SUPREME COURT OF QUEENSLAND

CITATION:	*Chiropractic Board of Australia v Jamieson* [2013] QSC 77
PARTIES:	**CHIROPRACTIC BOARD OF AUSTRLIA** (applicant) v **JOHN WILLIAM JAMIESON** (respondent)
FILE NO/S:	CA 4593 of 2010
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	26 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	No oral hearing
JUDGE:	Jackson J
ORDERS:	**The order of the court is that:** **1. it is declared that the decision of the costs assessor dated 3 December 2012 be set aside or varied by reducing it by the amount of $5,000.00;** **2. it is declared that the order of the registrar dated 18 December 2012 be set aside or varied by reducing it by the amount of $5,000.00; and** **3. the parties have leave to make written submissions no longer than one page in length as to the costs of the costs assessment by forwarding them by email to associate.jacksonj@courts.qld.gov.au within 7 days.**
CATCHWORDS:	PROCEDURE – COSTS – RECOVERY OF COSTS – Where the applicant applies for the review of a costs assessor's certificate – Where the applicant challenges the costs assessor's decision to assess the defendant's lawyer's fees which are not owing or liable – Where the applicant challenges the costs assessor's decision to allow the costs of travelling and parking, printing and copying, telephone, postage and petties, and transcript fees – Where the respondent is self-represented – whether fees that are not owing or liable and self represented disbursements are costs Words and Phrases – Costs *Chiropractors Regulation Act* 2001 (Qld), s 121 *Civil Proceedings Act* 2011 (Qld), s 15

Justices Act 1886 (Qld), s 158(1)
Justices Regulation 2004 (Qld), pt 3 of sch 2
Supreme Court of Queensland Act 1995 (Qld), s 221
Uniform Civil Procedure Rules 1999 (Qld), r 740, r 742

Cachia v Hanes [1994] HCA 14; (1994) 179 CLR 403, considered
Cachia v Isaacs (unreported, BC8902724, NSW Court of Appeal, 23 March 1989), cited
Freitag & Anor v Bruderle & Anor [2012] QSC 207, not followed
Jamieson v Chiropractic Board of Australia [2011] QCA 56, cited
Mbuzi v Favell [2011] FCA 1078, cited
Merrin v The Commissioner of Police [2012] QCA 181, considered
Saldanha v McAdam [2007] WASC 297, cited
Saldanha v McAdam [2007] WASC 297 (S), cited
The Commissioner of Police v Merrin [2002] QCA 480, cited
Visscher v Teekay Shipping (Aust) Pty Ltd (No 3) [2012] FCA 212, cited
Von Reisner v Commonwealth of Australia (No 2) [2009] FCAFC 192; (2009) 262 ALR 430, cited
Worchild v Petersen [2008] QCA 26, considered

COUNSEL: No counsel

SOLICITORS: Rodgers, Barnes & Green for the applicant
The respondent on his own behalf

[1] **JACKSON J**: Chiropractic Board of Australia ("CBOA") applies under *UCPR* 742 for review of the costs assessor's certificate of the costs of the respondent ("Jamieson") of the application for leave to appeal and appeal to the Court of Appeal in Appeal No. 4593 of 2010.

[2] On 29 March 2011, Jamieson's appeal to the Court of Appeal was allowed with costs. The order for costs was made under the now repealed s 221 of the *Supreme Court of Queensland Act* 1995 (Qld) and the *UCPR*. Jamieson subsequently served a costs statement. CBOA objected to items in the costs statement. A costs assessor was appointed but there was delay and the original costs assessor was replaced.

[3] Eventually, the replacement costs assessor's certificate dated 3 December 2012 was filed. A registrar's order under *UCPR* 740 was made on 18 December 2012 that CBOA pay Jamieson's costs pursuant to the order of the Court of Appeal in the amount of $15,562.20. The costs assessor's written reasons were filed on 9 January 2013. CBOA applied for review on 22 January 2013.

[4] The background is that Jamieson works with animals. CBOA's predecessor in Queensland, the Chiropractors' Board of Queensland, proceeded against him by way of complaint and summons in the Magistrate's Court of Queensland on charges of contravention of s 121 of the *Chiropractors Regulation Act* 2001 (Qld) for using

the words "Chiropractor", "Chiropractic" and "Chiro" whilst not being a registrant under the Act. Jamieson was found not guilty of all charges.

[5] On the same day that the charges were dismissed the complainant posted a statement on its website stating that "John Jamieson was today found guilty of breaching the law by using the restricted title of 'Chiropractor' in his animal healing practice".

[6] On 3 December 2009, which was over a year later, Jamieson filed an application for an extension of time to start a proceeding claiming damages for defamation against the complainant.

[7] On 9 April 2010, the District Court of Queensland at Maroochydore dismissed the application.

[8] As previously mentioned, on 29 March 2011, Jamieson was successful on his application to the Court of Appeal for leave to appeal from that decision and on the appeal itself. The reasons of the Court of Appeal are contained in *Jamieson v Chiropractic Board of Australia*[1]. Order 2 in that matter allowed the appeal with costs.

[9] CBOA is the successor to the rights and obligations of the Chiropractors' Board of Queensland.

[10] The certified amount of $15,562.20 comprises $12,537.20 disbursements and $3,025 assessor's fees which the assessor decided CBOA ought to pay.

[11] A schedule of costs attached to the certificate identified the relevant items by number. They included an item for solicitor's costs described as:

> "solicitor attendance fees, hearing, Mr Paul Donnelly, Donnelly Law NSW $1,000".

[12] A second item for solicitor's costs included in the amounts allowed was:

> "Donnelly Lawyers Client Agreement $5,000".

[13] The costs assessor's written reasons described the solicitor's "costs" allowed as being in the sum of $6,000, which is the addition of the two items mentioned above. In fact, Jamieson paid Donnelly Lawyers $1,000. The item of $5,000 has not been paid.

[14] Not only that, Jamieson says he has no liability to pay the item of $5,000 to Donnelly Lawyers. He says he has no liability beyond his agreement to pay $1,000 in respect of Donnelly Lawyer's attendance at the hearing of the Court of Appeal, which he has paid. CBOA wishes to rely upon Jamieson's statement, as evidence that the amount of $5,000 in the assessment should not be allowed.

[15] In an extraordinary turn of events, on 22 August 2012 solicitors acting for the trustee in bankruptcy of Paul Joseph Donnelly sent an email to the solicitor for CBOA, referring to earlier correspondence in which the trustee appears to have

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1 [2011] QCA 56.

claimed an equitable lien over any sum due from CBOA to Jamieson on account of the order for costs.

[16] Just how early that correspondence started is not clear. However, it seems that on 26 May 2011 Donnelly Lawyers had sent a memorandum of costs and disbursements to CBOA's lawyers, claiming legal costs, before GST, of $29,282.70 and disbursements of $330. What makes that extraordinary is that Jamieson appears to have known nothing about it, and no reference was made to the matter by the lawyers acting for CBOA before the costs assessor made his determination.

[17] CBOA's notice of objection to Jamieson's costs statement said of the item for $5,000 for Donnelly Lawyers, that "insufficient information is contained in this item to know whether it is a proper claim for standard costs in part or in whole or not."

[18] CBOA's lawyers did not raise that Donnelly's trustee in bankruptcy was making a claim inconsistent with the item in the costs statement for $5,000 for Donnelly Lawyers (because it was greater). Perhaps, they preferred to let sleeping dogs lie.

[19] However that may have been, CBOA now seeks to rely upon Jamieson's statement that the only amount he agreed to pay Donnelly Lawyers was $1,000, as being further evidence which should be admitted for the purpose of the review, so as to disallow the amount of $5,000 which was allowed by the costs assessor as part of the sum of $6,000 for solicitor's fees.

[20] I am inclined to permit them to do so, because until informed by Jamieson that he had agreed to pay and paid only $1,000, they did not have a basis for challenging the amount of $5,000 other than as set out in the notice of objection that insufficient material had been supplied in support of the item. Accordingly, I direct that the court receive the affidavit of Dan Templeton filed on 22 January 2013 on the hearing of the application for review[2]. That has the consequence of reducing the amount of the assessed costs by $5,000.

[21] The second subject of challenge by CBOA, is a group of expenses described as follows:

Travelling and parking expenses	$572.05
Printing and copying expenses	$1,079.50
Telephone, postage and petties	$676.65
Transcript	$209.00

[22] CBOA's challenge is based on the ground of their objection to the certificate that these are "out of pocket expenses of a self-represented litigant which should be disallowed". In pressing its contention, CBOA relies on *Freitag & Anor v Bruderle & Anor*[3]. In that case, reference was made to *Merrin v The Commissioner of Police*[4] (*"Merrin No 2"*).

[23] *Merrin No 2* was concerned with an award of costs under s 158(1) of the *Justices Act* 1886 (Qld). The relevant costs were identified under a scale of costs prescribed

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2 *UCPR* 742(5)(a).
3 [2012] QSC 207.
4 [2012] QCA 181.

under a regulation contained in pt 3 of sch 2 of the *Justices Regulation* 2004 (Qld). Item 5 of that schedule provided that "disbursements other than to witnesses for attending court, fees and other fees and payments (other than allowances to witnesses to attend proceeding) including allowances to interpreters, and travelling, and accommodation and other expenses of a lawyer acting as advocate, may be allowed to the extent that they have been reasonably incurred and are paid or payable."

[24] In *Merrin No 2*, the particular costs in question were expenses incurred by the applicants in travelling so that they might appear at the trial and at pre-trial mentions or hearings. The Court of Appeal upheld the decisions of the courts below refusing to award those items as disbursements, applying *Cachia v Hanes*[5] and *Worchild v Petersen*[6]. To the extent of any inconsistency with those cases, the Court of Appeal did not follow *The Commissioner of Police v Merrin*[7] (*"Merrin No 1"*). The item described as travelling and parking expenses in the current proceeding could be within the ratio of the decision in *Merrin No 2*, depending on the facts.

[25] In his written reasons, the costs assessor referred to *Cachia* and also to the decision in *Cachia v Isaacs*[8]. The costs assessor disagreed with CBOA's submission that no fees may be claimed, including payments to an agent for travelling and attending the court to file documents, holding:

> "If an expense is actually incurred, and it was necessary or proper for the attainment of justice or for enforcing or defending the rights of the parties whose costs are being assessed, then I submit that it should be allowed on assessment".

[26] Regrettably, perhaps, as a general statement that is not the law. Needless to say, a litigant who is self-represented must incur the travelling and parking expenses of attending court to attend to the prosecution or defence of the proceeding involved, but *Merrin No 2* denies the recoverability of those expenses as allowable costs on the footing that *Cachia* and *Worchild* require that outcome, at least in relation to an item of expense of the same kind as considered in *Merrin No 2*.

[27] There is nothing in the circumstance of the present case in terms of the statutory basis for the award of costs which, in my view, would distinguish the reasoning in *Merrin No 2*. Accordingly, I am bound by that decision and it is neither necessary nor appropriate to make any further comment about it.

[28] However, the further general contention that other actually, necessarily and reasonably incurred out of pocket expenses of a self-represented litigant should be disallowed is counterintuitive. Take the costs of a transcript, both generally and in the particular circumstances of this case. Whether or not a litigant is self-represented, a transcript may need to be obtained for the accurate conduct of a proceeding. In the event that a transcript of a proceeding before a State Court, in this case the District Court, is required then an expense needs to be incurred and

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5 [1994] HCA 14; (1994) 179 CLR 403.
6 [2008] QCA 26.
7 [2002] QCA 480.
8 (unreported, BC8902724, NSW Court of Appeal, 23 March 1989, per Samuels JA).

will have been paid to the State Reporting Bureau[9]. The transcript will also have been required in this case for the conduct of the appeal to the Court of Appeal from the District Court. It defies any logic or rational explanation to contend that the expense of a transcript is recoverable if paid by a lawyer but not if paid by a litigant. It should be borne in mind that, in this case, Jamieson was represented by both a barrister and solicitor at the hearing of the application for leave to appeal and the appeal in the Court of Appeal and that relevant documents in accordance with the practice direction applying to the bringing of such an application and appeal were prepared for the purposes of the hearing and filed, copies of which appear on the court's file.

[29] There is nothing in the ratio of *Merrin No 2* which would determine the recoverability of the item "transcript $209". In my view, the "transcript" amount was allowable. There are other cases in support of that view, decided by reference to statutory powers to award costs which were not greater than this court's power to award costs in the present case.[10]

[30] Turning to the item "printing and copying expenses $1,079.50", there is also nothing in the ratio of *Merrin No 2* which would determine the recoverability of that item. Photocopying of appeal books would be an allowable expense, according to some cases.[11] And as a matter of principle, it does not seem unlikely that such expenses might be actually, necessarily and reasonably incurred.

[31] In support of its submission that those items should be disallowed, CBOA relied on the reasoning in *Freitag*, where Henry J disallowed photocopying fees, transcript fees, postal fees, search fees and travel expenses, inter alia, because they were not "costs of filing and other court fees". The distinction his Honour drew was between filing and other court fees, on the one hand, and irrecoverable expenses, on the other hand, was that the costs of filing and other court fees "are objectively required and there can be no issue as to their appropriate quantum"[12].

[32] With respect to his Honour, I do not agree that this distinction represents a basis for determining the scope of recoverable expenses as "costs" under former s 221 of the *Supreme Court Act* 1995 (Qld) (or the current s 15 of the *Civil Proceedings Act* 2011 (Qld)). My reasons for coming to that conclusion are set out above. In addition, in *Von Reisner v Commonwealth of Australia (No 2)*[13] the Full Court of the Federal Court of Australia adopted the reasoning that "actually, necessarily and reasonably incurred out of pocket expenses" are allowable under s 43 of the *Federal Court of Australia Act* 1977 (Cth) as expenses incurred by a litigant in person. *Von Reisner* was referred to in *Merrin No 2* without disagreement.[14]

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9 I note that the SRB will discontinue operations in the near future and thereafter transcripts will be obtained from a private service provider for a fee.

10 For example, *Saldanha v McAdam* [2007] WASC 297 at [99] and [2007] WASC 297 (S) at [7]; *Mbuzi v Favell* [2011] FCA 1078 at [4] and [12]; and *Von Reisner v Commonwealth of Australia (No 2)* [2009] FCAFC 192; (2009) 262 ALR 430 at [23].

11 For example, *Visscher v Teekay Shipping (Aust) Pty Ltd (No 3)* [2012] FCA 212 at [9].

12 [2012] QSC 207 at p 9.

13 [2009] FCAFC 192; (2009) 262 ALR 430 at [23].

14 At footnote 71.

[33] Accordingly, in my opinion the transcript and printing and photocopying expenses are not disallowable, per se, because they are expenses incurred by Jamieson as a litigant in person.

[34] As previously mentioned, the item "travelling and parking expenses $572.05" is also challenged. The strength of a litigant in person's entitlement to claim expenses of that kind will depend on the destinations and purposes involved. For example, travelling and parking to file documents in court would seem to be an actual, necessary and (depending on the amount) reasonable expense.[15] But some attendances are not necessary. In the present case, the application and appeal were conducted by counsel instructed by a solicitor. Attendance of Jamieson would not have been necessary.[16] Of course, *Merrin No 2* would go further and deny the recoverability of those expenses even where the party is a litigant in person at the hearing.

[35] Similarly, the item "Telephone, postage and petties $676.65" may or may not have been expense necessary or reasonable in amount, depending on the circumstances.

[36] However, CBOA's challenge to the travelling and parking expenses and the telephone, postage and petties expenses was not based on whether the items were necessary or reasonable in amount. The ground of objection to the certificate for those items, which limits the scope of the review[17], was confined to the contention that such expenses are not recoverable by a litigant in person based on the distinction drawn in *Freitag*. As I have rejected that contention, it would be outside the scope of the review for me to consider the recoverability of these items further, which the assessor found were "reasonable out of pocket expenses necessarily or properly incurred".

[37] In the result, CBOA has been successful in relation to one of the items challenged and the decision of the costs assessor should be set aside or varied by reducing the amount assessed from $12,537.20 to $7,537.20. It should be further ordered that the order made under *UCPR* 740 should be set aside or varied, by reducing the amount by $5,000.00.

[38] CBOA seeks a further order that the parties be given leave to make written submissions regarding who should pay the costs of the initial assessment within 7 days of a decision on the application. The costs assessor's certificate and the order made under *UCPR* 740 include an amount of $3,025.00 as the costs of the assessment. It is regrettable that a party who seeks that an application be decided without an oral hearing should request that such a course of action be taken. It is all the more regrettable, given the very small sums of money involved in this dispute. But against the possibility of injustice to CBOA, I will direct that it be given leave to do so, confined to no more than one page of submissions.

[39] As to the costs of the application for review, CBOA submits that Jamieson should pay those costs. I do not consider that order should be made. CBOA succeeded on only one of the points it took. I propose to order that there be no order to costs of the review.

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15 *Cachia v Isaacs* (unreported, BC8902724, NSW Court of Appeal, 23 Mar 1989, per Samuels JA).

16 *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403 at 417.

17 *UCPR* 742(5)(b).