SUPREME COURT OF QUEENSLAND

CITATION:	*Chee v CBC Properties (Qld) Pty Ltd ACN 071 175 543 In its own capacity and as Trustee of the Chan Family Trust* [2017] QSC 328
PARTIES:	**KAY LING CHEE** (Applicant) **v** **CBC PROPERTIES (QLD) PTY LTD ACN 071 175 543 IN ITS OWN CAPACITY AND AS TRUSTEE OF THE CHEE FAMILY TRUST** (First Respondent) **STUART BENJAMIN** (Second Respondent)
FILE NO/S:	BS No 11055 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2017
JUDGE:	Lyons SJA
ORDERS:	**1. Both applications are dismissed with costs.** **2. Mr Stockley is relieved from any undertaking given to the former counsel of the applicants.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – TAXATION AND OTHER FORMS OF ASSESSMENT – APPEAL, REVIEW OR REFERENCE – RELEVANT PRINCIPLES – GENERALLY – where the applicant applies for review of a decision included in a costs assessor's certificate of assessment pursuant to r 742 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether an erroneous approach was taken by the costs assessor – whether pursuant to r 742(6) the certificate of the costs assessor and order of the Deputy Registrar should be set aside and the matter referred back to the costs assessor *Uniform Civil Procedure Rules* 1999 (Qld), r 740, r 742

Deposit & Investment Co Ltd (Receivers Appointed) and Ors v Peat Marwick Mitchell & Co (1996) 39 NSWLR 267
Farrar v Julian-Armitage and Anor [2015] QCA 289
Mancorp Pty Ltd v Baulderstone Pty Ltd trading as Baulderstone Hornibrook, unreported, Debelle J, SCSA, SCGRG 960 of 1989, 5 March 1993
Re Dovico; Ex-parte Mayne Wetherall Solicitors [2012] NSWSC 822

COUNSEL: M D Martin QC for the applicant
I A Erskine for the respondent

SOLICITORS: Mills Oakley for the applicant
Stockley Furlong for the respondent

This application

[1] This is an application by Kay Ling Chee for the review of a decision included in a costs assessor's certificate of assessment, pursuant to r 742 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**). In particular the applicant seeks orders pursuant to r 742(6) of the UCPR that the certificate of assessment of the costs assessor and the subsequent order of the Deputy Registrar dated 18 July 2016 be set aside, and that the assessment be referred back to the cost assessor with a direction that he assess the losses and expenses of the respondent according to law.

Background

[2] Norton & Co Pty Ltd (ACN 101 117 828), formerly Anthony Wetmore & Company Pty Ltd (ACN 101 117 828) (**Anthony Wetmore & Co**), was served with a subpoena for production returnable before the court on 27 January 2015. The subpoena was wide in its terms and called for the production of all documents in relation to over 30 entities, extending over a 12 year period. Anthony Wetmore & Co is not a party to these proceedings and was a stranger to the litigation.

[3] On 21 January 2015 Anthony Wetmore & Co brought an application to set aside the subpoena.

[4] On 27 January 2015, Byrne SJA made orders by consent that:

1. The subpoena be set aside;

2. The applicant, Kay Ling Chee, pay to Anthony Wetmore & Co Pty Ltd:

3. Pursuant to Rule 418 UCPR all of the losses and expenses, including legal costs, incurred by Anthony Wetmore & Co Pty Ltd in complying with the subpoena to be assessed; together with

4. The costs of the application to be assessed.

[5] A costs statement was prepared by Anthony Wetmore & Co and filed on 14 April 2015. The applicant filed a notice of objection and subsequently on 16 June 2015 the Registrar of the Supreme Court appointed Mr Gregory Ryan as the costs assessor. Mr Ryan undertook the costs assessment and received submissions from both parties. He issued his costs assessment certificate on 28 June 2016 and in assessing the loss and expenses of Anthony Wetmore & Co, he accepted an hourly rate for the principal Mr Wetmore as $340, for a manager as $230 and for administrative staff as $140.

[6] A costs certificate was filed and the Registrar's costs order in an amount of $37,161.17 issued on 18 July 2016, comprising Professional Fees of $3,576.25 together with disbursements of $33,584.92. Those disbursements included a costs assessor's fee of $2,640 and an amount of $5,355.23 as the costs of the assessment. The costs awarded exclusive of the cost assessors fees was therefore an amount of $24,229.69.

[7] The costs were not paid, and enforcement proceedings were commenced.

[8] On 16 September 2016, the applicant filed two applications:

1. An application under r 742 of the UCPR for review of a decision of the costs assessor; and

2. An application under r 740(3) of the UCPR for a stay of the Registrar's order for costs pending a review.

[9] On 30 October 2016, Douglas J made orders by consent:

1. Extending the time to 27 October 2016 for the applicant to request written reasons of the cost assessor, pursuant to r 7 of the UCPR;

2. Requiring the cost assessor to give written reasons in response by 17 November 2016;

3. That the applicant pay the costs assessor's costs of providing the reasons at the rate of $300.00 per hour plus GST forthwith upon receipt of a tax invoice from the cost assessor; and

4. Adjourning the application for review and the application for a stay to date to be fixed.

[10] On the basis of those orders Anthony Wetmore & Co undertook not to commence any enforcement proceedings until the applications were resolved by the Court.

[11] The applicant had made a request to the costs assessor for written reasons on 27 October 2016. The issues in dispute would seem to be in relation to rates for photocopying,

hourly rates charged for the work undertaken to comply with the subpoena by Anthony Wetmore & Co employees, and a dispute as to why a partner's attendance to deliver and collect documents from the Supreme Court was allowed as reasonable.

[12] On 6 November 2016, the costs assessor emailed to the applicant a tax invoice in the amount of $1,650.00 inclusive of GST.

[13] The applicant failed to pay the cost assessor's tax invoice as required by the order of Douglas J. Contrary to the order of Douglas J the applicant refused to pay the GST component of the cost assessor's tax invoice with the consequence that the cost assessor refused to issue his report.

[14] On 11 April 2017, solicitors for Anthony Wetmore & Co wrote to the applicant's solicitor referring them to their obligation under r 5 of the UCPR to proceed in an expeditious way, indicating that six months was not expeditious. The letter also noted that the applicant had not paid the Cost Assessors fees in full and was continuing to refuse to do so.[1]

[15] Given the applicant's failure to comply with the Order of Douglas J, Anthony Wetmore & Co paid the balance outstanding in relation to the cost assessor's tax invoice. On 20 April 2017 the costs assessor issued his detailed reasons in relation to the applicant's request for reasons and filed them with the court.

[16] On 25 October 2017 the following orders were made:

1. The applicant was granted to leave to file an amended application for review; and

2. The application for review of the costs assessor's decision and the application for a stay of the Registrar's Order for Costs were adjourned to 8 November 2017.

[17] They are the matters were before the Court at the hearing of this matter on 8 November 2017.

[18] It would seem from the submissions filed on behalf of Anthony Wetmore & Co that the total amount in dispute for the items analysed in the costs assessor's detailed reasons is in the order of $7,187.01. Counsel for the applicants submitted at the hearing however that, on the amended application for review, the dispute extends beyond the $7,187.01 because the erroneous approach taken by the costs assessor infected the entirety of the costs assessment, requiring the assessment to be sent back to the costs assessor.

The applicant's submissions

[19] The grounds specified in the amended application for review are that the costs assessor erred in law in finding that, firstly, Anthony Wetmore & Co was entitled to its losses and expenses of complying with a subpoena which was issued by the applicant on a full

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[1] Affidavit of R T Stockley sworn 5 October 2017, Court Document Number 51.

indemnity basis. The applicant argues that the costs assessor further erred in assessing the losses and expenses of Anthony Wetmore & Co in complying with the subpoena by allowing an hourly rate which included a profit margin as opposed to the assessment of the actual cost of Anthony Wetmore & Co in complying with the subpoena.

[20] The applicant seeks orders therefore that the costs assessor's certificate of 27 June 2016 and the order of the Deputy Registrar made on 18 July 2016 be set aside, and that the assessment of the respondent's costs made on 27 January 2015 by Byrne SJA be referred back to the costs assessor to be assessed according to law.

[21] The applicant argues that there was a significant error in the approach taken by the costs assessor in relation to the losses and expenses of the respondent. In his written reasons, the costs assessor stated:

> "The Court decision that I drew direction from are the decisions that support the allowance the of loss and expenses, including legal costs to non parties are ***Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Qld Ltd*** **[2005] QCA 323 (06/7604) McMurdo J 7 November 2005 at paragraph 157 the Court held "**As to compliance with a subpoena, pursuant to r 418, it will be ordered that each party required to do so will have its loss and expense, including its legal costs on an indemnity basis, incurred in responding properly to the subpoena, to be agreed or failing agreement, to be assessed. **"and in NSW the equivalent UCPR r.33.11 is supported by the NSWSC Frontier Assets Pty Ltd – v- Fishburn [2011] NSWSC 187**" [sic].[2]

[22] In relation to eleven specific items on which the costs assessor was asked to provide written reasons, in particular regarding the calculation of the hourly rate for partners and employees, the costs assessor referred to the Order of Byrne SJA of 27 January 2015 which referred to "all of the losses and expenses." The applicant in its written submissions notes that the costs assessor then said in his written reasons that "…, .. this is the same as indemnity costs order and therefore I regard the claim of the time taken by the … for doing this work to reasonable and reasonable in the amount claimed having regard to the hourly rate claimed…". The applicants argue that the statement by Justice McMurdo in *Xstrata* not authority for the proposition that losses and expenses are to be assessed on an indemnity basis.

[23] It is also argued by the applicant that the hourly rate allowed for by the costs assessor incorrectly included a component of profit. The applicant submits that the correct approach is to ascertain the actual salary of a person in the employ of Anthony Wetmore & Co who performed the relevant work, not their charge-out rate. It is argued that the assessed loss and expense of the respondent was approximately $20,000.

[24] The applicants submit that because of this error in calculation of hourly rate the Court will have to send the matter back to the costs assessor, particularly as there is no evidence of the salaries of the relevant persons in the material filed. Accordingly, the applicant argues that the costs assessor should be directed to perform an assessment of

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[2] Ibid, Exhibit "RTS-8" p 19.

the losses and expenses of Anthony Wetmore & Co based upon the actual salaries of the persons who performed the work in complying with the subpoena.

[25] In relation to the costs of photocopying documents, the applicant sought a reduction of $543.34 as against a claim for $641.61.

The submissions on behalf of Anthony Wetmore & Co

[26] Counsel for Anthony Wetmore & Co submits that there was no error in the approach of the costs assessor and argues that the applicant's complaint relates in substance to the *amount* assessed, rather than an error in the costs assessor's approach to assessment. The respondent submits that there is no evidence that the costs assessor exercised his discretion in a manner that was manifestly wrong and as such, the court would not interfere as it is not an extreme case.

[27] In support of its submissions, counsel referred to the applicant's failure to comply with previous orders of this Court, failure to comply with the rules of the UCPR relating to costs assessment (and review thereof) and the applicant's failure to provide any fulsome explanation to the Court for continuing and lengthy delays.

[28] On these bases counsel for Anthony Wetmore & Co submit that both applications should be dismissed with costs, and that Mr Stockley should be relieved from any undertaking given to the former counsel for the applicant.

Has there been an error in the approach of the costs assessor?

Relevant law

[29] The power to review a costs assessor's decision is contained in r 742 of the UCPR, which provides:

> "(1) A party dissatisfied with a decision included in a costs assessor's certificate of assessment may apply to the court to review the decision.
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> …
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> (5) On a review, unless the court directs otherwise—
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> (a) the court may not receive further evidence; and
> (b) a party may not raise any ground of objection not stated in the application for assessment or a notice of objection or raised before the costs assessor.
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> (6) Subject to subrule (5), on the review, the court may do any of the following—
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> (a) exercise all the powers of the costs assessor in relation to the assessment;

(b) set aside or vary the decision of the costs assessor;
(c) set aside or vary an order made under rule 740(1);
(d) refer any item to the costs assessor for reconsideration, with or without directions;
(e) make any other order or give any other direction the court considers appropriate."

…"

[30] In relation to the inclusion of a profit component in the calculation of an hourly rate the applicant has relied in particular on the decision of Debelle J in *Mancorp Pty Ltd v Baulderstone Pty Ltd trading as Baulderstone Hornibrook*[3] where it was held that the purpose behind the payment of expenses for complying with a subpoenas duces tecum was:

> "…to compensate for outgoings incurred. It is not intended to provide compensation for loss of profit. If a person has to employ staff to search for, identify and collate documents in answer to a subpoena, that person is entitled to recover a proper portion of the salary or wages paid to those employees, which is perhaps most accurately determined by reference to the hourly rate of wages or salary of those employees. The use of the word "loss" in the expression "such loss or expense as is reasonably incurred or lost" in r 81.09 does not I think alter this conclusion. Even if the word or is being used conjunctively and not disjunctively, it is not the intention of the rule to provide compensation over and above outgoings incurred by the person served with the subpoena. The taxing officer should therefore reduce the amount claimed by the applicants to eliminate the profit element. In this regard I note that the rule there provided for such loss or expense as is reasonably incurred whereas the rule under consideration here refers to all of the losses and expenses."

[31] That decision has not however been universally followed. In the 1996 decision of the New South Wales Supreme Court in *Deposit & Investment Co Ltd (Receivers Appointed) and Ors v Peat Marwick Mitchell & Co*[4] Bainton J discussed the decision in *Mancorp Ltd* and held that in his view was unreal in today's conditions. He stated

> "The costs in Australia in the 1990s in employing a person is not limited to the wages paid to him. There are a host of add-on costs…".

[32] His Honour continued:

> "I appreciate the problem of calculating the amount with any precision, but I do not see that is any reason for not making some allowance. Judges frequently have to enter verdicts for amounts not capable of precise calculation."

[33] Ultimately his Honour concluded:

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3 Unreported, Debelle J, SCSA, SCGRG 960 of 1989, 5 March 1993.
4 (1996) 39 NSWLR 267 at [96].

> "My view is that a firm required to answer a subpoena duces tecum is entitled to be reimbursed in respect of a partner's time spent on that task at his ordinary charge-out rate. If the work is done by an employed solicitor, the reimbursement should be at that solicitor's charge-out rate provided of course in both cases the partner or employee would be otherwise devoting that time to chargeable work, as I would expect would usually be the case."

[34] There was a later discussion of *Mancorp* in *Re Dovico; Ex-parte Mayne Wetherall Solicitors*[5] where Young AJ held:

> "[39] Rule 33.11 speaks in terms of "any reasonable loss or expense incurred in complying with the subpoena".
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> [40] There have been a number of decisions in respect of this rule (and its earlier equivalents) over the previous 20 years. In *Danieletto v Khera* (1995) 35 NSWLR 684, Bryson J held that this court has an inherent power to do justice to the recipient of a subpoena in addition to its power under the court rules. As Campbell J (as his Honour then was) pointed out in *J Aron Corporation v Newmont Yandal Operations Pty Ltd* [2004] NSWSC 996 (at [22]), the existence of this inherent power means that the provision should not be construed in "any narrow fashion".
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> [41] In *Deposit & Investment Co Ltd v Peat Marwick Mitchell & Co* (1996) 39 NSWLR 267 at 289 et seq, Bainton J held that where a firm of solicitors receives a subpoena it is entitled to recover as loss or expense the time spent by the partners and employees at charge out rates.
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> [42] This decision has been followed on many occasions in this court: see for example *A Pty Ltd v Z* [2007] NSWSC 999 at [45].
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> [43] There are two cases where a different approach has been taken. In *Mancorp Pty Ltd v Baulderstone Pty Ltd* (Unreported, Supreme Court of South Australia, Debelle J, 5 March 1993), it was held that the solicitors should receive merely the cost of looking for and collating the documents, not the profit margin as well, and in the Family Court in *Moriarty v Moriarty* [2009] FamCA 369 ; 243 FLR 409; 41 Fam LR 336, Cronin J just refused to follow it for reasons he then gave. I must confess those reasons do not seem to me to be any justification for his Honour's stance, but the decision may be able to be upheld because of the unique cost regime in the Family Court.
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> [44] The difficulties in following the *Deposit & Investment case* are (1) that a different regime may apply to solicitors (and accountants) as opposed to that applying to corporations and to other business people (such as bobcat operators, to borrow the example used by Cronin J in *Moriarty*) and (2) the solicitors may make a profit out of complying with the subpoena.
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> [45] As to this second point, it may be a false assumption to say that a solicitor who receives a subpoena has to put aside time to comply with it and so not do fee paying work in that time. The assumption is that, without the subpoena, the

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5 [2012] NSWSC 822.

> solicitor had so much work on hand that he or she would have been gainfully employed. Not every lawyer is in that position.
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> [46] The case of work done by an employee is similar up to a point, but there is the additional consideration that it would seem that the average solicitors' firm has overheads of between 60–70% of fees, so that for every employee, 30–40% of their charge out rate is profit.
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> [47] However, Bainton J recognised these problems in the *Deposit & Invesment case* (as did Cronin J in *Moriarty*). At 293, Bainton J made it clear that the difficulties in calculation were such that the method he adopted produced the best estimate of loss that the court could make.
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> [48] Even apart from the *Deposit & Investment case* there are good reasons for taking this view. First, the UCPR is not to be narrowly construed. Secondly, solicitors who issue wide ranging subpoenas to professional people know the law as laid down in the *Deposit & Investment case* and it is far more equitable that their clients should bear the real costs of their action rather than the recipient of the subpoena.
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> [49] Thus, in my view, the profit costs should be allowed."

[35] As the Court of Appeal recognised in the decision of *Farrar v Julian-Armitage and Anor*,[6] a court on review is confined, unless it otherwise directs, to the evidence and issues which were before the assessor. The Court does however very broad powers, which include exercising all the powers of a costs assessor. The court continued:

> "Those powers fall to be exercised cognisant that an assessment of costs commonly involves evaluative determinations and discretionary decisions about questions to which there is not only one correct answer, with the result that courts should generally be unwilling to interfere in the absence of clear error. In *Schweppes' Limited v Archer* Jordan CJ explained the approach to be taken:
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> > "The Court will always review a decision of a Taxing Officer where it is contended that he has proceeded upon a wrong principle, for the purpose of determining the principle which should be applied; and an error in principle may occur both in determining whether an item should be allowed and in determining how much should be allowed. Where no principle is involved, and the question is whether the Taxing Officer has correctly exercised a discretion which he possesses and is purporting to exercise, the Court is reluctant to interfere. It has undoubted jurisdiction to review the Taxing Officer's decision even where an exercise of discretion only is involved, and will do so freely on a proper case, using its own knowledge of the circumstances …, but it will in general interfere only where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong; and where the question is one of amount only, will do so only in an extreme case.""

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[6] [2015] QCA 289.

Discussion

[36] With those principles in mind I am not satisfied that there has been a manifest error in the way in which the costs assessor approached his task. On 27 January 2017 Byrne SJA ordered the applicant to pay "all of the losses and expenses, including legal costs, incurred by Anthony Wetmore & Co Pty Ltd in complying with the subpoena to be assessed". In that assessment, as the submissions for the respondent note, the issue as to the distinction between all the losses and expenses on the one hand, and the issue of profit on the other, were squarely put by the applicant in the notice of objection and was considered by the costs assessor. The costs assessor's reasons reveal[7] that in relation to the eleven specific items numbered 28, 29, 34, 35, 37, 47, 54, 59, 61, 62 and 66 his reasoning was as follows:

> "The court in this matter on 27 January 2015 ordered the applicant Kay Ling Chee to pay to Anthony Wetmore & Co Pty Ltd **'all of the losses and expenses'**. This is the same as indemnity costs order. I regard the claim for the time taken by the administration staff at Wetmore for doing the work; I consider it to be reasonable for the work to done and reasonable in amount having regard to the hourly rate claimed" [sic].

[37] In relation to the amount claimed for a senior administrative assistant, it was claimed at $140 per hour which was allowed on the basis that he compared it to the cost if the work was done by a junior clerk in a solicitor's office, who could charge $86.50.

[38] In relation to the hourly rate claimed for a manager chartered accountant at $230, the costs assessor considered that the amount should be allowed compared to the Supreme Court scale if it was done by a junior lawyer, who would charge $298 per hour.

[39] In relation to the claim of time taken by a Principal chartered accountant for doing the work, the costs assessor considered that the amount claimed was reasonable, having regard to the amount claimed at $370 per hour for the Principal chartered accountant.

[40] The costs assessor considered that those rates were reasonable when compared to the Supreme Court scale and that if the work was done by a junior lawyer, it would be charged at $298 per hour. I am satisfied therefore that the costs assessor considered that it was appropriate in the circumstances to adopt and apply a comparison between the standard cost for professional legal practitioners as compared to the costs claimed by professional non-legal practitioners, such as accountants.

[41] In my view, there can be no manifest error if the costs assessor took this approach. I consider that it is within the ambit of the discretion of the costs assessor. It is clear from the costs assessor's reasons that it was not actually said that the order of 27 January 2015 was the same as an indemnity costs order but rather, was said that it was essentially the same as an indemnity costs order in relation to the assessment of the professional fees incurred by the accountants. This is particularly obvious when one considers that the costs assessor did not assess the solicitor's professional fees and

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[7] Affidavit of R T Stockley sworn 5 October 2017, Court Document Number 51, Exhibit "RTS-8".

outlays on an indemnity basis but rather on the standard basis. I accept the submission for counsel for Anthony Wetmore & Co that, read in context, the costs assessor in his written reasons "conveyed merely that he considered the particular language of the Court order required treatment of the losses and expenses analogous to an order for indemnity costs".

[42] The other discretionary considerations which I may take into account include the following. I note that the initial order of Byrne SJA was made almost three years ago and the Registrar's costs order was made almost 18 months ago. The order of Douglas J was made on 30 October 2016 which is over a year ago. I also note that the order of Justice Douglas specifically required the applicant to pay the GST component of the costs assessor's tax invoice and that the applicant has refused to comply with those express terms. I also consider that the applicant has unduly delayed the determination of these proceedings in breach of the implied undertaking under r 5 of the UCPR. In particular, I note that despite the fact that this dispute is in relation to little over $7,000, it has resulted in the non-payment of the costs order for almost three years.

[43] The affidavit material also indicates that the applicant has failed to respond to correspondence from solicitors for Anthony Wetmore & Co giving them notice of the relisting, and further that solicitors for Anthony Wetmore & Co were forced to have the court relist the applications.

[44] I consider therefore that there is no evidence that the costs assessor failed to exercise his discretion or to do so in a manner which was manifestly wrong. In the circumstances both applications should be dismissed with costs. I also consider that the solicitor Mr Stockley should be relieved from any undertaking given to the former counsel for the applicant.