SUPREME COURT OF QUEENSLAND

CITATION:	*Caltabiano v Electoral Commission of Qld & Anor* [2009] QCA 182
PARTIES:	**ANDREA MICHELE CALTABIANO** (applicant/appellant) **v** **ELECTORAL COMMISSION OF QUEENSLAND** (first respondent/first respondent) **STEVEN ANDREW KILBURN** (second respondent/second respondent)
FILE NO/S:	Appeal No 6093 of 2009 SC No 3921 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Court of Disputed Returns at Brisbane
DELIVERED ON:	26 June 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2009
JUDGES:	Muir and Fraser JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal, set aside the orders made by the primary judge, and instead make the following orders.** **2. Dismiss the application filed by the first respondent on 1 May 2009 and order the first respondent to pay the appellant's costs of and incidental to that application to be assessed.** **3. Dismiss the application filed by the second respondent on 5 May 2009 and order the second respondent to pay the appellant's costs of and incidental to that application to be assessed.** **4. The respondents pay the appellant's costs of and incidental to the appeal.** **The Court directs that any submissions relating to an application by the second respondent for a certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) be made in writing within 10 days after the delivery of judgment.**

CATCHWORDS: CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTIONS AND RELATED MATTERS – DISPUTED ELECTIONS – DISPUTED ELECTIONS COURTS OR TRIBUNALS – PROCEDURE – where appellant filed an application in the Court of Disputed Returns seeking to challenge the election of the member of the Legislative Assembly for Chatsworth – where s 130(3)(b) *Electoral Act* 1992 (Qld) required a person disputing an election to deposit $400 with the Court – whether s 130(3)(b) was a mandatory requirement of an effective application

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTIONS AND RELATED MATTERS – DISPUTED ELECTIONS – DISPUTED ELECTIONS COURTS OR TRIBUNALS – PROCEDURE – where under *Uniform Civil Procedure (Fees) Regulation* 1999 (Qld) and *Uniform Civil Procedure Rules* 1999 (Qld) filing fees are payable for proceedings commenced in the Supreme Court – whether rules and regulations requiring payment of filing fees were applicable in the Court of Disputed Returns

MONEY – PAYMENT – APPROPRIATION OF PAYMENTS – IN GENERAL – where appellant, when filing her application, paid $502.50 – where appellant argued that the payment should be taken to include payment of the deposit required by s 130(3)(b) *Electoral Act* 1992 (Qld) – where primary judge implicitly held that $400 of the payment could not be appropriated to the deposit as there was a failure to convey the necessary intention when paying the money – whether the circumstances gave rise to an inference that $400 of the payment was appropriated to the required deposit

Appeal Costs Fund Act 1973 (Qld), s 15
Appeal Costs Fund Regulation 1999 (Qld), Sch 1
Elections Act 1915 (Qld), s 138
Elections Act 1983 (Qld), s 174, s 175
Electoral Act 1992 (Qld), s 127, s 128, s 129, s 130, s 131, s 133, s 134, s 140, s 148A, s 148D
Electoral and Other Acts Amendment Act 2001 (Qld)
Supreme Court Act 1921 (Qld), s 11
Supreme Court of Queensland Act 1991 (Qld), s 69, s 118, s 118B, s 120
Uniform Civil Procedure (Fees) Regulation 1999 (Qld), r 3, Sch 1
Uniform Civil Procedure Rules 1999 (Qld), r 3, r 561, r 971

Airservices Australia v Ferrier & Anor (1996) 185 CLR 483; [1996] HCA 54, cited
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited

Beattie v Fine [1925] VLR 363, cited
Caltabiano v Electoral Commission of Queensland & Anor (No 2) [2009] QSC 138, considered
Carpenter v Carpenter Grazing Co Pty Ltd & Ors (1987) 5 ACLC 506, cited
Commissioner of Taxation v Miller (1946) 73 CLR 93; [1946] HCA 23, cited
Devan Nair v Yong Kuan Teik [1967] 2 AC 31, cited
E Ryan & Sons Ltd v Rounsevell (1910) 10 CLR 176; [1910] HCA 2, cited
Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW (1956) 94 CLR 554; [1956] HCA 22, cited
Farrow Finance Company Ltd (in liq) v ANZ Executors and Trustee Company Ltd [1998] 1 VR 50, cited
Featherston v Tully (2002) 83 SASR 302; [2002] SASC 243, cited
Gower v Woodman Sales Pty Ltd [1988] 2 Qd R 15; [1987] FC 125, cited
Hansen v Australian Electoral Commission [2000] FCA 606, cited
Hayes v Federal Commissioner of Taxation (1956) 96 CLR 47; [1956] HCA 21, cited
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16, cited
Karam v Australia and New Zealand Banking Group Ltd & Ors [2003] NSWSC 866, cited
Knysh & Anor v Corrales Pty Ltd (1989) 15 ACLR 629, cited
Leeson v Leeson [1936] 2 KB 156, followed
Parker v Guinness (1910) 27 TLR 129, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Miskin Lower; ex parte Young [1953] 1 QB 533, cited
Re Nicklin Election Petition; Turner v King [1993] 1 Qd R 513; [1990] QSC 154, cited
Re Walsh; ex parte Deputy Commissioner of Taxation (NSW) (1982) 42 ALR 727, cited
Rudolphy v Lightfoot (1999) 197 CLR 500; [1999] HCA 61, cited
Skyring v Electoral Commission of Queensland [2002] 1 Qd R 442; [2001] QSC 80, cited
Smith v Australian Electoral Commission (2008) 104 ALD 395; [2008] FCA 953, cited
State of Queensland v Springfield Land Corporation (No 2) P/L [2009] QSC 143, cited
Sue v Hill (1999) 199 CLR 462; [1999] HCA 30, cited
Tanti v Davies (No 2) [1996] 2 Qd R 591; [1995] QSC 252, cited
Tasker v Fullwood [1978] 1 NSWLR 20, cited
Toll (FGCT) Pty Limited v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited

Vetter v Lake Macquarie City Council (2001) 202 CLR 439; [2001] HCA 12, cited
Visbord v Federal Commissioner of Taxation (1943) 68 CLR 354; [1943] HCA 4, cited
Williams v Mayor of Tenby (1879) 5 CPD 135, cited
Woods v Bate (1986) 7 NSWLR 560, cited

COUNSEL: P Dunning SC, with P Baston, for the appellant
P A Freeburn SC for the first respondent
D C Rangiah SC, with M L Grimshaw, for the second respondent

SOLICITORS: RiverLegal for the appellant
Crown Law for the first respondent
Carne Reidy Herd for the second respondent

MUIR JA:

[1] Fraser JA's recitation of the facts and of counsels' submissions, which I gratefully adopt, enables me to state my reasons with relative brevity.

Was payment of the deposit required by s 130 of the *Electoral Act* directory or mandatory?

[2] It is argued on behalf of the appellant that the requirements of s 130 of the *Electoral Act* 1992 ("the Act") in relation to the depositing of moneys with the Supreme Court registry are directory rather than mandatory with the consequence that non-compliance has no invalidating effect on an application under s 130.

[3] There are many cases in which it has been held that failure to comply with a particular statutory provision requiring an act to be done within a specified time does not invalidate the act. One such case is *Woods v Bate*[1] in which McHugh JA, with whose reasons Hope JA agreed, said that "In recent times the courts have shown great reluctance to invalidate an act done pursuant to a statutory provision because of the failure to comply with an antecedent condition ...". His Honour noted that, as a general proposition, "… the proper approach is to regard a statutory requirement, expressed in positive language, as directory unless the purpose of the provision can only be achieved by invalidating the result of any departure from it …".

[4] In *Project Blue Sky Inc v Australian Broadcasting Authority*[2] the Court, expressing approval of the criticism of the "elusive distinction between directory and mandatory requirements" by the Court of Appeal of New South Wales in *Tasker v Fullwood*,[3] said:[4]

> "They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provisions is invalid. The classification of a statutory provision as mandatory or directory

1 (1986) 7 NSWLR 560 at 567.
2 (1998) 194 CLR 355.
3 [1978] 1 NSWLR 20 at 23 – 24.
4 (1998) 194 CLR 355 at 390 – 391.

> records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision."

[5] The reasons then propounded another approach:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute". (footnotes omitted)

[6] In ascertaining whether it was the purpose of the Legislature that failure to pay the prescribed deposit as directed would result in invalidity or ineffectuality, one can do no better than consider the express language of s 130(1) which states:

> "For an application to have effect for the purposes of this division, the requirements of this section must be complied with."

[7] The expressed consequence of non-compliance with s 130 with respect to an application is that the application has no effect for the purposes of div 2 of pt 8 of the Act. A requirement of s 130(3) is that "The person disputing the election ... when filing the application, deposit with the court $400 …".

[8] It is pointless to enquire as to whether the requirements of s 130(3) are directory or mandatory: the consequences of non-compliance are prescribed and in terms which permit no doubt about the intention of the Parliament to render ineffectual applications which do not fulfil the requirements of s 130. It remains to be seen, however, whether there was a failure to deposit $400 with the application.

The contention that the primary judge's finding that the deposit of $400 was not paid on 14 April 2009 is a finding of fact which cannot be challenged

[9] I respectfully agree with Fraser JA's reasons on this point. Whether a sum of money was or wasn't paid is no doubt a question of fact but whether a sum paid was appropriated in a particular way or has a particular character is a question of law.[5]

[10] Counsel for the second respondent accepted that the primary judge in the second last sentence of para [41] of her reasons was not purporting to find that Ms McPaul used the words "filing fee" when stating the amount to be paid. That sentence is, "… Ms McPaul told the parties that the filing fee was $502.50, that amount was paid by Ms Caltabiano." That was also the primary submission of the appellant's counsel.

[11] If the sentence is to be construed as a finding that the words "filing fee" were used in this context, it would not have been a finding which was open on the evidence, as Fraser JA explains in his reasons. There are matters other than those referred to by

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[5] *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7; *Commissioner of Taxation v Miller* (1946) 73 CLR 93 at 97; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51.

Fraser JA which support this conclusion. The cross-examination of Mr Polkinghorne by counsel for the second respondent was based on an acceptance by counsel that Ms McPaul did not describe the sum of $502.50 as a filing fee.

[12] This exchange occurred in the course of the cross-examination:[6]

> "And when she came back she said words like, 'Yes, that's okay. I'll take it.'?-- Yes, she said that would be 502.50 and then we just asked – yes, that's correct.
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> I suggest that when she came back she said words to the effect, 'Yes, that's okay. I'll take it.' Do you agree or disagree with that?-- Yes, well, she stated that it would be $502.50 and that, yes, she would take it."

[13] In her cross-examination, Ms McPaul accepted that 14 April 2009 was a normal day, that the filing of the appellant's application was an "unremarkable event" and that she "wouldn't have made a special mental note for it". She gave no evidence of having a practice of referring to a "filing fee" when requesting or discussing the payment required on the filing of documents. Having regard to that evidence alone, a finding that Ms McPaul mentioned the words "filing fee" in relation to the sum of $502.50 would be difficult, if not impossible, to support.

Was a filing fee payable under the *Uniform Civil Procedure (Fees) Regulation* 1999?

[14] The principal hurdle the appellant needs to surmount in order to establish that the filing fees prescribed for originating applications by the *Uniform Civil Procedure (Fees) Regulation* were not payable is posed by the authorities to the effect that if a matter is referred by legislation to a court of record for determination it is implied that the practices and procedures of that court will apply. The principle is usefully stated and discussed in the following passage from the judgment of the court in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW*:[7]

> "When such a course is adopted it is taken to mean, unless and except in so far as the contrary intention appears, that it is to the court as such that the matter is referred exercising its known authority according to the rules of procedure by which it is governed and subject to the incidents by which it is affected. There are well-known passages in *National Telephone Co Ltd v Postmaster-General* (1913) AC 546, which it may be as well to quote. Viscount *Haldane* LC said: 'When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decisions likewise attaches' (1913) AC, at p 552. Lord *Parker of Waddington* said: 'Where by statute matters are referred to the determination of a court of record with no further provision, the necessary implication is, I think, that the court will determine the matters, as a court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same' (1913) AC, at p 562. Lord *Shaw of Dunfermline* said: 'In the general case, when a court

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6 At 114.

7 (1956) 94 CLR 554 at 559 – 561.

> of record . . . becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory consequences of procedure before such a court ensue' (1913) AC, at p 557. The application of the rule is no doubt stronger in cases where the reference is not of a specific matter but is general and covers all matters of a given description. But although they are cases of that kind, it is by no means beside the point to mention *Hem Singh v Das* (1936) LR 63 IA 180, at pp 188-192 where previous decisions upon Indian appeals are discussed and explained, and *RMARA Adaikappa Chettiar v R Chandrasekhara Thevar* (1947) LR 74 IA 264, where Lord *Simonds*, speaking for the Judicial Committee, said: 'The true rule is that where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorized by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal' (1947) LR 74 IA, at p 271. See further *Powell v Lenthall* (1930) 44 CLR 470, at pp 476, 477 and *Falk v Haugh* (1935) 53 CLR 163, at p 180.
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> *Sugerman* J in the Land and Valuation Court and *Owen* J and *Roper* CJ in Eq in the Supreme Court considered that the provisions which the *Purchase Act* makes, the nature of the scheme it embodies and certain indications to be found in its text evinced a contrary intention and displaced the operation of the presumptive rule. The question for decision is whether the considerations which may be marshalled in support of this conclusion form any satisfactory ground for excluding the application of the principle, or perhaps it is better to say for positively implying an exclusion of the right to require the statement of a case.
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> It may be remarked that the rule or principle invoked is but an expression of the natural understanding of a provision entrusting the decision of a specific matter or matters to an existing court. It is no artificial presumption. *When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality* ..." (emphasis added)

[15] As is apparent from the above passage, whether the prima facie position pertains in any case is dependant on the construction of the statute by which the referral is made. However, as the words emphasised above show, the presumption that the rules of practice and procedure of the court entrusted with the additional jurisdiction will apply, is not readily displaced.

[16] Counsel for the appellant pointed to a number of matters which he submits demonstrate an intention that the *Uniform Civil Procedure Rules* 1999 and the *Uniform Civil Procedure (Fees) Regulation* 1999 do not apply.

[17] The matters which, in my view, are capable of supporting the appellant's argument are:

(a) The provision that the court is "not bound by technicalities, legal forms or rules of evidence".[8]

(b) The provision that the "rules of court of the Supreme Court may include provision, not inconsistent with this division, with respect to the practices and procedures of the Court of Disputed Returns"[9] and s 134(7) which specifies matters which may be the subject of rules of the Court of Disputed Returns.

(c) The extent to which ss 130 and 138 prescribe matters of practice and procedure.

(d) The inclusion of a power to award costs.[10]

(e) The inclusion of a right of appeal.[11]

(f) The inclusion of provisions governing appeals and, in particular, the provision that the Court of Appeal "has all the powers given to it by the *Uniform Civil Procedure Rules 1999*".[12]

[18] Counsel for the appellant makes the point that if the *Uniform Civil Procedure Rules* were intended to apply to applications under pt 8 of the Act there would be no need for a right of appeal to be conferred by s 148A or for s 148D to confer on the Court of Appeal the powers given to it by the *Uniform Civil Procedure Rules*. There would be a right of appeal under the *Uniform Civil Procedure Rules*[13] and, of course, as those rules applied, the Court of Appeal would have the powers conferred by them.

[19] If the Legislature had in mind that the *Uniform Civil Procedure Rules* applied to the Court of Disputed Returns, it is also difficult to see why subss (6) and (7) of s 134 were thought necessary. A rule making power existed for the Supreme Court when the Act was enacted.[14] However, as is later discussed, the existence of subss (6) and (7) also supports the respondents' arguments.

[20] The provision in relation to costs, s 140, is something of a puzzle. In view of the clear powers and rules of the Supreme Court in relation to costs, why was it thought necessary to empower the Court of Disputed Returns to order "an unsuccessful party to the application to pay the reasonable costs of the other parties to the application"?

[21] The nature of the jurisdiction conferred on the Court of Disputed Returns also supports the view that the normal rules of practice and procedure of the Supreme Court may not have been intended to apply. Part 8 of the Act is concerned with electoral challenges. It is made plain that the Court of Disputed Returns is expected to determine them promptly and unconstrained by the rules of evidence or

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8 *Electoral Act* 1992, s 134(2).
9 *Electoral Act* 1992, s 134(6).
10 *Electoral Act* 1992, s 140.
11 *Electoral Act* 1992, s 148A.
12 *Electoral Act* 1992, s 148D(1).
13 Conferred by s 72 of the *Supreme Court of Queensland Act* 1991 (now s 69).
14 *Supreme Court Act* 1921, s 11.

technicalities.[15] The matters to be litigated are of importance to the workings of the electoral process and may affect the ability of one party or another to obtain sufficient seats on an election to form a Government. It would therefore not be remarkable if the Legislature concluded that filing and other court fees were inappropriate.

[22] Counsel for the appellant argues that s 130 of the Act sets out the full extent of the requirements for an application to the Court of Disputed Returns: there is an obligation to deposit $400 but no reference to filing fees. Again, it is arguably odd that, if the normal rules of court were thought applicable, s 130 would spell out the requirements for an efficacious application without reference to the rules of Court and in so doing, state the amount of a mandatory deposit.

[23] Despite the above considerations I have concluded, with some hesitation, that the rules of the Supreme Court from time to time were intended to apply. It is of some significance, in my view, that s 134(6) and (7) contemplated that the rules of the Supreme Court may be amended to contain rules relating specifically to the Court of Disputed Returns. No separate set of rules is therefore contemplated by the Act. It may also be thought, in light of these subsections, that if the normal rules of Court which were not inconsistent with the provisions of the Act were not to apply, that would have been expressly stated. Also, as counsel for the second respondent submits, s 134(6), by providing that "rules of court of the Supreme Court may" be amended to include rules not inconsistent with div 2 of pt 8, contemplates the possibility that no special rules will be made.

[24] The Legislative history is also of significance. Under the *Elections Act* 1983 (Qld), as amended, ("the Repealed Act") which preceded the Act, the role of determining electoral disputes was vested in a Tribunal constituted by a Supreme Court judge. Provision was made in the Repealed Act for procedural matters including: the issuing of subpoenas; witness expenses; the recording and transcribing of evidence and costs. Provision was made for the maximum amount a party could be ordered to pay on account of costs[16] and for the taxation of costs.

[25] Section 175(1) of the Repealed Act conferred on the "Governor in Council, with the concurrence of any two or more Judges of the Supreme Court …", power to make such rules of court "… not inconsistent with this Act, as may be considered necessary or convenient for regulating the procedure and practice of the Tribunal …". Section 175(2) provided a non-exclusive list of matters which could be the subject of the rule making power. Included were forms and matters of practice, procedure and costs. Section 175 may be contrasted with the relatively minimalist approach to rules taken in s 134 of the Act. The predecessor of the Repealed Act, the *Elections Act* 1915 also contained a rule making power similar to s 175(1).[17] The rules of the Tribunal which were in force during the 1915 Act's operation were *The Rules of the Elections Tribunal of 1888* and *Elections Tribunal Rules* 1977 (Qld). They were reasonably comprehensive, contained forms, and provided that the *Rules of the Supreme Court* which did "not conflict with the Act and these Rules" would apply.

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15 *Electoral Act* 1992, ss 130, 133, 134 and 135.

16 *Elections Act* 1983 to 1985, s 174.

17 *Elections Act* 1915 to 1962, s 138.

[26] If the Legislative intention was that the rules of the Supreme Court from time to time were not to apply, it is surprising that the Act did not contain provisions along the lines of those provided for in the earlier legislation.

[27] For the reasons given by Fraser JA, I am unable to accept the appellant's contention that the requirements of the *Uniform Civil Procedure Rules* and the regulations for the payment of a filing fee are inconsistent with s 130 of the Act.

Was the prescribed deposit in fact paid? – the appropriation issue

[28] The primary judge held, implicitly, that $400 of the payment of $502.50 made by the appellant on 14 April 2009 could not be appropriated to the deposit as there had been a failure to convey the appellant's intention in paying the money to Ms McPaul. Her Honour said:[18]

> "As the deposit was not paid and the intention of the party paying the money was not conveyed to the member of the Registry staff receiving that money the general rule stated by Cussen J in *Beattie* v *Vine* [sic] [1925] VLR 363 at 375 that 'where money is paid it is to be applied according to the will of the payer, and not of the receiver' has no application. The will of the payer must be made known to the receiver otherwise the receiver is free to apply the payment to any debt. In this case the only debt was the payment of the filing fee and the monies were appropriated by the receiver of the monies to that debt. The rule that applies in that situation was stated by Lord Macnaghten in *Cory Brothers & Co v Owners of the Turkish Steamship 'Mecca'* [1897] AC 286 at 293:
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> > 'When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor.'"

[29] The general principles applicable to the appropriation of payments in relation to debts are stated as follows in *Chitty on Contracts*:[19]

> "**Rights to appropriate payments.** Where several separate debts are due from the debtor to the creditor, the debtor may, when making a payment, appropriate the money paid to a particular debt or debts, and if the creditor accepts the payment so appropriated, he must apply it in the manner directed by the debtor; if, however, the debtor makes no appropriation when making the payment, the creditor may do so.
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> **Debtor's right to appropriate.** It is essential that an appropriation by the debtor should take the form of a communication, express or implied, to the creditor of the debtor's intention to appropriate the payment to a specified debt (or debts), so that the creditor may know his rights of appropriation as creditor cannot arise. It is not essential that the debtor should expressly specify at the time of the payment, which debt or account he intended the payment to be applied to. His

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18 *Caltabiano v Electoral Commission of Queensland and Anor (No 2)* [2009] QSC 138 at [64].

19 H Beale (ed), *Chitty on Contracts (Volume 1: General Principles)*, (13th ed, 2008), [21-059] – [21-060].

> intention may be collected from other circumstances showing that he intended at the time of the payment to appropriate it to a specific debt or account. Thus, where at the date of the payment some of his debts are statute-barred and others are not, it will be inferred (in the absence of evidence to the contrary) that the debtor appropriated the payment to the debts that were not so barred." (footnotes omitted)

[30] As appears from the above, an appropriation, to be effective, must be communicated[20] and an undisclosed intention to appropriate a payment in a particular way in the mind of the debtor when making payment is not sufficient.[21]

[31] However, as is made plain in the above quotation and as was pointed out in the judgment of the court in *Knysh & Anor v Corrales Pty Ltd*,[22] in the absence of an express statement of appropriation, "An appropriation by the debtor may be inferred from a variety of circumstances." *Parker v Guinness*,[23] which is relied on as authority for that proposition, has been approved of or applied in cases including *Knysh & Anor v Corrales Pty Ltd*,[24] *Re Walsh; Ex parte Deputy Commissioner of Taxation (NSW)*,[25] *Karam v Australia and New Zealand Banking Group Ltd*,[26] and *Leeson v Leeson*.[27]

[32] The following passage from the reasons of Greene LJ in *Leeson v Leeson* was quoted with approval in the Australian cases referred to in the previous paragraph:

> "When, however, he does not notify the creditor of his intention, and when the circumstances are such that the creditor receives the payment merely in satisfaction of the debts *and the payment is not more appropriate to the payment of the one debt than to that of the other the creditor is entitled to make the appropriation*. When it is said that there need not be an express appropriation of a payment, but that the appropriation can be inferred, that does not mean that appropriation of a payment can be inferred from some undisclosed intention in the mind of the debtor. It is to be inferred from the circumstances of the case as known to both parties. Any other view might lead to injustice, as the creditor's right to appropriate a payment would be defeated. When the matter is examined upon principle it will be found that an undisclosed intention in the mind of the debtor is not sufficient to support an appropriation. If authority is needed for that proposition it can be found in the judgment of Lush J in *Parker v Guinness* (1910) 27 Times LR 129 at 130, where he said: 'What is to be considered is this. Is the true inference to be drawn from all the circumstances of the case that the debtor paid the moneys generally on account, leaving the creditor to apply them as he thought fit, or is the true inference that he paid them on account of special portions of the debt for the purpose and with a view to wipe

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20 *Chitty on Contracts* [21-060]; *Leeson v Leeson* [1936] 2 KB 156.
21 *Leeson v Leeson* [1936] 2 KB 156.
22 (1989) 15 ACLR 629 at 633.
23 (1910) 27 TLR 129.
24 (1989) 15 ACLR 629.
25 (1982) 42 ALR 727 at 729.
26 [2003] NSWSC 866 at [19].
27 [1936] 2 KB 156.

> these out of the account? His undisclosed intention so to do would, of course, not benefit him. It is what he did in fact, and not what he meant to do that is to be regarded.' A debtor's undisclosed intention to appropriate a payment to one of two debts owed by him to a creditor cannot benefit him." (emphasis added)

[33] The above quoted passage from *Parker v Guinness* continued:

> "It is what he did in fact, and not what he meant to do that is to be regarded. But if the inference to be drawn from the circumstances is that the payment was in fact appropriated by the debtor at the time of payment, the fact that he made no express statement at the time is immaterial. Now an appropriation by the debtor may be inferred from a variety of circumstances. Each case must, in my opinion, be considered on its own peculiar facts."

[34] The inference to be drawn from the circumstances is the inference which would have been drawn by a reasonable person who had regard to those circumstances. The circumstances include "the purpose and object" of the application.[28]

[35] It is now necessary to consider the application to the facts of these principles relating to the appropriation of payments in respect of debts, which, in my view, are applicable by analogy.

[36] The appellant decided to make an application to the Court of Disputed Returns disputing the election of the second respondent as the member of the Legislative Assembly for Chatsworth.

[37] The appellant's agent, Mr Polkinghorne, perused the relevant provisions of the Act and saw that s 130(3)(b) required the deposit with the Supreme Court registry of $400 or a greater amount if required when the application was filed. On the morning of 14 April 2009 he telephoned the Supreme Court registry and, referring to the obligation to deposit moneys with the court when making an application to the Court of Disputed Returns, asked of a male Registry clerk "how much was required to be paid". He was not able to obtain the information he sought.

[38] Later that day Mr Polkinghorne went with the appellant and Mr Chand, a solicitor, to the Supreme Court registry intending to file the application and make a concurrent deposit in whatever sum was required. He had with him, it may be inferred, for reference should it be required, a copy of pt 8 of the Act which he had downloaded from his computer. Mr Polkinghorne took the application to the counter and, it emerges from the unchallenged evidence of Mr Chand, that he had "in front of him" his copy of pt 8. Mr Chand recalled that "the registry officer did not seem to know much about the Court of Disputed Returns" and that "most of what was discussed was about the amount to be paid".

[39] Ms McPaul, the Registry clerk, was handed the application by Mr Polkinghorne. She was aware that it was "an originating application for a hearing in the Court of Disputed Returns". Being unfamiliar with such applications, Ms McPaul left the counter to make enquiries. Her enquiries provided her with no assistance so she proceeded to treat the application as if it was an application made in the normal jurisdiction of the Supreme Court. She did not inform Mr Polkinghorne or the appellant of the course she was taking or of her failure to obtain assistance. After

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[28] See *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.

she returned to the counter she said words to the effect "that will be $502.50". The appellant wrote out a cheque for that amount and gave it to Ms McPaul. The amount calculated by Ms McPaul was the sum payable under the *Uniform Civil Procedure (Fees) Regulation* 1999 and the *Appeal Costs Fund Regulation* 1999 on the filing of an originating application in the Supreme Court.

[40] The appellant paid the money, intending to pay whatever was necessary to commence proceedings under div 2 of pt 8 of the Act. More particularly, she intended to deposit the prescribed sum in the Supreme Court registry when filing her application. She believed that the cheque for $502.50 was either for, or included, the deposit. On the primary judge's findings, Ms McPaul was not aware of the latter intention. She was aware, however, of the nature of the application and, it may be inferred, there was a common assumption that the filing was to be effected regularly so as to give rise to a valid application. There was certainly nothing to indicate that the appellant intended to waste the filing fee on an invalid application.

[41] The appellant relied on Ms McPaul to inform her of the sum to be paid to enable her to make a valid application and such reliance was or ought to have been apparent to Ms McPaul. The reliance was reasonable in the circumstances. In stating the fee, Ms McPaul expressed no uncertainty and gave no indication that she remained unaware of the relevant statutory requirements. The application was an unusual one and it was clearly within the ambit of a Registry clerk's duties to ascertain and inform members of the public commencing proceedings in the Registry of the payments necessary to give rise to an effectual application. It is difficult to see how that duty could be discharged without reference to the relevant statutory provisions or to some authoritative statement of their requirements.

[42] Absent the depositing of the $400 "when filing the application", the payment of the filing fee would be pointless: the application could have no effect as an application to dispute the second respondent's election.

[43] The circumstances referred to in paras [38] to [42] above, to my mind, are sufficient to give rise to an inference that $400 of the payment was appropriated to the deposit and the balance to the filing fee. To so conclude is to give efficacy to the appellant's application in pursuit of which she enlisted the aid of the Supreme Court registry. The conclusion prevents an appropriation of the $502.50 to a filing fee which confers no benefit on the payer. It also prevents an error or omission on the part of the Registry from depriving the appellant of the benefit of her payment and the unjust retention of a useless payment.

[44] I should add that in my view it is arguable that when the appellant handed over her cheque for $502.50 intending to deposit the prescribed sum in the Court, she, in fact, made the deposit regardless of the application of principles relating to the appropriation of payments in respect of debts. No appropriation by the payee could have been made unless the payer failed to appropriate. That right remained at least until payment and upon payment, the amount of the payment was necessarily deposited in the Supreme Court Registry.

[45] There is another consideration. Where an application to a court will be effective if the payment made by the applicant on filing is treated as a deposit and ineffective if treated as a filing fee and where the applicant has intended and attempted to pay a deposit, it is appropriate, in the absence of some clear factual reasons for a contrary approach, that the payment be treated as one which gives rise to a valid application.

There are, I think, public policy considerations favouring that conclusion, particularly in relation to processes which are not intended to be constrained by technicalities and formality.[29] It is also possible to derive some support for this approach from principles relevant to the presumption of regularity. Hope JA, with whose reasons the other members of the court agreed, explained the circumstances in which the presumption of regularity may be applied as follows in *Carpenter v Carpenter Grazing Co Pty Ltd & Ors*:[30]

> "As I understand it, the true rule is that the presumption may reasonably be drawn where an intention to do some formal act is established, when the evidence is consistent with that intention having been carried into effect in a proper way, the observance of the formality has not been proved or disproved and its actual observance can only be inferred as a matter of probability: *Harris v Knight* (1890) 15 PD 170 at 179-180; *In the Estate of Bercovitz* [1962] 1 WLR 321 at 327."

Conclusion

[46] For the above reasons the appeal should be allowed. I agree with the orders proposed by Fraser JA.

FRASER JA:

[47] On 14 April 2009 Ms Caltabiano, the appellant, an unsuccessful candidate in the State elections held on 21 March 2009, filed an originating application in the Court of Disputed Returns. The appellant sought to challenge the election of Mr Kilburn, the second respondent, as the member of the Legislative Assembly for Chatsworth.

[48] The first respondent, the Electoral Commission of Queensland, and the second respondent applied to the Court of Disputed Returns for an order summarily dismissing the appellant's originating application. The ground of the application was that the appellant had not complied with the requirement in s 130(3)(b) of the *Electoral Act* 1992 that she deposit $400 with her application.

[49] On 3 June 2009, the Court of Disputed Returns constituted by the primary judge, Atkinson J, dismissed the appellant's application on that ground.[31]

[50] The main issue before the primary judge was whether the appellant had paid the $400 deposit required by the *Electoral Act*. Her Honour found that she had not. When the appellant filed her originating application she gave a cheque for $502.50 to the appropriate administrative officer at the civil registry counter in the Supreme Court Registry. The primary judge found that the $502.50 did not include any payment by way of deposit under s 130(3)(b) of the *Electoral Act*; that the whole of the $502.50 was correctly applied to payment of the fees which are payable for filing applications of this kind; and that the appellant's application was incurably defective.

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29 See eg the principle that a party should not be allowed to suffer for the default of an officer of the Court, *Gower v Woodman Sales Pty Ltd* [1988] 2 Qd R 15 at 28 and *E Ryan & Sons Ltd v Rounsevell* (1910) 10 CLR 176.

30 (1987) 5 ACLC 506 at 514.

31 *Caltabiano v Electoral Commission of Queensland and Anor (No 2)* [2009] QSC 138.

[51] Section 148A of the *Electoral Act* allows for appeals to this Court from decisions of the Court of Disputed Returns on a question of law. On 9 June 2009 the appellant filed a notice of appeal from the primary judge's order dismissing her application. The appeal was expedited and it was heard on 19 June 2009.

The grounds of the appeal

[52] The notice of appeal contends that the primary judge made errors of law in holding that:

(a) The appellant was required to pay a filing fee under the *Uniform Civil Procedure (Fees) Regulation* 1999 ("*UCPR Fees Regulation*") and the *Uniform Civil Procedure Rules* 1999 ("*UCPR*");

(b) The payment of a deposit in accordance with s 130(3)(b) of the *Electoral Act* was a mandatory requirement of an effective application; and

(c) The appellant had not paid the deposit in accordance with s 130(3)(b) of the *Electoral Act*.

[53] I will discuss the arguments advanced in relation to those grounds of appeal after I have referred to the applicable legislation and set out the relevant findings of the primary judge.

Legislation and facts

[54] Section 127 of the *Electoral Act*, which is in div 1 of pt 8, provides:

> **"127 Supreme Court to be Court of Disputed Returns**
>
> (1) The Supreme Court is the Court of Disputed Returns for the purposes of this Act and the *Referendums Act 1997*.
>
> (2) A single judge may constitute, and exercise all the jurisdiction and powers of, the Court of Disputed Returns.
>
> (3) For subsection (2), the Chief Justice may be the single judge or appoint another Supreme Court judge to be the single judge."

[55] Section 128(1) of the *Electoral Act* provides that the election of a person may be disputed by an application to the Court of Disputed Returns under div 2 of pt 8, or by an appeal under div 4. Section 128(2) provides that the election "may not be disputed in any other way".

[56] Section 129 identifies those persons who may dispute an election. The appellant, as a candidate at the election for the electoral district concerned, was such a person.

[57] The focus of the arguments in the appeal was upon s 130 of the *Electoral Act* and its relationship with the legislation prescribing fees for filing documents in the Supreme Court. Section 130 of the *Electoral Act* provides:

> **"130 Requirements for an application to be effective**
>
> (1) For an application to have effect for the purposes of this division, the requirements of this section must be complied with.
>
> (2) The application must —
>
> (a) set out the facts relied on to dispute the election; and
>
> (b) set out the order sought from the Court of Disputed Returns; and

(c) be signed by —

(i) in the case of an application by the commission — the electoral commissioner; and

(ii) in any other case — the applicant before a witness; and

(d) if paragraph (c)(ii) applies — contain the signature, occupation and address of the witness.

(3) The person disputing the election must —

(a) file the application with the Supreme Court registry in Brisbane within 7 days after the day on which the writ for the election is returned as mentioned in section 123(2)(b); and

(b) when filing the application, deposit with the court —

(i) $400; or

(ii) if a greater amount is prescribed — that amount.

(4) Subsections (1) and (2) do not, by implication, prevent the amendment of the application."

[58] The period prescribed by s 130(3)(a) for filing an application expired on 14 April 2009, the day upon which the appellant filed her application.

[59] Section 134 of the *Electoral Act* provides:

"134 How application is to be dealt with by court

(1) The Court of Disputed Returns may conduct hearings and other proceedings in relation to the application.

(2) The court is not bound by technicalities, legal forms or rules of evidence.

(3) The court must deal with the application as quickly as is reasonable in the circumstances.

(4) In giving effect to subsection (3), the court must use its best efforts to ensure that —

(a) the proceeding begins within 28 days after the application is lodged; and

(b) the court's final orders are given within 14 days after the end of the proceeding.

(5) Despite subsections (3) and (4), the court must give all parties to the proceeding at least 10 days notice before it begins the proceeding.

(6) The rules of court of the Supreme Court may include provision, not inconsistent with this division, with respect to the practices and procedures of the Court of Disputed Returns.

(7) Without limiting subsection (6), the rules of court may make provision regarding the withdrawal of applications, the consequences of the death of

> applicants and the substitution of applicants in such circumstances."

[60] Section 140 provides that an unsuccessful party to the application may be ordered to pay the reasonable costs of the other parties, that if costs are awarded against the applicant the deposit must be applied towards payment of the costs, and that otherwise the deposit must be returned. The purpose of the deposit then is to provide some security for legal costs which respondents may incur in the successful defence of an application.

[61] There was a dispute about precisely what was said when the appellant's application was filed. The relevant evidence was given by the appellant, Mr Chand (the appellant's solicitor), Mr Polkinghorne (a law student acting as research assistant for the barrister retained by Mr Chand), and Ms McPaul (the registry officer who received the application for filing and the money paid with it). Each swore an affidavit. I will discuss their evidence in a later section of these reasons.

[62] The primary judge made the following findings:

> "[40] ... I am satisfied on the balance of probabilities that what occurred was that some time not long after 2.00pm on 14 April 2009, Mr Polkinghorne, Ms Caltabiano and Mr Chand, the solicitor, went to the civil registry counter at the Supreme Court. Mr Polkinghorne had brought with him an originating application to file in this matter, and a print out of Pt 8 of the Act. Ms Caltabiano brought her cheque book and Mr Chand attended without any particular role except that he worked for the firm of solicitors acting for Ms Caltabiano. The three of them approached the counter when their number was called but Mr Chand stayed in the background.
>
> [41] Ms McPaul was the registry officer on duty at the counter. She took the document for filing and noted that that court heading on the Originating Application included the words 'Court of Disputed Returns'. She went away to seek assistance because she was unfamiliar with the Court of Disputed Returns but could not find any superior officer from whom to seek assistance so she returned to the counter and said that she would take the document. **Mr Polkinghorne knew of the requirement in the *Electoral Act* to pay a $400 deposit but, if he did attempt to communicate that to the registry clerk, then he failed to do so.** Mr Polkinghorne is quietly spoken, he did not have a distinctive copy of the Act such as a pamphlet copy of the Act with him and I am satisfied that **Ms McPaul did not know of the statutory requirement to pay a deposit of $400. Mr Polkinghorne failed to communicate that to her and when Ms McPaul told the parties that the filing fee was $502.50, that amount was paid by Ms Caltabiano. Accordingly the filing fee of $502.50 was**

> **paid when the application was filed but the deposit of $400 was not**.[32]
>
> [42] These findings accord with the evidence of Ms Caltabiano and Mr Chand who were not challenged; and the evidence of Ms McPaul who gave her evidence honestly and forthrightly and made appropriate concessions. She remembered the occasion and I have little doubt that had she specifically had her attention drawn to the relevant provision of the *Electoral Act* or told of the requirement to pay $400, she would recall that and would not have ignored it and instead requested only the filing fee."

[63] The application has stamped on it that a fee of $502.50 was paid on 14 April 2009 when it was filed. It notes also that a deposit of $400 was received on 5 May 2009. That was paid some three weeks after the application was filed and after the expiry of the time limit specified in s 130(3)(a) of the Act.

[64] The registry officer gave the appellant a receipt for her cheque which recorded the receipt of a cheque for $502.50 for:

Payment Particulars	Amount Per Item	Item Total
SUPREME COURT, APPEALS COST FUND; BRISBANE; BS3921/09; CALTABIANO V ELECTORAL COMM. QLD	20.50	20.50
SUPREME COURT, ORIGINATING APPLICATION; BRISBANE; BS3921/09; CALTABIANO V ELECTORAL COMM. QLD	482.00	482.00

[65] The primary judge found that the $502.50 paid by the appellant upon the filing of her originating application comprised $482, which was payable under the *UCPR Fees Regulation* and the *UCPR*, and $20.50, which was payable under the *Appeal Costs Fund Act* 1973 and sch 1, item (a) of the *Appeal Costs Fund Regulation* 1999. The appellant's notice of appeal does not challenge the application of the legislation concerning the smaller fee.

[66] The *UCPR* were made under s 118 of the *Supreme Court of Queensland Act* 1991, which authorises rules of court for the "practices and procedures" of the Supreme Court, the District Court and the Magistrates Courts "or their registries" and for other matters mentioned in sch 1. Schedule 1 includes, in item 2, "Starting civil proceedings in the courts, including, for example, the following— (a) originating process" and, in item 23 (a), "documents filed in the registries".

[67] Rule 3(1) of the *UCPR* provides that, unless the rules otherwise expressly provide, the rules apply to "civil proceedings" in the Supreme Court, the District Court and the Magistrates Courts. Rule 971(1) provides that: "A document may be filed only if any prescribed fee for filing it is paid when the document is given to the registrar."

[68] Rule 971(9) provides, so far as is presently relevant, that: "In this rule— ***relevant fee*** means the fee payable under the [*UCPR Fees Regulation*], schedule 1, item … 1(2)(a) … for filing … — … (b) any application that is an originating process".

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[32] I have emphasised the findings of most significance to the parties' arguments.

[69] Section 120(2) of the *Supreme Court of Queensland Act* 1991 provides that the Governor in Council may make regulations "(a) to prescribe fees and costs for the Supreme Court, District Court or Magistrates Courts (***the courts***); (b) to provide how fees, costs and fines are to be received and dealt with in the courts". The relevant regulations are the *UCPR Fees Regulation*. Section 3 of the *UCPR Fees Regulation* provides:

> **"3 Fees for Supreme Court and District Court**
>
> (1) Schedule 1 applies for the Supreme Court and the District Court and sets out the fees payable for proceedings in the Supreme Court and the District Court."

[70] Item 1(2)(a) of sch 1 of the *UCPR Fees Regulation* stipulates (under the heading "Fees payable in the Supreme Court and the District Court") a fee of $482 for filing "any application" that is "an originating process".

Did the primary judge err in law in holding that the appellant was required to pay a filing fee under the *UCPR Fees Regulation* and the *UCPR*?

[71] The appellant's primary argument before the primary judge, which was repeated in this Court, was that no filing fee was payable. She argued that it followed that her payment of $502.50 should be taken to include payment of the deposit.

[72] The primary judge considered that the argument was based on the erroneous premise that the Court of Disputed Returns is separate from the Supreme Court. The primary judge held[33] that the Court of Disputed Returns is not a separate court but is part of the Supreme Court of Queensland. Her Honour considered that it followed that the legislation which required payment of a fee of $502.50 upon filing any originating process in the Supreme Court required that fee to be paid when filing an originating process in the Supreme Court sitting as the Court of Disputed Returns, unless that was inconsistent with the *Electoral Act*. Her Honour held that there was no such inconsistency.

The arguments

[73] The appellant challenged those conclusions. The appellant contended that the provisions of the *UCPR* requiring payment of filing fees do not apply either because they have no general application in the Court of Disputed Returns or because they are inconsistent with the *Electoral Act*. The appellant argued that the terms of s 134(6) of the *Electoral Act* (under which no rules of court have been made) were inapt to allow the *UCPR* to regulate an application in the Court of Disputed Returns and that s 130 comprehensively stated the requirements for an efficacious application to the Court of Disputed Returns, particularly including what payment was to be made when such an application was filed.

[74] The appellant referred to the absence of provision for a filing fee in the *Electoral Act*, under which the only prescribed fees are payable to the Electoral Commission of Queensland rather than in the Court of Disputed Returns. The appellant argued that the rules and regulations for filing fees applied only to proceedings in the courts mentioned in those provisions (including the Supreme Court) and not to

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33 [2009] QSC 138 at [7], citing *Skyring v Electoral Commission of Queensland* [2002] 1 Qd R 442 at 446 – 447 [13] – [17] per Chesterman J.

proceedings in the Court of Disputed Returns; that the expression "Court of Disputed Returns' in pt 8 of the *Electoral Act* was used to identify not only the jurisdiction to be exercised by the Supreme Court sitting as the Court of Disputed Returns, but also the manner of its exercise, as to which the detailed prescriptions in pt 8 as to the manner of exercise were inconsistent with the general application of the *UCPR*; and that the absence of any specific reference to a filing fee in the *Electoral Act* or in sch 1 of the *UCPR Fees Regulation* indicated that no fee was payable upon filing an application under s 130 of the *Electoral Act*.

[75] The respondents supported the reasoning of the primary judge. The first respondent argued that the filing fees were payable because the proceedings qualified as "proceedings in the Supreme Court", in terms of s 3(1) of the *UCPR Fees Regulation*, and that the prescriptions in pt 8 of the *Electoral Act* concerning procedure are not inconsistent with the general application of the *UCPR*. Both respondents argued that the fact that s 134(6) of the *Electoral Act* empowered the making of specific rules with respect to the practices and procedures of the Court of Disputed Returns did not suggest that provisions in the *UCPR* which applied to all civil proceedings in the Supreme Court were not applicable to an application under the *Electoral Act*. The respondents argued that there was no inconsistency between the rules and regulations imposing a filing fee for an originating process filed in the Supreme Court and the requirements for a deposit in s 130(3)(b) of the *Electoral Act*.

Discussion

[76] Section 130(3)(a) required for an effective application that the appellant "file the application with the Supreme Court registry in Brisbane". The "application" is that which is described in s 128(1), namely "an application to the Court of Disputed Returns" under div 2 of pt 8 of the *Electoral Act*. The "Court of Disputed Returns" is the Supreme Court. That conclusion is required by s 127, which in terms provides that the Supreme Court is the Court of Disputed Returns for the purposes of the *Electoral Act*.

[77] Accordingly, and as Chesterman J held in *Skyring v Electoral Commission of Queensland*,[34] references in the *Electoral Act* to "the Court of Disputed Returns" connote "that the particular jurisdiction of deciding contested elections to the Legislative Assembly is conferred on the Supreme Court …". The question in that case was whether the judge who was appointed to constitute the Court of Disputed Returns sat as a person designated to perform functions described in the *Electoral Act* or as a judge exercising the jurisdiction of the Supreme Court. Mr Skyring contended for the former proposition as part of his argument that the *Vexatious Litigants Act* 1981 did not require him to obtain leave before commencing a proceeding in the Court of Disputed Returns. Chesterman J referred to the different scheme in the earlier *Elections Act* 1915 (which had been held not to make the Supreme Court the Court of Disputed Returns) and to the decision of the High Court in *Sue v Hill*[35] and said that the *Electoral Act* "confers the role of determining disputed returns on the Supreme Court" and that it "does not create any separate tribunal". His Honour concluded that "the Court of Disputed Returns is the Supreme Court exercising a particular jurisdiction", with the result that the

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34 [2002] 1 Qd R 442 at 446 [13].

35 (1999) 199 CLR 462, concerning the similar scheme of the *Commonwealth Electoral Act* 1918 (Cth).

Vexatious Litigants Act "applies to a proceeding in that special jurisdiction of the Supreme Court …".[36]

[78] Similarly, Ambrose J said in *Tanti v Davies (No 2)* [1996] 2 Qd R 591 at 595 that:

> "The Act constitutes the Supreme Court of Queensland as the Court of Disputed Returns. I proceed on the basis that the general practice of the Supreme Court ought be followed except where it is apparent from the terms of the *Electoral Act* that some rule of practice ought not be applied."

[79] For these reasons, I consider that the effect of s 130(3)(a) of the *Electoral Act* is that a person who wishes to dispute an election must file with the Supreme Court registry an application to the Supreme Court exercising its jurisdiction as the Court of Disputed Returns. Such an application is, therefore, an originating process commencing a civil proceeding in the Supreme Court. It follows that the *Supreme Court of Queensland Act* 1991, *UCPR* and *UCPR Fees Regulation* are expressed in terms which are apt to require the payment of the filing fees.

[80] The remaining question under this ground of appeal is whether the *Electoral Act* is inconsistent with that legislation.

[81] The provisions in pt 8 of the *Electoral Act* subsequent to s 130 do not appear to me to suggest any such inconsistency. Those provisions commence with s 131, which requires the registrar of the Supreme Court to give a copy of the application to the candidate who is elected and to the commission (unless the commission filed the application). The next relevant provision, s 133(1), provides that the parties to an application are the persons who filed it and any respondent under that section. Sections 131 and 133(1) operate after, and they assume the due filing of, the application. Those and the subsequent provisions relied upon by the appellant are premised on the existence of proceedings earlier commenced by the filing of an application with the Supreme Court registry. They do not bear upon the practice and procedure applicable to the filing itself. That topic was dealt with in the *Rules of the Supreme Court* in force when s 130(3)(a) was enacted and it is now dealt with in the *UCPR*. As was the case under the repealed rules, the *UCPR* prescribes the requirement for a fee and the formal requirements for filing (the form of the documents, the permissible mode of delivery to the registry, etc). It seems very unlikely that the legislature intended to require documents to be filed with the Supreme Court registry free of any formal requirements, yet that is the effect of the appellant's argument.

[82] It is true that some provisions in pt 8 prescribe procedures for the Supreme Court exercising jurisdiction as the Court of Disputed Returns that differ from those prescribed in the *UCPR*. To that extent the *UCPR* provisions are displaced, but that still leaves significant procedural gaps. I cannot accept that the limited procedural prescription in pt 8 was intended to constitute a comprehensive procedural code.

[83] The appellant's counsel relied particularly upon the contrast which may be drawn between s 134(6) and s 148D. The latter prescribes the procedure on an appeal under s 148A and it includes the conferral upon the Court of Appeal of "all the powers given to it by [the *UCPR*]". The appellant argued for a negative implication that the powers of the Trial Division given by the *UCPR* were not applicable in the

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[36] [2002] 1 Qd R 442 at 447 [17].

absence of a similar provision and in light of the different words of s 134(6). The contrast upon which the appellant relies is, I think, simply a product of the fact that s 148D was inserted in 2001,[37] after the *UCPR* had commenced in 1999.[38] It seems to me to attribute rather too much to this quirk to draw the negative implication for which the appellant argues.

[84] Nor am I able to accept the argument that s 134(6) is inconsistent with the application of the legislation requiring the payment of a filing fee. Section 134(6) empowers the making of Supreme Court rules specifically regulating the practice and procedure of the Supreme Court exercising its jurisdiction as the Court of Disputed Returns, but that does not imply that rules of court which are not inconsistent with the *Electoral Act* and which apply generally to all civil proceedings in the Supreme Court do not apply to the Supreme Court exercising its jurisdiction as the Court of Disputed Returns. Section 134(6) permits but does not require the making of specific rules. As the second respondent argued, the likely legislative intention was that the large gaps left by the *Electoral Act* in the practices and procedures to be applied by the Supreme Court exercising jurisdiction as the Court of Disputed Returns would be filled by rules of court which apply generally in the Supreme Court.

[85] That view is consistent with the extrinsic evidence concerning the legislative purpose. Section 134(6) is in the form of the draft Bill attached to the Electoral and Administrative Review Commission ("EARC") report,[39] which preceded the enactment of the *Electoral Act*. The Report stated:

> "13.50 If the Elections Tribunal is abolished and the Supreme Court is given jurisdiction to hear election petitions, the following advantages would result:
>
> …
>
> (d) fewer details will be required in the new Electoral Act because many of the provisions relating to rules of evidence in the current Elections Act can be omitted from the new Act. **In many instances, the rules of the Supreme Court will apply to court proceedings where they are appropriate**." (I have added the emphasis.)

[86] That informed the EARC recommendation in para 13.51 of the Report that the Supreme Court sitting as the Court of Disputed Returns should replace the former Elections Tribunal.

[87] That the general procedural rules applicable in the Supreme Court apply to applications invoking the exercise of the Court's jurisdiction under the *Electoral Act* also accords with the principle expressed by the High Court in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560:

> "When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted,

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37 On 25 May 2001, by the *Electoral and Other Acts Amendment Act* 2001 (Act No 25 of 2001).

38 On 1 July 1999 under the *Supreme Court of Queensland Act* 1991, s 118B.

39 Electoral and Administrative Review Commission, *Report on the Review of the Elections Act 1983-1991 and Related Matters*, Report No 7 (1991).

> it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. **In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality**." (I have added the emphasis.)

[88] There are neither express words nor a "reasonably plain intendment" excluding the application of those provisions of the *UCPR* which are applicable in their own terms to an application under the *Electoral Act*.

[89] Ultimately the question is whether s 130 of the *Electoral Act* is inconsistent with the legislative requirements for the payment of a filing fee in r 971 of the *UCPR* and s 3 of the *UCPR Fees Regulation*. In my opinion there is no such inconsistency. Section 130 is open to the construction that it is a code which comprehensively states what must be required for an application to have effect for the purposes of div 2 of pt 8 of the *Electoral Act*, but one of those requirements is that a person who wishes to dispute an election must file with the Supreme Court registry an application to the Supreme Court exercising jurisdiction as the Court of Disputed Returns. Section 130, like the other provisions I have mentioned, does not prescribe the procedures which apply for filing applications with the Supreme Court registry. That subject is regulated by the *UCPR* and the *UCPR Fees Regulation* in terms that are apt to encompass the filing of an application under s 130 of the *Electoral Act*.

[90] I conclude that the appellant was required to pay the filing fee prescribed under the *UCPR* and the *UCPR Fees Regulation*.

Was the payment required by s 130(3)(b) of the *Electoral Act* a mandatory requirement of an effective application?

[91] The appellant argued that the trial judge erred in holding that payment of a deposit in accordance with s 130(3)(b) of the *Electoral Act* was a mandatory requirement of an effective application. The primary judge found that due payment of the deposit was a condition of an effective application under the *Electoral Act*. Her Honour observed that s 130(1) "makes that apparent in the clearest possible terms when it says that 'for an application to have effect for the purposes of this division, the requirements of this section must be complied with.' Those requirements include the requirement found in subsection 130(3)(b) that a person disputing the election must, when filing the application, deposit with the court $400, or if a greater amount is prescribed, that amount."[40] In support of that conclusion the primary judge referred to authority upon the construction of the Act,[41] and other legislation

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40 [2009] QSC 138 at [45].

41 [2009] QSC 138 at [48] – [49], referring to *Tanti v Davies (No 2)* [1996] 2 Qd R 591 at 595 – 596 per Ambrose J.

concerned with electoral challenges,[42] and to the underlying statutory policy which her Honour discerned in the EARC Report discussed earlier in these reasons.[43]

[92] The appellant's senior counsel argued that the requirement for the deposit was "directory" rather than "mandatory". Distinctions of that kind offer no assistance in the Court's task of construing this statute: the Court must give effect to the statutory purpose,[44] which in this case is unambiguously plain. The application was filed in the afternoon of the last day of the period allowed under s 130(3)(a) for an effective application. If the appellant did not pay a deposit when she filed the application then the only payment capable of constituting the deposit was the payment she made some three weeks after the expiry of the period allowed by s 130(3)(a). On no arguable construction of the *Electoral Act* can it be said that the appellant made that payment "when filing the application". In those circumstances s 130(1) would unequivocally deprive the application of effect for the purposes of div 2 of pt 8 of the *Electoral Act*.

Did the trial judge err in law in finding that the appellant had not made the payment required by s 130(3)(b) of the *Electoral Act*?

[93] The remaining question is whether the primary judge erred in law in holding that the appellant had not paid the deposit in accordance with s 130(3)(b) of the *Electoral Act*.

[94] The appellant advanced two arguments in support of her contention that the trial judge erred in law in finding that the appellant had not deposited the $400 required by s 130(3)(b) of the *Electoral Act*. She argued that the appellant's payment of $502.50 should be treated as having included the deposit either because the filing fee was not payable or because that result was in any event required by the facts. The first argument fails as a result of my finding that the primary judge was correct in holding that the filing fee was payable. The issue is whether the facts in any event require the conclusion that the appellant paid the deposit.

[95] In holding that the appellant had not paid the deposit the primary judge said:

> "[64] As the deposit was not paid and the intention of the party paying the money was not conveyed to the member of the Registry staff receiving that money the general rule stated by Cussen J in *Beattie v Vine* [sic] [1925] VLR 363 at 375 that 'where money is paid it is to be applied according to the will of the payer, and not of the receiver' has no application. The will of the payer must be made known to the receiver otherwise the receiver is free to apply the payment to any debt. In this case the only debt was the payment of the filing fee and the monies were appropriated by the receiver of the monies to that debt. The rule that applies in that

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42 [2009] QSC 138 at [51] – [59], referring to *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507 – 509 [9] – [13]; *Hansen v Australian Electoral Commission* [2000] FCA 606 at [11] per Kenny J; *Featherston v Tully* (2002) 83 SASR 302 particularly at 316 [54] per Bleby J with whom Mullighan and Williams JJ agreed; *Smith v Australian Electoral Commission* (2008) 104 ALD 395; *Williams v Mayor of Tenby* (1879) 5 CPD 135; *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31. The primary judge distinguished *Re Nicklin Election Petition; Turner v King* [1993] 1 Qd R 513 decided under the *Elections Act* 1983, which did not contain a provision analogous to s 130(1) of the *Electoral Act*.

43 [2009] QSC 138 at [60] – [61].

44 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 – 391 [93] per McHugh, Gummow, Kirby and Hayne JJ.

> situation was stated by Lord Macnaghten in *Cory Brothers & Co v Owners of the Turkish Steamship 'Mecca'* [1897] AC 286 at 293:
>
> > 'When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor.'
>
> [65] An undisclosed intention in the mind of the person making the payment is not sufficient to support an appropriation: see *Leeson v Leeson* [1936] 2 KB 156 at 162-163 per Green LJ quoted with approval by the Full Court of the Federal Court in *Knysh v Corrales Pty Ltd* (1989) 15 ACLR 629 at 633."

[96] The appellant challenged that reasoning. Her counsel argued that the evidence demanded the conclusion that the appellant's payment included the $400 deposit.

[97] The respondents argued that the primary judge's reasoning was correct. They also argued that the finding by the trial judge that "the filing fee of $502.50 was paid when the application was filed but the deposit of $400 was not" was a finding of fact which is unassailable because the appeal to this Court is restricted by s 148A to questions of law.

Discussion

[98] The trial judge's findings about what was said and done when the appellant filed her application were findings of fact. The finding by the trial judge that "the filing fee of $502.50 was paid when the application was filed but the deposit of $400 was not" is in a different category. It was a conclusion which involved the application of a legal standard to findings of fact about what was said and done when the appellant filed her application. Findings of that kind involve a question of law, or, at least, they may do so.[45]

[99] The critical findings of fact were that, "Ms McPaul did not know of the statutory requirement to pay a deposit of $400. Mr Polkinghorne failed to communicate that to her and when Ms McPaul told the parties that the filing fee was $502.50, that amount was paid by Ms Caltabiano."

[100] The appellant argued that it was not clear whether the primary judge's reference there to "filing fee" amounted to a finding that those words were spoken or whether it referred merely to Ms McPaul's understanding. The appellant contended that Ms McPaul's affidavit evidence on that topic demonstrates that she did not recall whether or not she had referred to a "filing fee". The second respondent contended that the primary judge found that Ms McPaul described the payment either as a "filing fee" or a "fee".

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[45] *Queensland v Springfield Land Corporation Pty Ltd (No 2)* (2009) 169 LGERA 284 at 297-298 [27]-[28] per McMurdo J, citing authority including *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7 per Mason J; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450-451 [24]-[26] per Gleeson CJ, Gummow and Callinan JJ.

[101] Mr Chand said that the appellant wrote out a cheque "for the amount nominated by the registry officer". Mr Polkinghorne said in a paragraph of his affidavit that he recalled that the registry officer looked at the application and said, "that will be $502.50". In her affidavit in response Ms McPaul responded to that paragraph but she did not comment upon the part I have quoted. Ms McPaul also deposed that she recalled "informing them of the amount of $502.50", but that she was "unable to recall whether I told the parties that there was a 'filing fee' or simply a 'fee' payable on filing this application": in context, that appears to mean simply that she had no recollection of either. The appellant said in her affidavit that the registry officer "told us a figure".

[102] In cross-examination Ms McPaul described what happened when the appellant and Mr Polkinghorne attended at her counter in the registry. She then recounted the following conversation with the appellant (as being her best recollection of the words spoken, which she could not give "word for word"):

> "I then said that's when the [appellant] sort of came a little bit more into my window, I guess you could say, and I told her the filing fee. I believe she asked me how much and I said the fee of $502.50."

[103] Consistently with her affidavit, Ms McPaul did not say that she used the phrase "filing fee". It is also far from being clear that she intended to convey that she described the payment "a fee". In any case the primary judge made no finding that she described the payment as "a fee". It was not put to any of the appellant's witnesses that Ms McPaul had used the phrase "filing fee" or the word "fee".

[104] In cross-examination of Mr Polkinghorne, counsel for the second respondent quoted Mr Polkinghorne's affidavit evidence that the registry officer said "that will be $502.50" and suggested that those words were not said in response to any reference by Mr Polkinghorne to the deposit required by the *Electoral Act*, but counsel did not put to Mr Polkinghorne that he was wrong in his evidence that Ms McPaul said only "that will be $502.50". Nor was it put to the appellant that she was wrong in her affidavit evidence that the registry officer "told us a figure". Mr Chand was also not required for cross-examination.

[105] There was therefore no basis in the evidence for a finding that Ms McPaul communicated to the appellant or her agents that the money which Ms McPaul asked the appellant to pay upon filing the application was a "filing fee" or "a fee". It follows that any such finding would amount to an error of law.[46] Accordingly, the finding must be treated as being that the appellant asked Ms McPaul what amount was payable and in response Ms McPaul nominated the figure of $502.50.

[106] The facts upon which the issue depends may therefore be summarised in these terms:[47] the appellant knew of the requirement in the *Electoral Act* to pay a $400 deposit and intended to include that deposit in her payment, but she did not know what amount, if any, was payable for filing fees; the appellant failed to express her intention to pay the deposit to the registry officer; the registry officer knew that the amount payable for filing fees was $502.50 but she did not know of the requirement for the deposit; in response to the appellant asking what amount was payable the registry officer informed the appellant that the amount was $502.50.

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46 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ.

47 In this summary I attribute to the appellant not only her knowledge, intention and conduct but also that of Mr Polkinghorne. He acted throughout as her agent and I understood the parties' submissions to assume that this was appropriate.

The legal issues

[107] The rules concerning the appropriation of payments to discharge debts which are discussed in the authorities cited by the primary judge have been applied on countless occasions. Latham CJ gave the following pithy statement of the rules:[48]

> "The debtor has the right when he makes a payment to appropriate the money to any of the debts owing to his creditor as he pleases, and, if the creditor takes the money, he is bound to recognize this appropriation. If the debtor does not make any appropriation when he makes the payment, the creditor is then entitled to make an appropriation, and he may do this at any time up to 'the very last moment' …".

[108] An undisclosed, subjective intention to appropriate is not itself effective, but in the absence of any express statement an inference may be drawn from the circumstances that a debtor appropriates a payment to a particular debt. The principle was explained by Lush J in *Parker v Guinness*:[49]

> "It is clear, I think that the debtor need not state in express terms that he appropriates the payment he makes in any particular way. What is to be considered is this. Is the true inference to be drawn from all the circumstances of the case that the debtor paid the moneys generally on account, leaving the creditor to apply them as he thought fit, or is the true inference that he paid them on account of special portions of the debt for the purpose and with a view to wipe these out of the account? His undisclosed intention so to do would, of course, not benefit him. It is what he did in fact, and not what he meant to do that is to be regarded. But if the inference to be drawn from the circumstances is that the payment was in fact appropriated by the debtor at the time of payment, the fact that he made no express statement at the time is immaterial. Now an appropriation by the debtor may be inferred from a variety of circumstances. Each case must, in my opinion, be considered on its own peculiar facts. The fact that accounts are rendered by the debtor before payment in a particular manner may be enough if the payment which is afterwards made is to be regarded as made in pursuance of the accounts that have been so rendered, and the nature of the transaction entered into between the creditor and debtor may be such as to show that the parties must have contemplated that the payments made by the debtor on account were appropriated in a particular way by the debtor. (See *City Discount Co v McLean*, LR 9 CP 692) The conduct of the parties coupled with the nature of the transaction, may be sufficient to lead to the inference I have mentioned. (See *Newmarch v Clay* 14 East, 239)."

[109] In *Knysh v Corrales Pty Ltd*, the Full Court of the Federal Court (Morling, Pincus and Lee JJ) referred to that decision and other authorities and held that:[50]

> "Where a debtor makes a payment to his creditor, and the inference to be drawn from the circumstances is that the payment is, in fact,

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48 *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 370 – 371. See also *Airservices Australia v Ferrier* (1996) 185 CLR 483 at 494 – 495 per Brennan CJ.

49 *Parker v Guinness* (1910) 27 TLR 129 at 130 – 131.

50 (1989) 15 ACLR 629 at 633 – 635.

appropriated by the debtor at the time of payment, the fact that he makes no express statement on the subject at the time is immaterial. An appropriation by the debtor may be inferred from a variety of circumstances: *Parker v Guinness* (1910) 27 TLR 129. In *Leeson v Leeson* [1936] 2 KB 156, Greene LJ considered the situation where the debtor does not give a specific indication of his intention to appropriate a payment made by him to a particular debt. He said, at 162-3:

> 'When, however, he does not notify the creditor of his intention, and when the circumstances are such that the creditor receives the payment merely in satisfaction of the debts and the payment is not more appropriate to the payment of the one debt than to that of the other the creditor is entitled to make the appropriation. When it is said that there need not be an express appropriation of a payment, but that the appropriation can be inferred, that does not mean that appropriation of a payment can be inferred from some undisclosed intention in the mind of the debtor. It is to be inferred from the circumstances of the case as known to both parties. Any other view might lead to injustice, as the creditor's right to appropriate a payment would be defeated. When the matter is examined upon principle it will be found that an undisclosed intention in the mind of the debtor is not sufficient to support an appropriation. If authority is needed for that proposition it can be found in the judgment of Lush J in *Parker v Guinness* 27 TLR 129 at 130, where he said: "What is to be considered is this. Is the true inference to be drawn from all the circumstances of the case that the debtor paid the moneys generally on account, leaving the creditor to apply them as he thought fit, or is the true inference that he paid them on account of special portions of the debt for the purpose and with a view to wipe these out of the account? His undisclosed intention so to do would, of course, not benefit him. It is what he did in fact, and not what he meant to do that is to be regarded." A debtor's undisclosed intention to appropriate a payment to one of two debts owed by him to a creditor cannot benefit him.'

See also *R v Miskin Lower, Glamorganshire Justices; Ex parte Young* [1953] 1 QB 533.

…

It is not in doubt that it was obligatory on the receiver to communicate to Corrales, either expressly or by implication, his intention to appropriate his payments to the judgment debt for which he was responsible: *Leeson, supra*; *Stepney Corporation v Osofsky* [1937] 3 All ER 289 and … *Chitty on Contracts*, 25th ed (1983), p 793. In the light of the correspondence between the

> parties, the appropriation in the present case fell a little short of being express. It was certainly implied from all the circumstances in which the payments were made."

[110] Similar statements may be found in other cases.[51] In *R v Miskin Lower; Ex parte Young*,[52] (which was a case in which there was no express appropriation) Pearson J inferred an appropriation from circumstances which included that the debtor "would be likely to wish these payments to be utilized in discharge of the original debt so that he would secure his release from the committal order".

[111] I understand the law to be that where the debtor intends to appropriate a payment to a particular account but there is no express appropriation communicated to the creditor, an appropriation may be inferred from circumstances of the case which reveal that the debtor does not intend to pay the money generally on account, leaving the creditor to apply the money as the creditor thinks fit, but that the debtor intends to pay the money to the particular account. One circumstance from which an appropriation may be inferred is that the nature of the transaction between the creditor and the debtor would demonstrate to a reasonable person in the creditor's position that the debtor must have intended that appropriation. All of the circumstances which bear on the question must of course be taken into account.

[112] Should it be inferred from the circumstances of this case that the appellant appropriated $400 of the payment in fulfilment of the requirement in s 130(3)(b) of the *Electoral Act*?

[113] The respondents argued that there was no room for such an inference. Their first argument was that such an inference was excluded by the primary judge's finding that "the filing fee of $502.50 was paid when the application was filed but the deposit of $400 was not". As I mentioned earlier, that was not a finding of fact but a conclusion arrived at by application of the law to the facts. The respondents then argued that the other findings and the evidence demonstrated that on the facts the appellant had not communicated an appropriation of part of the payment to the deposit and the registry officer had validly appropriated the whole payment to the filing fees.

[114] I would reject that argument. In my opinion the uncontentious facts show that a reasonable person in the payee's position would have appreciated that the appellant must have intended to appropriate $400 to the deposit she subjectively intended to make in order to fulfil the terms of s 130(3)(b) of the *Electoral Act*.

[115] The appellant's intention to pay the amount required for the commencement of an effective proceeding in the Court of Disputed Returns by filing the application was manifest even though it was not expressly stated; it is not to be supposed that the appellant intended to engage in the solemn farce of paying $500 to file an ineffective application. The appellant's request to be told how much was payable implied that (as was the case) the appellant did not know but expected that (as was objectively likely) the court officer did know the amount of the total payment required to file an effective application. The appellant paid the amount which the

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51 See *Karam v ANZ Banking Group Limited* [2003] NSWSC 866 at [19] per Santow J, citing *Re Walsh; Ex parte Deputy Commissioner of Taxation (NSW)* (1982) 42 ALR 727, *Knysh v Corrales Pty Ltd* (1989) 15 ACLR 629, and *Farrow Finance Company Ltd (in liq) v ANZ Executors and Trustee Company Ltd* [1998] 1 VR 50.

52 [1953] 1 QB 533 at 541.

appropriate court officer nominated as the total payment required, and the court officer did not communicate her intention to allocate the whole of that payment to "filing fees" or to "fees". That court officer was the appropriate officer to receive payment both of the filing fees and of the deposit. The appellant's manifest intention of commencing the proceedings could be achieved only by applying $400 of the payment to the deposit. On that footing, the appellant was permitted to file her application without paying $400 of the filing fee until some three weeks later (contrary to *UCPR* r 971(1)), but that irregularity did not invalidate the application.[53]

[116] The authorities I have discussed directly concerned the principles governing the appropriation of payments to discharge debts. We are not here directly concerned with a case of that kind. When the appellant asked the registry officer how much she had to pay the appellant was not indebted for filing fees or for the deposit. Rather she intended to make a payment in order to comply with the statutory requirements necessary to commence litigation in the Supreme Court exercising its jurisdiction as the Court of Disputed Returns. Cussen J's dictum in *Beattie v Fine* that "where money is paid it is to be applied according to the will of the payer, and not of the receiver"[54] was expressed as a principle of general application, and I would accept that principles which are analogous to those concerning the appropriation of payments of debts apply in this situation; but the strong public interest in facilitating access to justice suggests that the courts should readily infer that appropriation which will avoid invalidity of proceedings where, as here, there is no indication that the intending litigant intended to appropriate the payment in a different way. In my opinion, where moneys are paid in order to commence a proceeding in a court, and only a particular appropriation will lead to the validity of the proceeding, that is an objective circumstance favouring the inference that the moneys were not paid generally "on account, leaving the [payee] to apply them as [the payee] thought fit".[55]

[117] I consider that, in these very unusual circumstances, the inference must be drawn that the appellant appropriated $400 of her payment to fulfil the requirement in s 130(3)(b) of the *Electoral Act*. I respectfully conclude that the primary judge erred in law in failing to draw that inference. Applying the principles discussed earlier, there was then no scope for any subsequent appropriation by the payee.

[118] For these reasons I conclude that the appellant did "when filing the application, deposit with the court – (i) $400" in accordance with s 130(3)(b) of the *Electoral Act*. That being so her originating application should not have been struck out on the ground of non-compliance with that provision.

Orders

[119] I consider that the appropriate orders are:

1. Allow the appeal, set aside the orders made by the primary judge, and instead make the following orders.

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53 See UCPR, r 371(1). The legislation imposing filing fees does not contain any analogue to s 130(3)(a) of the *Electoral Act*.

54 *Beattie v Fine* [1925] VLR 363 at 375.

55 *Parker v Guinness* (1910) 27 TLR 129 at 130, per Lush J.

2. Dismiss the application filed by the first respondent on 1 May 2009 and order the first respondent to pay the appellant's costs of and incidental to that application to be assessed.
3. Dismiss the application filed by the second respondent on 5 May 2009 and order the second respondent to pay the appellant's costs of and incidental to that application.
4. Order that the respondents pay the appellant's costs of and incidental to the appeal.

[120] The second respondent foreshadowed an application for a certificate under s 15 of the *Appeal Costs Fund Act* 1973. I would direct that any submissions relating to that application be made in writing within 10 days after the delivery of judgment.

FRYBERG J:

[121] The *Electoral Act* 1992 requires the determination of this appeal "as quickly as is reasonable in the circumstances".[56] I shall deal with each of the grounds of appeal in turn.

"4. The primary judge erred in law in holding that the payment of a deposit in accordance with section 130(3)(b) *Electoral Act* 1992 (Qld) was a mandatory requirement of an effective application under the *Electoral Act* 1992 (Qld)."

[122] I agree that this ground fails for the reasons expressed by Muir JA.

"3. The primary judge erred in law in holding that the Appellant was required to pay a filing fee under the *Uniform Civil Procedure (Fees) Regulation* 1999 (Qld) and the *Uniform Civil Procedure Rules* 1999 (Qld) in order to file her application under the *Electoral Act* 1992 (Qld) with the Court of Disputed Returns."

[123] I agree with Muir JA's summation of the matters capable of supporting the appellant's submission on this ground.[57] Those matters lend a good deal of support to the submission. I am however persuaded that they are outweighed by the countervailing considerations referred to by both of my colleagues. In particular, I am influenced by the passage in the report of the Electoral and Administrative Review Commission quoted by Fraser JA.[58] The draft bill annexed to that report is materially indistinguishable from the *Electoral Act* 1992.

[124] For the reasons expressed by my colleagues, this ground fails.

"5. The primary judge erred in law in holding that the appellant had not paid the deposit in accordance with section 130(3)(b) *Electoral Act* 1992 (Qld)."

[125] The appellant paid the court more than the necessary $400 when her application was filed. The question is whether she deposited $400. My colleagues have recounted the relevant facts in their reasons for judgment. In the Court of Disputed Returns, Atkinson J found:

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56 Section 148D(2).
57 Paragraph [17].
58 Paragraph [85].

> "I am satisfied that Ms McPaul did not know of the statutory requirement to pay a deposit of $400. Mr Polkinghorne failed to communicate that to her and when Ms McPaul told the parties that the filing fee was $502.50, that amount was paid by Ms Caltabiano."[59]

In my judgment that does not constitute a finding that Ms McPaul used the words "filing fee". Ms McPaul had deposed that she was "unable to recall whether I told the parties that there was a 'filing fee' or simply 'a fee payable' on filing the application". To me it is clear that her Honour did not make a finding as between the two expressions.

[126] However she did accept the evidence of Ms McPaul. With great respect, I cannot agree that Ms McPaul's evidence can be construed to mean that she was uncertain whether she used either of the two expressions. The inclusion of "simply" in the affidavit indicates to my mind a firm deposition that it was one or the other. It is not open to this court in disposing of an appeal limited to questions of law to find otherwise.

[127] That is a factor in the respondent's favour, but it is by no means a conclusive one. It is true that in a strict legal sense, "fee" is to be contrasted with "deposit". However there is no reason to think that Ms McPaul was using "fee" in its legal sense. Nor is there any reason why those to whom she spoke should have so understood it. That being so, its use is not in my judgment a circumstance which carries great weight in the assessment of whether the appellant appropriated the money paid by her as the required deposit.

[128] There was no evidence that the appellant or anyone on her behalf expressly appropriated the payment or any part of it as a deposit, and it was not suggested that any such finding ought to have been made. Mr Polkinghorne gave evidence that he said words to the effect, "… under the Act that when filing the application, deposit with the court $400 or if a greater amount is prescribed that amount" *[sic]* to the clerk in the registry. If that evidence had been accepted it may well have constituted a communication sufficient to support an implied appropriation. However Atkinson J found that if Mr Polkinghorne did attempt to communicate that to the clerk, he failed to do so. That finding cannot now be challenged.

[129] Her Honour then held, "An undisclosed intention in the mind of the person making the payment is not sufficient to support an appropriation."[60] That was undoubtedly correct. Her Honour also referred to and apparently applied a dictum of Cussen J: "The will of the payer must be made known to the receiver, otherwise the receiver is free to apply the payment to any debt."[61] In this court the appellant submitted for the first time that communication of the appropriation was not essential if an appropriation could be inferred objectively from all of the circumstances.

[130] In my judgment that submission is correct. It gains support from the authorities, both old[62] and more recent.[63] But the proposition is not open ended. The

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59 *Caltabiano v Electoral Commission of Queensland (No 2)* [2009] QSC 138 at [41].

60 Citing *Leeson v Leeson* [1936] 2 KB 156 at 162-163 and *Knysh & Anor v Corrales Pty Ltd* (1989) 15 ACLR 629 at 633.

61 *Beattie v Fine* [1925] VLR 363 at 375.

62 *Parker v Guinness* (1910) 27 TLR 129.

63 *Knysh v Corrales Pty Ltd* (1989) 15 ACLR 629.

authorities cited to us were all cases where the payee had either received communications which implied an appropriation or (as in *Knysh*) had formed a correct belief as to the intention of the payer from the circumstances notwithstanding the absence of any express or implied communication of that intention.

[131] If we are to uphold this appeal, we must develop the law of appropriation one step further. We must hold that a subjective intention to appropriate to a particular account by the payer in circumstances which objectively bespeak such an appropriation may be sufficient notwithstanding the complete ignorance of the payee of that intention.

[132] It is important that the position of the payee be recognised. His or her legal rights depend upon whether there has been an appropriation. Only if there has been no appropriation by the payer does the payee's right to appropriate arise. In the present case the payee's knowledge has an added importance. If $400 was appropriated as a deposit it had to be held and applied pursuant to the *Court Funds Act* 1973 and the *Court Funds Regulation* 1999.[64] If it was not so appropriated, it was open to Ms McPaul to appropriate it as a filing fee, when, presumably, it would be paid into consolidated revenue.

[133] In my judgment, in the absence of an express or implied communication of an appropriation, it can still be held from the surrounding circumstances that a payer has made an appropriation, but only if those circumstances include either a belief in such an appropriation on the part of the payee or circumstances where a reasonable person in the payee's position would have had such a belief.

[134] I agree with Muir JA that it was within the ambit of Ms McPaul's duties to ascertain and inform members of the public commencing proceedings in the Registry of the payments necessary to give rise to an effectual application. Had she known of the requirement for a deposit and the consequences of its non-payment, I have no doubt that she would have assumed that the appellant intended to pay the deposit. Any reasonable person in that position would have formed such a belief. No other conclusion is open on the evidence. Such a conclusion is implicit in the reasons for judgment of my colleagues as I understand them.

[135] For these reasons there was in my judgment an effective appropriation by the appellant of the money paid by her. The appeal succeeds on a ground not raised at first instance.

[136] I agree with the orders proposed by Fraser JA.

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64 *Uniform Civil Procedure Rules*, r 561(3).