SUPREME COURT OF QUEENSLAND

CITATION:	*Hunter v Hunter & Anor* [2015] QSC 181
PARTIES:	**CORNELIA HUNTER** (applicant/plaintiff) **v** **JOHN MALCOLM HUNTER** (first respondent/seventh defendant) **MIRONESCO PTY LTD in its own capacity and as trustee of HUNTER FAMILY TRUST** (second respondent/eighth defendant)
FILE NO/S:	SC No 4124 of 2007 CA No 260 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2015
JUDGE:	Philip McMurdo J
ORDER:	**The application to review the assessment in this proceeding be refused.**
CATCHWORDS:	PROCEDURE – COSTS – TAXATION – REVIEW – PRINCIPLES APPLICABLE – INTERFERENCE WITH EXERCISE OF DISCRETION – application to challenge an assessment of the respondents' costs of the proceeding – where the plaintiff applicant was ordered to pay the respondents' costs on an indemnity basis – where the applicant claimed she was denied procedural fairness – principles in relation to appeals as to costs – a costs assessor has a very wide discretion and the usual limitations upon the court's interference with a discretionary judgment apply – the court is reluctant to interfere where no principle is involved and the question is, whether an assessor has correctly exercised a discretion – application to review the assessment for costs refused *Uniform Civil Procedure Rules* 1999 (Qld), r 703, r 732, r 735 *Amos v Monsour Legal Costs Pty Ltd* [2008] 1 Qd R 304; [2007] QCA 235, cited *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621, applied

Bottoms v Reser [2000] QSC 413, cited
Hunter v Organic & Natural Enterprise Group Pty Ltd [2012] QSC 383, cited
Hunter v Organic & Natural Enterprise Group Pty Ltd (No 2) [2013] QSC 61, cited
Hunter v Organic & Natural Enterprise Group Pty Ltd [2013] QCA 331, cited
Schweppes' Ltd v Archer (1934) 34 SR (NSW) 178, applied

COUNSEL: The applicant/plaintiff appeared on her own behalf
M Wright for the first respondent/seventh defendant and second respondent/eighth defendant

SOLICITORS: The applicant/plaintiff appeared on her own behalf
Wrightway Legal for the first respondent/seventh defendant and second respondent/eighth defendant

[1] This is an application which challenges an assessment of the respondents' costs in this proceeding which, after a lengthy trial, the applicant was ordered to pay on the indemnity basis.[1]

[2] The applicant, who was the plaintiff in the proceeding, sought relief under s 233 of the *Corporations Act* 2001 (Cth) in respect of the affairs of the first defendant. The seventh defendant to her claim was or had been her husband. The eighth defendant was a company of which he was the sole shareholder and director. It was in their favour that the order for indemnity costs of the proceeding was made and they are the respondents to this application.

[3] The applicant appealed against the dismissal of her claim. On the appeal, all defendants were represented by the lawyers who had acted for the present respondents at the trial. The appeal was dismissed in late 2013 and the applicant was ordered to pay the costs of the other parties to the appeal upon the standard basis.[2]

[4] Mr GR Walter was appointed to assess the costs under those orders of the trial judge and the Court of Appeal. By this application, the applicant challenged each of Mr Walter's assessments and those challenges came on for hearing together on 14 April 2015. On that day, I heard argument first on her challenge to the assessment of the costs of the appeal and dismissed that part of her application. I also heard her application in respect of the costs ordered by the trial judge. For the most part, the applicant was content to rely upon her extensive written submissions and affidavits. I reserved my decision on her application in relation to that assessment which is now the subject of this judgment.

[5] The applicant was not legally represented at the trial, on the appeal, during the process of the assessment of costs or on this application. This may explain why her submissions are characterised by misunderstandings about the principles which apply to a challenge to an assessment of costs. A costs assessor has a very wide discretion and the usual limitations upon the court's interference with a discretionary judgment apply. In a frequently cited

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1 *Hunter v Organic & Natural Enterprise Group Pty Ltd* [2012] QSC 383; *Hunter v Organic & Natural Enterprise Group Pty Ltd (No 2)* [2013] QSC 61.

2 *Hunter v Organic & Natural Enterprise Group Pty Ltd* [2013] QCA 331.

judgment in this context, *Australian Coal and Shale Employees' Federation v The Commonwealth*,[3] Kitto J discussed those limitations in the present context and adopted this summary from the judgment of Jordan CJ in *Schweppes' Ltd v Archer*:[4]

> "In appeals as to costs, the principles to be applied are these. The Court will always review a decision of a Taxing Officer where it is contended that he has proceeded upon a wrong principle, for the purpose of determining the principle which should be applied; and an error in principle may occur both in determining whether an item should be allowed and in determining how much should be allowed. Where no principle is involved, and the question is, whether the Taxing Officer has correctly exercised a discretion which he possesses and is purporting to exercise, the Court is reluctant to interfere. It has undoubted jurisdiction to review the Taxing Officer's decision even where an exercise of discretion only is involved, and will do so freely on a proper case, using its own knowledge of the circumstances: *Western Australian Bank v Royal Insurance Co*; *Clark, Tait & Co v Federal Commissioner of Taxation*, but it will in general interfere only where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong; and where the question is one of amount only, will do so only in an extreme case."

[6] The principle proceeding was tried over 10 days in August 2012. The respondents were represented at the trial, as they were in this application, by Mr Wright, a solicitor. He appeared at the trial as their advocate.

[7] The respondents' costs statement was served by Mr Wright in December 2013. Unsurprisingly in such extensive litigation, the costs statement ran to some 174 pages and involved 1,254 individual items. The costs sought were $239,143.50, together with disbursements of $2,764.70, a separate component for "professional due care and consideration" of $48,381.68 (20 per cent of the costs and disbursements) and GST of $29,029.01.

[8] The applicant served her Notice of Objections in February 2014. It ran to 44 pages and contained some 277 specific objections to individual items which, the assessor said in his reasons, appeared to cover all of the costs claimed.[5]

[9] The assessor noted in his reasons that the objections did not address the principles which apply where the indemnity basis is the basis of assessment. The assessor discussed these principles in his reasons by reference to r 703 of the *Uniform Civil Procedure Rules* 1999, *Amos v Monsour Legal Costs Pty Ltd*[6] and a judgment of de Jersey CJ in *Bottoms v Reser*.[7] The applicant did not submit that the assessor erred in stating the relevant principles. In particular, she did not contend that he had misinterpreted r 703(3). In his reasons, the assessor said that although the applicant's objections had not been made by reference to r 703 and those principles, he (rightly) considered that it was his duty to consider each

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3 (1953) 94 CLR 621.
4 (1934) 34 SR (NSW) 178, cited in *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621, 628-629.
5 Assessor's Reasons para [24].
6 [2006] QCA 235.
7 [2000] QSC 413.

item and to disallow or reduce it to the extent that it was not "reasonably incurred and of a reasonable amount".[8]

[10] The applicant's objections went so far as to dispute that there was any retainer by the present respondents of Mr Wright or his firm. She claimed that there was no professional relationship and that he was appearing simply as a friend. The assessor rejected that argument. The assessor, of course, had Mr Wright's file which included costs agreements between his firm and the respondents. The assessor said that this objection was "entirely without merit".[9]

[11] Despite her objections not being made by reference to the correct principles, the applicant enjoyed more than a little success. The assessor reduced the amount of professional costs by $101,321.19 and the amount of disbursements by $927.45. He reduced the claim for care and consideration by $21,641.68. There was a consequential reduction in the GST indemnity in an amount of $13,837.70.

[12] On 16 June 2014, the assessor's certificate was signed and filed. He assessed costs payable by the present applicant to the present respondents in a total of $202,742.66, comprising professional fees of $176,364.41 and disbursements of $26,378.25. The disbursements included costs of the assessment of $24,541. On the same day, he filed his certificate for the costs of the appeal.

[13] A few weeks prior to this and the other assessment, the applicant had filed an application seeking orders that the assessor be removed for what were said to have been breaches of r 720. That application came before me on 25 August 2014, i.e. more than two months after the assessments. I held that because the assessor's certificate had been issued, there was now no occasion for the removal of the assessor and the applicant's arguments would be considered on an application to review the assessments. I required the applicant to amend her applications so that they would comply with r 742, by setting out the grounds for her objections to the certificates. After a hearing in the Applications List before another judge in October, her application was sent to the Civil List where it came on for hearing on 14 April 2015. The applicant then unsuccessfully sought an adjournment, mainly upon an argument that the determination of her applications should await an outcome of a proceeding between her and the respondent Mr Hunter in the Family Court.

[14] In her amended application, the applicant set out certain purported "general grounds" for impugning each of the assessments as well as grounds which were specific to an assessment. The applicant developed all of those grounds by two sets of written submissions. I have considered each of those documents as well as the affidavits of the applicant upon which she relied for this application. In addition to her "general" grounds, her submissions challenged 47 items specific items which totalled $64,297.65.

[15] The first of her general grounds is a complaint that the assessor proceeded in disregard of her claim, made on 12 May 2014, that procedural fairness required that she have an opportunity to obtain legal advice. The assessor did not specifically address this in his reasons.

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8 r 703(3).

9 Assessor's Reasons para [32].

[16] On 24 April 2014, the applicant emailed the assessor about his letter to her and Mr Wright's firm of 11 April 2014. In that letter, Mr Wright explained, amongst other things, the procedure which he intended to follow in this assessment and the steps which he would require of the parties. One of those was that the (present) applicant provide by 24 April 2014 any written response to the material which the (present) respondents were required to provide. The applicant complained that she could not comply with that requirement because she was "without access to legal advice". She said that she was optimistic that she would soon obtain orders in the Family Court that would provide her with funds with which to seek advice in relation to the assessor's letter. The assessor does not appear to have responded specifically to that claim by the applicant. But in circumstances where the applicant had been unrepresented throughout the trial and the appeal and where there was no particular matter which had arisen in relation to costs upon which the applicant was wanting legal advice, the assessor was not bound to effectively stay the process of assessment whilst the applicant sought relief in the Family Court.

[17] The applicant claims that she was denied procedural fairness because the assessor did not provide her with material which she suggests was sent to him by Mr Wright. However, the evidence does not establish that there was anything which was in fact sent to the assessor by Mr Wright without her knowledge. Nor did she identify how any such material might have influenced this assessment in any respect. More than once the assessor told the parties that neither should communicate with him except in writing and with the other party receiving a copy of the communication. I infer that Mr Wright complied with that direction.

[18] There is a further claim by the applicant that she was denied procedural fairness in respect of the assessor's decision as to who should pay the costs of this assessment. I will return to that argument below.

[19] I go then to the applicant's arguments as to individual cost items. I will not deal with every argument about each item because, for the most part, the arguments challenge the discretionary judgment of the assessor in a way which would have the court reassess the costs, rather than conduct a review of the assessment according to the principles which I have discussed.[10] In no instance has the applicant demonstrated a manifest error in the assessment of an item or that her objection to an item was not considered. I refer here to the items of professional costs and disbursements for the work which was performed up to and including the judgment.

[20] There were several instances of incorrect arithmetic in the costs statement, from which the applicant says that too much has been allowed. The errors identified by the applicant occurred on particular pages, where the balance brought forward from the previous page, when added to items listed on the subject page, amounted to less than the total shown at the bottom of that page and carried forward. The assessor was alert to these errors. They were identified in the applicant's objections to the costs statement. In his letter of 11 April 2014 to the parties, the assessor noted those objections and said that his check had confirmed that "additions errors have been made". At para [26] of his reasons, the assessor noted that there was a contention by the applicant that there were "some seven pages in the costs statement … incorrectly totalled leading to an accumulated overstatement of the costs to the extent of $2,795.50 plus indemnity for GST". In that note, the assessor apparently overlooked one of the objections, which was about an error

[10] At para [5] above.

of $966.50 appearing on p 115 of the costs statement. However, at para [42] of his reasons, the assessor said that he found "additions errors on some 22 pages in the costs statement". It thereby appears that he not only allowed the objections of that kind, but also identified many other pages where there were mathematical errors. His schedule of deductions does not show a specific reduction for these mathematical errors.

[21] But that is understandable because the schedule showed deductions in respect of specific items of work and the error here was not about what was allowed for an item, but about the addition of the allowed sums. It is sufficiently clear that something was allowed in the applicant's favour for these errors. This appears from a comparison of the amount claimed in the costs statement, less the total of the reductions allowed for specific items and the amount ultimately allowed by the assessor. The total amount claimed was $319,391.01. The total of the reductions was $137,728.02. Subtracting those deductions from the claimed amount would result in $181,590.99. The amounts allowed were $176,364.41 for professional fees and $26,378.25 for disbursements. Included within the disbursements was an amount of $24,541 for the cost of the assessment. For the relevant comparison between what was claimed less the deductions and what was ultimately allowed, that component should be disregarded. Consequently, what was allowed was relevantly $178,201.66. There is therefore a difference of $3,389.33 which was allowed in favour of the applicant which is not explained by the schedule of deductions. I infer that this is explained by the errors in additions. A higher amount would have resulted from allowing for each of the eight errors which the applicant had identified in her objections. But the assessor found many other errors and it cannot be assumed that each of them resulted in an overstatement of the total.

[22] I would not review the assessment for those errors of addition. In particular, I would not require the assessor to reconsider this subject. The difference between what he has allowed in the applicant's favour and the amount for which she contended in her objection is so small as to not warrant the cost of a reconsideration, which may reveal no error by the assessor. Lastly, I should note that in her objection there was a further error of addition which she suggested had been made on p 174 of the costs statement. In fact there was no error on that page and her objection had overlooked the component of disbursements of $2,764.70. That alleged error was not the subject of a submission made in this application.

[23] The costs statement claimed for the attendance of Mr Wright at the trial on Wednesday, 15 August 2012. This was an error because the court did not sit on that day which was the RNA Show holiday. However, this was merely a typographical error which did not result in an excessive claim. The respondents claimed the correct number of days of trial but misstated the date of one of them.

[24] The applicant made extensive written submissions about the assessor's allowance for "due care and consideration". The respondents claimed an amount of $48,381.68 which was 20 per cent of the total of the individual items of professional costs and outlays. The assessor reduced that to an amount of $26,740, a reduction of $21,641.68. At paras [34] through [37] of his reasons, the assessor explained his conclusion about this component. In particular, he explained that, in favour of the respondents, was the fact that Mr Wright was under "the very considerable and onerous responsibility" of not only preparing the case for trial but also appearing as an advocate in a trial which occupied 10 days. He found that by Mr Wright acting also as the advocate, there was "a very substantial saving of legal costs by the seventh and eighth defendants". He also referred to the provisions

of the costs agreements between the respondents and Mr Wright's firm, which provided for an additional charge in the nature of "due care and consideration". He found further that the hourly rates charged by Mr Wright's firm were "modest" in comparison with other practices so that there was not a "component for 'due care and consideration' built in to the baseline hourly rates …".

[25] The applicant submitted that this component should not have been allowed at all, or at least in this amount, because Mr Wright, she submitted, performed poorly as an advocate. She asserted that it was another of the defendants who was the persuasive advocate in defeating her claim. This submission was not discussed by the costs assessor. But he was in no position to assess Mr Wright's performance as an advocate and he was correct in not attempting to do so. The trial judge may have been critical of Mr Wright in some respects. But her Honour did award the respondents their costs and upon the indemnity basis. A trial judge has the power to disallow a successful party some part of its costs where those costs have been caused by the unreasonable or incompetent conduct of the party's case by its lawyers. But the trial judge did not exercise that power. In my opinion, it would be highly undesirable to encourage any practice whereby costs assessors have to investigate the standard of an advocate's performance in the way which the applicant's submissions suggested. No error has been demonstrated in the assessor's discretionary judgment in the assessment of this component for care and consideration.

[26] I return to the question of the costs of the assessment. The assessor referred to r 732 of the UCPR which required him to decide the costs of the assessment. He noted that there was no offer to settle costs made under r 733. At para [41] of his reasons, the assessor wrote that he had requested the parties, by a letter dated 23 May 2014, to deliver any submissions about the costs of the assessment by 30 May 2014. He wrote that:

> "[I]t was not until 12 June 2014 that the [applicant] provided any reply on those matters. However, the 7 page email received by me from the [applicant] dated 12 June 2014 does not address any of the matters relevant to my consideration of the costs of the costs assessment and makes no submissions of assistance to me in deciding the costs of the costs assessment under r 732."

He then reasoned as follows:

> "[42] Having regard to all of the circumstances including the outcome on the costs assessment, to the submissions made by the parties in response to my letter to the parties dated 23 May 2014, and also having regarding to the fact that I found additions errors on some 22 pages in the costs statement it is my determination that the seventh and eighth defendants should bear a proportion of the costs assessment.
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> [43] Moreover, … the [applicant] having made no offer to settle costs under r 733 of the UCPR, it would normally be my determination that the costs of the costs assessment should, in effect, follow the event and that [the applicant] must pay all of the costs of the assessment. However and having regard to my determination within [42] of these Reasons, it is my determination that the [applicant] must bear $24,541 of the costs of the costs assessment with the seventh and eighth defendants to bear the remaining $1,100 of the costs of the costs assessment."

[27] The applicant complains that she was denied procedural fairness in that she was not given an opportunity to make submissions about this component. In particular, she was not given an opportunity to make a submission, with the benefit of the schedule of reductions produced by the assessor, that the extent of those reductions warranted an outcome under which she would not bear any of the costs of the assessment. Moreover, she says that the assessor should have given her that opportunity consistently with the procedure as he had explained it to the parties in his letter to them of 11 April 2014.

[28] In that letter, the assessor did set out a sequence of steps in a process under which he was to provide the parties with his Schedule of Reductions ahead of receiving any submissions of the parties as to the costs of the assessment. However, the assessor ultimately ruled on the costs of the assessment at the same time as he ruled on the assessment itself and provided the parties with his Schedule of Reductions.

[29] The assessor's reasons at para [41] referred to a seven page email from the applicant dated 12 June 2014, which is reproduced at pp 52 onwards of the exhibits to the applicant's affidavit filed 30 June 2014. This was sent after receipt of the assessor's email to the parties of 10 June 2014, in which he noted that no submissions had been received by him from the (present) applicant "in relation to the incidence of the costs of the costs assessment", so that he would "now decide the cost of the costs assessment [and] … communicate [his] determination to the parties … by 12 June 2014". As appears from his Reasons at para [41], on 23 May 2014 he had requested the parties to make any submission on this subject by 30 May 2014.

[30] In her email of 12 June 2014, the applicant wrote:

> "I intend making substantial submissions in relation to who should pay your costs for the assessments, as I am reliably informed that costs ought to be paid by the party seeking costs, when the costs they seek by way of their Costs Statement is considerably overstated. To make those submissions to you, I must seek your adherence to the Timetable at A above, by you providing copies of the submissions made to you and replies to the questions I have raised in emails that I have sent to you. I restated all the contents of emails and other communications referred to herein, and annexed them hereto."

[31] The reference to "the Timetable at A" was clearly to the timetable set out in the assessor's letter of 11 April 2014. Although the applicant did not refer to a need to see the Schedule of Reductions, she clearly enough stated that she might wish to make a submission as to who should bear the costs of the assessment depending upon the extent to which amounts were disallowed.

[32] I accept that the assessor did not follow the sequence of steps which he had set out in his letter of 11 April 2014. But it must have been clear to the applicant that he was not doing so. In other words, the applicant could not have thought that she could wait until after his assessment and his Schedule of Reductions had been provided to the parties before making her submissions (if any) on the subject of the costs of the assessment. Her complaint that he did not follow the sequence set out in his letter of 11 April 2014 therefore has no substance. It is another question whether she was denied procedural fairness by being required to make a submission on the subject without knowing the outcome of the assessment.

[33] I accept that the outcome was a relevant consideration for a decision on who should bear (and to what extent) the costs of the assessment. The applicant goes further and submits that an assessor should not allow the costs of the assessment where more than 15 per cent of the costs claimed have been disallowed. Rule 735 of the UCPR affects an assessment "of costs payable out of a fund" where that threshold of 15 per cent is reached. But that rule does not apply here. Section 342 of the *Legal Profession Act* 2007 (Qld) provides that upon an assessment under Div 7 of Pt 3.4 of that Act, the lawyer must pay the costs of an assessment if the costs claimed are reduced by 15 per cent or more, unless the assessor otherwise orders. But no submission was made by either side here as to the relevance of s 342 to the present question.

[34] The assessor reasoned that ordinarily the costs of an assessment should be paid by the party liable for the costs in the absence of an offer to settle by that party. Absent such an offer, the party entitled to the costs has no choice but to have the costs assessed. In my view, that reasoning was sound.

[35] The assessor then considered whether *some* of the burden of the costs of the assessment should be borne by the present respondents. He correctly took into account the outcome of the costs assessment. That was a relevant consideration because where claims in a costs statement are substantially reduced by the assessor, it can be said that the costs of the assessment have been increased through the fault of the party which presented the costs statement. But that was not the only consideration: it was also relevant for the assessor to consider the nature and extent of the objections. In this case, the assessor noted that the applicant appeared to have an objection to every item. And he noted that her objections were not framed by reference to the relevant principles and rules and that at least some of them were entirely without merit. In my view, there was no error in the exercise of his discretion in deciding to apportion the costs of the assessment as he did.

[36] The question then is whether he was bound to permit the applicant to make submissions on the costs of the assessment with the benefit of his assessment and in particular the Schedule of Reductions. Another assessor may have done so. It seems that this was his original intention. But what more could the applicant have submitted than she was able to submit to the assessor before he decided the matter? There is not any factual matter which the applicant could have communicated to him by a further submission. Importantly, the assessor was well aware of the relevance of the outcome of the assessment to this question of the cost of the assessment. And importantly also, the applicant's submissions here do not identify anything which, if submitted to the assessor, could have been influential. The applicant does not identify something about the assessor's disallowance of any costs which, if known to the applicant, could have resulted in a persuasive submission about the costs of the assessment. In my conclusion, the assessor's decision should not be reviewed upon this ground.

[37] For these reasons the application to review the assessment in this proceeding must be refused.