

COSTS ASSESSORS ANNUAL SEMINAR

20 June 2015

CASE MANAGEMENT ISSUES IN COSTS APPEALS

J C Gibson DCJ¹

District Court of New South Wales

The assessment of costs is intimately interconnected with the jurisdiction of Courts, and resembles the judicial process in some respects, in that it requires the costs assessor and Review Panel members to determine all anterior questions necessary to make their determination². An effective method of costs assessment is an essential part of the delivery of justice: *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103 at 106.

Many of the problems costs assessors encounter in conducting a costs assessment are familiar problems to judges, in that they relate to how proceedings are conducted. Sudden appellate reversals of time-honoured assessment practices (*Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674), litigants who want to continue the fight into the assessment process, and major changes to legislation combine to make the job of the judge hearing a costs appeal – like that of the costs assessor preparing his or her assessment - a difficult one.

Concern about the vastness of documentation and changes to the legislation concerning costs issues may not be new³, but it is clear that the complexities of assessment have been increasing since the abolition of scale fees in 1994. While costs assessors are now largely left to determine the “reasonableness” of fees on a case by case basis and from their own experience⁴, a job they are doing well in that the majority of costs appeals are unsuccessful⁵, they will do so in the context of legislation which will be, after the July 1 amendments, one of the largest and most complex pieces of legislation in Australia, namely the *Amendment of Legal Profession Uniform Law Application Act 2014* (NSW).

Costs assessors also carry out their task in an atmosphere of increased public scrutiny of lawyers allegedly charging unduly high legal costs⁶. With the advent of the Internet and

¹ Judge, District Court of New South Wales. This paper has been revised to include *Boris Reznitsky v District Court of New South Wales & State of New South Wales* [2015] NSWCA 194.

² *Report of the Chief Justice’s Review of the Costs Assessment Scheme*, Supreme Court of NSW, 7 September 2011 (hereafter referred to as “The Chief Justice’s Report”), at [3.10.12] – [3.10.13].

³ In *Hughes Tool Co v Trans World Airlines* (1972) 409 US 363, 393, Supreme Court Chief Justice Burger labelled the 1.7 million documents (694 feet of shelf space) and 10-foot high briefs “the twentieth-century sequel to *Bleak House*”, noting that 56,000 lawyers’ billing hours added up to \$7.5 million.

⁴ S Shaw, “The Assessment of Disputes about Legal Costs: a comparative analysis of Western Australia and New South Wales regimes”, July 2013, p. 31 (<http://researchrepository.murdoch.edu.au/22488/2/02Whole.pdf>).

⁵ S Shaw, *ibid*, p. 130.

⁶ See, for example, Jennifer Cooke, “Lawyers to face scrutiny on fees”, *Sydney Morning Herald*, <http://www.smh.com.au/national/lawyers-to-face-scrutiny-on-fees-20090415-a7ji.html>; “Lavish legal costs leave trail of unhappy clients” <http://www.theherald.com.au/story/840222/lavish-legal-costs-leave-trail-of->

social media, criticisms of this nature no longer face the limitations of traditional news sources. The result is that the legal profession in general is more accountable, and that there is pressure on courts, including costs assessors, to deliver justice which is “just, quick and cheap” (s 56 *Civil Procedure Act* 2005 (NSW)) in the public eye, as well as to the parties involved.

In litigation, the avoiding delay and expense is generally a case management issue, requiring timetables and sanctions such as costs orders for non-compliance. Although the costs assessment process is of an administrative rather than an adversarial nature, do judges and costs assessors have common problems of a case management nature and, if so, what advice can we give to one another about efficient disposal of case management-related issues?

There are two aspects to this problem – how judges should case-manage costs appeals, and how costs assessors should manage the submission process which is part of the assessment of costs. This paper is therefore divided into two parts:

- **Case management issues for judges dealing with costs appeals;**
- **Case management issues encountered by assessors as well as judges.**

I shall first set out some background for each of these two categories of case management issues, and then consider examples of case management-related problems in costs appeals arising from recent decisions, principally in the District Court of New South Wales.

Judges and case management of costs appeals

Judges need to be aware of case management requirements for costs appeals that may not apply to other forms of litigation. The undesirability of “satellite litigation” (*Lemoto v Able Technical & 2 Ors* (2003) 63 NSWLR 300) and of a victory in court becoming Pyrrhic due to costs issues are obvious.

There are no doubt many examples of costs appeals judicial case management issues which costs assessors would like to be examined, but I have restricted my observations to three particular areas:

- (a) **Proportionality of costs and lump sum costs orders on costs appeals.**
- (b) **Applications to the court for a costs assessor to recuse himself/herself for bias.**
- (c) **Should there be a specialist list for costs appeals, which can deal with costs appeals generally, as well as related issues?⁷ How should judgments (especially from the District Court) be made more generally available?**

I have discussed these three issues at pages 6 – 11 below.

These case management issues, insofar as they relate to how judges conduct costs appeals, are uncontroversial. However, what has case management got to do with the costs assessment

[unhappy-clients/](http://www.theherald.com.au/story/840222/lavish-legal-costs-leave-trail-of-unhappy-clients/); “Keddies client charged for saying thanks” <http://www.theherald.com.au/story/840222/lavish-legal-costs-leave-trail-of-unhappy-clients/>.

⁷ See the Chief Justice’s Report at [3.10] ff.

process? I shall next briefly outline the case management issues discussed in the second half of this paper.

Costs assessors and case management

Successful business management by legal practitioners requires efficient billing. Time billing (and thus efficient case management of litigation) is derived from business management theories⁸ intended for the purpose of conducting competitive private enterprises efficiently. These principles were, however, created for self-evidently different goals from the role of the courts, and costs assessors, in that the “just, quick and cheap” directive requires them to provide not only a quick and inexpensive result, but a just one.

These differences have led some commentators, such as the former Chief Justice of New South Wales, the Honourable Jim Spigelman AC,⁹ to state that courts do not provide a “service”, and that management principles applicable to other forms of business, or government departments, would accordingly not apply to case management of litigation. Justice is not a business, in that efficiency cannot trump fairness.

However, the law is also a business. The biggest change caused by applying business management theory to legal costs has been the introduction of time costing in law firms in 1940, after Reginald Heber Smith published a monograph linking law firm management practices and time costing¹⁰. Time costing as a tool of law office management and billing gained popularity, particularly after the US Supreme Court, in *Goldfarb v Virginia State Bar* (1974) 421 US 773, held that minimum fee schedules published by state and local county bar associations and enforced by the state bar associations violated section 1 of the *Sherman Act* against price fixing. Billing by the hour became the norm soon afterwards. In Australia, the practice of hourly billing became the norm in the 1970s. The hourly rates charged for the work done are the central core of costs assessments. The system has many detractors¹¹ but continues to be regarded as the most efficient way of ascertaining fair and reasonable payment of legal fees.

Business management principles may be relevant to legal costs incurred in a competitive business environment. How competitive, if at all, is the costs assessment process? Are even

⁸ Modern management theory is generally dated from the publications of Frederick Taylor, known as the father of modern management, and the author of “Shop Management” (1903) and “Scientific Management” (1911).

⁹ The relevant extract from the Chief Justice’s speech is as follows: “A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both civil and criminal trials, the deterrence of conduct by a public process with public outcomes – these are all public purposes served by the courts, even in the resolution of private disputes. An economist might call them “externalities”. They constitute, collectively, a core function of government....The judgments of courts are part of a broader discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This...has no relevant parallel in many other spheres of public expenditure. Managerial techniques appropriate for one part of the public sector are not necessarily applicable to another.” (The Honourable James Spigelman AC, “Judicial Accountability and Performance Indicators”, 10 May 2001).

¹⁰ See D Mccollam, “The American Lawyer”, 28 November 2005. This history comes from S Westgarth and R Balachendram, “Review of Billing Practices – the way forward”, Law Society of NSW, 2005, <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/522591.pdf>.

¹¹ See, for example, the Honourable Justice Wayne Martin CJ, “Billable Hours Past their Use-by Date”, Launch of Law Week (Western Australia), 17 May 2010.

the modified case management structures in use in the adversarial system appropriate to costs assessments? The costs assessment process is “neither wholly judicial, nor wholly adversarial, as there are strong elements of an inquisitorial nature involved”: *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR (NSW) 304 at [31]. These are issues which require consideration, as effective case management of costs appeals is an issue of importance in costs assessments, as procedural fairness is probably the most common ground of appeal from the decisions of the costs assessor and/or Review Panel.

The principal problem, in my opinion, is that there are differing views as to what “case management” really is, as well as to whether it is a “one size fits all” concept for all different kinds of cases. Different rules apply in different courts, ranging from the cradle-to-gave “docket” system of management in the Federal Court to the rubber-stamping of timetables in the country (and many city) registries of local and district courts. Some judges and courts are not even in favour of case management, or consider it undermines the rule of law¹²; others consider that alternate dispute resolution (ADR) undermines the importance of precedents and practice decisions¹³; some courts, notably at the District and Local Court level, are opposed to specialist lists, or use them only for the Sydney registry¹⁴; other courts have a highly structured docket system. Concerns about “managerial judging”, particularly in tribunals where legal representation is restricted, have also been raised¹⁵.

As a result of courts and judges being able to agree on how to achieve good case management, there are disputes as to what good case management is, particularly in courts which do not have specialist lists¹⁶. This makes consideration of what amounts to good case management difficult for judges, and courts, to agree upon. However, some general observations may be made.

When do case management issues arise in a costs assessment? Costs assessors are most likely to encounter case management problems when structuring the assessment process. For example, if the costs between the parties relate to proceedings in different courts, should the costs assessor include all these costs issues in one assessment? This was a common practice until the NSW Court of Appeal determined (*Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674) that a costs assessor could not make a global determination of this kind. (This unwelcome result has been overcome by s 70(3) *Legal Profession Uniform Law Application Legislation Amendment Bill 2015* (which is in turn contained in Schedule 1 of the *Amendment of Legal Profession Uniform Law Application Act 2014* (NSW)).

¹²Les Arthur, “Does Case Management Undermine the Rule of Law in the Pursuit of Access to Justice?” (2011) *Journal of Judicial Administration* 240 – 247.

¹³See the Honourable Justice Kenneth Martin, “Managing Change in the Justice System”, 18th AIJA Oration, 14 September 2012 at p. 48.

¹⁴The District Court of NSW, for example, has no commercial or building list, and case management of defamation is limited to cases started in the Sydney registry.

¹⁵M Mourell and C Cameron, “Neither Simple Nor Fair: Restricting Legal Representation before Fair Work Australia”, (2009) 2 AJLL 51. “Managerial judging”, a term coined by Professor Judith Resnik, has been criticised as creating bias (see, for example, C A Carr and Michael R Jencks, *supra*, at 212. See Professor T Sourdin’s helpful review at

http://www.lexisnexis.com/au/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T21286131720&format=GNBFULL&startDocNo=1&resultsUrlKey=0_T21286196742&backKey=20_T21286196743&csi=267865&docNo=1&scrollToPosition=0 (1996).

¹⁶The World Bank’s annual *Doing Business* reports (2004 and following) claim that commercial cases managed in specialist lists are resolved “fifty percent faster”.

Other “case management” issues which may arise for costs assessors during assessments, many of them familiar to judges, will include applications for adjournments of the assessment process. While less common than those made to the court, adjournments of costs assessments create the same kinds of difficulties that a court faces. Much will depend on the reason for the proposed adjournment; for example, there may be a request to adjourn the assessment to seek rulings from the court (*Griffith v Australian Broadcasting Corporation* [2013] NSWSC 750), or to require a solicitor/client assessment for a barrister’s fees rendered where no costs agreement was provided (*Enterprise Finance Solutions Pty Ltd v Ciszek* [2014] NSWDC 314). Should the question of whether or not to adjourn or postpone the assessment may need to take into account case management issues of the kinds considered in courts?

The most common case management issue is what constitutes an appropriate response to that most difficult of case management issues – delay and/or failure to comply with timetables. When the conduct of proceedings by one or both of the parties starts to lag, case management often consists of imposing increasingly strict time limits on practitioners, on the understanding that speed is an essential part of efficiency, when excessive speed in litigation may at times merely exacerbate the case management problems. This is particularly a problem in proceedings where litigants represent themselves.

An increasingly commonly discussed issue is the way in which changes to litigation procedure caused by electronically stored information (“ESI”) will impact upon costs and case management generally. The *Civil Procedure Act* 2005 (NSW) and *Uniform Civil Procedure Rules* 2005 (NSW) (“the Act” and “UCPR”) were drafted before e-discovery, giving evidence by electronic link such as Skype and social media became commonplace. Not only are the Act and UCPR out of date (technologically speaking – see, for example, UCPR r 31.10), but judges are struggling to keep up with the impact of modern technology on case management generally.

Finally, from the point of view of costs assessors, the enormous and ever-increasing popularity of complaints about apprehended bias means that assessors can probably look forward to an increasing number of complaints about how the assessment is conducted, on the basis that their views have been coloured or prejudiced by a wide range of factors (see, for example, *Altaranesi v Sydney Local Health District* (2012) 17 DCLR (NSW) 200, where Mr Altaranesi’s complaint about the costs assessor included claims of both actual and apprehended bias, and formed the basis of much of his claim of absence of judicial fairness). A recent example is *Davies v Noosa Cat (Australia) Pty Ltd* [2014] QSC 153. Additionally, there seems to be an increase in the number of practitioners requesting costs assessors to refer their opponents to the Legal Services Commission. Costs assessors need to be alert to the need to determine what to do in those circumstances.

From a review of these cases, I have selected the following topics (set out on pages 11 – 14 below) as being case management problems likely to be encountered by assessors:

- (a) How should costs assessors deal with applications which effectively adjourn the costs assessment?**
- (b) Costs appeals are increasingly frequently conducted by litigants in person. Should special case management rules be formulated to help them?**

(c) When, and in what circumstances, should a costs assessor use the slip rule (s 317 *Legal Profession Act 2004* (NSW) to correct his/her own mistake?

I shall now return to the first topic in this paper, namely recent decisions which have highlighted case management issues for judges when determining costs appeals.

(A) PROPORTIONALITY AND LUMP SUM COSTS ORDERS

It will not be necessary for me to deal with the principles of proportionality in detail, as Michelle Castle is giving a paper on this topic. I am indebted to her for noting that the first case to refer to proportionality in costs issues is *Skalkos v T & S Recoveries Ltd* [2010] NSWCA 281 at [7] – [9], where the costs of a 34-day defamation trial were \$941,444.77 for two publications to a handful of persons resulting in damages totaling \$150,000. (Proportionality is a hot topic in defamation law generally (see *Bleyer v Google Inc* [2014] NSWSC 897), but that is another issue entirely.)

Costs assessors and consultants can congratulate themselves on being well ahead of the rest of the profession when determining issues of proportionality under ss 56 – 62 *Civil Procedure Act 2005* (NSW). When McCallum J handed down *Bleyer v Google Inc* [2014] NSWSC 897, widely recognised as a landmark judgment on the “Jameel principle” (*Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75) of proportionality in relation to summary dismissal of defamation proceedings, her Honour was able to rely upon the explanation of proportionality by Brereton J in *Grizonic v Suttor* [2008] NSWSC 914 at [64], referring in turn to the leading English authorities of *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296; *Wallis v Valentine* [2002] EWCA Civ 1034; [2003] EMLR 8; *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946, [67]-[76]. Indeed, while concepts of proportionality have been viewed with hostility in other areas of the law, proportionality is a concept which has been taken into account in costs law generally, even before the *Civil Procedure Act 2005* (NSW) was enacted¹⁷.

One of the most useful examples of such principles being put into effect is the increasing popularity of lump sum costs orders, which dispense with the unattractive prospect of the costs of a costs appeal themselves becoming the subject of a further appeal. Such orders are not intended to replace costs assessments, but are a useful adjunct for specific cases, such as “mega-litigation”¹⁸.

The role of the costs assessor in preparing a report for the court on the costs for which the gross sum order is sought opens up new areas for expertise for costs assessors. This procedure is particularly useful where the amount in question is small, as the Chief Justice’s Report notes at [3.10.15]:

“Particularly in smaller matters, use of the court’s power to make a lump sum costs order is encouraged. While it may achieve only rough justice, the result is superior to the delay and additional expense incurred through the assessment process. Proceeding to assessment in

¹⁷ See for example *Sita v Sita* [2005] NSWSC 461. Costs decisions at the time of the civil procedure reforms noted that the court should not be reluctant to put a costs brake on litigants “whenever it appears that the parties’ litigious fervour may be leading them to excessive expenditure of costs”: *Re Sherbourne Estate (No 2)* (2005) 65 NSWLR 268. See Dal Pont, *Law of Costs*, LexisNexis, 3rd ed., 2014, [7.2].

¹⁸ See the Chief Justice’s Report at [3.10.14], citing *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23 at [9].

small cases is a Pyrrhic victory. Additionally, increased use of the power to award lump sum costs may collaterally improve the capacity of costs consultants and costs assessors to arrive at objectively reliable global assessments.”

The use of gross sum costs orders is particularly appropriate, in my view, to costs appeals, and it may be appropriate for parties having their assessed costs appealed to consider taking the further step of having the appeals costs the subject of an assessor’s report. I have made such an order in costs appeals on several occasions, most recently in *Aquaqueen International Pty Ltd v Titan National Pty Ltd (No. 3)* [2014] NSWDC 219, but it remains an underutilized tool in costs appeals.

(B) APPLICATIONS TO THE COURT FOR REMOVAL OF A COSTS ASSESSOR FOR APPREHENDED BIAS

While complaints against assessors for apprehended bias to date have been few in number,¹⁹ they create case management problems, as do requests for referral of litigants, or their legal representatives, for investigation of their conduct of proceedings. Such applications are rarely successful, and may even attract criticism,²⁰ but, as any search for the term “recuse” demonstrates, complaints of bias by the decision-maker, whether judge or assessor, seem to be enjoying a surge of popularity.

How should issues of bias be dealt with in the administrative process of costs assessment, and what approach should the Review Panel take if the complaint is about only one of its members?²¹ The recent decision of *Davies v Noosa Cat (Australia) Pty Ltd* [2014] QSC 153 raises some case management problems for courts dealing with such applications.

The facts were as follows. After proceedings were settled on the basis that the defendants were to pay the plaintiffs’ costs, the registrar appointed a costs assessor nominated by the defendants. The plaintiffs considered that this costs assessor (“Mr X”) was a bit too friendly with the solicitors for the defendants; he worked from the same premises, shared expenses, had a common telephone number and, worst of all, had gone off on the same tangential “frolic” about a particular item of expenditure as the defendants’ lawyers (at [7]). They brought an application for the registrar to remove the costs assessor but the day before the hearing the costs assessor delivered his Certificate of Costs to the parties and to the court. The operation of the certificate was stayed while the court worked out what to do.

The first problem was the jurisdiction of the court. The application had been made under the Rules or the court’s inherent jurisdiction for the costs assessor to be replaced even though he had completed his task (at [18]). Ann Lyons J commented:

“[19] The current application raises several issues for consideration. Can a costs assessor who has been validly appointed and who has proceeded to file his costs certificate be replaced? Is the costs assessor *functus officio*? Is the Court actually undertaking a review of the actions of the costs assessor despite their being no application to do so in accordance with the rules? Should the Court intervene in this case given the general reluctance of the Courts to intervene

¹⁹ See *Davies v Noosa Cat (Australia) Pty Ltd* [2014] QSC 153; *Reynolds v Whitten* [2008] NSWSC 184; *O’Connor t/a Thomson Rich v Fitti* [2000] NSWSC 540.

²⁰ See Basten JA’s remarks in *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* [2014] NSWCA 369 at [108].

²¹ *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209

in matters involving the discretion of the taxing officer as discussed in *Willis v Edgar* by Else-Mitchell J who stated:

“That function is not a judicial one in the strict sense and is better left to be exercised by the administrative officers of the Court who, by their long and constant experience in taxing costs, are better fitted to develop and apply rules of a reasonably uniform and consistent character than judges who deal with these problems on rare occasions only.

Cases will nevertheless arise from time to time when the Court's power of review has to be invoked because the quest for uniformity and consistency may on occasion lead to undue rigidity and consequent error. In some respects, too, the judges may be in a better position as a result of their own experience in presiding at and, formerly, conducting trials, to determine relevant questions as, for example, whether a difficulty which is claimed to have been present in a case was not more imaginary than real. It is on this basis and to correct what may be erroneous tendencies that I think the Court's power to review decisions of the taxing officers should in appropriate cases be exercised.”

Fortunately, as her Honour noted, a superior court of record such as the Supreme Court (unlike the District Court of NSW, I should add) “is never functus officio when its procedures have miscarried by denial of the fundamental requirements of justice” (at [40]). Ann Lyons J added that the court was “not a slave to its own procedure” (at [41]); in other words, court procedure can be adapted to meet the unexpected as well as the expected. The court thus had the power to hear the application.

Ann Lyons J considered there were two questions to determine: to identify the evidence of what might cause a costs assessor to perform an assessment other than on its merits, and a logical connection between that fact and the concern that the assessment would not be (or had not been) considered on its merits.

The evidence, when examined, fell short of amounting to apprehended bias. The costs assessor was not an employee of the defendants but a self-employed solicitor specialising in costs assessment, with a completely separate business. The fact that he shared premises and expenses was insufficient to amount to apprehended bias (at [36]).

The case is a useful summary of the problems caused by such applications, and the desirability of disclosure of such matters as shared addresses, prior associations and the like.

For a similar, but much weaker, complaint by a litigant in person (where the costs assessor was in the same building as the solicitor for the party entitled to costs) see *Altaranesi v Sydney Local Health District* (2012) 17 DCLR (NSW) 200²².

(C) DISTRICT COURT COSTS APPEALS CASE MANAGEMENT AND AVAILABILITY OF JUDGMENTS

Two of the problems that practitioners face, since the replacement of the Supreme Court by the District Court as the court to hear costs appeals, are:

²² For a casenote, see Rodgers Barnes Green Lawyers, “Removal of a costs assessor for apprehended bias”, www.rbglawyers.com.au .

- (a) The unavailability of judgments on issues which are of assistance to them on assessment management issues; and
- (b) The discontinuance of the Costs Appeals list referred to in the District Court Bench Book at [5-0550]²³.

The 2008 legislation transferred the hearings of costs appeals as one of a series of reforms designed to “free up the sitting time in the Supreme Court” and to provide “a more appropriate and less expensive forum for resolving smaller matters”²⁴. The current arrangements for costs management in Practice Note 1 (see point 7.6) still exclude costs appeals from case management by the Judicial Registrar, so they are generally managed by the List Judge²⁵.

This may contribute to lack of knowledge about legal costs issues, which was a concern of the Legal Services Commission in its submissions to the 2011 Chief Justice’s Review²⁶.

The purpose of transfer to the District Court of NSW of costs appeals was expressly stated to be for efficient case management²⁷. The proposal was for there to be a specialist Costs Appeals List, managed by one judge, with the decisions published on Caselaw. Although the Bench Book still refers to a Costs Appeals List, no such list exists. That is not a problem, but the unavailability of costs appeals decisions is an issue that has been referred to in costs seminars.

An example of the problem caused by unavailability of judgments occurred when I heard the appeal in *Enterprise Finance Solutions Pty Ltd v Ciszek* [2014] NSWDC 314. Both sides wanted to refer to a decision on the same issues handed down on 16 September 2011 by McLoughlin DCJ, namely *Sittchichai Laksanabechnarong v F Net Pty Ltd*, in which his Honour considered the application of s 317(4) of the Act to party and party costs. It was not published on Caselaw and it remains unavailable.

Fortunately, its contents were summarised in an article in the March 2012 issue of the *Law Society Journal* (“Costs: Failure to disclose reduces court ordered costs”, by Marina Wilson).

²³ District Court Civil Bench Book, Judicial Commission of New South Wales, http://www.judcom.nsw.gov.au/publications/benchbks/civil/costs_assessment_appeals.html

²⁴ New South Wales Parliamentary Debates, Legislative Assembly, 6 June 2008, 8635 (Barbara Perry), discussing the *Courts and Crimes Legislation and Amendment Act 2008* (NSW).

²⁵ See *Ritchie’s Uniform Civil Procedure NSW* at [18.1.12]. The other form of appeal excluded from case management by the Judicial Registrar, namely child care appeals, have their own specialist list. However, other forms of specialist lists in the District Court are rare – for example, despite being referred to specifically in UCPR r 31.10 and elsewhere, there is no District Court Commercial List.

²⁶ The Office of the Legal Services Commissioner of New South Wales, Submission to the Supreme Court of New South Wales, The Chief Justice’s Review of the Costs Assessment Scheme, November 2011, Executive Summary.

²⁷ [RD 215] Amendment to Legal Profession Act 2004 — Costs Appeals noted that “After 1 September 2008 all current appeals in the Supreme Court should be recommenced by Summons filed in the District Court. The Summons should specify the “Costs Appeals List”. The costs appeals will all be case managed by His Honour Judge Johnstone. Any pending appeals which are not recommenced will be transferred down unless they have already (up to 1 September 2008) obtained a hearing date. Practitioners will recall that His Honour was a costs assessor prior to appointment to the bench. Accordingly the case management will have particular effectiveness for costs disputes. The case management will take place in accordance with the Civil Procedure Act 2005 (ss56–60).”

This put me in the unusual situation of considering the assessor's view (and the Review Panel's view) of a Law Society journal summary of a case in the District Court, rather than the judgment itself.

The facts in *Sittchichai Laksanabechnarong v F Net Pty Ltd*, according to Ms Wilson, were as follows. An application to assess party and party costs was determined by the costs assessor at nil, on the basis that of the indemnity principle as discussed in *Wentworth v Rogers*, extending that principle beyond the pro bono principle to include costs incurred where there was no fee agreement. The assessor reasoned that due to the failure to disclose by the law practice, the client had no present liability to pay the practitioners. In the absence of a liability, costs cannot be recovered from the party ordered to pay the costs. An application for review was made, and the Review Panel allowed an amount of \$47,906.15. This decision was appealed to the District Court.

McLoughlin DCJ concluded that the principle was not immutable, and ought to be applied with some flexibility. Despite failing to provide a costs agreement and disclosure of costs, a practitioner was still entitled to costs from the client, but only after those costs were assessed on a solicitor and client basis first, and on a quantum meruit basis.

An additional matter for consideration, in determining that quantum meruit basis, was the applicability of s 317(4) of the Act, which permitted the reduction of the costs "proportionate to the seriousness of the failure to disclose". What was the impact of this provision on the determination of party and party (as opposed to solicitor and client) costs?

McLoughlin DCJ considered that, even though there was no costs agreement, if it were not for s 317(4), the practitioner would be entitled to costs on a quantum meruit basis. Where there had been a failure to disclose, McLoughlin DCJ concluded that "the assessor must take into account and make a determination in accordance with s 317(4). Quite clearly that is a subsection that is punitive and sets out the seriousness of a situation where there is a failure to disclose" (quotation taken from Ms Wilson's article). What this means is that a party's quantum meruit costs could be reduced by a small, or even a substantial, amount, by reason of the fact that no costs agreement disclosing costs had been entered into.

Ms Wilson's conclusion was:

"An application for assessment for party and party costs may be made even where there has been a failure by a practitioner to disclose to the client. However, the assessor must consider s 317(4) and determine whether there should be a reduction of the costs. On page 12, the court said: "It is sufficient to say that s 317(4) of the Act does not operate to provide an adverse party order to pay the client's costs with a ground for avoiding the consequences of the order. The subsection provides a client with a right to request on a practitioner/client... assessment a punitive order reducing the costs that would otherwise be fair and reasonable.

Because a failure to disclose may amount to unfairness to a client, it may affect the quantum of costs payable by the client. The court has now made it clear that s 317(4) has an indirect impact on court-ordered costs pursuant to the indemnity principle."

Subsequently, a senior costs assessor, Mr Gordon Salier, wrote to the Law Society Journal expressing disagreement with the decision. However, issues of comity (even where the relevant judgment is not available) led me to come to the same conclusion as McLoughlin

DCJ. Additionally, analysis of a series of cases in the NSW Supreme Court and the Victorian Supreme Court revealed a surprising number of cases where a legal practitioner had acted without a fee agreement, and this leads me to consider an interesting subset of such cases – the legal practitioner acting for himself/herself.

This was the situation in *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538. The successful party – a barrister being sued by his chambers for his fees – was acting for himself. Should he have sent himself a costs agreement? Schmidt J rejected an argument similar to that put before me by the plaintiff, namely that the lack of fee agreement meant that there was no retainer (at [33]) and thus no obligation to pay. Her Honour noted the provisions of s 317(1), but held that costs could still be awarded, and the quantum of the costs was a matter for the assessor, but “the recoverability of such costs is not foreclosed by the lack of agreement” (at [34]). Schmidt J held that, if costs can be awarded, then they should be able to be assessed in accordance with that order, subject only to the provisions of s 316(1).

Her Honour did not address the issue of whether those costs could be reduced by the assessor, or state whether the costs would have to be assessed on a solicitor/client basis first, but the language of her judgment appears to be that there is an entitlement to the fees under s 317(1) regardless of such steps.

This brings me to the second topic for discussion: case management issues for costs assessors. I have identified issues arising under the 2004 Act, as case management of these issues may well be the subject of regulation under the new legislation.

CASE MANAGEMENT ISSUES FOR COSTS ASSESSORS

Is case management relevant to costs assessments and, if so, when and in what circumstances? The examples I have selected are events commonly found both in court proceedings and costs assessments: interim applications and adjournments, litigants in person, angry litigants wanting to complain about their opponents or, worse, the assessor; and the slip rule.

(A) INTERIM RULINGS AND REFERRALS TO JUDGES

The practice of referring interim issues to the court has, in jurisdictions outside New South Wales, been referred to as “a convenient and sensible procedure” (*Re Cooke* [1997] 1 Qd R 15 at 17 per White J). The procedure in New South Wales is governed by s 390(4), but litigants have, on occasions, brought issues they consider to be of significance to the court.

Judges are well aware that the biggest single case management problem, after delay, is the correct way to deal with an application for adjournment of a hearing. Any procedure causing a costs assessment to be put off, or adjourned, is likely to cause case management problems.

A recent example of an interim ruling being sought is *Griffith v Australian Broadcasting Corporation* [2013] NSWSC 750. The plaintiff sought declaratory relief, at the suggestion of the costs assessor (at [12]), to argue that the ABC in-house lawyers could charge for acting for the ABC, but could not charge fees for acting for the independent journalist who prepared the programme the plaintiff had sued on for defamation (both had been defendants).

White J set out the statutory scheme (at [17] ff) and dismissed the application for a plethora of reasons, but confirmed the entitlement of a party to bring such an application, noting that, in *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333, Davies AJ rejected a submission that such an application was an unwarranted intrusion into the costs assessment process. It will be desirable, under the new legislation, for appropriate regulations and guidelines as to when and how interim applications of this kind should be made to the court.

Another reason why I raise this as a possible case management problem is that any potential role, in applications under the new legislation, for oral submissions²⁸, as well as in writing, may increase the number of interim applications for rulings during a costs assessment, including attempts to appeal a refusal to deny such a right²⁹. Such applications may range from an application to call evidence concerning the setting aside of the costs agreement under the *Contracts Review Act 1980* (NSW)³⁰ to complaints of apprehended bias, which are now increasingly being brought prior to the determination of the actual proceedings (or indeed any orders) in which the bias was allegedly shown. I understand that discussion of an amendment to include this right is still under consideration, as part of further amending legislation later this year. If enacted, this could add considerably to the case management burden of the costs assessor, and bring the assessment process another step closer towards the litigation process, a step which may be undesirable.

(B) LITIGANTS IN PERSON

In *Reznitsky v State of New South Wales* [2014] NSWDC 143 I encountered a case management problem familiar to costs assessors – a litigant in person who failed to comply with the timetables for submissions.

In *Reznitsky v State of New South Wales*, the costs assessment procedure was commenced on 5 February 2013 by the defendant. The plaintiff was still asking for extensions of time on 16 September 2013, despite having been given four prior opportunities to provide documents. Instead of responding to the assessment he supplied three separate submissions or objections to the Costs Assessor, the third of which was ominously entitled "Part 1" document he submitted on 23 September 2013, which was technically just after the expiry of his most recent extension of time. The assessor went ahead and completed the assessment.

Section 359 provides that the Costs Assessor must give "due consideration" to the submissions of the parties. Mr Reznitsky's appeal identified 15 grounds (many of them repetitive) asserting of lack of procedural fairness in this regard.

As the Costs Assessor had given a series of adjournments over a 7-month period, Mr Reznitsky's complaints were self-evidently without foundation. However, the question remains: when the Attorney-General, in the *Legal Profession Reform Bill*, 1993 Second Reading Speech (Hansard, 16 September 1993, p. 3227), said that the new system was intended to avoid the "unnecessarily complex and artificial" system of costs assessment with

²⁸ See the Chief Justice's Report at [3.9] ff. Although this provision was taken out of the *Legal Profession Uniform Law Application Legislation Amendment Bill 2015*, I understand that there are moves to add this to the *Miscellaneous Courts Amendment Bill* which will come before the legislature later in 2015.

²⁹ See, for example, the comments following this section of the Chief Justice's Report, especially at [3.10.2].

³⁰ See the comments made by Legal Aid as set out in the Chief Justice's Report at [3.10.5].

"a faster, easier and cheaper system of review of bills of costs": just how "fast" should that system be, and should it be slowed down for litigants in person who do not have the skill or expertise to understand the costs process? The adoption of a "standard" timetable for the duration of the costs assessment process (which is currently underway) will greatly assist costs assessors and parties alike.

Mr Reznitsky brought an application for judicial review: *Boris Reznitsky v District Court of New South Wales & State of New South Wales* [2015] NSWCA 194³¹. He argued that I had failed to deal with 5 matters, of which the "focal point" was the costs respondent's asserted own delays (at [41]).

The principal problem for Mr Reznitsky was that the issues he raised fell outside the parameters of an application for judicial review (at [44] – [47]), but McColl JA went on to confirm the correctness of the approach of the Costs Assessor to Mr Reznitsky's repeated delays (at [52]):

"The Costs Assessor considered the materials she was required to consider, reached her conclusion and issued her certificate of determination. Failure to consider a document belatedly received after the time for undertaking that process had expired did not constitute an "inadvertent error" which would attract the operation of LPA, s 371."

Litigants in person are increasingly bringing costs appeals in New South Wales. This is not only because of a general rise in the number of litigants in person, but because costs assessments require a close knowledge of the minutiae of the file, a task in which a litigant in person is often at an advantage.

The increase in self-representation has led to "self-help centres"³² in many courts in the United States, providing a wide variety of information about legal procedures of all kinds, including challenging a will, divorce and defence of criminal proceedings. In the "Dr Google" age of Internet information, will there be pressure on costs assessors, courts, or both, to provide similar assistance to litigants in person challenging costs assessments?

(C) THE SLIP RULE

In *Albarouki v Prime Lawyers Pty Ltd* [2013] NSWDC 130 the costs assessor made an unfortunate slip – he overlooked the client's letter challenging the solicitors' costs assessment, and provided a certificate without taking those objections into account. Discovering his error, he provided a second assessment. Was he entitled to do so?

Section 371 *Legal Profession Act 2004* (NSW), the so-called "slip rule" provides:

"Correction of error in determination

(1) At any time after making a determination, a costs assessor may, for the purpose of correcting an inadvertent error in the determination:

³¹ This portion of my seminar paper was added after the conference to include discussion of this appeal.

³² Norman H Meyer, Jr, in "Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators", (2014) 6(1) *International Journal for Court Administration*, pp. 4 – 5. Alarmingly, Meyer also comments that DIY-style litigants "will likely expect the judiciary to offer social media to them as part of their interactions with the courts" (at p. 5) as well as information about the court process.

(a) make a new determination in substitution for the previous determination, and

(b) issue a certificate under section 368 (Certificate as to determination) or 369 (Recovery of costs of costs assessment) that sets out the new determination.

(2) Such a certificate replaces any certificate setting out the previous determination of the costs assessor that has already been issued by the costs assessor and, on the filing of the replacement certificate in the office or registry of a court having jurisdiction to order the payment of the amount of the new determination, any judgment that is taken to have been effected by the filing of that previously issued certificate is varied accordingly.”

Is this limited to clerical error, or can it apply to a major oversight of the kind experienced by the costs assessor in those proceedings?

It says much for the professionalism of assessors that there was no precedent on this topic. However, mistakes of this kind are not uncommon elsewhere, and I was able to rely upon *Minister for Immigration and Cultural Affairs (MIMA) v Bhardwaj* (2002) 187 ALR 117, where a mistake of a very similar sort had been made (i.e. an application for a visa heard in the absence of the party applying, because the department forgot to notify him of the hearing), and in the context of a very similar legislative provision. For the reasons helpfully and clearly explained by Gleeson CJ at [6] and [14], I was able to note that not only was the costs assessor right to do so, he was statutorily obliged to issue a fresh certificate.

While it may be that this point is not entirely free from doubt, *Minister for Immigration and Cultural Affairs (MIMA) v Bhardwaj* is a very useful decision – although no substitute for regularly checking the In Tray.

Concluding remarks

I have chosen the issue of case management of costs assessments and costs appeals, rather than discuss specific case under the current legislation, because the impact of the *Amendment of Legal Profession Uniform Law Application Act 2014* (NSW) upon costs assessments and appeals will be profound. This is not only because of the nature and extent of the legislative amendments, but because of the impact of technology as well as expectations of an increasingly well-informed community that judges, assessors and administrators generally should perform their functions in a suitably modern (i.e. speedy and efficient) fashion.

Judges will have to rethink how they conduct cases in the light of these significant changes, and costs assessors may want to reconsider many of their management techniques in much the same way. Judges and assessors will accordingly have a lot in common. We will all have to help each other.