Queensland District Court Decisions

Picamore Pty Ltd v Challen [2015] QDC 67 (31 March 2015)

Last Updated: 31 March 2015

DISTRICT COURT OF QUEENSLAND

CITATION:	*Picamore Pty Ltd v Challen* [2015] QDC 67
PARTIES:	**PICAMORE PTY LTD** (applicant) v **PETER LESLIE CHALLEN** (respondent)
FILE NO/S:	D 2479/13
DIVISION:	Civil
PROCEEDING:	Review of costs assessment
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	31 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4, 5 September 2014
JUDGE:	McGill DCJ
ORDER:	**Assessment varied by increasing the amount allowed for professional costs by $20,304.00.**
CATCHWORDS:	COSTS – Solicitor and client – assessment – whether legal service performed – whether reasonable to do work, and whether done in reasonable way – some items adjusted. *Legal Profession Act* 2007 s 341(1).

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

Clayton Utz Lawyers v P & W Enterprises Pty Ltd [2011] QDC 5 – cited.

Pryles & Defteros v Green [1999] WASC 34 – distinguished.

Radich v Kenway [2014] QCA 301 – cited.

Southwell v Jackson [2012] QDC 65 – distinguished.

Tabtill No 2 Pty Ltd v DLA Phillips Fox (a firm) [2012] QSC 115 – cited.

Re Walsh Halligan Douglas' Bill of Costs [1990] 1 Qd R 288 – followed.

COUNSEL:	D de Jersey for the applicant D J Topp for the respondent
SOLICITORS:	Plastiras Lawyers for the applicant Hawthorn Cuppaidge and Badgery for the respondent

[1] This is a review of a costs assessment conducted pursuant to the Legal Profession Act 2007 ("the Act"). The applicant retained the respondent to act as its solicitor, in particular in relation to a dispute with another company over some land in New South Wales, and a costs agreement was entered into on 6 October 2011.[1] The respondent continued to act until September 2012 when his instructions were withdrawn.[2] The respondent rendered seven invoices to the applicant between October 2011 and August 2012, totalling $286,923.55, all of which were paid in full.[3] On 18 September 2013 a further invoice was sent for other costs not previously charged.[4] On 9 July 2013 however the applicant applied for the costs in respect of the first seven invoices to be assessed under the Act, and another judge made such an order on 9 August 2013. The respondent subsequently applied to set aside that order, and its operation was stayed by another judge, but on 28 November 2013 I lifted the stay, and ordered that the costs the subject of the invoice of 18 September 2013 also be assessed.

[2] The costs assessor filed a certificate of the assessment on 6 March 2014 by which she certified that professional costs were assessed at $106,378 and disbursements at $704.83. The assessor's fee of $19,247.27 and the applicant's costs of the assessment, assessed at $5,651.20, were both payable by the

respondent. Taking into account the amount already paid, there was a balance payable by the respondent to the applicant of $204,739.19. On 13 March 2014 a deputy registrar made an order that that amount be paid to the applicant. On 22 April 2014 the respondent filed an application to review the assessment. That came before another judge who gave some directions, and adjourned the matter for hearing on the civil list, and it came again before me. Over two days I heard submissions on behalf of the parties, and looked at a number of documents from the solicitor's file, during which time about half of the list of items being challenged on the review were worked through. The balance I have worked through on the papers.

[3] Ordinarily in a review of a costs assessment I would look at the costs statement, look at the notice of objection, and look at the reasons of the assessor (if provided) in relation to those items of the assessment which were challenged on the review, hear submissions on the point and deal with the matter raised. In the present case, however, there is the difficulty of there was no costs statement. The respondent provided an invoice accompanied by what was described as an itemised invoice in each case, but this was simply a list of amounts charged with the date, a brief description of what was done (for example "perusing email from X") the relevant person was identified, the time taken in hours to one decimal place, and the charge made. Because these items did not explain the justification for the work being done, or contain very much information about its content, the provision of these particulars did not make the invoice an itemised bill as defined in s 300 of the Act.[5]

[4] The applicant was entitled under s 332 to ask for an itemised bill and did,[6] but it was never provided. When the order for assessment was made, unfortunately no order was made for the preparation of an itemised bill covering the costs to be assessed. This would normally be in the form of a costs statement, and it is usual for the party seeking the assessment to be given the opportunity to identify any particular objections to the items in the statement. It is still necessary however for the assessor to assess the whole bill, if that is what is ordered by the court: Radich v Kenway [2014] QCA 301 at [36]. If the practitioner has already provided an itemised bill, that can usually stand, but if not it is appropriate to direct that one be provided, so as to form the basis of the assessment. That however was not done in the present case.[7]

[5] What happened was that the assessor prepared a schedule of claims and reductions which was in form something like a costs statement, with various items of work identified by number and dated, and columns for the outlays and amounts of costs allowed, with another column containing comments on the amounts claimed where that was different (at least sometimes) and some explanation for why the amount claimed had not been allowed.[8] The document runs to 182 pages, and is a

combination of a costs statement, a schedule of adjustments and a statement of reasons. The document was prepared by the assessor after she had had access to the respondent's file for the matter, but it was sometimes difficult to identify an item in the schedule of claims and reductions with a particular entry in an itemised invoice of the respondent. There were a couple of occasions during the review where there was argument about the appropriateness of the costs assessor having not allowed a particular amount and it emerged that the particular amount had not in fact been charged to the client.

[6] What it appears the costs assessor did was identify some documentation on the file which suggested that a particular person had done something, which under the costs agreement would on the face of it have given rise to a charge of x dollars, and then decided whether that charge was properly made, but the obligation of the assessor was to assess the legal costs in fact charged by the respondent, so only something which turned up in the itemised invoices could properly be assessed, and indeed needed to be assessed; the respondent was confined to what he had charged, the question being whether he was entitled to all of that. One can sympathise with the difficulty the costs assessor faced due to the absence of an itemised bill, and perhaps some difficulty in reconciling the solicitor's documentation with the invoices, but it might have been better to have numbered the items on the itemised invoices and then assessed by reference to those items. I suppose this just emphasises the importance of having a proper itemised bill at the time when an assessment is carried out.

Nature of the Review

[7] A review under UCPR r 742 is a form of appeal from the decision of the costs assessor to the court. Given that an application of the tests in the Legal Profession Act by the costs assessor is largely a matter of judgment, the approach on appeal will be similar to the approach on any other appeal from a matter of judgment, which is like the approach on appeal from a matter of discretion. When costs were taxed by taxing officers who were part of the court staff there was a tendency for the court to repose a very high level of confidence in the judgment of those officers: Australian Coal and Shale Employees' Federation v The Commonwealth [1953] HCA 25; (1953) 94 CLR 621 at 628. There is now the difference that the costs assessors are not part of the court staff, though they are appointed to the position by the principle registrar under r 743(L). The formal qualifications are fairly limited, though I understand that in practice some significant practical experience in matters of costs is required for appointment. The reasons filed by the assessor in this matter on 9 April 2014 give details of the experience of the assessor, and in a number of areas courts recognise that it is appropriate to respect the expertise of a specialist

tribunal when dealing with something in the nature of an appeal. Nevertheless, I do not think that the appropriate level of difference to costs assessors is quite as high as that adopted by Kitto J.

[8] In practice it is necessary to show that there has been some specific error made by the assessor, or that the outcome is in the light of the evidence so obviously inappropriate that there must have been some undisclosed error in the exercise of the assessor's judgment. It is not sufficient just for me to take the view that if I had been performing the assessment I would have assessed at a different amount, but if persuaded that there has been an error it is appropriate for me to exercise the relevant judgment for myself. Unless an error can be shown in one of those ways, the decision of the assessor will stand. In the present case I do not have detailed reasons in respect of all of the items which were raised in the review, though the schedule prepared by the costs assessor does usually give some brief indication of why the decision was reached. In some instances this makes it possible for me to identify that a decision has been reached on what I regard as a wrong basis. The absence of detailed reasons does mean that, in some cases where the decision strikes me as inappropriate in the light of the material I have seen, there is a risk that there will be factors unknown to me, or a process of reasoning not readily apparent, which may have justified the conclusion reached by the assessor. I do not consider however that I should assume that to be the case; rather I decide the review on the basis of such material as is available to me.

Background

[9] The applicant Picamore Pty Ltd was a shelf company in 1993 which was obtained by a property developer, Mr Freeman, to acquire a parcel of land in Bangalow in New South Wales, which was to be subdivided. The transaction settled in 1994 but in the meantime in 1993 there was an arrangement entered into between Mr Freeman, Mr Johnston, and some other people under which the shareholding in Picamore would be transferred to companies associated with Mr Johnston and the other people, and an agreement was entered into between those companies and another company associated with Mr Freeman under which that other company would subdivide and sell off parts of this land progressively, with the proceeds of that subdivision to be distributed in accordance with the agreement. The agreement was expressed to be executed as a deed, but the respondent was of the opinion that the document had not been properly executed as a deed.

[10] In 1997 there was a further agreement entered into, apparently because Mr Freeman was no longer prepared to continue to progress the subdivision of the land under the 1993 agreement. This further agreement purported to supersede the 1993 agreement, and was again expressed to be executed as a deed although again the

respondent considered that it had not been properly so executed. One of the changes affected by the 1997 agreement was to substitute a different company associated with Mr Freeman. Mr Johnston and the other people involved alleged that they had been pressured by Mr Freeman into entering into the 1997 agreement, but it does not appear that any attempts were made to unwind the 1997 agreement on this basis. The applicant also executed a mortgage over the land, or what was left of it by this time, to secure its obligations under the 1997 agreement.

[11] It seems that Mr Johnston became dissatisfied with the progress being made under the 1997 agreement, and in December 2003 purported to terminate the agreement, on the ground that a sum due to be paid to Picamore on 30 November 2003 by Mr Freeman's company had not been paid.[9] Mr Freeman did not accept this, and there was a dispute between them which at one stage involved proceedings in the Supreme Court of Queensland to satisfy a statutory demand on Mr Freeman's company. It appears that that dispute was not resolved at that time, but eventually the parties ceased actively to pursue it. Picamore was left with the residue of the land, which remains subject to a mortgage in favour of Mr Freeman's company.

[12] In 2011 solicitors acting for Mr Freeman's company wrote to Picamore seeking to reopen negotiations, and Mr Johnston consulted the respondent. Mr Johnston had in the earlier dispute consulted another solicitor, Mr O'Donoghue, who had sold his practice to the respondent, although he remained as a consultant to the respondent. Mr Johnston wanted proceedings brought to have the mortgage removed from the applicant's land, but before such proceedings were commenced Mr Freeman's company began a proceeding in the Supreme Court of New South Wales challenging the purported termination of the 1997 agreement, and seeking to have it continue.[10] The respondent acted for the applicant in that proceeding, and for the other parties to the 1997 agreement; a town agent was engaged in Sydney to enable that litigation to be carried on there, and a separate town agent was engaged in respect of the other defendants to that proceeding.

[13] On 6 October 2011 Mr Johnston received a costs agreement addressed to him and Picamore from the respondent which he executed and returned on behalf of the company and himself. There was also a separate costs agreement addressed to Picamore and two other companies, also entered into by the respondent but in the name of a different legal practice; it appears that for my purposes the second agreement, however curious, is irrelevant. The respondent issued the invoices for the costs in issue in respect of that proceeding until eventually his instructions were terminated in about September 2012.[11] Thereafter the applicant instructed directly

the solicitors who had previously been the Sydney town agents. The New South Wales proceedings went to trial in March 2013, but were settled in April 2013.[12]

[14] One of the issues considered by the costs assessor was whether the respondent had complied with his obligations of disclosure under the Act. The assessor found that he had not, and that finding was not challenged on the review. That has certain consequences under the Act, but it appears that generally speaking the costs assessor assessed the costs in accordance with that costs agreement. Before me neither party challenged that approach.

[15] The respondent has challenged the decisions of the costs assessor on the basis of a document filed on 15 July 2014, giving particulars of the matters sought to be raised on the review.[13] There were a number of matters dealt with in those particulars, which were grouped together under headings raising common issues, and it is convenient to deal with these reasons in the same way. One hazard with this approach was that a few items appeared under more than one heading, which should not have occurred.

Legal research

[16] A number of matters disallowed by the costs assessor related to time spent, either by the respondent or by some employee, undertaking legal research into various matters which were relevant to the dispute, either directly or indirectly. For example, item 187 was a claim to have spent five hours on 20 September 2011 researching the law of trusts, including in relation to constructive and resulting trusts. This was largely disallowed (one hour was allowed) on the basis that it was essentially self-education rather than being attributable to the presentation of the case. Reference was made by the assessor to Re Walsh Halligan Douglas' Bill of Costs [1990] 1 Qd R 288 where Dowsett J at page 290 noted that it might be difficult for a client "to know whether the hours worked in preparation were fairly attributable to the presentation of his case or whether they might more accurately be described as self-education on the part of an inexperienced or ill-educated practitioner-solicitor or barrister."

[17] The distinction is, broadly speaking, between those things that a particular solicitor is expected to know, the degree of legal expertise which may be said to constitute the stock in trade of a solicitor, and legal research undertaken to ascertain matters of law which are specific to the needs of a particular client, which are reasonably necessary for the purpose of discharging the solicitor's retainer, and which cover matters which the client could not reasonably expect the solicitor already to know. It is relevant to consider the particular solicitor concerned, whether practicing as a generalist or a specialist, and if a specialist the extent of expertise

held out. For this reason, the charge rate is relevant; an expensive solicitor might reasonably be expected to have a greater fund of legal expertise.

[18] There is however a further consideration which is relevant to legal research, and that is the question of whether the particular research was within the scope of the retainer. In the present case, the costs agreement was very widely drawn, as to the work to be done by the respondent, but generally by reference to the provision of legal services "as requested from time to time". Accordingly the question becomes in this case whether the client had requested the legal research.[14]

[19] If a solicitor is asked to investigate a particular legal topic or area which is in fact beyond the solicitor's fund of expertise, that ought to be disclosed to the client, and the client should be asked whether the solicitor is to undertake research on the point in order to advise the client. It may be appropriate to negotiate a limit to the cost of the research. Alternatively, the client may prefer to seek other advice, or to instruct the solicitor to brief counsel, which may prove to be a less expensive option. If the client has requested legal research by the solicitor, it would still be open to a costs assessor to consider whether the subject matter of the research was something which ought to have been within the reasonable expertise of the solicitor, but the first issue is whether the client actually wanted the research done.

[20] In the present case, I therefore indicated to counsel for the respondent that if the respondent was seeking to establish an entitlement to charge for research it was necessary for the respondent to show the research had been requested by the client, either expressly or by his being requested to do something which impliedly involved the undertaking of legal research, and pointed out that this was something which ought to have been either in writing from the client or evidence by a contemporaneous document. Once I raised this point, the respondent did not press any of the challenges in relation to the question of charges for legal research: p 3-44.[15]

Incomplete telephone calls

[21] There were a number of items in the schedule where charges had been made for what were described as incomplete telephone calls; that is to say, where the solicitor telephoned but was unable to speak to the person concerned, and, generally, left a message, presumably ordinarily for that person to return the call. An example of this was item 383, where there was an attempt to telephone counsel but a message was left for counsel to return the call, which subsequently occurred the same day: item 384. An allowance was made in respect of that call, though not the full amount claimed by the solicitor, on the basis that there was not sufficient evidence in the file to justify allowing the amount claimed.

[22] With regard to item 383 however this raises a question of principle of whether any legal service has actually been provided for the purposes of the costs agreement. I was not referred to any authority on the point, and am not aware of any.[16] In a sense something was achieved by leaving the message, because counsel subsequently telephoned back and in that way the solicitor was put in communication with counsel, when presumably some relevant legal service was provided. Attempting to telephone someone in this way does take some time, not just for the actual call, but because it is necessary to prepare for the call and be ready in case the person concerned is there and does speak immediately; it cannot be known in advance that the person concerned will not be available. Reference was made to my comment in Southwell v Jackson [2012] QDC 65 at [52], but that occurred in the context of a discussion of the term "attendance"; it did not reflect a considered conclusion that such an attendance necessarily involved the provision of a legal service.

[23] It appears to me that in principle something of this nature cannot properly be charged for under the costs agreement. That agreement is concerned with the provision of legal services, and not simply spending time doing things in connection with the matter. I do not think it is enough simply to say that the solicitor was at the time attempting to provide a legal service, and it was not his fault that the provision of that service did not materialise. It is not to the point that the fact that the attempt was made to contact the solicitor opposite on this occasion might have become relevant at a later date. I agree with the costs assessor that, if nothing was achieved, no legal service has been provided, and so no charge can be made in accordance with the costs agreement. Accordingly I conclude that in relation to item 383, and other similar items,[17] the costs assessor's decision was correct.

Amount of time charged for

[24] There was a general objection in relation to a large number of items in the invoices that the amount of times claimed to have been spent on a particular task was excessive and unreasonable, and many of the items were reduced on this basis, although a number of items were reduced on the related basis that the material on the file did not adequately demonstrate that the amount of time claimed had in fact been spent on that item. That is really a separate point. The onus is on the practitioner to show that there is an entitlement to charge the amount sought to be recovered for the legal services performed, and to justify by file notes or other appropriate means the amount of the charge by showing that it does reflect legal services actually provided. If the amounts claimed are not adequately documented, it follows that the claims must be disallowed, or allowed only to the extent that they

are properly documented, unless it is apparent from other material or the logic of the situation that some amount of time must have been spent on the task in question.

[25] Assuming however that the material available on the file does document adequately that particular time has been spent on a particular task, it remains relevant for the costs assessor to consider whether or not it was reasonable to carry out that work and whether or not that work was carried out in a reasonable way: s 341(1). If the costs assessor concludes that the amount of time applied to a particular task was excessive, it is appropriate for the costs assessor to reduce the amount claimed to an amount which reflects the charge under the costs agreement for the time that would have been taken had the work been carried out in a reasonable way. In the case of a number of items it was submitted that the amount allowed by the assessor was too restrictive.

Court documentation – pleadings

[26] The assessor reduced the amount claimed on item 271, partly on the basis that there was no sufficient evidence to support the time of 90 minutes claimed in the invoice,[18] and on the basis that there had previously been a claim for perusing the summons in New South Wales, and the commercial list statement, at item 249. That item included a charge for perusal, so someone had perused them, and it appears that the respondent had already discussed the pleadings with the client (item 261). On the same day as item 271 there were three telephone calls discussing the matter including one specifically discussing pleadings and issues (item 268 – four units claimed), though that may have occurred after this perusal. Assuming that the full amount claimed was in fact spent in the way described, in my opinion it has not been shown that the assessor erred; I regard 30 minutes as adequate for the work described.

[27] Item 343 was a claim for 1.8 hours for receiving and reading an email and 24 pages of enclosures, the amended summons and the amended commercial list statement as filed, for which perusal was claimed. One hour was allowed, which seems to me to be ample. There were extensive amendments, but several pages required little in the way of perusal.

[28] Item 881 was a total of nine and a-half hours claimed in respect of amendments to the responses of the first defendant and second to the fifth defendants, and amendments to the commercial list statement and cross-claim. It was said that this was not properly supported by documentation, many of the amendments were things that ought to have been done correctly in the first place, and there were further errors which still had to be corrected later. The costs assessor allowed just under three hours, plus the secretarial rate for typing up the changes. As counsel for

the applicant noted, these amendments were a work in progress at that time, being subsequently sent to counsel. The response of the first defendant was sent for filing on 12 December 2011 (item 391) and almost at once there were discussions with counsel about amendments: items 407, 418, 419, 442, 449, 467, 471, 472, 476. There were phone calls to the client about this (item 473, 475) and the pleadings were revised and errors detected: item 474. Then item 479 claimed 1.8 hours for drafting the amendments, reduced to 48 minutes which, given the work already done by counsel, strikes me as adequate. There was in item 790 a claim of 2.5 hours to review the pleadings to identify any need for amendment, which was disallowed. Later item 881 claimed 9.5 hours for drafting further amendments, after the affidavits had been prepared. Just under 3 hours was allowed. The respondent was able to produce for the review a diary note which did appear to support the time claimed, but this does not get over the question that a very large amount of time does seem to have been spent on these amendments, and I am not persuaded to differ from the amount allowed by the costs assessor.

[29] Item 885 claimed for drafting a subpoena, a standard form except for the schedule, two folios, which was drafted, together with a file note, for which 1.5 hours was charged. Again it was said there was no contemporaneous documentation, and that the amount of time spent was unreasonable, and the charge was reduced to 12 minutes of drafting and 12 minutes of typing at a secretarial rate. That strikes me as reasonable for drafting the two folios of the schedule to the subpoena.

[30] Item 902 was for engrossing changes proposed by counsel, for which the solicitor claimed one hour. There had been the previous claim for drafting the amendments and the solicitor had discussed these by telephone with counsel (item 899)[19] and received comments from counsel, for perusing which a separate charge was made: item 901. It seems to me that there was no entitlement to charge extra for further drafting at this point, as it was simply a matter of performing the mechanical exercise of making the changes to the document proposed by counsel. The allowance by the costs assessor was reasonable.

[31] Item 905 was 1.5 hours for drafting amendments to the response of the second to the fifth defendants to reflect changes to the first defendant's response. Again the work involved seems excessive in circumstances where there had been already some charge made in relation to amendments to that response under item 881, and the changes ought to have been reasonable obvious in circumstances where they were essentially responsive to changes already made to the other response. In these circumstances the reduction made by the costs assessor seems to me to be appropriate although I accept that there is a file note showing 1.5 hours spent on this.

[32] Item 972 was a claim for two hours for amending the pleadings, said to be unsupported by evidence on the file, and in any event to be simply an exercise in overcoming previous errors. It may be that this item was associated with another item the same day, perusing an email from the client concerning errors in the affidavit material and the pleadings. I note that almost a week earlier the final drafts of amended pleadings had been forwarded to counsel: item 953. It does appear to me on the material available that this was fixing mistakes in the pleadings which ought not to have been made, and for which it was therefore not reasonable for the solicitor to charge. I agree with the costs assessor's conclusion to that effect.

– Affidavits

[33] Item 368 was for a paralegal spending 1.5 hours drafting an affidavit by the client, and was disallowed on the ground that it duplicated subsequent claims, and item 127. There were a lot of claims for preparing Mr Johnston's statements and affidavits. Item 45 was for preparing a six-page statement by the client for which 96 minutes was allowed, and at item 48 another 18 minutes was allowed for amending the statement. The client vetted a six-page statement and returned it at item 52. At item 108 1.5 hours was allowed for notes for the affidavit of the client. Item 115 claimed for consolidating the earlier drafts of the statement, but this was disallowed and notes for the affidavit at item 116 were also disallowed. At item 127 a paralegal claimed seven units for reviewing and consolidating the notes and statements for the affidavit into a master affidavit by the client, which was disallowed as duplicating other claims, as were claims in item 217 for 2.5 hours for a paralegal for the same thing, item 359, for one hour for the same thing, and item 368, for 1.5 hours for the same thing. Item 372 was further work on this statement for which 24 minutes were allowed, although a claim the following day in item 374 for the solicitor to spend one hour drafting and amending the statement was disallowed on the ground that it duplicated item 372.

[34] One of the matters covered by item 568, on 11 April 2012, was notes for the affidavit during a long conference with the client. On 12 April 2012 there was another conference with the client which produced some further notes for the affidavit, and various other notes, for which eight hours was claimed and 5.7 hours allowed: item 577. On 24 April the solicitor claimed three hours 45 minutes and later seven hours for drafting the affidavit and arranging the material into categories and files, 1.8 hours was allowed,[20] and a further 1.9 hours for drafting updates to the affidavit (19 folios). On 29 April item 678, the solicitor claimed another 2.5 hours for reviewing the affidavit with notes from the client and some further notes by the solicitor after a conference the previous day with the client for three hours redrafting segments of the affidavit, for which three hours was claimed and 1.9 hours allowed.

[35] There was a further 12.2 hours claimed on 30 April for drafting and redrafting this affidavit (item 681), and some amendments and further amendments, a small part of which was allowed, and on 2 May there was a further claim of 4.5 hours for reviewing amendments to this affidavit, of which 1.7 hours was allowed: item 691. On 3 May there was a further 5.4 hours spent with the client reviewing and executing the affidavit (item 695), which ended up at 22 pages together with 45 pages of exhibits, but the following day there was a phone call from the client pointing out further mistakes in the affidavit, which had to be rectified: item 703. Neither of these claims was allowed.

[36] I was told that the statement covered wider ground than the affidavit, and no doubt it is helpful to have a full statement from the client, but once there is a full statement the process of drafting an affidavit should not be difficult, and overall the amount of time apparently spent on this affidavit seems to me to be quite extraordinary. I cannot accept that anything like that amount of time was reasonably spent on this process. I was somewhat concerned about whether part of the problem might have been that the client kept changing his version, but that matter was not specifically advanced and there was certainly no material put forward to show that that was the cause of the difficulty in preparing and finalising the affidavit. Overall, it is difficult to resist the conclusion that the amount of time claimed to have been spent on this by the solicitor and others was largely the product of inefficiency.

[37] I was also a little concerned that there might have been a cumulative effect of disallowing items here which may have operated unfairly, in that so many items were disallowed because of the existence of other items that ultimately very little time was actually allowed. However there was one substantial amount of time, 5.7 hours allowed under item 577, and it is difficult to see why a 22-page affidavit was not properly drafted in accordance with the client's instructions simply on the basis of that length of time. On the whole I am not persuaded that the amounts disallowed in respect of the affidavit were incorrectly disallowed, or that the amount ultimately allowed in relation to the statement and affidavit was inadequate.

[38] Item 550 was two hours spent by the solicitor perusing an affidavit by the principal witness on the other side, which had been served under cover of a letter to Mr Choy (item 546) and emailed on by him: item 549. The affidavit was 25 pages long, and the amount claimed was two hours. The solicitor made notes on the affidavit, and had also prepared eight folios of handwritten notes and comments, nine folios of notes for cross-examination and a further six folios of other notes. Given the extensive notetaking, it does appear that this affidavit, which would have been of considerable importance, did receive a good deal of attention from the solicitor. The costs assessor appears to have proceeded on the basis that the claim

of two hours was not specifically supported by documentation, and to have made what was described as a sufficient allowance of 48 minutes, but given the volume of notes, and the importance of this affidavit, the time of two hours does not strike me as obviously unreasonable. It does appear that the affidavit was subjected to detailed scrutiny and analysis by the solicitor and it may be that the assessor has applied a standard formula for perusal time, without taking this into account. In this case I conclude the costs assessor was being unduly restrictive, that the time allowed was inadequate for the work done, and that the two hours claimed ought to have been allowed.

[39] Item 558 was a claim for eight hours for the solicitor's perusing 193 pages of exhibits to this affidavit, on which he made 23 folios of notes. This was reduced to 2.3 hours on the basis that there was no documentation of eight hours and the principal of the firm was unlikely to spend eight hours uninterrupted. The latter does not strike me as a particularly compelling reason; if someone in his position decides to spend eight hours in that way, presumably he would be able to do so. It does not appear that the costs assessor was able, by cross-referencing other claims, to demonstrate that he had not spent eight hours uninterrupted on this task. Nevertheless, eight hours does seem a long time for 193 pages of exhibits. As pointed out by counsel for the applicant, not all of this would have been material not seen before, although it would have been appropriate for the material to have been checked to see whether the use made of it in the affidavit was correct, and whether there were other relevant documents which had been omitted. Overall my impression is that eight hours was too long, but 2.3 hours was just too short, and the approach of the assessor must have been wrong. I vary the assessment by allowing four hours for this item.

[40] Item 570 was one hour claimed for reviewing the affidavit of Mr Freeman "and documents", which appears to duplicate the work in item 550, which was not all that long earlier. This followed a lengthy conference with the client the previous day where a large volume of material was worked through, and for which the solicitor claimed eight hours and 15 minutes, which appears to have been allowed: items 566, 567, 568. Presumably this was an exercise in going through the affidavit again in the light of material that had been seen in the conference. I was shown the notes which were supposed to have been prepared for this. They looked like notes of the client's reaction when taken through the affidavit during the conference, though I was told that they were made after the conference and did involve going through the affidavit to correlate what he had been told at the conference. There was a further conference the following day, item 577, when a further eight hours was claimed, and one of the matters covered there was discussion concerning the party opposite, and a paragraph was said to be noted for cross-examination. It does look to me as

though at some stage during the conference the client was taken through that affidavit, and his response noted, which strikes me as a sensible way to approach things, but if that was done in my opinion it was unnecessary to have had a separate review of the affidavit away from the client, so I would not interfere with the disallowance of item 570.

[41] Item 680 was a further two hours claimed by the solicitor for reviewing the affidavit again on 30 April 2012, disallowed as a duplication of earlier claims, and because a further review of the affidavit at that point was unreasonable. Evidently this was an exercise in refreshing the solicitor's memory just before he spent some 12 hours drafting and redrafting his client's affidavit (item 681). It would have been reasonable no doubt to have made some reference to the affidavit opposite when preparing the client's affidavit, if only because one would expect that to some extent the client's affidavit would be responding to what was said there, but this further review for two hours before beginning work on the client's affidavit strikes me as unnecessary, and I think it was appropriately disallowed.

[42] The solicitor also drafted an affidavit by Ms Burlinson, but again a very large amount of time seems to have been devoted to preparing an affidavit which ultimately just ran to 13 pages. Item 715 claimed 6.5 hours for this and item 720 claimed a further nine hours, both of which were disallowed given that item 726 claimed a further 6.5 hours for this, of which three hours for drafting was allowed, plus secretarial time. In addition, on that day 1.5 hours was claimed separately for planning the structure of the affidavit and disallowed: item 725. No doubt it was appropriate to plan the matters to be covered in the affidavit, but the idea that this should take 1.5 hours separate from a very long time spent simply on drafting the affidavit just emphasises the unreasonableness of the whole claim.

[43] It is not as though this affidavit was prepared completely from scratch. Some notes from the witness were provided on 19 July 2011 (item 53), and she attended a conference on 6 October 2011: item 218. There was an affidavit by her sworn in February 2004, and there were notes from her, both of which had been perused: item 609.[21] Then on 24 April there was a conference with the witness taking instructions for the affidavit, from which 19 folios of notes were produced, for which five hours was claimed: item 660. Item 666 claimed 10 hours for drafting affidavits of Mr Johnson, Mr Lauer and Ms Burlinson, (disallowed as duplication) but the time spent specifically on the third of these was not identified. The schedule of objections filed 15 July 2014 said in relation to item 715 that the original affidavit of Ms Burlinson was created on 27 April 2012, but I cannot find that in the schedule of claims and reductions. Item 696 was an email on 3 May 2012 to counsel which apparently noted that an affidavit by Ms Burlinson was to be prepared. In these circumstances

claims of 6.5 hours on 10 May (item 715), nine hours on 25 May (item 720) and 6.5 hours on 31 May (item 726) strike me as obviously excessive.

[44] The draft affidavit was sent to Ms Burlinson that day (item 727) and it came back with apparently a small number of changes in red (item 729). There was an exchange of emails about a couple of points before a further 7.5 hours was spent on 3 June reviewing and re-drafting the affidavit, item 736 (1.7 hours allowed). The draft was sent back to Ms Burlinson on 4 June (item 739) and returned the same day (item 742) after which there was a further 2.5 hours claimed on 6 June for re-drawing the affidavit: item 748, 1.4 hours allowed. This seems to have been consequential upon changes made by another witness in his affidavit, though it may have been in response to an email the same day from Ms Burlinson with comments as to amendments: item 750. On 8 June the solicitor claimed a further eight hours for amending Ms Burlinson's and another affidavit (item 759 – disallowed) and on 8 June further time to re-draw her affidavit, amending eight folios: (item 760); 1.2 hours allowed, covering two affidavits amended. It appears the affidavits were ultimately executed on about 15 June: see item 784. Overall, this seems a very long time for a 13-page affidavit, and I am not persuaded that any of the conclusions of the costs assessor were not appropriate.

[45] The position was similar with an affidavit of Mr Lauer. Mr Lauer was present at a general conference on 6 October 2011 (item 218) but it does not appear that any work was done at that stage on a statement or affidavit. Again there had been an affidavit by him in earlier proceedings (see item 299). In item 740 on 4 June 2012, eight hours was claimed for the solicitor drafting the affidavit of Mr Lauer; it was said that this produced a draft of three pages, which after subsequent review and re-drafting became seven pages. Five hours was allowed by the costs assessor. The final version as filed was 13 pages, 110 paragraphs, and had 70 pages of exhibits. On 5 June there was a further claim for eight hours for reviewing and drafting Mr Lauer's affidavit, item 744, all of which was disallowed, and at item 746 another eight hours on the same day for reviewing and re-drafting the affidavit, now extended to 15 pages; the costs assessor allowed thirty-six minutes for the solicitor, and thirty minutes for the secretary to retype the document.

[46] The amended affidavit was sent to Mr Lauer that day, and on 7 June there were two items, item 753, review and drafting the affidavit for which a further 8.5 hours were claimed and 1.8 hours allowed, and item 754, another forty eight minutes for reviewing the affidavit of 2004, which was disallowed. There was a claim on 8 June, item 763, apparently for executing the affidavit but this was disallowed as was an email on 11 June to Mr Lauer with a copy of the affidavit and list of exhibits (item 766), apparently because on 13 June there were some changes drafted to the

affidavit of Mr Lauer for which a further three hours was claimed, and twenty-four minutes allowed: item 772. On 15 June the solicitor took the amended affidavit to Mr Lauer at home to have it executed, for which he claimed one hour; twelve minutes was allowed as this was said to be correcting errors to the earlier version: item 781. Even then it was necessary to amend at least one paragraph of the affidavit (item 804) which caused problems given that Mr Lauer was then travelling overseas: item 807. It appears that because of this the decision was taken not to amend the affidavit after all: item 840. Again a very large amount of time seems to have been devoted to drafting an affidavit which is not all that long, and which ought not to have been all that complicated, particularly in circumstances where there was some background known. On the whole I am not persuaded to depart from the approach adopted by the costs assessor in relation to this matter.

[47] Item 768 claimed nine hours for reviewing the file and evidence and notes; nine folios of notes along with a short chronology were produced. It was said in the submissions that, following the directions from the court that evidence be given by affidavit, it was critical to conduct this review following the three major affidavits having been sworn. I would have thought that if it was necessary to check over the file to ensure that nothing had been left out, a better time to do that would be before the affidavit material was finalised, but in any event, if the task of preparing the affidavits had been done properly, this sort of review would have been covered by that process. I am not persuaded that the assessor's decision to disallow this item as not reasonably necessary was wrong.

[48] Item 778 claimed 1.5 hours on 15 June for review of matters for cross-examination of Mr Freeman. The costs assessor disallowed this on the grounds that the client had requested that unnecessary work be not undertaken without prior consultation.[22] In any case, it seems to me that preparation for cross-examination is a matter for counsel, if counsel is going to be involved. This item was correctly disallowed.

[49] Item 813 was drafting an affidavit by a Mr van Iersel, a three page affidavit for which 30 minutes was claimed, and 18 minutes allowed. There were also three pages of exhibits. The function of the affidavit was to evidence the existence of a development approval for particular land as at a particular date.[23] It appears that this affidavit was necessary because the two principal witnesses, Mr Johnston and Mr Lauer, were both overseas and not in a position to depose to this: see item 811. There had been a telephone call to him to discuss the situation (item 800, 18 minutes claimed, 12 minutes allowed) and there was a further item 824 for the draft affidavit, though this may have involved copying only. There was an email to Mr van Iersel on 21 June concerning a variation to the affidavit (item 833, six minutes

allowed), and it appears that the affidavit was sent to Mr van Iersel for execution on 21 June: item 841, 12 minutes allowed. It was submitted that 30 minutes was reasonable given that the affidavit had to include two exhibits, but in circumstances where the function of the affidavit was quite limited, and where this affidavit was being prepared essentially to correct the other affidavit material which had been prepared, which could not be rectified because those deponents were away, the preparation of the relevant affidavit should have been a straightforward, almost mechanical exercise for which the 18 minutes allowed was quite adequate.

[50] Item 999 was three hours claimed for perusing an eight-page affidavit and 25 pages of exhibits of Ms S Freeman for which nine folios of notes were prepared. The assessor allowed one hour. The evidence was said to be critical on several issues involving meetings and phone calls, and it was compared with what was said about the same matters in the affidavit of Mr Freeman. There was a further 1.5 hours claimed for preparation of a critique of this affidavit said to be in accordance with Mr Johnston's instructions to provide him with the respondent's critique of the evidence: item 1001. This was allowed only at the secretarial rate, on the basis that it involved just typing up five pages of notes, but the notes are more extensive than those referred to in item 999. On the whole however, my impression is that the notes looked very like notes for cross-examination, which as I have said previously is a matter for counsel when counsel is engaged. It was reasonable to peruse the affidavit, and to compare what it said about matters also dealt with in Mr Freeman's affidavit with what Mr Freeman said, and to note any inconsistency, but that I think was the limit of reasonable work and I am not persuaded that the allowance of one hour by the costs assessor was not reasonable. In relation to item 1001, it is not clear that this item was actually billed to the client.

[51] Item 1000 involved perusing another affidavit, by Mr Jessup, with 30 pages of exhibits, and preparing notes raising cross-examination points (three folios) for which 1.75 hours was claimed and 0.5 hours allowed. It was reasonable to peruse the affidavit and to peruse any exhibits which had not since seen before, but otherwise this looks like time spent in preparing for cross-examination, which is a matter for counsel. I would not interfere with the allowance made by the costs assessor. Item 1002 then involved the preparation of a two-page critique of that affidavit; again this seemed to be largely directed to preparation for cross-examination, and in my opinion it was unnecessary, though I would not interfere with the allowance of the secretarial rate for typing this up.

[52] Item 1008 was perusing a 22-page affidavit, a second affidavit by Mr Freeman, which also had 51 page of exhibits; two pages of notes were produced, and six hours were claimed though this was reduced to 36 minutes, which seems too low,

bearing in mind that it would have been appropriate to compare what was said here with what had been said in the previous affidavit. It was said that major changes had been made to the earlier evidence, and three hours were claimed. In the case of the first affidavit, which was 25 pages and had 193 pages of exhibits, I have allowed two hours for perusing the affidavit and four hours for perusing the exhibits, more than the amount allowed by the cost assessor. It seems to me that this affidavit required much the same level of detailed examination, and may have also required some comparison with the earlier affidavit, and therefore I consider that three hours for this affidavit including the exhibits was a reasonable amount and I allow three hours for item 1008. It did strike me however that the notes that were made did not really achieve anything very much. My initial reaction, possibly prompted by my reaction to the notes, was that the costs assessor's allowance was not unreasonable, but after having given further consideration to the amounts properly allowed for the earlier affidavit, it seems to me that the amount allowed in respect of this affidavit should be consistent with that approach, and that has led me to reconsider.

[53] Item 1009 claimed 1.3 hours for perusing another 13-page affidavit with 89 exhibits and preparing a critique. I looked at the critique and it did not seem to me to serve any useful purpose, but it was reasonable to peruse the affidavit, for which the costs assessor allowed one hour. It was said that in fact 3.5 hours was spent on this, and that was claimed under item 1044, also disallowed. Given that the document had already been perused, that was correctly disallowed. I would not interfere with the amount allowed by the costs assessor for item 1009, or with the costs assessor's disallowance of item 1044.

[54] There was additional work done on the affidavit of Mr Freeman, presumably the second one, in items 1010, 1014, 1025 and 1026. The first dealt with the preparation and typing up of two pages of notes on the affidavit, for which only the secretarial rate was allowed. The second involved preparing notes on cross-examination of Mr Freeman which was disallowed as premature, and which I regard as a matter for counsel. The third and fourth are dealt with below, under the heading of Contact with Clients. This was an example of the same items being included in the schedule of claims more than once.

[55] Mr O'Donoghue, the solicitor who had been the solicitor for the client before the respondent took over that practice,[24] swore a four-page affidavit in March 2013. An amount of $360 was allowed at Item 1092 in relation to this. There was a further claim by Mr O'Donoghue for two hours of his time in connection with the preparation of the affidavit at item 1093 which was disallowed on the ground that it was not properly documented, and a sufficient allowance had been made at item 1092. It was submitted that it was reasonable for Mr O'Donoghue to recover remuneration

for the time and work he performed in preparing his affidavit for the matter, and in principle that is right, and it would probably be more efficient for Mr O'Donoghue to prepare his affidavit himself rather than for some other solicitor to work with him in that process. I am not however persuaded that the allowance in item 1092 was not sufficient. The short answer in relation to this item however is that I was unable to find anywhere in the invoices which the costs assessor was assessing that the applicant had in fact been charged anything for Mr O'Donoghue's time. If that was the case, there was no question of any amount charged being disallowed on this basis. This is one example of where the costs assessor fell into the trap of assessing costs which could have been charged rather than costs which had been charged.

Conferences or attendances

[56] On 30 August 2011 there was a conference between the respondent, Mr O'Donoghue and a junior practitioner, during which there was a telephone conference with Mr Johnston. The respondent had a diary note claiming 7.8 hours for this, though the amount claimed for Mr O'Donoghue was only 6.5 hours, a matter that was not resolved. I saw two diary notes, one which seemed to be just recording a discussion between the lawyers about the legal position. The costs assessor allowed the 6.5 hours for Mr O'Donoghue, but disallowed the whole of the claim for the respondent's time, item 122.[25] It was said that there was no entitlement to charge for a second solicitor at the conference, without obtaining the specific consent of the client, and no entitlement to charge in relation to the solicitors just talking about the legal position in the absence of some informed consent of the client to their doing so. This conference occurred before the costs agreement was signed, so the assessment was on the basis of reasonable remuneration. The costs assessor said that only activities which add value to the client's matter were reasonably charged.

[57] It is apparent from Mr Johnston's affidavit that he was aware that the respondent was taking over the matter from Mr O'Donoghue, and that over a period he was providing instructions to both of them. Presumably he would have been aware that both of the solicitors were involved in the conference when he phoned in. What concerns me is the risk of a large amount of time being charged for in circumstances where it is just the solicitors talking about the matter. If it were possible to show that the conference with the client went for a particular length of time, then in my opinion the client would be liable for the cost of both solicitors during that conference, in the circumstances of this matter, but I am more doubtful about whether the respondent was entitled to charge simply for talking about the matter with Mr O'Donoghue.

[58] In circumstances where Mr O'Donoghue had been acting in the related dispute previously, and where the respondent was taking over the client from him, I consider that some reasonable level of discussion between the two of them would have been appropriate in order for the respondent to be adequately informed about the situation. There is a diary note confirming that the conference ran from 10 a.m. to 5.45 p.m., and the matter had some complexity, and in all the circumstances I have concluded that the costs assessor did not approach this matter on the correct basis, because of an assumption that the discussion between the lawyers was an internal matter which was not to be charged for. That may often be the case, but in the particular circumstances of this matter I think some discussion between the respondent and Mr O'Donoghue was reasonable in order to enable the respondent properly to take over the conduct of the matter, and the respondent was entitled to charge for that although I do not see why his time should be longer than 6.5 hours. Accordingly I allow 6.5 hours for the respondent in respect of this item.[26]

[59] There was a further conference on 6 September 2011 involving Mr Johnston (in person this time), Mr O'Donoghue, the respondent and the junior practitioner. Mr O'Donoghue charged for 6.2 hours (item 141) and this was allowed, but the costs assessor disallowed a claim by the respondent in respect of the conference, item 142, and by the junior practitioner: item 143. It was submitted that the function of the conference was essentially for the respondent to get instructions about the matter, but that Mr O'Donoghue's presence was appropriate because he had been the solicitor during the 2004 litigation and he was familiar with the background of the matter. That was true, but there had not long before been a lengthy conference, part of the function of which was presumably to brief the respondent on the relevant aspects of the earlier dispute. The fact that some dealings between the solicitors at that stage were appropriate does not mean that all dealings of this nature between the solicitors were appropriate and does not justify Mr O'Donoghue and the respondent being involved in a whole series of conferences with Mr Johnston. This is so even if the respondent did not actually take over the file until 6 September 2011.[27]

[60] I am concerned that the costs assessor may have approached the matter on an unduly mechanical basis, but it does not appear to me that it was reasonably necessary for Mr O'Donoghue to keep coming to these conferences, and in those circumstances it was not reasonably necessary for the client to have to pay for his presence. I suspect that the better approach was not the one adopted by the costs assessor; rather the charge for Mr O'Donoghue in item 141 should have been disallowed, but item 142 should have been allowed, but I will not make this change. With regard to the junior practitioner, he was there it seems essentially to take notes, the client must have known that he was there, and in my opinion the obvious

inference would have been that his time would have been charged for. There is no suggestion that the client objected to this course, and in my opinion item 143 should have been allowed at an appropriate rate.

[61] On 14 September there was what was described as a conference between the respondent, Mr O'Donoghue and the junior solicitor for some six and a-half hours, plus apparently two hours 15 minutes for drafting though this is not specified. The costs assessor allowed Mr O'Donoghue's charges (item 160) but not the respondent's (item 161) or the junior practitioner's: item 164. I would have been more inclined to allow the respondent's rather than the other two but ultimately this matter was not pressed on behalf of the respondent.

[62] Item 577 was for a lengthy conference with Mr Johnston on 12 April 2012, taking instructions for his affidavit, and otherwise discussing the matter. Eight hours were claimed for the conference itself and other time claimed for other preparation work. With regard to the conference, Mr Johnston accepts that he attended a lengthy conference with the respondent, he said on 12 and 13 April 2012, when instructions were taken for his affidavit.[28] The costs assessor reduced the time allowed from eight hours to 5.7 hours, but in the circumstances in my opinion there was no justification for reducing the charge for the conference, particularly when this item covers the bulk of the work for drafting his affidavit, and I allow the full eight hours.

[63] The challenge to item 676 was not pursued. Item 761 was a charge for a solicitor to witness Ms Burlinson's affidavit when she swore it, which was disallowed by the costs assessor on the ground that the affidavit was sworn on 12 June. I can find no other charge in the bill for witnessing her execution of the affidavit, on 12 June or any other time. That it was witnessed by the solicitor appears on the face of the affidavit. In my opinion this amount claimed should have been allowed.

[64] Item 781 was an attendance on Mr Lauer at his residence to explain changes to his affidavit and obtain execution of the new version. This was disallowed on the ground that the changes involved correcting errors in the preparation of the affidavit in the first place. It is not clear however that this involved execution of a new version of the affidavit, rather than execution of a version which has been redrafted since the last occasion it was seen by the deponent in draft. I cannot see any other entry in the bill for executing the affidavit on a previous occasion, and if a solicitor took the affidavit to the witness for execution and witnessed it then the solicitor is entitled to charge. I would set aside this decision and allow the item as claimed.[29]

[65] Item 1091 was claimed as a conference for three hours, but this was at a time when the client had withdrawn instructions, and had attended to collect material to take it away. Mr Johnston said that he suspended the respondent's involvement

from the time of the mediation in September 2012.[30] It was submitted that during this conference Mr Johnston had asked the respondent for his views on certain topics he raised, but this does not seem to be supported by any contemporaneous documentation. If after withdrawing instructions the client in fact asked for the performance of further legal services, such as expressing an opinion about the prospects of the matter or the approach required to issues, the solicitor would be entitled to charge for that, but I am not persuaded that the respondent has shown that that occurred in this matter. This disallowance stands.

Perusal or examination of documents

[66] There were a large number of items where the costs assessor disallowed or reduced the amount of time claimed for perusing, or otherwise looking at, documents. Many of these decisions were challenged by the respondent, though the first challenge, of item 124, was ultimately not pressed, along with item 125 and 126: p 3-45. After some discussion of its contents item 127 was not pressed and item 129 was also not pressed: p 3-46. Item 168 was for perusing the 23 page 1993 deed and noting relevant clauses which produced five pages of notes, where the amount of three hours claimed was reduced to two hours; the costs assessor estimated it would take 30 minutes to read the deed. During the hearing I looked at the deed and the notes and there is no reason for me to think that the costs assessor's conclusion in relation to this item was wrong. It justified careful study, but two hours seems ample.

[67] Item 170 related to a junior employee comparing the 1993 and 1997 deeds and tabulating the comparison, on which the costs assessor reduced the time claimed. The costs agreement was not then in force, so it was correct to say that there was no agreement entitling the claims to be made in terms of six minute units, but nevertheless the length of time claimed was not very great, and it seems to me that the conclusion that 24 minutes was sufficient for this exercise was inconsistent with the conclusion earlier that the 1993 deed would have taken approximately 30 minutes to read. In the circumstances I allow this amount as claimed, 36 minutes being reasonable. This increases the amount allowed by $48.00.

[68] Item 171 was not pressed. Item 183 was perusing the 1997 deed (20 pages) and making four pages of notes, which involved referring to counsel's advice, for which 8.5 hours was claimed, though it was submitted by the respondent that in fact only seven hours had been charged. The matter is complicated a little by the fact that the notes that were produced to me during the hearing appeared to relate to item 210, drafting a letter of advice, for which eight hours was claimed and 3.1 hours allowed. It was reasonable to examine this deed carefully and to note and consider its effect. The costs assessor allowed 72 minutes, which seems inconsistent with the

allowance of two hours under item 168 in relation to perusing the 1993 deed. My impression during argument was that a claim for seven hours was far too long, but allowing only 72 minutes for item 183 was inconsistent with what was allowed for item 168, and I increase the amount allowed under item 183 to two hours, which takes it to $900.00.

[69] Items 184-271 were not pressed. Item 349 was an email to the Sydney solicitors providing details of evidence, for which 1.3 hours was claimed and 18 minutes allowed. It was said that the time taken was required in order to collect the information sought by those solicitors. It is apparent from some later items that there was quite a lot of evidentiary material in this mater, so it is plausible that some time would have been taken to locate this particular material. The email which I looked at was a fairly detailed explanation in response to part of what counsel had asked for. Overall my impression is that 1.3 hours suggests some inefficiency, but that the allowance of only 18 minutes was clearly inadequate, and I vary the decision of the costs assessor to allow one hour, increasing the costs allowed for this item to $480.00.

[70] Item 364 was perusing an email from the client with attachments, for which two hours was claimed. It was said that there was no memo supporting this time, and reference was made to prior claims at items 90, 292 and 348 as showing duplication. It seems to me that the item may to some extent duplicate item 348, though not the others, but item 348 was disallowed anyway. On the review there was a diary note produced which did suggest a fairly careful examination of financial records. Again my impression is that the amount claimed was too long, in circumstances where the financial documents were not particularly detailed, but the 36 minutes allowed was just too short, and I allow one hour, $480.00, for this item.

[71] Item 563 has in substance been dealt with already. Item 571 was one hour claimed for reviewing various handwritten notes. This occurred on the second of two days when there were long conferences with the client, for which large amounts of time had otherwise been claimed by the respondent, and where a number of items were disallowed on the basis that in effect the respondent had been claiming the same time more than once on those days. It does appear that the respondent did spend a very long time on this matter on each of those days, in the original account dated 30 April 2012[31] the respondent claimed eight items for his time totalling 18 hours, which seems a very long time to spend on one day. There may have been some incorrect dating of items in the schedule, because in both that account and the affidavit of Mr Johnston there was said to be a conference on the next day,[32] so it seems clear that one was in fact held, but in the schedule the dates given are 11 and 12 April.

[72] One would expect a fairly thorough review of contemporaneous documents in conjunction with the conference, but it is not clear why it was not sufficient to do that during the conference. This item is really bound up with the allowance for the conference, and for some time for preparation outside the actual conference. On the other hand, the only amounts allowed by the costs assessor on 12 April was 5.7 hours for the conference, six minutes under item 575, three units under item 576, one unit under item 578, 0.7 of an hour under item 579, 0.6 of an hour under item 580, and 0.3 of an hour under 581. Again, my impression is that although the initial claim was too long, the amount allowed by the costs assessor overall was too short. I therefore allow one hour under item 571 and a further hour under item 574.

[73] There was a related objection to item 596, for perusing various records of the companies, for which 48 minutes was claimed and 30 minutes allowed. It was said that there was no contemporaneous time memo which supported the claim, but there was a file note to support 48 minutes. There would have been a lot of documents to go through, and no doubt a good deal of this was appropriate. I am doubtful about this reduction, but overall am not persuaded that the judgement of the assessor has been shown to be wrong. Item 623 was for perusing an email with three deeds, a total of 48 pages, for which 1.25 hours were claimed and 48 minutes allowed. During the hearing I had great difficulty in understanding how perusal of these documents had anything to do with the matter in respect of which the respondent was then retained, and in those circumstances I am not persuaded that the amount of time allowed for this purpose was inadequate.

[74] Item 640 was a claim for a total of 12 hours on 19 and 23 April 2012 compiling information and adding to a chronology. It was disallowed on the basis that there was no contemporaneous memo, and there had been already a sufficient amount allowed in relation to the preparation of the affidavit. The idea that contemporaneous documents should be sorted into chronological order, either physically or by way of the preparation of a chronology of such documents, does strike me as an ordinary part of preparation of a case, particularly where there are a significant number of such documents. Twelve hours does seem a long time to take, but it was not disallowed on the basis that the time taken was excessive, and that would not have justified disallowing the whole of the time.

[75] It was submitted for the applicant that, given the time which had been spent otherwise on the preparation of statements and affidavits, particularly of Mr Johnston, it was not apparent that the client obtained any real benefit from the time spent sorting through the evidentiary documents in this way. However, the periods allowed for preparation of statements and affidavits had already been fairly thoroughly reduced to reasonable amounts specifically for drafting the affidavits.

There would have been some overlap, I suppose, with the conference going through documents with the client, but to some extent at least it is appropriate for a solicitor to go through and collate evidentiary documents in this way as a means of appreciating what documents are there and identifying documents which can be relied on.

[76] The evidentiary documents of course were not available, having been long since returned to the client. No written chronology of the documentation was produced. Ultimately the process described in this way does strike me as something which it would be appropriate for a solicitor to do, and it was not clear that this had been covered by any other particular item in the bill except to the extent that documents were gone through with the client in a conference. I have come to the conclusion that it was inappropriate to disallow this item in its entirety, and that the assessor's approach was wrong for that reason. In circumstances where it is not possible for me to assess the volume of evidentiary material to be sorted in this way, it is difficult to conclude that the amount of time claimed by the respondent was excessive, though the fact that a large number of other claims have been reduced either by the assessor or by me, suggests that it might well have been excessive. There is also the consideration that the respondent was not able to produce any document prepared as a chronology of evidentiary documents, which is the sort of thing one would expect to come out of an exercise of its nature. On the whole however I am not persuaded that those factors provide a sufficient justification for reducing the amount of time claimed. It is not obvious that this needs to be done by the respondent; it would have been more efficient for this to be done by a junior practitioner, with the respondent considering any documents worthy of note. I allow the 12 hours claimed, but at the rate for a junior practitioner, $2,880.

[77] Item 790 claimed 2.5 hours, and one hour on 17 June 2012, reviewing the pleadings with notes of possible amendments and things to follow up, notes on the affidavit of Mr Freeman, and searches of proceedings, disallowed in total. It was said to be necessary to review carefully the pleadings of the defendants as a consequence of the contents of the affidavits which had then been prepared, to consider whether any amendments were necessary to ensure that the pleadings reflected the evidence. There was also said to be a review of Mr Freeman's affidavits in what looks to me very like an exercise in identifying material for cross-examination. There was in item 881 a claim of 9.5 hours for drafting further amendments after the affidavits had been prepared, of which just under three hours was allowed. It is not clear to me that what was done on this occasion 11 days earlier really added anything to that, and I am not persuaded that any additional time spent at this point involved doing anything useful. I will not interfere with the decision of the costs assessor on this item.

[78] Item 796 involved a claim for two hours on 18 June 2012 making notes in relation to aspects of the matter, what had occurred in 1997, the content of the pleadings and the evidence in relation to the joint venture agreement, disallowed as duplicating earlier claims. It was said that this did not duplicate those claims because it involved having regard to the evidence in the affidavits prepared for Mr Johnston and the witnesses, and that the respondent had extensive diary notes when doing this exercise. Given that the affidavits had already been prepared, however, it is not immediately clear what the necessity for further analysis of the matter at this point really was. It seems to be really preparation for arguing the case, which would be a matter for counsel. That is how the notes prepared by the respondent on this occasion, which I saw during the review, read. Overall I am not persuaded that this involved doing anything particularly useful, and I will not differ from the decision of the costs assessor.

[79] Item 815 was 2.5 hours claimed for the preparation of notes on the construction of the agreement and also considering an application for summary judgment, disallowed as duplication and premature. I have great difficulty in seeing that there was any justification in giving significant time to consideration of an application for summary judgment. I am a little puzzled by the costs assessor's reference to instructions not to undertake unnecessary work, something which does not seem to be referred to in Mr Johnston's affidavit. I could not identify reference to such instructions in the schedule of claims and reductions, though a request not to undertake unnecessary work was mentioned in the reasons for disallowing item 778, and some subsequent items. Undertaking unnecessary work should of course not occur.

[80] While preparing my reasons I requested clarification from the parties about this issue, and my attention was drawn to an email of 22 April 2012, item 647, a copy of which was provided to me. It expresses concern over time spent on researching, and continues: "... when you are on the verge of tackling another line of legal thinking I absolutely need you to firstly outline your thinking to me before diving into many hours of work. This then gives me the opportunity to ask you what the extra work might entail in terms of cost and then approve or not approve the new approach." He added that this was to give him control over the amount being spent. I do not interpret that as an instruction not to do "unnecessary work." Rather it was an instruction not to do work on any new legal issue which might help their case without express approval, after disclosure of the cost implications. It did not restrict work on the existing grounds of defence, or cross claim. Whether it applied to a new tactical approach is debatable, and I prefer to decide item 815 on the basis that it was clearly inappropriate to be considering an application for summary judgment at that time.

[81] Item 927 was one hour for perusing records, and noting the absence of the original deed of variation of 31 October 1994. The amount claimed was reduced on the basis that this was administrative work and did not require the skill of a practitioner. It was submitted that it was necessary for the respondent to look himself for this deed in order to be satisfied about the outcome, but the absence of a complete executed copy of the document had already been noted in a letter of 5 October 2011 that I saw during the review. This document had been referred to in an affidavit, and he should have known whether he had it or not without the need to spend time searching for it. I am not persuaded that the costs assessor's conclusion on this matter was incorrect.

[82] Item 1011 was not pressed. Item 1012 was 1.3 hours for preparing notes on mortgage issues, disallowed as duplicating other claims and as premature, though it was noted that there was no contemporaneous memo to support the time. It does appear that there was a diary note supporting the times, but dated 5 August 2012, not claimed on that date although there was one hour claimed in item 1021 on that date, for preparing a summary of critical issues. It seems to me that item 1012 was essentially preparation for the mediation which occurred on 17 September.[33] The respondent did not attend the mediation, but it was submitted that at this stage he had expected that he would be attending, and this was part of his preparation for doing so.[34] The position was said to be the same with items 1021 and 1028 and dated 5 and 6 August 2012. It is clear that at this stage the respondent had not been instructed that he was to attend the mediation, which was occurring in Sydney, so in a sense preparation to do so was speculative and assumed that such instructions would be given at some time. In that situation if the instructions were not given it seems to me that the respondent was not entitled to charge. On the whole, I am not persuaded to differ from the conclusions arrived at by the assessor in relation to this matter.

Correspondence with New South Wales lawyers

[83] The remaining items were not the subject of detailed oral submissions, and ultimately after hearing some submissions of a general nature the matter was left to me to work through on the basis of the documentation that I had. In relation to some correspondence with the New South Wales solicitors, the respondent submitted that, in circumstances where the charges of the New South Wales solicitors had not been objected to, it was not appropriate for the corresponding charges of the respondent in relation to that correspondence to be disallowed. That in my opinion was too sweeping a statement, for two reasons. First, the mere fact that no challenge was made to the other solicitor's charge for particular correspondence does not amount to a representation or admission by the client that the charge was

properly made, and the costs assessor still had to decide as between the applicant and the respondent whether such charges as the respondent made were properly made.

[84] In the second place, a solicitor on the receiving end of inappropriate correspondence may still be entitled to charge for perusing it, because it may well not be apparent until it has been perused that it is inappropriate or unhelpful. So if the respondent sent a letter to the New South Wales solicitor which was unnecessary, the fact that the New South Wales solicitor charged for perusing it would not demonstrate that the respondent was entitled to charge for drafting and sending it. Of course if the New South Wales solicitor sent a letter to the respondent which was unnecessary or otherwise not properly the subject of a charge, the respondent would, at least prima facie, be entitled to charge for perusing it. He was not to know until he perused it that it was not something helpful or useful. I do not accept that as a general proposition whenever a New South Wales solicitor's charges for correspondence had not been objected to, the respondent's corresponding charges had to be allowed.[35]

[85] There was also an issue taken with the decision of the costs assessor that once the client's instructions had been withdrawn, or at least suspended, as they initially were, the respondent was not entitled to charge even for perusing further correspondence received from the New South Wales solicitor. It was submitted that, in circumstances where the New South Wales solicitor was still acting on the client's instructions, by sending an email to the respondent he was impliedly providing the client's instructions at least to read it and possibly to respond to it in some other way, which justified the respondent's charging for doing that. I can understand that argument, but it seems to me that in principle, once a solicitor's retainer has been withdrawn[36], if such emails are received the correct approach is to draw this to the attention of the client and to ask whether the solicitor has instructions to receive and respond to such emails, on the basis that that will be paid for, with the advice that otherwise they will not be read or responded to. In such a situation the client has the choice of agreeing to that, in which case the client will be liable for costs for it, or telling the solicitor to ignore such correspondence, and perhaps telling the New South Wales solicitor not to send any more. There is no suggestion that anything like that happened. I think that the respondent was assuming that the suspension would be temporary, and that in those circumstances it was appropriate for him to continue to do legal work on the matter, but in my opinion in that situation he was acting on a speculative basis.

[86] Item 43 was for Mr O'Donoghue's drafting a letter to the New South Wales solicitors acting for the applicant concerning instructions, for which 30 minutes was

allowed. This was challenged on the basis that the time of 5.5 hours claimed included not just that letter but notes on the affidavit of Mr Freeman and six pages of statement by Mr Johnston, and two pages of notes on the origin of the mortgage (items 43-46), but over these four items about half of the 5.5 hours was allowed. It was submitted that consideration of a lot of material on the file was required in order to draft these documents, and that may well have been right. I have not seen a copy of the letter, but the one-page memo concerning Mr Freeman's affidavit from 2004 would not have taken long to produce, though it would have been necessary to read the affidavit. The six-page statement of Mr Johnston refers to, and might have involved some examination of, the two joint venture deeds and the mortgage, and there is a reference to an affidavit dated 18 December 2003, Mr Freeman's affidavit dated 15 January 2004 (the subject of the memo, item 44) and the notice of termination of the joint venture agreement. There was said to be a considerable volume of correspondence associated with that notice of termination, but only one of them is referred to in detail in the affidavit.

[87] On the whole I am not persuaded that the amounts allowed by the costs assessor were inadequate. Indeed, it appears that some time was allowed for perusing a two-page document (item 46), which looks to me as though it was prepared by Mr Johnston. I assume that the letter was the one subsequently amended by the respondent (item 47). It appears to me that the allowance by the costs assessor was appropriate. Item 47 was one hour for the respondent to make quite extensive handwritten amendments to the draft letter. This was disallowed, on the basis that the client was only liable to pay for one solicitor to draft the letter, bearing in mind that there was at this time no costs agreement in place which provided for such work to be done by more than one solicitor. I agree with this analysis and would not allow this item. It is not a question of whether the letter was improved by the respondent's amendments, but whether the applicant was required to pay for two solicitors to draft and then redraft this letter.

[88] Item 105 is a claim for Mr O'Donoghue to tidy up a draft memo to counsel which had been prepared by a junior practitioner. It appears that the costs assessor allowed 1.4 hours for this under item 106. It was submitted that it was reasonable for Mr O'Donoghue to spend three hours in effect settling this document, but it does not seem to me that extensive factual changes were made in handwriting, and I am not persuaded that the amount allowed by the costs assessor was inadequate. Item 113 was for perusing a letter from the solicitors on the other side which ran just into three pages, in effect seeking clarification of certain matters set out it the earlier letter, and proposing a discussion with a view to settling the dispute. The respondent claimed three units, and six minutes was allowed. At this time there was no costs agreement in place so the respondent was not entitled to charge by

reference to time units, but what matters is how long it would take to peruse this letter. I am not persuaded that the assessment by the costs assessor was wrong, even allowing for the fact that the letter required careful consideration.

[89] Item 114 was for perusing a without prejudice letter of the same date which ran to one and a-half pages, for which four units were claimed and six minutes allowed. I agree that the letter needs to be considered in order to determine just what is being offered, which was not entirely straightforward, but I am not persuaded that the six minutes allowed by the assessor was not reasonable. Item 115 was for time spent by the respondent on a note about consolidation of the earlier drafts of Mr Johnston's statement, which was disallowed as an internal memorandum. This conclusion was objected to on the ground that it was a legitimate occasion for charging for some interaction between the respondent and Mr O'Donoghue, and that the time recorded for the task performed was reasonable, with the costs agreement permitting time to be charged in six minute intervals, neither of which meets the ground for disallowance. In fact the costs agreement was not then in force. This disallowance has not been shown to be wrong.

[90] Item 223 was for amendments to a letter to the solicitors opposite which had previously been drafted and sent to the client for comment at item 220, for which 2.3 hours was allowed. The client's comments were provided (item 222), and at this point the respondent drafted amendments to the letter for which he claimed two units. This was disallowed on the basis that there was a sufficient allowance at item 227 where the respondent claimed 1.3 hours to amend the letter and 12 minutes was allowed. Overall it seems that 6.6 hours were claimed for work on this letter, together with 1.2 hours to collect documents to be enclosed with it, which seems a long time even allowing for the fact that the letter set out in some detail over 10 pages the client's position in relation to the matter, and I am not persuaded that the total of 2.8 hours allowed over items 220, 222 and 227 was inadequate. The solicitor ought to have been reasonably familiar with the basis of the client's case at this time, as a result of the work that had been done, so this was a reasonable allowance.

[91] Item 224 was a claim of 1.2 hours for a junior practitioner to locate, collate and copy for attachment to the letter some documents, rejected on the basis that insufficient particulars were given. What I have seen appears to be a draft but not the final version of the letter sent out, but the draft that I have seen does not make reference to any attachments. I have not seen any material to justify this claim or to show that the costs assessor's conclusion was wrong.

[92] Item 229 was said to be another letter which was needed, on the basis that it was sent on behalf of separate parties, which also required several drafts because

of the complexity of the issues, for which 4.3 hours were claimed. I have not seen this document, but it is difficult to see how any significant amount could be claimed in addition to what had already been properly claimed for the other letter just because this version was sent on behalf of different parties.[37] It cannot have been inconsistent with the characterisation provided in the earlier letter on behalf of the applicant, or there would have been a conflict of interest. I am not persuaded that the disallowance of this item was wrong even if there was a separate letter produced and sent.

[93] Item 246 was a claim of four units apparently to engross a letter to the solicitors on the other side. It is not clear what letter this is, though there had previously been a letter drafted at item 234, which was apparently sent to the client who noted errors in it and then discussed the letter on the phone (item 243) before sending the amended letter to the respondent at item 245. This item therefore appears to be simply incorporating the requirements of the client of the draft. It was submitted that the respondent should be allowed time to read over the letter before signing, but given that he had already drafted it and this was essentially just an exercise of putting in changes required by the client it is difficult to see that any additional charge was justified at this point, and I would not interfere with the disallowance of this item by the costs assessor. There was also a charge by Mr O'Donoghue for reading the letter before it went, item 247, four units. This was, I gather, the letter making a counteroffer, and it may well have been appropriate if the client had sought Mr O'Donoghue's views on that counteroffer for him to consider it and advise the client of those views, but it is not apparent that this is what is being done here. It appears to be simply an exercise in keeping Mr O'Donoghue informed of the situation, and I am not persuaded that the respondent was entitled to charge for that.

[94] Item 259 was for perusing a letter from the solicitors opposite which was said to be in similar terms to the letter in item 258, perusal of which was allowed. I do not think that the fact that there was a second letter which was addressed to the other defendants justifies spending 24 minutes considering it, in addition to the time spent considering item 258, and I would not interfere with the assessor's disallowance. Item 268 was a call from the solicitor opposite said to last 28 minutes, and there was a further claim of 18 minutes for drafting notes, though the only notes produced were one page. The assessor allowed 30 minutes, and I am not persuaded that was wrong; 18 minutes for a one-page handwritten note seems excessive.

[95] Item 269 was a long conversation (42 minutes) with the Sydney solicitor outlining the nature of the matter and discussing counsel, but only 12 minutes were allowed on the basis of the amount charged by the other solicitor. The discrepancy

was said to be because of the time spent drafting notes, but that does not justify a further 30 minutes. I would not interfere with this assessment. Item 270 was a further phone call with the solicitor in Sydney discussing junior counsel, background matters and the affidavit in support of the summons, for which one and one-third hours was claimed and 48 minutes allowed, on the basis of the account of the Sydney solicitor. Again, the explanation for the difference was said to be time to prepare a file note, and again I am not persuaded that the amount allowed by the assessor was inadequate.

[96] Item 271 has already been dealt with. It should not have been included in the list of objections twice. Item 273 was a letter to the Sydney solicitor attaching the pleadings and letters and requesting a discussion on strategy, for which four units were claimed and 12 minutes allowed. It was plainly relevant to forward this material to the Sydney solicitors but the notion that 24 minutes was required to consider the contents of such a letter and collate the attachments to the email is implausible. Twelve minutes allowed by the costs assessor seems reasonable.

[97] Item 282 was an email attaching the New South Wales commercial list practice note which was disallowed as self-education, and an unnecessary claim given that the New South Wales agent had been appointed. It was submitted that it was necessary to gain an understanding of the commercial list practice in order to enable proper conduct of the matter, but on balance I agree that this was self-education, given that there was a New South Wales solicitor who was not acting just as a post box,[38] and I would not interfere with the disallowance. The latter point is underlined by the fact that the same day there was a lengthy phone call with the Sydney solicitor (item 284) discussing strategy, and considering pleadings and affidavit material, and it is not apparent why anything which needed to be discussed could not have been discussed at this time. There was a one page note of this phone call and 48 minutes were claimed; 18 minutes were allowed, apparently on the basis that the Sydney solicitor's account was for 30 minutes. This seems odd. It was also said that there was no provision in the costs agreement requiring the client to pay for a discussion as to strategy, but this seems to have been largely a discussion about the requirements of the New South Wales procedure. If the solicitor was not to be allowed to charge for finding out for himself by an examination of the relevant practice note what the New South Wales procedure was, it seems to me hard to say that he was not allowed to discuss that with the New South Wales solicitor. In circumstances where that solicitor has charged for 30 minutes, I think 30 minutes was justified here and I vary the assessment accordingly, increasing this item to $240.

[98] Item 290 was said to be a three page letter to the Sydney solicitor providing observations on the dispute, for which 3.3 hours was claimed and 42 minutes allowed. Given that this followed a lengthy letter to the other side, setting out the client's position, the time of 42 minutes allowed seems to me to be reasonable. No doubt the matter was complex, and if this were the first occasion on which it had been necessary for the solicitor to formulate the client's case on the various issues raised a longer period might well have been properly allowed; but the respondent was not starting from scratch every time he set out to explain the case to someone else. I would not interfere with this decision. Item 306 was for a phone call with the New South Wales solicitor who advised that junior counsel had been briefed to prepare the pleadings for the four defendants and that he would arrange for another solicitor to act as town agent for the respondent for the applicant. Having read the note which was in the trial book it seems to me that the 12 minutes allowed by the costs assessor was reasonable, notwithstanding that 30 minutes is written on the note.

[99] Item 310 was an email from the Sydney solicitor forwarding a letter from the other party with the amended summons and amended commercial list statement, for which 1.8 hours was claimed, and disallowed on the basis that there had also been a claim at item 343 of 1.8 hours for an email attaching the filed amended summons and amended commercial list statement. The assessor allowed one hour under the latter item and disallowed the former. I accept that it was necessary to peruse the amendments to the pleadings, but there was no answer to the proposition that this involved claiming twice for perusing the same amended documents. It strikes me as a little odd that the time allowed was allowed under the second item, but I am not persuaded to interfere with the decision in relation to either item 310 or 343.

[100] Item 318 was a letter from the Sydney solicitor as agent for the other defendants enclosing some documents for which one hour was claimed and 18 minutes allowed. Twelve pages were involved[39] but it is not apparent that the time allowed by the assessor for this was not adequate, and the decision stands. Item 329 was an email to the Sydney solicitor, and evidently one in similar terms to the other Sydney solicitor, for which 18 minutes was claimed. The email was actually drafted by a junior practitioner for which no charge was made, but it appears that six minutes has been allowed for each email and the total of 12 minutes under this item was reasonable.

[101] Item 332 was a brief email from the Sydney solicitor forwarding an email sent to both of them by the solicitor on the other side enclosing a draft order and commenting briefly on the need for a commercial list response and possibly a reply. The Sydney solicitor also passed on briefly the result of a conversation with the

solicitor on the other side, and touched on the issue of separate representations for the other defendants. It probably does not matter what I think the position was in relation to that, though it seems to me that, in circumstances where in substance the respondent was acting for all the defendants in Queensland,[40] it is difficult to see that any useful purpose was achieved by having separate town agents acting in Sydney; either there was no conflict of interest between the defendants, in which case they ought to have been all represented by the same lawyers unless they were themselves unable to agree on this, or, if there was a conflict of interest between the applicant and the other defendants, the representation of the applicant ought to have been completely separate. In any case, the assessor concluded that the 12 minutes claimed was excessive and having read the documents myself I agree. This decision stands.

[102] Item 333, although expressed in slightly different terms, appears to relate to the same email from the Sydney solicitor with the same enclosures, something confirmed by the fact that that was what was presented to me in the trial bundle in respect of these two items. The assessor in fact allowed a further six minutes on this item. On its face this was an overcharge and the only error by the assessor was to allow a further six minutes under this item. In circumstances where there was no justification for allowing 12 minutes once for this material there is certainly no justification for allowing it twice, but there was no challenge at the review by the applicant based on the proposition that any of the decisions of the assessor were too favourable to the respondent, and because of that and because this duplication was not raised expressly with counsel for the respondent during the hearing, I will not make this reduction.

[103] Item 336 was a claim for two units for a telephone call with the Sydney solicitor, disallowed on the ground that there was no evidence on file. No diary note by the respondent was produced to me either, but it was pointed out that the Sydney solicitor's account dated 29 November 2011 included an entry for 0.2 hour this day for such a phone call. That is true, and it is possible on this account to identify other telephone attendances with the respondent on this bill as items 269, 270, 284, 295 and 306. There was however an item 287 in the schedule, a telephone call on 3 November, which did not appear in the Sydney solicitor's account which covered that date, for which 30 minutes was allowed by the assessor, and there was a telephone attendance on the respondent dated 11 November in the Sydney solicitor's account which did not appear in the schedule. Given that it is the respondent's responsibility to show not merely that there was such a telephone call but that something useful in the way of legal work was done during it, and that has not been shown, I would not interfere with the assessor's decision to disallow item 336.

[104] On 18 November the Sydney solicitor forwarded a letter from the solicitor opposite enclosing orders which he understood were to be made by consent and asking that they be signed by the solicitors for the defendants: item 337. This appears to have been done again at item 338 when the signed consent orders were forwarded and 12 minutes allowed. Again the only odd part of this decision was that the allowance was not made on the first item. Given that the order had been forwarded the previous day and perused, in my opinion the 12 minutes allowed on item 338 was more than enough for perusing both emails, and I would not make any change to the assessment. Item 341 was a letter from the Sydney solicitor enclosing a copy of the orders, advising that drafting a response was in progress, and enclosing junior counsel's costs disclosure and costs agreement, for which 18 minutes was claimed and six minutes allowed. It was not necessary to peruse the consent order again, and I consider that the six minutes allowed by the costs assessor was quite reasonable, and allowed plenty of time for as much examination of counsel's disclosure letter as was required.

[105] This reflects a general pattern in relation to these objections, which will be apparent from what I have said so far. The amount claimed by the respondent was reduced by the costs assessor, and the material provided and the written submissions do not demonstrate that the amount allowed was inadequate. Either there is no material in the trial book or the material in that book supports the decision of the costs assessor, which was apparently reasonable, and accordingly I would not interfere. The other items to which this applies are items 343, 349, 353, 378, 418, 423, 435, 436, 476, 482, 509, 531, 712, 797, 899, 951, 991, 992, 993, 1015 and 1018.

[106] Item 360 was an email from the Sydney solicitor passing on a request from counsel for a copy of a company's constitution. This was disallowed as duplication and follow-up in relation to item 356, which was forwarding a request from counsel for something different. If counsel make separate requests at separate times inevitably this will lead to separate correspondence. In my opinion this was not duplication or follow-up and the claim for one unit, $48.00 should have been allowed.

[107] Item 361 was a response to a request for details of the order made at the end of 2004 in the Supreme Court, advising that there was no formal order on the court file, something which evidently was not obtained by examining the file since the letter went on to note that it would take several days to obtain it, and must have been obtained from the index to the court file. It was necessary to locate the diary note of the order on the old solicitor's file, but that would not have required detailed examination of the file, since presumably that sort of thing was filed chronologically

and it would have been at or close to the end. I am not persuaded that the allowance made by the costs assessor of 12 minutes was inadequate.

[108] Item 371 was an email from the Sydney solicitor enclosing counsel's drafts of the commercial list response, cross summons and commercial list statements in support of the applicant, and the commercial list response for the other defendants in that proceeding. It does not appear that the account includes any other charge for examining these documents, and I agree that it was reasonable to peruse these attachments, and that the two units claimed was reasonable. I increase the allowance by $48.00.

[109] Item 381 was a claim for 12 minutes for perusing an email from the Sydney solicitor forwarding an email from counsel setting out reasons for his opinion that there it was not appropriate to pursue a claim of statutory fraud in relation to the registration of the mortgage, and inviting the respondent to discuss the matter with counsel. I have read the material and consider that the six minutes allowed by the assessor was ample.

[110] Item 384 was a telephone discussion with counsel in relation to the content of these draft documents for which 30 minutes was claimed and 18 minutes allowed. The diary note has a reference to 30 minutes. The fee note from counsel, although it mentioned the conversation on this day, included it as part of three hours also covering drafting amendments to the cross summons and commercial list statement. Given the time spent on redrafting those documents after the phone call, it does occur to me that this must have been a fairly substantial and detailed discussion, and later that day amended versions of the documents were sent by email to the respondent: items 385, 386. In the circumstances there is enough evidence to justify the 30 minutes claimed, the assessor must have erred, and I would increase this item to $240.00. There was also a complaint about items 385 and 386 where four units were claimed, but it seems to me that four units were allowed at item 386(a).

[111] Item 425 was an email from the Sydney solicitor attaching a copy of a letter which had already been approved by the respondent, and another one page document, for which one unit was claimed. This was disallowed on the basis that perusing the letter prior to approving its being sent was sufficient. I suppose that strictly speaking it was appropriate for the solicitor to check that it had been sent in that form, but on the whole I did not think that justified even six minutes, and I will not interfere with the assessor's decision. Item 428 was a telephone call with the solicitor for the other defendants in Sydney, advising what had happened and discussing his role, for which three units were claimed and one unit allowed. Apart from supporting my general impression that having separate agents in Sydney was

not an efficient way to run this litigation, the diary note does not suggest that the allowance of one unit by the costs assessor was wrong.

[112] Item 440 was a claim for one unit for a telephone call to the Sydney solicitor, as was item 441; both of these were disallowed as there was no evidence on the file. The respondent relied on the account from the Sydney solicitor dated 8 February 2012, which referred to a telephone attendance on the respondent on 2 February 2012 for six minutes, and a further telephone attendance the same day to the respondent also for six minutes; however the schedule also includes a telephone call on 31 January 2012, item 434, which does not appear on the Sydney solicitor's account, and there are no telephone calls claimed on 2 February 2012 with that solicitor, so it is difficult to reconcile the amounts charged by the Sydney solicitor and the schedule. On the whole I am not persuaded in these circumstances that the entries on the account from the Sydney solicitor support the claims made by the respondent. There ought to have been diary notes from the respondent to support these claims, and they were not produced. The decision of the assessor stands in relation to items 440 and 441.

[113] Item 466 was said to be an email of counsel to the respondent with the amended response and further particulars for which two units were allowed in lieu of the four units claimed. I was shown an email from counsel of this date but one which simply responded to some questions and foreshadowed provision of the draft amendments the following day or the following Monday[41], which presumably was an earlier email than the one described in item 466. In these circumstances it has not been shown that the assessor's allowance of two units rather than four was wrong.

[114] Item 492 was a request to the Sydney solicitor to forward a PDF scan of the filed amended commercial list response, and a Word document version, which was disallowed in total on the basis that the requirement of two formats of the document was not reasonable. It occurs to me that having a PDF of the stamped document is the equivalent of a photocopy of the document as filed in the court, to prove it has been filed in the court, whereas the Word version of the document would be useful later if it were necessary to make amendments to the document.[42] Further it does not seem to me that the reasons of the assessor justify disallowing a request for at least one format. I consider that the assessor erred and this item ought to have been allowed, in the sum of $48.

[115] Item 504 was for perusing an email from the Sydney solicitor concerning notices to produce given by the plaintiff, and the attached documents, presumably the notices to produce. These were four notices each relating to one defendant. I was not provided with copies of the notices and suspected there was considerable

overlap in the documents required to be produced. It appears that, when issues arose with the solicitors on the other side about these notices, they were withdrawn: item 507. The respondent claimed three units, two units were allowed, and I am not persuaded that the amount allowed was inadequate, or the decision was otherwise unreasonable.

[116] Item 509 was an email from the Sydney solicitor which simply forwarded an email from the solicitors opposite enclosing a commercial list reply to the amended commercial list responses filed by the defendants and a commercial list cross-claim response, each of which was a little over two pages long, apart from purely formal parts. The respondent claimed 30 minutes for perusing this material and 24 minutes were allowed, which it was submitted was inadequate in circumstances where the Sydney solicitors had claimed a total of 36 minutes for perusing the same material, as shown by their account of 30 March 2012. Having looked at the court documents I consider that the amount allowed by the costs assessor was reasonable, and the fact that the Sydney solicitors charged for a more lengthy perusal does not in my opinion demonstrate that the amount charged by the respondent was correct; it suggests that on this occasion the Sydney solicitor was overcharging more.

[117] Item 514 was shown in the schedule as a telephone call with the Sydney solicitors concerning the reply and proposed particulars, for which the respondent claimed 18 minutes, the Sydney solicitor 12 minutes, and the assessor allowed six minutes. The only material as to its content was the respondent's diary note, which does not persuade me that the amount allowed by the costs assessor was too low. There was also some issue about the timing of this call because the diary note, and the Sydney solicitor's account, referred to a telephone call on 14 March 2012, but I do not think that alters the position.

[118] Item 552 was an email from the Sydney solicitor forwarding an affidavit served by the other side which apart from formal parts went for four pages, for which a total of 34 minutes was claimed and six minutes allowed. It was said that this affidavit, although evidencing close analysis, was included in the material for which 36 minutes was claimed and 30 minutes allowed in item 549. The submissions for the respondent emphasise that the affidavit had been closely examined, but did not address the duplication point and in those circumstances I am not persuaded to interfere with the decision of the assessor.

[119] Item 572 was a claim for six minutes for an email from the Sydney solicitor with two consent orders; it was disallowed on the basis that the same time was being claimed twice, this being a day on which a large number of other items had been claimed including a conference with the client for eight hours. The respondent's argument on the review was that the email, although received during the

conference, was not read until later. That may have been the case, but given all the other things that the respondent was supposed to have been doing on this file that day, it can be assumed that this was not an isolated task on this particular file, so as to trigger an entitlement to charge a minimum of six minutes.

[120] Although the costs agreement provides for the respondent, and others in the practice, to charge on the basis of the time they spend in indivisible, six-minute portions,[43] it does not mean that each time a specific thing is done a minimum of six minutes is to be charged for it. If the respondent while dealing with this matter on a particular day made five telephone calls and sent or received 15 emails, in the course of one continuous period of work on this file, the amount for which a charge could properly be made would be found by taking the length of time from when he began to work on the file until he finished working on the file, rounded up to the next six minute interval, charged at the agreed rate; he would not be entitled to make a minimum charge of six minutes for each individual item of work.

[121] This is obvious enough when one considers the terms of a costs agreement providing for time charging, but an itemised invoice or costs statement is prepared in the traditional form of a bill of costs, adopting a format which arose under a system of charging for particular pieces of work done, generally regardless of the time they took in a particular case. This leads to a tendency to break up the performance of legal services by the solicitor into its individual component parts, pricing each piece under the terms of the costs agreement as if that task had been performed in isolation. In my opinion the terms of this costs agreement do not justify that approach.

[122] The point is not that the solicitor is charging for the conference and for looking at the email at the same time, but that the solicitor was charging for looking at the email as if this task had been performed in isolation. Plainly it was not, and plainly it would not have added any significant amount to the length of time spent on this file that day. The respondent has not shown that it would have added some identifiable time, and has therefore not shown what additional amount ought to have been allowed for looking at this email, so I will not interfere with the costs assessor's decision at all.

[123] Item 777 was a telephone conference with counsel discussing the affidavits and their contents, which according to the respondent's diary note took 24 minutes. Counsel in his fee note charged 0.5 hours for this conversation, and in these circumstances the allowance of only 12 minutes seems inadequate, though the contents of the respondent's diary note does not really support anything like 24 minutes. There was some guidance about the contents of affidavits to be prepared which on principle was appropriate and ought to have been helpful. Overall I cannot

see any proper basis on which this reduction was justified, and I allow 24 minutes, an increase of $96.

[124] Item 834 was a telephone call to the Sydney solicitor's office where someone else was spoken to and in effect given some instructions for obtaining copied documents from the Land and Environment Court registry. The diary note does refer to 18 minutes, but the content of the note does not justify more than the six minutes allowed. Item 835 was receiving a telephone call from the Sydney solicitor who left a message to call back; I cannot understand how the fact that someone else in the office received the call and took a message would entitle the respondent to charge six minutes of his time, and this item was properly disallowed. It does not reflect well on the respondent that this charge was made, or that it was persisted in on the review.

[125] Item 836 was the return call, noted as 12 minutes in the respondent's diary note, and the Sydney solicitor appears to have charged the same length of time. Nevertheless there is very little justification in the content of the diary note for anything like that time, and I am not persuaded that the six minutes allowed by the costs assessor for item 836 was inadequate. I note that the Sydney solicitor has charged a second, longer phone call with the respondent on this day, though the schedule only records one phone call and no diary note for a second call was produced. This also shows the difficulty in reconciling the schedule with the account from the Sydney solicitor.

[126] Item 854 was a claim for a letter from the respondent to the Sydney solicitor enclosing an original affidavit, with a request that the document be copied by the Sydney solicitor, for which six minutes was allowed, which strikes me as reasonable. It was submitted on the review that there was also properly allowed six units to the deponent for settling the affidavit. Charges had already been made in respect of this affidavit, including item 848, drafting an amendment to it, for which 18 minutes was allowed, and two telephone calls to the deponent at items 849 and 853. If the respondent had already charged for drafting the affidavit, I do not consider that Ms Butler/Wallace was entitled to charge for "settling" it, and consider this item was allowed at the appropriate amount.

[127] Item 863 was simply an advice from the Sydney solicitor noting that he was out of the office for a couple of days and would serve the affidavit when he returned; it appears to have been disallowed as duplicating earlier attendances. I have not been able to identify the attendance this was said to duplicate. In the circumstances I allow one unit for this item, $48. Item 867 was a letter to the Sydney solicitor requesting confirmation of just what affidavits had been served, and a copy of the covering letter by which they were served, which seems unnecessary. There was

also a query about which firm's name was on one of the affidavits, which strikes me as decidedly odd in circumstances where it was the respondent who had witnessed the execution of that affidavit: item 781. The letter also referred to a further affidavit, and discussed updating counsel's brief with all the affidavits. It foreshadowed proposing amendments to the pleading to be settled by counsel, and enquired about the procedure to be followed to achieve that. In the light of the content as a whole I accept that what occurred here was more than just collecting material for the file without good reason. The assessor ought to have allowed a reasonable time, I regard the amount claimed of two units as reasonable, and allow $96 for Item 867.

[128] Item 868 was a reply to the letter, item 867, essentially the Sydney solicitor advising the situation in relation to the affidavits. This was disallowed on the basis that it was appropriate for the New South Wales practitioner to have carriage of the matter. Whether or not that was right, at this stage of the proceeding the respondent had carriage of the matter, and until the applicant changed the arrangement by handing over carriage to the New South Wales solicitor, as it subsequently did, I consider that this letter was properly perused and properly charged for. I allow the one unit claimed which I regard as reasonable. On the other hand, item 869, an email to the other Sydney solicitor, requesting copies of the covering letters and a copy of Mr Lauer's affidavit, does strike me as unnecessary, in circumstances where it was obvious that the two Sydney firms were liaising about issues such as service. I do not disagree with the disallowance by the assessor.

[129] Item 870 was an email attaching some of the exhibits to Mr Lauer's affidavit, presumably sent separately because of the size of the affidavit with the exhibits; like the costs assessor I do not consider it necessary for this affidavit to have been sent to the solicitor in this way. The affidavits had been sent to the Sydney solicitor, at item 829, and the provision of file copies to the other solicitor ought to have been arranged then. Item 879 was for the respondent to peruse an email from the Sydney solicitor to the solicitor for the other side serving one of the affidavits into which the respondent had been copied; a claim of one unit was rejected on the basis that this was not necessary for the conduct of the litigation. However in circumstances where at that time the respondent was the solicitor having the conduct of the litigation, I think it was reasonable then to be informed that service of the affidavit had occurred, and allow the one unit claimed.

[130] Item 882 was for a junior practitioner to prepare a draft of an email to counsel in relation to amendment to the pleadings, disallowed because of the amount allowed at item 890 in respect of the work of the respondent. This was objected to on the ground that the draft was actually prepared by the respondent, but if that was the case it duplicated item 890, in respect of which a sufficient amount has been

allowed. I am not persuaded that this disallowance by the costs assessor was in error. Item 888 was said to be an email to the Sydney solicitor enclosing a draft amended response and amended commercial list statement and asking that they be settled by counsel, with one of the two units claimed being allowed. This seems curious given that item 890 appears to be an email covering essentially the same topic direct to counsel. In these circumstances it is difficult to see that the email (item 888) achieved any useful purpose, and I am certainly not persuaded that more than one unit should be allowed.

[131] Item 910 was perusing a letter from the other side forwarded by email requesting copies of various documents, for which 4.5 units were claimed and one unit allowed. It was said that the time was required to review the 12 issues referred in the other side's letter, but six minutes was not obviously inadequate for perusing a two page letter about disclosure of documents. This decision stands. Item 916 was an email from the respondent to counsel suggesting further amendments to the court documents, with which counsel was happy, disallowed as "remedial". Accepting that it was appropriate for proposed changes to the pleadings to be discussed with counsel, this does not meet the issue raised by the assessor, that these amendments should have been incorporated in the previous version of the amended documents,[44] and accordingly I am not persuaded that the assessor's decision was in error. Item 938 was a phone call to the Sydney solicitor, disallowed because there was no evidence of it on file. That the call occurred is demonstrated by an email sent the following day (item 941) and the Sydney solicitor's account dated 3 August 2012, which has a call on that day for which 0.1 hour is claimed. Plainly no extra time could be claimed for producing a diary note on this occasion, and the call occurred, but I am not persuaded that more than one unit should be allowed.

[132] Item 956 was described as an email to the Sydney solicitor on 23 July 2012, disallowed because there was no evidence on the file. I have been provided with an email from the Sydney solicitor dated 25 July 2012 forwarding a letter from the solicitors opposite, which was said to relate to this item, but this appears to be item 962. I am not persuaded that the assessor's decision on item 956 was in error.

[133] Items 980 and 981 were phone calls to the two Sydney solicitors, for which six and 12 minutes respectively were allowed. It appears from the diary notes that essentially this was an exercise in the respondent ringing the Sydney solicitors to find out what was going on. In the case of the first one he did not talk to the Sydney solicitor but only to someone who worked in the office, and I would characterise that essentially as an extended call leaving a message. In those circumstances the respondent was fortunate to obtain the allowance of one unit. Having looked at the

diary note for the second phone call I am not persuaded that the allowance of 12 minutes was inadequate. Item 982 was a further call to the Sydney solicitor's office, again speaking to someone other than the solicitor; again this is in substance an extended process of leaving a message, and I consider that the respondent was fortunate to obtain the six minutes allowed by the costs assessor. I would not allow any more.

[134] Item 988 was for perusing an email from one of the Sydney solicitors to the other which the respondent had been copied into, for which no charge was allowed, apparently on the basis that it was for information only and it was not reasonable for the client to pay for this. I have not seen the email but the decision of the costs assessor was not obviously erroneous. Item 1003 was a phone call from the Sydney solicitor advising of the outcome of a directions hearing, for which two units were claimed on the basis of the time recorded in the file note. The account from the Sydney solicitor appears to claim three units for the same call, but the assessor allowed only one and having read the file note I think that one was adequate. Item 1016 was a telephone call to the Sydney solicitor's office where in substance a message was left asking for a copy of the order made on the previous day, the substance of which had been conveyed by the email item 1015. I agree with the assessor's conclusion that this was not reasonable for the conduct of the matter, and in any event it was in substance an incomplete call. I would not allow any part of this item.

[135] Item 1020 was an email to the Sydney solicitor of 6 August 2012 for which three units were claimed, and none allowed on the ground that it dealt with errors; it is true that a small part of the letter asks the solicitors to advise the solicitors opposite that there was an error in the amended pleading delivered recently, but otherwise the letter contains a discussion of the steps to be taken with a view to arranging for the mediation. Some allowance in my opinion was clearly reasonable, but I think two units is sufficient and allow $96.00 for this item. Item 1029 was an email attaching the Sydney solicitor's tax invoice for July 2012. This was disallowed on the ground that the Sydney solicitors were sending accounts directly to the client and this was sent for information only. The account and covering letter were addressed to the respondent's firm, though no doubt they were forwarded by the respondent to the client for payment. There is nothing in the material that I have seen to show whether or not the account was also forwarded by the Sydney solicitor directly to the client, and in these circumstances it has not been shown that the factual basis for the decision of the assessor was incorrect, and I am not persuaded that the decision was wrong.

[136] Item 1062 was an email forwarding some amended documents which had been forwarded by the solicitors opposite, sent to the respondent among others, including the client, disallowed as not being necessary for the proceeding and as contrary to the client's instructions. This occurred prior to the date the respondent's instructions were withdrawn, and until that occurred it was reasonable for the respondent to have a copy of the filed documents. I allow one unit for this item. Item 1080 was an email from the Sydney solicitor enclosing a copy of the plaintiff's position paper for the mediation which was under eight pages. This was after the respondent was put in "pause mode";[45] but the costs assessor allowed four units in respect of this, of the seven claimed in total over two days. The respondent said that there were two emails received, but it was not shown that the second contained anything else of substance. I am not persuaded there was any error in favour of the applicant.

[137] Item 1083 was an email from the Sydney solicitor to the other Sydney solicitor who had not been at the mediation and whose instructions had been withdrawn, advising of the result and inviting him to submit his fees. This was copied to the respondent. It does not say anything about the respondent's position, but his instructions were suspended at this time. The material from Mr Johnson did not clearly identify precisely when his instructions were withdrawn, but the respondent's material showed that they were suspended on 31 August 2012, and the respondent was not entitled to charge for perusing this email. It appears the suspension was extended at item 1086, supposedly dated 13 September 2012, though the respondent claimed that on 25 September 2012 he was told his services would be used on occasions.[46]

[138] Item 1087, although dated 13 September 2012 in the schedule, was an email from counsel to the various solicitors on 28 September 2012, advising the outcome of a directions hearing that day, when the matter was fixed for hearing in the following April. Counsel also passed on some discussions he had with counsel opposite about the hearing. This email was sent well after instructions were withdrawn, and no charge can be made. The remaining items challenged, 1101, 1102, 1103, were communications from the solicitor now acting for the applicant after the instructions were withdrawn. I have already dealt with this point and would not allow any of these items. I note that some allowance was made earlier for considering draft submissions at item 1100, but there was no challenge from the applicant to this decision.

Contact with clients

[139] There were a number of items dealing with correspondence or telephone calls with the client, or emails, where generally speaking the complaint is that the costs

assessor has not allowed the full amount of the time documented by the diary notes of the respondent, or otherwise claimed. My impression is that frequently the costs assessor thought the amount of time claimed was excessive for the work done, so far as that could be ascertained on the basis of the material on the file. Sometimes there were particular issues raised on the review[47] but generally there was simply an assertion by the respondent that the full amount of the time claimed ought to have been allowed.

[140] The respondent sought to rely on what was said to be the principle in Pryles & Defteros v Green [1999] WASC 34 at [26], that in an assessment of this nature the practitioner is entitled to challenge for work authorised by the client even though the work might not ordinarily be regarded as necessary or proper for the attainment of justice for the client. The latter is the test in Queensland for standard costs under the UCPR, and is plainly not the test laid down by the Act, but the Act does limit costs by reference to the question of whether it was reasonable to carry out the work and whether or not it was carried out in a reasonable way: Act s 341(1). Obviously if the work is done in response to a specific request from the client[48] that is likely to be relevant and indeed important as to whether it was reasonable to carry out the work, but it is still necessary to consider whether the work has been carried out efficiently, in assessing whether it was carried out in a reasonable way. In this regard, the rate being charged for the practitioner's time is a relevant consideration; the higher the rate of charge, the greater efficiency the client is entitled to expect. I am not persuaded that the costs assessor in performing this assessment was at any point applying the wrong test, even in respect of those items where I consider the conclusion arrived at was erroneous.

[141] It was therefore appropriate for the assessor to consider whether the work had been done with reasonable efficiency, and if the view was formed that it had not been, it was open to the assessor to allow less than the amount claimed. This applies even in respect of time as spent with the client. I note that one of the complaints of Mr Johnston was that the respondent seemed to take a long time in his dealings with him. In respect of a number of items, all I can say is that, having considered the material before me, I am not persuaded that the allowance (if any) made by the costs assessor was incorrect. This applies to items 177, 203, 260, 281, 283, 286, 289, 316, 323, 330, 352, 354, 486, 511, 541, 595, 614, 637, 762, 800, 812, 833, 837, 846, 921, 951, 957 and 1023.

[142] Item 207 was a telephone call with Mr Johnston after a letter of advice had been drafted to send to him, and after a conference to discuss matters. The diary note does record that 50 minutes was spent on the call, but from the note it seems to have been largely spent summarising the letter of advice. It is difficult to see that

anything very useful was done on this occasion and on the whole I think the costs assessor was acting generously in allowing 18 minutes. I would certainly not allow any more. Item 210 was the respondent's apparently comprehensive draft 11 page letter of advice, for which 8 hours was claimed. This was reduced to 3.1 hours on the basis that a junior practitioner had prepared the initial document and this was essentially just settling the letter. The respondent disputed the proposition that another practitioner was involved in drafting the letter, and I have not been able to find anywhere in the Schedule where allowance was made for any time for a practitioner to do a draft of the letter of advice.

[143] There was certainly various notes on particular topics which had been provided by the junior practitioner from time to time. There was evidence of a junior practitioner involved in what was described as compiling advice of evidence of breaches of express and implied obligations at item 129, and item 133 involved working on the Limitation Act, research and advice, again a junior practitioner. The practitioner at item 134 did some further work including preparing the draft advice, but all of this was disallowed by the costs assessor. Item 140 was described as initial advice version 2, for which the rate for the junior practitioner was allowed. It seems there was some initial advice given because there was a response to it from Mr Johnston at item 156, and at item 167 an updated advice document was forwarded by the junior practitioner, but it is not apparent that this involved any significant amount of additional drafting by him. In the circumstances it does appear that this was an erroneous view adopted by the costs assessor. Having concluded that the basis for the assessor's reduction was incorrect, it does not seem to me that there is any proper basis for disallowing any of this time, and I allow eight hours at the rate allowed, $3,600.

[144] Item 220 was in substance drafting a letter to be sent to the solicitors for the other side which ran to eight pages, sent in draft to the client for his approval. The respondent claimed 4.3 hours for this but only 2.3 hours were allowed. It is obvious that a good deal of work went into the draft, and indeed that Mr Johnstone was happy with it: item 222. This was an important letter, but 4.3 hours to draft it seems a long time, particularly in a context where the respondent had recently prepared a letter of advice which should have identified and formulated the background facts and the relevant issues. On the other hand, 2.3 hours strikes me as too short. In the circumstances I consider that the allowance made by the costs assessor was inadequate for this item and the costs assessor must have erred. Doing the best I can, I allow three hours, so item 220 is increased to $1,350.00.

[145] Item 222 was the reply from the client which enclosed a copy of the letter with a number of changes made, for which eight units were claimed and three units

allowed. Some of the notes are minor drafting changes or factual corrections, and on the whole I do not think very much time would have been required to consider the effect of the changes. A statement of environmental effects, a substantial document, was also emailed, but there was no claim for perusing it. On the whole I am not persuaded that the costs assessor's decision on this item was wrong.

[146] Item 225 was an email from Mr Johnston asking whether the letter had been sent, to which the solicitor replied with a short explanation: item 226. The former was disallowed, and one unit was allowed for the latter. It seems to me that if an email is received from the client the solicitor is entitled to charge for reading it even if it does turn out to be a follow-up, but I think the real point here is that there is no reason to think that the receipt of the email item at 225 and the response to it together occupied more than six minutes, so that overall the correct allowance has been made.

[147] Item 234 was drafting a letter on behalf of the other defendants apart from the applicant, for which four hours was claimed and 90 minutes allowed. It was said that it was unnecessary to spend this much time on what was in substance duplicate material, but it does not seem to me that there was that much overlap between the two letters. This work was said to be done over two days with five drafts of the letter being prepared. On the whole I think there was sufficient work specific to this letter to show that the assessor's allowance was wrong, and suspect that the reduction occurred because of some misunderstanding about the extent of the overlap in the two letters. Given the amount allowed under item 220, I consider that 2.5 hours is a reasonable allowance for this item, and increase the amount allowed to $1,200.

[148] Again this letter was sent to the client but I do not seem to have been provided with the client's response on this occasion. It was characterised as drawing attention to typos in the letter, but the respondent said that the changes were more extensive than that and claimed 1.4 hours: item 235. All I can say is that without having seen the email from the client it has not been shown that the assessor's decision was wrong, though I am wary about it. Item 256 was a telephone call disallowed on the basis that there was no contemporaneous documentation. It was submitted that the email at item 255 passing on the letter from the solicitors opposite indicated that there would have been a call, given that item 257 was a letter advising the other side that there were instructions to accept service. There should have been a diary note, and without that I consider that the assessor was entitled to disallow the claim and would not interfere with this decision.

[149] Item 278 was a claim for the respondent to peruse an email sent by the applicant to the solicitor opposite complaining about the way in which the summons had been served, and asking that solicitor to deal with the solicitors in the future.

This was disallowed on the ground there was no evidence on the file. A copy of the letter has been provided to me, I consider that the one unit claimed was justified and allow it.

[150] Item 305 was a telephone call from the client for which 45 minutes was claimed. I was shown a diary note which did contain a reference to 45 minutes, but says very little about the content of the phone call. The schedule said cryptically that subsequent accounts suggest 42 minutes was taken, in which case it is a little surprising that 12 minutes were allowed, but I really do not have sufficient material to show that the assessor's decision was wrong.

[151] Item 351 was perusing an email from the client enclosing a letter to some accountants in Lismore serving on them a subpoena to produce documents, for which two units were claimed but only one unit allowed. Having looked at the material, I accept that there was a certain amount of information in both the letter of service and the schedule to the subpoena which justified perusal, and some consideration, as well as the content of the email as to what was likely to be produced to the other side. Overall I am persuaded that on this occasion the assessor was too harsh, and that the two units claimed were justified.

[152] Item 412 was a claim for two units for a call from the client, disallowed because there was no diary note supporting the claim. One has been shown to me, stating that the client called wanting to discuss the letter from the other side of 20 December 2012, and after talking about some other matters, the respondent refreshed his memory of the letter and then telephoned the client and discussed it, a matter not recorded in detail in the diary note. On the whole two units seems plausible on this material and I allow $96.00.

[153] Item 415 was an email from the client, which was fairly short although it raised some new questions, and enclosed a letter, one page of company minutes and a Deed of Agreement with four pages of substance to be perused. Three units were claimed and two allowed, and on the whole I am not persuaded that the decision that the volume of material was not sufficient to justify the three units claimed was in error. Item 426 was an email from the client enquiring whether a letter proposed by the barrister had in fact been sent to the other side. This was disallowed on the basis that it was not reasonable to charge for a follow-up, but in my opinion if the client makes an enquiry it was reasonable for the respondent to take note of it and to respond to it. The objection of the applicant alleged that the communication was made necessary by the respondent being slow to deal with the recommendations from counsel, but this appears to be a reference to an email from counsel on 17 January (item 429) which was forwarded to the client on 18 January (item 421), to which the client responded the following day: item 422. In my opinion there was no

unreasonable delay between then and 25 January, and the respondent was entitled to charge for this email, $48.

[154] Item 433 claimed one unit for perusing an email from the client and the diary note was produced to me noting that, but the email concerned was not identified. There have of course been a lot of emails from the client which have been claimed for in this bill, and it is not clear that this was not a reference to going back and looking at some old email or emails from the client. The respondent would not ordinarily be entitled to charge for perusing a document for a second time. In circumstances where the respondent has not identified the email that was perused and is therefore unable to show that he has not previously charged for perusing this email, I would not allow this item either, though for a different reason.

[155] Item 475 was a telephone call with the client discussing amendment to certain clauses, for which 12 minutes was claimed and six minutes allowed. I have seen a diary note to confirm this, which also suggests that the issue which prompted the amendment had been raised by the client. In view of that factor, this is not something which would have been explained entirely from scratch, and I am not persuaded that doing the work in a reasonable way required more than six minutes.

[156] Item 477 is identified in the schedule as an incomplete phone call attempting to speak to the client, and was disallowed on that basis. I have seen a diary note however about a phone call from the client on that day in which he enquired about the draft amended response, and was told that it was still with counsel but that the respondent would chase up counsel. The respondent had discussed the amendments with counsel the previous week (item 467) and I do not think there was any great delay on his part. This again seems to me to be a situation where if the client chooses to telephone the solicitor about this matter the solicitor is entitled to charge, and either item 477 has been incorrectly described or this telephone call was left out of the schedule. I allow $48 for this call.

[157] Item 551 was an email to the client for which two units were claimed, disallowed on the ground that there was no evidence on the file to support it. I was shown a brief email which appears to meet this description, and which appears to be responding to some other communication which I cannot identify in the schedule. It was submitted for the respondent that there was a diary note recording that it took 15 minutes to draft this email, in support of a claim for two units. I read the email and it should have taken about 10 seconds to draft. The respondent is entitled to charge $48 for sending it, but a claim to have spent 15 minutes drafting this email is suggestive of significant inefficiency on the part of the respondent.

[158] Item 553 is another email where the claim was disallowed by the costs assessor because there was no evidence of it available. I have been shown the email, and a charge for it is justified, though it just passes on to the client the material received from the Sydney solicitor, and would have been covered by the six minutes allowed for item 552. No adjustment is necessary.

[159] Item 627 is a telephone call from the client discussing various matters, which produced a one-page summary in the diary note, for which 45 minutes was claimed. There does not seem to be a separate claim for drafting the diary note, which I suspect is included in the 45 minutes. The assessor allowed 18 minutes, which on this occasion given the content of the diary note does strike me as inadequate. The schedule suggests that the assessor did not see the note. For that or another reason, I accept that the assessor erred here. On the whole I think a reasonable allowance is 36 minutes, and I will increase the amount allowed by $144.

[160] Item 648 was another telephone call from the client which according to the diary note took 30 minutes, together with 24 minutes for drafting a one-page note of the conversation. The note is quite detailed, and does suggest that a good deal was discussed with the client in this phone call. Eighteen minutes were allowed, particularly given that costs were discussed, but there is no clear reference to costs in the note; there is one passage at the beginning which may be a reference to something to do with costs, but if so it was only a small part of the conversation. On the whole I accept that the assessor has made an inadequate allowance, and I increase this to 36 minutes, a further $144.

[161] Item 701 was an email to the respondent drawing attention to errors in affidavits, for which no charge was allowed. I have not seen the email but no attempt was made to justify this charge on any other basis, and if the email was simply an exercise in pointing out that the solicitor had made mistakes which ought not to have been made in drafting the affidavit, I agree that no costs should be allowed. Item 728 was an email sent by the respondent to Ms Burlinson, which was disallowed. On the previous day the respondent had sent by email a draft of her affidavit, requesting some further information in it, and this email pointed out that there were some additional paragraphs dealing with transfer of shares which had not at that stage been included in the affidavit. Either the affidavit ought to have been at a more advanced stage before it was sent to the client for approval, or this should have been included in the email sent the previous day, for which an allowance was made. I agree with the decision of the assessor not to allow any charge for this second email.

[162] Item 791 was a brief email from the client where the charge was disallowed on the basis that it involved pointing out errors in the affidavit. The email seeks a copy

of an affidavit, I assume the correct affidavit of Mr Lauer, and it points out one error with two paragraphs running together. It also refers to the fact that "both DA's" had now issued, but the respondent claimed this involved providing additional information. It does appear from the email which is item 804 that the second stage was only approved on 7 June 2012, 11 days before this email, and it appears that both approvals were provided by the client under cover of an email on 18 June, item 802. Overall I think there is enough in this email apart from pointing out a mistake to justify the respondent's charging for it, and I allow one unit, $48. Item 799 was a telephone call from a witness where 24 minutes was claimed for the call and 12 minutes for preparing a diary note; the assessor allowed 18 minutes, which in the light of the content of the diary note, strikes me as too short,[49] but it seems to me that a good deal of the note must have been written during the call, and I allow 24 minutes overall, an increase of $48.

[163] Because the two DA consents had issued something said in the affidavit of Mr Lauer sworn 15 June 2012, to the effect that neither of these approvals had been issued, had to be corrected. The respondent therefore emailed Mr Lauer pointing this out, and asking him to make contact: item 804. This email was disallowed on the basis that the respondent had already been told that Mr Lauer would be travelling abroad, but item 541 which was referred to was a conversation when the client merely said that he was going away in June 2012. It may be that Mr Lauer had access to emails even while he was away. Although the affidavit was wrong, Mr Lauer had not detected this mistake before he executed the affidavit. In my opinion the email was appropriate, but I would allow only one unit for it, $48.

[164] In the event Mr Lauer did not respond, and the respondent prepared an affidavit dealing with this matter for someone else, a copy of which was forwarded by email to the client on 20 June 2012, item 808, disallowed by the assessor "given subsequent claims". I have some difficulty in understanding the exact basis upon which this email was disallowed; it may be that this work was in substance duplicated by other emails that I cannot quickly identify in this schedule, and the assessor disallowed an early item rather than a later one. If so, it would have been better if the assessor had indicated which item was allowed as covering this work. On the face of it the email was appropriate, and there appears to have been a response from the client that day: item 820. In my opinion the respondent was entitled to charge for item 808, but having read the email I allow only one unit.

[165] There was a phone call from the proposed deponent, item 811, where only six minutes was allowed on the ground that this was remedial action given that two of the other deponents were overseas. That is true, but as I have explained it seems that the need to correct the information of Mr Lauer's affidavit arose because of

matters that the respondent had not been told of at the time it was executed. In my opinion the respondent was entitled to charge for this, and his diary note records 18 minutes for the phone call, so for item 811 I allow a further $96.

[166] Item 844 was a telephone call from Mr van Iersel for which 18 minutes was claimed and six minutes allowed. Although the diary note is short it does state that the call took 18 minutes, and it may have been reduced on the basis that the diary note was not seen by the costs assessor. But the note does not clearly show that the call would have occupied more than six minutes, and overall there is not a sufficient basis to interfere with the decision of the assessor. Item 855 was a relatively long one-page email to the Sydney solicitors giving details of the mechanics for filing and serving the affidavits. Eighteen minutes was allowed but at the rate for a more junior practitioner, apparently on the basis that there was no contemporaneous material which supported the respondent's claim to be author. I was shown on the review the email which on its face indicates that it was sent by the respondent, and, since three units was apparently accepted, and I think was reasonable, the amount allowed for this item should go up by the difference in the rates, $36.

[167] Item 856 was an email from the client in response to an email the same day, item 852, which I have not seen, but which was apparently disallowed because it dealt with the question of costs, particularly the costs of making amendments to the pleadings. The email deals with some factual matters about what has been occurring with affidavits, contains a three-line paragraph discussing the question of costs very briefly, and then speaks at length about why it may be appropriate to amend the pleadings, in fairly general terms. It was submitted for the respondent that it did not relate to costs and that there were comments directed to matters of importance, and that it was necessary to peruse the advice given earlier by Mr Doyle QC in order to respond. Part of the response does refer to the context in which a particular comment in that advice, presumably quoted in the earlier email, was explained, but I doubt it was necessary to peruse the entire advice for that purpose. Overall this email does appear to be responding to a complaint about costs from the client, and I am not persuaded that the conclusion of the costs assessor was incorrect.

[168] The client replied to this email on 25 June 2012: item 857, for which again no costs were allowed. It does appear that the email involves an instruction not to pursue a particular point; I do not interpret it as an instruction not to make any amendments to pleadings at all, which is how the costs assessor appears to have interpreted it. Nevertheless, this does appear to be a continuation of an argument about the cost of the litigation generally, and for that reason was properly

disallowed. I do not interpret it as an instruction not to brief counsel, as suggested in the outline for the respondent.

[169] Item 858 was a further reply by the respondent, pointing out that the proposed amendments went further than in relation to the particular point raised in the email item 857, and arguing that those other amendments should be made anyway. Although this email came up in the course of a complaint about the costs of the proceedings, it is in substance an advice as to the desirability of making a further amendment to the pleadings, and on that basis I consider that the respondent was entitled a charge for this. I did not understand the emails that I have seen as instructions not to amend pleadings at all, but assuming that they were if the respondent was of the opinion that the pleadings ought to be amended it was appropriate for the respondent to give advice to that effect to the client, at least to give the client the opportunity to reconsider that decision. On the other hand, I consider that one unit was sufficient and I would allow $48 for item 858.

[170] Item 859 was said to be an email to the client which was disallowed as relating to costs; the response was an assertion that this email provided further details of reasons for pleadings to be amended, but I have not been provided with a copy of the email. It sounds as though the respondent is addressing a different email from the costs assessor, but, if this was simply an exercise in enlarging on the advice in item 858, it ought not to have been necessary to send a separate email and I would not allow it for that reason anyway. This decision stands.

[171] Item 871 was a short email from the client seeking confirmation that the affidavit and exhibits were all ready to be served by tomorrow. This was disallowed on the ground that a follow up was not reasonably charged, but it seems to me that if the client specifically asks a question of this nature the solicitor is entitled to charge for reading it and replying to it. It seems that in fact it was the Sydney solicitors who responded to this directly to the client. For item 871 I allow $48. Item 873 was a response from one of the Sydney solicitors direct to the client, copied to the respondent, advising of the situation as to service. This was disallowed on the ground that it was a follow up, but it was essentially just a communication from the Sydney solicitors to the client which the respondent happened to be copied into, and, in circumstances where at that time the respondent still had carriage of the matter in New South Wales, it was reasonable for him to be informed about the situation in relation to service of the affidavits. I allow one unit for this email, $48.

[172] Item 893 was a short email from the client pointing out three things to be changed in amended pleadings, one of which was indicating that certain shares were held in trust jointly by himself and his wife. This was disallowed as dealing with errors, but the respondent submitted that the fact that the shares were held in that

way had not previously been advised, and in those circumstances in my opinion the respondent was entitled to charge for this, and I allow $48. An email from the client at item 894 was disallowed as dealing with costs. It was submitted for the respondent that this related to other matters, but no useful information or instructions were provided in other respects, and in my opinion this was essentially a communication in relation to costs, and the assessor's decision was correct. Item 945 was a brief email which was a follow up from the client, and was disallowed on that basis. It may appear that there was no news to pass on to the client, but on the whole it seems to me that the amount of work associated with this email and any response would have been trivial unless the respondent really had been running late in passing on relevant information to the client, and on that basis I would not interfere with the assessor's decision.

[173] Item 950 was an email from the respondent to the client attaching PDF copies of documents, for which three units were claimed on the basis that this involved locating and scanning the affidavits and preparing them for transmission in this way. The assessor allowed one unit which I consider was sufficient given that locating and scanning the affidavits was administrative work. Item 1017 was a long telephone call to the client said to have taken 83 minutes, during which a large number of things appear to have been discussed. On the basis of the respondent's diary note, there was a general discussion of the position in relation to the action, bearing in mind both sides' affidavit material, and some discussion of the approach to settlement and the approach to the mediation. It is true that a couple of fairly minor errors were mentioned and noted in the diary note, but overall it appears to be a fairly long and detailed discussion about the prospects of success in the matter in the light of the pleadings and affidavits. There is no obvious reference to costs. It may be that the costs assessor had not seen this diary note. In any event, it seems to me that this was clearly chargeable time, though the length of time claimed for the notes seems too great. I allow 90 minutes, $720.

[174] Item 1023 was a telephone call to the client for which four units were claimed, and three allowed. There is a diary note with a time 24 minutes on it, and the same day the respondent sent an email item 1019 which stated that they had discussed at length various matters that morning. The reply the next day, item 1027, referred to a summary of "all the knots Freeman has tied himself up in ... most of which we spoke of on the phone" which also suggests a call of some length. In this case there seems to be reasonable support for the amount claimed, and the reduction looks arbitrary. Again it may be that the assessor had not seen the diary note. I increase item 1023 to 4 units, an extra $48.00.

[175] Item 1027 was an email from the client sent 7 August 2012, not 6 August as stated in the schedule, where it was characterised as an instruction to do no further work until the mediation. It appears to be the reply to an email sent to the client on 6 August 2012 with copies of the directions order made on 3 August 2012, and registered Memorandum Q860000, item 1019, incorrectly dated 5 August. Among other things that stated that "there has not been any order made for the parties to list their documents." The relevant part of the reply, item 1027, was: "In the meantime, since we have not been presented with any disclosure directions I instruct that you not do any work on this until we know the outcome of the mediation." In this context, I interpret that as an instruction not to do work on disclosure until after the mediation. That this is the objective meaning is in my opinion reinforced by the fact that the client went on to request that the respondent provide a summary in writing which had been mentioned the previous day as something being worked on, so that the client could use it as a resource. That was an instruction to complete work on the process of putting that summary into writing, and to forward it. I do not consider that the wording of the subject line "Pause for breath" has the effect of extending the natural meaning of the body of the email.

[176] As well, there was no instruction given at that stage that the respondent was not to attend the mediation, although the email of 6 August had expressed the respondent's intention to attend the mediation. That instruction came in an email on 18 August 2012, apparently item 1068.[50] The wording of that email was consistent with that instruction having been given then for the first time. That email does not contain any instruction to stop work generally. So far as I have seen, that was first given in an email sent on 31 August 2012,[51] which I cannot identify in the schedule, and which confirmed the date of the mediation, and that the respondent was not to attend. The respondent's instructions were therefore suspended at that point. After the mediation failed, the client on 18 September 2012 by a further email instructed that the respondent was to "remain in pause mode".[52] That in terms extended the suspension, but it was never lifted and was tantamount to the withdrawal of his instructions.

[177] Items 1024 and 1025 related to the preparation of a three page critique of the Freeman affidavit and having it typed up, for which 1 hour was claimed, while item 1026 was a note collating evidence from the Freeman affidavits, for which 1.3 hours was claimed. These were disallowed, on the grounds that they duplicated earlier work, and were premature. This was said to be the work covered by the request from the client in the email item 1027 to provide the typed up summary to use as a resource. That I consider amounted to the adoption of this work by the client, so that the respondent was entitled to charge for it and for providing it, but there is the difficulty that I cannot see that this material ever was provided to the client, or to the

Sydney solicitor who took over conduct of the matter. The argument that the client, having requested this resource, had to pay for it, cannot succeed if the resource was never provided, and, in circumstances where the respondent has not shown that it was, these claims cannot succeed.

[178] Item 1033 was a claim for a telephone call with the Sydney solicitor regarding billing and also discussing the mediation, disallowed on the basis that the discussion was in relation to the question of costs. It was submitted for the respondent that the discussion also related to mediation, but in circumstances where there had been no instructions given prior to this that the respondent was to be involved in the mediation[53] I do not consider that this justified any charge to the client, and agree with the decision of the costs assessor. There were then a series of items 1035-1044, and 1049-1060, for which four hours was claimed, all of which was disallowed on the basis that the client had instructed the respondent not to do further work. As I have said, I do not consider that there had been any instruction not to do further work until 31 August, but the real question is whether this work was reasonably done at this time. Given that the matter was shortly to go to mediation, this could not be justified as preparation for trial, and there had been no instruction for the respondent to attend the mediation. Even if, prior to 18 August 2012, he was proceeding on the basis that he would be attending the mediation, and preparing for it, he had not been instructed to attend a mediation which was to be held in Sydney, and I do not consider that it was reasonable for him to be preparing to attend in the absence of such instructions. The decision of the assessor on these items was correct.

[179] The same really applies to the phone call to the client item 1064. Item 1065 was a telephone discussion with the client about summary judgment, for which eight units were claimed and six allowed. I consider that if there was any error in this item it was allowing the time that was allowed, since I consider it clearly inappropriate to be contemplating summary judgment prior to the mediation. The respondent claimed one unit for an email on 5 September 2012 acknowledging his instructions in an email the previous day from the client to refrain from doing further work: item 1082. Although I agree it was appropriate for the respondent to acknowledge the client's email instructing not to do further work, in my opinion the one unit allowed for item 1081 in respect of the email conveying those instructions was sufficient to cover the reply and I would not allow any additional charge for item 1082. Given the instructions to cease work, I consider that the work in items 1084, 1086 (to the extent that it did not involve a discussion about costs) and 1091 was essentially done on a speculative basis, and in circumstances where the instructions were not renewed there is no entitlement to charge for this work. I am not persuaded that there was a specific request from the client to undertake the work done in any of these items.

Other matters

[180] There were complaints about the disallowance of a number of items under the heading of correspondence with Neive O'Donoghue Office and Hawthorn, Cuppaidge & Badgery Office. These were two firm names under which the respondent practised, having acquired the practice of John Neive O'Donoghue from Mr O'Donoghue, who remained as a consultant.[54] Mr O'Donoghue had been the solicitor for the client in the past, and he remained as a consultant and was involved to some extent in this matter, and I have made some allowance for his time in briefing the respondent on what happened in the past when he was involved in litigation for the client. I do not consider however that the respondent was entitled to charge more because he was representing the applicant under one firm name and the other defendants under another firm name. I have already said something about this matter in respect of the number of items dealt with under the heading conferences or attendances.

[181] These include some earlier discussions between Mr O'Donoghue and the respondent, and an early conference with the client, in respect of which Mr O'Donoghue's claims had been allowed but the respondent's claims disallowed as duplication: item 24. I suspect that this might have been a conference where it was appropriate for both solicitors to be present, and to charge, but in circumstances where I have already allowed both solicitors to charge in respect of another significant conference (item 122), and I do not think that it was reasonable for the client to pay for a repeat of such conferences,[55] I would not interfere with the disallowance of the second solicitor in respect of this earlier conference.[56]

[182] One of the items raised in this section, item 318, has already been dealt with the heading of correspondence with New South Wales lawyers. This is another instance where the same item has been raised inappropriately more than once in this schedule. Some of the other items relate to charges for continuing work by Mr O'Donoghue, or for the respondent to peruse the results of that work, in a way which does not seem to be obviously justified by his involvement in the matter, or to have been expressly or impliedly requested by the client. Overall I think it is sufficient to say that I have considered the matters raised in the respondent's document, but am not persuaded to change any of the decisions of the cost assessor in relation to these matters.

[183] There were complaints about the disallowance of some items in relation to the preparation of the brief for counsel. Items 274 and 285 each claimed four hours for preparing the brief, and each was disallowed on the basis of duplication with later claims, noting the existence of an existing brief which could be updated. The work was actually done by a junior practitioner rather than the respondent personally.

There was also a draft memorandum to counsel prepared at item 277, which was also disallowed on the grounds that this was allowed subsequently. Again, I find it unhelpful to be told that particular work has been covered by an allowance made under some other item where that item is not identified, but this was not provided by the assessor as reasons.

[184] That is particularly acute in this case, where I have not been able to identify an item where there has been a charge for updating the existing brief or preparing instructions to counsel. Item 298 suggests that what actually happened ultimately was that a brief was prepared for the Sydney solicitors as agents, and they then put together the actual brief to counsel, and it was submitted that item 285 related to the preparation of the brief to the Sydney solicitors. It appears that the costs assessor was not distinguishing between a brief to the solicitors and the brief to counsel, but what has been allowed for preparation of the brief at item 298 was three hours for the respondent and no time for the more junior practitioner.

[185] This does strike me as unduly restrictive, even in circumstances where there was an existing brief which could be built on; the schedule indicates the brief ran to two volumes with a total of 486 pages. The allowance for the respondent seems reasonable, but it does seem to me that the involvement of a more junior practitioner as well in actually assembling material and preparing the brief was reasonable, and in the circumstances I allow a further four hours for that, which can be conveniently allowed under item 285. Item 798 was instructions to counsel for which the respondent claimed 1.25 hours, and 42 minutes was allowed. The instructions were fairly detailed, and involve collecting together various issues which had been identified in relation to amendment to the pleadings up until that time. Having looked at them my view is that the allowance of 42 minutes was clearly inadequate, but the original claim was too long. I substitute a period of one hour, an increase of $144.

[186] On 21 June the respondent went to the Supreme Court Registry to view the file for the 2004 proceedings, but when he got there he was told that the file had been sent to the wrong registry and so it was not available: item 831. The claim was significantly reduced, though that does seem hard in circumstances where he was not expected to know in advance that that had occurred; there had been a telephone call the previous day to the Registry in relation to the availability of the file: item 830. The file was obtained by the Registry later in the day, but he was not able to inspect it then because the Registry was closed due to a bomb threat: item 832, allowed. It appears that ultimately what happened was that copies of documents on the file were obtained on another visit to the Supreme Court Registry on that day, item 842 which was also reduced by the assessor. It does occur to me

that on the second occasion it ought to have been sufficient to have sent a clerk or other junior practitioner and for this reason I would not interfere with the decision of the costs assessor in relation to item 842. In relation to the earlier item, although I have some sympathy with the respondent's position, the situation is analogous to an incomplete telephone call, in that no legal service was provided, and therefore I think the respondent was not entitled to charge at all. I will not increase the amount allowed by the assessor.

Conclusion

[187] For the reasons given above I have changed the decision of the costs assessor by allowing in respect of the following items the following additional amounts:

Item No.	Amount
122	$2,925.00
143	$1,632.00
170	$48.00
183	$360.00
210	$2,205.00
220	$294.00
234	$480.00
278	$48.00
284	$96.00
285	$960.00
349	$336.00
351	$48.00
360	$48.00
364	$192.00

371	$48.00
384	$96.00
412	$96.00
426	$48.00
477	$48.00
492	$48.00
550	$576.00
551	$48.00
558	$816.00
571	$480.00
574	$480.00
577	$1,104.00
627	$144.00
640	$2,880.00
648	$144.00
761	$84.00
777	$96.00
781	$384.00
791	$48.00
798	$144.00
799	$48.00
804	$48.00

808	$48.00
811	$96.00
855	$36.00
858	$48.00
863	$48.00
867	$96.00
868	$48.00
871	$48.00
873	$48.00
879	$48.00
893	$48.00
938	$48.00
1008	$1,152.00
1017	$720.00
1020	$96.00
1023	$48.00
1062	$48.00
TOTAL	$20,304.00

[188] Accordingly the professional costs assessed at $106,378.00 should be increased to $126,682.00; there is no adjustment to be made to disbursements. Assuming that this does not alter the outcome in relation to the payment of the assessor's fees and the applicant's costs of the assessment, the balance payable by the respondent to the applicant would then be reduced from $204,739.19 to $184,435.19. I shall however invite submissions from the parties as to the appropriate order to reflect the conclusions set out above, as to the costs of the

review, and as to what should be done with the Deputy Registrar's order of 10 March 2014.

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[1] Affidavit of Johnston filed 9 July 2013 ("Affidavit 1"), Exhibit ATJ-01.

[2] Affidavit 1, para 14; affidavit of Johnston filed 14 November 2013 ("Affidavit 2"), para 32; item 1081. I address the date below.

[3] Affidavit 1, para 11, 13; Exhibit ATJ-02. They cover work done from 24 March 2011 to 22 August 2012.

[4] Affidavit of Smith filed 25 September 2013 para 32, Exhibit KFS-23.

[5] *Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2011] QDC 5 at [21]- [30]; *Tabtill No 2 Pty Ltd v DLA Phillips Fox (a firm)* [2012] QSC 115 at [78]- [84].

[6] Affidavit 1 para 15; Exhibit AJT-03.

[7] This was at the suggestion of the applicant's solicitor, that the costs assessor perform the assessment from the file: affidavit 1, Exhibit ATJ-08. It was done to save costs, but I think it has increased complexity in the long run.

[8] Filed on 7 April 2014. There were also reasons filed on 9 April 2014, dealing specifically with the decision on items 656 and 681.

[9] See generally Affidavit 2 para 4. I also obtained information from documents prepared by the respondent at the time.

[10] Ibid, para 13.

[11] There was some dispute as to this before me, which I will deal with more fully below.

[12] Affidavit 2, para 40.

[13] This was an amended version of a document which was filed on 13 June 2014 pursuant to the order of the other judge dated 16 May 2014.

[14] Some of the research items occurred prior to the time when the costs agreement was entered into. The agreement does not purport to be retrospective, but in the absence of a specific agreement the position remains in substance the same, that the respondent is only entitled to charge for work that has been requested by the client.

[15] The applicant's position was that the respondent had conducted research on his own initiative: Affidavit 1, para 32(a)(v).

[16] Solicitors' charges for failed attempts to attend on the client have long been the stuff of legal humour: see e.g. Megarry, RE, "Miscellany at Law", (Stevens & Sons Ltd, 1955) p 259; Leon, H.C. ("Henry Cecil"), "Daughters-in-Law", (Michael Joseph, 1961) chapter 10.

[17] Including items 267, 288, 315, 325, 383, 477, 528, 591-3, 776, 807, 810, 925, 930, 975, 986, 828, 1032.

[18] A diary note was produced to me, one page of analysis of the summons.

[19] After sending them to counsel: item 889.

[20] Item 656; I have read the reasons of the assessor in relation to this item.

[21] This was also disallowed, on the ground that it duplicated earlier claims.

[22] This point is considered at [79], [80] below.

[23] The affidavit of Lauer was prepared and signed stating that neither approval had issued, but the client informed the respondent on 18 June that both had: see emails 18 June 2012 (item 791) and 20 June 2012: item 804.

[24] In March 2011: Affidavit of respondent filed 20 November 2013 para 4.

[25] At this stage Mr O'Donoghue still had management of the file: Affidavit of the respondent filed 20 November 2013 para 8(a). The respondent took over after the next conference.

[26] It emerged that there were various occasions on which such an allowance could have been made, but I do not think it was allowed anywhere else, and for convenience allow it here.

[27] As claimed by the respondent, affidavit filed 20 November 2013 para 8(ba).

[28] Affidavit 2 para 28(b).

[29] Mr Johnston's comment at paragraph 32(b)(i) of Affidavit 2 seems to have been a misunderstanding.

[30] Affidavit 2 paragraph 32; Affidavit of respondent filed 19 September 2013 Exhibit PLC4, 31 August 2012. See further below.

[31] Affidavit 1 Exhibit ATJ-02 p 44.

[32] Affidavit 2 para 28(b); affidavit 1 Exhibit ATJ-02 p 44.

[33] I was told it was 17 September 2012: p 3-71. See also item 1083.

[34] He was instructed not to attend on 18 August 2012: see below.

[35] This argument was also advanced in relation to charges for dealings with counsel where counsel's fees were not challenged; it was also wrong there, for similar reasons.

[36] Or suspended; I do not think it makes any difference in principle.

[37] Assuming that was the case; the entry in the schedule does not suggest this to me, rather that this was the charge for actually sending the letter to the other side.

[38] For his view of his position, see affidavit of Johns filed 13 November 2013, para 10.

[39] Which were not provided in the documents for this review.

[40] See affidavit of respondent filed 19 September 2013, para 3.

[41] Apparently item 480, on 17 February 2012.

[42] As in fact occurred: item 881.

[43] The argument is Exhibit ATJ-01 to Affidavit 1; see clause 3.1. There were a couple of examples of fractions of units being claimed, such as 812 and 910. See also 623.

[44] There was no evidence that this was in response to some change in the opposing case, or the discovery of additional relevant material.

[45] On 31 August 2012; affidavit of respondent filed 19 September 2013, Exhibit PLC-4. It was well after he was told he would not be at the mediation: item 1061.

[46] Affidavit of respondent filed 19 September 2013 para 14(j).

[47] This part of the review depends on the submissions in the particulars of the objection document filed 15 July 2014; it was not dealt with in oral submissions.

[48] This was not shown in respect of any item raised in the review.

[49] Again, the schedule suggests that the assessor may not have seen the diary note.

[50] Mr Johnson said only that this instruction was given after he received the email of 6 August 2012: Affidavit 2, para 29(c). I have not identified an instruction earlier that 18 August.

[51] Affidavit of respondent filed 19 September 2013 Exhibit PLC-4.

[52] *Ibid*.

[53] There was no instruction not to attend the mediation until 18 August, as discussed above.

[54] Affidavit of respondent filed 20 November 2013 para 4, 5.

[55] This also covers the work claimed under item 20.

[56] This is in a sense an unsatisfactory outcome, since it would be better to allow earlier work and disallow later, but it is the result of the way the respondent's case was presented.