
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : STONE -v- REGISTRAR OF TITLES
[2012] WASC 21 (S)

CORAM : SIMMONDS J

HEARD : 23 APRIL, 19 MAY, 16, 17, 24 & 28 SEPTEMBER
2010 & ON THE PAPERS

DELIVERED : 25 JANUARY 2012

**SUPPLEMENTARY
DECISION** : 5 APRIL 2012

FILE NO/S : CIV 1672 of 2007

BETWEEN : SIMON ELLIOT STONE
First Plaintiff

GRAHAM LESTER STONE
Second Plaintiff

JOSEPHINE STELLA-MARIE WALTER
Third Plaintiff

AND

REGISTRAR OF TITLES
First Defendant

FABIENNE COHEN-STONE
Second Defendant

Catchwords:

Costs - Apportionment of costs where successful second defendant failed on most issues - Special costs orders - Approach where no supporting affidavit evidence - Costs of and for litigants in person also assisted by lawyer - Costs of the applications for costs where results mixed

Legislation:

Legal Practice Act 2003 (WA), s 215

Legal Profession Act 2008 (WA), s 280, s 601, s 616

Rules of the Supreme Court 1971 (WA), O 66 r 1, r 8A

Transfer of Land Act 1893 (WA), s 203

Result:

Order for costs to be made

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr J R Birman
Second Plaintiff	:	Mr J R Birman
Third Plaintiff	:	Mr J R Birman
First Defendant	:	No appearance
Second Defendant	:	Ms C F Greville (23 April 2010); Ms C F Greville & Mr J C Hammond (19 May 2010); Dr J J Hockley & Mr D Warren (16, 17, 24 & 28 September 2010)

Solicitors:

First Plaintiff	:	Birman & Ride
Second Plaintiff	:	Birman & Ride
Third Plaintiff	:	Birman & Ride
First Defendant	:	No appearance
Second Defendant	:	Hammond Worthington (24 April & 19 May 2010) and In person (all other dates)

Case(s) referred to in judgment(s):

Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Hannell [2007]
WASCA 158 (S)
Bowen v Alsanto Nominees Pty Ltd [2011] WASCA 39 (S)
Como v Helmers [2011] WASC 179 (S)
David Weiping Chen v Kim Man Chan (No 2) [2009] VSCA 233
EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd [2008] WASC 275 (S)
Heartlink Ltd v Jones as Liquidator of HL Diagnostics Pty Ltd (in liq) [2007]
WASC 254 (S)
J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers
(WA Branch) (No 2) (1993) 46 IR 301
Naidoo v Williamson [2008] WASCA 179; (2008) 37 WAR 516
Phillips Fox (a firm) v Westgold Resources NL [2000] WASCA 85
SDS Corporation Ltd v Pasdonnay Pty Ltd [2004] WASC 26 (S2)
Stone v Registrar of Titles [2012] WASC 21
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)

SIMMONDS J:**Introduction**

1 This is my decision on competing applications for costs following my judgment in the action. My judgment was *Stone v Registrar of Titles* [2012] WASC 21. The competing applications were made by reference to competing minutes of orders with written submissions in support, and in one case only clearly by reference to the written submissions the party made. Those materials were filed and served under programming orders made on 25 January 2012 at the delivery of *Stone*: the times for such filing and service under those programming orders were extended by consent, twice.

2 This decision should be read with *Stone*. For the most part, in this decision I provide paragraph references for *Stone* but do not reproduce or summarise what appears in those paragraphs.

3 To introduce the positions of the parties in those competing applications, I first provide some background. Then I describe those positions, before taking each and providing my reasons for the conclusion or conclusions I have reached on that position. The final section of this decision is my conclusion and call for orders.

Background

4 The following background is taken for the most part from *Stone*.

5 The action was commenced by the plaintiffs by originating summons filed on 5 July 2007 (the originating summons) claiming the orders described in *Stone* [7]. The claim, under *Transfer of Land Act 1893* (WA) s 203, for orders against the first defendant was abandoned on 23 April 2010.

6 There was a hearing on 23 April 2010 which addressed the resolution of the issues in the action confined with the consent of the second defendant to the issue which the plaintiffs had contended was the sole issue in the case. That was the issue of whether or not there was a gift (the gift) the first steps towards which were made on 7 May 2007 and which was a perfected gift to the plaintiffs by the second defendant's husband, who by the date of the commencement of the action was deceased (the deceased), of the deceased's joint interest with the second defendant in the residential property (the residential property) at which the second defendant was living (the perfect gift issue). See *Stone* [98]. There were further hearings, on 19 May and 13 July 2010, as a result of

which the issues for determination in the action also included those of whether the gift was vitiated by a lack of capacity of the deceased (the capacity issue), by undue influence (the undue influence issue), by duress (the duress issue) and by an unconscionable dealing (the unconscionability issue) (collectively, the further issues). See *Stone* [99] - [100]. There were further hearings of the issues arising out of the originating summons on 16, 17, 24 and 28 September 2010 (the September hearings).

7 The relationship between the perfect gift issue and the further issues was not as straightforward as the account thus far might be taken to indicate. In *Stone* I concluded the issues were not simply ones put forward by the second defendant as vitiating an otherwise perfected gift. Those issues were advanced as going to an element of the alternative basis the plaintiffs put forward for their contention that the gift should be upheld as a perfected gift. That element concerned the appointment of one of the donees as executor in a will the deceased made on 9 May 2007 (the will of 9 May 2007). The further issues went to showing that the will of 9 May 2007 should not be recognised on one or more of the grounds subsumed by the further issues. See *Stone* [145], read with [129] - [130] and [133].

8 I should further note, as the contrary appears to have been put to me for the plaintiff, that I do not consider the further issues should be regarded as a form of counterclaim. The further issues went directly to impeach the plaintiffs' claim. See on the nature of a counterclaim Kendall C and Curthoys J, *Civil Procedure in Western Australia* [18.2.1] (Service 128).

9 On 25 January 2012 I delivered the decision in *Stone*. I determined that the plaintiffs had not made their case that the gift was perfected on either of the two bases they advanced, although the element of the alternative basis to which the further issues related was in fact made out, contrary to the second defendant's case in that respect. I also determined, on the assumption I was in error as to the perfect gift issue, that the second defendant had not made out her case on any of the further issues.

Positions of the parties

10 Those positions appear from the parties' respective minutes and written submissions.

11 For the plaintiffs, there is a document 'Plaintiffs' minute of proposed orders on costs' dated 24 February 2012 and filed 27 February 2012 (the

plaintiffs' minute). For the plaintiffs there are also two sets of written submissions. One is the document 'Submissions on costs' dated 24 February 2012 and filed 27 February 2012 (the plaintiffs' original submissions). The other set of written submissions is the document 'Reply to the second defendant's submissions on costs' dated and filed 20 March 2012 (the plaintiffs' reply submissions).

12 For the second defendant, there is a document 'Second defendant's minute of proposed orders in relation to costs' dated and filed 12 March 2012 (the second defendant's minute). For the second defendant there are also two sets of written submissions. One is the document 'Second defendant's submissions in relation to costs sought in the second defendant's minute of proposed orders dated 12 March 2012' dated and filed 12 March 2012 (the second defendant's submissions of 12 March 2012). The other set of written submissions of which I took account (see *Stone* [252]) is the document 'Second defendant's outline of submissions on costs of hearing 23 April 2010' filed 18 May 2010.

13 From those respective documents the positions of the parties are these.

14 The second defendant's minute calls for orders that the plaintiff pay her costs, including all reserved costs, with a special costs order for the costs to be taxed without reference to the limits in item 11 of the applicable costs scales; with the plaintiff to pay the second defendant's costs of and incidental to the hearings on 23 April and 19 May 2010 on an indemnity basis; and with the plaintiff to pay the costs of the transcript.

15 The plaintiffs' minute calls for orders that the plaintiff pay the second defendant's costs of the action relating to the perfect gift issue with exceptions. The exceptions are that there should be no order as to the costs incurred from 23 April 2010 resulting from the abandonment of the plaintiffs' claim against the first defendant; and that the plaintiff is not liable to pay the second defendant's costs from 28 May 2010, that date being the date at which the second defendant filed a notice of intention to act in person. The plaintiffs' minute further calls for orders that the second defendant pay the plaintiffs' costs of the further issues. Finally, the plaintiffs' minute calls for orders that the costs orders relating to case management hearings (including status conferences and case evaluation conferences) be vacated and there be no order as to the costs of such hearings, with exceptions. The exceptions are for the order that the plaintiff pay the second defendant's costs of the status conference on 13 December 2007 such costs fixed at \$320; for the order that the second

defendant pay the plaintiffs' costs of the chamber summons filed 9 April 2010 heard on 19 April 2010, fixed at \$670; and the parties bear their own costs associated with the affidavit of the solicitor for the plaintiffs sworn 23 April 2010, the hearing of 23 April 2010, the hearing of 19 May 2010 and the listing conference of 13 July 2010. The first two exceptions track the orders made at the relevant conference. I return below to the affidavit referred to.

16 Out of those orders sought, I consider the following matters arise for me to address:

1. The costs of the action, with any exceptions;
2. Whether the special costs order the second defendant seeks should be made;
3. What separate costs orders if any should be made for the hearings on 23 April 2010 and 19 May 2010;
4. Whether there should be an order for the costs of the transcript;
5. Whether there should be special provision for the costs incurred from 23 April 2010 in relation to the abandonment of the plaintiffs' claim against the first defendant;
6. Whether there should be no liability of the plaintiff for any of the costs from 28 May 2010; and
7. Whether costs orders already made at the case management hearings should be vacated, with or without particular exceptions.

17 In addition, as I will explain, two further costs orders were sought by the plaintiffs, one in the plaintiffs' original submissions and one in the plaintiffs' reply submissions, which represent separate matters.

18 I turn to address all of these matters.

Costs of the action before exceptions

19 The applicable principles were not in contest.

20 It is not in question that the second defendant should have an order for at least some part of her costs of the action. I consider this to be appropriate on the basis of the usual costs order, resting on the principle that costs should follow the event. See *Rules of the Supreme Court 1971* (WA) (RSC) O 66 r 1(1).

21 Equally, however, where a successful party has introduced issues on which it fails, it may be ordered to pay the costs of the issues on which it has failed: *RSC O 66 r 1(3)*.

22 However, there is a broad discretion in relation to whether costs will follow the event, a discretion which must be exercised judicially: *Naidoo v Williamson* [2008] WASCA 179; (2008) 37 WAR 516 [39] (Steytler P; Pullin JA & Murray AJA agreeing).

23 There is also a discretion as to whether and, if so, how to allow for the costs of issues on which a successful party has failed. On that discretion, I note three of the authorities quoted from in Kendall C and Curthoys J, *Civil Procedure in Western Australia* [66.1.12] (Service 132) I will reach.

24 On the discretion whether or not to make an allowance for the costs of issues on which a successful party has failed, I note *Bowen v Alsanto Nominees Pty Ltd* [2011] WASCA 39 (S) [5] - [8] (McLure P, Newnes & Murphy JJA), referring to *Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Hannell* [2007] WASCA 158 (S), among other authorities, as follows:

It is clear that while the court has a broad discretion as to costs, generally costs will follow the event: *Rules of the Supreme Court 1971* (WA), O 66 r 1(1). It is incumbent upon the unsuccessful party to satisfy the court that there are good reasons why it should not pay the other party's costs: *Nikolaou v Papasavas, Phillips & Co (No 2)* [1989] HCA 11; (1989) 166 CLR 394, 407.

The court may, in the exercise of its discretion, order that a successful party recover only a portion of its costs where that party has been unsuccessful in respect of certain discrete issues. But that should not be done as a matter of course. To embark as a general practice upon an analysis of which party was successful on each issue, or necessarily to deprive a successful party of some portion of its costs if it has lost on a particular issue, would be likely to add further uncertainty and complexity to the outcome of litigation, derogate from the prospect of settlement, and oblige the court to hear lengthy and frequent arguments in relation to costs as an additional burden on its resources and the costs of the parties: see *MacKinnon v Petersen* (Unreported, NSWSC, 19 April 1989) (Cole J); *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 [67] - [68] (McHugh J). Litigation is time-consuming, expensive and burdensome enough already.

In addition, while parties should be encouraged to consider carefully what matters they put in issue, justice may not be served if by too ready a resort to deciding questions of costs according to success on particular issues,

parties are dissuaded by the risks of costs from canvassing all issues which might be material to the decision in the case: *Doric Products Pty Ltd v Lockwood Security Products Pty Ltd* [2002] FCA 282; *NRMA Ltd v Morgan (No 3)* [1999] NSWSC 768 [24].

In *Amaca* ..., the position was put as follows:

'[T]he power to adjust an order for costs by reference to particular issues upon which the generally successful party has failed, is properly exercised only where there are discrete and severable issues upon which the generally successful party has failed, and which have added to the cost of the proceedings in a significant and readily discernible way [7].'

25 On how to make an allowance if one is considered appropriate, I note from *David Weiping Chen v Kim Man Chan (No 2)* [2009] VSCA 233 [10] (Maxwell P, Redlich JA & Forrest AJA) the following (references in footnotes inserted; emphasis added):

The contentions of the parties raise a number of questions relevant to costs orders on appeal. The principles relevant to these questions can be summarised as follows:

1. The general rule is that costs should follow the event. Absent disqualifying conduct, the successful party should recover its costs even where it has not succeeded on all heads of claim. [*Ritter v Godfrey* [1920] 2 KB 47; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-8 (McHugh J); 124 (Kirby J)].
2. The Rules of Court permit significant flexibility in determining questions of costs. In particular, the court is entitled to examine the realities of the case and will attempt to do 'substantial justice' as between the parties on matters of costs: *Spotless Group Ltd v Premier Building and Consulting Pty Ltd and Northern Suburban Properties Pty Ltd* ('Spotless') [2008] VSCA 115, [14].
3. Where there is a multiplicity of issues and mixed success has been enjoyed by the parties, [*McFadzean v Construction Mining and Energy Union* (2007) 20 VR 250 ('*McFadzean*') [157]-[158]], a court may take a pragmatic approach in framing the order for costs, taking into consideration the success (or lack of success) of the parties on an issues basis. *Generally, if such an order is made, it is reflected in the successful party being awarded a proportion of its costs but not the full amount* [*Spotless* [15]; *Hughes v Western Australian Cricket Assn Inc* (1986) 8 ATPR 40-748, 48, 136; *Pricom Pty Ltd v Sgarioto* (Unreported, Supreme Court of Victoria, Eames J, 24 April 1995); *McFadzean* [2007] VSCA 289, [152]].

4. A court may, when fixing costs in a claim where there has been mixed success, take into account complications which it considers will arise in the taxation of costs, as part of its consideration of the overall interests of justice.
5. Where a court determines to make an order apportioning costs, then it does so primarily as 'a matter of impression and evaluation,' [*Major Engineering Pty Ltd v Helios Electroheat Pty Ltd (No 2)* [2006] VSCA 114, [5]] rather than with arithmetical precision, having considered the importance of the matters upon which the parties have been successful or unsuccessful, the time occupied and the ambit of the submissions made, as well as any other relevant matter.

See also *Phillips Fox (a firm) v Westgold Resources NL* [2000] WASCA 85 [28] (Owen J; White & Parker JJ agreeing on this point).

26 For the second defendant it was contended that she was 'wholly successful'. I disagree.

27 The further issues were discrete and severable from the ones on which she succeeded, even although they went not only to impeach the gift, assuming it was perfected, but also to an element of the alternative basis that the plaintiffs put forward for their contention that the gift should be upheld as a perfected gift. In that last respect, had the second defendant had to rely on the failure of that element for the perfect gift issue to be resolved in her favour, her case would have failed.

28 Further, these discrete issues added to the cost of the proceedings in a significant and a readily discernible way. I accept that a substantial proportion of the hearing days, including most of the September hearing days, were concerned with the further issues, even if there were elements of the evidence relating to the perfect gift issue which were necessarily involved in those hearings and which were addressed in the second defendant's written submissions provided to the court at the commencement of the September hearing days, and also addressed in closing submissions, directly and by reference to his written submissions by counsel for the plaintiff, and by reference to his written submissions by counsel for the second defendant.

29 See *Amaca* [7], quoted from in *Bowen* [8].

30 At the same time, I consider that the general approach referred to in *Chen* [10](3) is the one I should follow.

31 I have noted the submissions for the plaintiff that evidence and legal argument relating to the further issues are 'easily distinguishable' from those relating to the perfect gift issue, and 'capable of simple distillation by a taxing officer'. If such a state of affairs were evident to me, this would be a factor strongly weighing in favour of not making a percentage reduction but of making separate costs orders: see *Westgold* [28]. However, that state of affairs is not evident to me. There is evidence other than that referred to in the plaintiffs' original submissions which appears to me to relate to both sets of issues, in ways that do not appear to me to be easy to separate out. See the second defendant's affidavit of 8 October 2007 (exhibit 3).

32 The second defendant contends for a 10% reduction, having regard to the way in which the further issues were related to the perfect gift issue. I disagree, given the substantial effect on hearing time I have previously referred to.

33 I consider, as a matter of impression and discretion (see *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301, 302 - 303 (French J) (FCA)) that the second defendant should have costs of the action, reduced by 60%. I call this the general costs order.

34 I turn now to the second matter.

Special costs orders

35 It appeared not to be in contest that the application by the second defendant is under *Legal Profession Act 2008* (WA) s 280(2). However, I should note that the position appears to be that *Legal Practice Act 2003* (WA) s 215 applies (see *Legal Profession Act* s 616(1) read with s 601 'commencement day'). At the same time there appears to be no material difference between the two provisions.

36 There also appeared to be no contest as to the applicable principles.

37 The approach to the making of special costs orders under the provisions referred to is conveniently described in *Heartlink Ltd v Jones as Liquidator of HL Diagnostics Pty Ltd (in liq)* [2007] WASC 254 (S), particularly [11], [16] - [17] and [19]. That approach requires me to make two determinations. One is whether there is a fairly arguable case that the bill to be presented to the taxing officer may tax at an amount which is greater than the limit that would be imposed by the relevant costs determination (the first determination). The other is whether the

inadequacy arises because of the unusual difficulty of the matter; or because of its complexity; or because of its importance (the second determination). See also on the second determination *SDS Corporation Ltd v Pasdonnay Pty Ltd* [2004] WASC 26 (S2) [106] (Roberts-Smith J).

38 In respect of the first determination, I note that the second defendant did not apply for a variation of the programming orders for this determination as to costs to permit the parties to adduce affidavit evidence as to inadequacy. At the same time, I note that the second defendant did indicate she would file affidavit evidence in support if the court determined it required such information. I took this as an application for leave to permit the parties to adduce such evidence, if the court considered itself unable to make a determination without such an affidavit. For their part, the plaintiffs did not call on me to make such an order, and took a position which I took to be opposed to my making such an order on the second defendant's application.

39 I do not consider I should make an order permitting affidavit evidence as to inadequacy to be adduced.

40 It seems to me that I can proceed to make the first determination, as well as the second, as a matter of impression rather than detailed evaluation. See *EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd* [2008] WASC 275 (S) [7] (Martin CJ). I consider I can do so as the second defendant puts a case for inadequacy resting on the time from commencement of the proceedings by originating summons to the conclusion of the September hearings, as well as the number of days of hearings, particularly those representing the September hearings in which counsel for the second defendant was directly involved. It is not evident to me that I require affidavit evidence to evaluate that case.

41 As a matter of impression I am unable to agree that the first determination should be made as the second defendant contends. My focus must be on the one issue on which the second defendant succeeded, the perfect gift issue, and then only without regard to the element of the second defendant's case for the non-recognition of the will of 9 May 2007. Inadequacy arising otherwise should be set aside. As a matter of impression, I do not consider that the perfect gift issue so understood should be seen as one capable of giving rise to inadequacy. The time since the filing of the originating summons included time spent between 8 October 2007, when the second defendant's affidavit of that date was filed, and 13 August 2009, the date of a case management hearing before Registrar Johnston, over which no filings occurred and attempts were

made to settle the matter. See 13 August 2009 ts 2 - 3. To the extent of the period over which counsel was involved in preparing for and appearing at the September hearings, it is not evident to me there were substantial costs not provided for by the relevant scale that were not due to the further issues. As I have indicated, the further issues occupied a substantial portion of the September hearing days.

42 This determination makes it strictly unnecessary for me to make the second determination. However, I should indicate my view, on the submissions put to me by the second defendant and put against those submissions put by the plaintiff.

43 The second defendant's case was put in terms both of unusual difficulty and of importance.

44 The case in terms of unusual difficulty was put in terms of the test from *Como v Helmers* [2011] WASC 179 (S) [18] (Corboy J), that the matter was 'more difficult than would ordinarily be expected in an application of the kind under consideration' (citing authority).

45 However, again confining my attention to the perfect gift issue, I cannot agree the matter was of that character. True it is that the legal issues involved were of some nicety and difficulty in their application: see *Stone* [113] - [120], [125] - [129], [131] - [132], [137] and [142]. However, I do not consider those features made the matter one within the test in *Como*. Legal issues of some nicety that are difficult to apply not infrequently present themselves on originating summonses in this court. There was little difference between the parties as to the principles applicable; the differences lay in their application. See *Stone* [125] and [142]. The evidence for the purposes of that application was not significantly contested: see *Stone* [68], [74], [78] - [80] and [83] - [84]. Further, I do not consider that the perfect gift issue was such that those providing legal assistance to the second defendant would have had difficulty in arriving at an understanding of the principles involved or the difficulties in their application greater than that ordinarily to be expected in applications of the kind under consideration.

46 As to the case of the second defendant resting on importance, this importance was said to rest on the risk to the second defendant of the loss of the home she was occupying. Importance for this purpose can include importance to a party herself or himself: see *Heartlink* [19]. However, I consider I should also bear in mind that the plaintiffs' application in the originating summons was not for possession or for the sale of the

residential property. Further, the plaintiffs' application was for recognition of a part interest only in the residential property.

47 I consider the risk that following success by the plaintiffs they would apply for sale of the residential property to be insufficient for the purposes of the second determination.

48 Accordingly, I would not make the special costs order sought.

Costs orders for the hearings of 23 April 2010 and 19 May 2010

49 I describe the character of what occurred at those hearings and the costs order I made at the later hearing in *Stone* [98] - [99] and [251].

50 The second defendant's case for the order in the second defendant's minute for its costs of those hearings on an indemnity basis was that the second defendant at the hearing on 23 April 2010 decided she would not proceed with the issues of undue influence, duress and capacity on the basis of matters that importantly included the affidavit of the solicitor for the plaintiffs of 23 April 2010. That affidavit was corrected in material represented by a further affidavit of that solicitor that I considered at the hearing on 19 May 2010. That correction persuaded me in effect to permit those three issues to be further addressed in evidence.

51 The plaintiffs' case was for their order that the parties each bear their own costs associated with the affidavit of the solicitor for the plaintiffs of 23 April 2010, the hearings of 23 April 2010 and 19 May 2010, and a further hearing, on 13 July 2010, at which among other things the issues for the resumed hearing of the originating summons were identified to include the further issues. The plaintiffs' case for that order rested on the fact it was the solicitor for the plaintiffs himself who drew the error to the court's attention; that the error was contributed to by the way in which the second defendant's acquiescence in the listed hearing's duration of three hours led him, in my view not unreasonably, to conclude the claim on the further issues would not be pursued; and the failure on the further issues.

52 I accept the first and second aspects of the plaintiffs' case. In particular, having regard to them, I do not consider a case for indemnity costs has been made out. For that purpose, I apply the considerations in relation to such orders from *Swansdale Pty Ltd v Whitcrest Pty Ltd* [2010] WASC 129 (S) [10] (Pullin JA & Kenneth Martin J).

53 At the same time, I note the matters of perfect gift addressed at the hearings on 23 April 2010 and 13 July 2010: see *Stone* [98] (last two

sentences); and [100] (last two sentences). In view of that, and in view of the difficulty more generally in distinguishing between the matters in the hearings otherwise than as allowed for by the general costs order, I would not make any special provision for the hearings of 23 April 2010, 19 May 2010 or 13 July 2010, as the second defendant's minute calls for, as the plaintiff's minute calls for or otherwise.

Costs of the transcript

54 The second defendant's minute, as I have indicated, seeks an order for such costs; the plaintiff's minute makes no provision for it. No submissions are made by either party for or against the order. In those circumstances I consider the matter is left to me to determine, as an application for a special costs order requiring an allowance for that cost.

55 So approached, the matter is not one for which I consider I am able to conclude as a matter of impression that there was a need for the transcript from the nature of the perfect gift issue which would justify such an order. It may be that the cost can be shown to have been unreasonably incurred; otherwise, it seems to me the cost would be recoverable, as a disbursement.

56 I turn to the next matter.

An exception for costs incurred from 23 April 2010 in relation to the abandonment of the claim for orders against the first defendant

57 The claim, under *Transfer of Land Act* s 203, is as I have indicated referred to in *Stone* [7]. That reference is brief, and there is no indication there of when otherwise than during the proceedings before me the claim was abandoned. The second defendant does not take issue with the abandonment being dated as described.

58 In my view no exception should be made as the plaintiff's minute calls for. To the extent the costs incurred after 23 April 2010 were shown to be solely attributable to the claim so abandoned, I do not consider the costs would be recoverable on a taxation in any event. However, there was a close connection between the perfect gift issue and the orders so sought, given that the claim was to give effect by that means to the declarations the plaintiff sought which rested on the resolution of the perfect gift issue in their favour. I consider that to the extent it is impossible to disaggregate the costs solely attributable to the claim against the first defendant from costs otherwise attributable, there should be not be any question of the second defendant, who was successful in the

proceedings, suffering any abatement of her costs other than as allowed for in the general costs order.

59 Accordingly I would not make the exception the plaintiffs' minute provides for in relation to the costs incurred after 23 April 2010 resulting from the plaintiffs' abandonment of any claim for relief against the first defendant.

60 I turn to the next matter.

Whether there should be no liability of the plaintiff for any of the second defendant's costs from 28 May 2010

61 The potentially relevant provision in the *RSC* is O 66 r 8A, which reads:

8A. Costs where practitioner acts pro bono

- (1) In an action or matter in which a practitioner provides free legal services to a party, the party shall be entitled to recover costs in the same manner and to the same extent as if the services were provided for reward.
- (2) If an order is made for the payment of the party's costs, the practitioner may recover the amount ordered to be paid in respect of -
 - (a) fees for the practitioner's services; and
 - (b) disbursements incurred by the practitioner on behalf of the party.

62 I did not take it to be contest that an ordinary litigant in person cannot recover compensation for the time they spent in preparing and conducting their own case; however, such a person might be allowed their out of pocket expenses reasonably incurred, their reasonable expenses of preparing written submissions and their reasonable expenses necessarily and reasonably incurred in relation to the litigation of travelling or parking. See *Civil Procedure in Western Australia* [66.19.5] (Service 132). Whether when the litigant in person has free legal services provided to them by a legal practitioner within O 66 r 8A any of the expenses of the litigant in person would nonetheless have been reasonably incurred or necessarily and reasonably incurred, as the case may be, seems to me to be a matter for the taxing officer, not for me. No special costs order was sought in that regard here. Had one been sought, I do not consider it likely I would have granted it.

63 The plaintiffs' minute provides that the second defendant should not recover any of her costs, although I would understand the order as not affecting the possible recovery by the second defendant of the costs, *Civil Procedure in Western Australia* [66.19.5] above refers to. This is because the plaintiffs' case for its order is put in terms that no costs should be allowed in respect of the second defendant's time, the voluntary clerical assistance she received or the costs of counsel, Dr Hockley, who appeared for her at the September hearings and earlier provided services intended for her benefit.

64 In that last respect, it appears not to be in contest that Dr Hockley earlier provided professional advice to the individual who appeared for the second defendant at the hearing on 13 July 2010 as a McKenzie friend. Dr Hockley on 20 August 2010 informed the court at a hearing then that he acted *pro bono* for the organisation from which the McKenzie friend came, and that he had provided advice to that organisation to assist that individual and the second defendant. I also note, as counsel for the plaintiffs reminded me, that the transcript for that hearing shows Dr Hockley as appearing as 'amicus curiae for the second defendant'.

65 Counsel for the plaintiffs put to me that it was inconsistent with the position Dr Hockley occupied at the times of the hearings on 13 July 2010 and 20 August 2010 that that counsel at the first of the September hearings informed the court he appeared *pro bono* as counsel for the second defendant. I took it I should not accept at face value that latter characterisation of Dr Hockley's position. In any event the plaintiffs' case for the order they sought, at least as to Dr Hockley, was that by the time Dr Hockley first became involved, about 13 July 2010, the proceedings in the matter predominantly related to the further issues.

66 I would not make the order I understood the plaintiffs to be seeking. In my view it was clear from the 13 July 2010 hearing that Dr Hockley was assisting the second defendant, initially indirectly, then directly. This was sufficient in my view to bring his costs within RSC O 66 r 8A. Further, in view of the basis on which I concluded that the general costs order should be made, I am not persuaded considerations of the contributions the further issues made to the hearings from at least 13 July 2010 are not appropriately allowed for by that order. Finally, that general costs order in my view leaves room for a case to be put to the taxing officer for recovery of the costs of the second defendant as a litigant in person in accordance with the principles I have referred to.

67 I turn to the next matter.

Whether costs orders relating to case management hearings already made should be vacated with or without particular exceptions

68 I leave aside the exceptions made in the plaintiffs' minute to the order they seek, which as I consider were costs orders made in any event with which the plaintiffs have indicated no difficulty.

69 No submissions were directed to why I should make, as the plaintiffs' minute calls for me to make, no order as to the costs of those hearings for some of which (category 1) costs were ordered to be in the cause, in some cases fixed at particular amounts; for some of which (category 2) costs were reserved; and for the rest of which (category 3) no order for costs was sought or made.

70 It was not evident to me why for hearings in categories 1 and 2 costs should not (subject to the amount being fixed, in those cases) be as provided in the general costs order. As I have indicated, from an early stage *both* perfect gift *and* some at least of the further issues were, at least so far as the second defendant was concerned, involved in the proceedings. I do not see why allowance for that state of affairs made by the general costs order is not appropriate to the case management hearings in the present categories, let alone why the second defendant should be denied any of her costs of the hearings.

71 As to category 3, I do not see why I should make an order in relation to costs where the officer conducting the hearing did not himself or herself make one, including reserving costs.

72 Thus, I would not make the order of the present kind the plaintiffs seek. This I would understand as not affecting the costs orders the subject of the exceptions to that order the plaintiffs' minute specifies.

73 I turn now to the two matters raised in the submissions of the plaintiff which are not addressed, at least clearly, in their minute.

Further two matters

74 One is for the second defendant to pay the plaintiffs' costs of objecting and then arguing the objections to the admission of certain affidavit evidence, where that argument occurred on 16 and 17 September 2010. The other is that the second defendant should pay the plaintiffs' costs of preparing the plaintiffs' original submissions and the plaintiffs' reply submissions.

75 As to the first, the plaintiffs' case is that the argument resulted in
consent or rulings that what in sum was a large proportion of the affidavit
evidence for the second defendant was inadmissible.

76 It is indeed the case that most, and in some cases nearly all, of most
the affidavits filed for the second defendant relied upon at the hearings
was either as a matter of consent or as a matter of ruling found to be
inadmissible.

77 However, in some cases, the matter was the subject of leave to ask
questions of the deponent. Further, there were substantial portions of
what was the largest affidavit for the second defendant, hers of 8 October
2007, that remained, while no affidavit for her that she sought to rely upon
at the hearings suffered the fate that all of it was ruled inadmissible.

78 On those bases I do not consider I should make the order sought by
the plaintiffs' minute.

79 As to the second further order, that the second defendant pay the
costs of the plaintiffs' original submissions and the plaintiffs' reply
submissions, I note that neither the plaintiffs nor the second defendant
secured all or even most of the orders they respectively sought, at least in
terms. I consider the results of their costs applications were mixed.

80 I therefore consider that it not appropriate to make any costs order in
respect of either party's costs submissions.

Conclusion and orders

81 I have concluded that the only order for costs I should make is that
the second defendant have 40% of her costs of the action not otherwise
provided for in orders previously made, including reserved costs, to be
taxed if not agreed, subject to any orders for fixed costs previously made;
and there should be no order as to the costs of the parties' submissions as
to costs.

82 I will hear from the parties as to the detailed terms of these orders.