SUPREME COURT OF QUEENSLAND

CITATION:	*Anderson v Pickles Auctions Pty Ltd* [2022] QSC 265
PARTIES:	**MARK DE LEIGE ANDERSON** (plaintiff) **v** **PICKLES AUCTIONS PTY LTD** ABN 32 003 417 650 (defendant)
FILE NO/S:	BS No 8418 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2022
JUDGE:	Cooper J
ORDER:	**1. The application filed by the plaintiff on 30 September 2022 is dismissed.** **2. The plaintiff pay the respondent's costs of and incidental to the application to be assessed on the standard basis if not agreed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – TAXATION AND OTHER FORMS OF ASSESSMENT – PARTICULAR ITEMS – COUNSEL FEES – NUMBER OF COUNSEL – TWO COUNSEL – where the plaintiff and respondent entered a release and discharge in relation to a claim arising from a work-related personal injury – where the parties were unable to reach agreement as to costs – where the court appointed a costs assessor – where the costs assessment concluded that counsel's fees were not an allowable outlay under the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) – whether the costs assessor erred in concluding that counsel's fees were not allowable in an assessment of costs – whether the costs assessor erred in concluding that the costs of two counsel should not be allowed – whether the court should exercise the discretion conferred by r 742 of the *Uniform Civil Procedure Rules 1999* (Qld) *Uniform Civil Procedure Rules 1999* (Qld), r 686, r 701, r

702, r 703, r 738, r 742
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 289, s 290A, s 292, s 310, s 311, s 312, s 313, s 314, s 315, s 316, s 325R, s 584
Workers' Compensation and Rehabilitation Regulation 2014 (Qld), reg 134, reg 135, reg 136, reg 137

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Australian Coal & Shale Employees' Federation v Commonwealth (1953) 94 CLR 621, cited
J & D Rigging Pty Ltd v Agripower Australia Ltd [2015] 1 Qd R 562; [2013] QCA 406, cited
Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd [2015] QSC 122, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Wassmuth; Ex parte Attorney-General (Qld) [2022] QCA 113, cited
Schweppes Ltd v Archer (1934) 34 SR (NSW) 178, cited
Stanley v Phillips (1966) 115 CLR 470, cited
Wiesac Pty Ltd v Insurance Australia Ltd (No 3) (2021) 7 QR 642; [2021] QSC 069, cited

COUNSEL: N Ferrett KC for the plaintiff
C Heyworth-Smith KC for the defendant

SOLICITORS: Turner Freeman Lawyers for the plaintiff
Cooper Grace Ward Lawyers for the defendant

[1] In this proceeding, the plaintiff claimed damages for personal injury arising from a work-related incident. The parties compromised the proceeding before trial.

[2] The terms of compromise were recorded in a document titled "Release and Discharge" entered into between the plaintiff, the defendant and WorkCover Queensland on 28 April 2021 (**Release**).[1] Those terms included that WorkCover would pay the plaintiff's costs of and incidental to the claim and proceeding calculated in accordance with Part 8, Division 2 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) (**Regulation**), as agreed by the parties or, failing agreement, as assessed.[2]

[3] The parties did not agree the calculation of the plaintiff's costs.

[4] Following application by the plaintiff, the court appointed[3] Ms Anne Campbell (**Assessor**) to assess the costs payable to the plaintiff pursuant to r 686(c) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**)[4] and the Release.

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1 Affidavit of Matthew James O'Keefe filed 3 December 2021 (Court document 23), Exhibit MJO-1.
2 Release, cl 2.1.
3 Court document 24.
4 Rule 686(c) provides that costs may be assessed without an order for assessment having been made if, under a filed written agreement, a party agrees to pay another party costs under the UCPR.

[5] The Assessor issued her certificate on 30 August 2022.[5] In assessing the costs payable to the plaintiff, the Assessor concluded that counsel's fees are not an allowable outlay under Part 8, Division 2 of the Regulation. The plaintiff submits that was a legal error.

[6] The Assessor also upheld objections to certain cost items on the basis that the costs of two counsel should not be allowed. The plaintiff also challenges that aspect of the assessment.

[7] The plaintiff has applied pursuant to r 742 of the UCPR to the court to review the assessment. That rule confers a discretionary power on the court to, among other things, vary the decision of the Assessor.

[8] The application raises the following issues for determination:

(a) whether the Assessor erred in concluding that counsel's fees were not allowable in an assessment of costs calculated in accordance with Part 8, Division 2 of the Regulation;

(b) if so, whether the Assessor further erred in concluding that the costs of two counsel should not be allowed;

(c) what, if any, order the court should make in the exercise of the discretion conferred by r 742 of the UCPR.

Power to review and vary the assessment

[9] Rule 742 of the UCPR provides:

> "(1) A party dissatisfied with a decision included in a costs assessor's certificate of assessment may apply to the court to review the decision.
>
> …
>
> (6) Subject to subrule (5), on the review, the court may do any of the following—
>
> (a) exercise all the powers of the costs assessor in relation to the assessment;
>
> (b) set aside or vary the decision of the costs assessor;
>
> (c) set aside or vary an order made under rule 740(1);
>
> (d) refer any item to the costs assessor for reconsideration, with or without directions;
>
> (e) make any other order or give any other direction the court considers appropriate.
>
> …"

[10] Where a party to a costs assessment contends that the assessor has proceeded on a wrong principle the court will always review the assessment for the purpose of

5 Court document 25.

determining the principle which should be applied. Where, however, the error is said not to be one of principle but in the manner of the exercise of a discretion the court will be reluctant to interfere and will generally only do so where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong.[6]

The reasons given by the Assessor

[11] Pursuant to a request made under r 738 of the UCPR, the Assessor provided written reasons for the decisions in her assessment for a number of specified items (**Reasons**).[7] The Reasons addressed, among other items, the following claims for the costs of counsel's fees:[8] items 47, 373, 374, 410, 411, 568, 667, 729, 730, 943, 944, and 945. Five of these items, namely items 373, 411, 729, 943, and 944 concerned fees paid to senior counsel briefed to act for the plaintiff. Seven of these items, namely items 47, 374, 410, 568, 667, 730, and 945 concerned fees paid to junior counsel briefed to act for the plaintiff.

[12] In the Reasons, the Assessor cited a general objection made by the defendant on the assessment which, after referring to regs 135 to 137 of the Regulation, stated:[9]

> "It will be noted immediately that had the outlays described in s 137 of the Regulation been recoverable but confined to before the proceeding started, they could easily have been included in s 135 or had they been confined to the period after the proceeding started, they could have been included in s 136.
>
> In accordance with the usual principles of statutory interpretation, the words of s 137 are to be given their primary and natural significance. There are no words of qualification to limit the outlays provided for in s 137 to the period either before or after a proceeding is started. Indeed, s 137(2)(a) specifically qualifies reports in subss 1(a) to (d) by confining them to the period 'before the start of the proceeding'.
>
> Fees incurred in subss (e) to (i) are not so qualified. Obviously the reference to a mediator in subs 1(g) clearly refers to a period after a proceeding is started.
>
> Clearly the purpose of s. 137 is to limit the outlays to those specifically described. Any outlay not described in s. 137 is not to be allowed. The purpose of these limitations is to limit the costs payable by the statutory insurer. On a proper interpretation, the provisions of s 137 of the Regulation refers to outlays both before and after a proceeding is started, subject however to the limitations contained in s 137(2)."

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6 *Schweppes Ltd v Archer* (1934) 34 SR (NSW) 178 at 183-184; applied in *Australian Coal & Shale Employees' Federation v Commonwealth* (1953) 94 CLR 621 and *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2015] QSC 122 at [8]-[10].

7 Affidavit of Patrick Pollock filed 30 September 2022 (Court document 27), Exhibit PP-1.

8 In circumstances where item 47 was for work performed by junior counsel before the proceeding was started, the defendant did not submit the Assessor's decision to disallow that item was an error: see Defendant's outline of submissions at [37].

9 Reasons at page 11.

[13] The Assessor accepted that objection meant counsel's fees should be excluded from the assessment on the basis that those fees did not come within the outlays the plaintiff was entitled to recover under reg 137 of the Regulation. The explanation for that decision can be seen in the following part of the Reasons addressing item 373:[10]

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

[14] A similar explanation was set out in the Assessor's reasons for upholding the defendant's objections to each of the items referred to in [11] above which claimed counsel's fees.

Part 8, Division 2 of the Regulation

[15] The proper approach to statutory construction requires that the court's consideration focus on the text of the relevant provisions, in context.[11] The task must begin with a consideration of the text itself, although the meaning of the text may require consideration of the context, which includes the general purpose and policy of the provisions.[12]

[16] Part 8 of the Regulation is titled "Costs".

[17] Division 2 of Part 8 is titled "Claim for damages". It applies, relevantly, to a claim made by: [13]

(a) a worker who has a degree of permanent impairment of 20% or more;

(b) a worker who has a terminal condition; or

(c) a dependent.

[18] The legal professional costs of a claim before a proceeding is started are prescribed by reg 135. That regulation provides a method of calculating the amount of legal

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10 Reasons at pages 54-55.

11 *R v Wassmuth; Ex parte Attorney-General (Qld)* [2022] QCA 113 at [26] applying *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

12 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47.

13 See reg 134.

professional costs by reference to fixed amounts set out in Schedule 6 of the Regulation for specified steps undertaken before the proceeding is commenced.[14] The amount of costs calculated will vary depending on the amount of net damages the worker recovers.[15] The regulation can apply in circumstances where the claim has been settled,[16] or in circumstances where the claim has been determined and the court awards the payment of legal costs.[17]

[19] The legal professional costs of a claim after a proceeding is started are prescribed by reg 136 which provides that those costs are chargeable under the relevant scale of costs for work done for or in a proceeding in the court.[18] Those costs will not include the cost of work performed before the proceeding is started,[19] or the cost of work performed before the proceeding is started that is performed again after the proceeding is started.[20] In this proceeding the relevant scale of costs for the purposes of reg 136 is that set out in Schedule 1 of the UCPR. That scale of costs does not provide for the payment of counsel's fees.

[20] The critical provision in Part 8, Division 2 of the Regulation is reg 137 which addresses outlays. It provides:

> "(1) In addition to legal costs, the following outlays incurred by the claimant are allowed—
>
> (a) 1 hospital report fee for each hospital that treated the worker's injury;
>
> (b) 1 report fee for each doctor in general practice who treated the worker's injury;
>
> (c) 1 medical specialist's report fee for each medical discipline reasonably relevant and necessary for the understanding of the worker's injury;
>
> (d) 1 report fee of an expert investigating liability, of not more than $1,000, less any proportion of the fee agreed to be paid by the insurer;
>
> (e) Australian Taxation Office or tax agents' fees for supplying copies of income tax returns;
>
> (f) fees charged by the claimant's previous employers for giving information necessary for the claimant to complete the notice of claim, but not more than $50 for each employer;

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14 The steps for which costs are recoverable by reference to Schedule 6 are: pre-proceeding notification and negotiation; compulsory conference; investigation by expert; and pre-proceeding court applications.

15 See reg 135(2)-(4). "Net damages" means the damages recovered by the worker less compensation paid to the worker by an insurer and required to be refunded to that insurer: reg 135(6).

16 See reg 135(2)(a).

17 See reg 135(5).

18 See reg 136(2).

19 See reg 136(3)(a).

20 See reg 136(3)(b).

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

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

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

(2) The fees—

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

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

[21] Part 8 of the Regulation was made pursuant to s 584 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (**Act**), which provides that the Governor in Council may make regulations under the Act providing for anything specified in Schedule 1 of the Act. That includes, in item 12 of Schedule 1, costs "including costs before or after a proceeding is started, and the type and amount of costs that may be claimed by or awarded to a claimant during any stage before or after the start of a proceeding".

[22] It is necessary to refer to the provisions of Chapter 5, Part 12 of the Act, which also address the costs of personal injury claims and, consequently, form part of the statutory context of Part 8, Division 2 of the Regulation.

[23] The provisions in Chapter 5, Part 12 of the Act only apply in circumstances where a proceeding has gone to trial and a court has determined the claim.[21] Chapter 5, Part 12, Division 1 applies to the same types of claims as come within Part 8, Division 2 of the Regulation: that is, claims made by a worker who has a degree of permanent impairment of 20% or more, a worker who has a terminal condition or by a dependent.[22] Chapter 5, Part 12, Division 2 provides for different cost consequences in other claims.[23]

[24] Chapter 5, Part 12, Division 1 provides for two different costs orders by reference to a comparison of the outcome of the proceeding and written final offers the parties must make if the claim is not settled at a compulsory conference prior to the commencement of a proceeding.[24]

[25] First, where the claimant makes a written final offer that is not accepted by the insurer and the court later awards an amount of damages to the claimant that is

21 See ss 311, 312(1)(b), 313(1)(b) and 316(2)(a)-(b) of the Act.

22 See s 310 of the Act.

23 See s 315 of the Act.

24 See ss 289(1) and 292(2) of the Act.

equal to or more than the written final offer then the court must order the insurer to pay the claimant's costs, calculated on the indemnity basis.[25]

[26] Secondly, if the insurer makes a written final offer that is not accepted by the claimant and the court later dismisses the claim, makes no award of damages or makes an award of damages that is equal to or less than the insurer's written final offer then the court must order the insurer to pay the claimant's costs, calculated on the standard basis, up to and including the day of service of the written final offer and order that the claimant pay the insurer's costs, calculated on the standard basis, after the day of service of the written final offer.[26]

[27] The Act does not define what is meant by the terms "indemnity basis" and "standard basis". The defendant submitted[27] that these expressions bear the meanings given to them in the UCPR.[28]

[28] Further, Chapter 5, Part 12, Division 1 of the Act does not prescribe what costs order should be made in circumstances where, in a claim to which the division applies, a court makes an award of damages in an amount which is less than a claimant's final written offer but more than an insurer's final written offer. This is surprising given that the cost consequences of such an outcome is a matter that a party's lawyer must address in a financial statement provided to the party before a compulsory conference.[29]

Are counsel's fees part of the plaintiff's costs calculated in accordance with the Part 8, Division 2 of the Regulation?

[29] This question turns on a consideration whether the text of the relevant provisions, considered in context, confers an entitlement on the plaintiff to recover counsel's fees as part of his costs.

[30] Regulation 135 provides a method for calculating legal professional costs of the claim incurred before the proceeding started. Those costs can only be claimed in the fixed amount calculated in accordance with the terms of the regulation and by reference to the work specified in Schedule 6 of the Regulation: that is, pre-proceeding notification and negotiation; compulsory conference; investigation by expert; and pre-proceeding court applications. Although a party might incur counsel's fees in respect of such work, particularly pre-proceeding court applications, there is nothing in the text or context of reg 135 to indicate an entitlement to recover counsel's fees as a separate item.

[31] Nor does the text of reg 136 provide a basis for the recovery of counsel's fees as part of the legal professional costs of the claim incurred after a proceeding is started in this court. The words of reg 136 require that those costs be assessed in accordance with the scale of costs set out in Schedule 1 of the UCPR which, as already noted, does not provide for the payment of counsel's fees.

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25 See s 312 of the Act.
26 See s 313 of the Act.
27 Defendant's outline of submissions at [26](e) and (f).
28 See rr 701 to 703 of the UCPR.
29 See ss 290A(1)(d), 290A(2)(e) and 290A(3)(d)(ii) of the Act.

[32] There is then the question whether any costs or outlays may be recovered under reg 137, beyond those specifically identified in regs 137(1)(a) to (i).

[33] The plaintiff submits that the text of reg 137 suggests it is intended to allow recovery of certain identified costs rather than to prohibit items not mentioned in regs 137(1)(a) to (i).[30] That submission can be accepted, but it does not assist in establishing a basis within Part 8, Division 2 of the Regulation for a claimant's entitlement to recover counsel's fees.

[34] The only indication of an entitlement to recover counsel's fees which might be found in the text of reg 137 comes in the opening words of reg 137(1): "In addition to legal costs …". That is, if the term "legal costs" is construed broadly as including counsel's fees as well as solicitor's fees, then reg 137(1) should be understood as entitling the claimant to recover the various outlays identified in regs 137(1)(a) to (i) as well as legal costs (including counsel's fees).

[35] There are two difficulties with this argument.

[36] First, although the term "legal costs" is not defined for the purposes of reg 137, a plain reading of the opening words of reg 137(1) in the context of the other provisions of Part 8, Division 2 of the Regulation suggests that the term has been used to refer to the legal professional costs recoverable under regs 135 and 136. This construction is consistent with:

(a) the positioning of reg 137 directly after regs 135 and 136; and

(b) the subject matter of reg 137, being outlays as distinct from legal professional costs.

[37] There is no apparent reason why, despite the lack of consistency in the terms used, the reference to "legal costs" in the opening words of reg 137(1) should be understood as including any costs beyond the "legal professional costs" recoverable under regs 135 and 136.

[38] Secondly, as was recognised in the plaintiff's submissions,[31] counsel's fees are usually described as an "outlay" on an assessment of costs. The plaintiff sought to address this difficulty by submitting that the term "legal costs" is not used in a consistent manner in the Act or the Regulation and, for that reason, it should not be presumed that the term has been used in a technical or legal sense in reg 137(1) to exclude counsel's fees.[32]

[39] There is force in that submission. The plaintiff referred to the use of the term "legal costs" in s 290A of the Act. That section provides for a compulsory conference to be held before a proceeding is commenced. As noted in [28] above, it requires, among other things, that the lawyer for a party provide a financial statement to that party. The financial statement must include details of "legal costs" already incurred and an estimate of the party's "likely legal costs" to be incurred in the future. The clear purpose of the financial statement is, as the plaintiff submitted,[33] to ensure that

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30 Plaintiff's outline of submissions at [13].
31 Plaintiff's outline of submissions at [15].
32 *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2015] 1 Qd R 562 at 567 [13].
33 Plaintiff's outline of submissions at [28].

the party receiving it is fully informed of the degree of risk it would assume by rejecting any terms of compromise. To achieve that purpose, the term "legal costs" in s 290A should be understood to include counsel's fees. The defendant accepted as much.[34]

[40] The plaintiff also referred to s 325R of the Act which prohibits a person from paying consideration to another person for referring claims or potential claims. There is an exclusion in s 325R(3) where a law practice sells all or part of its business to another law practice and the amount paid for the referral of a claimant to the new practice is not more than the "current legal costs" of the claimant. In that context, s 325R(4) defines "legal costs" for the purpose of the section as meaning "the fees and costs, including disbursements, a law practice is entitled to charge and recover from the claimant …". This section was recently introduced into the Act[35] as part of a number of reforms directed to preventing claims farming. In my view, it offers no assistance in construing reg 137 of the Regulation.

[41] It is also possible to identify a lack of consistency in the use of the term "legal costs" and similar expressions in the Regulation.

[42] Part 8, Division 1 of the Regulation concerns the costs of a proceeding before an industrial magistrate or the industrial commission. In that context, reg 132(2)(a) provides that, in the event the magistrate or commission exercises the discretion to award costs, costs in relation to "counsel's or solicitor's fees" are as set out under Schedule 2, Part 2, Scale C of the UCPR. That is the scale of costs for the Magistrates Court. Unlike Schedule 1 of the UCPR, it prescribes fixed amounts to be paid as costs for various items, including counsel's fees to undertake specified tasks.

[43] Within Part 8, Division 2 of the Regulation, in addition to the lack of consistency between the term "legal professional costs" used in regs 135 and 136 and "legal costs" used in reg 137, there is an internal inconsistency within reg 135. Although reg 135(1) refers to "legal professional costs" of a claim before a proceeding is started, reg 135(5) refers to a court in the proceeding awarding the payment of "legal costs".

[44] Having regard to the lack of consistency in the various terms used to refer to a claimant's costs in the Act and the Regulation, I accept that it should not be presumed that the term "legal costs" has been used in reg 137(1) in a technical or legal sense to exclude counsel's fees. Nevertheless, that conclusion does not displace the meaning of "legal costs" on a plain reading of the opening words of reg 137(1) as explained in [36] above. Nor does such a conclusion, of itself, assist in establishing a basis within Part 8, Division 2 of the Regulation for a claimant's entitlement to recover counsel's fees on an assessment of costs.

[45] The plaintiff's submissions placed considerable emphasis on an argument going to context, namely that the result of the Assessor's decision, if taken to its logical conclusion, would be that a worker who pursues a claim to which the provisions of Chapter 5, Part 12, Division 1 of the Act and Part 8, Division 2 of the Regulation

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34 Defendant's outline of submissions at [28].

35 By operation of the *Personal Injuries Proceedings and Other Legislation Amendment Act 2022* (Qld).

apply could never recover counsel's fees, even after total success at trial.[36] This result, the plaintiff submitted, was plainly absurd and manifestly unfair.[37]

[46] Based on its submission that the terms "indemnity basis" and "standard basis" bear the meanings given to them in the UCPR (see [27] above), the defendant argued that a worker in that position would have beaten his or her final written offer and, for that reason, have an order of indemnity costs (including counsel's fees) in his or her favour.[38] The defendant expressly disavowed an argument that reg 137 of the Regulation operated to limit the assessment of costs under a court order on either the standard basis or the indemnity basis so as to exclude counsel's fees from the assessment.[39] To the contrary, the plaintiff submitted that reg 137 (as well as reg 135), augmented the relevant provisions of the UCPR by conferring an entitlement to recover certain costs incurred before the proceeding is started which might not be recovered under an order for costs assessed on the standard basis under r 702 or on the indemnity basis under r 703 of the UCPR.[40]

[47] That submission by the defendant is difficult to reconcile with the Assessor's statement in the Reasons that the provisions of Part 8, Division 2 of the Regulation "override" the provisions of the UCPR (see the extract in [13] above). Senior counsel for the defendant did not seek to support that aspect of the Assessor's decision during oral submissions.[41]

[48] Notwithstanding the difference between the Assessor's statement and the submissions advanced by the defendant, I accept that the operation of the provisions of Chapter 5, Part 12, Division 1 of the Act avoids the absurdity or unfairness which the plaintiff submitted would result from a construction which does not allow a claimant to recover counsel's fees under Part 8, Division 2 of the Regulation. That is, such a construction would not operate to exclude counsel's fees from the assessment of a plaintiff's costs under an order of the court that those costs be paid on the indemnity basis under s 312 of the Act.[42]

[49] Whether a construction which does not allow a claimant to recover counsel's fees under Part 8, Division 2 of the Regulation is the proper construction can be tested by considering how those provisions would operate when a proceeding has progressed to judgment but where no costs order has been made under either ss 312 or 313 of the Act so as to engage either of the bases of assessment prescribed under the relevant rules in the UCPR. Although, as the defendant submits,[43] the provisions of Part 8, Division 2 of the Regulation have force in the circumstances of this case due to cl 2.1 of the Release, the construction of those provisions should be the same whether costs are being assessed after a proceeding has progressed to

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36 Plaintiff's outline of submissions at [10], [14] and [22].

37 Plaintiff's outline of submissions at [23], [24] and [32].

38 Defendant's outline of submissions at [14] and [26](f)-(h); Transcript 1-13:21-38.

39 Transcript 1-21:30 to 1-22:9; 1-22:42 to 1-23:6.

40 It should be noted that r 701 provides that Chapter 17A, Part 2, Division 2 of the UCPR which contains rr 702 and 703 applies to costs "in a proceeding".

41 Transcript 1-23:37 to 1-24:2.

42 Nor would such a construction operate to exclude counsel's fees from the assessment of a plaintiff's costs under an order of the court that those costs be paid on the standard basis as provided for in s 316(2)(a) if the claim is one which comes within Chapter 5, Part 12, Division 2 of the Act.

43 Defendant's outline of submissions at [20]-[21].

judgment (but where the principles set out in ss 312 to 314 of the Act are not engaged) or costs are being assessed after a settlement.

[50] The provisions of Part 8, Division 2 of the Regulation would apply independently of an order made under Chapter 5, Part 12, Division 1 of the Act if, in a claim to which those provisions apply, a court made an award of damages in an amount less than a claimant's final written offer but more than an insurer's final written offer.[44] In that case, an assessment of the claimant's entitlement to costs could only be performed by reference to the provisions of Part 8, Division 2 of the Regulation.

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

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

(a) if the court awards an amount of damages to the claimant that is equal to or more than the claimant's final written offer then the court must order that the insurer pay the claimant's costs on the standard basis from the day of the final written offer;[45] but

(b) if the court awards an amount of damages that is less than the claimant's final written offer, but more than the insurer's final written offer then each party must bear its own costs.[46]

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

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

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44 Notwithstanding what is said in s 311 of the Act, an award of damages falling between the two final written offers would not engage the principles in ss 312 to 314 of the Act.

45 See s 316(2)(a) of the Act.

46 See s 316(3) of the Act.

[55] In these circumstances I have concluded that, on the proper construction of the provisions of Part 8, Division 2 of the Regulation, a claimant is not entitled to recover counsel's fees as part of his or her costs calculated in accordance with those provisions. On that basis, I am not satisfied that, in assessing the plaintiff's costs of and incidental to the claim and proceedings calculated in accordance with Part 8, Division 2 of the Regulation, the Assessor erred by excluding counsel's fees from the assessment. I have reached that conclusion notwithstanding that I consider the Assessor's statement that the provisions of Part 8, Division 2 of the Regulation "override" the provisions of the UCPR to be an error. On the construction of Part 8, Division 2 of the Regulation which I have accepted as the proper construction that error did not affect the outcome of the assessment.

[56] It follows from this that the plaintiff's application should be dismissed.

The costs of two counsel

[57] In case this construction of Part 8, Division 2 of the Regulation is incorrect, I will deal with the parties' submissions on the costs of two counsel.

[58] There was no disagreement between the parties as to the principles which apply in determining whether the costs of two counsel should be allowed.

[59] The authorities which have stated those principles have involved assessment of costs on the standard basis: that is, the relevant test is whether costs are necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed. The parties did not submit that a different test should be applied on an assessment under Part 8, Division 2 of the Regulation.

[60] Whether the cost of two counsel meet the test of being necessary or proper must be assessed having regard to the nature and circumstances of the proceeding.[47] The question is whether the case by reason of any of its features made it reasonably necessary or proper that the services of two counsel be engaged in order that the court may do justice between the parties. Depending on the circumstances of the particular case, features which might make the engagement of two counsel reasonably necessary or proper may include: the volume of material to be handled; the number or character of the witnesses to be examined; the nature or extent of the cross-examination required; the anticipated length of the case; the complexity of its issues of fact or of law; the extent of the preparatory research of fact or of law to be undertaken; the involvement of charges of fraud, or other serious imputations of personal reputation or integrity; or the complexity of the required presentation.[48]

[61] In undertaking the assessment, the Assessor accepted the defendant's objection to allowing the costs of two counsel.[49] In support of that objection, the defendant identified the following factors as relevant to the exercise of the discretion:

(a) the length and depth of experience that junior counsel briefed for the plaintiff had in personal injury matters;

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47 *Wiesac Pty Ltd v Insurance Australia Ltd (No 3)* (2021) 7 QR 642 at 649 [15] and 650 [18]; applying *Stanley v Phillips* (1966) 115 CLR 470 at 478.

48 *Stanley v Phillips* (1966) 115 CLR 470 at 479-480; applied in *Wiesac Pty Ltd v Insurance Australia Ltd (No 3)* (2021) 7 QR 642 at 650 [17] and 658 [49].

49 This general objection was set out at pages 12-13 of the Reasons.

(b) that the defendant had admitted liability well before the plaintiff briefed senior counsel;

(c) that the matter settled for the sum of $775,000 prior to trial;

(d) that the trial, if it had proceeded, was set down for two days;

(e) that the plaintiff intended to call only five witnesses: himself, an orthopaedic surgeon; an occupational therapist and two lay witnesses.[50]

[62] For his part, the plaintiff submitted on this application that the following matters, identified by reference to the agreed list of issues and the defence, warranted the engagement of both senior and junior counsel:[51]

(a) the parties' dispute over:

(i) the seriousness of the plaintiff's injuries;

(ii) the plaintiff's employment prospects from January 2016 onwards;

(iii) whether the plaintiff's medical condition would have affected his capacity to work in an identified category of employment;

(iv) whether the plaintiff was likely to have continued in that category of employment into the future and the future earnings he would have gathered;

(b) although negligence was admitted in the defence:

(i) causation was denied;

(ii) alternatively, particular integers of causation were put in issue;

(iii) the defendant alleged that a range of unrelated conditions had contributed to the plaintiff's difficulties, such difficulties being said by the plaintiff to be attributable to the injury the subject of the proceeding.

[63] In upholding the objection to allowing the costs of two counsel, the Assessor exercised a discretion. There is no suggestion that, in exercising that discretion, the Assessor acted upon a wrong principle. In those circumstances, the plaintiff must demonstrate that the exercise of the discretion was manifestly wrong (see [10] above).

[64] A decision which was not open to the Assessor on the facts before her, or was not within her lawful discretion, will be manifestly wrong. In determining whether the Assessor's decision is manifestly wrong, the court does not substitute its own opinion. Instead, having regard to the decision itself, the material before the Assessor as well as the circumstances relevant to the exercise of the discretion, the court determines whether the decision reveals an exercise of discretion that is manifestly wrong.[52]

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50 The objection stated that one of these lay witnesses was expected to give evidence for 45 minutes and the other for 15 minutes.

51 Plaintiff's outline of submissions at [44]-[49].

52 *Wiesac Pty Ltd v Insurance Australia Ltd (No 3)* (2021) 7 QR 642 at 658 [48]-[49].

[65] Approaching the matter on that basis, I am not satisfied that the plaintiff has established that the Assessor's decision to uphold the objection to allowing the costs of two counsel constituted an exercise of discretion that was manifestly wrong.

[66] Even if the court was required to exercise the discretion afresh, I am not satisfied that the matters identified by the plaintiff demonstrate that the cost of engaging two counsel was necessary or proper for the attainment of justice or for enforcing the rights of the plaintiff.

[67] I accept the defendant's submission that the matters identified by the plaintiff as warranting the engagement of both senior and junior counsel arise in many personal injury proceedings.[53] While those matters can sometimes lead to complexity, neither the material read on the application nor the plaintiff's submissions addressed any of the matters in sufficient detail to establish that this particular case involved a degree of complexity that warranted the engagement of both senior and junior counsel in the circumstances of the proceeding.

[68] On that basis, and having regard to the defendant's submission to the Assessor that, in the event the objection to allowing the costs of two counsel was upheld, it would be appropriate to allow the costs of senior counsel without a junior,[54] the following items would (subject to what I say about other objections upheld by the Assessor) be allowed in the event that the construction of Part 8, Division 2 of the Regulation set out above is incorrect: items 373, 411, 568, 667, 729, 943 and 944.

Other objections upheld by the Assessor

[69] In addition to upholding the two objections which the plaintiff has challenged on this application, the Assessor also upheld other objections to two of the items referred to in [68] above. Those items, and the further objections which the Assessor upheld in respect of them, are:

(a) item 667: an objection to the reasonableness of the amount of the fees charged by junior counsel;[55]

(b) item 944: an objection to allowing payment of a cancellation fee to counsel on an assessment of costs as between parties (as distinct from an assessment of costs as between a solicitor and a client).[56]

[70] The plaintiff did not challenge the Assessor's decision to uphold those objections. There is no suggestion that in exercising her discretion to uphold those objections that the Assessor acted upon a wrong principle. Nor has the plaintiff shown, or attempted to show, that the decision to uphold those objections reveals an exercise of discretion that is manifestly wrong.

[71] For those reasons, had I otherwise concluded that this was an appropriate case in which to exercise the discretion under r 742 of the UCPR to vary the decision of the

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53 Defendant's outline of submissions at [36]-[37].

54 See the Reasons at page 13.

55 See objection number 95 at pages 62-64 of the Reasons.

56 See objection number 146 at pages 70-72 of the Reasons.

Assessor, I would not have allowed item 944 and I would only have allowed item 667 in the amount of $990.[57]

Disposition of the application

[72] The orders will be:

(a) The application filed by the plaintiff on 30 September 2022 is dismissed.

(b) The plaintiff pay the respondent's costs of and incidental to the application on the standard basis if not agreed.

57 The outcome of the Assessor upholding objection number 95 is that the amount that would be allowed for item 667 would be two hours at an hourly rate of $450 plus GST.