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District Court of New South Wales

Palese v Malouf (trading as Malouf Solicitors) [2014] NSWDC 65 (21 March 2014)

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District Court

New South Wales

Case Title:	Palese v Malouf (trading as Malouf Solicitors)
Medium Neutral Citation:	[2014] NSWDC 65
Hearing Date(s):	14, 17 and 20 March 2014
Decision Date:	21 March 2014
Before:	Neilson DCJ
Decision:	
	Leave to appeal refused

Catchwords:	COSTS - Application for leave to appeal decision of costs review panel - solicitor/client costs COSTS - Inadequate costs disclosure - Reduction of costs allowed on assessment by amount considered proportionate to the seriousness of the failure to disclose - Requires determination of seriousness and then assessment of proportionality LEAVE TO APPEAL - must show practical injustice - Whether stereo-typification of litigant relevant PROCEDURAL FAIRNESS - Submissions of defendant before review panel contrary to s 375 (3)(a) Legal Profession Act 2004 - Levy v Bergseng distinguished - No evidence submissions considered
Legislation Cited:	Legal Profession Act 1987 Legal Profession Act 2004
Cases Cited:	Altaranesi v Sydney Local Health District [2012] NSWDC 90 Attorney General of New South Wales v Kennedy Miller Television Pty Ltd (1998) 43 NSWLR 729 CSR Ltd v Eddy [2008] NSWCA 83 Kells v Mulligan [2002] NSWSC 769
Category:	Principal judgment

Parties:	Liliana Eugenia Palese Anthony Mark Malouf (trading as Malouf Solicitors)
Representation	
- Counsel:	In person (Plaintiff) Ms Castle (Defendant)
- Solicitors:	In person (Plaintiff) Malouf Solicitors (Defendant)
File Number(s):	2013/255387
Publication Restriction:	No

JUDGMENT

1. HIS HONOUR: The plaintiff, Ms Lilliana Eugenia Palese is a former client of the defendant, Mr Anthony Mark Malouf. Mr Malouf is a solicitor who trades as Malouf Solicitors. He is a sole practitioner but it is clear that, from time to time, he employs other solicitors. The plaintiff first consulted Mr Malouf's practice on 20 November 2007. The plaintiff consulted Mr Malouf's practice as a result of the breakdown of her marriage to Mr Daniel Busic. In an affidavit sworn

in the Federal Magistrates Court on 30 January 2009, the plaintiff said this:

"6. Daniel and I met in about 1999/2000 and we [commenced] living together in or about January 2001. We married on 5 May 2001 and we separated on a final basis in March 2006.

7. There are two children of our relationship, namely:

(a) Adriana Busic born 23 March 2002...and

(b) Renata Busic born 27 July 2003..."

2. In the same affidavit, the plaintiff recited that she has two older children from a prior relationship, both daughters, Krystal Dobson and Monique Dobson, who, in January 2009, were aged 21 and 17.

3. The defendant is not the first solicitor that the plaintiff consulted because of her matrimonial difficulties. For about ten months she retained Messrs Renfrews of Newcastle and paid to them some $30,000 in fees. Thereafter, she retained York Family Law for some five months and, to the best of the plaintiff's recollection, she paid them approximately $25,000. The plaintiff moved from Messrs Renfrews because of the difficulty she encountered in retaining a solicitor in Newcastle when she was living in Toongabbie. The plaintiff ceased with York Family Law because they insisted on having their fees paid in advance ("up front").

4. Prior to the plaintiff's consulting Mr Malouf's practice there were proceedings on foot. Some of the documentation suggests that there was one set of proceedings in the Family Court of Australia and another set of proceedings in the Federal Magistrates Court, but the plaintiff told me, and it appears to be likely, that both sets of proceedings ended up being in the Federal Magistrates Court. One set of proceedings concerned residence and contact with the children of the marriage and the other set of proceedings concerned a property settlement and an application for spousal maintenance.

5. Amongst the papers before me is a lengthy letter from York Family Law to the plaintiff dated 20 November 2007, the day on which the plaintiff first consulted Mr Malouf's practice. On that day as well the plaintiff swore an affidavit prepared by York Family Law to ground an application for her former husband to be dealt with for contravention of orders made by the Federal Magistrates Court. The letter from York Family Law is instructive because it shows the issues that had arisen between the plaintiff and her former husband, issues with which Mr

Malouf's practice would have to deal. The substance of the letter is this:

"We confirm that we appeared with you at the Federal Magistrates Court on 20 November 2007. On that day the matter came before Federal Magistrate Altobelli. Mr Todd of Counsel appeared with Mr Xenos together with your former husband. Ms Fellowes appeared on behalf of your children.

We outlined to the Federal Magistrate the issues before the Court, namely that your former husband had not filed his Affidavits in support of the parenting issues and he has failed to make the disclosure that was required of him to be made which was due on 16 November 2007.

In relation to the parenting issues your former husband's Counsel advised the Court that the husband will rely on his previous Affidavits and otherwise there will be a short updating Affidavit to be filed within a couple of days.

In relation to the disclosure issues, your former husband's Counsel indicated that there are some documents to be produced; however, because the husband's solicitors had not received the complete file from the husband's previous lawyers, they were unable to assist the Court in that regard. We advised the Court that we will provide your former husband's Counsel with a folder of documents that your former husband's previous solicitors had provided to us so that they can then work out what documents are outstanding. The Federal Magistrate then stood the matter in the list.

Prior to doing so the Federal Magistrate made orders that your former husband has to file and serve his Affidavit by 5pm on Wednesday 21 November 2007 whereupon you can then exchange your evidence with him.

The Federal Magistrate indicated that once he has seen the report from Dr Waters he would release it.

The matter was then stood down for us to discuss the disclosure issues.

What then transpired is that we entered into some negotiations with your former husband's solicitors with a view to resolving the parenting and property issues. In relation to the parenting issues we are of the view, having received your instructions, the issues are not very significant and, in fact, the matter may be resolved. We note your instructions to amend the Terms of Settlement that we prepared and you went through during the course of the morning and we will submit that to your former husband for his approval through his solicitors once you have approved the amended draft which we emailed you a short time ago.

PROPERTY SETTLEMENT

In relation to the property matters we note your offer that we had put to your former husband's then solicitors was to the effect by way of final property settlement you would receive the home at Toongabbie unencumbered plus the payment of $150,000.

During the course of the negotiations your former husband's Counsel at Court today, your former husband put a counteroffer of:

(1) that he transfer the house to you forthwith, however the encumbrance on the property is to remain for a period of three years.

(2) that during the three-year period he will continue to meet the mortgage repayments as and when they fall due.

(3) that you receive the totality of the money that is sitting in the controlled moneys account which is approximately $65,000.

We note that you are concerned about the encumbrance over a period of three years and from our discussion with your former husband's Counsel he indicated that your former husband may be in a position to provide you with an unconditional bank guarantee for the value of the mortgage so that if he defaults you can call upon that guarantee and have the mortgage paid out through that bank guarantee. You indicated that you did not wish to have a settlement whereby you are locked in to the Toongabbie area for the next three years.

You then instructed us that you would not move from the offer of a cash payment of $150,000 but that over and above that you wanted to receive a payment equal to 50% of the value of the shares of the company NPG Pty Ltd as well as 50% of any moneys or bank accounts that he has which he has not declared and wanted to know what has happened with the $300,000 mortgage that was obtained and secured over the Toongabbie home. You were of the view that the money was drawn down against the family home at Toongabbie and you did not know what he used the money for.

We enclose a balance sheet which we had prepared for the Conciliation Conference on 17 November 2007. We have amended it to remove the reference to the Cecil Hill Home as the site has not yet been developed. As you will note from the attached document, the net asset position, assuming all the numbers are correct (including the value that we ascribed to National Projects at $500,000 being his interest in that company, $100,000 for DM Sports Partnership, $175,000 being the proceeds of sale of the shares NCG as well as the moneys owing to him from National Projects Pty Ltd of $110,740) less the liabilities there is a net asset position of approximately $1.273 M.

We are of the view that given the length of the marriage and the relationship being approximately five and a half years and given the initial financial contribution of your former husband which on any view was significant and assuming that there has been full and frank disclosure by him which is reflected in the attachment document, then we are of the view that your entitlement on a contribution-based analysis will be approximately 25% - 30%. When section 75(2) factors are then examined, you would receive an adjustment of about 15% (bearing in mind the care of the children, your income earning capacity compared to his) which means that your total entitlement will be 40% - 45%. 40% of $1.273 M is $509,200. 45% represents $572,850.

Under his offer you will receive:

(1) Family Home Unencumbered $400,000

(2) Motor vehicle $30,000

(3) Contents $2,000

(4) Super $2,000

(5) Controlled account E$65,000

Total $499,000.

Your offer represents a total property settlement in your favour of $584,000.

Whilst we accept that your former husband's offer is on the lower range of the scale. We note that our advice on your entitlement is premised on:

(1) the assumptions made in relation to the National Projects Pty Ltd at $500,000;

(2) The value of DM Sports Partnership of $100,000;

(3) The proceeds of sale of shares in NCG of $175,000;

(4) as well as the moneys owing to him by National Projects Pty Ltd of $110,740.

Overall we are of the view that your former husband's counteroffer subject to the encumbrance issue over the family home being settled is on the lower range of the scale of what you would be entitled to receive. We note that the above is premised on the basis there has been no assessment of the value of the Company, National Projects Pty Ltd, or what has occurred to the previous Company that went into liquidation; no audit of the income and expenses of the business has been done; no tracing of all bank accounts and assets that may have been removed from his name into someone associated with him such as his current wife.

We note that there is also a significant cost that will be incurred by you in tracking down any hidden assets and getting a valuation, an audit and tracing of the Company or Companies which we estimate to be between $50,000 to $100,000."

The letter goes on to discuss issues concerning child support.

6. On the day that the plaintiff first consulted Mr Malouf's practice the practice prepared a standard costs agreement which bore the date 20 November 2007. At the same time there was made a standard costs disclosure also bearing that date. The plaintiff signed the standard costs agreement on 21 November 2007 and appears to have sent it back to Mr Malouf's practice. There is in evidence another copy of the standard costs agreement and the standard costs disclosure but each has been signed by the plaintiff and Mr Malouf, and Mr Malouf's signature is dated 23 December 2008.

7. When the plaintiff first consulted Mr Malouf's practice she dealt with Mr Damien McKay, a family law accredited specialist. She was to remain with Mr McKay until December 2008 when he was replaced by Ms Nicole Quirk who was also a family law accredited specialist. It would appear that Ms Quirk replaced Mr McKay in Mr Malouf's employment. No doubt Ms Quirk, when she read through the file, found that the standard costs agreement and the standard costs disclosure had not been signed by Mr Malouf so they were again printed out and executed by both the plaintiff and the defendant. This has led to a submission that there were, in fact, two costs agreements and not one. As the costs assessor was to succinctly point out:

"Although the costs agreement has a date of 23 December 2008 next to the signature of Mr Malouf, the written agreement is dated 20 November 2007 and was submitted to the client on about that date as an offer. It was accepted subsequently by her signing a copy and returning it to the law practice. At the time the law practice overlooked having Mr Malouf sign the agreement and he subsequently signed it on 23 December 2008. But the delay does not affect the validity of the agreement. The Act requires only that the agreement be 'evidenced in writing' and that occurred by the written offer and the client's written acceptance.

As to precisely when the client returned the signed copy of the agreement, the law practice letter of 24 December 2010 contains evidence and submissions as to that issue, and for the purpose of the assessment I adopt its contention that it happened on 21 November 2007."

8. The requirement that an agreement be evidenced in writing is well known in the common law world. It was first enacted in the Statute of Frauds 1677. The principles in that statute still govern conveyancing in this State. One hardly ever sees a contract for the sale of land signed by both a vendor and a purchaser. A vendor signs a copy of a contract and a purchaser signs a copy of the same contract. The contracts are then exchanged. The purchaser ends up with a copy of the contract signed by the vendor and the vendors ends up with a copy of the contract signed by the purchaser. Each has a copy of the contract evidenced in writing and signed by the person against whom the party seeks to enforce it. Here, once the plaintiff returned the standard costs agreement with her signature on it and the date 21 November 2007 to Mr Malouf, Mr Malouf was entitled to enforce it. The only significance of the events of 23 December 2008 is that it provided a copy of the costs agreement that the plaintiff could enforce because it had been evidenced in writing by Mr Malouf. However, I hazard the observation that Mr Malouf would have been estopped from relying upon a contention that he could not be bound by the costs agreement because he had not signed it by reason of the fact that he had forwarded it to the plaintiff for her signature and received it back and acted on it for over one year prior to 23 December 2008. A clearer case of estoppel by conduct could not arise. The generation of the second copy of the fee agreement signed by both the plaintiff and the defendant was a mere formality and is not evidence of a second contract being entered into but rather an affirmation or confirmation of the earlier contract. Not only did the learned costs assessor proceed on that basis, so did the review panel and so must this Court. It is the only conclusion on the law available.

9. The defendant's practice continued to act for the plaintiff until 8 April 2010. Initially, the defendant's practice billed the plaintiff roughly monthly. The costs assessor reports that ten bills were delivered by the defendant to the plaintiff. They were on the following days:

(1) 30 November 2007 $22,887.39

(2) 23 January 2008 $96.25 (a report fee)

(3) 29 February 2008 $6,850.05

(4) 31 March 2008 $3,042.95

(5) 30 May 2008 $2,008.82

(6) 29 August 2008 $1,139.60

(7) 31 October 2008 $4,270.11

(8) 28 November 2008 $2,736.25

(9) 23 December 2008 $8,755.65

(10) 29 January 2009 $14,884.57

(11) 9 April 2010 $111,217.13

10. The total billed to the plaintiff by the defendant was $177,888.77. Of that sum, the plaintiff made payments of $2,296.25 between 22 January 2008 and 24 March 2009. As the result of one of the terms of the settlement of her property dispute, an amount of $69,913.64 was transferred from trust moneys previously held on behalf of both the plaintiff and her former husband to the defendant for the payment of the plaintiff's costs. Those moneys were used to pay for all the work done prior to 28 January 2009. The tenth bill, that numbered 11 in the table above, commences with work done on 28 January 2009 and contains disbursements incurred on and after 30 January 2009.

11. On 9 September 2010 the defendant signed an application by a legal practice for assessment of costs other than party and party costs and forwarded it to the Manager of Costs Assessment. The application was received by the Supreme Court on 13 September 2010. The Manager of Costs Assessment forwarded the bill of costs for assessment to the Honourable Mr Graham Mullane, a retired judge of the Family Court of Australia. Mr Mullane is in Newcastle. Mr Mullane produced a report bearing date 13 February 2012. The report is 86 pages long and contains 343 paragraphs. The learned costs assessor determined that the amount payable to the costs applicant, namely the defendant, was nil, his having assessed the defendant's costs to be $49,224.91 but pointing out that the plaintiff had already paid more than that to the defendant. The learned costs assessor also determined that the costs of the cost assessment, being $14,995.85 ought be paid by the costs applicant, the present defendant. The costs assessor issued certificates on 13 February 2012 but the Manager of Costs Assessment did not forward the certificates until 16 July 2012, after the costs assessor's fees were paid.

12. On 16 August 2012 the defendant filed in the Supreme Court an application for review of the determination of the costs assessor, that application bearing the date of filing 16 August 2012. The review panel was constituted by Mr John McIntyre and Ms Marilyn Filewood who, I have been told from the Bar table, are both experienced legal practitioners. The review panel issued a 20-page report dated 12 December 2012. The review panel determined as a fair and reasonable amount of costs to be paid to the defendant by the plaintiff $83,570.63. It also determined that the costs of the initial costs assessment were payable by the defendant in the sum of $6,770.85. The panel also determined that the costs of the review panel assessment

were to be paid by the plaintiff in the sum of $5,085.20.

13. On 22 August 2013 the plaintiff filed a summons in this Court commencing an appeal pursuant to UCPR 50.4. The grounds of the appeal are 14 in number. There is no averment in any of those grounds of an error of law. The matter first came before his Honour, Judge McLoughlin, on 19 September 2013 when his Honour granted the plaintiff leave to file and serve an amended summons seeking leave to appeal, such leave being for a period of 21 days. On 11 October 2013 the plaintiff filed an amended summons seeking leave to appeal.

14. Under the *Legal Profession Act 2004* s 384, a party has a right of appeal from either a costs assessor or a review panel where the party is dissatisfied with a decision as to a matter of law arising in the proceedings. In other words, to have an appeal as of right the plaintiff must allege an error of law. Under s 385 of the Act, a party to an application for a costs assessment relating to any bill may, in accordance with the rules of this Court, seek leave of the Court to appeal to the Court against the determination of the application made by either a costs assessor or a review panel. Initially the right of appeal was to the Supreme Court but the right to appeal is now to this Court. The amended summons seeking leave to appeal largely repeats the original grounds pleaded in the initiating process. However, there appear to be additional matters added to grounds numbered 10 and 12. When I need to refer to the grounds of the appeal, I shall refer to the grounds in the summons seeking leave to appeal.

15. When the matter was before the costs assessor, Mr Mullane, the plaintiff had the assistance of Mr Michael Vassili of Vassili Fozzard Lawyers of Strawberry Hills. That firm holds themselves out as both barristers and solicitors practising in the Supreme Courts of each State and in the High Court of Australia in a large number of fields. The initial submission by Mr Vassili to Mr Mullane bears date 14 December 2010 and is some 18 pages in length. Amongst other things, Mr Vassili submitted to the costs assessor that the costs agreement be set aside or varied in accordance with s 328 of the *Legal Profession Act 2004*. Mr Mullane set aside the costs agreement. On 9 February 2011 the costs assessor intimated to the parties that, because of a breach of the disclosure requirements of the *Legal Profession Act 2004*, and because of the provisions of s 317(1) of that Act, he might set aside the costs agreement between the parties. In the first 45 paragraphs of his reasons, the costs assessor set out that which had happened prior to an application made to him by the defendant to reopen the issue of whether to set aside the costs agreement. The costs assessor went on at some length to consider the further submissions that were put to him and further "evidence", that is, in fact, further submissions, that were put to him. Commencing at [130] the learned costs assessor commenced his conclusions on the issue of setting aside the costs agreement. At [160] the costs assessor set out his finding that the costs agreement was not

fair and reasonable and succinctly stated his reasons. The relevant paragraph of the report is this:

"I find that the Costs Agreement is not fair or reasonable because:

160.1 The client was vulnerable and the law practice knew that;

160.2 The rounding-up clause [charging in six minute increments] was unfair and unreasonable, particularly because the high number of small time claims and the way the law practice claimed for times, the effective charge rates for time spent were significantly more than the rates stated in the agreement;

160.3 The charge rate for photocopies in the agreement is unreasonable, particularly because much of the photocopying was in bulk;

160.4 The client was seriously disadvantaged and disempowered by the law practice's failures to comply with the disclosure requirements and that rendered the agreement unfair;

160.5 The law practice breached the requirement of the costs agreement to consult the client about the terms of engagement of each of the three barristers;

160.6 The law practice failed to bill reasonably frequently and this contributed to the unfairness and unreasonableness of the costs agreement;

160.7 When the law practice continued to act for the client after the bill of 29 January, it knew that the client's costs already billed were about $66,700, she had only paid only $1,496.25, she had no significant liquid funds other than what she could obtain of the joint investment, she would probably have to sell her home if she were to meet any further costs, her expectations of the litigation were unrealistic, and searches and other investigations in the last 14 months (and so far as it knew when the previous two law practices that had acted for her) had not provided evidence to substantiate her belief that the husband had secreted or disposed of assets; and

160.8 The law practice continued to act for the client, contrary to the terms of the costs agreement, when the client failed to pay its [sic] bills. The first bill (30 November 2007) was for $22,887.39. By 29 January 2009 the costs billed were approximately $66,700. But even then the total of the client's payments was only $2,296.25; only about 10% of the first bill."

16. The costs assessor then turned his mind to a number of issues. One of the first was to charging in six minute increments. The costs assessor did that between [167] and [170].

However, he has earlier visited the same issue commencing at [125]. Commencing there he said this:

"125. More than half of the items charged in the bill (about 472) are for one **six minute unit** of time. In the absence of any records of actual time taken for the items, if one assumes a random distribution of actual times of one, two, three, four, five, and six minutes, then for items where six minutes is [sic] claimed the average actual time is 3.5 minutes. So the amount claimed for one minute of time is on average a claim for 3.5 minutes spent.

126. The rate for a partner or accredited specialist is $385 including GST per hour. The actual rate claimed for the actual time spent is $385 including GST for 35 minutes which translates to in effect an hourly rate of $660 per hour for time spent (including GST). Similarly, the hourly rate specified in the costs agreement for a secretary is $93.50 (including GST), but the effective rate for items where only a **six minute unit** is claimed average $93.50 for 35 minutes, which translates to an hourly rate of $160.29 per hour of time spent.

127. 338 of the claims for one unit of time are charged at the rate of $385 per hour giving a total charge for these items of $13,013 whereas the charge if the hourly rate quoted in the costs agreement were applied to the actual time spent would be $7,590.92. The effect of these items of the rounding of times instead of charging for actual time spent is to charge more than 70% more than the stated rate. In dollars for these items alone the difference is $5,423.08."

17. One can see in that a distinct attack upon the widespread, if not universal, practice employed by the legal profession in this country, let alone State, of charging in six minute increments. The learned costs assessor then went on to point out that there was no actual objection to the hourly charge rates set out in the costs agreement propounded by the defendant. The costs assessor did not state that, in his view, the charge rates for an accredited specialist family lawyer and his or her secretary were excessive.

18. The costs assessor then went on to deal with specific objections about subpoenas and searches, reviewing files and interviewing and the preparation of affidavits, duplicate representation, excessive time claims for appearing at Court and attending at Court, excessive charges for photocopying, claims with respect to typing, phone calls and emails, an objection concerning a caveat and a deed of charge prepared by the defendant for execution by the plaintiff to secure the defendant's claim against the plaintiff for payment of his fees, and an objection raised by the plaintiff to termination of the appeal in the family law proceedings.

Eventually, that led to the costs assessor assessing the costs claimed in the bill to be $61,224.91.

19. The costs assessor then applied a reduction under s 317(4) of the *Legal Profession Act 2004*. After reciting the subsection, the assessor continued thus:

"309. It was not until 6 March 2009, that the law practice made any real attempt to provide an estimate of total legal costs. It was more than 15 months after the client signed the costs agreement. By then costs of about $70,000 had already been billed or (according to the law practice records) accrued. When that is combined with other breaches of the disclosure requirement, the seriousness of the nondisclosures is obviously high. The breaches were very damaging financially and emotionally to the client.

310. The conclusion I have reached is that the reduction proportionate to the seriousness of the failure to disclose is a reduction of $12,000 in the costs. That will reduce the assessed costs to $49,224.91."

The learned costs assessor then went on to consider the amount of moneys already paid and then said this:

"329. I am mindful that in my letter of 24 May 2011 I invited the law practice to amend the application to seek assessment of the whole of the subject bill and the other nine bills, because of the effect of a finding adverse to the law practice on the issue of nondisclosure or setting aside the costs agreement. It insisted that it would not do so. Even though the costs agreement has been set aside, the client will, because of the time limit in s 350(4) of the Act need leave of the Supreme Court to apply for assessment of the other bills (subsection 350(5)). But the effect of subsections 317(1) and (2) is that the law practice needs to have the costs in the other bills assessed before it can recover them and the Act does not have a time limit for assessment applications by a law practice.

330. The amounts the client has paid the law practice or have been paid to the law practice on her behalf exceed the costs assessed (so far as I am aware no other costs under the costs agreement have been assessed) and accordingly no amount is payable by the client to the law practice in respect of the costs assessed."

As a logical consequence of that, no interest would be payable on the costs that he had assessed.

20. Finally, it is to be noted that the costs assessor's fee was so high because he had spent "more than 100 hours" on the assessment, which he pointed out had been prolonged by what he perceived as unsatisfactory conduct by the defendant and by "correspondence expressing consternation because of the submission by the client's solicitors that the transfer of trust funds of the client for payment of earlier bills was not authorised by the client or by the legislation." I must point out it is hardly the role of a costs assessor to make any determination of what is done with trust moneys. It is a matter which is completely outside his purview. The application or misapplication of trust moneys is a matter that properly resides in the Equity jurisdiction of the Supreme Court of this State and not in a costs assessor.

21. Before turning to what the review panel did, I should point out that the costs assessor spent some time considering the position of the current plaintiff. Commencing at [81] the costs assessor said this:

"81. The proceedings were property proceedings after a separation from her marriage with three children. The client had the continuing care of three children, two of whom were young. She was concerned to retain the home, which was subject to a mortgage, and she believed the husband had not been making full and frank disclosure of his property. She had already incurred costs of $46,586.74 with her two previous firms of solicitors and was anxious to conclude her claim without costs greater than what she could pay from her share of the trust funds in the joint names of the parties and any funds she could obtain from the husband towards her costs.

82. She had received $30,000 from the interim order in April 2007 and part of that she used to pay $9,985.21 (the balance of the fees of Renfrews Solicitors, the first firm). She had paid the second firm (York Family Law) ten instalments of costs to a total of $19,696.25 in the period August 2007 to January 2008. She had borrowed funds from her mother, her sister and a friend. It appears from her affidavit of 30 January 2009 that part of the money from her mother was borrowed by her mother using a credit card. By letter of 21 November 2007 York Family Law notified the law practice that the client owed them $5,041.26.

83. These were the first family law proceedings in which the client had been involved. Family law proceedings after the breakdown of a marriage are notorious for the disturbed emotional states of parties involved. From the making of the costs agreement this was likely to be a matter where the client would have more emotional problems than an average litigant in such proceedings because she had the care of the three children, she distrusted the husband and believed he was concealing assets, she had engaged two previous law practices to act for her, she had parted company with each of them, and the separation from the last one was

because she would not, or could not, comply with their requirements to fund their costs. The law practice [the defendant] was aware of these matters.

84. The law practice may have formed a view that the client 'did not appear to be...emotionally affected from her family law proceedings', but the evidence that she was is overwhelming. She had enormous emotional investment in the proceedings. She was over-involved in the proceedings and demanding. Twice she and the solicitors acting for her parted company. She had incurred costs of $49,586.74. There is no doubt she would be very frustrated and disappointed at that. The law practice knew that, or if it didn't, ought to have known it, when she entered into the costs agreement.

85. The law practice says the client had 'an over-inflated view of her matter, her overall outcome, and the financial position of the parties'. In other words, the law practice considers that the client had an unrealistic opinion as to the extent of the parties' finances and an overoptimistic expectation of the outcome of the proceedings. Clearly in this sense the client was vulnerable as she was more likely to incur costs out of proportion to the ultimate outcome and more likely to reject any reasonable settlement advice or settlement offer. In appears from the law practice submissions that this did not change. The law practice says that the client 'did not seriously consider reasonable offers suggested by Ms Quirk and did not accept reasonable advice given to her by Ms Quirk, and others'. Clearly she continued to be vulnerable in this regard."

22. In the following two paragraphs the costs assessor set out what he could determine about both Mr Damien McKay and Ms Nicole Quirk from their entries in the Law Almanac and continued thus at [88]:

"88. Given the client's emotional investment in the proceedings and the disappointment she had experienced in the relationship with each of the two previous firms of solicitors, it is likely that the client was very insecure, apprehensive and anxious to find that she had lost the services of Mr McKay and the matter was being taken over by a solicitor she did not know, whom she thought was less experienced than Mr McKay and whom she knew had virtually no knowledge of the matter. Ms Quirk found on the very first day that the client was demanding and that Mr McKay continued to act for her and she was 'loud, rude and offensive'. Again this experience obviously increased the client's vulnerability."

The costs assessor then considered other submissions and said this:

"93. These statements indicate not just how emotionally involved the client was, but also how much she was depending financially on a good result. There is also an indication that she had given inadequate recognition to the fact that she was not (and would not be) in paid work and if her costs exceeded the funds she could obtain from the trust funds and from any interim costs order against the husband, she might have to sell the home if she could not obtain the funds by increasing the mortgage debt. She was vulnerable in that regard.

94. Ms Quirk in her dealings with the client formed a view that 'she did not seriously consider reasonable offers suggested by Ms Quirk and did not accept reasonable advice given to her by Ms Quirk and others'. This too suggested that she had unrealistic expectations and did not properly recognise her vulnerability because of her inability to establish all the husband's assets and their values."

23. Whether such inferences were open to a costs assessor merely reading written submissions is a moot point. A court even hearing from a litigant in person giving his or her evidence-in-chief and being cross-examined would be slow in reaching sweeping decisions about the mindset of a witness and, because it is relevant in another respect, it appears that the learned costs assessor has engaged in some stereo-typification of the plaintiff. Furthermore, the findings, if I may call them that, of vulnerability clearly are based on evidence presented to the costs assessor that the plaintiff had unrealistic expectations of the outcome of her proceedings and failed to heed advice given to her by her solicitors.

24. Of course, the classic way of a solicitor dealing with a client who will not heed advice is to withdraw from the proceedings, to cease to act for the client who will not heed advice. However, that would have left the plaintiff in an even more vulnerable position running proceedings in a Court against a legally represented opponent when she was unfamiliar with the processes of the Court and the requirements of the Court and, for examples, rules of evidence and practice and procedure. Furthermore, a client can instruct a solicitor as to what he or she is to do and a solicitor must be very careful in refusing to obey the instructions of his or her client. To do so might be both a breach of contract and professional negligence.

ADJOURNED TO FRIDAY 21 MARCH 2014

25. HIS HONOUR: When I adjourned yesterday evening I indicated that I would soon turn to the reasons of the review panel. It has occurred to me overnight that I ought to say something

about the finding of the costs assessor about a failure by the defendant's practice to comply with the disclosure requirements of the Act. However, it is probably easier for me merely to cite what was said by the review panel in that regard which outlines the nature of the finding of the costs assessor and also the approach of the review panel to the same issue.

26. It is to be noted that the function of the review panel is not to entertain an appeal. In *Kells v Mulligan* [2002] NSWSC 769, Master Malpass (as he then was) described the role of the panel in [25] thus:

"the function of the Panel is to conduct a review (as opposed to entertaining an appeal)".

After citing preliminary matters and the legislation, the review panel said this:

"The assessor gave comprehensive reasons to explain why he decided to set aside the costs agreement but he then assessed the bill at the hourly rate set out in the costs agreement. In doing so he apparently concluded that the hourly rate was fair and reasonable for an accredited family law specialist. Indeed no objection was taken to the hourly rate by the client. Were it necessary, the review panel would have determined that $350 per hour was a fair and reasonable hourly rate for an accredited family law specialist at that time. The costs agreement also provided for charges for work of a secretarial nature at the rate of $85 per hour which was also not objected to."

27. The figures quoted by the review panel are figures less GST: $350 per hour plus GST is $385 per hour and $85 per hour plus GST is $93.50 per hour. The inference to be drawn from what the costs review panel said is that the rate of charge for work of a secretarial nature was also a fair and reasonable one.

28. The review panel then stated that it did not consider that the current matter was an appropriate one in which to set aside the costs agreement. It then set out a short chronology and continued thus:

"'Fair' and 'reasonable' as set out in s 328 are said to be different concepts: In *Re Stuart; Ex parte Cathcart* [1893] 2 QB 201 at 204 205. There was a requirement at common law that a costs agreement between a client and his or her solicitor be both fair and reasonable: see *Weiss v Barker Gosling* (1992-1993) 16 Fam LR 728 where the following passage appears at 758:

'...there is, in my view, a requirement at common law for the costs agreement between a solicitor and client be fair and reasonable. Although that expression may be a composite one, it appears generally to have been approached in the cases on the basis that "fairness" relates to the point of entry into the agreement whilst "reasonableness" relates to the terms of the agreement itself.'

While s 328 sets out various matters that the costs assessor may have regard to and broadens the power of the costs assessor to also set aside a provision of a costs agreement without setting the whole agreement aside, the general principles of fairness and reasonableness set out in the common law still apply. Section 328 is not prescriptive, that is, it does not require a costs assessor to set aside a costs agreement merely because one or other of the factors set out in (a) to (g) of the section may be found to have occurred or exist. The power to set aside the costs agreement (or a term of it) is discretionary and should be exercised after weighing up all the relevant factors.

While not expressed directly by the assessor in his reasons, it appeared to the review panel that he approached his task in determining whether or not to set aside the costs agreement on the basis that if any of the factors in s 328 were found to exist that the setting aside of the costs agreement was required.

'Fairness' requires an analysis of whether or not the decision of the client to enter into the costs agreement has been influenced, clouded or impacted [sic] upon by the circumstances that existed at the time the costs agreement was entered into. For example, if the client could not read English and the agreement had not been interpreted prior to signing. Despite the voluminous submissions made on behalf of the client and accepted by the assessor about her naivety, personal circumstances and financial circumstances, the fact remains that more than 12 months after the costs agreement was presented to her (and signed by her) she chose to affirm the costs agreement on 23 December 2008 (on her version of events) after considerable work had been undertaken on her behalf and she had been billed on an almost monthly basis for costs and disbursements totalling approximately $52,000 up to that date. The application to set the agreement aside was not based on factors such as a lack of understanding by the client of its terms or the inherent unfairness of the agreement itself manifested by such things as excessive charge rates.

'Reasonableness' requires an analysis of the terms of the agreement itself. The review panel observes that it is a form approved and recommended by the Law Society of New South Wales and contains no additional 'special conditions'. The rates and charges contained in it are reasonable and unobjectionable in the experience of the review panel including the use of **six minute units** as a basis for calculating charges and the charges for photocopying, faxes and the like. The use of time costing is widely accepted across the profession as a

reasonable means of ascertaining an appropriate charge for an item of work and is commonly seen in both party/party and solicitor/client bills. It is common for example in assessments of lump sum bills that an assessor will seek the submission of an itemised bill that specifies the length of time involved in the individual items of work. At the end of the day it is really the amount being charged for the described item of work which is of most relevance and not the number of units.

The review panel agrees with the assessor that of the factors set out in s 328 paras (a) and (b) do not apply on the basis of the material before the assessor.

In relation to paras (d), (e), (f) and (g) the review panel is not persuaded by the submissions of the client and disagrees with the conclusion of the costs assessor that material before him was sufficient to justify setting aside the costs agreement.

The review panel observes that in relying upon the decision of the law practice to cease billing the client monthly from 29 January 2009 as a factor justifying the setting aside of the costs agreement, the assessor has overlooked the fact that by agreement between the client and the law practice, the client was not paying the monthly bills as rendered to her over a 14 month period in any event and that a comprehensive estimate of the future costs to be incurred in the matter was provided on 6 March 2009, some five weeks after the last monthly bill was rendered. During the period from first taking of instructions in November 2007 until 29 January 2009 the client was well aware of the costs being incurred on a regular basis. Then some five weeks later she was provided with a comprehensive and detailed letter updating the costs disclosure.

It is also the experience of the review panel that litigants, particularly in family law matters, often conduct such proceedings without regard to the cost or the other commercial considerations that might apply to more reasoning litigants. It is also commonplace for family law matters involving property settlement to be conducted by law practices on behalf of clients on the basis of payment on conclusion of the matter. In this matter the client instructed the law practice that her husband had a business that turned over a huge amount of money each year and not only was she convinced that the business was of significant value thus increasing the pool of matrimonial assets but that as a result of the funds to which her husband had access from time to time, that he had hidden assets from her and was not disclosing those assets to the court. These were her instructions and to the extent that it seemed justified the law practice had an obligation to carry out her instructions. The law practice made such searches and inquiries as it could but at the end of the day they discovered nothing to bear out the client's convictions. The law practice should not be criticised or penalised for following the client's instructions.

The review panel agrees with the assessor that the law practice failed to strictly comply with its disclosure obligations but does not agree, given all the other circumstances summarised by the review panel, that this failure justifies setting aside the costs agreement. The review panel further finds that the costs agreement itself complies in all material respects with the applicable disclosure requirements. The review panel is of the view that the failure to provide adequate disclosure in strict accordance with the Act is best addressed by applying the provisions of s 317 of the Act. More will be said about that later in these reasons.

The initial disclosure of costs given by the law practice to the client was on 20 November 2007. That disclosure estimated costs in the range of $7,200 to $19,800 'plus disbursements and GST'. The disclosure contemplated the possible need to obtain valuations and to retain counsel but it was early days and the review panel accepts that it was not reasonably practical to be more precise or to provide a better estimate at that time. Although the panel accepts that at that point it was not reasonably practicable to be more precise at that point in time having regard to the information available to the solicitor, the estimate was almost undoubtedly too low.

Over the next year or so, costs and disbursements in excess of $60,000 were incurred but no revised or updated estimate of costs and disbursements was given until 6 March 2009. As set out in the chronology, the bills were sent to the client on an almost monthly basis over the time so the client was aware of what costs and disbursements had been incurred during 2008.

Under the Act, the law practice had an obligation to warn the client that the original estimate was likely to be exceeded. It is not sufficient to simply sent out bills periodically for work done to date. That informed the client of the costs that she has incurred but not the amount of costs likely to be incurred to conclude the matter.

That was done however on 6 March 2009 when the law practice gave an updated estimate of costs and disbursements for an interim hearing and the final hearing. That disclosure estimated costs and disbursements including counsel's fees for the interim hearing in a range of $14,250 to $19,000 and a range of $98,500 to $170,500 for the final hearing. There is no suggestion that these estimates were not realistic or appropriate in the circumstances.

On balance therefore the review panel does not consider the failure to give a revised estimate at an earlier point in time sufficient reason of itself to justify setting aside the costs agreement. The review panel notes the finding of the assessor that the law practice complied with its disclosure obligations in relation to Mr O'Gorman and Mr Wong [both of counsel] but not in relation to Mr Macpherson...

It is not readily apparent from the material before the assessor which of these counsel had the brief in the matter at the time it settled nor the role that each played from time to time in the

proceedings. The review panel assumes that counsel changed from time to time perhaps due to availability at any given time. There is no suggestion that the fees paid to Counsel differed greatly one to another and none of them are senior counsel. In the circumstances and given the comprehensive updated disclosure made on 6 March 2009 included estimates of counsel's fees, the review panel does not consider that the failure to comply with s 310 in relation to Mr Macpherson is of such seriousness that it merits setting aside the costs agreement and again consider the appropriate course is to deal with this failure under s 317.

The review panel, having decided not to set aside the costs agreement, set aside the determination of the costs assessor and proceeded to conduct its own assessment."

I have quoted that extensively to show not only what was going on but to show the reasoning applied by the review panel. I can find in that reasoning no error of law insofar as it refers to the common practice of law in this State. It is consonant with other matters which I have experienced over the last 20 years on the Bench and contains no error of logic or any obvious error of fact.

29. The review panel then set out the nature of the application that had been made by the defendant to the costs assessor. The panel then continued thus:

"As has already been alluded to, the law practice had submitted earlier bills in the same matter to the client. Despite what the review panel thinks were the mistaken efforts of the costs assessor to have the law practice agree to have the earlier bills included in the assessment and the submissions of the client in relation to those bills, the fact of the matter is that the earlier bills were not the subject of the application. It is a moot point whether the client could have made an application to have the bills assessed relying on the decision in *Ryan v Retumu* but that was not the application before the assessor."

Shortly thereafter the review panel returned to this issue. It said this:

"The client submitted that the payments made prior to the issue of the bill dated 9 April 2010 and applied in payment of previous bills should be applied solely to the bill being assessed. While the submission was accepted by the costs assessor the review panel considers the costs assessor to be in error in this regard and as will be seen later in these reasons has not adopted that course.

The cost assessor's reasoning was that the law practice was not entitled to the costs set out in the earlier bills because of the provisions of s 317 of the Act. Subsection (1) provides that a

client need not pay costs until they have been assessed. That subsection is of no application in the circumstances of this matter as the costs in the earlier bills had been paid. While the client may have declined to pay the earlier bills and sought to have them assessed before the law practice was entitled to take any steps to recover the costs, she did not do so. Subsection (2) provides that costs cannot be recovered by a legal proceedings until they have been assessed. Again that subsection has no application to the earlier bills as the law practice had no need to commence legal proceedings to recover the costs in the earlier bills as they had been paid.

If it be the case that the earlier bills were disputed as alleged by the client in her submissions and payment of part of the earlier bills was made by deduction from the trust account without proper authority (which the law practice disputes and the review panel does not find it necessary to express a view about that), the review panel considers that the appropriate course would have been for the client to seek to have the earlier bills assessed and payments made could then have been taken into account.

The review panel notes that the bill of costs dated 9 April 2010 had attached to it a statement of account also dated the same date which summarised all the bills rendered during the course of the matter and set out payments made including the money transferred from a controlled money account. If the client wanted to dispute the earlier bills and denied giving authority for the transfer of the trust money then the receipt of the bill and the statement of account dated 9 April 2010 might have been an appropriate time to consider lodging an application for assessment relying on the decision in *Retumu v Ryan* which dealt with the assessment of interim bills after the rendering of a final bill or alternatively an application for leave to make an application for assessment out of time of the earlier bills. Such an application could also have been made when the client received the application for assessment of the bill dated 9 April 2010 by the law practice shortly after it was filed on 13 September 2010. In this regard the review panel notes that the client sought legal advice shortly after her retainer of the law practice concluded in September 2009 and before the bill of costs dated 9 April 2010 was sent to her. The client was also legally represented from an early point of time during the assessment process."

30. Again I find no error of law in that reasoning of the review panel nor any error of principle. It is clear that the plaintiff did, after the issue of the bill of 9 April 2010, decide to query the earlier bills which had been paid. However, that, in my view, represents ex post facto rationalisation by her or on her behalf. That position must be compared to an email communication from the plaintiff to the defendant's practice on 19 March 2009:

"The counteroffer I made has to be sent to Daniel today. Any other offer will show Daniel that my solicitor has given up on me because of money. We have not gone this far and done all this work for me to have nothing. All your firm has done to date is paperwork at a cost of $91,000. If we have to go to court I know that any Judge will see that Daniel has hidden his assets well and cost me an immense amount in legal fees. She will see he lives in a house already and is almost finished his $1.2 million house. She will see he is throwing a mother and two small children out onto the street. I will have justice and you will have your money PIF [paid in full] but if we accept his first pathetic offer what has your firm done for me except cost me in paperwork? Please, please send my offer as I know he can afford it and it is my right in asking you to do this. Daniel needs to feel pressured that my solicitor will go all out to get what I rightfully should have. I know I have a large bill with you but why should that stop you going to court and getting justice for me. Don't do any less for me because of money. You will get paid before me. I will have my house and my legal bills PIF."

There is no suggestion at that time that the plaintiff was querying in any way the bills that had already been sent to her.

31. The review panel then went on to set out the nature of the "general objections" that had been made by the plaintiff to the defendant's bill. The review panel then set out the methodology which it was to adopt. That methodology is that required by law and no error of law is apparent in the process adopted by the review panel.

32. As it was a live issue before me, I should quote what the review panel said about certain inquiries that were made by the defendant on behalf of the plaintiff to try to trace down the alleged assets hidden by the plaintiff's former husband, those inquiries being by way of searches and the issuing of subpoenas. The review panel said this:

"The review panel rejected as factually inaccurate the submission that the work done in relation to subpoenas and searches was unnecessary and without instructions. That is simply not borne out by the totality of the material before the costs assessor. The review panel notes that the client on a number of occasions accompanied the solicitor when documents produced under subpoena were inspected. The client had what appeared to be legitimate concerns that her husband had undisclosed assets that needed to be taken into account in the division of the pool of matrimonial assets and gave the solicitor instructions as to various sources of inquiry. To suggest that the client did not understand why this was done and that it was done without instructions is clearly incorrect."

33. There is not before me the material that was before the costs assessor and, therefore, the material that was before the review panel. Insofar as the review panel reached a decision on the material before it, it is in a better position than I am to decide whether the work done in relation to subpoenas and searches was done at the request or on the instructions of the plaintiff. In any event, such material as there is before me clearly indicates that the finding of the review panel was correct.

34. The review panel then sets out how it approached the various "general objections", many of which it determined in favour of the plaintiff. The review panel, after dealing with the various matters raised, came to the decision that the defendant's bill should be reduced by $10,554.53, indicating that the proper amount for costs and disbursements payable by the plaintiff to the defendant in relation to the bill of 9 April 2010 was $100,662.60. The plaintiff was entitled to a credit of $10,071.97 because of payments made by her to the defendant subsequent to the rendering of the bill and to a further credit of $2,020 for payments made by the plaintiff to the defendant after filing the application for assessment of the costs. After deducting those credits from the bill as determined, the balance was $88,570.63.

35. The review panel then turned to s 317(4). The review panel said this:

"Section 317(4) of the Act permits a costs assessor to reduce the amount of costs allowed on assessment by an amount considered to be proportionate to the seriousness of the failure to disclose. The review panel has stated earlier in these reasons that it has found that there was non-compliance with the obligation to disclose enshrined in the Act and that it intended to apply the provision of that section.

The first estimate was not updated when it clearly should have been. The law practice seems to have taken the view that sending out regular bills was an adequate way of informing the client in relation to costs. While that informs a client of the costs that have been incurred it does not comply with the obligation to inform the client of the [costs] that are yet to be incurred when the first estimate has been exceeded. In our view the law practice had more than an adequate opportunity to make additional disclosure to the client and to update that estimate as the matter progressed and proffered no reason why it had not done so.

The assessor in invoking the provisions of the section reduced the costs by $12,000. The review panel believes this reduction to be disproportionate to the seriousness of the failure. As to the seriousness of the failure, the review panel do not consider it to be the most serious

breach so it has reduced the costs by $5,000 as a result of that failure. In arriving at this deduction it considered that it has been fair to both parties. The review panel also notes there has been no judicial ruling in relation to this power and the manner in which it is to be used or the criteria relevant to the reduction. The review panel has also taken into the account in determining an appropriate reduction in the costs the fact that as a result of its failure to strictly comply with the requirements of disclosure the law practice is obliged to pay the costs of the costs assessment pursuant to the provisions of s 369(3)(a) of the Act."

36. The review panel accordingly reduced the amount of costs payable by the plaintiff to the defendant to $83,570.63. In reducing the defendant's bill by $12,000, the costs assessor gave no reason why he chose that amount. However, it appeared to me when I first reads the costs assessor's reasons that perhaps he had chosen to reduce the bill by 20% and rounded that 20% off to $12,000. It is to be recalled that, before the deduction, the costs assessor assessed the costs as being $61,224.91. $12,000 is approximately one fifth of that amount. The review panel appears to have sought to arrive at a figure which was "fair to both parties" and arrived at a figure of $5,000. That is approximately 6% of the total bill.

37. As the review panel stated, there is no decision as to how s 317(4) is to be applied. The section provides that "the amount of the costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose". The review panel did not consider the failure to disclosure in the current matter to be "the most serious breach" but then approached its decision making on the basis of a figure that was "fair to both parties".

38. The concept of "fairness to both parties" is not the concept of proportionality to the seriousness of the failure to disclose. To say that this was not "the most serious breach" again fails to assist in determining proportionality. Was this breach a serious breach? Was it a breach in the mid-range of seriousness? Was it a breach at the bottom of the range of seriousness? The inquiry really requires the review panel or the costs assessor initially to determine the seriousness of the breach, where it is on a scale between the most serious form of breach and a trivial breach, and once that decision is reached to then go to the question of proportionality.

39. In considering the seriousness of the breach, one must understand the policy underlying the duty of disclosure. Clearly, the principle behind disclosure is that the client of a legal practitioner know in advance what the work which she asks the lawyer to undertake may ultimately cost her. If, for example, a client approaches a solicitor and retains the solicitor to

act for him in a claim for compensation arising from a motor accident, he ought be made aware of what ultimately the nature of the costs bill that he might have to pay would be.

40. Clearly, from the reasons of the review panel, the initial disclosure by the defendant was inadequate. However, it must be borne in mind that, on 20 November 2007, the plaintiff was advised by York Family Law this:

"We note that there is also a significant cost that will be incurred by you in tracking down any hidden assets and getting a valuation and audit and tracing of the company or companies which we estimate to be between $50,000 to $100,000."

41. Clearly, the plaintiff was well aware on 19 March that the defendant had run up costs of $91,000 which she was prepared to pay. On 6 March 2009 the defendant had sent to the plaintiff a letter which, although six pages long, is only some five pages in length which amounts to full and comprehensive disclosure. It starts out by reciting that, to date, the defendant had billed the plaintiff for $66,575.39 and that there is also work in progress which had not been billed that was worth at least $8,620.50, and there were also fees payable to Mr Matthew Wong of counsel for work that he had undertaken but which had not yet been billed. The letter then points out that the plaintiff had paid a small sum towards the bills that had been rendered and that the amount of outstanding costs was $65,175.39. The letter then continues thus:

"We note that we are to deduct our outstanding costs and disbursements from funds allowed to you pursuant to Orders hopefully made on 25 March 2009 or otherwise and/or from any other funds which are available to you including settlement funds herein."

42. That is clearly the recitation of instructions given by the plaintiff to the defendant as to how they were to be paid. The letter goes on to point out that there was to be an interim hearing in the Federal Magistrates Court on 25 March 2009 and that the defendant estimated that the costs up to and including the interim hearing would be between $16,250 to $21,000. That range of costs was then itemised. There was then an estimate of future costs of preparation for an attendance at the "final hearing". That was itemised and the final range was between $98,950 and $170,500. There then were itemised factors which would affect the

amount of costs to be incurred. There is also a disclosure of fees likely to be paid to counsel.

43. In my view, the extent of the seriousness of the failure to disclose was minor. Accordingly, I have no reason for departing in the exercise of my discretion from the amount determined by the review panel. A reduction of the defendant's costs by 20%, in my view, was quite disproportionate to the seriousness of the breach.

44. The review panel then went on to reduce the amount of costs payable by the defendant for the costs of the costs assessor to $5,775 but that, of course, cannot be the subject of any complaint by the current plaintiff because those costs are payable by the defendant. However, I must point out this. The panel said this as to what the costs assessor had done:

"The costs assessor states in his reasons that the assessment took more than 100 hours of his time over an 18-month period. The inordinately large amount of material before the review panel is testimony to the exhaustively detailed manner in which the assessor set about his task. With due respect to his apparent thoroughness, costs assessment is intended to be a quick and inexpensive means of resolving cost disputes in both party/party and solicitor/client assessments. That aim, given when the costs assessment was introduced, has not been achieved in this matter. The review panel notes that the manager, costs assessment, has guidelines that indicate that most costs assessments are anticipated to cost less than $2,000 in assessor's fees."

45. It is important to bear in mind certain principles. The *Legal Profession Act 2004* largely reproduced provisions in the *Legal Profession Act 1987* relating to the assessment of costs. In *Attorney General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 Priestley JA said this:

"Act number 87 of 1993 of the New South Wales Parliament was called the *Legal Profession Reform Act 1993*. Among the changes made by this Act was the replacement of the long-standing system of taxation of costs by officers of the court with a system of assessment of costs by practitioners experienced in the practicalities of the costs of legal practice including the costs of litigation.

The Attorney General of the day, Mr Hannaford, when the proposed legislation was read a second time in the legislative council, listed a number of defects in the existing system of

taxation of costs. It was said to be 'overly formal, legalistic and complex': Hansard, 16 September 1993 at 3277. Matters to which particular attention was drawn were that the court officers who did the work of taxing costs were often transitory and thus not always particularly knowledgeable, the process was frequently an adversarial one, it took up far too much time and could also be costly. The Attorney General said that what was needed was 'a faster, easier and cheaper system of review of bills of costs' (ibid at 3277). He continued:

'The Legal Fees and Costs Board suggested that the system of taxation be replaced by a system of assessment of costs by practitioners well versed in the running of a legal practice. Such persons would be part-time assessors appointed by the Supreme Court. The Chief Justice has indicated his support for this proposal. In commenting on the recommendation of the Legal Fees and Costs Board, the Chief Justice noted, "I would support the proposal that, subject to appropriate rights of appeal to a judge, taxation of costs be undertaken in the first instance by assessors taken from the ranks of legal practitioners, rather than by court officials who are public servants. I think it is fair to say that the legal practitioners would be far more in touch with current rates payable in the market for legal services."

Along with the new system of working out what amounts were to be paid pursuant to court orders following litigation that one party pay another's costs, the substance of the law was also changed. The Attorney General explained the reason for this (ibid at 3278):

'The current system of taxation of party-party costs creates injustice and confusion. It means that even though a successful litigant is awarded costs against the other party he or she may be out of pocket for a significant amount. This is because party party costs are those 'necessary and proper' while solicitor client costs 'are all costs save those which are of an unreasonable amount or have been unreasonably incurred'. It is proposed to abolish this distinction and that, subject to the judicial discretion to vary the basis of awarding costs, the criterion for awarding costs should be those reasonably incurred. The client would then recover the full costs which he or she is required to pay other than any unreasonable costs. There is significant support for this proposal. The current system of taxation has been criticised by a number of judges over recent years.'

The new system of assessment of costs came into operation on 1 July 1994. It was amended by Act number 95 of 1996, which was assented to on 26 November 1996."

46. It can readily be seen, therefore, that the current system of assessment of costs was not to be "overly formal, legalistic or complex" and was designed to be faster, easier and cheaper than the system of taxation of costs. It is also important to bear in mind the principles applicable in an application for leave to appeal. These principles are summed up by my

colleague, Judge Gibson, in *Altaranesi v Sydney Local Health District* [2012] NSWDC 90. Commencing at [30] her Honour said this:

"30. When determining issues concerning the granting of leave to appeal, it is important to note the warning of the Court of Appeal in *Chapmans Ltd v Yandell* [1999] NSWCA 361 at [11]-[12]:

'On the other hand it is important to keep in mind the purpose of the requirement of leave to appeal. Is it intended to act as a filter to ensure that unsuitable appellant proceedings which are not able to be brought with the demands which that places upon the resources of the court and the burden which is places upon other parties and the delays which it cause to other litigants. See for example *Coulter v Regina* (1998) 166 CLR 350 about 359.

It is also in my opinion important to keep in mind that s 208M must be considered in the context of s 208L, which restricts an appeal as of right to matters of law. In considering whether or not leave to appeal is granted, it must be decided whether or not, there not being a matter of law arising in the proceeding and there being an appeal as of right only as to a matter of law, there is some other matter which injustice requires that leave to appeal be granted to allow that matter to be re-litigated. The party seeking leave to appeal obviously bears the burden of establishing that justice does require that leave to appeal be granted. Further, the Master, when considering whether to grant leave to appeal obviously has a very wide discretion: see *CDJ v VAJ* [1998] HCA 67 per McHugh, Gummow and Callinan JJ.'

31. The assessment process would be fettered by unnecessary litigation if leave to appeal were allowed too readily. In *Wentworth v Rogers* [2006] NSWCA 145; (2006) 66 NSWLR 474 Santow JA at 491 warned against reviews being readily granted or 'allowed to become automatic'.

32. The basis on which applications for leave to appeal should be granted must be approached on the broad basis of whether or not justice requires the granting of leave*: Chapmans Ltd v Yandell* at [12]."

In the grounds of appeal, the ground closest to raising an error of law is that numbered 4. It is this:

"The costs review panel erred in accepting further submissions from the review applicant, but failed to afford a right of the costs applicant to be heard in regard to the submission made by the review applicant."

That could be seen as raising an allegation of a failure to apply the rule of natural justice that a person exercising some form of judicial power must hear each side. The common law rule is

audi alteram partem: hear the other side. The application for review of the determination of the costs assessor appends grounds for making an application for review. The document containing the grounds is six pages and sets out 11 grounds; however, under each ground is contained a paragraph or a number of paragraphs which, in essence, are submissions.

47. For example, the first ground "the costs assessor erred in setting aside the costs agreement" is followed by four paragraphs of submissions. The second ground "the costs assessor erred in law in applying money paid for earlier bills to the bill the subject of assessment" is also followed by four paragraphs of submissions. The third and fourth grounds are followed by a paragraph of submissions and the fifth ground is followed by three paragraphs of submissions. The sixth ground is followed by eight paragraphs of submissions, the seventh ground with two paragraphs of submissions, the eighth ground with one paragraph of submissions, and the ninth ground with three paragraphs of submissions, and each of the tenth and eleventh grounds is followed by two paragraphs of submissions.

48. Section 375 of the *Legal Profession Act 2004* provides for the general functions of the panel in relation to a review application. Subsection (3) is in the following terms:

"However, the assessment is to be conducted on the evidence that was received by the costs assessor who made the determination that is the subject of the assessment and, unless the panel determines otherwise, the panel is not:

(a) to receive submissions from the parties to the assessment, or

(b) to receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor."

49. The policy behind subs (3) is clearly to bring finality to the process of assessing costs. However, it is clear that the review panel actually received the document annexed to the application for review. In other words, the defendant provided to the review panel submissions which were unsolicited by it. Paragraph [3.5] of the decision of the review panel is this:

"Section 375(3) of the Act provides that the review is to be conducted on the evidence that was received by the assessor and, unless the panel otherwise determines, is not to receive

submissions from the parties to the assessment or to receive any fresh evidence. In this matter the panel decided that submissions would not be received from the parties and that the review would be conducted on the material that was before the assessor and that it would consider only the grounds that could be distilled from the application for review."

50. In [4.1] of its report, the review panel outlined the grounds for the review "distilled" from the application for review. It lists the 11 grounds contained in the application of 16 August 2012 and adds as 12th ground that was subsequently put to the review panel by the defendant in a document that was supported by four paragraphs. The use of the verb "distilled" is unfortunate. Distillation is the process of extracting something from a much greater body of work. Here, the grounds were properly set out in the application but were supported by paragraphs of submissions. However, the use of an inappropriate verb should not determine the matter when it is clear that the review panel merely "extracted" from the application for review the grounds relied upon by the current defendant.

51. The plaintiff relied on the decision of Rothman J in *Levy v Bergseng* [2008] NSWSC 294. The plaintiff in that case was a senior counsel; he is now a judge of this Court. The defendants in that case were a firm of solicitors who can be referred to as MBP. There was a dispute about fees claimed by the plaintiff for work done by him on behalf of MBP's client in a personal injury action. Rothman J had to consider an allegation of a denial of procedural fairness. He said this:

"63. The application for review of costs assessment filed by MBP, is dated 5 July 2008 [sic] and was, in fact, filed on 6 July 2006. Paragraph 4 of the application is in the following terms:

'4. The grounds for making the application for review are set out in the attachment marked "A".'

Attachment 'A' commences with the preamble:

'The grounds for making the application for review are as follows:'

and then recites 18 pages of 'grounds'.

64. Those 'grounds' from time-to-time used the term 'submissions' to describe the document. The applicant for review used the term 'costs review applicant submits' or 'it is submitted' or 'in addition to the submission above' etc. The reliance on those words if the nature of the document were otherwise, would not itself make the attachment a submission. But the

attachment made representations, put argument, and made representation as to facts, as well as reciting the ground or error said to arise from the assessment. An analysis of the entirety of the attachment to the application for review of costs assessment is that it represents, predominantly, a submission by MBP as to the manner in which the error of the Costs Assessor, otherwise identified briefly, has been made and how it ought be rectified.

65. The Determination of the Review Panel does not suggest that the document was not, in its entirety, taken into account. Even if the Review Panel were to have discounted any reliance upon the submission, there would be an appearance of unfairness and a real, if subconscious, risk of prejudice: *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 629.

66. The Review Panel, in a little less than two pages, extracted the true grounds of appeal. In order to extract those grounds, the Review Panel would have been required to read the whole of Attachment A, including the submissions in support of the application. The Appeal Panel does not, expressly or impliedly, disavow any regard to the remainder of the Attachment. As a consequence, it is a necessary inference that Attachment A was read and taken into account. Attachment A is a submission."

52. His Honour went on to point out that the plaintiff in those proceedings submitted a document headed, "Responses and Submissions in Response to the Matters Raised in the Application for Review" but that was not taken into account by the review panel. At [71] his Honour pointed out that the review panel was in error as it had both read and taken into account the submissions from MBP but not the submissions of Mr Levy. At [73] his Honour determined that the review panel had denied Mr Levy procedural fairness.

53. The present case is different to *Levy v Bergseng*. It was not necessary for the review panel to extract the true grounds of appeal by reading all of the document that was put before it by the defendant. The grounds are clearly set out and can be lifted from the document without reading the balance of it. No actual distillation is required. There is nothing in the evidence before me to suggest that the review panel actually read the submissions that were put to it by the defendant. It was otherwise in *Levy v Bergseng*.

54. However, it is instructive to bear in mind what fell from the High Court in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550. The facts of that case were that two citizens of Tonga and their daughter who had been born in Australia applied under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for a review of deportation orders made against both parents by the delegate of the Minister under the *Migration Act 1958* and of their being refused further temporary entry permits and permanent entry permits. The father of the child had entered

Australia on a student visa and his wife was allowed a temporary entry. The permits having expired, the man and his wife remained illegally in Australia to raise money to support their relatives in Tonga who had suffered loss in a cyclone. Commencing at p 628, Brennan J (as he then was) said this:

"However, there was one allegation - that contained in par. 22 of the department's submission - which was damaging to the prospects of Mr and Mrs Kioa being allowed to stay in Australia. That information was never put to Mr and Mrs Kioa for their comments. Evidently the delegate did not rely on this allegation in making his decision, for his statement of the reasons for his decision provided under s. 13 of the *AD(JR) Act* did not refer to it. That statement should be taken to be a true and complete statement of the delegate's reasons unless there is evidence to the contrary...Although it is right to conclude that the allegation in par. 22 formed no part of the delegate's reasons, it was contained in the material before him which he proposed to consider in coming to a decision.

A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise: *Kanda v Government of Malaya* [1962] UKPC 2; [1962] AC 322 at 337; *Ridge v. Baldwin* [1964] AC at pp 113-144 per Lord Morris; *De Verteuil v. Knaggs* [1918] AC at pp 560, 561. The person who interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. As Lord Diplock observed in *Bushell v. Environment Secretary* [1981] AC at p 97:

'To "over-judicialise" the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair.'

Nevertheless, in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach the decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial

information was left out of account. The allegation in par. 22 was apparently credible, relevant and damaging. The failure to give Mr Kioa an opportunity to deal with it before making an order that Mr and Mrs Kioa be deported left a risk of prejudice which ought to have been removed."

55. In the current matter the plaintiff complains - and I do not use that word pejoratively at all - about the fourth paragraph supporting the first ground of review raised by the defendant. The paragraph is this:

"The Costs Assessor also made much of the client's vulnerability. He did this without evidence of her being vulnerable. The reality is that she was a former pole dancer and a 'woman of the world'. She had consulted two previous solicitors and was determined to discover her husband's concealed assets. On and by way of costs assessment she sought to shift the blame for her stubborn refusal to believe that her husband wasn't conceding assets to the solicitor."

56. One can readily understand the plaintiff being upset by the allegation that "she was a former pole dancer and a 'woman of the world'". Those are pejorative allegations. However, there is nothing to suggest that those words were ever read by the members of the review panel nor is it obvious that they took them into account and it was not necessary for them to read the four supporting paragraphs to extract the first ground raised by the defendant that the costs assessor erred in setting aside the costs agreement.

57. However, of course, there is a possibility that those words might have been read by the review panel but a possibility does not prove anything. The review panel explicitly said that it refused to receive submissions from either party and, applying the principle of regularity, one could not accept that two experienced costs assessors acting as a review panel would do otherwise than what they said they did. The principle of regularity is *omnia praesumuntur rite esse acta donec probetur in contrarium*: everything is presumed to be done properly until it be proved to the contrary.

58. However, even assuming that I could so proceed, that is not the end of the matter. In *CSR Ltd v Eddy* [2008] NSWCA 83 the Court of Appeal entertained an appeal from Malpass AsJ. The Dust Diseases Tribunal had awarded damages in favour of the plaintiff and ordered the

appellants to pay his costs of the proceedings before that Tribunal. The costs were the subject of an assessment by a costs assessor pursuant to the *Legal Profession Act 1987*. On 14 February 2006 the appellant sought review of the assessor's decision by a costs review panel which affirmed the assessment. In July 2006 the appellants sought to appeal from the determination of the panel by way of a summons filed in the Common Law Division which summons was dismissed by the Associate Justice. The appellant then filed an application for leave to appeal to the Court of Appeal. Leave was granted on 6 November 2007. One of the issues for determination was whether there had been a denial of procedural fairness in the plaintiff's failing to provide to the defendant copies of the costs agreements that he had with his solicitor and barrister. Basten JA, with whom Hodgson and McColl JJA concurred, said this:

"38 Once it has been accepted that the costs assessor had power to deal with the objection, which was based, at least in part, on the content of the costs agreements, it would seem that the appellants were entitled to be provided with copies of those agreements, so that they could make appropriate submissions in support of their objection. That they were unable to do, but that alone is insufficient to establish procedural unfairness. They still need to establish that the failure to provide them with the costs agreements caused them 'practical injustice': see *Re Minister for Immigration and Multicultural and Indigenous Affairs*; *Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6, at [37]-[38] (Gleeson CJ); see also the reference to an 'entirely speculative' adverse reaction, at [59] (McHugh and Gummow JJ) and see [149] (Callinan J). The appellants must demonstrate that they have in a practical sense lost an opportunity to make some submission material to the question in issue because they did not have access to the costs agreements.

39 Care must be taken in relation to the application of phrases such as 'practical injustice' which can, taken out of context, appear to have a broad and indefinite scope of operation. There is a distinction to be drawn between a complaint of unfairness where, on proper examination, it may be perceived that the unfairness is not established, and a case where unfairness has been established but the decision was inevitable, so that a grant of relief would be futile. In Lam a departmental officer told the applicant that he intended to make certain inquiries, but did not in fact do so. The failure to inform the applicant of the change of plan could have been unfair if the applicant had omitted to take some step in reliance upon the officer's intention, as originally communicated. Because the applicant was not deprived of any opportunity to put his case as fully as he wished and because he did not in fact rely upon the stated intention to his detriment, there was no unfairness in a practical sense. It is only when unfairness has been established that a second question arises, namely whether the lost opportunity could possibly have made any difference to the outcome. In *Re Refugee Review*

Tribunal; *Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57, the Tribunal wrongly told the applicant that it had certain material before it. The existence of the material was relevant to the credibility of the applicant. The applicant gave evidence on an application for judicial review that he had been misled by the statement and that, had he known it to be incorrect, he would have taken certain steps which he did not take, to demonstrate the consistency of his position and hence bolster his credibility. As explained by Gleeson CJ at [4]:

'It is possible that, even if the prosecutor had been given an opportunity to deal with the point, the Tribunal's ultimate conclusion would have been the same. But no one can be sure of that. Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive.'

40 The circumstances in *Aala*, in which the orders of the Tribunal were set aside, may be contrasted with the example given in *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141, in which the appellant's counsel had been stopped by the trial judge in a personal injury case from addressing on an issue of causation. Whilst affirming the right of a litigant to a fair trial, the Court noted an important qualification to the entitlement to relief in circumstances where unfairness had been demonstrated, stating at p 145:

'That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.'

41 The approach in *Stead*, an appeal in a civil trial, owed much to the principles derived from *Balenzuela v De Gail* [1959] HCA 1; (1959) 101 CLR 226 as to whether the wrongful rejection of evidence will lead to a new trial unless it appears that the rejected evidence 'could not have affected the jury's verdict': *Stead* at pp 144 and at 147. In that event, the appellant would not have lost 'a possible chance' of obtaining a favourable verdict: ibid at 147. That approach was expressly adopted in relation to administrative decision making in *Ex parte Aala* at [4] (Gleeson CJ), [58] and [80] (Gaudron and Gummow JJ, Hayne J agreeing at [172]), [87] (McHugh J dissenting), [131] (Kirby J) and at [211] (Callinan J).

42 Where the appeal turns upon a question of law, with no need for additional fact-finding, it will rarely be necessary for an appellate court conducting a rehearing to remit a matter, rather than determine the question itself. For that reason the example given in *Stead* of a case

where a new trial would be a futility is somewhat removed from a case in which the unfairness infects the fact-finding process. Where the error truly concerns a question of law only, tests of practical unfairness and whether, absent unfairness, the appellants could have obtained a different result, have little bearing on the matter. Thus, in the present case, the costs agreements which were not produced before the costs assessor were put in evidence without objection and it is undoubtedly open to this Court to determine, as a matter of law, whether the Panel's conclusion that the costs agreement did not support the submission that the indemnity principle had been contravened was correct."

The Court of Appeal then turned to that issue. Therefore, not only must there be a denial of procedural fairness but the current plaintiff must show "practical injustice" as that concept is understood and in accordance with the authority I have just cited.

59. I turn now to the various grounds raised in the summons seeking leave to appeal. The first ground is this:

"The costs review panel had regard for irrelevant considerations of their stated experience of the general characteristics of the family law client and thereby formed conclusions which they were not entitled to 'form', [based] on the prejudice of the irrelevant considerations."

60. Yesterday I spent some time outlining the findings of the costs assessor as to the plaintiff's "vulnerability". The costs assessor made those findings based purely on reading paperwork. They, in my view, amounted to stereo-typification of a person in the plaintiff's position. The same might be said of this matter raised by the review panel:

"It is also the experience of the review panel that litigants, particularly in family law matters, often conduct such proceedings without regard to cost or other commercial considerations that might apply to more reasoning litigants. It is also commonplace for family law matters involving property settlement to be conducted by law practices on behalf of clients on the basis of payment on conclusion of the matter. In this matter the client instructed the law practice that her husband had a business that turned over a large amount of money each year and not only was she convinced that the business was of significant value thus increasing the pool of the matrimonial assets but that as a result of the funds to which her husband had access from time to time, that he had hidden assets from her and was not disclosing those

assets to the court. These were her instructions and to the extent that it seemed justified the law practice had an obligation to carry out her instructions. The law practice made such searches and inquiries as it could but at the end of the day they discovered nothing to bear out the client's convictions."

61. That which the plaintiff complains about is, of course, the stereotyping of clients in family law matters as being less reasoning litigants than others. The review panel can hardly be criticised for observing what was common amongst family law legal practitioners, to conduct proceedings involving property on the basis of payment at the conclusion of the litigation. That is something that would be within their personal knowledge and, indeed, one of the reasons that they are appointed as costs assessors and as members of review panels.

62. Now, I interrupt. Was there any other particular part of the review panel observations that you complain about other than what their words were, "...might apply to more reasoning litigants," which indicates that litigants in the Family Court are less reasoning litigants? Is there any other particular complaint? That's the only one I can find quickly.

63. PLAINTIFF: It's just that, that they weren't aware that I, that the, the email wasn't me admitting that I wanted them to go further, but you've spoke about it in a different way.

64. HIS HONOUR: Thank you. Now, is there anything that they say in these reasons that you're complaining about?

65. PLAINTIFF: Being able to assess the previous bills, which you also explained about, and I can't think of--

66. HIS HONOUR: No, look, it's pejorative--

67. PLAINTIFF: I know. I just can't think.

68. HIS HONOUR: It's a pejorative matter, all right?

69. PLAINTIFF: I just, I just can't think. I'm just like--

70. HIS HONOUR: All right. Thank you.

71. I am unable to discern any other stereo-typification of litigants in family law matters. However, the Court's experience is that many litigants, whether they be represented or not, do not behave in the same way as litigants do who apply commercial considerations. For example, there is a great difference between the approach to litigation taken by financial institutions such as banks, building societies and insurance companies, by large corporate entities such as publicly-listed companies, by government agencies and departments and, for example, a person who brings an action for damages for personal injury or an applicant for criminal injuries compensation or a person claiming, for example, damages from the State because of allegations of assault and false imprisonment by members of the constabulary. Commercial considerations are appropriate to those engaged in commerce but are often not taken into account by those who seek to enforce various rights that they perceive that they have. I do not see anything in this ground that would warrant the granting of leave.

72. The second ground alleges that the costs review panel had regard to irrelevant considerations, although it is difficult to discern the actual meaning of this ground of appeal. It is this:

"The costs review panel had regard for irrelevant considerations of the approach of the costs assessor and thereby formed conclusions which were not entitled to be formed, based on the prejudice of the irrelevant considerations."

73. I, for my part, having closely read the material a number of times, cannot find any irrelevant considerations taken into account by the review panel.

74. The third ground of appeal is this:

"The costs review panel has miscarried their discretion in not having sufficient regard to those factors which would lead an assessor to set aside a costs agreement."

75. This appears to be a cumbersome way of stating that the review panel erred in the exercise of its discretion in failing to set aside the costs agreement or, in the alternative, it could be seen as an allegation that the costs review panel erred in the exercise of its discretion in setting aside the determination of the costs assessor that the costs agreement

should be set aside. I can find no such miscarriage of any discretion. They gave reasons which have validity and force.

76. The fourth ground of appeal I have already adverted to.

77. The fifth ground of appeal is that the costs review panel erred in the exercise of its discretion by considering "irrelevant factors in the determination of the vulnerability of the client". The costs assessor went to great lengths to establish the proposition that the plaintiff was "vulnerable". However, the question is, to what was she vulnerable? She was vulnerable to refusing to accept advice because of her belief that her former husband had hidden assets from her which should be taken into account in the property adjustment. Because of her belief that her former husband had hidden assets, she was also prone, that is vulnerable, to giving instructions to have the matter ventilated and, if the plaintiff's former husband failed to disclose, she was vulnerable or prone to giving instructions to have the solicitors explore the matter by making due search and inquiry, by issuing subpoenas and carrying out various searches. However, a litigant gives instructions to his or her solicitor. His or her solicitor must carry out his or her instructions provided they are within the law and consistent with professional ethics. If the litigant gives unreasonable instructions or fails to heed reasonable advice, a solicitor is entitled to withdraw from the case, to cease to act for the client. However, ceasing to act for the plaintiff would have put her in an even more vulnerable position because she would be left in the course of court proceedings with no lawyer to assist her when her former husband was legally represented. It would be akin to being taken from the frying pan and thrown into the fire. Largely, the concept of vulnerability was a matter raised by the costs assessor himself and ignores the reality that the plaintiff was actively pursuing litigation and she had given instructions to lawyers and they were required to do what she asked them to do. Should they not have done so she was entitled to complain or to withdraw her instructions if she wished to and to go and see another solicitor. However, the prospect of her successfully consulting a fourth set of solicitors may have been remote. I can find nothing in this ground of appeal.

78. The next ground of appeal is much the same. It is this:

"The costs review panel erred in the exercise of its discretion by failing to consider the specific vulnerabilities of the client."

That is not something, theoretically, that the costs review panel is entitled to do.

79. The next ground of appeal is this:

"The costs review panel erred in the exercise of its discretion in not having regard to appropriate considerations in terms of reasonableness."

80. The eighth ground of appeal is the mirror image of it which says:

"The costs review panel erred in the exercise of its discretion by taking irrelevant considerations into account in terms of reasonableness."

81. Earlier I quoted from the judgment of Priestley JA in *Attorney General of New South Wales v Kennedy Miller Television* where his Honour pointed out that the substantive law of costs was changed by Act number 87 of 1993 and the criteria for awarding costs should be costs reasonably incurred. A litigant who recovers an order for costs is entitled to receive all the costs actually incurred by him other than any unreasonable costs. As between a solicitor and client, the solicitor is entitled to recover all costs that he incurs other than any unreasonable costs. The review panel did find items for which the plaintiff should not be ordered to pay. That is, there were costs run up by the defendant which were not reasonable and ought not be paid by the plaintiff. The review panel disallowed those costs. It is difficult for me to discern exactly what the plaintiff relies upon under these grounds, but it appears to me that the review panel did only take into account in forming its view as to what costs were payable by the plaintiff to the defendant those costs that had been reasonably incurred.

82. The ninth ground is, in fact, a complaint about billing in **six minute units**. I have already pointed out what the costs assessor said about that and what the costs review panel said about that. That issue was sought to be raised in *CSR Ltd v Eddy* [2008] NSWCA 83. At [6] Hodgson JA said this:

"This has some bearing on the appellant's argument concerning six minute intervals. In reaching his assessment, the assessor could not and did not rely on the agreement between

the plaintiff and his solicitors in order to determine what was a fair and reasonable assessment for each item; so he must have concluded the amount he allowed reflected both a reasonable time for the item and a reasonable rate. He had before him a submission objecting to the claim for minimum units of time on the basis that it resulted in charges for time not spent. At least one instance, he allowed only three minutes where six minutes had been charged for. The appellant's present argument would have to show that, notwithstanding these matters, in some cases the solicitors had actually spent materially less time than the assessor considered reasonable, and also had charged for more time than they actually spent because there was a rounding up to six minute intervals; and also that this rounding up outweighed any rounding down. Where the assessor has not in fact proceeded on any basis that rounding up was permissible, in my opinion there is no reasonable possibility that this argument could make a material difference to the assessment."

83. Whilst it is common for the **six minute units** to be used, that which the review panel said on the issue represents good law, that is, that:

"At the end of the day it is really the amount being charged for the described item of work which is of most relevance and not the number of units."

84. Under the system of taxation, for example, there were fixed costs for most items. One might say that a short letter was worth $1, a long letter was worth $2, a subpoena was worth $3 and the fee for settling a pleading might be $1 per folio, a folio being 120 words. Time costing is just another way of trying to value the work actually being done. Like the review panel, I cannot see any substance in the complaint about the using of **six minute units**.

85. The tenth ground of appeal alleges error by the review panel in the way it failed to deal with the allegation of inadequate disclosure. Again, I find no substance in that ground for reasons which I have already given.

86. The eleventh ground again relates to that issue.

87. The twelfth ground alleges that the costs review panel misused its discretion in not having sufficient regard to the conduct of the parties in determining whether the costs agreement was fair and reasonable. With the utmost respect, I cannot agree with that. The costs review panel

gave adequate reasons why the costs agreement should stand and there is substance in those reasons.

88. The thirteenth ground is this:

"The costs review panel miscarried its discretion in not adopting the approach that if the law practice applied trust moneys without proper authority that may be a matter which gives rise to a conduct issue but has no direct bearing on the assessment process."

That ground must be rejected. In my view, the costs assessor erred in law by saying and purporting to do what he did about the alleged misapplication of trust funds. That is not a matter for either the costs assessor, the review panel or this Court in entertaining an application for leave to appeal. It is completely extraneous to the costs determination exercise being undertaken. As I said yesterday, if there be a breach of trust that is something that must be litigated in the Equity Division of the Supreme Court.

89. The final ground of appeal is this:

"The costs review panel has denied the cost applicant procedural fairness in not having sufficient regard to the client's item by item objections."

Item by item objection is a return to taxation of costs. When I was a young solicitor I would attend upon the registrar of a court in his chambers and sit on one side of his desk and the person representing the other party would sit on the same side of the desk as I did and we would then go through each item and a party could raise an objection or accept that the item was properly allowable, and once the two parties were not ad idem the Registrar would intervene and make a decision. That is the taxation process. It requires going through each bill item by item. The review panel did not err in not considering each item by item.

90. Having said that, however, it appears to me that the real complaint made by the plaintiff is that there is no itemisation of what was allowed and what was disallowed. Itemisation of each item allowed or rejected is, again, going back to a taxation of costs. However, it is clear from the review panel report that they considered various items separately. For example, on p 15

the panel said this:

"The objection of duplicate representation while not valid in the manner raised by the client is valid in the view of the review panel in relation to the items where Ms Quirk had an internal conference with Mr Malouf and both charged for that work. The review panel has already noted that Ms Quirk had the carriage of the matter during the time that spanned the bill of costs of 9 April 2010 and was an accredited specialist in family law and had also briefed counsel in the matter. Internal conferences with Mr Malouf were more of an administrative nature and were unnecessary and not reasonable for the proper conduct of the matter by Ms Quirk. In addition the costs agreement did not make allowance for two solicitors in the same firm to be working on the matter at the same time. Delegation of tasks to a paralegal and some items of supervision and direction of the paralegal by the solicitor are a different matter. Where this occurred it actually resulted in lower fees."

91. It is clear that that was the panel indicating that they were disallowing all fees claimed by Mr Malouf. On p 16, for example, the panel points out that all items conceded by the law practice were disallowed and on the same page this matter occurs:

"Work in relation to an appeal was the subject of another head of objection. Having carefully considered the response of the law practice, the review panel did not agree with these item by item objections of the client."

Commencing at the foot of that page the panel states that all items related to compliance with the requirements for costs disclosure were disallowed in accordance with the provisions of s 319(2)(b) of the Act. Further, at the top of p 17 there are other specific items that the panel disallowed. It also disallowed duplication. In other words, whilst the panel may not be stating each thing that they allowed and disallowed, they were giving their reasons in globo. Furthermore, the exact figures allowed by the panel show that they were, in fact, dealing with matters on an item by item basis.

92. They reached a view that professional costs were to be reduced by $7,156.05 inclusive of GST and the disbursements to be reduced by $3,398.48 inclusive of GST. Clearly they were not just making vague deductions but they were deducting precise amounts, indicating that they were preceding on an item by item basis. However, the ground of appeal may by

reference to "the client's item by item objections" be referring to the various objections raised on her behalf by Mr Vassili but clearly they were considered by both the costs assessor and by the review panel.

93. I shall now deal with some matters that were raised in the course of oral submissions. I have already referred to the letter from the defendant to the plaintiff of 6 March 2009 making a disclosure of costs for the interim hearing and also estimating costs if the matter had to proceed to a final hearing. On 17 March 2009 there was clearly a conference between the plaintiff and Ms Quirk of the defendant's practice. At 11.04pm on 17 March the plaintiff sent an email to Ms Quirk advising Ms Quirk that she did not wish to make the offer discussed with Ms Quirk in her office earlier that day but enclosing a counteroffer. The papers before me contain a further email from the plaintiff to Ms Quirk of 18 March 2009 at 2.28pm which commences with this: "This is what I sent you last night." Then there is what purports to be a form of an offer of settlement. The offer is that the former husband pay off the mortgage on the matrimonial home and transfer all his right, title and interest in that property to the plaintiff. The plaintiff's offer also required that all moneys in the trust fund be transferred to her and that the plaintiff's former husband pay all her legal expenses up until the date of the offer. The final statement in the offer is this: "This offer is made without prejudice and is not negotiable." The plaintiff then asked Ms Quirk not to send the offer to her former husband without the plaintiff's first checking it. Then there is the email of 19 March 2009 at 9.59am which I have already quoted, the first part of which is that the counteroffer that she wished to make to her former husband be sent to him on that day. As I read it, it is a direction by the plaintiff to Ms Quirk to send the offer set out in the email of 18 March 2009. The plaintiff complains that Ms Quirk did not do so. Ms Quirk no longer works for the defendant and there is no evidence on from Ms Quirk. However, this is something which really ought not be raised on an application for leave to appeal.

94. However, I must point out to the plaintiff that since her offer was "not negotiable" it is, in effect, an ultimatum. The plaintiff maintained in her oral submissions that all she wanted to happen from there on in were negotiations to settle the matter rather than preparation for hearing. However, if the offer which she crafted had been sent, it would have been the end of any attempt to negotiate a settlement because it was, in fact, an ultimatum.

95. The plaintiff also maintained in her submissions that, by the time she received the defendant's letter to her of 20 May 2009, she wished for everything to "stop". The letter of 20 May 2009 refers to a conference with the plaintiff on 12 May 2009. In it Ms Quirk points out that she discussed a number of issues with the plaintiff concerning the "property settlement". Firstly, there had been discussion with the expert who had been retained to give a business

valuation of the plaintiff's husband's company. That expert had advised Ms Quirk that his costs of valuation to date were $5,600 and he was of the view that the business may have a value of approximately $120,000. There is then set out a "balance sheet" in which the matrimonial assets are totalled, the matrimonial liabilities are totalled, and a net sum is made and then there is some mention of superannuation. The letter goes on to set out a number of considerations and on p 3 appears this matter:

"We are concerned at the way that you intend your matter to be run and the level of inquiry and investigation you intend for us to do may result in the real risk that the costs involved may exceed your likely outcome. You are also at risk that your Home will need to be sold to meet and pay for our legal costs."

96. The letter then records that it was Ms Quirk's strong recommendation to the plaintiff that it was in her best interests to settle. She then sets out the court's approach and sets out a valuation and advises the plaintiff as to possible likely outcomes if the matter proceeded to determination by the court. The letter goes on to point out that the initial offer proposed by the plaintiff represented her receiving 85% of the pool of property to be divided between her and her former husband. Earlier Ms Quirk had advised the plaintiff that realistically she could expect to receive between 50% and 65% of the pool of property to be divided between her and her husband. The plaintiff had then drawn to her attention her former husband's proposal which would represent her receiving 31% of the pool of property to be divided between her and her husband. The letter concludes with this matter:

"We otherwise confirm that you were considering your matter further and considering whether you would be in a position to refinance [the family home].

We would be pleased if you could contact Ms Quirk in the near future to advise her of your instructions in relation to settlement."

97. The plaintiff maintained that she wanted everything "to stop" at that point. The problem for the plaintiff with that submission is it ignores the reality that proceedings had been commenced in the Federal Magistrates Court, at least. There may have also been proceedings in the Family Court. Eventually there were two sets of proceedings in the Federal Magistrates Court which had to be brought to an end. Commencing court proceedings is like

the commencement of a chain reaction. It requires the other party to respond to the proceedings and the court itself becomes involved in trying to bring the litigation to finality by firstly encouraging parties to settle, secondly by trying to expedite the preparation of the matter for hearing, if a hearing be necessary, and finally hearing and determining the matter as soon as the court is able to do so. Things could not "just stop". They could if the plaintiff discontinued the proceedings but that would leave her with nothing. The title to the matrimonial property was in the plaintiff's husband. The defendant could cease to act for the plaintiff but that would leave the plaintiff in a worse predicament.

98. What exactly happened after 20 May 2009 is not at all clear to me from the material before me. However, there is a letter from the defendant to the plaintiff of 30 June 2009 commenting on an appearance in the Federal Magistrates Court on 26 June 2009. The property proceedings were listed for an interim hearing before Federal Magistrate Altobelli and there was a procedural application in regard to her husband's appeal concerning residence of and contact with the children. The letter sets out in some detail what occurred on 26 June 2009 and pointing out that the report of the expert, Mr Pickup, would not be available prior to 20 August 2009 and that the Federal Magistrate was only available on 20 August 2009 and, accordingly, he had listed the matter for a further interim hearing on that day. However, Mr Macpherson of counsel was not available on 20 August and Ms Quirk believed that Mr Wong of counsel would also be unavailable because of his personal circumstances on that day There is then a heading, "Your Costs" and contained in that is the following matter:

"As substantial costs have been incurred to date we are unable to act for you in relation to your Appeal and we are unable to instruct counsel to act for you on 20 August 2009 as your costs are too high at present. As Ms Quirk has been intimately [involved] in your matter, she is confident and highly competent to run your Interim Application on that date."

However, it appears that, in fact, counsel did attend on 20 August 2009 and the property proceedings were settled on that day.

99. It is clear that the proceedings were not settled as advantageously as the plaintiff was hoping. The costs assessor said this about the outcome of the proceedings:

"120. The proceedings were settled on 20 August 2009 by orders which provided for the wife to receive the funds held in trust by the law practice for the parties jointly subject only to the

payment of fees of Moore and Stephens for a valuation report. The law practice paid those fees of $14,850 on 31 August 2009 and the husband paid the law practice his half share of those fees on 23 February 2010.

121. The husband was to transfer his interest in the home to the wife subject to her by 30 December 2010 obtaining approval of a new finance in her own name to discharge the existing mortgage loan, such discharge to occur on about 28 February 2011. The husband was to pay the payments on the existing mortgage until 28 February 2011. If the wife failed to arrange the discharge of the existing mortgage by 20 December 2010 the home was to be sold and she would receive the net proceeds of sale after sale expenses of the mortgage.

122. The effect of the final orders was that the wife received the $30,000 proceeds of an interim order prior to the law practice acting for her and was entitled to $55,063.64 (the $69,913.64 from the joint trust funds less $14,850 payable to the valuers), $7,425 for the husband's half of the valuer's fees, the equity in the home, furniture and furnishings, her car worth about $13,000, plus the benefit of mortgage payments to be made by the husband. The value of the home was said by the law practice in its file notes of 20 August 2009 to be $412,000 and taking the mortgage into account, the equity in the home was about only $98,000. (In the letter to the client of 20 May 2009 it was estimated at only $88,000.)

123. Accordingly the result of the proceedings would leave the wife with liquid assets by way of funds from the trust account and the husband of $77,338.64 and the benefit of the husband paying the mortgage payments for 16 months. And she would have total legal costs (since the retention of the law practice and subject to assessment), of $177,888.77. It appears from the figures available to the law practice at the time of settlement that the only way the client could meet about $100,000 of the costs would be by sale of the home, and the equity in the home might not be sufficient."

100. It appears, with respect, that the substance of the plaintiff's grievance is the fact that the legal costs she incurred outstripped the amount of money available to her in liquid assets from the property settlement and jeopardises her continued ownership of the former matrimonial home. That grievance cannot be taken into account in determining the current application. This application is all about the costs incurred by the plaintiff in pursuing the litigation in the Federal Magistrates Court for which purpose she engaged the defendant.

101. The defendant did work. The defendant is entitled to be paid for all work that was properly done by him or by others on his behalf to assist the plaintiff in her litigation. In course of argument it was pointed out that, even if the costs agreement was set aside, the defendant

was still entitled to recover according to what is now called the law of unjust enrichment, the value of work he did on the plaintiff's behalf. Formerly one would have said the defendant was entitled to recover from the plaintiff for work he actually did in quasi contract on a quantum meruit. The Latin "quantum meruit" merely means for how much it is worth.

102. If a tradesman comes to my house and we have no agreement as to price and the tradesman does some work at my house then, absent any agreement, he is entitled to be paid quantum meruit the value of the work that he has done, and that can be ascertained, for example, by looking at going rates of charge in the tradesman's calling. In the current case, even if the cost agreement were set aside, the defendant was entitled to recover for work properly done by him on behalf of the plaintiff on a quantum meruit, and the finding of the review panel, not cavilled with in any way by the costs assessor, is at the rate of charge for both the accredited family law specialist and for secretarial assistance was fair and reasonable as were other amounts claimed in the costs agreement. Even if the costs agreement be set aside, the defendant would be entitled nevertheless to recover exactly the same amounts of money.

103. I am not persuaded, on the balance of probabilities, that there was any procedural unfairness. Even if there were, I could not be persuaded that there was "practical injustice" as that term is used in *CSR Ltd v Eddy*. The outcome of the proceedings would be the same, in my view, whether the costs agreement be set aside or not, because the defendant would still be entitled to recover its costs on a quantum meruit.

104. I have considered each of the grounds of appeal sought to be agitated but I find no substance in any of them. This, in my view, is a matter in which leave to appeal ought not be granted. It is unfortunate that the application for leave to appeal takes such considerable time and the amount of time expended has, in my view, been caused unnecessarily. For these reasons, leave to appeal is refused. I order the plaintiff to pay the defendant's costs of the application.

105. Any other orders sought?

106. CASTLE: Yes, your Honour. I seeks costs on an indemnity basis on the basis of an offer of compromise and a Calderbank letter that was put to the plaintiff in October.

107. HIS HONOUR: Thank you.

108. CASTLE: I have a copy of those here for Ms Palese.

109. HIS HONOUR: Thank you.

110. PLAINTIFF: I wish of your Court if I could come to some sort of instalment arrangement with the Court.

111. HIS HONOUR: That's not for me. You deal with the Registrar for that. Let me have a look. Now, do you accept that you received this communication, Ms Palese? This communication was sent by email on 2 October 2013.

112. PLAINTIFF: Yes, I do.

113. HIS HONOUR: A copy of an email from the defendant to the plaintiff bearing date 2 October 2013 together with the annexures thereto, being a Calderbank v Calderbank letter of 2 October 2013 and an offer of compromise pursuant to UCPR 20.26 will be exhibit 2.

114. EXHIBIT #2 COPY OF EMAIL FROM DEFENDANT TO PLAINTIFF DATED 02/10/13 TOGETHER WITH ANNEXURES BEING A CALDERBANK V CALDERBANK LETTER OF 02/10/13 AND AN OFFER OF COMPROMISE PURSUANT TO UCPR 20.26 TENDERED, ADMITTED WITHOUT OBJECTION

115. PLAINTIFF: Excuse me, your Honour, I don't mean to--

116. HIS HONOUR: Yes, I'm just--

117. PLAINTIFF: Sorry.

118. HIS HONOUR: --reading this.

119. PLAINTIFF: I just, I don't remember seeing this attached to - when I received this email. I don't even know what this is.

120. HIS HONOUR: It's headed, "Offer of Compromise".

121. PLAINTIFF: Yes, but I don't remember receiving that at all. The letter, yes, I do.

122. HIS HONOUR: Well, I mean, the covering email says it was there, "Offer of Compromise". The offer is $5,000 less; is that right?

123. CASTLE: Yes, that's right, your Honour.

124. PLAINTIFF: Sorry, what did you say? It's--

125. HIS HONOUR: The offer of compromise is for $5,000 less than Mr Malouf was entitled to.

126. PLAINTIFF: Okay.

127. HIS HONOUR: You see there on page - you've got the letter, haven't you?

128. PLAINTIFF: Yes, yes, yes.

129. HIS HONOUR: See, there he adds what's payable by the costs determination by the review panel $83,570.63, then the cost of the costs review determination which he paid in order that the determination be released but which were payable by you; the total comes to $88,655.83. The letter goes on to say that he will accept $83,655.83, which is $5,000 less. Sub-rule (7) was repealed operational 7 June 2013. How can it be open under rule 20.26 (7) if the rule was repealed?

130. CASTLE: Your Honour, I'll just have a look at that.

131. HIS HONOUR: It was repealed, operational 7 June 2013. Anyway he gave the plaintiff three weeks in which to consider it.

132. CASTLE: The rules at that stage allowed three weeks but the matter had been set down for hearing, your Honour, I believe.

133. HIS HONOUR: No. No, "The closing date for acceptance for an offer in the case of an offer made two months or more before the date set down for the commencement of the trial and no less than 28 days after the date on which the offer is made, in other cases to be such date as is reasonable in the circumstances," that's the only current provision.

134. CASTLE: May I take some instructions?

135. HIS HONOUR: Yes.

136. PLAINTIFF: Also, your Honour, sorry to interrupt but before any of these proceedings even stated when I first got the bill from Malouf I actually gave an offer to the, to Malouf in writing through Mr Vassili to try and make them negotiate of $50,000 at the end of that year when I tried to get the loan for my house because I could get an extended amount on my loan and 30,000 over the next three years and they didn't accept that. So I was, I was prepared to pay before any of this started $80,000 anyway. But that's written but I don't have it here with me but they would have a copy on their file.

137. HIS HONOUR: Yes. Yes, but this is another technical area of costs. If they make an offer of settlement and you fail to take it and they get a result that is better for them, then you have to pay their costs on an indemnity basis, that is, their full costs. Now, say, for example, you wanted $100,000 and you said, "Well, I'm prepared to take $80,000," and you offer them $80,000 and they said, "No," then the case runs and you get $100,000, then you get your full costs, what's called indemnity costs, from the time you made the offer of $80,000 that they failed to accepted. It's to encourage people to settle, don't you see? And here they offered you to take $5,000 less than they're entitled to without any claim for interest.

138. CASTLE: Your Honour, I can't effectively answer what your Honour has put to me in relation to the UCPR but, your Honour, can I ask that if your Honour is to find that the--

139. HIS HONOUR: Hang on, no, it's got the old form of it here, pre- 7 June, "The following provisions apply: the offer is limited as the time is open for acceptance; closing date for acceptance of the offer must not be less than 28 days after the date on which the offer is made; in the case of an offer made two months or more before the date set down for commencement of the trial, the offer must be left open for such time as is reasonable in the circumstances of the case; an offer made less than two months before the date set down for" - well, anyway, that's all gone now, all right? So it still has to be reasonable. This is all becoming academic, isn't it, Ms Castle?

140. CASTLE: Your Honour, it may be. It's only that my instructing solicitor has put the offer on and I am instructed to seek indemnity costs on the basis of them, and I would ask your Honour that, if there be any doubt as to the validity of the notice under the Uniform Civil Procedure Rules--

141. HIS HONOUR: Just drawing on *Calderbank v Calderbank.*

142. CASTLE: Yes, your Honour.

143. HIS HONOUR: Well, three weeks is a fair amount of time in which to consider it.

144. CASTLE: Yes, your Honour, in my submission, and it's a real compromise as opposed to a few hundred dollars or an illusory de minimis one; it's a genuine compromise.

145. HIS HONOUR: Yes, $5,000 is not to be sneezed at.

146. CASTLE: No, your Honour, particularly when one now considers the court resources and the costs that have been incurred and the policy behind the offer of compromise provisions, your Honour.

147. HIS HONOUR: It's easier sentencing people to life imprisonment than doing this. Why shouldn't you pay costs on an indemnity basis, Ms Palese?

148. PLAINTIFF: Because I tried to make a real effort to pay it before it even went to - I didn't even know you could get a costs assessor.

149. HIS HONOUR: But, you see, the end result of what I've done today is that you still have to pay the full $88,655.83. No doubt there will also be interest claimed on it now, won't there?

150. CASTLE: Your Honour, interest won't run until the certificates are filed.

151. HIS HONOUR: That's right, yes.

152. CASTLE: There is a contractual right to interest under the costs agreement. I don't have any--

153. HIS HONOUR: Well, that will no doubt be invoked.

154. CASTLE: Yes, no doubt, your Honour.

155. HIS HONOUR: You see, they made you an offer saying, "We'll take a haircut of $5,000," right, so that you would have been better off if you'd taken the haircut, wouldn't you? You would have been better of if you'd accepted their offer because you had $5,000 less to pay.

156. PLAINTIFF: But I, I truly believed that I had great grounds for - I didn't realise that my grounds were so, dismissed so easily. I thought they were genuine grounds. I wouldn't have come here if I just, and come on my own accord as well. So, yes, I believed that they were grounds that were allowed to be appealed against but--

157. HIS HONOUR: Well, that's hardly relevant--

158. PLAINTIFF: I know but--

159. HIS HONOUR: --your personal belief. I mean, you're not a lawyer. I mean, these things are very technical.

160. PLAINTIFF: That's - I, I realise that and it's been very difficult.

161. HIS HONOUR: I order the plaintiff to pay the defendant's costs on the ordinary basis until 24 October 2013 and thereafter on an indemnity basis.

162. CASTLE: May it please the Court.

163. HIS HONOUR: Any other orders sought?

164. CASTLE: No, your Honour.

165. PLAINTIFF: I don't understand what you just said, sorry.

166. HIS HONOUR: Sorry?

167. PLAINTIFF: What do you mean by all that?

168. CASTLE: Your Honour, I'm happy to explain to Ms Palese when your Honour has gone off the Bench.

169. HIS HONOUR: Thank you, yes. All right. You have to pay Mr Malouf's costs of these proceedings, that is the proceedings in the District Court, as between party and party until 24 October and thereafter you have to pay his full costs, that is on an indemnity basis.

170. PLAINTIFF: Okay.

171. HIS HONOUR: And that would no doubt trigger another assessment of costs.

172. PLAINTIFF: Do I get a list of costs of what's been--

173. HIS HONOUR: Yes. Well, they'll send you a bill.

174. PLAINTIFF: Okay.

175. HIS HONOUR: The Court will adjourn.

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