Précis Paper

Costs

This discussion is worthy of spending 50 minutes watching and listening to. These eminent lawyers examine the strength of a cost assessors findings and the difficulties of upsetting them on appeal.

Discussion Includes

- The procedure for having costs assessed
- How to challenge an assessment of costs
- Approach taken by the Court when reviewing a costs assessment
- The history and findings in *King v Allianz Australia Insurance Limited* [2015] QCA 101
- Issues relating to the elements of care and consideration and what is fair and reasonable
- Issues relating to what costs are necessary or proper

Précis Paper

Costs

1. In this edition of BenchTV, Tom Quinn (Barrister) is interviewed by Mike Dudman (Partner/Costs Lawyer) on the topic of legal costs with reference to the recent Queensland Court of Appeal (Philippides JA, Mullins and Burns JJ) decision in *King v Allianz Australia Insurance Limited* [2015] QCA 101 (*King*). Mr Quinn was counsel for the successful appellant, King, in this case and Mr Dudman is a partner of Blackstone Legal Costing, a costs consulting firm.

<u>What is the Procedure for Having Costs Assessed, and Challenging an Assessment?</u>

2. The procedure for a costs assessment will depend upon the nature of the relationship between the parties to the proposed assessment. The need for an assessment of costs arises in two distinct situations:
    a. An order for costs is made by a Court in favour of the successful party to the litigation against the unsuccessful party (*"award costs"*);
    b. A disgruntled former client seeks an assessment of costs and outlays charged by solicitors who have acted on behalf of the client (*"client costs"*).

3. There has been a recent increase in disputes concerning costs, particularly award costs, as parties are inclined to appeal the cost assessor's decision to not only a panel review of that decision but also to the District Court on a point of law relating to costs.

4. Previously, there was a process of taxation of legal costs undertaken by taxing officers. This no longer occurs in most jurisdictions and these 'taxing officers' have been replaced by cost assessors.

5. Once a Court has made an order for costs, the successful party will then usually use a legal costing firm to produce a costs statement that will then be sent to the unsuccessful party ('the paying party'). If the paying party disputes any items in the costs statement, it is obliged to lodge a notice of objection. Costs assessors are then appointed to consider the paying party's objections, and subsequent response by the successful party, and they adjudicate on each item objected to. Under rule 722 of the *Uniform Civil Procedure Rules 1999* (UCPR) (Qld), costs assessors must limit their assessment to the particular items raised in the notice of objection.

RULE 722:

Assessment must be limited

If a notice of objection relates only to a particular issue or a particular item, a costs assessor must limit the assessment to the resolution of the matters raised in the notice of objection in relation to the issue or item and otherwise assess the costs under rule 708.

Other Rules

6. Chapter 17A of the UCPR deals with costs, including costs assessment and applications for review of a costs assessment. Part 3 deals with award costs whereas Part 4 deals with client costs and their assessment under the *Legal Profession Act 2007* (Qld). As the *King* case concerns award costs, the discussion focusses on Part 3.

7. Part 3 contains 6 divisions. Division 1, titled "*Before application*", critically provides for 3 main elements:
    a. Service of a costs statement by the collecting party entitled to be paid costs;
    b. Service of the notice of objection by the paying party in response to the costs statement;
    c. A default assessment of the costs statement if no notice of objection is served within 21 days of the costs statement.

8. Division 2, titled "*Application*", provides the mechanism for obtaining a costs assessment once a costs statement has been served. The elements of the application process are:
    a. An application under rule 710 of the UCPR;
    b. An order appointing a costs assessor either pursuant to rule 712 or 713 of the UCPR.

9. Division 3, titled "*Assessment*", deals with the assessment process. Rule 721 sets out the matters for a costs assessor to consider in the exercise of the assessment discretion. Rule 722, detailed above, is important because it limits the assessment to the particular issue and particular items raised in the notice of objection. The consequence of that rule is that the costs assessor is not entitled to conduct a roving enquiry into the content of the costs statement. Rather the costs assessor is effectively limited to dealing with the particular items and the issues raised in relation to them as set out in the notice of objection.

10. Division 4 deals with the costs of the assessment and offers to settle. Division 5 provides for a costs assessor's certificate. Lastly, Division 6 concerns matters after the costs assessment. In particular, rule 742 confers an entitlement on the parties to a review of the costs assessor's decision. Subrule 742(5) limits the review to the initial grounds of objection set out in the notice of objection and grounds raised before the costs assessor. This is designed to ensure

that the scope of disputation in relation to the assessment is not broadened upon an application to review the assessment. This rule was important to the Queensland Court of Appeal's determination in *King*.

Where a Court is Reviewing a Costs Assessment, What Approach will the Court Take?

11. In a nutshell, the approach is one of both constraint and restraint. This restraint is analogous to the general inclination against appellate interference with the discretionary judgements of costs assessors. Thus, it is not sufficient for an appellate tribunal to uphold an appeal by taking the view that they would have made a different decision concerning the quantum of costs. Rather, review of costs assessor decisions are restricted to underlying errors or issues of principal.

12. The cases which establish the requirement to adopt restraint when dealing with an application for review of a costs assessment are both well-established and of the highest authority. These cases are discussed below.

13. In *Schweppes' Ltd. v. Archer* (1934) 34 SR (NSW) 178, there was a unanimous decision of the full court of the NSW Supreme Court. The Court adopted the following approach to review of costs assessments at page 183:

> *"[Courts] will in general interfere only where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong; and where the question is one of amount only, … [the Court will only intervene] in an extreme case."*

14. Consequently, a judge hearing a review application can only interfere with a costs assessment if the applicant demonstrates the assessment decision is within this narrow category of cases justifying interference. If the judge conducting the review merely substitutes their own opinion of what should have been allowed or disallowed in the costs assessment process, then it is likely the decision will be set aside.

15. The decision in *Schweppes* was endorsed by the High Court in *Australian Coal and Shale Employee's Federation v Commonwealth* (1953) 94 CLR 621. This High Court decision has subsequently been frequently referred to by intermediate Courts of Appeal: *Tey v Optima Financial Group Pty Ltd* [2012] WASCA 193; *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236; *Hall v Poolman* [2009] NSWCA 64.

16. To summarise the authorities in this area, the position is that:
    a. The very restrictive rules concerning applications to review a costs assessment are firmly entrenched;

b. An applicant seeking review of a costs assessment bears a heavy onus in demonstrating that a judge should interfere with a costs assessment decision.

17. It is important for the Courts to maintain this restrictive position for a number of reasons. Firstly, except in unusual cases, review of costs assessments involve relatively minor amounts for which there is no practical reason to review. Secondly, as costs assessors spend significant time reviewing documents relating to the costs statement, they have a far greater opportunity than an appellate court to understand the merits in the costs being claimed since the appellate Courts do not review these documents. Therefore, in Mr Quinn's experience, costs assessors have an 'infinitely superior grasp' of the relevant cost items and they are in the best position to determine what a fair and reasonable quantum of those costs is. If judges were to begin reviewing these numerous costs-related documents, this would suggest to parties that the quantum of costs may also be reviewed instead of an underlying principle or issue.

King v Allianz Australia Insurance Limited [2015] QCA 101

18. In *King,* the parties to the costs assessment were opponents in civil claim proceedings where the plaintiff, Daniel Raymond King, claimed damages for personal injuries sustained in a motor vehicle accident. Their relationship so far as costs were concerned arose from settlement of those proceedings and an order for payment of costs made in favour of the plaintiff against the defendant, Allianz Australia Insurance Limited.

19. In the costs phase of the dispute, a costs statement was prepared and sent to Allianz who subsequently lodged a notice of objection to several cost items. A costs assessor undertook a costs assessment involving six main issues raised by the parties. However, only two of these issues were in contention on appeal, being (1) the Care and consideration percentage and (2) Expert's fees. In relation to these two issues, the costs assessor:
    1. Considered the parties' submissions concerning care and consideration, also known as 'skill and conduct' in other states. Allianz argued that because King's solicitors had heavily involved counsel in the matter, King's solicitor's care and consideration should be reduced to 25%. Whilst the costs assessor took this argument into account, he did not agree with Allianz's approach and ultimately accepted King's claim for care and consideration at 30%;
    2. Weighed both parties' arguments regarding whether the number of experts were excessive, with particular attention to the costs of the report from the clinical anatomist. The costs assessor determined in favour of King that he should be able to recover the costs relating to the clinical anatomist's report.

20. Allianz subsequently submitted a review application of the cost assessment concerning these two issues.

Trial Judge Decision - Queensland Supreme Court (First Instance Decision)

21. In relation to care and consideration, the trial judge held that the costs assessor had not given sufficiently detailed reasons which demonstrated that he had given appropriate consideration to various cost items concerning expert fees. As a result, the trial judge found the costs assessor's decision involved an error of law, allowing the trial judge to intervene and reduce care and consideration to 25% which he felt was more appropriate.

22. In relation to expert fees, the trial judge unequivocally held that the costs assessor had not made any error of law by allowing King to recover costs for the clinical anatomist report. Nonetheless, the trial judge found that the costs assessor's decision was indefensible. He felt that the clinical anatomist 'expert' was not really an expert and therefore he should not have expressed the opinions he did in the report concerning his diagnosis, assessment, and medical cause and effect. Therefore, the trial judge found in favour of Allianz concerning these costs, despite the fact that Allianz had not articulated this argument itself in its review application.

23. King subsequently appealed the primary judge's decision to the Queensland Court of Appeal.

Decision of the Queensland Court of Appeal (Philippides JA, Mullins and Burns JJ)

i. Care and consideration

24. The Court rejected the primary judge's argument that it was necessary for the costs assessor to provide detailed reasons concerning his care and consideration decision in order to demonstrate that he had reviewed all the relevant documents. Therefore, the Court felt it was erroneous for the trial judge to find that the costs assessor failed to take into account all relevant considerations.

25. Furthermore, the Court found that Allianz's review application did not raise this argument of insufficient reasons on which the trial judge based his decision. Therefore, with reference to the case of *Australian Coal and Shale Employee's Federation v Commonwealth* (1953) 94 CLR 621, the Court held that the trial judge was mistaken in allowing Allianz to succeed on a ground which it did not raise. To allow otherwise would have detrimental policy outcomes as the admission of new grounds for review will result in the further prolongation of costs disputes after the substantive matter has already been settled.

ii. Expert Fees – Costs of Clinical Anatomist's Report

26. In regards to this issue, the Court considered rule 702 of the UCPR which looks at the basis upon which the successful party is entitled to recover costs.

RULE 702:

Standard basis of assessment

(1) Unless these rules or an order of the court provides otherwise, a costs assessor must assess costs on the standard basis.

(2) *When assessing costs on the standard basis, a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed*.

27. Although the 'fair and reasonable' test is now applied in NSW for costs assessment, NSW previously used to apply the 'necessary or proper' test specified above in rule 702. The leading Australian authority on this test is the NSW Supreme Court case of *W. A. Gilbey Ltd v Continental Liqueurs Pty Ltd* [1964] NSWLR 527. In that case, the Court considered whether it was 'necessary or proper' for the successful party to recover the costs associated with bringing in an 'expert' on Vodka from the USA. In applying the test, the Court held there was an important distinction between the terms 'necessary' and 'proper' as costs properly incurred were of a wider ambit than those costs which are absolutely necessary. Therefore, the terms are not interchangeable, with 'proper' costs being of a lower threshold than 'necessary' costs. The Court of Appeal in *King* endorsed this reasoning.

28. The Court then examined the trial judge's decision concerning the costs of the clinical anatomist's report. As with care and consideration, the Court found that the ground on which the trial judge based his decision was not raised by Allianz. Therefore, the trial judge must have impliedly given leave under rule 742(5) of the UCPR where such leave was not warranted.

RULE 742:

Review by court

(5) On a review, unless the court directs otherwise -

(a) the court may not receive further evidence; and

(b) a party may not raise any ground of objection not stated in the application for assessment or a notice of objection or raised before the costs assessor.

29. The Court of Appeal held at [24]:

> *"In view of the fact that it was not a ground raised by the respondent (Allianz), the primary judge's recognition that there was no error in the costs assessor's exercise of discretion, and the relatively modest amount of costs associated with the [clinical anatomist report], leave for reviewing this aspect of the costs assessor's decision was not warranted. The application for reviewing this aspect of the decision should not have succeeded."*

30. Therefore, the Court found in favour of King and upheld his appeal.

Costs of the Appeal

31. In *King v Allianz Australia Insurance Limited* [2015] QCA 146, the Court of Appeal also considered the costs of the appeal and ultimately held that no order should be made in relation to the parties' submissions on costs.

Conclusion

32. The *King* case reaffirms the court's restrictive approach to review applications of costs assessments because if these reviews become common place then there will be significant detrimental consequences for the efficacy of the legal system.

BIOGRAPHY

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Thomas Quinn's areas of practice include contract law, personal injury, property, wills, probate, family provision law, planning & environment law and transportation law.

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Mike Dudman leads Blackstone's Sydney practice. His extensive commercial experience is complemented by a broad education that includes business, psychology and the law.

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Focus Case

King v Allianz Australia Insurance Limited [2015] QCA 101

Benchmark Link

http://benchmarkinc.com.au/benchmark/composite/benchmark_16-06-2015_insurance_banking_construction_government.pdf

Judgment Link

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Cases

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Legislation

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