ACT CIVIL & ADMINISTRATIVE TRIBUNAL

THE OWNERS – UNITS PLAN 2881 v STOJANOVIC & ANOR [2020] ACAT 113

XD 171/2020

Catchwords: **CIVIL DISPUTE** – unpaid levies – claim for expenses under section 31 of the *Unit Titles (Management) Act 2011* – adjournment refused – failure to comply with tribunal directions – hearing on evidence already filed – counterclaim seeking recovery of payment subject to consent orders – no application made to set aside consent orders – unreasonable delay and reasonable costs

Legislation cited: *ACT Civil and Administrative Tribunal Act* ss 48, 56
Unit Titles (Management) Act 2011 s 31, 103

Subordinate Legislation cited: ACT Civil and Administrative Tribunal Procedures Rules 2020 r 71

Cases cited: *Burrell v The Queen* (2008) 238 CLR 218
CIC Australia Ltd v Australian Capital Territory Planning and Land Authority [2013] ACTSC 96

Tribunal: Senior Member K Katavic

Date of Orders: 17 December 2020
Date of Reasons for Decision: 17 December 2020

AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL **XD 171/2020**

BETWEEN:

THE OWNERS – UNITS PLAN 2881
Applicant

AND:

WILLIAM VOJISLAV STOJANOVIC
First Respondent

MILICA STOJANOVIC
Second Respondent

TRIBUNAL: Senior Member K Katavic

DATE: 17 December 2020

ORDER

The Tribunal orders that:

1. The respondents pay to the applicant the sum of $1,594.95 comprising:

   (a) $495 for expenses under section 31 of the UTM Act;

   (b) $780.95 interest at the rate of 10% incurred up to 23 June 2020; and

   (c) $319 for the ACAT filing fee.

2. The respondents' counterclaim is dismissed.

3. The respondents' claim for costs is refused.

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Senior Member K Katavic

REASONS FOR DECISION

Introduction

1. The respondents in this matter are the owners of a unit in Phillip, ACT. The dispute before the Tribunal began as a debt recovery matter for unpaid levies and expenses under section 31 of the *Unit Titles (Management) Act 2011* (**UTM Act**). There is some history between the parties which previously brought them before the tribunal in 2015. The respondents lodged a counterclaim the substance of which related to these earlier proceedings.

Background

2. On 10 February 2020, the applicant commenced proceedings seeking payment from the respondents as follows:

   (a) $2,061.47 unpaid levies.

   (b) $737.73 interest at the rate of 10%.

   (c) $3,483.51 expenses pursuant to section 31 of the UTM Act.

   (d) $319 ACAT filing fee.

3. The respondents filed a response admitting part of the claim, disputing some amounts claimed and made a counterclaim. The respondents later amended their counterclaim to reflect the amount owed to them by the applicant according to their claim and the levies being paid.

4. On 3 June 2020, the tribunal held a preliminary conference in this matter. The matter did not resolve and was adjourned for a further preliminary conference on 16 July 2020. The tribunal also ordered the applicant give to the tribunal and the respondents by 24 June 2020 the following documents:

   (a) Documents pertaining to Clean Away and grease trap charges and any rules\contracts the applicant is relying upon.

   (b) Documentation in relation to insurance excess and any rules\contracts relied upon by the applicant to charge this.

(c) All arrears and debt notices alleged to have been served on the respondents.

(d) Documentation pertaining to the bin cleaning charges and any rules\agreements between the parties in relation to these.

5. The respondents were also required to give to the tribunal and the applicant by 24 June 2020 any further evidence they wish to rely upon in relation to the plumbing charges.

6. The applicant did not comply with those orders. The respondents did.

7. The preliminary conference listed for 16 July 2020 did not proceed. The tribunal made orders as follows:

> *Noting that the applicant is not ready to proceed and that the respondents allege the adjournment has cost them income, the Tribunal orders:*
>
> *1. The matter is adjourned to Monday, 3 August 2020 at 10:30 AM.*
>
> *2. The respondent's loss of income for the day (estimated at $1,500.00) is to be considered in any future hearing or conference settlement.*

8. The respondents maintained their claim for costs of $1,500 for income lost due to the conference being adjourned.

9. At the hearing the respondents confirmed that in relation to the counterclaim they sought payment from the applicant as follows:

(a) $3,325 reimbursement for charges associated with the grease trap.

(b) $490 for unnecessary camera diagnostics undertaken on the grease trap charged to the respondents.

(c) $671 incurred by the respondents on 1 April 2016 for additional cleaning and diagnostics of the grease trap.

(d) $924 for bin room charges (not previously reimbursed by the applicant).

10. The claims for $3,325 and $924 were the subject of consent orders made in proceedings in this tribunal on 15 February 2015 (**the Consent Orders**). The

other amounts claimed are related to issues associated with those Consent Orders.

11. In their submission dated 21 October 2020, the respondents referred to an amount of $574.20 for camera diagnostics for the grease trap which was incurred on 12 October 2020. This amount was not included in the counterclaim or amended counterclaim. I do not regard it as properly before the Tribunal for consideration.

12. At the commencement of the hearing, the applicant's legal representative requested an adjournment. The respondents opposed the request. Essentially, the applicant's representative was not prepared for the hearing, had not amended the application, and had not complied with the directions made on 9 September 2020 in preparation for the hearing. The respondents had complied with the directions and were ready to proceed. In the circumstances, I refused the applicant's request and gave brief oral reasons at the hearing. I proceeded to hear the matter based on the material that had been lodged by the parties up to that date.

13. The documents before the Tribunal were as follows:

    (a) Application dated 7 February 2020.

    (b) Response and counterclaim dated 17 March 2020 including four attachments.

    (c) Documents submitted by the respondents on 24 June 2020.

    (d) Amended counterclaim dated 21 July 2020.

    (e) Documents submitted by the applicant on 3 August 2020.

    (f) Submissions and further material lodged by the applicant on 7 September 2020 and email correspondence between the parties on 8 September 2020.

    (g) Submissions and further documents submitted by the respondents on 21 October 2020.

The debt claim

14. By 23 June 2020, being prior to the hearing, the respondents had paid in full the outstanding levies the subject of the application, and some expenses as claimed under section 31 of the UTM Act. Some of the claimed expenses remained the subject of dispute. The Tribunal was required to decide whether those expenses were reasonable and reasonably incurred for the purposes of considering the amount to be awarded in favour of the applicant based on the evidence before it.

15. The respondents submitted that if the applicant could produce the arrears notices sent on 27 February 2017, 18 April 2017, 26 June 2019 and 12 December 2019 for which a claim of $55 for each was made pursuant to section 31, then they would not dispute the claimed expense. The applicant was not able to produce the arrears notices in support of its claim and therefore the Tribunal does, not in the circumstances, regard the claim for those notices to be reasonably incurred. The respondents disputed they had received these notices and took the not unreasonable step of putting the applicant to proof in respect of each as claimed. The applicant was not able to do so and therefore the Tribunal does not allow those expenses.

16. The respondents also disputed the amount of $500 charged on 8 December 2017 for insurance excess.

17. The parties agree that on or about 17 November 2017, there was an incident in which the window to the façade of the respondents unit was broken. There was some debate about whether this was an attempted break-in or other unsolicited damage to the property. It was not reported to police. The glass was repaired at a cost of $712.80 and a claim was made by the applicant to its insurer.

18. The Owners Corporation Rules for Units Plan 2881 at clause 3(3) state that when a claim against the corporation's building insurance policy in respect of damage to a unit title building property is accepted, section 103(1) of the UTM Act requires the insurance money to be applied to rebuilding and reinstating the building. The value of any excess applied by the insurer on any claim will be recoverable by the Corporation as a debt from the unit owner except where the damage to the building results from a wilful or negligent act or omission of the Owners Corporation or another unit owner.

19. The applicant claimed that the insurance excess of $500 was therefore recoverable from the respondents as a debt. Again, the respondents put the applicant to proof that an excess had been applied for that amount.

20. On 3 June 2020, amongst other things the tribunal ordered the applicant to provide by 24 June 2020 documentation in relation to the insurance excess and any rules contracts relied upon by the applicant to charge this. As noted above, the applicant did not comply with those orders but on 3 August 2020 submitted some further documentation. Amongst that documentation was an email exchange between the building and strata managers on 31 January 2018, the insurance claim form, and the invoice for the glass repairs.

21. No evidence was before the Tribunal that supported the applicant being charged an excess of $500 because of the incident in November 2017. In the absence of any proof before the Tribunal in support of the expense, the Tribunal is not satisfied that the amount of $500 has been reasonably incurred by the applicant and therefore does not allow that expense.

22. The respondents also disputed expenses which may be characterised as legal costs associated with recovering the debt owed by the respondents. These were expenses incurred as follows:

    (a) $44 incurred on 25 July 2019 for advice and other correspondence relating to the respondents request to arrange an instalment regime.

    (b) $55 incurred on 11 December 2019 for phone calls and emails correspondence regarding the outstanding debt.

    (c) $396 incurred on 7 February 2020 to commence the Tribunal proceedings to recover the debt.

23. The respondents believed that they had in place an instalment regime which had been accepted by the applicant to pay $100 per week off the outstanding amount. The applicant submitted that no formal arrangement had been made and that the respondents had adopted the practice of paying $100 a week off the debt. The applicant submitted that it regarded the arrangement as temporary due

to financial and health issues experienced by the respondents. The applicant explained that by December 2019 the respondents' situation had not changed and as there was no formal agreement in place the repayment situation was no longer going to be tolerated by the applicant. As a result, it instructed its legal representatives to proceed with recovery action.

24. Against that, the respondents submitted that it was not necessary for the applicant to engage the services of a debt collector or commence proceedings because the instalment regime had been accepted and was appropriate. They submitted any legal costs associated with commencing proceedings in the Tribunal and engaging debt collection services were not reasonably incurred.

25. I do not accept the respondents' submission that the amounts claimed are not reasonable. In circumstances where the respondents had unilaterally decided paying $100 per week off the debt was acceptable it was not unreasonable for the applicant to engage the services of a debt collector and commence proceedings in this tribunal. While the respondents reasonably believed the repayment arrangement was acceptable it was not formalised. They continued to comply with that arrangement assuming the arrangement was suitable. However, the consideration under section 31 does not require the Tribunal to consider whether the respondents' behaviour or belief was reasonable but whether the expenses claimed by the applicant in the circumstances were reasonably incurred. In the Tribunal's view they were consistent with the applicant's obligation to recover any outstanding monies owed therefore the Tribunal and awards those amounts as claimed. There is necessarily a cost involved in coming to the tribunal to seek relief which falls within section 31 of the UTM Act.

26. For these reasons, I order the respondents pay to the applicant the sum of $1,594.95 comprising:

    (a) $495 for expenses under section 31 of the UTM Act set out above at [22];

    (b) $780.95 for outstanding interest at the rate of 10% incurred up to 23 June 2020; and

(c) $319 for the ACAT filing fee.

Counterclaim

27. The respondents' counterclaim seeks payment from the applicant for the following:

    (a) $3,325 for the cost of clearance and inspection of the drain blockage as per the Consent Orders.

    (b) $490 for camera diagnostics of the grease trap charged to the respondents on 31 July 2013.

    (c) $671 for the cost of cleaning and diagnosis of blocked drains on 1 April 2016.

    (d) $924 for bin room charges not refunded to them.

    (e) $1,500 for lost income referred to above.

28. The respondents' claim did not specifically apply to set aside the Consent Orders.

The monetary claim regarding blocked drains

29. The respondents claimed they should not have had to pay to the applicant $3,325 and $490 in charges for clearing and inspecting the grease trap drains. They also seek to recover $671 from the applicant being the costs of clearing a blocked drain on 1 April 2016. This amounts to a claim for $4,486.

30. The respondents submitted the Consent Orders were signed under duress and based on false or misleading information. The respondents say the applicant convinced them to agree to the terms of the Consent Orders and amended the Owners Corporation Rules regarding responsibility for cleaning the grease traps because the applicant knew there was a fault in the construction of the drains for which it was liable. The respondents told the Tribunal they felt pressured into agreeing to the Consent Orders, did not understand what was going on and had no option to obtain independent legal advice at the time. They conceded they

had not taken any steps in the intervening five-year period to appeal or set aside the Consent Orders.

31. The applicant submitted that there was no basis to set aside the Consent Orders as there was no application before the Tribunal of that kind. The applicant further submitted that the respondents were not entitled to an order requiring the applicant to pay $3,325 because that payment was subject to Consent Orders.

32. I accept the applicant's submissions. There is no application before the Tribunal seeking to set aside the Consent Orders. Having regard to the terms of the Consent Orders I am not satisfied the respondents are entitled to payment of $3,325 from the applicant. Even if the respondents had properly sought to set aside the Consent Orders I would have declined to do so.

33. Finality of judgments is a central principle of the judicial system. Once controversies are resolved, they are not to be reopened except in a few, narrowly defined, circumstances.[1] Such circumstances are found in rules governing the reopening of final orders after they have been formally recorded. Any challenge to final orders may also be the subject of appeal. In relation to consent orders, rule 71(6) of the *ACT Civil and Administrative Tribunal Procedures Rules 2020* specifically sets out the matters the Tribunal may take into account in considering whether to set aside a final order made by consent.

34. There are several difficulties with the respondents' submission.

35. The respondents allege the applicant amended the relevant Owners Corporation Rules which resulted in the commercial units being responsible for the cost of cleaning and removal of liquid and solid waste discharged by the grease drainage line to grease traps provided for the exclusive use the commercial units knowing there was a fault in the drain.[2] There is no evidence before the Tribunal that supports such an assertion.

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[1] *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] per Gummow ACJ, Hayne J, Heydon J, Crennan J and Kiefel J

[2] The Consent Orders included declarations that these amendments were valid and took effect on the various nominated dates

36. On 1 April 2016 the respondents engaged the services of Duncan's Plumbing, Heating and Air-conditioning Pty Ltd to fix a blocked drain.[3] The respondents claim that the plumbers findings demonstrate problems with the drain that needed to be rectified which the applicant either did know about or ought to have known about. The invoice dated 1 April 2016 records the following:

> *Drain is badly hung in this section and has dodgy connections that someone has installed that need to be cut out and replaced.*

37. I am not satisfied that the invoice from Duncan's Plumbing, Heating and Air-conditioning is sufficient to demonstrate the existence of a problem or one that the applicant was aware of or could have been aware of prior to amending the Owners Corporation Rules or entering the Consent Orders. Further, had the respondents genuinely believed this to be the case it was open to them at the time to take steps to seek to have the Consent Orders set aside or take any other action they considered appropriate. They did not do so and to raise the issue in these proceedings some five years later is contrary to the principles of finality in litigation.

38. I am also not satisfied the respondents are entitled to recover the amount of $671 from the applicant, being the Duncan's Plumbing, Heating and Air-conditioning invoice. As a consequence of both the amendments to the Owners Corporation Rules and the Consent Orders this was an expense in relation to the drains which was the responsibility of the respondents. I make the same conclusion in relation to the respondents' claim for payment of $490 for camera diagnostics on the grease trap.

39. The respondents also claimed they agreed to the Consent Orders under duress. They claimed that they felt intimidated by the applicant having lawyers attend the mediation or conference in the Tribunal. They were under the impression the Consent Orders were the only option they had. They were anxious that the process had taken them away from the restaurant they were operating at the time and were mindful of getting back to the business without further delay and

[3] Duncan's Plumbing, Heating and Air-conditioning Pty Ltd invoice dated 1 April 2016 filed by the respondents on 17 March 2020 with the Response

hence signed the orders. I am not satisfied that the circumstances advanced by the respondents qualifies as duress. Again, there is insufficient evidence before the Tribunal about the nature of the proceedings and the conduct of the parties at the time to persuade me that the Consent Orders should be set aside. Making such a claim five years later is inevitably fraught with difficulty.

40. The respondents' claim for $4,486 is dismissed.

The bin room charges

41. The respondents claimed they were to be reimbursed $924 by the applicant in relation to bin room charges. They claimed this did not happen. The applicant submits on 1 May 2015 the amount of $1,122 was credited to the respondents account. This was more than what was required of the applicant. It was a component of the amount of $5,291.11 credited to the respondents on that date. It is reflected in a spreadsheet relied upon by the applicant.[4]

42. On 24 June 2020, the respondents lodged a statement of account for the period 1 January 2014 and 30 April 2015. The amount referred to by the applicant would have appeared on the following statement. This has not been provided to the Tribunal. The respondents rejected the applicant's spreadsheet on the basis that "any individual can manufacture invoices and spreadsheets – we require actual proof".[5]

43. I have no reason to doubt the correctness of the spreadsheet relied upon by the applicant or find that it has been 'manufactured'. Had the respondents genuinely claimed the credit of $5,291.11 was not applied to their account on 1 May 2015 inclusive of the $924 for the bin room charges then the statement of account for the period commencing 1 May 2015 might have been provided. I am satisfied on the evidence available that the amount of $1,122 was credited to the respondents on 1 May 2015 in respect of the bin room charges. The respondents' claim for $924 is dismissed.

The respondents' costs

[4] Applicant's submissions and material lodged on 7 September 2020
[5] Email from the first respondent to Mr Ecob dated 7 September 2020

44. The respondents operate business selling produce at market stalls in NSW and the ACT. They submitted that they attend these markets on fixed scheduled days. On 16 July 2020, they claim they were scheduled to attend a market in Double Bay, NSW. They claim they did not attend those markets because of their required attendance at the preliminary conference on that day.

45. Having regard to the orders made by the Tribunal on 16 July 2020, it is apparent that the conference did not proceed because of a lack of preparedness on the applicant's part. Essentially what the respondents claim are costs thrown away by reason of the applicant's failure or unpreparedness to proceed on that date.

46. The respondents maintained their claim for costs at the hearing and in support of the amount claimed they relied upon three transaction records for income received at the Double Bay markets on 2 July 2020 for $1,244, 9 July 2020 for $1,427, and 23 July 2020 for $1,948. They submitted that these amounts reflected a range of income they reasonably expected to receive had they attended the Double Bay markets on 16 July 2020 which is consistent with the amount of $1,500 claimed.

47. The applicant's opposed the claim for costs on the basis that the respondents did not incur any costs thrown away by reason of the conference not proceeding as listed. The applicant claimed the conference was only listed for half an hour and was to be conducted by telephone. The applicant further submitted, the respondents made a personal decision not to attend the Double Bay markets in circumstances where their attendance was only required by telephone which could have been facilitated from Double Bay taking only half an hour of their time away from the stall. The applicant submitted the respondents could have attended the Double Bay markets and participated in the conference by phone. The applicant also submitted that the respondents would have been taken away from any activity to participate in the conference whether the matter settled or not. Even if the conference proceeded but did not settle, would the applicant still be required to cover lost income for a full day?

48. The Tribunal's powers in relation to costs are governed by section 48 of the ACAT Act. Section 48(1) provides:

Costs of proceedings

(1) The parties to an application must bear their own costs unless this Act otherwise provides or the tribunal otherwise orders.

(2) However—

(a) if the tribunal decides an application in favour of the applicant, the tribunal may order the other party to pay the applicant—

(i) the filing fee for the application; and

(ii) any other fee incurred by the applicant that the tribunal considers necessary for the application; or

Examples—subpar (ii)

- *a fee for a business name or company search*
- *a filing fee for a subpoena*
- *hearing fees*

(b) if the tribunal considers that a party to an application caused unreasonable delay or obstruction before or while the tribunal was dealing with the application—the tribunal may order the party to pay the reasonable costs of the other party arising from the delay or obstruction; or

(c) subject to section 49, if a party to the application contravenes an order of the tribunal—the tribunal may order the party to pay the costs or part of the costs of the application to the other party; or

(d) if the application is an application for review of a decision under the Heritage Act 2004, the Planning and Development Act 2007 or the Tree Protection Act 2005, and the tribunal makes an order under section 32 (2) (Dismissing or striking out applications)—the tribunal may order the applicant to pay the reasonable costs of the other party arising from the application.

Note A legal expense relating to a proceeding in the tribunal may be recoverable as a debt under the Unit Titles (Management) Act 2011, s 31.

*(3) For subsection (2) (d), **reasonable costs of the other party arising from the application** include reasonable legal costs but do not include holding costs.*

Examples—holding costs

- *interest and lender imposed charges associated with a loan*
- *costs of engaging workers and subcontractors and hiring equipment for a development*

49. Subsection (2)(a), (c) and (d) and subsection (3) of section 48 do not apply in the circumstances of this case, and the Tribunal's discretionary power under

subsection (1) is limited. That limitation was considered in *CIC Australia Ltd v Australian Capital Territory Planning and Land Authority*,[6] wherein the Court identified the four main elements of section 48 as:

> *(a) the default position is that the parties bear their own costs;*
> *(b) the default position may be varied by provisions of the ACAT Act;*
> *(c) the default position may be varied by an order of ACAT;*
> *(d) in four specified circumstances, ACAT may make particular costs orders.*[7]

50. Section 48 "confers a narrow power on ACAT ...to make only the orders specified in section 48(2) and only in the circumstances specified in that provision."[8]

51. Applying that interpretation to the circumstances of this matter, the respondents' application for costs must be dismissed unless it comes within section 48(2)(b).

52. It is regrettable that the conference did not proceed as listed on 16 July 2020. It is highly undesirable for matters to experience delay in either reaching settlement early or progressing to hearing if they are unable to be resolved. Unfortunately, the Tribunal is left with the impression that the applicant's representatives were generally inattentive or unprepared in respect of this matter given the requested adjournment at the commencement of the hearing for reasons similar to those recorded by the tribunal on 16 July 2020. The circumstances in which the conference was then adjourned to a further date qualifies as delay for the purposes of section 48(2)(b). This was the second conference scheduled in this matter following an earlier conference on 3 June 2020 which resulted in the applicant being required to give the Tribunal and the respondents by 24 June 2020 the series of documents set out in those orders. The applicant did not comply with those orders.

53. In those circumstances, I am satisfied the delay was unreasonable. There was sufficient time to provide the documents and obtain instructions for the purposes

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[6] [2013] ACTSC 96
[7] *CIC Australia Ltd v Australian Capital Territory Planning and Land Authority* [2013] ACTSC 96 at [37]
[8] *CIC Australia Ltd v Australian Capital Territory Planning and Land Authority* [2013] ACTSC 96 at [82]

of attending on 16 July 2020. Had the applicant complied with the orders of 3 June 2020 and been prepared to proceed with the conference on 16 July 2020 an additional conference may not have been required. The matter may have resolved and if not, a timetable to prepare the matter for final hearing would have been set without the need for the parties to attend the Tribunal for a further conference. Unusually in this matter the conference on 3 August 2020 was adjourned for further conference on 9 September 2020. It was at this conference directions were made, and the matter listed for hearing.

54. The Tribunal may exercise the discretion in section 48(2)(b) if there is unreasonable delay and order the applicant pay the respondents' reasonable costs arising from the delay. I am not satisfied that the amount of $1,500 is reasonable. The respondents were only required to attend the conference by telephone and, had it proceeded, it would have only occupied up to one hour of their time. The respondents elected not to attend the Double Bay markets in those circumstances. They submitted that it was not practical for them to attend the markets and take time out to participate in the conference because of the paperwork they needed to refer to for the purposes of the conference and both of them being required to serve customers and participate in the conference. I am not satisfied that it is as complicated and difficult as the respondents suggest.

55. For these reasons I am not persuaded to exercise the Tribunal's discretion in section 48(2)(b).

Conclusion

56. I am satisfied that the applicant is entitled to an order for payment of some of the claimed expenses pursuant to section 31 of the UTM Act and not others. Given that at the time of the hearing the debt the subject of the application was paid (apart from some outstanding interest) the applicant requested the Tribunal make orders requiring the respondents to pay the amount claimed, outstanding interest and any other amounts awarded by the Tribunal with a notation that the amount of $2,061.47 had been paid. I decline to do so. It is not necessary to make orders to the effect that the debt was owed. The applicant is only entitled to an order for the amount that has not been paid, subject to the Tribunal's findings in relation to its claimed expenses.

57. The respondents have been wholly unsuccessful in their counterclaim and claim for costs.

58. The Tribunal orders:

1. The respondents are to pay to the applicant the sum of $1,594.95 comprising:

(a) $495 for expenses under section 31 of the UTM Act;

(b) $780.95 interest at the rate of 10% incurred up to 23 June 2020; and

(c) $319 for the ACAT filing fee.

2. The respondents' counterclaim is dismissed.

3. The respondents' claim for costs is refused.

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Senior Member K Katavic

Date(s) of hearing	2 November 2020
Solicitors for the Applicants:	Mr S Ecob, CCA Legal
First and Second Respondents:	In person