

## **COSTS UPDATE**

The Hon Justice Paul Brereton, RFD<sup>1</sup>  
Keynote address to the New South Wales State Legal Conference  
Friday, 28 March 2008

### **Introduction**

In this paper I propose to address three topics in the field of legal costs, which appear to me to be of current interest and importance, namely:

- The nature and extent of the role of the costs assessor;
- Overcharging; and
- Interest on costs.

### **The nature and extent of the costs assessor's role**

Since the substitution in 1994 of assessment of costs by assessors for the former process of taxation by taxing officers of the court, there has been a measure of controversy as to the role of the costs assessor and the extent of the assessor's powers, and in particular whether an assessor can construe a costs agreement or retainer, or decide whether there was a retainer.

The relevant statutory provisions include the following.

By (NSW) *Legal Profession Act* 2004, s 4, *legal costs* is defined to mean "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services including disbursements but not including interest". By s 349A, *client* is defined to mean "a person to whom or for whom legal services are or have been provided".

Section 350 (Application by client or third party payers for costs assessment) provides:

- (1) A client may apply to the Manager, Costs Assessment for an assessment of the whole or any part of legal costs.
- (2) A third party payer may apply to a costs assessor for an assessment of the whole or any part of legal costs payable by the third party payer.

Section 352 (Application for costs assessment by law practice giving bill) provides:

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<sup>1</sup> A Judge of the Supreme Court of New South Wales; Chair of the Cost Assessment Users Group.

- (1) A law practice that has given a bill may apply to the Manager, Costs Assessment for an assessment of the whole or any part of the legal costs to which the bill relates.

Section 353(1) (Application for assessment of party/party costs) provides:

- (1) A person who has paid or is liable to pay, or who is entitled to receive or who has received, costs as a result of an order for the payment of an unspecified amount of costs made by a court or a tribunal may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs.

Section 357 (Referral of matters to costs assessors) provides:

- (1) The Manager, Costs Assessment is to refer each application for costs assessment to a costs assessor to be dealt with under this Division.

Section 359 (Consideration of applications by costs assessors) provides:

- (1) A costs assessor must not determine an application for assessment unless the costs assessor:
  - (a) has given both the applicant and any law practice or client or other person concerned a reasonable opportunity to make written submissions to the costs assessor in relation to the application, and
  - (b) has given due consideration to any submissions so made.
- (2) In considering an application, a costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit.
- (3) For the purposes of determining an application for assessment or exercising any other function, a costs assessor may determine any of the following:
  - (a) whether or not disclosure has been made in accordance with Division 3 (Costs disclosure) and whether or not it was reasonably practicable to disclose any matter required to be disclosed under Division 3,
  - (b) whether a costs agreement exists, and its terms.

Section 361 (Assessment of costs by reference to costs agreement) provides:

- (1) A costs assessor must assess the amount of any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if:
  - (a) a relevant provision of the costs agreement specifies the amount, or a rate or other means for calculating the amount, of the costs, and
  - (b) the agreement has not been set aside under section 328 (Setting aside costs agreements),unless the assessor is satisfied:

- (c) that the agreement does not comply in a material respect with any applicable disclosure requirements of Division 3 (Costs disclosure), or
  - (d) that Division 5 (Costs agreements) precludes the law practice concerned from recovering the amount of the costs, or
  - (e) that the parties otherwise agree.
- (2) The costs assessor is not required to initiate an examination of the matters referred to in subsection (1) (c) and (d).

Section 363 (Criteria for costs assessment) provides:

- (1) In conducting an assessment of legal costs, the costs assessor must consider:
  - (a) whether or not it was reasonable to carry out the work to which the legal costs relate, and
  - (b) whether or not the work was carried out in a reasonable manner, and
  - (c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 361 or 362 applies to any disputed costs.
- (2) In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to any or all of the following matters:
  - (a) whether the law practice and any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf complied with any relevant legislation or legal profession rules,
  - (b) any disclosures made by the law practice under Division 3 (Costs disclosure),
  - (c) any relevant advertisement as to:
    - (i) the law practice's costs, or
    - (ii) the skills of the law practice or of any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf,
  - (d) (Repealed)
  - (e) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
  - (f) the retainer and whether the work done was within the scope of the retainer,
  - (g) the complexity, novelty or difficulty of the matter,
  - (h) the quality of the work done,
  - (i) the place where, and circumstances in which, the legal services were provided,
  - (j) the time within which the work was required to be done,

- (k) any other relevant matter.

Section 364 (Assessment of costs—costs ordered by court or tribunal) provides:

- (1) In conducting an assessment of legal costs payable as a result of an order made by a court or tribunal, the costs assessor must consider:
  - (a) whether or not it was reasonable to carry out the work to which the costs relate, and
  - (b) whether or not the work was carried out in a reasonable manner, and
  - (c) what is a fair and reasonable amount of costs for the work concerned.
- (2) In considering what is a fair and reasonable amount of legal costs, a costs assessor may have regard to any or all of the following matters:
  - (a) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
  - (b) the complexity, novelty or difficulty of the matter,
  - (c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,
  - (d) the place where and circumstances in which the legal services were provided,
  - (e) the time within which the work was required to be done,
  - (f) the outcome of the matter.
- (3) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs and any relevant regulations.
- (4) If a court or a tribunal has ordered that costs are to be assessed on an indemnity basis, the costs assessor must assess the costs on that basis, having regard to any relevant rules of the court or tribunal and relevant regulations.

Section 368 (Certificate as to determination) provides:

- (1) On making a determination of costs referred to in Subdivision 2 or 3 of this Division, a costs assessor is to issue a certificate that sets out the determination.
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- (4) In the case of an amount of costs that has been paid, the amount (if any) by which the amount paid exceeds the amount specified in any such certificate may be recovered as a debt in a court of competent jurisdiction.
- (5) In the case of an amount of costs that has not been paid, the certificate is, on the filing of the certificate in the office or registry of

a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs, and the rate of any interest payable in respect of that amount of costs is the rate of interest in the court in which the certificate is filed.

The effect of the provisions to which I have referred is that, subject to such rights of review or appeal as the legislation provides, a costs assessor's determination establishes a legally enforceable liability in respect of the subject legal costs. Where a decision-maker is given authority to make a decision, that authority ordinarily carries with it the authority to decide all anterior issues necessary to be resolved, for the purposes of the ultimate decision. Here, the assessor's ultimate decision is the "fair and reasonable amount" of costs payable by the client for the legal services rendered (in the case of a practitioner/client assessment), or under an order (in the case of a party/party assessment). That necessarily imports, in the case of a practitioner/client assessment, under any relevant costs agreement *properly construed*, and in the case of a party/party assessment, under the order *properly construed*. Moreover, s 359(3)(b) expressly empowers a costs assessor to decide whether a costs agreement exists, and its terms. Section 363(f) includes amongst the relevant considerations "the retainer and whether the work done was within the scope of the retainer". The indicia in the statute favour the view that a costs assessor may decide questions of liability, including construction of the relevant order or costs agreement.

There are, however, cases that have suggested that the role of the costs assessor is a limited one, involving only the determination of the reasonableness as a matter of quantum of costs for work done, and not the underlying entitlement to charge. In *Muriniti v Lyons*,<sup>2</sup> Dunford J (at [54]-[59]), said:

[54] Under the process introduced by the 1993 Act, the assessment of costs is entrusted to "assessors" appointed by the Chief Justice being barristers or solicitors of at least 5 years standing. An "assessor" is one who assesses, taxes or estimates the value of property (or work), whilst "assess" means to "fix amount" or "estimate value": Concise Oxford Dictionary, 6th ed (1976). See also Macquarie Dictionary (1981) at 141-2. In construing a covenant in a lease, "assessed" was said to mean "reckoned on the value": *Floyd v Lyons* [1897] 1 Ch 633. The essential quality of such an assessor is to fix an amount or to put a value on something such as property or services. There is another type of assessor such as nautical assessors in Admiralty cases, called in to assist and advise the judge on technical matters, but without any deliberative voice: Jowitt: Dictionary of English Law (1959) at 162; but such assessors are irrelevant to the present discussions.

[55] A Costs Assessor under the Act is not an officer of the Court when acting as such; s 208(4), is not part of the Supreme Court and has no power to take sworn evidence or resolve conflicts of evidence: *Ryan v Hansen* [2000] NSWSC 354, 49 NSWLR 184.

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<sup>2</sup> [2004] NSWSC 135.

[56] Having regard to the status and powers of Costs Assessors and the ordinary meaning of the word “assessor”, I am satisfied that the powers of Costs Assessors are limited to determining the value of the work done or services rendered in circumstances where there is no dispute that costs are payable and the only issue is as to the amount. It is no part of their function to determine whether or when such costs are payable. The matters set out in s 208A which they must, and in s 208B which they may, take into account are all matters relevant to putting a value on the work done or services rendered and the fairness or justice of the amount claimed; but are not matters which relate to the terms of a costs agreement (particularly if oral) and whether any conditions precedent to payment have been fulfilled. The determination of such questions requires the reception of sworn evidence, which can be tested by cross-examination, and an assessment of such evidence. Costs Assessors do not have the power to deal with such matters.

[57] For similar reasons it has been held that a Costs Assessor has no power to hear a cross-claim by a client against a solicitor based on negligence, nor to award damages: *Ryan v Hansen*, supra per Kirby J; or to make an assessment when no costs are presently due and payable: *Lace v Younan* [1999] NSWSC 1072 per Master Harrison (no bill of costs rendered); *Baker v Kearney* [2002] NSWSC 746 per Master Malpass (judgment in District Court that applicant for assessment not entitled to costs). I am therefore satisfied that on being notified of the dispute as to the plaintiff’s liability to pay the costs, the Costs Assessor should have declined to make a determination or issued a certificate unless and until such issue was resolved.

[58] It could never have been the intention of the legislature that where the liability for a debt for costs was disputed, a party to the dispute could render the other party to the dispute liable for the debt without any judicial determination of the disputed issues between them simply by having the value of the work assessed by a Costs Assessor and the certificate of determination registered as a judgment in a court of competent jurisdiction. Yet this is precisely what the defendant has sought to do in the present case.

[59] In his judgment of 14 July 2000 in no 12152/99 at [13] Davies AJ appears to have taken a different view and indicated that the plaintiff’s contentions as to the agreement and otherwise were matters to be determined in the first instance by the Costs Assessor and then be dealt with by this Court on appeal pursuant to s 208L or 208M, although para [4] of the judgment suggests that the issue now under consideration was not raised in that case. With all respect to his Honour, for the reasons already given, I take a different view.

More recently, in the first-instance decision in *Hall Chadwick v Doyle*,<sup>3</sup> Rothman J expressed a similar view (at [72]-[80]):

Function of a Costs Assessor

[72] Seemingly overlooked in the submissions before the Court was the role and function of a Costs Assessor. A Costs Assessor is not an officer of the Court. A costs assessment, as made clear earlier, involves the adjudication by the Costs Assessor of what is fair and reasonable. It

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<sup>3</sup> [2006] NSWSC 1195.

does not determine the lawfulness or otherwise of a bill of costs or the costs agreement that underpins it. An amendment to the bill of costs made by the Costs Assessor is predicated upon the satisfaction of the Assessor that the disputed costs are unfair or unreasonable. In so doing, the Costs Assessor may have regard to the criteria adumbrated in s208B of the 1987 Act. That of course includes the relevant costs agreement but s208B lists the additional matters to be considered by the Costs Assessor over and above those listed in s208A of the 1987 Act. Section 208B allows the Costs Assessor to determine whether a term of a particular costs agreement is unjust in the circumstances and in so doing the Costs Assessor is to have regard to the public interest.

[73] It is unnecessary to finally determine the issue, but it would seem that the Costs Assessor is not exercising the judicial power of the State. The Costs Assessor is dealing with an administrative task and creating rights rather than enforcing them. The rights created by the Costs Assessor are dependent upon the Costs Assessor's determination of what is fair and reasonable and the public interest and are not determined by the lawfulness of conduct or of a costs agreement. The procedure of a Costs Assessor was succinctly summarised by his Honour Kirby J in *Ryan v Hansen* (2000) 49 NSWLR 184, from 191. As is made clear by his Honour, there is no requirement for a hearing before the Costs Assessor.

[74] In the instant proceedings the fundamental issue between the parties is not the amount of any such costs, the propriety of any work performed or whether the work and/or costs were fair and reasonable, but rather whether the terms of the contract embodied in the costs agreement, properly construed, entitle the defendant to any money whatsoever. In other words, that which was determined by the Costs Assessor, relevant to present purposes, was the proper construction of the costs agreement as to whether or not "success" had been achieved and therefore whether costs were payable under the contract.

[75] Such an exercise is not an exercise contemplated by the Act as one which is within the jurisdiction of a Costs Assessor. The underlying assumption in the Act is that work was performed for which a bill has been rendered and monies are payable. A bill that is rendered but is not payable because of the very terms of the contract embodied by the costs agreement is not one which can be the subject of an assessment pursuant to the terms of the Act.

[76] In other words, in circumstances such as this, where the issue between the parties is whether, as a matter of the construction of the contract, the condition precedent for the payment of any legal fees has been satisfied, that issue should be determined before the matter is referred to a Costs Assessor.

[77] In this instance the Costs Assessor has certified costs, and for that purpose has construed the Conditional Costs Agreement. The construction exercise performed by the Costs Assessor was not an exercise performed for the purpose of determining whether such a provision was fair and reasonable (bearing in mind the criteria to which the Assessor may have regard) but rather for the purpose of determining as a question of law the proper construction of the contract and whether, as a matter of fact, the circumstances have been met which provide for fees to be payable. That is an issue of law on the construction of a

contract and not the determination of fair and just fees on a costs assessment.

[78] If a Costs Assessor issues a certificate which is dependent primarily upon a determination of the proper construction of the Costs Agreement and that construction is incorrect, the exercise of the Costs Assessor is without jurisdiction and voidable, if not void.

[79] It is for a court of competent jurisdiction to determine finally the construction of the contract. It would be different if the construction of the contract was but one step in the determination by the Costs Assessor as to what was fair and reasonable. The latter may well be an error of law within the jurisdiction conferred by the Act. The former, however, is a jurisdiction that is not conferred on the Costs Assessor and any assessment dependent upon such a finding would not be a costs assessment as prescribed by the Act.

[80] This may well mean that any such "costs assessment" or "certificate" would not be one to which was accorded the status as being taken as a judgment of the Court and enforceable as such.

However, higher authority favours a wider view of the assessor's role. In *Graham v Aluma-Lite Pty Ltd*,<sup>4</sup> there was an issue as to whether the appellant's recoverable costs could include anything for counsel's fees, since counsel had been acting *pro bono*, which – it was contended - meant "absolutely free of any charge." Priestley JA, with whom Mason P and Cole JA agreed, said (at 11):

...the matter raised in [the] point was something for the Costs Assessor to consider. It appears from the materials before us in this application that submissions were put to him on the point. Presumably, the proper way of pursuing that point would be to pursue whatever avenues of review or appeal may be available against the Costs Assessor. I would not wish to encourage Aluma-Lite to think that if such avenues are available success will lie at the end of the road. Without having heard argument on the matter, it nevertheless seems to me a doubtful proposition. The answer to the question would depend upon an examination of a number of considerations, including the actual terms upon which counsel agreed to do the work he was asked to do on behalf of Mrs Graham by the Manager of the New South Wales Bar Association's Legal Assistance Scheme. The court does not know what the terms of counsel's engagement were. But, in any event, as I have indicated the question, in my opinion, is not one for this court. It is for the Costs Assessor in the first instance and thereafter whatever the Supreme Court Act and Rules provide for review or appeal.

In *Wentworth v Rogers*,<sup>5</sup> a submission that a costs assessor could not determine the terms upon which counsel had been engaged was rejected. Having observed that the passage just cited from *Graham v Aluma-Lite* was against the submission, the Court continued (at [56]):

[56] During the course of the hearing we indicated to the parties that we were disposed to follow what Priestley JA had said. His judgment was

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<sup>4</sup> NSWCA, 25 March 1997, Unreported; BC9700842.

<sup>5</sup> [1999] NSWCA 403 (Handley and Stein JJA and Sheppard AJA).



agreed in by Mason P and Cole JA and it behoves us to follow it unless we are convinced that it is not correctly decided. In our respectful opinion, it is correctly decided. We do not see what other course there is that could be taken. It follows that the submissions made by Ms Wentworth and Mr Russo that no order for costs should be made in favour of Mr Rogers because his counsel and solicitor had acted *pro bono* should be rejected.

Then, in *Wentworth v Rogers; Wentworth and Russo v Rogers*,<sup>6</sup> the Court of Appeal considered whether an assessor had power to determine the terms and validity of any agreement or arrangement with respect to costs entered into between the Respondent and his legal advisers, and whether a judge in the Common Law Division could and should address the same issue pursuant to an appeal from the costs assessor. Santow JA said (at [37]-[43]; 484-486):

Power or jurisdiction of costs assessor to interpret the costs agreement

[37] Against this statutory background I turn now to the primary question to be answered. Did the costs assessor under s 208(3)(b) of the Act have power to determine in relation to any relevant costs agreement

- (a) its nature, in the sense of whether oral or evidenced in writing,
- (b) its being or not being a “costs agreement” within the meaning of that expression in the Act, and
- (c) its proper construction?

[38] I consider that the decision of the Court of Appeal in *Graham v Aluma-Lite Pty Ltd* (Court of Appeal, 25 March 1997, unreported), relevantly affirmed in *Wentworth v Rogers* [1999] NSWCA 403, contains strong dicta supporting the proposition that a costs assessor undertaking an assessment pursuant to Pt 11 Div 6 of the Act *does* have power to consider the terms on which the legal practitioner was retained. I quote the relevant passage in full from the joint judgment of Handley JA, Stein JA and Sheppard AJ-A in *Wentworth v Rogers*:

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[39] It will be self-evident that determining the terms of the retainer necessarily entails determining both the content of the costs agreement as well as its proper interpretation. The costs assessor is unconstrained by the rules of evidence (s 208(2) of the Act). But a costs assessor does not have judicial powers such as to summon those involved, whether barrister or solicitor, to give evidence or to submit them to cross-examination. What a costs assessor can do is require the applicant to produce any relevant documents (s 207(1)) and require by a notice further particulars as to the basis of which costs were ascertained (s 207(2)).

[40] The Court of Appeal implicitly accepted that with these powers, though falling short of curial, the costs assessor was not only empowered in the first instance to determine the terms of the retainer of counsel and solicitor but should do so. That approach recognises the expeditious administrative process for assessing costs under the Act.

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<sup>6</sup> [2006] NSWCA 145; (2006) 66 NSWLR 474.

For most cases determination by the costs assessor should suffice without necessity for curial review. It would be unusual that the content of the costs agreement was not self-evident from its written record, or its interpretation so problematic that a costs assessor could not, in practice, reach a sufficiently reliable result. But the discretion to order curial review remains as a safeguard for the exceptional cases that warrant it.

[41] Section 208(3)(b) expressly empowers the costs assessor to ascertain “whether a costs agreement exists, and its terms”. That, in my view, necessarily includes determining whether such agreement is within the definition of “costs agreement” in the Act and whether it is rendered void by s 184(4). That question in turn necessarily entails a consideration of whether the agreement is, or is not, “in writing or evidenced in writing”.

[42] I consider that the Court of Appeal decision in *Wentworth v Rogers* [1999] NSWCA 403 must be followed. To the extent that the decision of Dunford J in *Muriniti v Lyons* [2004] NSWSC 135 is inconsistent, it should not be followed. However, there is nothing in the Court of Appeal’s reasoning which precludes later review of the costs assessor’s decision by a judicial officer with wider curial powers pursuant to the discretionary appeal mechanism in s 208M of the Act where this is justified. Section 208M(4) provides for “an appeal ... to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given”.

[43] In *Muriniti v Lyons*, Dunford J concluded (at [56] to [58]) that the costs assessor, who set out to determine under s 208A and s 208B whether certain preconditions for the payment of costs had been fulfilled, should have declined to make a determination or issue a certificate. This was until the issue of whether or when the relevant costs were payable had been resolved by a court with power to require sworn evidence and have it tested by cross-examination. That reasoning, though not in relation to court-ordered costs, was inconsistent with the reasoning of the Court of Appeal to which I have referred and should not be followed.

However, Basten JA expressed doubts about this and (at [185]; 515-516) left the question open, and Hislop AJA (at [216]; 512) preferred to express no opinion on it, as the case could be disposed of without resolving it.

In the appellate proceedings in *Doyle v Hall Chadwick*,<sup>7</sup> an appeal from Rothman J was dismissed, but the Court of Appeal differed from Rothman J’s view as to the powers of costs assessors. Hodgson JA (with whom Mason P and Campbell JA agreed) said (at [55]-[62]):

#### JURISDICTION OF COSTS ASSESSOR

[55] Both parties submitted that a costs assessor does have jurisdiction to construe a costs agreement and determine its effect.

[56] In my opinion, s.208(3) of the 1987 Act makes it clear that this is so, at least where the assessment is between the lawyer and the client. However, I do not entirely agree with either of the opposing views expressed in the *Muriniti* litigation, that is, the view of Davies AJ in

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<sup>7</sup> [2007] NSWSC 159.

*Muriniti v. Lyons* [2000] NSWSC 680 and that of Dunford J in *Muriniti v. Lyons* [2004] NSWSC 135.

[57] In that litigation, there was a dispute as to the terms of an agreement between a solicitor and a barrister, where the agreement was apparently not in writing and the barrister was deceased. The barrister's widow applied to the Supreme Court for a costs assessment under the 1987 Act; and when, over objection of the solicitor, the costs assessor indicated an intention to proceed, the solicitor commenced proceedings in the Supreme Court, seeking among other things a declaration to the effect that any agreement with the barrister was subject to a condition that had not been fulfilled.

[58] Davies AJ dismissed those proceedings, holding that any questions as to the terms of the agreement were to be determined by the costs assessor, not the Court.

[59] The costs assessor proceeded with the assessment, and issued a certificate, although he stated explicitly that he was only determining a fair and reasonable amount of costs, not whether they were payable. The barrister's widow filed the certificate of assessment, obtained a judgment under s.208J and pursued execution of that judgment.

[60] The solicitor commenced further proceedings in the Supreme Court, seeking a declaration that he was not liable to pay the costs; and those proceedings were subsequently amended to seek an extension of time to appeal from the determination of the costs assessor. Dunford J granted that leave. In the course of his decision, he said this:

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[61] In my opinion, Davies AJ was correct to say that a costs assessor, assessing costs between a lawyer and client, can determine disputes as to the terms of the costs agreement, and Dunford J was wrong to say otherwise. However, where the existence of the terms of the agreement are in dispute in a way that would require the hearing of evidence to resolve, it may be appropriate for the costs assessor to decline to resolve the dispute; and in the *Muriniti* litigation, it would in my opinion have been open and reasonable for Davies AJ to have permitted the question to have been determined in the proceedings before him. As it turned out, the costs assessor did decline to resolve this question; and in my opinion, in those circumstances, the costs assessor should not have issued a certificate which could be converted into a judgment. That is, in a case where there is a real dispute on substantial grounds as to whether any costs are payable, a costs assessor should not complete an assessment by issuing a certificate unless satisfied that the costs are payable, because the certificate can be filed so as to take effect as a judgment.

[62] In my opinion, this approach is consistent with the views of the Court of Appeal in *Graham v. Aluma-Lite Pty. Limited* (NSWCA, unreported, 25/3/97) and *Wentworth v. Rogers* [1999] NSWCA 403. In so far as there is a divergence of opinion in *Wentworth v. Rogers* [2006] NSWCA 145 as to the power of a costs assessor, in assessing party and party costs, to determine the terms and effect of the costs agreement of the party against whom the costs are sought, it is not necessary to address that divergence of opinion in this case.

In my view a costs assessor can, and at least ordinarily should, determine disputes as to liability to pay costs, as an incident of determining whether the costs are “fair and reasonable”, even where there is a dispute as to whether costs are payable at all. The outcome of a finding that costs are not payable will be a determination that the fair and reasonable costs are nil.

## Overcharging

That overcharging can be professional misconduct is well established. In *Re Veron; ex parte Law Society of New South Wales*,<sup>8</sup> Mr Veron conducted a practise a considerable part of which consisted of cases in which he was retained by victims of accidents to recover damages for personal injuries. Following an investigation of his trust account, he was called upon to show cause as to why he should not be dealt with for professional misconduct by the full court of the Supreme Court, on the basis of charges of professional misconduct. The substance of the charges included that Veron charged for professional costs grossly in excess of those that would be charged in similar circumstances of solicitors of good repute and competency, and which he knew or ought to have known were extortionist and could not be justified. The Court said (at 140-141):

By far the most important allegations of misconduct, which are involved in almost every case, relate to withdrawals of trust funds made by the respondent for his own use from his trust account. These funds were received by the respondent as the result of payments made to him on account of the verdict or settlement and party and party costs. In almost every one of the sixty-five cases investigated a large amount of profit costs had been retained by the respondent, ranging from £700 to £1,200, although the amount is not a percentage of or related to the size of the verdict. In most cases the respondent obtained an authority from the client to deduct these or in some cases even larger sums from the verdict for what he called solicitor and client costs.

Later, the Court continued (at 142):-

In these proceedings the respondent, by his counsel, attempted to divert the issue of misconduct by a discussion on over-charging per se in an individual case or by attempting to raise questions of the adequacy of the scales of charges in this State allowed by the rules of the Supreme Court, or by an argument that a few solicitors who commonly act for plaintiff's in running-down actions have set up a standard of charges quite divorced from that adopted by the general body of practitioners, and like considerations. We reject these attempts. An affidavit by a management consultant on his method of evaluating professional costs as in an industry was rejected. The charges against the respondent go far beyond any question of merely exceeding the statutory scales of charges for they allege disgraceful and dishonourable conduct.

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<sup>8</sup> (1966) 84 WN (Pt)(1) (NSW) 136.

The Court does not sit as taxing officers dealing with individual items of costs. Nor is such an approach realistic in the present circumstances. We are guided by experience and a broad sense of what is reasonable and fair and not by any narrow approach to questions of mere overcharging. Even if it could be said that the existing scales for litigious work need revision by the judges, such an enquiry stands far outside the scope of these proceedings.

After adopting the well-established definition of “professional misconduct” referred to in *Allinson v General Council of Medical Education & Registration*<sup>9</sup> - namely, “something... which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency” - and noting that mere negligence, even of a serious character, was not misconduct, the Court continued (at 144):-

It has long been recognised that the charging of extortionate or grossly excessive costs by a solicitor may amount to professional misconduct - *Muex v Lloyd* [(1857) 2 CBNS 409; 140 ER 476]; *In Re Hill* [(1887) 4 TLR 64]. All the modern text-writers treat such conduct as a head of professional misconduct - *Cordery on Solicitors*, 6<sup>th</sup> ed, p604; Lund, *Guide to Professional Conduct and Etiquette of Solicitors*, p65; *Halsbury’s Laws of England* 3<sup>rd</sup> ed, vol 36, p 226, par 314 (edited by Sir Thomas Lund, Secretary of the Law Society and H H Turner, its Senior Under-Secretary). We have been furnished with transcripts of the findings and orders of the English Disciplinary Committee in the three cases of disciplinary action against solicitors for over-charging which are referred to in the last reference, footnote (a). It is pointed out in that footnote that, as was said by the Disciplinary Committee in its Findings and Order No. 1626, it is not in every case where a solicitor agrees with a client a fee which is substantially larger than the fee which would be allowed on taxation that he is guilty of conduct unbefitting a solicitor. As is stated in Sir Thomas Lund’s book (*loc cit*), it is a question of degree and dependent upon the facts of the individual case. As with all questions of degree, cases may occur in which it is difficult to decide on which side of the borderline they fall. This particular difficulty was referred to in *Chapman v Chapman* [[1954] AC 429, at pp445-446], by Lord Simonds LC, who said that he was not as a rule impressed by an argument about the difficulty of drawing the line, since he remembered “the answer of a great judge that, though he knew not when day ended and night began, he knew that midday was day and midnight was night”. Likewise the Court in these present proceedings is in no difficulty in deciding on which side of the line the solicitor’s conduct falls. In the sixty-five actions in which Mr Veron appeared as solicitor for the plaintiff which have been brought to the Court’s notice he retained, as we have already said, in almost every instance as his solicitor’s profit costs, a sum ranging between £700 and £1,200, the average amount retained being, as was freely admitted by his Counsel, a sum in the vicinity of £1,000. These were ordinary running down actions such as are nowadays probably the most common form of litigation in this Court on its common law side and with whose incidents its judges are, in consequence, very

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<sup>9</sup> [1894] 1 QB 750.

familiar. For the most part, the defendant's liability was admitted, and in the great majority of them the action was compromised either before it came to trial or, in some instances, after the trial had proceeded for a short distance. It is obvious to us from the evidence which we have heard that their conduct displayed on the solicitor's part no exercise of special skill, no special attention and no special exertions such as might sometimes be found to permit, without departure from proper professional standards of conduct, of the charging of fees higher than those allowed by the ordinary scale.

The Court relevantly concluded (at 145):

In most instances the retention by the solicitor was preceded by a written authority from the client authorising the retention of a sum which it specified. ... The amount specified in the authority appears to have been fixed arbitrarily, very commonly at £1,000 or an amount in that vicinity, and without reference to the work involved in the action. If we may judge them by our view of those who were before us for cross-examination on their affidavits, the clients from whom these authorities were taken were for the most part people of little or no business experience, or experience of litigation or its costs, and reliant in this, as in other matters concerning the litigation, upon the guidance of their solicitor. In all the circumstances, viewing the matter for the moment only as one of general principle and apart from an examination of the facts of particular cases, and from the arguments already mentioned or yet to be considered, which have been advanced on behalf of the solicitor, we should have little difficulty in concluding that the costs charged by the solicitor were exorbitant and grossly excessive and his general course of conduct in relation to them such as would be regarded as dishonourable by his professional brethren of good repute and competency.

Mr Veron was struck-off.<sup>10</sup>

More recently, the same Court has considered cost charging and the obtaining of Costs Agreements from clients in the context of professional misconduct in *Law Society of New South Wales v Foreman*.<sup>11</sup> Kirby P (as he then was) said (at 421-422):-

I cannot leave this appeal without saying something concerning ground 4 which was before the Tribunal. It charged the solicitor with "gross overcharging". ... It was alleged that such costs were paid by, or on behalf of, Ms Weiss and that the sum charge was "grossly in excess of a sum for legal costs which would be charged by solicitors of good repute and competency". It was contended that, to charge such a sum, constituted professional misconduct.

The Tribunal dismissed that charge: ... In the record of the Tribunal's deliberations on the point it is stated that, as a result of the submissions of counsel before the Tribunal, the Society's case in respect of gross over-charging "stands or falls on whether or not

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<sup>10</sup> See also re *Munro, ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 154, re *Miles, ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 163.

<sup>11</sup> (1994) 34 NSWLR 408.

there is a costs agreement". Having decided that Mrs Avidan did, in fact, execute the cost agreement, it seems to have been assumed that there was nothing left to be considered in this ground of complaint. ...

No appeal was brought by the Society to this Court against the order of dismissal in this regard. ...

I do not take complaint 4 into account the resolution of these proceedings. Yet it seems virtually impossible to credit that legal costs in a dispute between a married couple for the most part over their matrimonial property could properly run up legal costs in the figures that are mentioned here. ...

Little wonder that the legal profession, and its methods of charging, are coming under close parliamentary, media and public scrutiny. Something appears to be seriously wrong in the organisation of the provision of legal services in this community when charges of this order can be contemplated, still less made. Of course, those charges were rendered not by Ms Foreman alone but by her then firm. That firm has not been heard, in the nature of these proceedings, to defend its charges before this Court. I have considered whether, out of the Court's inherent power, we should not order an investigation into how such an apparently enormous sum was charged to an individual litigant. To me, it appears astonishing and prima facie appalling. Indeed, it seems a matter for the Court's concern. But the Law Society did not wish to prosecute the solicitor on this complaint.

Mahoney JA said (at 437):-

But, whatever be the position in relation to special provisions, a costs agreement which provides for charges on an hourly or similar basis is likely to involve a conflict between the solicitor's duty and his interest. Such an agreement ordinarily involves that the solicitor may determine how much time is to be spent on the client's litigation and by whom. It will therefore put the solicitor in a position in which her duty to her client (to do the work in such time that the costs will be no more than they need be) may be in conflict with her interest (that she receive more costs rather than less). The temptation may exist to spend upon the client's litigation time for which costs would not otherwise be billed or to engage on it staff whose time could not or would not be used elsewhere in the firm. ...

... If costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgment in entering into them.

Similar observations have been made in the Family Court of Australia by Fogarty J in *Weiss v Barker Gosling (No 2)*<sup>12</sup>, and by the Supreme Court of the Australian Capital Territory in *In the matter of the Legal Practitioners Act*

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<sup>12</sup> (1993) 118 FLR 218; (1993) 17 Fam LR 626; (1994) FLC 92-474

*1970 and in the matter of an application by the Law Society of the ACT in relation to the conduct of Barry and Christopher Roche.*<sup>13</sup>

Section 393 provides that if a costs assessor considers that the costs charged are grossly excessive, he or she must refer the matter to the Legal Services Commissioner to consider whether disciplinary action should be taken against any practitioner involved. The predecessor section, s 208Q, also declared that deliberate overcharging was professional misconduct, but s 498(1)(b) now provides that charging of excessive legal costs is capable of being unsatisfactory professional conduct or professional misconduct. The former provision - which declared deliberate charging of excessive costs to be professional misconduct - has been removed, apparently in response to the judgment of the Court of Appeal in *Nikolaidis v Legal Services Commissioner*,<sup>14</sup> which held that for there to be a deliberate overcharge, the practitioner had to be personally implicated, by intent or reckless indifference, in the charging.

The determination of a costs assessor as to what are “fair and reasonable costs” does not conclusively decide, for the purposes of disciplinary proceedings, whether the costs charged were grossly excessive. In *Nikolaidis* the Court of Appeal held that the Administrative Decisions Tribunal had been wrong to reject an expert report tendered by the practitioner as to whether he had overcharged on the basis that the assessment process was conclusive of that issue (although its rejection on other grounds was upheld). It is important to appreciate that an assessor does not decide in any binding way that there is overcharging, but is entitled to form an opinion to that effect, the only consequence of which is to trigger the obligation to refer the matter to the Commissioner.<sup>15</sup> And recently, the Administrative Decisions Tribunal, considering a complaint of deliberate overcharging brought as a result of a referral under former s 208Q, rejected the cost assessor’s opinion – to the effect that there had not been an appropriate apportioning of costs between three concurrent cases, and that there *may* have been deliberate overcharging – as inadmissible on *Makita* grounds.<sup>16</sup> As an appeal is pending, I will not comment on the outcome, save to observe that I would discourage cost assessors from becoming expert witnesses for the prosecution in disciplinary proceedings that may arise from their referrals under s 393.

### **Interest on costs**

*Legal Profession Act*, s 367A, which applies to party-party assessments, provides that a costs assessor is to determine an application for an assessment of costs payable as a result of an order made by a court or tribunal by making a determination of the fair and reasonable amount of those

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<sup>13</sup> [2002] ACTSC 104.

<sup>14</sup> [2007] NSWCA 130.

<sup>15</sup> *Weller v Scammell* [2007] NSWSC, Cooper AJ, 22 February 2007, [79].

<sup>16</sup> *Legal Services Commissioner v Galitsky* [2008] NSWADT 48.



costs. It authorises no more than determination of the amount of costs. Section 363A, which provides that a costs assessor may, in an assessment, determine the rate of interest payable, expressly does not apply to a party/party assessment. Under s 368, a certificate can set out only “the determination”. A costs assessor does not have power to include or calculate interest in a party/party assessment and certificate. Accordingly, in a party/party assessment, an assessor does not have power to include interest, and any obligation to pay interest arises and is enforceable under the relevant order of the court, and not the assessor’s certificate.

The Court’s powers in this respect are conferred by (NSW) *Civil Procedure Act 2005*, s 101, which relevantly provides that the court may order that interest is to be paid on any amount payable under an order for the payment of costs, and that such interest is to be calculated, at the prescribed rate or at such other rate as the court may order, as from the date or dates on which the costs concerned were paid, or such later date as the court may order. An order under s 101 for interest on costs recognises and compensates the costs creditor for having been out of pocket as a result of having to pay its lawyers’ costs and disbursements. However, such an order is for “interest ... on any amount payable under an order for the payment of costs”, and it does not make the interest part of the costs.

Such orders are sought perhaps less often than should be the case, and quite large amounts can be involved. While the discretion must be exercised on a case-by-case basis, it has become apparent that no special circumstances are required to justify such an order, and the Court will readily order interest on costs where the costs creditor has been out-of-pocket by reason of paying its own lawyers on an interim basis during the pendency of the matter. An order under s 101 for interest on costs recognises and compensates the costs creditor for having been out of pocket as a result of having to pay its lawyers’ costs and disbursements, and there is no requirement before such an order is made that the circumstances of the case be out of the ordinary.<sup>17</sup> Not much if any evidence is required in support of such an application: it can be inferred from the nature of commercial litigation that parties are likely to have had to pay some amounts of costs and disbursements as the litigation progresses, and in any event an order can be framed in such a way that interest will run only from the date on which there has been a payment.<sup>18</sup>

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<sup>17</sup> *Grogan v Thiess Contractors Pty Ltd* [2000] NSWSC 1101, [10], [12]; *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd (in liq)* [2002] NSWSC 280, [17], [23]-[25]; *Puntoriero v Water Administration Ministerial Corporation* [2002] NSWSC 217, [10]; *Lahoud v Lahoud* [2006] NSWSC 126, [82]-[83].

<sup>18</sup> *Lahoud v Lahoud*, *ibid* [80]-[81]. See also *Hexiva Pty Ltd v Lederer (Costs)* [2006] NSWSC 1259, [20]-[23]; *Cat Media Pty Ltd v Allianz Australia Insurance Ltd* [2006] NSWSC 790; *Farkas v Northcity Financial Services Pty Ltd* [2006] NSWSC 1036.