# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Lessbrook Pty Ltd (in liq) v Whap; Stephen; Bowie; Kepa & Kepa* [2014] QCA 63 |
| PARTIES: | **In Appeal No 9231 of 2013:**<br>**LESSBROOK PTY LTD (in liquidation)**<br>ACN 010 855 875<br>(appellant)<br>**v**<br>**MIMIA WHAP FOR THE ESTATE & DEPENDANTS OF HELENA WOOSUP (DECEASED)**<br>(respondent)<br><br>**In Appeal No 9233 of 2013:**<br>**LESSBROOK PTY LTD (in liquidation)**<br>ACN 010 855 875<br>(appellant)<br>**v**<br>**ELIZABETH STEPHEN FOR THE ESTATE & DEPENDANTS OF GORDON KRIS (DECEASED)**<br>(respondent)<br><br>**In Appeal No 9234 of 2013:**<br>**LESSBROOK PTY LTD (in liquidation)**<br>ACN 010 855 875<br>(appellant)<br>**v**<br>**FRANCIS BOWIE FOR THE ESTATE & DEPENDANTS OF MARDIE BOWIE (DECEASED)**<br>(respondent)<br><br>**In Appeal No 9236 of 2013:**<br>**LESSBROOK PTY LTD (in liquidation)**<br>ACN 010 855 875<br>(appellant)<br>**v**<br>**FLORENCE KEPA FOR THE ESTATE & DEPENDANTS OF FRED BOWIE (DECEASED)**<br>(respondent)<br><br>**In Appeal No 9237 of 2013:**<br>**LESSBROOK PTY LTD (in liquidation)**<br>ACN 010 855 875<br>(appellant)<br>**v**<br>**EMILY KEPA FOR THE ESTATE AND DEPENDANTS OF FRANK BILLY (DECEASED)**<br>(respondent) |

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| FILE NOS: | Appeal No 9231 of 2013<br>Appeal No 9233 of 2013<br>Appeal No 9234 of 2013<br>Appeal No 9236 of 2013<br>Appeal No 9237 of 2013<br>SC No 194 of 2007<br>SC No 195 of 2007<br>SC No 193 of 2007<br>SC No 192 of 2007<br>SC No 191 of 2007 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Cairns |
| DELIVERED ON: | 1 April 2014 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 March 2014 |
| JUDGES: | Muir and Gotterson JJA and Daubney J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The appeals be allowed.**<br>**2. The orders made on 2 September 2013 be set aside.**<br>**3. The respondent pay the appellants' costs of each appeal and of the applications to the registrar.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – where the primary judge gave judgment against the appellant in proceedings and ordered that the appellant pay the respondent's costs to be assessed – where the appellant and respondent filed separate applications nominating different costs assessors – where the registrar appointed a costs assessor put forward by the appellant – where the respondent applied for an appeal of the registrar's decision – where the primary judge set aside the registrar's order appointing the costs assessor nominated by the appellant and appointed a costs assessor nominated by the respondent – whether the primary judge erred in the exercise of his discretion in setting aside the order of the registrar appointing a costs assessor – whether the appeal is an "appeal only in relation to costs" within the meaning of the *Supreme Court of Queensland Act* 1991 (Qld) – whether the appellant should be granted leave to amend its notice of appeal to include an appeal against an order of the primary judge refusing an application by the appellant for leave to appeal |

*Civil Proceedings Act* 2011 (Qld)
*Supreme Court Act* 1995 (Qld), s 253
*Supreme Court of Queensland Act* 1991 (Qld), s 62, s 64, s 118C(2)(a), s 264
*Uniform Civil Procedure Rules* 1999 (Qld), r 307(2), r 687(1), r 705, r 706(2), r 710, r 713, r 743, r 743K(1), r 743M, r 743N, r 743O, r 791, r 792

*ASIC v Jorgensen & Ors* [2009] QCA 20, considered
*Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472; [2001] FCA 1549, considered
*Heaslip v State of Queensland* (unreported, Supreme Court of Queensland, 23 July 2012), considered
*House v The King* (1936) 55 CLR 499; [1936] HCA 40, followed
*In re The Will of F B Gilbert (dec)* (1946) 46 SR (NSW) 318; [1946] NSWStRp 24, considered
*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40, followed
*Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513; [1987] HCA 48, considered
*Southwell v Jackson* [2012] QDC 65, considered
*Virgtel Ltd & Anor v Zabusky & Ors* [2009] 2 Qd R 293; [2009] QCA 92, applied

COUNSEL: C R C Newlinds SC for the appellant
G Mullins for the respondents

SOLICITORS: Norton White for the appellant
Cleary & Lee for the respondents

[1] **MUIR JA**: **Introduction** These five appeals, which were heard together, raise issues that are identical for present purposes. It is thus convenient to discuss the issues by reference to the evidence in one of the matters. The primary judge gave judgment against the appellant in the proceedings and ordered that the appellant pay the respondent's costs to be assessed. The order was a little more complicated than that but the full details of the costs order are not presently relevant.

[2] The respondent applied on 12 June 2013 pursuant to r 713 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR) for orders that the respondent's costs statement served on 5 April 2013 be assessed and that Mr Neville Hiscox be appointed to assess such costs. The appellant filed a similar application pursuant to r 743 of the UCPR on 13 June 2013 seeking that the respondent's costs statement be assessed by a costs assessor selected from the three costs assessors nominated by the appellant. Both applications were listed for hearing before a registrar in Cairns on 3 July 2013.

[3] The registrar advised the parties in an email on 13 June 2013 that she proposed to "make appropriate orders" at 10.30 am on 3 July 2013 and said that she would consider written submissions from either party if received prior to that time. She noted that the respondent had already filed submissions.

[4] Further submissions were emailed by the respondent's solicitors to the registrar and to the appellant's solicitors on 2 July 2013. The appellant's submissions were provided to the registrar on 2 July 2013. The respondent's solicitors emailed submissions in reply to the appellant's submissions to the registrar on 3 July 2013 at 9.19 am. On 3 July 2013 at 11.28 am, the registrar emailed the parties attaching a draft order which provided for the appointment of Mr Glen Walter, one of the costs assessors put forward by the appellant, to assess the costs.

[5] On 3 July 2013, the solicitors for the respondent requested that the registrar provide written reasons for her decision. She advised in an email the same day that registrars deciding the appointment of costs assessors were not required to provide written reasons. Late on the afternoon of 3 July 2013, the respondent's solicitor received an email from the appellant's solicitors to the registrar noting that it had been erroneously stated in the appellant's written submissions to the registrar that Mr Hiscox had been the costs assessor in a matter of *Southwell v Jackson*.[1] The email noted that the error was drawn to the attention of the registrar by the respondent's submissions in reply. It concluded by stating that the appellant's solicitors were not aware of the error at the time the submissions were filed and that the barrister who settled the submissions was also unaware and wished to join in the correction to the submissions.

[6] The barrister concerned sent an email to the registrar and the respondent's solicitors at about 6.05 pm on 3 July 2013 withdrawing the submission in relation to Mr Hiscox. The respondent applied on 15 July, pursuant to r 791 of the UCPR, for "a rehearing and/or appeal of the decision of the … Registrar of 3 July 2013". Under r 791, a party to an application who is dissatisfied with a decision of a registrar may, with leave of the Court, have the application reheard by the Court.

[7] The application was heard by the primary judge on 2 September 2013. He set aside the registrar's order appointing Mr Walter and appointed Mr Hiscox in his place. On 11 September 2013, the appellant applied unsuccessfully for leave to appeal against the primary judge's 2 September 2013 orders.

**The issues for determination on the appeal**

[8] The central issues for determination are:

(a) whether the primary judge erred in the exercise of his discretion in setting aside the order of the registrar appointing a costs assessor;

(b) whether the appeal is an "appeal only in relation to costs" within the meaning of the *Supreme Court of Queensland Act* 1991 (Qld) (the 1991 Act); and

(c) whether, if (b) is answered in the affirmative, the appellant should be granted leave to amend its notice of appeal to include an appeal against an order of the primary judge refusing an application by the appellant for leave to appeal.

**The primary judge's reasons for setting aside the registrar's orders**

[9] The primary judge acknowledged that as a matter of principle courts are reluctant to interfere with decisions of the nature of that under consideration. Dealing with the

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1 [2012] QDC 65.

contention that the registrar's decision was infected by the appellant's unjustifiable criticisms of Mr Hiscox, his Honour observed:

> "Dealing with the second reason first, it has been shown there was material before the registrar which did unjustifiably criticise Mr Hiscox, the cost assessor nominated by the [respondent]. There were a number of criticisms. One was founded on reference to *Southwell v Jackson (2012) QDC 65* in which a Court had allegedly reduced the cost assessment of Mr Hiscox and referred to Mr Hiscox's performance as unsatisfactory. It transpires that allegation was incorrect. Mr Hiscox was not the cost assessor in that case. That erroneous criticism was contained in correspondence filed on the application before the registrar and in the [appellant's] submissions filed in response to the registrar's invitation for submissions in writing.
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> … It is unknown at what time that morning [the registrar's] decision was made. The registrar gave no reasons for appointing Mr Walter, one of the three assessors nominated by the [appellant]. In the absence of reasons, it is impossible to know whether the [appellant's] erroneous criticism of the assessor nominated by the [respondent] influenced the registrar's decision."

[10] The primary judge observed that it was unclear what weight was given to the respondent's submissions complaining of the error or whether the respondent's submissions in that regard had even been seen. He noted that the appellant's correction of the error occurred only after the decision was published.

[11] The primary judge concluded that a criticism of Mr Hiscox in *Heaslip v State of Queensland*,[2] made to the registrar by the appellant, could not be sustained on the material before him or before the registrar. He concluded that it was also not possible to know whether the registrar had been misled by that matter.

[12] The primary judge found that the submission to the registrar by the appellant that the respondent had shown "a singular insistence" on the appointment of Mr Hiscox was "not entirely accurate in that the [respondent] had proposed a different costs assessor when earlier seeking the [appellant's] consent to a short-form cost assessment". His Honour concluded that the matter was irrelevant and that its "inclusion was susceptible to being seen as imputing suspicion, particularly considered in light of the [other] erroneous criticisms". His Honour then decided that, in the interests of justice, leave should be given and the decision be made afresh.

[13] The primary judge then considered the factors relevant to his decision as to the appointment of a costs assessor:

> "It was noted in submissions that the registrar had selected the assessor whose hourly fee was lowest. The three assessors nominated by the [appellant] listed hourly fees of $275, $316, and $400 respectively. The [respondent's] nominee's hourly fee was $300 and thus the second-lowest of the nominees. **Variation between his hourly rate and at least the cheapest two of the [appellant's]**

[2] Unreported, Supreme Court of Queensland, 23 July 2012.

> **three nominees is not of itself sufficiently material to provide a determinative basis for favouring one over another. Moreover, such a basis for selection would be of dubious foundation. For instance, an experienced assessor may charge more per hour for an assessment but take fewer hours to complete it than a less experienced colleague.**
>
> **The question then is, all things being equal, that is, absent some material consideration bearing upon the suitability of an appointment, who should be appointed from a selection of ostensibly suitable appointees?** The [appellant] submitted there should at least be a preference for one of its three nominees over the [respondent's] nominees, in circumstances where the [respondent] had only nominated one person. It referred in that regard to a notation in the LexisNexis Uniform Civil Procedure Rules Service to the effect that a shortlist of cost assessors' names should be provided to the Registrar. In fact, the Rules have no such requirement, nor on the evidence in the present application is it the usual practice. Moreover, pursuant to rule 710, the party applying for a cost assessment must, in the application, 'if practicable, nominate a particular cost assessor'. While there is no rule precluding the nomination of several 'particular' nominees in the alternative, the [respondent's] election not to do so provides no logical basis to favour the [appellant's] nominees over the [respondent's].
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> The only basis of any substance advanced for why one assessor ought be selected in preference to any others nominated, in the absence of evidence of unsuitability, is evidence of a convention, or practice, in the Brisbane and Townsville Registries that where there is no agreement between the parties on an agreed cost assessor, the practice is for the registrar hearing the application to appoint the cost assessor whose consent to act as a cost assessor is first filed. There was no evidence of any other practice to the contrary. **The assessor whose consent to act as a cost assessor is first filed will generally be the assessor nominated by the party whose costs are to be assessed.** The practice may therefore reflect weight being given to the successful party's choice, not unreasonably. In any event though, it reflects weight being given to expedition, consistently with rule 5.
>
> In some cases it may be a nominated assessor is unavailable, or not sufficiently experienced, or there may be some other reason of substance as to why a nominated assessor is not suitable for appointment. **However, in the absence of any reason of substance favouring the selection of one assessor over another, the question of which assessor's consent to act as a cost assessor was first filed is an appropriate discretionary consideration in determining the appointment.**" (emphasis added)

[14] The primary judge then reaffirmed that apart from the timing of the filing of consents to act as costs assessor there were no other material considerations that assisted him in making his decision.

**Consideration**

[15] It is desirable to start with a brief analysis of the relevant provisions of the UCPR. Part 3 of Chapter 17A of the UCPR provides for assessment of costs other than under the *Legal Profession Act* 2007 (Qld). A party entitled to be paid costs may serve a costs statement in the approved form on the party liable to pay the costs (r 705). The party on whom the costs statement is served may serve a notice of objection complying with the requirements of r 706(2) on the serving party. Either party to a costs assessment served by one party on another may apply for a costs assessment not less than 21 days after service of the costs statement.

[16] Rule 710(2) provides:

> "(2) The application must—
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> (a) be in the approved form; and
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> (b) be accompanied by—
>
> (i) the costs statement; and
>
> (ii) either—
>
> (A) if a notice of objection has been served on the applicant—the notice of objection; or
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> (B) otherwise—an affidavit of service of the costs statement; and
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> (c) if practicable—
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> (i) nominate a particular costs assessor for the assessment; and
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> (ii) for a costs assessor other than an assessing registrar, state the applicable hourly rate of the nominated costs assessor; and
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> (d) if applicable, be accompanied by the nominated costs assessor's consent to appointment to carry out the costs assessment and confirmation that, if appointed, there would be no conflict of interest."

[17] The application for a costs assessment is returnable before the registrar (r 710(3)).

[18] Where the parties fail to agree on a costs assessor:[3]

> "(2) A party may either—
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> (a) apply to the registrar for appointment of a costs assessor for the costs assessment; or
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> (b) apply to the court for directions."

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[3] *Uniform Civil Procedure Rules* 1999 (Qld), r 713(2).

[19] The rules relating to the appointment and registration of costs assessors are also relevant.

[20] Persons applying for appointment as a costs assessor must apply in the approved form and provide an affidavit demonstrating the person's eligibility for appointment. Three things must be stated in the affidavit:[4]

> "(i) any adverse matter known by the person that may affect whether the person is a fit and proper person for appointment;
>
> **(ii) the hourly rate or rates the person would charge if appointed;**
>
> (iii) any other matter required by a practice direction to be stated in the affidavit; …" (emphasis added)

[21] Under r 743M, a costs assessor must give written notice to the "principal registrar of any change in name, contact details or hourly rate or rates for the costs assessor". The list of costs assessors the principal registrar is required by r 743N to keep and publish must contain any change notified under r 743M(3) and "the name, contact details and hourly rate or rates of each costs assessor".[5] Under r 743O, the Chief Justice may make a practice direction setting the maximum hourly rate chargeable by a costs assessor.

[22] On the hearing of the appeal, it was not argued by counsel for the appellant, that the primary judge erred in granting the respondent leave under r 791 to have the application reheard by the Court. The question for this Court then was whether the exercise of the primary judge's discretion miscarried. Although principles applicable to a rehearing of the nature of that provided for in r 791 were the subject of extensive analysis in the respondent's outline of argument, having regard to the approach taken by counsel for the appellant, they do not bear upon the outcome of the appeal.

[23] As the respondent's counsel submitted, this appeal is against an order consequent upon the exercise of a discretion and the applicable principles are to be found in *House v The King*.[6] In that case, Dixon, Evatt and McTiernan JJ identified the established principles governing appeals against the exercise of discretions as follows:[7]

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

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4 *Uniform Civil Procedure Rules* 1999 (Qld), r 743K(1). No practice direction has been made in respect of r 743K(1)(iii).

5 *Uniform Civil Procedure Rules* 1999 (Qld), r 743N(2)(a).

6 (1936) 55 CLR 499.

7 *House v The King* (1936) 55 CLR 499 at 504–505.

[24] Those principles were further expanded on in the reasons but, for present purposes, it is unnecessary to look beyond the above passage.

[25] It is apparent from the above brief analysis of relevant rules that they attach considerable significance to the hourly rates of costs assessors. Indeed, apart from the naming of a particular costs assessor, an application for a costs assessment must, apart from any requirements in the prescribed form, state only the nominated costs assessor's applicable hourly rate.

[26] The primary judge pointed out, correctly, that "an experienced assessor may charge more per hour for an assessment but take fewer hours to complete it than a less experienced colleague". So too may an inefficient or ponderous assessor with a low hourly rate end up charging more than one with a markedly higher hourly rate who does his work efficiently and expeditiously. It does not follow, however, that differences in the hourly rates of competing costs assessors should be treated as insignificant.

[27] The primary judge erred, with respect, in concluding on the basis of considerations such as this that all things were equal. They were not. It was not disputed that there was no evidence to distinguish between the assessors proposed by the parties in terms of experience, skill, diligence, expedition or availability but there remained an obvious criterion for distinguishing between them: the hourly rate of charge. There was a substantial variation in hourly rates, the lowest rate being $275 per hour and the highest $400 per hour. There was a gap of $25 per hour between the respondent's nominee and the assessor with the lowest rate nominated by the appellant. That difference, particularly having regard to the emphasis placed on fees by the rules, could not be regarded as *de minimis*.

[28] In view of that conclusion, it is not necessary to deal with the emphasis placed by the primary judge on primacy of the date of filing of the assessor's consent. I propose to do so however as it raises a question of general application.

[29] Counsel for the appellant submitted that it made sense for the choice of costs assessor by the party with the benefit of the costs order to be respected. The reason being that such party would normally have the greatest interest in ensuring the prompt determination of the matter. Counsel submitted also that such party's solicitors would be likely to have established a rapport with a particular costs assessor or costs assessors who would be familiar with the solicitors "way of operating his files".

[30] It may be accepted that the party with the benefit of the costs order will normally have the greatest interest in expedition. It may also be relevant that such party's solicitors work well with the costs assessor nominated by their client and that they have found that assessor's work to be good in the past. The closeness of such a relationship, however, may be a matter that tells against appointing the costs assessor.

[31] In some circumstances, it may be obvious that the order of filing of the competing assessors' consents is a relevant factor in determining an application under r 713. For example, a party that showed a disposition to delay proceedings but rushed to file an application under r 713 when informed of the other party's intention to make such an application should not be permitted to benefit from its stratagem. Plainly, the circumstances surrounding the making of the r 713 application will vary from case to case and will have varying degrees of relevance and significance.

[32] The losing party also has a strong interest in the costs assessment. That party has been ordered to pay the other party's assessed costs and has the right under the rules to put forward its own nominee.

[33] As the above discussion suggests, there will normally be a variety of competing considerations to be assessed and weighed in a registrar's determination under r 713(2)(a). The fact that the selection of a costs assessor is entrusted to the exercise of a registrar's discretion and that there is an avenue of review by the Court militates against arbitrary decision making and the fettering of the registrar's decision by the adoption or application of a rule of thumb or practice. So too does the existence of the right to approach the Court under r 713(2)(b) in lieu of applying to a registrar under r 713(2)(a). Although the registrar's role is administrative in nature there is, nevertheless, an obligation not to take into account irrelevant considerations and to take into account the parties' submissions and all other relevant considerations that the registrar is bound to take into account.[8]

[34] For these reasons, the exercise of the primary judge's discretion miscarried. As neither party advanced any reasons for the selection of one costs assessor over another, apart from the considerations debated before the primary judge and discussed above, it seems to me that it is appropriate to appoint Mr Walter, the costs assessor with the lowest hourly rate, namely $275 per hour. Counsel for the respondent drew the Court's attention to an affidavit in which a principal of his instructing solicitors deposed to Mr Hiscox's ability to commence the assessment immediately. The affidavit was sworn on 23 August 2013 and there is no evidence of how Mr Hiscox or any of the other costs assessors are now placed.

**Did the appellant require leave to appeal?**

[35] The appellant applied to the primary judge for leave to appeal against the orders made on 2 September 2013. On 11 September 2013, the primary judge ordered that, "The [appellant's] oral application made on 11 September 2013 for leave to appeal against the decision of [the primary judge] dated 2 September 2013 be refused" and that the appellant pay the respondent's costs of the application. The primary judge held that that the appellant required leave to appeal as the proposed appeal was "an appeal only in relation to costs" within the meaning of those words in s 64 of the 1991 Act.

[36] Section 64(1) provides:

> "An appeal only in relation to costs lies to the Court of Appeal from a judgment or order of the court in the Trial Division only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another judge of the court in the Trial Division."

[37] Counsel for the respondent relied on r 687(1) of the UCPR as a basis for the proposition that the 2 September 2013 order related to a component of the original costs order with the consequence that an appeal from the order would be "an appeal only in relation to costs". Rule 687(1) provides:

> "If, under these rules or an order of the court, a party is entitled to costs, the costs are to be assessed costs."

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8 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–42.

[38] It was submitted that the 2 September 2013 orders, as to how the costs assessment was to proceed, were "not apt to deny to the orders which [the appellant] seeks to set aside the character of orders as to costs only which were in the discretion of the trial judge". A related submission was to the effect that as the 2 September 2013 orders were ancillary to or in respect of the machinery of the 2 September 2013 orders, it could not be argued that the connection between those orders and the original costs orders were "too tenuous and remote" to characterise them as orders "as to the award of costs only".

[39] The reference to a "tenuous and remote" connection is derived from the reasons of Keane JA in *Virgtel Ltd & Anor v Zabusky & Ors*.[9] In that case the applicant applied to this Court to have the respondent's appeal against a judge's refusal to stay orders for costs made against the respondent by this Court dismissed or struck out on the basis that the orders staying or refusing a stay of the costs order was, in substance, an order as to "costs only" within the meaning of s 253 of the *Supreme Court Act* 1995 (Qld) (the 1995 Act). Section 253, which was replaced by s 264 by operation of the *Civil Proceedings Act* 2011 (Qld), relevantly provided:

> "No order made by any judge of the [Supreme Court] … as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order."

[40] Keane JA, describing the scope of the application of s 253, said:[10]

> "In my respectful opinion, the focus of s 253, considered in context, is indeed upon the exercise of the judicial discretion to award costs as between the parties to the litigation or other parties involved in that litigation. The provisions of s 253 and its counterparts in England and Wales have long been understood as concerned with orders actually awarding costs. As was said by this Court in *Re Golden Casket Art Union Office*, it is an order that a party pay the other party's costs that is 'in terms' of the section an 'order as to costs only'. Neither party was able to refer to any case where s 253 or its analogues has been held to apply to an order which does not involve the actual disposition of costs of proceedings." (citations omitted)

[41] Paragraph [14] of Keane JA's reasons contains the reference to the "tenuous and remote" connection:[11]

> "I agree that s 253 should not be read down so as to reduce its wholesome operation in limiting the number of appeals as to costs which may come before this Court, but it is, in my respectful opinion, also important that the filter should not be applied in an artificially expanded way. In the present case, the only connection between the refusal of the stay and 'an order as to costs' is that, historically, the liability the immediate enforcement of which Zabusky sought to stay arose pursuant to such an order. In my respectful opinion, that connection is too tenuous and remote to characterise the refusal of the stay as an 'order as to costs'."

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9 [2009] 2 Qd R 293 at 295.

10 *Virgtel Ltd & Anor v Zabusky & Ors* [2009] 2 Qd R 293 at 295.

11 *Virgtel Ltd & Anor v Zabusky & Ors* [2009] 2 Qd R 293 at 296.

[42] Counsel for the respondent also placed reliance on *ASIC v Jorgensen & Ors*[12] and on the above passages from *Virgtel*. In Jorgensen, the appellant appealed against orders for costs pursuant to r 307(2) of the UCPR made against a company of which he was a director and which he purported to represent at first instance and on appeal. That sub-rule provided that if a party discontinued or withdrew with the court's leave, the Court "may make the order for costs it considers appropriate". The appellant's grounds of appeal were that the primary judge had wrongly denied him an adjournment to seek legal advice on his right to represent the company and had refused to permit him to be heard on the issue of costs. Counsel for the respondent referred to the following paragraphs in the reasons of Keane JA:[13]

> "[29] The evident purpose of s 253 of the *Supreme Court Act* is to impose a filter upon appeals about the exercise of the discretion to award costs where the disposition of the costs is left by law in the discretion of the judge. The evident intent of the provision is to ensure that the primary judge's balancing of discretionary considerations should not be reconsidered on appeal save in cases where the primary judge has first addressed the question whether there is good reason to allow his or her exercise of the discretion to be reviewed.
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> [30] In this case, there can be no doubt that the occasion for the exercise of the judicial discretion reposed by the law in the primary judge had truly arisen under r 307(2) of the UCPR. This Court could come to a different view as to the proper exercise of the discretions as to costs which Mr Jorgensen seeks to challenge only if it were to take a different view of the proper balance of the considerations which bear upon the exercise of the discretion from that taken by the primary judge. To put the point in another way, even if this Court were to conclude that the rulings as to representation and adjournment of which Mr Jorgensen seeks to complain were indeed erroneous, it would not follow that the exercise of the judge's discretion as to costs could be said to be erroneous as a result. This Court would need to perform the same kind of exercise as that undertaken by the learned primary judge in terms of striking the just balance between competing discretionary considerations in order to determine whether there should be a different outcome. And, of course, this outcome would concern only the orders as to costs. This view of the matter is, I think, consistent with the common law rule that an interlocutory error on the way to a final judgment will not result in an order setting aside the judgment unless the final judgment itself can be said by the appellate court to involve a miscarriage of justice.
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> [31] So far as the first aspect of ASIC's argument is concerned, the disposition of the costs was committed by law to the

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12 [2009] QCA 20.

13 *ASIC v Jorgensen & Ors* [2009] QCA 20 at [29]–[31].

> discretion of the learned Chief Justice. Rule 307(2) of the UCPR was the provision which had immediate operation in this regard. The learned Chief Justice's refusal to allow Mr Jorgensen to speak for the Company in relation to the order as to costs between it and ASIC, and the refusal of an adjournment to enable him to obtain legal assistance in that regard were not apt to take the disposition of the costs outside of r 307(2) of the UCPR. Mr Jorgensen's complaints that he was not permitted to speak for the Company and that he was wrongly refused an adjournment to refine his urgings that he should be allowed to do so are not apt to deny to the orders which he seeks to set aside the character of order as to costs only which were in the discretion of the trial judge. As I have said, the position in relation to the second aspect of ASIC's argument, that is, the argument in relation to the order that Mr Jorgensen pay ASIC's costs of the proceedings, is clearly in ASIC's favour." (citations omitted)

[43] Paragraph [31], in particular, was said by counsel for the respondent to support the respondent's argument that the 2 September 2013 orders "as to how [the] assessment would proceed were 'not apt to deny to the orders which [the appellant] seeks to set aside the character of orders as to costs only'".

[44] It has been said that the words "in relation to" are wide words.[14] In *Australian Competition and Consumer Commission v Maritime Union of Australia*,[15] Hill J observed in a passage of particular use for present purposes:

> "But the phrase is both 'vague and indefinite': see per Taylor J in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620. Like the phrase 'in respect of', the phrase 'in relation to' will not, at least normally, apply to any connection or relationship no matter how remote: see *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 51 per Dawson J. The extent of the relationship required will depend upon the context in which the words are used.
>
> As Beaumont and Lehane JJ said in *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285 in discussing a number of the cases dealing with 'relates to':
>
> > '… it will depend upon context whether it is necessary that the relationship be direct or substantial, or whether an indirect or less than substantial connection will suffice.' (References omitted.)"

[45] When s 64 is read as a whole, in the light of its predecessors and historical purpose it is unlikely that a rehearing by a judge under r 791 of a matter decided by a registrar falls within "an appeal only in relation to costs". Rule 792 which provides that "a party may appeal to a court under rule 791 only with the leave of the court as constituted by a judge or magistrate" assumes that s 64(1) has no application.

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14 *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513 at 533.

15 (2001) 114 FCR 472 at 487–488.

[46] That is possibly because a proceeding under r 791 and r 792 is more properly characterised as the rehearing by a court of an administrative determination by a registrar of the costs assessor to be selected to perform a particular costs assessment. Neither the registrar's nor the court's order affects the original costs order made by the court. The person against whom the order is made remains liable to pay the costs as assessed and the person who has the benefit of the order remains entitled to payment of such costs.

[47] An appeal to the Court of Appeal under s 62 of the 1991 Act from an order of a judge made in a hearing under r 791, for similar reasons, should not be categorised as an appeal "only in relation to costs". The issue for determination on such an appeal would normally be whether the primary judge erred in granting leave and/or in the consequent determination of the identity of the costs assessor. Those matters do not affect the original costs order in any way.

[48] Counsel for the appellant submitted that the words "in relation to" should be given a restricted meaning. The basis for the argument was that, prior to the replacement of s 253 of the 1995 Act by s 264 of the 1991 Act by operation of the *Civil Proceedings Act* 2011 (Qld), the purpose and meaning of the words "only as to costs" was well established by judicial authority in Queensland and Great Britain. He referred in that regard to *Virgtel* and *Jorgensen*. Reference was made also to the explanatory notes to the *Civil Proceedings Bill* 2011 (Qld) (the Bill) which stated:

> "*Clause 192* inserts new sections 69A and 69B to provide restrictions on appeal in relation to costs or from an order made by the consent of the parties, in line with current restrictions on appeals under section 253 of the 1995 Act."

[49] The s 69B referred to in cl 192 of the Bill became s 264.

**Conclusion on the question whether leave to appeal to this Court was required**

[50] There is no reason to suppose that the purpose of s 64 is any different from the purpose of s 253 of the 1995 Act as explained by Keane JA in *ASIC v Jorgensen*. That purpose and the historical construction of like provisions as well as the explanatory notes all suggest that "in relation to" in s 64 is not apt to include a relationship which does not bear upon the exercise of a judicial discretion in making or failing to make an order as to costs. In conclusion on this point, I note that the argument of counsel for the respondent concentrated on the words "in relation to" and seemed to give no role to the word "only". Section 64 does not apply to all appeals in relation to costs. It applies to appeals "only in relation to costs". This appeal, as the above discussion shows, is not "only in relation to costs" even if, which I do not accept, it is "in relation to costs" within the meaning of those words in s 64.

[51] On the hearing of the appeal, counsel for the appellant applied for leave to amend the notice of appeal by adding after "2 September 2013" "and 11 September 2013" and a paragraph 4 "refusing the appellant leave to appeal".

[52] For the reasons just given, it is unnecessary to rule on the application for leave. I observe merely that it would have been appropriate to grant leave had leave been necessary. Appeals of the nature of the one being considered tend to prolong the parties' disputation and substantially increases costs for little, if any, material

benefit to the parties. The frequently quoted explanation of Sir Frederick Jordan for the desirability of discouraging appeals from the exercise of a discretion which does not determine substantive rights in *In re The Will of F B Gilbert (dec)* is apposite:[16]

> "… if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal."

[53] In this case, however, there is a need to address a question of principle which may bear on the practice of registrars.

**Conclusion**

[54] For the above reasons, I would order that:

1. The appeals be allowed.

2. The orders made on 2 September 2013 be set aside.

3. The respondent pay the appellants' costs of each appeal and of the applications to the registrar.

[55] I would make no order as to the costs of the appeal to the primary judge or as to the application made to the primary judge for leave to appeal. The primary judge did not err in concluding that the registrar's appointment should be set aside because of the risk that erroneous information had been taken into account. The appellant opposed the respondent's appeal on grounds which have not been shown to be sound and failed. Having regard to these matters, the preferable approach is to make no order as to costs in respect of the application at first instance.

[56] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[57] **DAUBNEY J:** I agree with Muir JA.

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16 (1946) 46 SR (NSW) 318 at 323.