SUPREME COURT OF QUEENSLAND

CITATION:	*Geatches v Anglo Coal (Moranbah North Management) Pty Ltd & Anor (No 2)* [2014] QSC 136
PARTIES:	**GRAHAME JOHN GEATCHES** (plaintiff/respondent) **v** **ANGLO COAL (MORANBAH NORTH MANAGEMENT) PTY LTD** (first defendant/applicant) **UGM ENGINEERS (QLD) PTY LIMITED (ACN 110 707 910)** (second defendant)
FILE NO/S:	SC 449 of 2009
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	12 June 2014
DELIVERED AT:	Cairns
HEARING DATE:	22 April 2014
JUDGE:	Henry J
ORDERS:	**1. The order of 24 February 2014 (doc. 32) is set aside.** **2. The order of 25 March 2014 (doc. 34) is varied by the deletion of the word "Defendants" and insertion of the words "First Defendant".** **3. The balance of the application is dismissed.** **4. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – COSTS – RECOVERY OF COSTS – where the applicant first defendant sought to rectify the consent order of 17 June 2013 to incorporate the terms of settlement on the basis that any departure on the consent order from the terms of settlement was a mistake – where the trial Judge delivered rulings on 9 April 2014 – whether leave should be given to re-open concluded argument PROCEDURE – COSTS – RECOVERY OF COSTS – where the applicant first defendant seeks review of the decision of a costs assessor – whether solicitor's care and conduct costs ought be reduced by reason of second counsel's involvement – whether there was a duplication of allowances for solicitor's care and conduct

Uniform Civil Procedure Rules 1999 (Qld) r 742, 743

Australian Coal and Shale Employees' Federation v The Commonwealth (1953) 94 CLR 621, applied
Carr v Finance Corporation of Australia Ltd (No. 1) (1981) 147 CLR 246, considered
Geatches v Anglo Coal (Moranbah North Management) Pty Ltd & Anor [2014] QSC 106, cited
Re Federal Deposit Bank Ltd (In Liquidation) [1937] QWN 38, considered
Remely v O'Shea & Ors (No 2) [2008] QSC 218, cited

COUNSEL: T W Quinn for the plaintiff
R Dickson for the first defendant

SOLICITORS: Roati Legal for the plaintiff
Herbert Smith Freehills for the first defendant

Introduction

[1] This application by the first defendant to review the decision of a costs assessor pursuant to r 742 of the *Uniform Civil Procedure Rules* ("UCPR") was the subject of findings and orders when argued before me on 8 April 2014. I delivered reasons the following day.[1]

[2] In summary, the central feature of the applicant's argument was that costs common to the proceeding or claim against both defendants were not recoverable from the applicant first defendant. It argued that would involve the recovery of costs incurred in respect of the claim and proceeding against the second defendant and that would be inconsistent with the terms of settlement of the case and the release and discharge which provided, inter alia, that the plaintiff was not entitled to costs of or in relation to the claim and proceeding against the second defendant. That argument ("the applicant's interpretation argument") was premised upon an interpretation of the terms of settlement and release and discharge which I rejected.

[3] The words of the terms of settlement and release and discharge in respect of costs were not expressly included in the Registrar's consent order in respect of costs. Paragraph 5 of the application sought the amendment of the consent order purportedly so that it is not inconsistent with and gives effect to the terms of settlement. I reasoned it was unnecessary to resolve an argument about my power to set aside or vary the consent order because "even if recourse is had to the words of the terms of settlement and release and discharge, it would not alter the meaning which is in any event conveyed by the consent order."[2] I found that my interpretation as to which costs were assessable by the assessor was the same "even if regard is had to the words of the terms of settlement and the release and discharge."[3]

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1 *Geatches v Anglo Coal (Moranbah North Management) Pty Ltd & Anor* [2014] QSC 106.
2 Ibid, 5.
3 Ibid, 6.

[4] Applying that interpretation I found:

> "[I]n the assessment of a single cost item which all or some component of was incurred in relation to the claim against the first defendant:
>
> (a) if there was information before the costs assessor allowing him to conclude that an identifiable portion of that cost was not incurred in relation to the claim against the first defendant, that portion should not have been assessed as a cost of or incidental to the claim against the first defendant;
>
> (b) but where there was no information before the costs assessor allowing him to be able to make such a conclusion, other than the general proposition that the item was for the benefit of the plaintiff's claim against each defendant, then the whole of the costs amount should have been assessed as a cost of or incidental to the claim against the first defendant."[4]

[5] The applicant had structured its submissions on 8 April in general reliance upon its failed interpretation argument. It plainly was not in a position to immediately identify and submit on the probably limited number of cost items that may have remained arguable on the review given my findings. I therefore made orders allowing further written submissions and setting a date for further oral submissions. In doing so I contemplated any remaining submissions would go only to the abovementioned limited number of costs items. It appears the applicant was not of a similar understanding.

The rectification submission

[6] The applicant's further written submissions and further oral submissions, heard on 22 April 2014, submitted the consent order of 17 June 2013 ought be rectified by incorporating the terms of settlement on the basis that any departure of the consent order from the terms of settlement was a mistake (the "rectification submission").

[7] Further, the applicant sought leave to read an affidavit relevant to the alleged mistake by Harold Downes sworn 14 April 2014 and filed 16 April 2014. The respondent objected to the reading of that affidavit, but, in the event leave was given, sought leave to read and file an affidavit by John Roati sworn 17 April 2014. The applicant objected to some passages of that affidavit. Leave was given subject to my ruling on the objection. To remove doubt, I formally give leave for the reading of Mr Downes' affidavit. Given the conclusions which follow, it is unnecessary to rule on the abovementioned objection in respect of Mr Roati's affidavit.

[8] The applicant's rectification submission must fail at the threshold for two reasons.

[9] Firstly, it is a submission which should have been made as part of the argument advanced before me on 8 April 2014. Ordinarily, leave would be required to re-open concluded argument.[5] One basis for granting leave may be the emergence of

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4 Ibid, 7.

5 *Carr v Finance Corporation of Australia Ltd (No. 1)* (1981) 147 CLR 246, 257-258.

some relevant consideration which could not have been predicted on the day of argument. Mr Downes' affidavit, filed 16 April 2014, was obviously calculated at supporting a grant of leave on the basis the applicant was surprised by an argument that it was the terms of the consent order, not the terms of settlement, which the assessor should have acted on. However in the absence of the respondent consenting to the application the argument was a predictable incident of resistance to paragraph 5 of the application which sought an amendment of the consent order "so that it is not inconsistent with and does give effect to the terms of settlement". The rectification submission is relevant to paragraph 5 of the application and its underlying premise is little different from the premise of the submissions relevant to that paragraph already advanced on 8 April 2014. The time to exhaust those submissions was then, before I made my rulings. The fact the rectification submission could and, if it was to be advanced at all, should have been advanced on 8 April 2014 militates against leave being given.

[10] Secondly, there is no utility in ruling on the submission. Out of an abundance of caution I have reviewed the abovementioned affidavits. Even if they were taken to support a conclusion the applicant's solicitors mistakenly believed the consent order accurately reflected the terms of settlement the best result for the applicant would be an amendment of the order so that it contained the relevant words of the terms of settlement. This potential end equation could only assist the applicant if the applicant's argument as to the interpretation of the relevant terms of settlement was correct. That argument was held and lost on 8 April 2014. Even if the submission were considered on the merits the end result sought by the applicant would rely on an interpretation I have rejected. Thus the submission could not make any material difference to the stage already reached in consequence of my findings of 8 April 2014. For these two reasons it is unnecessary to further consider the rectification submission.

Disputed Items

[11] The three costs items remaining in issue on this review are for solicitor's general care and conduct, or care and consideration as it is also known. The applicant's arguments in respect of the three items are, in summary:

(a) any usual allowance or percentage for care and consideration should have been reduced because of the involvement of senior and junior counsel ("involvement of counsel argument");

(b) the amounts allowed for the items involve duplication of costs ("duplication argument").

[12] The disputed items are items 2230 and 2294 in the respondent's costs statement of 19 June 2013 and item 169 in the respondent's additional statement of costs of 17 December 2013, provided per the assessor's direction. The assessor allowed $15,000, $2,756.59 and $1,871.40 respectively for these items, a total of $19,627.99. The applicant's proposed draft order would only allow $10,000 for item 2230 and nothing for the other two items.

[13] Before dealing with the applicant's argument it is helpful to review the content of each of the three items, the objections before the assessor and the assessor's determinations and reasons.

Item 2230

[14] Item 2230 was:

> "2,230 Instructions and Solicitor's care and conduct of the proceeding having regard to the circumstances of the case including but not limited to matters referred to in Item 1 of the Supreme Court Scale of Costs – care and consideration"[6] 17,424.31

[15] The objection to item 2230 was:

> "The claim for care and consideration is excessive particularly having regard to the costs which ought to be allowed pursuant to the Order and Terms of Settlement."[7]

[16] The assessor reduced the claimed amount by $2,424.31. His reasons were:

> "In relation to the claim for care and consideration, I set out my figures in relation to the amount allowed as follows:
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> | | | |
> |---|---|---|
> | Amount claimed to Item 2230 | $ | 58,127.78 |
> | (Deductions) | | 7,797.22 |
> | Balance: | | 53,330.56 (sic)[8] |
>
> I calculated 30% which equalled $15,099.17 and reduced this to $15,000 as being a reasonable amount for care and consideration. The amount originally claimed was $17,424.31. The amount allowed was $15,000.00 and accordingly the deduction was $2,424.31.
>
> In relation to the allowance, I considered that this was a significant claim which settled for in excess of $2m. It was an important matter for the Plaintiff, the number of documents that were perused particularly in relation to medical matters was considerable and the instructing solicitor appears to have handled the matter expertly in relation to the Plaintiff's claim. Having taken into account all of those circumstances, I considered that the allowance at the upper limit of what I would be prepared to allow was appropriate."[9]

Item 2294

[17] Item 2294 was:

> "2,294 Instructions and Solicitor's care and conduct of the proceeding having regard to the circumstances of the case including but not 4,732.88

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6 Affidavit John Roati (28) exhibits p 192.
7 Affidavit John Roati (28) exhibits p 269.
8 The correct balance of 50,030.56 was used in the ensuing calculations.
9 Amended Costs Assessor's Certificate (33) p 48.

> limited to matters referred to in Item 1 of the Supreme Court Scale of Costs – care and consideration (claimed in relation to work undertaken in the assessment of costs in accordance with Paragraph 19 Remely –v- O'Shea & Ors (No 2) [2008] QSC 218)"[10]

[18] The objection to item 2294 was:

> "These claims are to be adjudicated upon subject to the outcome of the assessment. Further and in the alternative, the claim should be reduced as the claim for costs should be significantly less than that as contemplated by the Costs Statement and no amount should be allowed."[11]

[19] The proposed reduction was $4,732.88, the entirety of the claim. The assessor reduced the claimed amount by $1,976.219. His reasons were:

> "The objection to this Item is that it was to be adjudicated upon subject to the outcome of the Assessment and the alternative was that it should be reduced as the amount allowed would be significantly less than that as contemplated by the Costs Statement. The Objection sought a reduction of the total amount in relation to this Item which I did not accept.
>
> The amount claimed was $4,732.88 on an amount of $15,776.25 which equated to an allowance of 30%. I was only prepared to allow 20% for the care and consideration Item for this Item. The deductions from Items 2231 – 2293 equated to $1,993.30 and accordingly the balance on which care and consideration was to be calculated was $13,782.95. The amount allowed was accordingly $2,756.59. After deducting this from the amount claimed, there was a reduction of $1,976.29 to this Item."[12]

Item 169

[20] Item 169 was in an additional statement of costs provided in response to a direction by the costs assessor which read as follows:

> "1. If the Plaintiff elects to do so, the Plaintiff shall provide me with a note of any Additional Items that he wishes me to consider in relation to the costs of the Assessment to be provided within 14 days from the date of this letter."[13]

In the correspondence which contained this direction the assessor earlier dealt with a r 733 offer and determined the costs of the Assessment should be paid by the First Defendant. His direction was consequent upon that determination.

[21] Item 169 was:

> "169 Instructions and Solicitors' care and conduct of 3,039.54

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10 Affidavit of John Roati (28) exhibits p 197.
11 Affidavit of John Roati (28) exhibits p 297.
12 Amended Costs Assessor's Certificate p 48.
13 Affidavit of Christie Jenkins (36) exhibits p 89.

> the proceeding having regard to the circumstances of the case including but not limited to matters referred to in Item 1 of the Supreme Court Scale of Costs – care and consideration (claimed in relation to work undertaken in the assessment of costs in accordance with paragraph 19 Remely –v- O'Shea and Ors (No 2) [2008] QSC 218 (1)"[14]

[22] The objection of the applicant, dealt with in greater detail below, complained that item 169 did not relate to additional costs and that there was duplication as between it and 2294.

[23] The assessor allowed $1,871.40. His reasons are dealt with below.

Discussion

[24] The respondent submits the applicant's arguments about these items go beyond any ground for interference advanced by the application's grounds for objection in the review application. It is true that the application's grounds for objection were largely premised upon its unsuccessful interpretation argument, however ground 11 did allege a miscarriage of discretion for certain (unspecified) claims in that the assessor wrongly took some matters into account, failed to take other matters into account, did not exercise his discretion and was manifestly wrong. This ground is not specific, contrary to r 742(3)(a), but it falls to be understood in the context of the application. The application sought an order varying the decision so as to meet the grounds for objection raised before the assessor. When regard is had in turn to those grounds it is apparent the applicant's duplication argument, which featured in the objections before the assessor, is reasonably within the bounds of the grounds stated in the application.

[25] The position is more problematic in respect of the involvement of counsel argument. It is on the face of it an argument that falls within the general complaint in ground 11 of the application that the assessor did not take into account matters which should have been taken into account. That was admittedly an unspecific complaint but in the absence of earlier agitation by the respondent as to the imprecision of ground 11 and given the argument was identified in the applicant's counsel's written outlines for both appearances in this court there appears to be no prejudice in considering the argument. There is another problem however.

[26] As can be seen from the above quoted objections, the involvement of counsel argument did not feature in the objections before the assessor in respect of these items. The objections were replete with complaints about the need for counsel and the quantum of counsel's fees in respect of some items, but those objections did not relate to the quantum of general care and conduct. Rule 742(5)(b) prohibits, unless the court otherwise directs, a party from raising any ground of objection not stated in the application for assessment or a notice of objection or raised before the costs assessor. The involvement of counsel argument advanced on the review, to reduce the total assessment for the care and consideration items, is in substance a ground of

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[14] Affidavit of Christie Jenkins (36) exhibits p 107.

objection not stated, notified or raised before the costs assessor in respect of the items. It is therefore precluded from consideration on this review unless I direct otherwise. No meritorious basis has been identified for me to direct otherwise.

[27] The applicant argued in effect that because the contributions of solicitor and counsel can overlap and because the items allowed for counsel's fees was excessive the assessor should have discounted the allowance for care and consideration to a greater extent than he did. However, if, as the applicant submitted, counsel's fees were excessive, then that was relevant to an argument in respect of items relating to counsel's fees, not to an argument in respect of the solicitor's care and consideration items.

[28] It was also argued that the allowance for care and consideration should have been less because of the overlapping contribution of counsel. The amount to be allowed to a solicitor for general care and consideration should not be reduced by reason of the involvement of counsel, even of a second counsel, unless counsel actually performed work that is ordinarily performed by a solicitor.[15] The assessor did not specifically refer to considering the possibility that the role performed by counsel may have eased the solicitor's burden, but that does not bespeak error. It is unlikely to be a topic to which the assessor would have made express reference in the absence of some substantive indication that counsel did perform work ordinarily performed by a solicitor. There is no evidence on the review that the work performed by counsel eased the burden of work ordinarily performed by the solicitor.

[29] Further the percentages allowed are not so significant as to infer error. A 30% allowance for care and consideration was described by the assessor in his reasons as being at the upper limit of what he would be prepared to allow. He allowed that percentage in item 2230, acknowledging the significance of the claim, which settled for in excess of two million dollars. He only allowed 20% on the other two items in dispute. An allowance of 30% is significant but not of itself exceptional in matters of complexity, just as the involvement of counsel is not exceptional in matters of complexity.

[30] These reasons all demonstrate the argument's absence of merit. I decline to direct pursuant to r 743(5) that the involvement of counsel argument can be raised as a ground of objection on the review. In the event I am incorrect in doing so then for the above reasons I reject the argument on its merits.

[31] As to the duplication argument, the applicant submits there has been duplication in the allowances for care and consideration. If so, that would be an error of principle warranting interference on this review.[16]

[32] It is apparent from the facts outlined above that the care and consideration costs allowed for in item 2230 related to care and conduct of the proceeding excluding care and conduct in that component of solicitor's work which had to be undertaken in relation to the assessment of costs. It is likewise apparent the care and conduct

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15 *Re Federal Deposit Bank Ltd (In Liquidation)* [1937] QWN 38.

16 *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621.

component of solicitor's work which had to be undertaken in relation to the assessment of costs was allowed for in item 2294. There is no duplication in the amounts allowed for as between items 2230 and 2294; they relate to different work.

[33] The applicant complains more particularly that there is duplication between the costs allowed for in item 2294 and item 169. Its argument derives some cosmetic appeal from the fact both items are described as relating to work undertaken in the assessment of costs. On analysis the argument faces the formidable obstacle that it is unsupported by the substantive evidence about what actually occurred. The evidence shows the applicant's concern as to duplication was raised with the assessor and that the assessor took care to ensure there was no duplication in the allowances for these items.

[34] After the additional statement of costs dated 17 December 2013 was provided, the applicant submitted to the assessor, inter alia:

> "The First Defendant submits that the document sent under cover of the Plaintiff's solicitors' letter of 17 December should be ignored because it is not a document which is permitted by Direction 1.
>
> Plainly, Direction 1 invited a note only of Additional Items. The document contains 169 numbered items most of which are not truly Additional Items but are a repeat or reworking of items 2231 to 2294 within the Costs Statement."[17]

The applicant went on to complain in effect that it was embarrassed by the unidentified duplication between the claims and the impossibility of knowing which components of which claim needed to be addressed.

[35] The assessor responded, inter alia:

> "I do say that it is my experience that anticipated costs claimed by a receiving party are invariably different to what was contemplated at the time of the preparation of the Costs Statement. I confirm my earlier advice that it is my usual practice to ask for a note of same that the receiving party wishes me to consider.
>
> I can inform the parties generally however that it is also my practice when considering the costs of the Assessment that <u>any items that are duplicated (or re-worded) in the Costs Statement and Additional Items provided to me will be disallowed</u>. I accordingly would not necessarily require any further submissions from the Solicitors for the First Defendant in that regard for those items as <u>I will be able to verify same from the Plaintiff's Solicitor's file</u> which I will eventually call for and receive."[18] (emphasis added)

[36] The applicant's further response of 3 February 2013 announced it would assume the additional statement was the operative document and not items 2231 to 2294 of the initial costs statement. The applicant objected more specifically in respect of item 169, as follows:

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17 Affidavit of Christie Jenkins (36) exhibits p 110.

18 Affidavit of Christie Jenkins (36) exhibits p 113.

> "Item 169. The case of Remely has little application other than that it may be appropriate in a costs assessment to allow for some care and consideration. In Remely it was held that a modest amount could be allowed when there had been an application to the court in relation to the assessment process. The sum claimed of $3,039.54 is extravagant. It has not been certified by a solicitor. Nothing in the fifteen (15) pages indicates the need for the application of legal knowledge. To the contrary, the statement goes well beyond the invitation by the legal costs assessor for a note of additional costs."[19]

[37] In submitting item 169 to the assessor the plaintiff had referred to a passage in *Remely* where McMeekin J reasoned that although an amount for care and consideration was claimed in the bill up to the time of the preparation of the costs statement he could "see no good reason why a further modest amount could not have been allowed for the work subsequently required".[20] Such reasoning is uncontroversial, although His Honour's use of the word "modest", seized upon by the applicant, was obviously meant in a relative sense. The actual quantum of the further amount is inevitably a matter for the individual facts of each case. Plainly the further amount ought not duplicate allowances already made.

[38] The assessor's approach to the avoidance of duplication in respect of the initial and additional costs statements was illustrated in his reasons relating to items 2240 to 2289 as follows:

> "The Objection to these Items was on the basis that these claims are be adjudicated upon subject to the outcome of the Assessment. I note that I requested a note of any Additional Items that the successful party (in this case the Plaintiff) wished me to consider in relation to the costs of the Assessment and was provided with a document which related to those Items. I had made it clear to the parties that any Items that were duplicated would be disallowed. It is my usual practice to look at the Additional Items provided and if this duplicates matters then I disallow them in the Costs Statement and allow them in the Additional Items Statement which has the same result.
>
> In this case, I ascertained that many of the Items were duplicated in the Additional Items Statement and accordingly, totally disallowed Items 2238 – 2272 and the respective amounts in the Costs Statement. I will not repeat the amounts deducted but they are set out in full in my breakdown of deductions that was provided to each party at the end of my Assessment.
>
> In relation to Items 2273 – 2289, I was able to verify from the instructing solicitor's file that these Items did or would occur prior to the completion of my Assessment and I was prepared to allow same."[21] (emphasis added)

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19 Affidavit of Christie Jenkins (36) exhibits pp 119-120.

20 *Remely v O'Shea & Ors (No 2)* [2008] QSC 218, [19].

21 Amended Costs Assessor's Certificate p 48.

[39] In the applicant's request for reasons it made three requests for reasons relating to the additional costs statement – the first two of which were:

> "1 Why this document was allowed at all, having regard to the duplications with costs of assessment in the Costs Statement;
>
> 2 Why there was allowed in the Costs Statement an amount for care and consideration for the costs assessment and also in the further costs Statement an additional sum was allowed for the same component."[22]

[40] The assessor's reasons in response thereto were, inter alia:

> "I was requested in the Reasons for a response to three questions in relation to the Costs Statement. As I have stated, once I had been appraised of Rule 733 Offers, I made directions to request the successful party (in this case the Plaintiff) to provide me with a list of any Additional Items that he wished me to consider in relation to the Costs of the Assessment. I accordingly received that document... I refer to my Reasons to, in particular, Objection 685 as to my approach in relation to the Costs Statement. I confirm that I carefully went through the Statement that had been provided to me by the Plaintiff's solicitors in relation to the Additional Items and where there was any duplication or matters that did not occur I disallowed same.
>
> I give my Reasons in relation to the 3 specific questions requested of me as follows:
>
> (1) I allowed this document as even though there were duplications with the Costs of Assessment set out in the Costs Statement, I deducted any of those duplications and took this into account in the drafting and producing fee (which necessarily followed in a reduction to the care and consideration Item in both the Costs Statement and the Additional Items Statement) so that the First Defendant was not penalised by those duplications. The alternative would have been for me to obtain the instructing solicitor's file and effectively do my own Statement as to Additional Items which in a matter as large as this would have taken a considerable time and increased the costs of the Assessment. These would have effectively been inserted as Short Charges. I was aware from previous experience that anticipated costs in a Costs Statement are quite often very different to what in fact occurs and that is the reason I usually work off the Additional Items that are provided to me particularly where they set out exactly what has happened. I deduct what has not happened which is easier to do so in the Costs Statement rather than that Statement. As I have stated, there is no penalty imposed on the paying party in any event as any duplication or Items disallowed in either Statement

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22 Amended Costs Assessor's Certificate annexure A.

effectively result in the same position. It also gives the paying party an opportunity to object to what in fact really did occur.

(2) The question that requires my Reason is why I allowed in the Costs Statement an amount for care and consideration and also in the further Statement an additional sum. Again, the paying party is not penalised by me looking at both Statements as any Items that are disallowed are taken into account in the folio count for the drafting and producing of the relevant documents. In relation to the Additional Items, the folio count resulted in deductions at Items 156 and 157 for $165.50 and $39.60 respectively which took into account Items totally disallowed or which included duplications. In relation to Item 169, the care and consideration on this Statement although claimed at 30% was only allowed at 20% on the amount allowed. This resulted in a further deduction of $1,168.14. Accordingly, I did not consider that the paying party was penalised in any way by the provision of this information by the Plaintiff's solicitors as per my direction. ..."[23] (emphasis added)

[41] The information before the court on this review did not include the inevitably extensive materials the assessor would have waded through in conducting his assessment and in detecting and disallowing duplications. However, as the above quoted passages show, it included the repeated express assertions of the assessor that he did as a matter of fact check the materials to detect any duplication and disallowed any duplication detected. The broad powers of review conferred by r 742 may in an appropriate case cause the court to direct the production of the more detailed materials that were before the assessor. It was not submitted that ought occur here.

[42] It follows that the information on the topic of duplication before the court on this review is that the assessor did not err in principle and carried out the exercise of checking for duplication and disallowed duplicated items. In the light of such uncontradicted information the argument that because items 2294 and 169 bear the same descriptions they must involve duplication is exposed as superficial and unsustainable.

Setting aside and variation of Registrar's orders

[43] The failure of the applicant's various arguments would ordinarily result in the dismissal of its application. However orders should be made to address two technical problems in respect of the court's costs orders made by the Registrar subsequent to the assessment.

[44] The first problem is that there are two such orders. The first, made on 24 February 2014, was for the payment of costs pursuant to the certificate of the costs assessor filed 13 February 2014 assessed at $177,611.90. The second, made on 25 March 2014, was for the payment of costs pursuant to the amended certificate of the costs

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23 Amended Costs Assessor's Certificate p 49.

assessor filed 19 March 2014 assessed at $177,560.90. The amended certificate had been issued to correct a minor error and involved a minor reduction of the assessed amount. The second order should have included an order vacating the first order so as to avoid the applicant being the subject of two orders and thus theoretically liable to make the payments required by both. It is not seriously suggested the respondent would have sought to enforce both orders but the error should be corrected.

[45] The second problem is that the orders required the "defendants" to pay the plaintiff's costs when the party liable should have been described as the "first defendant". Again, it is not suggested the respondent would have sought to enforce either order against the second defendant, but the error should also be corrected.

[46] Rule 742(6)(c) empowers the court on a review to vary or set aside the Registrar's orders. I would order the setting aside of the first order and amendment of the second order to correctly describe the party liable under it.

[47] Given those orders could easily have been secured without the need for the application for review[24] and given the applicant's lack of success otherwise on the application my preliminary view is that the respondent should have his costs. The respondent has already submitted that those costs should be on the indemnity basis but both parties seek to be heard further as to costs after the publication of my decision. I will hear the parties as to costs.

Orders

[48] My orders are:

1. The order of 24 February 2014 (doc. 32) is set aside.
2. The order of 25 March 2014 (doc. 34) is varied by the deletion of the word "Defendants" and insertion of the words "First Defendant".
3. The balance of the application is dismissed.
4. I will hear the parties as to costs.

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[24] See for example r 666 read with rr 667 and 668.