

AUSTRALIA / JUDGMENT

Innovative Builders and Engineers Pty Ltd v Shah No 2

[2025] NSWCATAP 46**COURT**

Civil and Administrative Tribunal

DECIDED

06 March 2025

BEFORE

P H Molony, Senior Member

D G Fairlie, Senior Member

CASE / FILE NUMBER

2024/00244876

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Civil and Administrative Tribunal New South Wales

Medium Neutral Citation: Innovative Builders and Engineers Pty Ltd v Shah No 2 [2025] NSWCATAP 46**Hearing dates:** On the papers**Date of orders:** 6 March 2025**Decision date:** 06 March 2025**Jurisdiction:** Appeal Panel**Before:** P H Molony, Senior Member
D G Fairlie, Senior Member

Decision:

(1) The Appeal Panel dispenses with a hearing with respect to the costs issues in the appeal and with respect to the referral of appellant's miscellaneous application for the return of moneys to the Consumer and Commercial Division.

(2) The costs of the appealed proceedings are costs in the cause on rehearing.

(3) The respondent homeowners shall pay the appellants' costs of the appeal as agreed or assessed. If assessed, the assessor is to have regard to the factors outlined in pars [16] and [37 – 53] of these reasons in determining fair and reasonable legal costs.

(4) The appellants' miscellaneous application seeking an order for return of moneys paid to the homeowners under the original Tribunal order dated 20 December 2024 is referred to the Consumer and Commercial Division for hearing.

Catchwords:	Costs - rr 38 and 38A of the Civil and Administrative Tribunal Rules 2014 – appeal allowed - costs of appealed proceedings to be costs in the cause on rehearing – costs of appeal to follow the event – measure of costs recoverable by self-represented parties –where leave to be legally represented not sought or obtained – discretion to make costs orders – meaning of disbursements and out of pocket expenses.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 60 Civil and Administrative Tribunal Rules 2014 (NSW), rr 39 and 38A Civil Procedure Act 2005 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Ahern v Aon Risk Services Australia Ltd (No 2) [2022] NSWCA 39 Cornucopia (Young) Pty Ltd v Ward t/as Newcastle Model Autosports and Hobbies [2024] NSWCATAP 59 Fifteenth Eestin Nominees Pty Ltd v Rosenberg (No 2) (2009) 24 VR 155; [2009] VSCA 178 Islam v Metricon Homes Pty Ltd [2018] NSWCATAP 116 N & T Buildings Pty Ltd v Ball [2018] NSWCATAP 83 Sethi v The Owners – Strata Plan 93392 (No 8) [2024] NSWSC 213 The Owners – Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326
Texts Cited:	Halsbury, Laws of Australia, Lexis Nexis Online
Category:	Costs
Parties:	Innovative Builders and Engineers Pty Ltd (First Appellant) Mohd Ertaz Ul Chowdhury (Second Appellant) Mahmudul Shah (First Respondent) Syeda Begum (Second Respondent)
Representation:	M Chowdhury (First Appellant) Second Appellant (Self-Represented) First Respondent (Self-Represented) M Shah (Second Respondent)
File Number(s):	2024/00244876
Publication restriction:	None Decision under appeal
Court or tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not published
Date of Decision:	18 June 2024
Before:	R C Titterton OAM, Senior Member
File Number(s):	2023/00397159

REASONS FOR DECISION

This decision concerns what costs orders should be made in this appeal (if any) with respect to: the costs of the successful appeal by Innovative Builders and Engineers Pty Limited (the builder) and its director, Mr Chowdhury (the director), who we collectively refer to as the appellant's; and the appellant's appeal against the costs order made against them in the appealed proceedings, which we have had to redetermine on appeal. Our reasons for doing so are set out in our appeal decision: *Innovative Builders and Engineers Pty Ltd v Shah* [2024] NSWCATAP 253 (the appeal decision) dated 6 December 2024.

This decision also addresses issues concerning the appellant's application, consequent on the outcome of the appeal, for the return of moneys paid under the orders set-aside on appeal.

A knowledge of that decision is assumed in these reasons. We do not intend to repeat in this decision matters traversed there.

The orders we made were:

- (1) Appeal allowed.
- (2) The orders made by the Tribunal on 11 June 2024 and 12 September 2024 are set aside.
- (3) The application is to be reheard before a differently constituted Tribunal with new evidence allowed.
- (4) The costs of the appealed proceedings are costs in the cause on rehearing.
- (5) The respondent homeowners are to pay the appellants' costs of the appeal as agreed or assessed.
- (6) If any party contends that there should be a different order to those in orders (4) and (5) above then:
 - (a) They shall file an application for miscellaneous orders specifying the order(s) they seek within 15 working days of the publication of these reasons together with:
 - (i) Details of the costs they seek (specifying amounts); and,
 - (ii) Submissions (not exceeding 5 pages) in support of their application.
 - (b) The other party(ies) shall file submissions in reply (not exceeding 5 pages) within a further 10 working days.
 - (c) Any submission in reply from the party(ies) seeking costs (not exceeding 2 pages) shall be filed within a further 5 working days.
 - (d) All submission should also address:

- (i) Whether the Appeal Panel can dispense with a hearing and deal with the issues relating to costs on the papers by relying on the materials provided; and
- (ii) Whether, if the Appeal Panel makes an order for costs, it should fix the costs by ordering a specific amount.

Additional materials relevant to the costs application

In addition to the material filed in support of the appeal we had the following materials before us:

From the appellants:

Miscellaneous application seeking an order for costs, with attachments dated 11 December 2023.

Miscellaneous application seeking an order for return of moneys paid to the homeowners under the original Tribunal order dated 20 December 2024.

Submissions dated 19 February 2024 relating to the costs issue. In those submissions the appellants indicated that they would be making separate submissions on the money issue. No such submissions have been received.

From the homeowners:

Submissions with respect to the application for the return of money dated 6 January 2024.

Submissions styled as “Respondent’s points of claim” dated 11 February 2024.

Further submissions with respect to the application for the return of money received on 25 February 2025.

The appeal decision also contained comments to the effect that the return of money issue should be determined on the rehearing.

Additional Procedural directions (with reasons) for the filing of submissions addressing all issues were made by us on 29 January 2025 due to our concerns about whether the homeowner’s were aware of the costs application. We think it worth quoting that document in full:

The Appeal Panel makes the following orders:

- 1) With respect to the miscellaneous application filed by the appellants and received on 11 December 2024 (which was made in accordance with order 6 of our orders made 6 December 2024), we make the following further orders:
 - a) The time for the respondents to file and serve submissions in reply (not exceeding 5 pages) under order 6(b) made on 6 December 2024 is extended to 12 February 2025.
 - b) The time for the appellants to file and serve submissions in response (not exceeding 2 pages) under order 6(b) made on 6 December 2024 is extended to 19 February 2025.

- 2) With respect to the miscellaneous application filed by the appellants, dated 20 December 2024, the parties are to file and serve submissions addressing the issues raised in par 12 below as follows:
 - a) The appellants submissions by 5 February 2025.
 - b) The respondents submissions in reply by 12 February 2025.
 - c) The appellants submissions in response by 19 February 2025.

SHORT REASONS FOR DECISION:

With respect to the miscellaneous application regarding costs filed on 11 December 2024.

- 1) On 6 December we published our decision in appeal number 2024/00244876: Innovative Builders and Engineers Pty Ltd v Shah [2024] NSWCATAP 253. We allowed the appeal and remitted the appealed decision to the Consumer and Commercial Division for rehearing. We also made orders concerning the costs of the hearing below, and of the appeal, and gave the parties an opportunity to seek specific orders in that regard.
- 2) In addition, we called for submissions as to whether the costs application could be determined without a hearing. No submissions have been received in response.
- 3) By their application received on 11 December 2024 the appellants sought an order that the respondents pay the costs of the appeal fixed at \$19,297.00 (the costs application). No other application was received from any of the parties with respect to costs of the appeal.
- 4) Subsequently, on 20 December 2024, the appellants filed another application seeking orders for the return by the respondents to the appellants of \$157,165.00 (the money application). The respondents have served submissions in reply to the money application.
- 5) With respect to the application received 11 December 2024 we noted:
 - a) It was filed by email addressed to NCAT Appeals only, and not copied to the respondents.
 - b) No submissions in reply to that application have been received from the respondents, whereas the respondents have a history of responding to all other process or documents served on them.
 - c) There is no proof or acknowledgement of service of the costs application on the respondents.
 - d) Inquires made of the appellants by Registry asking for confirmation of service of the costs application were met with an assurance that “the application was sent to the respondent on 20 December 2024.”
 - e) Similar inquires, made of the respondents by Registry, have been met with a statement in writing that the costs application has not been received and a request for time to respond to it.

- 6) On balance, we are not satisfied that the respondents were served with the costs application. On their face, the appellants assertions of service are consistent with service of the money application of 20 December 2024 only.
- 7) As a result, we have made order 1 above extending time for the parties to file submissions in reply and response.

With respect to the money application dated 20 December 2024.

- 8) In our reasons for allowing the appeal, we wrote with respect to the appellants' claim for the return of money that, at [92]

"We note that the parties informed us that \$50,000 had been paid to the homeowners in part-payment of the money order, but not by whom. An allowance for that amount, and who paid it, should be factored into the final orders made by the Tribunal when the matter is redetermined."

- 9) The appellants now asserts that amount is \$157,165.00 and has provided some documents said to show proof of payment. By the money application they seek an order from us, after the substantive appeal has been completed, for the return of that money. We think this application should have been made in the Consumer and Commercial Division, not to the Appeal Panel.
- 10) In addition, for us to entertain that application would require us to reconvene and make orders for the provision of evidence in order to determine the issue. This is not the usual practice of the Appeal Panel or one that we can quickly do. It would take some months for us to convene a hearing to receive evidence. This creates real and practical obstacles to us dealing with the money application in a just, cheap and quick manner as required by s 36 of the Civil and Administrative Tribunal Act.
- 11) We have reached the tentative conclusion that we should make an order referring the money application to the Consumer and Commercial Division for hearing, where we think it should properly have been made. The Consumer and Commercial Division is better equipped to provide a just, cheap and quick resolution of it, than we are.
- 12) As required by s 50, we propose to give the parties an opportunity to make submissions on whether the money application should be referred to the Consumer and Commercial Division for hearing in accordance with order 2 above. Those submissions should address whether we can then determine the referral issue, without a hearing, on the basis of the material supplied by the parties.

Should the issues be determined on the papers.

The appellants in their submissions, dated 19 February 2024, agreed that the costs issues could be determined on the papers. The appellants did not comment as to whether issues relating to the return of money application should be determined without a hearing. In later submissions they indicated that those issues would be the subject of further submissions, which have not been forthcoming.

The homeowners in their submissions asked for a hearing so they could be present to eliminate any confusion.

Section 50 (2) to (4) of the CAT Act provide:

- (2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.
- (3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first:
 - (a) afforded the parties an opportunity to make submissions about the proposed order, and
 - (b) taken any such submissions into account.
- (4) The Tribunal may determine proceedings in which a hearing is not required based on the written submissions or any other documents or material that have been lodged with or provided to the Tribunal in accordance with the requirements of this Act, enabling legislation and the procedural rules.

The homeowners have requested a hearing to eliminate any confusion. After reading the submissions and supporting documentation from both parties we think the parties respective positions are clear. We can see no benefit to conducting a hearing if its sole purpose is to prevent confusion on our part alone. There are no matters about which we require to hear evidence and those documents about which the parties differ speak for themselves, in the light of the parties submissions and admissions.

In those circumstances we propose to dispense with a hearing of the costs issue which can be adequately determined in the absence of the parties by considering their written submissions and the documents or material they have given to us.

With respect to the return of money issue, neither party has addressed the issue of whether we can determine it without a hearing. We are satisfied that it can be adequately determined in the absence of the parties by considering their written submissions and the documents or material they have given to us.

We will make orders dispensing with those hearings.

The appellants application for costs.

By a miscellaneous application, dated 11 December 2024, the director filed an application (we presume by his use of the word “we” in the application on behalf of both appellants) seeking an order that “the respondent pay the following costs in relation to the appeal.” He then set out details of his expenses claimed totalling \$19,028.65. The application was signed by and apparently written by the director, but did provide details of the appellants’ legal representative.

There is no issue taken by the appellants with our view that the costs of the appealed proceedings should be costs in the cause on rehearing. What we understand the appellants to be seeking in the application is their costs of the appeal fixed at \$19,028.65. The grounds for the application said:

As per the appeal order attached with this submission for the ncat (sic) case 2004/00244876 we request the respondent to pay the costs that were spent on the appeal registry for the ncat case. These include lawyer fees and the cost for registering the appeal.

The costs application had attached to it:

A receipt from the NSW Online Registry for an NCAT appeal filing fee of \$1,007.00 paid by the director on 26 June 2024 in respect of file number 202400235345 (the Online Registry Invoice) .

An account to the builder for solicitors for work done from 23 September 2004 to 30 September 2024 relating to the appeal, and to an application to adjourn it, totalling \$15,084.65.

An account from Australiawide Consulting Services Pty Ltd dated 26 August 2024 to the builder for \$1,925.00 being, “Administration Costs for the management of documentation for the NCAT Appeal Case 2024/00244876.”

A receipt from NCAT for an appeal filing fees of \$1,012.00 paid on 3 July 2024 in respect of file number 202400244876 paid by the builder.

The appellant’s application for costs was made in circumstances where, despite having been granted leave to be legally represented in the appeal on 15 July 2024, the director represented himself and the builder in the appeal. The submissions filed in the appeal by the appellants were filed by the director, not the legal representative, and did not disclose the name of the solicitor.

The respondent homeowner’s submissions.

In their submissions, the homeowners argued that our initial conclusion that the costs of the original proceedings should be costs in the cause on the rehearing was correct. That, however, was not a matter that the appellants had challenged in their costs application. The appellants’ focus was on an order that the homeowners pay their fixed costs of the appeal.

In their submissions of 19 February 2025, the homeowners queried each of the invoices relied on by the appellants, and argued that we should not make any order for costs.

Costs – the applicable law

Costs in the Consumer and Commercial Division of the Tribunal are to be determined in accordance with s 60 of the Civil and Administrative Tribunal Act 2013 (NSW) (the NCAT Act) or rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) (the NCAT Rules).

Section 60 provides a general rule that operates in the Tribunal to the effect that each party to proceedings in the Tribunal is to pay their own costs, unless there are special circumstances warranting an award of costs. Costs is defined in sub-s 5:

In this section—

costs includes—

- (a) the costs of, or incidental to, proceedings in the Tribunal, and
- (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

Rule 38 makes provision with respect to certain matters in the Consumer and Commercial Division. It relevantly provides:

- (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
- (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—
 - (a) ...
 - (b) the amount claimed or in dispute in the proceedings is more than \$30,000.

Similarly, s 60 applies to internal appeals, but rule 38A(2) creates an exception and relevantly provides that:

- (2) Despite section 60 of the Act, the Appeal Panel for an internal appeal ... must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

Rules 38 and 38A have been interpreted in numerous cases as constituting an exception to s 60. Where they apply, costs orders can be made on the ordinary basis, in the absence of special circumstances justifying a costs order as otherwise required by s 60. Costs order made on the ordinary basis usually follow the event, i.e. are made in favour of the successful party.

The making of a costs of is discretionary, but where the usual course is not followed the reasons for doing so ought to be clearly explained.

Where the parties are self-represented – as we understood was the case when we published our appeal decision which showed the appellants as being represented by the director – they are usually restricted in what they can claim as costs. In our appeal decision we referred the parties to the CCD Guideline on Cost, August 2017, which contains the following advice to parties:

9. A party can ask for the following costs:
 - a) The fees charged by their lawyer or professional agent for preparing or running the case.
 - b) The ‘disbursements’ of their lawyer or professional agent. Disbursements are extra ‘out of pocket’ expenses charged by a lawyer or professional agent – such as Tribunal filing fees, witness expenses and photocopying charges.
 - c) The disbursements’ of a self-represented party or non-professional agent – such as Tribunal filing fees, witness expenses and photocopying charges.
10. A party cannot ask for any of the following costs:
 - a) Their own travelling costs
 - b) Their own time spent in preparing or running the case, or lost earnings of a self-represented party or non-professional agent.

In *The Owners – Strata Plan No 21563 v Rutherford* [2023] NSWCATAP 326 (Rutherford) an Appeal Panel, at [67–69], considered whether legal costs incurred by a self-represented party were costs of, or incidental to, proceedings in the Tribunal.

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

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

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

7 The phrase ‘of and incidental to’ is usefully discussed by Sir Robert Megarry, the Vice Chancellor in *Re Gibson’s Settlement Trusts* [1981] Ch 179. On the one hand the phrase extends the award of costs to costs incurred in connection with matters in the court. On the other hand it requires such costs to be subordinate to or causally linked to such a matter.

8 In the present case on the one hand the phrase extends the costs to those preparatory to the hearing, on the other hand it limits costs of the prior proceeding recoverable to those which were in fact preparatory to the hearing. Those costs would ordinarily include the costs of the preparation of evidence and documentation utilised in the hearing, and in this respect I note that the hearing proceeded by way of evidence given in the first instance by way of affidavit.

...”

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

Those costs extend to the “costs of such preparatory steps as are shown to be reasonably connected with the proceeding”: *Fifteenth Eestin Nominees Pty Ltd v Rosenberg (No 2)* (2009) 24 VR 155; [2009] VSCA 178 Maxwell P and Neave and Redlich JJA .

In *Cornucopia (Young) Pty Ltd v Ward t/as Newcastle Model Autosports and Hobbies* [2024] NSWCATAP 59 Senior Member Sarginson (as he then was), constituting an Appeal Panel, considered whether a lump sum order for costs should be made in favour of the respondent in a retail lease appeal to which rr 38 and 38A of the NCAT Act applied, when the appellant had not been aware that the respondent was legally represented. The appeal had been withdrawn shortly before the hearing, and the respondent sought its costs. In cases under the RL Act legal representation is allowed as of right. The Tribunal wrote, at [81- 88]:

81. Costs are awarded “by way of...partial indemnity...for professional legal costs actually incurred in the conduct of litigation” (*Cachia v Haines* (1994) 179 CLR 403; [1994] HCA 14 at [11]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29 at [22]).
83. The costs of the self-represented respondents obtaining legal advice from a Solicitor during the course of the appeal proceedings are, in the circumstances of this matter, costs of, or incidental to, the appeal proceedings.
83. The appellant submits that the respondents should not be entitled to costs because the respondents did not inform the appellant’s Solicitor and the Appeal Panel they had a Solicitor advising or acting in the proceedings.
84. Under cl 7(b) of Sch 4 of the NCAT Act, parties to Retail Leases Act 1994 (NSW) disputes in the Tribunal do not require leave for legal representation in the Tribunal. Section 45(2) of the NCAT Act states that a party to an internal appeal may be represented by a person without requiring leave from the Appeal Panel if the party was entitled to be represented by such a person without the leave of the Tribunal in the proceedings in which the decision under appeal was made .

85. This is not an appeal where the respondent needed to seek leave to be legally represented. A party incurring legal costs in Tribunal proceedings where it required leave to be legally represented, but never made a successful application to be legally represented, involves different discretionary considerations to a retail lease matter where no leave was required.
86. The salient issue is whether the respondents obtaining legal advice to assist the respondents in representing themselves in the appeal proceedings is a legal cost of or incidental to the proceedings. I am satisfied that it is, in the circumstances of this matter. The respondents were not under an obligation to inform the appellant's Solicitor that they were obtaining legal advice. From the invoices provided in the appellant's materials, it can be inferred that the respondents were not seeking that Slack-Smith Legal represent the respondents in the appeal proceedings, but that the Solicitor provide legal advice to assist Mr Ward to represent himself and his wife.
87. Further, the legal costs incurred involve a small amount. This is not a situation where a self-represented party claims to have incurred a very large amount of legal costs in obtaining advice and a Solicitor preparing the matter, but without the Solicitor seeking to be on record as the legal representative of the party in the appeal; or notifying the other party; or obtaining leave to appear in the appeal proceedings (if leave is required under s 45 of the NCAT Act).
88. The submissions of the appellant do not identify any applicable legal principle or statutory obligation on the respondents or Slack-Smith Legal to inform the Tribunal or the appellant's Solicitor that Slack-Smith Legal had provided legal advice and assistance to the respondents. The only analogy referred to is "costs for lawyers uncertified in the jurisdiction they were appearing" prior to the uniform legal recognition legislation. That analogy is of no assistance to whether a self-represented litigant obtaining legal advice in an appeal is a legal cost recoverable under s 60 of the NCAT Act.

The Appeal Panel in *N & T Buildings Pty Ltd v Ball* [2018] NSWCATAP 83 at [11]-[12], rejected the proposition that it is a pre-condition to a costs order that leave be granted for two reasons, at [12]:

The first is that section 45 does not limit representation by a party only to legal practitioners. Secondly the Appeal Panel does not accept that an order for payment of costs under any of the provisions of the Act or the Rules applies only to the costs incurred by a party paid to a legal practitioner.

Concerning the making of fixed costs orders, the Court of Appeal discussed the relevant principles in *Ahern v Aon Risk Services Australia Ltd (No 2)* [2022] NSWCA 39, with respect to similar provision in the Civil Procedure Act 2005 (NSW) at [14]-[18] :

14. The principles relevant to the Court's exercise of discretion under s 98 were set out in *Hamod v New South Wales* [2011] NSWCA 375 at [813]-[820] (Beazley JA) (*Hamod*). Her Honour noted at [813]:

[813] The discretion thereby conferred upon the court is not confined and may be exercised whenever the circumstances warrant its exercise, having regard to the scope and purpose of the provision: *Harrison & Anor v Schipp* [2002] NSWCA 213; 54 NSWLR 738 per Giles JA at [21]-[22]. In *Harrison v Schipp*, Giles JA considered that the discretion in s 98(4) may be exercised where the assessment of costs would be protracted and expensive and, in particular, if it appeared that a party obliged to pay the costs would not be able to meet a liability of the order likely to result from the assessment. However, his Honour stated, at [22]:

"The power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available."

15. The principal purpose of a specified gross sum costs order under s 98(4)(c) is to avoid the expense, delay and aggravation likely to be involved in a contested costs assessment process: *Hamod* at [816]-[817]. As Basten JA noted in *James v Australia and New Zealand Banking Group Ltd* [2017] NSWCA 84 at [3]:

The power to make such an order is governed by the obligation of the court to give effect to the overriding purpose of the Act, as identified in Pt 6 of the Civil Procedure Act. The court is to ensure that the issues between the parties are resolved "in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute" (Civil Procedure Act, s 60); that obligation extends to the disposal of disputes as to costs. Although questions of costs undoubtedly play an important practical role in commercial litigation, disputes as to quantification are ancillary to the primary issues in dispute and consequential upon the resolution of the primary issues. Costs provide an opportunity for ongoing litigation about "non-essential issues" which should be resolved with as little technicality and expense as reasonably practicable. [footnotes omitted]

16. Primary considerations relevant to the exercise of the s 98(4)(c) discretion include "the relative responsibility of the parties for the costs incurred; the degree of any disproportion between the issue litigated and the costs claimed; the complexity of proceedings in relation to their cost; and the capacity of the unsuccessful party to satisfy any costs liability": *Hamod* at [816]; see also *Kostov v Zhang (No 2)* [2016] NSWCA 279 at [22]; *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (No 2)* [2015] NSWCA 422 at [30].
17. The power to award a gross sum should only be exercised when the Court considers that it can do so fairly between the parties and where an appropriate sum can be determined from the available materials: *Harrison v Schipp* (2002) 54 NSWLR 734 at 743; [2002] NSWCA 213 at [22]. The power may be exercised where a party's conduct has unnecessarily contributed to the costs of the proceedings, especially where the costs incurred have been disproportionate to the result of the proceedings: *Hamod* at [818].

18. If it considers it appropriate to make the order, the Court may adopt a “broad brush” approach to quantification, as to require the Court to undertake a detailed examination of the kind carried out in a formal costs assessment would defeat the purpose of the order: *Harrison v Schipp* at 743; *Penson v Titan National Pty Ltd (No 3)* [2015] NSWCA 121 at [7]. The costs ordered should be “based on an informed assessment of the actual costs having regard to the information before the court (for example, by relying on costs estimates or bills)”: *Hamod* at [820]. Courts have typically applied a discount when assessing costs on a gross sum basis, though the aptness of a discount primarily depends on the accuracy and reliability of the costs evidence available to the Court: *Hamod* at [814].

See also *Sethi v The Owners – Strata Plan 93392 (No 8)* [2024] NSWSC 213 at [18] per Chen J .

In *Islam v Metricon Homes Pty Ltd* [2018] NSWCATAP 116 the Appeal Panel discussed the principles to be applied when making a lump sum order at [47-48] and in applying them, said at [49]:

19 In this case, as noted above, the builder made no submissions in respect of the applicable principles and there was no evidence before the Tribunal in respect of legal costs other than tax invoices that were not itemised. In such circumstances, we are not satisfied that on the available material the Tribunal could be confident that it had arrived at an appropriate sum. In our view, for the Tribunal to be confident that the legal costs claimed were reasonable it would need, at a minimum, a narrative of the work that had been undertaken on behalf of the builder, with information about the rates at which particular work was charged.

Legal costs include disbursements. Halsbury’s Laws of Australia, Lexis Nexis Online at [325-9505] explains that term (citations omitted):

The amount of costs includes what are otherwise termed disbursements, both for the purposes of solicitor-client costs and party-party costs. Disbursements are those payments which have been made in pursuance of the professional duty undertaken by the solicitor which he or she is bound to perform, or have been sanctioned as professional payments by the general practice and custom of the profession. The term refers to money which, for the purposes of the retainer or proceeding, has been actually paid out to other people, such as witnesses, counsel, professional advisers, and so can be distinguished from ‘costs’ strictly speaking, which cover remuneration for the exercise of professional legal skill by a lawyer.

With self-represented parties these are best identified as out of pocket expenses. They include such things as witness costs and Tribunal filing fees

We now turn to consider the costs issues.

Consideration - Costs with respect to the appealed proceedings.

Neither party has taken issue with our order that, “the costs of the appealed proceedings are costs in the cause on rehearing.” Indeed, the homeowners actively support it in their submissions, while the appellants did not address it. For the reasons outlined in the appeal decision we remain of the view that it is the proper order to make in the circumstances, and will make a final order to that effect.

Consideration - Costs of the appeal.

The appellants seek an order that the respondent homeowners pay them the costs of the appeal fixed at \$19,028.65. This is comprised of the four items for which they have produced some documentary evidence, specified in par [15] above, said to prove their entitlements.

The vast majority of the costs claimed is for legal fees associated with the preparation of the appeal in a period of one week, in circumstances where the appellants had obtained leave to be legally represented on 15 July 2024, although a notice of representation by the solicitors was never filed. The appeal was heard on 10 October 2024. It had been listed for 30 September 2024, but was adjourned following an application being made by the solicitors, which is charged for in their invoice. These are clearly costs of and incidental to the appeal and may only be recovered under a costs order. Whether it is fair and reasonable that they be paid by the homeowners is a different question.

A review of the details provided in the solicitor’s account, which is dated 1 October 2024, reveals that the charges are for urgent work done between 23 September 2024 and 30 September 2024. It is not an itemised bill. The total worth attributed to that work is \$18,804.65 inclusive of GST, which is then discounted by \$3,000.00, resulting in an amount claimed of \$15,804.65. This charge represents what is said to be a total of 519 units of work undertaken by three people, charging differing, unspecified rates. These can, however, be calculated from the figures provided. It does not specify what documents were viewed and considered, or their size, so as to enable an assessment to be made of the reasonableness of the charges.

The invoice does provide information as to the nature of the work done. This includes:

Familiarising themselves with the facts and documents relating to the original proceedings and with the appeal up to 23 October 2024.

Liaising with and taking instructions from the appellants.

Reviewing the evidence in the original proceedings.

Seeking and obtaining on the appellant’s behalf an adjournment of the scheduled appeal hearing.

Researching the relevant law.

Preparing submissions for the appeal hearing.

The invoice says that this was all done in the last week of September leading up to the appeal hearing. There is no explanation of why advice and assistance on the appeal was not sought earlier, given that the appealed decision was made on 18 June 2024 and the timetable for the filing

of appeal documentation put in place on 15 July 2024. No explanation is given as to why the solicitors, who assisted in preparing the appellants' submissions and sought an adjournment on the appellants' behalf, did not file a notice of representation or identify the submissions they prepared. The amount of costs claimed is a very large amount to have been incurred in the short time disclosed in the solicitor's invoice.

We note that the homeowners suggest that the solicitors were involved in assisting the appellants in the original proceedings, and that the invoice is not a true reflection of what occurred. This is not something we are in a position to determine. These legal fees need to be assessed and critically examined in order to determine what is properly recoverable on a party/party basis, if an order for costs of the appeal were made.

We also note that the invoice contains a sizeable research component, which requires close scrutiny as to what is reasonable and necessary.

That the appellants final submissions on the appeal were drawn with the assistance of a solicitor was not apparent on the face of the submissions. They were not signed by and did not bear the name of the solicitors. Parts of those submissions, but not all, were qualitatively different from other appeal documents drawn by the appellants. They bore the hallmarks of being drafted by someone with legal training. The director confirmed this during the appeal hearing when asked about the differences noticed by Senior Member Fairlie. This was the first time the Appeal Panel was aware that the appellants had actually sought assistance from a solicitor.

Earlier documentation relied on by the appellants was confusing and difficult to understand, as was the material they relied on before the original hearing. This would no doubt have added to the difficulty the solicitors faced in familiarising themselves with the facts and documents relating to the original proceedings and to the appeal. This additional difficulty is not something it is reasonable to expect the homeowners to pay for. It was not of their making. Neither was the urgency.

We observe that the appellants' submissions on costs filed on 20 February 2024 also bear the hallmarks and coherency of being professionally drafted, although they are signed by the director and do not disclose that they have been professionally drafted.

This reflects a pattern of conduct in these proceedings in which the appellants, while having leave to be legally represented, have not disclosed when they have sought legal assistance, and in which documents drafted by their legal representative have not always disclosed that fact. While it is clear from the authorities that this will not stop them recovering their costs, it does give rise to one of a series of factors that should be taken into account when assessing the appellant's costs. It is important to note that at no time was a notice of representation filed by the solicitors

Those costs should be either agreed between the parties or properly assessed. There issues we have already discussed require consideration in determining whether the solicitor's charges are fair and reasonable.

In addition, we note the following with respect to out of pocket expenses claimed by the appellants.

First, the homeowners say that the filing fee of \$1007.00 for case number 202400235345 was not paid in relation to the appeal, which bears the number 2024/00244876. In their costs application the appellants say that this is a District Court filing fee. There is no explanation of what this fee relates to. It does not relate to the appeal.

Secondly, the account from Australiawide Consulting Services Pty Ltd dated 26 August 2024 for \$1,925.00 being for, "Administration Costs for the management of documentation for the NCAT Appeal Case 2024/00244876." It is addressed to both appellants. There is no evidence that it has been paid. It does not break down what was involved in the management of the documents on behalf of the builder, or provide such basic information such as the how many photocopies were involved, or what time was taken in managing the documents, and who did that work. It does not distinguish between work done for the builder and work done for the director, given that only the builder was charged. The documentation filed by the appellants with respect to the appeal was always filed on behalf of both appellants, not on behalf of the builder or the director separately.

In submissions the homeowners asserted Australiawide Consulting Services Pty Ltd is the director's company and is charging for work done for him. They submitted that allowing the appellants to recover for such work is "inappropriate". The director in submissions responded that he is a director of Australiawide Consulting Services Pty Ltd and that the charges are legitimate. The charges are for work which was not undertaken by the solicitors. Whether it is fair and reasonable that an appellant claim such costs is a real question. In saying that we acknowledge that the appellants are entitled to recover out of pocket expenses, such as photocopying costs, which can be claimed.

We also have difficulty in understanding what management of documentation to the value of \$1,925.00 was undertaken of the appellants' case, given how the documentation was presented to us. While the appellants' documents were presented in folders, the documents they contained were not uniform across the folders or all numbered. There were, however, approximately 500 pages of material filed by the appellants, each of which were required to be copied 5 times.

Finally, the filing fee of \$1012.00 for the appeal appears to be an out of pocket expenses that the builder paid.

We will order that the respondent homeowners pay the appellants costs of the appeal as agreed or assessed. If assessed, the assessor is to have regard to the factors outlined in pars [16] and [37 – 53] of these reasons in determining fair and reasonable legal costs.

Consideration - the money paid under the original order.

At paragraph [92] of our appeal decision, we wrote:

92 We note that the parties informed us that \$50,000 had been paid to the homeowners in part-payment of the money order, but not by whom. An allowance for that amount, and who paid it, should be factored into the final orders made by the Tribunal when the matter is redetermined.

There was and still is no evidence before us as to who made those payments or when they were made. Statements by the parties in emails and submissions indicate that more has been paid since then, but again there is no evidence of who made the payments or when.

The appellants have since filed a miscellaneous application seeking return of the money which we have said should be referred to the CCD, where it ought properly to have been made.

Despite being given an opportunity to do so, that appellants have not provided submissions regarding this, irrespective of the fact that they indicated that they would do so. The time for doing so has now passed. In their submissions, the homeowners have said that the issue should be left for the Tribunal to determine on rehearing.

The CCD is in a position to conduct a hearing (when it sees fit) and to find what payments have been made, by whom, and to then make appropriate orders with respect to the application for the return of moneys. We are not a position to do so.

We will refer the miscellaneous application seeking a refund of the money paid to the CCD, where the Tribunal can determine how and when it will be considered in the usual course of Division business.

This brings the appeal to an end.

Orders.

We make the following orders:

The Appeal Panel dispenses with a hearing with respect to the costs issues in the appeal and with respect to the referral of appellant's miscellaneous application for the return of moneys to the Consumer and Commercial Division.

The costs of the appealed proceedings are costs in the cause on rehearing.

The respondent homeowners shall pay the appellants' costs of the appeal as agreed or assessed. If assessed, the assessor is to have regard to the factors outlined in pars [16] and [37 – 53] of these reasons in determining fair and reasonable legal costs.

The appellants' miscellaneous application seeking an order for return of moneys paid to the homeowners under the original Tribunal order dated 20 December 2024 is referred to the Consumer and Commercial Division for hearing.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated:

06 March 2025

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