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District Court of New South Wales

Hunter v Hanson [2014] NSWDC 77 (4 June 2014)

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District Court

New South Wales

Case Title:	Hunter v Hanson
Medium Neutral Citation:	[2014] NSWDC 77
Hearing Date(s):	3 June 2014
Decision Date:	04 June 2014
Jurisdiction:	Civil
Before:	Gibson DCJ
Decision:	

(1) Summons dismissed.

(2) Costs reserved.

(3) Liberty to apply in relation to costs.

(4) Exhibits retained until further order.

Catchwords: COSTS - costs appeal under s 384 Legal Profession Act 2004 (NSW) - alleged failure of Review Panel to give adequate reasons - whether grounds of appeal related to issues raised with the Review Panel - whether method of assessing counsel's preparation fees was an issue of law - appeal dismissed

Legislation Cited: Legal Profession Act 2004 (NSW), ss 370 and 384

Legal Profession Regulations 2005 (NSW), rr 128 and 134

Cases Cited: Arnott v Glissan [2013] NSWCA 316

Attorney-General (NSW) v Kennedy Miller Television Pty Ltd (1998) 43 NSWLR 729

B & L Linings Pty Ltd v Chief Commissioner of State Revenue [2008] NSWCA 187; (2008) 74 NSWLR 481

Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd (2011) 12 DCLR (NSW) 304

Bobb v Wombat Securities Pty Ltd [2013] NSWSC 757

Cassegrain v CTK Engineering Pty Ltd [2008] NSWSC 457

Freeman v McNally [2003] NSWSC 780

Frumar v Owners of Strata Plan 36957 [2006] NSWCA 278; (2006) 67 NSWLR 321

Gorczynski v AWM Dickinson & Son [2005] NSWSC 277

Lang v Kirkness (New South Wales Supreme Court, Harrison M, 22 October 1997)

Lawrence v Shaw [2013] NSWDC 91

Levy v Bergseng [2008] NSWSC 294; (2008) 72 NSWLR 178

Madden v New South Wales Insurance Ministerial Corporation [1999] NSWSC 196

Nassour v Malouf [2011] NSWSC 356

Public Service Board of New South Wales v Osmond (1986) 9 ALN N85

Randall Pty Ltd v Willoughby City Council (2009) 9 DCLR(NSW) 31

Wende v Horwath (NSW) Pty Limited [2014] NSWCA 170

Texts Cited:	G E Dal Pont, Law of Costs, 3rd Ed. (LexisNexis)
Category:	Principal judgment

Parties:	First Plaintiff: Scott Hunter Second Plaintiff: Helen Hunter First Defendant: Benjamin Hanson Second Defendant: Graham Wardell
Representation	
- Counsel:	Plaintiffs: Mr A R R Vincent / Dr W A J Higgs First Defendant: Mr P English Second Defendant: Ms K Law (solicitor)
- Solicitors:	Plaintiffs: PJG Solicitors First Defendant: Banki Haddock Fiora Second Defendant: Matthews Folbigg Pty Limited
File Number(s):	2014/67094
Publication Restriction:	None

JUDGMENT

1. The plaintiffs by Amended Summons filed on 22 April 2014 bring an appeal under s 384 *Legal Profession Act* 2004 (NSW) ("the Act") from the decision of the **Costs Review Panel** (the "Review Panel") of 10 February 2014 upholding a decision of a Costs Assessor of 10 May 2013 in the amount of $81,652.33. An alternative application under s 385(2) of the Act for leave to appeal was abandoned during submissions. The plaintiffs seek orders setting aside of the whole of the decision of the Review Panel, and for the assessment to be remitted to the Review Panel for re-determination.

2. The costs the subject of the assessment were incurred in Local Court proceedings by the parties against each other for apprehended personal violence orders ("APVO"). These applications, which were dealt with concurrently by Magistrate Pinch, arose from a dispute over an access road adjoining the parties' properties. The proceedings were conducted over many months, occupying nine pre-hearing dates and seven hearing days. Magistrate Pinch handed down judgment on 16 February 2012 awarding an APVO to each of the defendants in this application. On 23 April 2012 Magistrate Pinch awarded costs in favour of the defendants and referred the costs orders for assessment of "fair and reasonable" costs under the Act. In her long and careful judgment, Magistrate Pinch explained the reasons for her findings on costs, including (at page 45) her finding that counsel for the successful party was entitled to additional preparation costs for the gaps between the hearing dates, and explaining the reasons for these adjournments, many of which resulted from the unsuccessful party's conduct of the proceedings.

3. An appeal by the plaintiffs from Magistrate Pinch's decision was lodged on 16 February 2012. The appeal was listed for hearing on a total of four days in June and July 2012. On 29 August 2012 King SC DCJ dismissed the appeal and made a further order for costs. The defendants in this application, the successful party before King SC DCJ, then commenced the process of having their costs in the Local Court and District Court assessed. On 30 April 2013, a Certificate of Determination of Costs was issued by the Costs Assessor reducing the costs claimed from $108,987.33 to $81,652.33.

4. The plaintiffs sought review of that decision by the Review Panel on the following six grounds:

"1. The Cost Assessor has not reviewed the cost of disbursements which is primarily the cost of transcripts. The acquisition of the local court transcripts was unnecessary at least for the period of days where the Cost Applicants were presenting their own case. Where days of preparation time is claimed transcripts should be seen as extraordinary and superfluous. The amount claimed is also unreasonable in light of the fact that tapes were available at a fraction of the cost. The Cost Assessor has not 'assessed' by merely accepting the disbursements wholly.

2. The fee scale accepted by the Cost Assessor is not fair and reasonable. The Magistrate gave guidance presenting a scale which recommended up to $400 per hour as reasonable for Senior Counsel down to $240 for a solicitor and suggested the representation by Junior Counsel should fall between. While the Assessor did not have benefit of the demeanour of the Magistrate, ignoring her guidance is contrary to her intent and should not be upheld.

3. The Cost Assessment scheme should determine fair and reasonable compensation. The rate of $400 per hour including 10 hour court 'days' at $4000 is beyond compensatory and is absolutely punitive to the Cost Defendants who signed undertakings and agreed to stay on bail to avoid the expense of a hearing. The Cost Applicants made a third and fourth application in Sydney while their first and second applications were on foot in Lithgow, applied to have the case sent back to Sydney in an application the Magistrate noted 'was doomed to fail', withdrew7 an application *from* District Court in Bathurst on the day and failed to appear without notice on August 1,2011 the second day of the hearing - absolutely unnecessary court days for which the Cost Defendants have their own costs to bear. The assessment is punitive.

4. The Cost Assessor made a manifest error in awarding costs for Item 40 16 February 2012. Regarding this date the Magistrate ordered that each party was to bear their own cost. The Magistrate listed the dates including each and every time there was a mention, a decision not to impose or revoked interim orders and where the Cost Applicants lodged additional applications. To include another day over and above the order is in error and compounds the punitive effect on the Cost Defendants.

5. The 10 hours ($4000) per appearance date claimed was effectively halved because that proportion has been attributed to preparation by the Cost Assessor. The fair and reasonable assessment for hours of preparation time between Item 1 and Item 21 is inconsistent with the assessment that follows after Item 21.

Following the logic regarding preparation and scale determined by the Cost Assessor;

Items 22 to 24 were reduced by 3 hours ($1200) where a total of 11 hours were allowed for 2 days heating on 8 and 9 August 2011

Item 26 was reduced by 5 hours ($2000) where in Items 25 to 27 the same amount of preparation, 11 hours were allowed for a single 1 day hearing on 20 October 2011

Items 28 to 29 were reduced by 3 hours ($1200) where overall in Items 28 - 31,12 hours were allowed for 1 day of hearing on 27 October 2011

Item 32 was reduced by 3 hours ($1200) where in Item 32 to 33 [a more reasonable] 6 hours were allowed for 1 day hearing on 15 November 2011

Items 34 to 39 were reduced by 14 hours ($5600) where 44 hours were claimed, 30 hours were allowed for preparation post hearing in addition to the 44 hours of preparation allowed during the hearing.

The Court was not available consecutive days for the hearing which may have required more preparation but the effect of that circumstance should not be borne by the Costs Defendants. 74 hours, or 10 5 hours per each of the 7 days of hearing, in preparation time allowed is not fair or reasonable.

6. Items 41 to 43 are allowed at the rate claimed because S4000 per day was the Assessor's determination and he used that scale against the number of days the appeal Judge ordered. The Cost Assessor erred because it does not follow where previously in the determination this rate was deemed to include $2000 or 5 hours of preparation, that the cost should not be varied.

The order was for 1 day preparation. Using the Cost Assessor's allowance of $4000 or 10 hours preparation on 22 July 2012 it necessitates reducing the 3 hearing days by $2000 or 5 hours preparation each day. Otherwise the Cost Assessor is actually awarding 25 hours preparation which clearly was not the intent of the Justice, This determination is inconsistent with the Cost Assessor's treatment of the 'day5 In his assessment of Items 1 to 39."

5. On 30 January 2014 the Review Panel upheld the decision of the Costs Assessor and the plaintiffs appealed to this Court from the decision of the Review Panel.

6. However, the grounds of the appeal to this Court differ significantly from the six grounds before the Review Panel. Although the plaintiffs identify their principal complaint as being that the assessed costs "have not been sufficiently reduced to equate to costs that would be "fair and reasonable" for an APVO application of these sought [sic] that was determined before Magistrate Pinch" (written submissions, paragraph 11), the grounds of appeal state, as the error of law, that the Review Panel failed to provide reasons and/or adequate reasons of its determination (see the grounds of appeal, paragraphs 1, 1(a), 1(b), 1(c), 1(d)). Ground 1 of the

appeal is that the Review Panel failed to provide a statement of reasons in accordance with s 380 of the Act and pursuant to r 134 of the *Legal Profession Regulations* 2005 (NSW) ("the Regulations") and as required by common law independently of those statutory provisions. Grounds 2 and 3 identify two asserted errors in relation to allowance for items that were not properly the subject of costs orders.

The grounds of appeal

7. The grounds of appeal set out in the Amended Summons are as follows:

"Under S 384 of the *Legal Profession Act* 2004 (NSW)

1. The Review Panel erred in law in that it failed to provide reasons and/or adequate reasons of its determination, as follows.

a. Inadequacy of reasons of the Cost Assessor and of the Review Panel who adopted and agreed with the reasons of the Cost Assessor by finding no error in those reasons in respect of the methodology applied in adjusting disputed Items 4, 5, 7, 8,10-12 and 14 (as identified in paragraph 5.2 of the Cost Assessment) and particularly where the inadequacy of reasons precludes a determination by the Plaintiffs of whether the quantum of adjustments made by the Cost Assessor as upheld by the Review Panel were made on the basis of any or all of:

i. the finding of the Cost Assessor that 7 *will allow the rate claimed by Ms Traill of $400 per hour plus GST"* (as being fair and reasonable) and the Cost Assessor made the adjustments based on a determination of a number of hours which were not fair and reasonable (which were not specified in the Cost Assessment or Review Assessment), the product of such parameters being equal to a dollar amount of adjustments; or

ii. an assessment of the Plaintiffs submissions that the nature of the 'prehearing' proceedings were punitive having regard to the outcome of those proceedings in part in favour of the Plaintiffs and ascribed a dollar amount of adjustments on that basis; or

iii. for some other reason.

b. Inadequacy of reasons of the Cost Assessor and of the Review Panel who adopted and agreed with the reasons of the Cost Assessor by finding no error in those reasons in respect of the methodology applied in adjusting disputed Items 5-19, 20, 22-24, 26, 28-29 and 32 (as identified in paragraph 5.2 of the Cost Assessment) and particularly where the inadequacy of

reasons precludes a determination by the Plaintiffs of whether the quantum of adjustments made by the Cost Assessor as upheld by the Review Panel were made on the basis of any or all of:

i. the finding of the Cost Assessor that To *the extent that the Cost Applicants Counsel [Ms Traill] charged at the rate of $400 per hour plus GST and $4,000 per day plus GST I accept that the daily rate (which as I have said I regard as fair and reasonable) includes an amount in the region of $2,000 plus GST for preparation including conferences and travelling time"* and the Cost Assessor made the adjustments based on identifying time spent on actual preparation corresponding to each immediately following hearing date, crediting up to a maximum of $2,000 for actual preparation and adjusting the daily rate for such hearing day from $4,000 to $2,000, which doesn't appear to have been the case; or

ii. the finding of the Cost Assessor that *"The claim for 10 hours at $400 per hour plus GST for each of the 7 hearing days was not fair and reasonable on a party/party basis and a 'refresher rate' would be more appropriate for the days following the initial hearing date"* and made adjustments at a 'refresher rate' which was not specified in the Cost Assessment, which also doesn't appear to have been the case; or

iii. the finding of the Cost Assessor that 7 *accept that to charge a full brief fee equivalent to 10 hours time is not fair and reasonable, particularly on a party/party basis unless that time is reasonably spent on the matter or otherwise"* and the Cost Assessor made the adjustments based on identifying time spent on actual preparation corresponding to each immediately following hearing date, crediting a maximum of up to $2,000 for actual preparation and adjusting the daily rate for such hearing day from $4,000 to $2,000, which also doesn't appear to have been the case; or

iv. for some other reason.

c. Inadequacy of reasons of the Cost Assessor and of the Review Panel who adopted and agreed with the reasons of the Cost Assessor by finding no error in those reasons in respect of the methodology applied in adjusting disputed Items 34-39, which were amounts attributed for costs solely in respect of the preparation of submissions in the Local Court matter following the 'pre-hearing days' or 'hearing days' and particularly where the inadequacy of reasons precludes a determination by the Plaintiffs of whether the quantum of adjustments made by the Cost Assessor as upheld by the Review Panel were made on the same basis referred to in (b)(i) to (b)(iv) inclusive above, notwithstanding that no appearances were required in this period to substantiate a day rate being charged.

d. Inadequacy of reasons of the Cost Assessor and of the Review Panel who adopted and agreed with the reasons of the Cost Assessor by finding no error in those reasons in respect

of the methodology applied in adjusting disputed Items 41-[44] which were disputed by the Plaintiff in respect of the order of District Court Judge King SC of the District Court made on 29 August 2012 where those costs were not assessed (and were implicitly disallowed), particularly in light of the findings of the Cost Assessors that

i. *"I accept that to charge a full brief fee equivalent to 10 hours time is not fair and reasonable, particularly on a party/party basis unless that time is reasonably spent on the matter or otherwise"]* and

ii. *"To the extent that the Cost Applicants Counsel [Ms Traill] charged at the rate of $400 per hour plus GST and $4,000 per day plus GST I accept that the daily rate (which as I have said I regard as fair and reasonable) includes an amount in the region of $2,000 plus GST for preparation including conferences and travelling time".*

e. In light of all of the above, the Review Panel failed to provide:

i. a statement of reasons in accordance with s 380 of the *Legal Profession Act* 2004 (NSW) and further information required under regulation 134 of the *Legal Professional Regulations* 2005 (NSW); and

ii. reasons required by the common law independently of those statutory provisions in (e)(i) above.

2. The Review Panel erred in law in not assessing costs in favour of the Plaintiffs by order of Magistrate Pinch on 23 April 2012 for *"1 hearing day on 1 August 2012".* Magistrate Pinch specifically directed an assessment of those costs under s 353(2) of the Legal Profession Act 2004 (NSW), which included an order for costs in favour of the Plaintiffs. Note: the reference by Magistrate Pinch was in fact a typographic error which should actually have been a reference to 1 August 2011. The error went uncorrected in the Cost Assessment and the Review Assessment despite submissions by the Plaintiffs correctly referring to 1 August 2011.

3. The Review Panel erred in law in allowing for costs on 16 February 2012 for Item 40 in an amount of $2,200 in favour of the Defendants which was not properly the subject of the costs order of Magistrate Pinch on 23 April 2012 where no reasons were given by the Cost Assessor that such costs were fair and reasonable despite the fact that Item 40 was not included in the order of Magistrate Pinch on 23 April 2012.

Under S 385(2) of the *Legal Profession Act* 2004 (NSW)

4. To be the extent the errors identified in (2) and (3) immediately above are not determined to be 'matters of law' within the meaning of s 384 of the Legal Profession Act 2004 (NSW), the Review Panel made such errors of fact or mistake in adjusting costs for those items.

5. The Review Panel erred in applying the methodology of adjustment as identified (correctly or incorrectly) by the Plaintiffs from the Review Assessment (want of any reasons being given by the Review Panel for adjustments made) (see (1) immediately above) which are asserted to not accord with that methodology.

6. The Review Panel erred in identifying the disputed costs."

8. The defendants' objections to these grounds are firstly that no issue of adequacy of reasons of the Costs Assessor was made to the Review Panel and therefore ought not to be before the Court. The second objection is that the plaintiffs have conflated the Costs Assessor and Review Panel. These submissions are dealt with in more detail below. I shall first address the plaintiff's complaint as to the adequacy of reasoning by the Review Panel.

The obligations to give reasons

9. Section 370 of the Act requires that a statement of the reasons, given in accordance with the Regulations, should accompany the determination of costs assessors. Clause 128(1) requires the statement of reasons to contain the following:

. (a) the total amount of costs for providing legal services determined to be fair and reasonable;

. (b) the total amount of disbursements determined to be fair and reasonable;

. (c) each disbursement varied by the determination;

. (d) in respect of any disputed costs, explanation of both the basis on which the costs were assessed and how the submissions made by the parties were dealt with;

. (e) if the costs assessor declines to assess a bill, the basis for doing so;

. (f) a statement of any determination that interest is not payable on the amount of costs assessed or, if payable, of the rate of interest payable.

10. Clause 128(2) (formerly cl 61(3)) provides that the statement may be accompanied by such further information as a costs assessor considers necessary.

11. When considering the adequacy of reasons given by costs assessors, the discussion often starts with *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729. Priestley JA (at 735) and Handley JA (at 739), referring to Deane J's statement of the obligation to give reasons (*Public Service Board of New South Wales v Osmond* (1986) 9 ALN N85), underlined the importance of costs assessors giving reasons for their determination, as any appeal would be rendered meaningless without the benefit of the assessor's reasons. The degree to which those reasons should resemble a judgment remained controversial. As Malpass M pointed out in *Freeman v McNally* [2003] NSWSC 780 at [18], a determination of a costs assessor (or for that matter the **Costs Review Panel**) should not be viewed as requiring the same elements as are expected in court of a judgment.

12. In *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278; (2006) 67 NSWLR 321 Giles JA at [62] laid down a series of requirements:

"If either the claimant or the opponent wished to appeal to the Supreme Court, he or it could not do so when he or it did not know:

(a) whether the panel's assessment had been by taking the itemised bill of costs and allowing, disallowing or adjusting items, or by coming to its own view of work reasonable to be carried out;

(b) if the former, what items had been allowed, disallowed or adjusted and whether as to hourly rate or reasonable times or for some other reason; or

(c) if the latter, what work the panel thought reasonable and how it costed the carrying out of the work."

13. The explanation for Giles JA's expectation as to the obligation to give reasons may be gleaned from [43] of his judgment:

"[43] The extent of the obligation, whether by explication of reg 68(1) or by giving content to s 208KG, is informed by the general law concerning the duty of judicial officers to give reasons for their decisions discussed in cases such as *Soulemezis v Dudley (Holdings) Pty Ltd* (1987)

10 NSWLR 247, *Mifsud v Campbell* (1991) 21 NSWLR 725 and *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430. The extent of a judicial officer's duty depends on the circumstances. **Whether or not a costs assessor and a panel are acting administratively or judicially, which was left open in *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd*, the extent of their duties must take into account the different nature of their task and their roles as legal practitioners bringing to bear their experience and judgment in evaluation of what work was reasonable and what is a fair and reasonable amount of costs; but it is also moulded by the basis for the obligation to give reasons in *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd*, thereafter taken up by the legislature.**" (Emphasis added)

14. However, the question of whether a costs assessor or a panel are acting administratively or judicially is no longer "left open". The true nature of the costs assessment process is administrative, as is set out in the authorities discussed by Johnstone DCJ in *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* (2011) 12 DCLR (NSW) 304 at [31]. Giles JA's statements about the obligation to give reasons as being "moulded" by the non-administrative component in their role need to be viewed in light of this subsequent clarification.

15. Courts nevertheless continued to have high expectations of the nature and contents of the reasons for decisions by costs assessors. In *Cassegrain v CTK Engineering Pty Ltd* [2008] NSWSC 457 at [79]- [81], White J, referring to *Frumar, supra,* observed:

"[79] The key requirement is that in respect of "any" disputed costs the assessor must provide an explanation of the basis on which the costs were assessed and how the submissions of the parties were dealt with.

[80] Whilst the assessor is required to identify each disbursement varied by the determination, there is no express requirement that where the assessor proceeds by way of allowing, reducing or rejecting individual items of costs, that in respect of each item of disputed costs he or she explain the quantum of costs allowed or disallowed.

[81] Of course, the regulation is not an exclusive statement of a costs assessor's obligation to give reasons. That is clear from s 370(1). The regulation prescribes such supplementary information as is required in addition to the provision of a statement of reasons for the determination. A statement of reasons must be sufficiently precise to give meaningful content to the rights of appeal (either as of right or by leave) in ss 384 and 385."

16. Notwithstanding *Frumar,* in practical terms, courts have shown a degree of flexibility as to the degree of detailed reasoning required by costs assessors. Professor Dal Pont in *Law of Costs*, 3rd Ed. (LexisNexis) notes at [18.67]: "Subsequent cases have indicated that 'global' approaches to assessing costs, including 'global reductions' of costs, are unlikely to meet the minimum standard contemplated in *Frumar*. At the same time, it has been judicially remarked that lengthy and elaborate reasons are not required, provided the essential ground on which the decision rests is articulated." (citing *Madden v New South Wales Insurance Ministerial Corporation* [1999] NSWSC 196 at [16] per Malpass M; *Randall Pty Ltd v Willoughby City Council* (2009) 9 DCLR(NSW) 31 at [56] per Johnstone DCJ.)

17. More recently, Rothman J in *Levy v Bergseng* [2008] NSWSC 294; (2008) 72 NSWLR 178 at [81] stated that all that was required was disclosure of the process by which the Tribunal arrived at its conclusions, rather than a compelling or even a logical reason:

"[81] However, as summarised at 186 supra, reasons were given by the Review Panel. The reasons of the Tribunal need not be compelling or even logical. It is sufficient that the Tribunal discloses the process by which it arrived at its conclusions. Lack of logic is not an error of law: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321. Nor is a tribunal requiredto deal with every argument in minute detail: *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* [1987] FCA 301; (1987) 16 FCR 465."

18. The degree to which an assessor or Review Panel is required to give reasons has now been carefully analysed by the New South Wales Court of Appeal in *Wende v Horwath (NSW) Pty Limited* [2014] NSWCA 170:

"[161] The function of the review panel will vary according to the way in which the applicant for review chooses to frame the application. If specific objections are stated, the panel will, of necessity, deal with them. If no objections are stated and the implicitly indicated desire of the applicant is merely to have the review panel conduct a general review, no specific matters will call for attention. In either such case, however, the function of the review panel is, as stated in s 375(1), to "review the determination of the costs assessor" and to decide whether the assessment should be affirmed or altered.

...

[163] Where the person making an application for review elects to raise particular objections, a review panel will be entitled to proceed on the basis that that person is, in all other respects, content with the original assessment. In such a case, the panel will adequately perform its function by dealing with the expressed grounds of objection and giving each of them separate and distinct consideration.

...

[175] In relation to several of the 35 grounds of objection raised in the applicants' application for review, the panel rejected the applicants' contentions and said that the assessor's decision was correct for the reasons the assessor had given. The primary judge said of the proposition that this did not satisfy the requirement that the panel state reasons (at [92]-[95]):

"92 . . . The reasons are contained in a 12-page document and do not simply adopt the reasons of the assessor. However, in respect of several grounds of review, the Review Panel indicates that it has accepted the reasons of the assessor. Whether this is a sufficient giving of reasons depends upon the content of the assessor's reasons and the challenge made to the assessor's reasoning. For example, if the assessor has given detailed reasons, and the ground for review is that the assessor is wrong, without more, it seems appropriate for the Review Panel to review the assessor's reasons and conclude whether it accepts them or otherwise.

93 Accordingly, to be effective, a challenge to the adequacy of the Review Panel's reasons in circumstances where the Review Panel merely accepts the assessor's reasoning must identify the defect in the assessor's reasons and the occasion when this point was taken before the Review Panel. The appellants' grounds and submissions make no such identification, either of the defect in the assessor's reasons, or how the Review Panel was alerted to that defect.

94 In these circumstances, it seems to me that the appellants can only succeed if as a matter of law the Review Panel were not entitled to accept the assessor's reasons irrespective of the ground of review. No authority has been cited for such a rule. I do not accept it to be the correct principle and therefore reject these grounds of appeal.

95 The appellants' submissions assert (at [73]) that 'as the review panel adopted those reasons it is the cost assessor's reasons which must be judged as adequate or not'. This is correct as far as it goes. However, if the only challenge to the Review Panel is that the reasons of the costs assessor are 'inadequate' and those reasons comprise a closely typed document of 34 pages, it appears to me that the appellants' challenge to the adequacy of the reasons is not sufficiently identified and cannot be accepted."

[176] The primary judge was correct. There is no basis for any argument that a review panel which considers to be right both the decision under review and the reasons given for it must formulate its own paraphrase of those reasons."

19. These findings are of particular relevance to the present case, where the Review Panel has effectively followed this course. The Review Panel has identified the six grounds of complaint about the Cost Assessor's findings and identified in brief terms why they consider this to be the correct decision, very much in the way outlined by the Court of Appeal, rather than setting out and considering afresh the submissions of the plaintiffs and investigating each of the issues raised in those complaints. These submissions run counter to the explanation of the Review Panel's role as explained in *Wende, supra.*

20. An additional complaint of the plaintiffs is that the alleged inadequate reasons of the Costs Assessor are not the subject of comment by the Review Panel. Mr Vincent submits it was implicit in the six grounds of appeal set out above that the Review Panel was being asked to consider the adequacy of the Costs Assessor's reasons. I do not accept this submission, and I do not consider it was necessary for the Review Panel to parse and analyse the six grounds for review before them. In relation to the specific complaints in paragraphs 4 - 6 of those grounds of review, these were all explicable on the basis of counsel's entitlement to additional preparation time for each gap in the hearing, for the reasons explained by Magistrate Pinch and King SC DCJ in their respective judgments. The Costs Assessor did not need to repeat the contents of those judgments; his methodology makes what he has done quite clear, as the plaintiffs acknowledge in the notation appearing at the bottom of ground 5 of the issues before the Review Panel.

21. This is the first of three problems common to all of the grounds brought by the plaintiffs. The second is the plaintiffs' conflation of the judgments of the Costs Assessor and Review Panel in their appeal grounds.

Costs Assessor or Review Panel?

22. If the assessment appealed from is the Review Panel's decision, the Costs Assessor's decision is not the judgment appealed from. In *Bobb v Wombat Securities Pty Ltd* [2013]

NSWSC 757 at [36] Beech-Jones J stated:

"[36] Before me, Counsel for Mr Bobb, Mr Raphael, did not press his claim for relief against the costs assessor. It was accepted, rightly in my view, that for the purpose of vindicating Mr Bobb's statutory rights of appeal in the District Court under s 384 it was only the review panel's reasons that were relevant and not those of the costs assessor."

23. The third difficulty the plaintiffs face is that the grounds of appeal before me bear very little relation to the grounds before the Review Panel. A comparison of the six grounds the subject of the Review Panel's determination (see above) demonstrates that there was no complaint before the Review Panel as to the inadequacy of, or lack of, reasoning by the Costs Assessor. The basis upon which the complaint was raised is as set out in paragraph 11 of the plaintiffs' written submissions of 28 May 2014, namely that the costs had not been sufficiently reduced, that they were punitive, that allowance should not have been made for the transcript, that the charge out rates for counsel were too high, and (in relation to grounds 5 and 6) that preparation costs between adjournments of the proceedings, while the proceedings were part heard, should not have been permitted as this was in addition to the component for the preparation costs contained in the daily estimate for counsel's hearing fee, and thus not permissible.

24. In *Lawrence v Shaw* [2013] NSWDC 91 at [24], Murrell SC DCJ similarly rejected grounds which were not put before the Review Panel. As the New South Wales Court of Appeal explained in *Wende v Horwath (NSW) Pty Limited*, *supra*, the appeal from the Review Panel's decision must deal with the matters raised with the Review Panel.

25. On any one of these three bases, the plaintiffs' appeal must fail. In addition, the defendants submit that those matters which the plaintiffs are able to raise are not issues of law but challenges to quantum.

The nature of s 384 appeals

26. A right of appeal under s 384 of the Act has been described as "narrow": *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd*, *supra*, at [12]; *Gorczynski v AWM Dickinson &*

Son [2005] NSWSC 277 at [22]. An error of law, as opposed to an error of fact or mathematics, must be established. The Court of Appeal noted in *Arnott v Glissan* [2013] NSWCA 316 at [6] that "[a] challenge to the assessment in terms of its quantification, either in totality or in respect of certain items would rarely, if ever, give rise to a matter of law". Accordingly, the function of the Court in a s 384 appeal is limited to the identification of an error in respect to a question of law. The Court should not embark upon a review of the merits of the case or the facts in the case beyond those issues necessary to answer the appropriately identified questions of law: *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* [2008] NSWCA 187; (2008) 74 NSWLR 481. If no question of law is able to be identified, the appeal should be dismissed: *Lang v Kirkness* (New South Wales Supreme Court, Harrison M, 22 October 1997).

27. An appeal on the basis of asserted inadequacy of reasons is a matter of law: *Nassour v Malouf* [2011] NSWSC 356. However, as is noted above, the question of adequacy of reasons is restricted to the question of the findings of the Review Panel (which must be approached in the manner explained by the Court of Appeal in *Wende v Horwath (NSW) Pty Limited*, *supra*) as is explained above. Even if the issues had been raised with the Review Panel, the plaintiffs would fail on this ground.

28. An additional problem arising in relation to s 384 appeals is that legal error alone is insufficient. In *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd*, *supra*, Johnstone DCJ stated at [16]:

"[16] Not only must a party who is appealing under s 384(1) establish an error of law, that party must also demonstrate that the error made justifies disturbing the assessment: *Gorczynski v AWM Dickinson & Son* [2005] NSWSC 277 at [22]. Thus it has been said by Associate Justice Malpass:

The onus borne by the plaintiff is not merely to demonstrate error as to a matter of law arising in the proceedings to determine the application but also to demonstrate that any such error is material to the determination": *Honest Remark Pty Ltd v Allstate Explorations NL* [2008] NSWSC 439 at [24].

... [whilst there has been an attack on the expression of the reasoning process, it has not been shown that the determination itself was erroneous and should be disturbed ... The onus borne by [the plaintiffs] has not been discharged": *Skalkos v Assaf* [2002] NSWSC 1221 at [17]-[18]."

29. Having noted these difficulties, I now consider each of the grounds of appeal.

Ground 1 of the Appeal

30. This ground of appeal concerns disputed items 4, 5, 7, 8, 10 - 12 and 14 of the Costs Assessment.

31. This ground fails firstly because it was not raised before the Review Panel and secondly because it conflates the Review Panel and the Costs Assessor's reasons.

32. Even on its merits, this ground of appeal cannot be made out. The Costs Assessor allowed for preparation time in between the many adjournments in this hearing. Both parties understood, when the Costs Assessor was considering the entitlement of the plaintiffs to preparation time, that the Court was not available for consecutive days for the hearing. The explanation for this was set out at page 45 of Magistrate Pinch's judgment, which was as follows:

"Ms Traill has argued that because there were gaps of more than 2 months between blocks of hearing dates it was necessary for her to prepare for each block of hearings in addition to the initial hearing day in May 2011. The Court accepts that such preparation was reasonable in this case, particularly when the transcript of the previous days was made available in the interim periods and would need to be perused and further instructions taken.

The Court notes that the reason for the hearing occurring m blocks as it did was the fault of the initial underestimation of the time needed for the hearing. This was no fault of the Applicants whose estimation of 5 days was derided by the Defendants. They persuaded the Court at Lithgow that the allocation of a single day was appropriate (and were awarded costs on the strength of it). Hence, it is reasonable that the costs of any additional preparation occasioned by the manner of the hearing should be recovered by the Applicants."

33. The plaintiffs acknowledged to the Review Panel that the repeated delays in the conclusion of the matter and the many adjournments "may have required more preparation"

(see the grounds for review), but were complaining that it was neither fair nor reasonable for them to have to bear these extra costs.

34. The submission that was put before me was that it was inconsistent for the Costs Assessor to have acknowledged that $2,000 of the $4,000 daily hearing fee of counsel relates to preparation, but to allow for additional preparation in between these adjournments. I do not accept this submission. Nor do I accept that the reasoning of the Costs Assessor (and the acceptance of this reasoning by the Review Panel) was inadequate. The explanation for these costs was clearly identified and known to the plaintiffs, as is evident from their notation about the reason for these additional preparation costs, which they considered to be "not fair or reasonable".

35. No error of law by the Review Panel in failing to find error in the exercise of the Costs Assessor's discretion and methodology is made out. The Review Panel not only had the benefit of the Costs Assessor's comments and notes, but of the parties' submissions and, for that matter, the explanation for these additional costs by the plaintiffs themselves underneath point 5 in the grounds for making the application for review. Most importantly, they had the benefit of reading the judgment of Magistrate Pinch, and the relevant extracts set out above.

36. This ground is not made out.

Ground 2 of the Appeal

37. This ground of appeal concerns the failure of the Costs Assessor to set out the methodology applied in adjusting disputed Items 5-19, 20, 22-24, 26, 28-29 and 32 (as identified in paragraph 5.2 of the Cost Assessment).

38. This ground must fail for the same reason as ground 1.

Ground 3 of the Appeal

39. This ground of appeal concerns the failure of the Costs Assessor to set out the methodology applied in adjusting disputed Items 34 - 39 as identified in paragraph 5.2 of the

Cost Assessment.

40. This ground must fail for the same reason as ground 1.

Ground 4 of the Appeal

41. This ground of appeal concerns the failure of the Costs Assessor to set out why he failed to reduce disputed Items 41 - 44 of the costs sought by the defendants.

42. This ground must fail for the same reason as ground 1.

Ground 5 of the Appeal

43. This ground concerns the entitlement of the defendants to costs for the date on which the substantive judgment was delivered by Magistrate Pinch, namely 16 February 2012.

44. This is dealt with in ground 4 of the Review Panel's statement of reasons as follows:

"**Ground 4:**

The Panel notes that there is no specific mention in the Assessor's reasons as to his allowing costs for the appearance to take judgment on 16 February, 2012. However, the Panel has had access to the Assessor's file including the Assessor's handwritten notes regarding this item which indicate that the Assessor turned his mind to the question of allowance or otherwise and determined there was no reason why the costs of taking the Judgment on 16 February, 2012 should not be included. The Panel is of the same view particularly given the wording of the particular Order 'Costs are awarded to the Applicants, **including** costs for:....' And the fact that those costs were not specifically excluded."

45. The Magistrate clearly intended the plaintiffs pay the defendants' costs and that those costs include certain specific dates that were the subject of dispute. One of those costs was

clearly the appearance to take judgment on 16 February 2012. The Review Panel was correct in holding that the Costs Assessor had taken into account the Magistrate's observations about preparation time between the hearings.

46. No challenge was made to the Magistrate concerning the costs for appearance to take judgment; no doubt there were other costs that were similarly not the subject of challenge. The use of the word "including" clearly was an inclusive term to ensure that all costs were to be the subject of orders in favour of the successful party, unless indicated otherwise. The Review Panel have correctly interpreted the Magistrate's order.

47. This ground of appeal fails.

Ground 6 of the Appeal

48. This ground asserts that the Review Panel erred in law in not assessing costs in favour of the plaintiffs by order of Magistrate Pinch on 23 April 2012 for *"1 hearing day on 1 August 2012* [sic]" . A costs order was actually made in favour of the plaintiffs for that day, not the defendants. The claim is that, contrary to this order, the Cost Assessor assessed costs in favour of the defendants. The amount of adjustment sought is $300.

49. This claim is misconceived. At paragraph 4.2 the Costs Assessor says:

"The Local Court made a costs order in favour of the costs respondents in respect of one day on 1 August 2012**. That costs order is not subject of this costs application**." (Emphasis added)

50. Nor was the Costs Assessor misled by the Magistrate's typographical error. At paragraph 4.3, in quoting King SC DCJ, the Costs Assessor correctly refers to that particular day as being 1 August 2011. He was not misled by the wrong date appearing in the Magistrate's judgment.

51. The defendants submit any costs for this date could not possibly have been taken into account in any event, because the plaintiffs never put a bill of costs in to be assessed for this

date, as the amount was not in dispute. That is conceded to be correct by Mr Vincent.

52. The Review Panel has not made any error in law as the Costs Assessor specifically did not assess it. There was nothing for the Costs Assessor to assess.

53. This ground of appeal has not been made out.

Do the errors justify disturbing the Costs Assessment?

54. If I have erred in holding that the Review Panel's reasons were inadequate, I am satisfied that the costs assessment should not be disturbed. The intention of Magistrate Pinch in relation to the additional preparation costs are clear; the use of the word "including", in relation to the costs generally, is clear. The submission that the plaintiff claimed costs for the hearing on 1 August 2011 is not only simply in error but contrary to this specific statement to that effect by the Costs Assessor as is set out above.

55. The defendants have put a number of matters to me, including delay in these proceedings, the nature of the claim, and the substantial costs already incurred. However, the principal reason why I am satisfied that any error of law (such as inadequate reasoning) would not justify disturbing the costs assessment is that the intention of the judgments in relation to costs is clear. No error in relation to the granting of preparation costs between the adjournments has been demonstrated, whether the reasoning behind these assessments has been adequately exposed or not. The costs involved in grounds 5 and 6, even if error had been made out, are trifling in nature.

Should these proceedings be remitted to the Review Panel?

56. Alternatively, if I have erred in holding that there is no error of law and that any such error does not justify disturbing the costs assessment, it is not appropriate, in my view, to refer these matters to the Review Panel when they are capable of resolution in this Court. There can be no real misunderstanding as to the nature of the quantifiable sum in relation to each of these items, and it would be appropriate in the circumstances for me to re-determine the issue

under s 384(2) of the Act.

57. If I were to do so, I would not make any of the deductions sought on the part of the plaintiffs. These proceedings were protracted and the entitlement of counsel to additional preparation fees was clearly reasonable.

Costs

58. I note that I have reserved the issue of costs with liberty to apply.

Orders

(1) Summons dismissed.

(2) Costs reserved.

(3) Liberty to apply in relation to costs.

(4) Exhibits retained until further order.

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