in the civil enforcement part of the proceedings could, the applicants submitted, be appreciated by comparing the substantive relief sought in the amended summons to the terms of the consent orders. Of the substantive relief sought in the amended summons, only the restraint in prayer 2 and the removal of the rainwater tank in prayer 4(b) were not addressed by the consent orders. The balance of the substantive relief claimed by the applicants was encapsulated by the consent orders such that those orders were properly described as being substantially in the terms or to the effect claimed by the applicants: *Kiama Council v Grant* at [80(a)(ii)].

In relation to the northern boundary of 6 Bulkara Road, in the amended summons the applicants sought an order (prayer 4(a)) that the first respondent carry out “adequate engineering and other works on the northern ... boundar[y] of 6 Bulkara [Rd] ... to ensure that there will be no further damage to the property located at 8 ... Bulkara [Rd]”. That order was sought in circumstances where the applicants said that earthworks had been carried out on or adjacent to the northern lot boundary of 6 Bulkara Rd which were more than 600mm below the existing ground level, such that the first respondent was required by s 3.30(7) of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) to provide support for those earthworks in the form of a retaining wall or other structural support. [13] The consent orders required the first respondent to install new piles along the common boundary of 6 Bulkara Rd with 8 Bulkara Rd, and to reduce the existing concrete sleepers adjacent to the northern boundary of 6 Bulkara Rd to ground level (order 9(a) and (b)).

Further, the applicants submitted, although the first respondent was not required to provide engineering certification to the applicants for the works, as sought by in prayer 4(a) of the amended summons, order 12 of the consent orders permits the applicants’ engineer to carry out four inspections of the works at the first respondent’s cost while the works are being carried out. Furthermore, the consent orders require the parties’ respective engineers to confer and finalise an engineering design, scope and sequencing for the works (orders 2(a) and 3).

In relation to the western boundary of 6 Bulkara Rd, the applicants submitted that the consent orders (order 9(d), (e) and (f)) required the first respondent to carry out the following works on or adjacent to the western boundary of 6 Bulkara Rd, being the boundary with 8A Bulkara Rd: (1) excavate a safe batter near the western boundary; (2) dismantle the existing sandstone blocks along and within the boundary; and (3) construct a core-filled block wall along the boundary with toe footing onto 8A Bulkara Rd. The applicants submitted that those works meet the description of “adequate engineering and other works on the ... western boundar[y] of 6 Bulkara [Rd] ... to ensure that there will be no further damage to the property located at ... 8A Bulkara [Rd]” (prayer 4(a)). As in the case of the piling works on the northern boundary of 6 Bulkara Rd, although the

first respondent was not required to provide engineering certification to the applicants for the works, the consent orders provide for an engineering design and inspection regime in relation to the works (orders 2(c), 5 and 12).

In relation to rectification of damage to the applicants' property, the applicants submitted that prayer 4(c) sought an order requiring the first respondent to rectify the damage caused to the dwelling house, pool house and property at 8 and 8A Bulkara Rd by unauthorised works on 6 Bulkara Rd. The unauthorised works were the works referred to in prayer 3(g), being works which the applicants said caused damage to each of the items of property in prayer 3(g)(i) to (vii). Paragraph 24 of the POC alleged that the first respondent had carried out earthworks causing damage to buildings on lots adjoining 6 Bulkara Rd in breach of cl 10 of Sch 6 of the Codes SEPP. The applicants submitted that the consent orders require the first respondent to rectify the damage to all of those items of property, and, in particular, the first respondent is required to:

construct a new concrete pathway and associated capping beam on 8 Bulkara Rd immediately adjacent to its southern boundary with 6 Bulkara Rd (order 9(c)). That is the southern side pathway referred to in prayer 3(g)(i). The consent orders provide for an engineering design and inspection regime in relation to the works (orders 2(b), 4 and 12);

dismantle the existing sandstone blocks along and within the western boundary of 6 Bulkara Rd with 8A Bulkara Rd and construct a new core-filled block wall on the boundary (order 9(e) and (f)). The existing sandstone blocks form part of the sandstone block retaining wall referred to in prayer 3(g)(ii);

construct new timber fences along the northern and western boundaries of 6 Bulkara Rd (order 9(g)). The boundary fences are referred to in prayer 3(g)(iii);

remove and re-install the front side gate and repair the adjacent brickwork (order 13(a)), being the gate and brickwork referred to in prayer 3(g)(iv);

remove and re-install on a mortar bed the sandstone block steps on the southern facade of the dwelling at 8 Bulkara Rd (order 13(b)), being the steps referred to in prayer 3(g)(v);

rectify cracking to the rendered brick foundation wall on the southern façade of the dwelling at 8 Bulkara Rd (order 13(b)), being the wall referred to in prayer 3(g)(vi); and

repair cracking in the rendering of the pool house at 8A Bulkara Rd (order 13(c)), being the pool house referred to in prayer 3(g)(vii).

The applicants submitted that the damage to the front side gate and adjacent brickwork, sandstone block steps, rendered brick foundation wall and pool house rendering was documented in the photographs behind Annexure C to the consent orders all of which, with the exception of photograph 1a, were taken from the expert report of Mark Lindsay filed by the applicants on 17 November 2025.

In relation to the judicial review part of the proceedings, the applicants accepted that the consent orders did not include an order invalidating the CDC (as was sought in prayer 1 of the amended summons) or a consequential order restraining the first respondent from acting upon or carrying out any works in purported reliance on the CDC (as was sought in prayer 2). The applicants had alleged (ground 6) that the second respondent had no power to issue the CDC in circumstances where the approved development on 6 Bulkara Rd contravened development standards and other requirements in the Codes SEPP in that:

it sought to approve the erection of a roof terrace on the top most roof of the dwelling in contravention of s 3.2(1)(a) (ground 1);

the dwelling exceeded the 8.5m maximum height limit in s 3.8 (ground 2);

the dwelling exceeded the maximum gross floor area permitted under s 3.9(1) (ground 3);

the first-floor terrace exceeded the maximum height limit for the floor level, as well as the maximum total floor area, under s 3.12(2) and (3) (ground 4); and

the first-floor terrace did not include a privacy screen as required under s 3.15(3) (ground 5).

Whilst the consent orders do not include any order invalidating the CDC or restraining the first respondent from carrying out works pursuant to it, the applicants submitted that nonetheless several of the concerns underlying their claims in the judicial review part of the proceedings had been addressed by either the consent orders “or the first respondent’s conduct”. In several respects, the first respondent had also effectively surrendered or capitulated in the judicial review claim. In substance, the applicants achieved several of the outcomes they sought to achieve in the judicial review claim which was submitted to be the appropriate measure of their success, as opposed to whether the applicants obtained relief precisely in the terms of the amended summons: Nadilo at [85] and [93].

In relation to ground 1 of the judicial review claim concerning the roof terrace, the applicants said that they raised ground 1 on the basis that the erection of a roof terrace on the top most roof of a building is not complying development under the Housing Code (s 3.2(1)(a) of the Codes SEPP). The first respondent denied that the CDC sought to approve the erection of a roof terrace, and pleaded that the approved architectural plans, being the only plans approved by the CDC, did not show any roof terrace. In the alternative, the first respondent pleaded that to the extent that the structural plans were approved by the CDC and showed a roof terrace, those plans were to be read down so as not to show any roof terrace. Although the first respondent denied that the CDC sought to approve the erection of a roof terrace, the first respondent caused two successive development applications to be lodged for proposed development at 6 Bulkara Rd which included the addition of a roof terrace. The first development application DA89/2025/1 was refused (on 5 August 2025), the second development application, DA439/2025/1, was approved (on 25 February 2026). On 5 August 2025 (the same day the first development application was refused), Council issued a Stop Work Order to the first respondent in relation to works to the roof terrace. The roof terrace that was ultimately approved was in substantially the same form as that shown on

structural plans S14.11 and S14.21. The applicants submitted that the first respondent's conduct in lodging two successive development applications for the erection of a roof terrace was an effective surrender or capitulation to ground 1, implicitly accepting that the roof terrace required development approval.

In relation to ground 2 of the judicial review claim that the dwelling house proposed under CDC exceeded the maximum building height permitted by s 3.8 of the Codes SEPP, the height exceedance being caused by the rooftop terrace, the first respondent denied the height exceedance. Again, the applicants submitted that the first respondent's subsequent conduct involved an effective surrender or capitulation in respect of ground 2.

In relation to ground 4 of the judicial review claim that the "non-trafficable roof" located off Bed 5 to the rear of the approved dwelling was a terrace for the purposes of the Codes SEPP and that there was a failure to comply with the development standards for maximum height of the floor level of a terrace and maximum floor area in s 3.12(2) to (3) of the Codes SEPP, the first respondent denied that the non-trafficable roof was a terrace, including on the basis that it was inaccessible as the first-floor windows overlooking it were fixed. The first respondent did not admit the alleged breaches of s 3.12(2) to (3) of the Codes SEPP.

In relation to ground 5 of the judicial review claim which was premised on the "non-trafficable roof" being a terrace and alleged a failure to install a privacy screen at the edge of the terrace as required by s 3.15(3) of the Codes SEPP, the first respondent denied the allegation, including on the basis that the "non-trafficable roof" was not a terrace and therefore s 3.15(3) of the Codes SEPP did not apply. However, the applicants submitted, order 15 of the consent orders requires the first respondent to carry out landscaping works on the first-floor non-trafficable roof (or terrace) generally in accordance with the landscaping plan and to replace existing sliding doors from a bedroom to the terrace with fixed windows (the latter being required by the CDC). Significantly, the applicants submitted, the first respondent denied that the non-trafficable roof was a terrace on the basis that it was inaccessible due to the first-floor windows being "fixed". However, order 15(b) of the consent orders requires the removal of existing sliding doors on Bedroom 5 and the installation of fixed windows in that bedroom, as per the CDC. The applicants' privacy concerns underlying grounds 4 and 5 were addressed by order 15 of the consent orders in that the non-trafficable roof will no longer be accessible, and screening will be provided by the landscaping works. For that reason, the first respondent effectively surrendered or capitulated in respect of those grounds.

The applicants submitted that there was no good reason why the Court ought not require the first respondent to pay their costs of the proceedings. Where one party has after litigating for some time effectively surrenders to the other, there will commonly be lacking any basis for an exercise of the court's discretion otherwise than by an award of costs to the successful party: *One.Tel* at 553. The exercise of the costs discretion will ordinarily be to make the usual order as to costs, unless there is disentitling conduct on the part of the other party: *Kiama Council v Grant* at [80].

First respondent's submissions on the applicants' motion for their costs of the proceedings

In relation to the applicants' motion for costs, the first respondent submitted that it was unnecessary and unreasonable for the applicants to have commenced the Class 4 proceedings on 22 May 2025. Before the proceedings were commenced, the first respondent's builder Cassidis had agreed to rectify the alleged damage. The proceedings were commenced without appropriate pre-litigation warning, and within one month of commencement, the first respondent had made an offer to resolve the judicial review claim that reflected the final outcome. Where proceedings have settled without a hearing on the merits, and the parties have acted reasonably, the proper exercise of discretion will usually be that the parties bear their own costs: *Nichols* at [30] (Payne JA).

The typical exceptions were submitted to be when one party has effectively surrendered to the other; and one party was almost certain to have succeeded or a party has acted so unreasonably that the other party should obtain its costs: *Lai Qin* at 624 to 625; *One.Tel* at [6]; *Kiama Council v Grant* at [78]. Even if one of those exceptions is satisfied, they are subject to disentitling conduct by the party who otherwise would have recovered: *Kiama Council v Grant* at [80]. Here, ultimately, there was no surrender, the first respondent is simply doing under the consent orders what his builder was originally going to do, and the relief ordered aligned with one his pleaded defences of estoppel. The conduct of the applicants should also disentitle them from an order for costs, the outcome putting them essentially in no better position than if they had not commenced the proceedings.

The first respondent accepted, at least in respect of the civil enforcement element of the proceedings, that the applicants obtained most of the relief that they sought. However, it was what had already been offered. Moreover, the first respondent alleged in his points of defence that the applicants were estopped from seeking rectification of almost all the works before the conclusion of the build on No 6 Bulkara Rd. The relief ordered effectively provided for rectification at about that time. That was a measure of success by the first respondent, not a capitulation. What the applicants' submissions also failed to convey was the element of compromise in the orders for rectification, particularly with respect to the western sandstone wall. That structure, and the existing fence, encroached onto the first respondent's property: the retaining wall by 25 to 34 cm; and the fence by up to 70cm inside the boundary. The applicants' pool house also encroached over the boundary. The first respondent submitted that the consent orders provided for the removal of all those encroachments; in relation to the pool house, at the cost of the applicants. The removal of those encroachments and reclamation of the better part of a metre of land was a gain for the first respondent.

That was not the only benefit to the first respondent. The challenge to the CDC was dismissed. That was a point on which the applicants capitulated. Where the parties have reached a compromise, the usual result will be that each party bears their own costs, unless one party has acted unreasonably: *Lai Qin* at 624 to 625.

It was put against the first respondent that his conduct in lodging two successive development applications for the erection of a roof terrace was an effective surrender or capitulation to ground 1. The same was put on ground 2. What the submission failed to appreciate was that the first respondent first lodged a development application, DA54/2025/1, for a rooftop terrace on 25 February 2025, a day after the CDC was issued on 24 February 2025, and days before the first applicants' solicitors first raised a concern about the validity of the CDC with the second respondent, the certifier Mr Awada. That conduct was submitted to be entirely consistent with the first respondent's position that a rooftop terrace was never approved by the CDC; otherwise, there would have been no need for him (unprompted by anything said by the applicants) to lodge a development application.

In relation to grounds 4 and 5, it was put that "the Applicant's privacy concerns are addressed by order 15 of the consent orders in that the non-trafficable roof will no longer be accessible, and screening will be required by the landscaping works". Order 15 required relevantly landscaping to be carried out in accordance with a specified plan on the first-floor non-trafficable roof; and the fixing of windows facing that roof "in accordance with Complying Development Certificate no. 268854 issued by the Second Respondent on 24 February 2025". The latter simply required the first respondent to comply with the CDC. The position that non-accessibility addressed the applicants' privacy concerns was submitted to "admit[] the first respondent's case that the CDC only approved a roof that was non-accessible". If anything, it was a capitulation by the applicants.

In relation to disentitling conduct, the first respondent submitted that before the commencement of the proceedings, his builder Cassidis had stated to the first applicant that he would repair the alleged damage towards the conclusion of the build, referring to an email of 18 February 2025. The first applicant confirmed the arrangement in correspondence to the second respondent on 20 February 2025, and to Council on 24 April 2025. The first applicant was "even willing to go along with the builder's suggestion (subject to any engineering advice to the contrary) for the repair works to be carried towards the conclusion of the build". The applicants were effectively in no better position now. The construction of the first respondent's home was approaching its conclusion, with practical completion expected to be achieved by the end of July 2026.

Further, the applicants commenced the proceedings without giving the first respondent reasonable notice. The applicants made no approach to the first respondent directly until two days before the proceedings were commenced. That approach demanded a proposal for rectification within one day. The problems could have been worked through without proceedings, and resolved in discussions between the parties. Ultimately, they were so resolved.

Applicants' submissions in reply on motion for their costs of the proceedings

In reply, the applicants referred to the first respondent's submission that before the proceedings were commenced, "[his] builder had agreed to rectify the alleged damage", and submitted that the "agreement" (referred to variously throughout the first respondent's submissions as an "understanding", an "arrangement" and "commitments to rectify") was also conflated with a settlement offer or offer to resolve the proceedings (subsequently made by the first respondent's

solicitors in the proceedings). The Court need not and should not resolve the dispute as to the existence of an agreement as between the applicants and the first respondent's builder in determining the costs application. To do so would be to undertake a hypothetical trial of the matter under the guise of a costs application.

In relation to the first respondent's submission that the removal of encroachments and reclamation of land was a gain/benefit for him and so the orders for rectification included an element of compromise, the applicants noted that none of the claims made in the proceedings, either by them or the first respondent, involved any issue of boundary encroachment. That the first respondent secured those benefits in relation to matters extraneous to the litigation as a term of settlement did not detract from the fact that he capitulated to the applicants' case.

In relation to the first respondent's submission that he first lodged a DA, DA54/2025/1, for a rooftop terrace on 25 February 2025, whereas the applicants' lawyers first raised a concern about the validity of the CDC with the second respondent on 13 May 2025 so that the lodgment of the DA was unprompted by anything said by the applicants and could not temporally be construed as a capitulation, the applicants submitted that the lodgment of DA84/2025/1, and the further lodgment of DA439/2025/1 (ultimately approved on 25 February 2026), was an effective surrender or capitulation to grounds 1 and 2 in the judicial review claim. It implicitly involved an acceptance on the part of the first respondent that the roof terrace, which he had constructed and which led to enforcement action being taken by Council, required development approval and could not be constructed as complying development.

First respondent's motion for his costs of the judicial review claim

First respondent's submissions on his costs of the judicial review claim

In his notice of motion filed on 8 May 2026, the first respondent only seeks a costs order in respect of the judicial review claim which he submitted was separable from the civil enforcement claim and clearly delineated in the amended summons. The first respondent submitted that the judicial review claim was resolved in a way such that the CDC remained in force and he could continue to build what had been approved. It was appropriate that he be awarded costs of the judicial review claim in circumstances where the applicants' conduct in commencing and continuing to prosecute the judicial review claim was unreasonable in multiple respects: they commenced the proceedings without giving appropriate pre-litigation warning; raised claims that could not have any practical utility given neither the first CDC nor the second CDC was challenged; did not accept reasonable offers to resolve the judicial review claim which were made early in the proceedings to the same or similar effect as the outcome; and ultimately capitulated in agreeing to orders that did not set aside the CDC nor provide a privacy screen to the first-floor. In the alternative, the first respondent submitted, each party should bear their own costs of the entirety of the proceedings. Referring to Nichols at [30], the first respondent submitted that where proceedings have settled without a hearing on the merits, and the parties have acted reasonably, the proper exercise of discretion will usually be that the parties bear their own costs. The typical exceptions to this are when one party has effectively surrendered to the other; one

party was almost certain to have succeeded; or a party has acted so unreasonably that the other party should obtain its costs: *Lai Qin* at 624 to 625; *One.Tel* at [6]; *Kiama Council v Grant* at [78].

In relation to the alleged failure to give sufficient pre-litigation warning, the first time that the first respondent heard that the applicants had a problem with any CDC was when he was copied into a letter from their solicitors dated 13 May 2025 to the certifier, the second respondent Mr Awada. That letter threatened a challenge to the first CDC, not the third CDC, and did not request any action by the first respondent. It was only on 20 May 2025, two days before the filing of the summons, that the applicants (through their solicitors) directly approached the first respondent and gave him one day to respond. Such failure can amount to unreasonable conduct sufficient to ground an order for costs against the commencing party; it is an important pre-litigation step to give the other party an opportunity to respond with the possibility of avoiding litigation: *Janssen v Qureshi* at [64] to [66]. A period of one day to consider a potential application for judicial review was not reasonable, providing insufficient time for a person to obtain advice and respond accordingly.

Nor was it reasonable to expect the first respondent to respond to a letter issued one week earlier not to him, but to the certifier, the second respondent Mr Awada, which did not request anything from him. About one month after the summons was served, the first respondent's solicitors provided a detailed response which set out his case, and included a proposal to resolve the proceedings. That response made clear the first respondent's position that the applicants' two fundamental concerns in their judicial review claim, the rooftop terrace and the use of a "terrace" on the first-floor, were not approved by the CDC; and that he had no intention of building or using them as such. The offer in respect of the judicial review claim was to provide an undertaking to the applicants "not to construct a roof terrace under the modified CDC"; and "to install plantings across the first-floor non-trafficable roof to provide your clients with certainty that it will be non-trafficable". The latter made it into the final consent orders and resolved the judicial review claim.

Had the applicants provided a greater (and reasonable) period of notice, then the position and offer could have been put earlier, and the proceedings in respect of the judicial review claim avoided. The first respondent was required to incur costs that could have been avoided if the applicants had made him aware of their concerns in relation to the CDC earlier, and it was unreasonable for them not to have done so.

In relation to what he said was the unreasonable prosecution of the judicial review claim, the first respondent submitted that this was not a case where an applicant for a CDC was seeking to argue that contentious parts of a development were approved. The first respondent's view (and the view of the certifier) was they were not, and he was not going to build them. The applicants were made aware of this on 25 June 2025. From that point in time, it was unnecessary for the applicants to continue to prosecute the proceedings. They had the benefit of clear representations, and it would have been unconscionable for the first respondent to depart from them. In that correspondence, the first respondent offered to provide an undertaking not to construct a rooftop terrace, and to install plantings along the first-floor area. The applicants did not accept the offer.

The Calderbank offer was reinstated on 2 September 2025. The applicants insisted upon the installation of a privacy screen, and again continued to prosecute the judicial review claim.

The first respondent submitted that such conduct was particularly unreasonable in circumstances where the final orders in respect of judicial review reflect what was offered by the first respondent (and not accepted by the applicants) on 25 June 2025 and again on 2 September 2025. The applicants did not do better than the first offer and continued to prosecute the proceedings for some 9 months knowing that the first respondent would not build a trafficable roof either on the rooftop or the first-floor under the CDC; why the first respondent said that neither was approved; and that the first respondent was prepared to give undertakings and propose landscaping to address any residual concerns of the applicants.

Further, the applicants only challenged the third CDC and if they had succeeded in obtaining the relief sought in the summons, then the third CDC would have been declared invalid. However, the first CDC and second CDC would have remained valid unless and until set aside by separate proceedings: *Rossi v Living Choice Australia Ltd* [14] at [45] (Basten JA). The first respondent submitted that this was significant, particularly with respect to grounds 4 and 5 concerning the alleged first-floor “terrace”.

The first respondent submitted that the effect of a declaration that the third CDC was invalid would have been that there was still an approved non-trafficable roof under the first and second CDCs. That roof would have been without the privacy screen that the applicants contended needed to be installed. Therefore, success on grounds 4 and 5 would have produced no practical outcome. The pursuit of a claim that could have no practical benefit or utility can be frivolous: *Ford v Child Support Registrar* [15] at [34] to [36] (Ryan J).

Finally, the first respondent submitted, the consent orders include no declaration of invalidity in respect of the third CDC. The orders relevant to the judicial review claims were order 16 which otherwise dismisses the summons; and order 15 which requires landscaping to be carried out in accordance with a specified plan on the first-floor non-trafficable roof; and the fixing of windows facing that roof “in accordance with Complying Development Certificate no. 268854 issued by the Second Respondent on 24 February 2025”. The last part, the first respondent submitted, demonstrated a concession by the applicants that the windows facing the first-floor roof were approved in the CDC as “fixed”. As much was pleaded by the first respondent in his response summons dated 8 September 2025. Thus, the applicants accepted that the CDC did not approve any means of access from inside the building onto the non-trafficable first-floor roof. That was a capitulation to the first respondent’s case. Further, the consent orders contain no relief in respect of the alleged roof terrace, nor the alleged FSR breach. By agreeing to the orders, the applicants effectively conceded that there was no such approved terrace or any breach.

Applicants' submissions on first respondent's motion for his costs of the judicial review claim

In response to the first respondent's submission that the proceedings were commenced without appropriate pre-litigation warning, the applicants noted that their architect notified the second respondent about issues with the CDC in as early as September 2024. The objection made by the applicants' town planner to DA/89/2025/1 also made reference to issues with the CDC, contrary to the evidence given in the Huang affidavit that the first time the first respondent became aware that the applicants had concerns was on 13 May 2025. On 9 May 2025, the applicants engaged solicitors.

As the CDC that the applicants sought to set aside was issued on 24 February 2025, the applicants had until 23 May 2025 to commence these Class 4 proceedings: s 4.31 of the EPA Act. On 13 May 2025, the applicants wrote to the second respondent through their solicitors which correspondence was copied to the first respondent and foreshadowed potential Class 4 proceedings. The correspondence set out a proposed pathway forward to resolve the issues identified by the applicants without the need for litigation. A response was invited by close of business on 19 May 2025 in circumstances where the applicants had only until 23 May 2025 to commence Class 4 proceedings. That the correspondence was issued to the second respondent and only copied to the first respondent was submitted to be immaterial. That the correspondence did not "request any action by [the first respondent]" was equally immaterial, given that it was the second respondent who had issued the CDC and not the first respondent. The solicitors acting for the first respondent chose not to engage with the concerns raised in the letter sent on 13 May 2025 and essentially deferred to the second respondent and the builder, Cassidis. In all the circumstances, the Court would not find that the applicants failed to give sufficient pre-litigation warning and therefore acted unreasonably. Although ss 4.31(a) and 4.59 of the EPA Act "do not necessarily prevent judicial review proceedings being commenced after the expiration of 3 months, it was not unreasonable for the applicants to seek to commence the proceedings within time".

The applicants next referred to the first respondent's submission that they prosecuted their claims in respect of the rooftop terrace and the first-floor terrace in an unreasonable manner, relying on correspondence sent by their solicitors on 25 June 2025, and in particular the assertion that no rooftop terrace or first-floor terrace was approved. Whether or not the CDC approved a rooftop terrace and/or a first-floor terrace in breach of the relevant provisions in Part 3 of the Codes SEPP was a matter that need not be determined on the present costs applications. That the first respondent denied that his certifier had approved a rooftop terrace and first-floor terrace as early as 25 June 2025 did not make the prosecution of those claims unreasonable. It was "merely a reflection of his contrary view, with which the applicants did not agree".

Further, the applicants submitted, the first respondent proceeded to construct a stairway providing access to the roof from the first-floor of the dwelling, as well as a new opening of the roof. Adjacent to the roof opening the first respondent also constructed a parapet wall or balustrade. On 5 August 2025, Council issued a Stop Work Order in respect of those works. The

first respondent also proceeded to install sliding doors from Bedroom 5 on the first-floor of the dwelling, rather than fixed windows as required by the CDC. On 18 November 2025, the second respondent issued a written directions notice in respect of the sliding doors. Order 15(b) of the consent orders requires the existing sliding doors to be removed and replaced with fixed windows. The applicants submitted that the Court ought to infer from these circumstances that their concerns in relation to the rooftop terrace and the first-floor terrace, both of which were claimed by the first respondent to be non-trafficable, were well founded, it being difficult to understand what purpose a stairway and sliding doors might have had other than to provide pedestrian access to the roof and first-floor. Accordingly, the Court would not find that the applicants acted unreasonably in continuing to prosecute those claims.

In relation to the first respondent's submissions as to the practical utility of the applicants seeking the particular form of declaratory relief sought in the amended summons, the applicants submitted that consistent with the principle in *Lai Qin*, the Court would decline to engage in such a hypothetical assessment. In any event, the applicants' challenge to the CDC as modified on 24 February 2025 yielded tangible and practical benefits to the applicants.

In responding to the Calderbank offer sent on 25 June 2025, the applicants proposed a without prejudice meeting on site to attempt to reach agreement on all issues. That was plainly not an unreasonable course to adopt. In responding to the Calderbank offer sent on 2 September 2025, the applicants accepted that part of the offer not to construct a rooftop terrace and to install plantings between the approved planter box and the fixed window on the first-floor to provide certainty that it would remain non-trafficable. The applicants accepted that part of the first respondent's offer, subject to two additional matters. The counter-offer was rejected on 26 September 2025. On 2 October 2025, the applicants compromised their position by no longer requiring a privacy screen to be installed on the first-floor roof. The applicants sought details of the plantings that were proposed between the planter box and the fixed window, however the first respondent declined to provide those details until after his offer was accepted.

The applicants submitted that it was not unreasonable to request to see that landscaping detail prior to reaching an agreement. Ultimately order 15(a) of the consent orders required the first respondent to carry out landscaping works in accordance with a specified plan. Had the landscaping plan been provided earlier, the applicants might well have reached an agreement with the first respondent in respect of those particular claims. In any event, each of the offers and counter-offers made by the parties was a global offer to resolve the entirety of the proceedings, including both the judicial review claim and the civil enforcement claim. It was clear from a review of the settlement offers made by both parties that there were numerous impediments to reaching an agreement, including the issue of costs which was ultimately carved out of the agreement (by order 17 of the consent orders).

Consideration

I do not consider this to be an appropriate case for an order pursuant to the “default position” in r 42.20(1) of the UCPR that the applicants pay the first respondent’s costs of the proceedings, notwithstanding that the consent orders included an order for the dismissal of the proceedings. Nor, however, do I consider it appropriate in the circumstances that there be an order that the first respondent pay the applicants’ cost of the proceedings. For the reasons which will follow further below, I likewise do not consider it appropriate in the circumstances that there be an order that the applicants pay the first respondent’s costs of the judicial review claim where, as here, the parties have reached a compromise. Unless one party has acted unreasonably, the proper exercise of discretion will usually be that the parties bear their own costs: Nichols at [30] (Payne JA). In *Lai Qin McHugh J* at 625 said:

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

Here, I am satisfied that the applicants and the first respondent acted reasonably in commencing and defending the proceedings and that their conduct continued to be reasonable until the litigation was settled. Accordingly, I will make an order that each party pays their own costs.

In relation to the applicants’ motion seeking an order that the first respondent pay their costs of the proceedings, I do not accept that the first respondent effectively surrendered to the applicants or capitulated in the proceedings as a whole, in either the civil enforcement part or the judicial review part of the proceedings. In relation to the civil enforcement part of the proceedings, the first respondent accepted that the applicants obtained most of the relief they sought in relation to the northern and western boundaries of 6 Bulkara Road, the western boundary being the boundary with 8A Bulkara Road. That is plainly the effect of orders 9(a) and (b), (d), (e) and (f), 2(c), 5 and 12. However, of the relief the applicants sought in the amended summons, the consent orders do not address the restraint in prayer 2 and the removal of the rainwater tank in prayer 4(b). Also, the relief the applicants obtained in relation to the northern and western boundaries of 6 Bulkara Road was essentially what the first respondent’s builder had already indicated that he would do. The relief the subject of the consent orders effectively provides rectification at about the time the build in 6 Bulkara Rd is complete. The consent orders require:

an engineering design to be finalised in 28 days, that is by 14 May 2026;

the applicants to relocate necessary services 28 days thereafter, that is, by no later than 11 June 2026;

the first applicant Mr Deva to remove encroachments within 42 days of the orders, that is by 28 May 2026;

the first respondent to complete some repair works 28 days thereafter, that is, by no later than 25 June 2026; and

the first respondent to complete the remaining repair works (being damage to the front side gate and cracking to the house and pool house) 28 days thereafter, that is, by no later than 23 July 2026.

The repair works are thus to be completed towards the conclusion of the build, at about the same time as expected practical completion. The orders for rectification also reflect, as the first respondent submitted, the removal of encroachments onto the first respondent's property by the western sandstone retaining wall by about 25cm to 34cm, and by the fence by up to 70cm, and by the pool house, the removal of the encroachment by the pool house at the cost of the applicants. The removal of these encroachments was a gain for the first respondent (albeit as the first respondent submitted secured as a term of settlement and not raised by the applicants on any claims made in the proceedings).

In relation to the judicial review part of the proceedings, the applicants did not obtain a declaration that the CDC was invalid and of no effect, or a consequential order restraining the first respondent from acting upon or carrying out any works in reliance on the CDC as they sought in prayers 1 and 2 of the amended summons. It is true, as they submitted, that nonetheless "several of the concerns" underlying their claims in the judicial review part of the proceedings were addressed by either the consent orders or the first respondent's conduct. I also accept that the appropriate measure of their success is not whether they obtained relief precisely in the terms of the amended summons: Nadilo at [85] and [93] (Preston CJ of LEC). However, I am unable to accept that the present matter involved a "clear winner": Nadilo at [93], citing *One.Tel* at 553. Indeed, there is considerable force to the first respondent's submissions that before the proceedings were commenced on 22 May 2025, his builder Cassidis had said to the first respondent that he would repair the alleged damage towards the end of the build (an arrangement confirmed in correspondence to the second respondent on 20 February 2025 and to Council on 24 April 2025); that the proceedings were commenced without a prelitigation warning, the applicants approaching the first respondents directly only two days before the proceedings were commenced and requiring a proposal for rectification within one day; and that within one month of commencement, the first respondent had made an offer to resolve the judicial review claim and the applicants' privacy concerns by undertaking not to construct a roof terrace. This effectively reflected the final outcome, with practical completion of the build expected to be achieved by the end of July 2026.

In *Nichols Payne JA* said at [6]: "If one party commences litigation without making a pre-litigation demand, and allowing the other party a reasonable opportunity to respond, it cannot expect to recover the costs of obtaining orders which would not in any event have been opposed": at [6]. And in *Janssen v Qureshi Pain J* referred at [64] to "the important pre-litigation step of notifying the intended respondents to litigation of the intention to commence proceedings in order to give them an opportunity to respond with the possibility of avoiding litigation". Her Honour at [65] referred to a number of circumstances which strongly suggested that the respondents should

have had the opportunity to negotiate with the applicants before proceedings were commenced without notice to them, and held at [66] that the commencement of the proceedings without notice to the respondents was unreasonable in the circumstances.

Nor am I persuaded that in all the circumstances there was ultimately anything in the nature of a surrender by the first respondent. It is true that the first respondent lodged two development applications for the erection of a rooftop terrace. However, an examination of the chronology reveals that the first respondent first lodged a DA, DA54/2025/1, for a roof-top terrace on 25 February 2025, a day after the CDC was issued on 24 February 2025, before the first applicant's solicitors first raised a concern about the validity of the CDC with the second respondent, the certifier Mr Awada, and before the applicants commenced the proceedings by summons filed on 22 May 2025. That chronology is consistent with the first respondent's position that only a non-trafficable roof and not a rooftop terrace was approved by the CDC, and not with any capitulation on the part of the first respondent.

At the same time, notwithstanding that the judicial review claim was resolved in such a way that the CDC remained in force and the first respondent could continue to build what had been approved, I do not consider that the first respondent should be awarded his costs of the applicants' judicial review claim. There is some force to the applicants' submission that they had only until 23 May 2025 to commence proceedings within time. Whilst further communication between the parties in relation to the concerns raised by the first applicant's solicitors letter sent on 13 May 2025, I do not consider it unreasonable for the applicants to have sought to commence these proceedings within time.

Further, whilst the first respondent denied as early as 25 June 2025 that his certifier had approved a rooftop terrace and a first-floor terrace, the first respondent proceeded to construct a stairway to the roof from the first-floor of the dwelling, a new roof opening and a parapet wall or balustrade adjacent to the roof opening, and to install sliding doors from Bedroom 5 on the first-floor, rather than fixed windows as required by the CDC. The applicants' concerns in relation to the rooftop terrace and first-floor terrace were not entirely unfounded, and I do not consider that they acted unreasonably in continuing to prosecute their claims in respect of them. Nor do I consider the conduct of the applicants (or that of the first respondent) in reaching agreement on the consent orders, by way of offers and counter offers, to demonstrate any relevant unreasonableness.

Conclusion

For the foregoing reasons, I shall make no order as to costs of the proceedings, including of the applicants' and first respondent's motions for costs.

Orders

The Court makes no order as to costs.

ANNEXURE A

The hearing listed on 21-22 April 2026 is vacated.

Piling works, the pathway and retaining wall

Within 28 days of these orders, the applicants' engineer, Mark Lindsay of Lindsay & Associates, and the first respondent's engineer, Shahab Rad of Smart Structures Australia, are to liaise in good faith and use reasonable endeavours to agree and finalise an engineering design, scope and sequencing for:

piling works along the common boundary of 6 Bulkara Road, Bellevue Hill NSW 2023 (6 Bulkara) with 8 Bulkara Road, Bellevue Hill NSW 2023 (8 Bulkara);

a new concrete pathway and associated capping beam in the area of the existing pathway adjacent to the southern boundary of 8 Bulkara; and

the construction of a retaining wall along the common boundary of 6 Bulkara with 8A Bulkara Road, Bellevue Hill NSW 2023 (8A Bulkara) including confirmation that the proposed batter is outside the zone of influence of the residential building at 6 Bulkara.

The engineering design and scope for the piling works referred to in order 2(a) shall include the reduction of the existing concrete sleepers on 6 Bulkara to the ground level of 6 Bulkara.

The engineering design and scope for the new concrete pathway and associated capping beam referred to in order 2(b) shall include the following components:

slab on ground design to be agreed by the engineers;

compaction of the ground prior to installation; and

connection of concrete path to the piles referred to in order 2(a) via a capping beam.

The engineering design and scope for the new retaining wall referred to in order 2(c) shall include the following components:

the retaining wall is to be a core-filled block wall;

the footing of the retaining wall is to be located within 8A Bulkara; and

the retaining wall is to be designed so that the sandstone blocks making up the existing retaining wall on 8A Bulkara can be used for recladding of the retaining wall facing into 8A Bulkara on top of the toe footing.

Each party is to bear its own engineering consultant's costs incurred in relation to the design work referred to in order 2.

Within 28 days after the design is agreed pursuant to order 2, the applicants are to arrange, at the applicants' cost, for the relocation of any electricity or other services required to enable those works to proceed.

Within 42 days of these orders, the applicants are to remove at the applicants' cost:

the encroaching portion of the pool house awning located at 8A Bulkara as shown in pink highlight on Annexure A;

the encroaching portion of the western part of the pool house (including the post in its south-eastern corner) as shown generally within the lines marked red on the photograph in Annexure B; and

remove temporarily, the pool equipment shown in the photograph in Annexure B

Within 28 days after completion of the works referred to in order 8, the first respondent is to arrange, at the first respondent's cost, to carry out in accordance with the design agreed pursuant to order 2, the following works:

installation of new piles along the common boundary of 6 Bulkara with 8 Bulkara;

reduction of the existing concrete sleepers adjacent to the northern boundary of 6 Bulkara to ground level of 6 Bulkara;

construction of a new concrete pathway and associated capping beam on 8 Bulkara, immediately adjacent to its southern boundary;

excavation of a safe batter near the western boundary of 6 Bulkara;

dismantle the existing sandstone blocks along and within the western boundary of 6 Bulkara with 8A Bulkara in the location marked in yellow on the survey plan on Annexure A. Such blocks are to be placed on 8A Bulkara in a suitable location to be agreed;

construction of a core-filled block wall along the common boundary of 6 Bulkara with BA Bulkara with toe footing onto BA Bulkara;

and construction of a timber fence 1.8 metres high along the common boundaries between 6 and 8 Bulkara, and 6 and BA Bulkara.

The applicants are to allow the first respondent, by his servants or agents, to enter 8 Bulkara and 8A Bulkara within the 28 days identified in order 9 to carry out the works at a time to be agreed by the parties (acting reasonably). Such access is to include a work zone of at least 1 metre in width measured from the western boundary of 6 Bulkara within BA Bulkara area with any temporary fencing for the work zone to be opaque in order to protect the privacy of the occupants of 8 Bulkara and BA Bulkara.

The applicants are to arrange, at the applicants' cost, for the recladding of the sandstone blocks against the wall referred to in order 9(f).

During the carrying out of the works referred to in order 9, the applicants' engineer may carry out four Inspections of the works at the first respondent's cost, such Inspections to be arranged with the first respondent's builder, Cassidis.

Cracking and Gate Repairs

Within 28 days after completion works identified in order 9 the first respondent is to rectify, at the first respondent's cost:

damage to the front side gate adjacent to the southern boundary of 8 Bulkara and cracking in the adjacent brickwork at 8 Bulkara as depicted in [photographs 1a. 1 to 2] in Annexure C by:

for the front side gate, side fence to be removed and re-installed to plumb level; and

for the adjacent brickwork, stitching using Helifix ties.

cracking in the sandstone block steps and cracking in the rendered brick foundation wall on the southern facade of the residential dwelling at 8 Bulkara as depicted in [photographs 3 to 6] in Annexure C by:

for the sandstone block steps. to be temporarily removed to allow construction of the side path and then reinstalled on a mortar bed; and

for the cracking in the rendered brick foundation, rectification as agreed by the engineers; and

cracking in the rendering of the pool house at 8A Bulkara as depicted in [photograph 7] in Annexure C by stitching using Helifix ties.

The applicants are to allow the first respondent, by his servants or agents, to enter 8 Bulkara and 8A Bulkara within the 28 days identified in order 13 to carry out the works at a time to be agreed by the parties (acting reasonably).

Landscaping

Within 28 days of the completion of the works identified in order 9 the first respondent is to carry out, at the first respondent's cost:

landscaping works generally in accordance with the landscaping plan prepared by Kostya Udin Landscape on 9 March 2026;

removal of the existing sliding doors from Bedroom 5 on 6 Bulkara and installation of fixed windows in Bedroom 5 on 6 Bulkara in accordance with Complying Development Certificate no. 268854 issued by the second respondent on 24 February 2025.

Summons dismissed

The Summons is otherwise dismissed.

Costs

Either party has liberty to apply for a costs order by 8 May 2026, such application to be supported by any evidence and submissions upon which the applicant relies.

Should such an application for a costs order be made, the responding party is to provide evidence and submissions opposing that application within 14 days of receiving the application.

The Court will determine any such costs application on the papers, if appropriate.

The parties have liberty to restore on three working days' notice.

Liberty to apply

In the event that unforeseen circumstances mean that the timeframes cannot be complied with by either party, liberty to apply.

The Court notes that:

The parties agree to rely on the survey plans conducted on 25 July 2025 and boundary pegs placed on 10 March 2026 by Hills & Blume for any reference to the common boundaries.

The parties agree to meet and negotiate in good faith should unforeseen circumstances mean that the timeframes cannot be complied with by either party.

Endnotes

1.

[1975] 3 All ER 333.

2.

(2000) 101 FCR 548; [2000] FCA 270.

3.

(2006) 143 LGERA 441; [2006] NSWLEC 96.

4.

(1998) 193 CLR 72; [1998] HCA 11.

5.

Citing *Jenkins v Hope* [1896] 1 Ch 278.

6.

(2018) 97 NSWLR 681; [2018] NSWCA 84.

7.

(2021) 250 LGERA 89; [2021] NSWCA 232.

8.

[2023] NSWSC 1162.

9.

(1997) 186 CLR 622; [1997] HCA 6.

10.

(1993) 44 FCR 194, 200; [1993] FCA 585.

11.

(2022) 252 LGERA 50; [2022] NSWLEC 39.

12.

[2006] NSWCA 365.

13.

Applicants' points of claim filed 12 September 2025 (POC), [18] to [20]

14.

[2015] NSWCA 244.

15.

[2009] FCA 328.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated:

01 September 2026

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/1a05a124d435905677e187b5>

CASE PAGE <https://chat.esheria.ai/case-law/australia/deva-v-lu-2026>

Prepared on 29 October 2026 · Esheria