SUPREME COURT OF QUEENSLAND

CITATION:	*Carter Capner Law v Clift & Ors* [2020] QCA 125
PARTIES:	**CARTER CAPNER LAW** ABN 65 600 423 881 (appellant) **v** **SEAN CLIFT** (first respondent) **GARY ERWIN** (second respondent) **STEVEN PATTEN** (third respondent) **SUZANNE RUSSELL** (fourth respondent) **LANA SCHEUBER** (fifth respondent)
FILE NO/S:	Appeal No 4446 of 2019 SC No 8446 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 78 (Bond J)
DELIVERED ON:	9 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2019
JUDGES:	Fraser and Philippides JJA and Crow J
ORDERS:	**1. Allow the appellant's application for leave to adduce new evidence in the appeal.** **2. Allow the appeal against order 1 in the orders made by Bond J on 29 March 2019.** **3. Dismiss the appeal against order 2 in those orders.** **4. The parties have leave to make submissions in writing about costs in accordance with Practice Direction 3 of 2013.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where the appellant entered a costs agreement with each respondent in relation to a personal injuries claim – where the costs agreements were described as "no-win no-fee" – where the scale of costs under the agreements contained an item for general care and conduct – where the agreement contained a proviso that where a no-win no-fee

arrangement applied, the allowance for general care and conduct must not be less than 15 per cent of the aggregate of all time-based items performed by the appellant – whether this proviso was an "uplift fee" under s 300 of the *Legal Profession Act* 2007 (Qld) – whether the costs agreements were therefore invalid because they did not comply with the requirements in s 324 of the *Legal Profession Act* relating to disclosure of uplift fees

PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – BILLS OF COSTS – POWER TO ORDER DELIVERY – where the respondents' files were transferred to another law practice – where the respondents applied for an order that the appellant provide each of them with a written report of legal costs incurred by the appellant to date pursuant to s 317(1) of the *Legal Profession Act* – where the primary judge ordered the appellant to provide itemised bills of its costs to each respondent pursuant to the inherent jurisdiction of the Supreme Court – whether the appellant should be permitted to adduce evidence that the respondents did not request an itemised bill of costs – whether the respondents needed an itemised bill of costs – whether it was appropriate to exercise the discretionary power in the inherent jurisdiction to order the appellant to deliver itemised bills of costs to the respondents

Legal Profession Act 2007 (Qld), s 3, s 13, s 216, s 299, s 300, s 308, s 311, s 313, s 317, s 319, s 324, s 327, s 328, s 347
Uniform Civil Procedure Rules 1999 (Qld), r 26(5), r 377(1)(c), r 658, schedule 1

Australian Securities and Investment Commission v Westpac Securities Administration Ltd (2019) 373 ALR 455; [2019] FCAFC 187, applied
Casey v Quabba & Anor [2005] QSC 356, cited
Coadys (a firm) v Getzler (2007) 18 VR 288; [2007] VSCA 281, considered
Equuscorp Pty Ltd v Wilmoth Field Warne (a firm) (2007) 18 VR 250; [2007] VSCA 280, considered
Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation (2011) 199 FCR 226; [2011] FCAFC 154, applied
Heffernan v Comcare (2014) 218 FCR 1; [2014] FCAFC 2, not followed
Johnson Tiles Pty Ltd v Esso Australia Ltd (1999) 94 FCR 167; [1999] FCA 1363, cited
Minister for Immigration and Border Protection v WZAPN (2015) 254 CLR 610; [2015] HCA 22, applied
Owners of Shin Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404; [1994] HCA 54, applied
Parramatta River Lodge Pty Ltd v Sunman (1991) 5 BPR 12,038, considered
Re Morris Fletcher & Cross' Bills of Costs [1997] 2 Qd R 228; [1997] QSC 7, considered

Rennie Golledge Pty Ltd v Ballard (2012) 82 NSWLR 231; [2012] NSWCA 376, not followed

COUNSEL: K Wilson QC for the appellant
N Ferrett QC, with S Anderson, for the respondents

SOLICITORS: Carter Capner Law for the appellant
Compensation Partners Lawyers for the respondents

[1] **FRASER JA:** The appellant ("CCL"), an incorporated law practice, appeals against orders made by Bond J declaring that each costs agreement between CCL and five former clients, the respondents, is void pursuant to s 327 of the *Legal Profession Act* 2007 (Qld)[1] and requiring it to deliver an itemised bill of costs to each respondent.

Validity of the costs agreement

[2] The issue in this part of the appeal is whether, as the primary judge found, a proviso relating to CCL's professional fee for care and conduct in the costs agreements provides for payment of an "uplift fee", a term defined in s 300 of the *Legal Profession Act* to mean "additional legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates".

[3] The appeal was conducted with reference to the costs agreement made between CCL and the fifth respondent, it being common ground that the differences between that agreement and the agreements with the other respondents are immaterial, apart from one difference mentioned in the next paragraph. Under the costs agreement CCL agrees to investigate, prepare, and pursue a claim for personal injuries received by the client as a result of a motor vehicle accident. Clause 3 of the costs agreement obliges the client to pay legal costs for the work according to an attached scale of costs. That obligation is subject to what the costs agreement describes as a "no-win no-fee" provision in clause 4. The effect of clause 4 is that, if the client observes the terms of the agreement and does not terminate CCL's engagement before the client's claim is finalised, the client is not obliged to pay any professional fees, interest, office charges, or disbursements incurred by CCL up to a specified limit, until the matter has resulted in a defined "successful outcome". The conditions upon which clause 4 is applicable are reflected in clauses 5.2 and 5.3, under which CCL may charge and recover from the client the amounts specified in clause 3 if the client fails to observe his or her obligations under the costs agreement or if the client terminates the agreement other than by reason of an unremedied default of CCL's obligations.

[4] Part 1 of CCL's attached scale of costs itemises charges for professional fees, some by unit of work and some by the time taken to do the work, part 2 itemises charges for disbursements, and part 3 itemises office charges. Part 4 is headed "General care & conduct". It includes only item 25:

> "In addition to an amount that is to be allowed under the above Items, a further proportion thereof to reflect the solicitor's care, consideration, skill and conduct of a proceeding or transaction that is

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1 References to the *Legal Profession Act* in these reasons are to the reprint current as at 5 June 2017.

> considered by an independent costs assessor to be reasonable having regard to the matter including, for example…".

After eight examples are listed, the text concludes with the proviso found by Bond J to be an uplift fee:

> "PROVIDED THAT where a fee/cost payment deferral or no-win no-fee arrangement applies, the further allowance must be not less than 15% of the aggregate of all time based Items performed." (In CCL's costs agreements with the other respondents 20 per cent is specified instead of 15 per cent.)

[5] The inclusion of clause 4 in the costs agreement produced the consequence that the proviso in item 25 applies. It also produced the consequence that the costs agreement is a "conditional costs agreement", a term defined in s 300 of the *Legal Profession Act* to mean, so far as is relevant here, "a costs agreement that provides that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate". Both consequences were produced notwithstanding that the operation of clause 4 was itself conditional, as provided for in that clause and reflected in clauses 5.2 and 5.3.

[6] Section 324(1) of the *Legal Profession Act* provides that a conditional costs agreement may provide for the payment of an uplift fee. If a conditional costs agreement does so provide, s 324 requires that:

(a) the basis of calculation of the uplift fee must be separately identified in the agreement (s 324(2));

(b) the agreement must contain an estimate of the uplift fee or, if that is not reasonably practicable, a range of estimates and an explanation of the major variables that will affect the calculation of the uplift fee (s 324(3));

(c) in relation to a litigious matter "the uplift fee must not exceed 25% of the legal costs, excluding disbursements, otherwise payable" (s 324(4)), subject to "the right of a law practice to discount its fees and, if a law practice does discount its fees, the reference in subsection (4) to legal costs is the fees the law practice would have charged if the law practice's fees had not been discounted" (s 324(5)).

[7] Section 327(1) of the *Legal Profession Act* provides that a costs agreement that contravenes, or is entered into in contravention of, any provision of division 5 in that part of the Act is void. Other consequences of a contravention include that the legal costs are recoverable pursuant to s 319(1) under a scale of costs if one is applicable or otherwise according to the fair and reasonable value of the legal services, provided the amount recoverable is not to be in excess of the amount that would have been recoverable under the costs agreement (s 327(2), (3)) and a law practice that entered into a costs agreement in contravention of s 324 is not entitled to recover the whole or any part of the "uplift fee" (s 327(4)).

[8] The costs agreement does not comply with s 324, at least in so far as it does not contain an estimate or a range of estimates of an uplift fee as provided for in s 324(3). It is not necessary to decide whether there are other non-compliances. The costs agreement is invalid under s 327(1) if it provides for payment of an uplift fee.

[9] The primary judge found that the proviso was an uplift fee for the following reasons:

(a) The word "additional" in the definition of "uplift fee" suggests a distinction between legal costs that are payable on a successful outcome and something extra which is to be regarded as "additional legal costs" payable on a successful outcome.

(b) The definition contemplates "a form of agreement which provides a baseline position or ordinary manner of calculation of legal costs" and, in addition, "something extra, which is beyond the base line" also imposed on a successful outcome.[2]

(c) Apart from the effect of the proviso, the amount allowed for general care and conduct is an amount objectively assessed by an independent costs assessor as being "reasonable". That assessed amount is not an "uplift fee" because it would be calculated and objectively ascertainable whether or not there was a successful outcome.

(d) This assessed amount, and other costs, could be charged and recovered by CCL from the client under clauses 5.2 and 5.3 of the costs agreement in some circumstances where there was not a successful outcome.

(e) The scale of costs was capable of incorporation both in costs agreements involving a no-win no-fee arrangement and costs agreements which did not involve such an arrangement, but the proviso applied only in the former case; the constraint that the "further allowance" must not be less than 15 per cent of the aggregate of all time based items does not apply where the costs agreement is not a no-win no-fee arrangement.[3]

(f) Section 324 requires that the question whether a conditional costs agreement provides for the payment of an uplift fee must be capable of being answered when the agreement is made. It is therefore not relevant to enquire whether the agreement was performed in such a way as to impose an uplift fee. The proviso therefore comprehends an uplift fee even though it was only where the "ordinary calculation" of the general care and conduct fee in part 4 could give rise to a figure less than 15 per cent of the aggregate of all time based items that the proviso would require payment of an additional amount on top of the "ordinary amount". That additional amount is the uplift fee.

[10] CCL argues that the operation of the proviso is hypothetical. That is true, but as the primary judge considered, the legislative scheme requires that the validity of a costs agreement must be assessed as at the time it is made; a costs agreement provides for payment of an uplift fee if the agreement may be performed in a way that results in the client becoming obliged to pay an uplift fee upon a successful outcome.

[11] CCL argues that a care and conduct fee of the kind provided for in item 25 of the scale of costs attached to the costs agreement is a conventional component of a solicitor's professional fees. The costs agreement makes it clear that an amount will be charged for care and conduct. The mere fact that a costs agreement is a conditional costs agreement does not mean that it provides for an uplift fee. The

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2 Reasons [36].

3 The proviso also applies in the case of a deferred payment arrangement, but that is not submitted to be relevant.

contractual provisions referring to the care and conduct fee do not provide for the fee to be charged because of or for success. Item 25, including the proviso, provides for a legal cost in the same way that every other item in the scale of costs allows for a legal cost. No "additional" fee is to be charged only in the event of success. It follows, CCL submits, that the provision for payment of the professional fee for care and conduct in an amount of no less than 15 per cent of the described items could not be regarded as providing for an uplift fee.

[12] The definition of "uplift fee" expressly provides only that it comprises "legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates" and that the uplift fee is additional to something else. It is implicit in the expression "additional legal costs" in the definition that the matter to which an uplift fee is additional itself comprises legal costs. It is also implicit that there is a difference between the nature of an uplift fee payable under a costs agreement and the nature of other legal costs payable under that agreement; otherwise every item of professional costs in a conditional costs agreement would be an uplift fee, each such item being payable in addition to each other such item.

[13] The difficulty in construing the definition arises from the absence of any description of what it is that distinguishes an uplift fee from the other legal costs to which it must be additional. There is no description in the definition either of the nature of the legal costs comprising an uplift fee or of the nature of the legal costs to which an uplift fee must be "additional". To discover the legislative purpose it is necessary to consider the context in which the definition appears.

[14] The respondents submit that the extrinsic material (including the second reading speech and the explanatory note) does not assist in the construction exercise but that the context in which the *Legal Profession Act* was enacted included the use of the term "uplift fee" in cases[4] before its enactment to describe a premium above the lawyer's normal charges to compensate for the risk the lawyer might not be paid. Those cases use the term in its ordinary meaning. Statements in some intermediate appellate court decisions suggest that in some circumstances it is permissible to use the ordinary meaning of a defined term in order to construe the words of the definition.[5] Acknowledging the force of the reasoning in those cases, the High Court decisions in *Owners of Shin Kobe Maru v Empire Shipping Co Inc*[6] and *Minister for Immigration and Border Protection v WZAPN*[7] require the contrary conclusion for the reasons given by the Full Court of the Federal Court in *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation*[8] and *ASIC v Westpac Securities Administration Ltd*.[9]

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4 See *Casey v Quabba & Anor* [2005] QSC 356 at [37], [43], [45], [48], [49] (Jones J) and *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167 at [39] (Merkel J), referring to *Bevan Ashford v Geoff Yeandle (Contractors) Ltd (In Liq)* [1999] Ch 239 at 250 – 252.

5 *Heffernan v Comcare* (2014) 218 FCR 1 at [46]; *Rennie Golledge Pty Ltd v Ballard* (2012) 82 NSWLR 231 at [129]; *Streller v Albury City Council* [2013] NSWCA 348 at [43]; *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279 at [11]; *Tovir Investmests Pty Ltd v Waverley Council* [2014] NSWCA 379 at [20].

6 (1994) 181 CLR 404 at 419.

7 (2015) 254 CLR 610 at 628 [48].

8 (2011) 199 FCR 226 at [102] – [106].

9 (2019) 373 ALR 455 at [22] and [333]. See also *Secretary, Dept of Home Affairs v CCA19* [2019] FCAFC 209 at [52].

[15] The explanatory notes for the *Legal Profession Bill* 2007 (Qld) (which were incorporated in the Attorney-General's Second Reading Speech) record that the *Legal Profession Act* 2004 (Qld) had enacted legal profession reforms in specified areas and that it was based upon the national model laws for the regulation of the legal profession being developed through the Standing Committee of Attorneys-General. The "new costs provisions" in the *Legal Profession Bill* 2007 are said to "build on current requirements relating to costs disclosure, costs agreements, billing and cost assessment" and that "regulation of uplift fees" was amongst some important elements. The notes record that the Bill had been drafted for greater consistency with the national model laws because their drafting was not complete when the *Legal Profession Act* 2004 (Qld) was being drafted and substantial changes to the Model Bill were published in September 2006. That was a reference to the "Model Bill (Model Provisions), Second Edition, August 2006", which was part of the "Legal profession – model laws project". The provisions in part 3.4 of the *Legal Profession Act* substantially replicate those in part 3.4 of that edition of the Model Bill. The relevance of that point is explained in [26] of these reasons. Otherwise the explanatory notes and second reading speech do not shed any light upon the nature of the costs to which up to a maximum of 25 per cent may be added as an uplift fee. It may be speculated that the aim of the Model Bill was, as proposed in the Sackville Report of 1994,[10] to authorise an uplift fee up to a specified maximum percentage of the usual costs otherwise payable to the legal practitioner, but I have not found extrinsic evidence that this was in fact the aim.

[16] The relevant operative sections of the *Legal Profession Act* are in chapter 3, part 3.4, division 3. The aim of chapter 3 is "ensuring that law practices and lawyers operate effectively in the interests of justice, their clients and the public interest".[11] That reflects one of the main purposes of the Act of providing for "the protection of consumers of the services of the legal profession and the public generally".[12] Those statutory purposes are implemented by the provisions in part 3.4 for "law practices to make disclosures to clients regarding legal costs" and regulating "the making of costs agreements, including conditional costs agreements".[13] A construction that best gives effect to those statutory purposes must be preferred: s 14A of the *Acts Interpretation Act* 1954 (Qld).

[17] Division 3 of part 3.4 commences with s 308(1). Subject to exceptions described in s 311, s 308(1) obliges a law practice to disclose to a client (in writing, as required by s 310(1)) a great deal of information about "legal costs", including "an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs" (s 308(1)(c)). That provision applies generally. The term "legal costs" is not defined for division 3.[14] It is naturally to be understood as costs payable for legal services performed by the law practice.

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10 Access to Justice Advisory Committee, "Access to Justice: An Action Plan", 1994, Chapter 6 at 6.12 and 6.30.

11 *Legal Profession Act*, s 216(1).

12 *Legal Profession Act*, s 3(a).

13 *Legal Profession Act*, s 299(a) and (b).

14 The term is defined in s 346 for division 8 of the same part, concerning speculative personal injuries claims.

[18] The term "costs agreement" is defined in s 300 to mean "an agreement about the payment of legal costs". Uplift fees in a costs agreement are singled out for additional treatment in three ways. First, s 313(1) provides:

> "If a costs agreement involves an uplift fee, the law practice must, before entering into the agreement, disclose to the client in writing –
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> (a) the law practice's legal costs; and
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> (b) the uplift fee, or the basis of calculation of the uplift fee; and
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> (c) the reasons why the uplift fee is warranted."[15]

[19] The use in (a) of the same term "legal costs" that is used in s 308(1) in a context that distinguishes those "legal costs" from the "uplift fee" in (b), for which (c) requires a separate justification, suggests that the justification for an uplift fee lies otherwise than in the performance of the legal services for which the costs agreement provides.

[20] The second way in which uplift fees in a costs agreement are singled out is by the provisions in s 324 about the form and content of a conditional costs agreement containing an uplift fee. In the context of the provisions already discussed and the definition of "conditional costs agreement", the provision in s 324(1) permitting an uplift fee to be included in a conditional costs agreement suggests that the justification for an uplift fee is that payment of some or all of the costs for the performance of the legal services is conditional on the successful outcome of the matter to which those costs relate.

[21] The same view finds support in the requirement of s 324(2) that the basis of calculation of the uplift fee must be "separately identified" in the costs agreement and the distinction drawn between an uplift fee and "the legal costs" in the requirement in s 324(4) that, in relation to a litigious matter, "the uplift fee must not exceed 25% of the legal costs, excluding disbursements, otherwise payable". In this context I would construe the expression "legal costs … otherwise payable" as meaning the costs that would be payable under the costs agreement if it did not include the provision making those costs conditional upon a successful outcome being achieved.

[22] The third way in which uplift fees are singled out is by the provision in s 327(4) that a law practice is not entitled to recover an uplift fee under a conditional costs agreement entered into in contravention of s 324. That provision is consistent with the construction of "otherwise payable" I prefer, in so far as it conveys that the justification for an uplift fee lies otherwise than in the performance of the legal services, the costs of which remain recoverable pursuant to s 327(2) (up to the amount that would have been recoverable under the conditional costs agreement but for the contravention) according to a scale of costs, if one is applicable, or otherwise according to the fair and reasonable value of "the legal services provided" (s 319(1)(c)).

[23] That statutory context and the consumer protection purposes of the relevant provisions combine to suggest the construction that the legal costs to which an uplift fee may be added are the legal costs that would be payable for the legal services to be performed by the law practice under the costs agreement if the costs agreement

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15 Such a disclosure is not required to be made to a "sophisticated client": s 313(2).

did not include the provision making payment of costs conditional upon a successful outcome. Upon this construction the addition to a law practice's usual costs of a premium to take into account that the law practice will not become entitled to payment unless and until a successful outcome is achieved is an uplift fee.

[24] A premise of CCL's main argument is that the definition of uplift fee instead connotes a fee payable upon a successful outcome in addition to other legal costs *payable under the costs agreement upon the successful outcome*. Upon this construction, the legal costs "otherwise payable" in terms of s 324(4) are, like the uplift fee, the legal costs measured in accordance with the conditional costs agreement that are payable upon the successful outcome being achieved. That is also an available construction of the statutory text. A corollary of that construction is that the search for an uplift fee is confined to the terms of the costs agreement.

[25] Upon CCL's construction an uplift fee of 25 per cent could be charged in compliance with s 324(4) whilst undisclosed premiums were added to the professional fees the law practice would charge if the client retained the law practice upon the basis that payment was not conditional upon success. That is one of the reasons for rejecting that construction. In an assessment of costs the obligation of a costs assessor to consider "the fairness and reasonableness of the amount of legal costs" generally does not apply to costs calculated in accordance with a costs agreement that complies with applicable disclosure requirements and has not been set aside under s 328 of the *Legal Profession Act* upon the ground that it is not fair or reasonable.[16] Accordingly, subject only to the possibility of a remedy after the event in a substantial proceeding of the kind authorised by s 328, CCL's construction would deprive the 25 per cent cap of any significance. The construction I prefer does not allow the consumer protection purpose of s 324(4) to be eroded in that way. It also better fulfils the consumer protection purpose of s 313(1) by increasing the potential value of information about the law practice's costs that is required to be disclosed to the client.

[26] In *Equuscorp Pty Ltd v Wilmoth Field Warne (a firm)*[17] and *Coadys (a firm) v Getzler*[18] the Victorian Court of Appeal (Buchanan, Ashley and Neave JJA) construed provisions about uplift fees in the *Legal Practice Act* 1996 (Vic). That legislation referred to a conditional costs agreement providing "for the payment of a premium on the legal costs otherwise payable under the agreement on the successful outcome of the matter in respect of which the agreement is made".[19] That provision is taken from the Model Provisions of 28 June 2004.[20] The provisions about uplift fees in that document were substantially changed in the Second Edition of the Model Provisions issued about two years later which are substantially replicated in the Queensland legislation. In particular, the Queensland legislation does not describe the legal costs to which an uplift fee is added as the legal costs otherwise payable "under the agreement on the successful outcome".

[27] The construction point in issue in this appeal was not in issue in the Victorian cases. In those cases the costs agreements required payment of costs at a rate which was

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16 *Legal Profession Act*, s 341(1)(c).
17 (2007) 18 VR 250.
18 (2007) 18 VR 288.
19 *Legal Practice Act* 1996 (Vic) s 98(1), referred to by the Court in *Equuscorp* (2007) 18 VR 250 at [118].
20 Legal profession – model laws project, Model Provisions, 28 June 2004, provided to the Standing Committee of Attorneys-General for consideration at its meeting in July 2004.

very much lower than the solicitors' "Normal Rate", costs at that rate being payable only in the event of a successful result. It was not suggested that the Normal Rate exceeded the rate the solicitors would have charged if payment were not conditional upon a successful result being achieved. The Court of Appeal held that there was no "premium" as contemplated under the applicable legislation. That is consistent with the construction of the *Legal Profession Act* I have articulated.

[28] Consistently with the construction for which CCL contends in this case, in *Equuscorp Pty Ltd v Wilmoth Field Warne (a firm)* the Victorian Court of Appeal remarked that the Victorian legislation required reference only to the terms of the costs agreement[21] and not to concepts such as "usual", "normal", "base", "standard", or "ordinary" costs.[22] In my respectful opinion that obiter dictum should not be applied in the construction of the materially different provisions of Queensland's *Legal Profession Act*.

[29] It is a corollary of what I regard as the better construction of the *Legal Profession Act* that an uplift fee may be found to be concealed within the rates or other modes of calculation of costs for legal work specified in a conditional costs agreement which, in contravention of the statutory requirements, does not reveal the existence of any uplift fee. In this case, however, the evidence that the costs agreement includes an uplift fee happens to come from the form of that agreement itself. As the primary judge considered, it is to be inferred from the text of the proviso in item 25 that the requirement for a top-up payment where the assessed fee for care and conduct falls short of 15 per cent is not incorporated in CCL's costs agreements in cases in which payment of its legal costs is not deferred or made conditional on a successful outcome. CCL did not adduce any evidence to rebut that inference. It justifies the conclusion that the top-up payment would not be payable under a costs agreement in substantially the same form except for the exclusion of the provision in clause 4 making payment of legal costs conditional on a successful outcome. It follows that the proviso in item 25 provides for the payment of an uplift fee.

[30] CCL referred to item 1 in schedule 1 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). It provides that the additional amount "to be allowed for a solicitor's care and conduct of a proceeding is the amount the registrar or a costs assessor considers reasonable, in accordance with any guidelines issued in a practice direction by the Chief Justice and having regard to the circumstances of the proceeding, including, for example…". There follow 10 examples of relevant circumstances. The Chief Justice promulgated the contemplated guidelines in Practice Direction No. 22 of 2018. Under those guidelines the amount allowed for general care and conduct "will normally be calculated on the basis of a percentage of the total amount otherwise allowed for costs (not including outlays) on the costs statement". The allowed percentage is to take into account the matters in item 1 in schedule 1. A table describes ranges of percentages between 10 per cent and 18 per cent for a straightforward claim not otherwise specified in the District Court and between 15 per cent and 20 per cent for a straightforward claim not otherwise specified in the Supreme Court where the amount involved is not above $2 million, which, in the absence of exceptional circumstances, should be allowed and scaled according to the nature of the matter within the range.

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21 18 VR 250 at [25].

22 18 VR 250 at [119].

[31] It follows that for a claim by the fifth respondent within the jurisdiction of the District Court there is significant scope for the operation of the proviso in item 25 of the scale of costs in the costs agreement. For a claim in the Supreme Court, it would seem likely to be unusual for the proviso to operate, since the assessed allowance for general care and conduct ordinarily would not be less than 15 per cent without reference to the proviso. There is nevertheless scope for its operation in such a case. The amount to be allowed for care and conduct is the amount the registrar or a costs assessor considers reasonable. The guidelines in the practice direction allow for departures from the stated ranges of percentages where there are exceptional circumstances, so in some such circumstances the registrar or costs assessor might assess an allowance which is less than 15 per cent. Furthermore the statement in the practice direction that, in the absence of exceptional circumstances, the percentage allowed should fall within the stated range appears to be premised upon the examples listed in item 1 in schedule 1 of the UCPR being taken into account, but there are some differences between that list of examples and the list of examples in item 25 in part 4 of the costs agreement.

[32] The provisions in item 1 in schedule 1 of the UCPR and the practice direction are incapable of displacing the inference arising from the proviso in item 25 of the costs agreement itself that it was foreseeable when the costs agreement was made with the fifth respondent that the amount assessed under the preceding part of item 25 might prove to be less than 15 per cent of the items described in the proviso. In that event the proviso would require payment of an additional amount constituting an uplift fee. The same is true a fortiori in relation to the costs agreements with the other respondents, in which the proviso specified 20 per cent rather than 15 per cent.

[33] Otherwise schedule 1 of the UCPR and the practice direction merely support CCL's uncontroversial submission that a percentage allowance for care and conduct is a conventional component of a law practice's professional fees, a fact that does not bear upon the question whether a payment required by the proviso in item 25 of the costs agreement is an uplift fee.

[34] I would affirm the primary judge's decision that the costs agreement made between CCL and the fifth respondent provides for the payment of an uplift fee. It follows from the way in which the proceedings were litigated that the same conclusion applies in relation to CCL's costs agreements with the other four respondents. The grounds of appeal against the primary judge's declaration that those costs agreements were void pursuant to s 327(1) of the *Legal Profession Act* concern only the question whether the agreements contain an uplift fee. It follows that the appeal against the declaration fails.

Order that CCL deliver an itemised bill of costs to each respondent

[35] The primary judge ordered that CCL must provide to each of the respondents an itemised bill identifying the legal costs which it claims should be paid to it in the event of a successful outcome of the respondent's personal injuries claim, that itemised bill to be made up in a way that would allow the legal costs to be assessed under part 3.4, division 7 of the *Legal Profession Act*, if occasion for performance of such an assessment should ever arise.

[36] The respondents' amended originating application applied for an order that CCL provide each respondent with a written report of the legal costs incurred by CCL to date pursuant to s 317(1)(a) of the *Legal Profession Act*. The relevant provision is

instead s 317(1)(b). Section 317(1) obliges a law practice "on reasonable request" to give a client a written report of the progress of the matter in which the law practice is retained (s 317(1)(a)) and a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter (s 317(1)(b)). In pleadings exchanged by the parties CCL admitted the respondents' allegation that each respondent made a request to CCL to provide a written report on each of their legal costs on specified dates (16 March 2018 in the case of the fifth respondent). The issues in relation to s 317(1) arose upon CCL's denial of the respondents' allegation that CCL had failed without reasonable excuse to provide written reports as requested. CCL alleged that it provided such reports on specified dates, its obligation to make and give reports pursuant to s 317(1) ceased upon termination of CCL's retainer, and its obligations after termination and its entitlement to recover fees from the respondents were governed by tripartite deeds.

[37] The hearing before the primary judge proceeded with reference to an agreed bundle of documents. Tripartite deeds were made by each respondent with CCL and a different law practice ("the present practitioner") the respondents had retained after terminating CCL's retainer. Those deeds addressed issues arising from the circumstances that CCL claimed a general retaining lien over the respondents' documents but was willing to transfer the files to the present practitioner upon its costs and disbursements being secured. In the case of the fifth respondent the tripartite deed is dated 6 February 2018. Amongst other provisions:

(a) The present practitioner agreed to pay CCL upon receipt of cleared funds in settlement from the other party, subject to applicable legislative provisions, the amount claimed as reasonable costs by CCL except where the client disagreed or by operation of s 347 of the *Legal Profession Act*. (In broad terms the effect of s 347 is that in a speculative personal injury claim a law practice may not charge or recover from a client an amount that exceeds 50 per cent of the net amount to which the client is entitled under a judgment or settlement of the claim.)

(b) The fifth respondent agreed to give to the present practitioner an irrevocable authority to receive money from the other party and pay CCL's costs in an amount to be agreed or as assessed.

(c) The parties agreed upon a mechanism for apportioning the money received from the other party if the money received from the other party was not sufficient to pay the costs of both practitioners.

[38] CCL's letters of 10 April 2018 and 25 May 2018 to the present practitioner are headed "without prejudice". For each respondent the letters specify a lump sum amount, plus GST and itemised outlays, as an estimate of CCL's costs provided for the assistance of the present practitioner in advance of anticipated settlements. CCL's letter of 14 August 2018 described the effect of marking the earlier letters "without prejudice" as being that the specified sums would be accepted if they were not disputed; the estimates remained unchanged and would be accepted unless it became necessary to prepare a costs statement, in which event CCL reserved the right to charge for all items in that statement approved upon an assessment. CCL's letter of 20 August 2018 to the present practitioner states a sum in respect of each respondent which CCL offered to accept upon the successful conclusion of the respondent's claim, subject to a provision that is not relevant for present purposes. CCL's letter of 6 September 2018 explained that the sums offered to be accepted

had not been arrived at by reference to the court scale, as was obvious by CCL's opposition to the respondents' application in this proceeding (which had by then been filed).

[39] The primary judge concluded that on the proper construction of s 317(1) of the *Legal Profession Act* it refers solely to a client who is a current client. The respondents do not seek to challenge that conclusion.

[40] The primary judge observed that the respondents also sought an order requiring CCL to provide the requested information by reference to the Supreme Court's inherent jurisdiction over legal practitioners. The primary judge rejected CCL's argument that its responses to the respondents' requests under s 317(1) rendered an exercise of the inherent jurisdiction inutile. The initial "without prejudice" responses were not satisfactory, even in the light of the subsequent explanation of what CCL meant by "without prejudice", and the offer to settle in a lump sum amount was also not a proper response. The primary judge considered that the "formal position" was that "there has as yet been no unconditional response to a perfectly reasonable request from a former client to a law practice to identify with precision the costs to which the law practice claims to be entitled (albeit in the event that there is a successful outcome), set out in a way which would permit a judgment to be formed as to the validity of the entitlement."[23] A factor favouring relief was that the respondents needed it. It was desirable that they attempt to negotiate their dispute rather than litigate it to finality. In any such negotiation it is a crucial consideration that the parties clearly understand the extent of their costs liability to their own legal representatives, including their former legal representatives.

[41] The relevant ground of appeal contends that the primary judge erred in eight ways by invoking the inherent jurisdiction of the Court to make such an order. I will discuss first the contention that the relief granted by the primary judge was not sought in the amended originating application. The UCPR require an application that is an originating process to specify the orders or other relief sought in the proceeding,[24] but such an application can be amended with the leave of the Court[25] and the Court also has a discretionary power to make any order that the nature of the case requires even if there is no claim for such an order in the originating process.[26]

[42] Whatever is the source of power, a judge who intends to exercise a power to make an order that is not sought in the originating process necessarily will be concerned to ensure that procedural fairness is afforded to a person, such as CCL, who will be adversely affected by that order.[27] CCL submits that the primary judge should not have exercised the inherent jurisdiction without inviting CCL to make submissions about whether it ought to be exercised and, if so, what relief ought to be granted.

[43] CCL accepts that in the Trial Division the respondents' senior counsel adverted to the relevant aspect of the Court's inherent jurisdiction as support for the argument that s 317(1) authorised the claimed order and submitted that the inherent jurisdiction provided an alternative source of power to grant that order. CCL contends, however, that the respondents did not ask the primary judge to make an

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23 Reasons [18].
24 UCPR, r 26(5).
25 UCPR, r 377(1)(c).
26 UCPR, r 658.
27 See, for example, *Mark Bain Constructions Pty Ltd v Avis* [2012] QCA 100 at [108].

order in the exercise of the inherent jurisdiction requiring CCL to deliver itemised bills. For the following reasons that contention is incorrect.

[44] In an outline of argument given to CCL on the morning of the hearing before the primary judge, the respondents submitted that s 13 of the *Legal Profession Act* preserved the inherent jurisdiction of the Court and that the inherent jurisdiction was an alternative basis upon which the relief sought could be granted. The outline quoted the following passage from Fryberg J's reasons in *Re Morris Fletcher & Cross' Bills of Costs*:[28]

> "The making of an order for delivery of a bill is a matter of discretion, but it can fairly be said that the courts lean toward ordering delivery. In *Parramatta River Lodge Pty Ltd v Sunman* (1991) 5 BPR 12,038 at 12,046 Young J has said:
>
> > 'The whole tone of most of the cases has been that a solicitor is the officer of the court and, no matter how inconvenient it might be, the court expects that in accordance with the highest standard of the profession the solicitor will give a fully detailed list of charges to the person liable to pay the bill and if asked will submit the bill for moderation by an officer of the court. That is the price of being a member of an honourable profession; that is the price of being admitted by this court to practice law in this State.'
>
> He was, of course, referring to New South Wales, but what he said is equally applicable in Queensland."

[45] That passage was quoted in support of the order sought in the amended originating application for delivery of a "report". At the hearing the respondents identified the issue as being whether there ought to be an injunction compelling CCL to produce a written report of the kind contemplated by s 317.[29]

[46] Shortly afterwards, however, the respondents' senior counsel referred to the inherent jurisdiction, answered "yes" to the primary judge's question whether the respondents' "bottom line" was that "I have, all else failing, inherent jurisdiction to make … a former solicitor give to his client an itemised bill of what the former solicitor says is owing", and affirmed that the Court retained the inherent jurisdiction if the statute did not apply.[30] Subsequently, after initially submitting that s 317 called only for a statement of the amount owing rather than an itemised report, the respondents' senior counsel submitted that the respondents were entitled to be put in a position where they could assess whether what was claimed was reasonable. What the respondents wanted to vindicate their right under s 317, if it existed, or in the exercise of any inherent jurisdiction, was the itemisation of the legal costs because that would allow the respondents to assess whether those amounts were reasonable.[31]

[47] CCL's senior counsel subsequently told the primary judge that CCL did not contest the proposition that the primary judge had inherent jurisdiction to make an order. CCL relies upon the following exchange:

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28 [1997] 2 Qd R 228 at 233.
29 Transcript 10 October 2018 at 1-6.
30 Transcript 1-32, 1-35 (lines 1 – 30).
31 Transcript 1-39.

> "MR WILSON: They don't ask for it, but I can't contest the proposition. It's stated in a number of cases.
>
> HIS HONOUR: Well, when you say they don't ask for it, what do you mean by that?
>
> MR WILSON: Well, under paragraph 1 of the application, it's just under section 317.
>
> HIS HONOUR: Show me the application again. Yes. Yes."[32]

[48] The submission that the application relied only upon s 317 is correct. The submission that the respondents did not ask for an itemised bill was incorrect if it implied that no such request was made at the hearing. The primary judge did not state in the quoted passage that he would not adjudicate upon the respondents' application made for the first time at the hearing for an itemised bill in the exercise of the inherent jurisdiction. In the course of further submissions by CCL's senior counsel the primary judge said that he was being "asked to say that he should do something … under s 317 … or alternatively, in the inherent jurisdiction"[33] and that "there's a fall back to the inherent jurisdiction".[34]

[49] The transcript reveals both that in submissions at the hearing the respondents sought an order in the inherent jurisdiction, in the alternative to their application for an order for a report under s 317(1), that CCL deliver an itemised bill and that the primary judge conveyed to CCL that he intended to adjudicate upon that claim. CCL was on notice that such an order might be made. It was entitled to make whatever submissions it wished to make in opposition to such an order, including in support of an application to reopen its case and adduce additional evidence or an application for an adjournment. CCL was afforded procedural fairness.

[50] CCL contends that the primary judge should not have exercised the inherent jurisdiction to order delivery of an itemised bill without allowing CCL to rely upon additional evidence, including an affidavit by Mr Lee, who is the principal of the present practitioner. In this respect CCL's senior counsel submitted to the primary judge that correspondence between the parties that was not in evidence made it clear that the respondents did not seek an itemised bill.[35] He subsequently reminded the primary judge of that submission and sought to rely upon three exhibits to the affidavit of Mr Lee.[36]

[51] CCL applies for leave to adduce new evidence in the appeal. The respondents do not oppose the application and it should be granted. That evidence reveals that two of the three exhibits upon which CCL sought to rely before the primary judge[37] concern only the question, which is not in issue in this appeal, whether statements in the letters from CCL of 10 April 2018 and 18 May 2018 were qualified in a way that meant those letters were not "reports" within the meaning of s 317 of the *Legal Profession Act*. For present purposes the significant exhibit is an email dated 16 March 2018 from Mr Lee to CCL.[38] In that email Mr Lee stated that his client "did

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32 Transcript 1-42.
33 Transcript 1-57.
34 Transcript 1-60.
35 Transcript 1-56.
36 Transcript 1-69.
37 Ex BML 53 and BML 80.
38 Ex BML 45.

not ask for 'particulars' of your costs", "he asked you to state the actual total amount of your fees", and his client "has also not at this stage asked for an itemised bill". In addition to that email, the new evidence reveals that the present practitioner made statements to the same effect in letters from Mr Lee to CCL in mid-February 2018[39] and on 23 March 2018.[40]

[52] The respondents opposed CCL's application to the primary judge for leave to reopen its case and adduce evidence. They argued that the new points had not been pleaded and the respondents would want to adduce evidence about other emails. The issue raised by the pleadings was whether specified documents constituted written reports under s 317. It was submitted that the additional correspondence was not admissible in the interpretation of the pleaded documents. The primary judge refused CCL's application for leave to reopen upon the ground that the application had been run by reference to an agreed bundle of documents and a reopening would require reference to many more documents which were not pleaded.

[53] In the context of Mr Lee's email of 16 March 2018, and consistently with CCL's initial submission upon the point at the hearing, the respondents' application for an order that CCL provide a "written report of the legal costs" pursuant to s 317(1) of the *Legal Profession Act* conveyed that they sought only an unqualified statement by CCL of the amount of costs claimed to be payable in the event of the client achieving the defined successful outcome. The pleading did not alter that impression or refer to any claim in the inherent jurisdiction. The bundle of documents must have been prepared with reference to the very narrow points in issue in relation to the claimed statutory right under s 317. The primary judge did not take into account that it was only after the commencement of the hearing that the respondents contended that what was meant by the word "report" in their application was an itemised bill of costs and they sought an order in the inherent jurisdiction requiring CCL to deliver an itemised bill of costs. Upon the respondents being permitted to advance that new claim upon a different basis for an itemised bill of costs CCL should have been permitted to adduce relevant evidence in opposition to it.

[54] The effect of the respondents' argument in this respect is that Mr Lee's email of 16 March 2018 and the additional emails upon which CCL seeks to rely in the appeal are not significant. They argue that there "was never much mystery about what was being requested" and that it "was something that would allow an assessment or taxing master, to use the old language, to come to a view about what was properly chargeable."[41]

[55] The materiality of the evidence CCL sought to adduce at the hearing, and the additional evidence it seeks to adduce in the appeal, is demonstrated by the finding of fact made by the primary judge that CCL had not provided an unconditional response to the respondents' requests that CCL identify the costs to which it claimed to be entitled in the event of a successful outcome "with precision" and "set out in a way which would permit a judgment to be formed as to the validity of the

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39 Ex BML 33 – BML 37.
40 Ex BML 49.
41 Transcript 16 September 2019 at 1-24.

entitlement."[42] The evidence CCL sought to adduce before the primary judge is to the effect not only that there was no such request but that the respondents, by their solicitor, had expressly disclaimed any such request. The additional evidence upon which CCL seeks to rely in the appeal confirms that conclusion.

[56] Consistently with his own correspondence, Mr Lee did not state in his affidavit that he needed an itemised bill. A possible explanation for that is, as he deposed, that he was the solicitor responsible for each of the relevant files when he was employed with CCL until he commenced employment with the present practitioner.[43] At the hearing before the primary judge, however, the respondents disclaimed reliance upon any affidavit; consistently with the original basis upon which they went to the hearing, they ran their cases solely upon the documents. At the hearing CCL sought to rely upon identified exhibits to Mr Lee's affidavit but CCL did not seek to rely upon the affidavit itself. For that reason I do not accept CCL's argument that the primary judge incorrectly precluded reliance by CCL upon the affidavit of Mr Lee to which the relevant correspondence was exhibited.

[57] It is necessary then for this Court to consider whether the primary judge's order is nonetheless sustained by the documents, including the additional correspondence that should have been admitted at the hearing. The respondents rely upon the following passage in CCL's letter of 14 August 2018 as evidence that the respondents had not conceded before the hearing of the application that they did not require an itemised bill:[44]

> "Your letter yesterday seeks a further 'report' as to costs. No further legal work having been performed by us on their behalf, quite obviously means that the estimates previously given remain unchanged. These are the sums that will be accepted – as they were in April and May – except if it becomes necessary to prepare a costs statement, in which event we reserve the right to charge for all items contained therein proved upon an assessment."

[58] That statement is consistent with CCL not having been asked to prepare an itemised bill. It was open to the respondents to argue that CCL's reservation of the right to claim additional costs upon an assessment, if one were required, meant that the statement was not a "report" under s 317(1), but that is not significant for the issue about the inherent jurisdiction to order delivery of an itemised bill.

[59] The remaining contentions in the relevant ground of appeal are that the respondents had no present entitlement to a bill of costs because there had been no successful outcome of the respondents' claims; it was not known whether the 50/50 rule would apply to one or more of the respondents' claims; the amount CCL would be entitled to recover from each respondent depended upon whether there was a valid costs agreement between CCL and that respondent; the order required CCL to engage in an unduly onerous hypothetical exercise; and each respondent had received sufficient information from CCL to enable that respondent to negotiate a settlement of his or her claim.

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42 Reasons [18].
43 Affidavit of Mr Lee sworn 17 August 2018, paras 2 – 3.
44 Ex BML 80.

[60] The passage in *Parramatta River Lodge Pty Ltd v Sunman* quoted in *Re Morris Fletcher & Cross' Bills of Costs* (see [44] of these reasons) concerned a case in which the client's liability to pay the solicitor's costs was not conditional in any respect. In *Duffett v McEvoy*,[45] which Fryberg J cited in *Re Morris Fletcher & Cross' Bill of Costs* in relation to the inherent jurisdiction, Lord Blackburn (giving the reasons of the Privy Council) described the object of ordering delivery of a bill as "being to see whether there are special circumstances as would cause it to be taxed". Similarly, in *Parramatta River Lodge*, Young J explained the relevant legislation and inherent power of the Court to require a detailed statement from the solicitor as to costs and disbursements by reference to the purpose of giving the person liable to pay the bill sufficient information to decide whether or not to refer it for taxation. It was in that context that Young J observed that the "whole tone of most of the cases has been that … the solicitor will give a fully detailed list of charges … and if asked will submit the bill for moderation by an officer of the court."

[61] Those cases are not authority for a proposition that in a case of this very different kind – in which (so far as the evidence reveals) CCL had not given the respondents a bill for professional fees and CCL was not entitled to recover any professional fees unless and until the respondents succeeded in their claims – the Court will order delivery of an itemised bill as of course. The exercise of the discretion to make any such order in the inherent jurisdiction must be informed by evidence of the material circumstances in the particular case.

[62] CCL inevitably would be put to at least some inconvenience and (presumably unrecoverable) expense in preparing an itemised bill, particularly in circumstances in which the primary judge declared that the costs agreements with the respondents were invalid, thereby requiring CCL's costs to be assessed according to the applicable scale of costs in the UCPR rather than the costs agreement. There is no evidence to support the respondents' submission that the delivery of itemised bills should be a "trivial task".[46] This consideration militates against the making of the order in the absence at least of some good reason to do so.

[63] The evidence does not disclose a good reason to make the order. There is no evidence that an itemised bill is needed by the respondents for the suggested purpose of settling or litigating their claims. CCL had provided the respondents with its estimates of the costs for which the respondents will be liable if the defined successful outcome is achieved, together with an offer to charge no more if the respondents did not require assessments of the costs. If that might be thought to be insufficient in a particular case, or even in many cases, there is no evidence that this is such a case. There is also no evidence that Mr Lee, who evidently was the solicitor responsible for each of the relevant files when he was employed by CCL, was not in as good a position as CCL to estimate the amount of its costs likely to be allowed upon an assessment. There are various assertions in the solicitors' correspondence, but the only probative evidence comprises admissions against the respondents' interest in the form of inferences from Mr Lee's statements disclaiming a request for an itemised bill.

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45 (1885) 10 App Cas 300 at 302.

46 Respondents' outline of argument, para 38.

[64] In these circumstances it would be inappropriate to exercise the discretionary power to order CCL to deliver itemised bills of costs to the respondents.

Proposed orders

[65] The parties asked for an opportunity to make submissions about costs after judgment in the appeal. I propose the following orders:

(a) Allow the appellant's application for leave to adduce new evidence in the appeal.

(b) Allow the appeal against order 1 in the orders made by Bond J on 29 March 2019.

(c) Dismiss the appeal against order 2 in those orders.

(d) The parties have leave to make submissions in writing about costs in accordance with Practice Direction 3 of 2013.

[66] **PHILIPPIDES JA:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[67] **CROW J:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.