

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : HART -v- JGC ACCOUNTING & FINANCIAL
SERVICES PTY LTD [No 2] [2016] WASCA 168

CORAM : REGISTRAR WHITBREAD

HEARD : 4 AUGUST 2016

DELIVERED : 23 SEPTEMBER 2016

FILE NO/S : CACV 5 of 2014

BETWEEN : NIGEL WILLIAM HART
Appellant

AND

JGC ACCOUNTING & FINANCIAL SERVICES
PTY LTD
First Respondent

JUSTIN GEORGE COPPIN
Second Respondent

NIKOLA FUDLOVSKI
Third Respondent

ROSEMARY FUDLOVSKI
Fourth Respondent

FUDLOVSKI INVESTMENTS PTY LTD
Fifth Respondent

BLUECHIP ENTERPRISES PTY LTD
Sixth Respondent

Catchwords:

Costs - Taxation - Interpretation of Legal Practitioners (Contentious Business)
Costs Determination - Preliminary point - Claim for costs of junior practitioner
under Supreme Court scale of costs - Whether quantum of such costs is
restricted to the same maximum hours claimable by senior practitioner for given
item under scale

Legislation:

*Legal Practitioners (Supreme Court) (Contentious Business) Determination
1996 (WA)*

Result:

Preliminary point determined in favour of the appellant

Category: B

Representation:

Counsel:

Appellant	:	Mr R W Bower
First Respondent	:	Mr T J Carmady
Second Respondent	:	Mr T J Carmady
Third Respondent	:	Not applicable
Fourth Respondent	:	Not applicable
Fifth Respondent	:	Not applicable
Sixth Respondent	:	Not applicable

Solicitors:

Appellant	:	Corser & Corser
First Respondent	:	Williams & Hughes
Second Respondent	:	Williams & Hughes
Third Respondent	:	Not applicable
Fourth Respondent	:	Not applicable
Fifth Respondent	:	Not applicable
Sixth Respondent	:	Not applicable

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

Alliance Contracting Pty Ltd v James [2014] WASC 212 (S)

Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd [2015] WASC 318 (S)

Commonwealth Bank of Australia v Pankaj Oswal in his own capacity and ATF
The Burrup Trust [No 2] [2012] WASC 180

D & Z Constructions Pty Ltd v IHI Corporation [2013] WASC 265 (S)

Electricity Generation and Retail Corporation trading as Synergy v Woodside
Energy Ltd [2014] WASC 469 (S)

Kidd v The State of Western Australia [2015] WASCA 62 (S)

Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 4] [2014] WASC 282

Simmons v Love [No 2] [2016] WASC 167

REGISTRAR WHITBREAD:**Facts and background**

1 This matter relates to a preliminary point on a taxation; as to whether items listed in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996* (WA) (and any scales determined thereafter) (the Determinations) are to be capped both as to hours and quantum or solely as to quantum.

2 In the relevant bill (which is before me for taxation) the quantum does not exceed scale but the number of hours exceed the numbers of hours allocated to that item in the relevant scale (because a more junior practitioner has conducted the work).

3 The paying parties (the respondents) contend that the Determinations set out a maximum and a maximum number of hours which can be claimed. Hence, if a junior practitioner conducts the work the scale operates to limit the amount of hours that can be claimed even though, thereby, a lower cost is applicable to the work (by virtue of the lower hourly rate than is applicable for a senior practitioner).

4 The receiving party (the appellant) contends that where a junior practitioner has performed the work, but took more hours than provided for under the scale, as long as the total cost for that item does not exceed the maximum financial amount provided for that item under the scale then the appellant should be able to claim that in its bill.

5 It is, of course, trite to say that just because an amount is claimed in a bill does not mean that a taxing officer will determine, on a taxation, that all of that amount is due and payable. However, the differing positions of the parties on this point of construction requires determination as a preliminary issue.

The appellant's submissions

6 The appellant's original contention derived from *Commonwealth Bank of Australia v Pankaj Oswal in his own capacity and ATF The Burrup Trust [No 2]* [2012] WASC 180 (*Oswal*), where his Honour Justice Le Miere said:

In 1996 the Legal Costs Committee introduced a new basis for fixing costs in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996* (the 1996 Determination).

The 1996 Determination stated in r 6(4) that the new scale of costs set out in the Schedule to the Determination reflects the fact that the costs of legal services provided in relation to Supreme Court actions are in the main calculated by reference to the time reasonably spent in the provision of those services and by applying to that time a reasonable hourly rate, that rate varying according to the seniority and experience of the practitioner and the complexity of the work. In r 7(2) the 1996 Determination stated that the new scale of costs shows the time and the fee earner whose hourly rates have been used to calculate the dollar amount in the scale. Examples are given in r 7 of the 1996 Determination of how the scale is to work. The example given in r 7(4) is illuminating:

"Thus, by way of further example, it can be seen that item 2 of the Schedule applies a maximum of \$540. It has been calculated on the basis of a junior practitioner taking three hours to perform the work and charging at a rate of \$180 per hour. However, if in a particular case a senior practitioner performed the work and took 2.45 hours at a reasonable hourly rate of \$220 per hour, the result would still be within the maximum amount allowed by the scale. It would then be a matter for the Taxing Officer to decide whether the time spent in performance of the work was reasonably spent by a practitioner of that seniority.'

The example given shows that in assessing costs the taxing officer is not confined to consideration of the hourly or daily rate applicable to the fee earner specified in the fee earner column of the Scale.

I see no reason to interpret the scale to limit the amount allowable by reference to the time specified in the time column of the Scale. For example, item 1(c) in the Scale set out in the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010* (the 2010 Determination) provides that in relation to a statement of claim the time is 10 hours, the fee earner is a senior practitioner (SP) and the maximum amount recoverable by one party from another party in relation to that item of work is \$4,290. That has been calculated by allowing 10 hours of time by a senior practitioner at an hourly rate of \$429. If in a particular case a junior practitioner performed the work and took 12 hours at a reasonable hourly rate of \$297, as set out in the table subjoined to cl 10 of the 2010 Determination, the result would still be within the maximum amount allowed by the scale. I can see no reason why a plaintiff should not be able to recover an amount calculated by allowing 12 hours work by a junior practitioner at the rate of \$297, if the time spent in performance of the work was reasonably spent by a practitioner and the hourly rate was appropriate to a practitioner of that seniority [6] - [8]. (emphasis added by the appellant)

7 The appellant submitted that on Justice Le Miere's construction of the 1996 Determination in *Oswal*, there is no impediment to the taxation of the appellant's bill proceeding in its current form, without a special

costs order. That is, on the basis that the junior practitioner's time exceeded the maximum number of hours for an item permitted under the relevant scale but that time, at the hourly rate allowable for a junior practitioner did not exceed the maximum costs permitted for that item under the relevant scale.

The respondent's submissions

8 The respondent's written submissions argued that the appellant's submissions meant that the only maximum prescribed by the scale is the total dollar amount applicable to each item. The consequence of this, on the appellant's submission, is that the amount of time prescribed for each item in the scale is not a maximum to be applied independently, but rather is simply a figure to be used in the computation (by multiplying the time allowed by the applicable hourly rate for the nominated fee earner) of the maximum dollar allowance for each item.

9 The respondents argued that the effect of the appellant's submission is that, ultimately, the amount of hours prescribed by the scale is irrelevant. It is only the maximum dollar amount that is to be considered.

10 The respondents submitted that the appellant's submission should not be accepted and contended that the scale prescribes independent maxima for both the amount of time and the total dollar amount for each relevant item.

11 The respondents acknowledged that the reasons for decision in *Oswal* support the appellant's construction. However, they submitted that his Honour's reasons did not accord with the proper construction of the relevant costs Determinations and seemed to differ with the approach taken in other decisions in this court.

12 The scale, in its current form, was introduced in 1996 by way of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996* (WA) (1996 Determination). The Schedule to the 1996 Determination provided, in effect, that:

[T]he costs of or in relation to a party to an action or other proceeding ...

...

shall not exceed the amount set out in Table B.

Later Determinations contain a clause in the same terms.

13 In *Oswal*, Le Miere J saw 'no reason to interpret the scale to limit the amount allowable by reference to the time specified in the time column of the Scale' [8].

14 However, the respondents contrasted this with the approach of Kenneth Martin J in *Simmons v Love [No 2]* [2016] WASC 167 [74] where his Honour referred to an amount of time (in hours), which is multiplied by the maximum hourly rate prescribed by the scale to calculate a maximum allowance.

15 Part 4, cl 7(3) of the 1996 Determination, in referring to the scale item for drawing and settling a statement of claim, states that it:

[P]rovides for a maximum of 10 hours for the preparation of this document. (emphasis added)

16 In *Oswal*, Le Miere J used the same example of a statement of claim and referred to the 10 hours prescribed in the scale. His Honour stated:

[I]n relation to a statement of claim the time is 10 hours, the fee earner is a senior practitioner (SP) and the maximum amount recoverable by one party from another party in relation to that item of work is \$4,290. That has been calculated by allowing 10 hours of time by a senior practitioner at an hourly rate of \$429 [8].

17 The respondents contend that his Honour did not refer to the 10 hours as being a maximum, notwithstanding that this is how the 10 hours was referred to in cl 3 of the 1996 Determination. The example referred to by his Honour in *Oswal* [7] is not an example of an allowance being allowed in excess of the maximum prescribed hours set out in the scale. In the example, a more senior practitioner spent less time performing the work than the maximum amount of time prescribed under the scale.

18 The respondents contend that his Honour's comments in *Oswal* [8] were not a necessary part of his Honour's reasoning process. In the *Oswal* decision the party was claiming the maximum amount of hours prescribed under the scale. The party was not claiming an amount of hours in excess of the prescribed maximum hours. To that extent, his Honour's comments did not form part of the *ratio decidendi* of his decision and they submit therefore are not binding on the taxing officer.

19 Further, the respondents contend that his Honour's approach in *Oswal* is to be contrasted with other decisions in this court, for example:

1. the Court of Appeal in *Kidd v The State of Western Australia* [2015] WASCA 62 (S):

The effect of the orders sought would be to remove the limits imposed by the relevant items in relation to both the maximum hours allowable under the item, and the maximum hourly rate allowable under the item [8].

2. *Electricity Generation and Retail Corporation trading as Synergy v Woodside Energy Ltd* [2014] WASC 469 (S) where the Chief Justice stated:

[T]o permit the taxing officer to award costs without being limited by the applicable costs determinations in respect of the general hourly rates for particular classes of practitioner, the maximum amounts specified in respect of various items, or the maximum hours specified in relation to those items [2]. (emphasis added)

3. *D & Z Constructions Pty Ltd v IHI Corporation* [2013] WASC 265 (S) and where the Chief Justice stated:

However, the respondent does not claim for that time, but only for the maximum hours and corresponding amount applicable to this item under the scale - namely, 40 hours, which is a little under half the time actually spent [14].

4. Also, for further examples, *Alliance Contracting Pty Ltd v James* [2014] WASC 212 (S) [10] (Beech J); *Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd* [2015] WASC 318 (S) [23] (Chaney J); and *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 4]* [2014] WASC 282 [43] (Edelman J).

20 The respondents submitted that his Honour's reasons in *Oswal* are not binding on a taxing officer and should not be followed. They submit that the proper construction of the relevant Determinations is that the amount of time and the total amount of dollars prescribed by each relevant item in the scale are independent maxima.

The appellant's submissions in reply

21 In reply the appellant submitted that the amount of hours prescribed by the 'Time' column of the scale is only relevant where the work that is governed by an item in the scale is performed by a fee earner of the same experience as is used in the calculation of the maximum dollar amount

permitted by that scale item. That is, the scale should not be interpreted as requiring a junior practitioner to work at the same pace as a senior practitioner. If that were the intended operation of the scale, there would be no merit in allowing maximum hourly rates commensurate with a fee earner's experience. A junior practitioner will usually require more time than a senior practitioner to complete a task that the Costs Committee consider to warrant the seniority and experience of a senior practitioner.

22 The appellant contends that it follows that where the scale permits a certain maximum dollar amount for an item calculated on the basis of a senior practitioner (or counsel) requiring a certain number of hours to perform that task, a taxing officer should take notice of the fact that the scale considered that task to be suitable for completion by a senior practitioner, and reasonably permit a junior practitioner to invest more time than a senior practitioner to complete the task, provided that the total sum claimed does not exceed the maximum dollar amount calculated on the basis of a senior practitioner performing the task.

23 The appellant referred to cl 6 of the 1996 Determination which provides:

- (1) The Committee has decided to alter the basis used for fixing the scale of costs.
- (2) The underlying basis for the previous scales of costs was adopted in 1953 and was described *inter alia* by the Full Court of the Supreme Court of Western Australia in ***Cruickshank v Producers Markets Co operative Ltd*** [1960] WAR 184 -

'... the 1953 amendments to the costs rules ... have introduced a novel basis for the fixing of costs, as a result of which, broadly speaking, the remuneration allowable to the profession in litigious works is to be based not on work done but on the value of the subject matter of the *lis* - a value to be fixed by the court where the claim is not for a liquidated sum. Formerly the costs recoverable in a civil action were fixed by the Taxing Master after a painstaking and sometimes protracted consideration of the many items contained in elaborate bills of costs culled from diary entries and cost sheets ... Under the new scale the costs allowable are by no means measured by the work actually done. ...The effect is that under the new scale the taxation of profit costs becomes a mere formality; the discretion of the Taxing Master is reduced to a minimum and the real discretion becomes that of the trial judge. His discretion is to fix the value of

the subject matter of the litigation where the claim is other than a liquidated sum ...'.

- (3) It is the view of the Committee that it is no longer possible to support a scale based on an ad valorem charge for the main item of getting up case for trial. The scale of litigation and the way it is conducted has changed immeasurably since 1953. A survey of costs charged, time spent, and the amount in issue shows that the scale does not reflect the basis on which many solicitors actually charge for the provision of legal services. This has the consequence that solicitors may enter into agreements under section 59 of the Act in order to avoid the constraints of the scale. On the other hand, the Committee considers that there should not be a return to a scale which produces a bill containing numerous small items.
- (4) The new scale of costs set out in the Schedule reflects the fact that the costs of legal services provided in relation to Supreme Court and District Court actions are in the main calculated by reference to the time reasonably spent in the provision of those services and by applying to that time a reasonable hourly rate, that rate varying according to the seniority and experience of the practitioner and the complexity of the work. (emphasis added)

24

Clause 7(3), (4) and (5) of the 1996 Determination provide:

- (3) Thus, for example, item 6(a) of the Schedule which relates to the drawing and settling of a statement of claim, provides for a maximum of 10 hours for the preparation of this document to be performed by a senior practitioner charging at a rate of \$270 per hour. In fact, in a particular matter, the time reasonably spent in drawing and settling a statement of claim may be only 2 hours and it may be performed by a practitioner who is relatively junior. By reason of the lack of complexity of the case, it may be that such practitioner should only reasonably charge at the rate of \$180 per hour. If that be the case, then \$360 would be a reasonable charge. Alternatively, if the statement of claim were drawn in complex litigation and 30 hours were reasonably spent on the task by a senior practitioner who might reasonably charge \$280 per hour, then it would be appropriate for that party, if it were successful in the litigation to ask for a special costs order to be made by the Court to increase the maximum amount in item 6(a). This flexibility applies to each item in the scale other than the amounts set out in the items referred in Part 4.
- (4) Thus, by way of further example, it can be seen that item 2 of the Schedule applies a maximum of \$540. It has been calculated on the basis of a junior practitioner taking 3 hours to perform the work and charging at a rate of \$180 per hour. However, if in a particular case a senior practitioner performed the work and took 2.45 hours at a reasonable hourly rate of \$220 per hour, the result

would still be within the maximum amount allowed by the scale. It would then be a matter for the Taxing Officer to decide whether the time spent in performance of the work was reasonably spent by a practitioner of that seniority.

- (5) It will be noted from items 13 and 14 of the Schedule that if more than 100 hours must reasonably be spent on getting up the case for trial and if more than 3 days must reasonably be spent by counsel in mastering the brief and preparing for the trial, then the Committee considers that to be a basis to seek a special order for costs under O.66, R.12 of the *Rules of the Supreme Court*. (emphasis added)

25 The appellant contends that it can be seen from cl 7 of the 1996 Determination that the inclusion of a number of hours in the 'Time' column of the scale is for the sole purpose of showing the 'time and the fee earner whose hourly rates have been used to calculate the dollar amount in the scale' to overcome 'the lack of information about how the maximum amounts in former determinations were calculated'.

26 The first paragraph of the Schedule to the 1996 Determination (reproduced as cl 11(a) in subsequent Determinations) provides:

[T]he costs of or in relation to a party to an action or other proceeding inclusive of counsel fees but exclusive of other disbursements) -

- (a) recoverable by one party from another party; or
- (b) payable by a party to that party's own solicitor,

shall not exceed the maximum amounts set out in the scale of costs in the Schedule.

27 The appellant argues that 'costs ... recoverable by one party from another; or payable by a party to that party's own solicitor shall not exceed' in context with 'the maximum amounts set out in the scale of costs' can only be a reference to the amount in dollars prescribed for the items within the scale of costs.

28 The appellant contends that the observations of the his Honour Justice Kenneth Martin in *Simmons v Love [No 2]* are supportive of his Honour Justice Le Miere's views in *Oswal*:

Table B is the 'Supreme Court Scale of Costs'. That scale presents as a table showing: (column 1) a list of legal work (scale items); (column 2) a descriptor or brief description of the type of work covered by that scale item; (column 3) an amount of time (in hours) allocated for that work; (column 4) the applicable fee earner (eg, Senior Practitioner, SP) (for the

purpose of identifying a relevant maximum hourly rate, which is then multiplied by the number of hours allocated to calculate a maximum allowance - see cl 8 of the Schedule); and (column 5) an allowance amount (in dollars) for that scale item [74]. (emphasis added)

29 The reference in *Simmons v Love [No 2]* to the calculation of a 'maximum allowance - see cl 8 of the Schedule); and (column 5) an allowance amount (in dollars) for that scale item' do not conflict with the views expressed by his Honour Justice Le Miere in *Oswal*, and does not advance the Respondents argument.

30 Paragraphs 11 and 13 of the respondents' submissions take the operation of cl 7(3) of the 1996 Determination (extracted above at [24]) out of context. The sentence from which the respondents' quotation is drawn does not cease with the word 'document'. It continues by stating 'provides for a maximum of 10 hours for the preparation of this document to be performed by a senior practitioner charging at a rate of \$270 per hour'. It therefore follows that the Respondents' submission at this point is misconceived.

31 The appellant contends that [7] - [8] of Le Miere J's decision in *Oswal* are not mutually exclusive. They must be read together in the context of the issue that his Honour was determining - whether the taxing officer made an error in principle in allowing the maximum amount allowed under the scale for matters in chambers notwithstanding that the time spent in court was one and a half hours and not one day as stated in the time column of item 10 in the Scale. His Honour answered that question in [7] of his judgment, where his Honour delivered his ratio: 'I see no reason to interpret the scale to limit the amount allowable by reference to the time specified in the time column of the Scale'.

32 Therefore, the appellant contends that rather than being in contrast with Le Miere J's observations in *Oswal* the views expressed by the Court of Appeal in *Kidd v The State of Western Australia* endorse the views expressed by Le Miere J in *Oswal*. The court stated:

[T]he relevant item in the determination specifies a number of hours which have been multiplied by the hourly rate applicable to Senior Counsel to produce the maximum amount allowable under the item. It is not clear to us whether the proper construction of the scale precludes the taxing officer from allowing costs assessed by reference to time greater than the hours specified, provided that the total amount allowed does not exceed the maximum specified for the item. It is our provisional view that that is the better construction of the scale. However, in case the taxing officer should take a different view, we make it clear that we do not consider that the

costs allowable to the first and second respondents in respect of the preparation of their answer should be limited by the number of hours specified in item 23(b), given that the hourly rates applicable to the practitioners doing the work were significantly less than the hourly rate applicable to senior counsel, which is the rate which has been used in that item to determine the maximum allowable amount [17]. (emphasis added)

33 Further, the appellant contends that the Honourable Chief Justice's obiter comments in *Electricity Generation and Retail Corporation v Woodside Energy Ltd* [20] are of no application to the present case. His Honour the Chief Justice's comments were made in the context of summarising the orders sought by an applicant for a special costs order pursuant to s 280(2) of the *Legal Profession Act 2008* (WA), and do not reflect any judicial reasoning or legal principles.

34 His Honour the Chief Justice's obiter comments in *Electricity Generation and Retail Corporation v Woodside Energy Ltd* are of relevance to the present proceedings. His Honour stated:

In relation to Item 23(f), which concerns the preparation of a case for appeal hearing, the practitioner deposes that the Sellers were charged \$105,169.57 for 193.5 hours of time spent by three senior practitioners and two junior practitioners preparing the matter for hearing. Under the applicable 2014 Determination, the maximum allowable amount equates to 10 hours of the time of a senior practitioner, totalling \$4,730 [20]. (emphasis added by the appellant)

35 This comment by the Chief Justice strongly accords with the appellant's interpretation of the correct construction of the operation of the costs scale, namely that the 'time' column of the scale is merely included to show (or adopting the Chief Justice's terminology, 'equate') how some scale amounts are calculated with reference to a practitioner of a specified experience level charging the maximum hourly rate permitted by the scale.

36 In the passage extracted from the Honourable Chief Justice's decision in *D & Z Construction Pty Ltd* the respondents place emphasis solely on the words 'maximum hours' without reference to the words 'corresponding amount' which follow and colour the Chief Justice's reference to maximum hours. It is submitted that the Chief Justice's comments in *D & Z Construction Pty Ltd* must be read in the context of the appellant's submissions on cl 7 of the 1996 Determination.

37 The facts in *Alliance Contracting Pty Ltd* involved a party seeking special costs orders under s 280(2) of the *Legal Profession Act* lifting the

limits under the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* (WA). The appellant contends that:

Alliance Contracting (supra) can be distinguished from the present case as it involved senior counsel and senior practitioners performing work and charging hourly rates in excess of the maximum dollar figures permitted by the scale, whereas the present case largely involves charges incurred by a junior practitioner performing work of a difficulty and complexity suitable for a senior practitioner, which brings with it an unavoidable outcome that a junior practitioner will take longer to complete some tasks than a more experienced senior practitioner.

- 38 The appellant contends that the respondents' reference to his Honour Justice Chaney's comments in *Apache Oil Australia Pty Ltd* accord with the appellant's construction of the operation of the scale, being that the reference to hours in the 'Time' column is for the purpose contended for by the appellant. His Honour stated:

The relevant scale items for each of the defence and counterclaim provide for a maximum of 10 hours work at the maximum hourly rate provided for a senior practitioner [23].

- 39 The appellant further contends that Edelman J's comments in *Mineralogy* are of no bearing on the present case, and in any event, are prefaced with the qualification that his Honour 'received no submissions' on the interpretation of the reference to hours in the scale, and followed by the acknowledgement that his Honour 'did not need to express any conclusion upon [that issue]'.

- 40 Therefore the appellant contends that none of the authorities cited in support of the respondents' submissions directly supports the respondents' assertion that the scale prescribes independent maxima for both the amount of time and total dollar amount for each item in the scale. Further, none of the authorities cited by the respondents dealt with facts synonymous with the present application (that is, where the costs sought to be recovered relate to work by a junior practitioner which, due to the junior practitioner's level of experience, took longer than the time reasonably required by a senior practitioner, but for which the dollar value of the junior practitioner's work does not exceed the maximum allowable dollar value for the relevant scale item.). Conversely, the appellant contends that both the 1996 Determination and *Oswal* directly support the appellant's construction on the proper operation of the scale, namely the reference to hours in various scale items is not an independent maximum of recoverable costs when the relevant work for any given scale item is

completed by a practitioner of less experience than provided for in the scale item.

Hearing on 4 August 2016

41 On 4 August 2016 the parties spoke to their submissions. Neither party moved significantly from their position as set out in their written submissions. Both parties explained their contentions as set out in their written submissions.

Findings

42 Having considered both parties' submissions I am of the view that the remarks of Justice Le Miere in *Oswal* [6] - [8] are part of the *ratio decidendi* of that authority. The remarks of the Court of Appeal in *Kidd v The State of Western Australia* are, in contrast, *obiter dicta*. The Court of Appeal reached no conclusion; raising an argument, whereas Le Miere J expressed a conclusion on the relevant point. As a registrar of this court I am bound by the *ratio decidendi* on this point as set out in *Oswal*.

43 None of the other authorities to which the respondents referred me, as contra authority to *Oswal*, expressed a conclusion on this point such that the remarks of the presiding judge form part of the *ratio decidendi* of that case.

44 Hence, I find for the appellant on the preliminary point and the bill may proceed to be taxed in its present form; where the junior practitioner hours charged for an item under the scale exceed the hourly maximum but the costs claimed for that item do not exceed the relevant financial maximum for such item under the scale.

Costs

45 I will hear the parties as to costs incurred arguing this preliminary point on the taxation.