

SUPREME COURT OF QUEENSLAND

CITATION: *Ralph Lauren 57 Pty Ltd v Conley* [2016] QSC 149

PARTIES: **RALPH LAUREN 57 PTY LTD (as trustee)**
(ACN 079 745 056)
(applicant)
v
MICHAEL CONLEY (as trustee for the CINDY FLEMING TRUST)
(respondent)

FILE NOS: SC Nos 2270 – 2273 of 2015
SC Nos 2275-2284 of 2015

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 August 2016

DELIVERED AT: Brisbane

HEARING DATE: 24 June 2016

JUDGE: Ann Lyons J

ORDER: **1. In each proceeding the Certificate of Assessment is to be filed by the Costs Assessor in the Brisbane Supreme Court Registry by 6 September 2016.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – TAXATION AND OTHER FORMS OF ASSESSMENT – TAXING OFFICERS AND ASSESSORS – OTHER MATTERS – where the respondent filed applications for Costs Assessments – where the Costs Assessor ordered the applicant to pay the assessment fees – where the Costs Assessor submits its fees are disbursements – where the Costs Assessor withholds filing of Certificates of Assessments until payment of fees received – where the respondent submits it has no obligation to pay the assessment fees until Certificates of Assessment are filed – where the applicant seeks directions for filing of Certificates of Assessment, payment of assessment fees by respondent and that Costs Assessor’s fees are not disbursements – whether the Court should intervene in costs assessment prior to the filing of Certificates of Assessment and make the directions sought

Uniform Civil Procedure Rules 1999 (Qld) rr 705, 706, 715, 723, 727, 737, 742

Heaslip v State of Queensland, Unreported 23/7/2012, 5690 of 2010

Herald & Ors v Workerbee (Brisbane) Pty Ltd & Ors [2003] QSC 223

Hunter v Hunter [2015] QSC 181

Maggbury Pty Ltd v Hafele Australia Pty Ltd & Ors [2001] QSC 78

National Australia Bank Ltd v Clanford Pty Ltd [2002] QSC 361

Ralph Lauren 57 Pty Ltd v Conley [2015] QSC 090

Re Cooke [1997] 1 Qd R 15

COUNSEL: M P Williams for the applicant
T Quinn for the costs assessor

No appearance from counsel for the respondent

SOLICITORS: Barry.Nilsson for the applicant
Hawthorn Cuppaidge & Badgery Lawyers for the respondent
G R Ryan Solicitor for the costs assessor

The dispute

- [1] On 17 April 2015 Michael Conley (as trustee) (“Conley”) was ordered to pay Ralph Lauren 57 Pty Ltd’s (“Lauren”) costs on an indemnity basis in 14 separate Supreme Court proceedings.¹
- [2] After being served with Lauren’s Costs Statement, Conley issued Notices of Objection and then filed Applications for Costs Assessments in each of the 14 proceedings. A Costs Assessor was subsequently appointed by the Registrar to assess each Costs Statement.
- [3] The Costs Assessor subsequently advised the parties that the assessments in the 14 matters was complete and that the Certificates of Assessment would be filed in Court once the assessment fees were paid by Lauren.
- [4] Lauren now seeks directions and declarations in relation to the filing of the Certificates of Assessment and the payment of the assessment fees in circumstances where Conley is the applicant in the 14 Applications for the Costs Assessments, and where liability for the payment of costs in the order of \$75,000 ultimately rests with Conley but Lauren has been ordered to pay the costs of the assessment.

History of the assessments

- [5] On 17 April 2015 Douglas J ordered that Conley’s statutory demands be set aside and that Lauren’s costs of and incidental to the proceedings be paid on the indemnity basis by

¹ *Ralph Lauren 57 Pty Ltd v Conley* [2015] QSC 090 (15/2270) Douglas J 17 April 2015.

Conley in each of the 14 Supreme Court proceedings 2270/15 to 2273/15 inclusive, and 2275/15 to 2284/15 inclusive.²

- [6] On 28 October 2015 Lauren served Conley with a Costs Statement in relation to each of those proceedings pursuant to r 705 of the *UCPR*.
- [7] On 2 December 2015 Conley served Lauren with a Notice of Objection to the Costs Statement in relation to each of the proceedings pursuant to r 706 of the *UCPR*.
- [8] On 3 December 2015 Conley filed applications pursuant to r 713 of the *UCPR* for a costs assessment in relation to each of the 14 Supreme Court proceedings and proposed three costs assessors to be appointed as the Costs Assessor. Consents for the appointment of each of those costs assessors were also filed as required. Rule 713 is in the following terms:

“713 Costs assessor if no agreement

- (1) This rule applies if the parties do not agree that a costs assessment be carried out by a particular costs assessor.
 - (2) A party may either—
 - (a) apply to the registrar for appointment of a costs assessor for the costs assessment; or
 - (b) apply to the court for directions.
 - (3) If an application is made under subrule (2)(a), the registrar may order the appointment of a particular costs assessor to carry out the costs assessment.”
- [9] On 8 December 2015 Lauren’s solicitors responded to the Registrar by letter nominating three different costs assessors and enclosing their consents to appointment. Written submissions were also provided by Lauren at the invitation of the Registrar with respect to the appointment of a costs assessor. On 27 January 2016 the Registrar made Orders appointing Mr Gregory Ryan as the Costs Assessor.
 - [10] On 28 January 2016 copies of the Registrar’s Orders were sent via email to both the parties and the Costs Assessor by a Supreme Court administrative officer. On 1 February 2016 Lauren’s solicitors advised Conley that, despite the email from the Supreme Court administrative officer, the costs assessment would not commence until Conley had served the Costs Assessor with the Registrar’s Orders in accordance with r 713A of the *UCPR*.
 - [11] Rule 713A requires the applicant for an Order appointing a Costs Assessor to serve a copy of the Order on the assessor at least 14 days after the day the order is made. Rule 713A is as follows:

“713A Service of order appointing costs assessor

The applicant for an order appointing a costs assessor under rule 713 must serve a copy of the order on the costs assessor appointed by the order at least 14 days after the day the order is made.”

² *Ralph Lauren 57 Pty Ltd v Conley* [2015] QSC 090 (15/2270) Douglas J 17 April 2015.

- [12] On 4 February 2016 the Costs Assessor advised Lauren’s solicitors via email that he had received the Registrar’s Orders in compliance with r 713A of the *UCPR* and as such, the costs assessment could commence. The Costs Assessor requested that Lauren provide the relevant documents.
- [13] On 5 February 2016 Lauren’s solicitors responded to the Costs Assessor’s email confirming that Conley was required to serve the Registrar’s Orders on the Costs Assessor pursuant to r 713A, and that the requested documentation would be provided once the assessment had commenced. Conley’s solicitors were copied into this correspondence. The Costs Assessor later replied to both parties maintaining that r 713A had been complied with and again requested that documentation be provided. Conley’s solicitors provided documentation to the Costs Assessor on 5 February 2016.
- [14] On 8 February 2016 a Registrar advised the Costs Assessor by email that the Registrar’s Orders of 27 January 2016 had been inadvertently sent to the Costs Assessor and that no costs assessment process could commence until the requirements of r 713A of the *UCPR* had been complied with. Later on 8 February 2016, the Costs Assessor forwarded the Registrar’s email to both parties and duly requested that, “as a formality”, Conley provide him with the Registrar’s Orders.
- [15] On 10 February 2016 the solicitors for Conley served the Registrar’s Orders of 27 January 2016 on the Costs Assessor as required by r 713A of the *UCPR*. On 11 February 2016 Lauren’s solicitors provided the Costs Assessor with the relevant documentation. The Costs Assessor commenced his assessment of costs in each of the proceedings on or about 11 February 2016.
- [16] It would seem to me therefore that given that history there can be little doubt that Conley is the applicant for the Cost Assessment for the purposes of r 713 and r 713A of the *UCPR* despite being the respondent in the 14 substantive court proceedings. Neither do I consider that Lauren became an applicant for the purposes of those rules, as argued by the Costs Assessor by responding to the Registrar’s letter and submitting three different costs assessors names. The issue as to who is the correct applicant for the Cost Assessment becomes relevant in relation to r 740(4) of the *UCPR*, which I will discuss later in these reasons.
- [17] On 16 March 2016 the Costs Assessor notified the parties that he had assessed all items under the Costs Statements and had decided all questions other than the costs for the assessments.
- [18] On 18 March 2016, the Costs Assessor wrote a letter to the parties with respect to the “Applications for Costs Assessment” in the 14 separate proceedings. In the Subject Heading of that letter, the Costs Assessor referred to Lauren as the applicant and Conley as the respondent. The Costs Assessor indicated that, having been informed that “no written offers to settle costs were received”, his determination was that “the costs of the assessment fall in favour of the party entitled to costs which is the applicant. The respondent must pay the costs of each of the 14 assessments.”³ The Costs Assessor then outlined the costs which he had assessed in each of the 14 matters and directed that Lauren’s solicitors provide to Conley’s solicitors details of any additional costs claimed

³ Affidavit of JA Mobbs sworn 20 June 2016, Court Document #36, Exhibit ‘JAM 11’.

in relation to “the assessment by me of each Costs Statement.” Those costs were emailed to Conley by Lauren’s solicitors on 7 April 2016.

- [19] On 6 May 2016 the Costs Assessor finalised his costs assessment and corresponded with each party in relation to each of the 14 proceedings. The assessments in each of the 14 separate proceedings were in essentially the same format. By way of illustration, the assessment with respect to File No 2273/15 was in the following terms:

“I have completed the assessment of the Costs Statement after consideration of the objections and responses and advise the same has been assessed in the amount of \$25,759.40.

I enclose the summary page of the allowances and reductions for your information; I also enclose my tax invoice in the sum of \$5,333.25.

Uniform Civil Procedure Rules 1999 provides: - r.737 Certificate of Assessment: -

- (1) At the end of a costs assessment, a costs assessor must certify the amount or amounts payable by whom and to whom in relation to the application, having regard to ---
- (a) The amount at which the costs were assessed; and
 - (b) The costs of the assessment.

The costs assessors fee is recoverable in the assessment as an outlay that I certify r.737 (1) (a) and until it is paid I can't sign the certificate.

Upon receipt of payment of my tax invoice, I will sign the certificate of assessment and file the same in the Court.”⁴

- [20] The Draft Costs Assessor’s Certificate was enclosed with each letter and was in the same format. By way of illustration the Draft Certificate with respect to File No 2273/15 was in the following terms:

- “1. ...
2. I am an approved costs assessor appointed under the Uniform Civil Procedure Rules 1999.
 3. I was appointed to assess the costs in this matter pursuant to the Order of the Registrar, Supreme Court Brisbane, dated 27th January 2016.
 4. I have assessed the costs payable by the Respondent to the Applicant pursuant to the Order of Justice Douglas dated 17th April 2015, in the amount of Twenty-Five Thousand Seven Hundred and Fifty-Nine Dollars and Forty Cents (\$25,759.40) comprising:
 - a. Professional Fees \$11,975.27
 - b. Disbursements \$13,783.61

⁴ Affidavit of JA Mobbs sworn 20 June 2016, Court Document #36, Exhibit ‘JAM 12’.

5. My fee of \$5,333.25 is payable by the Respondent Michael Conley (as trustee for the Cindy Fleming Trust) and has been included as a disbursement.
6. The party entitled to be paid the costs of the assessment is the Applicant. Those costs are assessed at \$12,033.73 and have been added to the professional fees and disbursements.”⁵

- [21] It is clear that in each of the 14 proceedings the assessment invoices for the Costs Assessor’s fee are addressed to Lauren despite the fact that the assessments are in its favour. In the correspondence the Costs Assessor states “I will sign my costs assessor certificate and file in the court once my tax invoice in respect of the assessment is paid by the applicant.”
- [22] I note at this point that the Costs Assessor referred to Conley and Lauren as those parties were described in the Supreme Court proceedings rather than by reference to the applicant as described in r 713 and r 713A of the *UCPR*. It is significant that the Costs Assessor has referred to Lauren as the applicant in the costs assessment when, as I noted in paragraph [16], it would seem to me that the application was made by Conley pursuant to r 713 of the *UCPR* and Conley is therefore the applicant for the costs assessment.
- [23] I note however that the Form 60A, required under r 704 of the *UCPR*, refers to the party who submits the Costs Assessment form as the applicant. That Form no doubt confuses the issue. In this regard I note that r710 of the *Supreme Court of Queensland Act 1991 (Qld)* as passed only contemplated that a party “who has served a costs statement under r 705” could apply for a costs assessment. This rule was amended in June 2008⁶ however to provide that a party “on whom a costs statement under rule 705 is served” could also apply for a cost assessment. That is clearly the situation here. I would infer therefore that Form 60A was not updated at the time the rule was amended as that Form only contemplates that the party who has served the costs statement can be the applicant.
- [24] On 13 June 2016 the solicitors for Lauren wrote to the solicitors for Conley and the Costs Assessor noting that pursuant to r 740(4) of the *UCPR*, Lauren was not the applicant for the cost assessment and was not therefore primarily responsible for the payment of Costs Assessor’s fee. That letter also referred to some mathematical errors in the Draft Certificates (which are not the subject of argument in this application) and disputed that the costs of the assessment were disbursements under r 723 of the *UCPR*, as had been claimed by the Costs Assessor in his correspondence to the parties dated 6 May 2016.
- [25] On 14 June 2016 Lauren sent r 444 letters to both the solicitors for Conley and the Costs Assessor. On 17 June 2016, the solicitors for Conley indicated that they had no obligation to pay the Costs Assessor’s fees because there had been no Costs Assessor’s Certificate filed as contemplated by Division 6 of the *UCPR* and made further reference to the requirements of r 740. The solicitors for Conley also made it clear that they were unable to pay the Cost Assessor’s fees as the invoices were addressed to Lauren.

The current application

⁵ Affidavit of JA Mobbs sworn 20 June 2016, Court Document #36, Exhibit ‘JAM 12’.

⁶ *Uniform Civil Procedure Rule Amendment Rule (No.2) 2008*, s 6.

- [26] On 20 June 2016 the solicitors for Lauren filed an application for directions. The application seeks orders for the filing of the Form 62 Costs Assessor’s Certificate by the Costs Assessor pursuant to r 737 of the *UCPR* and a direction that the costs assessor’s fees are not a disbursement in the applicant’s costs pursuant to r 723 of the *UCPR*. Directions are also sought for the payment of the Costs Assessor’s fees by Conley pursuant to r 740.
- [27] Counsel for Lauren argues that the Court has previously intervened in a cost assessment prior to the filing of a Costs Certificate and relies on the decisions of *Maggbury Pty Ltd v Hafele Australia Pty Ltd & Ors*,⁷ *Herald & Ors v Workerbee (Brisbane) Pty Ltd & Ors*,⁸ *Re Cooke*⁹ and *National Australia Bank Ltd v Clanford Pty Ltd*.¹⁰

The costs assessor’s position

- [28] In these applications the Costs Assessor has appeared by counsel on the basis that he was served with the r444 letters and as a courtesy to the Court. The Costs Assessor has also filed an affidavit sworn 23 June 2016 outlining the history of the assessments. Counsel for the Costs Assessor has also made submissions and argues that the applications should be dismissed as r 742 of the *UCPR* provides a mandatory mechanism for applications in relation to a costs assessor’s decision and the application should be made in accordance with that provision.
- [29] Counsel argues therefore that the application is premature as there is a proper mechanism which should be engaged before r 742 can apply and it has not been met. The rule requires the filing of a Certificate of Assessment in Court by the Costs Assessor and that has not yet occurred. In particular counsel argues that there is a specific procedure set out in r 742 and that usually such a review would proceed by reference to the Costs Assessor’s reasons. The reasons would inform the review and that the established principles in relation to reviews of costs assessment as recently restated in *Hunter v Hunter*¹¹ would then apply.

Conley’s position

- [30] The solicitor who appeared at the hearing of the application on behalf of Conley indicated that his client took a neutral position in respect of the specific relief sought in relation to directions for the filing of the Costs Assessors Certificate and a direction that the costs assessor’s fees are not disbursements.
- [31] The solicitor for Conley however made submissions in relation to directions for the payment of the Costs Assessor’s fees and endorsed a review of the Costs Assessor’s Certificate by this Court.

Does Division 6 apply?

- [32] I note that Division 6 is headed “AFTER ASSESMENT”. Rule 739 also clearly provides that Division 6 “applies if a certificate of assessment is filed in a court” (my emphasis).

⁷ [2001] QSC 78.

⁸ [2003] QSC 223.

⁹ [1997] 1 Qd R 15.

¹⁰ [2002] QSC 361.

¹¹ [2015] QSC181.

- [33] As there has been no Certificate of Assessment filed, the requirements of r 742 (which is part of Division 6 of the *UCPR*) have not therefore been met.
- [34] Accordingly Division 6 can have no application to the current application. Indeed, counsel for Lauren accepts that the *UCPR* does not expressly provide for any Court involvement until after a certificate is filed.
- [35] It would seem therefore that counsel for the Costs Assessor is arguing that an application pursuant to r 742 should be the *only* mechanism by which the Court can review a decision by a Costs Assessor. Whilst r 742 does provide a mechanism to review a decision by a Costs Assessor I do not consider that such a provision constrains the Courts power to give directions in relation to such an assessment whether it be before, during or after such an assessment.

Court's jurisdiction

- [36] There are a number of decisions where the Court has reviewed a costs assessor's decision at an early stage including the 2012 decision of *Heaslip v State of Queensland*¹² where Applegarth J gave directions in relation to the future conduct of a costs assessment involving a costs assessor. Similarly in *National Australia Bank Ltd v Clanford Pty Ltd*¹³ Mullins J dealt with an application to review a decision of a registrar under the repealed Chapter 17 Part 2, at a point when the review mechanisms had not been engaged as follows:

“Rule 742 of the *UCPR* provides for a party dissatisfied with the decision of the registrar on reconsideration under r 741 to apply to the court to review the decision. The review by the court therefore does not take place until the registrar has assessed the Costs Statement and the application for reconsideration of the registrar's assessment has been decided. It was therefore not open to the plaintiff to seek a review of the assessing registrar's decision dated 21 June 2002, as the assessment of the Costs Statement had not taken place.”¹⁴

- [37] Mullins J indicated however that in the circumstances of that case, the interests of justice required a direction to the registrar who was conducting the costs assessment under the repealed Chapter 17 of the *UCPR* as follows:

“In the absence of submissions dealing with the jurisdiction to make an order or direction which gives effect to the conclusion which I have reached about the client agreement which is contrary to the assessing registrar, I have identified the following possible bases:

- (a) r 706(1)(h) of the *UCPR*;
- (b) s 118E(1) of the Supreme Court of Queensland Act 1991; and
- (c) the inherent jurisdiction of the court.

I have formed the view that the administration of justice demands that I make a direction which reflects the conclusion which I have reached

¹² Unreported 23/7/2012 5690 of 2010.

¹³ [2002] QSC 361.

¹⁴ [2002] QSC 361 at [28].

about the client agreement, so that the assessment of the Costs Statement filed on 26 April 2002 proceeds on a proper basis. This is consistent with the approach of White J in *Re Cooke* and the approach of Wilson J in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*. It may be that if r 706(1)(h) of the *UCPR* cannot be relied on, the gap is filled by s 118E(1) of the *Supreme Court of Queensland Act 1991* or the inherent jurisdiction of the court.”¹⁵

[38] It would also seem to me that r 366 and rr 447 and 448(i) could also be relied upon. I consider therefore that the Court can intervene. The real question is whether the Court should intervene in the circumstances of this case and make the directions sought.

[39] In order to assess whether this Court should intervene it is important to accurately characterise the nature of the errors which Lauren submit have occurred. It would seem to me that the current applications in the 14 separate proceedings essentially raise the following questions:

- (i) Has the Costs Assessor correctly assessed the cost of the assessment in each proceeding as a disbursement pursuant to r 723 of the *UCPR*?
- (ii) Has the Costs Assessor correctly assessed that the cost of each of the assessments is to be paid by Lauren in circumstances where Lauren has the benefit of the costs order and was not the applicant for the cost assessment?
- (iii) Can a Costs Assessor refuse to file the Certificate of Assessment until his fees are paid?

[40] In order to answer those questions it is necessary to consider those provisions of the *UCPR* which are in contention. It is important to bear in mind that the cost assessment regime was significantly altered in Queensland in 2007 by the *Uniform Civil Procedure Amendment Rule (No 4) 2007 (Qld)*. The former provisions applied to costs payable or to be assessed under an Act, the *UCPR* or an order of the Court, as does the current Chapter 17A (with some exceptions, which are not presently relevant with respect to costs payable under the *Legal Profession Act 2007*).

[41] The current Chapter 17A of the *UCPR* was introduced by virtue of amendments which took effect on 10 December 2007, with the subsequent amendments taking effect on 27 June 2008. Those amendments replaced the former Chapter 17 Part 2, under which costs were previously only assessed by a Court Registrar (taxing officer), with a new system of assessment by Costs Assessors as well as Court Registrars (Assessing Registrars).

The provisions of the UCPR

[42] I am satisfied that the requirements of Chapter 17A have been complied with in relation to the engagement of the Costs Assessor. In this regard the party entitled to be paid costs (Lauren) has served the Costs Statement in the approved form on the party liable to pay the costs (Conley) in accordance with r 705. The objection to that Costs Statement was then served by Conley as required by r 706. Conley subsequently made an application for costs assessment pursuant to r 710 and the current Costs Assessor was ultimately

¹⁵ [2002] QSC 361 at [38]-[39].

appointed by the registrar pursuant to r 713. Conley as the applicant for the order appointing the cost assessor then served the Costs Assessor as required by r 713A.

- [43] The powers of an Assessing Registrar¹⁶ (as distinct from a Costs Assessor) are extensive and are expressly set out in r 714. Those powers include the power to administer an oath, examine witnesses, require a party to be represented by a solicitor, extend or shorten the time for taking a step, direct a party to produce documents, give directions about the conduct of the assessment process or “anything else the court directs”.
- [44] The powers of a Costs Assessor however are more limited but would certainly include implied powers to determine matters and make necessary directions to the extent that a specific order of the Court is not required pursuant to r 715. Rule 715 is in the following terms:

“715 Powers of a costs assessor

The court may, by order, give a costs assessor who is not an assessing registrar a power mentioned in rule 714 in relation to a costs assessment.”

- [45] Accordingly it would seem to me that rr 714 and 715 give an Assessing Registrar and a Costs Assessor certain powers, but clearly contemplate the Court giving directions about the cost assessment process given both provisions envisage the Court making “orders” or giving “directions”. In any event I consider the provisions of r 366 are sufficiently wide enough to allow the Court to give directions to a Costs Assessor about the “conduct of the assessment process.” The question remains however as to whether in the circumstances of this case the Court should give directions about the conduct of the assessments.

Should the court give directions to the Costs Assessor?

- [46] The evidence indicates that the Costs Assessor has issued invoices to Lauren and has included his own costs of the assessment as a disbursement on the basis of r 723 of the *UCPR*. Rule 723 is in the following terms:

“723 Disbursement or fee not paid

- (1) If a party’s costs statement includes an account that has not been paid, the party may claim the amount as a disbursement.
- (2) A costs assessor may allow the amount as a disbursement only if it is paid before the costs assessor signs the certificate of assessment.
- (3) Subrule (2) does not apply to an amount for lawyers’ or experts’ fees” (my emphasis).

- [47] The original Costs Statement filed by Lauren did not include an account which had not been paid pursuant to r 723(1) of the *UCPR*. There was no such account in existence at the time of the Costs Statement. On 18 March 2016 however the Costs Assessor not only directed that Conley was to pay the costs of the assessment but also directed Lauren to provide to Conley and to him “in Costs Statement format” any “additional costs claimed in relation to the assessment by me of each Costs Statement”. The affidavit of Jarrad Mobbs sworn 20 June 2016 states that some additional amounts were claimed by Lauren

¹⁶ As defined by r 679 *UCPR*.

in the email sent on 7 April 2016. It would seem that the Costs Assessor has then added his own fee to the additional costs claimed on the basis that Lauren was claiming the total amount as a disbursement pursuant to r 723.

- [48] The evidence indicates that Lauren does not accept it is liable to pay the Costs Assessor's fees and there is no evidence before me to indicate Lauren has included that amount in its Costs Statement and claimed it as a disbursement. Indeed it would seem to me it could not do so. Despite the fact that Lauren has not claimed the Costs Assessor's fees as a disbursement, has no intention of doing so and probably could not do so, those amounts have been included in the Draft Certificates.
- [49] Each of the Draft Costs Assessor's Certificates, sent to the parties on 6 May 2016, specifically provides that the costs assessed include a specific component for disbursements and are payable to Lauren pursuant to the Orders of Douglas J. The total cost of the disbursements in each Draft Certificate includes a specific amount for the Costs Assessor's fee in each matter. The Costs Assessor makes it clear that his fee must be paid by the party who filed the Costs Statement (Lauren) before he will sign the certificate of assessment or the amount cannot be allowed as a disbursement pursuant to r 723(2).
- [50] Whilst the Form 62 is in a format which includes, at clause 4, the insertion of the assessor's fees as a disbursement, that can only apply when it actually is a disbursement which can be added pursuant to r 723.
- [51] Furthermore, r 737 of the UCPR provides that at the end of a costs assessment the assessor must certify the amounts payable by whom and to whom in relation to the application, having regard to the amount of costs that were assessed and the costs of the assessment. It also provides that that certificate must be filed within 14 days after the assessment. Rule 737 is in the following terms:

“737 Certificate of assessment

- (1) At the end of a costs assessment, a costs assessor must certify the amount or amounts payable by whom and to whom in relation to the application, having regard to—
 - (a) the amount at which costs were assessed; and
 - (b) the costs of the assessment.
 - (2) The certificate must be filed by the costs assessor in the court within 14 days after the end of the assessment and a copy must be given to each of the parties.” (my emphasis)
- [52] I note that the Costs Assessor indicates he completed the assessment on 6 May 2016.
- [53] Since 6 May 2016 the Costs Assessor has not certified the certificate, neither has he filed it.
- [54] In this regard I note that r 737 provides that a costs assessor *must* file a Certificate of Assessment in Court within 14 days after the end of the costs assessment, certifying the amounts payable by the parties to the application. In certifying the amounts payable the assessor must have regard to the amounts at which costs were assessed and the costs of

the assessment. Copies of the Certificate must also be given to the parties. I can find no power in the UCPR for a costs assessor to delay the filing of a Certificate of Assessment because his fees have not been paid. The fact that this has occurred would in my view be a sufficient reason for the Court to give directions about the filing of the Certificate of Assessment.

- [55] Significantly r 738 then provides that within 21 days of receiving a copy of the costs assessor's Certificate of Assessment a party may request reasons for any decision included in the certificate and the reasonable costs of the provision of such reasons must be borne by the party requesting the reasons. The review mechanism therefore clearly envisages that the Court will be reviewing the costs assessor's reasons for his assessments and that the reasons would be a critical part of the review process.
- [56] It is clear that a Certificate has not been filed in accordance with r 737 and consequently no reasons have been requested pursuant to r 738.
- [57] Rule 740 then comes into operation. It would seem to me that the overriding philosophy of the costs assessment regime is that a costs assessor's fees would as a general rule be paid by the party who sought the assessment, who in this case would be Conley. That rule provides:

“740 Judgment for amount certified

- (1) After a certificate of assessment is filed, the registrar of the court must make the appropriate order having regard to the certificate.
 - (2) The order takes effect as a judgment of the court.
 - (3) However, the order is not enforceable until at least 14 days after it is made and the court may stay enforcement pending review of the assessment on terms the court considers just.
 - (4) Unless the registrar orders otherwise, the costs assessor's fees—
 - (a) are payable to the cost assessor in the first instance by the party who applied for the assessment; and
 - (b) are to be included in that party's costs of the assessment.
 - (5) Amounts paid or payable under the order are charged with payment of the costs assessor's fees.”
- [58] I accept that the previous procedure required the fees of the taxing officer (Court Registrar) be paid before the certification of taxation was signed. That was because the total certified included the taxing fee. This is referred to in Ryan, Weld and Lee, *Supreme Court Practice*.¹⁷ It would also seem to be the case that the current prescribed form for a Costs Statement, which is Form 60A, still allows for those costs to be included. No doubt that is because the Registrar can appoint an Assessing Registrar to be the Costs Assessor. Such an inclusion however must be subject to the specific provision of the current *UCPR*. I can find no requirement that the cost assessors fees must be paid before the Assessors Certificate can be filed. It would seem to me therefore that the current r 740(4) of the

¹⁷ Volume 1, para 91.116.1.

UCPR creates the Costs Assessors right to payment but *after* the Certificate of Assessment is filed.

- [59] Furthermore on the chronology which has been put before me the applicant for the Costs Assessment would clearly seem to be Conley and not Lauren for the reasons I have previously outlined. The invoice however is addressed to Lauren who is not the applicant of the costs assessment. As I have already noted, r 740(4) specifically provides that “Unless the Registrar orders otherwise” the Costs Assessor’s fees are payable to the Costs Assessor in the first instance by the party who applied for the assessment. In the present case it is clear that the Registrar has not ordered otherwise. As Conley is the applicant I cannot ascertain on what basis the invoice has been sent to Lauren. If the invoice is to be sent to anyone other than Conley that is a matter for determination by the Registrar pursuant to r 740(4) and not the Costs Assessor.
- [60] Such a determination cannot occur until the filing of the Costs Assessors Certificate has occurred. The subsequent provision of the Costs Assessor’s reasons would be a necessary precondition for any such determination.
- [61] In my view the Costs Assessor in withholding the filing of his Certificate is in breach of r 737.
- [62] Whilst I consider that a direction should be given requiring the Costs Assessor to file his certificate I am concerned that it is premature to make any further directions at this point in time. I note that the Costs Assessor has only issued his Costs Assessor’s Certificates in draft form and presumably could change his mind before issuing his final certificate, particularly given I can see no basis for him to address his invoices to Lauren.
- [63] Furthermore given the Costs Assessor has not at this stage set out the reasons for his assessments it is difficult for this court to proceed to give the further directions sought without having regard to those reasons. It would seem that in this case it is essential that the review procedures as outlined in r 742 of the *UCPR* should be engaged so that the Costs Assessors reasons can be reviewed should the Certificates of Assessment be issued in their current form.
- [64] I accordingly direct the Costs Assessor to file his Certificate of Assessment within 7 days from today.
- [65] I will hear from the parties in relation to costs of the application.