SUPREME COURT OF QUEENSLAND

CITATION:	*The President's Club Limited & Anor v Palmer Coolum Resort Pty Ltd & Anor (No 2)* [2020] QSC 11
PARTIES:	**THE PRESIDENT'S CLUB LIMITED** ACN 010 593 263 (first plaintiff) and **THE AMBASSADOR'S CLUB LIMITED** ACN 010 593 647 (second plaintiff) **v** **PALMER COOLUM RESORT PTY LTD** ACN 010 593 638 (first defendant) and **COEUR de LION INVESTMENTS PTY LIMITED** ACN 006 334 872 (second defendant)
FILE NO:	SC No 5746 of 2012
DIVISION:	Trial
PROCEEDING:	Costs
DELIVERED ON:	14 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions from the first plaintiff and defendants received 6 September 2019, supplementary written submissions from the first plaintiff and defendants received 10 October 2019 and 7 November 2019
JUDGE:	Wilson J
ORDERS:	**The order of the Court is:** **1. The costs of the applications heard on 30 July 2019 (but not including any costs incidental to the initial hearing before Mullins J on 11 July 2019) shall be paid by the first plaintiff to the first and second defendants and such costs shall be payable forthwith after they have been agreed or assessed.**
CATCHWORDS:	PROCEDURES – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – EVENT: WHAT CONSTITUTES – where the first plaintiff made an application that the proceeding be transferred to the Federal Court of Australia – where it was determined that the first

plaintiff's application was a step for which the first plaintiff required leave to proceed – where leave to proceed was refused – where the defendants made an application that the proceeding be dismissed or permanently stayed for want of prosecution – where the first plaintiff's application to transfer the proceeding was dismissed – where the first plaintiff submits the proceedings constituted two events – where the defendants submit that the proceedings constituted one event– whether the proceedings constituted one event, or two, for which costs are to be determined

PROCEDURES – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that if no step has been taken in a proceeding for two years from the time the last step was taken, a new step may not be taken without an order of the court – where the last step taken by the first plaintiff was nearly six years ago – where the defendants applied to dismiss or permanently stay the proceeding for want of prosecution – where it was determined that the first plaintiff's application that the proceeding be transferred to the Federal Court was a step for which the first plaintiff required leave to proceed – where leave for the first plaintiff to take a step was granted – where the defendants' application to dismiss the proceeding was dismissed – where the first plaintiff's application to transfer the proceedings was dismissed – whether costs should be disposed of in accordance with the general rule that costs follow the event – whether the "indulgence principle" applies – whether costs of the initial hearing should be costs "of and incidental" to the hearing on 30 July 2019 – whether the defendants' application to dismiss or permanently stay the proceeding requires the making of any separate order for costs – whether any costs order should preclude enforcement until final judgment in the action

Uniform Civil Procedure Rules 1999 (Qld) rr 681, 682, 684

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor [2013] QSC 216, cited
Baviv Pty Ltd v J & R Cuda Pty Ltd [2001] QSC 011, cited
BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, cited
Bucknell v Robins [2004] QCA 474, cited
Davis v Perry O'Brien Engineering Pty Ltd (No 2) [2016] QSC 285, cited
Day v Humphrey & Ors [2018] QCA 321, cited
Dempsey v Dorber [1990] 1 Qd R 418, cited
Dibley v Sydney West Area Health Service [2009] NSWSC

856, cited
Earnshaw v Loy (No 2) [1959] VR 252, cited
Fordham v Fordyce [2007] NSWCA 129, cited
Furber v Stacey [2005] NSWCA 242, cited
Holt v Wynter (2000) 49 NSWLR 128, cited
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26, cited
Latoudis v Casey (1990) 170 CLR 534, cited
McDermott & Ors v Robinson Helicopter Company (No 2) [2015] 1 Qd R 295, cited
Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2) [2013] QSC 271, cited
Monie v Commonwealth of Australia (No 2) [2008] NSWCA 15, cited
NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd [1999] QSC 328, cited
Oldfield v Gold Coast City Council [2009] QCA 124, cited
Oshlack v Richmond River Council (1998) 193 CLR 72, cited
Pennefather v Young Engineering Service Pty Ltd [2003] QSC 432, cited
Re Quality Blended Liquor Pty Ltd (No 2) [2014] QSC 307, cited
Sequel Drill & Blast PIL v Whitsunday Crushers PIL (No 2) [2009] QCA 239, cited
Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co. (No. 2) [1953] 2 All ER 1588
Stanley v Layne Christensen Company [2006] WASCA 56, cited
The President's Club Limited & Anor v Palmer Coolum Resort Pty Ltd & Anor [2019] QSC 209
Way & Anor v Primo Rossi Pty Ltd & Anor [2018] QCA 203, cited

COUNSEL: G Handran and T Jackson for the first plaintiff
No appearance for the second plaintiff
P Dunning QC and M Karam for the first and second defendants

SOLICITORS: McBride Legal for the first plaintiff
No appearance for the second plaintiff
Alexander Law for the first defendant
Sophocles Lawyers for the second defendant

[1] On 30 July 2019, in a one day hearing, I heard the following applications in this matter:

1. The President's Club Limited (ACN 010 593 263) (the first plaintiff or "the Club") applied for an order that the proceeding be transferred to the Brisbane Registry of the Federal Court ("transfer application"). It was noted that:

   (a) this application was filed almost six years after any party had taken a step in the proceeding;

(b) in those circumstances, the defendants submitted that leave to file the application was required pursuant to r 389(2) of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*");

(c) the first plaintiff disputed that such leave was necessary; and

(d) therefore, the first issue to determine was whether leave was required.

2. If leave was required, the first plaintiff applied for leave pursuant to r 389(2) to proceed with its transfer application.

3. The defendants applied for the proceeding to be dismissed or permanently stayed for want of prosecution.

[2] The claim between the second plaintiff, The Ambassador's Club Limited (ACN 010 593 647), and the defendants, had been settled and the second plaintiff was not involved in the hearing on 30 July 2019.

[3] My reasons were published on 26 August 2019[1] and I determined that:

1. The first plaintiff required leave pursuant to r 389(2) of the *UCPR* to file the transfer application.

2. The first plaintiff was granted leave to take a step in the proceeding.

3. The defendants' application to dismiss or permanently stay the proceeding for want of prosecution was dismissed.

4. The first plaintiff's application to transfer the proceeding to the Federal Court was dismissed.

[4] I requested the parties to make submissions on the question of costs, and stated that I would deal with the question of costs on the papers, unless either party requests a hearing. Neither the first plaintiff, nor the defendants, requested a hearing on the matter of costs.

[5] The first plaintiff and defendants filed written submissions on 6 September 2019.

[6] On 3 October 2019, I requested supplementary submissions from the first plaintiff and defendants in response to each other parties' costs submissions. These supplementary submissions were received on 10 October 2019.

[7] On 1 November 2019, I requested further submissions from the parties in relation to:

1. The costs of the initial hearing before her Honour Justice Mullins on 11 July 2019.

2. Whether the costs order should preclude enforcement until final judgment in the action.

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[1] *The President's Club Limited & Anor v Palmer Coolum Resort Pty Ltd & Anor* [2019] QSC 209 ("*Reasons*").

[8] These further submissions were received on 7 November 2019.

[9] The second plaintiff has not filed any submissions in relation to costs.

Relevant legal principles

[10] The general rule for costs is r 681 of the *UCPR*, which provides that:

> "(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise."

[11] The proper approach is for the Court to:

1. First, identify the event(s).

2. Second, consider whether there are circumstances which justify a departure from the general rule.

The event

[12] The words "follow the event" are to be read "distributively."[2]

[13] Where there are two or more issues for determination in a proceeding, each gives rise to an "event" for which the costs are to be determined separately.[3] Those "events" are defined by the issues or questions that arise, and the event is not simply the result or outcome of the action:[4]

> "For this purpose it becomes necessary to consider the extent of the power of a judge to award costs of issues under r. 689(1), as well as the way in which it may be exercised. The Rule speaks, in the first place, of costs of proceedings being in the discretion of the court but as following the "event" unless the court otherwise orders. The word "event" in a context like this has spawned an immense amount of authority. Before the Judicature Act and rules, the guiding principle applied in Chancery was that costs were in the discretion of the court, while at common law, where trials took place with a jury, it was that costs followed the event. Under the Judicature Act and rules, the pre-Judicature principles were preserved in what in Queensland became O. 91, r. 1, which adopted O. LXV, r. 1 of the English rules of 1875 including the second proviso to that rule providing that costs follow the event "unless … the Court shall for good cause otherwise order". Despite far-reaching later changes in the corresponding English rules

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2 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60-61 [83] per MacPherson JA, with whom McMurdo P and Thomas JA agreed, citing *Reid Hewitt & Co v Joseph* [1918] AC 717.

3 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60-61 [83] per MacPherson JA, with whom McMurdo P and Thomas JA agreed.

4 *McDermott & Ors v Robinson Helicopter Company (No 2)* [2015] 1 Qd R 295 at 302 [30] per P Lyons J, citing *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60 [83] per MacPherson JA, with whom McMurdo P and Thomas JA agreed.

> governing costs, O. 91 r. 1 remained in the original form until the UCPR came into force on 1 July 1999."[5]

[14] This approach was also recognised in *McDermott v Robinson Helicopter Company (No 2)*[6] where P Lyons J noted:

> "It appears to me to follow from the decision of the Court in *Interchase* and by reference to the language of rr 681 and 684, that, under the current rules, events in an action are to be identified by reference to individual issues or questions in the action, and the event is not simply the result or outcome of the action; and, at least by implication, that the predilection for making orders for costs by reference to success on individual events within the action remains. In that case, no ground for depriving the fourth defendant, successful in the action, of his costs, other than his failure on a number of issues, was identified."

[15] The application of the general rule in r 681 may lead to costs orders which reflect different results on separate events, unless the Court considers some other order is more appropriate.[7]

Special or exceptional circumstances to depart from the general rule

[16] There must be "special or exceptional circumstances" to depart from the general rule. In *Oshlack v Richmond River Council*,[8] ("*Oshlack*"), McHugh J (with whom Brennan CJ agreed) endorsed a statement of Devlin J in *Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co. (No. 2)*[9] that:

> "... Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure."

[17] The rationale for that statement of general principle was explained by McHugh J in *Oshlack*[10] in the following terms:

> "... The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."

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5 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60 [82] per MacPherson JA, with whom McMurdo P and Thomas JA agreed.

6 [2015] 1 Qd R 295 at 302 [30] per P Lyons J (footnotes omitted).

7 *Sequel Drill & Blast PIL v Whitsunday Crushers PIL (No 2)* [2009] QCA 239 at [4] per McMurdo J, as his Honour then was, citing *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at [84]; *Latoudis v Casey* (1990) 170 CLR 534 at 568 per McHugh J.

8 (1998) 193 CLR 72 at 96 per McHugh J, with whom Brennan CJ agreed.

9 [1953] 2 All ER 1588 at 1590 per Devlin J.

10 (1998) 193 CLR 72 at 97 per McHugh J, with whom Brennan CJ agreed (footnotes omitted).

[18] The general rule should only be departed from, in the Court's discretion, with "good reason".[11] As was observed by Philippides J, as her Honour then was, in *Bucknell v Robins*,[12] there are limited exceptions to the general rule, which focus on:

1. the conduct of the successful party disentitles such an order;[13] or,

2. the existence of "special" or "exceptional" circumstances.[14]

Rule 684

[19] I note also that r 684 of the *UCPR* provides:

> "(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
>
> (2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."

[20] In *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2),*[15] McMurdo J (as his Honour then was) stated the following with respect to the interpretation of r 684:

> "[7] [...] The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule? That this remains the approach under r 681 and r 684 comes not only from the terms of the rules themselves but also from the recognised purposes for it. [...]
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> [8] Thus in *Todrell Pty Ltd v Finch & Ors*, Chesterman J approved this passage from the judgment of Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd*:
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> > "Notwithstanding that the court has power to deprive a successful party of costs, or even order a successful party to pay costs, that is a course to be taken in unusual cases and with a degree of hesitancy."
>
> I adhere to the view I expressed in *Australand Corporation (Qld) Pty Ltd v Johnson & Ors* that ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some

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11 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22] per Chesterman J, as his Honour then was.

12 [2004] QCA 474.

13 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 98 per McHugh J, with whom Brennan CJ agreed. See also *Oldfield v Gold Coast City Council* [2009] QCA 124 at [71] per Muir JA, White and A Wilson JJ.

14 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120, 126 per Kirby J.

15 [2009] QSC 64 at [7], [8] per McMurdo J, as his Honour then was (footnotes omitted).

> of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and severable and has occupied a significant part of the trial."

[21] As Jackson J observed in *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor*,[16] the discretion plainly extends so as to allow the Court to decide costs by reference to particular questions in, or in parts of, a proceeding. His Honour further observed that the Courts have from time to time encouraged an "intelligently made" apportionment of costs which fairly reflects both the outcome, and the costs associated with, the determination of different questions or paths.[17]

[22] A court will generally only deprive the successful party of the costs relating to an issue on which it was unsuccessful when that issue was clearly dominant or separable.[18] Where the Court considers it appropriate to depart from the general rule, it may declare a percentage of the costs as attributable to the question or part of the proceeding to which the order relates.[19] The apportionment is not merely arithmetical but involves some judgment and approximation.[20]

The first plaintiff's submissions

[23] The first plaintiff submits that the three applications before the Court constituted two events:

1. The first event: the first plaintiff's application for leave to proceed with the transfer application and the defendants' application to dismiss or stay the proceedings.

2. The second event: the first plaintiff's transfer application.

[24] The first plaintiff submits that given the overlapping evidence and considerations, the first plaintiff's application for leave to proceed, and the defendants' application to dismiss or permanently stay the proceeding, were corollaries of one another.

Costs should follow the two events

[25] As such, the first plaintiff submits that costs should follow each of these events respectively.

The apportionment alternative

[26] The first plaintiff submits that if the Court considers that it is appropriate to depart from the general rule, then there should be an apportionment of costs in favour of the first plaintiff to reflect the substantial success it had.

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16 [2013] QSC 216 at [5] per Jackson J.

17 *Re Quality Blended Liquor Pty Ltd (No 2)* [2014] QSC 307 at [16] per A Wilson J, citing *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 at [15]-[16] per Jackson J.

18 *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [64]–[66] per Campbell JA, with whom Mason P and Beazley JA agreed (Mason P and Beazley JA disagreeing with respect to indemnity costs).

19 *UCPR* r 684(2).

20 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [17] per McMurdo J, as his Honour then was.

[27] The first plaintiff submits that with the relationship between the evidence related to the Federal Court proceeding and certain key overlapping factors, together with the fact that the transfer question only occupied minimal time at the hearing, the Court may find that the circumstances justify a departure from the general rule by apportioning costs as an attributable percentage.

[28] The first plaintiff submits that an appropriate apportionment of costs would be that the defendants pay 75% of the first plaintiff's costs of what the first plaintiff submits to be the two events, in order to recognise the time and effect taken up in dealing with the issues raised.

The first plaintiff should not pay the defendants' costs

[29] The first plaintiff submits that it is not appropriate to order them to pay the defendants' costs of both applications on the basis it was seeking an indulgence. At most, a costs order of the kind made in *Pennefather v Young Engineering Service Pty Ltd*[21] may be made.[22]

The defendants' submissions

[30] The defendants submit that the applications before the Court constituted only one event, i.e., the first plaintiff's transfer application. The defendants submit that each of the other matters determined were ancillary to this primary purpose.

[31] The defendants submit that because the whole genesis of the hearing on 30 July 2019 was the first plaintiff's ultimately unsuccessful transfer application, the first plaintiff should pay the whole of the defendants' costs of the hearing.

[32] The defendants further submit that even if there were two relevant "events" as the first plaintiff contends, then:

1. costs should follow one of those events, namely the first plaintiff's unsuccessful transfer application, with the result that the first plaintiff must pay the defendants' costs of that application; and

2. in relation to the other "event", which the first plaintiff defines as "the Club's successful application for leave to take a step, and the consequent dismissal of the defendants' application":

    (a) the general principle that "costs follow the event" must give way to another well-established principle, namely that when an application is brought by a party seeking an indulgence from the Court (such as leave to take a step in a proceeding following a very long period of delay), that party must pay the costs of the application, irrespective of the outcome; and

    (b) accordingly, the Club must pay the defendants' costs in relation to this "event" as well.

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21 [2003] QSC 432 at [15] per Mackenzie J.

22 Costs of each application be costs in the proceeding.

[33] Accordingly, the defendants submit that, in the circumstances of this case, even if there is one or two events, the outcome is the same, that is, the first plaintiff pay all the defendants' costs.

[34] The defendants submit that the first plaintiff's alternative submission that "an appropriate apportionment of costs would be that the defendants pay 75% of the Club's costs of both applications" is unprincipled and unjustifiable.

Discussion

[35] In this matter there were two distinct issues or questions to be determined, namely:

1. the first plaintiff's application for leave to proceed with the transfer application and the defendants' application to dismiss or stay the proceedings ("the first event"); and

2. the first plaintiff's transfer application ("the second event").

[36] Each give rise to an "event" for which the costs are to be determined separately.[23]

[37] In relation to the first event, the first plaintiff was granted leave to proceed (after arguing unsuccessfully that leave was not required). The defendants' application to dismiss or stay the proceeding for want of prosecution was dismissed. Both applications were corollaries of the other.

[38] In relation to the second event, the first plaintiff's transfer application was dismissed.

[39] Each event will be considered in relation to the appropriate costs order.

First event – the application for leave to proceed

[40] The first plaintiff relied on *Smiley v Watson* [2001] QCA 269 ("*Smiley*") and unsuccessfully argued that leave was not required pursuant to r 389(2) of the *UCPR* as a precursor to bringing the transfer application. This issue took up a fair portion of hearing time.

[41] However, I found that the Court of Appeal's decision in *Ghosh & Anor v NBN Limited & Ors* [2014] QCA 53 ("*Ghosh*") was "directly applicable and binding", with the result that the first plaintiff did require the leave of the Court pursuant to r 389(2) to proceed with its (amended) transfer application. It is noted that the issue as to whether *Smiley* or *Ghosh* applied has not been previously considered.

[42] As the first plaintiff required the leave of the Court to proceed it was in the position of a party seeking an indulgence from the Court in the context of the last step in the proceeding being almost six years ago.

[43] In *Day v Humphrey & Ors*,[24] the Court said:

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[23] *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60-61 [83] per MacPherson JA, with whom McMurdo P and Thomas JA agreed, citing *Reid Hewitt & Co v Joseph* [1918] AC 717.

[24] [2018] QCA 321 at [9] per Morrison JA, with whom Philippides JA and Brown J agreed.

> "[9] Costs can also be awarded on a differential basis depending on the degree of success, and whether the success was only on issues that occupied an identifiable proportion of the time.[25] Other bases for departing from the general rule include where the successful party was seeking an indulgence from the court, where the successful party had excessively delayed the prosecution of the case or where a successful party's interests were conducted jointly with that of an unsuccessful party."

[44] The defendants submit that when a party is seeking an indulgence, the principle that "costs follow the event" is displaced and that party must pay the costs of the application irrespective of the outcome. The defendants submit that such a principle is very well established,[26] and in Queensland, its application can be traced back as far as 1908.[27]

[45] Ordinarily, a successful applicant, who has allowed him or herself to get out of time, should pay the costs of the application unless the respondent's opposition was wholly unreasonable.[28]

[46] However, it is no more than a guiding principle ("the guiding indulgence principle")[29] that a successful applicant seeking an indulgence pays the costs of the respondent. This principle does not mandate that parties seeking an indulgence must pay the costs of the respondent.

[47] Consistent with the judicial discretion to award costs, instances where successful litigants are ordered to pay the respondents costs when seeking an indulgence, should not be viewed as propounding any inflexible rule. As Young CJ in Eq stated in *Fordham v Fordyce*:[30]

> "[50] Mr Simpkins, for the claimants, has put considerable store on what he has called "The Indulgence Principle", by which he means that, where a person seeks an indulgence of a court, that person should pay the

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25 Citing, for example, *X & Y v Pal (by her tutor X)* (1991) 23 NSWLR 26; *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

26 The defendants cite the following cases in support of such a proposition: *Cox v Mosman* [1908] St R Qd 210 at 214; *Golski v Kirk* (1987) 14 FCR 143 at 157 per Beaumont J, with whom Kelly J agreed; *Holt v Wynter* (2000) 49 NSWLR 128 at [121]; *Summit Chemicals Pty Ltd v Vetrotex Espana SA* [2004] WASCA 109 at [12] per E M Heenan J, with whom Miller J agreed; *The Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd (No 2)* [2007] NSWSC 797 at [6] per Young CJ-in-Eq; *Commonwealth of Australia v Lewis* [2007] NSWCA 127 at [94] per Beazley JA, with whom Santow and Ipp JJA agreed; *Amlaki FZ LLC v Pinnacle Network (Aust) Pty Ltd* [2008] FCA 1491 at [9] per Finkelstein J; *Helen Owen v Johnny Musladin (No 2)* [2010] ACTCA 24 at [24] per Refshauge J; *Emmanuel Tam Ezekiel-Hart v The Law Society of the Australian Capital Territory, Robert Reis, Larry King and Rod Barnett (No 2)* [2012] ACTSC 135 at [58] per Refshauge ACJ; *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 619 at [24]; *Correa v Whittingham (No 2)* [2013] NSWCA 471 at [56] per Gleeson JA, with whom Barrett JA and Tobias AJA agreed; *Director of Public Prosecutions for the Australian Capital Territory v The Honourable Acting Justice Brian Martin & Ors* [2014] ACTSC 154 at [4]; *GAIN Capital UK Limited v Citigroup Inc (No 3)* [2016] FCA 582 at [8] per Markovic J; *Day v Humphrey & Ors* [2018] QCA 321 at [9] per Morrison JA, with whom Philippides JA and Brown J agreed.

27 The defendants cite *Cox v Mosman* [1908] St R Qd 210 at 214 (following *Merry v Nicholls* (1873) LR 8 Ch 205 and *Cooper v Cooper* (1876) 2 Ch D 492).

28 *Holt v Wynter* (2000) 49 NSWLR 128 at 147-148 [121] per Sheller JA, with whom Handley JA and Brownie A-JA agreed.

29 Otherwise, the "guiding indulgence principle", or "the indulgence rule".

30 [2007] NSWCA 129 at [50]-[51] per Young CJ in Eq.

> opponent's reasonable costs unless the latter was based unreasonably. As I stated during argument, I doubt whether there is such an overarching principle. In saying this I do not doubt that in various standard situations, particularly in applications in the Equity Division, a person seeking a boon pursuant to statute or general rules of equity normally needs to pay the costs. However, I doubt whether one can conflate those cases into some overarching principle.
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> [51] Mr Simpkins relied on what Campbell J said in *Nardell Coal Corporation v Hunter Valley Coal Processing* (2003) 178 FLR 400 particularly at 435-436. However, the illustrations given by Campbell J in that case do not convince me that there is some usual principle which is applied unless it is inappropriate to do so in a particular case. It may be that there is such a principle in cases under the old Two Guinea Rule in equity where applicants seeking to modify restrictions imposed by restrictive covenants had to tender two guineas to the other side so the opposing solicitor could investigate the case. It may be that there is some standard guideline in the exercise of discretion in other cases, but I do not think one can say there is an overarching principle known as "The Indulgence Principle" which is to apply unless it is inappropriate."

[48] The Court will have regard to the extent to which it might be said that costs were unnecessarily incurred by a party, and will have regard to the reasonableness of the party's conduct in determining how costs should be awarded.[31]

[49] It is submitted by the first plaintiff that costs being awarded against parties seeking an indulgence is commonly applied on applications to amend a pleading or a court document. However, it has also been applied in applications for leave to take a step,[32] but not universally so.[33]

[50] In *Stanley v Layne Christensen Company*,[34] Wheeler JA explained how the guiding indulgence principle operates:

> "[52] The general rule is, and should remain, that where a party is seeking the indulgence of the Court, that party will be required to pay the costs of the application, including costs thrown away, and will not normally receive the costs of the application. However, it is also a normal rule that the Court will have regard to the extent to which it might be said that costs were unnecessarily incurred by a party, and will have regard to the reasonableness of the party's conduct in determining how costs should be awarded. In particular, where a contested application, even for an indulgence, is unnecessary because a party acting reasonably would have consented to appropriate orders, the party who has caused the costs to be

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31 *Stanley v Layne Christensen Company* [2006] WASCA 56 at [52] per Wheeler JA, with whom Steytler P and Pullin JA agreed.

32 See for example *Baviv Pty Ltd v J & R Cuda Pty Ltd* [2001] QSC 011 per Jones J; *Dempsey v Dorber* [1990] 1 Qd R 418 at 423 per Connolly J, with whom Carter and Moynihan JJ agreed.

33 See for example *Way & Anor v Primo Rossi Pty Ltd & Anor* [2018] QCA 203 per Brown J, with whom Morrison and Philippides JJA agreed; *Pennefather v Young Engineering Service Pty Ltd* [2003] QSC 432 per Mackenzie J.

34 [2006] WASCA 56 at [52]-[54] per Wheeler JA, with whom Steytler P and Pullin JA agreed.

> unnecessarily incurred will not obtain its costs of such a proceeding merely because the application is for some indulgence. That is implicitly recognised in *Briggs* at 14, where Owen and Parker JJ appear to accept that an unreasonable withholding of consent might form an appropriate basis for a ruling on costs which departed from the "normal rule" relating to indulgences. However, in that case their Honours considered that it could not be said that the other party was unreasonable to require that the proposed amendment be justified to the satisfaction of a judicial officer.
>
> [53] In the present case, the respondents set out in their case the detailed consultations between the parties which took place, apparently by agreement, which led to the parties being very clear, prior to the hearing, about the arguments which each sought to advance. They submit that in those circumstances efficient case management required the parties to make an informed decision as to whether or not to argue an issue, and that it would be contrary to the principles of efficient case management to permit a party to raise an objection and argue it, with the prospect of being able to recover its own costs of making the argument, even if unsuccessful, simply on the basis that the opposing party was seeking an indulgence.
>
> [54] No party advances any argument in opposition to the respondents' cross-appeal, and, in my view, it should be allowed, on the basis that the so-called "normal rule" as articulated in *Briggs* is but one of a number of guides to the appropriate orders which may be made in interlocutory applications. I would allow the appeal and set aside the Master's order as to costs."

[51] The paramount consideration in the Court's discretion to order costs is to do justice between the parties in the particular case, and the Court may have regard to the parties' conduct in connection with the litigation.[35]

[52] The first plaintiff submits that it is not appropriate to apply the guiding indulgence principle here because of the following considerations:

(a) The defendants unsuccessfully applied to dismiss the proceedings for want of prosecution. The defendants' application was neither defensive, nor induced by the first plaintiff's application for leave to proceed. Rather, their application was signalled in response to the transfer application,[36] well before the first plaintiff amended its application to seek, by way of further relief, leave to proceed "to the extent necessary". Not content to contest the transfer application and leave the proceeding to lie in the Supreme Court if it was unsuccessful, the defendants elected to take the additional, proactive step of applying to dismiss it *in universum*. That election was not connected with any question as to whether leave

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35 *Earnshaw v Loy (No 2)* [1959] VR 252 at 253 per Sholl J. See also *Furber v Stacey* [2005] NSWCA 242 at [119] per Einstein J, citing with approval *Howitt v W Alexander & Sons Ltd* [1948] SC 154 at 159 per Lord Russell.

36 The first plaintiff submits that the following documents support this contention: Affidavit of Michael John Sophocles filed 11 July 2019, exhibit MJS-1, p 91-92 (letter from Sophocles Lawyers to McBride Legal dated 9 July 2019) and the Affidavit of Michael John Sophocles filed 16 July 2019, exhibit MJS-2, p 9 (transcript of proceedings dated 11 July 2019, p 28-30).

depended on leave to proceed being granted.[37] Accordingly, the first plaintiff submits that these relevant circumstances further, and alone, render unsuitable the application of any indulgence rule.

(b) Given the matters in (a) above, the first plaintiff submits that the relative costs which the parties incurred in agitating their respective positions were not simply the product of the Club seeking a boon.

(c) Prior to the defendants' application, the first plaintiff submits that neither party had raised the progress of this proceeding in any forum (including in the Federal Court when the second defendant sought to sever the common issues from the trial of its claim). Moreover, the defendants' silence was as deafening as their inaction and mutual disinterest in this proceeding. Those matters appear to be distinguishing features which draw this case apart from any case which has applied the indulgence rule in successful applications for leave to proceed.

(d) Although the same considerations applied in each application, fairly viewed the only witness required for cross-examination was required by the defendants and was extensively examined in prosecution of their application.[38]

(e) The defendants contested leave to proceed (and prosecuted their application to dismiss the proceedings) even though, as the Court found:

    (a) This was not a case where no one had considered the issues in this proceeding for the last six years, as there are some overlapping issues raised in the Federal Court which were subject to short form pleadings.[39]

    (b) The litigation between the parties would not be concluded if leave was not granted due to the Federal Court trial listed in December of this year.[40]

    In respect of these issues, the first plaintiff submits that the defendants adopted the unreasonable position that they would suffer prejudice if this proceeding remained on foot, yet they remained content to defend the common facts and issues in the Federal Court[41] without complaint. The Court understandably found, in these circumstances, that the continuation of the proceedings would not involve injustice or unfairness to the defendants for the reason of delay.[42]

(f) The time taken and submissions made at the trial of the applications overwhelmingly concerned the dismissal and leave applications.

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37 The first plaintiff submits that the defendants' submissions do not explain why the defendants cross-applied to dismiss the proceedings. The first plaintiff submits that given that omission, those submissions divert attention from that real issue.

38 The first plaintiff submits that cross-examination was, largely, a direct attempt to diminish the Club's explanation for delay to secure a springboard, if not a direct gateway, to urge for dismissal of the proceedings.

39 The first plaintiff cites *Reasons* at [119], [138].

40 The first plaintiff cites *Reasons* at [125], [131]. The plaintiff submits that the defendants' submissions relevantly omit the findings as to an absence of any real prejudice to them.

41 The first plaintiff cites *Reasons* at [131], [137]-[139], [161].

42 The first plaintiff cites *Reasons* at [140].

[53] The first issue to be resolved in this matter was whether leave was required. The first plaintiff submitted that leave was not required, however, the defendants submitted that *Ghosh* was binding and leave was required. I agreed with the defendants' position. Submissions on this issue took up some time at the hearing.

[54] The next issue was whether leave should be granted.

[55] The first plaintiff sought an indulgence from the Court, in circumstances where there had been a nearly six year delay and I had some concerns about the first plaintiff's explanation for this delay.

[56] I accept that, in the circumstances, the approach taken by the defendants was reasonable. Cross-examination of the first plaintiff's solicitor was focussed and highlighted some issues about the explanation for the delay. I was not particularly impressed with the evidence for the explanation of the delay as provided by the first plaintiff's solicitor in circumstances where effectively it was second-hand evidence that could have been provided by a director of the first plaintiff.[43]

[57] After considering all of the relevant issues, I was of the view that leave should be granted. I was satisfied that, in all of the circumstances, the continuation of the proceedings would not involve injustice or unfairness to the defendants for the reason of the delay.

[58] In my view, in relation to the leave issue, it could not be said that the defendants' conduct was "wholly unreasonable".[44]

[59] In my view, the first plaintiff should pay the defendants' costs of the leave application (the first event) as:

1. The first plaintiff:

   (a) unsuccessfully argued that it did not require leave pursuant to r 389(2) as a precursor to bringing the transfer application; and

   (b) was seeking an indulgence from the Court in circumstances where nearly six years had elapsed since the last step taken in the proceedings and that the first plaintiff came to the court with a less than satisfactory explanation for the delay.

2. In all of the circumstances the defendants' opposition to the granting of leave to the first plaintiff was not "wholly unreasonable".[45]

The defendants' application to dismiss or permanently stay the proceeding

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43 *Reasons* at [130].

44 *Holt v Wynter* (2000) 49 NSWLR 128 at 147-148 [121] per Sheller JA, with whom Handley JA and Brownie A-JA agreed.

45 *Holt v Wynter* (2000) 49 NSWLR 128 at 147-148 [121] per Sheller JA, with whom Handley JA and Brownie A-JA agreed.

[60] The first plaintiff submits that courts have previously ordered defendants cross-applying to dismiss proceedings for want of prosecution to pay the plaintiff's costs.[46]

[61] Although the defendants filed an (amended) application to dismiss or permanently stay the proceeding, which was dismissed, in my view this application does not require the making of any separate order as to costs. That is because the arguments in support of that application were largely identical to the defendants' arguments as to why the Club should not be granted leave under r 389(2).

[62] The defendants' counsel readily acknowledged at the hearing if I found in favour of the first plaintiff's application, then the defendants' application for dismissal will follow that event.[47] The focus at the hearing was on the first plaintiff's leave application to take a step.

[63] The first plaintiff acknowledges that given the overlapping evidence and considerations, the first plaintiff's application for leave to take a step and the defendants' unsuccessful application for dismissal are corollaries of one another. Once the leave application was determined, the dismissal application was able to be disposed of within the space of four lines in the judgment.[48]

[64] I accept that the dismissal application was part of the same legitimate response by the defendants to the indulgence being sought by the first plaintiff.

[65] In my view, the defendants' (amended) application to dismiss or permanently stay the proceeding did not add to the time or cost involved in the hearing on 30 July 2019.

[66] In my view, the defendants' application does not require the making of any separate order for costs.

Second event – the transfer application

[67] In relation to the first plaintiff's application to transfer the proceeding, the general rule that "costs follow the event"[49] should apply, because there are no circumstances requiring a departure from that general rule.

[68] The first plaintiff accepts that costs should follow this event.

[69] Accordingly, the first plaintiff should pay the defendants' costs of its unsuccessful transfer application.

The initial hearing before Mullins J

[70] On 11 July 2019, the proceeding came before Mullins J. By leave, the defendants filed their application to dismiss or permanently stay the proceeding, and the first plaintiff filed its amended transfer application. Mullins J also made an order setting the matter down for hearing on 30 July 2019.

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46 The first plaintiff cites *Dempsey v Dorber* [1990] 1 Qd R 418 at 423 per Conolly J, with whom Carter and Moynihan JJ agreed, and *Way & Anor v Primo Rossi Pty Ltd & Anor* [2018] QCA 203.

47 *Reasons* at [142].

48 *Reasons* at [142]-[143].

49 *UCPR* r 681; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67] per McHugh J, with whom Brennan CJ agreed.

[71] The defendants submit that the appropriate outcome is for the first plaintiff to pay all of the defendants' costs of the applications heard on 30 July 2019, and those costs should include the costs of the initial hearing before Mullins J on 11 July 2019.

[72] The defendants submit that the costs of the initial hearing before Mullins J on 11 July 2019 might be said, in familiar parlance, to be costs "of and incidental" to the hearing on 30 July 2019.

[73] The defendants refer to *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)*,[50] where Jackson J stated that "the inclusion of the words 'and incidental to' is at best unnecessary and at worst introduces confusion as to the operation of an order made without those additional words".[51] Although Jackson J declined in that case to make orders for costs of the relevant applications as orders for the costs "of and incidental to" the relevant application, his Honour said:[52]

> "To be clear, I do not intend that this should have the consequence that any costs actually, necessarily and reasonably incurred in relation to the application are not recoverable under the orders as made, including costs of preparation."

[74] The defendants submit that in this case, the costs of the hearing on 30 July 2019 include the costs necessarily incurred in relation to the initial hearing before Mullins J on 11 July 2019. That is because costs incurred in relation to the initial hearing on 11 July 2019 were also costs incurred in relation to the applications which were ultimately heard on 30 July 2019.

[75] The defendants submit that it would be desirable, in the interests of clarity and certainty, for the costs order to make the position explicit.

[76] The hearing before Mullins J did not determine any matters in dispute between the parties. At that hearing, her Honour made directions and relevantly ordered that each parties' costs be costs in the proceedings.[53] The draft of this Order was prepared by the defendants.[54]

[77] It is noted that Mullins J made some amendments to this draft, however, no amendment to paragraph 6 (that each parties' costs be costs in the proceedings).

[78] I note, as per the order of Mullins J, that the defendants knew then that the applications would be determined in the Civil list on 30 July 2019, but nonetheless the draft Order contained a clause that the parties' costs be costs in the proceedings.

[79] In my view, the order should not be varied.

[80] In these circumstances, I am satisfied that the costs of the initial hearing before Mullins J should not be included in this costs order.

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50 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271.
51 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271 at [18] per Jackson J.
52 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271 at [21] per Jackson J.
53 Order made on 11 July 2019.
54 Affidavit of Michael Sophocles filed 16 July 2019 ex MJS-2 (transcript of proceedings dated 11 July 2019, p 12).

Whether any costs order should preclude enforcement until final judgment in the action

[81] The first plaintiff submits that if the Court considers it appropriate to order that the first plaintiff to pay any costs of the defendants on the question of leave to proceed, the appropriate order should preclude enforcement[55] of any costs order until final judgment in the action.[56]

[82] The first plaintiff submits that the first plaintiff has, at the hands of the defendants, suffered financial difficulties, including in the conduct of these proceedings.[57] Further, that the parties are involved in a trial listed for 12 days in the Federal Court, to commence on 2 December 2019.

[83] The first plaintiff submits that it is not unusual for such an order to be made on the basis that enforcement of those costs is precluded until final judgment in the proceeding and relies upon two New South Wales cases:

1. *Holt v Wynter* (2000) 49 NSWLR 128 at 148 [122] per Sheller JA.[58]

2. *Dibley v Sydney West Area Health Service* [2009] NSWSC 856 at [79] per James J.[59]

[84] It should be also noted that in those two New South Wales decisions, the Court did not find that the respondent acted unreasonably in resisting the application.[60]

[85] The first plaintiff does not rely on any Queensland decisions to support their submission that the appropriate order should preclude enforcement of any costs order until final judgment in the action.

[86] In these two New South Wales cases, there does not appear to be any reasoning or discussion as to why the order was framed in this way. I note, however, that r 42.7 of the *Uniform Civil Procedure Rules* 2005 (NSW) provides a presumed position that costs do not become payable until the conclusion of the proceedings:

> " … (2) Unless the court orders otherwise, costs referred to in subrule (1) do not become payable until the conclusion of the proceedings".

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55 The first plaintiff submits the order as to be cast as follows, "costs of the defendants' application be their costs in any event".

56 The first plaintiff cites *Holt v Wynter* (2000) 49 NSWLR 128 at 148 [122] in support, where Sheller JA, in allowing the appeal, proposed the orders as, *inter alia,* "Set aside order 1 made by Acting Judge Cantrill on 20 July 1998 but confirm order 2 that the plaintiff pay the defendant's costs of the application; such order 2 not to be enforced prior to final judgment in the action without the leave of the District Court; [...]").

57 The first plaintiff refers to the Affidavit of Robson filed 22 July 2019 [20(b)]-[20(g)(iv)], especially [20(g)(ii)].

58 (2000) 49 NSWLR 128 at 148 [122] where Sheller JA, in allowing the appeal, proposed the orders as, *inter alia,* "Set aside order 1 made by Acting Judge Cantrill on 20 July 1998 but confirm order 2 that the plaintiff pay the defendant's costs of the application; such order 2 not to be enforced prior to final judgment in the action without the leave of the District Court; [...]").

59 *Dibley v Sydney West Area Health Service* [2009] NSWSC 856 at [79] where James J stated "[...] I consider that I should make the further order which was made in *Holt v Wynter* that the costs order not be enforced prior to final judgment in the action, without the leave of the court."

60 *Holt v Wynter* (2000) 49 NSWLR 128 at 147-148 [121] per Sheller JA, with whom Handley JA and Brownie A-JA agreed.

[87] However, in Queensland, the position is different to New South Wales. Rule 682(2) of the *UCPR* provides that (emphasis added):

> "... (2) If the court awards the costs of an application in a proceeding, the court **may** order that the costs not be assessed until the proceeding ends."

[88] The defendants submit that this represents a different policy choice from that taken in other jurisdictions and has the consequence that a party seeking to depart from the presumed position must establish good reasons before such an order will be made, and where different jurisdictions have opted for starkly different alternatives, the choice must be viewed as a deliberate one, and one that powerfully informs the exercise of the discretion. I accept this submission.

[89] The defendants submit that in Queensland, an order that the costs of an application in a proceeding not be assessed until the proceeding ends is exceptional. The rule reflects an intention on the part of the legislature to discourage unnecessary applications and promote agreement.

[90] The defendants submit that the onus is on the first plaintiff to establish that the presumed position not apply.

[91] In the present case, the first plaintiff submits two reasons as to why the costs order should preclude enforcement until final judgment:

1. The first plaintiff has at the hands of the defendants, suffered financial difficulties, including in the conduct of these proceedings;[61] and

2. The parties are involved in a trial listed for 12 days in the Federal Court, to commence on 2 December 2019.

[92] In my view, even if I was satisfied of the first matter, I am not satisfied that these matters warrant an order that the costs not be assessed until the proceeding ends, so as to preclude enforcement after the final judgment in the action.

[93] Relevantly, and importantly in my view, the first plaintiff sought an indulgence of the Court after a nearly six year delay. The proceeding lay dormant for nearly six years before the first plaintiff sought to reactivate it. As noted in my judgment, I raised some concerns about the explanation provided by the first plaintiff as to this delay.

[94] Further, the applications heard by me on 30 July 2019 related to the determination of discrete or self-contained question(s), and any future determination by a trial judge of factual issues concerning claims and counterclaims will not alter the issues which I was required to decide in this application.[62]

[95] I will not exercise my discretion under r 682(2) to order that the costs not be assessed until after the proceeding ends.

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61 Affidavit of Robson filed 22 July 2019 (CFI # 52), paragraphs 20(b) - 20(g)(iv), especially 20(g)(ii).

62 *Davis v Perry O'Brien Engineering Pty Ltd (No 2)* [2016] QSC 285 at [8] per Applegarth J.

Summary

[96] In my view, the appropriate costs outcome is as follows:

Application/event	Appropriate costs outcome
The first plaintiff's application for leave to take a step in the proceeding (and the defendants' application to dismiss/stay the proceedings, which was a corollary of the first plaintiff's application).	The general rule is displaced. The first plaintiff (as a party seeking an indulgence) must pay the defendants' costs.
The first plaintiff's amended application to transfer the proceeding to the Federal Court.	The general rule applies. Costs follow the event. The first plaintiff must pay the defendants' costs.

Order for costs

[97] As such, the order for costs will be:

1. The costs of the applications heard on 30 July 2019 (but not including any costs incidental to the initial hearing before Mullins J on 11 July 2019) shall be paid by the first plaintiff to the first and second defendants and such costs shall be payable forthwith after they have been agreed or assessed.