

SUPREME COURT OF QUEENSLAND

CITATION: *Ginn & Anor v Ginn; ex parte Absolute Law Lawyers & Attorneys* [2015] QSC 49

PARTIES: **DENNIS JOHN GINN**
(first applicant)
VALERIE JUNE BOUTTELL
(second applicant)
SHARON DAWN BOCK
(third applicant)
v
**CHRISTOPHER FREDRICK GINN (AS
ADMINISTRATOR OF THE ESTATE OF FREDRICK
WILLIAM CHARLES GINN)**
(respondent)
**EX PARTE ABSOLUTE LAW LAWYERS &
ATTORNEYS**
(non-party applicant)

No S209 of 2011

DIVISION: Trial Divison

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 9 March 2015

DELIVERED AT: Cairns

HEARING DATE: 28 January 2015

JUDGE: Henry J

ORDER: 1. Pursuant to r 742(6), the decision of the costs assessor in the Cost Assessor's Certificate dated 25 November 2014 disallowing items 1, 3, 4, 9 and 10 claimed in the Costs Statement dated 11th July 2014 is varied:
(a) to allow those items; and
(b) to assess the total costs payable by the respondent to Absolute Law as per the order dated 2 July 2014 as \$8,799.50, being \$8,569.50 for the costs claimed as per the Costs

**Statement dated 11th July 2014 and \$230 for
the costs of the Costs Assessor as per his Tax
Invoice to Absolute Law dated 25th November
2014.**

CATCHWORDS: PROCEDURE – COSTS – where the applicant seeks a review of a decision in a Cost Assessor’s Certificate pursuant to r 742 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the respondent was ordered to pay costs on an indemnity basis – where the Registrar ordered that a costs assessment be completed – where there was no objection to the costs statement – whether disallowance for lack of particularity constitutes correction of obvious error under r 708(4)(b) – where the assessor disallowed items in the costs statement – where the applicant seeks a variation of the assessor’s certificate to allow the disallowed items

Clayton Utz Lawyers v P & W Enterprises Pty Ltd [2011] QDC 5, distinguished

Ralph Hume Garry v Gwullim (CA)(2003) 1 WLR 510, applied

Remely v O’Shea and Ord (No.2) 2008 QSC 218, applied

Legal Profession Act 2007 (Qld) s 341(1)

Uniform Civil Procedure Rules 1999 (Qld) r 106, r 705, r 706, r 708, r 710, r 721, r 742

COUNSEL: J Jacobs for the Applicant
M Jonsson for the Costs Assessor

SOLICITORS: Absolute Law for the Applicant
Dr Jonsson of Counsel was retained directly by the costs assessor

- [1] The applicant seeks a review of a decision in a Cost Assessor’s Certificate pursuant to r 742 of the *Uniform Civil Procedure Rules* 1999 (Qld)(“UCPR”).

Background

- [2] In the course of the convoluted history of this matter Mr Christopher Ginn made allegations in an affidavit filed by him against his former solicitor, the non-party applicant (“the applicant”). On 2 July 2014 I ordered that Mr Ginn pay the costs on the indemnity basis of the applicant of and incidental to its appearance to meet Mr Ginn’s oral application founded upon the allegations in his affidavit.

- [3] On 11 July 2014 the applicant served its costs statement on Mr Ginn pursuant to r 705 of the UCPR. That costs statement claimed \$8569.50. Mr Ginn did not serve any notice of objection under r 706.
- [4] On 28 October 2014 the Registrar ordered that a costs assessment be completed pursuant to r 710 in respect of the costs order against Mr Ginn. The Registrar's order also appointed a costs assessor for the assessment.
- [5] There were some exchanges between the assessor and the applicant during the course of the assessment. The assessor was not content with the state of the costs statement. He elaborated to some extent on his concerns but when queried by the applicant he pointed out he was the adjudicator and not the applicant's consultant and proceeded to conduct his assessment.
- [6] The assessor in due course issued a certificate in which he only allowed \$5,016.10 for a claim of \$8,569.50.
- [7] In respect of the items which were disallowed their description in the costs statement and the costs assessor's assessment in respect of them was as follows:¹

Item No.	Costs Statement Description of Item	Fees	Costs Assessor's Assessment
1.	Telephone from Peter Apel advising of the hearing of the application and we requesting that he provide to us copies of the application and all supporting documentation given that we were not aware of this and Mr Christopher Ginn has not agreed to the orders being sought.	\$49.50	Telephone call to a third party. Insufficient particularity. The identity of the third party and their role in the matter is not identified. The necessity for the call is not apparent and there is insufficient detail of the matters that were discussed. Disallowed.
3.	Perusal and consideration of email from Justine Gerrey of Bottoms English together with the affidavit of Christopher Ginn, affidavit of John Bottoms, application, amended application,	\$396.00	Perusal of various documents. Insufficient particularity. This is a single claim for numerous attendances. Also parties are referred to but their role in the matter is not identified.

¹ Application, Affidavit of Shervin Tambrchi filed 10 December 2014 Ex ST1.

	affidavit of Anthony James Johnsston and affidavit of Peter Apel attached to the email.		Disallowed.
4.	Perusal and consideration of email from Peter Apel enclosing amended application, affidavit of Peter Apel and affidavit of Tony Jonsson attached thereto including checking to make sure the affidavits are the same as that contained with the email from Bottoms English Lawyers.	\$49.50	Perusal of various documents. Insufficient particularity. This is a single claim for numerous attendances. Also parties are referred to but their role in the matter is not identified. Disallowed.
9.	Perusal, consideration and review of the six volumes of the file in this matter making copies of relevant documentation from the files to tender to the court in oral submissions given the lack of time within which to prepare and file an affidavit and making a chronology and notes of events to discuss with Joseph Jacobs in respect to opposing the orders being sought by Christopher Ginn in paragraphs 21 to 35 of his affidavit.	\$792.00	Perusal of various documents. Insufficient particularity. This is a single claim for numerous attendances. Also parties are referred to but their role in the matter is not identified. Disallowed.
10.	Travel to and from Court including attendance at the hearing of the application.	\$2475.50	Various attendances. Insufficient particularity. This is a single claim for numerous attendances. Disallowed.

- [8] On this review the applicant seeks a variation of the assessor's certificate so that the disallowed items are allowed. It is submitted the varied assessment should thus give rise to a total assessment of \$8799.50, being the \$8569.50 claimed in the costs statement in addition to \$230.00 for the costs of the costs assessor.

The Issue

- [9] In the course of the assessment, on 11 November 2014, the assessor telephoned the applicant expressing concern that the costs statement did not contain sufficient particulars.² He forwarded the applicant a copy of *Clayton Utz Lawyers v P & W Enterprises Pty Ltd*.³ That case had no direct relevance. It was concerned with whether invoices delivered by a solicitors' firm were itemised bills, as defined by ss 6 and 300 of the *Legal Profession Act 2007* (Qld). It was there held necessary that the itemised bill state in detail how the legal costs were made up in a way that would allow them to be assessed pursuant to s 341(1) of that Act. Section 341(1) requires a costs assessor to consider whether it was reasonable to carry out the work to which the legal costs relate, whether or not the work was carried out in a reasonable way and the fairness or reasonableness of the amount of legal costs in relation to the work.
- [10] The costs assessment with which the present application is concerned was not a costs assessment under the *Legal Profession Act*. It was an assessment under the UCPR. There was no obligation on the costs assessor to consider the matters provided for in s 341(1) of the *Legal Profession Act*.
- [11] Importantly the present assessment was to be a default assessment pursuant to r 708 of the rules. That is because Mr Ginn had not served a notice of objection under r 706 in respect of any item in the costs statement.
- [12] The fact that it was a default assessment meant the assessor had no obligation to consider each item in the statement. Rule 708(3) and (4) relevantly provides:
- “(3) The costs assessor must, on proof that the costs statement was served on the party liable for the costs—
- (a) assess the costs without considering each item and by allowing the costs claimed in the costs statement; and
- (b) issue a certificate of assessment.
- (4) However—...
- (b) sub rule (3)(a) does not prevent the costs assessor correcting an obvious error in the costs statement.” (emphasis added)
- [13] In a letter to the applicant of 12 November 2014 the assessor wrote:

² Affidavit of Shervin Tambrechi filed 10 December 2014 (doc.71) [7].

³ [2011] QDC 5.

“From their reading of r 708(3)...some solicitors are left with the impression that the default assessment is just an automatic rubber stamp for the contents of the costs statement. This assumption is incorrect, and was never intended.”⁴

[14] That reasoning is challenged by the applicant.

[15] The obvious rationale underpinning r 708 is that where a person served with a cost statement does not object to it there is no need for the costs assessor to consider the costs statement with the same degree of scrutiny that is required when there is an objection.

[16] Rule 721 provides for what a costs assessor must ordinarily consider:

“721 Discretion of a Costs Assessor

In assessing costs, a costs assessor must consider the following—

- (a) any other fees and allowances payable to the solicitor or counsel for other items in the same proceedings;
- (b) the nature and importance of the proceeding;
- (c) the amount involved;
- (d) the principle involved;
- (e) the interests of the parties;
- (f) the person who is to pay the costs, or the fund or estate out of which the costs are to be paid;
- (g) the general conduct and costs of the proceedings;
- (h) any other relevant circumstances.”

[17] However r 708(5) specifically provides that r 721 does not apply to an assessment of costs under r 708. The non-application of r 721 is consistent with r 708(3)(a) which provides that the costs assessor must assess the costs without considering each item.

[18] The effect of r 708(3)(a) is that, save for correcting an obvious error, the assessor “must” assess the costs by allowing the costs claimed in the costs statement. The only basis for not allowing the costs claimed in the costs statement is that the correction of obvious error permitted by r 708(4)(b) may occasion a variation to the costs claimed.

⁴ Affidavit of Shervin Tambrchi filed 10 December 2014 (doc 71) Ex ST3.

- [19] The assessment here did not expressly purport to “correct an obvious error”. Rather the assessment purported to disallow certain items because insufficient particularity had been provided in the description of the items in the costs statement. This case therefore turns upon whether the disallowance of an item for insufficient particularity comes with the meaning of “correcting an obvious error” in r 708(4)(b).

Discussion

- [20] The meaning of “an obvious error” was considered in *Remely v O’Shea and Ors (No.2)*.⁵ McMeekin J there observed:

“To my mind an obvious error is one that should be evident from a reading of the costs statement without the need for argument or analysis, or close consideration of a liability for the amount or the quantum claimed. Niceties in interpretation or approach are not called for.

It needs to be borne in mind that the assessor carries out the default assessment without the benefit of any objection and without the benefit of any appearance or argument to better enable him or her to appreciate points of difference. There is a deal of force in Mr Dickson’s submissions that it could hardly have been intended that the assessor be concerned with “undue precision”.⁶

- [21] His Honour then canvassed the detail of the issues raised in argument in respect of the costs statement in that case, highlighting that such an approach required the very exercise that r 708(3)(a) precludes. His Honour concluded:

“I am in no position to determine the disputes without further argument and that is precisely what the rules do not require or permit. However the question is whether the assessor was required to go through this exercise. I think not. It seems to me that an experienced assessor was obliged to do no more than sum up the situation broadly. The assessor would be aware that work of the general kind claimed had been required. Whatever the appropriate amounts that could be claimed might be, he or she should, in a general sense, determine whether those amounts would differ significantly from the amounts in fact claimed. If so satisfied the assessor should allow the costs claimed, as the rule directs.”⁷

- [22] I respectfully agree with his Honour’s views.

⁵ 2008 QSC 218.

⁶ Ibid [14-15].

⁷ Ibid [22].

- [23] At first blush it seems inconsistent that r 708 requires that costs must be assessed “without considering each item” claimed, while nonetheless allowing the costs assessor to correct an obvious error as part of that process. However when the language of r 708 is considered in the context of the part of the chapter in which it appears in the UCPR, it is apparent that the consideration of each item which r 708(3)(a) precludes is the considered scrutiny required by r 721 on an assessment where there has been a notice of objection. Consideration in that sense of “each item” is precluded. However perusal of “each item” to check for obvious error must be permissible given that r 708(4)(b) permits obvious errors to be corrected.
- [24] Such perusal may expose direct evidence of obvious error. There may for example be an obvious mathematical error on the face of the statement. However perusal of a costs statement may also provide indirect evidence of obvious error. It may for example include a description of an item from which it can be inferred the item has obviously been included by mistake.
- [25] It is also possible on perusal that an amount claimed for an item may be so obviously out of proportion to the item described as to compel an inference of obvious error in quantifying the amount claimed. However, as is implicit in the above cited observations of McMeekin J, the disproportion must be so significant on its face as to compel the inference of obvious error. It would not be to the point that the assessor might merely be uncertain on perusal as to whether the amount claimed for an item is appropriate. Such uncertainty does not reflect the presence of obvious error. Moreover the uncertainty could not be resolved without engaging in consideration of the item, activity which is precluded by r 708(3)(a).
- [26] In the present case there was no informed basis to conclude from a perusal of the costs statement that the costs amounts that could be claimed would have differed so significantly from the amounts in fact claimed as to bespeak obvious error. In any event, the assessor did not disallow the items in issue for that reason.
- [27] The items were disallowed outright for want of particularity. It is conceivable that a correction of obvious error may involve outright disallowance by way of correction of an item, for instance in the event it is obvious the entire item was included in error.

However it was not suggested the disallowed items were included in error. In concluding that the items in issue did not include sufficient particulars the assessor was not merely perusing the claim to check for obvious error. Rather, he was engaging in consideration of the items contrary to r 708(3)(a).

[28] Counsel for the costs assessor, appearing to assist the court and not to agitate for a specific outcome, submitted in effect that an assessor's perusal of a costs statement to check for obvious error may be so constrained by the statement's lack of particularity that the lack of particularity is itself an obvious error. The submission placed emphasis upon r 705 which deals with the mandatory content of a cost statement.

[29] Rule 705(2) relevantly provides:

“The costs statement must—

- (a) contain sufficient details to enable the party liable to pay the costs to understand the basis for the costs, prepare an objection to the costs statement and obtain advice about an offer to settle the costs cost.”

[30] It was submitted in effect that a failure to comply with r 705(2)(a) would constitute an obvious error within the meaning of r 708(4)(b).

[31] The premise of that submission is that the assessor would scrutinise whether the adequacy of detail of each item in the costs statement is sufficient. Such consideration of each item is precluded by r 708(3)(a). Moreover it is consideration which is not apt to the situation where there has been no notice of objection by the party liable to pay the costs. It is that party's interests which r 705(2) is calculated at protecting.

[32] The question whether a costs statement contains “sufficient details to enable the party liable to pay the costs to understand the basis for the costs, prepare an objection ... and obtain advice about an offer to settle” will invariably depend upon the circumstances of the case and, more particularly, the knowledge of the party liable to pay the costs. The subjective nature of the exercise of considering whether sufficient details have been provided in a costs statement was well explained by Ward LJ in *Ralph Hume Garry v Gwullim (CA)*:⁸

⁸ (2003) 1 WLR 510, 522.

“The test, it seems to me, is thus, not whether the bill on its face is objectively sufficient, but whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right then open to him, vis, to seek taxation”

[33] Any concern as to whether a statement of costs contains sufficient detail for the party liable to understand the basis for it and prepare an objection must logically fall away in circumstances where that party is properly served with a costs statement and elects not to object to it. In such circumstances it is hardly to the point that a costs assessor would have preferred that the costs statement contain more particularity.

[34] It is the very fact that the party served with the costs statement elects not to object which triggers an assessment process that expressly precludes the costs assessor from considering each item. In the absence of objection by the party equipped with the subjective knowledge relevant to considering the sufficiency of detail in the costs statement it cannot be here concluded that there exists an obvious error as to the sufficiency of detail in the statement. The assessor’s concerns as to a lack of particularity in the present case did not equate to a conclusion of “obvious error” as contemplated in r 708(4)(b).

[35] The decision of the costs assessor should be varied to allow the items disallowed by him. It is uncontentious that the costs of the assessor should also be included in the assessed costs.

[36] The application also sought an order for costs in respect of this review but that was no longer pressed at the review.⁹

[37] My orders are:

1. Pursuant to r 742(6), the decision of the costs assessor in the Cost Assessor’s Certificate dated 25 November 2014 disallowing items 1, 3, 4, 9 and 10 claimed in the Costs Statement dated 11th July 2014 is varied:
 - (a) to allow those items; and

⁹ T 1-3 L 33.

(b) to assess the total costs payable by the respondent to Absolute Law as per the order dated 2 July 2014 as \$8,799.50, being \$8,569.50 for the costs claimed as per the Costs Statement dated 11th July 2014 and \$230 for the costs of the Costs Assessor as per his Tax Invoice to Absolute Law dated 25th November 2014.