# FEDERAL COURT OF AUSTRALIA

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| Parties: | **JOANNE ELIZABETH DYER v SUE CHRYSANTHOU SC AND THE HON CHARLES CHRISTIAN PORTER** |
| File number: | NSD426/2021 |
| Registrar: | **JUDICIAL REGISTRAR LUXTON** |
| Date of decision: | 19 January 2022 |
| Date of hearing: | 22 October 2021 |
| Counsel for the Applicant: | M Hodge QC |
| Solicitor for the Applicant: | Marque Lawyers |
| Counsel for the First and Second Respondents: | C P O'Neill |
| Solicitor for the First Respondent: | Kennedys |
| Solicitor for the Second Respondent: | Company Giles |

# ORDERS

**NSD426/2021**

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| **BETWEEN:** | **JOANNE ELIZABETH DYER**<br>Applicant |
| **AND:** | **SUE CHRYSANTHOU SC**<br>First Respondent |
| | **THE HON CHARLES CHRISTIAN PORTER**<br>Second Respondent |

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| **ORDER MADE BY:** | **JUDICIAL REGISTRAR LUXTON** |
| **DATE OF ORDER:** | **19 JANUARY 2022** |

**THE COURT ORDERS THAT:**

1. The applicant's costs pursuant to the orders made on 11 June 2021 are determined in the amount of $430,200.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR DECISION

1 These reasons concern the assessment of the applicant's costs pursuant to the orders made by Thawley J on 11 June and 20 July 2021 and by me on 3 September 2021. On 11 June it was ordered by His Honour that:

> The first and second respondents pay the applicant's costs of the proceedings.

On 20 July it was ordered that:

> The costs be referred for mediation or determination by a Registrar of the Court who will decide on the appropriate mechanism for determination of those costs.

Following consultation with the solicitors for the parties, I decided not to conduct a mediation but instead to determine the applicant's costs by way of a lump sum assessment. On 3 September I ordered that:

> The applicant's costs pursuant to the orders made on 11 June 2021 be determined by way of a lump sum assessment.

The lump sum assessment was heard by me on 22 October 2021.

**Principles**

2 In *Paciocco v Australia and New Zealand Banking Group Limited* (No 2) (2017) 253 FCR 403 (*Paciocco*), the Full Court considered the circumstances in which a lump sum costs order should be made, and how the assessment should be approached. As to assessment, the Full Court stated as follows at [18]:

> We emphasise that in making a lump sum award of costs, the Court in undertaking the task of assessing costs is not precluded from undertaking a close inquiry of costs relating to a particular issue or category of costs, should the Court consider it appropriate to do so: see eg *Hudson v Sigalla (No 2)* [2017] FCA 339 at [30] (*Sigalla*). The Court is able to adopt its own procedures in inquiring into costs, is able to be flexible in how it conducts that inquiry, including by the obtaining of suitable assistance whether by referee's report or other reporting, and is able to acquire the level of detail needed to make a determination that is fair, logical and reasonable.

3 A number of recent decisions of this Court have set out the principles to be applied in the assessment of costs on a lump sum basis. In *Zafra Legal Pty Ltd v Harris (Liquidator) (No 3)* [2021] FCA 441 (*Zafra*), Banks-Smith J set out the principles at [116]-[121] as follows:

> 116 In *Hislop v Paltar Petroleum Limited (No 4)* [2017] FCA 1632 Gleeson J set out the following principles relevant to lump sum costs assessments:
>
> > [6] The usual rule, which applies in this case, is that costs are payable on a party and party basis: rr 40.01 and 40.02. Costs as between party

and party are defined in the Dictionary (Sch 1 to the Rules) as 'only the costs that have been fairly and reasonably incurred by the party in the conduct of the litigation'. In contrast, an award of costs on an indemnity basis is intended to compensate a party fully for costs where it was unreasonable for the party to be subject to any expenditure of costs, such as where a hopeless proceeding is brought: see *Bitek Pty Ltd v iConnect Pty Ltd* [2012] FCA 506; (2012) 290 ALR 288 ('*Bitek*') at [12].

[7] Specification of a lump sum is not the result of a process of taxation or assessment of costs; the sum can only be fixed broadly having regard to the information before the Court; the approach taken to estimate costs must be logical, fair and reasonable: *Harrison v Schipp* [2002] NSWCA 213; (2002) 54 NSWLR 738 at [22]. The task is one of estimation or assessment and not of arithmetic: *Bayley & Associates Pty Ltd v DBR Australia Pty Ltd* [2014] FCA 346 at [17(e)]. The sum of costs fixed should be proportionate to the nature, including the complexity, of the case: *Bitek* at [18].

[8] The starting point for the fixing of costs is the charges rendered by Mr Hislop's solicitors. Then, there may be an 'impressionistic discount of the costs actually incurred or estimated, in order to take into account the contingencies that would be relevant in any formal costs assessment': *Bitek* at [18], citing *Hamod v New South Wales* [2011] NSWCA 375 at [820]. However, the court must be 'astute not to cause an injustice': *Bitek* at [23].

[9] In *Hancock v Rinehart (Lump sum costs)* [2015] NSWSC 1640, Brereton J made the following observations concerning the application of a discount in determining a lump sum costs order, where costs were ordered to be paid on an indemnity basis:

> [56] The first defendant submits that there should be a further global percentage reduction of 15%, for two main reasons: first, because on assessment, even on the indemnity basis, a successful party invariably recovers something less than its actual costs, typically 15% where the assessment is on an indemnity basis; and secondly, the necessarily broad-brush approach of the court to assessment on a lump sum basis - involving some risk that the sum includes costs that would not be recovered on assessment - coupled with the savings to the costs creditor in time and costs through avoiding a detailed assessment, and the loss to the costs debtor of the opportunity to scrutinise and object to a detailed bill, has resulted in a practice of applying a discount on lump sum assessments.
>
> [57] While it is undoubtedly the usual practice of the court when making a lump sum costs order to apply a discount for the reasons mentioned, that does not mean that the Court must apply a percentage discount to the sum sought by the successful party and the Court 'must be astute not to cause an injustice to the successful party' by applying 'an arbitrary 'fail safe' discount on the costs estimate submitted to the court'. Thus if the court can be confident that there is little risk that the sum includes costs that might be disallowed on assessment, the case for a discount is seriously undermined.

(footnotes omitted)

117 Another useful extract is the following from *Bitek Pty Ltd v IConnect Pty Ltd* [2012] FCA 506 where Kenny J stated:

> [23] It must also be borne in mind that, in making a lump sum costs order, the Court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment: see *Harrison v Schipp* (2002) 54 NSWLR 738 per Giles JA at 743 [21]-[22]; *Hadid v Lenfest Communications Inc* [2000] FCA 628 at [35] per Lehane J; and *Auspine Ltd v Australian Newsprint Mills Ltd* (1999) 93 FCR 1 at 5 per O'Loughlin J. Indeed, to do so would defeat the purpose of making a lump sum costs order. Adopting a less exacting approach than would be applied on taxation, but bearing in mind that there is only Mr Tye's evidence before the Court and that the Court must be astute not to cause an injustice to anyone including the respondents, I am satisfied that Mr Tye has not calculated costs in an excessive amount.

118 A useful summary of principles was also collated by Markovic J in *Fewin Pty Ltd v Burke (No 3)* [2017] FCA 693 at [7]-[14]. Her Honour also noted that 'the Court is entitled to take into account the evidence that is before it; its own observations of the proceeding and the judge's own experience' (at [61]).

119 Although the detailed examination involved in a taxation is not required, the Court should be conscious not to cause injustice to the applicants by adopting an arbitrary failsafe discount across-the-board on the costs claimed, but at the same time be careful not to prejudice the respondents by over estimating the costs: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119 at 123, citing *Leary v Leary* [1987] 1 WLR 72; [1987] 1 All ER 261 at 265, and as cited in *Geneva Laboratories Limited v Prestige Premium Deals Pty Ltd (No 5)* [2017] FCA 867 at [86].

120 In *Australian Mud Company Pty Ltd v Coretell Pty Ltd (No 7)* [2017] FCA 1469 McKerracher J reviewed the relevant authorities and recorded submissions concerning lump sum costs orders made by this Court: at [34]. The submissions made by the parties in that matter were that lump sum costs orders are typically in excess of 65% of total costs with a number being of the order of 70%-75%. In *Geneva Laboratories*, Bromwich J endorsed the view of a costs consultant who suggested a broad brush assessment of 80%: at [106]-[107], [112]. However, as Markovic J noted in *Crescent Capital Partners Management Pty Limited v Crescent Funds Management (Aust) Limited* [2019] FCA 1082 at [62], it is not the case that the court is able to simply apply a percentage recovery in one particular case to another set of circumstances. Each case is to be determined based on its own circumstances.

121 The Court's guidelines are a relevant benchmark: *LFDB v SM (No 4)* [2017] FCA 753 at [9]; and *Bitek* at [20]. Regard should also be paid to the Scale and the National Guide to Counsel Fees. Although the Court is not obliged to apply strictly the Scale, it may provide assistance and may be influential: *Geneva Laboratories* at [86].

4 In *Zafra*, Banks-Smith J also went on to state as follows at [125]:

> 125 The starting point for an assessment is actual costs incurred. There is no reason in theory why an assessment may not differ greatly from a claimed amount, if the actual costs are not prima facie unreasonable, and if the parties seeking payment have gone to considerable trouble to come to the claimed amount based on Scale rates, and incorporating fair and reasonable discounts. To assume a default position that a further discount should be applied to

a claimed amount is to fail to give credit to a careful and responsible consideration of costs undertaken by, in this case, solicitors with some guidance from a costs expert.

5 In *Hislop v Paltar Petroleum Limited (No 4)* [2017] FCA 1632 (referred to in the extract from *Zafra* above) (*Hislop*), Gleeson J also stated as follows at [14]-[15]:

> 14 In *Fewin (No 3),* Markovic J made lump sum costs orders in relation to several costs orders, including both orders to pay costs on an indemnity basis and on a party/party basis. Her Honour recorded that counsel had charged rates within (or well within) the National Guide (at [65], [69], [73] and [78]) and her Honour expressed the opinion that rates charged by solicitors were reasonable, noting that no evidence was led to challenge the reasonableness of the rates charged, work undertaken or time spent on particular items of work (at [69]). Where the costs entitlement was on the ordinary (party/party) basis, rather than the indemnity basis, Markovic J applied a discount of approximately one-third (at [70], [75] and [79]).
>
> 15 In *LFDB*, Griffiths J allowed an application for lump sum costs in full. The quantum allowed appears to have included 75% of solicitors' fees (which appear to have been calculated by reference to rates charged outside the scale) and 100% of disbursements including counsel's fees. Griffiths J accepted a submission that senior counsel's fees were higher than those in the National Guide (at [21]) but concluded that they were not unreasonable having regard to the complex and technical issues presented by the substantive proceedings, as well as the wider history of the matter.

6 The applicant made further reference to the decision of Griffiths J in *LFDB v SM (No 4)* [2017] FCA 753 at [21], noting the following subparagraphs:

> 21 *(a)* ...
>
> *(b) No costs agreement*: There is no substance in this criticism having regard to the well-established principle that any failure to comply with a cost disclosure requirement under the *Legal Profession Act 2004* (NSW) is only relevant to an assessment of costs as between solicitor and client, not the costs as between parties (see *Royal* at [31] and the other authorities referred to there by Davies J). In any event, I am satisfied that there is a sufficient explanation of the legal fee arrangement in [25] and [26] of Mr Sturzaker's first affidavit.
>
> *(c)* …
>
> *(d)* …
>
> *(c) Dr Ward's fees*: Even accepting that Dr Ward's fees are higher than those in the National Guide, I do not consider that they are unreasonable having regard to the complex and technical issues presented by the substantive proceedings, as well as the wider history of the matter.

7 In respect of her consideration of counsels' fees in *Hislop*, Gleeson J stated as follows at [50]-[51]:

> 50 I was prepared to accept that it is fair and reasonable to allow an amount for counsels' charges in excess of the ranges set in the Guide having regard to the special features of the litigation and the evidence of the rates charged by counsel for the defendants, but I did not accept that the allowance should be significantly in excess of those ranges. In saying this, I am not intending to suggest that counsels' fees were excessive. Rather, that a fair and reasonable lump sum costs order did not involve imposing upon the defendants' the full costs of Mr

Hislop's particular choice of counsel including senior counsel who charged well outside the ranges specified in the Guide.

51 For these reasons, I allowed 64% of senior counsel's fees (63.6% of senior counsel's daily rate is $7,000, which is significantly above the top of the range in the Guide) and 90% of junior counsel's fees (90% of junior counsel's daily rate is $4,500, which is also above the top of the range in the Guide) in the lump sum order, with the result that I discounted Mr Hislop's disbursements by $80,000.

8 I note that the applicant also relied upon the principles set out in the decision of McKerracher J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 7)* [2018] FCA 1217 at [50]-[53] and [56] as follows:

> 50 The Court must be satisfied that any lump sum costs order is made on the basis of a logical fair and reasonable estimate of costs and should be astute to avoid both overstating the recoverable costs and underestimating the appropriate account by applying some arbitrary discount to the amounts claimed: *Beach Petroleum* (at 123). The onus is on the moving party to demonstrate there is a logical, fair and reasonable basis for the order.
>
> 51 The power to make an order for lump sum costs is appropriate for application in complex cases where a taxation is likely to result in additional time, trouble, aggravation and expense: *Paciocco* (at [20]) and *Beach Petroleum* (at 120).
>
> 52 It would be completely pointless if the evidence produced in a lump sum application was the same as the evidence in the taxation process. The object of avoiding the need to adduce all that evidence is to save the time and cost to the parties and the public's resource – the Court. The cost to the CITIC parties in proceeding to conventional taxation in this instance have been estimated at between $690,000 and $800,000 approximately.
>
> 53 The successful parties are entitled to be adequately compensated for the expense in conducting litigation in accordance with these measures.
>
> …
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> 56 Mineralogy relies upon the observations of Logan J in ***Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 9)*** (2011) 194 FCR 250, where his Honour said (also citing Sackville J in *Seven Network*) (at [31]-[34]):
>
> > 31 A survey of past authority discloses that, though occasions for the wider exercise of the power have been infrequent, it has been exercised even in respect of lengthy and complicated commercial litigation, eg ***Seven Network Ltd v News Ltd*** [2007] FCA 2059 (Sackville J) (*Seven Network*). Indeed, one reason given for the exercise of the power in such cases has been that a taxation of costs in such a case would be likely to involve unreasonable delay and expense: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119 at 120 (*Beach Petroleum*). As von Doussa J notes in *Beach Petroleum*, that has been regarded in the United Kingdom as the purpose of such a rule: *Leary v Leary* [1987] 1 WLR 72. By reference to that British authority, his Honour further observed of the power (*Beach Petroleum* at 120) that, "An order that costs be assessed as a gross sum does not envisage that any process similar to that involved in taxation should take place, but the power must be exercised judicially and after giving the parties an adequate opportunity to make submissions on the matter".
> >
> > (Emphasis added.)

32 Later, in *Seven Network*, at [25] Sackville J summarised principles which had emerged in respect of the fixing of costs in gross. I gratefully adopt his Honour's summary:

> 25 The authorities establish a number of principles applicable to a claim for a gross sum costs order to be made pursuant to FCR, O 62 r 4(2)(c):
>
> (i) The purpose of the subrule is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation: *Beach Petroleum v Johnson (No 2)*, at 120, per von Doussa J, applying *Leary v Leary* [1987] 1 All ER 261; *Harrison v Schipp* (2002) 54 NSWLR 738, at 742 [21] per Giles JA.
>
> (ii) An order that costs be assessed as a gross sum does not envisage that any process similar to that involved in taxation should take place. On the contrary, the Court applies a much broader brush than would be used on a taxation of costs pursuant to O 62: *Beach Petroleum v Johnson (No 2)*, at 120, 124, per von Doussa J; *Harrison v Schipp*, at 743 [22], per Giles JA.
>
> (iii) The Court should be confident that the approach taken to the estimate of costs is logical, fair and reasonable. The Court should be astute to avoid both overestimating the recoverable costs and underestimating the appropriate amount, for example by applying an arbitrary discount to the amounts claimed: *Beach Petroleum v Johnson (No 2)*, at 123, per von Doussa J.
>
> (iv) Although the power to assess a gross sum for costs involves the exercise of a discretion, it is necessary to bear in mind fundamental principles applicable to an assessment of costs on a party and party basis. These include the principles contained in O 62 r 19 (embodying the "necessary or proper" test) and those stated in *Stanley v Phillips* (1966) 115 CLR 470, at 478, per Barwick CJ (on a party and party taxation the emphasis is upon obtaining adequate representation to enable justice to be done, not upon the propriety of steps taken to ensure maximum success in the cause): *Auspine Ltd v Australian Newsprint Mills Ltd* (1999) 93 FCR 1, at 4-5 [12]-[15], per O'Loughlin J; *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629, at [6]-[8], per Mansfield J.
>
> (v) Although the methodology permitted by O 62 r 4(2)(c) initially involves a broader approach than on a normal taxation, the provisions of O 62 and Schedule 2 provide assistance in fixing an appropriate gross sum: *Charlick Trading Pty Ltd v ANRC*, at [10], per Mansfield J.

33 To this summary, his Honour added the following, at [26]-[30]:

> 26 The last point should be developed a little further. FCR, O 62 r 4(2)(c) authorises the Court to order that, *instead of taxed costs*, the successful party should be entitled to a gross sum costs order. The subrule contains no express direction that the Court is to apply the detailed criteria that are laid down in O 62 and Schedule 2. On the contrary, the subrule apparently leaves the question of quantification at large.

> 27 Rule 4(2)(c) is, however, located within an Order that makes detailed provision for the assessment of party and party costs. It would be extremely odd if the more expeditious procedure contemplated by r 4(2)(c) resulted in either a successful or an unsuccessful party being exposed to an assessment of costs which simply ignores or overrides the basic principles applicable to a taxation of costs. I accept Mr Sheahan's submission that it would be an error for a Court to use its power under r 4(2)(c) to assess a gross sum clearly higher than that which would be allowed on a taxation of costs.
>
> 28 On the other hand, it must be borne in mind that r 4(2)(c) establishes a procedure that applies instead of taxed costs. As the cases have stressed, the object of the procedure is to avoid the expense, delay and aggravation that would be involved in a taxation of costs, especially in a lengthy and complex case such as this. The procedure is intended to replace the potentially elaborate process contemplated by O 62 and Schedule 2, whereby a taxing officer meticulously analyses a specially prepared bill of costs by reference to individual items, some of which have distinctly Dickensian overtones.
>
> 29 It is necessary for the Court to have sufficient information to enable it to make a logical, fair and reasonable estimate. In this respect, as the parties agreed, Telstra bears the onus of establishing that its claim to a gross sum satisfies the applicable test. In practice, this may involve the parties adducing evidence from expert costs assessors addressing whether the costs claimed by the successful party were "necessary or proper for the attainment of justice or for maintaining or defending the rights of a party" (O 62 r 19) or, in more general terms, whether the amounts sought would have been recoverable on a taxation of costs.
>
> 30 Care should be taken, however, to ensure that the process does not take on too many of the characteristics of a taxation of costs …
>
> (Emphasis in original.)

34 I respectfully agree with these further observations of Sackville J, subject to one qualification arising from his Honour's reference to some items which may fall for the analysis by a taxing officer of a bill of costs having "Dickensian overtones".

## Evidence

9 The applicant relied upon the affidavits of her solicitor, Nathan Mattock, sworn 25 June 2021 and 1 October 2021. The affidavit of Mr Mattock sworn 25 June 2021 was taken to comprise the Costs Summary within the meaning of the Costs Practice Note (GPN-COSTS) (**CPN**) at [4.10]-[4.12]. The respondents relied upon the affidavit of a solicitor and legal costs consultant, Kerrie-Ann Rosati, sworn 17 September 2021 and a bundle of documents which they tendered without objection. Annexure KAR-3 to the affidavit of Ms Rosati was taken to comprise the Costs Response within the meaning of the CPN at [4.13]-[4.14].

10 The bundle, although tendered by the respondents, is comprised of the applicant's documents as follows:

(1) the costs agreement between the applicant and her solicitors;

(2) the costs agreements between the applicant and counsel;

(3) a tax invoice from the applicant's solicitors dated 22 July 2021 in the amount of $553,532.99 (including GST), comprising $378,647.50 in legal costs and $174,885.49 in disbursements (including counsels' fees); and

(4) documents evidencing the claimed disbursements.

The costs agreements are in each case conditional. Also, whilst the costs agreements with counsel specify both hourly and daily rates, the daily rates apply to work undertaken between the hours of 8:00 am and 6:00 pm, and thus permit the charging of an amount in excess of the daily rate in respect of any one day.

11 In the Costs Summary, Mr Mattock notes that the applicant is not entitled to claim input tax credits in respect of any GST (at [4]-[5]). He goes on to set out his experience and notes that he, Emma Johnson and Lauren Gasparini were the three "primary lawyers" who carried out work on the matter. He also states at [15] as follows:

> In my experience advising and acting with respect to the recovery of costs in the Federal Court, I consider that it is common to recover on a party/party basis between 75% and 85% of solicitors' fees and 100% of disbursements, including counsel fees. In this matter, however, from my analysis of the costs incurred by Marque Lawyers, the party/party costs constituted 90% to 95%, deposed below at paragraph 28.

12 At [18]-[19] of the Costs Summary, Mr Mattock sets out the rates charged by the solicitors who worked on the matter, noting that they exceed the amounts permissible under the Scale. The rates are set out as follows:

(a) Partner - $700 per hour;
(b) Senior Associate - $600 per hour;
(c) Lawyer - $450 per hour; and
(d) Paralegal - $300 per hour.

These amounts are exclusive of GST. Notably, the partner rate exceeds the maximum rate under paragraph [1.1] of the Scale (which equates to $650 per hour) and the paralegal rate exceeds the rate under paragraph [1.3] of the Scale (which equates to $110 per hour). When account is taken of GST, the senior associate rate also exceeds the maximum rate under paragraph [1.1] of the Scale. Paragraph [1.1] of the Scale provides as follows:

> 1.1 Attendances by a lawyer requiring the skill of a lawyer (including attendances in conference, by telephone, on counsel, appearing in court, instructing in court and travelling), for each unit of 6 minutes a sum in all circumstances not exceeding $65.
>
> (a) having regard to the lawyer's skill and experience; and
>
> (b) having regard to the complexity of the matter or the difficulty or novelty of the questions involved.

Plainly, the amount of $65 per 6 minute unit is a cap. Also, in applying the Scale regard should be had to the matters set out at [1.1(a)] and [1.1(b)].

13 At [20]-[21] of the Costs Summary, Mr Mattock sets out the rates charged by counsel who rendered fees on the matter. Senior counsel, Michael Hodge QC, charged $900 per hour and $9,000 per day, and junior counsel, Shipra Chordia, charged $300 per hour and $3,000 per day. These rates appear to be GST exclusive (compare the GST inclusive rates set out in the costs agreements), and I will proceed to consider counsels' fees on a GST inclusive basis. Mr Mattock notes that rates charged by Mr Hodge QC (but not by Ms Chordia) exceed the rates set out in the National Guide to Counsel Fees promulgated by the Court.

14 Both the solicitors and counsel charged on a conditional basis; that is, the applicant is only liable to pay the fees upon certain circumstances arising (Costs Summary at [22]-[23]).

15 Mr Mattock provides a breakdown of the costs claim and then goes on to express his opinion as to the proportion of party/party costs (Costs Summary at [27]-[28]):

> 27. The Costs Claim can be broken down as follows:
>
> (a) by total fees charged by Marque Lawyers as a percentage of the Marque Lawyers' Fees, being me (roughly 22% of the Marque Lawyers' Fees), Ms Johnsen (roughly 35% of the Marque Lawyers' Fees) and Ms Gasparini (roughly 29% of the Marque Lawyers' Fees);
>
> (b) by total fees charged by Mr Hodge QC as a percentage of the Costs Claim, being roughly 17% of the Costs Claim and by Ms Chordia as a percentage of the Costs Claim, being roughly 11% of the Costs Claim;
>
> (c) by type of work carried out by Marque Lawyers as a percentage of the Marque Lawyers' Fees, being:
>
> (i) Court attendances and appearances, and relevant associated work required to prepare for such appearances – roughly 33% of the Marque Lawyers' Fees;
>
> (ii) Attending on redactions to evidence - roughly 9% of the Marque Lawyers' Fees;
>
> (iii) Reviewing and drafting Court documents (including evidence, submissions and disclosure documents), attending on disclosure and conducting research – roughly 27% of the Marque Lawyers' Fees; and
>
> (iv) Correspondence with the Court, the Respondents and counsel – roughly 27% of the Costs Claim.

> 28. By reason of the preceding paragraph, my review of the Timesheets, and my experience set out at paragraphs 22 to 27 above, it is my opinion that at least 90% to 95% of the Marque Lawyers' Fees is made up of costs incurred by the Applicant on a party/party basis. On this matter, the solicitor/client costs were relatively low due to the procedural and administrative nature of the proceedings.

I should note at this point that I do not accept the proposition that the applicant's solicitor/client costs were relatively low.

16 Mr Mattock sets out certain matters relating to a claim for an uplift for care, skill and responsibility pursuant to item 11.1 of the Scale. I note the following matters:

(1) the work was undertaken on an urgent basis (Costs Summary at [29(a)]);

(2) the proceedings were commenced and heard within a 13 day period ([29(c)] and [30]) (albeit slightly different timeframes are referred to in these paragraphs);

(3) the confidential information had to be considered with caution ([29(b)] and [31]); and

(4) Mr Hodge QC "was required to be involved at an intricate level on all matters" ([29(c)]).

17 Mr Mattock estimates that further costs up until the determination of the lump sum costs claim will be incurred in the amount of $17,600 (Costs Summary at [33]-[34]).

18 In his affidavit sworn 1 October 2021, Mr Mattock provides an update of the costs incurred and those sought by way of a lump sum costs order. He provides the following summary at [10]:

| | |
|---|---|
| Professional Fees | $340,782.80 (90% of Actual Professional Fees) |
| Counsel's Fees | $159,225.00 (100% of Counsel's Fees) |
| Disbursements | $15,660.49 (100% of Disbursements) |
| Further Fees | $12,651.20 (80% of Further Fees) |
| Future Costs | $14,850.00 |
| **TOTAL** | **$543,169.44** |

In the following two paragraphs ([11]-[12]), Mr Mattock sets out a claim for $22,473 in respect of the costs of dealing with the question of confidentiality orders. He notes that no costs orders were made in respect of this component of the proceedings. I have taken the amount of $22,473 to comprise part of the grossed up amount of professional fees (that is, $22,473 of the amount of $378,647.50 referred to in the Costs Summary at [26], 90% of which is $340,782.80, being the amount of Professional Fees referred to earlier in this paragraph). Given that Thawley J

made the confidentiality orders on 23 June 2021, and that the Costs Summary is dated 25 June, I infer that the costs relating to the confidentiality orders comprise part of the professional costs set out in the Costs Summary.

19 There was no cross-examination of Mr Mattock.

20 In the Costs Response, Ms Rosati sets out an analysis of the Costs Summary. This analysis has a number of stages as follows:

(1) Ms Rosati sets out a breakdown of the legal costs incurred by reference to the individual solicitors and counsel. This is done on a percentage basis.

(2) She breaks down the solicitors' work by reference to the individual operators, the time they worked, the percentage of total time and the percentage of total costs.

(3) Ms Rosati considers the experience of the individual operators.

(4) She then considers and adjusts the claimed costs by reference to the amounts allowed at item 1.1 of the Scale and also by reference to the apparent experience of the individual operators. These adjustments result in a reduction in solicitors' fees from the amount of $378,647.50 to $285,311.

(5) Ms Rosati then breaks down the solicitors' work by reference to particular categories. In doing so, she identifies categories (preparation of documents and reading short documents) which, under the Scale, are awarded on a basis other than time. She identifies a total of just under 54% of the total solicitors' costs as being likely to be reduced significantly when assessed on a basis other than time. Ms Rosati then expresses the view that a significant overall reduction should be made to the costs to account for this.

(6) She considers the rates charged by counsel. Ms Rosati notes that whilst the rates charged by Ms Chordia are within the range set out in the National Guide to Counsel Fees issued by the Court on 28 June 2013 (**Guide**), the rates charged by Mr Hodge QC significantly exceed those rates.

(7) She expresses the view that the disbursements (other than counsel fees) should be allowed in the amount claimed, being $15,660.49.

(8) Perhaps most significantly, Ms Rosati then makes a percentage reduction to the already adjusted professional costs. At paragraphs [17]-[18] (numbered [16]) of the Costs Response), she points to a range of factors which she says justify a reduction of 45% to the already adjusted amounts. I note that Ms Rosati was cross-examined about the factors set out at [17], save for the matters set out at [17(g)], [17(h)] and [17(j)].

(9) She assesses the complexity of the matter, stating:

> While the matter involved high profile parties, the issues were not legally complex. The evidence was not voluminous and the action was commenced on 11 May 2021 and the substantive order was made on 27 May 2021.

Ms Rosati then applies a loading of 7.5% to the adjusted solicitors' fees.

(10) She then applies a further reduction of 30% to the adjusted counsel fees. The adjustment is stated to be made:

> …to account [for] fees incurred by counsel that are considered to have not been fairly and reasonably incurred in the circumstances of the proceeding.

Ms Rosati does not elaborate on this analysis.

(11) At paragraph [19] of the Costs Response, she sets in tabular form a summary of her analysis:

| **Cost** | **Incurred** | **Adjusted for Rate Reduction** | **Percentage Adjustment** | **Amount Allowed** |
|---|---|---|---|---|
| **Professional fees** | $378,647.50 | $285,311.00 | 55% | $156,921.05 |
| **Skill Care & Responsibility** | 0 | | Add 7.5% for Item 11 | $11,769.08 |
| **Total Professional fees** | 0 | | | $168,690.13 |
| **Counsels' fees** | $159,225.00 | $130,912.50 | 70% | $91,638.75 |
| **Disbursements** | $15,660.49 | | 100% | $15,660.49 |
| **Total** | **$553,532.99** | | | **$275,989.37** |

The net result of Ms Rosati's analysis was that costs should be allowed in the amount of $275,989.37, being an overall reduction of approximately 50%.

21 Ms Rosati was cross-examined on her affidavit and the Costs Response. Much of the cross-examination was concerned with the matters set out at paragraph [17] of the Costs Response. As noted above, these were the matters which appeared to bear on the 45% reduction made to the adjusted solicitors' fees. I note the following matters arising out of cross-examination:

(1) It was put to Ms Rosati that in forming an opinion as to the reasonableness of the time spent by the applicant's lawyers on the matter, she should have enquired about the time spent by the respondents' lawyers. Her evidence was that she did not believe that it was necessary to do so. I accept that. In my view, the costs incurred by a respondent would be of little assistance in assessing the reasonableness of the costs claimed by an applicant on a lump sum assessment.

(2) At the time that she prepared the Costs Response, Ms Rosati was unaware that two case management hearings had been conducted on 14 May 2021. The reference to a case management hearing conducted on that date is the sole example of "excessive charging" given in the Costs Response at [17(c)].

(3) Ms Rosati gave evidence that it appeared to her that there were many attendances on counsel not relating to this proceeding, and that there was other work included that may not have related to this proceeding. On her evidence, these issues related to work done prior to the entry into the costs agreement with the applicant's solicitors on 11 May 2021 (Costs Response at [17(d)]). In that paragraph she referred to "other counsel not related to this proceeding including Mr Owens SC, Mr Gleeson SC [and] Mr Santucci". Under cross-examination, however, Ms Rosati conceded that in undertaking her assessment she did not recall the role played by Mr Owens SC as referred to in the judgment of Thawley J in *Dyer v Chrysanthou (No 2) (Injunction)* [2021] FCA 641. Also, she did not disagree with the proposition that the costs of contacting Mr Gleeson SC were minuscule. Further, it appears that Ms Rosati's conclusion that Mr Santucci was "not related to this proceeding" was based on the fact that he did not render an invoice for his work and was not referred to in the affidavit of Mr Mattock. In my view, these matters do not provide a solid foundation for such a conclusion, particularly when consideration is given to the substance of the narrations set out in the invoice from the applicant's solicitors.

(4) When asked whether her comment in the Costs Response at [17(e)] that the second respondent was "not joined to the proceeding until 12 May 2021" had some bearing on what amount should be recovered, Ms Rosati answered that it was "just an observation."

(5) In response to a question about her comment in the Costs Response at [17(f)], Ms Rosati noted that when taking a broad brush approach, one of the things she looks at is the

work done "post-judgment or post-costs order". In this case, she noted that $22,473 of such work was claimed.

(6) In response to a question concerning bulk entries for trial preparation (see the Costs Response at [17(a)] and [17(i)]), Ms Rosati answered that she had no information before her other than the entry "attending on trial preparation and the notation as to what they were doing that day." She did not seek from either of the respondents' solicitors information about what had happened on those days of the trial. For the reasons set out earlier in this paragraph, I do not believe that it was necessary for her to do so. Further, I accept that the use of bulk entries makes it difficult to identify, save to a high level of abstraction, what work is actually being referred to in such entries.

(7) There is some uncertainty as to which matters Ms Rosati took into account in determining the reduction to be applied to the adjusted solicitors' fees. The transcript records at page 26 the following exchange in relation to her comment in the Costs Response at [17(k)] that Ms Chordia charged fees "well in excess of a full day":

> MR HODGE: It – it's fine. Ms Rosati, let me put this to you. You don't suggest that Ms Chordia was charging in a ways that she wasn't entitled to?---I'm just making an observation about - - -
>
> But you do know, if I'm right, that last observation about Ms Chordia's costs, that can't be relevant to the adjustment that you're going to – or you think should be made to the fair and reasonable professional fees for Marque Lawyers?---No. I deal with counsel's fees at 18, so they're my observations of all the costs.
>
> I know, I'm just trying to understand. Because you see 17 sets out these points, (a) to (k), and then 16 says:
>
> > *In all of these circumstances an overall reduction of 45 per cent should be made to the adjusted incurred professional costs.*
>
> ?---Yes.
>
> And - - -?---And then at 18 - - -
>
> I know. But just – I understand you want to get there, and we will in a moment. But when you say "in all of these circumstances" in paragraph 16, I take it that's not supposed to include subparagraph (k) of 17?---No.
>
> And I take it also, it's not supposed to include any of the things that are just observations?---No, they're all the circumstances that I've taken into account to apply a broad brush reduction.

It is unclear from this exchange whether, in determining the reduction to solicitors' fees, Ms Rosati took into account her own observations about the fees charged by counsel.

**Consideration**

22 As noted at the beginning of these reasons, the first and second respondents were ordered to pay the applicant's costs of the proceedings. In the absence of an order for costs on a different basis, the costs are taken to be as between party and party (see r 40.01). The determination of lump sum costs will be made on this basis.

23 It is important not to lose sight of the essential features of the litigation. This was, in my view, complex litigation (albeit concerning a narrow question) which was initiated, heard and determined in a short period of time. Intensive work was required. Excluding interlocutory matters, the hearing occupied four days. Given the nature of the litigation, there were significant issues of confidentiality in respect of much of the evidence, and this added to the work which was required to be undertaken. So much is apparent from the redacted version of the reasons for judgment of Thawley J, of which many passages are redacted either in part or in their entirety.

24 There was substantial reliance on counsel in the conduct of the matter. This apparent both from the narrations in the solicitors' tax invoice dated 22 July 2021, and from the statement in the Costs Summary at [29(c)] concerning Mr Hodge QC's involvement. That sub-paragraph states as follows:

> In light of the urgency of these proceedings and the requirement to have an experienced senior counsel on this matter, it is my opinion that it was reasonable to engage Mr Hodge QC as counsel in these proceeding. Due to the fact that the proceedings were commenced and heard within a 13-day period, *Mr Hodge QC was required to be involved at an intricate level on all matters.* It is my opinion that the Senior Counsel Fees were reasonably incurred. [emphasis added]

Whilst a perfectly valid approach, it is likely that the solicitors and counsel spent significant time on similar tasks. Such an approach may justify a discount to the solicitors' fees when costs are assessed on a party and party basis (see for example *Hislop* at [44]).

25 Consistent with the approach adopted in respect of taxations of costs, as part of the costs of the proceeding I will allow, subject to any overall adjustment, those costs incurred in respect of the costs assessment process. I will not, however, allow the costs incurred in respect of the confidentiality issues the subject of the orders made on 23 June 2021. No costs order was made in respect of those matters (see Mattock affidavit sworn 1 October 2021 at [11]-[12]), and I do not accept that the order in respect of the costs of the proceeding made on 11 June 2021 operates prospectively to include such matters. Accordingly, before any other discounts are applied, there will be a deduction of $22,473 from the gross solicitors' fees of $378,647.50, leaving a

balance of $356,174.50. Similarly, as to counsels' fees, there will be deductions totalling $7,177.50 made up as follows: $6,187.50 for Mr Hodge QC, being his fees in respect of 16-18 June 2021; and $990 for Ms Chordia, being her fees in respect of 17 June 2021.

26 This means that the effective starting point before the application of any discounts, either self-imposed or imposed by the Court, should be as follows:

| | |
|---|---|
| Solicitors' fees - to 25/6/21 | $356,174.50 ($378,647.50 less $22,473) |
| Solicitors' fees - 26/6/21 to 1/10/21 | $15,814 |
| Mr Hodge QC – to 25/6/21 | $90,090 ($96,277.50 less $6,187.50) |
| Ms Chordia – to 25/6/21 | $61,957.50 ($62,947.50 less $990) |
| Other disbursements | $15,660.49 |
| Future costs | $14,850 |

27 Noting that a lump sum assessment is "an intuitive, rather than mathematical, exercise, and a 'broad brush' approach is appropriate", I will express the determination in a rounded amount (see *Zafra* at [147]). However, given the conditional nature of the costs agreements, I anticipate that there may be some utility in setting out in these reasons the calculations of fees for solicitors and counsel, and accordingly I will do so.

28 Taking into account the matters referred to above, and in particular to:

(1) the nature and complexity of the proceeding (including additional work arising from the issue of confidentiality);

(2) the award of costs on a party and party, rather than indemnity, basis;

(3) the substantial reliance on counsel in the conduct of the proceeding;

(4) the solicitors' and paralegals' rates as charged when compared with the rates referred to in the Scale at [1.1]; and

(5) the impact of charging on a time basis for items which the Scale provides for on other than a time basis;

and applying the broad brush approach required by the authorities, I am satisfied that a reduction of 30% should be applied to the solicitors' fees incurred in this matter (excluding the

solicitors' fees which comprise "future costs" – see below). This reduction will be applied with respect to both the period until 25 June 2021 and the period 26 June 2021 to 1 October 2021.

29 I have considered the claim for counsels' fees in light of the matters referred to above. Save for work in respect of the confidentiality issues referred to at [25], I am satisfied that the work performed by both senior and junior counsel should be recoverable pursuant to the costs order. I note that the Guide sets out rates for senior and junior counsel. The most recent version of the Guide was issued on 28 June 2013. The rates for Ms Chordia ($330 per hour and $3,300 per day, inclusive of GST) are less than the maximum provided for in the Guide, and I will allow them as claimed. The rates for Mr Hodge QC ($990 per hour and $9,900 per day, inclusive of GST) exceed the maximum in the Guide. Noting the comments of Gleeson J in *Hislop* at [50]-[51], and the age of the most recent version of the Guide, I am satisfied that it is appropriate to allow a rate which exceeds the rate set in the Guide. I will, however, discount the rates allowed for Mr Hodge QC to $850 per hour and $8,500 per day, inclusive of GST. Accordingly, the amounts allowed in respect of counsels' fees up to 25 June 2021 will be $61,957.50 for Ms Chordia and $77,350 for Mr Hodge QC.

30 An amount of $15,660.49 is claimed in respect of other disbursements. The respondents did not seek any reduction in respect of this component (see the Costs Response at [19]). It appears to me to be fair and reasonable. I will allow it in full.

31 The applicant also seeks the amount of $14,850 in respect of future costs. This amount is comprised of both solicitors' and counsels' fees. It includes the costs of the hearing before me on 22 October 2021. It appears to me to be fair and reasonable. I will allow it in full.

32 The components of the lump sum determination are therefore as follows:

| | |
|---|---|
| Solicitors' fees - to 25/6/21 | $249,322.15 |
| Solicitors' fees - 26/6/21 to 1/10/21 | $11,069.80 |
| Mr Hodge QC – to 25/6/21 | $77,350 |
| Ms Chordia – to 25/6/21 | $61,957.50 |
| Other disbursements | $15,660.49 |
| Future costs | $14,850 |
| **Total (rounded)** | **$430,200** |

**Determination**

33 The applicant's costs pursuant to the orders made on 11 June 2021 are determined in the amount of $430,200.

Dated: 19 January 2022