Costs

Introduction

> **"*Litigation is not a process for the faint hearted. It is a costly and time-consuming process and usually productive of stress, all of which, of their nature, have adverse effects upon those involved in the process. In some, if not most, cases that come before the courts, it is a necessary evil*."**

Costs of the litigious process are the subject of regular criticism (and debate) both outside and within the legal profession. The need to have regard to the containment of costs is recognised in the statutory mandate contained in s 56 of the *Civil Procedure Act 2005* (NSW) for the just, quick and cheap resolution of the real issues in dispute between the parties. Given the sentiment conveyed in the above quotation (taken from Beazley JA's dissenting judgment on costs in *Old v McInnis and Hodgkinson* [2011] NSWCA 410), it behoves lawyers engaged in litigation to consider carefully not simply the way in which costs can be minimised in the expeditious conduct of their cases but also what advice should be given to their clients (be they in the position of plaintiff or defendant) as to how best to protect their costs position. As Beazley JA went on to note, the processes of the Court are designed to encourage parties to engage in litigation efficiently and with an eye to ensuring that costs bear an appropriate relationship with the matter in dispute.

With that in mind, I propose in this paper to address particular aspects in relation to the making of costs orders that not uncommonly arise in the matters that come before me: first, the question as to when costs will be apportioned as between different issues in the proceedings and the basis on which such an apportionment may be made; second, the circumstances in which special costs orders may be made in accordance with the Court Rules; third, the issue of interest on costs (since, at least anecdotally, that is not uncommonly overlooked by practitioners); and fourth, the question of security for costs. I will also address briefly the increasing spectre of

personal costs orders being sought against legal practitioners, something perhaps not far removed from the fictional phenomenon of anatidaephobia.

At the outset, I note that the Court's power to award costs pursuant to s 98(1) of the *Civil Procedure Act 2005* (NSW) is, subject to the rules of court and to statute, discretionary. It is well recognised that the discretion is a very wide one (*Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72; (1998) 152 ALR 83; *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 322), though it must of course be exercised judicially (having regard to its statutory context, established principle and the circumstances of the relevant case). I have already noted the overriding statutory context in which this discretion falls to be exercised (that being the need for parties to conduct their proceedings with a view to the just, quick and cheap resolution of the real issues in dispute).

Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that, subject to Part 42, if the court makes any order as to costs, it is to order that costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs. The general rule is thus that a successful party will be the recipient of an order for costs in its favour (those costs to be on the ordinary or party/party basis). Such an order is compensatory in nature, to reflect the vindication of the successful claim or defence thereof, not punitive (*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; *Ohn v Walton* (1995) 36 NSWLR 77).

In *Dunstan v Rickwood (No 2)* [2007] NSWCA 266, at [44], McColl JA, with whom Beazley and Ipp JJA agreed, said:

> A court should only depart from the general rule and award indemnity costs where the conduct of the party against whom the order is sought is "plainly unreasonable": *Sydney City Council v Geftlick* [2006] NSWCA 280 at [90] per Tobias JA, Mason P and Hodgson JA agreeing. Indemnity costs orders should be reserved for the most unreasonable actions by unsuccessful plaintiffs: *Leichhardt Municipal Council v Green* [2004] NSWCA 341 per Santow JA (at [57]).

The type of case in which an indemnity costs order may be imposed for unreasonable conduct is that considered in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397.

Pausing here, it is surprising to me how readily some lawyers seem to be prepared to allege fraud, sometimes without apparently realising that this is the import of the allegations they have made. Allegations of fraud, or conduct tantamount to fraud, are not lightly to be made and must be properly particularised. The making of them without a proper basis will expose not just the client but also the legal practitioner to an indemnity costs order.

There are, of course, also special costs rules that apply in circumstances where parties avail themselves of the procedure under the rules for the making of a formal Offer of Compromise or where they invoke the principles in *Calderbank v Calderbank* [1975] 3 All ER 333; 3 WLR 586, by making what is commonly referred to as a *Calderbank* offer. The rationale for those special costs rules is the public policy (and private interest) recognised in the early settlement of litigation and the discouragement of wasteful litigation. In *Leichhardt Municipal Council v Green* [2004] NSWCA 341, Santow JA said at [14]:

> *… the practice of Calderbank letters is allowed because it is thought to facilitate the public policy objective of providing an incentive for the disputants to end their litigation as soon as possible. Furthermore, however, it can be seen as also influenced by the related public policy of discouraging wasteful and unreasonable behaviour by litigants.*

The Court of Appeal in *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 recently reiterated the public policy objectives of special costs orders. Basten JA, with whom McColl and Campbell JJA agreed, there referred at [6] to the objects underlying the Offer of Compromise procedures under the then court rules identified in *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724 as including:

> 1. To encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by defendants which amount to a realistic

> assessment of the plaintiff's real claim which can be placed before its opponent without risk that its "bottom line" will be revealed to the court;
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> 2. To save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and
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> 3. To indemnify the plaintiff who has made the offer of compromise, later found to have been reasonable, against the costs thereafter incurred. This is deemed appropriate because, from the time of the rejection or deemed rejection of the compromise offer, notionally the real cause and occasion of the litigation is the attitude adopted by the defendant which has rejected the compromise. In such circumstances, that party should ordinarily bear the costs of litigation.

I consider those special costs rules as the second main topic of this paper.

Apportionment of costs as between issues

The statement of general principle (that costs ordinarily follow the event) necessarily requires one to determine what is "the event" for the purposes of the costs orders. Where there are a number of issues in the proceedings (on which there have been varying degrees of success) it will not always be easy to determine the relevant event, as recognised by Bergin CJ in Eq in *Owners Strata Plan No 64970 v Austruc Constructions Ltd (No 5)* [2010] NSWSC 586. Her Honour there said (at [22]) that in a case where there are multi-parties and multi-issues it is not a simple matter to identify the "event" that the authorities say costs should normally follow (there referring to *Lenning v Alexander Proudfoot Co World Headquarters* [1991] NSWCA 172; *Hooker v Grilling (No 2)* [2007] NSWCA 214, at 215). Here Honour recognised that in any particular case there may be a number of "events".

In this regard, I have found helpful the down to earth approach to that question suggested by the English Court of Appeal in *Roache v News Group Newspapers Ltd* [1992] TLR 551. There, the question as to who was to be seen as the successful party "in the event" was posed as being a question as to *"[w]ho, as a matter of substance and reality, had won? Had the plaintiff won anything of value or anything he could not have won without fighting the action through to a finish? Had the*

defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

In *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3)* (1998) 30 ACSR 20, Young J (as his Honour then was), having accepted that where there are multiple issues it may be appropriate for the court to assess the costs on each issue or to make a reduction in the costs which the successful party obtains because of that party's losses on separate issues, said (at [22]), in an approach later cited by Barrett J (as his Honour then was) in *Golding v Vella (No 2)* [2001] NSWSC 731 at [8]:

> The cases, however, show that it is unwise to be too technical about what is meant by "event" or "issue" in this context. The judgment of Thomas J in *Colburt v Beard* (1992) 2 QD R 67 gives abundant examples which establish this point. *In particular one does not look at issues as if they were pleaders' issues but approaches the matter with a broad brush*. (my emphasis)

There is, in the authorities, a tension between the accepted general principle that a successful party should have the whole costs of the proceeding (including the costs of an issue on which it has failed) (as noted in *Windsurfing International Incorporated v Petit* (1987) AIPC 90-441) and the recognition that in an appropriate case a costs order may be formulated to reflect the degree of success on distinct issues (see for example *Lavender View Regency Pty Ltd v North Sydney Council (No 2)* [1999] NSWSC 775 per Rolfe J; *Uniline Australia Ltd (ACN 010 752 057) v Sbriggs Pty Ltd (ACN 007 415 518) (No 2)* [2009] FCA 920; (2009) 82 IPR 56 per Greenwood J; *Leallee v Cmr of the NSW Department of Corrective Services* [2009] NSWSC 518 per Price J; *Sahab Holdings Pty Ltd v Registrar-General (No 3)* [2010] NSWSC 403 per Slattery J at [36]).

The rationale underlying the general principle is reflected in the observation made by Jacobs J in *Cretazzo v Lombardi* (1975) 13 SASR 4 (at 12) that:

> … trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors

> affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues.

The rationale underlying a departure from the ordinary costs rule appears to be that where there are multiple issues the application of the general rule may involve hardship where a party succeeds on some issues but not others (*James v Surf Road Nominees (No 2)* [2005] NSWCA 296, per Beazley, Tobias and McColl JJA (at [22])).

It has been said on more than one occasion that the discretion to apportion costs is one to be exercised only in the most exceptional of circumstances (*Trade Practices Commission v Nicholas Enterprises Pty Ltd* (No 3) (1979) 28 ALR 201; (1979) 42 FLR 213; (1979) ATPR 40-141; *Stena Rederi Aktiblag v Austal Ships Sales Pty Ltd* [2007] FCA 1141, at [12]).

The circumstances in which apportionment of costs as between different issues may be appropriate are: where, in respect of one or more issues, the successful party has "unfairly, improperly, or unnecessarily increased the costs" (Waddell J, as his Honour then was, in *Windsurfing*); where the bulk of the time has been taken on an issue on which the unsuccessful party had succeeded (Mahoney JA in *Waters v PC Henderson (Aust) Pty Ltd* (unreported CA (NSW) 6 July 1994; Toohey J in *Hughes v Western Australian Cricket Assn* (1986) ATPR 40-748); where a particular issue or group of issues is clearly dominant or separable (Mahoney JA in *Waters;* McColl JA in *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373).

In *Hughes*, Toohey J commented that a successful party who has failed on certain issues may not only be deprived of the costs of those issues but may also be ordered to pay the other party's costs of those issues. His Honour nevertheless also said that:

> It seems to me that the only basis on which it would be appropriate to depart from the general rule that costs follow the event, by reason of the

> circumstance that the appellant lost what might be regarded as the dominant issue, is that the judgment is made that, had that issue been excluded then, although the dominant issue was not clearly separable, the costs incurred on the appeal would be likely to have been substantially less, perhaps because there was less at stake.

In *James* (at [35]), their Honours were of the opinion that it was preferable not to speak in terms of "rules" in this context but noted that an available approach to the exercise of the court's discretion in particular cases could be to estimate the time taken on discrete issues at the hearing and to make orders accordingly. This points to the significance of the time taken up to and during the hearing on particular issues. In *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 724, Brereton J (at [10]), cited *Waterman v Gerling Australia Insurance Co Ltd (Costs)* [2005] NSWSC 1111 in which it was held (at [10]) that it might be appropriate to award costs of a separate issue where a clearly defined and separate issue (on which the otherwise successful party failed) had occupied a significant part of the trial. Similarly, in *Sabah Yazgi v Permanent Custodian Ltd (No 2)* [2007] NSWCA 306, at [24], it was said that it may be appropriate to deprive a successful party of costs or a portion of costs if the matters upon which that party was unsuccessful took up a significant part of the trial either by way of evidence or argument.

Making an assessment of the time occupied by various discrete issues requires an assessment of what evidence was required for each and the overlap, if any, between the evidence on particular issues (see eg *LMI Australia Pty Ltd v Baulderstone Hornibrook Pty Ltd (No 2)* [2002] NSWSC 72). There, Barrett J, as his Honour then was, considered that the two claims before him were "so separate and dissociated" (even though they involved common witnesses) that they should be treated for costs purposes as if they had been the subject of separate trials (and made costs orders accordingly).

A helpful summary of the principles in this area can be found in *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd* [2008] NSWSC 1423, where Hammerschlag J (referring to the relevant authorities collated by White J in *Short v Crawley (No 40)* [2008] NSWSC 1302, at [25]–[32]) said the following as to the question when the general rule may be displaced:

(a) a costs order in favour of a successful party can be modified to reflect its failure on particular issues even if the successful party did not act unreasonably in raising those issues: *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd*; (Supreme Court of New South Wales, Hodgson CJ in Eq, 3 June 1998 unreported, BC9802305 at 10–11);

(b) if a party unreasonably pursues or persists with points which have no merit, such conduct will constitute a consideration relevant to the ordering of costs even in circumstances where that party is generally successful: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 122;

(c) conduct in relation to the matter may be discreditable to an extent warranting a party being deprived of costs: *Jamal v Secretary Department of Health* (1988) 14 NSWLR 252 at 271;

(d) where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed: *Hughes v Western Australian Cricket Assn (Inc)* (1986) 8 ATPR 40-748 at 48,136;

(e) where the proceedings involve multiple issues departure from the general rule may be warranted particularly where the losing party has succeeded on issues which occupied significant time. Nevertheless the application of the general rule may involve hardship where a party succeeds on some issues but fails on others particularly where the losing party succeeds on some issues. However unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed: *Ritchie's Uniform Civil Procedure NSW* at [42.1.15]; *Waters v PC Henderson (Aust) Pty Ltd* (New South Wales Court of Appeal, 6 July 1994, unreported, BC9404952 at 5); *Short v Crawley (No 40)* at [27]–[28];

(f) a successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them: *Hughes v Western Australian Cricket Assn (Inc)* at 48,136.

Ultimately, as Finkelstein and Gordon JJ observed in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 (at [5]) (citing *Hodge v TCN Channel 9 (No 2)* [2006] NSWSC 1272 and *Standard Commodities Pty Ltd v Societe Socinter Department Centragel* [2005] NSWSC 493; (2005) 54 ACSR 496):

> Costs are in the court's discretion. Fairness should dictate how that discretion is to be exercised. So, if an issue by issue approach will produce a result that is fairer than the traditional rule, it should be applied.

What happens when it is determined that there should be an apportionment of costs as between differing issues?

In *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 (cited by the Court of Appeal in *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296 (at [36]) and again in *Bostik Australia Pty Limited v Liddiard (No 2)* [2009] NSWCA 304), Gummow, French and Hill JJ said (at [272]):

> Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion for the trial judge. Mathematical precision is illusory and the exercise of the discretion will often depend upon matters of impression and evaluation.

In *NRMA Ltd v Morgan (No 3)* [1999] NSWSC 768, Giles J (as his Honour then was) stated (at [25]):

> If an order reflecting success or failure on issues is made, it is appropriate to have regard to the time referable to the issues, although necessarily without mathematical precision (*Lenning v Alexander Proudfood Co World Headquarters* (NSWCA, 22 April 1991, unreported)). It is not necessary that the issue or issues on which the party filed was or were raised by him unreasonably (*Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, at 615).

In *NRMA*, his Honour acknowledged (at [28]) that precision was impossible and framed the costs orders by reference to his view as to what would give appropriate recognition to the fact that the NRMA was not wholly successful in the proceedings "bearing in mind the ebb and flow of litigation". In *Lenning v Alexander Proudfoot Company World Headquarters* [1991] NSWCA 172, the court (Priestley and Clarke JJA and Kirby P) stated:

> In our view the costs orders should be made bearing in mind the court's observations of what took place in court, but principally by reference to what the moving parties were claiming and what was the effect of the orders that were made.

What must be borne in mind is that when costs reflecting in substance the overall outcome of the case are made, this may result in a successful plaintiff ending up in an adverse position in relation to costs. In *Owners Strata Plan No 64970 v Austruc Constructions Ltd (in liq) (No 5)*, Bergin CJ in Eq took into consideration that there were a number of events, including steps taken in the conduct of the case such as the success by one party in an allegation of denial of procedural fairness and in having part of the claim against it dismissed after remitter. Her Honour, having reviewing all the events in the lengthy process of the litigation, ordered the plaintiff (which had succeeded on some of its claim) to pay half of the costs of the proceedings before the referee of one of the defendants (even though that defendant had failed on some events) and that in respect of all proceedings before the court the parties should each bear their own costs.

In *Owners Corporation v Kell & Rigby*, the plaintiff (who succeeded on one only of two discrete building claims) was nevertheless ordered to pay 40% of the costs of the defendants (and to bear its own costs of the proceedings) in circumstances where the claim on which it succeeded was a relatively minor claim (in monetary terms and in the time taken on that claim in the hearing) and one that would otherwise have fallen within the jurisdiction of the District Court (where the proceedings had initially been commenced) but the claim had been inflated by a much larger claim on which the plaintiff had been almost wholly unsuccessful.

It is therefore incumbent on legal practitioners to consider carefully in advance the issues on which the claim is based; make allegations responsibly and with a proper factual foundation; and when there are multiple issues in a case (as to which there may be difference outcomes), consider how best to ensure that the costs referable to each issue can be quantified (not simply because this will be important if the matter ultimately proceeds to an assessment of costs referable to particular issues but also because this may enable a submission to be made as to the apportionment of costs as between discrete issues). (The possibility of different findings on different issues

is something that should also be considered when thought is given to the formulation of settlement offers.)

Offers of Compromise

Under the *Uniform Civil Procedure Rules* there are special provisions that apply (unless the court otherwise orders) where a valid offer of compromise has been made. Pursuant to r 42.14, if a valid offer of compromise is made by a plaintiff and not accepted then if the plaintiff obtains an order no less favourable to the plaintiff than the terms of the offer, the plaintiff is entitled to a costs order on an indemnity basis from the day following the day on which the offer was made. Similarly, pursuant to r 42.15 if a valid offer of compromise is made by a defendant (and not accepted), then (unless the court otherwise orders) if the final judgment is not less favourable to the plaintiff, the defendant is also entitled to a costs order on an indemnity basis from the day following the day on which the offer was made. This may involve a balancing, as well as an arithmetical, exercise depending on the terms of the offer of compromise.

In *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at [725], the Court of Appeal said that the special costs rules were expected to apply "in the ordinary case". In *Morgan v Johnson* (1998) 44 NSWLR 578 (at [581]–[582]), it was said that the Rules confer a "*prima facie*" entitlement to special costs orders in those circumstances. Other cases say that "compelling" or "exceptional" circumstances would be required to justify a departure from the special costs rules (*Hillier v Sheather* (1995) 36 NSWLR 414 (at 422B-E) per Kirby P; *South Eastern Area Health Service v King* [2006] NSWCA 2 at [83] per Hunt AJA; and *Caine v Lumley General Insurance Ltd (No 2)* [2008] NSWCA 109 at [35]–[37] per Basten JA and see discussion in Ritchie's Commentary at [20.27.15]). In *Rosebanner Pty Ltd v Ausgrid* [2011] NSWCA 150, the Court of Appeal recently confirmed that the rationale of the rules in relation to offers of compromise, as described in *Morgan v Johnson*, has significant force.

In *Regency Media,* Spigelman CJ, Beazley, McColl JJA said at [15]:

> … Rules 42.14, 42.15 and 42.15A … provide that, when the relevant costs rule is engaged, a party is entitled to indemnity costs from a specified time (usually one day after an offer of compromise is made), "unless the court orders otherwise"…. The relevant provisions of these rules do not specify that exceptional circumstances or the avoidance of substantial injustice must be established before the court will make a different order to the prima facie order for which the rules provide and, in our opinion, the rule should not be so construed. Rather, the discretion is one that has to be exercised having regard to all the circumstances of the case.

There are particular requirements with which an offer of compromise must comply in order to bring the matter within the operation of the special costs rules. Importantly, r 20.26(2) provides that an offer must be exclusive of costs "except where it states that it is a verdict for the defendant and that the parties are to bear their own costs".

In *Trustee for the Salvation Army (NSW) Property Trust v Becker (No 2)* [2007] NSWCA 194, Ipp JA emphasised that an offer that did not comply with the then equivalent provisions in the Supreme Court Rules (because it was expressed to be inclusive of the costs of the proceedings) was not invalid, "it merely has no effect under the Uniform Civil Procedure Rules" [24], applying the reasoning *in Associated Confectionery (Aust) Ltd v Mineral and Chemical Traders Pty Ltd* (1991) 25 NSWLR 349. His Honour went on to note that an offer of compromise to which effect could not be given for the reason that it was expressed to be inclusive of costs might nevertheless take effect as a *Calderbank* offer.

At [27] his Honour said:

> Calderbank offers are simply offers that do not comply with the relevant rules of court relating to the making of offers of compromise: *Jones v Bradley (No 2)* (at [5]). Whether an offer, intended to be an offer under the *Uniform Civil Procedure Rules* but which is ineffective because it does not comply with those Rules, operates as a *Calderbank* offer, depends upon the intention of the offeror as revealed by the terms of the offer. The offer may disclose an intention that it should take effect only if it complies with the *Uniform Civil Procedure Rules*. On the other hand, it may disclose a general intent to make an offer, irrespective of whether it takes effect under the *Uniform Civil Procedure Rules* or not.

In the *Salvation Army* case, the offer of compromise expressly provided that if it was ineffective under the Uniform Civil Procedure Rules (there contemplated because of

the possibility that different Rules might be said to apply in probate proceedings) then the offer was to be treated as a *Calderbank* offer. His Honour considered that the offer reflected an overriding intent that, irrespective of its application under the relevant Rules that might apply to it, it should take effect as a *Calderbank* offer and said "In my opinion, the offer of compromise was capable of being accepted by the appellant on the basis that it was an informal *Calderbank* offer and should be regarded as such an offer".

However, more recently in *Old v McInnis and Hodgkinson* [2011] NSWCA 410, the majority in the Court of Appeal (Beazley JA dissenting) did not treat an invalid Offer of Compromise as a *Calderbank* offer because the offeror had not stated that the offer, if ineffective as the former, was to be treated as the latter. Beazley JA dissented in that regard, noting at [29] what had been said in *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379; [1983] 3 All ER 153, by Megarry VC at 1383, that:

> Whether an offer is made "without prejudice" or "without prejudice save as to costs," the courts ought to enforce the terms on which the offer is made so as to encourage compromises and shorten litigation. The latter form of offer has the added advantage of preventing the offer from being inadmissible on costs, thereby assisting the court towards justice in making the order as to costs.

I venture to suggest that the moral of the story is that when an Offer of Compromise is made it may be prudent at the same time to send a separate *Calderbank* offer to make it clear that if, for whatever reason, the Offer is held not to be a valid offer of compromise under the rules then there is on foot a separate *Calderbank* offer (since in *Old* there was an apparent intention by the offeror to treat the offer of compromise as a *Calderbank* offer but that was not sufficient for the majority to accept it as such). (One advantage of the latter course is that the *Calderbank* offer could also deal with the issues not possible in the offer of compromise process such as question of costs that the *Calderbank* offer may be a better compromise than the Offer of Compromise itself though the inclusion of costs in *Calderbank* offers also carries with it some risks, as I discuss below).

Apart from the formal requirements for a valid offer of compromise, it is clear that the offer must involve "a real and genuine element of compromise" (*Herning v GWS Machinery Pty Ltd (No 2)* [2005] NSWCA 375; *Anderson Group Pty Ltd v Tynan Motors Pty Ltd (No 2)* [2006] NSWCA 120; *Leichhardt Municipal Council v Green* [2004] NSWCA 341). Where difficulty is regularly occasioned in this regard is where the offer that is made involves only a small discount from the claim in the proceedings or is in effect a "walkaway offer" (particularly where made at or shortly after the commencement of the proceedings).

It has been said that where an offer is in substance a demand for payment of the full amount claimed, or a formal offer "designed simply to trigger the entitlement to indemnity costs", or requires dismissal of the claim, then the necessary element of compromise may be lacking (see *Tickell v Trifleska Pty Ltd* (1990) 25 NSWLR 353 at [355]; *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at [368]; *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWSC 609 at [6]; *Bennette v Cohen (No 2)* [2009] NSWCA 162 at [40]-[41]).

Of course, r 20.26(2) expressly contemplates that a defendant may issue an offer of compromise providing for a verdict in its favour on a "walkaway" basis (ie, on the basis that each party bear its own costs), which of itself seems to involve a recognition that such an offer involves an acceptable level of compromise. What is unclear is that an offer of compromise that provides for a verdict in other (less favourable) circumstances will be treated as so doing.

The decision in *The Uniting Church v Takacs (No 2)* [2008] NSWCA 172 at [30]-[33] and *Bennette v Cohen (No 2)* at [40]-[41] indicate that, absent an element of compromise, the Court may find that the offer is not a genuine offer of compromise.

I note, in this regard, that in *Leichhardt Municipal Council* the Court said at [21]:

> There is little appreciable difference between saying that an offer should not in the court's discretion attract costs sanctions in the circumstances and saying that an offer is not a genuine offer of compromise in the circumstances. Both depend upon a value judgment of the offer and the conduct of the parties in the circumstances of the claim.

What must be considered is whether the offer represented or formed part of a genuine attempt to reach a negotiated settlement (*Baulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited (No 2)*, [2009] NSWCA 12 at [19]).

In *In Regency Media Pty Ltd v AAV Australia Pty Ltd* [2009] NSWCA 368, for example, an offer of compromise was served by the defendants offering to settle a claim in the order of $600,000 by payment of the sum of $10,000. The offer was made at an early stage of the proceedings. At [31] – [33], the Court of Appeal said:

> An offer which is in substance an invitation to surrender can result in the successful triggering of the indemnity costs mechanisms under the rules. (See r 20.26(2); *Leichhardt Municipal Council* supra at [36]-[37], [40].) However, as Basten JA suggests in *Robb Evans* supra at [20], the claim or defence would have to approach something of the character of being frivolous or vexatious for that to be the case. (See also *Hancock v Arnold* supra at [17].) If it were otherwise, the public policy to encourage settlement would rarely be served, in an all or nothing case. These proceedings were not of that character, as indicated by the success which the respondent had at first instance.
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> The normal order for costs, even in a clear case, is that each party bears its own costs without full indemnity. If a derisory offer, of the kind made in these proceedings, could result in an order for indemnity costs, then it is likely that many, perhaps most, contract interpretation disputes would result in an indemnity costs order, if the formality of an offer in accordance with the rules had been made at an early stage. If the appellant were to succeed in the present case, it is quite likely that such an offer would accompany most statements of claim as a matter of commercial practice. The purpose of the special order - to encourage settlement - would no longer be served. An order for indemnity costs could, in our opinion, become the normal order in many commercial disputes.
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> It is often the case that the result of an interpretation issue appears quite clear in retrospect. However, an offer of compromise must be assessed, in large part, at the time it was made. (See most recently *Hancock v Arnold* supra at [23].) Whether what was offered was a relevant compromise, and whether its rejection was reasonable should not be assessed with the benefit of 20:20 hindsight.

At [29], their Honours in *Regency Media* said:

> As is usually the case in proceedings turning on an issue of contractual interpretation, this was an all or nothing case. The claims did not involve a process of evaluation or assessment in which the end result could vary over a range. Either one party or the other party was correct. Whilst a marginal difference between the offer and the result may constitute a real and genuine offer of compromise in a personal injury context, that is not generally true in an all or nothing case. (See *Anderson Group* supra at [9]; *Robb Evans* supra at [18].)

In *Robb Evans & Associates v European Bank Ltd (No 2)* [2009] NSWCA 170, to which reference was made in *Regency Media*, the offer made by the defendant was to pay $2,000 plus costs, in respect of a claim for in excess of $800,000 and was perhaps not surprisingly considered to be derisory.

What amounts to a derisory offer as opposed to being a sufficient element of compromise must to a large extent be a matter of impression. In *Anderson Group Pty Ltd v Tynan Motors Pty Ltd* [No 2] [2006] NSWCA 120 a 20% discount on the sum claimed (taking into account the total claim including interest) was considered by Basten JA to be sufficient to amount to a genuine compromise, his Honour describing this (at [9]) as a "significant element of compromise". (His Honour there considered that, notwithstanding that it should be inferred that the respondent would have valued its chance of successfully defending the litigation at a higher level than did the appellant, "the offer involved a genuine element of compromise" and that the failure to accept the offer warranted a departure from the ordinary rule as to costs.)

In *Regency Media,* their Honours adopted the statement of Basten JA in *Robb Evans* at [22] that:

> Whether or not the offer involved a genuine compromise must be assessed by reference to the rule pursuant to which the offer was made. That rule refers to an offer to compromise a claim in proceedings on specified terms. Subject to an exception in the case of judgment for the defendant on the basis that each party bear its own costs, the offer must be exclusive of costs: r 20.26(2). Consistently with that approach, the costs consequences are measured by reference to the order or judgment "on the claim concerned": r 42.15(1). The fact that a party which failed to accept an offer incurs costs in pursuing litigation to a result which is less favourable to it than the offer, is not a factor which is material to determining whether the offer itself was a genuine offer of compromise for the purposes of r 20.26.

For the legal practitioner, therefore, when considering making Offers of Compromise under the Rules, have regard to the time at which those offers should be made and be careful to ensure that there is a genuine element of compromise in the offer (too early may be regarded as an invitation to capitulate particularly if there is not a reasonable discount on the claim; too late may be insufficient costs protection). Be careful about including non-monetary considerations as this may make the offer difficult to assess as against any later judgment. Do be mindful of the rules which preclude the making of all inclusive offers of compromise. And give consideration to the making at the same time or around that time of a Calderbank offer that may be able to be relied upon if for some reason the Offer of Compromise is invalid.

Calderbank offers

The position in relation to offers expressed to be without prejudice except as to costs (and relied upon as being in accordance with the principles in *Calderbank v Calderbank* [1975] 3 All ER 333; [1975] 3 WLR 586) differs in that the party seeking to rely on the offer must establish both that it represents a genuine compromise of the dispute *and* that it was unreasonable for the offeree to reject it. It is recognised that the making of a *Calderbank* offer is one of the circumstances in which the court may exercise its discretion under r 42.1 to make some order other than that costs should follow the event but that it does not automatically follow that simply because the offer was more favourable than the judgment then an indemnity costs order will be made.

The onus is on the party making a *Calderbank* offer to satisfy the court that it should exercise the costs discretion in its favour (*Evans Shire Council v Richardson (No 2)* [2006] NSWCA 61).

In *Commonwealth v Gretton* [2008] NSWCA 117, Beazley JA noted the public policy considerations that underpin the making of favourable costs orders where a

Calderbank offer has been made (at [41]), those being the encouragement of settlement of disputes as soon as possible and the discouragement of wasteful and unreasonable behaviour by litigants. Her Honour noted that the making of a *Calderbank* offer does not automatically result in a favourable costs order, notwithstanding that the judgment is more favourable to the party making the offer than the terms of the offer, referring to what was said by Giles JA in *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37], to the effect that the question is whether in all the circumstances the failure to accept the offer "warrants departure from the ordinary rule as to costs".

In *Cat Media Pty Ltd v Allianz Australia Insurance Ltd* [2006] NSWSC 790, Bergin J (as her Honour then was), summarising the relevant principles to be gleaned from the Court of Appeal decision in *Leichhardt*, noted that the discretion as to the cost consequences attendant under the general law upon an offer of compromise made in a *Calderbank* letter is to be exercised having regard to all of the relevant circumstances of the case. Her Honour observed not only that there is not a prima facie presumption in favour of an award for indemnity costs if the *Calderbank* offer is not accepted and is not bettered but also that "there is no rule that an optimistic offer is not a genuine offer".

Relevantly, in *Cat Media*, her Honour accepted that the offer there made by the defendant was a genuine offer of compromise (although describing it as a "borderline" case), where the offer represented a payment that would have covered only a portion of the plaintiff's costs incurred up to that time. Her Honour noted that, in submissions, the plaintiff had argued that the offer was, in reality, no more than an invitation to capitulate and had relied upon what was said by Bryson JA in *Leichhardt* at [59]:

> The respondent's case did not succeed but it was not a case which could not reasonably be argued … The only element of compromise in the offer was as to costs: otherwise it was a call on the respondent to capitulate and give up: the element of compromise was slight and the respondent's ultimate lack of success does not to my mind demonstrate that the reasonable course for the respondent was to capitulate, nor does anything show that the respondent was delinquent with going on with the trial or in resisting the appeal.

Bergin CJ in Eq (in considering that submission, and the defendant's submission in response that Santow JA in the same case had recognised that a "walkaway" offer could, in a particular case, be a genuine offer, as could an offer which allowed only a small discount from 100% success be genuine and realistic depending on the circumstances of the case) noted (at [15]) that:

> An offer to pay only a portion of the plaintiff's costs at such a late stage of the proceedings may well present as equivalent to a requirement that the plaintiff capitulate. I am of the view that it is a borderline case but on balance, the fact that the defendant was willing at that time to give up — or compromise — what it saw as its strong position and pay $100,000 to the plaintiff persuades me that the offer was a genuine offer of compromise.

In *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322, it was suggested that unless a *Calderbank* or informal offer of compromise involved some direct inconsistency with the formal "offer of compromise" rules, the content and terms of such an offer would be of relevance to the exercise of the costs discretion (at [133]–[135]).

There is a question as to the consequences which should flow from the making of an "inclusive of costs" *Calderbank* letter, in circumstances where the offer of compromise rules provide for offers to be made on an exclusive of costs basis.

In *Elite*, McColl JA noted the line of authority, commencing with *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97, to the effect that a *Calderbank* letter expressed to be inclusive of costs will not warrant departure from the usual basis upon which a successful party's costs are calculated.

Einstein J, in *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (Formerly GIO Insurance Ltd)* [2006] NSWSC 583, in a passage noted by her Honour in *Elite*, said at [40]–[41]:

> It has been held that a *Calderbank* letter which is expressed to be "inclusive of costs", is insufficiently precise to qualify as a *Calderbank* offer, for the reason that the offeree is placed in a position of not being able to determine the appropriate amount to attribute to the substantive claim and the costs incurred

> in advancing it: *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97 at 102; *Hanave Pty Ltd v LFOT Pty Ltd (formerly Jagar Pty Ltd)* [1998] 1429 FCA 11, BC9805993 (*Smallacombe Pty Ltd v Lockyer Investments Co Pty Ltd* was referred to by Young J in *Rosser v Maritime Services Board* (NSW) (No 3) (unreported, Supreme Court of New South Wales, 25 November 1997, Young J, BC9706221).
>
> These authorities recognise the importance of isolating the costs component in such a way which is clear and capable of proper assessment independently of the principal claim, as part of a *Calderbank* letter.

In *Elite*, McColl JA noted (at [101]) that Campbell J (as his Honour then was) had made the same point in *White v Baycorp Advantage Business Information Services Ltd* [2006] NSWSC 910 (in a case where the *Calderbank* offer had encompassed an amount both for damages and costs). Her Honour then considered Victorian authority where it had been held that a *Calderbank* letter could be expressed to be on an all-inclusive basis (*M T Associates Pty Ltd v Aqua-Max Pty Ltd* [2000] VSC 163 per Gillard J, observing that many cases were settled on an "all in" basis and "[t]here is little difficulty in making an assessment of the likely amount of the claim and costs").

Her Honour noted (at [103]) that in an ex tempore judgment in *DSE (Holdings) Pty Ltd v InterTAN Inc* [2004] FCA 1251; (2004) 51 ACSR 555 (at [12]–[13]), Allsop J (as his Honour then was) had referred to *Smallacombe, Hanave Pty Ltd v LFOT Pty Ltd (formerly Jagar Pty Ltd)* [1998] FCA 1429; (Unreported Judgment of the Federal Court of Australia, Moore J, 11 November 1998) and *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)* [2000] FCA 602, and did not regard *Smallacombe* as having articulated "a definitive rule that in an application for costs, an offer that was an all inclusive sum could not, in any circumstances, be taken into account by a court in considering whether thereafter indemnity costs should be awarded".

There is, in my view, a distinction between a finding that an inclusive offer in a particular case does not enable a determination as to whether proceedings are more or less favourable than the offer (as was the difficulty in *Associated Confectionery*) on the one hand, and a conclusion that a costs inclusive offer can never be treated as giving rise to a special costs order on the other hand.

After considering the divergent lines of authority, McColl JA came to the following conclusion (from [111]):

> The Smallacombe line of authority has been developed by experienced trial judges whose views, in my opinion, should be accorded great weight. The underlying premise of such cases rests in the proposition that an offeree cannot be said to have acted unreasonably in not accepting an offer expressed to be inclusive of costs, because the offeree does not have an adequate opportunity to consider the offer and because of the difficulties posed when a court comes to consider the reasonableness of the offeree's conduct in rejecting/not accepting it. In other words such an offer presents practical difficulties.
>
> First, the recipient of such an offer would not know the likely party and party costs to date on taxation or assessment: see *Smallacombe* (at 102); *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)*. Secondly, in considering the reasonableness of the offer at the time the question of its costs consequences arose, it would be necessary to indulge in a taxation, or assessment, of costs: *Associated Confectionery* (at 351). The Court should not be required to postpone the decision as to the basis upon which costs should be awarded while awaiting the outcome of that exercise. Nor should it be required either to speculate as to what the outcome of an assessment might be, nor arbitrate on a dispute between the parties on this topic.
>
> In *Smallacombe* (at 102) Spender J opined that "all-in" offers "would not promote the finality of litigation, but fragment it", a proposition implicitly recognised by Cole J (as his Honour then was) in *W Jeffreys Holdings Pty Ltd v Appleyard and Associates* (1990) 10 BCL 298 when he said "[g]reat difficulty is encountered if offers are framed in Calderbank letters on an inclusive of costs basis. It leads to ex post facto and unsubstantiated estimates of what costs may have been at a given date".

McColl JA expressed concurrence with the view expressed by Allsop J, as his Honour then was in *DSE Holdings*, (at [115]) that:

> … *Smallacombe* does not lay down a "definitive rule" that an "all-in" *Calderbank* offer can never be considered on the question of indemnity costs. The Court cannot fetter the s 98 discretion by legal rules: *Oshlack* (at [35]). *Smallacombe* does, however, afford guidance as to the exercise of the s 98(1) discretion. It informs the question of the reasonableness of an offeree's refusal to accept an "all-in" offer. In my view it has a sound practical basis. *While I accept each case should be considered on its facts, Smallacombe provides sound reasons to discourage offerors from drafting Calderbank letters on an "all-in" basis.* (my emphasis and, may I say, practitioners should take heed!)

It is also relevant to note that her Honour said that, even had the offer not been inclusive of costs, her prima facie view would have been that it did not, in the circumstances in which it was made, attract an indemnity costs order because it was open for acceptance for only one week at a time when there was no imminent trial and the respondent's solicitors forwarded under cover of the same letter a quantity of economic loss material which it would have been necessary for the appellant's solicitors to assess. In noting the longer time period within which equivalent offers of compromise were required to be open, her Honour said (at [117]) "Prima facie, I see no reason why litigants who choose not to avail themselves of the rules as to Offers of Compromise should be in a better position than those who do, if they radically foreshorten the period in which an offer is open for consideration".

Insofar as the reasonableness of a party's rejection of an inclusive of costs *Calderbank* offer is referable to the difficulty the recipient has in determining the likely costs at the time at which the fact that such an offer has been made is relevant. It was said, for example, in *Elite* at [143]–[144] per Basten JA that:

> If a party in receipt of an offer wishes to know how far the sum offered will go in meeting its costs up to that time, all it has to do is ask its lawyers. In an age where lawyers are required to provide advance estimates of their fees and in circumstances where commercial services are billed on a monthly basis, it is unrealistic to suggest that the recipient of an inclusive offer will be confused or otherwise unable to assess the financial risk of proceeding with litigation. In any event, the offeree is likely to be liable for legal fees exceeding the costs recoverable from the other party. Most litigants, in considering offers, will want to know from their own lawyers, how much they will receive in the hand. Of course, if the offer is not left open for a reasonable time, that might itself make non-acceptance a reasonable course. However, an offeree which is genuinely seeking to assess its position, might be advised to seek more time, if it thinks that is reasonably required.
>
> The suggestion that a Calderbank letter which is expressed to be inclusive of costs is "insufficiently precise to qualify as a Calderbank offer" requires to be addressed in particular circumstances. A defendant who fears that even if successful it will be unable to recover costs awarded against the plaintiff, may wish to make an offer in full and final settlement, without further disputation over costs. It may wish to place pressure on the plaintiff to consider the offer favourably by reserving an entitlement to use the offer in relation to costs if the matter proceeds to trial. There is no reason based on policy or principle

> which would preclude a defendant relying on such an offer only when it is said to be exclusive of costs. Such an inclusive offer will not cause the plaintiff embarrassment: its value will be that amount remaining to him or her after deducting costs already incurred, which the plaintiff's lawyer should be readily able to quantify. The disadvantage of an inclusive offer lies with the defendant if the matter proceeds to judgment. Where the judgment is equal to or above the inclusive figure, the defendant will have failed to better its own offer. However, if the judgment is below the offer there may be uncertainty because the offer included an unquantified element for costs incurred up to the time when it lapsed or was rejected. No doubt the figure for costs incurred to that time by the plaintiff could be resolved by some form of assessment, but if the calculation of the damages component is not clearly seen to provide a figure above the judgment, then the interests of justice will usually not be served by incurring further expense in assessing the costs element of an offer and the plaintiff would be entitled to his or her costs: see Smallacombe above at [140].

At [146] his Honour further held that:

> … the fact that a defendant's offer is made early in the proceedings should not by itself be given significant weight in assessing the reasonableness of the plaintiff in rejecting it. Nor should significant weight usually be given to what the plaintiff did or did not know at that stage. Were it otherwise, the more complex the litigation the less likely that the rejection of an early offer which proves to have been fair and reasonable, will have costs consequences. That tendency would diminish rather than enhance the purpose to be discerned from Calderbank offers and court rules.

and at [149]:

> In the present case, the fact that the offer was said to be open for only seven days may well be a factor suggesting that a failure to accept the offer was not unreasonable. However, it is but one circumstances to be considered and should not by itself lead to any prima facie conclusion. The absence of any request for an extension of time would be relevant in assessing reasonableness, as would the fact that the offer was made in response to an offer by the defendants which itself required acceptance within seven days. (my emphasis)

Ritchie's Commentary (at [42.13.25]), noting the differing views as to inclusive of costs *Calderbank* offers, expresses the opinion that the first rationale for disregarding such offers (the difficulty for the courts in determining whether a judgment amount is no less favourable than an unaccepted offer) has no persuasive force where the final judgment substantially exceeds the offer (or equally, it might be said, where the final judgment establishes that the claim had no foundation and is

dismissed altogether) and that the second reason (namely the difficulty for an offeree in assessing the real value of the offer) has little force in the case of a defendant's offer because the plaintiff should be well able to make a reasonable estimate of the costs they have incurred (referring to what was said by Basten JA in *Elite* at [144]–[145]).

The disadvantage of a *Calderbank* offer (compromise with an offer of compromise) lies, as will be obvious, in the requirement to prove that it was unreasonable for it to be rejected. As to the arguments that are commonly raised as to whether rejection of an offer was unreasonable, those turn on matters such as the timing of the offer (if it is made early in the proceedings – say, before the close of pleadings or before discovery or before affidavits have been served - on the basis that the offeree is not in a position to assess the prospects of the proceedings at that stage) or made at a time during the Court vacation period; that it is inclusive of costs and hence cannot be readily assessed; that it carries as a term of the offer a condition that involves giving up a valuable right or one the worth of which cannot be assessed.
For the practitioner, be careful in making all-inclusive costs offers (if costs form part of the offer make sure that there is sufficient information as to the costs offer to enable the recipient of the offer to understand what it comprises and assess its reasonableness); and bear in mind the onus of establishing unreasonableness of a rejection of the offer lies on the offeror.

Interest on costs

Interest is commonly sought pursuant to s 100 of the Civil Procedure Act (under the power to award interest where the proceedings are for the recovery of money from the date the cause of action accrues to the date of judgment or any part of that period on the whole or any part of the amount awarded).

The award of pre-judgment interest under s 100(2) of the Act is compensatory in nature. A successful plaintiff obtaining a monetary judgment will ordinarily be entitled to an award of interest. It is said that the purpose of the discretion in relation to the award of interest is to permit that party to be properly compensated for the loss it has suffered (*Screenco Pty Ltd v RL Dew Pty Ltd* [2003] NSWCA 319; (2003)

58 NSWLR 720). In *Hexiva Pty Limited v Lederer (No 2)* [2007] NSWSC 49, Brereton J noted (at [97]) that in relation to claims for statutory pre-judgment interest under s 100(2) of the *Civil Procedure Act* 2005 that the courts have taken a less stringent approach to what is required to prove such a claim than in relation to what is necessary to prove a claim for interest as damages:

> Whereas the cases on statutory pre-judgment interest suggest that loss from late payment will be assumed, the cases in which interest is claimed as damages for deprivation of money suggest that the plaintiff bears the onus of establishing the loss, which is not presumed to arise from the mere withholding of money [*Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd & McAuley* (1991) 58 SASR 184 (FC); *Hobartville Stud Pty Ltd v Union Insurance Co Limited* (1991) 25 NSWLR 358, 363-4 (Giles J); *Walker v FAI Insurance Limited* [1991] TasR 258; (1991) 6 ANZ Ins Cas 61-081, 77,279 (Wright J); *Eugenie Holdings Pty Ltd v Stratford* (NSWSC, 12 November 1991, Giles J, BC9101436); *McBeath v Sheldon* (1993) Aust Tort Reports 81-208 (Giles J); affirmed *Sheldon v McBeath* (1993) Aust Tort Reports 81-209 (NSWCA); *State Bank of NSW Limited v Yee* (1994) 33 NSWLR 618, 636].

Less common is it for interest to be sought by the successful party on the costs paid by it during the course of the litigation (pursuant to s 101 of the *Civil Procedure Act*), although an order for the payment of interest on costs does not require a special case to be established. In *Woods v Woods* [2001] NSWSC 1108, Hamilton J noted that the usual justification for such an order is that the successful litigant has been out of pocket by the payment of costs to his or her lawyers.

In *Davies v Kur-ring-gai Municipal Council* [2003] NSWSC 1010, Austin J said at [5]:

> The cases to which I have been referred show that:
>
> - in general, judicial discretions in relation to the award of interest should be exercised to ensure that the successful party is properly compensated (Bennett v Jones [1977] 2 NSWLR 355; Home Owners Insurance Pty Ltd v Job (1983) 2 ANZ Ins Cas 60-635; Falkner v Bou rke (1990) 19 NSWLR 574);
>
> - the Court examines all the circumstances of the case in deciding whether to make an order for interest on costs under s 95(4) or s 76, including such matters as whether the successful party has been out of pocket for a lengthy time, whether the unsuccessful party has benefited from the use of money during that time, and the conduct of the parties

> (Grogan v Thiess Contractors Pty Ltd [2002] NSWSC 1101 (22 December 2002), at [11] per Barr J).

though his Honour went on to express the view that such an order was not warranted simply because moneys had been paid on account of costs, noting that in some cases an order for the payment of interest on costs has been found to be justified principally because the claimant had paid substantial legal costs from time to time over a lengthy period (*Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd* [2002] NSWSC 280) and in other cases the court had been influenced by the indigent circumstances of the claimant (referring to *Woods v Woods*). His Honour accepted that a "special" case was not required to be made out and emphasised the cost to an individual of proceedings in this court.

In *Joseph Lahoud v Victor Lahoud* [2006] NSWSC 126, Campbell J considered an application pursuant to s 101 of the Civil Procedure Act for interest on costs paid to the successful parties' lawyers for costs and disbursements over the course of the proceedings and said at [82] and [83]:

> In my view it is appropriate to make an order for the payment of interest on costs. There is no requirement, before an order for payment of interest on costs is made, for the Court to be satisfied that the circumstances of the case are out of the ordinary: *Grogan v Thiess Contractors Pty Ltd & Anor* [2000] NSWSC 1101 at [10] per Barr J; *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd (in liquidation) & Ors* [2002] NSWSC 280 at [23]–[25] per Einstein J; *Puntoriero & Anor v Water Administration Ministerial Corporation* [2002] NSWSC 217 at [10] per Grove J; *Davies v Ku-ring-Gai Municipal Council* [2003] NSWSC 1010 at [7] per Austin J.
>
> To the extent to which the plaintiffs have been out of pocket as a result of having to pay their lawyers' costs and disbursements, it is appropriate that the compensation which is recognised in the Court's order for costs take into account the fact that the plaintiffs have been out of pocket in that way: *Hughes Bros v Trustees of the Roman Catholic Church* [1999] NSWSC 1051 at [60]; *Grogan v Thiess Contractors Pty Ltd & Anor* [2000] NSWSC 1101 at [12]; *Woods v Woods* [2001] NSWSC 1108 at [29]; *Australian Development Corporation Pty Limited v White Constructions (ACT) Pty Ltd (in liq)* [2002] NSWSC 280 at [17]; *Puntoriero v Water Administration Ministerial Corporation* [2002] NSWSC 217 at [10]; *Optus Networks Pty Ltd v Leighton Contractors Pty Limited* [2005] NSWSC 156 at [9]; *Roads and Traffic Authority v Cremona (No 3)* [2005] NSWCA 13 at [34].

In *Cat Media*, Bergin J (as her Honour then was) referred to the matters considered by Campbell J in *Lahoud* and said (at [28]–[29]):

> There is no doubt that in this case that the defendant has been paying costs to its legal advisors during the period since the proceedings commenced. The proceedings were commenced two years ago and the defendant has been out of that money from the time it paid those costs. The plaintiff submitted that the circumstances of this case are not such as to warrant the exercise of my discretion in favour of the defendant as the defendant could hardly be described as being in "indigent circumstances". It is not necessary to establish that an applicant for an award of interest on costs is in such circumstances. This is particularly so in commercial causes. Parties to commercial litigation must understand that where large amounts of money are paid for litigating in this List interest on costs may be awarded to a successful party.
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> The exercise of this discretion is focused upon the fact that the successful party has been out of its money for some time and the consideration of whether the successful party will be appropriately compensated by an award of costs in its favour without an award of interest. It is not apt to suggest that the defendant is a large insurance company, as was suggested by the submission that it was not in indigent circumstances. It will depend upon the circumstances of each case but where the parties to the litigation are commercial parties suing and being sued for millions of dollars, the fact that the successful party has been out of money that could have been used otherwise in the commercial enterprise is a relevant factor to be taken into account in the exercise of the discretion. The matters to which Campbell J referred in Lahoud at [84] are relevant to this case.

In *Farkas v Northcity Financial Services Pty Ltd* [2006] NSWSC 1036, Bergin J (as her Honour was then) emphasised that in *Cat Media* she had not intended to convey that an award of interest should be limited to cases where money could otherwise have been used in a commercial enterprise. There, the fact that an individual plaintiff has been out of his money (whether it could have been used in his professional enterprise or otherwise) was a relevant factor to be taken into account in the exercise of the discretion to award interest under s 101(4) of the Act.

What the practitioner needs to do is to ensure that the evidence upon which an interest on costs order can be made is available when the application is made (evidence as to the payment of the invoices or liability to pay interests on those costs).

As to how an order for interest of this kind should be formulated, in *Lahoud*, Campbell J (as his Honour then was) had expressed the following concern:

> The form of the order for interest on costs has occasioned me some concern. As the plaintiffs have succeeded in obtaining an order for indemnity costs in relation to only one issue in the proceedings, it is possible that there will be some costs and disbursements which the plaintiff has paid from time to time as the litigation progressed, but which are not allowed on assessment. It might sometimes be possible to cast an order in the form of allowing interest only on such costs as the plaintiff has paid as are allowed on assessment — but such an order would require the assessor to conduct what would amount to a separate assessment in relation to each payment that the plaintiffs had made. While the making of such a series of costs assessments would be within the scope of section 353 Legal Profession Act 2004, adopting such a procedure has the potential for making the costs assessment itself more complex and expensive. Further, it sometimes happens in the course of litigation — and the evidence does not tell me whether it has happened in the course of this litigation — that a litigant makes payments to his lawyers from time to time of lump sums on account of costs, without purporting to allocate those payments to particular memoranda of fees or items of work performed. If that had happened in the present case, one could not tell whether the whole or any part of such a payment had been allowed on assessment.

In that case, his Honour concluded at [85]–[86] that:

> In all the circumstances, the appropriate way of calculating interest on costs is to ascertain the total of the amounts which the plaintiffs have paid and are liable to pay for costs and disbursements, ascertain the total amount of costs and disbursements allowed on assessment, calculate the percentage which the total amount allowed on assessment bears to the total costs and disbursements which the plaintiffs have paid or are liable to pay, and allow the plaintiffs interest on that percentage of each payment which they have made from time to time on account of costs and disbursements.
>
> I recognise that that method of proceeding contains within it the possibility that the plaintiffs might have paid for some items of work which the assessor discounts considerably or totally. If the plaintiffs had paid such an amount comparatively early in the course of the litigation, and interest was allowed on the percentage of that amount which seems to me to be appropriate, then the plaintiffs would be somewhat overpaid interest, by comparison to the amount that the plaintiffs would receive if individual assessments of each payment made were carried out. Conversely, if the plaintiffs paid for such an item of work comparatively late in the course of the litigation, the method of proceeding which I am proposing to adopt could result in the plaintiffs being underpaid interest, by comparison to the amount that the plaintiffs would receive if individual assessments of each payment made were carried out.

> However, it seems to me that those possibilities are ones which fall within the ambit of the degree of approximation and estimation which is frequently involved in assessing compensation. I do not regard them as a reason for not following that method.

This formula was followed by her Honour in *Cat Media*. A formula which avoids the complex and expensive task of a costs assessor calculating interest on individual payments seems to me to be desirable particularly if an indemnity costs order will be granted for only part of the costs of the proceedings.

In *Drummond and Rosen Pty Limited v Easey & Ors [No 2]* [2009] NSWCA 331, Macfarlan JA in the Court of Appeal, with whom Tobias JA agreed, said this in relation to the making of an order for the payment of interest on costs (at [4]):

> In the absence of any countervailing discretionary factor (of which there appear to be none in the present case), it is appropriate that an order for interest on costs be made to compensate the party having the benefit of a costs order for being out of pocket in respect of relevant costs which it has paid (*Lahoud v Lahoud* [2006] NSWSC 126 at [82-3] per Campbell J).

This was followed by Brereton J in *Owners Plan 70150 v Allianz Australia Insurance Ltd* [2010] NSWSC 759, at [8], his Honour noting that there has been an evolution in the courts' approach from one in which an order for interest on costs was considered exceptional and one requiring that special circumstances be established to one where "ordinarily, a party that obtains a costs order will also recover if it seeks one, an order for interest on those costs in the absence of any countervailing discretionary factor" (also citing *Hexiva Pty Ltd v Lederer* [2006] NSWSC 1129).

Security for costs

The fundamental purpose of the power to order security for costs is to secure justice between the parties. *Ritchie's Commentary to the Uniform Civil Rules* notes that this is done "principally by ensuring that unsuccessful proceedings do not occasion injustice to defendants". Further, it was made clear in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; 13 ALC 437 that one does not approach an

application for security for costs with any predisposition in favour of the award of security and that the discretion to order security for costs is unfettered and should be exercised having regard to all the circumstances of the case. The court has a wide discretion in relation to security for costs and each case depends upon its own circumstances.

The principles to be taken into account on applications for security for costs were set out by Beazley JA in *Meltglow*. Those principles include the following factors: the promptness with which the application is brought; the strength and bona fides of the plaintiff's case (including whether a costs order is likely to be made at the conclusion of the litigation); whether the plaintiff's impecuniosity has been caused by the defendant's conduct the subject of the claim; whether the application for security is being used to deny an impecunious plaintiff the right to litigate; whether there are any persons standing behind the plaintiff who are likely to benefit and who are willing to provide security; whether the persons standing behind the plaintiff have offered any undertaking for the costs; whether the plaintiff is in substance a plaintiff; and the public interest, if any, in the litigation.

In the context of this paper I do not propose to explore further the issues that may be raised on such applications. Suffice it to note that the applications should be made promptly (as delay may count against the application) and should include information from which an assessment can be made as to the estimated quantum of the costs (and how that has been reached).

Personal costs orders

Section 99 of the *Civil Procedure Act* makes provision for costs orders to be visited personally on legal practitioners in certain circumstances. Section 99(1)(a) empowers the Court so to do in respect of costs incurred by the serious neglect, serious incompetence or serious misconduct of the legal practitioner. Section 99(1)(b) of the *Civil Procedure Act* empowers the Court to make compensatory orders against a legal practitioner who is responsible for costs having been incurred

without reasonable cause. Unlike the ordinary costs rules, this statutory power performs a disciplinary and penal function.

Alternatively, pursuant to s 348(1)(b) of the *Legal Profession Act 2004* (NSW) an order may be made that the solicitor be directed to indemnify a party against the whole of the costs payable by him to his legal representatives in respect of and associated with proceedings. There is also power under s 98(1)(b) of the *Civil Procedure Act* to make such a costs order.

In the commentary in *Ritchie's Uniform Civil Procedure* it is noted that, when read with ss 56(3) and (4) of the *Civil Procedure Act,* the powers conferred by the present section are not confined to the jurisdiction that existed at common law, citing by way of authority *Ridehalgh v Horsfield* (1994) Ch 205 at 231.

The concept of reasonable cause, as noted in *Ritchie's,* permits consideration not only of procedural defects or defaults but of the underlying merits of the litigation, reference there being made to the additional power conferred by ss 345 and 348 of the *Legal Profession Act* to award costs in the circumstances provided for in those sections.

The statutory power under s 99 is a confirmation of the Court's jurisdiction to exercise control over its own officers (*Kelly v Jowett* (2009) NSWCA 278 at [56]). The so-called "wasted costs jurisdiction" is exercised where the court is satisfied that the legal practitioner has failed to fulfil his or her duty to the Court (see *Kelly v Jowett* at [61]; *Puruse Pty Ltd v Council of the City of Sydney* (2009) 169 LGERA 85 at [45]). It is not to be used for the purposes of a professional negligence claim (*Harley v McDonald* at 703-704).

The exercise of the jurisdiction in this regard is one that recognises the tension between two public interests that lawyers should not be deterred from pursuing their client's interests by fear of incurring personal costs orders and that litigants should not be penalised by unjustifiable conduct in litigation by the opponent's lawyers.

The Court of Appeal in *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153; (2005) 63 NSWLR 300 (there considering a different provision under the *Legal Profession Act 1987* (NSW) but which would also apply under the current statutory provisions) considered the relevant principles to be gleaned from the English and Australian authorities which have considered the power to order legal practitioners to pay the costs of proceedings in which they have represented parties. Those are set out in paragraph [92] of McColl JA's judgment:

> The new Div 5C should be construed against the background of the following principles which can be gleaned from the English and Australian authorities which have considered the power to order legal practitioners to pay the costs of proceedings in which they have represented parties:
>
> (a) The jurisdiction to order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services must be exercised "with care and discretion and only in clear cases": *Ridehalgh* (at 229), *Re Bendeich* (1994) 53 FCR 422; *Deputy Commissioner of Taxation v Levick* [1999] FCA 1580 ; (1999) 168 ALR 383 per Hill J at [11]; *Levick v Deputy Commissioner of Taxation* [2000] FCA 674; (2000) 102 FCR 155 at [44]; *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 416 at [8] per White J (with whom Davies and Williams JJA agreed); *De Sousa v Minister for Immigration* (1993) 41 FCR 544; *Money Tree Management Service Pty Ltd v Deputy Commissioner of Taxation (No 3)* [2000] SASC 286;
>
> (b) A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence which is plainly doomed to fail: *Ridehalgh* (at 233); *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120 at [56] per Lord Hobhouse; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 (affirmed on appeal*, Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* [1999] FCA 773 ; (1999) 87 FCR 134); *Levick v Deputy Commissioner of Taxation; cf Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 157 ; [2003] 2 Qd R 683;
>
> (c) The legal practitioner is not "the judge of the credibility of the witnesses or the validity of the argument": *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297; the legal practitioner is not "the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him": *Myers v Elman* (at 304, per Lord Atkin); *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] HCA 26 ; (2001) 47 ATR 1 at [34] per Callinan J;

(d) A judge considering making a wasted costs order arising out of an advocate's conduct of court proceedings must make full allowance for the exigencies of acting in that environment; only when, with all allowances made, a legal practitioner's conduct of court proceedings is quite plainly unjustifiable can it be appropriate to make a wasted costs order: *Ridehalgh* (at 236, 237);

(e) A legal practitioner against whom a claim for a costs order is made must have full and sufficient notice of the complaint and full and sufficient opportunity of answering it: *Myers v Elman* (at 318); *Orchard v South Eastern Electricity Board* (at 572); *Ridehalgh* (at 229);

(f) Where a legal practitioner's ability to rebut the complaint is hampered by the duty of confidentiality to the client he or she should be given the benefit of the doubt: *Orchard v South Eastern Electricity Board* (at 572); *Ridehalgh* (at 229); in such circumstances "[t]he court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so": *Medcalf* (at [23] per Lord Bingham);

(g) The procedure to be followed in determining applications for wasted costs must be fair and "as simple and summary as fairness permits … [h]earings should be measured in hours, and not in days or weeks … Judges … must be astute to control what threatens to become a new and costly form of satellite litigation": *Ridehalgh* (at 238 – 239); *Harley v McDonald* [2001] UKPC 18 ; [2001] 2 AC 678 at 703 [50]; *Medcalf* (at [24]).

What is clear is that orders of this kind are exceptional orders to be made.

In relation to the question as to what amounts to "serious neglect" or "serious incompetence", it has been suggested that this requires something akin to gross negligence or serious dereliction of duty (*Wentworth v Rogers* [1999] NSWCA 403; *Litmus Australia Pty Ltd v Canty* [2006] NSWSC 196; although see *Whyked Pty Ltd v Yahoo! 7 Pty Ltd* [2008] NSWSC 477). As to what constitutes the provision of legal services "without reasonable prospects of success" , Barrett J in *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284 said that the construction of without reasonable prospects of success was one the meaning of which was equated with the concept of something so lacking in merit or substance as to be not fairly arguable.

In *Degiorgio,* Barrett J said (at [27] and [28]):

> In drawing a line at a somewhat higher point on the relevant scale of conduct, the Legal Profession Act should not, in my opinion, be presumed intend that lawyers practising in New South Wales courts must boycott every claimant with a weak case. A statutory provision denying to the community legal services in a particular class of litigation cannot be intended to stifle genuine but problematic cases. Nor do I see the statutory provisions as intended to expose a lawyer to the prospect of personal liability for costs in every case in which a court, having heard all the evidence and argument, comes to a conclusion showing that his or her client's case was not as strong as may have appeared at the outset to be. The legislation is not meant to be an instrument of intimidation, so far as lawyers are concerned.
>
> The several factors to which I have referred, including the references in the Premier's second reading speech and the apparent legislative purpose, cause me to adopt the construction of "without reasonable prospects of success" that equates its meaning with "so lacking in merit or substance as to be not fairly arguable". The concept is one that falls appreciably short of "likely to succeed".

At paragraph [132] of *Lemoto*, her Honour McColl JA noted that the test whether a claim or defence was so lacking in merit or substance as to be not fairly arguable must be applied in the context of the constituent components of the relevant section, and that the question as to whether a legal practitioner held a reasonable belief that provable facts and an arguable view of the law meant that the prospects of recovering damages or defeating a claim or obtaining a reduction in the damages claimed were fairly arguable were matters about which reasonable minds might differ:

> Barrett J's construction of the expression "without reasonable prospects of success" appears to me to accommodate both the purpose of Div 5C and to reflect the language of s 198J. The test, whether a claim or a defence was "so lacking in merit or substance as to be not fairly arguable", must be applied, however, in the context of the constituent components of s 198J. In that context the question becomes whether the solicitor or barrister held a reasonable belief that the provable facts and a reasonably arguable view of the law meant that the prospects of recovering damages or defeating a claim or obtaining a reduction in the damages claimed were "fairly arguable".

> These are matters about which reasonable minds might differ. The question will be whether the solicitor or barrister's belief that they had material which objectively justified proceeding with the claim or the defence "unquestionably fell outside the range of views which could reasonably be entertained": *Medcalf* at [40] per Lord Steyn.

Her Honour noted that the question will be whether the solicitor's or barrister's belief (that there was material which objectively justified proceeding with the claim or the defence) unquestionably fell outside the question of views which could reasonably be entertained; reference there being made to *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120. The conduct must be judged having regard to the circumstances known at the time and not with the benefit of hindsight (*Maurice Tarabay v Licha Bechara* [2010] NSWSC 292). Where the wasted costs jurisdiction is invoked there is a causal element namely that the wastage of costs was caused by the serious neglect, incompetence or misconduct in question.

Section 345 of the *Legal Profession Act* provides that:

> That a law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

Subsection 4 of section 345 provides that:

> A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim.

Where the conduct alleged is conduct that could lead to disciplinary findings, the *Briginshaw* ((1938) 60 CLR 336) principles would apply and the Court will approach the matter on the basis that there should be a high degree of certainty or satisfaction as to the basis on which the application is made (see McColl JA's comments at paragraphs [122] to [130] of *Lemoto)*.

In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 Goldberg J considered that it was too general a proposition to suggest that the commencement or maintenance of proceedings with no or no substantial prospects of success enlivened the jurisdiction to order a solicitor to pay the costs of a party; Sheller JA in *Carson* in this regard referred to the impropriety of commencing futile proceedings or proceedings foredoomed to fail. In *Lemoto*, McColl JA referred to these dicta and noted that cases in which legal practitioners had been ordered to pay the other party's costs of the proceedings were those in which the claims were plainly unarguable or the proceedings were futile giving as an illustration of a hopeless case that might attract that jurisdiction the case where there was no evidence to support an essential element of a cause of action.

Fruits of the action lien

In order to balance the spectre of personal costs orders with something more positive for legal practitioners, I note that equity recognises a lien over the fruits of litigation to secure the payment of the solicitors' costs of the proceedings (subject to the requirement that the work have a sufficient causal connection to the recovery in that litigation).

In *Ex Parte Patience; Makinson v Minister* (1940) 40 SR (NSW) 96 at 100-101, Jordan CJ gave the classic exposition of a solicitor's equitable right to have his or costs and disbursements paid from money recovered for his or her client:

> A solicitor has no lien for his costs over any property which has not come into his possession. If, however, as the result of legal proceedings in which the solicitor has acted for the client, the client obtains a judgment or award or compromise for the payment of money, although the solicitor acquires no common law title to his client's right to receive the money or to any part of that right, he acquires a right to have his costs paid out of the money, which is analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor. That is to say, the solicitor has an equitable right to be paid his costs out of the money; and if he gives notice of his right to the person who is liable to pay it, only the solicitor and not the client can give a good discharge to that person for an amount of the money equivalent to the solicitor's costs: *Welsh v Hole* 1 Doug 238. If the person liable to pay refuses, after notice, to pay the costs of the solicitor, the solicitor may obtain a rule of Court directing that the

> amount of his costs be paid to him and not to the client; and payment by the judgment debtor to the client after notice of the solicitor's claim is no answer to an application for such a rule: *Read v Dupper* 6 TR 361; *Ormerod v Tate* 1 East 464; *Ross v Buxton* 42 Ch D 190. Further, if the client and a judgment debtor make a collusive arrangement for the purpose of defeating the solicitor's right, the Court will enforce that right against the judgment debtor notwithstanding the arrangement and notwithstanding that no notice of the solicitor's claim had been given to the judgment debtor prior to the arrangement: *Ross v Buxton*.

More recently, in *Firth v Centrelink* [2002] NSWSC 564; (2002) 55 NSWLR 451, Campbell J (as his Honour was then) considered the nature of a solicitor's lien over money recovered for the solicitor's client and helpfully set out the follow propositions at [35]:

> (a) The solicitor's right exists over money recovered through obtaining judgment in litigation, and also over money recovered through the settlement of litigation: *Carew Counsel Pty Ltd v French* [2002] VSCA 1 at [33]; *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980, Lehane J, 22 September 1997, unreported at 4.
>
> (b) The solicitor's right exists over both the amount of a judgment in favour of the client, and the amount of an order for costs in favour of the client: *In The Estate of Fuld (No 4)* [1968] P 727 at 736; *Twigg v Keady* (1996) 135 FLR 257 at 266 - 267 per Finn J; *In Re Blake; Clutterbuck v Bradford* [1945] Ch 61 (a case concerning a statutory charging order rather than a lien arising in equity's exclusive jurisdiction, but dependent on the same principle as the equitable right - see para 44 below).
>
> (c) It exists over money which is in the possession of the solicitor, and also over money which is in court (*In Re Meter Cabs* [1911] 2 Ch 557 at 562) and money which is owed to the client but not paid into court (*In The Estate of Fuld* (No 4) [1968] P 727; *Re de Groot* [2001] 2 Qd R 359 at 375)
>
> (d) The solicitor need not be still acting for the client at the time that the money was recovered: *In The Estate of Fuld* (No 4) [1968] P727; *Kelso v McCulloch* (Supreme Court of NSW, Young J, 24 October 1994 unreported); *Twigg v Keady* (1996) 135 FLR 257 at 289 per Kay J; *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980, Lehane J, 22 September 1997, unreported at 4
>
> (e) For the right to arise it must be shown that there is a sufficient causal link between solicitor's exertions and the recovery of the fund of money: *Roam Australia Pty Ltd v Telstra Corp Ltd*

[1997] FCA 980, Lehane J, 22 September 1997, unreported at 4 - 5; *Carew Counsel Pty Ltd v French* [2002] VSCA 1 at [33].

(f) The quantum of money for which the solicitor has the equitable right is the amount which is properly owing to the solicitor by the client, whether that amount be ascertained by taxation of a bill of costs, or assessment, or pursuant to a costs agreement: *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980 (Lehane J, 22 September 1997, unreported at 4). In relation to those situations where taxation is necessary to ascertain the quantum owing to the solicitor, the solicitor's right exists in the fund prior to the occurrence of the taxation (*Johns v Cassel* (1993) 6 BPR 13,134 at 3,136 per Hodgson J; *Twigg v Keady* (1996) 135 FLR 257 at 289 per Kay J; *In The Estate of Fuld (No 4)* [1968] P 727 at 740; *Roam Australia Pty ltd v Telstra Corp Ltd* [1997] FCA 980 (Lehane J, 22 September 1997, unreported at 6).

(g) The solicitor's equitable right exists before the court is asked to intervene to protect it; it "arises immediately upon the recovery of monies through the exertions of the solicitor": *Carew Counsel Pty Ltd v French [2002] VSCA 1 at [33];* if the lien is over the proceeds of an order for costs, it comes into existence at the time of making of that order for cost: *Phillipa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266; *Kison v Papasian* (1994) 61 SASR 567. If the lien is over the proceeds of a settlement, it arises when the settlement agreement is entered into: *Re de Groot* [2001] 2 Qd R 359 at 368. (These statements concern when the lien comes into existence as an item of present property - they are not concerned with the ability of the solicitor to deal with the rights under the lien as future property before the fund is in existence.)

(h) The right of the solicitor is one which the solicitor can enforce against the client, entitling the solicitor to an injunction to prevent the payment of the fund to the client without notice to the solicitor until such time as the quantum of the solicitor's entitlement to be paid from the fund is ascertained: *In The Estate of Fuld* (No 4) [1968] P 727. If the quantum of the solicitor's entitlement has been ascertained, the solicitor is entitled to an order that the amount of his entitlement be paid to him from the fund, notwithstanding opposition from the client: *Leamey v Heath* [2001] NSWSC 1095 (Campbell J, 22 November 2001, unreported).

(i) The right can also be enforced against people other than the client, in certain circumstances. When the money recovered takes the form of a debt owed to the client, which has been assigned, the right of the solicitor will prevail over the rights of an assignee of the debt, save where the assignee is a bona fide purchaser for value without notice: *Re de Groot* [2001] 2 Qd R 359. (If the assignee is a bona fide purchaser for value without notice, it may be that priorities between the solicitor's right and the right of the assignee are to be determined in

accordance with the rule in *Dearle v Hall*, (see Meagher, Gummow & Lehane, Equity Doctrines and Remedies, 3rd edition, at [819] ff) or it may be that the court considers who, of the solicitor and the assignee, has the superior equity - *Re de Groot* [2001] 2 Qd R 359 at 368 - 376 - but it is not necessary for me to consider that matter further.)

(j) If the client is a company which goes into liquidation, the solicitor is entitled, in relation to costs arising from work done before the start of the liquidation, to claim the full amount of the costs from the fund, and is not required to prove in the liquidation: *In Re Born; Curnock v Born* [1900] 2 Ch 433; *In Re Meter Cabs* [1911] 2 Ch 557. This has the same practical effect as enforcing the right against the other creditors of the company. The solicitor's lien attaches to property recovered through his exertions, even if the actual recovery occurs after the client goes into liquidation: *North West Construction Co Pty Ltd (In Liquidation) v Marian* [1965] WAR 205 at 211.

(k) Likewise if the client is a natural person who becomes bankrupt, the solicitor is not required to prove in the bankruptcy for the amount of costs incurred, but can recover the costs from the debt which is the result of his efforts: *Guy v Churchill* (1887) 35 Ch D 489; *Worrell v Power & Power* (1993) 46 FCR 214. The trustee in bankruptcy takes that debt subject to the equitable right of the solicitor to be paid his costs, and if the amount of the solicitor's costs exceeds the value of the debt, the debt does not vest in the trustee in bankruptcy at all; if the client is discharged from bankruptcy he can sue to enforce the debt as it never was property divisible among the creditors, and any amount that the client then receives is also subject to the solicitor's lien: *Kison v Papasian* (1994) 61 SASR 567

(l) If the client is the liquidator of a company in liquidation, the solicitor's lien over property recovered through his exertions is to be satisfied before the statutory order of priorities for distribution of the property of the corporation comes into effect: *Jeffcott Holdings Ltd (in liq) v Paior* (1995) 18 ACSR 213

(m) If the money recovered is held in the solicitor's trust account, and the solicitor is served with a garnishee notice, issued to enforce a debt which the client owes to another person, the garnishee notice is not effective to attach the money in the trust account, to the extent that the solicitor has a lien over it: *Phillipa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266. Likewise if the money recovered is held by a third party, and a garnishee notice is served on that third party, the solicitor's lien prevails over the garnishee notice: *Dallow v Garold; Ex parte Adams* (1884) 14 QB D 543.

His Honour went on to consider the nature of the equitable right and said (at [38]) that "it is apparent that the equitable right which a solicitor has to be paid costs and disbursement from the fund which his efforts have recovered, is a kind of

proprietary interest in that fund." His Honour noted that the facts that the right can survive an insolvency administration of the client and is assignable (as held by Jordan CJ in *Ex parte Patience*) are "strong indicia of it being a right of a proprietary nature."

His Honour confirmed (at [48]) that the rationale for the existence of the solicitor's lien over a fund recovered through his or her efforts is that, if the solicitor had not done the work, and spent the money, there would not be any fund in existence and that the solicitor's role in bringing the fund into existence is of such importance that equity recognises proprietary rights which enable the solicitor to be paid out of the fund, citing (at [48]-[49]) the observations of Lord Justices Cotton, Lindley and Bowen in *Guy v Churchill* (1887) 35 Ch D 489 and the observation in *Read v Dupper* (1795) 6 TR 361; 101 ER 595 of Lord Kenynon CJ that:

> …the principle by which this application is to be decided was settled long ago, namely that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expence those fruits are obtained.

Campbell J in *Firth v Centrelink* drew an analogy between the proprietary nature of the right to be paid out of the asset and the right to trace funds into the hands of a third party at [41], the former being a right:

> … which can prevail against an assignee of the asset who is not a bona fide purchaser for value without notice, that is the equivalent, in the context where the solicitor does not have full title to the fund, of being able to trace the funds into the hands of a third party.

His Honour, in considering and rejecting the proposition that notice was necessary to perfect such a lien, noted that in *Ex parte Patience* the solicitor's right to have costs paid out of the money recovered was analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor (see [52]-[69].

In *Firth v Centrelink*, Campbell J did not expressly deal with the question whether an equitable right of the kind there considered arises where the fund has been 'preserved' rather than 'recovered' through the efforts of a solicitor. That issue was considered by White J in *Jackson v Richards* [2005] NSWSC 630, his Honour there noting (at [56]) that he had not been able to discover any case at common law or equity which could properly be characterised as one recognising a lien arising where the client had "successfully resisted a claim on his property", nor had Counsel there referred his Honour to any such case.

His Honour came to the view at [61] that:

> In my view, a solicitor does not have a "lien" merely because through his or her instrumentality the client has successfully resisted a claim, even a claim on property. If a defendant is sued for a debt, and successfully resists the claim, it could be said that a solicitor whose efforts have resulted in the successful resistance of the claim has preserved all the client's property of the claim. But I am aware of no authority which says that solicitor has a lien over the defendant's property for the amount of the plaintiff's claim. claim. It would be curious if the extent of a solicitor's lien should depend upon the extravagance or the modesty of the claim made by the opposite party against the client. … a lien over the proceeds of a judgment or order or a compromise of a claim, is limited by the success for the client which has been quantified objectively by the judgment, order or compromise.

His Honour also noted that the weight of authority is against the lien extending to the recovery of property (as opposed) to money. At [62]-[63], his Honour said:

> There is some force in the submission of counsel for the plaintiffs that there is no logical reason for not allowing a solicitor a lien over property preserved by his efforts, just as he is entitled to a lien over money recovered for a client. In each case the solicitor would be preferred to other unsecured creditors of the client, but if the solicitor is entitled to that preference for moneys recovered, there is equal reason for him to be entitled to it for property preserved. There is a public policy ground for solicitors having such a preference, as otherwise meritorious claims or defences might not be maintained. However, the "fruits of the litigation lien" is akin to the maritime doctrine of salvage, in that it looks to the recovery of "fruit" above other factors. (*Read v Dupper*). Nor, for the reasons in para 61, is the corollary between a lien on property recovered and a lien on property preserved, complete. In any case, logic is not the determining factor. It would be logical for the lien to apply to the recovery of real or personal property other than money. That is not the law. The position was corrected by statute, but the statute has since been repealed. Having

> regard to the repeal of s 39A of the Legal Practitioners Act 1898, there is no scope for the expansion of the lien on policy grounds. In any event, it may be doubted that on policy grounds the court should prefer the position of a solicitor to unsecured creditors generally. (Pringle v Gloag (1879) 10 Ch D 676 at 680).
>
> To allow the plaintiffs' claim to a particular lien would be to expand the reach of the common law right to an area formerly covered by statute, where the statute has been repealed because Parliament thought that the rights conferred on solicitors were against public policy. In my view, the plaintiffs are not entitled to a particular lien, or right in the nature of a lien, in respect of the defendant's share of the proceeds of sale of the Drummoyne property, nor in respect of so much of the proceeds of sale of the Drummoyne property as reflect the defendant's successful resistance to Ms Rose's claim.

Though White J confirmed that the lien did not extend to a contested claim relating to real property, rather than a monetary amount, his Honour accepted at [59] that:

> As *Jones v Cassell* and *Grogan v Orr* demonstrate, in an appropriate case, [the equitable right] may extend to a judgment obtained for the sale of property and to the fund realised upon such sale, *where the order was obtained by the client and can be regarded as a fruit of the litigation*.

White J (at [39]), noting the differences between the statutory right to obtain a charging order and the common law "fruits of litigation" lien, said that one of the differences between the two was that the statutory charge only came into existence upon its being declared by a judge, whereas the "lien" arises automatically. At [47], White J said:

> It is clear from para 62 of the judgment of Sheller JA, which I have quoted, that the Court accepted that for a solicitor to be entitled to a lien over the fruits of litigation, those fruits must be "produced by the industry of the solicitor". This is not an exacting standard. It is not necessary to demonstrate that a judgment or settlement came about as a result of specific efforts by the solicitor, but there must be some causal link between the solicitor having acted for the client in the proceedings and the resulting payment to the client. (*Doyles Construction Lawyers v Harsands Pty Ltd* (McLelland CJ in Eq, 24 December 1996 unreported); BC9606389 at 4; *Roam Australia Pty Ltd v Telstra Corporation Ltd (t/as Telecom Australia)* (Federal Court of Australia, Lehane J, 22 September 1997 unreported) (at 4–5); *Firth v Centrelink* at 463–464).
>
> Neither of these cases decides that a solicitor is entitled to a lien over a fund brought into existence as a result of an order for sale of property, where the order was not obtained by the client, but was

> obtained by the opposite party, against the client's resistance. The opinion of the majority of the Court of Appeal in Grogan v Orr was that the orders which the Family Court made were the fruits of the cause produced by the industry of the solicitor, and that those orders produced the proceeds of sale of the property. That was a finding of fact. The only point of law decided was that, as Hodgson J held in Jones v Cassel, an order for sale of property, and the fund arising therefrom, can be the fruits of litigation which can provide security for a solicitor whose industry has produced them.

Therefore, when considering whether an equitable lien can be established, the first question that falls to be considered is whether the money in the controlled moneys account is to be characterised as having been 'recovered' as part of the fruits of the litigation or simply 'preserved'.

Examples of 'recovery', in this context, include where the action is a successful claim for compensation from the Crown (*Ex parte Patience; Makinson v Minister*) and a successful claim for personal injury, even where it is won by settlement and not by an order of the court (*Firth v Centrelink*).

Success, whether outright or equivocal, in the principal claim is not a necessary element to make out recovery, where a costs order is obtained. The principle in *Ex parte Patience* was applied by the Queensland Court of Appeal in *Philippa Power & Associates v Primrose Couper Cronin Rudkin* (1997) 2 Qd R 266, where it was held that a lien arose in favour of solicitors over costs which were awarded to their client, although the settlement of her principal claim was on terms that were not particularly satisfactory for the client. Again, costs awarded pursuant to a successful defence of a winding up order were treated as 'recovered', for the purposes of the solicitor's particular lien, in *Akki P/L v Martin Hall P/L*). Further, in *Worrell (as trustee of the estate of Wedgewood) v Power & Power* (1993) 118 ALR 237, where no order was made regarding the principal claim but the plaintiff was given leave to amend its statement of claim and ordered to pay the defendant's costs thrown away by virtue of the amendment, it was held by the Full Court of the Federal Court that a lien arose in favour of the solicitors acting for the defendant over the costs so awarded.

On the other hand, in *Jackson v Richards* the funds were characterised as simply having been 'preserved', not recovered as such. There, the solicitor in question had acted for the defendant in defence of a claim where the plaintiff had sought an order to that the defendant sell a property and pay her 65% of the proceeds. The outcome of the proceedings was that the defendant was ordered to sell the property and the plaintiff received an award for 60% of the sale proceeds. At [54], White J held that "I do not consider that the order for sale of the property can be regarded as a fruit of the litigation for the defendant. The order was not obtained by him."

In coming to this conclusion, his Honour distinguished two cases (*Grogan v Orr* [2001] NSWCA 114 and *Johns v Cassel* (1993) 6 BPR 13,134; FLC 92-364) (at [50]) on the basis that in "[n]either of these cases decides that a solicitor is entitled to a lien over a fund brought into existence as a result of an order for sale of property, where the order was not obtained by the client, but was obtained by the opposite party, against the client's resistance". His Honour went on to say at [51] that:

> The conclusion of Sheller JA in *Grogan v Orr* that in matters under s 79 of *the Family Law Act 1975* (Cth), the whole of the parties' property is "under consideration" must be, I think, a statement applied to the particular facts of that case, rather than a statement of law applicable to all claims under s 79 of the *Family Law Act* or s 20 of the *Property (Relationships) Act*. The fact that the court has power to make orders to adjust the whole of a party's property is irrelevant unless one or other of the parties invokes the power by asking the court to determine its rights by reference to all of the parties' property. It cannot be the case that if, as in the present case, a party to a relationship makes a particular claim to a share of the client's property, so that the balance of the client's property is never at risk, the client's retention of property that was not the subject of a claim could be said to be due to the industry of the solicitor.

The question that arises on the application of the reasoning in *Jackson v Richards* is not which party 'wins more' in the final result, but on whose action the order that results in the monetary fund is obtained.

The second issue that arises is whether the requirement that there was a sufficient causal connection between the solicitor's labour and the fruits of the

litigation has been satisfied. (The fact that a solicitor is no longer acting for the client at the time the judgment was given does not disqualify the solicitor from claiming a lien but is a factor to be taken into account). The test is that there must be "be some causal link between the solicitor having acted for the client in the proceedings and the resulting payment to the client" (*Jackson v Richards*; *Doyles Construction Layers v Harsands Pty Ltd* (NSWSC, McClelland CJ in Eq, 24 December 1996, unreported); *Roam Australia Pty Ltd v Telstra Corporation Ltd (t/as Telecom Australia*) (FCA, Lehane J, 22 September 1997, unreported); *Firth v Centrelink*).

Regarding this 'causal connection', McLelland CJ in Eq said in *Doyles Construction Lawyers* that:

> [I]t is unnecessary for Doyles to demonstrate that the settlement came about as the result of specific efforts by them. According to the statement of principle [in *Patience*]…it is sufficient to give rise to the equitable right that the settlement resulting in payment to the client came about as a result of the legal proceedings and that the solicitor had acted for the client in those proceedings, this being treated as a sufficient causal link.

The same issue was considered by Lehane J in *Roam Australia*, where his Honour considered that the above comment by McLelland CJ in Eq did not stand for the proposition that in every instance a solicitor has acted for party where a judgment or compromise is obtained, they are entitled to a lien over the 'fruits' no matter how "slight or fleeting" their involvement. His Honour, still discussing *Doyles Construction*, then said:

> In each case, in my view, it must be a question whether the requisite causal link is established, whether the judgment or compromise is, on the evidence, to be regarded as brought about (or partially brought about) by the efforts of the solicitors. In *Doyles* the causal link was not difficult to see: although others had acted for the plaintiffs at earlier stages in the proceedings, Doyles acted for a period of about ten months up to, and overlapping with the time when the compromise was negotiated.

His Honour then held that a sufficient causal connection was established on the facts in *Roam Australia*, where the solicitors had acted for 16 months, ceasing to do so shortly before trial, having briefed counsel from time to time, attended directions hearings, attended to discovery and inspections and obtained affidavit

evidence, acted in mediations and undertook some further unsuccessful settlement negotiations.

Ultimately, whether there is sufficient causal connection to found a lien is a question of fact.

The fruits of the action lien is an equitable interest that is proprietary in nature and survives a company's liquidation. As to the time at which the lien arises, in *Phillipa Power & Associates v Primrose Couper Cronin Rudkin* [1977] 2 Qd R 266 at 271-2 (noted by Campbell J in *Firth* at [51]), Macrossan CJ and White J in the Court of Appeal in Queensland said:

> Once the nature of a solicitor's interest in a fund representing the fruits of his labours is appreciated and it is accepted that the solicitor's interest in the fund dates back to the time when the fund first comes into existence, or the original order for the payment of the sum constituting the fund is made, then it is clear that the interest of the solicitor will prevail over the right of an execution creditor subsequently seeking to attach the fund.

In *Jeffcott Holdings Ltd (in liq) v Paior & ors* (1995) 18 ACSR 213, Debelle J said:

> It seems that a solicitor appointed by a liquidator is entitled to a lien for his costs on a fund recovered in the winding up as a result of his exertions: *Re Massey, Re Freehold Land and Brickmaking Co* (1870) LR 9 Eq 367. The solicitor has no lien on monies which were in the hands of the company before the winding up or the general assets of the company, where neither has come into the hands of the company as a result of any action on the part of the solicitor: *Re Massey* (supra). *He is, however, entitled, after the winding up, to obtain a charging order on a fund in court recovered by the company as a result of his exertions before the winding up*: *Re Born, Curnock v Born* [1900] 2 Ch 433. These principles are but instances of the equitable right or lien of a solicitor to be paid his costs out of monies recovered by his own exertion. That right or lien was explained by Jordan CJ in *Ex parte Patience; Makinson v Minister* (1940) 40 SR(NSW) 96, 100. The lien also exists in the case of a bankrupt estate where a fund has resulted from the efforts of a solicitor: *Worrell v Power and Power* (1993) 118 ALR 237; *Kison v Papasian* (1994) 61 SASR 567. *I do not think that a solicitor's entitlement to a lien is affected by s 441(a). There is nothing in s 441(a) which expressly purports to alter the entitlement nor does it appear by necessary intendment. Had it been intended to affect the entitlement to that lien, that intention would have been clearly ascertainable: Potter v Minahan* (1908) 7 CLR 277, 304. (my emphasis)

> …The fund to which the appellant looks for security for his costs and which he seeks to charge is the fund which will be generated by the exertion of the solicitors for the company, if the company succeeds in the action. I do not think it equitable that the appellant should have a charge upon this fund to the detriment of the solicitors whose efforts would have brought about the existence of the fund. Nor is it equitable that they be able to share pari passu with the solicitors. Although the power to make an order for security for costs provides a means by which the court might alter the priorities otherwise applicable on a winding up, I do not think it proper in this action to make an order which would qualify or affect the solicitor's lien in any respect. I would, therefore, dismiss the appeal.
>
> Even if s 441(a) had the effect of altering the entitlement of the company's solicitors to a lien so that they must rank for their costs with all others who have priority pursuant to that provision, I would not order the security for costs which the appellant seeks. Any costs payable to the appellant will be costs of the winding up and will rank with other claims made pursuant to s 441(a). Section 386(3) provides a means by which the court can attempt a just distribution among the claimants if the fund is inadequate to meet all the claims upon it. At the risk of repetition, it cannot be overlooked that any fund which will come into existence will be the result of the exertions of the solicitors for the company. It would be inequitable if the appellant were able to gain a priority over those whose efforts have created the fund. I agree with the learned master that it would not be a proper exercise of the discretion in relation to making an order for security for costs to give the appellant the priority he seeks or to entitle the appellant to share pari passu with the solicitors for the company. If the fund is inadequate to meet all claims upon it, the parties can, if necessary, apply to the court pursuant to s 386(3). That is the appropriate time for the appellant to apply. To grant his present application could result in an inequity to those who have at least an equal claim to that of the appellant.

Equitable liens can be charges within the statutory definition of a charge in s 9 of the *Corporations Act* but would not seem to be registrable on the basis that they arise by operation of law. The same position may not necessarily apply having regard to the new *Personal Property Securities* legislation. The requirement for registration will there depend on whether there is an interest in personal property provided for by a transaction that in substance secures the payment or performance of an obligation (s 12(1)). The question there will be whether that encompasses an equitable lien or common law lien arising by operation of law in the relevant circumstances.

Costs of Interlocutory proceedings/proceedings which are settled without consideration of the merits

Hamilton J in *Coscom Pty Limited v Standing Enterprises Pty Limited* [2006] NSWSC 114 noted the principles applicable to costs orders in interlocutory applications and said:

> In interlocutory applications for injunction or extension of a caveat a successful plaintiff will usually obtain, not a straight out order for its costs, but an order that the costs of the application be its costs in the proceedings. This will mean that the plaintiff will recover the costs of the interlocutory application if it is successful in the proceedings. If it is not, it will not recover the costs of the interlocutory proceedings, but the defendant will not be entitled to recover under an order for costs in its favour the costs of the interlocutory application.

His Honour noted that in that case the caveat aspect had been settled without any determination by the court and proceeded on the principle laid down in *Re Minister for Immigration & Ethnic Affairs Ex parte Lai Qin* (1997) 186 CLR 622, that a court will generally not try a settled case in order to determine the incidence of costs (this being, his Honour said, extremely wasteful of the time of the courts).

In *Lai Qin*, McHugh J said:

> In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.
>
> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise

> a power and that the plaintiff had no reasonable alternative but to commence a litigation.

As I read McHugh J's judgment, the word "so" is used to indicate a level of unreasonableness which would warrant an order being made for costs; in other words unreasonableness having regard to the circumstances in which the costs were incurred. I note that in that passage his Honour adverted to the situation where the plaintiff may have had "no reasonable alternative but to commence litigation".

Where the question of costs arises on a discontinuance by one party, the Court of Appeal has made clear that although there is no presumption that costs will be ordered against the discontinuing party the onus is on the party seeking a discontinuance without payment of the other party's costs to satisfy the court that there is "some sound positive ground or good reason for departing from the ordinary course" provided for under UCPR 42.19 (*Australiawide Airlines Limited v Aspirion Pty Ltd [2006] NSWCA 365* at [53]). Hodgson JA there noted that discontinuance both precludes full consideration of matters that could be relevant to previously undecided costs and provides a framework in which all undecided costs questions should be considered. Basten JA in that case said that a party which seeks to discontinue "must generally, in a relevant sense with respect to costs, be treated as an unsuccessful party", noting that the discretion was not unconfined. His Honour commented that in some cases discontinuance will involve the termination of proceedings without the court knowing what result there would have been had they been determined on the merits but that in one sense the existence of a hearing on the merits may be largely irrelevant "just as the actual result of a hearing on the merits will not be affected by the fact that the proceedings might have been run differently and might then have achieved a different result".

Basten JA observed at [79] that:

> In some circumstances it may be argued that a discontinuance does not involve a surrender or abandonment by the plaintiff, but recognition that "some supervening event" has militated against success, rendered the proceedings futile, or wholly removed the plaintiff's cause of action.

In *Massarani v Roads and Traffic Authority of NSW* [2011] NSWSC 1520, Davies J applied the above and considered whether some positive ground or good reason for departing from the ordinary course had been demonstrated (having regard to whether there had been any supervening event or change that had brought about the discontinuance) and, in the absence of any such event considered that none had been established.

Therefore, where events make continuance of proceedings not viable for legal or commercial reasons consideration should be given as to how to establish good reason for an order other than an order for costs against the discontinuing party and the party moving to discontinue proceedings should do so promptly in order to avoid further costs being incurred.

Conclusion

The above is intended to be no more than an overview of the issues that arise in relation to costs of the litigious process. It has been said that in life there are two certainties: death and taxes. In litigation there is at least one: costs. It is incumbent on you as practitioners to seek both to minimise the costs incurred in litigious proceedings and maximise your client's ability to recover costs of proceedings in which it has been successful on some or all of the issues before the Court.