SUPREME COURT OF QUEENSLAND

CITATION:	*Farrar v Julian-Armitage & Anor* [2016] QCA 141
PARTIES:	**VIKI MAREE FARRAR** (applicant) **v** **ANGELA JULIAN-ARMITAGE** (first respondent) **GREGG LAWYERS PTY LTD** ACN 137 730 842 (second respondent)
FILE NO/S:	Appeal No 9554 of 2014 Appeal No 9555 of 2014 DC No 319 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) – Further Order
ORIGINATING COURT:	District Court at Southport – [2014] QDC 194
DELIVERED ON:	3 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Margaret McMurdo P and Morrison JA and Henry J Judgment of the Court
ORDER:	**The applicant pay the second respondent the respondents' costs fixed at $45,000.**
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – DISCRETION – where the court ordered the applicant to pay the respondent's costs on the standard basis in an amount fixed by the court unless the parties agreed – where the parties did not agree as to costs – where the parties prepared an itemised cost statement and objections for the purpose of the court to fix costs – where the court held an itemised cost assessment is not preferable where costs are to be fixed – where the court fixed the amount of the respondent's costs in accordance with r 687(2)(c) of the *Uniform Civil Procedure Rules* 1999 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 687, r 705 *Amos v Monsour Pty Ltd* [2009] 2 Qd R 303; [2009] QCA 65, cited *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd* [2007] QCA 167, cited *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd* [2007] QCA 278, cited

Farrar v Julian-Armitage & Anor [2015] QCA 289, cited
Goodwin v O'Driscoll & Anor [2008] QCA 43, cited
Sochorova v Commonwealth of Australia [2012] QCA 152, cited

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: No appearance for the applicant
No appearance for the respondents

[1] **THE COURT:** In dismissing the application for leave to appeal this court ordered the applicant to pay the respondent's costs of and incidental to the application on the standard basis in an amount to be fixed by the court unless agreed.[1]

[2] Costs have not been agreed. It therefore falls to this court to fix costs.

[3] The court here preferred the process of fixing costs, rather than leaving them to be assessed, in circumstances where the subject of the application was itself a case involving a protracted dispute about a costs assessment.[2] The parties made even this process more complicated for themselves than it had to be.

The nature of the process to be undertaken

[4] The general rule, reflected in the *Uniform Civil Procedure Rules* ("*UCPR*") at r 687(1), is that the costs to which a party is entitled under the rules or court order will be assessed costs. However, rule 687(2)(c) provides that "instead of assessed costs" the court may order a party to pay another party "an amount for costs fixed by the court" (emphasis added).

[5] It is implicit in r 687(2)(c)'s provision for the fixing of costs by the court, as an alternative to an assessment of costs, that the process to be undertaken by the court will not replicate a costs assessment. The process is intended to be speedy and inexpensive to fix a gross sum broadly, without the specificity involved in an assessment of costs.[3] As this court observed in *Goodwin v O'Driscoll*:[4]

> "Fixing costs is intended as a summary determination of what is fair and reasonable for costs in the circumstances. It is not intended to mimic an assessment of costs."

[6] These considerations inform the nature and extent of the materials required to make such a determination and are reflected in Practice Direction 3 of 2007, paragraph 3:

> "a. The court has a broad discretion to fix costs, and will do so where that will avoid undue delay and expense, but only provided the court is confident to fix costs on a reliable basis.
> b. Parties should therefore, at all relevant times in the course of the hearing of a matter, be in a position to inform the court of their realistic estimate of the amount of the recoverable costs, on

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1 *Farrar v Julian-Armitage & Anor* [2015] QCA 289.
2 *Farrar v Julian-Armitage & Anor* [2015] QCA 289, [102].
3 *Amos v Monsour Pty Ltd* [2009] 2 Qd R 303, 310.
4 [2008] QCA 43, [12].

a standard or indemnity basis, should that party be the beneficiary of a costs order. Where practicable, the estimate should be verified on affidavit.

c. Preferably parties should not, for this purpose, be put to the expense, and suffer the delay, of preparing a costs statement complying with the UCPR. Any estimate must nevertheless be carefully formulated and realistic."

The parties unnecessarily complicate the process

[7] The materials exhibited to the affidavits filed by the parties' solicitors show that after this court's dismissal of the application Gregg Lawyers, solicitors for the respondents, referred their file to and obtained a short form cost assessment from cost consultant GR Ryan, totalling $60,655.40. Unsurprisingly provision of that document to the applicant's solicitor did not encourage settlement. Instead the applicant's solicitor pressed repeatedly for a full itemisation in accordance with Schedule 1 of the *UCPR*, citing *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd*[5] in support of such a course. This in turn prompted Gregg Lawyers to obtain and provide an itemised assessment from Mr Ryan, totalling $68,777.46.

[8] After the applicant's solicitors offer to settle costs for $35,000 was rejected her solicitors engaged costs assessor Glenn Walters who prepared a 33 page notice of objections, identifying reductions for objections totalling $49,667.66, leaving a balance of $19,109.80.

[9] The frolic of the parties procuring an itemised costs assessment and the detailed objections to it was unnecessary for the purpose of the court fixing costs. It was apparently prompted, at least in part, by an erroneous understanding that *ChongHerr Investments* is authority for the proposition that an itemised costs statement should be provided for the court to fix costs.

[10] In that matter the Court of Appeal in giving its decision on the appeal ordered the respondent to pay the appellant's costs of the application below and of the appeal.[6] It did not by its orders signal an intention that it would fix those costs. It appears it was subsequently decided to seek an order fixing costs but by that time a costs assessor had carried out an assessment. The appellant there relied upon the assessment as providing its realistic estimate of the amount of recoverable costs for the purposes of the Practice Direction[7] and, because it was before the court, regard was had to it. However, there is nothing in the court's decision suggesting that is the only or the preferable way of providing the realistic estimate called for by the Practice Direction. That is unsurprising. The Practice Direction provides it is preferable parties should not be put to the expense and delay of preparing a costs statement complying with the *UCPR*.[8] It follows, where costs are to be fixed, it will not ordinarily be preferable for parties to be put to the expense and delay of obtaining an itemised costs assessment.

[11] Unlike the proceeding giving rise to it, the litigation history of this application for leave to appeal was not protracted or complex. It would have been sufficient for the solicitor with carriage of the matter for the respondents to depose directly to his or her own estimate of the recoverable costs. In circumstances where Gregg Lawyers

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5 [2007] QCA 278.
6 [2007] QCA 167.
7 [2007] QCA 278, [2].
8 *UCPR* r 705.

had apparently not invoiced for their own professional work and were looking to persuade their opponent to settle costs it is unsurprising they elected to incur the cost of a short form costs assessment for that purpose. However the ensuing escalation was unnecessary, as would have been apparent if the parties had proper regard to Practice Direction 3 of 2007.

[12] That the court now has detailed material to which it may have regard in fixing costs, just as it apparently did in *ChongHerr Investments*, should not be seen as endorsing the frolic undertaken by the parties. Nor should it divert the court from a summary determination into some form of review of the assessment and objections.

[13] It is necessary to dispense with one other complication before finally turning to the task at hand. The court gave directions about the length and deadlines for filing of written submissions. The solicitors for the respondents filed a written submission in time, although its two paragraphs read like evidence rather than a submission. The respondents' solicitors later filed an unheralded further submission, over a month after the deadline for the filing of their submission in reply. That submission read as an initial submission rather than a reply. It was not limited to the two pages fixed for a reply and even exceeded the five pages fixed for the initial submission. The applicant objected to the filing, doubtless because if it were allowed the applicant would suffer the prejudice of either its properly filed submissions not having been drafted with knowledge of arguments which should have been raised in the respondents' initial submissions or of having to prepare yet another written submission in response to the impermissible late submission of the respondents. The respondents' submission concluded by seeking an extension of time for the making of the submission. Remarkably, no explanation at all was given for the delay, the excessive length or the failure to have made proper submissions in the first place. The extension should not be given and the late submission should not be taken into account.

Discussion

[14] This was an application for leave to appeal, although it was necessarily prepared and argued in anticipation that the hearing of the application would involve consideration of the merits. It did not involve particular legal complexity but required a detailed grasp of a legislative regime and provisions that have not attracted much appellate consideration. The application also required mastery of a lengthy record below, spanning an appeal record book of five volumes. The hearing consumed a little over four hours of actual sitting time. It was, overall, a moderately demanding matter in the context of the appellate jurisdiction.

[15] At first blush such a matter would typically warrant a higher award of costs than the total of $19,109.80 conceded in the objections by Mr Walters though seldom as high as the $68,777.46 assessed in the itemised assessment by Mr Ryan.

[16] It is unnecessary for the purposes of the present exercise to analyse the 138 objections giving rise to Mr Walters' low total of $19,109.80. Even the applicant's own solicitor expressed the view in exhibited correspondence that, having conferred with counsel on the topic, the proper range of costs for a matter of this kind should be between $35,000 and $40,000. In the court's experience that is a reasonable estimate although the upper end of that range likely extends higher given this was a moderately demanding matter involving two applications.

[17] As to Mr Ryan's assessment, before explaining why its total is too high for present purposes, it is important to acknowledge a proper entitlement to costs should not be diminished by adherence to regressive views or practices calculated to cast much of the financial burden of litigation upon the successful party.[9] As was observed in *ChongHerr Investments*:

> "The fundamental principle is that the successful party should not have been put to the expense of litigation, and it should be indemnified in respect of the costs which it has reasonably incurred in order to establish rights contested by the unsuccessful party."[10]

However, it is also important to appreciate there are features of Mr Ryan's assessment which suggest his task did not involve particular scrutiny of what costs were necessary or proper in the context of assessing party-party costs. It is sufficient to highlight some of those features to demonstrate why this court should not adopt the total quantified by his assessment as representing a reasonable estimate of recoverable costs.

[18] By far the most significant outlays incurred by the second respondent were the payments of counsel's fees. Counsel's invoices were exhibited and were also listed in the costs assessment. Those eleven invoices total $26,597.07. The rate charged in those invoices is relatively high for experienced junior counsel, though not inappropriately so. It was of course a matter for the respondents what fee they were prepared to pay and it would have been reasonable to expect that experienced counsel, particularly one who as here appeared at first instance, might deliver greater savings in preparation time than less experienced counsel. Counsel's total invoiced preparation time of 24 and half hours spent in preparing outlines and lists of authorities and in hearing preparation time does not bespeak any obviously substantial saving in preparation time.

[19] It appears from the detail in the assessment that counsel's instructing solicitor did not use counsel in a cost effective way during the preparation phase. For instance, counsel's invoices include advising for one and a half hours upon the applicant's draft index and spending three and a half hours amending outlines to incorporate references to the appeal book. Further Mr Ryan's assessment is littered with fees for communications by the instructing solicitor with counsel in a surprisingly high volume for a fixed litigation target like an application for leave to appeal. This suggests a high level of reliance on counsel by the instructing solicitor in the instructing solicitor's conduct of the matter.

[20] In light of the significant time and guidance contributed by counsel to the preparation phase of the case it is reasonable to expect there would have been a commensurate tempering of the preparation work claimed by the instructing solicitor. The itemised assessment does not suggest any such moderation, as the following two examples demonstrate.

[21] First, Mr Ryan's assessment of the solicitor's fees includes a single item of $11,088[11] for the solicitor's "perusing/examining" of the appeal record book, a surprisingly large item given the same firm of instructing solicitors was both involved below and was a party in the proceeding. It is reasonable to expect that either capacity would have given rise to a pre-existing working familiarity with the record. Second, Mr Ryan's assessment includes an item of $9,156.42[12] for care and consideration.

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9 *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd* [2007] QCA 278, [11].
10 Ibid.
11 Affidavit of John Gregg ex D p 21 (item 244).
12 Affidavit of John Gregg ex D p 37 (item 429).

This represents 30 per cent of the total of the already significant total of $30,521.40 solicitor's fees otherwise assessed by Mr Ryan. Such a high percentage is not apt here, if such an item is apt at all in a case like the present.

[22] It will be recalled Gregg Lawyers acted for itself as second respondent as well as for the first respondent. There is no evidence any of the work performed by the second respondent was ever charged, not even to the first respondent. Mr Gregg did not depose to any deferred billing or payment arrangement pertaining to either respondent. He did not depose to an estimate of the respondents' recoverable costs. His affidavit did not verify the assessed solicitor's fees represented costs actually incurred by his firm.

[23] It may be inferred the second respondent performed the assessed work. It is also reasonable to infer a substantial proportion of that apparently unpaid work would have consumed some of the firm's otherwise billable time and resources. Such work therefore came at a compensable cost attributable to professional skill and time in a way self represented laypersons' work on their cases does not.[13] The compensable cost of that work may be similar to but will not necessarily be the same as the cost of acting for a lay client of the firm. For instance, in a case like the present, it is reasonable to expect significant efficiency should have flowed from the firm also being a party.

[24] The assessment of Gregg Lawyers' work carried out by Mr Ryan made no allowance for such efficiency and the description of work that apparently fell for assessment did not reflect any such efficiency.

[25] For all of these reasons, while Mr Ryan's assessment assists the court's understanding of the work performed, the assessment total materially exceeds a realistic estimate of the amount of the recoverable costs.

Conclusion

[26] A fair and reasonable estimate of the respondents' recoverable costs in the novel circumstances of this case is $45,000. Cost should be fixed at that amount. Given the absence of evidence of cost arrangements between the respondents costs should be made payable to the second respondent.

Order

[27] The court's order is:

1. The applicant pay the second respondent the respondents' costs fixed at $45,000.

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13 See *Sochorova v Commonwealth of Australia* [2012] QCA 152, [16].