SUPREME COURT OF QUEENSLAND

CITATION:	*Anderson v Pickles Auctions Pty Ltd* [2023] QCA 205
PARTIES:	**MARK DE LEIGE ANDERSON** (appellant) **v** **PICKLES AUCTIONS PTY LTD** ABN 32 003 417 650 (respondent)
FILE NO/S:	Appeal No 1464 of 2023 SC No 8418 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 265 (Cooper J)
DELIVERED ON:	20 October 2023
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2023
JUDGES:	Mullins P and Flanagan JA and Henry J
ORDERS:	**1. Appeal allowed.** **2. Set aside the orders made by the learned primary judge.** **3. Vary the decision of the costs assessor made 30 August 2022 by allowing Items 373, 411, 568, 667 (reduced to $990.00), 729 and 943, disallowed by her in that decision.** **4. The respondent pay the appellant's costs of the appeal and the costs of the applications filed in the proceeding below on 30 September 2022 and 9 January 2023.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – TAXATION AND OTHER FORMS OF ASSESSMENT – PARTICULAR ITEMS – COUNSEL FEES – GENERALLY – where the appellant and the respondent entered into a release and discharge in relation to a claim arising from a work-related personal injury – where the appellant engaged both senior and junior counsel – where the parties were unable to reach agreement as to costs – where the court appointed a costs assessor – where the costs assessor disallowed the recovery of counsel's fees on the basis that Part 8 Division 2 of the

Workers' Compensation and Rehabilitation Regulation 2014 (Qld) ("Regulation") overrode the *Uniform Civil Procedure Rules 1999* (Qld) – where the primary judge upheld the costs assessor's decision on the basis that reg 137 of the Regulation constituted an exhaustive list of recoverable outlays – whether, as a matter of statutory construction, Part 8 Division 2 of the Regulation prohibits the recovery of counsel's fees as an outlay – whether reg 137 of the Regulation constitutes an exhaustive list of the outlays that may be recovered by a claimant on an assessment of costs for a claim for damages arising from a work-related personal injury

Acts Interpretation Act 1954 (Qld), s 14(1)
Uniform Civil Procedure (Fees) Regulation 2019 (Qld), Part 2 Division 1
Uniform Civil Procedure Rules 1999 (Qld), r 360, r 361, r 686(c), r 710(1A), r 713(2)(a), r 726, r 742
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 289, s 290A, s 292, s 312, s 313, s 314, s 316, s 584
Workers' Compensation and Rehabilitation Regulation 2014 (Qld), reg 132, reg 134, reg 135, reg 136, reg 137

Scott v Commercial Hotel Merbein Pty Ltd [1930] VLR 25; [1929] ArgusLawRp 75, cited
State of New South Wales v Avery (2016) 92 NSWLR 141; [2016] NSWCA 147, cited

COUNSEL: G R Mullins KC for the appellant
C C Heyworth-Smith KC, with M A Eade, for the respondent

SOLICITORS: Turner Freeman Lawyers for the appellant
Cooper Grace Ward for the respondent

[1] **MULLINS P:** I agree with Flanagan JA.

[2] **FLANAGAN JA:** The issue in this appeal is whether, as a matter of statutory construction, Part 8 Division 2 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) ("Regulation")[1] excludes counsel's fees as a recoverable outlay. More particularly, does reg 137, which falls within Part 8 Division 2 of the Regulation, provide for an exhaustive list of outlays that may be recovered by a claimant on an assessment of costs for a claim for damages for personal injury arising from a work-related injury.

[3] The learned primary judge construed the provisions of Part 8 Division 2 of the Regulation as prohibiting a claimant's entitlement to recover counsel's fees as part of his or her costs calculated in accordance with those provisions.[2]

[4] It is important to note that the issue in this appeal only arises in the limited circumstances outlined below, where no order for costs was made by a court and the issue of how costs were to be calculated was the subject of a written document titled

---

1 Since the Release and Discharge was entered into, no amendments have been made to the relevant provisions of Part 8 Division 2 of the Regulation.

2 *Anderson v Pickles Auctions Pty Ltd* [2022] QSC 265, [55] ("Reasons").

"Release and Discharge" entered into between the appellant, the respondent and WorkCover Queensland.

[5] For the reasons that follow, Part 8 Division 2 of the Regulation should not be construed as prohibiting the recovery of counsel's fees as an outlay.

Background

[6] On 11 December 2015 the appellant sustained a work-related injury. A notice of claim for damages was served on WorkCover. The matter progressed through the pre-court procedures prescribed by Part 2 Chapter 5 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("Act"). A compulsory conference was convened on 19 June 2019 but the matter did not resolve. Subsequently, pleadings were filed in the Supreme Court, including a claim and statement of claim, a notice of intention to defend and defence and a reply. The appellant delivered a statement of loss and damage and the parties exchanged documents. It is accepted that each of these steps in the progression of the litigation was governed by the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR").[3]

[7] The appellant engaged both senior and junior counsel who were involved in various tasks, including the drafting of pleadings, providing advices, attending mediation and preparing for trial.

[8] On 28 April 2021 the appellant, the respondent and WorkCover compromised the proceedings before trial. The terms of the compromise were recorded in the Release and Discharge. Clause 2.1 provided:

> "In addition, WorkCover on its own behalf and on behalf of the Employer will pay the Plaintiff's costs of and incidental to the claim and proceedings calculated in accordance with Part 8, Division 2 of the [Regulation], as agreed by the parties or, failing agreement, as assessed."

[9] The parties did not agree. In accordance with Clause 2.1 therefore, the appellant's "costs of and incidental to the claim and proceedings" were those costs "as assessed". On 30 November 2021 the appellant applied for the following orders:

> "1. Pursuant to rules 710(1A) and 686(c) of the *Uniform Civil Procedure Rules 1999* (Qld), there be an assessment of the Plaintiffs costs payable by the Defendant pursuant to the Release and Discharge dated 28 April 2021; and
>
> 2. Pursuant to rule 713(2)(a) of the *Uniform Civil Procedure Rules 1999* (Qld), the Registrar appoint a costs assessor from the Register of Approved Costs Assessors to conduct the costs assessment with the area/s of expertise of personal injury."

[10] Rule 710(1A) permits a party to apply for a costs assessment not less than 21 days after service of a costs statement. Rule 686 deals with the assessment of costs without an order. Rule 686(c) permits costs to be assessed without an order if, under a filed written agreement, a party agrees to pay another party's costs under

---

[3] Appellant's second amended outline of argument, paragraph 4; respondent's outline of argument, paragraph 5.

the UCPR. In seeking an order pursuant to r 686(c), the appellant proceeded on the basis that the respondent had not agreed to pay his costs under the UCPR. Were it otherwise, no order under r 686(c) would have been required.

[11] The order made by the Registrar on 15 December 2021 appointed a court approved costs assessor "to conduct the assessment of the costs payable by the Defendant to the Plaintiff pursuant to rule 686(c) [UCPR] and the Release and Discharge dated 28 April 2021".[4] As already observed, the Release and Discharge provided that in the absence of agreement, costs were "as assessed". The order therefore contemplated an assessment of costs under the UCPR as modified by Part 8 Division 2 of the Regulation.[5] This was accepted by the respondent at the hearing of the appeal.[6] As outlined below, both the costs assessor and the primary judge proceeded on this basis. Counsel's fees however, were disallowed. The costs assessor disallowed this outlay on the basis that Part 8 Division 2 of the Regulation "overrode" the UCPR which expressly makes such outlays recoverable. Counsel's fees were disallowed by the primary judge on the basis that reg 137 of the Regulation constituted an exhaustive list of recoverable outlays.

Part 8 Division 2 of the Regulation

[12] Pursuant to ss 584(1) and (2) of the Act, the Governor in Council may make regulations which make provision for anything specified in Schedule 1. This includes under Item 12 of Schedule 1 of the Act:

> "costs, including costs before and after a proceeding is started, and the type and amount of costs that may be claimed by or awarded to a claimant during any stage before or after the start of a proceeding…"

[13] Part 8 Division 2 of the Regulation was promulgated pursuant to this power and relevantly provides:

> "**135 Costs before proceeding started**
>
> (1) This section prescribes the legal professional costs of a claim before a proceeding is started.
>
> (2) If a claimant recovers at least $150,000 net damages, the costs are—
>
> (a) if the claim is settled—
>
> (i) without holding a compulsory conference—120% of the amount in schedule 6, column A; or
>
> (ii) after a compulsory conference is held—the amounts in schedule 6, columns A and B; and
>
> (b) for investigation of liability by an expert—the amount in schedule 6, column C; and

---

4 RB 53.

5 Part 8 Division 2 applied to the appellant because he was a worker whose DPI was 20 per cent or more: reg 134(a) of the Regulation.

6 TS 1-18 lines 20 – 41.

(c) for an application to the court—the amount in schedule 6, column D.

(3) If a claimant recovers net damages of $50,000 or more but less than $150,000, the costs are 85% of the amount calculated under subsection (2).

(4) If a claimant recovers less than $50,000 net damages, the costs are 85% of the amount calculated under subsection (2) multiplied by the proportion that the net damages bear to $50,000.

Example of subsection (4)—

If the net damages recovered are $30,000, the costs are (85% of the amount calculated under subsection (2)) x 3/5.

(5) However, if a court in the proceeding awards the payment of legal costs, the costs recoverable under subsections (2), (3) and (4) are multiplied by 120%.

(6) In this section—

net damages means the damages recovered less the compensation paid by an insurer.

136 Costs after proceeding started

(1) This section prescribes the legal professional costs of a claim after a proceeding is started.

(2) The costs are chargeable under the relevant scales of costs for work done for or in a proceeding in the court.

(3) However, the costs do not include—

(a) the cost of work performed before the proceeding is started; or

(b) the cost of work performed before the proceeding is started that is performed again after the proceeding is started.

137 Outlays

(1) In addition to legal costs, the following outlays incurred by the claimant are allowed—

(a) 1 hospital report fee for each hospital that treated the worker's injury;

(b) 1 report fee for each doctor in general practice who treated the worker's injury;

(c) 1 medical specialist's report fee for each medical discipline reasonably relevant and necessary for the understanding of the worker's injury;

(d) 1 report fee of an expert investigating liability, of not more than $1,000, less any proportion of the fee agreed to be paid by the insurer;

(e) Australian Taxation Office or tax agents' fees for supplying copies of income tax returns;

(f) fees charged by the claimant's previous employers for giving information necessary for the claimant to complete the notice of claim, but not more than $50 for each employer;

(g) fees charged by a mediator of an amount previously agreed to by the insurer;

(h) filing fees or other necessary charges incurred in relation to an application to the court before a proceeding is started;

(i) reasonable fees for sundry items properly incurred, other than photocopying costs.

(2) The fees—

(a) are allowable only for reports mentioned in subsection (1)(a) to (d) disclosed before the start of proceedings; and

(b) for subsection (1)(a) to (c)—are payable according to the recommended Australian Medical Association scale of fees."

Costs assessor's reasons

[14] The primary judge summarised the reasons of the costs assessor as follows:[7]

> "In the Reasons, the Assessor cited a general objection made by the defendant on the assessment which, after referring to regs 135 to 137 of the Regulation, stated:
>
> > 'It will be noted immediately that had the outlays described in s 137 of the Regulation been recoverable but confined to before the proceeding started, they could easily have been included in s 135 or had they been confined to the period after the proceeding started, they could have been included in s 136.
> >
> > In accordance with the usual principles of statutory interpretation, the words of s 137 are to be given their primary and natural significance. There are no words of qualification to limit the outlays provided for in s 137 to the period either before or after a proceeding is started. Indeed, s 137(2)(a) specifically qualifies reports in subss 1(a) to (d) by confining them to the period 'before the start of the proceeding'.

---

7 Reasons, [12]–[13].

> Fees incurred in subss (e) to (i) are not so qualified. Obviously the reference to a mediator in subs 1(g) clearly refers to a period after a proceeding is started.
>
> Clearly the purpose of s. 137 is to limit the outlays to those specifically described. Any outlay not described in s. 137 is not to be allowed. The purpose of these limitations is to limit the costs payable by the statutory insurer. On a proper interpretation, the provisions of s 137 of the Regulation refers to outlays both before and after a proceeding is started, subject however to the limitations contained in s 137(2).'

The Assessor accepted that objection meant counsel's fees should be excluded from the assessment on the basis that those fees did not come within the outlays the plaintiff was entitled to recover under reg 137 of the Regulation. The explanation for that decision can be seen in the following part of the Reasons addressing item 373:

> 'Section 137 of [the Regulation] lists the allowable outlays. Counsel's fees are not an allowable outlay under that section. In my view the provisions of Part 8 Division 2 of [the Regulation] override the provisions of [the UCPR] under the principle of '*generalia specialibus non derogant*', as the former is later legislation and is more specifically related to this type of action than [the UCPR], which is more general in nature. In conducting my assessment I also considered the Explanatory Notes for [the Regulation]… In my view the Explanatory Notes are clear that it is the intention of the legislation to prescribe the outlays and the legal professional costs of a claim both before and after a proceeding is started in these types of matters. … In my assessment I also considered Paragraph 2 of [the Release] in which the parties agree that WorkCover 'will pay the Plaintiff's costs of and incidental to the claim and proceedings calculated in accordance with Part 8, Division 2 of [the Regulation]…'" (footnotes omitted)

[15] The primary judge noted that senior counsel for the defendant did not seek to support the costs assessor's construction that the provisions of Part 8 Division 2 of the Regulation "override" the provisions of the UCPR.[8]

[16] The costs assessor's certificate[9] refers to the fact that she was appointed to assess costs by the order of the Registrar made 15 December 2021 pursuant to r 686(c) of the UCPR and the Release and Discharge dated 28 April 2021. The certificate also refers to the costs assessor assessing the costs pursuant to the order. The costs assessor, in her written reasons, states that in her assessment she considered rules 378, 386, 680, 692 and 702 of the UCPR. Rule 702 deals with the standard basis of assessment and relevantly provides that unless the UCPR or an order of the court provides otherwise, a costs assessor must assess costs on the standard basis. The costs assessor also referred to her consideration of the provisions of Part 8 Division 2 of the Regulation.

---

8 Reasons, [47].

9 RB 54.

[17] Evidently, the costs assessor was cognisant of conducting the assessment both pursuant to the UCPR and the Regulation. But for the costs assessor's erroneous view that the provisions of Part 8 Division 2 of the Regulation "overrode", in the sense of excluding the operation of the provisions of the UCPR, it may be accepted that the assessment would have been conducted pursuant to the UCPR as modified by Part 8 Division 2 of the Regulation.

The primary judge's reasons

[18] The application before the primary judge was made pursuant to r 742 of the UCPR for a review of the decision of the costs assessor included in the certificate. The review was sought on the basis that the costs assessor had erred in concluding that Part 8 Division 2 of the Regulation precluded the recovery of counsel's fees incurred after a relevant proceeding had been commenced.[10]

[19] His Honour correctly identified the principles governing the proper construction of Part 8 Division 2 of the Regulation:[11]

> "The proper approach to statutory construction requires that the court's consideration focus on the text of the relevant provisions, in context. The task must begin with a consideration of the text itself, although the meaning of the text may require consideration of the context, which includes the general purpose and policy of the provisions." (footnotes omitted)

[20] His Honour considered that regs 135 and 136 operated as follows:[12]

> "The legal professional costs of a claim before a proceeding is started are prescribed by reg 135. That regulation provides a method of calculating the amount of legal professional costs by reference to fixed amounts set out in Schedule 6 of the Regulation for specified steps undertaken before the proceeding is commenced. The amount of costs calculated will vary depending on the amount of net damages the worker recovers. The regulation can apply in circumstances where the claim has been settled, or in circumstances where the claim has been determined and the court awards the payment of legal costs.
>
> The legal professional costs of a claim after a proceeding is started are prescribed by reg 136 which provides that those costs are chargeable under the relevant scale of costs for work done for or in a proceeding in the court. Those costs will not include the cost of work performed before the proceeding is started, or the cost of work performed before the proceeding is started that is performed again after the proceeding is started. In this proceeding the relevant scale of costs for the purposes of reg 136 is that set out in Schedule 1 of the UCPR. That scale of costs does not provide for the payment of counsel's fees." (footnotes omitted)

---

10 RB 55.
11 Reasons, [15].
12 Reasons, [18]–[19].

[21] His Honour noted that for the purposes of reg 136, the relevant scale of costs in the proceeding was that set out in Schedule 1 of the UCPR. His Honour observed that the scale of costs in Schedule 1 does not provide for the payment of counsel's fees. His Honour contrasted this with Part 8 Division 1 of the Regulation which concerns the costs of a proceeding before an Industrial Magistrate or the Industrial Commission. Regulation 132(2)(a) provides that, in the event the magistrate or commission exercises the discretion to award costs, costs in relation to "counsel's or solicitor's fees" are set out under Schedule 2 Part 2 Scale C of the UCPR. This is the scale of costs for the Magistrates Court. His Honour observed that unlike Schedule 1 of the UCPR, the scale prescribes fixed amounts to be paid as costs for various items, including counsel's fees to undertake specific tasks.

[22] Later in the Reasons,[13] the primary judge observed that neither the text nor context of either reg 135 or 136 indicated any entitlement to recover counsel's fees as a separate item.

[23] His Honour's conclusion, that on the proper construction of the provisions of Part 8 Division 2 of the Regulation a claimant is not entitled to recover counsel's fees as part of his or her costs calculated in accordance with those provisions, was substantially founded on a consideration of the provisions of Chapter 5 Part 12 Divisions 1 and 2 of the Act. Part 12 deals with costs. Division 1 concerns costs applying to a worker with a DPI of 20 per cent or more, or a worker with a terminal condition, or a dependant, whereas Division 2 concerns costs applying to a worker who does not have a terminal condition and has a DPI of less than 20 per cent. Both divisions state the costs consequences of a party not accepting the other party's written final offer. Before commencing proceedings, the parties are required to participate in a compulsory conference pursuant to s 289 of the Act, and if the claim is not settled at the compulsory conference, the parties are required, pursuant to s 292, to make written final offers. His Honour summarised the effect of Chapter 5 Part 12 Division 1 of the Act as follows:[14]

> "The provisions in Chapter 5, Part 12 of the Act only apply in circumstances where a proceeding has gone to trial and a court has determined the claim. Chapter 5, Part 12, Division 1 applies to the same types of claims as come within Part 8, Division 2 of the Regulation: that is, claims made by a worker who has a degree of permanent impairment of 20% or more, a worker who has a terminal condition or by a dependent. Chapter 5, Part 12, Division 2 provides for different cost consequences in other claims.
>
> Chapter 5, Part 12, Division 1 provides for two different costs orders by reference to a comparison of the outcome of the proceeding and written final offers the parties must make if the claim is not settled at a compulsory conference prior to the commencement of a proceeding.
>
> First, where the claimant makes a written final offer that is not accepted by the insurer and the court later awards an amount of damages to the claimant that is equal to or more than the written final

---

13 Reasons, [30]–[31].
14 Reasons, [23]–[28].

> offer then the court must order the insurer to pay the claimant's costs, calculated on the indemnity basis.
>
> Secondly, if the insurer makes a written final offer that is not accepted by the claimant and the court later dismisses the claim, makes no award of damages or makes an award of damages that is equal to or less than the insurer's written final offer then the court must order the insurer to pay the claimant's costs, calculated on the standard basis, up to and including the day of service of the written final offer and order that the claimant pay the insurer's costs, calculated on the standard basis, after the day of service of the written final offer.
>
> The Act does not define what is meant by the terms 'indemnity basis' and 'standard basis'. The defendant submitted that these expressions bear the meanings given to them in the UCPR.
>
> Further, Chapter 5, Part 12, Division 1 of the Act does not prescribe what costs order should be made in circumstances where, in a claim to which the division applies, a court makes an award of damages in an amount which is less than a claimant's final written offer but more than an insurer's final written offer. This is surprising given that the cost consequences of such an outcome is a matter that a party's lawyer must address in a financial statement provided to the party before a compulsory conference." (footnotes omitted)

[24] His Honour accepted that Part 8 Division 2 of the Regulation would not operate so as to exclude counsel's fees from an assessment of a claimant's costs under an order of the court that those costs be paid on the indemnity basis under s 312 of the Act.[15] His Honour proceeded to reason however, by reference to Chapter 5 Part 12 Divisions 1 and 2 of the Act, that in circumstances where a court makes an award of damages for an amount which is less than a claimant's final written offer, but more than an insurer's final written offer, Part 8 Division 2 of the Regulation will operate so as to exclude the recovery of counsel's fees:[16]

> "Whether a construction which does not allow a claimant to recover counsel's fees under Part 8, Division 2 of the Regulation is the proper construction can be tested by considering how those provisions would operate when a proceeding has progressed to judgment but where no costs order has been made under either ss 312 or 313 of the Act so as to engage either of the bases of assessment prescribed under the relevant rules in the UCPR. Although, as the defendant submits, the provisions of Part 8, Division 2 of the Regulation have force in the circumstances of this case due to cl 2.1 of the Release, the construction of those provisions should be the same whether costs are being assessed after a proceeding has progressed to judgment (but where the principles set out in ss 312 to 314 of the Act are not engaged) or costs are being assessed after a settlement.

---

15 Reasons, [48].

16 Reasons, [49]–[54].

The provisions of Part 8, Division 2 of the Regulation would apply independently of an order made under Chapter 5, Part 12, Division 1 of the Act if, in a claim to which those provisions apply, a court made an award of damages in an amount less than a claimant's final written offer but more than an insurer's final written offer. In that case, an assessment of the claimant's entitlement to costs could only be performed by reference to the provisions of Part 8, Division 2 of the Regulation.

The outcome of a construction of Part 8, Division 2 of the Regulation which does not allow a claimant to recover counsel's fees is that a claimant who succeeds in obtaining an award of damages, but in an amount less than his or her final written offer, would be in a significantly worse position with respect to costs than a claimant who beat his or her final written offer and, by reason of s 312(2) of the Act, obtains an order for costs on the indemnity basis, including counsel's fees. While that might, at first glance, seem unfair it must be considered in the broader context of the effect of written final offers on costs.

In particular, it needs to be considered against the cost consequences for a claimant who does not have a terminal condition and has a degree of permanent impairment of less than 20% under Chapter 5, Part 12, Division 2 of the Act. In such a case:

(a) if the court awards an amount of damages to the claimant that is equal to or more than the claimant's final written offer then the court must order that the insurer pay the claimant's costs on the standard basis from the day of the final written offer; but

(b) if the court awards an amount of damages that is less than the claimant's final written offer, but more than the insurer's final written offer then each party must bear its own costs.

So, again, a claimant who succeeds in obtaining an award of damages, but in an amount less than his or her final written offer, would be in a significantly worse position with respect to costs than a claimant who beat his or her final written offer and, by reason of s 316(2)(a) of the Act, obtains an order for costs on the standard basis, including counsel's fees.

Both comparisons emphasise the importance of written final offers and evidence a legislative objective of seeking to promote settlement of claims without proceedings having to be filed in court. The imposition of serious consequences in respect of costs where a claimant fails to beat his or her written offer would be likely to further that legislative objective by encouraging claimants to make reasonable written offers as part of the compulsory conference process. For the reasons just discussed, a construction of Part 8, Division 2 of the Regulation which does not allow a claimant to recover counsel's fees would be consistent with that legislative objective." (footnotes omitted)

[25] In construing reg 137, his Honour considered that the only indication of an entitlement to recover counsel's fees which might be found in the text of reg 137 was in the opening words "[i]n addition to legal costs". If construed broadly, the term "legal costs" was capable of including counsel's fees as well as legal professional costs. His Honour considered that there were two difficulties with this construction. First, the term "legal costs" was not a defined term for the purposes of reg 137. Secondly, reg 137 is positioned directly after regs 135 and 136 and deals with the subject matter of outlays as distinct from legal professional costs. His Honour concluded that the term "legal costs" should therefore not be construed as encompassing any costs beyond the "legal professional costs" recoverable under regs 135 and 136.[17]

[26] In construing the term "legal costs" in reg 137 as meaning "legal professional costs", his Honour made reference to s 290A of the Act which also uses the term "legal costs":[18]

> "Secondly, as was recognised in the plaintiff's submissions, counsel's fees are usually described as an 'outlay' on an assessment of costs. The plaintiff sought to address this difficulty by submitting that the term 'legal costs' is not used in a consistent manner in the Act or the Regulation and, for that reason, it should not be presumed that the term has been used in a technical or legal sense in reg 137(1) to exclude counsel's fees.
>
> There is force in that submission. The plaintiff referred to the use of the term 'legal costs' in s 290A of the Act. That section provides for a compulsory conference to be held before a proceeding is commenced. As noted in [28] above, it requires, among other things, that the lawyer for a party provide a financial statement to that party. The financial statement must include details of 'legal costs' already incurred and an estimate of the party's 'likely legal costs' to be incurred in the future. The clear purpose of the financial statement is, as the plaintiff submitted, to ensure that the party receiving it is fully informed of the degree of risk it would assume by rejecting any terms of compromise. To achieve that purpose, the term 'legal costs' in s 290A should be understood to include counsel's fees. The defendant accepted as much."

Part 8 Division 2 of the Regulation does not exclude the recovery of counsel's fees on an assessment of the claimant's costs

[27] The order of 15 December 2021 contemplated the assessment of costs to be conducted under the UCPR as modified by the provisions of Part 8 Division 2 of the Regulation. Chapter 17A of the UCPR deals with costs and contains specific rules in relation to the recoverability of outlays and disbursements, including counsel's fees. Rule 726 for example, provides that the cost of a proceeding may include costs incurred for:

> "(a) the advice of counsel on pleadings, evidence or other matters in a proceeding; and

---

17 Reasons, [36]–[37].
18 Reasons, [38]–[39].

(b) counsel drawing or settling any pleading or other document in a proceeding that is appropriate for counsel to draw or settle."

[28] As accepted by the respondent, counsel's fees "have always been properly characterised as a professional disbursement or outlay, and recoverable by a solicitor in his or her bill of costs".[19]

[29] Counsel's fees are an outlay which would be recoverable in the ordinary course under the UCPR. As correctly submitted by the appellant, "if the legislature intended to fundamentally alter the scheme for the assessment and award of costs by removing the plaintiff's entitlement to recover counsel's fees, it would have expressly done so".[20]

[30] As Chapter 17A of the UCPR contains specific rules dealing with the recoverability of counsel's fees, as a matter of statutory construction, it is irrelevant for the purposes of reg 136(2) that the scale of costs for the present proceedings, Schedule 1 of the UCPR, does not provide for the payment of counsel's fees. This is because such provision is specifically made for the recoverability of counsel's fees under Part 17A of the UCPR.

[31] Similarly, it is also irrelevant that reg 132(2)(a), which refers to a magistrate or the commission awarding costs in accordance with Schedule 2 Part 2 Scale C of the UCPR, makes specific reference to counsel's fees. Schedule 2 simply reflects that in the Magistrates Court the amount recoverable on assessment for counsel's fees are capped in accordance with the relevant scale. This is to be contrasted with the Supreme and District Court, where counsel's fees fall to be assessed by reference to notions of reasonableness having regard to the circumstances and complexity of the proceedings.

[32] There is however, a more compelling reason why the list of outlays in reg 137 should not be construed as constituting an exhaustive list of recoverable outlays. Some of the outlays referred to in reg 137 would be outlays incurred after the commencement of proceedings. Part 2 Division 1 of the *Uniform Civil Procedure (Fees) Regulation 2019* (Qld) provides for fees payable for proceedings in the Supreme Court and the District Court. These include fees payable for the filing of a claim, the setting down for hearing or trial of any proceeding and for the hearing or trial of a proceeding.[21] Part 3 of the *Uniform Civil Procedure (Fees) Regulation* provides for the payment of allowances for witnesses which include disbursements for travelling allowance, accommodation allowance and attendance allowance. These fees constitute ordinary and necessary outlays or disbursements which a solicitor is required to incur in commencing and conducting proceedings for a claimant. These outlays are not however, specified in reg 137. According to its ordinary meaning, the reference in reg 137(1)(i) to "sundry items" would not encompass such outlays and disbursements. There are no evident policy reasons under the Act which support a construction of Part 8 Division 2 of the Regulation, and in particular reg 137, as excluding or prohibiting the recoverability of such outlays and disbursements. Nor does the exclusion of the recoverability of counsel's fees necessarily further the legislative objective of encouraging claimants to make

---

19 Respondent's outline of argument, paragraph 30.

20 Appellant's outline of argument, paragraph 29.

21 *Uniform Civil Procedure (Fees) Regulation 2019* (Qld), Part 2, Division 1, Items 1(3), 5(2) and 6(2).

reasonable written offers as part of the compulsory conference process. To the contrary, the involvement of counsel may likely assist in achieving this legislative objective. Rule 726 of the UCPR expressly contemplates the recoverability of counsel's fees in relation to the advice on pleadings, evidence and other matters in a proceeding. Such involvement of counsel would ordinarily assist a claimant in formulating an appropriate written final offer.

[33] As previously observed, the primary judge's construction of Part 8 Division 2 of the Regulation was substantially founded on the operation of Chapter 5 Part 12 Divisions 1 and 2 of the Act. His Honour considered it "surprising" that Chapter 5 Part 12 Division 1 did not prescribe what costs order should be made in circumstances where, in a claim to which the division applies, a court makes an award of damages in an amount which is less than the claimant's written final offer but more than an insurer's written final offer. Such an omission or gap only arises if the operation of Part 17A of the UCPR is excluded. Section 312 of the Act mirrors r 360 of the UCPR and s 313 of the Act mirrors r 361 of the UCPR except in the context of written final offers made under s 292 of the Act rather than offers to settle made under the UCPR. The operation of the UCPR is only modified by the express terms of ss 312 and 313 of the Act. The Act makes no provision for the circumstance in which an award of damages is made in an amount less than a claimant's written final offer but more than an insurer's written final offer. In such circumstances, the UCPR would operate so that costs would be assessed on the standard basis. The operation of the UCPR has not been displaced either expressly or by necessary implication in such circumstances by the operation of Chapter 5 Part 12 Division 1 of the Act. This is to be contrasted with Chapter 5 Part 12 Division 2 which deals with costs applying to a worker who does not have a terminal condition and has a DPI of less than 20 per cent. Section 316(3) expressly provides that if an award of damages is less than the claimant's written final offer, but more than the insurer's written final offer, each party bears their own costs. Section 316(3) therefore operates to modify the operation of the UCPR.

[34] Regulation 137 should not be construed as constituting an exhaustive list of the outlays recoverable on an assessment of costs. The better view is that reg 137 identifies and limits what may be recovered in relation to specific outlays which are generally particular to the proceedings to which the Act relates. As counsel's fees are ordinarily a recoverable outlay pursuant to r 726 of the UCPR, one would expect the legislature to use express language to exclude or modify the operation of the rule. Further, reg 137 does not expressly refer to other outlays such as fees for filing a claim, witness expenses, setting down and hearing fees which would be disbursements ordinarily recoverable on an assessment of costs. While legislation affecting the recoverability of costs may sometimes be correctly described as a "blunt instrument",[22] there are no evident policy considerations which support the exclusion of such outlays.

[35] The resolution of the issue raised by this appeal does not depend on whether the term "legal costs" in reg 137 has the same meaning as the term "legal professional costs" used in regs 135 and 136. My view is however, that the term "legal costs" has a broader application than the term "legal professional costs". Section 14(1) of the *Acts Interpretation Act 1954* (Qld) provides that a heading to a chapter, part, division or subdivision of an Act is part of the Act. Regulation 135 is headed

---

22 *State of New South Wales v Avery* (2016) 92 NSWLR 141, [29]–[64] per Sackville AJA.

"Costs before proceedings started" and reg 136 is headed "Costs after proceedings started". Regulation 137 deals with a different topic and is headed "Outlays". The opening words to reg 137(1) are "[i]n addition to legal costs". These words do not make specific reference to the "legal professional costs" referred to in regs 135 and 136. Further, the outlays referred to in reg 137 are outlays that may be incurred either before or after a proceeding has commenced. The term "legal costs" is also used in s 290A of the Act which deals with the exchange of material for a compulsory conference. The material includes a certificate of readiness which includes a statement that the party's lawyer has provided a financial statement containing the information required under s 290A(3). This provides details of the legal costs payable by the party to the party's lawyer up to the completion of the conference and an estimate of the party's likely legal costs and net damages if the claim proceeds to trial and is decided by a court as well as an estimate of the party's likely legal costs and net damages if the claim is settled without proceeding to trial. It was accepted by both parties that the reference to "legal costs" in s 290A(3) would include counsel's fees. The provision of an estimate of legal costs including counsel's fees would assist not only in the conduct of the compulsory conference, but also in the formulation by both parties of their written final offers. The requirement for the disclosure of this information is not easily reconciled with counsel's fees being excluded from any subsequent assessment of costs.

[36] As Part 8 Division 2 of the Regulation deals specifically with the issue of costs, the change in the usage of the terms from "legal professional costs" in regs 135 and 136 to "legal costs" in reg 137, indicates that the change in language was intentional. This is consistent with the rule that where a legislature could have used the same term but chose to use a different term, the intention was to change the meaning.[23] If the term "legal costs" in reg 137 is given the same meaning as that in s 290A of the Act, it would encompass outlays and disbursements under the UCPR which are not specified as outlays in reg 137. If the term is interpreted in this way, it supports a construction of reg 137 that it is concerned with specific outlays referrable to the nature of the proceedings under the Act which are allowable upon an assessment of costs. Such an interpretation does not require reg 137 to be construed as constituting an exhaustive list of recoverable outlays so as to prohibit outlays that would ordinarily be recoverable under Part 17A of the UCPR.

Disposition

[37] I would propose the following orders:

1. Appeal allowed.

2. Set aside the orders made by the learned primary judge.

3. Vary the decision of the costs assessor made 30 August 2022 by allowing Items 373, 411, 568, 667 (reduced to $990.00), 729 and 943, disallowed by her in that decision.

4. The respondent pay the appellant's costs of the appeal and the costs of the applications filed in the proceeding below on 30 September 2022 and 9 January 2023.

---

23 *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 25; D Pearce, *Statutory Interpretation Australia* (9th ed, LexisNexis Butterworths, 2019) at [4.8].

[38] **HENRY J:** I agree with the reasons of Flanagan JA and the orders proposed by his Honour.