DISTRICT COURT OF QUEENSLAND

CITATION:	*Henley & Anor v State of Queensland & Anor* [2005] QDC 094
PARTIES:	**DEBORAH JOAN HENLEY** First Plaintiff and **PAUL RAYMOND HENLEY** Second Plaintiff v **STATE OF QUEENSLAND** First Defendant and **QUEENSLAND RAIL** Second Defendant
FILE NO/S:	D3997 of 2000
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	29 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2004
JUDGE:	McGill DCJ
ORDER:	**Appeal allowed, direction of the registrar set aside, direct that the registrar assess the costs pursuant to the order in the way laid down in *Bottoms v Reser*, and without making any further requirements of the solicitors for the plaintiff. First Defendant to pay the First Plaintiff's costs of the reconsideration and appeal, fixed.**
CATCHWORDS:	PRACTICE – Costs – assessment – indemnity basis – agreement with client to pay lump sum – approach to assessment – whether costs statement necessary. UCPR r 704(3). *Bottoms v Reser* [2000] QSC 413 – followed. *EMI Records Ltd v I C Wallace Ltd* [1983] 1 Ch 59 - considered

COUNSEL: D L K Atkinson for the first plaintiff
G J Robinson for the first defendant

SOLICITORS: Murphy Schmidt solicitors for the first plaintiff
Crown Solicitor for the first defendant.

[1] This is an application to review a decision of a deputy registrar in relation to an assessment of costs, brought pursuant to r 742. It raises an important question of principle in relation to the process to be followed when costs are being assessed on the indemnity basis in accordance with r 704. In order to understand the matters in issue, it is necessary to say something about the history of the action.

History of the matter

[2] By a claim filed in October 2000 the first plaintiff claimed damages in respect of injuries suffered by her when she slipped and fell while crossing a pedestrian overpass over the Ipswich Motorway adjacent to the Goodna Railway Station. There was a second plaintiff, her husband, who claimed damages for loss of consortium. The action against the second defendant was discontinued in March 2002. The first defendant accepted liability on the second day of the trial, but there remained a dispute in relation to quantum. The plaintiff's injuries, although not producing a substantial loss of function, were painful and interfered with her ability to work, and meant that for practical purposes she was able to work only on a part-time basis. On 7 October 2002, after a trial in August that year, I gave judgment that the first defendant, State of Queensland, pay the first plaintiff $261,200 and the second plaintiff $3,500. The damages assessed included the amounts of $120,000 for future economic loss and $70,000 for future gratuitous care.

[3] When judgment was delivered I was told that the first plaintiff had formally offered to accept an amount which was lower, indeed substantially lower, than the damages assessed. Accordingly and without opposition from the first defendant an order was made pursuant to r 360 that the first defendant pay the first plaintiff's costs of and incidental to the action to be assessed on the indemnity basis. The second plaintiff's costs were to be assessed on the standard basis.

[4] Negotiations between the parties failed to resolve the quantification of the first plaintiff's costs, and on 5 November 2003 an application was filed for her costs to be assessed pursuant to r 709. With that application was filed a costs statement which set out an itemised list of disbursements but in relation to professional fees claimed a lump sum of $62,500 "as agreed by the first plaintiff in the client agreement."

[5] In support of the assessment however the plaintiff[1] filed two affidavits by the solicitor who had the carriage of the action, and an affidavit by an independent, experienced solicitor, with particular experience acting for plaintiffs in personal injury actions.

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1 I shall from now on refer to the first plaintiff as the plaintiff and the first defendant as the defendant, as they are the only relevant parties.

[6] There was a directions hearing in relation to the assessment on 10 December 2003, at which time the defendant's representative indicated that there would be cross-examination on those affidavits, and a direction was sought for the production of the documents referred to in them. Subsequently the deputy registrar wrote to the parties asking them to address various questions including: "(a) If, for the exercise of discretion under r 704 UCPR, a registrar must have regard to any applicable scale, how is it possible to do so without an itemised costs statement?" and "(b) Under r 704 UCPR a registrar must allow all costs reasonably incurred. In the absence of an itemised costs statement how is it possible to determine whether the costs have been reasonably incurred? How can this be done without an itemised costs statement?"

Evidence

[7] Three affidavits were filed on behalf of the plaintiff. The first affidavit of Ms Avery filed 5 November 2003 exhibited correspondence, and set out in some detail the history of the action, although it is not clear that that affidavit purports to record everything which was done by the solicitors for the purposes of the action. The affidavit records that the then relevant firm had contact with the plaintiff first on or about 24 November 1997, and that that firm and its successors agreed to act on a speculative basis for the plaintiff. There is no reference to a client agreement having been entered into at that time, but there was one entered into dated 4 July 2000 which provided that the plaintiff would not be liable to pay any fees unless and until she received damages. The document went on to provide that the fees would not be calculated on a time basis, on a scale or as a percentage of the damages. It gave an estimate of the fees for all professional work on the assumption that the claim was settled prior to the institution of proceedings of $27,500, although it provided that the amount may vary as more information became available as to the circumstances of the injury and the extent of the damages, and that the firm would inform the plaintiff if it considered that the amount of its fees would vary from this amount. In that situation, or if the claim did not settle at that state, there would be a further client agreement with a further estimate of costs. The agreement then went on to deal with what are probably better described as outlays, for which an estimate of $1,500 was given.

[8] It is not entirely clear to me that that agreement amounted to an agreement to pay the lump sum of $27,500 for professional fees in the event that the matter was settled prior to the commencement of proceedings. It is however unnecessary to decide that question, because the matter did not settle at that stage, proceedings were commenced, and there were later client agreements entered into. The proceedings were commenced on 6 October 2000, but not actually served until 2 May 2001.

[9] A statement of loss and damage was served on 6 July 2001. The defendant provided a list of documents by letter of 28 August 2001. They were inspected on or about 5 September 2001. A list of documents was subsequently provided to the defendant, and on 5 February 2002 a notice to admit facts was served on the defendant. On 19 February 2002 the defendant in response admitted that it was responsible for the maintenance and construction of the relevant area of the overpass on which the plaintiff alleged she had fallen and injured herself. As a

consequence of this admission, the action against the second defendant was discontinued by a notice filed on 6 March 2002.[2]

[10] There was a further client agreement signed by the first plaintiff on 12 March 2002. This provided that fees would be payable conditional on the plaintiff's recovering damages, and would not be calculated on a time basis or on a scale, although a copy of the Supreme Court Scale was attached. The fees were said to be calculated on a lump sum basis, which was said to be significantly more than if the fees were calculated on a scale, but would not be a percentage of the damages. It was agreed that the fees for professional work from the receipt of instructions to attending a settlement conference prior to tendering the request for trial date would be $43,500. There was the qualification that the amount charged would not exceed the amount recovered by way of damages, and that there would be a further client agreement if the claim did not settle at the settlement conference. Outlays were dealt with separately, and an estimate of $4,500 was given for them; they were to be paid as charged.

[11] There was a settlement conference on 27 March 2002, but the claim did not then settle. The defendant was not prepared to settle liability separately. It appeared therefore that the matter would have to proceed to trial. On 30 April 2002 a further client agreement was forwarded to the plaintiff. This was ultimately signed by her on 10 May 2002.[3] It was similar to the previous client agreement, and provided for a lump sum for professional fees of $62,500 for all of the work undertaken from receipt of instructions to and including a two day trial. It remained speculative in the same sense, and again there was provision for extra charges estimated at $12,500 in respect of outlays.

[12] The affidavit set out reasons why this was unusually complex litigation as a personal injury action. It did have the difficulty that there was initially uncertainty as to the correct defendant, and neither defendant admitted responsibility for the structure until February 2002. It was necessary for the plaintiff's lawyers to use various means to investigate the true factual situation, which was of course particularly within the knowledge of the defendant. Part of the complexity associated with this was that the defendant, prior to admitting that it was responsible for the area in question, discovered a huge quantity of material in relation to this point, some ten archive boxes full of documents.[4] The other consideration is that it was a "slip and fall" case, an area where there has always been some complexity in the law, and where the law has if anything in recent years become more complex, as there have been a host of appellate decisions in Queensland and elsewhere, not all of which appear to be going in the same direction.

[13] Although ultimately liability was admitted on behalf of the first defendant, that was only on the morning of the second day of the trial, by which time effectively all of the costs associated with proving liability would have been incurred. The other matter referred to, that the consequences to the plaintiff of the injuries were in the long term in the form of increased pain rather than functional impairment, is a

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2 Apart from these formal steps, the solicitors were doing much additional work, but this outlines the progress of the action.

3 Almost three months before the first day of the trial.

4 Affidavit of Avery para 72(d).

matter which make the assessment of damages more difficult, and perhaps less certain. It seems to me that this is not so much a matter of the complexity of the case as a matter which justifies greater care and thoroughness in preparation.

[14] There was a further affidavit by Ms Avery exhibiting a "matter costs summary report" prepared by the accounts department of the solicitors showing the hours worked on the plaintiff's file by professional staff members until 23 October 2002, the day before the day on which the order for costs was made. This shows the total number of units of billable time spent by each of 12 individuals, the "time value," "time billed" and "write on/off" for each of them and totals. Each unit was said to represent six minutes work, and a total of 1,867 units were recorded, 186.7 hours of work. These included four units by a senior partner, 153 units by a managing partner, and various units by solicitors, articled clerks, and a consultant investigator and paralegal clerk. The charge rate for various individuals is not stated, but presumably can be calculated from the total number of units and the "time value" for each person. The amount in the "write on/off" column was added to the "time value" amount to produce a figure for "time billed." This material provides some indication of the amount of time applied to the file by the various people, but no other details about what time was applied to doing what.

[15] There was also filed on behalf of the plaintiff an affidavit by Mr Davis, an independent solicitor, who had been asked to express an opinion on whether the costs claimed by the plaintiff were reasonable as indemnity costs. He had been provided with a draft of Ms Avery's longer affidavit, and information as to the amount of time spent on the case, and the plaintiff's solicitors' estimate of the risk assumed by them in agreeing to represent the plaintiff on a speculative basis. He expressed the opinion that the amount of time spent by each category of staff was very reasonable given the complexity of the case. He was informed that a further 10 to 15 hours of work was necessary after the work recorded in the exhibit to the second affidavit of Ms Avery in order to finalise the matter. He set out estimates of the usual range of hourly rates charged by litigation firms in Brisbane at the time of swearing his affidavit by reference to partner, associate or senior solicitor, senior clerk or junior solicitor, and junior clerk or paralegal. The affidavit is ambiguous as to whether the range is exclusive or inclusive of GST.[5] He went on to provide information as to average hourly rates of partners in a report by an academic for the years 1996 to 2001. Average hourly rates for various practices during this period, including most relevantly in Brisbane City, were also stated. Mr Davis then went on to apply his estimates of the ranges of fees that would commonly be charged for the work in Brisbane to the information as to the number of hours of work done by various people, which would have been derived from the document exhibited to Ms Avery's second affidavit, by which he calculated a range, including an allowance for the final work not covered by that document, of between $35,510 and $45,520.

[16] He then went on to discuss the practice of charging an uplift on professional fees in cases where solicitors agreed to do work on a speculative basis, as was the case here, to accommodate the risk that the firm will not be paid because the action may fail, the risk that the firm may not recover expenses incurred in taking the case to trial if the action fails (even if under the client agreement such expenses are still recoverable from the client), and the loss of value of the fees incurred by reason of

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5 Presumably this was clarified by cross-examination.

deferred payment. He expressed the opinion that such an uplift was invariably applied in complex difficult and time consuming cases accepted on a speculative basis. He explained how the uplift was calculated by reference to the risk of such cases being unsuccessful, to show that this is done in such a way that, in the long run and assuming the estimates of the risk were accurate, the amount recovered from the successful cases would be sufficient to provide the equivalent of the usual rate of charging in respect of all cases, had it been charged and paid in all cases.

[17] Mr Davis expressed his opinion that in this case an appropriate estimate of the risk of failure was 25 percent, and that therefore an uplift factor of 33 percent was justified to accommodate the fee non-payment risk. He expressed the opinion that there should be an equivalent uplift in respect of the expense risk; it occurs to me that views may differ on that point. He also referred to a margin for the deferred payment risk, by reference to the interest charged on the firm's business overdraft. In his opinion that justified the addition of $6,000 to $8,000 to the fees calculated earlier. His affidavit does not set out in full the basis upon which these figures were derived in this case.

[18] Applying these two uplift factors to the amounts derived previously produced a range of between $60,000 and $75,000. On that basis he expressed the opinion that professional fees of $62,500 were reasonable in this particular case.

Objections to Evidence

[19] At the hearing before the deputy registrar the defendant objected to this affidavit, and it appears that the deputy registrar disallowed most of this affidavit, from paragraph 9 on. On the appeal counsel for the plaintiff did not argue that the registrar erred in excluding this material, but, after considering the arguments advanced to the registrar on behalf of the defendant (which were recorded in the transcript of the proceedings before the registrar) in my opinion all that material was wrongly excluded. This is really not necessary for what I have to decide, but it is inappropriate for the assessment, which is yet to take place, to proceed on an incorrect basis.

[20] The excluded material was relevant to matters the registrar had to decide, and the objection that it amounted to swearing the issue (which at most applied to one statement in the affidavit) is one which is rarely upheld in relation to expert evidence these days.[6] In 1989 three members of the High Court doubted whether any such exclusionary rule existed.[7] In matters concerning valuation, valuers regularly give evidence as to the valuation of the land or other object. At most the expert is excluded from giving an opinion on the ultimate issue where that issue involves the application of a legal standard or norm to particular facts in order to arrive at the ultimate issue.[8] But that was not what Mr. Davis was doing; his

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6 See Freckelton and Selby "Expert Evidence" (Lawbook Co., 2002) p.254; *Thannhauser v Westpac Banking Corporation* (1991) 31 FCR 572; *Naxakis v Western General Hospital* (1999) 73 ALJR 782 at [110].

7 *Murphy v R* (1989) 167 CLR 94 at 110 per Mason CJ and Toohey J, 127 per Deane J.

8 Cross on Evidence at [29125] and cases there cited, in particular *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 34 NSWLR 129 at 130-1. Freckelton and Selby suggest at pp 262-4 that the rule does not apply in civil matters tried without a jury, which is sensible.

opinion was in substance that the amount agreed to fell within the range produced by applying his estimate of the usual range for solicitors' charges to the amount of time he had been told had been applied to this action, adjusted to allow for the uplift factors he had identified. That is not the very issue the registrar has to decide, namely, the amount allowable under r 704(3). No part of the affidavit should have been excluded on this basis.

[21] Apart from complaining about Mr Davis swearing the issue, the defendant raised a number of other matters in the course of that argument. It was submitted that at times Mr Davis was simply repeating what he was told. That is no basis for objection. An expert is expected to reveal in his evidence the basis of his opinion, and to the extent that he is relying on things that he has been told by someone else, that is properly revealed and therefore properly appeared in the affidavit.[9] It was next submitted that Mr Davis did not show sufficient detail about the source of his knowledge about usual rates of charging by solicitors. Apart from being wholly unrealistic, such an objection does not go to admissibility but at best is a matter of weight. It was then submitted that his references to information from a report by Professor Meredith were irrelevant because he had not in terms adopted the figures derived by Professor Meredith. But an expert may take into account a variety of sources of information without necessarily expressly adopting any of them, and the fact that Mr Davis did not directly adopt the figures derived by Professor Meredith is irrelevant. What Mr Davis was doing here was properly disclosing this as a source of relevant information available to him.

[22] It was then submitted that there was no basis for his statement about the complexity of the case, but that ignored the fact (which Mr Davis had properly disclosed earlier in the affidavit) that he had been provided with a copy of Ms Avery's affidavit, which was a sufficient basis for that statement. It was then submitted that Mr Davis' calculation of uplift and the associated discussion was not a matter of expertise. Again this misunderstands the function of proper expert evidence. It is not just a matter of the expert stating a bald conclusion, the expert must explain the basis upon which that conclusion was reached.[10] All of the discussion about uplift and the (mechanical) calculations disclosed in the affidavit were properly disclosed in order to fulfil that legitimate purpose.

[23] One issue which might have been raised, but was neither argued on behalf of the defendant nor relied on by the registrar, was the proposition that evidence in relation to an uplift factor was irrelevant because no allowance could properly be made for an uplift factor. In any case, in my opinion where the plaintiff was claiming an assessment on the basis of an uplift, if that issue were contentious the appropriate course would have been to admit the evidence subject to relevance.

[24] It was also submitted that, because the registrar was an expert tribunal, at least in relation to costs, expert evidence was not admissible in relation to such matters because the registrar was expected to know it all anyway.[11] This argument is wrong

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9 Cross on Evidence, para [29065].

10 *R v Jenkins; ex parte Morrison [No 2]* [1947] VLR 277; *Makita Aust Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

11 For example at p.8 around line 10 it was submitted that what was reasonable was for him alone to decide and therefore not a matter for an expert to swear to.

for two reasons. First, the fact that the tribunal is an expert tribunal does not alter the test for the admissibility of expert evidence; that test still operates by reference to the ordinary person, not the ordinary person having the degree of expertise of the particular expert tribunal. For example, the Land Court comprises members who have considerable expertise in the valuation of land, but matters in the Land Court routinely involve the calling by each party of expert evidence as to the valuation of the land in question. Indeed, I understand that commonly all of the evidence put before the Land Court in the course of hearing a particular matter will be valuation evidence. It has never been suggested in the Land Court, or the Land Appeal Court, or the Court of Appeal, that the expertise of the members of the Land Court in matters of valuation of land renders expert evidence on land valuation inadmissible. In my opinion it is clear that the same approach applies in the assessment of costs before a registrar.

[25] The other reason is that Mr Davis' evidence was particularly directed to the question of what costs are ordinarily charged by solicitors to their clients and actually paid by the clients. Under the rules it is the function of registrars to assess costs as between parties to litigation, but under the *Queensland Law Society Act* the assessment of costs as between solicitor and client is and has been for some years a matter which is not, at least ordinarily, dealt with by a registrar, but by a costs assessor. No doubt there are still some occasions when a registrar is concerned with the assessment of costs as between the solicitor and the client, but that would occur far less frequently than would have been the case in the past, when such costs were also routinely assessed by registrars. Accordingly in my opinion it cannot be assumed that registrars now have their former degree of expertise in relation to the particular issue of what costs in practice solicitors ordinarily charge their clients, and clients ordinarily pay. But that is the matter which is to be taken into account when assessing indemnity costs under r 704(3)(c). In my opinion in the circumstances the receipt of opinion evidence from an expert in relation to such an issue was not merely permissible but appropriate.

Other evidence, and outcome

[26] The only other evidence before the deputy registrar was an affidavit by Mr King, a costs assessor, which was filed on behalf of the defendant. It exhibited what was said to have been a detailed costs statement in the usual form for assessment, in relation to the plaintiff's costs of the action, but drawn by reference to the Supreme Court scale. Mr King then nominated a figure of $30,960 which he said would have been that produced if the statement had been drawn by reference to the District Court Scale. I take it that this simply involved changing amounts allowed for various things under the Supreme Court Scale to the equivalent amounts allowed under the District Court Scale, and did not involve any expression of opinion on the part of Mr King on the reasonableness of any of the items claimed in the bill or the charges for them. It follows that the defendant did not by evidence identify any work by the plaintiff's solicitors which was alleged to be unreasonable or not properly undertaken.

[27] The assessment proceeded on 13 and 14 April 2004, with cross-examination, and with submissions being heard. On 1 June 2004 the registrar gave a direction that the plaintiff provide a costs statement in taxable form. The plaintiff objected to this

course, and sought a reconsideration of that decision. However, on 29 September 2004 the decision was confirmed, and the plaintiff's objections upon the reconsideration were dismissed. It is from that decision that the appeal is brought to this court. That approach appears to have been adopted on the basis that an appeal could be brought from a deputy registrar to the court in relation to an assessment only under r 742 after the processes of objection and reconsideration required by r 741 had been completed. It is unnecessary in the circumstances to decide whether or not that is correct.

[28] That has produced one result which in view of the nature of the matters in dispute in this case is unfortunate: the argument was to some extent developed by reference to particular grounds of the objection, and by reference to particular grounds of the application for reconsideration. That is no doubt a convenient approach in the ordinary case, but in this case where the matter in issue is the whole question of the correct approach to an assessment in the particular circumstances which have arisen here, somewhat broader questions have to be considered. The defendant submitted that the plaintiff should be confined to the grounds raised in the application for reconsideration. I am satisfied that the matters on which I will decide this application were raised before the registrar, which is sufficient.

Indemnity costs

[29] The UCPR provides for costs to be assessed on the standard basis, or on the indemnity basis. Plainly the rules intended the outcome to be different, and that the latter basis be more generous to the party having the benefit of an order for assessment on it. Prior to the UCPR the ordinary bases for taxation of costs awarded in an action were for party and party costs and for solicitor and client costs. The assessment on the standard basis is similar to the former party and party taxation, as indicated by the similarities between the test for party and party costs under the former rules[12] and the test for the standard basis under the UCPR.[13] Although for some purposes costs on the indemnity basis are regarded as the equivalent of the former solicitor and client costs[14], the rules providing for them are somewhat different. In particular, r 704(3) provides:

"When assessing costs on an indemnity basis, the registrar must allow all costs reasonably incurred and of a reasonable amount, having regard to –

(a) the scale of fees prescribed for the court; and

(b) any costs agreement between the party to whom the costs are payable and the party's solicitor; and

(c) charges ordinarily payable by a client to a solicitor for the work."

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12 RSC O 91 r 81

13 Rule 703(2).

14 See UCPR r 743.

This is significantly different from the test for the former solicitor and client costs,[15] and in these circumstances it is unsurprising that a different approach has been adopted.

[30] The Chief Justice considered the operation of this rule in *Bottoms v Reser* [2000] QSC 413. In that case his Honour had to deal with the approach to assessment of costs which had been ordered, after the commencement of the UCPR, to be paid on a "solicitor and own client" basis. His Honour concluded that under those rules the only bases for assessment were the standard basis and the indemnity basis, and that the order should be taken to comprehend "what is now regarded as the indemnity basis under r 704."

[31] His Honour went on to discuss the approach to assessment on that basis, ie, the indemnity basis. His Honour said at p.4 that it "encompasses all costs except so far as they may be of unreasonable amount or where unreasonably incurred." On the following page he adopted a comment from *EMI Records Ltd v I C Wallace Ltd* [1983] 1 Ch 59 at 74, that in determining reasonableness "the receiving party will be given the benefit of any doubt." He continued: "In other words, considerable liberality should ordinarily be extended in assessing reasonableness. That is indeed implicitly recognised by the reference in para (b) of sub-rule (3) to any costs agreement between a client and the client's solicitor. It would perhaps be an unusual case where, costs having been agreed in that way, they were then, on this process of assessment, to be excluded as 'unreasonable.' Plainly however if they warranted characterisation as outlandish, they ought no doubt nevertheless to be excluded. I emphasise my view that in such an assessment, no niggardly or unduly narrow approach would be warranted."

[32] The registrar was aware of this decision, and mentioned it in his reasons upon the reconsideration, but he has unfortunately misinterpreted it. He noted that the actual order in that case was for "solicitor and own client" costs, and continued: "It was in this context that the words which the plaintiff seeks to offer up as enlarging the scope of indemnity costs were made. The Chief Justice was obviously conscious of the fact that the one and the same test for indemnity costs was to be used to assess the respondent's 'solicitor and own client' costs, therefore, it seems he felt the need to indicate, for the better guidance of the registrar who had referred the issue to the court, the indemnity test was to be applied generously to properly fulfil the intention behind the order for costs on the solicitor and own client basis. This does not mean, as the plaintiff seems to suggest, the words of the Chief Justice have any relevance to an assessment, inter partes, on the indemnity basis. Those words were used solely to describe an assessment of costs, inter partes, in the nature of an assessment between solicitor and own client."

[33] I disagree. In my opinion the judgment of the Chief Justice in *Bottoms* is perfectly clear. He had to decide what the effect of an order to pay "solicitor and own client" costs was, and decided that, in the context of the UCPR, it meant costs assessed on the indemnity basis. He then went on to explain what approach was to be taken on an assessment of costs on the indemnity basis. There is not one word in the Chief Justice's judgment to suggest that there are two separate approaches to assessment

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15 RSC O 91 r 82. Under this the amount allowed for particular work would generally be the same as under r 81: *Re Marsland and Marsland* [1902] St R Qd 219.

of costs on the indemnity basis, one when an order has been made in those terms, and one where a different order, for solicitor and own client costs, has been made. In my opinion there is only one approach to the assessment of costs on the indemnity basis, and that is the approach expounded by the Chief Justice.

[34] I am not aware of any decision of the Court of Appeal on the assessment of costs on an indemnity basis, and therefore the decision of the Chief Justice stands as the authority on the subject for Queensland, unless and until the Court of Appeal determines on a different approach. The approach of the Chief Justice should of course be followed. It would be superfluous for me to express my agreement, but I would merely note that his Honour's views on the interpretation of the rule are deserving of even more respect than they otherwise would because his Honour was involved as a member of the rules committee in the formulation of r 704.

Approach of the Registrar

[35] There were a number of matters referred to by the registrar in his reasons which indicate that he was not following the approach laid down by the Chief Justice. He referred for example to a number of charges set out in paragraph 4 of the agreement, including an amount for file storage for a reasonable time after completion of the claim, and a contribution towards the firm's professional indemnity insurance, and said that the charges were business expenses for which the general level of solicitors professional fees provided remuneration. That may be true when a bill is being assessed according to the scale, but in circumstances where the costs are being assessed on the indemnity basis and the client has agreed to pay these amounts, in my opinion the issue is whether they were reasonably incurred and in a reasonable amount, which is to be approached in the way indicated by the Chief Justice. I have difficulty in seeing how that could lead to their being disallowed.

[36] Later the registrar referred to the incurring of costs in connection with the settlement conference, in the preparation of an extensive review of the file summarising all the salient features of the case as to both liability and quantum. This was undertaken by the particular solicitor who had carriage of the matter, because she was to be accompanied at the settlement conference by a more senior colleague. The registrar was of the view that it was unnecessary for two solicitors to attend the conference and therefore this preparation was also unnecessary.

[37] I do not agree. Settlement conferences these days are a very serious matters. Far more matters are resolved at settlement conferences, or in connection with them, then are ever resolved at trial. It seems to me axiomatic that a solicitor attending a settlement conference should properly prepare for it, a process which I would expect in the ordinary case to take some hours. Even if only one solicitor were attending the settlement conference, obviously there should be significant and thorough preparation beforehand, the costs of which should undoubtedly be allowed, particularly on an assessment on the indemnity basis. It also seems to me quite reasonable, in a matter where there was some difficulty, for attendance at the settlement conference to be by a more senior and experienced member of the firm, who would need to be provided with an appropriate summary of the matter, and I think it also reasonable that the solicitor having the carriage of the matter, who would be in a better position to comment on anything unexpected which arose, and

who would be the one who would be chasing up any further information which was required as a result of the settlement conference, should be present. In my opinion it was plainly reasonable for this to be done. It was certainly not something which could be disallowed if approaching the matter in the way indicated by the Chief Justice. Such expenditure is by no stretch of the imagination outlandish.

[38] There are other examples. The registrar was critical of the first letter before action, on the ground that it did not provide full particulars of the circumstances of the accident. But it seems to me to have been a reasonable enough means of opening communications with the other side, and it raised the issue, about which the defendant was exceedingly coy for far too long, of whether it was the defendant who was responsible for the state of the structure. The same could be said about the request for particulars, and an FoI request; plainly these were attempts to prise out of the defendant the information, which was ultimately forthcoming, that it was responsible for the structure. In circumstances where the defendant was dilatory in making that admission, and where the relevant facts were solely within its knowledge, it is hardly for it to criticise the expenditure of costs in trying to extract that information. The question is not whether things could have been done in a more efficient or less expensive way, but whether, as the Chief Justice put it, the work is shown to have been unreasonably done.

[39] It was submitted on behalf of the defendant that there is a difference between allowing costs that are reasonable and allowing costs which are not shown to be unreasonable. In my opinion the answer to that is the tests were equated by the Chief Justice in *Bottoms* at p.4, where his Honour regarded r 704 as embodying the latter test.

[40] His Honour referred to the decision of the Court of Appeal in England in *EMI Records Ltd v Wallace Ltd* (supra) where the Vice Chancellor considered a large number of authorities, and then went on to sum up the position as follows: "To say that on a taxation all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred seems to me to be giving the litigant a complete indemnity, shorn only of anything that is seen to be unreasonable. … I do not think that it would be right to express this difference in terms of the burden of proof being shifted from the winner to the loser, though no doubt in many matters much of the argument during the taxation will proceed on these lines." His Lordship went on to indicate that the party having the benefit of the order should also have the benefit of any doubt in relation to any particular item. He did go on to note however that if costs had been unreasonably incurred the fact that they had been expressly authorised by the client would not make them recoverable. He gave as examples a situation where the successful party had authorised half a dozen conferences with three expert witnesses, when two conferences with a single expert would plainly have been ample, or employing the most expensive experts, or two of the most fashionable silks and a pair of juniors, or having his case conducted throughout by two of the senior partners in the solicitors firm instead of one. These are no doubt the sort of examples which would have been present in the mind of the Chief Justice when he used the word "outlandish".

[41] Although it is clear from the reasoning in *EMI* that the fact that the client had agreed to pay particular costs is not the end of the matter, it does seem to me that it is the

beginning of the matter, that is to say, the starting point. One of the matters to be taken into account is any costs agreement between the party and the party's solicitor. Obviously when the agreement provides for costs to be paid on a particular basis, such as on a time charging basis, it would be appropriate to assess the costs on that basis, rather than by reference to some other basis upon which costs have not been charged. Charging on a time basis is so common these days that it could not be regarded as an unreasonable basis for charging for the purposes of assessment on the indemnity basis. Where that has occurred, an appropriate basis for taxation would be a consideration of the charging rates, and what has been done by whom in order to generate the amount claimed. There is no particular reason why a costs statement in taxable form in the traditional sense should be required for that purpose.

[42] In the present case the situation is a little different, because the agreement is for a lump sum amount. In view of the analysis in *EMI*, it is open to the other party to go behind that lump sum amount, but I do not think it is necessarily very helpful to do that by reference to a costs statement drawn on the basis of the scale. It was submitted that one of the matters required to be taken into account is the scale of fees prescribed for the court, and that it was not possible to do this without a conventional costs statement. I do not agree. The registrar from his experience would know that the plaintiff's costs for a two day liability and quantum case in the District Court would typically be assessed at about $X. This case being more difficult and more complicated than the average, one would expect that it would produce an assessment according to scale of a somewhat greater amount, $Y. That provides a basis for the application of s 704(3)(a). I cannot believe that an experienced registrar would be unable to put values on these amounts without an item by item assessment.

[43] That does not mean that these values would be conclusive or limiting. It is notorious that the District Court Scale[16] (particularly some items such as item 27[17]) is quite inadequate, and that in practice solicitors commonly charge and clients commonly pay amounts well above the scale. I am prepared to take judicial notice of that proposition on the basis of my own experience in the law, and on evidence that I have heard in other matters.[18] I would certainly expect a registrar to be well aware of it. In my experience the amounts in practice charged and paid by clients for District Court matters are commonly between 50 percent and 100 percent above the scale.[19] If the costs are to be assessed on an indemnity basis, in my opinion inevitably there has to be a substantial adjustment to any scale amounts to accommodate this.

[44] There is also the significance of the fact that the costs were agreed under an agreement that the professional fees were to be paid only if the plaintiff were successful in obtaining damages. The affidavit of Mr Davis refers to three separate

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16 I refer to the Scale as it was at the relevant time; the District Court scale has now been brought into line with the Supreme Court scale, except as to some amounts.

17 See *McCoombes v Curragh Queensland Mining Ltd* [2001] QDC 142. The Court of Appeal refused leave to appeal: [2001] QCA 379.

18 Such as *Thompson v Royds* [2003] QDC 288.

19 That is supported by a comparison between the hourly rates for solicitors referred to in Mr. Davis' affidavit and the hourly rate of $147 allowed in items 47, 48 and 61 of the District Court scale current from 6 October 2003.

bases justifying some "uplift" because of this. There was no discussion in the reasons of the registrar as to whether there ought to be some uplift in relation to speculative matters, and if so on what basis, and no argument on these matters was addressed to me. In those circumstances, I will not express any opinion on the matter, but plainly in the present case, unless the defendant accepts that some uplift along these lines was appropriate, this is something that ought to be addressed by the registrar. But it is not necessary to have a costs statement on the basis of a assessment according to scale in order to do that.

[45] It is also established, in relation to the assessment of costs on an indemnity basis that it is unnecessary to consider whether the costs agreement complies with the requirements of the *Queensland Law Society* Act 1952.[20] It follows that it is unnecessary for the registrar to consider whether the requirements of that Act were complied with. In addition, in circumstances such as the present where the plaintiff was initially unaware of which of two defendants to sue, and ultimately one of the defendants admitted that it was the appropriate defendant, the costs should include the costs of proceeding against the other defendant, against whom the proceedings were promptly discontinued once that admission was made.[21]

[46] The plaintiff prepared an affidavit which provided a good deal of detail about various things which were done in the course of the action. Ms Avery has been cross-examined on that affidavit, and that would have given the opportunity to explore questions such as how much time was spent on any matter which the defendant was seeking to dispute as not reasonably undertaken. In addition, any further information required in relation to the work done by the various persons referred to in her second affidavit could have been investigated at that time. As pointed out in *EMI*, in circumstances such as this it is essentially a matter for the party liable on the bill to identify matters said to have been unreasonable, and to raise the issue of the extent to which the amount charged has been influenced by the inclusion of such work. In my opinion, once the correct approach is understood for the assessment of costs on the indemnity basis, the difficulties identified by the registrar go away.

[47] There is also the consideration that the registrar has the benefit of independent expert evidence that the amount of time devoted to the matter was not unreasonable, and as to the charges ordinarily payable by clients to solicitors for such work. This evidence indicates that, if allowance is made for a reasonable uplift factor because of the speculative nature of the claim, the lump sum was consistent with the sort of charges ordinarily payable by clients to solicitors for such work. That in my view is a matter of some significance when assessing the reasonableness of the amount the plaintiff agreed to pay for this work.

[48] For an assessment of this nature on the indemnity basis, in my opinion an item by item examination of every piece of work which was done by the solicitors in the course of the conduct of the action is entirely unnecessary. In my opinion there was ample material available before the registrar to enable him to identify any work which it was unreasonable for the defendant to pay for, bearing in mind the

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20 *Parker v Borg* (Rockhampton S22/01, de Jersey CJ, 12.7.02, unreported); *National Australia Bank Ltd v Clanford Pty Ltd* [2002] QSC 361.

21 *Parker v Borg* (supra).

approach of the Chief Justice, and to identify to what extent the amount charged may have been inflated by the inclusion of such work. There was also ample material available to assess the overall reasonableness of the charge. In my opinion it is unnecessary for the proper performance of that function for there to be prepared a costs statement in the conventional form.

[49] Even if I were wrong about that, there was a detailed costs statement already available before the registrar, in the form of the statement exhibited to Mr Kerr's affidavit. That it was drawn on the basis of the Supreme Court Scale is irrelevant; it would still identify all the work done, so as to make it possible to argue about whether or not the work for which the plaintiff has agreed to pay the lump sum included work which ought not to be paid for by the defendant notwithstanding that the costs are being assessed on the indemnity basis. In circumstances where the amount the plaintiff has agreed to pay is not calculated by reference to a costs scale, the reasonableness of that amount cannot in my opinion sensibly be assessed simply by reference to the costs scale. I have already identified what use can properly be made of the District Court Costs Scale in the circumstances of this matter. But in any case, an experienced registrar should have no difficulty in assessing the costs statement which has been drawn on the Supreme Court basis by reference to the District Court Scale. If he really wanted to undertake that function, it could certainly be done, but in my opinion it would be a foolish waste of time, in circumstances where undoubtedly the vast bulk of the work referred to in that document would be entirely unexceptionable.

[50] In circumstances where the registrar already has one costs statement available before him, in my opinion it was absurd to require a second one to be prepared simply because the first was prepared on the Supreme Court Scale rather than by reference to the District Court Scale. In circumstances where the amount the plaintiff agreed to pay the solicitors has not been derived by reference to the scale, the amount payable in accordance with the scale for any particular item of work is in my opinion irrelevant. The only real significance of the detailed costs statement is that it provides even further particularisation of the work that was undertaken by the plaintiff's solicitors.

Conclusion

[51] In these circumstances in my opinion the decision of the registrar to require a costs statement in the conventional form was the product of an error of law, in his failure to apply the approach laid down by the Chief Justice in *Bottoms v Reser*. Further, it was in my opinion in all the circumstances a decision so unreasonable that no reasonable registrar would have required it. Accordingly the appeal is allowed, the direction of the registrar is set aside, and I will direct the registrar to assess the costs pursuant to the order in the way laid down in *Bottoms v Reser*, and without making any further requirements of the solicitors for the plaintiff.

[52] The defendant must pay the costs of the appeal. In my opinion there has been too much time and money wasted in arguing about costs in relation to this matter already, and when this order is made and these reasons are published I propose to fix the costs of the appeal myself.