

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : WALTER -v- BUCKERIDGE
[No 5] [2012] WASC 495

CORAM : LE MIERE J

HEARD : 26 JUNE 2012

DELIVERED : 21 DECEMBER 2012

FILE NO/S : CIV 2549 of 2003

BETWEEN : JULIAN ALAN WALTER
Plaintiff

AND

LEONARD WALTER BUCKERIDGE
First Defendant

BGC (AUSTRALIA) PTY LTD (ACN 005 736 005)
Second Defendant

FILE NO/S : CIV 2566 of 2003

BETWEEN : JWH GROUP LTD
First Plaintiff

JULIAN ALAN WALTER
Second Plaintiff

AND

LEONARD WALTER BUCKERIDGE
First Defendant

BGC (AUSTRALIA) PTY LTD
Second Defendant

Catchwords:

Practice and procedure - Costs - Application for a special costs order - Valid costs agreement - Turns on own facts

Legislation:

Legal Practice Act 2003 (WA), s 215, s 216, s 221

Legal Practitioners Act 1893 (WA), s 58ZB, s 59

Legal Profession Act 2008 (WA), s 260, s 280, s 288

Rules of the Supreme Court 1971 (WA), O 66 r 12

The Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 (WA), Item 10

Result:

Application allowed in part

Category: B

Representation:

CIV 2549 of 2003

Counsel:

Plaintiff	:	Ms M L Coulson
First Defendant	:	Mr S M Davies SC & Mr D J Garnsworthy
Second Defendant	:	Mr S M Davies SC & Mr D J Garnsworthy

Solicitors:

Plaintiff	:	Clayton Utz
First Defendant	:	King & Wood Mallesons
Second Defendant	:	King & Wood Mallesons

CIV 2566 of 2003

Counsel:

First Plaintiff	:	Ms M L Coulson
Second Plaintiff	:	Ms M L Coulson
First Defendant	:	Mr S M Davies SC & Mr D J Garnsworthy
Second Defendant	:	Mr S M Davies SC & Mr D J Garnsworthy

Solicitors:

First Plaintiff	:	Clayton Utz
Second Plaintiff	:	Clayton Utz
First Defendant	:	King & Wood Mallesons
Second Defendant	:	King & Wood Mallesons

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

Anfrank Nominees Pty Ltd v Connell [No 2] (1991) 6 WAR 271
Anfrank Nominees Pty Ltd v Connell [No 2] (1992) 7 WAR 179
Brown v Talbot & Olivier (1993) 9 WAR 70
Chakera v Kuzamanovic [2003] VSC 92
Chamberlain v Boodle & King (a firm) [1981] 1 WLR 1443
Esther Investments Pty Ltd v Markalinga Pty Ltd (1992) 8 WAR 400
Frigger v Lean [2012] WASC 66
Hancock Family Memorial Foundation Ltd v Porteous [2000] WASC 61

International Air Transport Association v Ansett Australia Holdings Ltd [2008]
HCA 3; (2008) 234 CLR 151
Lampropoulos v Kolnik As Executor of the Will of Gerald Thomas Foley [2010]
WASC 193 (S)
Pryles & Defteros v Green [1999] WASC 34
Re Raven Ex Parte Pitt (1881) 45 LT 742
SDS Corporation Ltd v Pasdonnay Pty Ltd [2004] WASC 26 (S2)
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR
165

- 1 **LE MIERE J:** In each of these defamation actions I ordered that the actions be discontinued and the plaintiffs pay the defendants' costs of the actions. The defendants now apply for special costs orders. The defendants seek orders that in assessing the defendants' costs the limits in the scale of costs be removed.

The actions

- 2 Mr Walter and Mr Buckeridge had been involved in J-Corp Pty Ltd a home building company. Mr Buckeridge became involved in J-Corp Pty Ltd in early 1986 when interests associated with Mr Buckeridge acquired a 50% shareholding in J-Corp. Mr Walter and his interests held the other 50% shareholding in J-Corp. The relationship between Mr Walter and Mr Buckeridge deteriorated. On 14 June 2002 Mr Buckeridge and his related company Kimpura Pty Ltd commenced proceeding COR 176 of 2002 in this court against Mr Walter, Julian Walter Holdings Pty Ltd and J-Corp seeking an order that J-Corp be wound up on the grounds of oppression (the Oppression Action). In the course of the Oppression Action, the plaintiffs in that action made a number of allegations against Mr Walter in relation to J-Corp having paid some of Mr Walter's personal expenses. The Oppression Action was settled in mid-2003 by way of deeds of settlement and release, and completion under those deeds took place on 31 July 2003. One outcome of the settlement was that Mr Walter, in effect, purchased, subject to certain accounting adjustments as to price, several of J-Corp's housing businesses. On 12 November 2003 Mr Buckeridge, personally and through his related companies J-Corp, Kimpura and Esther Investments Pty Ltd, commenced in this court action CIV 2375 of 2003 against Mr Walter and his related companies (the Adjustments Action). In the Adjustments Action, Mr Buckeridge and his companies claimed approximately \$700,000 arising from the alleged non-payment of monies owed under the settlement deeds, allegedly pursuant to the adjustment process under those deeds.

- 3 In December 2003 Mr Buckeridge published an article in the BGC Christmas Bulletin, which is a publication of the second defendant (BGC), which is part of the BGC Group, a group of construction and building related companies. This article is the subject of CIV 2549 of 2003 (the Bulletin action). Mr Walter says that he took the article to be calling him a thief and a criminal by accusing him of having committed many acts of stealing from J-Corp. Mr Walter says he believed that the article would likely have been published to many building industry participants and that

there was a high likelihood that the allegation would be repeated and gossiped about extensively. The writ was filed on 18 December 2003.

- 4 On 18 December 2003 *The West Australian* newspaper published an article entitled 'Buckeridge, Walter Sling Brickbats'. Mr Walter took what was attributed to Mr Buckeridge in the article to be re-affirming the allegation that Mr Walter was a thief and a criminal and to be saying that he was not paying a debt of approximately \$700,000 that was owed to Mr Buckeridge because Mr Walter did not have the money to do so. Mr Walter says he felt this was an attack on his credit worthiness and financial status and his ability to pay his debts. On 19 December 2003 Mr Walter commenced CIV 2566 of 2003 against Mr Buckeridge and BGC in relation to the article (the West Australian action).

History of proceedings

- 5 Both actions were hard fought. There were numerous interlocutory disputes concerning pleadings and discovery. In the BGC Bulletin action the defendants unsuccessfully sought leave to appeal from a decision of the master dismissing the defendants' application to strike out the statement of claim and allowing the plaintiff's application to amend the statement of claim. In the West Australian action the defendants brought three separate appeals to the Court of Appeal.

Discontinuance of the actions

- 6 Mr Walter applied to discontinue the actions with no order as to costs. Mr Walter swore that, in brief, his reasons for wanting to discontinue the actions were that he was tired, frustrated and fed up with the litigation which had been going since December 2003. The defendants consented to Mr Walter discontinuing the actions but opposed the plaintiffs' application in relation to costs and sought orders that the plaintiffs pay the defendants' costs. On 22 November 2011 I ordered that the actions be discontinued and that the plaintiffs pay the defendants' costs of the actions: [2011] WASC 313.

The costs disputes

- 7 Before the court may make a special costs order it must be of the opinion that the amount of costs allowable under the relevant costs determinations is inadequate because of the unusual difficulty, complexity or importance of the matters.
- 8 The plaintiffs submit that there is no valid costs agreement between the defendants and their solicitors and accordingly the defendants'

solicitors are confined to the applicable scale of costs. In that case, the plaintiffs argue the defendants' liability to their solicitors would not exceed the amount allowable under the relevant scales and the costs allowable under the relevant scales are not inadequate.

- 9 It is convenient to outline the evidence before the court on these applications before considering the issues to which it gives rise. In support of their applications the defendants filed two affidavits. One was sworn by Andrew Teo, a director and company secretary for BGC. The second was sworn by Michael Lundberg a partner in the law firm King & Wood Mallesons who has the conduct of these matters on behalf of the defendants. King & Wood Mallesons was formerly known as Mallesons Stephen Jaques. For convenience I will refer to the firm as Mallesons. At the hearing of these applications the defendants also read an affidavit sworn by Mr Buckeridge on 16 March 2011 in the discontinuance applications. I will outline the contents of these affidavits.

Lundberg 8 March 2012 affidavit

- 10 Mr Lundberg gives an overview of each action and the matters in issue in each action. Mr Lundberg says that he prepared his affidavit on the basis of a review of the court documents files, correspondence files and time recording system maintained by Mallesons. In relation to the Bulletin action the review involved

... reviewing the eight lever arch files which contained the Court documents filed in the action. These files do not include the witness statements, the annexures to those statements, the appeal documents or the discovery documents, which I kept in separate files. The review also has involved reviewing various parts of the 17 volumes of correspondence files maintained by Mallesons Stephen Jaques.

- 11 Mr Lundberg identified four issues in the Bulletin action. The first is whether the defendants had published a defamatory comment in respect of the plaintiff. The second is the imputation arising from the publication. The plaintiff pleaded that the imputation was that between 1990 and 2001 the plaintiff had stolen large amounts of money from J-Corp and thereby committed a serious criminal offence. The defendants pleaded that the imputation was that the plaintiff stole money from J-Corp by fraudulently converting J-Corp money to his own use or the use of others by converting that money with an intent to use it at his own will. In the alternative, the defendants pleaded that the plaintiffs stole from J-Corp by fraudulently converting J-Corp property to his own use with an intent to permanently deprive J-Corp of the property. The third issue is whether

the alleged defamatory imputation was true. The defendants pleaded 15 categories of transactions including numerous subcategories. The defence is 61 pages in length. The defendants said that each of the pleaded transactions was an offence of stealing. The plaintiff filed a reply. In its final version, the plaintiff admitted that J-Corp made the payments alleged by the defendants but denied that the payments amounted to stealing. The plaintiff pleaded various facts and circumstances in support of that plea. The defendants filed a rejoinder. Mr Lundberg says that for that purpose Mallesons reviewed the corporate records of J-Corp for the period around the late 1980s and early 1990s, as well as the employee records maintained by J-Corp in relation to the employment of the plaintiff's mother and father, and Mrs Hobbs. The fourth issue is damages. The plaintiff claimed compensatory, aggravated and exemplary damages before abandoning the claims for aggravated and exemplary damages.

12 Mr Lundberg outlined the history of the pleadings. Mr Lundberg then outlined the witness statements exchanged by the parties and objections made to them. The plaintiff served three witness statements. Mr Lundberg then outlined the 'many contested and other hearings' before the court including appeals which 'required a great amount of time and resources'.

13 Mr Lundberg describes the specific work undertaken by Mallesons relating to the action including preparation of the defence, considering the reply and responding to the reply, preparing discovery and attending to inspection, preparing for and attending mediation, engaging an independent expert and preparing for and attending the discontinuance application. Mr Lundberg annexes schedules which identify work relating to the consideration of the replies and in responding to the replies (the Replies Schedule), work relating to the preparation of the discovery list and inspection of the plaintiff's list (the Discovery Schedule), work relating to the preparation for and attendance at the mediation (the Mediation Schedule), work relating to the briefing of the independent expert (the Expert Schedule) and work relating to the preparation for and attendance at the hearing of the discontinuance application (the Discontinuance Schedule). Each schedule sets out the fee earner engaged on the work, the date on which the work was done, the units of work, the rate charged and the amount charged. Mr Lundberg outlines the nature of the brief to the expert. Mr Lundberg says that three counsel have been engaged in the action, two of whom are now judges of this court.

- 14 Mr Lundberg then gives an overview of the West Australian action and refers specifically to the defence. The defence was amended on several occasions. In March 2008, an amended substituted defence was settled by senior counsel, who is now a judge of this court (not one of the counsel engaged in the Bulletin action). Further amendments were made and settled by Mr Tobin QC.
- 15 Mr Lundberg outlines the history of the engagement of Mallesons by the defendants to act on their behalf in the actions. Mr Lundberg annexes to his affidavit a letter from Mallesons to BGC dated 5 July 2004 concerning a rebate agreement relating to fees. Mr Lundberg said that from the time Mallesons was first engaged in relation to the actions he expected that the defendants would pay Mallesons for the provision of legal services at the ordinary rates charged by Mallesons for each solicitor who carried out work on the defendant's behalf. The usual rates charged for solicitors employed by Mallesons are set by the firm at the beginning each financial year. Mallesons charged the defendants for its work in conducting each of the actions on the basis of the standard hourly rates of the firm as amended from time to time. During the course of the Bulletin action the fees charged by Mallesons to the defendants have been set out in over 70 monthly invoices issued to the defendants. These fees have been of the standard rates charged by Mallesons. The invoices rendered by Mallesons to the defendants throughout the course of the actions have all been paid.
- 16 Mr Lundberg says that in preparing for these applications he made enquiries within Mallesons and with representatives of the defendants as to the existence of a written costs agreement between Mallesons and the defendants between December 2003 and the present. Mr Lundberg says that having conducted that review he realised that the rebate letters may not be sufficient to satisfy the requirements of a costs agreement under the relevant legislation. He informed the defendants of this and they instructed him to prepare a cost agreement which would satisfy the relevant legislation and record in writing the agreement that had been in place since December 2003. On 8 March 2012 Mr Lundberg caused a formal costs agreement to be provided to BGC. On 8 March 2012 Mr Lundberg received from Mr Teo a signed copy of the costs agreement.
- 17 Finally, Mr Lundberg sets out a table of the practitioners within Mallesons who undertook work on behalf of the defendants in connection with the actions and their seniority.

Teo 8 March 2012 affidavit

18 Mr Teo says that the first defendant, Mr Buckeridge, is the executive chairman of BGC. In or about December 2003, on behalf of Mr Buckeridge and BGC, Mr Teo instructed Mallesons to defend the actions. Prior to engaging Mallesons, Mr Teo had instructed Mallesons on behalf of Mr Buckeridge, and BGC and other entities with the BGC group of companies, in relation to a number of other proceedings in this court. Mr Teo understood that Mallesons would charge for their services in respect of the actions at the usual rates charged for legal practitioners who did the work and that Mallesons expected to be paid for their services on that basis. Mr Teo knew Mallesons usual rates by reason of having previously been involved in the engagement of Mallesons to perform work.

19 Mr Teo was informed by Mr Lundberg that existing letters between Mallesons and BGC may not be sufficient to satisfy the requirements of a costs agreement under the relevant legislation. He instructed Mr Lundberg to prepare a costs agreement that did satisfy the relevant legislation and which would record in writing the agreement that had been in place since December 2003. Mr Teo annexes to his affidavit a copy of the signed costs agreement between Mallesons, Mr Buckeridge and BGC dated 8 March 2012. Mr Teo says that the agreement is consistent with his understanding of the agreement that had been in place since December 2003.

Buckeridge 16 March 2011 affidavit

20 Mr Buckeridge says that he has spent considerable money over the years on legal fees in opposing the plaintiffs' claims and over the last seven years those fees have been paid to his solicitors, to several senior barristers, to a junior barrister and to an accounting firm to act as an expert, among other things.

Plaintiffs' affidavits

21 The plaintiffs filed an affidavit of Kathleen McNally, a senior associate employed by Clayton Utz, the solicitors for the plaintiffs. At the hearing of these applications, the plaintiffs also read an affidavit sworn on 21 February 2011 by Mr Walter in support of his application for leave to discontinue the actions. I will outline the contents of those affidavits.

McNally 16 April 2012 affidavit

22 Ms McNally has had the conduct of the action on behalf of the plaintiff. Ms McNally gives an overview of the Bulletin action and the matters in issue in that action. Ms McNally refers to the extent of discovery. Ms McNally refers to the pleadings and concedes that a special costs order is appropriate in relation to the defence dated 30 June 2006. Ms McNally makes observations about the witness statements and objections to them. Ms McNally outlines hearings in the course of the action.

23 Ms McNally says that Maria-Louisa Coulson, of the specialist legal costs law practice Coulson Legal, has undertaken a global review of the costs outlined in the Discovery, Mediation, Expert and Discontinuance Schedules. Ms McNally says that she has been informed by Ms Coulson of the methodology applied by Ms Coulson in undertaking the review. Ms McNally sets out Ms Coulson's opinion in relation to those matters. In relation to the Discovery and Discontinuance Schedules, Ms McNally says that Ms Coulson makes a number of specific observations and concludes that the maximum allowance under the scale is not inadequate. In relation to the Mediation Schedule, Ms McNally says that Ms Coulson says that she has not globally assessed the claims for mediation because the scale does not provide for a maximum allowance other than a maximum hourly rate. In relation to the Expert Schedule, Ms McNally says that Ms Coulson says that the work prescribed is covered by the getting up items of the scale and as a result of matters she refers to it is not possible to draw a conclusion as to whether or not the maximum allowances under the getting up items of the scale are inadequate.

Walter 21 February 2012 affidavit

24 Mr Walter says, in brief, his reasons for wanting to discontinue the actions are:

I am tired, frustrated and fed-up with this litigation which has been going since December 2003.

Mr Walter says that he commenced the actions 'because of the seriousness and falsity of the allegations published about me, and what I understood to be the extent of its publication and its potential to hurt my personal and professional reputation'. Mr Walter says that he has already paid over \$1 million in legal fees in respect of these actions.

Responsive affidavits

25 The defendants filed a further affidavit of Mr Lundberg sworn on 30 April 2012 in response to Ms McNally's affidavit, and a further affidavit sworn by Mr Lundberg on 14 June 2012, which attached a letter and itemised account for legal services. I will briefly outline the contents of those affidavits.

Lundberg 30 April 2012 affidavit

26 Mr Lundberg responds to statements by Ms McNally concerning work done to get up the actions and the interrelationship of that work to work done in the Oppression and Adjustments Actions. Mr Lundberg annexes a schedule of work done preparing witness statements for the defendants' witnesses, considering the plaintiff's witness statements, preparing objections to the plaintiff's witness statements and preparing responsive witness statements. The schedule, like the earlier schedules, sets out in relation to each item of work done, the fee earner, the date, rate, number of units and amount charged.

Lundberg 14 June 2012 affidavit

27 Mr Lundberg attaches to his affidavit a copy of a letter from Mallesons to BGC dated 6 September 2004 and the enclosed redacted itemised account for legal services provided between 28 June 2004 and 27 August 2004.

Plaintiffs' argument about costs agreements

28 As I have said, the plaintiffs submit that there is no valid costs agreement between the defendants and their solicitors, that the defendants' solicitors are confined to the applicable scale of costs, the defendants' liability to their solicitors would not exceed the applicable scales of costs and hence the costs allowable under the relevant scales are not inadequate.

29 A similar point was taken by the plaintiffs in *Hancock Family Memorial Foundation Ltd v Porteous* [2000] WASC 61. There, counsel for the plaintiffs had taken the preliminary point that the defendants were not entitled to a special costs order unless they were prepared to state whether there was a costs agreement between them and the defendants and to produce the agreement. Reliance was placed upon s 59(3) of the *Legal Practitioners Act 1893*, which reads:

- (3) A client who enters into an agreement made under subsection (1) shall not be entitled to recover from any other person, under any order, judgment, or agreement for the payment of costs, any costs

which are the subject of that agreement beyond the amount payable by the client to the practitioner under that agreement.

The submission was said to be supported by two decisions, *Anfrank Nominees Pty Ltd v Connell* [No 2] (1991) 6 WAR 271 and *Anfrank Nominees Pty Ltd v Connell* [No 2] (1992) 7 WAR 179.

30 Anderson J said (at [5]):

I do not think that either case stands for the proposition that the Court cannot make a special costs order or should not do so unless the party seeking the order produces the costs agreement to demonstrate that recovery of costs in the amount taxed pursuant to the special order will not infringe s 59(3). As I understand the cases, they go no further than to say that a solicitor ought not to actually recover costs in excess of those which he is entitled to charge his client pursuant to any agreement he may have with his client; and that to do so may amount to unprofessional conduct. In other words, the question whether there is a costs agreement, and, if so, what is its effect, are questions which become relevant after the bill has been taxed. This is in accordance with the terms of the subsection itself. According to the subsection, what is prohibited is the 'recovery' of costs beyond the amount payable by the client.

His Honour rejected the submission that he should not proceed to consider making a special costs order unless and until the defendants produced any costs agreement that may have been made between them and their solicitors. The reasoning of Anderson J was accepted by Roberts-Smith J in *SDS Corporation Ltd v Pasdonnay Pty Ltd* [2004] WASC 26 (S2) at [68] and by Simmonds J in *Lampropoulos v Kolnik As Executor of the Will of Gerald Thomas Foley* [2010] WASC 193 (S) at [33].

31 The parties acknowledged the decisions referred to but submitted that it was necessary and desirable to determine the issues relating to the costs agreement in this application. The matters were argued by the parties and, as a matter of case management, it is appropriate that I determine those issues.

The Costs Agreements

32 The defendants submit that there are a number of costs agreements between the defendants and Mallesons. First, they submit there is an oral costs agreement made in December 2003. Secondly, the defendants say that as from 5 July 2004 there was a written costs agreement in force which was constituted by the rebate letter of 5 July 2004, invoices issued by Mallesons and a remittance notice sent by the defendants to Mallesons. Thirdly, the defendants say that a new written costs agreement was

entered into by letter dated 29 August 2011 from Mallesons to BGC for the period 1 November 2011 to 30 June 2012. Fourthly, the defendants say there is a written costs agreement dated 8 March 2012. I will consider each of these alleged agreements.

Oral agreement

33 There is evidence that the defendants made an oral agreement with Mallesons in December 2003. At that time the regulation of legal practitioners' remuneration and the making of costs agreements was regulated by the *Legal Practitioners Act 1893* (WA). Section 58ZB(1) provided relevantly that subject to s 59, the taxation of bills of costs of practitioners, as between practitioner and client or party and party, and any other aspect of the remuneration of practitioners the subject of a determination by the Legal Costs Committee shall be regulated by a determination in force. Section 59(1) provided that a practitioner may make a written agreement with a client respecting the amount and manner of payment for past or future services. On the face of those provisions, an oral costs agreement was ineffective.

34 The defendants submitted that, at least as at December 2003, it was possible for a solicitor to enter into an agreement as to costs with a client which was not a written agreement pursuant to s 59 of the *Legal Practitioners Act 1893*. The defendants relied upon *Pryles & Defteros v Green* [1999] WASC 34 for that proposition. I do not think that authority has any application in the present circumstances. In that case the court was concerned with a review of the taxation of a bill of costs of practitioners in respect of work undertaken on behalf of the client pursuant to a retainer to pursue an appeal by the client to the Court of Criminal Appeal. There was no determination of the Legal Costs Committee in force which regulated the costs of work undertaken to pursue an appeal to the Court of Criminal Appeal. Parker J held that in the absence of a determination on taxation, costs will be allowed which, in the view of the taxing officer, constitute a reasonable charge in respect of all work reasonably undertaken. In that context Parker J said at [28]:

It remains at least theoretically possible, on such a taxation, that the practitioner or client may seek to set up an agreement as to costs which is not a written agreement pursuant to s 59.

His Honour's observations do not have any application where, as here, there is, or was, a determination in force that regulates the work undertaken by the legal practitioners.

Costs agreement 5 July 2004

35 The defendants say that as from 5 July 2004 there was a written costs agreement in force which was constituted by:

- (a) the letter from Mallesons to the defendants dated 5 July 2004;
- (b) the invoices that were sent following the 5 July 2004 letter which set out the basis on which Mallesons were charging the defendants; and
- (c) the defendants' remittance advice sent to Mallesons and dated 2 November 2004.

36 The letter of 5 July 2004 is an offer by Mallesons of 'a rebate on aggregate annual legal fees, commencing retrospectively from 1 July 2003'. The offer is made to the BGC group which is stated to consist of entities including the defendants. Mallesons offered that if the relevant year's legal spend exceeds the specified band the BGC Group would receive a percentage discount applied in reduction of amounts then or thereafter becoming due to Mallesons by the BGC Group. The invoice of 31 August 2004 referred to by counsel for the defendants was sent to the second defendant under cover of a letter of 6 September 2004 which referred to both of these actions. The letter stated that it enclosed the firm's itemised account for legal services provided between 28 June 2004 and 27 August 2004 and a schedule showing the discounts Mallesons had applied. The invoice was stated to be for legal services provided during the period from 28 June 2004 to 27 August 2004 and the amount charged for those services. The schedule took the form of a table which set out the fee earner, his or her position, rate, number of hours, actual time value, discount and fees billed. There was also attached a document described as 'account narrations for billing period' which consisted of a number of entries each specifying a date, person and position. A remittance advice from the BGC Group shows that it paid to Mallesons an amount equal to the amount of the invoice.

37 In July 2004 the remuneration of legal practitioners and the making of costs agreements was governed by the *Legal Practice Act 2003* (WA). Section 215 of the *Legal Practice Act 2003* relevantly provided that subject to s 221, the taxation of bills of costs of legal practitioners as between legal practitioner and client or party and party and any other aspect of the remuneration of legal practitioners the subject of a determination, is regulated by a legal costs determination in force. Section 221 provided that a legal practitioner may make a written

agreement with a client in respect of the amount and manner of payment for the whole or any part or parts of any past or future services, fees, charges or disbursements in respect of business done or to be done by the legal practitioner.

38 The letter of 5 July 2004 is not a written agreement in relation to the costs of these actions. It is an offer by Mallesons to the group, of which the defendants are a part, of a rebate on aggregate annual legal fees incurred by the group.

39 Mallesons' invoice of 31 August 2004, the covering letter of 6 September 2004, the attached account narrations for billing period document, the BGC remittance advice and the payment by BGC of the amount of the remittance advice constitutes or evidences an agreement. The agreement is that BGC agreed to pay Mallesons \$14,492.50 for legal services provided during the period from 28 June 2004 to 27 August 2004 in relation to the defamation actions by Mr Walter against Mr Buckeridge and BGC in accordance with the schedule and narrations for billing period attached to the invoice. The agreement is an agreement between a legal practitioner and a client in respect of the amount and manner of payment for the whole or any part or parts of any past services, fees, charges or disbursements in respect of business done by the legal practitioner and hence is a costs agreement as provided for by s 221 of the *Legal Practice Act 2003* if it is 'a written agreement'.

40 However, the agreement is not a written agreement. In *Chamberlain v Boodle & King (a firm)* [1981] 1 WLR 1443, 1445, Lord Denning MR in considering whether two letters constituted a contentious business agreement such as to satisfy s 59 of the *Solicitors Act 1974* (UK) approved the statement of Fry J in *Re Raven Ex Parte Pitt* (1881) 45 LT 742, 743:

The words of the Act are 'an agreement in writing'. What is an agreement in writing? It must be a document which shall show all the terms of the bargain between the parties, and show by writing the accession of both parties to those terms.

Lord Denning added:

It seems to me that an agreement in writing can be contained in letters. But the letters ought at least to be signed by the client if he is to be deprived by the agreement of his right to tax. Further the agreement must be sufficiently specific - so as to tell the client what he is letting himself in for by way of costs.

In 'Contracts in Writing' (1966) 40 *Australian Law Journal* 265, H K Lucke wrote:

On the other hand, not every written document which relates to and evidences a contract is necessarily a written contract. Agreements evidenced partly by writing and partly by word of mouth are treated like oral contracts. What, then is the essence of a written contract? A document is a written contract when the parties agree - at the conclusion of their contract or afterwards - that it is to be an authentic and conclusive record of their bargain, 'the final and complete repository of their contractual intentions' [*Cooper & Son v Neilson & Maxwell Ltd* [1919] VLR 66 at 77, Cussen J].

An invoice relevantly is a list of the particular services provided with their prices and charges. Lucke observed that the courts will not normally be able to find the requisite intention of both parties that an invoice is to be regarded as a complete record of their agreement. The payment of the invoice by BGC may amount to an agreement to pay the amount set out in the invoice for the services described in the invoice. However, that agreement is an agreement partly in writing and partly by conduct, not a written agreement.

Costs agreement dated 29 November 2011

41 The defendants submit that a new costs agreement was entered into by letter dated 29 November 2011 from Mallesons to BGC for the period 1 November 2011 to 30 June 2012. The defendants say that the agreement consists of the letter and the attached appointment terms. Since 1 March 2009 the remuneration of law practices and making costs agreements has been regulated by the *Legal Profession Act 2008* (WA). The requirements for making a costs agreement are set out in s 282. A costs agreement must be written or evidenced in writing. It may consist of a written offer that is accepted in writing or by other conduct. The written offer must state that it is an offer to enter into a costs agreement, that the offer can be accepted in writing or by other conduct and the type of conduct that will constitute an acceptance. The letter of 29 November 2011 states that it is an offer to enter into a costs agreement. It states that the offer can be accepted 'by continuing to instruct us or by signing and returning a copy of this letter'. The letter is signed by the legal practitioners and by the client. The letter appears to satisfy the requirements of s 282 of the *Legal Profession Act 2008* and hence constitute a costs agreement for the purposes of that Act. However, the plaintiffs say that the 29 November 2011 agreement is not a costs agreement for the purposes of the *Legal Profession Act 2008*. The basis

of that submission appears to be that the practitioner failed to comply with disclosure requirements.

42 The plaintiffs say that to constitute a costs agreement which departs from the applicable scales the practitioner was required to disclose to the client a number of matters referred to by Ipp J in *Brown v Talbot & Olivier* (1993) 9 WAR 70, 77 - 78. In that case the plaintiffs sought an order that a written costs agreement entered into between them and their solicitors be cancelled on the ground that it is unreasonable. The review of the costs agreement sought was based on s 59 of the *Legal Practitioners Act 1893* which provided that a written costs agreement may be reviewed by the court and if in the opinion of the court it is unreasonable the amount payable may be reduced or the agreement cancelled and the costs taxed in the ordinary way. Those matters have no application in the present circumstances. Section 288(2) of the *Legal Profession Act 2008* provides that on application by a client, the court may order that a costs agreement be set aside if satisfied that the agreement is not fair or reasonable. In this case, there is no application by the client to set aside the costs agreement. It is not competent for the opposing party to apply for a costs agreement between a client and his or its solicitors to be set aside.

43 The plaintiffs further submitted that it is also necessary for the legal practitioner to comply with its disclosure obligations pursuant to r 16A of the *Law Society of Western Australia Professional Conduct Rules*, June 2002 revision. The *Law Society Professional Conduct Rules* do not have any legislative status. They are intended by the Law Society to be regarded as a guide to what is considered by the legal profession in Western Australia to be proper behaviour.

44 Part 10 div 3 of the *Legal Profession Act 2008* provides for legal practices to make disclosures to clients regarding legal costs. Section 260(1) provides that a law practice must disclose to a client the matters listed in the twelve paragraphs of the subsection. Section 263(2) provides that disclosure of costs to clients required by s 260 is not required to be made in any of the specified circumstances. One circumstance is where the client is a large proprietary company. The evidence before the court may be sufficient to give rise to the inference that BGC is a large proprietary company. However, that was not argued and I find it unnecessary to determine whether or not the practitioners were exempted by s 263(2) from the requirement to make the disclosure of costs required by s 260. Mallesons did not comply with at least some of the disclosure requirements of s 260(1). For example, the agreement of

29 November 2011 does not disclose an estimate of the total legal costs or a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs as required by s 260(1)(c). The plaintiff argues that Mallesons' failure to comply with the disclosure requirements of the *Legal Profession Act 2008* results in the costs agreement being void.

45 A contract expressly or impliedly prohibited by a statute is void and unenforceable. However, a failure to comply with a statutory requirement does not necessarily render a contract void and unenforceable. One must determine as an exercise in statutory construction whether the statute intends that result or some other consequence: *Chakera v Kuzamanovic* [2003] VSC 92 [11] (Nettle J).

46 The Act does not expressly provide that a failure to disclose renders a costs agreement void. When one looks to the other provisions of the *Legal Profession Act 2008*, it is clear that the Act does not intend that a failure to comply with the disclosure requirements renders a costs agreement invalid or unenforceable. The Act intends the consequences which are set out in s 268. Section 268(3) provides that if a law practice does not disclose to a client anything required by div 3 to be disclosed and the client has entered a costs agreement with the law practice, the client may apply under s 288 for the costs agreement to be set aside. The intention of the Act is that the costs agreement is valid and enforceable unless and until it has been set aside. Section 268(4) provides that if a law practice does not disclose to a client anything required by that division to be disclosed then, on an assessment of the relevant legal costs, the amount of the costs may be reduced by an amount considered by the taxing officer to be proportionate to the seriousness of the failure to disclose. The intention of the Act is that the failure of a law practice to comply with the disclosure requirements does not of itself operate to render fees irrecoverable.

47 In summary, the agreement of 29 November 2011 is a costs agreement for the purposes of the *Legal Profession Act 2008* and is not void.

Costs agreement 8 March 2012

48 On 8 March 2012 Mallesons (by this time called King & Wood Mallesons) entered into a costs agreement with retrospective effect. The agreement consists of a letter dated 8 March 2012 signed by Mallesons and on behalf of Mr Buckeridge and a document entitled 'Appointment

Terms' including schedules of fees and costs. The background to the agreement is set out in [1] of the letter:

- 1 The parties to this agreement acknowledge the following:
 - (a) On 1 March 2012, the firm known as Mallesons Stephen Jaques changed its name to King & Wood Mallesons, but otherwise the entity remains the same. In this letter we will refer to the firm as Mallesons Stephen Jaques.
 - (b) Since on or about 1 December 2003, both BGC (Australia) Pty Ltd and Leonard Walter Buckeridge have provided instructions to Mallesons Stephen Jaques to act on their behalf in relation to the Supreme Court proceedings brought by Julian Alan Walter namely, CIV 2549 of 2003 and CIV 2566 of 2003 (Actions).
 - (c) There was an agreement in place between Mallesons Stephen Jaques and BGC (Australia) Pty Ltd and Leonard Walter Buckeridge regarding the provision of legal services by Mallesons Stephen Jaques to BGC (Australia) Pty Ltd and Mr Buckeridge since on or about 1 December 2003 until 1 November 2011. However, to the extent that the agreement was in writing it may not satisfy the *Legal Practitioners Act 1893*, *Legal Practice Act 2003* and the *Legal Profession Act 2008* (Relevant Legislation). The purpose of this letter is to record in writing the terms of that agreement to satisfy the requirements of the Relevant Legislation. It is intended that this written costs agreement will have retrospective effect.
 - (d) You are not obliged to enter into this written costs agreement. The effect of the Relevant Legislation is that if you do not sign this agreement then Mallesons Stephen Jaques is only entitled to charge you at amounts no greater than those allowed by a relevant determination of the Legal Costs Committee (WA).

49 The plaintiffs accept that a lawyer may make a valid costs agreement with his or her client after the legal services have been performed. However, the plaintiff submits that the letter and appointment terms do not cover work already done but only cover work yet to be done. That submission is based upon the language of the Appointment terms and the assertion that the hourly rates and disbursement costs provided in the fees and costs schedule are the current rates and costs only. The plaintiffs acknowledge that the letter refers to an intention to operate retrospectively but says that the agreement does not operate retrospectively, its terms being prospective only.

50 Whether the agreement operates retrospectively or only prospectively is a question of the proper construction of the agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, referred to with approval by Gummow, Hayne, Heydon, Crennan and Keifel JJ in *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 [53].

51 The letter expressly states that it is intended to have retrospective effect. The letter further states that it 'applies to all work carried out in relation to the Actions between on or about 1 December 2003 and 1 December 2011' and that 'work carried out after 1 November 2011 is governed by the master agreement referred to in paragraph 2(c) above'. The letter states that the agreement incorporates and includes the standard appointment terms of Mallesons as amended from time to time. The current version of the standard appointment terms and current standard rates and charges of Mallesons that is attached to the letter do not apply to work carried out before those appointment terms and rates and charges came into effect. Prior to that time, the appointment terms and rates and charges that are applicable are those which were the standard appointment terms and rates and charges of Mallesons at the time the work was carried out.

52 I find that the agreement of 8 March 2012 is a costs agreement that applies retrospectively to work carried out by Mallesons in relation to these actions between 1 December 2003 and the date of the letter. The agreement operates prospectively from the date of the letter.

53 The plaintiffs submit that if the agreement is a costs agreement then it is unreasonable. As I have said, only the client, and not the plaintiff, can apply for the costs agreement to be set aside on the ground that it is unreasonable. Unless and until the costs agreement is set aside by the court, on application of the client, it remains a costs agreement. For the reasons set out earlier, it is unnecessary to consider whether or not the agreement of 8 March 2012 complies with the disclosure requirements of the *Legal Profession Act 2008*.

- 54 I find that the letter of 8 March 2012 and its attachments is a costs agreement which applies to the work done for the defendants in these actions by Mallesons since 1 December 2003.

Relevance of costs agreements to special costs orders

- 55 Section 280(1) of the *Legal Profession Act 2008* (WA) relevantly provides that, subject to any costs agreement made in accordance with div 6 or the corresponding provisions of a corresponding law, the taxation of bills of law practices and any other aspect of the costs charged by law practices, is regulated by an applicable costs determination. Section 280(1) empowers the court to order an amount exceeding the determination if the court 'is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter'. Section 215 of the *Legal Practice Act 2003* (WA) was in substance in the same terms. Prior to s 215 of the *Legal Practice Act 2003* coming into force, s 58ZB of the *Legal Practitioners Act 1893* (WA) and O 66 r 12(1) of the *Rules of the Supreme Court 1971* (WA) had in substance the same effect, although under O 66 r 12 the court was empowered to make an order for the payment of costs exceeding the determination if it was of the opinion that the amount of costs allowable in respect of a matter under a costs determination was inadequate because of the unusual difficulty, complexity importance of the matter or for other good reason.

- 56 Section 280 of the *Legal Profession Act 2008* applies to costs between legal practitioners and their own clients, and costs between party and party. Section 280(2) empowers the court, if it is of the requisite opinion, to order the payment of costs above those fixed by the determination or to make one of the other orders specified. The power to make such a 'special costs order' is not conditioned upon there being a costs agreement between the legal practitioner and his client. To put it another way, if the court is of the requisite opinion it may order the payment of costs above those fixed by the determination in relation to solicitor and own client costs and in relation to party and party costs. In neither case is it a condition of the power to order the payment of costs above those fixed by the determination that there be a costs agreement made in accordance with div 6 under which the legal practitioner is entitled to charge costs above those fixed by the determination.

- 57 If a special costs order has been made under s 280(2), a taxing officer may have regard to the terms of any costs agreement between the successful party and its lawyer, provided that it is valid and enforceable in

taxing the costs to be paid by the unsuccessful party to the successful party. The taxing officer should not have regard to any costs agreement between the successful party and his lawyer if the costs agreement is not valid and enforceable. However, the absence of a valid and enforceable costs agreement between the successful party and his lawyer does not affect the power of the court to make a special costs order under s 280(2).

Power to make special costs orders

58 Section 280 of the *Legal Profession Act 2008* empowers the court, if it is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, to:

- (a) order the payment of costs above those fixed by the determination;
- (b) fix higher limits of costs than those fixed in the determination;
- (c) remove limits on costs fixed in the determination;
- (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or assessed.

59 Some of the work done by the defendants' solicitors was done before the *Legal Profession Act 2008* came into force. However, s 216 of the *Legal Practice Act 2003* confers on the court the same power to make orders in relation to costs to which that Act applies. Prior to s 215 of the *Legal Practice Act 2003* coming into effect on 1 January 2004, O 66 r 12(1) of the *Rules of the Supreme Court* provided that where the court is of opinion that a special order as to costs should be made by reason of the unusual complexity or importance of the case or for any other good or sufficient reason the court may order that any particular allowances in any relevant scale be raised or a limit removed and in giving any such direction the court may fix a limit within which the taxing officer may allow such costs. That rule empowers the court to make any of the orders prescribed in (a) to (d) in s 280(2) of the *Legal Profession Act 2008* if the court is of opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual complexity or importance of the matter or for any other good or sufficient reason which includes unusual difficulty.

60 The first question is whether the conditions for the making of a special costs order are satisfied. It is not necessary for the court to find that the costs allowable under a determination are in fact inadequate. It is

sufficient if the court considers that it is fairly arguable that the taxing officer might properly allow costs at an amount greater than the amount allowable under the relevant legal costs determination: *Frigger v Lean* [2012] WASC 66 [81] (Allanson J with whom Newnes and Murphy JJA agreed).

- 61 In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1992) 8 WAR 400, 404, Malcolm CJ discussed the way in which a judge should approach the task of considering a special order as to costs:

It is a matter for the trial judge to determine as a matter of judgment whether, on the face of it, the amount of work done appears to have been reasonably done so as to constitute good and sufficient reason for making the order.

That is a judgment which is essentially preliminary and provisional in nature for the purpose of the exercise of the discretion granted in the Rules. A judge will no doubt draw on his own experience, the impression gained during the course of the litigation, and his appreciation of the issues which have been involved in making that judgment.

In *Frigger v Lean* Allanson J said:

The questions arising under s 280 are to be addressed as matters of impression rather than detailed evaluation: *EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd* [2008] WASC 275 (S) [7]. In some cases, it may be necessary to prove the criteria in s 280 by specific evidence. In other cases, the court may be able to form a view from its knowledge of the case, as in *Verdell Pty Ltd v F & G Nominees Pty Ltd* [2002] WASC 58 (S2) [14] - [15]. In the present case, the primary judge had heard and determined the applications to remove the receiver as plaintiff and to set aside the injunction, and had then determined the application to permanently stay the appellants' action. It was open to his Honour to form the necessary opinion from his own knowledge of the matter and from the papers before the court without requiring further evidence such as a draft bill of costs [82].

CIV 2549 of 2003 - The Bulletin Action

- 62 The defendants seek a special costs order in respect of the whole action. The plaintiff concedes that a special costs order should be made in respect of the defence dated 30 June 2006, but the balance of the orders sought by the defendants are in dispute.
- 63 In his affidavit sworn 8 March 2012, Mr Lundberg has described the nature and amount of the work carried out by Mallesons on behalf of the defendants in these actions. Mr Lundberg has produced schedules setting

out the costs of preparation of the defence, consideration of the replies and responding to the replies and preparation of discovery and inspection. The amount of the costs set out in those schedules greatly exceeds the amounts allowable under the relevant determinations. Mr Lundberg has also produced schedules of the costs for preparing for and attending the mediation and for the engagement of the independent expert witness. Mr Lundberg has not produced a schedule of work that would be considered as getting up. However, Mr Lundberg has referred to the issues in the action, witness statements and 17 volumes of correspondence.

64 I have been the case manager of these actions since February 2009. Since becoming case manager I am familiar with the issues and steps taken in the action, including issues that arose and matters that were fought and resolved before I became case manager. I am satisfied that, having regard to the nature and extent of the issues and steps in the actions and the evidence of the work done by Mallesons, the amount of costs allowable under the relevant legal costs determinations may be inadequate to provide the defendants with a proper indemnity for the legal costs they have incurred in defending the actions. By proper indemnity, I mean, of course not a complete indemnity for the liability of the defendants to their lawyers but a partial but proper indemnity. It is fairly arguable that the costs reasonably incurred in this action will exceed the relevant maximums allowed for in the costs determinations.

Unusual difficulty

65 The defendants submit that the matter that best demonstrates the unusual difficulty of this case has been the pleadings. There have been numerous pleadings disputes including:

- (a) strike out application in respect of the statement of claim followed by an unsuccessful appeal against that decision;
- (b) strike out application in respect of the defence;
- (c) strike out applications and requests for further and better particulars of the reply.

66 Judicial and extra judicial writings are replete with observations about the difficulty and complexity of the law of defamation in general and defamation pleadings in particular. Justice David Ipp AO in 'Themes in the Law of Torts' (2007) 81 *Australian Law Journal* 609, 615 said:

Pleadings in defamation actions are as complex, as pedantic and as technical as anything known to Dickens.

That is not to say that all defamation actions, or pleadings in defamation actions, are so difficult or complex that a special costs order is warranted. However, this is such a case. The numerous pleading disputes occurred notwithstanding that all of the parties were represented by senior solicitors and experienced counsel and the points taken and argued were for the most part points of substance. The disputes in relation to the pleadings were due to the unusual difficulty of the issues involved in the case.

Complexity

67 I am satisfied that the action involved complexity, and indeed unusual complexity, which caused more work to be done and more costs to be incurred than is usual in an action. The complexity arises from the factual issues in the action. In his affidavit of 8 March 2012, Mr Lundberg said that the work undertaken by Mallesons and counsel in relation to the preparation of the defence included:

Reviewing the available documentary evidence for the purposes of drafting the defence, including analysing the employment records maintained by J-Corp Pty Ltd concerning certain employees, the accounting records maintained by J-Corp Pty Ltd, and the invoices relating to particular items of expenditure. The documentation in question relates to the period between about 1990 and 2001. It was necessary to analyse each transaction in question to determine whether or not the transaction provided a benefit to J-Corp Pty Ltd. This was made difficult by reason of the extended period that was needed to be examined and the age of some of the records, and because some of the accounting staff that had been responsible for the entry of transactions into the general ledger had left J-Corp Pty Ltd. In preparing the defence, it was necessary to confer with accounting staff employed by J-Corp Pty Ltd.

68 The defendants investigated the accounting records of J-Corp Pty Ltd over a lengthy period, reviewed and analysed employment records concerning the plaintiff's father and mother, records relating to the salary entitlements of the plaintiff, records concerning numerous expenditures and many other transactions. The defendants investigated the relevant transactions to consider whether they conferred a benefit on Mr Walter or other persons and could properly be characterised as the fraudulent conversion of money to Mr Walters own use or the use of others with an intent to permanently deprive J-Corp of money or property. The volume of relevant transactions, and the records relating to them, was substantial.

Importance

69 I am satisfied that greater costs were incurred by the defendants in this action than usual by reason of the importance of the matter. The plaintiff and the first defendant are prominent businessmen involved in the building industry. The second defendant is a company involved in the building industry. The plaintiff says that the article which is the subject of the action in effect called him a thief and a criminal by accusing him of having committed many acts of stealing from J-Corp. The issues in the action had the potential to seriously affect the reputations and standing of the parties. That is in part reflected by the manner in which the action was conducted on both sides and that both sides engaged senior solicitors and experienced counsel.

Individual items

70 There was an unusual amount of evidence before the court for an application of this sort. In their written and oral submissions the parties made many submissions in relation to individual items of work. I find it unnecessary and inappropriate to consider those matters. Taking an overview of the action I am of the opinion that the amount of costs allowable in respect of the matter under the relevant legal costs determination is inadequate because of the unusual difficulty, complexity and importance of the matter. Whether or not particular items of work were necessary to be done, or costs were properly incurred and the amount that should be allowed for that work are matters for the taxing officer. If the court were to descend to a consideration of the matter by reference to the reasonableness of particular items of work undertaken and the costs that might be allowed for those items the court would in effect be embarking upon a preliminary taxation of the costs. Those are properly matters for the taxing officer.

Discretion to make special costs order

71 For the reasons I have stated, I am of the opinion that the amount of costs allowable in respect of this action under the relevant legal costs determinations is inadequate because of the unusual difficulty, complexity and importance of the matter. I am satisfied that, in the exercise of my discretion, it is appropriate to make a special costs order in relation to CIV 2549 of 2003.

CIV 2566 of 2003 - The West Australian Action

72 In this action the first defendant seeks a special costs order in respect of the defence. The plaintiffs have conceded a special costs order should

be made in respect of the defence and therefore there is no dispute between the parties on this issue. I am of the opinion that the amount of costs allowable in respect of the defence under the legal costs determination is inadequate because of the unusual difficulty, complexity and importance of the matter.

73 The first defendant also seeks a special costs order in respect of the discontinuance application heard on 29 March 2011. That is contested by the plaintiffs. In each action the plaintiffs applied for leave to discontinue the action against the defendants and that there be no order as to the costs of the action and any costs order already made but not yet paid or satisfied be vacated. The defendants consented to the plaintiffs' application for leave to discontinue the actions but resisted the costs orders sought by the plaintiffs. I ordered that the actions be discontinued and that the plaintiffs pay the defendants' costs of the actions.

74 The *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010* applies to the discontinuance applications. The relevant item in the scale of costs is item 10. The item allows for two days preparation and one day hearing at the rate for counsel and allows for a maximum of \$10,230. I am not satisfied that the amount of cost allowable in respect of that matter is inadequate because of the unusual difficulty, complexity or importance of the matter. Order 23 r 2(3) provides that the court may order the action be discontinued upon such terms as to costs as may be just. That is, the court has a discretion. In the course of the hearing, and in my judgment, reference was made to well known authorities concerning the exercise of the court's discretion in relation to costs orders where there has been no hearing on the merits of the case. I am not satisfied that the applications involved any unusual difficulty, complexity or importance. As I have said, there was no dispute that the action should be discontinued, the dispute was only as to the exercise of the court's discretion in relation to costs.

Orders

75 The defendants submit that the appropriate form of order is to remove limits on costs fixed in the determinations. The court may fix higher limits of costs than those fixed in the determinations by raising the hourly rates and number of hours allowed for items of work in the scale or may remove limits on costs fixed in the determination. I have considered whether it would be appropriate to assist the taxing officer by setting a limit on the hourly rates or number of hours allowable to the solicitors and counsel or fixing higher limits for scale items in the determinations. I

have decided not to do so. The taxing officer must consider whether or not it was reasonable to carry out the items of work to which the claimed costs relate, whether or not the work was carried out in a reasonable manner, and what is a fair and reasonable amount of costs for that item. This is not a case where it is appropriate to fix higher limits of costs than those fixed in the determination. It is appropriate to remove the limits on costs fixed in the determinations for each item. I will remove the limits of costs fixed in the determinations. It will be for the taxing officer to determine, in relation to each item of work, whether it was reasonable to incur the costs of doing that work and if so the number of hours that were reasonably employed in doing the work and having regard to the work that was done and the person who did it what is a reasonable hourly rate.

76 I will make orders to the following effect:

1. In CIV 2549 of 2003 the limits on costs fixed in the relevant determinations relating to each item of work be removed;
2. In CIV 2566 of 2003 the limit on costs fixed in the relevant determination in relation to the defence be removed.