

AUSTRALIA / JUDGMENT

Velik v Steingold [2017] NSWDC 37

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District Court

New South Wales

Medium Neutral Citation: Velik v Steingold [2017] NSWDC 37

Hearing dates: 2 December 2016, 15 February 2017

Date of orders: 03 March 2017

Decision date: 03 March 2017

Jurisdiction: Civil

Before: Dicker SC DCJ

Decision: (1) The Amended Summons is dismissed.

(2) The plaintiffs are to pay the first defendant's costs of the proceedings as agreed or assessed.

(3) Liberty to the parties to apply for a different costs order to that set out in (2) above.

Catchwords: Appeal – costs – whether the Costs Review Panel erred in relation to consideration of interlocutory costs orders made in the Supreme Court – whether costs order made by the Court of Appeal impliedly replaced interlocutory Supreme Court costs orders – whether certain items of costs claimed should have been allowed by the Review Panel – whether the plaintiff should have been ordered to pay the costs before the Review Panel

Legislation Cited: Civil Procedure Act 2005 (NSW)

Legal Profession Act 2004 (NSW)

Supreme Court Act 1970 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: Bunning v Cross (1978) 141 CLR 54

Crowley v Glissan (1905) 2 CLR 402

Frumar v The Owners of Strata Plan 36957 [2006] NSWCA 278

Hancock v Rinehart [2015] NSWSC 1640

Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32

Lawrence v Ramensky Lawyers [2006] NSWSC 175

Levy v Bergseng [2008] NSWSC 294

Oshlack v Richmond River Council (1998) 193 CLR 72

Ryan v Hansen [2000] NSWSC 354

Turner v Pride [1999] NSWSC 850

Velik v Steingold [2013] NSWCA 303

Vumbaca v Sultana [2012] NSWDC 237

Wende v Horwath (NSW) Pty Ltd [2014] NSWCA 170

Category: Principal judgment

Parties: Stephen Wayne Velik (First Plaintiff)

Laura Allison Velik (Second Plaintiff)

Noreen Steingold (First Defendant)

Gordon Albert Salier (Second Defendant)

John Lawrence Sharpe (Third Defendant)

Representation: Counsel:

S Velik (Plaintiffs)

M Castle (First Defendant)

Solicitors:

S V Law (Plaintiffs)

Hicksons Lawyers (First Defendant)

Crown Solicitors Office (Second and Third Defendants)

File Number(s): 2016/219619

Judgment

1. This is an appeal against determinations as to costs made by a Costs Review Panel in a Certificate of Determination issued on 7 November 2016 with reasons provided dated 23 November 2016. The plaintiffs seek orders which include that the appeal be allowed and that the Certificate of Determination of the Costs Review Panel be set aside. Subsequent orders including as to costs are also sought.

2. The first defendant is the only active defendant in the appeal. The other two defendants were the members of the Costs Review Panel and filed submitting appearances.
3. The grounds of appeal are set out in the Amended Summons relied on by the plaintiffs dated 2 December 2016 and are in the following terms:

"1. The Review Panel erred in law in determining the Review Application without having given due consideration to the submissions of the Plaintiffs in paragraphs 1 to 10 inclusive of the Costs Respondents' Objections to Costs Applicant's Application for Assessment of Party Party Costs dated 9 December 2015, in breach of sections 359(1)(b) and 375(2) of the LPA.

1A. The Review Panel erred in law in determining the Review Application without having given the Plaintiffs a reasonable opportunity to make written submissions to the Review Panel in relation to the Defendant's submitted grounds for making the Review Application as contained in the Review Application to the following effect, in breach of sections 359(1)(a) and 375(2) of the LPA:

- (a) the orders of the Court made 22 June 2010 and 5 November 2010 were never appealed in the Court of Appeal;
- (b) the orders of the Court made 22 June 2010 and 5 November 2010 were never argued in the Court of Appeal.
2. The Review Panel erred in law in determining that the issue of the interlocutory costs orders was never raised in the Court of Appeal without any evidence to support that determination.
3. The Review Panel erred in law in concluding that the Assessor erred in determining that the Court of Appeal's cost orders superseded the interlocutory cost orders made in the matter.
4. The Review Panel erred in law in determining that solicitor fee items 1 to 24 inclusive and Counsel fee item 49 in the Defendant's application for Assessment of Party/Party Costs having case no. 2105/317958 in the Supreme Court of New South Wales at Sydney (Costs Assessment Application) were within the scope of the order of the Court made 22 June 2010, further without any evidence to support that finding.
5. The Costs Review Panel erred in law in determining that solicitor fee items 31 to 33 inclusive and Counsel fee item 51 of the Costs Assessment Application were within the scope of the order of the Court made 5 November 2010, further without any evidence to support that finding.
6. The Costs Review Panel erred in law in determining that the Plaintiffs' [sic] should pay the costs of the Review Application, in circumstances where the Plaintiffs did not participate in the Review Application in any manner except for being named by the Defendant as review respondents in the Review Application."
1. The appeal is brought by the plaintiffs pursuant to Section 384 of the Legal Profession Act 2004 (NSW) ("LPA") (which is applicable to this appeal) which provides as follows:

"384 Appeal against decision of costs assessor as to matter of law

- (1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the District Court, appeal to the Court against the decision.
- (2) After deciding the question the subject of the appeal, the District Court may, unless it affirms the costs assessor's decision:
 - (a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or
 - (b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.
- (3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given."

1. Section 382 of the LPA provides as follows:

"382 Appeal against determination of panel

- (1) Subdivision 6 (Appeals) applies in relation to a decision or determination of a panel under this Subdivision as if references in Subdivision 6 to a costs assessor were references to the panel.
 - (2) Subject to subsection (1), the panel's determination of an application for review of a costs assessor's determination is binding on all parties to the assessment that is the subject of a review and no appeal or other review lies in respect of the determination."
1. For the purposes of the appeal the court had before it the following:
 1. A folder of material which became Exhibit A in the Appeal;
 2. The written submissions on behalf of the parties in Court of Appeal proceedings 2012/305131 which resulted in the decision of Velik v Steingold [2013] NSWCA 303, which became Exhibit 1 in the Appeal;
 3. The reasons for decision of the Costs Review Panel dated 23 November 2016 which became Exhibit 2 in the Appeal.
 1. This material was tendered without objection by the parties.
 2. For the purposes of the Appeal, the parties relied upon detailed written submissions as follows:
 1. Written submissions of the plaintiffs dated 18 September 2014 (which I take should read 18 September 2016 as they were filed on that day);
 2. Written submissions on behalf of the first defendant dated 13 October 2016;

3. Responsive written submissions of the plaintiffs dated 10 November 2016 and filed 11 November 2016.

Factual background

1. This matter has a complex factual background which is summarised in some detail in the written submissions of the plaintiffs dated 18 September 2016 as reflected in the materials in Exhibit A. The factual background is also partly set out in the decision of Sackville AJA in *Velik v Steingold* [2013] NSWCA 303 at [3]-[40].
2. To understand the background to the Appeal it is necessary to set out some of the background facts referred to in those documents which I do as follows:
 1. In 2009 the plaintiffs began a tenancy of a residential property in St Ives in New South Wales from the first defendant. The first defendant was the registered proprietor of land in St Ives of which the leased property formed part;
 2. On 4 December 2009, whilst the residential tenancy was still on foot, the plaintiffs exchanged contracts with the first defendant to purchase the rented property for \$1.26 million with a deposit of \$126,000. The exchanged contract for sale provided for a Torrens subdivision of the St Ives land as a pre-condition to completion of the plaintiffs' purchase of the property;
 3. There was a dispute between the plaintiffs and the first defendant in relation to the completion of the contract for purchase and both parties purported to terminate the contract. The plaintiffs vacated the St Ives property;
 4. The parties reached agreement as to the terms of the withdrawal of a caveat and the deposit moneys in dispute were placed in an account subject to the resolution of the dispute between the parties;
 5. The first defendant resold the property to another party;
 6. In 2010, the current plaintiffs commenced proceedings as plaintiffs in the Equity Division of the Supreme Court of New South Wales seeking damages and the return of their deposit;
 7. The original Statement of Claim in those proceedings was amended on a number of occasions. On 22 June 2010 the plaintiffs were granted leave to file and serve a Further Amended Statement of Claim. A term of the grant of that leave was that the plaintiffs pay the costs of the first defendant thrown away as a result of the Further Amended Statement of Claim ("the first Supreme Court Order");
 8. Later, on 6 October 2010, the plaintiffs filed a Notice of Motion seeking certain orders. On 5 November 2010, an order was made in the Supreme Court for the plaintiffs to pay the first defendant's costs of the plaintiffs' Notice of Motion filed on an indemnity basis ("the second Supreme Court Order");

9. In November 2011, the Supreme Court proceedings were finally heard before Justice Slattery;
10. On 31 July 2012, Justice Slattery made orders substantially in favour of the defendants including costs orders. The costs orders were made on 29 October 2012 as follows: "The plaintiffs to pay 75% of the defendant's costs of the Supreme Court proceedings on the ordinary basis including up to 29 October 2012";
11. On 4 December 2012 the plaintiffs appealed the decision of Slattery J by filing a Notice of Appeal. The Notice of Appeal is significant in these proceedings (see Exhibit A tab 11). Under the heading "PROCEEDINGS IN THE COURT BELOW" reference is made to the decision of Justice Slattery and the orders and the "Material date" of 4 September 2012 following the dates of hearing of 16 and 17 November 2011.

The "DETAILS OF APPEAL" stated that the appeal was not filed pursuant to leave to appeal but was brought as of right under Section 101(1)(a) of the Supreme Court Act 1970 (NSW).

The appeal grounds all referred to the primary judge (being Justice Slattery) having allegedly erred in various ways and to findings which his Honour should allegedly have made.

The orders sought included the following orders:

"1. Appeal allowed.

2. Orders of the Court below be set aside.

...

5. The respondent pay the appellants' costs in the appeal and in the Court below."

It should be noted that there was no express mention in the Notice of Appeal of any leave to appeal or appeal being made in relation to the first Supreme Court Order made on 22 June 2010 or the second Supreme Court Order made on 5 November 2010. Leave to appeal was not expressly sought from those interlocutory orders and no extension of time was sought in the Notice of Appeal to appeal from those orders;

1. The written submissions of the parties before the Court of Appeal, as indicated above, became Exhibit 1 on the Appeal. The written submissions on behalf of the appellants (the current plaintiffs) made no mention of costs. There was also no mention of any appeal against the first Supreme Court Order or the second Supreme Court Order. In the amended written submissions of the respondent (the current first defendant), there was no mention of the first Supreme Court Order or the second Supreme Court Order. In paragraph 33 of the submissions, there was a reference to costs but only in relation to what was sought by the first defendant concerning the orders made by Justice Slattery depending on the outcome of the appeal;

2. The Court of Appeal gave its decision on 13 September 2013 allowing the appeal of the current plaintiffs: Velik v Steingold [2013] NSWCA 303. Sackville AJA who gave the main decision (with whom McColl and Gleeson JJA agreed) stated as follows in paragraphs [107]-[109] of the reasons:

"[107] The appeal should be allowed. The orders made by the primary Judge on 4 September 2012 and 29 October 2012 should be set aside.

[108] The Purchasers' Notice of Appeal seeks an order that the sum of money received by the Vendor from the interest bearing account in the joint names of the parties, pursuant to the orders made by the primary Judge on 4 September 2012, be paid to them, together with an unspecified amount of interest. The Purchasers should be directed to bring in Short Minutes of Order within seven days. If the Vendor disputes the proposed orders, she should file alternative Short Minutes of Order, together with brief submissions in support.

[109] Unless there is some reason for different costs orders to be made, the Short Minutes of Order should incorporate the following orders:

1. The Vendor pay the Purchasers' costs of the appeal.
2. The Vendor pay the Purchasers' costs of the proceedings at first instance.
3. The Vendor, if otherwise qualified, have a certificate under the Suitors' Fund Act 1951.";
1. The plaintiffs in the current appeal refer in particular to paragraph [109](2) of the judgment of Sackville AJA but say that the indication of the Court of Appeal was overtaken by the final orders subsequently made;
2. Short Minutes of Order dated 20 September 2013 signed by the solicitors for the parties in the Court of Appeal were filed in the Registry and, it appears to be accepted, were made by the Court of Appeal Registrar. The formal orders of the Court as revealed in the Court of Appeal database are as follows:

"1. The respondent pay \$126,000 to the appellants.

2. The respondent pay the sum of \$34,976.81 for pre-judgment interest from 4 April 2010 until 13 September 2013.
3. Judgment for the appellant in the sum of \$160,976.81 (including interest) against the respondent.
4. Judgment to take effect from 13 September 2013.
5. The respondent to pay the appellants' costs of the appeal.
6. The respondent to pay the appellant's costs of the proceedings at first instance.
7. The respondent, if otherwise qualified, have an indemnity certificate under the Suitors' Fund Act 1951." (See Exhibit A, tab 3.)

The plaintiffs to the current appeal place particular reliance on Order 6 of the Court of Appeal orders. It is submitted by them that the effect of Order 6 is that the Court of Appeal intended that the orders for costs in the first Supreme Court Order and the second Supreme Court Order were superseded by Order 6 such that the current first defendant is not permitted to rely on those costs orders against the current plaintiffs. It is submitted that this is the clear effect of the order;

1. The plaintiffs emphasise that throughout the Court of Appeal proceedings the first defendant was represented by senior and junior counsel and a national solicitor firm;
2. On 29 October 2015, the first defendant in the current proceedings as costs applicant filed a party-party costs assessment application against the plaintiffs as costs respondents in respect of the first Supreme Court Order and the second Supreme Court Order;
3. On or about 5 November 2015, the costs assessment application was assigned to Mr Michael Robinson for determination as a Costs Assessor under the LPA;
4. Both the plaintiffs and the first defendant made written submissions to the Costs Assessor Mr Robinson;
5. The submissions of the plaintiffs in substance were to the following effect:
 1. That the Court of Appeal costs order superseded the first Supreme Court Order and the second Supreme Court Order and thus nothing was owed by the plaintiffs to the first defendant under those costs orders;
 2. The plaintiffs disputed certain of the costs items claimed by the first defendant;
1. On 29 January 2016, the Costs Assessor, Mr Robinson, issued his determination of the costs assessment application and:
 1. Found that the amount owed under the costs assessment was nil because the Court of Appeal costs orders superseded the first Supreme Court Order and the second Supreme Court Order; and
 2. Determined that the costs of the costs assessment application were to be paid by the first defendant as costs applicant;
1. On 7 March 2016 the first defendant filed a review application seeking a review of the determinations of the Costs Assessor;
2. On 22 March 2016, the review application was assigned to the second and third defendants in the current proceedings as review panellists for determination;
3. The Review Panel considered the material that was placed before the Costs Assessor Mr Robinson and determined not to receive any additional submissions or material from the parties but to rely solely upon the material that was placed before the Costs Assessor;

4. No further submissions were in fact sought to be relied upon by the parties to the review application;
5. On 17 May 2016, the Review Panel issued its Certificate of Determination of Costs by the Review Panel together with reasons deciding, in summary:
 1. The first Supreme Court Order and the second Supreme Court Order were never raised in the Court of Appeal;
 2. The first Supreme Court Order and the second Supreme Court Order were not subject to argument in the Court of Appeal;
 3. The Costs Assessor at first instance had erred in determining that the Court of Appeal costs order had superseded the first Supreme Court Order and the second Supreme Court Order;
 4. To allow certain costs as sought before the Costs Assessor. In substance, the objections of the current plaintiffs were rejected although some items were reduced;
 5. To order the plaintiffs to pay the costs of the costs assessment and of the review;
1. A new Certificate was issued on 7 November 2016.

Submissions of the parties

Submissions on behalf of the plaintiffs

1. As indicated above, the plaintiffs relied in this Appeal on detailed written submissions. In addition, the first plaintiff, Mr Velik, who is a solicitor, appeared on behalf of the plaintiffs and made detailed oral submissions. I will not attempt to summarise all of the submissions made by the plaintiffs as the oral submissions took a number of hours to make and the detailed written submissions speak for themselves.
2. However, in general summary terms, the plaintiffs made the following submissions:
 1. The Review Panel erred in holding that the Court of Appeal costs order had not superseded the first Supreme Court Order and the second Supreme Court Order. It was submitted that the costs orders which were made by the Court of Appeal, following signed consent orders from the parties dated 20 September 2013, were clear on their face and required the current first defendant to pay the current plaintiffs' costs of "the proceedings at first instance" and this included the costs of the two interlocutory orders the subject of the assessment. The result of this submission was that the current first defendant could not seek an assessment of the costs arising from the first Supreme Court Order and the second Supreme Court Order.
 2. It was submitted that this was the proper result following an application of the principles set out in the decision of the Court of Appeal in *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170 at paragraphs [59]-[64], particularly at [64]. It was also submitted that in construing the order of the Court of Appeal, the meaning of Order 6 as made was clear. Even if there was an

allegation of an ambiguity in the order, the surrounding material, in particular the Notice of Appeal, made clear that the orders sought by the current plaintiffs included that the current plaintiffs sought an order that the current first defendant pay the plaintiffs' costs "in the appeal and in the Court below";

3. The Review Panel failed to give due consideration to paragraphs 1 to 10 inclusive of the plaintiffs' objections to the defendant's application for assessment of party/party costs dated 9 December 2015 in breach of Sections 359(1)(b) and 375(2) of the LPA. It was said that this was clear as the determination of the Review Panel made no reference at all to these objections. It was further submitted that if the Review Panel had given due consideration to these submissions, the Review Panel would have determined that the plaintiffs should not pay any sum to the first defendant in respect of the first Supreme Court Order and the second Supreme Court Order;
4. It was submitted that the Review Panel erred in law in determining that the issues of the first Supreme Court Order and the second Supreme Court Order were never raised in the Court of Appeal without any evidence to support that determination. It was argued that the Review Panel relied on the judgment of Justice Slattery without seeking a copy of the Notice of Appeal to the Court of Appeal. It was argued that the Review Panel should have sought the parties' written and oral submissions made in the Supreme Court proceedings. It was also submitted that if the Review Panel had sought and obtained evidence of what was raised in the Court of Appeal they would have determined that the plaintiffs should pay the first defendant nothing in respect of the first Supreme Court Order and the second Supreme Court Order;
5. It was submitted that the Review Panel erred in law in determining that the solicitor fee items 1 to 24 inclusive and Counsel fee item 49 in the first defendant's application for assessment of party/party costs were within the scope of the first Supreme Court Order without any evidence to support that finding. It was said that only the first defendant's costs which, in substance, were thrown away as a result of the Further Amended Statement of Claim, should have been allowed and these items did not fall within that;
6. It was submitted that the Review Panel erred in law in determining that solicitor fee items 31 to 33 inclusive and Counsel fee item 51 of the first defendant's cost assessment application were within the scope of the second Supreme Court Order made on 5 November 2010 when such items fell outside of the scope of the order and the Review Panel did not seek evidence of the relevant correspondence and documents the subject of the fee items to properly consider them. It was said that if the Review Panel had looked at the documents they would have disallowed the items;
7. It was submitted that the Review Panel erred in law in determining that the plaintiffs should pay the costs of the review application in circumstances where the plaintiffs did not participate in the review application in any manner except for being named by the first defendant as review respondents in the review application. It was submitted that in

substance the plaintiffs acted only as a submitting appearing party to the review application and should therefore not have to bear any costs of the review application. It was also submitted that if the plaintiffs succeeded on any one or more of the appeal grounds the plaintiff should not have to bear any costs of the costs assessment and the review determination to that effect should be set aside.

1. I have only set out the plaintiffs' submissions in summary in the above paragraph. The written submissions dated 18 September 2016 and the reply submissions were lengthy and it is not necessary to set them out in any greater detail to understand their scope.

Submissions on behalf of the first defendant

1. The first defendant relied in this Appeal on her detailed written submissions prepared by her Counsel dated 13 October 2016.
2. The first defendant, in summary, made the following submissions:
 1. The first Supreme Court Order and the second Supreme Court Order were not subject to any appeal in the Court of Appeal proceedings. Further, it is clear from the Notice of Appeal, the written submissions and the judgment of the Court of Appeal that those two orders were never considered by the Court of Appeal and no submissions were made in relation to them in the Court of Appeal. It was submitted that the consent orders made by the Registrar in the Court of Appeal could not on their proper construction in the light of the principles in *Wende v Horwath*, above, be construed as superseding the first Supreme Court Order and the second Supreme Court Order. It was also stated that when the surrounding material was examined that it was clear that the Court of Appeal never had in contemplation those two orders.

It was submitted that the general proposition applicable was that an interlocutory costs order once decided is not overturned unless there is an express judgment to that effect or it is necessarily overturned by implication from another order. This was not the case here. It was submitted that Part 42.7(1) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") was applicable and there was no "otherwise order" by the Court of Appeal overturning the first Supreme Court Order and the second Supreme Court Order;

1. The only matters litigated in the Supreme Court, it was said, were the matters pleaded and the subject of submissions and argument. There was no pleading and there was no argument in relation to the two interlocutory costs orders. It was submitted that the Court of Appeal orders, including the order as to costs of the first instance proceedings, related only to the general costs of the proceedings, from which the interlocutory costs orders were excluded by virtue of Part 42.7 of the UCPR, and, as a result of the plaintiffs' failure to make any application for review or appeal, the interlocutory costs orders stood;
2. It was submitted that it was clear from the determination of the Review Panel that they considered the plaintiffs' principal objections to the first defendant's costs application;

3. It was submitted that the material before the Review Panel including the lengthy submissions of the plaintiffs themselves at first instance, contained sufficient information for the Review Panel to determine that the first Supreme Court Order and the second Supreme Court Order were never raised in the Court of Appeal proceedings. Pursuant to Section 359(2) of the LPA, a costs assessor is not bound in considering an application by the rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit. It was therefore irrelevant whether or not the Review Panel sought a copy of the Notice of Appeal in the Court of Appeal for its determination;
4. There was no requirement in, or positive obligation arising from, the UCPR (or otherwise) for a party to confirm existing costs orders in any subsequent appeal in relation to the substantive proceedings;
5. No error was demonstrated in relation to the decision of the Review Panel concerning that the costs were within the scope of the first Supreme Court Order. The Review Panel had before it an itemised bill of costs supported by submissions in response, which provided a rational and correct basis upon which the costs were claimed. It made a decision on the basis of those materials which it was entitled to do. The costs assessors comprising the Review Panel were experienced and were in a position to call upon their own experience in the conduct of litigation and determining what was fair and reasonable costs taking into account Section 364 of the LPA. It was clear from the reasons for determination of the Review Panel that it considered the matters required to be taken into account pursuant to Section 364 of the LPA in assessing the costs payable pursuant to the costs orders;
6. Similar submissions were made in relation to the costs being within the scope of the second Supreme Court Order. The indemnity costs order covered the items disputed;
7. In relation to the costs of the Review Panel, the Review Panel had a discretion pursuant to Section 379 of the LPA as to the liability for the costs of the review. The Review Panel made the correct decision as to costs. The general rule is that costs will follow the event as provided by Part 42.1 of the UCPR and *Oshlack v Richmond River Council* (1998) 193 CLR 72. The determination that the plaintiffs pay the first defendant's costs of the review was reasonable. The aim of a costs order is to compensate a party in whose favour it is made, not to punish the person against whom the order is made;
8. The appeal should be dismissed with costs.

Plaintiffs' responsive submissions

1. The plaintiffs relied on detailed responsive written submissions in which they disputed the submissions made on behalf of the first defendant.

Legislative Provisions

1. Part 42.7 of the UCPR provides as follows:

"42.7 Interlocutory applications and reserved costs

- (1) Unless the court orders otherwise, the costs of any application or other step in any proceedings, including:
 - (a) costs that are reserved, and
 - (b) costs in respect of any such application or step in respect of which no order as to costs is made,

are to be paid and otherwise dealt with in the same way as the general costs of the proceedings.

- (2) Unless the court orders otherwise, costs referred to in subrule (1) do not become payable until the conclusion of the proceedings."

1. Section 357(1) of the LPA provides as follows:

"357 Referral of matters to costs assessors

- (1) The Manager, Costs Assessment is to refer each application for costs assessment to a costs assessor to be dealt with under this Division."

1. Section 358(1) of the LPA provides as follows:

"358 Costs assessor may require documents or further particulars

- (1) For the purposes of determining an application for a costs assessment, a costs assessor may, by notice in writing, require a person (including the applicant, the law practice concerned, or any other law practice or client) to do any one or more of the following:
 - (a) to produce, at a specified time and place, any specified document (or a copy of the document),
 - (b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states) including, for example:
 - (i) information as to the instructions given to, or work done by, any law practice in respect of the matter concerned, and
 - (ii) information as to the basis on which the costs concerned were calculated,
 - (c) to otherwise assist in, or co-operate with, the determination of the assessment in a specified manner."

1. Section 359 of the LPA provides as follows:

"359 Consideration of applications by costs assessors

- (1) A costs assessor must not determine an application for assessment unless the costs assessor:

- (a) has given both the applicant and any law practice or client or other person concerned a reasonable opportunity to make written submissions to the costs assessor in relation to the application, and
- (b) has given due consideration to any submissions so made.
- (2) In considering an application, a costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit.
- (3) For the purposes of determining an application for assessment or exercising any other function, a costs assessor may determine any of the following:
 - (a) whether or not disclosure has been made in accordance with Division 3 (Costs disclosure) and whether or not it was reasonably practicable to disclose any matter required to be disclosed under Division 3,
 - (b) whether a costs agreement exists, and its terms."

1. Section 364 of the LPA provides as follows:

"364 Assessment of costs—costs ordered by court or tribunal

- (1) In conducting an assessment of legal costs payable as a result of an order made by a court or tribunal, the costs assessor must consider:
 - (a) whether or not it was reasonable to carry out the work to which the costs relate, and
 - (b) whether or not the work was carried out in a reasonable manner, and
 - (c) what is a fair and reasonable amount of costs for the work concerned.
- (2) In considering what is a fair and reasonable amount of legal costs, a costs assessor may have regard to any or all of the following matters:
 - (a) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
 - (b) the complexity, novelty or difficulty of the matter,
 - (c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,
 - (d) the place where and circumstances in which the legal services were provided,
 - (e) the time within which the work was required to be done,
 - (f) the outcome of the matter.
- (3) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs and any relevant regulations.

- (4) If a court or a tribunal has ordered that costs are to be assessed on an indemnity basis, the costs assessor must assess the costs on that basis, having regard to any relevant rules of the court or tribunal and relevant regulations."

1. Section 375 of the LPA provides as follows:

"375 General functions of panel in relation to review application

- (1) A panel constituted under this Subdivision may review the determination of the costs assessor and may:
- (a) affirm the costs assessor's determination, or
 - (b) set aside the costs assessor's determination and substitute such determination in relation to the costs assessment as, in their opinion, should have been made by the costs assessor who made the determination that is the subject of the review.
- (2) For the purposes of subsection (1), the panel has, in relation to the application for assessment, all the functions of a costs assessor under this Part and is to determine the application, subject to this Subdivision and the regulations, in the manner that a costs assessor would be required to determine an application for costs assessment.
- (3) However, the assessment is to be conducted on the evidence that was received by the costs assessor who made the determination that is the subject of the assessment and, unless the panel determines otherwise, the panel is not:
- (a) to receive submissions from the parties to the assessment, or
 - (b) to receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor.
- (3A) A panel reviewing the determination of a costs assessor may determine that the amount of fair and reasonable costs is the amount agreed to by the parties to the review if during the course of the review the parties notify the panel that they have agreed on the amount of those costs.
- (4) If the costs assessors who constitute the panel are unable to agree on a determination in relation to an application, the panel is to affirm the determination of the costs assessor who made the determination that is the subject of the review."

1. Section 379 of the LPA provides as follows:

"379 Recovery of costs of review

- (1) A panel that conducts a review of a costs assessor's determination under this Subdivision is to determine the costs of the review and may, subject to this section, determine by whom and to what extent those costs are to be paid.
- (2) If the panel affirms the determination of the costs assessor, the panel is to require the party who applied for the review to pay the costs of the review.

- (3) If the panel sets aside the determination of the costs assessor, and makes a determination in favour of the party who applied for review, the panel is to require the party who applied for the review to pay the costs of the review if the determination of the panel increases or decreases the total costs payable (as assessed by the costs assessor) by an amount that is less than 15 per cent (or such other percentage as may be prescribed by the regulations) of the total costs payable as assessed by the costs assessor.
- (4) Subject to subsections (2) and (3), the panel may require any party to the assessment that is reviewed to pay the costs of the review or may determine that the costs of the review are to be shared between the parties in any manner that the panel considers appropriate.
- (5) The panel is to issue to each party and the Manager, Costs Assessment, a certificate that sets out the panel's determination under this section.
- (6) The certificate is, on filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs of the review.
- (7) The costs of the review are to be paid to the Manager, Costs Assessment.
- (8) The Manager, Costs Assessment may take action to recover the costs of a review.
- (9) Regulations may be made with respect to determinations of a panel under this section.
- (10) In this section:

costs of a review means the costs incurred by the panel or the Manager, Costs Assessment in the course of a review under this Subdivision, and includes the costs related to the remuneration of the costs assessors who constitute the panel."

1. Section 384 of the LPA provides as follows:

"384 Appeal against decision of costs assessor as to matter of law

- (1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the District Court, appeal to the Court against the decision.
- (2) After deciding the question the subject of the appeal, the District Court may, unless it affirms the costs assessor's decision:
 - (a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or
 - (b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.
- (3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given."

Consideration

Appeal Grounds 1, 1A, 2 and 3

1. I have set out these appeal grounds above but I repeat them now for convenience:

"1. The Review Panel erred in law in determining the Review Application without having given due consideration to the submissions of the Plaintiffs in paragraphs 1 to 10 inclusive of the Costs Respondents' Objections to Costs Applicant's Application for Assessment of Party Party Costs dated 9 December 2015, in breach of sections 359(1)(b) and 375(2) of the LPA.

1A. The Review Panel erred in law in determining the Review Application without having given the Plaintiffs a reasonable opportunity to make written submissions to the Review Panel in relation to the Defendant's submitted grounds for making the Review Application as contained in the Review Application to the following effect, in breach of sections 359(1)(a) and 375(2) of the LPA:

- (a) the orders of the Court made 22 June 2010 and 5 November 2010 were never appealed in the Court of Appeal;
 - (b) the orders of the Court made 22 June 2010 and 5 November 2010 were never argued in the Court of Appeal.
2. The Review Panel erred in law in determining that the issue of the interlocutory costs orders was never raised in the Court of Appeal without any evidence to support that determination.
3. The Review Panel erred in law in concluding that the Assessor erred in determining that the Court of Appeal's cost orders superseded the interlocutory cost orders made in the matter."
1. In my view, each of these appeal grounds should be rejected. I generally prefer the submissions of the first defendant in relation to these appeal grounds.
2. In relation to ground of appeal 1, it is clear to me from an examination of the Determination of the Review Panel and the Review Panel's Statement of Reasons dated 17 May 2016 that they considered the plaintiffs' objections dated 9 December 2015 (see Exhibit A tab 8). Paragraphs 61-73 of the plaintiffs' Notice of Objections are expressly referred to in paragraph 6 of the Reasons of the Review Panel. In paragraph 17 of the Review Panel's Reasons, the effect of the Court of Appeal's orders in their context was expressly considered. In paragraph 19 of the Review Panel's Reasons, it is stated that where the Review Panel has not made specific comment upon, nor referred to an objection by the plaintiffs, then the Review Panel has assessed costs on the basis that the Review Panel has accepted the submissions made by the first defendant. It is clear in my view that the Review Panel has considered the issues in the relevant paragraphs and the plaintiffs' submissions on the issues. It is not necessary in my view for the Review Panel to make express reference to the paragraphs in question if it is clear that the submissions of the plaintiffs overall have been taken into account and considered. In relation to paragraphs 1-2 of the plaintiffs' objections, it is further noted that the plaintiffs were given a full opportunity to raise matters relating to the substantive issues

in their objections and related submissions.

3. In relation to appeal ground 1A, in my view it was unnecessary for the Review Panel to give the plaintiffs a further opportunity to make written submissions to the Review Panel as claimed.
4. In my opinion, a careful review of the Notice of Appeal (Exhibit A tab 11), the written submissions on behalf of the parties in the Court of Appeal (Exhibit 1), the judgment of the Court of Appeal (Exhibit A tab 9) and the relevant consent order made by the Registrar of the Court of Appeal (Exhibit A tab 3), makes it clear that the order made by the Court of Appeal could not reasonably be construed as superseding the first Supreme Court Order and the second Supreme Court Order. Those interlocutory orders were never before the Court of Appeal for its consideration and were not referred to in the Notice of Appeal. I reject the submission made by the plaintiffs that it was clear on the face of the Notice of Appeal that all orders made below, including the first Supreme Court Order and the second Supreme Court Order, were being appealed.
5. Leave would normally have needed to be sought by the current plaintiffs to appeal against those interlocutory orders because they were interlocutory orders and the appeal periods to appeal from them had expired: see UCPR Part 51.10 and Section 101(2)(c) and (e) of the Supreme Court Act 1970 (NSW). The plaintiffs submit that separate leave was not required where the plaintiffs had the right to bring the appeal in relation to the final judgment. They rely on cases which include *Crowley v Glissan* (1905) 2 CLR 402 and *Bunning v Cross* (1978) 141 CLR 54. Even if that is correct, the terms of the Notice of Appeal are a strong guide as to what was appealed to the Court of Appeal. There is no express reference to the two interlocutory costs orders in the Notice of Appeal.
6. I also take into account the reasoning of Basten JA and Barrett JA in the Court of Appeal in *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170 at [59]-[64] and [245]. Although Beazley P agreed with Barrett JA on most issues (see [1]), the plaintiffs submit that there is no real difference between the appeal judges on the correct approach to be taken in construing a court order. I accept that submission. In my view, the first Supreme Court Order and the second Supreme Court Order were simply never before the Court of Appeal for its consideration and not therefore in the contemplation of anyone on the appeal.
7. Whether looked at on the face of the order itself or looked at in the light of the context of the Court of Appeal order and the reasons for judgment of the Court of Appeal, in my view the order did not vary the first Supreme Court Order or the second Supreme Court Order. What was before the Court of Appeal was an appeal from the orders made by Slattery J not the earlier interlocutory orders. There is no mention of these two interlocutory orders in the Court of Appeal's judgment. Accordingly, the Court of Appeal order did not supersede or impliedly replace the two earlier interlocutory orders in question.

8. I also accept the submissions of the first defendant that Part 42.7 of the UCPR is relevant. Orders for costs had been made in the two interlocutory matters. Therefore Part 42.7(1)(b) of the UCPR where it provides "costs in respect of any such application or step in respect of which no order as to costs is made" (emphasis added) is inapplicable. Orders as to costs had been made at first instance in the first Supreme Court Order and the second Supreme Court Order and these had not been set aside, expressly or by necessary implication, by the Court of Appeal order.
9. The plaintiff submits that Part 42.7 of the UCPR should be held to apply only to decisions at first instance and not to decisions of the Court of Appeal because the Court of Appeal is superior in the judicial hierarchy. The first defendant submits this is incorrect and illogical and the rule does apply to decisions of the Court of Appeal. In my view the submissions of the first defendant should be preferred on this point. The first Supreme Court Order and the second Supreme Court Order were costs orders made presumably after a consideration at the time of the merits of each order. The orders were made to compensate the first defendant. To find that these specific costs orders have been superseded by a general Court of Appeal order would be illogical and potentially cause injustice. Part 42.7 operates in accordance with its terms so that a later decision must expressly or impliedly alter the existing costs decision. That is not the case here.
10. I reject the submissions of the plaintiffs in this regard.
11. The plaintiffs also submit:
 1. The Review Panel was obliged to give the plaintiffs a reasonable opportunity to make written submissions and give due consideration to any submissions so made: section 359 (1) of the LPA;
 2. These requirements were a statutory obligation on the Review Panel: *Turner v Pride* [1999] NSWSC 850 at [36]-[38];
 3. These statutory requirements fulfil the obligation to accord natural justice: *Ryan v Hansen* [2000] NSWSC 354 at [30];
 4. The submissions of the first defendant at first instance did not refer to the Notice of Appeal;
 5. The reasons of the Review Panel did not adequately set out its reasoning as to the Court of Appeal order. The Review Panel was required to disclose the process by which it arrived at its decision: *Levy v Bergseng* [2008] NSWSC 294 at [81];
 6. In particular, the Review Panel as a minimum standard must place the parties in a position to understand why the decision was made sufficiently to allow them to exercise the right of appeal: *Frumar v The Owners of Strata Plan 36957* [2006] NSWCA 278.

1. In my view, the reasons of the Review Panel are sufficient to expose its train of reasoning for arriving at its conclusion: see Reasons at paragraphs 12 and 17. There is no reason, in my opinion, why the Appeal Panel was obliged to undertake a detailed examination in its reasons of each paragraph of the plaintiffs' extensive written submissions.
2. Even if some breach of the rules of natural justice had occurred by the Review Panel, as asserted by the plaintiffs, by not giving an opportunity to the plaintiffs to make written submissions as alleged, in my view I have now had the opportunity to review the plaintiffs' detailed submissions. In my opinion the position is clear that the plaintiffs' argument on the Court of Appeal order should be rejected. I would determine under Section 384(2) of the LPA that the opinion of the Review Panel in relation to the Court of Appeal order was correct and that of the original assessor incorrect for the reasons set out above.
3. In my view there is no substance in this ground of appeal. This also deals in substance with appeal grounds 2 and 3.
4. As to ground 2, the Court of Appeal submissions, the Notice of Appeal and the Court of Appeal reasons establish that the issue of the interlocutory costs orders was never raised in the Court of Appeal.
5. The plaintiffs submit that submissions cannot be evidence. Submissions can however have evidential value as to what matters were argued before a court.
6. The Review Panel clearly had before it the reasons of the Court of Appeal: Review Panel May 2016 reasons paragraph 5. It appears those reasons were considered by the Review Panel. Reference was made by it in paragraph 17 of its Reasons in the following way: "...nor was it a matter to which the Court of Appeal has directed its attention in any way."
7. The plaintiffs submit that the Court of Appeal reasons were not evidence supporting the Review Panel's decision and rely on *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32 and *Vumbaca v Sultana* [2012] NSWDC 237. The first defendant submits that the Review Panel was not bound by the rules of evidence. In my view, the reasons of the Court of Appeal were material of an evidential nature which the Review Panel was entitled to take into account. The Court of Appeal reasons amounted to evidence to support the Review Panel's determination on this issue as no reference was made in those reasons to the interlocutory costs orders in question. This supports the argument that the issue of those interlocutory costs orders was not before the Court of Appeal. I do not consider that the cases relied on by the plaintiffs referred to above are relevant on this issue.
8. In my view there was evidence before the Review Panel to support its determination on this issue and the ground of appeal should be rejected.
9. In relation to ground 3, this should be rejected for the reasons which I set out above in relation to grounds 1A and 2.

Appeal Ground 4

1. Ground of Appeal 4 is repeated for convenience:
4. The Review Panel erred in law in determining that solicitor fee items 1 to 24 inclusive and Counsel fee item 49 in the Defendant's application for Assessment of Party/Party Costs having case no. 2105/317958 in the Supreme Court of New South Wales at Sydney (Costs Assessment Application) were within the scope of the order of the Court made 22 June 2010, further without any evidence to support that finding.
1. The order of 22 June 2010 related to the first defendant's costs thrown away as a result of the Further Amended Statement of Claim.
2. The Review Panel Reasons dated 17 May 2016 (Exhibit A, tab 8) referred in paragraph 4 to the fact that the application for assessment by the first defendant set forth the basis upon which costs were claimed including the claim for legal services as provided and set out "in an itemised fashion the legal services that were provided". In paragraph 6 of its Reasons, the Review Panel refers to the plaintiffs' objections dated 19 January 2015 to individual items as referred to in paragraphs 61 to 73 of the plaintiffs' Notice of Objections. It is clear, therefore, that the Review Panel had reviewed the objections to the individual items made by the plaintiffs. In paragraph 7, the Review Panel refers to the first defendant's response to the plaintiffs' objections. In providing this history, it is clear that the Review Panel looked at the various objections made by the plaintiffs and the responses of the parties.
3. In paragraph 16 of its Reasons, the Review Panel notes the necessity for it to carry out its own review as opposed to conducting an appeal and asserts that it "has acted accordingly". In paragraph 18 of its Reasons, the Review Panel appears to consider, as it was obliged to, the matters relevant under Section 364 of the LPA. In paragraph 19 of its Reasons, the Review Panel makes clear in its determination that where it has not made specific comment upon, nor referred to an objection by the plaintiffs, then the Review Panel "has assessed costs on the basis that the Review Panel has accepted the submissions made" by the first defendant.
4. The plaintiff submits that the Review Panel should have called for the underlying documents involved to determine whether the costs sought fell within the scope of the order. It was asserted that it could only have determined that the costs were "thrown away" if it had done that. The plaintiffs say that the determination of the proper scope of the order is an anterior matter which involves a question of law not fact.
5. However, I agree with the submissions of the first defendant that the Review Panel had before it an itemised bill of costs supported by submissions in response, which provided a rational basis upon which the costs were claimed. It made a decision on the basis of the materials before it which it was entitled to do in the circumstances. As Section 359(2) of the LPA makes clear, a costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit. No additional submissions were invited or called for from the parties by the Review Panel but the Review Panel was entitled to take that course and conduct the review on the evidence that was received by the

costs assessor at first instance who made the determination that is the subject of the assessment: Section 375(3) of the LPA.

6. The costs assessors in the Review Panel were very experienced practitioners.
7. I note the submissions of Counsel for the first defendant that the Review Panel was entitled to make the decision which it did in the circumstances: see paragraph 42 of the first defendant's written submissions dated 13 October 2016.
8. I also note:
 1. Items 1 to 24 inclusive and Counsel fee item 49 of the first defendant's application – Exhibit A, tab 1;
 2. The plaintiffs' response dated 9 December 2015, paragraphs 58 and 61 and Exhibit G: Exhibit A, tab 3;
 3. The first defendant's response dated 15 January 2016 pages 3-4 in Exhibit A, tab 4;
 4. The plaintiffs' submissions in reply dated 10 November 2016 and filed 11 November 2016 pages 10-11 as to this issue.
1. In my view, the first defendant's submissions should generally be accepted on this issue. In addition to the matters referred to above, I note the following:
 1. The detail in the first defendant's itemised bill of costs;
 2. The fact the Review Panel had before it the plaintiffs' objections and a copy of the Further Amended Statement of Claim. It is also noted that the proceedings were commenced on 21 April 2010 and the order in question was only made shortly after on 22 June 2010;
 3. The fact the additions in the Further Amended Statement of Claim were substantial and required a reassessment of the whole pleading in the context of the proceedings at that time;
 4. The obvious impact of this new pleading on work which had already been performed in relation to the earlier versions of the pleading.
1. In my opinion, the conclusion reached by the Review Panel was open to it on the basis of this material. The Reasons of the Review Panel suggest a careful examination of the issue including the disallowance of other items claimed. Inherent in its decision was a decision that it did not need to call for the underlying documents. In my view, taking into account the reasoning set out, no error of law is established as alleged by the plaintiffs.
2. This ground of appeal is rejected.

Appeal Ground 5

1. Ground of Appeal 5 provides as follows:

5. The Costs Review Panel erred in law in determining that solicitor fee items 31 to 33 inclusive and Counsel fee item 51 of the Costs Assessment Application were within the scope of the order of the Court made 5 November 2010, further without any evidence to support that finding.
1. The second Supreme Court Order was an order for costs on an indemnity basis: Exhibit A, tab 1, page 3, paragraph 6. Under Section 364(4) of the LPA, if a court or a tribunal has ordered the costs are to be assessed on an indemnity basis, the costs assessor must assess the costs on that basis.
2. Part 42 Rule 5 of the UCPR which relates to indemnity costs provides that in the general case of an award of indemnity costs, "all costs (other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount) are to be allowed". As is submitted in paragraph 47 of the first defendant's submissions dated 13 October 2016, it appears that the Review Panel has determined to disallow certain items: see the Review Panel's Reasons at paragraph 20. This indicates that there was a review by the Review Panel of the items objected to by the plaintiffs.
3. I have carefully reviewed the plaintiffs' submissions in relation to this ground of appeal. These include the plaintiffs' responsive submissions filed 11 November 2016 at pages 10-11. The plaintiffs submit that the Review Panel should have called for copies of the Notice of Motion and the relevant correspondence before deciding the issue as to whether the legal work fell within the scope of the order. The first defendant says this could have been done but was not necessary as the itemised bill of costs together with the parties' objections and submissions made clear the costing issue for decision.
4. An order for indemnity costs generally permits a party to claim costs of and incidental to an application commenced by way of Notice of Motion. See paragraph 26 of *Lawrence v Ramensky Lawyers* [2006] NSWSC 175 which dealt with a costs order made on the usual basis. The fact such costs could be claimed would be even clearer in the case of an order for indemnity costs.
5. My comments in relation to Ground of Appeal 4 apply equally to this ground of appeal. However, here, the fact that the costs order was an indemnity costs order makes the plaintiffs' task even harder in establishing the appeal on this ground. In making that comment, I am not stating that an order for indemnity costs shifts the burden to the costs respondent to negate the costs applicant's entitlement.
6. The plaintiffs rely on *Lawrence v Ramensky Lawyers*, above, at [26] and *Hancock v Rinehart* [2015] NSWSC 1640 at [27] as standing inferentially for the proposition that a party cannot recover for legal costs concerning without prejudice correspondence relating to a Notice of Motion even in the case where an indemnity costs order is made. It is submitted that these cases only permit costs to be allowed which relate to the procedural steps for the Notice of Motion and preparing for and running the Notice of Motion. In my opinion, these cases do not assist the plaintiffs on this issue. No direct authority on the issue was brought to the

attention of the court by the plaintiffs.

7. In my view, there is nothing inherently wrong in allowing costs relating to the preparation of correspondence concerning why a party's Notice of Motion is bound to fail or is otherwise inappropriate. It is a practitioner's task to avoid unnecessary applications. Writing to a party in relation to alleged applications of that nature is, in my view, reasonable and consistent with the principles set out in Sections 56-58 of the Civil Procedure Act 2005 (NSW), particularly section 56 (3).
8. The Review Panel had before it all the different submissions of the parties and was entitled to decide that the items in question fell within the indemnity costs order made and were reasonable. That approach was fulfilling its duty under section 364 (1) of the LPA. No error of law is established.
9. In my view this ground of appeal should be rejected.

Appeal Ground 6

1. Ground of Appeal 6 is as follows:
6. The Costs Review Panel erred in law in determining that the Plaintiffs' [sic] should pay the costs of the Review Application, in circumstances where the Plaintiffs did not participate in the Review Application in any manner except for being named by the Defendant as review respondents in the Review Application.
 1. The plaintiffs submit that they should not pay the costs of the review application as the plaintiffs did not participate in the review application in any manner or take any active role except for being named by the first defendant as respondents to the review application. They also submit that a review application is "an entirely new application."
 2. An analogy is made by the plaintiffs with a submitting appearance situation in a court proceeding.
 3. However, the plaintiffs:
 1. Chose actively to oppose the costs assessment and make objections at first instance before the Costs Assessor;
 2. At no stage indicated to the Review Panel that they no longer wished to proceed with their objections on the review;
 3. Would no doubt have taken advantage of any determination by the Review Panel in their favour.
 1. The costs assessment process under the LPA contemplates a review by a Review Panel if a party seeks that review from the decision of a Costs Assessor. There is no reason why a party who has taken an active role in opposing an assessment at first instance should not be subject to a costs determination in the event that they lose before the Review Panel.

2. The determination by the Review Panel as to costs in the present case is consistent with the general principle that costs should follow the event.
3. In addition, Section 379(1)-(4) provides a general costs discretion to the Review Panel subject to the limitations in those sub-sections.
4. In my opinion, the determination as to costs fell within the costs discretion of the Review Panel. In addition, as the first defendant submits, the purpose of an order for costs is to compensate the person in whose favour it is made, not to punish the person against whom the order is made. Here, the cost determination was clearly made in order to compensate the first defendant for the costs involved in the need to seek a review.
5. Having determined that there were to be no further submissions on the review, in my opinion the Review Panel was entitled to make the costs decision which it did.

Disposition

1. For the above reasons, all of the grounds of appeal are rejected.
2. I make the following orders:
 1. The Amended Summons is dismissed.
 2. The plaintiffs are to pay the first defendant's costs of the proceedings as agreed or assessed.
 3. Liberty to the parties to apply for a different costs order to that set out in (2) above.

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Decision last updated: 09 March 2017

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