SUPREME COURT OF QUEENSLAND

CITATION:	*Eyears v Zufic* [2016] QCA 40
PARTIES:	**MARINA EYEARS** (applicant) **v** **PETER ZUFIC as trustee for the PETER AND TANYA ZUFIC FAMILY TRUST trading as CLIENTCARE SOLICITORS** (respondent)
FILE NO/S:	Appeal No 3211 of 2015 DC No 2535 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 27 November 2014
DELIVERED ON:	26 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2015
JUDGES:	Holmes CJ and Ann Lyons and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Applications refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – FROM DISTRICT COURT – BY LEAVE OF COURT – where the respondent acted for the applicant in acrimonious Family Court proceedings – where the respondent served an itemised costs account for his professional fees on the applicant – where the Family Court Registrar gave a preliminary assessment of professional fees in the amount of $126,881.27 – where no objections to this amount were received – where the respondent instituted proceedings, *inter alia*, for the costs assessment of the Family Court as a debt – where the respondent applied for summary judgment on the debt portion of the claim – where the applicant counterclaimed alleging gross negligence and damages in excess of $1.2 million – where the respondent's summary judgment application was dismissed in the Magistrates Court without reasons being given – where the respondent successfully appealed to the District Court and obtained summary judgment – where the applicant argues the District Court judge erred in allowing a new outline of argument to be relied on at the hearing, predetermined the

matter by virtue of his Honour's *ex tempore* judgment and that his Honour failed to take into account contentious matters – whether there has been a breach of the rules of natural justice, a failure to take into account relevant facts and/or an error of law – whether leave should be granted to appeal from the decision of the District Court

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the applicant appealed the decision of the District Court awarding summary judgment to the respondent – where the appeal was three months out of time – where the applicant argues that she suffers from bad health including an adjustment disorder and a lack of motivation and memory, that she would be homeless if the District Court decision was to stand and that the transcript was provided to her late – whether the application ought to be granted for an extension of time in which to apply for leave to appeal the judgment of the District Court

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the respondent acted for the applicant in acrimonious Family Court proceedings – where the respondent served an itemised costs account for his professional fees on the applicant – where the Family Court Registrar gave a preliminary assessment of professional fees in the amount of $126,881.27 – where no objections to this amount were received – where the respondent instituted proceedings, *inter alia*, for the costs assessment of the Family Court as a debt – where the respondent applied for summary judgment on the debt portion of the claim – where the applicant counterclaimed alleging gross negligence and damages in excess of $1.2 million – where the respondent's summary judgment application was dismissed in the Magistrates Court without reasons being given – where the respondent successfully appealed to the District Court and obtained summary judgment – where the applicant argues the District Court judge erred in allowing a new outline of argument to be relied on at the hearing, predetermined the matter by virtue of his Honour's *ex tempore* judgment and that his Honour failed to take into account contentious matters – whether the District Court judge erred in awarding summary judgment to the respondent

Uniform Civil Procedure Rules 1999 (Qld), r 292

Re P's Bill of Costs (1982) 45 ALR 513, applied

COUNSEL: The applicant appeared on her own behalf
K Barlow QC, with B O'Brien, for the respondent

SOLICITORS: The applicant appeared on her own behalf
Client Care Solicitors for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Ann Lyons J and the orders she proposes.

[2] **ANN LYONS J:**

This application

[3] The applicant and respondent have been in dispute for the last decade with respect to the professional fees the respondent charged the applicant when he acted for her in acrimonious Family Court proceedings. On 3 April 2014 the respondent filed an application for summary judgment for the amount of his claim in the Magistrates Court. On 10 June 2014 the magistrate dismissed the respondent's application without giving reasons.

[4] The respondent appealed and on 27 November 2014 the primary District Court judge allowed the respondent's appeal and granted summary judgment for part of the respondent's claim. The applicant now seeks leave to appeal that decision of the District Court and also seeks an extension of time within which to apply for leave as her application is three months out of time.

[5] The reasons advanced by the applicant as to why the extension should be given are that she suffers from bad health and that she would be homeless if the decision of the District Court were to stand. There is some evidence by way of a medical certificate that the applicant has been suffering from an "adjustment disorder" since the decision was handed down and that she continues to suffer from poor concentration as well as a "lack of motivation and memory".[1] The applicant also asserts that the judge's reasons were provided to her 'late' as Auscript was not able to release the reasons until they were revised by the primary District Court judge. In my view there has been no real explanation as to why her application for leave to appeal is three months out of time. I will however turn to the merits of the application for leave to appeal.

The Family Court Proceedings and Orders

[6] The applicant engaged the respondent to act as her solicitor in Family Court proceedings over a decade ago in late 2004. Those proceedings related to a property settlement after a short 19 month marriage and an application to vary a domestic violence order against the applicant's former husband. A written Client Costs Agreement was entered into in July 2005, about seven months after the solicitor was initially contacted. The respondent ceased to act for the applicant in February 2007 after a series of contentious hearings in the Family Court. The pleadings particularise that during the course of proceedings five counsel were involved in total, including three senior counsel, two other firms of solicitors, an accountant and a private investigator.[2]

[7] On 13 July 2007 the respondent commenced Supreme Court proceedings against the applicant by way of Claim for the recovery of his professional fees in an amount of $235,162.72 although an assessment had not at that point been obtained. The applicant filed a Defence and then an Amended Defence and Counterclaim on 14 August 2007.

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1 Medical Certificate of Dr Epa dated 26 March 2015; appeal record book, 191.
2 Applicant's further re- amended defence filed 24 June 2014, [18]; appeal record book, 143.

[8] Correspondence then ensued between the legal representatives with the solicitors for the applicant arguing that the Costs Agreement was invalid and that the "maximum amount claimable was in accordance with the Family Court Scale". On 9 January 2009 the respondent agreed that, for the purposes of limiting the costs associated with the matter, he accepted that the client agreement would "not apply" and that "the maximum amount claimable by this firm for its professional fees against Mrs Eyears is the amount calculated in accordance with the Family Court scale".[3]

[9] On 17 March 2009 the respondent served on the applicant an itemised costs account for his professional fees in the Family Law proceedings pursuant to the *Family Law Rules* 2004 (Cth) in an amount of $198,929.25. The applicant served a Notice of Dispute pursuant to the *Family Law Rules*, disputing that costs account in May 2009.

[10] On 12 June 2009 the respondent filed his itemised costs account and the applicant's Notice of Dispute in the Family Court and sought an assessment of costs pursuant to schedule 6, clause 6.25(3) of the *Family Law Rules*.

[11] On 28 September 2010, pursuant to orders of a Family Court Registrar dated 3 September 2010, the applicant filed and served an Amended Notice of Dispute essentially alleging that the respondent was incompetent and that the work had been done negligently. A further Amended Notice of Dispute was filed on 11 April 2011.

[12] On 4 July 2011 the Family Court Costs Assessment Registrar gave notice to both parties of a preliminary assessment of $126,881.27 and stated that any objections to that assessment had to be received with 21 days.[4]

[13] No objections were received.

[14] On 24 August 2011 the Family Court ordered that the applicant pay the respondent the sum of $126,881.27.

[15] The applicant has not applied to set aside the Order of 24 August 2011 or otherwise challenged it.

[16] The respondent demanded payment of that sum of $126,881.27 by letter dated 2 September 2011.

[17] On 7 September 2011 the applicant unsuccessfully applied to the Supreme Court of Queensland for a stay of the costs assessment in the Family Court pending the determination of her Counterclaim.

The subsequent Supreme Court proceedings

[18] On 7 October 2011 the respondent filed an Amended Statement of Claim in the Supreme Court seeking payment of the amount of the costs assessment order, together with an additional sum related to other work.

[19] On 27 January 2012 the applicant filed an Amended Defence and Counterclaim alleging gross negligence and claiming damages in excess of $1.2 million.

[20] On 27 March 2012 de Jersey CJ ordered that the Defence be struck out with leave to file an amended defence and stayed the Counterclaim until further order with the requirement that any application to lift the stay required the leave of a judge.

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3 Reasons of the District Court judge delivered 27 November 2014; appeal record book, 88, lines 22-24.

4 Appeal record book, 86-87.

[21] The applicant then applied for the respondent's Statement of Claim to be struck out or permanently stayed on the basis that the Supreme Court lacked jurisdiction. The application was dismissed by de Jersey CJ and the proceedings transferred to the Magistrates Court.

The Magistrates Court

[22] After the debt recovery proceeding was transferred to the Magistrates Court on 11 March 2014, the respondent filed an application for summary judgment on 3 April 2014 for the amount of his claim. That application was the application which was dismissed by the Magistrate on 10 June 2104 without reasons being given. Whilst reasons were specifically requested by counsel for the respondent none have ever been provided.

[23] On 24 June 2014 a further re-amended Defence was filed in the Magistrates Court. On 4 July 2014 the respondent filed a Notice of Appeal in the District Court with respect to the magistrate's dismissal of the application. Whilst an application to lift the stay on the Counterclaim imposed by de Jersey CJ was subsequently filed in July 2014, it would appear that it has been adjourned pending the determination of the current proceedings.

[24] On 27 November 2014 the primary District Court judge heard the appeal and was satisfied that it was appropriate in the interests of justice to proceed by way of rehearing pursuant to r 765(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("***UCPR***") and to receive further evidence from the parties, pursuant to r 766(2), particularly as the magistrate had not provided reasons for the decision which was made. His Honour continued:[5]

> "If that is done, it makes it practical for this court to consider the issue that was agitated below; namely, whether the [applicant] has any real prospect of defending all or part of the claim and whether there is any need for a trial. For the reasons which I will shortly move to, I am satisfied that the defendant has no real prospect of defending the claim in respect of the sum of $126,881.27, and I am satisfied that in respect of that claim there is no need for a trial."

[25] The primary District Court judge ordered that judgment be given for part of the respondent's claim and ordered that the applicant pay the respondent the sum of $126,881.27 plus interest.

Grounds of appeal

[26] In this appeal the applicant argues:

1. the District Court judge made errors of law by allowing the respondent to provide a new outline of argument at the hearing which meant that the appeal was on a different basis to the argument before the Magistrate. The applicant argues that the new argument raised new issues and accordingly this was unfair as her counsel was not given adequate time given to read the material or to respond to it;

2. the District Court judge had predetermined the matter as he gave an *ex tempore* judgment after having reserved the matter for 30 minutes;

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5 Appeal record book, 87, lines 18-23.

3. there were contentious matters before the Family Court and Supreme Court which were not brought to the attention of the District Court judge in that:

   (a) there was an intentional non-disclosure to the court of material facts which were relevant to the proceedings and the District Court judge erred in law by failing to take into account the details of the factual dispute between the parties;

   (b) incorrect and misleading information was given to the court by the respondent and misleading statements were made in court. The applicant submits that this was a breach of the professional rules;

   (c) the primary judge did not pay any attention to the defence in her Counsel's outline of argument and that the primary judge's comments in relation to the *Fair Trading Act* 1989 (Qld) contradicted the applicant's outline of argument;

   (d) there are factual matters in dispute which require a trial. In particular the applicant argues that she has a basis to defend the respondent's claim because of the false and misleading representations which were made to her to induce her to retain the respondent for the Family Court and domestic violence proceedings. The applicant makes allegations in her submissions in relation to the competence of her solicitor as well as arguing that he made false statements to her and misrepresentations in relation to the late payment of fees;

   (e) the respondent did not fulfil any of the terms of the client agreement and that the total amount of the respondent's costs was $357,105.25;

   (f) the respondent failed in his duty to engage a forensic accountant when he was obliged to and argues that such a forensic accountant would have exposed the applicant's former husband's fraud; and

   (g) there had been two unsuccessful applications by the respondent for an enforcement warrant, the first a decision of Registrar Davies on 17 April 2013 rejecting the respondent's application for an enforcement warrant and, the second, an enforcement warrant obtained from the District Court set aside on 9 April 2015 by Judge Rackemann pending the determination of the Court of Appeal. Additionally, that the applicant successfully had an enforcement warrant ordered by the Family Court set aside.

[27] For the sake of convenience I shall deal with these various grounds of appeal under three headings:

1. Has there been a breach of the rules of natural justice?
2. Has there been a failure to take into account the relevant facts?
3. Has there been an error of law?

The nature of this appeal

[28] The applicant requires the Court's leave to appeal as the decision in question was made in the District Court's appellate division. In considering such an application this Court has a discretion. Considerations which influence the exercise of such a discretion include whether there is an error which should be corrected, whether an injustice has occurred and whether there is an important question of law which needs to be determined.

[29] It is clear that the appeal to this Court is an appeal in the strict sense and the decision of the District Court is not subject to an appeal by way of rehearing. It is not open to this Court to substitute its view of the facts for that determined by the District Court judge. The issue before this Court is whether there has been any error of law or any error in the primary judge's exercise of discretion.

Has there been a breach of natural justice?

[30] The applicant argues that the primary judge erred in allowing the respondent to provide a new outline and was severely prejudiced as a result of being caught by surprise.

[31] It is clear that at the hearing before the primary judge the respondent's counsel had indicated that the new outline was submitted because further affidavit and further pleadings had been provided by the applicant. Furthermore, the bundle of documents which were provided to the primary judge included material which was known to the applicant including a copy of the costs assessment order as well as pleadings and interlocutory orders in the debt recovery proceedings. It is clear, therefore, that the applicant and her solicitors and counsel were well aware of that material and in my view they were not taken by surprise as to the content of that new information.

[32] The applicant was represented by counsel at the hearing and a perusal of the transcript reveals that all of the relevant issues were argued. The primary judge had allowed time for the applicant's counsel to read the material and allowed an adjournment for several hours plus a two hour luncheon adjournment to consider the new issues. Furthermore, it is clear that counsel was able to address those issues in the afternoon and did not seek an adjournment to consider it further nor did the applicant's counsel press the primary judge for an order that she be granted leave to file further submissions in response to that outline.

[33] In my view the applicant has not established any error or prejudice because of the reliance on the new material. I am not therefore satisfied that there has been a breach of the rules of natural justice.

[34] The applicant argues that there was an "intentional non-disclosure" to the Court but has failed to specify what should have been taken into account. It is clear that the primary District Court judge was well aware that the respondent's initial claim for costs has been reduced by the Family Court Costs assessor and that the disbursements incurred were significant. I am not satisfied that the applicant has established that incorrect and misleading information was given to the court by the respondent or that misleading statements were made in court as alleged.

[35] Neither am I satisfied that because the primary judge gave ex tempore reasons that gives rise to an inference that the judge had predetermined the matter. Having considered the transcript and the judge's extensive reasons I do not consider that there is any evidence which would support such an argument. His Honour carefully examined the arguments put to him and gave reasons as to why came to the decision to grant summary judgment.

Has there been a failure to take into account the relevant facts?

[36] The applicant contends the primary judge failed to take into account the factual dispute between the parties. The primary judge's decision however sets out the history of the dispute between the parties. In my view the primary judge was well

aware of the critical factual dispute between the parties. That factual dispute was also referred to in the oral submissions before the judge and the primary judge had the benefit of the parties' pleadings. The primary judge was well aware of the actual dispute between the parties as the following extract from his judgment reveals:[6]

> "On the 4th of July 2011, the Family Court wrote to the parties providing a notice of preliminary assessment made pursuant to clause 6.30 of the Rules in the sum of $126,881.27. That is $72,047.98 less than the sum calculated in the [respondent's] itemised costs account. The notice of preliminary assessment stated that any party wishing to object must file and serve written notice of objection within 21 days, failing which a costs assessment order will be made for the $126,881.27 pursuant to clause 6.32.
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> Because there was no objection, on the 24th of August 2011 a Family Court costs assessment order was made pursuant to clause 6.32 in respect of the property settlement proceedings in that court. The assessment was that:
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> > *The amount payable by (the [applicant]) to (the [respondent]) is $126,881.27.*
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> That is the sum for which the [respondent] sought summary judgment. There has been no application to have the costs assessment order set aside. The plaintiff demanded payment of that sum by letter on 2 September 2011. On 7 September 2011, the [applicant] filed an application seeking a stay of the costs assessment in the Family Court pending the determination of her counterclaim. That application for a stay was dismissed by de Jersey CJ on 28 September 2011.
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> On 7 October 2011, the [respondent] filed the amended statement of claim seeking payment of $126,881.27, the subject of the costs assessment. The [respondent] also sought another sum for costs relating to the domestic violence proceeding of approximately $10,000. Those costs have not yet been assessed. The plaintiff does not seek judgment in respect of those costs from me today."

Has there been an error of law?

[37] Not only was the primary District Court judge well aware of the factual dispute but, as the Reasons also reveal, he was well aware of the test for summary judgment contained in r 292 of the *UCPR*. His Honour then carefully analysed the facts and the law which applied and was ultimately satisfied that the test had been satisfied. Furthermore the Reasons reveal that the primary District Court judge had a copy of the proposed further re-amended defence and was well aware of the applicant's argument as to why there was the need for a trial as follows:[7]

> "The matters which are relied upon for Ms Eyears as raising serious issues to justify a trial are to do with an argument that the basis for the [respondent's] entitlement to fees cannot be the client agreement which was reduced to writing but must be an oral agreement. It is

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6 Appeal record book, 89, lines 1-26.

7 Appeal record book, 90-92.

submitted that the terms of the oral agreement are matters which must be established at trial. If there was an oral agreement it is argued that it was an entire agreement and could not be terminated at the election of the [respondent] because the [respondent] had no just cause to terminate it, and because he terminated the oral agreement without just cause he is entitled to no fees whatsoever. It is argued that the written client agreement is void by reason of section 48F of the Queensland Law Society Act of 1952.

Whether or not a solicitor's client agreement is an entire contract is a question of construction. Clauses 7(ii) and (iii) of the client agreement allow for the issue and payment of invoices on a monthly basis. That rebuts any presumption that might be argued to arise that a solicitor's client agreement is an entire contract. The [applicant] attacks the written client agreement, and if successful in the attack on that agreement, argues that the alternative would be an oral agreement which should be interpreted to be an entire contract that could not be terminated at the election of the [respondent].

The argument is based upon section - sections of the Queensland Law Society Act of 1952. It is submitted:

> *The client agreement document relied upon by the* [respondent] *did not comply with s 48F of the Queensland Law Society Act 1952 because it did not contain adequate disclosure as per part 3.4, division 3 of the Legal Profession Act 2004, nor was it provided by the* [respondent] *prior to entering into it with the* [applicant], *nor did it comply with the requirements of the Queensland Law Society Act 1952 section 48, nor did it include a costs notice required by the Family Law Rules 2004.*

It can be seen that that submission raises a number of different arguments. The first is that it:

> *did not comply with section 48F of the Queensland Law Society Act 1952 because it did not contain adequate disclosure as per part 3.4, division 3 of the Legal Profession Act 2004 –*

Section 48F of the Law Society Act provides that if a client agreement does not comply with section 48 of the Law Society Act, the client agreement is void. The Act did not require compliance with any aspect of the Legal Profession Act of 2004. Because of that, I reject this first aspect of the submission for the [applicant]. The second aspect of the submission was that it was not provided by the [respondent] prior to entering into it with the [applicant]. I interpret that to mean that it's submitted that the [respondent] should have provided a copy to the [applicant] before she entered into it. It can be seen that section 48 of the Law Society Act 1952 made no such requirement. The requirement under section 48 was not that the client agreement be provided, 'prior to entering into it by the ([respondent]),' but, rather, pursuant to section 48 subsection (2), 'within a reasonable time after starting work' for the client.

I note that the client agreement, having been provided some seven or so months after, arguably, work started in October of 2004 raises the argument that it was not provided within a reasonable time. However, the consequences of that have been considered by his Honour Fryberg J in the case of Jezer Construction Group and Others (2004) QSC 440, in particular, at page 7. Non-compliance with the requirement to provide the agreement within a reasonable time was thought by his Honour to possibly attract a criminal sanction, but his Honour concluded that it did not produce the effect that the agreement made out of time was one which did not comply with section 48.

The next part of this attack made by the [applicant] was that the agreement did not include a costs notice required by the Family Law Rules. I note that nothing in the Family Law Rules renders the client agreement void as a result of the non-provision of a costs notice. Instead, the rules by clause 6.03(1)(a) and 6.16(a) make provision for a party to apply to the Family Court to set aside the agreement. No application was made to set aside that agreement. On the contrary, the Family Court waived the requirement for provision of a costs notice by order of the 15th of March 2011.

The section 48 of the Queensland Law Society Act at subsection (4) was particularly relied upon by the respondent. It provides:

> *The notice in the schedule must be completed by the practitioner or firm and given to the client, together with a copy of any scale of the work provided under an Act, before the client signs the client agreement.*

It was submitted that it should be interpreted against the background that this is consumer protection legislation. It is accepted by the [applicant] that under the Acts Interpretation Act the word 'Act' is defined in section 6 of the Act to refer, in effect, to any Queensland statute and that it would not refer to the Family Law Rules.

By reference to section 4 of the act, it was submitted that that interpretation was displaced and that a contrary intent appears by implication in the Queensland Law Society Act. I reject that submission. Nothing in the Queensland Law Society Act leads me to conclude that there was a statutory intention to displace the operation of the rules which applied in the federal sphere which allowed a party to seek to protect itself by applying to have a solicitor-client agreement declared void. Insofar as I might be wrong in respect of that, I refer then to the argument that it was necessary to provide a scale of costs.

Mr Justice Fryberg dealt with a similar argument in Herald and Worker Bee (2003) QSC 223. His Honour determined by that the failure to forward a scale may have been conduct required of a solicitor. His Honour was referring to a scale required by a Queensland statute. But his Honour went on to observe that the failure to send a scale did not render the agreement void. With respect, it seems to me that his Honour's reasoning was correct, whether it was obiter or not, and I accept that reasoning. Accordingly, I reject the arguments for the respondent that the client agreement was void."

[38] There can be no doubt that the respondent was retained to do legal work for the applicant and did that work. Pursuant to a Client Agreement the applicant agreed to pay the respondent's accounts within 30 days. The Family Court ordered that the amount of $126,881.27 was payable. That order has not been set aside. In the 1982 decision of *Re P's Bill of Costs*,[8] the Full Court of the Family Court held that the *Family Court Act* 1975 (Cth) and Regulations provide "an exclusive code" relating to disputed accounts between a solicitor and client in relation to any business done by the solicitor "in or incidental to proceedings under the Family Law Act."[9]

[39] The fact remains that the dispute in relation to the costs assessment order is irrelevant to the debt recovery proceedings because, as the primary judge records, there was no challenge to the costs assessment order. The making of such an order gives rise to an immediately recoverable debt.

[40] In my view the substantive appeal is without merit. No error has been shown in this regard.

[41] The applicant is also incorrect in her assertion that the Enforcement Warrant was set aside by Rackemann DCJ on 9 April 2015. Enforcement of the Warrant is simply "stayed until further order".

[42] There is no important point of law, or matter of public importance or interest, such that the Court should grant leave in the circumstances of this case.

[43] I would refuse the applications.

[44] **APPLEGARTH J:** I agree with the reasons of Ann Lyons J and with the orders proposed by her Honour.

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8 (1982) 45 ALR 513.

9 *Re P's Bill of Costs* (1982) 45 ALR 513, 520.