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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00124203

TITLE OF PROCEEDINGS

First Appellant	EFG
First Respondent	Secretary, Department of Communities and Justice
Second Respondent	State of New South Wales

FILING DETAILS

Filed for	State of New South Wales,Respondent 2
Legal representative	Karen Smith
Legal representative reference	
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Submissions for second respondent.pdf)

[attach.]

EFG v Secretary, Department of Communities and Justice & Ors

NSWCA proceedings 2025/00124203

Second Respondent's written submissions

27 August 2025

A. SUMMARY

1. In the proceedings below, the appellant sought judicial review of a decision by a delegate of the Secretary of the Department of Communities and Justice assessing the amount of costs pursuant to a certificate granted under the *Costs in Criminal Cases Act 1967* (NSW)

2. The Secretary had, in accordance with s 4(3), determined that the amount which "would reasonably have been incurred" by the appellant, referred to in s 4(2) as "the maximum amount", was $419,976.07. The Secretary then made a determination under s 4(2) that the amount "that should be paid" to the appellant was $188,172.20, in accordance with the Secretary's adoption of a policy of moderating invoices submitted for payment in accordance with certain published rates for the legal costs of counsel and solicitors (**the Attorney General's rates**).

3. The appellant contended that the exercise of the discretion under s 4(2) of the Act was invalid for a variety of reasons which were said to constitute legal unreasonableness. The principal attack was on the exercise of the discretion under s 4(2) to make a payment less than the "maximum amount".

4. By orders made on 10 March 2025 (Red Book p 35), for reasons published on that day (**J**) (Red Book p 9), the primary judge (Basten AJ) dismissed the proceedings. In particular, the primary judge held that s 4(2) and (3) contemplate that the Secretary may, without acting in manner which is legally unreasonable, exercise the discretion in s 4(2) to determine that an amount should be paid which is less than the "maximum amount": J[13].

5. The appellant has not demonstrated any basis to doubt the primary judge's conclusions. This Court should dismiss the appeal.

6. The Court below made an order (not challenged in this appeal) on 25 October 2024 that there be no publication of the appellant's name or of any detail that might lead to his identification.

B. FACTUAL BACKGROUND

7. The primary judge set out the relevant factual background at J[2]-[6]. The appellant does not challenge those findings.

C. RELEVANT LEGISLATIVE PROVISIONS

8. The long title of the Act is: "An Act relating to costs in criminal cases; to amend the Justices Act 1902 as amended by subsequent Acts; and for purposes connected therewith."

9. Section 2 of the Act enables a defendant to apply to the court for a certificate where they are acquitted or discharged, or have their conviction quashed on appeal. To grant a certificate, the court must be satisfied of the matters referred to in s 3(1).

10. The only function of such a certificate is to enable the grantee to apply under s 4 for payment of costs incurred in the proceedings to which the certificate relates. Section 4 of the Act relevantly provides:

> **4 Payment of costs**
>
> (1) A person to whom a certificate has been granted under this Act may apply to the Director-General for payment from the Consolidated Fund of costs incurred in the proceedings to which the certificate relates. The application is to be accompanied by a copy of the certificate.
>
> (2) The Director-General may, if of the opinion that, in the circumstances of the case, the making of a payment to the applicant is justified, determine the amount of costs that should be paid to the applicant, not exceeding the maximum amount referred to in subsection (3).
>
> (3) The maximum amount is the amount that, in the opinion of the Director-General, would reasonably have been incurred for costs by the applicant in the proceedings, reduced by any amounts that, in the opinion of the Director-General, the applicant—
>
> (a) has received or is entitled to receive, or
>
> (b) would, if the applicant had exhausted all relevant rights of action and other legal remedies available to the applicant, be entitled to receive,
>
> independently of this Act, because of the applicant's having incurred those costs.
>
> (4) The Director-General may refuse an application under this section if of the opinion that, in the circumstances of the case, the making of a payment to the applicant is not justified or (without limitation) if costs are otherwise recoverable.

11. References to the "Director-General" are now to be read as references to the Secretary of the Department of Communities and Justice: see s 1A and Annexure A to the Secretary's submissions below: Black Book pp 20–21.

12. At J[11]-[12], the primary judge held that a determination under s 4 relevantly involves three discretionary — or more accurately, as the primary judge said (J[12]), evaluative — determinations. The appellant accepts this structure of the provision: see AWS[2], [14], [37].

13. The first step is that the Secretary must be "of the opinion that, in the circumstances of the case, the making of a payment to the applicant is justified": s 4(2): J[11]. If the Secretary is not of that opinion, then no further steps can be taken. This may also lead to the Secretary refusing the application under s 4(4). In the present case, this step was determined favourably to the appellant.

14. The second step is that the Secretary then determines the "maximum amount" as referred to in s 4(2) and given content by s 4(3): J[12] (described there as the third step, but an exercise antecedent to the second). This step has two components:

    (a) First, the Secretary is to identify the "amount that … would reasonably have been incurred for costs by the applicant in the proceedings". As the Court of Criminal Appeal observed in *Rodden v R* (2023) 112 NSWLR 162; [2023] NSWCCA 202 (***Rodden***) at [129], this provision does not direct consideration towards the actual costs incurred by the applicant but, rather, towards what they would reasonably have been, objectively assessed.

    (b) Next, that amount is reduced by amounts which the applicant has received, is entitled to or would be entitled to receive, independently of the Act. There were no such amounts in the present case.

15. In *Rodden* at [129], the Court of Criminal Appeal commented in relation to s 4(3):

> The purpose of this section is plain enough. It expresses a cap by reference to an objective criterion of reasonableness in the context of what was required for the applicant's defence.

16. The primary judge also adopted the description of a "cap" at J[12].

17. In the present case, the Secretary determined that "the maximum amount" was $419,976.07. The Secretary did so by analysing the invoices provided by the appellant and removing items which were found not to have been reasonably incurred: J[5].

18. The third step is that the Secretary then "determine[s] the amount of costs that should be paid to the applicant". Section 4(2) expressly provides that the determination of the amount of costs to be paid is not to exceed the "maximum amount" referred to in subsection (3). That implicitly contemplates that the decision-maker might decide that an amount of costs lower than the "maximum amount" should be paid. So does the phrase "maximum amount" itself.

19. As the primary judge observed at J[13], the conferral of a power subject to a cap is inconsistent with the appellant's principal submission that any amount less than the "maximum amount" would involve an unlawful determination. The fact that the power is conferred in unconstrained terms is likewise inconsistent with the appellant's submission that it is permissible to pay an amount less than the maximum amount only where the applicant's actual costs are less than that amount (AWS[23], [36], [41]) or "there were some other circumstance which compelled deviation from" payment of the maximum amount (AWS [46], see also [37]). That is to read words of limitation into s 4(2) which are simply not there.

D. APPEAL GROUND 1: PURPOSE OF THE ACT

20. The appellant's first appeal ground is: "The judgment appealed from was in error in failing to identify adequately the purpose of the Act." The primary judge did not so err. The primary judge dealt comprehensively with the appellant's argument below as to the purpose of the Act at J[45]-[46] and [65].

D.1 The primary judge correctly identified the purpose of the Act

21. The primary judge held at J[65] that "the purpose of the Act is to provide an element of indemnity in the circumstances in which a certificate is provided. However, it is no part of the statutory scheme to provide a full indemnity." That conclusion is fully supported by the text of s 4 itself. As noted above, s 4 grants the Secretary a discretion to determine whether, and how much, a person in possession of a cost certificate should be paid from the Consolidated Fund for costs incurred in the proceedings to which the certificate relates. "The language which has actually been employed in the text of legislation is the surest guide to legislative intention": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; [2009] HCA 41 at [47].

22. If the purpose of the Act was to allow full cost recovery by persons in possession of a cost certificate, or to ensure that such a person is entitled to be reimbursed all the costs reasonably incurred, s 4 could readily have provided so in express terms. Rather, s 4

was drafted by reference to the three evaluative steps discussed in paragraphs 12–19 above.

23. In this regard, it is relevant to note that the person to whom the discretions in s 4 are given is the Secretary of the Department of Communities and Justice. The Secretary is a senior public servant, with oversight over public funds. That suggests that at least one of the matters that may be relevant to the exercise of the discretions in s 4 is the appropriate expenditure of public funds.

24. Conversely, the Secretary would not be expected to have extensive experience in costs assessment. If Parliament had intended that there should be an entitlement to be reimbursed all the costs reasonably incurred, the focus of the exercise under s 4 becomes the assessment of the reasonableness of the applicant's costs. In such a case, Parliament would presumably have conferred the power under s 4 on an individual with expertise in costs assessment (e.g. the Manager, Costs Assessment in the Supreme Court of NSW).

D.2 Reliance on second reading speech

25. The appellant's argument below proceeded by attempting to ascertain the purpose of the Act from passages of the second reading speech when the Act was originally passed in 1967. The appellant has repeated that approach in this Court at AWS[8]-[13]. The appellant's argument in reliance on the second reading speech suffers from the following four difficulties.

26. First, insofar as the argument uses as its starting point passages of the second reading speeches, it is contrary to orthodox principles of statutory construction. The task of statutory construction must begin with a consideration of the text of the statute as a whole: *AB (a pseudonym) v Independent Broad-based Anti-Corruption Commission* (2024) 278 CLR 300; [2024] HCA 10 at [21], citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47]. The purpose or object of a statute should not be derived extraneously, excluding consideration of the language of a critical provision and then applied to construe that provision: *Singh bhnf Ambu Kanwar v Lynch* (2020) 103 NSWLR 568; [2020] NSWCA 152 at [33].

27. Second, as the primary judge noted at J[46], s 4 in the Act as enacted was in quite a different form from its current emanation. The present version of s 4 is a result of schedule 5, cl 2 of the *Courts Legislation Amendment Act 1998* (NSW), which wholly

replaced the version of s 4 as enacted. The section as enacted relevantly involved the Under Secretary conducting the task of stating the amount of costs that would reasonably have been incurred and providing that determination to the Treasurer: s 4(3)(a)(ii). The Treasurer then determined whether the making of a payment to the applicant was justified and then had a discretion to "pay to the applicant his or her costs or such part thereof as the Treasurer may determine": s 4(5). It may be noted that, even in the provision as originally made, the Treasurer expressly had a power to pay to the applicant an amount less than that which had been stated by the Under Secretary.

28. Third, as the primary judge observed, the appellant's attempt to discern support for his position from the second reading speeches is "akin to reading tea leaves": J[45]. None of the passages quoted by the appellant support the contention that a party to whom a certificate had been issued must receive the total amount of their reasonably incurred costs. And, as noted immediately above, the text of the legislation as originally made was to the contrary.

29. Fourth, on the contrary, there are passages from the parliamentary debate that demonstrate that Parliament was conscious of the possibility that, under the Act, a person to whom a certificate was awarded might be left significantly out of pocket, and that Parliament deliberately sought to avoid a mechanism that would require a detailed calculation of the reasonableness of an applicant's legal costs in order to determine the amount payable to that applicant.

30. During the parliamentary debate, the Member for Kogarah (a member of the opposition) expressly raised the concern that a wrongly charged person might receive less under the Act than they were required to pay to their legal representatives, offering as a hypothetical example a person who received $50 under the Act but incurred legal costs of $350 for expensive legal representatives: Hansard 3922-3923 (contained in the Blue Book at pp 272–273).

31. The Member for Randwick responded that such a person was willing to pay their legal representatives' fees and had entered into a bargain with them; and that "[t]his legislation is a man's opportunity, where work is done, to get some recompense" [emphasis added]: Hansard 3923 (Blue Book p 273). The Minister for Justice endorsed those comments and then added at Hansard 3924 (Blue Book p 274):

> Costs vary from case to case. I expect that under this measure there will be a variation in the orders for costs having regard to the complexity of the cases, the

> work involved, the time taken, and so on. I do not propose, nor does the Government, to enter into some form of taxing system, which I think is the idea underlying the remarks of the honourable member for Kogarah. On the other hand, if he is saying that the certificate should order the payment of all the costs, that would be an open invitation to any solicitor or barrister to fix a fee by arrangement or contract.
>
> …
>
> … I said that, if the honourable member's argument is that a bill of costs in a criminal matter should be taxed, that is absurd. What is required in the sort of case we are talking about is a quick and ready assessment of costs where necessary that can be met by quick payment. Do not let us get involved in a taxing system that goes on for weeks and months.

32. To the extent that it is permissible to have regard to the parliamentary debate during the second reading speech, that debate supports the primary judge's conclusion that s 4(2) permits a determination that the amount to be paid is an amount less than the "maximum amount".

D.3 Appellant's asserted purpose: to "rectify injustice"

33. Beyond reliance on the second reading speech, the appellant otherwise asserts that the purpose of the Act is to "rectify" the "injustice caused when innocent people wrongly accused incur legal costs in defending themselves", and concludes that such an objective cannot be achieved unless such an innocent person is reimbursed for all their reasonably incurred costs: AWS [13], [38]. This argument suffers the following difficulties.

34. First, the unqualified nature of the appellant's argument cannot be reconciled with the discretions conferred on the Secretary under s 4(2) and 4(4) to refuse to make any payment at all to an applicant, and to "determine the amount of costs that should be paid", even where the Court has granted the applicant a certificate under the Act.

35. Second, the appellant's argument proves too much. On the applicant's logic, the injustice to an innocent defendant is not rectified so long as they have paid any legal costs which have not been reimbursed under the Act. For example, the appellant submits: "The nature of the clear objective – to rectify an injustice – is such that it makes no sense to conceive of it being only partly satisfied": AWS[13]. If the Act operated in accordance with the appellant's suggested purpose, an applicant under the Act should always be entitled to recover their entire costs liability, regardless of whether their legal representatives have charged them an amount more that what

would reasonably have been incurred. Yet that is inconsistent with the imposition of the "maximum amount" in s 4(2) and (3).

36. Third, and in any event, the appellant's argument begs the question. It simply assumes that the only relevant objective is to reimburse the applicant and that there are no other relevant interests. On the contrary, as indicated in paragraph 23 above, at least one further objective of the Act is the appropriate expenditure of public funds. As Gleeson CJ explained in *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [5], the general rule of interpretation to prefer a construction that would promote the purpose or object underlying the Act:

> … may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

The High Court quoted these words approvingly in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40]–[41], along with the observation of the United States Supreme Court that "no legislation pursues its purposes at all costs".

37. Similarly, at AWS[7], the appellant invokes the principle that the Act is "beneficial legislation". The principle that remedial (or beneficial) legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively. The principle does not mean that every leeway of constructional choice should be exercised in favour of a plaintiff: *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1; [2021] NSWCA 204 at [85], [97], [134].

E. APPEAL GROUND 2: OTHER ARGUMENTS CONCERNING THE CONSTRUCTION OF SECTION 4

38. The appellant's second appeal ground is that the primary judge erred in his construction of s 4 of the Act. This argument is given further content in the appellant's written submissions. In particular, at AWS[36] and [41], the appellant submits that, on the proper construction of s 4(2), there is only one circumstance in which the discretion under s 4(2) can be exercised to make a payment less than the "maximum amount": namely, where the costs actually incurred by the applicant are less than the maximum

amount. Otherwise, the applicant submits, the exercise of discretion is legally unreasonable in the relevant sense. (On the other hand, AWS[46] appears to accept that the discretion under s 4(2) could be validly exercised to make a payment less than the "maximum amount" in further circumstances, which are said to be unusual.)

39. Such an approach is contrary to the text of the provision and authority. In *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton* (2011) 82 NSWLR 336; [2011] NSWCA 414, Campbell JA observed at [182] that where a power is granted to an administrative decision maker and no express limitations are imposed on the power, "[t]he power is unconfined except to the extent of any limitations imposed by the subject matter, scope and purpose of the statute". The primary judge reasoned in a similar way at J[54].

40. Had the legislation intended that there be one (and only one) circumstance in which the discretion under s 4(2) could be exercised to make a payment less than the "maximum amount", the provision could readily have been drafted in such a way. Rather, s 4(2) was drafted so as to require the three evaluative determinations described in paragraphs 12–19 above.

41. As the primary judge correctly observed at J[43], the appellant's claim collapses to the contention that the Secretary was bound to determine the amount payable on a certificate under the Costs Act as if conducting a party and party assessment as between parties in civil proceedings. Again, the section was not drafted in such a way, and the passages from the second reading debate set out in paragraph 31 above indicates that that was specifically not what Parliament intended.

F. APPEAL GROUNDS 3 AND 4: RELIANCE ON ATTORNEY GENERAL'S RATES

42. The appellant's third and fourth appeal grounds appear to contend that the primary judge erred by failing to find that the Secretary's decision was legally unreasonable because the Secretary used the Attorney General's rates to determine the amount to be paid to the appellant.

43. The extent to which these grounds depend on success on the second ground of appeal does not emerge from the appellant's written submissions. That is, it is not clear whether the appellant contends that the exercise of discretion was legally unreasonable even if the primary judge's construction of s 4 was correct.

44. The tenor of the appellant's submissions is that there is a single "reasonable" approach to the exercise of discretion under s 4(2), and therefore that other approaches will be

legally unreasonable in the relevant sense. Thus, the appellant contends in ground 3 that the primary judge erred "in failing to determine the legal standard of reasonableness". That misunderstands the concept of legal unreasonableness in the context of judicial review, as explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 and subsequent cases. That concept is directed towards identifying whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 at [81]-[82].

45. The primary judge addressed the question consistently with those principles. In particular, his Honour observed:

(a) once it is accepted that s 4(2) of the Act envisages payments which do not reach the maximum amount of reasonably incurred costs, there must be some scale of fees which can be applied by the Secretary: J[41]; and

(b) the rates which the Secretary applied were not legally unreasonable: J[53]. As his Honour observed, those rates are applied on a daily basis by the many lawyers in private practice who do State Government work. In *Stanizzo v The Secretary of the Department of Justice of New South Wales* [2016] NSWSC 348, Rothman J also described the Attorney General's rates as "a reasonable rate" for the Secretary to apply to the determinations required by s 4: [58], read with [15]. Their reasonable use is not limited to the rates agreed contractually between the State and counsel/solicitors (cf AWS[18]–[19]).

46. The appellant has not identified any errors in the primary judge's reasoning. The appellant's complaints in respect of these appeal grounds appear to largely depend on, or repeat, the appellant's arguments concerning the proper construction of the section.

47. The high point of the appellant's case as to legal unreasonableness appears to be the submission at AWS[23]: "it must be unreasonable not to pay an amount of costs already determined to be reasonable." That argument fails to appreciate two important matters.

48. First, a determination that $X is reasonable (for a given purpose) does not entail that any value other than $X is legally unreasonable. That is inconsistent with the concept of legal unreasonableness as applying to decisions outside a range of possible defensible outcomes.

49. Second, the determinations required in steps 2 and 3 are directed towards different issues. The determination required by step 2 is the determination of what costs would reasonably have been incurred (which could legitimately involve consideration of the length and complexity of the matter, and what the Secretary might determine to be reasonable rates for lawyers to perform that work). The determination required by step 3 is the determination of what should be paid to the applicant (which could legitimately involve different considerations, such as the appropriate expenditure of public funds).

G. OTHER COMPLAINTS NOT IN THE GROUNDS OF APPEAL

50. The appellant's written submissions have a discursive section (AWS[1]-[37]) in which the appellant raises a number of complaints not expressly linked to the appellant's grounds of appeal. For the sake of completeness, these complaints are addressed below.

G.1 Unreasonableness in change in policy

51. At AWS[15]-[24], the appellant contends that the Department previously had an approach of assessing the costs to be paid on the basis of a party and party costs assessment (which the appellant contends was "necessarily in accordance with the legal standard of reasonableness"), that this policy has changed, and that this change was "arbitrary and capricious".

52. The appellant put a similar argument below, which the primary judge addressed at J[47]-[52]. The primary judge observed that there was a flimsy evidential basis for the appellant's submissions as to previous practices but in any event held that there can be no unlawfulness in simply varying an administrative practice applying one set of rates to apply another, where both are permissible: J[50]. The appellant has not demonstrated any error in that reasoning.

53. At AWS[17], the appellant has provided a truncated quotation from *Stanizzo* at [15]. The whole passage makes it clear that the Secretary's process in 2014 also involved the moderation of the costs claimed by reference to the Attorney General's rates at the time (e.g. a cap of $264/hr for solicitors). That is, the practice about which the appellant complains has been in place for at least 11 years.

G.2 Different results between civil and criminal cases

54. At AWS[26], the appellant complains that the application of the Attorney General's rates "creates a massive difference in the recovery of costs paid by the state as between civil cases and criminal cases", which is said to be "arbitrary and capricious". The appellant appears to be seeking to compare the situation that would have obtained if the applicant had engaged the same lawyers in civil litigation against the State, obtained an order for costs, and had those costs assessed.

55. Even if there were a difference in result between those situations, that does not demonstrate legal unreasonableness. The contexts, statutory schemes, underlying policy considerations, and interests at stake are entirely different. There has long been a difference of approach in the awarding of costs in civil and criminal litigation: see, eg, *Latoudis v Casey* (1990) 170 CLR 534 at 557.

G.3 Arbitrariness

56. At AWS[27], the appellant contends that it is "arbitrary" for applicants to be paid differing proportions of their costs. Under the policy applied by the Secretary, different applicants will generally receive a similar amount of monetary compensation from public funds for criminal hearings of similar length and complexity, regardless of whether they chose to engage more expensive legal representation. That result is not arbitrary. It is certainly not legally unreasonable.

57. Indeed, it is consistent with s 4 as a whole for applicants to be paid differing proportions of their costs. As noted above, the "maximum amount" in s 4(3) is the "amount that … would reasonably have been incurred for costs by the applicant in the proceedings". That necessarily raises the possibility that an applicant who engages more expensive legal representation will receive a lower proportion of their overall costs liability.

G.4 Inflexible application of policy

58. At AWS[28]-[30], the appellant appears to contend that the policy to apply the Attorney General's rates was inflexibly applied, and was therefore legally unreasonable.

59. It is well established that it is permissible for a decision maker to develop criteria for the exercise of a discretionary statutory power and to take account of policy in doing so: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577. A general policy as to how a discretion will 'normally' be exercised does not lead to invalidity, so long as the applicant is able to put forward reasons why the policy should be changed,

or should not be applied in the circumstances of the particular case: *Elias v Commissioner of Taxation* (2002) 123 FCR 499; [2002] FCA 845 at [34], cited in *Minister for Home Affairs v G* (2019) 266 FCR 569; [2019] FCAFC 79 at [60].

60. The Court should reject any suggestion that the policy was applied inflexibly, in a manner which would lead to legal unreasonableness. That argument does not find support in the facts. On 30 November 2023, the appellant made submissions as to why the policy should be changed: Blue Book pp 207–208. The appellant made further objections to the application of the policy on 8 July 2024: Blue Book pp 244–246. As noted in the delegate's letter of 14 August 2024, the approach adopted was to consider the application of the Attorney General's rates on a case-by-case basis. The delegate noted that in some circumstances the decision-maker assigns a rate higher than the Attorney General's rates to a solicitor or counsel, offering the example of a solicitor who is an accredited specialist in criminal law where counsel has not been briefed: Blue Book p 259.

61. The correspondence between the plaintiff's legal representatives and the Department between 1 February and 1 March 2024 indicates that submissions were sought and received in relation to any special features of the case: Blue Book pp 209–216. There is no basis to infer that the policy was applied in a manner which did not allow full account to be taken of any relevant differentiating features of the particular case (noting that the plaintiff does not identify any features which ought to have been taken into account but were not).

62. The fact that the policy was not applied inflexibly also addresses the appellant's submission at AWS[25] and [36] to the effect that it is unreasonable for no applicant to ever be paid the "maximum amount". That submission also makes the factual assumption, unsupported by the evidence, that the rates charged by a criminal defendant's legal representatives will always be higher than the Attorney General's rates.

H. ORDERS

63. For the reasons set out above, the appeal should be dismissed with costs.

64. However, even if the Court were to allow the appeal, it would not be appropriate to make order 5 sought in the Notice of Appeal (an order that the respondents pay to the appellant the amount of $419,976.07) (Red Book p 42). If the Court finds that the decision-maker did make a decision that was wrong in law (for example because the

decision-maker adopted an incorrect interpretation of s 4), then the appropriate relief is an order in the nature of certiorari quashing the entire decision. The decision-maker will then proceed to consider the appellant's application according to law.

65. Even if the Court were to conclude that the application of the Attorney General's charging rates was legally erroneous, order 5 sought in the Notice of Appeal still would not follow. In the present case, the Secretary had determined that the amount which "would reasonably have been incurred" by the appellant, referred to in s 4(2) as "the maximum amount", was $419,976.07. The Secretary did so by analysing the invoices provided by the appellant and removing items which were found not to have been reasonably incurred: J[5]. The primary judge observed at J[25] and [28] that the Secretary did not attempt at this stage to determine whether the rates at which solicitor and counsel charged were "reasonable". That was because the exercise which the Secretary undertook was to apply the Attorney General's charging rates at the third step. If the appellant's argument is accepted, it was erroneous to do so, and therefore the exercise of determining the "maximum amount" was incomplete. As the primary judge held at J[28], the Secretary would not be bound to pay the "maximum amount" which the Secretary had accepted without assessing the reasonableness of the rates applied.

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