SUPREME COURT OF QUEENSLAND

CITATION:	*Wiltshire v Amos & Anor* [2018] QSC 224
PARTIES:	**CHRISTOPHER WILTSHIRE** (appellant/first respondent) **v** **EDWARD AMOS** (respondent/applicant) And **EDWARD SKUSE** (not a party to the appeal/second respondent)
FILE NO/S:	BS No 4199 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane – [2010] QDC 138 (Samios DCJ)
DELIVERED ON:	4 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2018
JUDGE:	Crow J

ORDER:

1. **Application for review allowed to the extent of reducing the costs assessed at $132,463.80 by $9,600 to a sum of $122,863.80.**

2. **The appellant/first respondent is to email to associate.crowj@courts.qld.gov.au and to the respondent/applicant other written cost submissions within five days hereof.**

3. **The respondent/applicant is to email to associate.crowj@courts.qld.gov.au and to the appellant/first respondent written costs submissions within 10 days hereof.**

4. **The appellant/first respondent is to email to associate.crowj@courts.qld.gov.au and to the respondent/applicant any submission in reply on the issue of costs within 12 days hereof.**

CATCHWORDS: PROCEDURE – COSTS – TAXATION AND OTHER FORMS OF ASSESSMENT – PRINCIPLES OF

TAXATION OF ASSESSMENT – GENERALLY – where the respondent to the subject appeal sued his barrister for negligence in the District Court – where the respondent was successful in the trial before the District Court – where the Court of Appeal overturned the decision of the District Court – where the Court of Appeal ordered that the respondent was to pay the applicant's costs of the appeal – where the respondent applied for a review of the costs as assessed by the second respondent – where there are seven grounds of review – whether the costs were incorrectly assessed by the costs assessor

Barristers' Conduct Rules 2011 (Qld) r 25, r 26, r 27, r 116
Legal Profession Act 2007 (Qld) s 308, s 309, s 310, s 311, s 316, s 319, s 326, s 341
Uniform Civil Procedure Rules 1999 (Qld) r 723, r 742, r 743J, r 743L,

Chiropractic Board of Australia v Jamieson [2013] QSC 77, cited
ChongHerr Investments Ltd v Titan Sandstone Pty Ltd [2007] QCA 278, cited
Giannarelli v Wraith (1988) 165 CLR 543, cited
Hennessey Glass & Aluminium Pty Ltd v Watpac Australia Pty Ltd [2007] QDC 57, cited
Kroehn v Kroehn (1912) 15 CLR 137, cited
Medlicott v Emery (1933) 149 LT 303, cited
Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd [2015] QSC 122, considered
Remely v Vandenberg [2009] QCA 17, cited
Stanley v Phillips (1966) 115 CLR 470, cited
Skalkos v T & S Recoveries Pty Ltd (2004) 65 NSWLR 151, cited
TNT Bulkships Ltd v Hopkins (1989) 65 NTR 1, cited
W & A Gilbey Ltd v Continental Liqueurs Pty Ltd [1964] NSWR 527, considered
Wiltshire v Amos [2010] QCA 294, related

COUNSEL: K F Boulton for the appellant
F L Harrison QC with P G Jeffery for the respondent

SOLICITORS: Keller Nall & Brown for the appellant
Sharma Lawyers for the respondent

Background

[1] The applicant for this costs review, also the respondent to the subject appeal (Mr Amos) sued Monsour Legal Costs in the Magistrates Court for damages for negligence. This was in relation to a costs assessment provided by Monsour. The claim was dismissed on 31 August 2004 and Mr Amos was ordered to pay Monsour's legal costs on an indemnity basis which were assessed at $49,996.

[2] Dissatisfied with the Magistrate's decision, Mr Amos appealed to the District Court. That appeal was dismissed by the District Court with costs on 17 May 2005.

[3] Mr Amos then appealed to the District Court against the costs order made by the Magistrates Court and he was successful to the extent that on 2 November 2006 the District Court reduced the costs order by some $4,490. As he was successful but only to a small extent, Mr Amos was ordered to pay Monsour's costs of the latter (costs) appeal on the standard basis.

[4] As is recorded in the Court of Appeal's decision in *Wiltshire v Amos*,[1] the proceedings between Mr Amos and Monsour continued with Mr Amos appealing against the costs order to the Court of Appeal. That appeal was dismissed by the Court of Appeal on 24 July 2007.

[5] Mr Amos then raised an allegation that the first Monsour costs order had been procured by fraud and so Mr Amos commenced another action against Monsour.

[6] On 2 June 2008 Mr Amos commenced proceedings in the District Court by District Court proceeding DC 2 of 2008 filing a claim and statement of claim, claiming the costs order be set aside and that Monsour pay Mr Amos' costs of the appeal and damages in the amount of $250,000. The claim and statement of claim were drafted and settled by Mr Wiltshire. Mr Wiltshire, accepted a direct access brief from Mr Amos and rendered an account to Mr Amos in the sum of $1,000 for "fee for brief - drawing and settling claim and statement of claim".

[7] Mr Amos, resolute in his determination to sue the defendant Monsour, proceeded to a one day trial in the District Court on 2 June 2009. Mr Amos was unsuccessful and so turned his attention to his barrister, Mr Wiltshire. Mr Amos then sued Mr Wiltshire in the District Court for negligence, attacking Mr Wilshire's competence and honesty.

[8] Mr Amos succeeded in the trial against Mr Wiltshire. The District Court awarded Mr Amos damages in the sum of $114,302.17. Mr Wiltshire then appealed that decision to the Court of Appeal who heard the appeal on the morning of 8 October 2010. On 22 October 2010 the Court of Appeal delivered its decision in *Wiltshire v Amos*[2] allowing the appeal, setting aside the judgment and ordering a new trial. By paragraph 5 of the Court of Appeal's order, Mr Amos was ordered to pay Mr Wiltshire's costs of the appeal. Some seven years and eight months after the costs order of 22 October 2010, Mr Amos applied for a review of costs as assessed by the second respondent Mr Skuse, an approved costs assessor.

***Uniform Civil Procedure Rules* 1999 (Qld) 742 Review by the Court**

[9] Uniform Civil Procedure Rules 742 provides:

"**742 Review by court**

---

1 [2010] QCA 294 at [2].

2 [2010] QCA 294.

(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.

(2) An application for review must be filed within—

(a) if reasons are requested under rule 738(1)—14 days after the party receives those reasons; or

(b) otherwise—14 days after the party receives the certificate.

(3) The application must—

(a) state specific and concise grounds for objecting to the certificate; and

(b) have attached to it a copy of any written reasons for the decision given by the costs assessor; and

(c) state any other matter required by a practice direction made in relation to this rule.

(4) The applicant must serve a copy of the application on all other parties to the assessment within 14 days after the application is filed.

(5) On a review, unless the court directs otherwise—

(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.

(6) Subject to subrule (5), on the review, the court may do any of the following—

(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.

(7) Unless the court orders otherwise, the application for review does not operate as a stay of the registrar's order."

[10] In *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd*,[3] Martin J succinctly summarised the relevant law as follows:

---

[3] [2015] QSC 122 at [8] – [10]. Citations omitted.

"The ambit of this rule was considered by Jones J in *Nashvying Pty Ltd v Giacomi* where his Honour said:

> '[4] The discretion conferred by the sub-rule is a wide one. But it is to be exercised with a consciousness that it is effectively an appeal against the exercise by the cost assessor of a discretion. In general, the Court will 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.'

In *Australian Coal & Shale Employees' Federation v The Commonwealth*[4] Kitto J reviewed a number of authorities concerning the review of decisions of taxing officers. He concluded his analysis by adopting the summary of the law on this matter which was made by Jordan CJ (with the concurrence of the other members of the court) in *Schweppes' Ltd v Archer* where Jordan CJ said:

> 'In appeals as to costs, the principles to be applied are these. 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.' (citations omitted)

On an application such as this, the applicant carries the onus. In *Australian Coal & Shale Employees' Federation v The Commonwealth*, Kitto J adopted the following expression of principle:

> 'A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case; and where, after properly considering the matter, the master has arrived at a decision, **it lies upon those who impeach his decision to satisfy the Court that he is wrong**.' (emphasis added)"

Ground 1: Allowing professional costs of $6,145 contrary to Mr Amos' preliminary objections

---

4 (1953) 94 CLR 621.

[11] The amended grounds for review in ground 1 are in full as follows:

> "The costs assessor erred in allowing professional costs of $6,145.00 contrary to Mr Amos' preliminary objections, and in particular, in the absence of proof that those costs had been paid by Mr Wiltshire."

[12] In his written submissions in support of an application for review, Mr Amos said in respect of ground 1:

> "8. Smith and Stanton's costs of $3,145.00 were improperly allowed by the costs assessor because they were not assessed on scale. The costs assessor allowed the costs as if they were to be assessed on a full indemnity basis, not on a standard basis as ordered.
>
> 9. Mr Amos otherwise repeats and relies on his preliminary objections."

[13] Paragraph 9 of the submissions in repeating and relying upon the preliminary objections refers to document 33 on the court file. The reference to the preliminary objections relates to the objection number two relating to items three to five of the costs statement. The preliminary objections are quite detailed and complain of the costs of Patane Lawyers "for work on 4 May 2011 post dates the Costs Order made on 22 October 2010. Consequently such costs are beyond the scope of the said Order." In his detailed reasons for his decision the costs assessor Mr Skuse allowed $3,000 for the fees for Patane Lawyers pointing out that the total invoice for work performed by Patane Lawyers was $6,090 and that was reduced to some $3,000. The costs assessor Mr Skuse stated "the objector apparently did not read the full tax invoice which are two subsequent pages of particularity." [5]

[14] Notwithstanding the reasons of the costs assessor, Mr Wiltshire now concedes that the $3,000 paid in respect of Patane Lawyers' fees ought not to have been allowed. This is a fair concession made by Mr Wiltshire. Accordingly, item 3, Patane Lawyers' fee of $3,000, as contained in the costs statement,[6] is disallowed.

[15] The specific attack in ground 1 is that Smith & Stanton's costs of $3,145 were assessed "as if they were to be assessed on a full indemnity basis, not on a standard basis as ordered." Item 4 of the costs statement[7] is the allowance by Mr Skuse the costs assessor of the Smith & Stanton Lawyers' fees of $3,145. At paragraph 7, page 10 of Mr Skuse's reasons for allowing the $3,145, Mr Skuse criticises Smith & Stanton Lawyers' invoice of 12 October 2010 as it failed to be broken up as to amount. However, as reasoned by Mr Skuse, simply by attendance at the appeal on 8 October 2010 and with an hourly rate for a senior lawyer as disclosed,[8] the Court of Appeal fees of some $1,500 plus travel expenses would be allowed.

[16] Furthermore, Mr Skuse who had access to detailed materials concerning the appeal was well placed, utilising his expertise as an approved costs assessor, to assess the relatively

---

5 See Costs Assessor's Reasons for Decision at page 9.
6 Court document 32.
7 Court document 32.
8 In the Smith & Stanton Lawyers' costs agreement of 20 September 2010 at $370 per hour.

modest amount of solicitors fees claimed at $3,145. It is further noted that the total invoice sum of 12 October 2010 was $3,543.80. Mr Skuse concluded out that the amount of $3,145 was at the lower end of the fees estimated in the disclosure notice provided by Smith & Stanton Lawyers which had an estimate of $3,000 to $5,000[9]. Mr Skuse was able to conclude that the amount claimed at $3,145 on a standard basis out of a total of $3,543.80 was "in fact, an under-claim." It cannot be shown that the costs assessor's discretion was not exercised or that it was exercised in a manner which was manifestly wrong. Ground 1 of the appeal is dismissed, other than to the extent of the $3,000 Patane Lawyers' fee which is conceded.

Ground 2: Error in allowing disbursements contrary to preliminary objections

[17] In its entirety ground 2 of the amended grounds of appeal is:

> "2. The costs assessor erred in allowing "disbursements" of $123,085.90 contrary to Mr Amos' preliminary objections, and in particular, in the absence of proof that those costs had been paid by Mr Wiltshire..."

[18] The argument brought under ground 2 is that the absence of proof that the disbursements of $123,085.90 have in fact been paid renders them unassessable. That argument is repeated in paragraph 10 of Mr Amos' submissions. However, by paragraph 12 of Mr Amos' submissions it appears to be accepted that it is not necessary that the disbursements in fact be paid but rather the test is whether the disbursements are in fact "incurred on behalf of the litigant by his solicitor."[10]

[19] Mr Amos argues that for the "liability … to have been incurred there must be either an unconditional or a conditional but unavoidable obligation to pay it." Mr Amos' written submission was "[i]t would appear from the other side's coyness about whether or not the fees had been paid that the liability to pay them is something less than unavoidable, that is to say, that in fact such a liability has not been incurred."

[20] Mr Amos' written submissions were, however, overtaken by the admission of further evidence at the commencement of the application. Mr Harrison QC applied on behalf of Mr Amos to admit further evidence in the form of a further affidavit of the solicitor Mr Collinson,[11] further evidence to be obtained from Mr Sharma[12] by way of subpoena duces tecum as well as further evidence from Mr Wiltshire which was to be obtained from Mr Wiltshire pursuant to a notice to cross-examine upon his affidavit.

[21] With respect to Mr Collinson's affidavit[13], Mr Harrison QC sought a direction from the court pursuant to r 742(5)(a) *Uniform Civil Procedure Rules* 1999 (Qld) to receive the further evidence. In the course of the application, I ruled against Mr Harrison QC's submission for the admission of Mr Collinson's affidavit with, however, the concession

---

9 Dated 5 October 2010.
10 See *W & A Gilbey Ltd v Continental Liqueurs Pty Ltd* [1964] NSWR 527 at [7] per Asprey J.
11 Court document 127.
12 The solicitor for Mr Wiltshire.
13 Court document 127.

being made on behalf of Mr Wiltshire that he was and has been at all material times registered for GST.

[22] The contentious part of Mr Collinson's affidavit relates to the rates of fees of Queen's Counsel. In paragraph 50 Mr Collinson asserts as a solicitor since 1976 and having conducted litigation as part of his practice since that time, that the average daily rate of Senior Counsel as at 2010 was approximately $6,000 plus GST. That submission is made on the basis of paragraph 8 of Mr Collinson's affidavit sworn 31 May 2018 in which Mr Collinson said "as best I can recall, the average daily rate of Senior Counsel in or about 2010 was approximately $6,000 plus GST." Mr Collinson however failed to reveal to the Court how he has arrived at a best recollection of an average daily rate for Senior Counsel in 2010 at $6,000 plus GST per day other than reference to one matter in which Mr Tate of Queen's Counsel was retained, furthermore that retainer occurred in 2008, i.e. two years prior to the relevant time.

[23] In support of his submission, Mr Harrison QC referred to the approach of Jackson J in *Chiropractic Board of Australia v Jamieson*[14] and the decision of Holmes JA (as her Honour then was) in *Remely v Vandenberg*.[15] Rule 742(5)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) reposes in the Court a discretion to be exercised in appropriate cases for the receipt of further evidence but with the purpose of r 742, (that is to review a costs order) being firmly kept in mind. On a similar discretion, the former order XCI rule 120 Henchman J said in *Re O'Sullivan, Wilson v Bedford*:[16]

> "[t]hat discretion must, of course, be exercised judicially, i.e., in accordance with legal principles. One of these is that, in general evidence which was available to a party before a hearing should not be allowed to be adduced by him on a rehearing …".

[24] Given that the evidence in Mr Collinson's affidavit dealing with rates of fees rendered by Queen's Counsel, was evidence which was freely available at all times and given, that even if the evidence had been provided to the costs assessor, it would not have made an important impact upon the assessment, Mr Collinson's affidavit was ruled inadmissible.

[25] In *Chiropractic Board of Australia v Jamieson*,[17] evidence was admitted under the r 742(5)(a) *Uniform Civil Procedure Rules* 1999 (Qld) where the basis for challenging a costs amount was not available because of a default by a party in providing proper disclosure. It is that principle which provided the proper basis for a direction to be given for the admission into evidence pursuant to r 742(5)(a) *Uniform Civil Procedure Rules* 1999 (Qld) of Mr O'Shae's retention letter of 7 November 2010,[18] Ms Moody's retention letter and costs agreement of 7 October 2010[19] and Mr O'Shea's costs retention letter of 27 April 2010.[20]

---

14 [2013] QSC 77 at [20].
15 [2009] QCA 17.
16 [1937] St R Qd 50 at 62.
17 [2013] QSC 77 at [20].
18 See exhibit 1.
19 See exhibit 2.
20 See exhibit 3.

[26] In response to the point regarding failure to prove payment of counsel's fees, Mr Boulton on behalf of Mr Wiltshire admits that counsel's fees had not yet been paid however points to the terms of the retainers[21] and to r 723 *Uniform Civil Procedure Rules* 1999 (Qld) in support of his submission that failure to prove payment of counsel's fees is not a prerequisite to the allowance of counsel's fees on a costs assessment. While Mr Harrison QC on behalf of Mr Amos expressly did not rely upon paragraph 15 of Mr Amos' written submissions,[22] he did submit, a more sophisticated argument brought upon the basis of the evidence provided in exhibits 1, 2 and 3 which is discussed at paragraphs [59] to[77] below. However, no part of the submission can overcome the plain words in r 723 *Uniform Civil Procedure Rules* 1999 (Qld) (upon which Mr Skuse relied):

> "**723 Disbursement or fee not paid**
>
> (1) If a party's costs statement includes an account that has not been paid, the party may claim the amount as a disbursement.
>
> (2) A costs assessor may allow the amount as a disbursement only if it is paid before the costs assessor signs the certificate of assessment.
>
> (3) Subrule (2) does not apply to an amount for lawyers' or experts' fees."

[27] It may be seen by the context of r 723 *Uniform Civil Procedure Rules* 1999 (Qld) that necessity for the allowance of a disbursement to be paid does not apply to lawyers' expert's fees. Rather a discretion is reposed in a cost assessor to allow an unpaid expert or lawyer's fee as a disbursement. It can be readily appreciated why this is so. If it were not so, impecunious parties, such as persons injured in motor vehicle accidents or at work, would be seriously disadvantaged because as a result of their serious injuries they may be impecunious and unable to pay counsel's fees. With the exception of r 723(3) *Uniform Civil Procedure Rules* 1999 (Qld) the lawyers and expert's fees, which may be a significant sum, could not be allowed and the consequential effect would be that large amounts would need to be paid for by the injured person out of the damages they are awarded. That would be manifestly unfair.

[28] In the present case the costs assessment occurred in May 2012 and the costs assessor's certificate issued on 15 May 2012, without proof of payment, however, r 723 *Uniform Civil Procedure Rules* 1999 (Qld) permits this to occur. The test remains under r 742 *Uniform Civil Procedure Rules* 1999 (Qld) with respect to a review of costs, the Court will interfere only where it appears the discretion has not been exercised at all or has been exercised in a manner which is manifestly wrong. That cannot be shown in respect of ground 2. With respect to r 723(3) *Uniform Civil Procedure Rules* 1999 (Qld), Mr Skuse stated in relation to the failure to produce receipts of payment that "[p]roof of payment is not a condition precedent for the Assessor to allow counsel and solicitor's costs that were properly and necessarily incurred by the Costs Claimant." Therefore, rather than being suggestive of a failure to exercise a discretion or exercising discretion in a manner which is manifestly wrong, the costs assessor quite properly and

---

21 See exhibits 1, 2 and 3.

22 Court document 128,

accurately applied r 723(3) *Uniform Civil Procedure Rules* 1999 (Qld) .[23] Ground 2 is accordingly dismissed.

Ground 3(a) and (b): Two counsel

[29] Grounds 3(a) and (b) of the matter grounds for review are:

> "3. The costs assessor erred in not disallowing Mr Amos' preliminary objections by:-
>
> (a) finding that the engagement of two counsel (including Senior Counsel) was appropriate, including by taking into account of the matter of Mr Wiltshire's reputation when the issue before the Court was not whether Mr Wiltshire had been negligent, but as to the adequacy of Mr Amos' disclosure;
>
> (b) finding the counsel's fees were necessary and proper."

[30] Paragraphs 21 to 28 of Mr Amos' submissions argue that two counsel ought not to have been allowed. In paragraph 23 of Mr Amos' submissions the correct principle is identified in order to determine whether two counsel ought to be allowed. The test is whether "the nature and circumstances of the case are such that services of two counsel are required if the case is to be presented to the court in such a manner that justice can be done between the parties."[24]

[31] By paragraph 24 of Mr Amos' submissions it is obliquely argued that "[t]his case did not satisfy that test" before adding in paragraph 28 that "Mr Amos otherwise repeats and relies upon his preliminary objections." Mr Amos made detailed written submissions in his preliminary notice of objections relating to the allowance of senior and junior counsel on pages 2 to 5. The preliminary notice of objections and submissions cite 12 authorities in support of the argument to disallow two counsel.[25]

[32] In his reasons for decision the costs assessor, Mr Skuse, said of his decision to allow the use of senior and junior counsel at pages 3-5 as follows:[26]

> "b) <u>The use of multiple counsel - items 1 and 2 in the Costs Statement:</u>
>
> This objection runs over pages 1 to part of page 7 of the Objections. At page 3 of the Objections, the Objector cites *Stanley v Phillips* [1966] l15 C.L.R.

---

23 Costs Assessor's Reasons for Decision at page 9.

24 *Stanley v Phillips* (1966) 115 CLR 470 at 479 per Barwick CJ.

25 *Kroehn v Kroehn* (1912) 15 CLR 137; *Stanley v Phillips* (1966) 115 CLR 470; *Balmaha Pty Ltd v Jorgensen and Halliday & Co (A Firm),* unreported, Andrews SPJ, SC No 998 of 1983, 22 August 1985; *Jovanovski v Tafcum Contractors Pty Ltd (In Liq),*unreported, Dowsett J, SC No 4014 of 1987, 19 March 1993; *Resort Management Services Limited v Noosa Shire Council (No 2)* [1995] 1 Qd R 56; *Beazley v Marshall (No 3)* (1986) 41 SASR 321; *Andrewartha v Andrewartha (No 2)* (1987) 45 SASR 85; *Oldaker v Currington* [1987] VR 712 at 715; *In Re Blyth & Fanshawe; Ex parte Wells* (1882) 10 QBD 207; *Gyopar v Cohens Frenkel Berkovitch Kefford & New* [1987] FLC 91-839; *In Re Broad & Broad* (1885) 15 QBD 420.

26 This is quoted verbatim and any errors contained within belong to the author of the document referred to.

This case included this statement:

'*The question is whether the successful party's advisors might reasonably have regarded the engagement of senior counsel as necessary for adequate representation.*'

The Costs Objector also cites *Kroehn v Kroehn* (1912) 15 CLR 137 and the test formulated at page 141, '*would a prudent person not compelled by poverty come into court in such a case without two counsel?*

In answering the question, regard must be had, interalia to:

- *The importance of the case;*
- *The probable duration of trial;*
- *The probability of conflict of evidence entailing the necessity of cross-examination; and*
- *General practise in employing two counsel*.'

c) Decision of Costs Assessor:

The Costs Assessor found the engagement of two counsel (including Senior Counsel) was appropriate for the following reasons.

The matter:

i. Was complex, involving an application to adduce further evidence - this was serious in that it involved cross-examination of legal practitioners as to credit;

ii. Was serious in that it involved a conflict on the evidence between legal practitioners;

iii. Was complex in its requirement to examine many aspects of the law in detail including disclosure obligations;

iv. Resulted in Reasons for the Decision by the three Appellant Court Judges which were 14 pages in length;

v. Was complex with a vast volume of material as indicated by an affidavit dated 2 July 2010 sworn by Paula Scheiwe, solicitor, which with 17 exhibits, occupied a full binder and was 319 pages in length.

vi. The importance to the Appellant - This was extreme as detailed in the paragraph entitled Reputation at page 8, below, in these reasons.

Accordingly, the Assessor found that the utilisation of two counsel was warranted.

The Assessor adopts the material set out in paragraph d) on page 3 of the Objections - the remarks of Barwick CJ in *Stanley v Phillips* at page 479.

> The Assessor rules that this instant case satisfies this test as to:
>
> - Volume of material;
>
> - Nature and extent of cross-examination required;
>
> - Complexity of fact or law;
>
> - The extent of preparation; and
>
> - The involvement of serious imputations of personal reputation or integrity;
>
> '*make it reasonably necessary or proper that the services of two counsel be engaged in order that the court may do justice between the parties*.'"

[33] It is apparent that the costs assessor Mr Skuse had in mind the correct principles as set out by the High Court in *Stanley v Phillips*[27] and *Kroehn v Kroehn*.[28] As can be seen from his reasons the costs assessor did carefully apply the principles. Grounds 3(a) and (b) are therefore dismissed.

Ground 3(c): The costs were disproportionate to the amount in issue

[34] In its entirety ground 3(c) of the amended grounds of review is that "the costs assessor erred in disallowing Mr Amos' preliminary objections by finding that the costs claimed were not disproportionate to the appeal." Mr Amos' submissions on this ground are mercifully limited to four paragraphs.

[35] It is correct as Mr Amos submits, that in determining whether costs have been reasonably properly incurred, it is relevant to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue.[29]

[36] It is accurate as Mr Amos submits that the amount obtained in the judgment against Mr Wiltshire was limited to $114,302.17 and that the costs allowed by the costs assessor ($132,436.80) exceeded that by almost $16,000. It is, however, immediately to be observed that the value of the subject matter in issue is not the only matter relevant to determining whether the costs have been reasonably and properly incurred.

[37] Mr Amos' submissions say nothing about the importance of the subject matter in issue. A perusal of the Court of Appeal's reasons in *Wiltshire v Amos*[30] can only reasonably lead to the conclusion that the matter was of the utmost importance to Mr Wiltshire and of general importance. Left uncorrected and because of Mr Amos' failure to meet his disclosure obligations, Mr Wiltshire, as a barrister, faced the unattractive prospect of having a published judgment questioning his credibility and his competence as a barrister. As the Court of Appeal found, the failure by Mr Amos to disclose documents relevant to the crucial credit issues impacted significantly upon the negligence issues.

---

27 (1966) 115 CLR 470.
28 (1912) 15 CLR 137.
29 *Skalkos v T & S Recoveries Pty Ltd* (2004) 65 NSWLR 151 at 153 [8].
30 [2010] QCA 294.

Put shortly the primary judge had been misled. In the circumstances, it cannot be said that the careful preparation for and presentation of an extremely important appeal is not a matter of "importance" with respect to the "subject matter in issue".

[38] Ground 3(c) is therefore dismissed.

Ground 3(d): Inadequate particularisation

[39] Ground 3(d) of the amended grounds of review is "the costs assessor erred in disallowing Mr Amos' preliminary objections by finding that the invoices issued by solicitor and counsel were adequately particularised".

[40] The complaint made by Mr Amos in paragraph 34 is that the invoice of Smith & Stanton Lawyers was a lump sum bill and did not contain particulars of time charged by the solicitor nor any reference to an hourly or daily rate. This was dealt with by the costs assessor on page 10 of his reasons in item 7(a) as follows:

> "Whilst the particulars comprising one page of this invoice, are not broken up as to amount, it can be seen by a quick observation that the tax invoice is not excessive."

[41] Again, it will be recorded that the tax invoice of $3,543.80 was reduced to $3,145 and is modest and can reasonably be said to be, as the costs assessor said, "an under-claim".

[42] Complaint is made in paragraph 35 of Mr Amos' submissions that Mr O'Shea QC's bills did not contain particulars of the time charged by counsel nor any reference to an hourly or daily rate. That can be shown to be incorrect by observing the invoices.

[43] Paragraph 36 of Mr Amos' submissions also complain that Ms Moody failed to provide adequate particulars of time charged by Ms Moody "although it contained particulars of the time charge by counsel." It would seem Ms Amos' submission in this regard is that Ms Moody did particularise her time charges but did not particularise them enough. Ms Moody's invoices have been perused and they are in an ordinary form and fairly particularised as one would expect from junior counsel. Ground 3(d) is rejected.

Ground 3(e): Allowance of costs that were not costs of the appeal

[44] In its entirety ground 3(e) is "[t]he costs assessor erred in disallowing Mr Amos' preliminary objections by failing to disallow professional costs which were not costs of the appeal. Mr Amos' submissions adopt the concession with respect to the reduction of the Patane Lawyers' costs of $3,000 which had already been allowed for in the assessment before complaining of the allowance of $2,200 for Mr O'Shae QC's work performed on 5 November 2010 and $4,400 of Mr Moody of counsel's work which was performed after 22 October 2010. This ground is conceded by Mr Wiltshire.

Ground 3(f): GST

[45] The written submissions of both Mr Amos and Mr Wiltshire are unhelpful with respect to ground 3(f). In paragraphs 30 and 31 of Mr Wiltshire's written submissions, it is asserted:

> "30. The objector's preliminary notice of objection did not raise any issue concerning the allowance of GST on fees charged by counsel and solicitors. It is submitted that GST was properly charged on tax invoices delivered by counsel and solicitors.
>
> 31. Accordingly it is submitted there is no substance to amended ground 3(f) and that that ground should be rejected."

[46] This is incorrect. In the second paragraph of page 3 of the preliminary notice of objections,[31] Mr Amos stated "GST input credits must not be claimed on assessment with respect to disbursements." In furtherance of that submission Mr Amos cited *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd*[32] and *Hennessey Glass & Aluminium Pty Ltd v Watpac Australia Pty Ltd*.[33] In paragraph 9 of *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd* the Court of Appeal said "[w]e agree with the views of McGill DCJ in *Hennessy Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd* that the necessity to give credit for an input tax credit applies not to solicitors' professional fees, but to outlays which attract GST."

[47] It may be seen from the above that Mr Wiltshire is completely incorrect when he asserts as he does in paragraph 30 that the "objector's preliminary notice of objection did not raise any issue concerning allowance of GST." No assistance on the issue thus can be gained from the written submissions for Mr Wiltshire. Furthermore, it is plain that the costs assessor understood the GST objection and dealt with it.

[48] In the costs assessor's reasons on pages 10 and 11 under item 9 the following appears:

> "9. GST objection - page 3, second paragraph.
>
> In a letter dated 27 April 2012, the Costs Claimant wrote to the assessor and copied the objector and made the following statement:
>
> > 'I refer to your letter of directions no. 7 dated 24 April 2012. In respect of GST, I advise that no input credits have been obtained as to outlays.'
>
> Decision of Assessor: The assessment procedure, the Assessor accepts written assurances from solicitors, relating to GST credits."

[49] Mr Amos' challenge to the GST issue is contained completely within paragraphs 43 and 44 of his written submissions as follows:

> "43. The costs assessor relied on a statement by Mr Wiltshire that 'no input credits had been obtained as to outlays' and accepted his written assurance. However, Mr Wiltshire has been registered for

---

31 Court document 33.
32 [2007] QCA 278.
33 [2007] QDC 57.

> GST since 1 October 2000. There is no explanation given by Mr Wiltshire as to why he states that he had not claimed input tax credits, nor any production of his quarterly and annual returns to demonstrate that he has not claimed input tax credits.
>
> 44. To the extent that Mr Wiltshire has not paid the costs claimed, then there is no reason why he could not claim input tax credits once those costs are paid as a result of any costs paid by Mr Amos to Mr Wiltshire as a result of this application for review. If GST is not disallowed the costs recovered by Mr Wiltshire will exceed actual costs expended by him and a party cannot make profit from recovery of costs from another party."

[50] No explanation has been provided by Mr Amos as to why the costs assessor was wrong in accepting Mr Wiltshire's statement that no input credits have been obtained as to outlays.

[51] Mr Wiltshire, as a legal practitioner, is pursuant to s 28 of the *Legal Practitioners Act* (Qld) 2007 an officer of the Court. Rules 25 to 27 of the *Barristers' Conduct Rules* provide:

> "25. A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.
>
> 26. A barrister must not deceive or knowingly or recklessly mislead the Court.
>
> 27. A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading"

[52] A court is broadly defined in r 116 of the *Barristers' Conduct Rules* to include all investigations and inquiries established by statute or by parliament. Cost assessors undertake an inquiry in the broad sense in determining what the costs are to be properly allowable in any particular case. The fact that Mr Wiltshire has been registered for GST since 1 October 2000 does not infer that he has or will always claim an input tax credit in respect of any particular item. This is the only argument brought by Mr Amos which is made where an officer of the court, with high ethical duties has expressly stated that he has not claimed and will not claim input tax credits. As is noted by r 27 above, the duty is ongoing and is prospective as well as retrospective. Furthermore, at the application Mr Wiltshire offered an undertaking that he would not apply for an input tax credit component. No reasonable and logical explanation has been provided as to why it would be concluded that Mr Wiltshire will claim an input tax credit when he expressly says he has not. There is no substance in ground 3(f) and Mr Amos cannot demonstrate the costs assessor has taken into account an irrelevant consideration or invalidly exercised his discretion. Ground 3(f) is rejected.

Ground 3(g): Other objections

[53] In its entirety ground 3(g) is:

> "The costs assessor erred in disallowing Mr Amos' preliminary objections by failing to take into account or give any weight or sufficient weight to Mr Amos' preliminary objections which are not specifically addressed by the costs assessor in his reasons for decision."

[54] All that is said on this objection in the written submissions is contained in paragraph 46 as follows:

> "46. Mr Amos repeats and relies upon his preliminary objections."

[55] As set out above r 742(3)(a) *Uniform Civil Procedure Rules* 1999 (Qld) requires an applicant to state the specific and concise ground for objecting to the certificate. It is not permissible to, and is anathema to, Chapter 17A of the *Uniform Civil Procedure Rules* 1999 (Qld) for such objection to framed on this basis. In document 33 the preliminary notice of objection contains 11 pages of objections. The 11 page costs assessor's reasons for decision identify and address the issues raised in the preliminary objections. Ground 3(g) is rejected.

Ground 4: Judging fees by reference to current levels

[56] By paragraph 47 of his written submission, Mr Amos asserts that "[t]he costs assessor erred in judging the reasonableness of professional fees by reference to current fees, rather than the level of such fees in 2010." It is further asserted in paragraph 48 of Mr Amos' written submissions "[t]he costs assessor does not state why the rates charged by counsel as at 2010 were reasonable."

[57] Costs assessors appointed pursuant to r 743J *Uniform Civil Procedure Rules* 1999 (Qld) are required to have a minimum of five years' experience in the practice of the law or in the assessment of costs. Not all lawyers aspire to be a costs assessor, some would see it as difficult and tedious work. It is however necessary and important work. A broad discretion is reposed in the principal registrar pursuant to r 743L *Uniform Civil Procedure Rules* 1999 (Qld) to appoint or refuse to appoint a person as a costs assessor. It may be presumed that costs assessors ordinarily acquire a great deal of knowledge concerning the "going rates" for costs assessments particularly in respect of barristers and solicitors fees.

[58] On pages 6 and 7 of his reasons for decision, the costs assessor Mr Skuse makes reference to the fair estimates provided in November 2010 and the costs assessor finds that the Senior Counsel's rates are "not excessive and is in line with the commercial realities of the marketplace." In *ChongHerr Investments*[34] the Court of Appeal said:

> "The amount claimed by the appellant is less than the amount assessed. The appellant is entitled to a proper indemnity for the costs reasonably incurred by it in litigation in which its legal position was vindicated. The Court should not diminish that entitlement by an adherence to regressive views or practices calculated to cast much of the financial burden of litigation onto those whose rights have been vindicated by the courts.

---

[34] [2007] QCA 278 at [11].

> The fundamental principle is that the successful party should not have been put to the expense of litigation, and it should be indemnified in respect of the costs which it has reasonably incurred in order to establish rights contested by the unsuccessful party."

[59] There is no material to suggest that the costs assessor did judge counsel's fees by reference to current levels as opposed to 2010 levels. Even if one presumes the fact that another experienced Queen's Counsel practicing ordinarily in a different area of law two years previously charged a lesser amount, that is not proof that the costs assessor assessed their fees by reference to current rates of fees as opposed to the rates in 2010. Ground 4 is rejected.

Grounds 5 and 6: Reliance on material not disclosed to Mr Amos

[60] Grounds 5 and 6 of the amended grounds for review provide:

> "5. The costs assessor erred in taking into account material received from Mr Wiltshire which was not disclosed to Mr Amos including the retainers, costs agreements and correspondence referred to in the costs assessor's reasons for decision.
>
> 6. Not having seen the retainer agreements referred to by the assessor, Mr Amos puts Mr Wiltshire to proof that the agreements complied with the disclosure requirements of ss 308-310 of the *Legal Profession Act* 2007 (Qld)."

[61] In paragraphs 53 to 56 of Mr Amos' written submissions, Mr Amos refines these grounds to an argument brought upon the failure to disclose the retainer letters of Mr O'Shea QC and Ms Moody of counsel. It is plain that the retainer letters provided by Mr Wiltshire were considered by the costs assessor. On page 5 of his reasons, the costs assessor records in respect of the retainers of Patrick O'Shea:

> "A letter dated 27 April 2010 addressed to the lawyers Paula Sheiwe & Associates for the Cost Claimant was produced to the Costs Assessor where counsel set out his fee disclosure and estimates of fees. In a letter dated 7 November 2010 (second retainer letter) addressed to Smith & Stanton, solicitors for the Costs Claimant, counsel makes further disclosure and sets out his estimate of total fees."

[62] On page 7 of his reasons the costs assessor says inter alia:

> "Additionally, on the Costs Claimant's solicitor's file supplied to me … is a letter from Shannon Moody containing her cost retainer dated 7 October 2010, comprising a costs agreement dated 7 October 2010 being an Offer of Services from Shannon Moody, Barrister …".

Mr Amos puts his argument concerning this non-disclosure in paragraph 55 as follows:

> "55. Not having seen the retainer agreements referred to by the assessor, Mr Amos puts Mr Wiltshire to proof that those

> agreements comply with the disclosure requirements of ss 308-310 of the *Legal Profession Act* 2007 (Qld)."

[63] As discussed above, pursuant to the directions made at the commencement of the application, exhibits 1, 2 and 3 were disclosed which provided Mr Harrison QC with an evidential basis in furtherance of his submission that counsel's fees ought not to have been allowed as they had not been "incurred". Mr Harrison QC argued that the agreements had not met the disclosure requirements of s 308 to s 310 of the *Legal Profession Act* 2007 (Qld) and by virtue of both of the interaction of that Act and the common law requirement, the fees had not been incurred and accordingly, the barristers' fees ought not be allowed at all.

[64] Although the submissions were made ably, the argument suggesting a failure to comply with the provisions of the *Legal Profession Act* 2007 (Qld) may be dealt with directly.

[65] The first problem with the submission is that even if there was failure to comply with s 308 to s 310 of the *Legal Profession Act*, then by s 316(1) it does not have the effect that counsel's fees are not required to be paid at all but rather that the assessor must undertake a Division 7 assessment. Division 7 assessments are carried out pursuant to the criteria set out in s 341 of the *Legal Profession Act* 2007 (Qld). Whilst it cannot be contended that the cost assessor carried out a Division 7 assessment, it can be seen from the cost assessor's detailed reasons that he did take into account many of the important factors required in s 341 and in particular ss 341(1)(a), (b), (c) and s 341(2)(e), (f) and (g). Even if Mr Wiltshire therefore had breached ss 308 to 310 of the *Legal Profession Act* 2007 (Qld), Mr Amos has not been able to demonstrate that a Division 7 assessment would not have resulted in an assessment at the same level. To some extent Mr Harrison QC conceded[35] that the effect of s 316 is not to render counsel's fees unobtainable on assessment but merely they must be a different type of assessment, namely a Division 7 assessment. The submissions have not been forthcoming as to how the result of a Division 7 assessment would have differed from the assessment and process undertaken by Mr Skuse, the costs assessor.

[66] The principal reason for rejecting the submission is that Mr Amos has not demonstrated that there has been a failure to disclose the retainer agreements in accordance with the Division within the meaning of s 316(1) of the *Legal Profession Act* 2007 (Qld). Mr Harrison QC on behalf of Mr Amos argued[36] that there was a breach of s 310(1) of the *Legal Profession Act* 2007 which provides:

> "**310 How and when must disclosure be made to a client**
>
> (1) Disclosure under section 308 must be made in writing before, or as soon as practicable after, the law practice is retained in the matter."

[67] Mr Harrison QC[37] was able to demonstrate with respect to exhibit 2 that Ms Moody's cost disclosure letter and cost agreement that it was signed on 7 October 2010, that is

---

35 At T1-27.
36 At T1-27.
37 At t1-27.

the day before the appeal. Plainly, and as can be further demonstrated with respect to Ms Moody's invoices, that is a breach of s 310(1) as disclosure was not made as soon as practicable after Ms Moody had been retained in the matter.

[68] In this regard, reference may be had to document 29, the affidavit of Mr Wiltshire filed 26 October 2011 enclosing as exhibit "CJRW3" Mr O'Shea QC's invoice of 25 March 2011, showing that Ms Moody had been involved in the matter since April 2010. Prima facie therefore Mr Harrison QC is able to demonstrate a breach of s 310(1) were it not for s 311 of the *Legal Profession Act* 2007 (Qld), as Mr Boulton ably points out. Section 311 of the *Legal Profession Act* provides as follows:

> "**311 Exceptions to requirement for disclosure**
>
> (1) Disclosure under section 308 or 309(1) is not required to be made in any of the following circumstances—
>
> (a) if the total legal costs in the matter, excluding disbursements, are not likely to exceed $750 exclusive of GST or, if a higher amount is prescribed under a regulation, the prescribed amount;
>
> (b) if—
>
> (i) the client has received 1 or more disclosures under section 308 or 309(1) from the law practice in the previous 12 months; and
>
> (ii) the client has agreed in writing to waive the right to disclosure; and
>
> (iii) a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, the further disclosure is not warranted;
>
> (c) if the client is—
>
> (i) a law practice or an Australian legal practitioner; or
>
> (ii) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body, each within the meaning of the Corporations Act; or
>
> (iii) a financial services licensee within the meaning of the Corporations Act; or
>
> (iv) a liquidator, administrator or receiver, as mentioned in the Corporations Act; or
>
> (v) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the

partnership would be a large proprietary company, within the meaning of the Corporations Act, if it were a company; or

(vi) a proprietary company, within the meaning of the Corporations Act, formed for the purpose of carrying out a joint venture, if any shareholder of the company is a person to whom disclosure of costs is not required; or

(vii) an unincorporated group of participants in a joint venture, if—

(A) 1 or more members of the group are persons to whom disclosure of costs is not required; and

(B) 1 or more members of the group (the relevant members) are persons to whom disclosure is required; and

(C) all relevant members have indicated that they waive their right to disclosure; or

(viii) a Minister of the Crown in right of a jurisdiction or the Commonwealth acting in his or her capacity as a Minister, or a government department or public authority of a jurisdiction or the Commonwealth;

(d) if the legal costs or the basis on which they will be calculated have or has been agreed as a result of a tender process;

(e) if the client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice;

Example of paragraph (e)—

if the law practice acts in the matter on a pro bono basis

(f) in any circumstances prescribed under a regulation.

(2) Despite subsection (1)(a), if a law practice becomes aware that the total legal costs are likely to exceed $750 or a higher prescribed amount, the law practice must disclose the matters under section 308 or 309, as required, to the client as soon as practicable.

(3) A law practice must ensure that a written record of a principal's decision that further disclosure is not warranted as mentioned in subsection (1)(b) is made and kept with the files relating to the matter concerned.

(4) The reaching of a decision mentioned in subsection (3) otherwise than on reasonable grounds is capable of constituting

unsatisfactory professional conduct or professional misconduct on the part of the principal.

(5) Nothing in this section affects or takes away from any client's right—

(a) to progress reports under section 317, unless section 317(5) applies; or

(b) to obtain reasonable information from the law practice in relation to any of the matters stated in section 308; or

(c) to negotiate a costs agreement with a law practice and to obtain a bill from the law practice."

[69] In constructing s 311 it is plain that the disclosure requirements, which may in some circumstances be seen as onerous, are plainly intended to protect citizens from excessive legal fees for which they have not been properly forewarned. However, s 311 creates exceptions for sophisticated clients and that most certainly includes an Australian Legal Practitioner under s 311(1)(c). Because Mr Wiltshire as a barrister is an Australian legal practitioner, the disclosure requirements of ss 308 and 309(1) did not apply. In those circumstances, the statutory challenge to the allowance of counsel's fees cannot be sustained.

[70] Mr Amos' principal argument is that counsel's fees ought not to have been allowed because they had not been "incurred". Mr Harrison QC attempts to demonstrate this by reference to case authority and specifically with reference to the terms of the retainers as set out in exhibits 1 to 3 inclusive. In particular, exhibit 1 Mr O'Shea QC's letter of retainer of 7 November 2010 provided, inter alia:

"My memoranda of fees will only be payable:

(a) in the event that an order is made in favour of your client that his costs be paid; and

(b) to the extent that such an order includes the costs specified in my memoranda of fees; and

(c) to the extent that such costs are recovered from the respondent.

Your client will take all reasonable steps to obtain such an order, and to achieve recoverability of the maximum possible costs specified in my memoranda of fees."

[71] Mr O'Shea QC's letter of retainer of 27 April 2010,[38] has precisely the same terms as does Ms Moody, in clauses 10.3 and 10.4 of her costs agreement.[39]

[72] As to the specific terms of payment, it may be seen that by the order of the Court of Appeal of 22 October 2010, clause (a) has been satisfied. It may be seen from document 34 of the costs assessor's certificate that clause (b) has been satisfied. In the

---

38 See exhibit 3.

39 See exhibit 2.

almost eight years since the appeal decision clause (c) has not been satisfied as Mr Amos has not paid the assessed costs including counsel's fees but rather exercised his right to challenge the assessment in every possible way including the current review. It could not be suggested that Mr Wiltshire has not taken all reasonable steps to obtain such an order and achieve recoverability. The contractual terms of payment therefore have been satisfied.

[73] It was necessary for Mr Harrison QC to build a complicated argument in support of his submission that counsel's fees ought not have been allowed in the assessment. The starting point of the argument is the judgment of Aspery J (as he then was) in *W & A Gilbey Ltd v Continental Liqueurs Pty Ltd*[40] where his Honour said:

> "… a taxing officer in a party and party taxation should allow a successful litigant in whose favour an order for costs has been made, a just and reasonable amount in respect of each item claimed in such litigant's bill of costs where such item was, in fact, incurred on behalf of the litigant by his solicitor …"

[74] He then submitted that for any liability to be incurred there must be an unconditional or a conditional but unavoidable obligation to pay it.[41] The submission also refers to Halsbury:[42]

> "A barrister's fees which have been incurred by his instructing a solicitor or other professional client on behalf of the lay client in the course of litigation and which have been paid to the barrister become part of the costs of the action."

[75] Mr Harrison QC also cites *Medlicott v Emery*[43] the proposition that a barrister's fees cannot be recovered on taxation unless they have in fact been paid. Mr Harrison QC also calls an aid the decision in *TNT Bulkships Ltd v Hopkins*.[44] Mr Harrison QC submitted that the costs allowed cannot exceed the actual costs incurred and/or expended on the basis that a party cannot make a profit from recovery of costs from another party.

[76] The difficulty with this complex submission is that each of the authorities referred to is somewhat dated and all occur prior to the *Legal Profession Act* 2007 (Qld). The cases were decided at a time when the traditional common law position was that a barrister could not sue the solicitor who had instructed them in order to recover their fees as those fees were regarded merely as a debt of honour and not as the subject of an enforceable contract or even a quantum meruit.[45] I can recall in the earlier times of my own practice more than 20 years ago that brief to counsel would be delivered, on not an

---

40 [1964] NSWR 527 at [7].

41 *Re Beckwith; ex parte Power & Power* (1993) 43 FCR 256 at 269-271. See in the income tax context, *Commissioner of Taxation v CityLink Melbourne Ltd* (2006) 228 CLR 1 at 39 [134] and *Lewski v Commissioner of Taxation* (2017) 254 FCR 14 at 44 [89].

42 *Halsbury's Laws of England*, 4th ed reissue vol 3(1) paragraph 426 pages 334-335.

43 (1933) 149 LT 303.

44 (1989) 65 NTR 1 at 7.

45 See *Giannarelli v Wraith* (1988) 165 CLR 543 at 555 per Mason CJ; at 565 per Wilson J; at 587 per Deane J; and at 601 per Toohey J (with whom Gaudron J agreed).

uncommon basis, with a cheque representing the barrister's fee. I do not recall that occurring at all in the last 20 years of my practice. In those days barristers not having any ability to recover their fees resorted to obtaining the assistance of their association in order to assist in recovery of the non-payment of fees by requesting that the recalcitrant solicitor be placed on the "Private List".

[77] Things, however, radically changed in 2007 with the introduction of the *Legal Profession Act* 2007 (Qld) and in particular ss 319 and 326 which provide:

> "**319 On what basis are legal costs recoverable**
>
> (1) Subject to division 2, legal costs are recoverable—
>
> (a) under a costs agreement made under division 5 or the corresponding provisions of a corresponding law; or
>
> (b) if paragraph (a) does not apply—under the applicable scale of costs; or
>
> (c) if neither paragraph (a) nor (b) applies—according to the fair and reasonable value of the legal services provided.
>
> Note for paragraph (c)—
>
> See section 341(2) for the criteria that are to be applied on a costs assessment to decide whether legal costs are fair and reasonable.
>
> (2) Subsection (1) does not apply in relation to the recovery of legal costs for work by a barrister retained, before the relevant day, to perform that work.
>
> (3) In this section—
>
> ***relevant day*** means the day that is 6 months after the day of commencement of this section.
>
> …
>
> **326 Effect of costs agreement**
>
> Subject to this division and division 7, a costs agreement may be enforced in the same way as any other contract."

[78] Sections 319 and 326 of the *Legal Profession Act* 2007 (Qld) are plain in their terms. In particular s 326 very express and direct as it allows a cost agreement to be enforced in the same way as any other contract. Barristers now have a statutory right of recovery by contract as well as a quantum meruit claim.[46]

[79] The effect in particular of s 326 of the *Legal Profession Act* 2007 (Qld) is that Mr O'Shea QC and Ms Moody of counsel may enforce their costs agreements in the same way as any other contract. With reference to s 326 of the *Legal Profession Act* 2007 (Qld) and r 723 of the *Uniform Civil Procedure Rules* 1999 (Qld) there can be no doubt within the terms of *Gilbey's* case that fees for Mr O'Shea QC and Moody of

---

46 There is a helpful and detailed paper written on the effect of the change by Mr Amerena of counsel.

counsel have in fact been incurred. It is plain, however, and it is an agreed fact that they are not yet paid. However, as can be seen, there is no contractual right to the payment until the costs are in fact recovered. Furthermore, r 723 *Uniform Civil Procedure Rules* 1999 (Qld) comes to the aid of the assessor and provides the assessor with the discretion to allow any claim that has not been paid. With reference to the costs retainer letters,[47] it is plain in my view that Mr Skuse correctly exercised his discretion to allow counsel's fees. It follows that the costs assessor Mr Skuse has not exercised his discretion to allow counsel's fees in a manner which is manifestly wrong. I therefore reject grounds 5 and 6.

Ground 7: No opportunity to file final objections

[80] Ground 7 of the amended grounds for review is:

> "7. The costs assessor erred in disallowing Mr Amos' preliminary objections and issuing the certificate of assessment without affording Mr Amos an opportunity to file final objections to Mr Wiltshire's costs statement."

[81] Ground 7 was abandoned at the hearing and accordingly it is dismissed.

[82] The application for review is dismissed, other than in regard to the amount of $9,600 as conceded by Mr Wiltshire.

[83] The orders are:

1. Application for review allowed to the extent of reducing the costs assessed at $132,463.80 by $9,600 to a sum of $122,863.80.

2. The appellant/first respondent is to email to associate.crowj@courts.qld.gov.au and to the respondent/applicant other written cost submissions within five days hereof.

3. The respondent/applicant is to email to associate.crowj@courts.qld.gov.au and to the appellant/first respondent written costs submissions within 10 days hereof.

4. The appellant/first respondent is to email to associate.crowj@courts.qld.gov.au and to the respondent/applicant any submission in reply on the issue of costs within 12 days hereof.

---

47 See exhibits 1, 2 and 3.