DISTRICT COURT OF QUEENSLAND

CITATION:	*Ham v Clarke* [2022] QDC 159
PARTIES:	**GLENYCE LORRAINE HAM** (appellant) **v** **ALLAN CHARLES CLARKE** (respondent)
FILE NO:	D155/20
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Maroochydore
DELIVERED ON:	20 July 2022
DELIVERED AT:	District Court, Maroochydore
HEARING DATE:	19 August 2021
JUDGE:	Long SC DCJ
ORDER:	**The order made in the Magistrates Court at Maroochydore on 6 August 2020 that "the defendant pay the costs of the plaintiff to be agreed or assessed on the standard basis in accordance with r 702 of the *Uniform Civil Procedure Rules*, until 26 September 2017 and thereafter on the indemnity basis to be assessed in accordance with r 703 of the *Uniform Civil Procedure Rules*", be set aside and replaced by an order that "the defendant pay to the plaintiff 30 per cent of his costs of the proceeding, as agreed or assessed on the standard basis".**
CATCHWORDS:	APPEAL – S 45 *Magistrates Court Act 1921* (Qld) – Where the appellant appeals against the decision that she pay costs of the respondent in respect of proceedings relating to a defamation claim – Whether the appellant requires leave to appeal or has a right to appeal pursuant to s 45(1)(a) of the *Magistrates Court Act 1921* (Qld) DEFAMATION – COSTS – Where the respondent only partly succeeded as to one of seven claims for defamatory publication and otherwise abandoned, during the trial, the most substantial part of his claim for damages on the basis of economic loss – Where costs of the proceeding were ordered partly on a standard basis and partly on an indemnity basis in purported application of s 40(2)(a) of the *Defamation Act* 2005 – Whether the Magistrate took into account the

prospect of apportionment of costs, having regard to the extent of the respondent's success – Whether the magistrate acted unreasonably in effectively ordering that the appellant pay the costs of the claims which were unsuccessful including the abandoned claim for economic loss – Whether the Magistrate erred in his findings in relation to the application of s 40(2)(a) of the *Magistrates Court Act 1921* (Qld).

LEGISLATION: *Magistrates Court Act* 1921 (Qld) ss 45, 47
Defamation Act 2005(Qld) s 40
District Court of Queensland Act 1967 (Qld) ss 118
Uniform Civil Procedure Rules 1999 (Qld) rr 681, 748, 765, 766, 785

CASES: *American Express International v Hewitt* [1993] 2 Qd R 352
Business and Professional Leasing Propriety Limited v Akuity Pty Ltd (2008) QCA 215
Byrns v Davie [1991] 2 VR 568
Cameron v Nominal Defendant [2001] 1 Qd R 476
Colburt v Beard [1992] 2 Qd R 67
Graham v Roberts & Muller [1956] Qd R 459
Hallam v Ross (No 3) [2012] QSC 421
Harpur v Ariadne Australia Ltd (No 2) [1984] 2 Qd R 523
House v The King (1936) 55 CLR 499
Interchase Corporation Ltd (in liq) v Grosvenor Hill Qld Pty Ltd (No 3) [2003] 1 Qd R 26
Nationwide News Pty Ltd v Weatherup [2017] QCA 70
Ramzy v Body Corporate for GC3 CTS 38396 & Anor [2012] QDC 397
Rosniak v Government Insurance Office (1997) 41 NSWLR 608
Schilaro v Peppercorn Childcare Centres Pty Ltd [2000] 2 Qd R 83
Smith v Ash [2011] 1 Qd R 175
Theiss v T.C.N. Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156
Van Riet v ACP Publishing Pty Ltd [2004] 1 Qd R 194

COUNSEL: M D White for the appellant
D V Ferraro for the respondent

SOLICITORS: Butler McDermott Lawyers for the appellant
Spire Law Pty Ltd for the respondent

Introduction

[1] This is an appeal brought pursuant to s 45 of the *Magistrates Court Act 1921* (Qld) ("*MCA*") in respect of the costs order made by a magistrate consequently to his determination of the respondent's claim for defamation. It is convenient to note that the appellant's right of appeal is to be found in that provision, as follows:

> "**45 Appeal**
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> (1) Subject to this Act, any party who is dissatisfied with the judgment or order of a Magistrates Court—
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> (a) in an action in which the amount, value or damage involved is more than the minor civil dispute limit; or
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> (b) in an action for the recovery of possession of land if—
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> (i) the value of the land is more than the minor civil dispute limit; or
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> (ii) the annual rental of the land is more than the minor civil dispute limit; or
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> (c) in proceedings in interpleader in which the amount or damages claimed, or the value of the goods in question, is more than the minor civil dispute limit; or
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> (d) in a proceeding under the Property Law Act 1974, part 19, division 4, subdivision 1; may appeal to the District Court as prescribed by the rules.
>
> (2) Provided that—
>
> (a) where in any of the cases above referred to in subsection (1) the amount, damage or value is not more than the minor civil dispute limit, an appeal shall lie by leave of the District Court or a District Court judge, who shall not grant such leave to appeal unless the court or judge is satisfied that some important principle of law or justice is involved;
>
> (b) an appeal shall not lie from the decision of the Magistrates Court if, before the decision is pronounced, both parties agree, in writing signed by themselves or their lawyers or agents, that the decision of the court shall be final.
>
> (3) Within the time and in the way prescribed by the rules, the appellant must give to the other party or the other party's lawyer notice of the appeal, briefly stating the grounds of the appeal.

(4) Notice of appeal shall not operate as a stay of execution upon the judgment, but the execution may proceed unless the magistrate or a District Court judge otherwise orders.

(5) In this section—

minor civil dispute limit means the amount that is, for the time being, the prescribed amount under the Queensland Civil and Administrative Tribunal Act 2009."[1]

[2] The order which is the subject of that appeal was made on 6 August 2020, in terms that:

> "…the Defendant pay the costs of the Plaintiff to be agreed or assessed on the standard basis in accordance with Rule 702 of the *Uniform Civil Procedure Rules*, until 26 September 2017 and thereafter on the indemnity basis to be assessed in accordance with Rule 703 of the *Uniform Civil Procedure Rules*."

[3] The notice of appeal, which is entitled as "SUBJECT TO LEAVE" was filed on 14 September 2020, together with an application for an extension of the time allowed for filing it, to that date. On 16 October 2020, an order was made pursuant to rule 748 of the *Uniform Civil Procedure Rules 1999* ("*UCPR*") allowing that extension. The grounds set out in the notice of appeal are that:

> "1. The learned Magistrate's discretion as to costs miscarried, insofar as:
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> (a) the learned Magistrate erred by failing to properly consider the relative success of the Plaintiff by referring to the quantum of the Plaintiff's claim and the issues in dispute in the proceeding;
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> (b) the learned Magistrate erred by ordering the Defendant to pay the Plaintiff's costs associated with imputations found to be either not defamatory or otherwise defensible at law;
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> (c) the learned Magistrate's order that the Defendant pay the Plaintiff's costs associated with the Plaintiff's abandoned claim for economic loss was unreasonable, and inconsistent with the learned Magistrate's finding elsewhere that such claim should have been abandoned at a much earlier time;
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> (d) the learned Magistrate's finding that section 40(2)(a) of the *Defamation Act* (Qld) ("*Defamation Act*") was engaged, was unreasonable and cannot be supported having regard to the evidence;

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[1] As prescribed in Schedule 3 of the *Queensland Civil and Administrative Tribunal Act* 2009, the minor civil dispute limit, is $25,000.00.

(e) the reliance placed upon the absence of an apology from the Defendant in the learned Magistrate's assessment as to the reasonableness of the Defendant's approach to settlement negotiations was unreasonable having regard to the evidence and the Court's ultimate determination of the issues at trial."

The relief sought in that notice is that the Magistrate's order be set aside and replaced with an order that the plaintiff (respondent) pay the defendant's (appellant's) costs of the proceeding as agreed or assessed on the standard basis.

[4] Although the appeal is brought and primarily maintained, as of right pursuant to s 45(1)(a) of the *MCA*,[2] the appellant has also, as a matter of "precaution", addressed the prospect of leave being required pursuant to s 45(2)(a). On the other hand, the respondent expressly takes the point that the appellant requires such leave. The context for this issue lies in understanding that:

(a) as originally filed, on 14 March 2017, the respondent's statement of claim particularised a claim for damages in the sum of $140,000.00 (including $20,000.00 for aggravated damages);

(b) on 19 December 2017, the respondent filed an amended statement of claim with a claim for relief amended to be for $10,000.00 in general compensatory damages, $141,693.80 for special compensatory damages on account of lost earnings, interest and costs. It was expressly stated that to the extent that this claim exceeded $150,000.00 (the jurisdictional limit of the Magistrates Court) it was abandoned pursuant to s 5 of the *MCA*;[3]

(c) the trial of that claim was conducted on 15 and 16 November 2018;[4]

(d) on 16 November 2018,[5] prior to the appellant beginning her case and subsequently to the observations of the Magistrate on 15 November 2018, at the close of the respondent's case, as to the substantial inadequacy of proof of the

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2 It is to be noted that the terms "judgment" and "order" are not defined in the *MCA* and that there is no contention raised that an order in respect of the costs of a proceeding is not amenable to the application of s 45 of the *MCA*.

3 See MFIB/Tab 6, with the consequential further amended defence and reply, respectively, at Tabs 7 and 8.

4 At MFIA:T1-2.18-36, there is reference to the tendering of an amended claim, without objection, to align the claim with the amended statement of claim.

5 MFIA: T2-2.17-19.

claim for special compensatory damages,[6] the respondent withdrew or abandoned that part of his claim for damages;

(e) judgment was delivered on 6 December 2019, with written reasons, for a conclusion that of the seven defamatory publications allegedly made by the appellant, only one (in respect of a telephone call to an individual) was found to be defamatory, with an award of $1,500.00 in damages (including a small portion of aggravated damages).[7]

(f) after further written submissions, on 6 August 2020, further written reasons were published for the Magistrate's determination as to costs, which is the subject of this appeal.

Is leave to appeal required?

[5] The question as to whether the appellant requires leave to appeal is one of some importance, as it has been noted to go to the jurisdiction of the Court in respect of the appeal.[8] Here the question is as to whether this appeal is brought in respect of "an action in which the amount, value or damage involved" is more than $25,000.

[6] The submissions for each of the parties make reference to the decision in *Ramzy v Body Corporate for GC3 CTS 38396 & Anor* ("*Ramzy*"),[9] which includes some considerable discussion of the meaning of the phrase "an action in which the amount, value or damage involved", or how it may be determined what amount was involved in a particular proceeding. This includes a review of a number of authorities where similar questions have arisen in respect of the application of cognate provisions.

[7] Although as noted for the respondent, s 45 of the *MCA* does not, unlike other cognate provisions,[10] expressly require a grant of leave to appeal a costs order. Rather, this question is to be determined on the same basis as any appeal brought from a judgment or order of a magistrate exercising civil jurisdiction and therefore according to the amount, value or damage involved in the action.

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6 MFIA: T1-73.44 – 1-78.45.
7 Affidavit of P G Boyce filed 14/9/20, at PGB1; Magistrate's Reasons at [138]-[139].
8 *Smith v Ash* [2011] 1 Qd R 175 at [51].
9 [2012] QDC 397.
10 E.g. s 118B of the *District Court of Queensland Act 1967* and s 64 of the *Supreme Court of Queensland Act 1991*.

[8] For the respondent specific reference is made to the conclusion reached in *Ramzy*, at [30], that "the amount involved is determined by reference to the amount ultimately claimed by the party or parties". The contention is that here, this was the amount of $10,000, having regard to the respondent's abandonment of his claim for special damages.

[9] Before turning to the appellant's contentions it may be noted that in this instance there is no complication arising in respect of any reliance upon the amounts claimed for costs or interest, as arose and was a substantial part of the discussion and review of authority in *Ramzy.*[11] However, it may be noted that this discussion included reference to earlier authority generally recognising that "an order as to costs is a final judgment" and therefore amenable to appeal subject to any statutory constraints.[12] It is also convenient to note the full context in which such conclusion as the respondent relies upon, is expressed:

> "[30] A further question however is whether the 'amount involved' is to be determined by reference to the situation when the proceeding is commenced, or whether it is to be determined by reference to the amount recoverable as at the date of judgment. It is clear that expressions such as 'the amount claimed' or 'the sum sued for' are to be assessed as at the time when the proceeding is filed, so that extra amounts which become payable thereafter are not taken into account. In *Schiliro v Peppercorn Child Care Centres Pty Ltd* [2000] 2 Qd R 83, Thomas JA at 87 noted that in *Graham v Roberts (supra)* Hanger J had construed the words 'amount involved' in what is now s 45 'as referring to the amount in issue, that is to say the amount that one party claimed against the other.' His Honour however can hardly have been speaking of the claim as initially filed, because at that stage of course there was no counterclaim, and he held that in the circumstances of that case one took the counterclaim into account when determining the amount involved. His Honour therefore must have been speaking about the amount claimed in the sense of what was ultimately claimed in the proceeding, that is to say the situation at trial. That would also cover the possibility that the claim could be amended from time to time in the course of the proceeding. Accordingly in my opinion the amount involved is determined by reference to the amount ultimately claimed by the party or parties."

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11 See *Ramzy* [2012] QDC 397 at [16]-[40].

12 See *Ramzy* [2012] QDC 397 at [23]-[24], particularly in reference to *Colburt v Beard* [1992] 2 Qd R 67; *Cameron v Nominal Defendant* [2001] 1 Qd R 476; and *Van Riet v ACP Publishing Pty Ltd* [2004] 1 Qd R 194.

[10] For the appellant, emphasis is placed upon the reference to the determination in *Graham v Roberts & Muller*,[13] as a decision in respect of the meaning of "amount involved", as that concept appeared in s 11(3) of the *Magistrates Courts Acts* 1921 to 1954 (an earlier version of what now appears as s 45 of the *MCA*). In particular, that the "amount involved":

(a) "is that involved in the action and not that involved in the appeal";[14] and

(b) "… the amount involved in the action is clearly the amount of the claim" (and where there is a counterclaim, the total of the claims made).[15]

As noted in *Ramzy*:

> "The position as explained in *Graham v Roberts* is that what matters is the actual amount claimed even if it was artificially inflated just to generate an entitlement to an appeal. It is certainly the same if it was too high through error."[16]

[11] Those submissions then focus upon the penultimate sentence in the extract from *Ramzy*[17] and the assimilation, there, of the notion of "what was ultimately claimed in the proceeding" with "the situation at trial". It is then contended that, in the context of a trial which had commenced in respect of a claim for damages well exceeding $25,000 in total, which was pursued through the respondent's case and only abandoned in the light of the Magistrate effectively pointing out that it was doomed to fail, that:

(a) it is not an appropriate characterisation of the reality of "the situation at trial" as being that the respondent was only claiming $10,000 from the appellant; and

(b) accordingly, the amount, value or damage involved in the action the subject of this appeal is more than the minor civil dispute limit and leave to appeal is not required.

[12] At first blush, the submissions may not appear to be accommodated by the question posed at the outset of paragraph [30] in *Ramzy*. And it may also be observed that a further passage in *Ramzy*, may provide some support for the respondent's position. In understanding this passage, it is necessary to note that in *Ramzy*, the appeal was in

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13 [1956] Qd R 459.
14 Ibid at 462.
15 Ibid at 464-465.
16 [2012] QDC 397 at [37].
17 See para [9], above.

respect of a determination relating to liability for that part of the claim of the body corporate made for penalty interest and recovery costs in respect of outstanding contributions of a unit owner.[18] There had been an earlier determination by a judicial registrar, upon an application for summary judgment, of the entitlement of the body corporate to the amount of the unpaid contributions. In that context, the following was observed:

> "[38] One remaining argument advanced on behalf of the second respondent was that, once the judicial registrar gave judgment in respect of the amount claimed by way of contributions, that ceased to be part of the amount involved in the action. Reliance was placed on the proposition that at that point the right or cause of action in respect of the contributions merged in the judgment and no longer had an independent existence: *Blair v Curran* (1939) 62 CLR 464 at 532. From that point on, what was left in the proceeding was the claim for the penalty and the recovery costs, and that amount did not on any view of the matter total in excess of $25,000. Accordingly leave to appeal was required.
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> [39] In my opinion this submission was correct. If the amount involved in an action can go up as a result of the enlargement of the claim because of the passage of time, or indeed for any other reason, the amount involved in an action could also go down. This could occur, for example, if the plaintiff abandoned part of the claim, or if part of the claim were formally compromised, and it seems to me that in principle the situation is no different if judgment is given in respect of part of the claim. Thereafter the amount involved in the action is the balance of the claim. This would be consistent with the practice that has been followed from time to time, where a proceeding is commenced in the Supreme Court seeking relief including relief which would not be within the jurisdiction of the District Court, and then partial summary judgment is given, and the only part of the relief claimed still in issue following the partial summary judgment is a claim which is within the jurisdiction of the District Court. In such circumstances, proceedings have been transferred from the Supreme to the District Court."

[13] However, it may also be seen that the limitations of the question initially posed, are, as is often the case, reflective of the circumstances of that particular case, as opposed to being a general prescription of necessary alternatives. Further, and whilst it may be accepted, as is an effect of the decision in *Ramzy*, that the concern is with the ultimate hearing, as the necessary context for the determination which is the subject of the appeal and therefore to the exclusion of any part or parts of a claim which have

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18 [2012] QDC 397 at [5].

previously been separately determined (and therefore separately become amenable to appeal), the position of the appellant as to the necessity to look at the amount, value or damage of the part or parts of the claim to which that hearing was directed, is to be preferred as the more appropriate and realistic position.

[14] Otherwise, there is a tendency towards what was proscribed in *Graham v Roberts & Muller* (consistently with the contemporary wording of s 45(1) the *MCA*, which directs attention to the amount, value or damage involved "in an action") in focus upon what is involved in the appeal. This may be more readily understood by postulating the situation that there had been an award of damages for the full amount of $10,000.00, as remained claimed after the close of the respondent's case. Also, that view is supported not just by the approach taken in *Graham v Roberts & Muller* but also the decision of the majority in *Schilaro v Peppercorn Childcare Centres Pty Ltd*.[19] The relevant circumstances in the *Schilaro* decision are not directly comparable but the decision itself is instructive. That decision was concerned with an earlier version of s 118(2) of the *District Court of Queensland Act 1967* and most particularly s 118(2)(b), which in its immediate context provided:

> "(2) A party who is dissatisfied with a final judgment of a District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—
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> (a) is given –
>
> (i) for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
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> (ii) in relation to a matter at issue with a value equal to or more than the Magistrates Courts jurisdictional limit; or
>
> (b) involves directly or indirectly any claim, demand or question in relation to any property or right with a value equal to or more than the Magistrates Courts jurisdictional limit."

Relevantly, that jurisdictional limit was $50,000. The applicant had claimed $200,000 damages for negligence and breach of statutory duty. She failed on both counts but the District Court Judge assessed damages, in any event, in a quantum of $29,645.31, which after deduction of the WorkCover refund was for a net assessment of

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19 [2000] 2 Qd R 83.

$11,250.12. Therefore, as was noted, there was no judgment given for any amount at all and particular attention needed to be directed to s 118(2)(b).

[15] In contrast to the dissenting opinion (which was particularly concerned with determination of the actual value of the claim, including as sought to be maintained on appeal, in the context of concern as to the prospect of inflated claims by plaintiffs),[20] the majority determination was premised upon adoption of the amount claimed by the plaintiff, as the appropriate measure of the value of the claim for the purpose of applying s 118(2)(b).[21] It is to be particularly noted that in coming to that conclusion, Thomas JA specifically noted:

(a) the conclusion in *Graham v Roberts & Muller* as being that the "amount involved" was in reference to:

> "… the amount in issue. That is to say the amount one party claimed against the other";[22] and

(b) in the context of noting other competing considerations as between the position of plaintiff and defendant, an acknowledgment that " … a plaintiff may obtain a right of appeal by overclaiming to a ridiculous extent, but note that at least in that case the right of appeal exists for both parties.[23]

[16] Moreover and to the extent that the application of s 45(1)(a) may depend upon the particular circumstances of individual cases, here and notwithstanding that the judgment ultimately given by the Magistrate did not extend to particular consideration of the proof of the special damages claimed by the plaintiff, as the appellant contends:

(a) that aspect of the claim was pursued and in issue at the hearing, until such time as the Magistrate gave a clear intimation that it was doomed to fail; and

(b) the appeal sought to be pursued, as demonstrated by the grounds, raises issue as to the Magistrate's treatment of this consideration in the order made as to costs.

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20 Ibid at [6]-[7].
21 Ibid at [20] and [32].
22 Ibid at [15].
23 Ibid at [20].

[17] Accordingly and in the circumstances of this case, the appropriate conclusion is that the appellant does not require leave to appeal but has a right to appeal pursuant to s 45(1)(a) of the *MCA*.

[18] However and in the event that this is not the correct conclusion, it may be indicated that it would have been appropriate to grant the appellant leave to appeal pursuant to s 45(2)(a) of the *MCA,* having regard to the important principles of law involved in the interpretation of s 40 of the *Defamation Act*, in the application of that provision to the circumstances of this case, and as are discussed below. That is, in recognition of the necessity for there to be a question going beyond the immediate consequence of the decision for the immediate parties to the proceeding.[24]

The appeal

[19] The appeal is by way of rehearing.[25] In the absence of the exercise of power to receive further evidence, the rehearing is conducted upon the record of the proceedings below.[26] The powers specifically granted to the court under s 47(d) of *MCA*, include to:

> "make any other order, on such terms as it thinks proper, to ensure the determination on the merits of the real questions in controversy between the parties".

However, the necessary limitation of the apparent breadth of such power, lies in understanding that the appeal in this instance, is in respect of an exercise of judicial discretion as to an award of costs.

[20] Understandably for the respondent, emphasis is placed upon the recognised reluctance of appeal courts to interfere with a primary exercise of discretion in relation to costs.[27] But as is appropriately recognised in the submissions made for the appellant, the

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24 *American Express International v Hewitt* [1993] 2 Qd R 352 at 353.

25 *District Court of Queensland Act* 1967, s 113 and *UCPR* 765(1) and 785(1).

26 *UCPR* 766(1)(2) and s 47 of the MCA. See: *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523 at 528; *Scrivener v Director of Public Prosecutions* (2001) 125 A Crim R 279 at [10].

27 E.g. see: *Business and Professional Leasing Propriety Limited v Akuity Pty Ltd* (2008) QCA 215 at [79] and particular reference is made to the observations in *Daulizo v Trust Co of Australia* [2005] VSCA 215 at [6].

grounds of appeal are couched in terms of addressing the principles espoused in *House v The King*.[28] In particular that:

> "It is not enough that the judges composing the Appellate Court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the Appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so."[29]

[21] To put those contentions in some broader context and in addition to what has already been noted as to the circumstances in which the exercise of discretion occurred, it is desirable to note the following as to the claims made below:[30]

(a) The plaintiff, as an orthopaedic surgeon, had conducted a practice on the Sunshine Coast for 17 years and for more than 10 years had employed the defendant as a medical secretary/receptionist and subsequently, in what was recognised as a trusted position, as his Practice Manager;

(b) Tension entered into that relationship in the context of the plaintiff's separation from his wife (with whom the defendant had a close relationship) and the plaintiff's apparent support of his new partner in the workplace;

(c) The employment relationship deteriorated and came to an end in circumstances, later found by the Fair Work Commission, to have been poorly managed by the plaintiff and amounting to an unfair dismissal (or constructive dismissal) because of a forced resignation, with an order for compensation which "took into account her 'contributing conduct'";

(d) Only one of the seven claimed defamatory publications by the defendant, in this context, was held to be substantiated. That was in respect of a complaint to the effect that the plaintiff had harassed, abused and bullied the defendant, made in a

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28 (1936) 55 CLR 499.
29 Ibid at 504-505.
30 As taken from the primary decision of the Magistrate in respect of those claims: PGB1 to the affidavit of P G Boyce, filed 14/9/20.

telephone call, on the day of her constructive dismissal (21 September 2016), to a female associate;[31]

(e) It is otherwise unnecessary to note the further circumstances of this or in respect of those of the remaining allegations in any further detail, save to note, in respect of the unsubstantiated allegations, that in respect of:

(i) those relating to messages and posts on Facebook (respectively publications 6 and 7) and also to two emails to the Director of Support Services at the Sunshine Coast Hospital (all sent or posted on the day of her constructive dismissal), were not found to be defamatory of the plaintiff; and

(ii) the publications to her general practitioner on 21 September 2016 of being bullied and verbally harassed by the plaintiff and in her application to WorkCover on 30 October 2016 of "relentless verbal abuse, bulling and harassment", were also not found to be defamatory or alternatively "governed by qualified privilege".[32]

[22] The costs order which is the subject of this appeal is the representation of a single exercise of judicial discretion, requiring the consideration of a number of competing considerations. Such an exercise of discretion must occur in accordance with established principles and is circumscribed by some legislative provisions. In particular, by s 40 of the *Defamation Act* which provides:

> "**40 Costs in defamation proceedings**
>
> (1) In awarding costs in defamation proceedings, the court may have regard to—
>
> (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and
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> (b) any other matters that the court considers relevant.

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31 This associate knew the respondent and gave evidence of having filled in for the appellant in the respondent's practice and of being offered the appellant's position after she left: MFI A, T1-61.30-45.

32 It is also germane to note that the plaintiff's claim for special damage was premised upon the alleged defamation to being the loss of referrals from this doctor and that, as was the identified difficulty in respect of the damages issue, the absence of this doctor as a witness for the plaintiff was also of particular factor noted in the reasons in respect of the determination of this particular claim.

> (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—
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> (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or
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> (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.
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> (3) In this section—
>
> ***settlement offer*** means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made."

Particularly having regard to the permissive nature of the provisions in s 40(1) and as was not in contention, the provisions of the *UCPR*, including *UCPR* 681, embodying the principle that costs generally "follow the event, unless the court orders otherwise", generally remain applicable.[33]

[23] Neither does s 40(2) have any such effect. Although it is only necessary to have particular regard to the application of s 40(2)(a), in the circumstances of this case, it is to be noted that the particular orders mandated by s 40(2) are:

(a) in the first instance, preconditioned by a requirement that it be determined that a plaintiff has either been successful or unsuccessful in bringing defamation proceedings and a particular party is consequently to be awarded costs of the proceeding;

(b) dependent upon the court's satisfaction to the respectively necessary factual conclusion; and

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[33] See: *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19 at [70]-[73]; *Wagner & Ors v Nine Network Australia & Ors v Nine Network Australia & Ors (No 2)* [2019] QSC 309 at [4].

(c) in any event, subject to consideration as to whether "the interests of justice require otherwise".

It is the third aspect, or proviso, which may be particularly seen as preserving the potential operation of general principles, including those relevantly reflected in the *UCPR.*

[24] The operation of s 40 of the *Defamation Act* was the subject of the following observations in *Nationwide News Pty Ltd v Weatherup:*[34]

> "[70] The provisions of s 40 do not displace the Court's power to order indemnity costs for some other reason or displace the rules of court by which parties can obtain some protection in respect of costs by making formal offers to settle. …….
>
> [72] It is unnecessary for present purposes to closely compare the provisions for formal offers under the UCPR and s 40. As the appellant's submissions note, the relevant provisions of the UCPR are engaged if the plaintiff makes a formal offer to settle under the rules and the outcome achieved by the plaintiff is "no less favourable" than the offer. The focus of s 40(2)(a) is somewhat different. Its focus is on a party's conduct and, in particular, a defendant's unreasonable failure to make a settlement offer or agree to a settlement offer proposed by the plaintiff. Whilst in general terms r 360 and s 40 are concerned with settlement offers, they are not necessarily engaged in the same circumstances. For example, s 40 may be engaged by a settlement offer which does not comply with the formal requirements of the rules. Rule 360 may be engaged in a case in which the defendant did not accept an offer but in which the defendant did not act unreasonably.
>
> [73] It is sufficient for present purposes to observe that s 40 co-exists with other provisions governing costs, including the power to order costs on an indemnity basis in appropriate circumstances. If s 40(2)(a) is engaged, then unless the interests of justice require otherwise, a court "must" order costs of and incidental to a proceeding be assessed on an indemnity basis." (citations omitted)

[25] Although the appellant ultimately seeks the intervention of this Court to achieve an order that the respondent (plaintiff) pay the appellant's (defendant's) costs of the proceeding, it is also noted that, as acknowledged in *Alborn v Stephens*,[35] "a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs". And central to the appellant's contentions is the further

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34 [2018] 1 Qd R 19 at [70]-[73].
35 [2010] QCA 58 at [8].

recognition, earlier in the same paragraph in that decision, that in the application of the principle recognised in *UCPR* 681 of costs generally following the event:

> "The 'event' is not to be determined merely by reference to the judgment or order obtained … but is be determined by reference to 'the events or issues if more than one arising in the proceedings'."[36]

[26] The appellant particularly points to *Theiss v T.C.N. Channel Nine Pty Ltd (No 5)*,[37] in explication of the application of such principle to defamation proceedings, as largely a matter of impression rather than particularly precise apportionment as to a multitude of issues. Given what has already been noted as to the operation of s 40 of the *Defamation Act* in the continued context of such principles, there is no reason not to have regard to them. Indeed, such considerations may be seen to be at least relevant to the overriding question in s 40(2) of the *Defamation Act*, as to whether some other order than the assessment of the entire costs of the proceeding on the indemnity basis, is otherwise required in the interests of justice.[38]

Error in the exercise of discretion?

[27] Each of the grounds numbered 1 and 2 is addressed to assertion of failure to, at least properly, consider the relative or limited nature of the success of the respondent, as the plaintiff in the proceedings below. Although germane to the same general issue, the third ground of appeal is couched more broadly, in terms of the "unreasonableness" of the effect of the costs order in respect of the costs of the abandoned claim for economic loss. That contention is also tied to a suggestion of inconsistency in the following findings (after it was noted by the Magistrate that the defendant's submissions "ought to be understood in the context of the plaintiff's claim was for substantially more than the amount awarded"):

> "7. Whilst the amount of court time devoted to the economic loss was minor, as was the pleading, the plaintiff only abandoned the biggest component of its claim once it was apparent that the alleged loss could not be proved. This ought in my view to have become apparent at a much earlier time.

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36 Ibid at [8]; in reference to *Interchase Corporation Ltd (in liq) v Grosvenor Hill Qld Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 615 and *Byrns v Davie* [1991] 2 VR 568 at 570-571.

37 [1994] 1 Qd R 156 at 209-210.

38 As was the approach taken in *Hallam v Ross (No 3)* [2012] QSC 421 at [14]-[16]. See also the observations in *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19 at [86].

> 8. The consequential costs of both parties would in my opinion have been less if there was a much closer consideration of how that loss was to be proved. That view however, must be understood to be an opinion expressed with the benefit of hindsight."

[28] The single exercise of discretion as to an award of costs involved consideration of the application of s 40 of the *Defamation Act* and cannot be considered in isolation from the considerations imported by that provision. Indeed, the specificity of s 40 to this type of proceeding means that it circumscribes such an exercise of discretion. Accordingly, it does not follow that, as the appellant's submissions contend, that the exercise of this discretion, nor, more particularly, the exposition of reasoning in respect of it, must necessarily follow a prescriptive course of first determining what proportion of the costs of the proceeding are to be awarded to a partly successful party, before turning to consider the application of s 40 and then finally returning to all relevant issues, including any question as to apportionment of costs, when considering the interests of justice question.[39] Rather and like any exercise of judicial discretion, the outcome is to be achieved by a process of synthesis,[40] which requires all relevant considerations to be identified and appropriately weighed in the balance or outcome, in the context of any legislative provisions which fetter or circumscribe the particular exercise of discretion. Moreover, and as observed in respect of the application of the principles discussed in *House v The King* on appeal:

> "As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King*, itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust?"[41] (citation omitted)

[29] Accordingly, the critical question in respect of Grounds 1 and 2 is as to whether the Magistrate did take into account the prospect of apportionment of costs, having regard to the extent of the respondent's success. Although expressed in the context of other reasoning, more particularly directed to consideration of the application of s 40, as

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39 See Appellant's written submissions, filed 12/10/20, at [47] and AT1-40.30-45.

40 Cf: the discussion as to the aspect of synthesis involved in an exercise of sentencing discretion, in *Wong v R* (2001) 207 CLR 584 at [74]-[76] and *Markarian v The Queen* (2005) 228 CLR 357 at [31].

41 *Markarian v The Queen* (2005) 228 CLR 357 at [25].

contended for the respondent, the answer must be that the Magistrate did so, as may be particularly seen as reflected in the following parts of the Magistrate's reasons:

> "18. The last issue for me to consider is whether it is not in the interests of justice to not make an indemnity costs order.
>
> 19. In that respect:
>
> a. The quantum of the judgment amount – for the reasons I have explained do not make the success of the plaintiff a pyrrhic victory.
>
> b. The damages were not nominal. They were modest, but not nominal; it might be said they were more than modest if you exclude the economic loss.
>
> c. The judgment process was time consuming and relatively complex – but would have been regardless. The case was well argued and took more time to consider than normal, and it must be said was extensively submitted upon.
>
> d. That the plaintiff did not succeed on all defamatory imputations alleged does not of itself mean that the interests of justice overwhelmed section 40(2)(a).
>
> e. The absence of any apology from the defendant. Even to the extent that in the unchallenged affidavit of Mr Carpenter – he specifically asked the defendant's lawyer about any apology and it was specifically ignored. Implicit in this is the rejection of the defamation law – that says an apology per se does not constitute an admission and the policies and procedures of the Act to encourage parties act reasonably.
>
> f. It might be said the admissions made in the witness box by the defendant notwithstanding the pleading, was indicative of the reasonableness of the defendant.
>
> **The claim for economic loss**
>
> 20. Although the amount claimed was substantial sum and was withdrawn late in the proceedings, the claim did not add either to the length of the proceedings or the complexity of the proceedings. In respect of Rule 684 of the *Uniform Civil Procedure Rules*, in this circumstance I do not believe that there would be any basis upon which the defendant would be entitled to the costs in respect of that particular question.
>
> 21. In that respect I've considered the Court of Appeal's general discussion in the *Thiess* case. When I consider the history of the litigation, the pleadings, the amount of time devoted to the proceedings in court, and the issues to be determined in the judgment, it did appear to me although the amount claimed was

> substantial this particular issue did not take up much time of the proceedings and that in the circumstances should not make a costs order in respect of that particular issue in favour of the defendant or at all.
>
> 22. In that respect I also considered the Court of Appeal's approach in apportioning some of the costs. In that respect I consider the submissions made by the defendant's counsel, in particular paragraph 33 which in summary form addresses the complaints made by the defendant. I have already accepted the plaintiff's position in relation to the vindication of the plaintiff in these proceedings so to that extent I won't repeat what I have already concluded. For completeness however, the extent of the plaintiff's success or lack thereof does not of itself deprive the plaintiff of an award of costs. It could not be said, even by way of an impression, that it would a fair assessment to in any way reduce the plaintiff's costs because of the outcome of the litigation. In that sense if the defendant had been reasonable in her approach to costs or an apology, some of these costs consequences may not have been visited upon her."

Earlier and immediately following the passage set out above in outlining the contentions in respect of Ground 3 and particularly as introducing some inconsistency of reasoning,[42] the Magistrate also observed:

> "9. In making these observations I also understand that in my previous decision in effect accepted that the plaintiff had his reputation damaged by the publication of the defamatory matter, and as a consequence the defendant could not defend what she said."

The citation at the conclusion of the passage is to *Nationwide News Pty Ltd v Weatherup*,[43] and the Magistrate subsequently expanded upon his reasoning:

> "16. It's also clear that when exercising the costs discretion that I should not place too much weight to the quantum of the claim as assessed by the jury. The key question is my assessment that the defendant has caused reputational damage to the plaintiff. The assessment of the damage caused by the harm does not lend itself to a conclusion about whether in this case a lower scale should apply. As to this the Court of Appeal said in *Weatherup*:
>
> > 'The respondent's claim was <u>unlike</u> a cause of action for a debt or a claim for economic loss in which success is measured essentially in monetary terms. <u>The vindication which the respondent obtained by virtue of the jury's verdict means that his success should not be measured simply by reference to the size of the monetary award subsequently</u>

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42 See paragraph [27], above.
43 [2017] QCA 70.

> assessed by the judge. The defamation was a serious one.' (emphasis as in original)
>
> 17. Whilst the defamatory matter was not published as widely as the matters in the *Wagner & Weatherup* case, the defamation was still regarded by the plaintiff as a serious one."

[30] It has to be concluded that, particularly having regard to his position in conducting the trial, that this was a view of the circumstances which was open to the Magistrate, including having regard to the abandoned claim for economic loss. That is also a sufficient conclusion to dispose of Ground 3, irrespectively as to whether or not it might be considered to be a generous view of the respondent's position or even not necessarily the most appropriate view of the circumstances.

The application of s 40 of the *Defamation Act*

[31] The difficulty with the fourth ground of appeal is encapsulated in what has already been observed as to the necessity for the application of s 40 of the *Defamation Act* to be incorporated in, rather than be considered as an adjunct or postscript to, the exercise of discretion as to an award of costs. Whilst it is necessary for there to be determination as to the conditions upon which either limb of s 40(2) may be engaged, the following contention of the appellant is not established as an error in the exercise of the Magistrate's discretion:

> "47. In the present case, the learned Magistrate acted upon a wrong principle and failed to take into account a material consideration. His Honour should have first assessed the relevant success of the Respondent in the proceedings. His Honour should have then assessed whether the Respondent's costs should have been paid by the appellant, and if so, in what proportion. Only then should his Honour have moved on to the implications of section 40 of the *Defamation Act*."[44]

[32] However, the question raised by the fifth ground of appeal is of greater difficulty. This ground particularly incorporates complaint about the emphasis placed upon the absence of any apology or offer of apology by the appellant. Such emphasis is apparent in the extracts from the Magistrate's reasons, which have been set out above. However, as

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44 Appellant's written submissions, filed 12/10/20, at [47].

may be noted from the appellant's written submissions, an underlying issue with the Magistrate's consideration of the application of s 40(2), is in discerning the basis upon which he determined that subsection (2) was applicable. That is, as to whether he "was of the view that the appellant unreasonably failed to make a settlement offer or that the appellant unreasonably failed to agree to a settlement offer".[45]

[33] It is necessary to understand the evidence that was placed before the Magistrate as to the interactions between the parties, in negotiating any prospect of settlement of the proceedings. In broad terms, it was disclosed that:[46]

(a) On 24 April 2017, the plaintiff (himself) wrote to the defendant's solicitors, expressing "disappointment" as to the absence of "contrition or remorse" in the appellant's defence, but he included the following:

> "Despite that, in order to expedite a settlement, I am prepared to waive the claim for aggravated damages and decrease the claim for compensatory damages to $35,000 under the following conditions:-
>
> (1) Your client send a letter (with a copy to me) to Dr Gordon Stone indicating that the statements about me were false and that there is no reason why he should not continue to refer patients to me in the future in the hope rather than expectation that this will mitigate the damage done by your client to my professional reputation.
>
> (2) Your client issue a written apology to me for her conduct and defamatory statements over the last year."

That offer was expressed to be "open until 5pm on 28 April 2017". The response, in a letter from the defendant's solicitors dated 28 April 2017, was to reject the plaintiff's offer, with an indication that they did "not hold instructions to make a counter-offer and are therefore of the view that this matter will continue to progress through the court phase";

(b) On 11 July 2017, the defendant's solicitors wrote to the solicitors for the plaintiff and, in the context of reference to the defendant's success in her unfair dismissal claim, expressed her offer "for each party to walk way and bear their own costs"; and

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45 Appellant's written submissions, filed 12/10/20, at [49].

46 See: affidavit of GJ Carpenter, filed 17/1/20.

(c) Otherwise, the evidence is that the appellant maintained this position up to and including at a settlement conference conducted by a deputy registrar on 30 October 2017. That included:

(i) The reopening of the "former offer to settle previously made", in a letter from the appellant's solicitors, dated 26 September 2017, in response to a letter dated 19 September 2017 from the solicitors for the plaintiff, making an offer pursuant to the principles in *Calderbank v Calderbank*", in terms that:

> "A. Within 14 days of acceptance of this offer, your client is (sic) email Ms Adrianna Leonardi, Ms Renee Nordland and Dr Gordon Stone in the following terms:
>
> *Dear Adrianna/Renee/Dr Stone, I made statements to you relating to Dr Allan Clark which were defamatory and false. I hereby retract those statements.*
>
> *Regards*
>
> *Glenis Ham*
>
> B. Within 21 days of acceptance, your client will pay to our client an amount of $13,000 as compensation for the publication of the defamatory statements.
>
> C. Your client will refrain from publishing any further defamatory material of our client.
>
> D. Each party will bear their costs incurred to date."; and

(ii) The evidence that:

> "During the settlement conference I asked the defendant's solicitor, Mr Gabe Hutchinson, if his client will give an apology. Mr Hutchinson advised his instructions where to offer that each party walk away and pay their own costs. I then said to Mr Hutchinson words to the effect of "*so your client won't make an offer including an apology*" to which Mr Hutchinson replied that his instructions where (sic) to offer that each party walk away and pay their own costs."[47]

Whilst all of these exchanges are referable to a point in time prior to the clarifications as to the respondent's claims, in the amended statement of claim filed 19 December 2017, all of the claims pursued by the respondent were identified in his earlier statement of claim, filed 14 March 2017, including effective reference to the economic

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47 Ibid at [8].

loss component reflected in the prayer for damages totalling $140,000 and comprising $120,000 for compensatory damages and $20,000 for aggravated damages.

[34] The primary difficulty is in locating in the reasons given by the Magistrate, any indication, expressly or by necessary implication, as to the basis upon which he determined that s 40(2)(a) applied, as he evidently purported to conclude having regard to his setting out that provision and the structure of his reasons in reference to that provision. Nor is there any other apparent reason expressed for the conclusion that indemnity costs were only to be paid from 26 September 2017.

[35] As has been noted, quite apart from the pre-conditions to the engagement of s 40(2)(a) that a plaintiff has successfully brought defamation proceedings and that costs are to be awarded to that successful plaintiff and the ultimate necessity to consider matters relating to the interests of justice to otherwise order, the mandated outcome as to an award of indemnity costs entirely depends upon a finding that the defendant either (with the adoption of the appropriate approach of relevantly reading in the definition of "settlement offer" in s 40(3)):

(a) unreasonably failed to make, before the proceedings were determined, an offer to settle the proceedings, including an offer to make amends, that was (or would have been) a reasonable offer at the time it was made; or

(b) unreasonably failed to agree, before the proceedings were determined, to an offer proposed by the plaintiff, including an offer to make amends, that was a reasonable offer at the time it was made.

[36] The problem here is further exemplified in the following further passage in the Magistrate's reasons and which stands in contrast to his earlier observations as to any proposal from the appellant which included any offer to apologise:

> "23. It might be said given the Defamation Act provisions that are to encourage resolution of claims that it was the Defendant herself who achieved a pyrrhic victory. It might be said that the poor relations between the parties and their litigation history might not have made the considerations to which I refer easy. Having said that, when I look at the Plaintiffs offer in his solicitor's letter it seems clear that he managed to put those types of

> considerations to one side and make a reasonable decision to compromise the matter."[48]

This is obviously in reference to the letter dated 19 September 2017, relating to a settlement offer of the respondent (plaintiff). However, there is nothing expressed nor implied as to why the date of the responding letter from the appellant's solicitors was chosen for the commencement of liability upon the indemnity basis.

[37] Moreover, there is nothing to explain whether or how this outcome was based upon a conclusion that the appellant had unreasonably failed to make a settlement offer (given the potential relevance of the emphasis placed upon the absence of any offer to apologize to the question as to whether there had been any reasonable settlement offer made by the appellant) and/or that the appellant unreasonably failed to agree to a reasonable settlement offer of the respondent (given the reliance placed on the exchange of correspondence, respectively dated 19 and 26 September 2017). This difficulty may be seen as being particularly acute in respect of the apparent focus, in the order made, upon the letter dated 26 September 2017 and the circumstances of not just the complete failure of the respondent to establish his discrete claim upon which the economic loss component of his claim was premised but also his failure to prove any basis for any such assessment of damage, as led to the abandonment of that aspect of his claim.

[38] Otherwise, it may be noted that by footnote to the written record of the order and the specific reference to the date 26 September 2017, the Magistrate notes:

> "In that respect I have accepted the assessment of the situation referred to in the Plaintiff's Submissions- para 11(a-d) and 14 9b) (sic)."[49]

Reference to those submissions also provides no substantial support for this order, as it may be noted that those submissions were directed at an order that the plaintiff (respondent) be "awarded indemnity costs of the entire proceedings". Those submissions were entirely directed to the application of the first limb of s 40(2)(a).

[39] What is missing is any indication upon which it may be determined that the Magistrate has any made any appropriate finding as to the basis upon which s 40(2)(a) of the *Defamation Act* was engaged in this case. And far from any indicia of discernment as

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48 Affidavit of PG Boyce, filed 14/9/20, PGB-6: Magistrate's Reasons for Decision – Costs, at [23].
49 Affidavit of PG Boyce, filed 14/9/20, PGB-6: Magistrate's Reasons for Decision – Costs, at [24].

the difference in the bases upon which that sub-section could be engaged, the result has an appearance of some confusion of alternatively relevant considerations and therefore absence of such discernment. That bespeaks legal error in the exercise of the Magistrate's discretion and in the circumstances of the centrality of the consideration of that provision, appropriate to engage the principles in *House v The King* and warrant that the order of the Magistrate be set aside.

Conclusion

[40] Accordingly, there will be an order setting aside the order made by the Magistrate, on 6 August 2020, as to costs. Particularly given the nature of the appeal hearing being conducted by this Court, the breadth of the power of this Court pursuant to s 47(d) of the *Magistrates Courts Act 1921* and pursuant to *UCPR* 766(1)(a) and the circumstances of this case, it is appropriate for this Court to determine the appropriate order as to the costs of the proceeding in the Magistrates Court.

[41] It may be accepted that, as the Magistrate did, it is appropriate to give some considerable weight to the result achieved by the respondent, in vindication of his reputation.[50]

[42] It is appropriate to note that this outcome is such as to warrant conclusions, such as to satisfy the pre-conditions to the application of s 40(2)(a) of the *Defamation Act*, that these defamation proceedings have been relevantly successfully brought by the respondent (plaintiff) and so as to warrant some award of costs to him.

[43] On the other hand, what may not be so simply put aside is an understanding as to how the proceedings, in respect of which the parties have incurred the costs at issue, were framed by the respondent and the extent to which he failed to succeed in respect of the overwhelming majority of his discrete claims. This is particularly because there were such discrete claims, in respect of seven separately and differently alleged publications and some different imputations. It was only in respect of the publications alleged to have been made to WorkCover and Dr Stone that there was alleged to have been any similar publication of defamatory matter:

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50 See *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19 at [93] and [98].

(a) the terms of the publication and defamatory imputations found in respect of the instance upon which the respondent succeeded, were in words to the effect that he had "harassed, abused and bullied" the appellant;[51]

(b) in respect of the alleged publication to WorkCover, it was in respect of inclusion in an application form, the statement that her claim had been brought about because of "relentless verbal abuse, bullying and harassment by [the respondent]",[52] an application later withdrawn by the appellant; [53] and

(c) in respect of the alleged publication to Dr Stone, it was that the appellant had told him that she was being bullied and verbally harassed by the respondent.[54]

[44] There is little to be gained in attempting to further examine or summarise the reasoning of the Magistrate in respect of those allegations which were not found proven, except to again note that in addition to findings that in the context in which they were made, or may have been made.[55] The publications to WorkCover and Dr Stone were not defamatory of the respondent and in any event, attracted the defence of qualified privilege.[56] It is to be noted that the Magistrate's findings as to liability have not been the subject of any challenge.

[45] Accordingly, and in the task which now confronts this Court, it is appropriate that some considerable weight be given to the limited extent to which the respondent has successfully vindicated his reputation, in the wider context of these proceedings and the incurrence of costs in respect of them. That extends, as well, to understanding that the damages which were pursued in this proceeding, to an extent of the limit of the monetary jurisdiction of the Magistrates Court, were so substantially premised upon a case which was not susceptible of proof, upon the evidence produced by the respondent at trial, and the substantial claim based in economic loss, was only abandoned after the close of the respondent's case and in the context of that particular problem being specifically identified by the Magistrate.

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51 Affidavit of PG Boyce, filed 14/9/20, PGB-1 (Magistrate's reasons – 6/12/19) at [10c]), and [58]-[72].
52 Ibid at [10(e)] and [73].
53 Ibid at [77].
54 Ibid at [10(d)].
55 The Magistrate was also not prepared to find what had been said to Dr Stone, because of his absence as a witness. See: ibid at [87]-[88].
56 Ibid at [102].

[46] In terms of the application of the second limb of s 40(2)(a) of the *Defamation Act*, it is necessary to have regard to the reasonableness of any settlement offer made by the respondent "at the time it was made". However, not only is this not the basis relied upon by the respondent for the engagement of s 40(2)(a), but there is no apparent basis upon which it could be found that, in the context which has been noted and also given what has been noted as to the necessary connection of the offers that were made by and for the respondent, to some recovery for his claim in respect of economic loss and apology generally in relation to all of the allegations, that:

(a) there was any such reasonable settlement offer made by the respondent; nor

(b) that there was any unreasonable failure of the appellant to agree to any such offer.

Neither is there any suggestion that there is any such offer which is capable of engaging more generally applicable principles, such as are discussed in *Calderbank v Calderbank.*[57]

[47] It is to be noted that, as observed in *Wagner & Ors v Nine Network Australia & Ors (No. 2),*[58] in the application of the second limb of s 40(2a):

> "It should not be assumed that the rejection of a reasonable offer *per se* amounts to an unreasonable rejection."

Similar reasoning is applicable to the application of the first limb. Which is what the respondent has contended should apply here. As has been noted, this is upon the basis of any absence of any offer from the appellant, other than that the parties walk away and bear their own costs and specifically because there has not been any offer as to making amends including by way of any apology. It is for the party seeking the engagement of s 40(2) to satisfy the Court that the basis for doing so is established and therefore this includes establishing the necessary unreasonableness of the plaintiff's responses or conduct. It may well be different in respect of the overriding consideration because it may be seen to be expressed as an exception or exclusion in respect of the otherwise mandated position if the relevant criteria are otherwise established.[59]

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57 [1975] 3 All E R 333.
58 [2019] QSC 309 at [36].
59 *Vines v Djordjevitch* [1955] 91 CLR 512 at 519.

[48] It has to be observed that the difficulty for the position adopted by the appellant, lies not just in understanding the effect of the ultimate conclusion of the Magistrate as to her defamation of the respondent in the telephone call to her associate, but in more particularly understanding that, as reflected in the Magistrate's findings:[60]

(a) the letter from the plaintiff's solicitors dated 19 September 2017 contained a specific notation that the associate would "give evidence rebutting [the appellant's] denial" that she had said "that she had been harassed, abused and bullied" by the respondent (as was indeed ultimately evidence given by this witness and accepted by the Magistrate);[61] and

(b) that despite her denial of this in her pleadings, the appellant was found by the Magistrate to have "acknowledged in cross-examination that she could have said the words";[62]

[49] Accordingly, it is appropriate to find that, in these circumstances, the only offer made and repeated by the appellant, that the parties walk away and bear their own costs, was not any reasonable offer at any time that such an offer was made. Therefore, it is appropriate to find as is contended for the respondent that the appellant failed to make any reasonable settlement offer, at any time. However, and in the full context of these proceedings, including the complications of the other allegations and relief which was being pursued by the respondent, it should not be found that the appellant unreasonably did so, for the purpose of engaging the application of s 40(2)(a). Of course, a substantial impact of the respondent's claim was removed in the course of the trial but that was only actually abandoned on the morning of the second and last day of the trial and therefore when much of the costs in issue had already been incurred.

[50] Alternatively and even if it were appropriate to conclude that the appellant had acted unreasonably in this regard and therefore that the requirements of s 40(2)(a) were otherwise satisfied , it would not be appropriate to conclude other than that the interests of justice does require an order otherwise, particularly having regard to the circumstances as to the extent of the success of the respondent in the proceedings and more particularly his lack of success including in respect of what the Magistrate

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60 Affidavit of PG Boyce, filed 14/9/20, PGB-1 (Magistrate's reasons – 6/12/19) at [66]-[67].

61 MFI A, T1-61.1-16, 1-62.20-35 and 1-64.14-21, particularly in reference to being "harassed and bullied".

62 Ibid at T2-58.22-27.

appears to have correctly observed, was a situation in respect of the economic loss claim that ought to have been recognisable at an appreciably earlier point in time,

[51] In the circumstances, the appropriate order to be made, is that the appellant pay 30 per cent of the respondent's costs of the proceedings in the Magistrates Court, as a representation of the extent to which he has been successful in vindicating his reputation in these proceedings.

Orders

[52] Accordingly, the appeal will be allowed with an order that:

> The order made in the Magistrates Court at Maroochydore on 6 August 2020 that "the defendant pay the costs of the plaintiff to be agreed or assessed on the standard basis in accordance with r 702 of the *Uniform Civil Procedure Rules*, until 26 September 2017 and thereafter on the indemnity basis to be assessed in accordance with r 703 of the *Uniform Civil Procedure Rules*", be set aside and
>
> replaced by an order that "the defendant pay to the plaintiff 30 per cent of his costs of the proceeding, as agreed or assessed on the standard basis".[63]

[53] Otherwise, the parties will be heard in respect of dealing with the costs of the appeal.

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[63] The order of the Magistrate, which is to be replaced, may be noted to have been immediately followed by a further statement in terms: "I also certify that it is reasonable and necessary for the plaintiff to instruct counsel in respect of all of the proceeding." The potential significance of this certification was not addressed in the course of the appeal and neither was it made the subject of the appeal. Accordingly, the form in which the order of this Court has been framed does not affect that certification for any relevant effect that it may have.