IN THE COURT OF APPEAL 99.233

SUPREME COURT OF QUEENSLAND

Appeal No. 6654 of 1998

Brisbane

[Maher v Woodman]

BETWEEN:

LINDSAY ALFRED MAHER
(Second Defendant) Applicant

AND:

FLORENCE MARGARET WOODMAN
(Plaintiff) Respondent

MAHER INVESTMENTS PTY LTD
(IN LIQUIDATION) ACN 009 535 013
(First Defendant)

McMurdo P
Pincus JA
Thomas JA

Judgment delivered 22 June 1999.

Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

NEITHER PARTY HAS AN APPEAL AS OF RIGHT. APPLICATIONS OF BOTH PARTIES FOR LEAVE TO APPEAL REFUSED. NO ORDER MADE WITH RESPECT TO THE COSTS OF EITHER APPLICATION.

CATCHWORDS: **APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - IN GENERAL AND RIGHT OF APPEAL - application of section 118(2)(b) *District Court Act* 1967 - principles for determining when appeal lies as of right - *Schiliro v Peppercorn Child Care Centres Pty Ltd* (CA No 9640 of 1998, 22 December**

1998), *Australia Meat Holdings Pty Ltd v Morris* (CA No 6503 of 1998, 20 April 1999) and *EM Investments (Qld) Pty Ltd v Aldrick* (CA No 2468 of 1999, 24 May 1999) discussed.

PROCEDURE - INFERIOR COURTS - QUEENSLAND - DISTRICT COURT - PRACTICE - COSTS - Rules 363-369 *District Court Rules* - nature and extent of jurisdiction of District Court to award costs otherwise than according to scale.

***District Court Act* 1967 (Qld) ss118(2), (3)**
***Rules of the District Court* Rules 363, 363A**
***Australia Meat Holdings v Morris* Appeal No 6503 of 1998, 20 April 1999**
***Colburt v Beard* [1992] 2 Qd R 67**
***Devries v Australian National Railways Commission* (1993) 177 CLR 472**
***EM Investments (Qld) Pty Ltd v Aldrick* Appeal No 2468 of 1999, 24 May 1999**
***Schiliro v Peppercorn Child Care Centres Pty Ltd* Appeal No 9640 of 1998, 22 December 1998**
***State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306**

Counsel: The applicant appeared on his own behalf.
Mr R Stenson for the respondent.

Solicitors: The applicant appeared on his own behalf.
Barry Beaverson & Stenson for the respondent.

Hearing Date: 21 April 1999.

IN THE COURT OF APPEAL

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Brisbane

Before McMurdo P
Pincus JA
Thomas JA

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AND:

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(In Liquidation) ACN 009 535 013
(First Defendant)

REASONS FOR JUDGMENT - McMURDO P

Judgment delivered 22 June 1999

1 I have had the benefit of reading and agree with the reasons for judgment of Thomas JA and with the orders he proposes.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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MAHER INVESTMENTS PTY LTD
(IN LIQUIDATION) ACN 009 535 013
(First Defendant)

REASONS FOR JUDGMENT - PINCUS JA

Judgment delivered 22 June 1999

1 I have had the advantage of reading the reasons of Thomas JA and subject to the following observations agree with them. In *E M Investments (Qld) Pty Ltd v Aldrick* (Appeal No 2468 of 1999, 24 May 1999) it was decided by this Court that the construction of s 118(2)(b) of the *District Courts Act* 1967 which is to be found in the reasons mentioned above is correct. It appears to me that that decision, although given ex tempore, should be followed. The language of s. 118(2)(b) suggests, although not very clearly, that in the cases to which it applies it is what is involved in the judgment appealed from, not what is involved in the appeal, which counts. The *E M Investments* formula is a compromise between these two views; it makes relevant what was claimed before judgment and also makes relevant whether there is, at the time the matter comes before the Court of Appeal, a live contention that there **should be** a judgment for $50,000 or more.

2 But where the judgment is for less than $50,000 - say $40,000 - the question whether there is a right of appeal may depend upon which side appeals. If the plaintiff asks that the judgment be raised (by $10,000 or more) there will be an appeal as of right, but there will not, if the defendant asks that it be lowered. Where the claim is for $50,000 or more and fails, the plaintiff will ordinarily, as it seems to me, have a right of appeal unless it is conceded that the judgment should be for less than $50,000; but the defendant will have no right of appeal in respect of a judgment for less than $50,000.

3 There is an imbalance here, plaintiffs' appeals being more generously treated; that is so because of adoption of the test whether there is a live contention that there should be judgment for $50,000 or more, a contention unlikely to be made by a defendant. It may be inferred that the language of s 118(2)(b) was based on part of s 35 of the *Judiciary Act* 1903 (Cth) on the assumption (which has proved to be unjustified) that after generations of application in the High Court a settled construction of s 35 might have been reached. Were the matter to be approached afresh, I should have thought that a fairer test, in the sense of one

giving comparable rights to plaintiffs and defendants, would have been one which depended only on the amount involved in the appeal. But as I have said, the *E M Investments* case should be followed and the test there laid down applied, for the future.

4 I agree with the orders proposed by Thomas JA.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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[Maher v Woodman]

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REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 22 June 1999

1 Mr Maher desires to appeal against a decision given against him in the District Court at Mackay for $28,356.00 with limited costs to be taxed on the Magistrates Court scale. Upon the court intimating some doubt as to whether an appeal lay as of right, Mr Maher, who appeared in person during the six day trial below and upon the appeal to this court, applied for leave to appeal in the event that the court decided it was necessary to do so. It will be convenient to refer to Mr Maher in these reasons as the applicant.

2 Counsel for the respondent also sought leave to appeal against an order by the trial judge refusing leave to appeal against the order for costs. The respondent claims that the costs order should have been based on the District Court scale. Notice of the application for leave to cross-appeal first appeared in the outline of submissions. On the assumption that an appeal was instituted by the applicant's Notice of Appeal, the respondent's notice of cross-contention appears to have been given out of time. On the assumption that no appeal has been commenced by the applicant's Notice of Appeal, the respondent has even greater difficulty in having such a document regarded as equivalent to a Notice of Appeal filed and served as required by the Rules of Court. The applicant, who disclaimed any knowledge of legal matters, took no point concerning the irregularity of the application for leave to cross-appeal, but the question of leave is a matter for the court, and the whole question of exercise of discretion in order to entertain the purported cross-appeal will be considered in due course.

3 The action followed certain dealings between the respondent, the applicant and the applicant's company (which is now in liquidation). These dealings included a contract of 29 March 1993 between those three parties under which the company agreed to harvest and stockpile timber from a certain property. The applicant guaranteed due performance of such obligations and undertook to indemnify the respondent against any loss which might be occasioned by the acts of the company. The respondent alleged numerous breaches and other acts causing damage in its initial claim of $84,666.00, which was amended at an early stage of the trial to a figure of approximately $77,000.00. In the event the learned trial judge found against the respondent on many of the heads of claim but found that some of the claims had been made out to a limited extent, assessing an aggregate of such entitlements at $23,018.00, and allowing interest on some of the items, leading to a total judgment of $28,356.00.

4 This court permitted the parties to present their full arguments as if on appeal, reserving the question whether an appeal lay as of right or by leave only, and also reserving the question whether leave should be granted to cross-appeal.

5 The record with which this court has been supplied reveals evidence from four witnesses on behalf of the respondent, and from the applicant on his own behalf, along with various exhibits. The Notice of Appeal was supported by two outlines of argument presented by the applicant, supplemented by his written notes which were presented to this court and his fairly extensive oral submissions. These amount essentially to a complaint that all the evidence on behalf of the respondent was fabricated and that his Honour erred in accepting any evidence at all that was called on behalf of the respondent.

6 The proposed appeal is directed entirely against findings of fact made by a trial judge who had the benefit of seeing and hearing the witnesses over a period of six days. The principles upon which an appeal court responds to a request to set aside such findings have been stated many times and for present purposes it is enough to refer to *Devries v Australian National Railways Commission*[1] and *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)*[2]. It is very difficult for a Court of Appeal to set aside any finding which depends substantially on the credibility of witnesses unless it can be shown that the trial judge failed to use or plainly misused the advantage of seeing and hearing the witnesses at trial or unless some other material error is shown such as a glaring improbability or an inconsistency with other acts that are incontrovertibly established. Suggestions were made in the *Earthline* case that a Court of Appeal should not be unduly restrained in

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1 (1993) 177 CLR 472.

2 (1993) 73 ALJR 306.

reviewing such findings and the cases are by no means rare where a trial judge is held to have misused his or her advantage. However it needs to be clearly understood that an appeal court is not in a position to overturn findings based upon the credibility of witnesses whom the court has not seen unless there is a good reason for doing so, consistently with the principles expressed in cases such as *Devries v Australian National Railways Commission.*

7 Much of the argument advanced by the applicant consisted of assertions of rectitude on his own part and of the complete absence of it in the evidence of the respondent and her husband. Such assertions do not assist this court in its task. The record of proceedings and the arguments of the applicant reveal some misunderstanding of the nature of the process and function of the trial judge in making findings of fact on the balance of probability in a civil proceeding such as the present. Various attempts by the learned trial judge to explain to the applicant the nature of the process seem to have failed.

Application to give further evidence

8 During argument the applicant applied for leave to tender further evidence in the form of additional photographs together with captions which he said were taken at relevant times during the work which was the subject of the proceedings. Some of these were designed to demonstrate the thickness of some of the logs, which was an issue which the learned trial judge found in favour of the applicant in any event. Another photograph was said to be of a portion of the respondent's property, the steepest part of which Mr Woodman had estimated to have a 45 degree slope. The applicant, who was and remains of the view that in this context degrees and percentages are the same, claims that this photograph (which the court is asked to assume is of the same area as that to which Mr Woodman was referring) shows that Mr Woodman was lying in claiming (which he did not) that it was "45 per cent steep". The

applicant went on to assure this court that a 45 per cent slope was straight up and down as for example the wall of the court room. It is enough to say that even accepting the photograph as relating to the relevant part of the land to which the Woodmans referred in their evidence, the only matter to which it goes is credit. It is to be further noted that on most matters involving assessments of credit the learned trial judge found in favour of the applicant.

9 The applicant also proffered a photograph which was said to be taken some days after the first day of commencement of work and which was said to show the place where the pump and electric motor "was". That is to say, according to the applicant, it shows the place at which the respondent alleged that the applicant had run over those items with the respondent's traxcavator. The point that the applicant attempts to make is that the photograph suggests it would be difficult for a traxcavator to negotiate this area and that therefore Mr and Mrs Woodman must have been lying when they said that they saw him damage the pump in this way. It hardly seems necessary to point out that even in three days a site could become cluttered, and that some doubt might attend the date when the photograph was taken even if the assumption is made that it shows the same place as that upon which the missing pump once had been.

10 The applicant informed the court that all these photographs existed at the time of the trial and that at that time they were at his home, which is some distance from Mackay where the case was heard. The case ran over six days including a weekend. In my opinion the further photographs which the applicant applied to be given as fresh evidence could not be said to be fresh evidence which was not reasonably available at the original trial. Neither can it be said that the evidence is cogent. The further evidence fails to satisfy the tests necessary for the reception of fresh evidence upon an appeal.[3] It should not be received.

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[3] Rules of Supreme Court, Order 70 Rule 10; *Clarke v Japan Machines*

(Australia) Pty Ltd [1984] 1 Qd R 404, 408; *Brisbane City Council v Mainsel Investments Pty Ltd* [1989] 2 Qd R 204, 214-215; *Horne v Commissioner of Main Roads* [1991] 2 Qd R 38, 41.

11 A similar ruling should be made with respect to a letter dated 20 August 1998 signed by Mr R J Jamieson which was included in the appeal record over the objection of the respondent. It was apparently written and obtained some months after the judgment in the present proceedings and amounts to an unverified statement by a person not called as a witness in the proceedings. It does not satisfy the requirements for reception of further evidence upon appeal.

Appeal Prospects

12 As already indicated the proposed appeal is against the learned trial judge's findings on matters of credibility, and in particular against his acceptance of part of the evidence of Mr and Mrs Woodman. One of the grounds of appeal is based upon a comment made by his Honour during final addresses when he attempted to explain the difference between the criminal and the civil standard of proof. This has been converted by the applicant into a submission "that the learned trial judge said, if it was a criminal action the appellant would have won the action". No error appears in the statements his Honour actually made in this regard, and they seem to have been misinterpreted by the applicant. It needs to be noted in this case, as it is on every occasion when a judge instructs a jury, that the fact-finder is entitled to accept part of a witness's evidence and reject other parts. Counsel for the respondent submitted that his Honour bent over backwards to be of assistance to the applicant. My perusal of the record certainly suggests that his Honour was by no means unsympathetic towards the applicant in the performance of his fact- finding duties. The

rejection of evidence of Mr Woodman and Mrs Woodman on many occasions and acceptance of other parts of their evidence is hardly surprising in the context of substantially oral dealings between parties over an extended period when many events occurred as to which the parties are in dispute and as to which different recollections may have resulted.

13 A large part of the applicant's address to this court consisted of the re-agitation of matters that were the subject of submissions below, and with which the learned trial judge dealt in his comprehensive written reasons. These include disputes as to the number of hours worked by the respondent's skidder, the damage to the pump (for which the applicant was held liable to the extent of $1,200.00), whether or not a particular fax was sent and many other matters. Further complaint was made about the sparsity of documents and receipts, but his Honour expressly noted that circumstance and took it into account. Mention was made of an alleged entitlement on the part of the applicant to reimbursement for work done in expectation of a second export of timber eventuating. As his Honour correctly remarked, no such claim was raised by way of set-off or counter claim in the present proceedings, and we have been informed that the applicant has now brought separate proceedings in respect of those matters.

14 Having listened to the submissions and perused the record, in my view there is nothing to suggest that any error occurred in the fact-finding process or on any matter of law, and there is no reason to think that an appeal would have any prospect of success.

Leave to appeal

15 Section 118(2) of the *District Court Act* 1967 (Qld) provides:

> "A party who is dissatisfied with a final judgment of a District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment-

(a) is given-

(i) for an amount equal to or more than the Magistrates Courts jurisdictional limit; or

(ii) in relation to a matter at issue with a value equal to or more than the Magistrates Courts jurisdictional limit; or

(b) involves directly or indirectly any claim, demand or question in relation to any property or right with a value equal to or more than the Magistrates Courts jurisdictional limit."

16 The Magistrates Courts jurisdictional limit is $50,000.00. Plainly the present judgment fails to reach that amount. Little difficulty exists in the application of section 118(2)(a), which will normally involve examination of whether the judgment is for $50,000.00 or more, or if the property the subject of the judgment (for example specific performance or detention) is of that value. Some difficulty however has been encountered in the application of section 118(2)(b).

17 The amendment which produced section 118 in its present form seems to have been based upon the formula formerly used in section 35 of the *Judiciary Act* 1903 (Cth), and no clear pattern of interpretation had emerged from the High Court decisions given prior to its repeal. In considering whether an appeal satisfied the requirements of section 35 of the *Judiciary Act*, the decisions of the High Court tended from case to case to give weight to one or more of three factors in deciding whether the necessary "value" could be discerned. These factors are:

(a) the amount claimed in the action;

(b) the amount of the judgment; and

(c) the amount at issue in the appeal (ie the amount by which the judgment stands to be altered if the appeal is successful).

18 It is difficult to find any statutory justification for confining attention to the amount by

which the appeal might alter the judgment, as a right of appeal is given if the *judgment* "involves ... any claim ... in relation to any ... right with a value" of $50,000.00 or more. However the amount at which the *judgment* may stand *after* the appeal would seem to be a potentially relevant factor.

19 The present discussion is concerned with money claims including claims for damages. Some assistance in applying section 118(2) has been provided by recent decisions of this court, notably *Schiliro v Peppercorn Child Care Centres Pty Ltd*[4], *Australia Meat Holdings Pty Ltd v Morris*[5] and *E M Investments (Qld) Pty Ltd v Aldrick*.[6] In *Schiliro* the majority held that in applying section 118(2)(b) primary reliance should be placed on the amount claimed in the action. That case was an appeal by a plaintiff who had failed entirely. The trial judge assessed damages in any event at a sum of less than $50,000.00, but the plaintiff's appeal sought to substitute a judgment for more than $50,000.00. *Australia Meat Holdings v Morris* was a defendant's appeal against a judgment of less than $50,000.00. The plaintiff had merely claimed unspecified damages for negligence. The court distinguished *Schiliro* on the basis that the plaint did not claim any particular sum. It held that as the judgment was for less than $50,000.00 and there was no contention that a higher figure should have been awarded, the appeal was incompetent.

20 The *E M Investments* decision recognised the existence of a gap that was not covered by the first two mentioned cases. That judgment includes the following statements:

> "[U]nless the appeal is one with the potential to result in a judgment or a loss of a judgment for $50,000 or more, it cannot be said under section 118(2)(b)

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4 Appeal No 9640 of 1998, 22 December 1998.

5 Appeal No 6503 of 1998, 20 April 1999.

6 Appeal No 2468 of 1999, 24 May 1999.

> that the 'judgment involves any claim in relation to any right with a value' of $50,000 or more".

and

> "[A]n appeal lies from the judgment of the District Court if the amount claimed in the plaint is $50,000 or more, *and* there is a live contention that there should be a judgment for $50,000 or more[7]."

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[7] Ibid pp4-5.

21 Whilst some points of distinction may be recognised between plaintiffs' and defendants' appeals and their potential consequences, it seems to me that the above statements present the least unsatisfactory construction of s118, and present a relevantly simple and workable interpretation in a heavily litigated area. The advantage of relative certainty is apparent.

22 The above remarks are not intended to deny the right of a party in an appropriate case to add together the claim and the counter-claim, to the extent that they may properly contribute to the amount in issue[8].

23 I conclude then, consistently with the *E M Investments* case, that under s118(2)(b) in money claims (including claims for damages) prima facie an appeal lies from a judgment of the District Court if the amount claimed in the plaint is $50,000.00 or more *and* there is a live contention that there should be a judgment for $50,000.00 or more. This position should apply both in relation to plaintiffs' appeals and defendants' appeals. The possibility is recognised that some practitioners may be tempted to include a spurious claim in the appeal for example on the quantum of damages in order to qualify for an appeal as of right under this sub-section. As to this it is enough to say that the profession is expected to be conscious of

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[8] *Graham v Roberts & Muller* [1956] St R Qd 459.

its obligation not to abuse the process of the court.

24 In the present case the applicant fails to qualify under section 118(2)(a) as the judgment was given for less than $50,000.00. It is a defendant's appeal. Although the amount originally claimed by the plaintiff exceeded $50,000.00, there is no cross-appeal or contention that there ought now to be a judgment for such a sum. Applying the principles that have been stated above, the applicant fails to show a right of appeal under either section 118(2)(a) or section 118(2)(b). He therefore needs the leave of the court to bring such an appeal.

Should leave be granted?

25 The discussion above indicates that the prospects of a successful appeal are not sufficient to justify the granting of leave. It is limited to an attack on findings of fact, and the arguments in support of the attack consist of assertion rather than logic. I would refuse leave to appeal.

Respondent's cross-appeal

26 As mentioned in paragraph 2 above, this application seems to require both an extension of time and the grant of leave.

27 The order for costs was in these terms:

> "The second defendant must pay the plaintiff's costs of the action to be taxed on the Magistrates Court scale appropriate to a judgment in such an amount [$28,356.00] limited to a trial of three days, and not include expenses of witnesses called on issues on which the plaintiff failed to obtain some award."

28 Upon making that order counsel for the respondent applied to his Honour for leave to

appeal against it. His Honour refused that application, and it is upon that refusal that the present cross-appeal is founded. That application would however appear to have been misconceived. It was based on the erroneous assumption that section 9 of the *Judicature Act* 1876 (Qld) (now section 253 of the *Supreme Court Act* 1995 (Qld)) applies to orders for costs in the District Court. Counsel for the respondent was unable to refer to any statutory provision to this effect, and on its face that section applies only to orders in the Supreme Court. Counsel referred to the section which enacted the present section 118 of the *District Court Act*[9] but this merely gives the Court of Appeal the power to grant leave to bring an appeal from any judgment of the District Court[10].

29 It follows that the present application, which is for leave to appeal against the District Court judge's refusal of an application for an order that he had no power to make, is likewise misconceived. It is appropriate however to treat the respondent's application as a simple application for leave to appeal against that part of the principal judgment that deals with costs.

30 Counsel conceded that the amount at stake was relatively small and could not have itself or even in conjunction with the amount of the judgment attain the Magistrates Court limit of $50,000.00. Accordingly, the application is to be determined according to the unfettered discretion which this court has to grant or withhold such leave[11].

31 The principal submission is that the discretion of a District Court judge to award costs on the Magistrates Court scale is limited to judgments which do not exceed $20,000.00.

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9 Section 47 of the *Courts Reform Amendment Act* 1997.

10 *District Court Act* section 118(3) as inserted by section 47 of the *Courts Reform Amendment Act* 1997.

11 *District Court Act* section 118(3).

32 The power of the District Court to award costs is obscurely based, as the power to make Rules of Court does not expressly confer a power in relation to costs[12]. However it has been held in the Full Court decision of *Colburt v Beard*[13] that on the proper construction of the Act such a rule-making power exists. The relevant rules are 363 to 369.

Rule 363 provides :

> "Except where herein otherwise provided, the costs of any action or proceeding shall be paid by or apportioned between the parties in such manner as the Judge directs, and in default of a special direction shall abide the event; and the costs may be recovered in like manner as a debt adjudged by the Court to be paid can be recovered".

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12 *District Court Act* section 126, formerly section 101.

13 [1992] 2 Qd R 67.

Rule 363A provides:

> "(1) If the plaintiff in an action to recover a debt or damages recovers less than $500, the plaintiff is not entitled to costs unless a Judge otherwise orders.
>
> (2) If the plaintiff in an action to recover a debt or damages recovers an amount less than $5000 and the plaintiff could have sued for and recovered the amount in a Magistrates Court, then unless a Judge otherwise orders, the plaintiff is not entitled to a greater amount for costs than the plaintiff would have recovered if the plaintiff had brought the action in a Magistrates Court.
>
> (3) If the plaintiff in an action to recover a debt or damages recovers an amount of $5000 or more but not more than $20,000 and the plaintiff could have sued for and recovered the amount in a Magistrates Court, a Judge may, when awarding costs, order that the plaintiff is not entitled to a greater amount for costs than the plaintiff would have recovered if the plaintiff had brought the action in a Magistrates Court."

33 Rule 363 was subjected to some scrutiny in *Colburt v Beard*[14]. In particular the ambit of power contemplated by the words "special direction" was considered, and the

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14 Ibid p69.

conclusion was reached that:

> "There is no valid distinction between the reference to the "discretion" of the judge in O.91 r.1 and the statement in r.363 that the costs shall be paid or apportioned "in such manner as the Judge directs"".

34 It follows that unless this power and discretion has been cut down by some other Rule, the power of a District Court judge to award costs is a broad one, subject only to the proper exercise of the discretion that superior courts are recognised as having in such matters. It is noted that Rule 363 begins with the words "except where herein otherwise provided".

35 Section 363A covers three specific situations according to particular levels of recovery. With respect to the situations of recovery of under $500 and of less than $5000, a mandatory result is provided for. With respect to the third situation (recovery of between $5,000.00 and $20,000.00) the judge "may" limit the plaintiff to Magistrates Court costs. No provision is made in respect of recovery of more than $20,000.00 which is of course the situation in the present case. Rule 363A may have been intended to reflect the Magistrates Courts' former jurisdictional limit of $20,000.00, but the Rule was not brought into operation until 1 January 1994, by which time it would seem already to have been overtaken by the increase of Magistrates Court jurisdiction by the *Magistrates Court Jurisdiction Amendment Act* of 1993. That Act had increased the limit to $40,000.00. In 1997 a further amendment increased it to $50,000.00. Apparently no attempt has been made to keep the Rule in tandem with legislative increases in jurisdiction. It would seem that the substance of the Rule was first contained in the 1992 Schedule of Scale of Fees and Costs in 1992[15]. This seems to have been removed from the Schedule and transposed into the present Rule in 1993, but, as noted above, not commenced until 1994. Whatever the explanation, Rule 363A does

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15 *District Court Rules Amendment Order (No 1)* 1992, SL No 442 of 1992, Gazette of 18 December 1992 p1992; reprinted in Wylie's *District Court Practice Queensland* p9227.

not appear to be part of any rationally controlled scheme in relation to scale rates in the respective courts.

36 The short answer to the submission of the respondent's counsel is that Rule 363A does not "otherwise provide" in cases where the amount recovered exceeds $20,000.00.

37 However Rule 365 also needs to be considered. It provides that:

> "Unless another rule provides otherwise, a court, registrar or taxing officer may only allow a cost under the schedule of scale of fees and costs".

38 Counsel for the respondent did not direct particular attention to Rule 365 although in my view it arguably supports his contention. Rule 363 is prefaced with the words "except where herein otherwise provided", while Rule 365 is prefaced with the words "unless another rule provides otherwise". It follows that they need to be read together. Rule 365 was substituted in its present form in 1996[16]. In my view the distinction between "costs" referred to in Rule 363 and "a cost" referred to in Rule 365 should be taken to be deliberate. The main effect of Rule 365 is to prevent a court, Registrar or Taxing Officer from allowing any particular item of cost inconsistently with the figure or method prescribed by the Schedule. Accordingly I have reached the view that, consistently with the view taken in *Colburt v Beard*, a District Court judge has a discretion comparable with that of a Supreme Court judge under Order 93 to order that costs be fixed by more ways than according to the Schedule. These include the power to act in the way suggested by *Colburt v Beard* in relation to the District Court action in question in that case, namely by limitation of costs to particular

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16 *District Court Amendment Rule (No 3)* of 1996, made on 27 June 1996, SL No 155 of 1996. The previous rule stated: "The fees to be allowed to barristers and solicitors practising in a District Court for appearing on behalf of a party to an action or other proceeding, and the expenses to be paid to witnesses, shall be according to the Schedule of Scale of Fees and Costs, unless otherwise provided in these rules".

issues, abridgement of the time with respect to which costs may relate, and notional set-off of issues upon which a party has succeeded against those on which that party has lost. It is only in special cases that such discretions will be appropriately exercised, but such discretions exist. In the present case the learned District Court judge limited the costs in three ways, namely by limiting the time to which they related, secondly by limitation of issues, and thirdly by the application of the Magistrates Court scale.

39 The learned District Court judge had the benefit of personal experience of six days of litigation between these parties and his reasons for judgment demonstrate his comprehension of the issues and of the conduct of the parties. The making of such an order would appear to lie well within the ambit of sound exercise of the discretion available to him.

40 Two things should be said about the respondent's application. In the first place, notice of the cross-contention was first given in the respondent's outline of submissions which was filed 44 days after the notice of appeal was filed. Order 70 Rules 13 and 14 of the Rules of Supreme Court, which are applicable by dint of Rule 334 of the District Court Rules, provide in effect that a respondent's cross-contention must be given within seven days of the service of the notice of appeal on the respondent. It would therefore seem to be out of time. Secondly, the giving of a notice of cross-contention as part of an outline of submissions is to be discouraged for two reasons. Firstly, because of the different time frames attending outlines of submissions, a notice of cross-contention given in such a document is likely to be out of time. Secondly, an outline of argument is essentially a submission and it is undesirable that a formal notice be hidden away in a series of arguments.

41 It has been necessary to deal rather fully with this application, because arguments based upon lack of jurisdiction are well calculated to induce a court to grant leave. If the matter stood alone and had otherwise been regularly brought before the court, I should have

been inclined to grant leave and dismiss the cross-appeal. However in view of the fact that the applicant, Mr Maher, has been refused leave to appeal, and the circumstance that the respondent's application is out of time, the appropriate order will be to refuse that application also.

Conclusions

42 For the above reasons, neither party has an appeal as of right, and the applications of both parties for leave to appeal should be refused. Both matters formed a substantial part of the appeal proceedings, and I would make no order with respect to the costs of either application.