Queensland District Court Decisions

Chapman v Harris [2019] QDC 47 (12 April 2019)

Last Updated: 7 May 2019

DISTRICT COURT OF QUEENSLAND

CITATION:	*Chapman v Harris* [2019] QDC 47
PARTIES:	**SHAYE CHAPMAN** (plaintiff) **v** **KATRINA JUNE HARRIS** (defendant)
FILE NO/S:	D2111/18; S9553/2014
DIVISION:	
PROCEEDING:	Review of costs assessment
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 – 14 March 2019
JUDGE:	McGill SC DCJ
ORDER:	**Amount certified as professional fees increased from $358,600.37 to $362,462.40. Decisions of the costs assessor otherwise confirmed.**
CATCHWORDS:	COSTS – Assessment – review of assessment under Legal Profession Act 2007 – approach to review – operation of time charging costs agreement – consideration of decision of assessor on certain items.

COSTS – Assessment – review of assessment under Legal Profession Act 2007 – costs of assessment – purpose and effect of statutory provision – event of assessment – whether discretion miscarried – provisional re-exercise of discretion.
Legal Profession Act 2007 ss 340, 341(1), 342.
Amos v Monsour Pty Ltd [2009] QCA 65; [2009] 2 Qd R 303 – cited.

Australian Coal and Shale Employees' Federation v The Commonwealth [1953] HCA 25; (1953) 94 CLR 621 – cited.

Barker v Bishop of London (1756) Barnes 147; 94 ER 849 – cited.

Bentine v Bentine [2016] Ch 489 – considered.

Bethscheider v CMC Lawyers Pty Ltd [2018] QDC 133 – cited.

Bucknell v Robins [2004] QCA 474 – cited.

Re Carter Newell's Bill of Costs [1993] 2 Qd R 593 – considered.

Re Carthew (1884) 27 Ch D 485 – cited.

Re Clark [1851] EngR 875; (1851) 13 Beav 173, 50 ER 67 – considered.

Re Clark [1851] EngR 875; (1851) 1 De G M & G 43, 52 ER 467 – cited.

Re Dibbs and Farrell [1941] NSWStRp 10; (1941) 41 SR (NSW) 249 – applied.

Re Elwes and Turner (1888) 58 LT 580 – considered.

Farrar v Julian-Armitage [2015] QCA 289 – considered.

Re Feez Ruthning's Bill of Costs [1989] 1 Qd R 55 – cited.

Graham Evans Pty Ltd v Stencraft Pty Ltd [1999] FCA 896 – cited.

Gregg Lawyers Pty Ltd v Farrar [2014] QDC 194 – considered.

Re Hardy and Madden (1881) 7 VLR 450 – applied.

Higgins v Woolcott [1826] EngR 1009; (1826) 5 B & C 760, 108 ER 283 – cited.

Idemitsu Queensland Pty Ltd v Agip Coal Australia Pty Ltd [1996] 1 Qd R 26 – cited.

King v Allianz Australian Insurance Ltd [2015] QCA 101 – applied.

Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534 – cited.

Re Lewis (1904) 49 Sol Jo 54 – considered.

MJ Arthur Pty Ltd v QS Law Pty Ltd [2018] QDC 150 – cited.

Re MacDonnell, Henchman and Hannam [1910] St R Qd 329 – cited.

Re MacKenzie (1893) 69 LT 751 – considered.

Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 – applied.

Picamore Pty Ltd v Challen [2015] QDC 67 – cited.

Radich v Kenway [2014] QCA 301 – applied.

Remely v O'Shea [2008] QCA 389 – cited.

Re Richards [1912] 1 Ch 49 – considered.

Richardson v Lander (*No. 2*) (1947) 65 WN (NSW) 81 – considered.

Re Ridgeway and Irwin [1904] VicLawRp 18; (1903) 29 VLR 130 – cited.

State Mercantile Pty Ltd v Oracle Telecom Pty Ltd (no 2) [2017] QDC 60 – cited.

Schweppes Ltd v Archer [1934] NSWStRp 17; (1934) 34 SR NSW 178 – applied.

Swinburn v Hewitt (1838) 7 Dowl 314 – cited.

Tamawood Ltd v Paans [2005] QCA 111; [2005] 2 Qd R 101 – applied.

Re a Taxation of Costs [1936] 1 KB 523 – cited.

Wende v Horwath (NSW) Pty Ltd [2014] NSWCA 170 - considered.

White v Milner [1794] EngR 2337; (1794) 2 H Bl 357, 126 ER 593 – considered.

Wilson v Angseesing [2018] QSC 61 – considered.

COUNSEL:	MP Amerena for the plaintiff SM Gerber for the defendant
SOLICITORS:	The plaintiff represented herself Sambrook Grant for the defendant

[1] The defendant was formerly a client of the plaintiff solicitor, in a period from about May 2011 until June 2014. In 2014 the plaintiff commenced a proceeding in the Supreme Court seeking to recover an amount for unpaid legal costs, including interest. On 22 May 2015 McMurdo J (as his Honour then was) ordered that the plaintiff file and serve an itemised bill comprising all of the fees and charges of the plaintiff to the defendant, that a particular costs assessor be appointed to assess the costs set out in the itemised bill in accordance the Legal Profession Act 2007, and certain consequential orders. On 15 July 2015 the plaintiff's itemised bill was served, with 4,664 items, claiming a total for professional fees and outlays of $693,301.02,[1] although the amount actually sought by the plaintiff was $674,249.54.[2]

[2] A notice of objection was served by the defendant, and the costs assessment proceeded until a certificate of assessment was filed on 10 October 2017.[3] This assessed the legal costs payable by the defendant to the plaintiff in the amount of $263,475.74, after deducting the costs of the costs assessment in the sum of $117,043.95 (including the costs assessor's fees), deducted pursuant to a determination that the costs of the assessment be paid by the plaintiff to the defendant. The plaintiff applied for a review of the assessment, which came before me for hearing on 11 March 2019.[4]

Approach to the review

[3] The review is to be conducted in accordance with UCPR r 742, made applicable to an assessment of costs under the Legal Profession Act 2007 ("the Act") by r 743I. The test to be applied on the review is that laid down by Sir Frederick Jordan, with the concurrence of the other members of the Full Court, in Schweppes Ltd v Archer [1934] NSWStRp 17; (1934) 34 SR NSW 178 at 183-184, a test which was adopted by Kitto J in Australian Coal and Shale Employees' Federation v The Commonwealth

[1953] HCA 25; (1953) 94 CLR 621 at 628-629, and in turn by the Queensland Court of Appeal in King v Allianz Australian Insurance Ltd [2015] QCA 101. Mullins J with whom the other members of the court agreed at [18] summarised the approach in the following terms:

"Generally, the discretion of the costs assessor will not be interfered with by a judge on review, unless the costs assessor has erred on a question of principle. Where the question on the review is the quantum allowed for the item, the court is generally unwilling to interfere with the judgment of the costs assessor whose expertise is to make judgments on the quantum of the costs and disbursements."

[4] Sir Frederick Jordan of course was speaking about a taxing officer of the Supreme Court of New South Wales before the war, of whom there would have been only a small number, and whose qualities the Chief Justice would have been in a good position to assess. Whether the same approach is justified now in Queensland where there are over 50 costs assessors who are in private practice, with a variety of backgrounds and different levels of experience, most of whom will be quite unknown to the judge conducting the review, is a question which perhaps did not receive as much consideration from the Court of Appeal as it might have, but I accept that I am bound by and must apply the test adopted by the Court of Appeal in King.[5]

Background

[5] The defendant consulted the plaintiff about a family dispute arising out of her claim that she was not receiving a fair share of the estate of her parents. Her father had been a successful property developer, but his assets were largely tied up in various companies and at least two family trusts, through most of which he had conducted his business while he was alive. After his death in January 1994 his two sons, the defendant's brothers, continued to operate the business in this way, and the practical effect of what had occurred seemed to the defendant to be that the two brothers had in effect inherited the whole of the business, or at least inherited control of it, whereas she had received very little. There were payments which had been made to her on a regular basis, but it emerged that these had been characterised in the accounts of the family trust as loans rather than as distribution from the trust. The defendant's mother died in April 2011; the defendant claimed that her mother had been acting under the influence of her brothers prior to her death.

[6] Evidently the relationship between the defendant and her brothers was not good. The brothers were not cooperative about the situation, and an application had to be made to the Supreme Court of New South Wales in order to obtain access to records of the trust and the companies, in the course of which the judge commented

that there were at least grounds for suspicion that there had been some trust fraud committed by the brothers. Very little information had ever been provided to the defendant about the trust or the companies, whether or not she had an interest in them. There was a certain factual complexity about what had happened with the various property holdings, and the shareholdings in the various companies which had been used from time to time, though my impression is that the complexity arose not so much from the number of entities involved, since several of them seem to be essentially non-functioning companies, but from the obstructive attitude of the brothers. One step taken to exclude the defendant was the establishment of a new trust in 2007, of which the defendant was not a beneficiary.

[7] Eventually the relationship between the plaintiff and the defendant broke down. I gather the plaintiff terminated the retainer; in any case, the defendant changed solicitors. The new solicitors adopted a different approach, and this resulted in the whole dispute being resolved between the defendant and her brothers by the payment to her of a significant sum of money. This left the defendant with the impression that the plaintiff's work had been unproductive, and she was therefore reluctant to pay the plaintiff's fees. During or at the end of the retainer the plaintiff issued a total of 24 invoices. Most of these were paid in full, before disillusionment set in, but the most recent five, delivered after April 2014, were not paid, including one for over $500,000. The total amount paid to the solicitor was $77,674.83.

[8] It does appear that a good deal of the work undertaken by the plaintiff was related to attempts to piece together what had happened with the "family fortune" on the basis of such documents as were publicly available, and what additional information could be prised out of the hands of the brothers or their companies or professional advisors. I gather that some difficulty was experienced in preparing a satisfactory pleading, possibly caused or contributed to by the difficulty in obtaining proper information about exactly what had happened.

[9] Part of the proceeds of the settlement were held in the trust account of the defendant's new solicitors, on the basis of a claim by the plaintiff of a lien over the proceeds of the settlement in respect of her costs. Shortly before the review came on for hearing before me, another judge made an order that an amount of $305,184.58 be paid to the plaintiff out of the moneys held by that solicitor.[6]

[10] In the principal proceeding the defendant raised various issues about the costs agreements and whether the solicitor had been negligent, but these matters were ultimately either not pursued or not pursued successfully. Nevertheless, an issue remains to be resolved in the proceeding because, as a result of the order of the other judge, in my view the plaintiff has been paid more in total than she is entitled to receive. I will return to the implications of this later in my judgment.

Items argued

[11] The way I conducted the review was to deal with a particular item that was argued and then decide it, giving concise oral reasons. Strictly speaking what I said at the time stands as my reasons for deciding the particular item, but in the interest of making my reasoning accessible I will reproduce here what I said, with the addition of some background and any necessary amplification.

[12] The review initially proceeded on the basis of a classification of items in the amended application for review, which grouped together numbers of items on the basis that the issue they raised was similar or the same. The first group of items argued this way were those where it was submitted that the costs assessor had wrongly disallowed the cost of printing an electronic communication as a permanent record for a hard copy file. There were a number of instances where a claim under the costs agreement of 55 cents per page for printing was made to print an email or other electronic document so that there was a hard copy for the file, and these items had been disallowed. It seems to me that, as a matter of principle, it is a reasonable way in which to conduct a legal practice for a solicitor to maintain a hard copy file, and where a solicitor is doing so, and it is reasonable to include an electronic communication in the hard copy file, a charge for printing the document can properly be made by the solicitor, at least in a case where the costs agreement provides for a charge for printing.[7]

[13] The issue, under s 341(1)(a) of the Act, is whether it was reasonable to do this, and as a general proposition I consider that it was, at least so long as the content of the email printed contained something of which it would be appropriate to keep a permanent record as part of the file. There were however emails that I looked at which were just forwarding another email, or just a communication making arrangements for something to happen in the immediate future, which would become irrelevant as soon as that thing had occurred. I took the view that this was not the sort of communication which was worth keeping on a hard copy file as such, as distinct from simply noting the fact that such a communication had occurred in some document on the file.

[14] Item 3 was a claim for printing an email of the kind that I considered was too trivial to justify inclusion of a permanent file, and after I foreshadowed that, the item was not pressed. Ultimately the question of how my approach to this issue should be applied to the whole bill was the subject of a commercial compromise between the parties, as a result of which the extra amount allowed for these items was $10.48.[8]

[15] We then moved to Table 7 on p 9 of the amended application. Item 47 was a claim for a paralegal perusing and collating various documents obtained from an ASIC search of certain companies. There would have been no reason for the paralegal to have perused this material, since he was essentially just locating it and printing it so that it could be perused by the solicitor, as occurred at item 50. Half an hour to collate a relatively small number of ASIC searches seems a long time, but in any event there was no material on the solicitor's file to show that half an hour was spent in this way. On this basis I concluded that the item was properly disallowed, as there was no evidence that the work claimed for had been done: p 1-37.

[16] Item 59 claimed 6 units for the paralegal to peruse and collate a bundle of property and banking documents received from the client.[9] Again there was no reason for the paralegal to be perusing these documents, as distinct from having a superficial look at them in order to sort them.[10] Further the claim for perusal was not supported by any diary note. The costs assessor had upheld the objection on the ground that there had been previous allowances for reading this material (see p 1449) though I had some difficulty in identifying the earlier occasion when the material was read. The objection was on the ground that the time taken was excessive, and the decision reduced the time to 4 units. I declined to interfere with the costs assessor's decision on the ground that the claim for perusal was not supported by a diary note, collating the material would have been essentially a mechanical exercise and the time allowed seemed reasonable.

[17] Item 63 claimed 8 units for the paralegal again for perusing and collating a different bundle of documents received from the client. This had been also disallowed on the basis of a previous allowance for reading this material (p 1449), though again it was not obvious that there was an earlier item on the bill for that, and it was apparent from the file that additional material had been produced to which this item related. Having considered the material on the file, I concluded that it was appropriate to allow two units, an amount of $55.00.

[18] Item 65 claimed 5 units for the paralegal perusing and collating yet another bundle of documents received from the client. This had been reduced rather than being disallowed, but for the same reason as before. However, an examination of the file, particularly of the paralegal's diary note, suggested to me that no more than two units should be allowed, which was what the costs assessor had in fact allowed, so it was not appropriate to interfere with his decision.

[19] Item 228 claimed 3.7 hours for the paralegal to copy and collate documents for inclusion in the brief to counsel, and drafting an index. The costs assessor allowed for drafting the index but not copying and collating as these items were covered by printing expenses, such as items 229 and 273. The material on the file does

suggest that the process of putting together the brief to counsel was prolonged, and my general impression was that it was not performed efficiently. It appeared from the file that what occurred initially was that the documents to be included in the brief were identified by the solicitor (item 227), and the paralegal then drafted an index to the documents (one page) which was approved by the solicitor; the relevant documents were then copied and put in folders and paginated, though the pagination was done mechanically rather than manually by the paralegal.

[20] The costs assessor allowed one hour for the paralegal's work in this regard. Bearing in mind that there was a per page cost for copying, it was not appropriate to charge as well for any time spent by the paralegal on copying, otherwise the same work would be charged for twice under two separate provisions of the costs agreement. I agree with this interpretation by the assessor of the costs agreement. Overall, having considered the material on the solicitor's file, I was not persuaded that it was appropriate, applying the test in King, to interfere with the costs assessor's decision as to how much paralegal time to allow under this item: p 1-52.

[21] At this point in the review, I formed the view that the process of going through items by category was not proving efficient, because it was often necessary, in order to understand the issues relevant to a particular item, to consider to some extent what had been claimed in other related items in the bill, and how those items were dealt with, and generally to be aware of the relevant documents on the solicitor's file. Because of this and because of the number of items covered by the application to review, it seemed to me more efficient if I worked through the challenged items from the beginning of the itemised bill. That would assist in developing an understanding of how the work done by the plaintiff was carried out. I therefore went back to the earliest item still in dispute, and worked through the bill in that way.

[22] Item 13 was another claim for printing an email, but again the email was a short communication about making an arrangement which was of no lasting significance, and therefore not worth printing as something to be kept on the permanent file. It was in the same position as item 3.

[23] Item 15 claimed 1.1 hours for the paralegal to research cases relating to the Family Provision Act. There had been at the first conference some discussion about whether there was any prospect of getting an extension of time so that the defendant could apply for further provision out of the estate of her father. The solicitor's diary note of that conference referred to the need to research this question, and the solicitor claimed that she had been given instructions to do this, even though no such instructions appear in the diary note, or anywhere.[11] It is particularly important, when oral instructions are given, that these be recorded with precision, so that the risk of any dispute about the scope of the instructions is

minimised. The costs assessor had disallowed the item on the basis that this was "self-education for lawyer expert in this area of estate claims".[12] The question was whether an application for an extension of time would be granted where the death of the deceased was in 1994, which is a long extension. It might have been worthwhile investigating whether there was any prospect of getting an extension of that length, and identifying matters which would be relevant to justify such an extension. Because of the unusual nature of such an application, some research was justified, had instructions been given.

[24] A further difficulty I had with this claim however that was what was in fact undertaken by the paralegal strikes me as very ineffective. The paralegal apparently looked at, and in any event printed out, ten cases, but in four of them there was no question of an extension of time, one was an application made out of time which was dealt with on different grounds, one involved an extension of time in an application made in Victoria where the statutory provision is different, and in one the extension of time related only to some of the multiple applicants. I ascertained this information by reading the copies of the cases which were on the solicitor's file; the paralegal had printed out cases even though they were irrelevant, which suggests that either he had not looked to see whether the decision really was of any relevance, or he was printing indiscriminately. Overall it seemed to me that this work was done quite inefficiently and was essentially worthless to the client. For this reason as well I was not prepared to allow this item, apart from the fact that the material on the file did not clearly record instructions at the time to undertake research into this particular issue.

[25] Item 17 claimed 9 units for the paralegal to search records of a particular company with ASIC, printing and collating the searches. Item 18 claimed separately 73 pages of printing. Item 17 was reduced by the costs assessor "in view of allowances of items 35 and 36" which were the items where the solicitor claimed for perusing those records. It seemed to me that on the face of the bill, and in light of the material on the file, the time claimed included the time involved in printing the documents, which for reasons I have stated earlier could not be claimed again under the costs agreement. The costs assessor had still allowed most of the time claimed and in the circumstances I was not persuaded that I was justified on the test in King in interfering with the costs assessor's decision to allow any more: p 1-71.

[26] Item 30 claimed one unit for drafting an email to the client attaching a letter to the solicitor on the other side requesting a copy of the will. Item 28 was a separate claim of two units to draft and fax to that solicitor the letter requesting the copy of the will. That was allowed as claimed, but item 30 was disallowed on the basis that the time was covered in the allowance at item 28. Having considered the letter to

the other solicitor, my view is that allowing two units for drafting it was if anything generous, and the very brief email to the client simply attaching a copy of the letter did not justify any more time. I agreed with the costs assessor's decision here.

Application of a time charging costs agreement

[27] This raises an issue which I have spoken about previously.[13] The costs agreement provided for charging for the work done on the basis of the time taken at a particular rate, calculated on a minimum unit of six minutes, but there was nothing in the costs agreement to justify interpreting it as meaning that the clock is restarted for every separate item of work. What has been done here in effect is to prepare an itemised bill under a costs agreement, which provides for time costing, as if it were an itemised bill under a system where the solicitor was entitled to a scale charge for each item of work undertaken. That in my opinion is clearly wrong. The true construction of the costs agreement is that the solicitor is entitled to charge in accordance with the method of calculation specified in the agreement from the time when she starts work on the file till the time when she stops work on the file, whether during that period she does one item of work or 50.

[28] Accordingly in a situation like this, where obviously the two items of work were done together, the entitlement to charge is based on the total time taken for the items. There would have been no possible justification for spending more than 12 minutes in total on those two items; if in fact the solicitor spent more than 12 minutes, the work was not done in a reasonable way and was properly disallowed in part. Accordingly I entirely agree with the costs assessor's decision on item 30: p 1-73.[14]

More items argued

[29] Item 33 claimed half an hour for the solicitor to draft a one page email to the client seeking certain additional information relevant to any potential family provision claim. The time allowed was reduced by the costs assessor on the basis that the time claimed appeared to be excessive and unreasonable having regard to the length of the email. It was submitted that it was insufficient just to look at the length of the email, but necessary to consider the extent to which the content reflected careful consideration of the relevant legal issues. The difficulty with that submission is that the content did not suggest that careful consideration had in fact been given to those issues which were of particular significance in relation to an application under the Family Provision Act, either for substantive relief or for an extension of time. In those circumstances, I consider that spending more than half an hour on that letter did not involve doing the work in a reasonable way, and agree with the decision of the costs assessor, which was to allow only that amount of time.

[30] Item 44 claimed .6 of an hour for the paralegal to search probate notices in three Sydney newspapers, disallowed by the costs assessor on the basis that the paralegal had previously been advised by the Supreme Court registry that no grant of probate had been made. There is however a difference between ascertaining the existence of a grant and searching for a notice of intention to apply for a grant. Notice will be given before an application is filed in the Supreme Court, and provides some advance warning of an intention to take that step. Accordingly the conclusion of the costs assessor, that this work was unnecessary given the information provided by the registry, was in my view wrong. It follows that the assessor's decision was on a wrong factual basis, and this item should be allowed as claimed, $165.00.

[31] Item 45 claimed .1 of an hour for the paralegal to search the ASIC database for the defendant's mother. This was disallowed on the ground that it was a duplication of item 41, .4 of an hour to obtain an ASIC search and land title database search for the defendant's mother and two of the companies. An examination of the file revealed nothing to show that there was a second search which met the description in item 45, and on that basis I agreed with the assessor's decision to disallow the item.

[32] Item 56 claimed .2 of an hour for the solicitor to confer with the paralegal in respect of the searches, to discuss indexing, the outcome of the review of the material that was received from the client and the most recent instructions from the client. This was disallowed on the basis that allowance had already been made for reading the material, but the reasons also referred to the objection being upheld, and the basis of the objection was that internal communications between the solicitor and the paralegal were not something which could be charged for. It is true that there is old authority to this effect, but that did not arise in the context of the assessment of costs under a costs agreement, which on its face contemplates that different people may be involved in the work. In those circumstances, it would be reasonable to expect that some communication between the different people doing the work would occur, and this ground of objection was not justified.

[33] The solicitor in item 50 claimed 1.9 hours to read and consider recent land and company searches. The period of two units claimed for discussing that and other things with the paralegal strikes me as not excessive, and appropriate. This is an situation where the costs assessor acted on a wrong principle, as to whether this was chargeable at all, and accordingly I allowed item 56 as claimed, $99.00: p 2-15.

[34] Item 76 was a telephone call to the office of the solicitor on the other side, and the costs statement says simply that the solicitor was advised that she was not in the office. That was disallowed on the basis that nothing useful was done so this did

not qualify as “work” for the purposes of the costs agreement. I certainly agree with the costs assessor that no charge should be made for a failed attempt to communicate with someone, whether the failure amounts to a telephone not being answered, or being answered by someone else who says that the person concerned is not available. On the other hand, the diary note for the conversation showed that in fact there was some meaningful communication between someone at the other firm, particularly about the provision of a copy of a will, and in those circumstances this was not really an ineffectual conversation. The problem really was that the itemised bill was not properly formulated in this respect. Having looked at the diary note I consider that the telephone call was one the solicitor was entitled to charge for, and will therefore allow one unit, $49.50: p 2-17.

[35] Item 80 was another issue of printing for the file a document which had been sent electronically. Having looked at the document it was worth including in a hard copy file, and accordingly 55 cents was properly claimed for this item, which is covered by the compromise.

[36] Item 81 claimed for a telephone attendance on the Supreme Court registry confirming that a caveat had been placed on a probate application, which was disallowed on the ground that this was over cautious. The complaint on the review here was only that an amount of $50.05 had been deducted rather than the $49.50 claimed for the item, in effect that an extra 55 cents had been deducted. That appears to be correct, and an extra 55 cents should be allowed in respect of item 81.

[37] Items 94 and 95 claimed for an email to the client requesting a meeting to discuss progress and to take further instructions, and printing a copy for the hard copy file. These were disallowed as over-servicing. The complaint was only that $50.10 had been taken off for these two items, although item 95 had been listed earlier as an item disallowed on page 1447. There are however difficulties with the reasons on page 1447. Fourteen items are listed together, of which it is said that four items were allowed and the rest were disallowed, including 95, but the amount deducted was $6.60. At 55 cents a page, this comes to 12 pages, and each of the ten items disallowed was for printing only one page. Ultimately I left the question of whether there had been any double counting of items disallowed to be resolved at the end of the review, and suggested that the parties might like to see whether that issue could be compromised. In due course it was covered by the compromise referred to, so that it was not necessary for me to decide this or a number of other items where the plaintiff was alleging that the particular item had been disallowed and deducted more than once. Since item 95 is covered by the compromise, it

should not be separately deducted here, so an adjustment of 55 cents is appropriate.[15]

[38] Item 101 claimed 55 cents for printing an email to the client attaching a copy of the will and a copy of the email received from the solicitor opposite. This was disallowed on the general ground in relation to printing electronic communication, but in my opinion in any event that was properly disallowed because the solicitor had already printed a copy of the email from the solicitor opposite with its contents at item 98, and it was unnecessary to print as well the email forwarding this to the client. It is covered by the compromise, as is item 104.

[39] Item 120 claimed $9.90 to purchase two lever arch folders to hold the brief to counsel, disallowed on the ground that the cost of stationery was part of the overheads of the plaintiff's business: p 1445. That is the traditional approach to these matters, but given the terms of the costs agreement, and the express provision for the client to reimburse outlays and expenses, including stationery, I consider that this cost was recoverable. The defendant did not dispute the quantum involved. Accordingly I allowed all items where lever arch folders had been claimed but disallowed by the cost assessment on this basis. That was items 120, 230, 888, 1020, 1019, 1024, 1330, 1988, 2181; this included a couple of items for purchasing dividing tabs to use in such lever arch folders, and in principle the same applies to them. Again the defendant did not dispute the quantum, though I was a little surprised at the cost of such tabs.[16] The total incorrectly disallowed on this basis was $209.25.

[40] Items 240 and 241 claimed for perusing a very short email from counsel advising that the brief had been received, and printing a copy for the file. This was objected to essentially on the basis that it was too trivial to charge for, upheld by the cost assessment on that basis. I agree; this email was inconsequential, no charge should have been made, and there was no point in printing it for the file.

[41] Item 367 was a charge for printing an email to the client for which 55 cents was claimed. Having looked at the email I consider it was something worth keeping a copy of on the hard copy file, and allowed this item, but that decision was superseded by the compromise about printing. The same applied to item 397.

[42] Item 396 claimed three units for the solicitor to prepare a letter to the solicitor opposite, in reply to the letter for which a claim was made at item 370. It was objected to on the ground of excessive time taken, and that was upheld, with two units allowed. On the review it was submitted that the assessor had not given the complexity of the matter and the difficulty of the issues covered by the letter sufficient weight, and that the time claimed was reasonable for this letter. Having

considered the content of the letter, and bearing in mind that a large amount of time had already been allowed for considering the earlier letter and the material included with it, it did not appear to me that, consistent with the approach in King, I would be justified in interfering with the decision of the costs assessor: p 2.51.

[43] Item 521 claimed for a telephone call by the paralegal to counsel "in relation to structure exhibits to supporting affidavit of client". This was objected to on the ground that it was not reasonable to be consulting counsel about a matter such as this. In order to understand the situation here it is necessary to bear in mind that there had already been extensive communication with counsel about this draft affidavit of the client in support of the summons.

[44] At item 477 the solicitor had begun preparing the affidavit, and at item 468 had perused an email from counsel dealing with the contents of the affidavit. The solicitor identified documents for inclusion in the affidavit at item 480, there was at item 491 a telephone discussion between the solicitor and counsel including about the proposed affidavit of the client, at item 504 the solicitor spent 1.5 hours drawing the affidavit, at item 507 there was a discussion with the client about it, followed by item 508, a further 7 units further preparing the affidavit following discussions with counsel and the client. At item 512 there was a telephone attendance for half an hour with counsel discussing amendments to the affidavit, and counsel sent an email regarding further changes which the solicitor reviewed at item 513, then drew amendments to the affidavit at item 515. The paralegal emailed counsel seeking clarification in relation to exhibits at item 517, and advice from counsel was received at item 519.

[45] The particular phone call at item 521 appears to have been about whether the documents referred to should be made separate exhibits, or should be one exhibit as a bundle with the documents identified as at pages within that exhibit.[17] It is not clear from the documents on file whether the idea emanated from the solicitor or from the barrister, but after extensive discussion with the barrister the draft affidavit had provided for a series of separate exhibits. I agree with the cost assessor that this is a matter which a solicitor should decide without consulting counsel, but in any event there had been ample consultation with counsel already about this affidavit, and to have had yet another discussion with counsel about such a trivial matter at this point was not carrying out the preparation of the affidavit in a reasonable way. I agree with the cost assessor's decision to disallow this item: p 2-60.

[46] Item 547 claimed one unit for the paralegal to email the defendant passing on an updated cost estimate from counsel, disallowed on the ground that this related to cost disclosure matters. It was submitted for the plaintiff that a distinction should be drawn between communication with a client in relation to the solicitor's costs, and

communication with the client in relation to counsel's fees, and reference was made to an earlier decision of mine where I had allowed a charge for such communication. [18]

[47] Under the cost agreement the client was to be charged for legal work, that is, work undertaken by the solicitor for the benefit of the client. Communications between solicitor and client about the business relationship between the solicitor and client are not undertaken for the benefit of the client, at least not in the relevant sense, but for the benefit of the solicitor, and therefore not within the scope of the work for which a charge may be made under the costs agreement. This email was in performance of the plaintiff's obligation under s 309 of the Act. The obligation to comply with the disclosure regime in the Act is also something which is not within the scope of legal work under the costs agreement, whether it is in compliance with the statutory obligation on the solicitor or the statutory obligation on counsel. It appears that on this occasion the disclosure from counsel was simply passed on to the defendant by forwarding the email. I consider it was appropriately disallowed by the cost assessor.

[48] Item 557 claimed one unit for the solicitor to telephone counsel to discuss progress and to confirm the documents had been forwarded to the client for execution. This was disallowed by the costs assessor on the ground that the telephone call was not reasonably required. I agree and would not interfere with his decision on this.

[49] Item 582 claimed one unit for the solicitor to peruse the sealed summons and affidavit of the client, after they had been filed in the Supreme Court, which was disallowed on the basis this amounted to over-servicing, in circumstances where the solicitor had prepared these documents, and the only difference could have been that the court seal had been applied to them, and a return date allocated on the summons, as a result of their having been filed. I agree with the cost assessor's decision on that item. No perusal was necessary.

[50] Item 601 claimed for a telephone attendance to the court registry to enquire what had happened on the hearing of the application, which was disallowed on the basis that it was sufficient to rely on the advice subsequently received from counsel. What happened here is that counsel had been briefed to attend on the return date of the summons, when apparently all that was expected was that the matter would be adjourned for hearing on a later date and directions given, but counsel omitted to put the matter in her diary and forgot to turn up at court. Nevertheless, counsel for the respondent turned up, and the matter was adjourned for hearing and directions were given. There is one reference in a document on the file suggesting that the directions were in accordance with some agreement between counsel, and if so I

expect no harm was done, but this was a serious failure which does not reflect well on counsel. I think there are difficulties however with the reasoning of the cost assessor. If counsel were not there, counsel was not in a position to be able to say what happened either, and the only way to ascertain reliably the outcome of the hearing was to contact the registry. I consider that it was reasonable for the solicitor to make this enquiry, and allow the amounts claimed in items 601 and 602, a total of $50.60: p 2-79.

[51] Item 605 claimed two units for a telephone call by the solicitor advising the defendant of the outcome of the hearing. This was reduced by the cost assessor on the basis that there was nothing much to report as neither the solicitor nor counsel had gone to the hearing. I consider it was reasonable to advise the client of the outcome, which was not just that the matter was adjourned to a particular date, but included directions for the other side to file affidavits by a particular date. The cost assessor allowed only one unit. His reasons suggest that he did not fully appreciate what was discussed in the course of the phone call, as shown by the diary note of it. Having considered the diary note, it seems to me that the claim of two units was reasonable in the circumstances, and I increased the allowance under this item by $49.50: p 2-81.

[52] Item 148 claimed two units for the paralegal to research local forensic accountants to undertake an examination of the company and financial documentation. This process included telephoning two of them. There was then some discussion with the solicitor, when the paralegal was told to make contact with them as to their availability and charges. That subsequently occurred. The objection to item 148 was upheld by the cost assessor on the basis that such information was part of a lawyer's intellectual capital. The cost assessor appears to have treated this information as either something a solicitor who was an expert in commercial litigation should just know, or information the acquisition of which would be of some lasting benefit to such a solicitor, so that in either case the solicitor was not entitled to charge.

[53] On the other hand, it seems to me that the cost assessor must have been assuming too much of the solicitor's intellectual capital. A solicitor will not necessarily have at any particular time a list of suitable forensic accountants to undertake this exercise. Even a solicitor who has a list of suitable forensic accountants would be expected to check their cost and availability when an issue arose about their use in a particular case. Overall I consider that the approach of the cost assessor was too restrictive, and that in the circumstances the work was reasonably undertaken: p 3-13. I consider that the matter is sufficiently clear to

justify my interference notwithstanding the need to satisfy the test in King, and accordingly allow an extra $55 for this item.

[54] Item 559 claimed two units for the solicitor's drafting an update to the matrix of land and schematics. This was disallowed by the cost assessor on the basis that there was no proof of this item on the file. That in principle would be, in an appropriate case, a proper basis to disallow the claim, but after careful examination of the material on the file I consider that I have found sufficient evidence to justify this claim. The position is that a sheet which summarised the information obtained from various company and land searches was prepared for each of the relevant companies, and on this occasion those documents were revised to include additional information which had been obtained since they were originally prepared. The documents struck me as a convenient way to summarise the effect of the searches which had been undertaken, and to collect the material relevant to each particular company in a way which would provide for ease of reference. It strikes me as not an unreasonable way to do the legal work for the defendant, which would necessarily involve coming to grips with issues about what property was owned by which company and how that company was controlled, which may well change from time to time: p 3-18. Accordingly I allowed the amount claimed for this item, two units, $99.

[55] Item 273 claimed a charge for printing 570 pages, described as "printing searches and brief to counsel". This was disallowed by the costs assessor, on the basis that what this involved was printing a copy of the brief for the solicitor to have available as a reference copy. It was submitted that it was a reasonable practice for a solicitor when preparing a brief to counsel to prepare a reference or office copy of the brief to which the solicitor could refer when working with counsel on the matter, to facilitate communication between them about the content of the brief. I think there is sense in that, and it is apparent to me, both from experience at the bar in the more distant past and from observation of what is going on in court, that this is a fairly common practice among litigation solicitors. In those circumstances, I have difficulty with a conclusion that as a matter of principle it was not appropriate for the solicitor to maintain a reference copy of the brief to counsel for use in this way.

[56] I do not consider that this can be seen simply as a document which is prepared to assist the solicitor; rather it would facilitate the solicitor and counsel working together to advance the interest of the client. Accordingly I disagree with the conclusion reached by the costs assessor: p 3-27. The material produced during the review, which was also available to the assessor, revealed that the brief contained 732 pages. The division between item 273 and item 229, where 860 pages were claimed for "printing counsel brief", which was reduced on the assessment to 732

pages, is somewhat curious (p 3-25) but on the whole I consider that it was reasonable to do all the printing claimed. In the circumstances, I disagree with the costs assessor's decision, and allowed $313.50 under item 273: p 3-28.[19]

[57] I should say that, although it is reasonable for this to be done in the case of a brief to counsel, I do not think it follows that it is necessarily appropriate for an office copy or reference copy to be kept for every bundle of documents which is prepared and sent to someone for some purpose in the course of litigation. The situation really depends on the circumstances. I know that it is a common practice for a solicitor to have an office copy of counsel's brief, and it does strike me as being likely to be of assistance in the efficient working together of counsel and solicitor in the conduct of the client's case. The position may well be different in some other cases.

[58] For example, when a brief was being prepared for the forensic accountant, a reference copy, described as "firm's retention copy", of this material was also prepared. All of this must necessarily have been material already held anyway on the solicitor's file, and the solicitor could refer to such material, if necessary with the assistance of the index to the brief to the forensic accountant. If a forensic accountant is properly to fulfil the role of an independent expert it would be inappropriate to be working closely together with the solicitor in the matter, in the way in which a solicitor and counsel might be expected to work closely together. Accordingly, it seems to me that there is not the same justification for keeping a reference copy of a brief to a forensic accountant that there is for a brief to counsel: p 3-37.

[59] Item 1017 claimed 75 cents per page for printing 1920 pages, for the brief to the forensic accountant and the firm's retention copy. The assessor reduced the claim by $517.50, on the ground that the brief contained 600 pages, and that further printing was unnecessary. The index to the brief appears in the material before me, showing that it was prepared in three volumes and occupied a total of 795 pages. This amount of printing should have been allowed for this item, if the current costs agreement had provided a per page cost for printing.

[60] The first costs agreements dated 5 May 2011 provided expressly that the plaintiff charged 'for printing, faxing and photocopying 50 cents per page and also the cost of stationery." This was before GST was added, so while that agreement remained in force it was appropriate to charge 55 cents per page for printing. There was however an amended costs agreement dated 26 October 2011. This also provided for the client to pay all necessary and proper expenses and disbursements, and listed rates for expenses which included photocopying and faxes at 75 cents per page (presumably including GST), but made no reference to a

charge for printing. After 26 October 2011 the itemised bill had claims for printing costs at a rate of 75 cents per page. In my opinion there was no right under that costs agreement to impose this charge.

[61] There was no express provision that entitled the solicitor to charge printing at this rate. The fact that the printing was done on the machine that also did the photocopying is irrelevant; they are different functions, and in the absence of an express provision for a charge for printing, there was no right to charge for it: p 3-46, 47. Even if the costs agreement entitled the plaintiff to recover the actual expense incurred in printing, that would have meant the marginal cost of printing each additional page, which would have been a small fraction of a cent, and the amount involved was not proved: p 3-45. The subsequent costs agreements were relevantly in the same terms, so that after item 486 all of the items claiming an amount specifically for printing a document or documents in my opinion were not properly included in the itemised bill, and all should have been disallowed.[20]

[62] This is something which the costs assessor did not detect,[21] and had not been raised by the defendant in the notice of objections. The issue was not a live issue before the assessor, and it first emerged when I checked the second costs agreement after counsel mentioned the preliminary reasons of the assessor for item 2254.[22] At this point counsel for the plaintiff claimed that he was taken by surprise, and objected to the point being raised on a wider basis, essentially on procedural fairness grounds. After hearing further submissions, I concluded that it would not be appropriate, bearing in mind the terms of r 742(5) and procedural fairness considerations, for me to interfere with the assessment by reconsidering on this basis items which were not raised in the application for review, and pressed in submissions before me, on a ground not raised before the costs assessor: p 3-50. [23] On the other hand, if it was argued before me that the costs assessor's decision was incorrect in relation to an item for printing, so I had to determine the amount properly allowable in respect of that item, I would necessarily have to do that on the basis of my interpretation of the contract, which was that no specific charge was allowable for printing.

[63] It seems to me that the costs assessor's decision in relation to item 1017 proceeded on the basis that there were fewer pages to be printed for the brief to the forensic accountant than were actually required. Ultimately, this item and item 1018 were not pressed on the review. Item 1018 was a related point; the other side had served a substantial affidavit by the accountant for the brothers and their companies and trusts, two copies of which were printed, one for the forensic accountant and one as a reference copy. The latter strikes me as entirely unnecessary, since obviously there was a copy of that affidavit already in the plaintiff's file, and I agree

with the costs assessor's decision to disallow the second copy, though of course on my interpretation of the costs agreement he should have disallowed the lot anyway.

[64] Item 1616 was for printing the exhibits to an affidavit by the forensic accountant, with an index, which were sent to him, so that he would have a copy of the exhibits as attached to the affidavit as filed in the court. This was disallowed by the costs assessor on the basis that allowance had already been made for printing this material at item 1590. That was true, that item also involved printing the exhibits to the affidavit of the expert, and was allowed as claimed. It emerged that what had happened was that the document at item 1590 had been printed without page numbers, which, bearing in mind that it contained 231 documents (see item 1589), was a serious deficiency. There was no point in sending an unpaginated mass of documents to the expert. If this task had been done properly it would not have been necessary to print out and send the second document. On that basis I considered it was properly disallowed anyway, even if there had been a right to charge for printing: p 3-40, 41.

[65] Item 1956 was a charge for printing 97 pages, apparently documents received from the forensic accountant after he had inspected documents at the office of the accountant for the brothers and the company, and identifying which ones were not exhibited to the affidavits of that accountant: see item 1955. The costs assessor disallowed this charge in view of the allowance at item 1955, where he allowed one hour at secretarial rates, on the basis that this was essentially a mechanical exercise, rather than at the rate for a paralegal. If there had been a right to charge for printing under the costs agreement this would not have been an appropriate conclusion, and initially I was disposed to allow this amount (p 3-43), until the fact that the then current costs agreement did not provide for a charge for printing was exposed. The item was therefore properly disallowed, although for the wrong reason.

[66] Item 2360 claimed 4.1 hours for the paralegal to collate, index and file material received from the other side, and update the index to searches for the briefs to counsel and the expert. The other side had provided a bundle of documents in response to orders made by Justice Hallan on 7 February 2013. These were not provided all at once, but it appears that ultimately 357 pages of documents were provided. The costs assessor noted that time had already been allowed for preparing an index to the other side's documents, and the diary note on the file did not justify the time claimed, nor was there any breakdown between the different types of work, some of which was clerical work not justifying the use of a paralegal. Initially the item was disallowed in total, but ultimately $220 was allowed, apparently on the basis that some clerical work had been undertaken. Having considered the

terms of the index to the defendant's documents in its amended form, apparently reflecting the additional work done in this regard, I would not allow more than half an hour for a paralegal to do what was involved in updating the index and any necessary sorting of documents, which would have been an amount less than the amount allowed by the costs assessor: p 3-57. Accordingly I did not interfere with the costs assessor's decision.

[67] Item 1065 was a claim for one unit for the paralegal to email the solicitor discussing some issues arising in relation to the identification of some of the property owned by one of the brothers. This and three later items were considered together by the costs assessor, who disallowed this and two claims for printing on the basis that the costs of preparing the particular brief involved were excessive. This decision was challenged not on the basis of the disallowance, but on the basis that the amount deducted from the bill because of the disallowance of these three items was $809.26, whereas the total of the amount claimed in the three items was $30.38. In effect, accepting the decision of the costs assessor, the reduction was too large by $778.88.

[68] The explanation for this appears to be that the group of items was intended by the costs assessor to include item 1069, an item which was also objected to and which was not dealt with expressly otherwise in the preliminary reasons. The amount of the reduction is equal to the amounts claimed for items 1065, 1066 and 1069; item 1068 was a charge for printing the email at item 1067, a charge for which was allowed. I suspect that the reference to item 1068 at page 1213 in the preliminary reasons was a mistake for item 1069. Item 1069 was 2.7 hours for the paralegal to collate company, property and financial documents relating to a trust, to be forwarded to the forensic accountant. Given the extent to which this material had previously been "collated" by the paralegal, I find it quite surprising that a further 2.7 hours was required to put it in to a proper form for forwarding to the forensic accountant, and in those circumstances it would be unsurprising if the costs assessor disallowed the item.

[69] On reflection therefore, on this interpretation of the costs assessor's preliminary reasons, I consider there is a plausible explanation for the disallowance of this amount and would not have interfered with the costs assessor's decision. However, during the hearing I had not worked this out, and said that it did appear that $778.88 too much had been deducted at this point, so I would allow that amount on the review: p 3-62. In the circumstances I do not consider that it would be right to reopen that decision, even though on reflection it appears to me to have been wrong.

Summary of adjustments

[70] Counsel for the plaintiff did not press any further items on the review. Overall on the review I have made the following adjustments to the decision of the costs assessor:

Item	Adjustment
3 and others	$10.48
44	$165.00
56	$99.00
63	$55.00
76	$49.50
81	.55
95	.55
120 and others	$209.25
148	$55.00
273	$313.50
559	$99.00
601, 602	$50.60
605	$49.50
1065-1068	$778.88
TOTAL	**$1,935.81**

[71] The plaintiff also submitted that the costs assessor had made an error in the calculation of the amounts in the certificate, having at one point in the calculation used a figure from an earlier and different draft list of adjustments. This was not disputed. The itemised bill as provided for the assessment claimed professional fees of $670,517.36 and outlays of $22,783.66: p 1371. In his provisional table of reductions, which he prepared and circulated to invite further submissions, the assessor reduced the outlays by $803.74 and the professional fees by $339,652.38: p 1275.

[72] After receiving further submissions, the assessor adjusted the outcome for a number of items, usually in favour of the solicitor, as a result of which he allowed additional professional fees of $29,975.11, although the amount allowed for outlays was reduced by $60.60: p 1378. As a result, on the assessment the amounts allowed became $360,840.09 for professional fees, and $21,919.32 for outlays. However, the costs assessor, in a calculation sent to the parties on 23 May 2017,

said that the amount allowed for professional fees on the assessment was $358,600.37, and that was the figure in his certificate filed on 10 October 2017. That figure was therefore in error,[24] as the amount allowed for professional fees was $2,239.72 too low.

[73] The certificate should therefore be amended to read:

Professional fees $362,775.90[25]

Outlays $21,919.32

$384,695.22

Costs of the Costs Assessment

[74] The only remaining matter which was challenged was the decision of the costs assessor to order that the plaintiff pay the costs of the costs assessment. The costs assessor concluded that there was no good reason to depart from the position provided for by s 342(2)(a) of the Act, that the plaintiff must pay the costs since on the assessment the legal costs were reduced by 15 per cent or more: p 1515. It was submitted that the costs assessor had taken too narrow a view of the discretion available to him under that section, and that it was appropriate to have regard to the extent to which the various objections raised by the defendant had been upheld by the costs assessor. It was submitted that, of the matters in dispute (whether measured as items or, it was submitted more appropriately, in dollar terms) there had been substantial success on both sides, and in those circumstances it was appropriate to make no order as to these costs.[26] Reference was made to the principle that in general costs should follow the event,[27] and it was submitted that each disputed item should be treated as a separate event, because each was inherently separable; in effect the costs assessment involved making a large number of decisions which were properly characterised as separate.

[75] Section 342(2) of the Act provides:

“Unless the costs assessor otherwise orders, the law practice to which the legal costs are payable or were paid must pay the costs of the costs assessment if—

(a) on the assessment, the legal costs are reduced by 15% or more; or

(b) the costs assessor is satisfied the law practice failed to comply with division 3.”

[76] Sub-section (3) goes on to provide that if the law practice is not liable to pay the costs of the costs assessment, the costs of the assessment must be paid by the party ordered by the costs assessor to pay those costs.[28] Section 342 represents the current manifestation of a series of statutory provisions which have been in

force, initially in England and subsequently in Australia, for a long time. It was recognised from at least the early 17th century that there is a public interest in regulating the charging practices of lawyers. In 1605 the English parliament passed an Act "to Reform the Multitudes and Misdemeanours of Attornies"[29] which identified the mischief to be dealt with as the abuse of "sundry attornies and solicitors by charging their clients with excessive fees and other unnecessary demands... whereby the subjects grow to be overmuch burdened."

[77] A statutory right to a solicitor and client assessment by a court officer was introduced by the Attorneys and Solicitors Act 1729,[30] although prior to that time the courts would on occasion exercise their jurisdiction to regulate solicitors' costs as part of their power to deal with misconduct of solicitors as officers of the court.[31] Section 23 provided in part:

"And the said respective courts are hereby authorised to award the costs of such taxations to be paid by the parties, according to the event of the taxation of the bill (that is to say) if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court in their discretion shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bills".[32]

[78] That provision is significant for two reasons: first it identified the "event" of the taxation as a comparison between the bill as taxed and the bill as delivered, and second, it provided no discretion if a sixth part was taxed off the bill as delivered, but a discretion otherwise based on the reasonableness of the bill. It appears that in practice the approach was that the first part of the statute was applied literally, so that the court would award costs against the solicitor,[33] but in the exercise of the discretion where a sixth part was not deducted, "the statute is a good guide, what it directs in one case seems to be a right rule in the other; ever since the statute, costs of taxation have been reciprocally given to the party charged, and to the attorney, as a sixth part has, or has not, been taken off".[34]

[79] In White v Milner [1794] EngR 2337; (1794) 2 H Bl 357, 126 ER 593 the court held that "the statute of George II was applicable only where an attorney made exorbitant charges on his client in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it". As a result, it was held that the solicitor was not obliged to pay the costs in circumstances where the reduction in the bill was made in respect of certain work for which the solicitor had not been retained, where the charges would have been unobjectionable if the defendant had been liable to pay them, and the other items of the bill were not reduced by one sixth. This emphasised that the purpose of the provision was to deter overcharging.

[80] The 1729 statute was replaced by the Solicitors Act 1843[35] which also provided for taxation of costs, and contained a slightly different approach to the costs of taxation. The costs were to be paid by the attorney or solicitor if the bill when taxed was less by a sixth part than the bill delivered, but otherwise by the party chargeable with the bill, though there was a provision that the taxing officer could "certify especially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of taxation". In effect, this section incorporated the practice under the earlier Act, as revealed in Barker v Bishop of London (supra).

[81] The 1843 Act was the basis of the Costs Act 1867 s 26,[36] which provided that "the costs of [taxation] shall... be paid for according to the event of such taxation, that is to say, if such bill when taxed be less by a sixth part than the bill delivered" by the solicitor, and otherwise by the party chargeable with the bill. There was a provision for the taxing officer to "certify specially any circumstances relating to such bill or taxation", which gave the court or judge a discretion to make such order as such court or judge "may think right respecting the payment of the costs of such taxation...".

[82] Under these Acts there were various reported decisions where courts had exercised their discretion in relation to costs, special circumstances having been certified by the taxing officer. It was said in Swinburn v Hewitt (1838) 7 Dowl 314 that the solicitor was equally liable for costs however small the sum beyond one sixth which was taxed off. In Re Richards [1912] 1 Ch 49 special circumstances had been certified where the bill was reduced by more than one sixth as a result of what was regarded by the taxing master as a blunder on the part of whoever prepared the bill, in including a figure in the disbursements column in respect of a cheque drawn by the client which had been sent to counsel in payment of his fee. Parker J said at p 54:

"In my opinion it would be inequitable to allow the clients to take advantage of a blunder which was apparent on the face of the bill and cash account. They cannot fairly say they proceeded to taxation because of this blunder, unless indeed they first pointed it out to the solicitor and asked that it might be corrected, and this they failed to do. There have been cited to me various cases which lay down the general rule that after his bill has been delivered a solicitor cannot alter the bill in such a manner as to reduce the charges made without submitting to conditions as to the costs of taxation; and that is a reasonable and uniform rule of the courts. But I do not think that rule was intended, nor in my judgment ought it, to interfere with the discretion of the court when the taxing master has specially certified the

circumstances. The court has in such a case a general power to vary the ordinary statutory rule, and where it is inequitable in the special circumstances certified that the statutory rule should be applied, the court should exercise its discretion in favour of the solicitor or the client as the case may be."

[83] His Lordship ordered that the cost of the taxation be born by the client, but that the solicitor pay on a solicitor and client basis the costs of the application to the court, on the basis that this had been incurred due to the blunder of the solicitor. In general the more flexible approach in White v Milner (supra) was not applied under the 1843 Act. In Re Clark [1851] EngR 875; (1851) 13 Beav 173, 50 ER 67 the Master of the Rolls approved what had been certified as the uniform opinion of the taxing masters:[37]

"Since the passing of the [1843] Act, therefore, the practice in the taxing masters officers has been uniform not to strike anything out of the bill, but to tax off all items disallowed, and to include the amount of all such disallowed items in the computation, for the purpose of awarding the costs of the reference, subject, however, to making a special report, if the circumstances of the case should render it proper to do so."

[84] So there was new emphasis on the distinction between the total bill as delivered and the amount allowed on taxation, regardless of the basis upon which items on the bill were disallowed. Such an approach was consistent with the wording of the statute, which applied the one-sixth rule to the distinction between the bill 'as taxed' and the bill 'as delivered', but the test under the 1729 Act had been expressed in the same terms. This decision was confirmed by the Court of Appeal in Re Clark [1851] EngR 875; (1851) 1 De G M & G 43, 52 ER 467, which was treated as settling the law under the 1843 Act.[38] The position was complicated in England however by the decision of the Court of Appeal in Re a Taxation of Costs [1936] 1 KB 523, where it was held that certain items in the solicitor's bill of costs, disallowed on the grounds that they were not covered by the retainer, should not have been taken into account for the purposes of applying the one-sixth rule under the equivalent provision in the Solicitors Act 1932.

[85] As pointed out by Jordan CJ in Re Dibbs and Farrell [1941] NSWStRp 10; (1941) 41 SR (NSW) 249 at p 254, the court there relied on cases under the earlier Act, and appears to have proceeded on the view that the Acts of 1843 and 1932 were identical in their operation. They did not have regard to the earlier decision of the Court of Appeal in Re Clark (supra). Jordan CJ concluded that Re Clark should be preferred.[39] Nevertheless, this approach was not adopted by the Court of Appeal in Farrar v Julian-Armitage [2015] QCA 289, where the court concluded that it was not appropriate for the purposes of s 342(2) to take into account as a reduction any

amount which should not have been included in the itemised bill, not being "legal costs" under the Act: [99]. Reference was made to Re Ridgeway and Irwin [1904] VicLawRp 18; (1903) 29 VLR 130 at 134, where it was held that only charges for work as a solicitor could be taxed, and any charges for other work, such as work as an estate agent, could not be taxed and should be struck out of the bill. The decision did not touch on the question of whether items so struck out should be considered when applying the one sixth rule, but no reference was made to Re Clark or the other cases referred to above.

[86] The Court of Appeal in Farrar (supra) also held that any charge made in the itemised bill which had been withdrawn by the solicitor prior to the time when the assessor commenced the cost assessment was to be disregarded in applying the 15% rule: [94]. This was done without reference to relevant authority, including the decision of the Full Court in Re MacDonnell, Henchman and Hannam [1910] St R Qd 329, where Cooper CJ, delivering the judgment of the court, said at 329: "It may be admitted that a solicitor cannot be allowed to withdraw from his bill items with the payment of which he is wrongfully seeking to charge his client, and that in such cases it makes no difference whether such items are taxable or not."[40] That court went on to distinguish a situation where an amount of witnesses expenses paid directly by the client had been included in the bill only for the convenience of the client and with its agreement, but where the solicitor had never sought payment of them.

[87] A literal reading of the current section does provide some support for the approach in Farrar, because the 15% is applied by reference to the amount of the legal costs reduced "on the assessment."[41] It could be said that this would not apply to costs withdrawn by the solicitor prior to the assessment, and that in this respect the section is different from the earlier provisions, which applied the test to the difference between the amount allowed on taxation and the bill as delivered. It is however unfortunate that this interpretation has been adopted without reference to authority; the effectiveness of this provision as a means of discouraging the charging of excessive legal costs will be reduced if a solicitor can avoid the application of the rule by withdrawing charges at any time before the assessment. [42] This point does not however arise in the present case.

[88] The English Act of 1843 was adopted in all the Australian states, not just Queensland. The Victorian equivalent was considered by the full court in Re Hardy and Madden (1881) 7 VLR 450, where it was argued for the solicitor that imputations of fraud which had been made by the client were not proved, so the client making them ought to pay the costs. It was also submitted that the bulk of the amount taxed off represented a charge for attendance at court by a country solicitor at the request

of certain directors of the company, who had been informed of it, where only a much lower amount was allowed by the master because formal consent to the charge had not been proved. An amount was also disallowed in respect of the provision of copies of documents, but no attempt had been made to prove that any copies had been charged for twice. However these and other arguments were rejected by the full court, which said at p 452 that more than one third of the total bill had been taxed off, which fully justified the application for taxation. “The amount taxed off is so large as to compel us to allow the company their costs.”

[89] Another decision on the exercise of the discretion under the then Act is Richardson v Lander (No. 2) (1947) 65 WN (NSW) 81. A bill of costs was reduced by more than 50 per cent on taxation but the taxing officer certified that there were special circumstances and Herron J had to exercise the statutory discretion.[43] The large reduction in the bill occurred because three specific large sums had been taxed off. The smallest of these was said not to affect the discretion as to the way in which costs of taxation were dealt with: p 85. His Honour said that the largest was such that, if it had been the only relevant consideration, “it would be inequitable if the statutory rule was to be applied to the solicitor because this amount was included as a disbursement, and I would have exercised my discretion in favour of the solicitor”: p 86. However the third amount, which was also quite large, was one where the only special circumstance which was raised was that there was some lack of clarity in the law, and his Honour held that the fact that the law was in some respects uncertain was not a warrant to depart from the statutory rule, since “I can imagine very few cases in which there would not arise vexed questions of law on the taxation of costs... .” Because this item and the smallest item together amounted to more than one sixth of the bill, and bearing in mind that the outcome of the taxation was that instead of a small sum being owed to the solicitor, a substantial amount became repayable, it could not be said that the application of the ordinary rule was inequitable or unjustified: p 86. His Honour expressed the view that “the rule was instituted to prevent solicitors from overcharging clients... .”

[90] One issue which arose in Queensland under the Costs Act 1867 was the effect of delivering a lump sum bill, and then, when the client sought an itemised bill, delivering one for a larger amount, which was then submitted to taxation. In Re Carter Newell’s Bill of Costs [1993] 2 Qd R 593 it was held that in those circumstances the amount of the bill was the amount of the original lump sum bill, which was all that the solicitor was ever actually claiming, so what mattered was whether that amount had been reduced by more or less than one sixth, not the amount of the itemised bill subsequently provided.[44] Ryan J said that what happened in that case was that the itemised bill “is to be regarded as explanatory of the lump sum bill. The client had rejected the lump sum bill. The solicitor had then

delivered an itemised bill. The solicitor could not recover more than the amount of the lump sum bill. On the taxation, the amount claimed in the lump sum bill was allowed in full. The solicitor was therefore entitled to the costs of the taxation."

[91] His Honour distinguished the English case of Re Carthew (1884) 27 Ch D 485, where a solicitor delivered a detailed bill which added to a particular sum, but at the foot of it had written "say" a lower amount, before the signature. The bill was taxed, and the question was whether the one sixth rule was to be applied to the larger or the smaller amount. The Court of Appeal held that it was to the larger amount, characterising what had occurred as a bill in that amount, with an offer to accept the lower sum. They held that no bill had been delivered at the lower amount. In one case the taxing master had not certified special circumstances, but in another appeal heard at the same time special circumstances had been certified, because it was said that the solicitor had always made it clear that he only ever wanted the smaller sum. Nevertheless, the court held that those circumstances did not justify a departure from the rule.

[92] Baggallay LJ said at p 494:

"I think it would be exceedingly pernicious to lay down a rule which would enable a solicitor whose bill exceeded what could be allowed on taxation, to oblige his client, by a device of this kind, to have his bill taxed at a greater risk as to costs than if a bill had been delivered for the amount which the solicitor had stated his willingness to accept."

Cotton LJ said the rule in the Act should not be departed from, and Lindley LJ did not consider that the circumstances justified a departure from the outcome in the Act, where the amount allowed on taxation was significantly lower than the amount which the solicitor had been paid and accepted, though it was not one sixth of that amount. Evidently the court took a dim view of the proposition that for the solicitor to offer to accept a lower sum was a sufficient reason to depart from the prima facie position under the Act. There is a distinction between an offer to accept a lower amount and a lump sum bill for a lower amount, delivered before the itemised bill.

[93] There are other cases where a solicitor has in fact accepted, or has offered to accept, a lower amount than the amount in the bill in satisfaction of a claim for costs. In Re Elwes and Turner (1888) 58 LT 580 a solicitor charged a particular sum which was paid, but subsequently the client, after consulting other solicitors, demanded a bill, which was delivered at a somewhat higher amount. More than one sixth was taxed off, though the outcome was still higher than the amount paid. The taxing officer having certified special circumstances, Kay J ordered that each party pay their own costs, on the ground that the itemised bill was too high, which justified

taxation, but the whole process was futile as it served to justify the amount that the solicitor had been paid. Kay J said: "The object of the Act is to make solicitors careful in drawing bills of costs, so that they should not charge more than they ought. They have come within the very mischief against which the Act provides."

[94] In Re MacKenzie (1893) 69 LT 751, a bill had been delivered but with a note of an "allowance" by the solicitor at a lower sum, presumably an offer to accept that sum. The bill was taxed and more than one sixth of the larger sum was taxed off, but still more than the solicitor was willing to accept. The taxing master certified special circumstances, and the court ordered that the client pay the solicitor's costs, a decision confirmed by the Court of Appeal. Reference was also made to the fact that most of what was taxed off related to work which was not solicitors work, but was work which ordinarily a trustee would do himself, though in the present case one of the trustees was unwilling to have contact with the others, and specifically asked the solicitor to do that work. So there was another factor which could have been relevant to the decision. Otherwise, the decision appears inconsistent with Re Carthew (supra).

[95] In Re Lewis (1904) 49 Sol Jo 54 the charges of a solicitor for a mortgagee were payable by the mortgagor, who sought taxation on which more than one sixth was taxed off, largely because of the disallowance of an item which would not have been taxed off between the solicitor and the mortgagee, but which the mortgagor was not liable to pay. The taxing master had certified that the solicitor had omitted to charge for some "items" for which he could have made a charge, and overall it was a moderate bill and could have been larger, presumably on the basis that the items not charged would have outweighed the items taxed off. The court held that the mortgagor should pay the costs of taxation, apparently on the basis that it was only a moderate bill, though if the bill included an item not properly chargeable to him, it strikes me as hard on the mortgagor that he had to pay the cost of avoiding an improper charge. Nevertheless, the court regarded the fact that overall this was not a case of a solicitor overcharging as significant in relation to the outcome for costs.

[96] It would be consistent with the modern approach to costs generally for offers to settle a costs dispute to be treated as relevant to the costs of a costs assessment under the Act. In the case of a costs assessment under the rules, they are particularly important, because of r 734. In Wilson v Angseesing [2018] QSC 61 offers to settle the costs dispute were treated as relevant to the question of the costs of the dispute, and the extent of success on the review under r 742 was treated as significant in relation to the costs of the review; but that was not an assessment under the Act. I have not located a decision of a court where it has been said that an offer to settle the disputed costs in a way which with hindsight

should have been accepted was relevant to the discretion as to costs where s 342(2)(a), or its earlier equivalents, applied.

[97] In England the 1843 Act was replaced by the Solicitors Act 1932. That was replaced by the Solicitors Act 1974, which was amended in various respects by the Legal Services Act 2007. A history of the legislation, and consideration of the approach to the discretion in England, appears in the judgment of the Court of Appeal in Bentine v Bentine [2016] Ch 489. The English Act provides that if the bill is reduced by one fifth the solicitor pays the costs, unless the costs officer certifies special circumstances relating to the bill or the assessment, in which case the court may make such order with respect to costs of the assessment as it may think fit: s 70(9), (10).[45] The court held that the test for special circumstances should not be too narrow, that the circumstances did not need to be exceptional, but rather that when applying the test "one is looking for something significant and out of the ordinary course which justifies departing from the prima facie one fifth rule set by parliament."[46]

[98] In Bentine there were a number of separate bills assessed together. In respect of five bills the challenge was on an issue which if successful would have meant that the solicitors would have recovered nothing. The principal focus of preparation for the hearing was on that issue, but just before the hearing the parties compromised on a particular sum in respect of all of the bills, which represented a reduction of 30 per cent of the total, without allocating the settlement sum in any way. The question of what costs order should be made was left to the costs judge, who ordered the client to pay 70 per cent of the solicitor's costs of the assessment, having found that special circumstances did exist. He noted that the client must have essentially abandoned the ground which would have led to nothing being paid for the major bills, in circumstances where one of the five bills in dispute had been abandoned by the solicitor earlier in the process. Other, smaller bills were disputed but in a much more limited way, and where the issues were described as commonplace. The bulk of the costs had been incurred in relation to an issue which the client must have largely conceded. The costs judge held that overall the solicitor had been more the victor, hence the order. A majority of the Court of Appeal held that it had not been shown that the discretion of the costs judge had miscarried in this respect; Sir Bernard Rix, in dissent on this point, considered that the statutory rule did not become irrelevant simply because special circumstances were found to exist, but he thought the costs judge had put that factor out of his mind once he found special circumstances.

[99] Sales LJ referred to the purpose of the legislation at [7]:

"Disputes between solicitors and clients regarding the amount of solicitors' bills can be substantial, and the costs of resolving them can likewise be substantial. ... Both client and solicitor benefit from knowing in advance what the basic default rule is governing the costs of an assessment, and what ordinarily counts as winning and losing, so that they can make a rational calculation of the risks involved in proceeding with the disputed assessment before a costs judge. ... It is in the interests of the parties and the court that the parties have a reasonable idea of where they stand before they incur yet more costs in arguing about those costs and that arguments about the incidence of the costs of arguing about costs should be kept within reasonable parameters in an effort to prevent them becoming disproportionate. In this context, reasonable protection for the expectations of the parties formed on the basis of the default rule is important."

[100] His lordship from [23] reviewed the history of the legislation, starting with the 1729 Act. Sir Bernard Rix noted at [83] that in relation to the interpretation of the section "the client is normally a consumer (although in this case a firm of solicitors), so that the one fifth rule is regarded as a piece of consumer protection; and there was a settlement on the basis that the 20 per cent threshold had been crossed, indeed comfortably crossed. Settlements are much to be desired and encouraged." At [84] he agreed that "special circumstances" should not be interpreted narrowly, but added that therefore "there is all the more reason to ensure that the statutory protection given to the client by the 20 per cent test is not lost sight of." He would have made no order as to costs of the assessment. Arden LJ at [111] said: "In my judgment, the policy behind s 70(9) is that the remedy under s 70 should be efficacious and that potential claimants should not be disincentivised from bringing claims under s 70 by the usual costs shifting rule." The usual costs shifting rule would mean that, if a solicitor obtained an order for payment of costs, the costs of the proceeding to obtain that order would follow the event of that order. This slightly opaque pronouncement appears also to recognise the consumer protection significance of the provision.

[101] That the provision for taxation of a solicitor's bill in the English Act is a consumer protection provision is reflected in the Legal Profession Act 2007. Section 3 identifies as one of the main purposes of the Act "to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally..." The provisions for assessment of itemised bills are to be found in Part 3.4 of the Act, and s 299 identifies the main purposes of this part as including:

"(c) to regulate the billing of costs for legal services;

(d) to provide a mechanism for the assessment of legal costs and the setting aside of particular costs agreements.... ."

Division 7, dealing with costs assessments, contains some provisions which distinguish between a sophisticated client and another client, such as s 335(6), where a client other than a sophisticated client can obtain an order for a costs assessment (subject to the exercise of a discretion) if an application is made outside the 12 month limit provided in subsection (5). This reflects a focus on consumer protection.

[102] Section 335, dealing with an application by a client, does not contain any specific requirement for the client to identify any part or parts of the legal costs the subject of the application to which objection is taken, or the grounds for that objection. Subsection (10) does require the application to be made in the way provided under the UCPR. Rule 743A(5) requires an affidavit filed in support of an application for a costs assessment to:

"(a) state whether the applicant disputes or requires assessment of all or what part of the costs; and

(b) if the applicant disputes all or part of the costs, state the grounds on which the applicant disputes the amount of the costs or liability to pay them."

If the applicant has an itemised bill it is to be an exhibit to the affidavit – subrule (3) – but the rule obviously contemplates that the applicant may not have an itemised bill, so the requirement to state grounds in subrule (5) cannot mean that the grounds have to be stated by reference to each item of the bill which is objected to.[47] Note also that the rule contemplates objections as to both quantum and liability.

[103] There is no equivalent in this part of the rules to r 706 which requires a party served with a costs statement to serve a notice of objection which identifies each item objected to and the grounds of objection. Here the form of notice of objection under r 706 was followed by the defendant, but there is no requirement in the Act or rules for the client to do this. On the face of it a client could simply complain that the amount sought for costs by the lawyer is much higher than the estimate given before the work was done, and the client is concerned that the costs are excessive and wants to have them independently assessed to ascertain whether that is the case.

[104] That approach would be consistent with the decision of the Court of Appeal that, when an order is made for an assessment under the Act, the assessor's obligation is to assess all items in the itemised bill within the scope of the order, whether or not the client has raised a specific objection to that item.[48] I consider

that it follows that, where there is a specific objection, the costs assessor is not confined to resolving that objection, but is still required to apply the tests set out in the Act. So long as costs are disputed, if there is a costs agreement for the purposes of s 340 and paragraphs (c)-(e) do not apply, the assessment must be made by reference to the terms of the agreement, and by s 341 the costs assessor must consider the matters in subsection (1)(a) and (b). These provisions are expressed in mandatory terms, and are not made conditional upon any specific objection having been taken by the client. Indeed, in the hypothetical example given above, the costs assessor would be required to assess each and every item covered by the order for assessment by applying to it the statutory criteria, even though the client had raised no specific issue with that item.

[105] If one looks just at the Act and the rules, the scheme of assessment under the Act does not require a client to identify particular items in the itemised bill to which a challenge is made, or particular grounds of that challenge, and it follows that the process of assessment is not adversarial in the conventional sense, that is, a costs assessor is not just deciding issues raised by the parties on the basis of submissions made by the parties. The costs assessor is performing the function of independently assessing the bill to determine whether or not the client has been properly charged by the law practice for the work done, to be determined by the application of the statutory tests.

[106] The existence of such a mechanism, which is simply the current manifestation of a regime for regulating legal costs which is almost 300 years old, reflects a legislative recognition, which is more than 400 years old, that it is not in the public interest for lawyers to overcharge their clients. If legislators have identified one principle which can be expected to command universal public assent,[49] it is that it is a bad thing for lawyers to be overcharging, and they need to be regulated and controlled to prevent them from doing so.[50] It is part of the structure of consumer protection in this area that, if the result of the independent assessment of the solicitor's bill is that it is reduced by a significant amount, prima facie the solicitor has to pay the costs of that process. By fixing a cut-off point, legislatures have recognised that the process of assessment involves value judgments on which minds may differ,[51] so the mere fact that some reduction has been made does not demonstrate overcharging.

[107] The rule has been recognised as functioning as a form of general deterrent, to discourage solicitors from overcharging.[52] Although the wording of the current provision is different from the wording in the Costs Act 1867, there is no reason to doubt that s 342(2)(a) is a manifestation of a legislative purpose of deterring law practices from overcharging, in the public interest. It is I think significant that

paragraph (b), providing that prima facie the costs of the assessment are to be paid by the law practice if the law practice failed to comply with the requirements for costs disclosure in division 3, is obviously also designed to deter lawyers from failing to comply with those requirements.[53] Viewed as a whole, the purpose of s 342(2) is to deter lawyers from behaving in a manner of which the legislature disapproves.

[108] In this context, I must mention what was said in Farrar v Julian-Armitage [2015] QCA 289 at [95], where the court said: "The obvious purpose of s 342 is to help determine who should be liable to pay for the 'costs of the assessment'." So much is incontrovertible, and explains the presence in the statute of a provision dealing with the costs of the assessment, though it does not identify the purpose of the particular content present in subsection (2). In particular it does not identify the purpose of deterring lawyers from overcharging, though it does not seem to me that it is inconsistent with the recognition of that as the purpose of that subsection

[109] I am conscious of the fact that s 342(2) is in different terms from the other provisions to which I have referred, and that the task in the present case is to interpret this particular provision. In Tamawood Ltd v Paans [2005] QCA 111; [2005] 2 Qd R 101 Keane JA, with whom the other members of the court agreed, said at [23]:

"It is clear that the power of a court or tribunal to award costs to a party is now the creature of statute. The nature and extent of that power can only be discerned by close consideration of the terms of the statute which creates the power and prescribes the occasions for, and conditions of, its exercise. In the performance of this task, observations of the courts in relation to the operation of other statutory regimes relating to costs may afford general assistance but they cannot be allowed to distract attention from the terms of the particular statute in question."

[110] In that case the relevant particular statute was the Commercial and Consumer Tribunal Act 2003, and the court held that the effect of the relevant provisions of that Act, which were differently expressed from s 342, was that there was to be no order as to costs of a proceeding in the tribunal unless good reason was shown in terms of the interests of justice for making an award of costs in particular proceedings before the tribunal: [28]. The wording of s 342(2), specifying an outcome "unless the costs assessor otherwise orders" is similar to the wording of r 681 in the UCPR. The latter, containing the general rule about costs of a proceeding, is that they are "in the discretion of the court but follow the event, unless the court orders otherwise." This reflects the proposition that the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation.[54]

[111] There has been much debate over the identification of an "event" for the purposes of r 681, and over the extent to which a court should look at separate issues which arise in a trial as "events" rather than looking at the overall outcome. The more modern tendency, in my opinion, has been to focus on the practical outcome in terms of overall success or failure of the litigation, with a preference for a "winner takes all" approach, unless the way in which the litigation has been conducted justifies a departure from that approach in the particular circumstances of an individual case.[55] I do not propose to enlarge on this issue, because what matters for present purposes is that it is recognised that, once the relevant event has been identified, it is necessary for a party seeking the court to order otherwise to show that there is good reason to depart from the prima facie position under the rule.[56] In my opinion the wording of subsection (2) produces the same result, that in the present case it is necessary to show that there is good reason for departing from the prima facie position established by the subsection before a costs assessor will be justified in doing so.

Matters challenged in the costs assessor's reasons

[112] On behalf of the plaintiff it was submitted that the reasons of a costs assessor showed that his exercise of the discretion in relation to costs had miscarried. His reference to both parties appearing to take ambit positions in the proceeding (p 1514) was unfair to the plaintiff, since the various amounts claimed in the itemised bills had been amounts which a practitioner could reasonably put forward as amounts in respect of which a fee was payable. Whether or not this was so is not shown by evidence; the mere fact that a claim was made in the itemised bill proves nothing. With regard to the defendant's position, the proposition that she took up an ambit position was a little inconsistent with an earlier statement of the costs assessor. The costs assessor said that he generally found the defendant's grounds of objection helpful and well argued, would not have liked to undertake the assessment without them and did not think that the costs assessment would have taken much less time without them: p 1514.

[113] The reference to "ambit positions" can perhaps best be understood by comparing the total amount claimed in the itemised bill, about $690,000, the amount conceded in the notice of objections, $87,000, and the amount allowed by the costs assessor, $380,000 (before deducting the costs of the assessment).[57] The point that the costs assessor was making, and in my view making with some justification, was that both parties were well away from the ultimate outcome.

[114] There were certainly lots of objections taken. The notice of objections covered 341 pages, compared with 431 pages for the itemised bill. Most of the items in the bill were objected to.[58] The costs assessor in his preliminary reasons for

assessment listed the items he had disallowed or reduced, with concise reasons, but also said about 857 items (by my count) that they were allowed as claimed, sometimes giving reasons, which suggests that these were items objected to where the objection wholly failed. If overall 63% of the items in the bill had been objected to, it follows that for 29% of the items objected to, the objection wholly failed. That does not suggest to me that the process of assessment would have been significantly prolonged by a general approach of the defendant, of taking inappropriate or unreasonable objections. It supports what the costs assessor said, that generally the objections were helpful and well argued, and the assessment had not been much delayed by unsuccessful objections. In these circumstances, the plaintiff's argument, which essentially was that so many of the objections had failed that the defendant should not get her whole costs of the assessment, was not, for this assessment, a particularly strong point.

[115] On the other hand, he commented that most of his time was spent locating documents on the plaintiff's file to support items claimed, and noted that items within a particular date in the itemised bill were not in any logical order, and did not match the arrangement of documents on the file: p 1515. I might say that when I was looking at bits of the plaintiff's file in the course of my review of the assessment, I also found at times that it was difficult to identify documents that I was searching for, even though at that stage many of the documents were tagged with item numbers from the bill. That tagging provided some support for the proposition that the sequence of the file did not always match the sequence in the itemised bill.

[116] I have no reason to doubt the correctness of the statement that the time taken by the assessor was greater than it otherwise would have been because the documents on the file did not match the sequence of items in the itemised bill. If the state of a solicitor's file means that the costs assessment takes longer than it otherwise would, and as a result the costs assessor (who charges by the hour) charges more than he otherwise would, that strikes me as a very good reason for the solicitor to pay at least the extra costs caused in that way, regardless of the terms of s 342.

[117] It is not an answer to say that the solicitor was not asked to put the file in order or otherwise prepare it for the assessment. The solicitor was asked to produce the file to the costs assessor. The obvious purpose of that was to enable the costs assessor to check documents on the file against the claims in the itemised bill. On an assessment under the Act, the law practice has the onus of proving that the work was done in a reasonable way and that it was reasonable to do the work, and the items in the bill must be substantiated.[59] It would be wrong for a costs assessor to

assume that because something was claimed in an itemised bill, what had been claimed had been done.

[118] Reference was made by the assessor to a proposal by the defendant for mediation in February 2015, and a Calderbank offer of settlement by the defendant, to which it was said the plaintiff did not respond with a counteroffer: p 1514. This was based on a submission on behalf of the defendant to which the plaintiff had not responded at the time of the decision in relation to the costs of the costs assessment. The chronology appears to be that the plaintiff was asked to show cause why she should not pay the costs of the assessment, and put in a submission in a letter on 31 May 2017: p 1733. The solicitor for the defendant was invited to respond on 31 May 2017, and did so by a letter sent by email on 2 June 2017: p 1737–1741. That email was copied to the plaintiff. On 5 June the plaintiff sent an email to the costs assessor referring to the letter of 2 June, stating that she had noted a number of factual inaccuracies, and continuing:

"If you feel that it may be relevant to your deliberations as to the issue of the costs of the costs assessment I am happy to provide you with further submissions in reply."

[119] That was a remarkably unhelpful thing for her to have said. She did not identify the particular statements in the letter of 2 June to which she took exception, so it was impossible for the costs assessor to have known whether or not they were going to influence his decision on the costs of the costs assessment. In any event, it is not a matter of waiting for an invitation to make submissions; if she had time to send that email, she had time to send an email identifying what she said were factual inaccuracies, putting her version, and making any other submissions in reply she wished to make. In the event, the costs assessor issued a letter determining that the plaintiff must pay the costs of the costs assessment the following day, over 28 hours after the plaintiff's email of 5 June.[60] I do not consider that there is any natural justice point here. The plaintiff had the opportunity to respond to any factual inaccuracies she alleged in the defendant's submissions, and chose not to take it. If the costs assessor was led into error as a result, she has only herself to blame.

[120] The position under s 342(2) in my opinion is that where, as here, the costs are reduced by more than 15 per cent, the costs assessor has a discretion as to the costs of the assessment, but the starting point is that the law practice pays them, so that it is necessary for the law practice to show there is good reason for departing from the prima facie position stipulated by the statute in order to avoid an order that it pay the costs of the assessment. The submission made to the costs assessor, and to me, was that the effect of the section is that the costs assessor has an unfettered discretion in relation to costs. He certainly had a discretion, but it was not

unfettered, since s 342(2) provides for a prima facie position, and it is necessary for a law practice seeking a different order to show good reason to depart from that prima facie position.

[121] The conclusion of the costs assessor, that good reason had not been shown in this case, was in my opinion clearly open to him, and in my view no ground has been shown to interfere with his decision to that effect. It has not been shown that he proceeded on any wrong principle, that he took into account any irrelevant matter, or that he otherwise erred in coming to the conclusion that good reason had not been shown. He was clearly aware that a lot of matters raised in the notice of objections did not succeed, but he stated that he considered that the objections were generally reasonable ones, even when they did not succeed.

[122] I have found no case where the court has decided the question of costs of a taxation or assessment on the basis of weighing success or failure on particular objections, and the decisions in Re Hardy and Madden (supra) and Richardson v Lander (No. 2) (supra) appear to be inconsistent with that approach. In Wende v Horwath (NSW) Pty Ltd [2014] NSWCA 170 Bastan JA at [86] said of the local equivalent to s 342(2) that it gave the costs assessor a broad discretion, and "it would be open [when the bill was reduced by more than 15%] ... to order some or all of the costs of the assessment to be borne by the party responsible for paying the bill, possibly on the basis that many objections had proved fruitless and time consuming." In that case however the issue was whether this particular provision applied only to solicitor/client assessments, the court was not concerned with any particular exercise of the power, there was no reference to authority, and the comment was dicta. In any case, that was not the situation here. Overall, the plaintiff has not shown that the costs assessor's discretion has miscarried, so there is no basis for me to intervene on a review.

Precautionary finding

[123] I will say, on a precautionary basis, what I would do if I found that there had been an error in the exercise of the discretion, so that it fell to me on the review to exercise the discretion afresh. I would certainly order the plaintiff to pay the costs of the costs assessment. The purpose of s 342(2)(a), the reason why it says what it says, is to give effect to the legislative purpose of protecting consumers of legal services. It is not in the public interest for law practices to overcharge. When they do so, they should pay the costs of the process. The legislature has also determined that it is in the public interest for law practices to disclose their fees in advance, and it has inserted the provision in paragraph (b) of the same subsection to encourage law practices to comply with the disclosure obligations. The provisions operate in parallel.

[124] In the present case the outcome of the assessment demonstrates clearly significant overcharging on the part of the plaintiff. The amount claimed by the plaintiff, $674,249.54 (p 1744) was reduced on the assessment to $382,759.41, a reduction of 43%. St the plaintiff overcharged by 76% of a proper amount.[61] That amply warrants a sanction in costs. The amount of the reduction was almost three times the cut off percentage of 15 per cent. This is disregarding any reduction which ought to have been made because of the claim for printing items which was unjustified by the terms of the costs agreements which did not provide expressly for printing charges. The position in my view is similar to re Hardy & Madden (supra).

[125] This approach is not inconsistent with the notion that costs should follow the event, in the broader sense of that concept as discussed by McHugh J in Oshlack (supra), where he referred to costs being awarded to "a successful party in litigation": [67]. The measure of success, in any realistic sense, of an assessment under the Act of a law practice's itemised bill at the instance of a client is the amount which is taken off the bill. Although the current Queensland Act does not in terms speak of the "event" of the assessment as being the amount taken off, the use of that expression in earlier statutes was not some artificial legislative construct; it was a reflection of the practical reality that that is the measure of success in such a situation.

[126] The whole point of getting a bill taxed, now assessed, is to reduce the amount that the client or third party payer has to pay. The only meaningful measure of success in that situation is the amount by which what the law practice seeks to charge has been reduced. The legislature, by adopting a 15 per cent cut off figure, has fixed where a line is to be drawn between the sort of overcharging which might occur innocently as a result of differences in approach between a solicitor writing a bill and the taxing officer or assessor, and one which can be identified as prima facie a case of overcharging. Accordingly, it is not meaningful to speak about the decision on each item in an itemised bill as a separate event; the relevant event, the relevant measure of success of an assessment, is the total amount by which the bill is reduced.

[127] The submission for the plaintiff was wrong for two other reasons. In the first place, as I said earlier, a costs assessment under the Act is not an adversarial procedure, it is fundamentally a supervisory process by an independent person of the charges made by a law practice. The assessor has to assess every item within the scope of the order for assessment, even if no particular objection is made by the client. It would be most unsatisfactory if a client would be better off not seeking to identify deficiencies in the itemised bill, in case the assessor did not adopt that submission and that was used as a basis for penalising the client in costs. That

would be inconsistent with the underlying consumer protection purpose of the legislative provision.

[128] Apart from that, the assessment of an item in an itemised bill is not something which occurs in isolation from the assessment of all the other items. There have been several good examples of that with the bill here, as will be apparent from the reasons that I have given earlier in relation to particular items. That too much time was taken over preparing the affidavit of the client in support of the summons is not something that was apparent from looking at one particular item in isolation, but by looking at the overall effect of all of the items relevant to the preparation of that affidavit. If too much time has been taken overall, that impacts on the bill by disallowing those items which are claimed after a reasonable time has been taken. Another example is where a separate claim of one or more units was made in respect of each of a series of items of work done together on the one day, which I have held is not the right way to charge under this time charge costs agreement. That is only apparent from the consideration together of all of the items claimed for a particular day.

[129] Probably the best example however is the one which was not applied generally, the point that after the first costs agreement had ceased to apply there was no right to a per page charge for printing. This point covered a large number of items, 1260 by my count, all of which ought to have been disallowed in their entirety for this reason. In my opinion, the idea that each item in the bill should be looked at as a separate “issue” is fundamentally inconsistent with the way in which the process of assessment is actually carried out. Accordingly, in this respect the submission for the plaintiff was quite unpersuasive. It would in my opinion be unrealistic to assess the “success” or otherwise of this assessment by counting the number of items, or the amount of money in respect of the items, on which the objections either succeeded or failed.

[130] In the present case the bill involved serious overcharging, and although it might in theory be possible for there to be other factors relevant to the bill or the assessment which could offset the significance of that factor, nothing of that nature appears in the present case. This is not a case where it could be said that an unreasonable attitude or position on the part of the defendant made the assessment more costly. There were no relevant offers to settle the costs dispute. I am firmly of the view that the correct conclusion here was that the plaintiff should pay the costs of the costs assessment.

[131] There was no challenge to the quantum of those costs pursued on the review. So the amount at which they were assessed, $117,043.95 (including the costs

assessor's fees) should be deducted from the amount found to be payable on the assessment.

[132] That is all that is required of me pursuant to the review under r 742. It is now a matter of determining what final order should be made by the court under r 743H, and bringing to a conclusion the litigation generally. The only matter sought to be pursued by the defendant is the question of the refund of the overpayment. The plaintiff has received a total of $382,859.41, whereas following the review the plaintiff was entitled to receive $267,651.27. There may however be other unsatisfied costs orders to be set off. Plainly if the plaintiff has been overpaid in the light of the outcome of the assessment process, any excess is refundable.[62] I shall hear submissions about that when these reasons are delivered, and about the costs of the review.

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[1] Exhibit 1 p 1371; affidavit of Walter filed 14 December 2015 paras 4 – 8. It does not appear that the itemised bill has ever been filed in the court.

[2] Page 1744. I shall refer to documents in Exhibit 1 just by the page numbers.

[3] Court document 47.

[4] The substantive proceeding was transferred from the Supreme Court to the District Court by a consent order of Martin J on 9 May 2018: court document 61. An amended application for review was filed in this court on 28 June 2018: court document 62.

[5] And in *Farrar v Julian-Armitage* [2015] QCA 289 at [15], also without consideration of this issue.

[6] Court document 77. It is not apparent from the order, or obvious to me, how this figure was derived.

[7] Maintaining a comprehensive file is not just for the benefit of the solicitor. It can operate to the benefit of the client, particularly if that solicitor ceases to be retained. For the importance of a well-maintained file, see Quick on Costs (2017) #90-460.

[8] This covered 58 items, 3, 13, 29, 34, 49, 55, 71, 80, 87, 90, 95, 101, 104, 113, 116, 131, 141, 153, 169, 196, 208, 219, 232, 234, 286, 294, 302, 318, 330, 347, 351, 367, 375, 377, 379, 403, 412, 430, 432, 439, 448, 450, 453, 460, 476, 482, 488, 493, 504, 509, 516, 518 and 538.

[9] The costs agreement provided for charging for the work done on the basis of the time taken at particular rates, calculated on the basis of a "unit" of six minutes, one tenth of an hour: p 1905.

[10] *Re Feez Ruthning's Bill of Costs* [1989] 1 Qd R 55 at 73, 74, and see p 89.

[11] Some instructions were received on 6 May, after this work was done, item 51; email of 6 May 2011, quoted at p 1-64.

[12] The itemised bill claimed that the plaintiff is an expert in commercial litigation: Exhibit 1 p 33 para 1.4. I have not seen a claim of expertise in estate litigation, or family provision claims.

[13] *Bethscheider v CMC Lawyers Pty Ltd* [2018] QDC 133.

[14] There is an error in the transcript at p 1-72, line 39: the word "not" has been omitted.

[15] The amount claimed in the bill was actually 60 cents, apparently an error in the bill: see p 50. The same error appears in items 84 and 90.

[16] Officeworks offers on line A4 tab dividers at 50 cents for five.

[17] I find the former much easier to use, but my preference in that regard is irrelevant to this issue.

[18] *Picamore Pty Ltd v Challen* [2015] QDC 67 at [104]. What actually happened was that I did not interfere with a costs assessor's decision to allow only 1 unit of the 3 claimed for a letter which dealt with several topics including enclosing counsel's fee disclosure. I suspect that on that occasion I was not conscious of this particular issue.

[19] For consistency I should have also increased the amount allowed under item 229 by $70.40; but item 229 was under heading 7 of the amended application, and had previously been "not pressed": p 3-4.

[20] By my count, this comes to 1,260 items claiming $16,735.50 for 22,314 pages in the itemised bill. I have not worked out how much of this was disallowed or reduced anyway by the assessor.

[21] His preliminary reasons for item 2254 did mention that the costs agreement did not provide for printing, but the item, a printing expense, was reduced, not disallowed, and other items for printing were not disallowed. The true position must

have been that the assessor did not appreciate the implications of this change in the costs agreement.

[22] See p 3-44; contrast p 3-43 line 10.

[23] See *Remely v O'Shea* [2008] QCA 389 at p 3, as to the scope of a review.

[24] As conceded by the costs assessor in an email of 16 May 2018: affidavit of plaintiff filed 12 September 2018, Exhibit 1, page 2, where the difference is stated, incorrectly, as $2,339.72.

[25] $358,600.37 + $2,239.72 + $1,935.81.

[26] With the fees of the costs assessor to be divided evenly between the parties.

[27] UCPR r 681; See *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at [66]- [69] per McHugh J.

[28] This sub-section is also introduced by the expression "unless the costs assessor otherwise orders", which appears to be otiose.

[29] 3 James 1 c 7; Friston "Civil Costs Law and Practice" (2nd ed 2012) p 6.

[30] 2 Geo 2 c 23.

[31] Friston op cit p 8, and authorities at note 42.

[32] Statutes at Large, Vol 16, p 64. I have changed "f" to "s" to accord with modern usage. More of the section is quoted in *Bentine v Bentine* [2016] Ch 489 at 501, 502.

[33] *Higgins v Woolcott* [1826] EngR 1009; (1826) 5 B & C 760, 108 ER 283.

[34] *Barker v Bishop of London* (1756) Barnes 147; 94 ER 849.

[35] 6 & 7 Vict c 73.

[36] *Re Feez Ruthning's Bill of Costs* [1989] 1 Qd R 55 at 63, 84, 92.

[37] Of whom these were then six: see [1851] EngR 182; 51 ER 71.

[38] *Re Dibbs and Farrell* [1941] NSWStRp 10; (1941) 41 SR (NSW) 249 at 254; *Bentine v Bentine* [2016] Ch 489 at [31]-[32]. See also the quote earlier from *Re Richards*.

[39] The Chief Justice's approach was the view of the court, by majority. The High Court dismissed an application for leave to appeal: see p 258; (1941) 15 ALJ 86. The

same conclusion has now been arrived at by the English Court of Appeal: *Bentine v Bentine* [2016] Ch 489 at [36], [99].

[40] See, to the same effect, *Re Dibbs and Farrell* (*supra*) at p 255, and *Re Richards* (*supra*) as quoted.

[41] At first instance, a very narrow meaning was attributed to the "assessment", as limited to the actual process of deciding what to allow for each item, and excluding the process of receiving submissions and gathering evidence: [2014] QDC 194 at [32].

[42] The point made by Jordan CJ in *Re Dibbs* and *Farrell* (supra) at p 255.

[43] There was also an issue about whether certain sums should have been struck out of the bill rather than taxed off, but that was resolved by following re *Dibbs & Farrell (supra)*.

[44] That applies here, but the difference is not significant.

[45] Since 1986 the power of the court under subsection (10) has been exercised by the taxing masters, or more recently costs judges, so that there is a finding of special circumstances in the course of making a ruling, rather than a certificate as such: *Bentine (supra)* at [6].

[46] *Bentine* at [69] per Sales LJ, [109] per Arden LJ.

[47] The function of the subrule is to enable the court to conduct a meaningful directions hearing under r 743E; see in particular r 743G(2)(d) and (e), and (3).

[48] *Radich v Kenway* [2014] QCA 301. To the extent that *Gregg Lawyers Pty Ltd v Farrar* [2014] QDC 194 at [136] decided to the contrary, it has been overruled.

[49] Except of course among lawyers.

[50] "That solicitors costs are or ever will be regarded as other than excessive is extremely improbable. To accuse a lawyer of rapacity is to utter a time honoured sentiment. ...": EBV Christian "A Short History of Solicitors" (1896) p 201, quoted in Quick RW "Costs: The Historical Perspective" (1983) 13 Qld Law Society Journal, p 169. See also *Re Feez Ruthning's Bill of Costs* (*supra*) at 82, 90.

[51] *Amos v Monsour Pty Ltd* [2009] QCA 65; [2009] 2 Qd R 303 at [8].

[52] *Re Dibbs and Farrell* (*supra*) at p 255 per Jordan CJ: "The principle purpose of the litigation... was no doubt to protect clients from imposition by overcharge." See

also *Richardson v Lander (No 2)* (*supra*) and *Re Elwes and Turner* (*supra*), as quoted.

[53] The fact that this is not the only adverse consequence of a failure to comply with the disclosure requirements –see s 316 - does not reduce the force of this point.

[54] *Oshlack (supra)* at [66].

[55] I adopt what I said in *State Mercantile Pty Ltd v Oracle Telecom Pty Ltd (No 2)* [2017] QDC 60 at [21]- [24]. See also *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 896 at [17]- [19].

[56] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 568; *Bucknell v Robins* [2004] QCA 474 at [17].

[57] As it happens, the costs assessor has virtually split the difference.

[58] By my count, 63 of each of the first 100 items and the last 100 items in the bill.

[59] *Gregg Lawyers Pty Ltd v Farrar* [2014] QDC 194 at [104], [105]; *MJ Arthur Pty Ltd v QS Law Pty Ltd* [2018] QDC 150 at [185].

[60] It is not clear whether he had seen this email. He did not mention it in his letter of 25 March 2018 (p 1440) but he could have easily taken the view that it was not worth mentioning.

[61] On the figures as adjusted on the review, the percentages become 42.9% and 75%.

[62] *Richardson v Lander (No 2)* (*supra*); *Idemitsu Queensland Pty Ltd v Agip Coal Australia Pty Ltd* [1996] 1 Qd R 26.