SUPREME COURT OF QUEENSLAND

CITATION:	*Jezer Construction Group P/L & Ors v Lilischkies* [2004] QSC 270
PARTIES:	**JEZER CONSTRUCTION GROUP PTY LTD** **ACN 054 548 319** **PETER GRAHAM SCHMITH** **DORIS NGIE-LIK TING** **MICHAEL WAI-MAN CHOI** (applicants) v **KLAUS LILISCHKIES and LEIGH LILISCHKIES** (respondents)
FILE NO:	BS4071/04
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	27 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2004
JUDGE:	Wilson J
CATCHWORDS:	PROCEDURE – COSTS – AGREEMENTS AS TO COSTS – where parties made agreement that costs in Queensland Building Tribunal be assessed on the Supreme Court scale of costs on the standard basis – where proceeding dismissed byTtribunal – where Tribunal ceased to exist prior to assessment of costs– where Commercial and Consumer Tribunal did not have jurisdiction to determine application – where parties made application to the Supreme Court for assessment of costs seeking to have Registrar assess costs. PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – INTERPRETATION AND GENERAL PROVISIONS – where application to Supreme Court for assessment of costs incurred in Queensland Building Tribunal proceedings - quantification of costs a question of fact – power of Court to refer questions of fact to a special referee under rule 501 of *UCPR* – whether Registrar can be a 'special referee'. CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – DISCHARGE BY AGREEMENT – GENERALLY – where parties entered into deed of settlement – where deed made provision for

assessment of costs and fees on Supreme Court scale of costs to be assessed on the standard basis – where mechanism for assessment failed – where assessment to be undertaken by Queensland Building Tribunal – where Tribunal ceased to exist prior to assessment – whether Supreme Court has power to substitute mechanism for assessment of costs.

Commercial and Consumer Tribunal Act 2003

Queensland Building Tribunal Act 2000 (repealed) s 61

Supreme Court Act 1995 ss 255, 256, 257

Supreme Court of Queensland Act 1991 s 134

Uniform Civil Procedure Rules 1999 rr 501, 505, 506, 684

Booker Industries Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600 applied
Harris v Caladine (1991) 172 CLR 84 followed
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444 applied

COUNSEL: J B Sweeney for the respondents

SOLICITORS: Tucker & Cowen for the applicants
HW Litigation for the respondents

[1] **WILSON J**: On 20 February 2001 Klaus and Leigh Lilischkies (the present respondents) commenced proceedings in the Queensland Building Tribunal ("the QBT") against Jezer Construction Group Pty Ltd, Peter Graham Schmith, Doris Ngie-Lik Ting and Michael Wai-man Choi (the present applicants). That proceeding was settled pursuant to a deed of settlement dated 19 March 2003. The present application arises out of the parties' agreement with respect to costs.

[2] In the deed the parties recited (inter alia) -

> "I. The entry into this deed is accord and satisfaction in respect of the claims the subject of the proceedings, notwithstanding that fact, on 20 March 2003 the parties will consent to an order that the proceedings be adjourned to the registry to enable this deed to be given effect to."

By clause 2 the respondents agreed to pay the applicants $1.3 million "plus *Jezers costs of the proceedings* (as defined hereunder)". The clause continued –

> "(d) *Jezers costs of the proceedings* which are to be the reasonable legal costs and outlays of and incidental to the proceedings assessed on the Supreme Court scale of fees on the standard basis, incurred by the Chois, Schmith and Jezer to 19 March 2003 to be agreed, or in default of agreement to be assessed by the Tribunal."

Under s 61 of the *Queensland Building Tribunal Act* the QBT had power to award costs and implied power to assess those costs itself or make orders for their assessment. Clause 6 of the deed provided -

> "6. If the parties fail to reach agreement as to the quantum of the costs, the Chois, Schmith and Jezer shall be at liberty to file in the QBT the consent order in the terms annexed hereto to facilitate the assessment of the same."

The consent order attached to the agreement was in these terms -

> "1. The applicants pay the first, second, third and fourth respondents reasonable legal costs and outlays of and incidental to the proceedings assessed on the Supreme Court scale of fees on the standard basis, incurred to 19 March 2003 to be assessed by the Tribunal."

[3] On 20 March 2003 the parties consented to an order of the QBT adjourning the hearing and providing that in the event neither party filed an application by 1 June 2003, the proceedings would be dismissed.

[4] 1 June 2003 passed without any application being filed. With the commencement of the *Commercial and Consumer Tribunal Act* 2003 on 1 July 2003, the QBT ceased to exist, and a new tribunal, the Commercial and Consumer Tribunal ("the CCT"), was established.

[5] On 3 February 2004 the applicants served on the respondents a costs statement of 942 pages claiming approximately $420,000 costs and outlays and an application for costs in the CCT. The application came before the CCT on 12 March 2004, and on 29 March 2004 it ruled that it did not have jurisdiction to determine the application. The member said -

> "12. I prefer the submissions of counsel for the Lilischkies. I find that this tribunal has no jurisdiction to deal with the application for costs and nor, in the circumstances of this case, does it have jurisdiction to amend orders made in the QBT.
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> 13. Section 8 of the Act gives this tribunal jurisdiction to deal with matters that it is empowered to deal with under the Act or an empowering Act. There is no suggestion that there is any Act that empowers this tribunal to resolve costs disputes.
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> 14. Proceeding B082-01 was started and finished in the QBT and therefore this tribunal cannot have jurisdiction pursuant to section 158 of the Act.
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> 15. In the deed of settlement the parties established a mechanism by which the quantum of the costs to be paid to Jezer, Schmith and the Chois could be assessed. They agreed that consent orders could be filed in the QBT. No such orders were filed prior to the abolition of the QBT and therefore it is now impossible to file them.

> 16. I accept the submission of counsel for the Lilischkies that the machinery for the assessment of costs in the settlement agreement has broken down. This tribunal does not have jurisdiction to deal with costs absent any proceedings on foot before it. It is a matter for the parties how they choose to resolve their dispute.
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> Decision
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> 17. I find that this tribunal has no jurisdiction to assess the costs in proceedings B082-01 in the QBT. This fact was canvassed in correspondence between the solicitors for the parties prior to the hearing. If I had jurisdiction to do so in the interests of justice I would make an order that the respondents in proceedings B082-01 pay the costs of the applicants, however as those proceedings were dismissed I cannot see the basis upon which I might make such an order. I am prepared to entertain further submissions in respect of the costs of the jurisdiction hearing should the parties wish to submit them in writing."

In my respectful opinion the decision of the CCT and the member's reasons were clearly correct.

[6] On 21 April 2004 the CCT ruled that it had no power to award costs in relation to the application in respect of which it had determined it had no jurisdiction.

[7] The parties attempted to file in the registry of this Court a written agreement in the following terms -

> "1. The costs statement filed with this application and marked "A" be assessed on a standard basis pursuant to the agreement reached between the applicant and the respondent dated 19 March 2003.
>
> 2. There be no order as to costs concerning the costs of this application."

It was their intention to have the Registrar assess costs under *UCPR* r 684(2)(c) which provides -

> "**Registrar to assess costs**
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> **684** (1) Unless the court orders otherwise, the registrar must assess costs under this part.
>
> (2) The registrar must, on application, assess costs without an order for assessment if –
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> …

> (c) under a filed written agreement, a party agrees to pay to another party costs under these rules."

However, the Registrar declined to accept the document, and suggested that the parties make application to the Court.

[8] An agreement under which "a party agrees to pay to another party costs under these rules" is one relating to a proceeding between those parties to which the *UCPR* apply. The Registrar was correct in declining to accept the document.

[9] The parties wish this Court to declare that the amount payable by the respondents to the applicants pursuant to clause 2(d) of the deed "is such amount as is assessed by the Court as being the reasonable legal costs and outlays of and incidental to Queensland Building Tribunal proceedings B082-01, incurred by the applicants to 19 March 2003 when assessed on the Supreme Court scale of fees on the standard basis", to direct that those costs be assessed by the Registrar of the Court, and to make orders about the costs of the assessment and the costs of the application.

[10] In *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 the lessee of a property was given an option to purchase it at a price "as may be agreed upon by two valuers one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by the ... valuers." The lessor refused to nominate a valuer. The House of Lords construed the option clause as an agreement to sell the property at a fair and reasonable price, and the provision for ascertaining that price to be a subsidiary, non-essential part of the contract. The machinery for the assessment of that price had broken down, and there was no reason why the Court should not substitute other machinery. Their Lordships ordered an inquiry into the fair value.

[11] In *Booker Industries Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 a lessee had an option to renew its lease at a rent to be agreed with the lessor, or failing agreement to be determined by an arbitrator appointed by the president of the Queensland Law Society Inc, such rent not to be less than that payable in the last year of the first term. The lessee exercised the option, but the lessor refused to request the president to make the necessary appointment. The High Court held the option valid. The majority (Gibbs CJ, Murphy and Wilson JJ) considered that it was more than an agreement to agree: the lease itself provided the entire mechanism for determining the rental for the renewed term, and that in order to give business efficacy to the relevant provisions, it was necessary to imply a term that once the anterior conditions specified in the relevant clause had been performed, the parties would do all that was reasonably necessary to procure the nomination of an arbitrator by the president. Brennan J applied the reasoning in *Sudbrook* to uphold the option clause. He drew a distinction between a clause for determining a price or rental where the manner of calculation was essential to the parties, and one where the parties had agreed on a reasonable price or rental and provided a mechanism for ascertaining it. In the latter case, if the mechanism failed, a Court would be more inclined to substitute its own objective determination of a reasonable price or rental and uphold the agreement.

[12] In the present case clause 2(d) of the deed of settlement provided both a measure of the costs payable ("the reasonable legal costs and outlays of and incidental to the proceedings assessed on the Supreme Court scale of fees on the standard basis") and

a mechanism for their assessment ("to be agreed, or in default of agreement to be assessed by the Tribunal"). The mechanism for assessment has failed in that the QBT has ceased to exist. I respectfully adopt the approach of Lord Fraser in *Sudbrook* at 484, and conclude that there is no distinction in principle between a case where the mechanism for assessment of the costs and outlays fails because of the non co-operation of one of the parties and the present case where it has failed because of a legislative act in abolishing the body which was to perform the assessment. Accordingly the Court should substitute a mechanism for the assessment of the costs and outlays.

[13] The parties submitted that the Court itself should undertake the assessment, and that it should delegate that task to its Registrar. I am persuaded that the Court should provide a mechanism for the assessment of the costs, and that it should retain control over the process. The issue is the selection of a practicable, efficient and cost effective mechanism. The bill is 942 pages long, and comes to approximately $420,000. Its assessment is likely to take a long time and to be contentious. The task could be delegated to the Registrar pursuant to the Court's inherent power to order its own affairs. See generally *Harris v Caladine* (1991) 172 CLR 84. However, in deciding whether to direct him to assess costs incurred in an independent but now defunct tribunal, it is legitimate to take account of the other demands upon the Registrar and his limited resources, and of the availability of alternative mechanisms.

[14] Under *UCPR* r 501 the Court may refer a question of fact to a special referee for decision or opinion.[1] Under r 505 the Court might accept or reject the opinion, decision or findings in the referee's report in whole or in part and make an order or give judgment on the basis of the opinion, decision or findings as it considered appropriate. The assessment would involve the determination of a question of fact – namely, the quantification of reasonable legal costs and outlays of and incidental to the proceedings (in the QBT) assessed on the Supreme Court scale of fees on the standard basis. This option was canvassed in oral and written submissions, and the parties concurred in submitting that the assessment could be referred to a referee, and that Court might appoint its Registrar as referee. I am unpersuaded that the Court could appoint the Registrar as referee. In my view s 257 of the *Supreme Court Act* 1995, by which the referee would be deemed to be an officer of the Court, and *UCPR* r 506, which makes provision for his remuneration, are inconsistent with the appointment of an existing officer of the Court as referee.

[15] The practical solution is for the appointment of an independent costs assessor as referee to perform the assessment. I shall give the parties the opportunity to agree upon the selection of a costs assessor who is willing to perform this role or alternatively to submit a panel of names for the Court's consideration. The proposed referee's consent to act should be filed. The question of the referee's remuneration and responsibility for it should be dealt with in the referring order.

[16] The deed of settlement contained mutual releases and discharges from all claims, actions or rights arising out of the disputes or the contract save as arose by reason of the deed (clauses 14 and 15). It was silent upon who should bear the costs of the

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[1] Sections 255 and 256 of the *Supreme Court Act* 1995 restrict the circumstances in which a special referee may be appointed. Rule 501 of the *UCPR* is widely cast, and to the extent of any inconsistency it prevails over ss 255 and 256 of the 1995 Act: *Supreme Court of Queensland Act* 1991 s 134.

assessment by the QBT. I consider that on the proper interpretation of the agreement the costs payable by the respondents include the costs of the assessment in so far as such costs would have been allowable under the Supreme Court scale had the assessment been performed by the QBT. Costs otherwise incurred, including costs in reaching or attempting to reach agreement, were intended to lie where they fell. In circumstances where agreement was not reached and the mechanism for assessment of the costs has failed, the parties are to bear their own costs except to the limited extent already described.

[17] I will hear the parties on the form of the orders to be made and any directions to be given to the referee.