

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : HUNTINGDALE VILLAGE PTY LTD (RECEIVERS
AND MANAGERS APPOINTED) ATF
HUNTINGDALE VILLAGE UNIT TRUST -v-
PERPETUAL NOMINEES LTD [2013] WASC 352
(S)

CORAM : LE MIERE J

HEARD : 21 & 23 MAY 2014

DELIVERED : 2 JULY 2014

FILE NO/S : COR 223 of 2009

BETWEEN : HUNTINGDALE VILLAGE PTY LTD (RECEIVERS
AND MANAGERS APPOINTED) ATF
HUNTINGDALE VILLAGE UNIT TRUST
First Plaintiff

SILKCHIME PTY LTD (RECEIVER AND
MANAGERS APPOINTED) ATF SILKCHIME UNIT
TRUST
Second Plaintiff

VANNIN PTY LTD (RECEIVER AND MANAGERS
APPOINTED) ATF HAY FAMILY TRUST
Third Plaintiff

WARWICK ENTERTAINMENT CENTRE PTY LTD
(RECEIVER AND MANAGERS APPOINTED) ATF
WARWICK ENTERTAINMENT UNIT TRUST
Fourth Plaintiff

PARAGON APARTMENTS LTD (RECEIVERS
AND MANAGERS APPOINTED)
Fifth Plaintiff

AND

PERPETUAL NOMINEES LTD
First Defendant

MARK ANTHONY KORDA
Second Defendant

DAVID JOHN WINTERBOTTOM
Third Defendant

WESTPOINT CORPORATION PTY LTD (IN LIQ)
Fourth Defendant

OREN ZOHAR
Fifth Defendant

Catchwords:

Costs - Application for costs of disallowance application - Costs should follow the event - Costs should be paid forthwith - Plaintiffs and non-party should pay costs

Costs - Application for special costs order - Whether amount of costs allowable under costs determination is inadequate - Fairly arguable that taxing officer might properly allow costs at amount greater than amount allowable - Inadequacy arises because of complexity and importance of the matter - Limits on costs imposed by the *Legal Practitioners (Supreme Court) (Contentious Business) Costs Determination 2012* should be raised

Legislation:

Legal Practitioners (Supreme Court) (Contentious Business) Costs Determination 2012

Legal Profession Act 2008 (WA), s 280(2)

Rules of the Supreme Court 1971 (WA), O 66 r 10(1)

Supreme Court Act 1935 (WA), s 37

Supreme Court Consolidated Practice Directions (WA), 4.7.1(3)

Result:

Application granted

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr A Metaxas
Second Plaintiff	:	Mr A Metaxas
Third Plaintiff	:	Mr A Metaxas
Fourth Plaintiff	:	Mr A Metaxas
Fifth Plaintiff	:	Mr A Metaxas
First Defendant	:	No appearance
Second Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill
Third Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill
Fourth Defendant	:	No appearance
Fifth Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill

Solicitors:

First Plaintiff	:	Metaxas & Hager
Second Plaintiff	:	Metaxas & Hager
Third Plaintiff	:	Metaxas & Hager
Fourth Plaintiff	:	Metaxas & Hager
Fifth Plaintiff	:	Metaxas & Hager
First Defendant	:	No appearance
Second Defendant	:	King & Wood Mallesons
Third Defendant	:	King & Wood Mallesons
Fourth Defendant	:	No appearance
Fifth Defendant	:	King & Wood Mallesons

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

Amaca Pty Ltd v Hannell [2007] WASCA 158 (S)

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013]
WASCA 66 (S)

Duskwood Pty Ltd v Bellara Willows Pty Ltd [2001] WASC 281

Electricity Generation Corporation v Woodside Energy Ltd [2011] WASC 268 (S2)

Frigger v Lean [2012] WASCA 66

Huntingdale Village Pty Ltd (Receivers and Managers Appointed) ATF Huntingdale Village Unit Trust v Perpetual Nominees Ltd [2013] WASC 352

Knight v FP Special Assets Ltd (1992) 174 CLR 178

Naidoo v Williamson [2008] WASCA 179

Ritter v Godfrey [1920] 2 KB 47

UTSA Pty Ltd (in liq) v Ultratune Australia Pty Ltd (1997) 1 VR 667

Vestris v Cashman (1998) 72 SASR 449

1 **LE MIERE J:** The second, third and fifth defendants (the Receivers) applied by chamber summons of 2 August 2010 to disallow amendments to the plaintiffs' re-amended statement of claim of 11 August 2010. The application was heard on 28 August 2013. On 26 September 2013 I published reasons for decision that the amendments to [19(g)] and [28] to [299] of the re-amended statement of claim should be disallowed: *Huntingdale Village Pty Ltd (Receivers and Managers Appointed) ATF Huntingdale Village Unit Trust v Perpetual Nominees Ltd* [2013] WASC 352. On 2 December 2009 I ordered that the plaintiffs have leave to amend their statement of claim without ordering that paragraphs of the re-amended statement of claim of 11 August 2010 be struck out. The Receivers have now applied for the following orders in relation to costs:

1. The plaintiffs and Mr Norman Carey do jointly and severally pay the Receivers' costs of their application to disallow the amendments to the re-amended statement of claim together with the costs of their application for special costs orders and any reserved costs to be taxed.
2. Pursuant to s 280(2) of the *Legal Profession Act 2008* (WA), the costs the subject of order 1 be taxed without regard to the limits on costs imposed by the *Legal Practitioners (Supreme Court) (Contentious Business) Cost Determination 2012*.

Evidence

2 The Receivers and the plaintiffs each adduced extensive affidavit evidence. The Receivers' affidavits covered 322 pages. The plaintiffs' affidavits covered 1,646 pages. The Receivers and the plaintiffs each made extensive objections to the other's affidavits. Most of the objections were on the grounds of relevance or that the material was comment rather than evidence. I received the affidavits in evidence subject to the objections. It was not necessary to determine the objections in the course of the hearing and to have done so would have taken up a great deal of time unnecessarily. It was unnecessary to determine the objections in the course of the hearing because none of the witnesses were cross-examined and each party had determined the evidence to be adduced without reference to the outcome of the objections.

Receiver's submissions

3 The Receivers made the following submissions. First, the Receivers were successful in their application to disallow paragraphs of the re-amended statement of claim and in accordance with the general rule

that the successful party recover its costs the plaintiffs should pay the Receivers' costs. Secondly, the general rule set out in Consolidated Practice Direction 4.7.1(3) that interlocutory costs be paid forthwith should apply in this case to the extent that it should be ordered that the costs be taxed rather than that they be paid 'in any event'.

4 Thirdly, Mr Carey should pay the Receivers' costs because the plaintiffs are insolvent and he instigated the proceeding on behalf of the plaintiffs, he instructed the plaintiffs' solicitors to bring the proceeding and to resist the application to disallow the amendments to the statement of claim and he has an active interest in the subject matter of the litigation. Furthermore, the Receivers have previously given Mr Carey notice that they intended to seek costs against him personally.

5 Fourthly, there should be special costs orders pursuant to *Legal Profession Act 2008* (WA) s 280(2) that the Receivers' costs be taxed without regard to the limits on costs imposed by the *Legal Practitioners (Supreme Court) (Contentious Business) Costs Determination 2012* (the Determination) on the grounds that the costs allowable under the Determination are inadequate because of the complexity of the matter and because of the importance of the matter.

Plaintiffs' contentions

6 The plaintiffs' contentions are as follows. First, the Receivers should be deprived of their costs because of their conduct. There are two aspects to that assertion. First, the Receivers failed to make available to the plaintiffs records which they should have. In 2010 the plaintiffs commenced proceeding COR 147 of 2010 in this court to obtain access to relevant records held by the Receivers. The plaintiffs also sought to have Corrs Chambers Westgarth (Corrs), the solicitors who did legal work for, and rendered invoices to, the Receivers, tax their bills, which Corrs resisted. The only explanation for the Receivers' conduct and for Corrs' conduct was that both wished to avoid scrutiny of their fees and costs notwithstanding their respective statutory obligations. The Receivers' application to disallow the amendments should not have proceeded because production of the Receiver's records has shown that they provided evidence and information which should always have been available to the plaintiffs to plead their claim.

7 The second aspect of the plaintiffs' assertion is that the Receivers' inappropriate and improper conduct led the plaintiffs to commence this proceeding. The conduct of the Receivers includes incurring excessive fees and charging the companies for travelling expenses and meals for

their employees and 'even for drinks' and 'no matter how modest the amounts involved this was totally inappropriate'.

8 Alternatively, if the Receivers are to be awarded their costs then the costs should be apportioned because the Receivers did not succeed on all of the issues in the application.

9 Finally, there are no grounds for making a special costs order. The amount of \$10,560 allowable under the Determination is not inadequate and the matter was not complex or important so as to justify a special costs order.

Mr Carey's submissions

10 Mr Carey submitted that the circumstances do not warrant the exercise of the court's discretion to order Mr Carey, a non-party, to pay the costs. Further, the court should not exercise its discretion in favour of the Receivers because the Receivers did not pursue their application of 20 December 2010 for security for costs.

11 In relation to the Receivers' application for a special costs order, Mr Carey does not take issue with the special order other than in relation to hourly rates. Mr Carey submitted that the costs should be taxed without regard to the limits set by the Determination, other than in relation to hourly rates.

Costs should follow the event

12 The costs of interlocutory proceedings are in the discretion of the court. The usual rule is that costs follow the event. Generally speaking a successful applicant is entitled to receive his costs from the unsuccessful respondent. This is ordinarily a just outcome because a party who turns out to have given the applicant cause to have recourse to the court to enforce the rules or procedure of the court or to have unjustifiably resisted the application should be required to recompense the applicant for his costs. The Receivers were successful. In my reasons for decision I found that most of the re-amended statement of claim should be struck out. I did not make an order that those paragraphs of the statement of claim be struck out. I ordered that the plaintiffs have leave to amend their statement of claim. That was because counsel for the plaintiffs submitted that he wished to plead the material facts stated in many of those paragraphs of the statement of claim, together with additional material facts that would give rise to a reasonable cause of action, in the further

amended statement of claim. Nevertheless, the Receivers were successful and in substance obtained the relief which they sought in the application.

13 A successful party may be deprived of his costs in some circumstances. A court may deny costs to a successful party who has 'done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense': **Ritter v Godfrey** [1920] 2 KB 47, 60 (Atkin LJ). The conduct of the Receivers in refusing or failing to give the plaintiffs access to the records which led to the plaintiffs instituting COR 147 of 2010 does not justify depriving the Receivers of their costs of the disallowance application. The disallowance application was necessary because the plaintiffs pleaded a defective statement of claim. In part, the statement of claim was defective because of misconceptions of law by the plaintiff. Insofar as the plaintiffs pleaded as they did because they did not know relevant material facts without obtaining the relevant records that does not excuse or justify the plaintiffs in pleading a defective statement of claim. Furthermore, the plaintiffs elected to resist the Receivers' disallowance application after receiving submissions from the Receivers that the pleading was defective.

14 The plaintiffs also say that the Receivers should be deprived of their costs of the disallowance application because of the Receivers' conduct in incurring fees and reimbursing themselves expenses which gave rise to this proceeding. The Receivers deny that they have charged excessive fees or wrongly reimbursed themselves expenses. Those are not matters which I am able to, or should, determine in the course of this application for costs of the disallowance application. Those matters are to be determined at trial. In any event the disallowance application is a discrete matter and the Receivers are entitled to their costs of their successful application even if after the trial of this matter it is found that the plaintiffs were justified in bringing the proceeding.

15 Where a party, though generally successful in an application, has, by the introduction of some issues on which he has failed, increased the costs, the court may order that party to pay the costs of such issues. The power to adjust an order for costs by reference to particular issues upon which the generally successful party has failed is properly exercised only where there are discrete and severable issues upon which the generally successful party has failed, and which have added to the cost of the proceedings in a significant and readily discernible way: **Amaca Pty Ltd v Hannell** [2007] WASC 158 (S) [7].

16 In deciding what amounts to success in an application, the court will have regard to the outcome in the context of the application and the argument. In this case the Receivers were generally successful and there are not discrete and severable issues upon which the Receivers failed and which added to the cost of the proceedings in a significant and discernible way. There should be no apportionment of the costs or any discount of the costs payable to the Receivers on account of any issues on which they failed.

Costs should be paid forthwith

17 Any order for the payment of costs may require the costs to be paid forthwith notwithstanding that the proceedings are not concluded: *Rules of the Supreme Court 1971* (WA) O 66 r 10(1). Consolidated Practice Direction 4.7.1(3) provides that as a general rule, where an order for costs is to be made against a party in interlocutory proceedings, the costs will be fixed and ordered to be paid forthwith or by a particular date. The Practice Direction explains that there a number of reasons for that general rule. The second reason is that:

the historical practice of ordering costs to be paid 'in any event' does not sufficiently serve the purpose of discouraging ill-considered or needless interlocutory applications. The overwhelming majority of actions settle and the orders are not enforced. The apparent benefit to parties in whose favour such orders are made is illusory.

Whilst the Practice Direction refers to 'discouraging ill-considered or needless interlocutory applications', the same principle applies to non-compliance with the rules or pleadings that otherwise necessitate a pleading summons or the conduct of a party in resisting an application which should have been conceded. The Practice Direction concludes at 4.7.1(7) that 'the Court will generally order that interlocutory costs ordered to be paid by a party are to be paid forthwith or by a particular date, rather than in any event'. There is no good reason for departing from what is now the general practice in this court of ordering that interlocutory costs be paid forthwith.

Mr Carey should pay the costs

18 Section 37 of the *Supreme Court Act 1935* (WA) empowers the court to make an order for costs against a person who is not a party to the action: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; *Naidoo v Williamson* [2008] WASC 179 [39] (Steytler J) referring to *UTSA Pty Ltd (in liq) v Ultratune Australia Pty Ltd* (1997) 1 VR 667, 708.

19 In *Knight v FP Special Assets Ltd* Mason CJ and Deane J, with whom Gaudron J agreed, recognised a general category of case in which an order for costs should be made against a non-party. That category consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Their Honours said (at 193) that where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.

20 All of the assets and undertakings of the plaintiff companies, except for Silkchime, are under the control of the Receivers. Each of the companies owes debts to unsecured creditors in addition to the secured debt owed to ING. The amount owed by Warwick Entertainment Centre to other creditors is in excess of \$13 million, the amount owed by Huntingdale to other creditors is more than \$2 million, the amount owed by Paragon to other creditors is \$23,096 and the amount owed by Vannin to other creditors is more than \$6 million. Apart from the judgment debt owed to Warwick Entertainment Centre by Silkchime, the only other assets of Huntingdale, Vannin, Warwick Entertainment Centre and Paragon are assets of Warwick Entertainment Centre and Vannin which consist of claims against entities within the Westpoint Group and units in Warwick Cinema Syndicate Trust. Those assets are subject to ING's security and remain under the control of the Receivers. Silkchime has assets worth approximately \$7 million which are not subject to ING security. Pursuant to a judgment of this court Silkchime owes Warwick Entertainment Centre an amount exceeding \$16 million with interest continuing to accrue on the judgment debt. Silkchime is also subject to claims by other parties totalling more than \$6 million, excluding interest. I find, based on the affidavit evidence, that each of the plaintiff companies is insolvent.

21 It is common ground that Mr Carey caused the plaintiffs to bring this proceeding and is the person instructing the plaintiffs' solicitors to continue this proceeding. The plaintiffs' solicitors are acting on the instructions of Mr Carey. It follows that the re-amended statement of claim was filed on the instructions of Mr Carey and the plaintiffs' resistance of the Receivers' application to disallow the amendments to the re-amended statement of claim was on the instructions of Mr Carey.

22 Mr Carey is the person who stands behind the plaintiffs and for whose benefit, as a shareholder, these proceedings have been brought and are being maintained. Mr Carey may also benefit by reason of being a guarantor of the loan advanced by ING to the plaintiffs.

23 The plaintiff companies are insolvent. Mr Carey is the effective litigant conducting the litigation by the plaintiff companies. He stands to benefit if the plaintiff companies are successful in the proceeding. Those are circumstances which justify ordering Mr Carey to pay the Receivers' costs personally.

24 Mr Carey submits that he should not be ordered to pay the Receivers' costs because the Receivers did not proceed with their application for security for costs before the disallowance application was heard. Counsel for Mr Carey, Ms Coulson, submitted that *Duskwood Pty Ltd v Bellara Willows Pty Ltd* [2001] WASC 281 is authority that one of the more important considerations in dealing with a non-party costs application is whether an application for security for costs has been made against the non-party.

25 In *Duskwood* the defendants were successful in their defence of two actions brought by the plaintiff company. They sought an order that a director of Duskwood be jointly and severally liable with Duskwood to pay their costs of each trial. Steytler J said:

[o]ne of the more important considerations, in dealing with an application [for an order for costs against a non-party] is that of whether an application for security for costs has been made against the non-party or whether some other timely warning of an intention to claim costs against the non-party has been given [18].

Steytler J then considered a number of relevant authorities to the effect that, if an application for security for costs was brought, those who stand behind the company may then make a decision, ordinarily at an early stage, as to whether to make the financial commitment necessary to allow the litigation to proceed. Steytler J referred to the statement by Olsson J in *Vestris v Cashman* (1998) 72 SASR 449, 458:

To express the concept in another fashion, common fairness dictates that a defendant seeking to place a non-party at risk of an order for costs must, either by bringing a timely application for security or, alternatively, at least by letter advising the defendant's intention, place the non-party on notice of that risk, so that the non-party will not, in effect, be lulled into a false sense of security and ambushed, when it is too late for it to reflect [whether to make the financial commitment necessary to allow the litigation to proceed].

26 This proceeding was commenced in the Federal Court in September 2009 and transferred to this court in November 2009. At the first directions hearing in this court on 2 December 2009 I directed that the plaintiffs file a statement of claim. There was a further directions hearing on 29 January 2010. The Receivers had foreshadowed an application to strike out the statement of claim. On 27 March 2010 the plaintiffs' solicitors, Corrs, informed the Receivers' solicitors that the plaintiffs intended to amend their statement of claim and accordingly there would be little utility in the Receivers applying to strike out the existing statement of claim. On 30 March 2010 Corrs informed the plaintiffs' solicitors that in their view there was no utility in progressing this action until I had delivered judgment in COR 173 of 2009.

27 On 16 June 2010 Corrs informed the plaintiffs' solicitors that if the plaintiffs proceeded with this action, the Receivers would seek costs from Mr Carey. On 4 August 2010 Corrs formally requested that the plaintiffs make arrangements for security for costs to be provided to the Receivers. On 24 August the plaintiffs filed a re-amended statement of claim and made application to join Corrs to this proceeding. On 9 September 2010 Corrs informed the plaintiffs' solicitors that in their view the amendments to the statement of claim widened the scope of the action and requested that the plaintiffs provide security for the Receivers' costs. There were then further communications between the solicitors concerning security for costs. On 15 October 2010 the Receivers filed an application to disallow the amendments to the re-amended statement of claim. In November 2011 Mallesons Stephen Jaques, which firm subsequently became King & Wood Mallesons and which I will refer to as Mallesons, commenced to act for the Receivers in relation to their application to disallow amendments to the re-amended statement of claim and the plaintiffs' application to join Corrs. On 1 December 2010 Mallesons informed the plaintiffs' solicitors that security for costs in the sum of \$2,703,360 should be provided by the plaintiffs and that the application should properly be brought after the determination of the disallowance and joinder applications 'as the outcome of those applications may impact on the necessity to proceed with the application for security for costs'. Mallesons also asked whether Mr Carey was prepared to provide an undertaking to meet any costs orders that be made against the plaintiffs in this proceeding. There were further communications between Mallesons and Corrs on the one hand and the plaintiffs' solicitors on the other hand concerning security for costs.

28 On 20 December 2010 the Receivers filed an application for security for costs. The application for security for costs came before the court at a

directions hearing on 21 December 2010 when it was adjourned until 15 February 2011. After 21 December 2010 the Receivers' application to disallow the amendments to the statement of claim was not listed for hearing and no substantive steps were taken in the proceeding pending other proceedings between the parties.

29 On 28 August 2013 the disallowance application was heard. On 26 September 2013 I delivered judgment on the disallowance application. On 22 October 2013 I made orders that the plaintiffs file and serve any further re-amended statement of claim by 25 November 2013.

30 Mr Carey was put on notice that if the plaintiffs proceeded with this action the Receivers would seek costs from him personally as early as 16 June 2010. The plaintiffs and Mr Carey had notice that the Receivers sought security for their costs of this proceeding as early as 4 August 2010. An application for security for costs was not filed until December 2010. That was a result of conferral between the parties concerning the conduct of the action. During that period the plaintiffs had no reason to believe that the Receivers did not press their request for security for costs. Indeed, the Receivers informed the plaintiffs that they pressed their request. The Receivers' application for security for costs was not heard until 28 August 2013. No substantive steps were taken by the parties in the proceeding during that period. Indeed, the plaintiffs resisted any step being taken in the proceeding. The Receivers did not, by their actions or inactions, lead the plaintiffs to believe that the Receivers did not press their application for security for costs. In all the circumstances there is nothing unfair in ordering Mr Carey to pay the costs of the disallowance application notwithstanding that the application was heard before the Receivers' application for security for costs.

Special costs order

31 The *Legal Profession Act* s 280(2)(c) empowers the court to make a special costs order 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. The section requires that before making an order pursuant to its terms the court must form an opinion which has two components. First, the court must determine that the amount of costs allowable in respect of a matter under a legal costs determination is inadequate. Second, the court must conclude that the inadequacy arises because of the unusual difficulty, complexity or importance of the matter: ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** [2013] WASCA 66 (S).

32 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] WASCA 66 [81], Allanson J with whom Newnes and Murphy JJA agreed. In *Frigger* 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].

33 In this case the Receivers read an affidavit of Ms Puris, a solicitor employed by Mallesons who has assisted in the day-to-day conduct of the matter. Ms Puris swears that the invoices rendered by Mallesons and by counsel disclose that they have spent a total of 247 hours working on the matter for which the Receivers have been billed \$160,417.03. That amount vastly exceeds the maximum applicable under the relevant scale. I heard and determined the disallowance application and, as case manager, have been managing the case for some time. Having regard to my knowledge of the case, the disallowance application and the evidence of Ms Puris I find 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, that is an amount exceeding \$10,560.

34 The Receivers do not contend that the application involved a matter of unusual difficulty. They say that the amount of costs allowable in respect of the application under the relevant cost determination is inadequate because of the complexity and importance of the matter. The Receivers submit, and I accept, that the issues raised in the amended and further amended statement of claim were of some legal and factual complexity. The re-amended statement of claim ran to 308 paragraphs and 82 pages. The statement of claim was divided into sections and many of the sections followed a similar structure. Nevertheless, the number of

allegations and the matters to which they related make the statement of claim a complex pleading. The allegations covered a number of years, assets and receiverships. The legal issues involved include issues relating to the powers and duties of receivers and the nature of receivers' agency for companies in receivership.

35 I also accept that the matter is important in the relevant sense. The serious nature of the assertions made against the Receivers which involved allegations of breaches of statutory, common law and fiduciary duties owed and overcharging go to the Receivers' reputation and their standing within their profession.

36 I am of the opinion that the amount of costs allowable in respect of the disallowance application under the relevant costs determination is inadequate because of the complexity and importance of the matter. My discretion to make a costs order under s 280(2) is enlivened.

37 Once the discretion to make a costs order under s 280(2) is enlivened, the *Legal Profession Act* s 280(2) provides that the court may:

- (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.

The special costs order sought in this case relates to two aspects of the scale, the time allowed by the scale for performance of the work and the hourly rates provided in the scale.

38 The Receivers submit that I should make an order removing the limits on costs fixed in the Determination. Mr Carey does not take issue with the special order sought by the Receivers other than in relation to hourly costs. Mr Carey says that the costs should be taxed without regard to the limits set by the applicable legal costs determinations, other than in relation to hourly costs. Mr Carey says that the Receivers have not demonstrated why it is appropriate to allow higher hourly rates, other than the fact that the Receivers, solicitors and counsel have charged higher rates. Mr Carey further submits that an order should not be made that the hourly rates to apply in assessing party and party costs should be in excess of the hourly rates allowed in the scales merely because a party's solicitor

or counsel have charged at a higher rate: *Electricity Generation Corporation v Woodside Energy Ltd* [2011] WASC 268 (S2) [7].

39 The relevant item in the Determination is item 10(a) 'proceedings in chambers other than proceedings to which item 11 applies'. The time allowed for the proceeding is two days' preparation and one day hearing. The rate allowed is for counsel fee of \$363 an hour and a total of \$10,560.

40 The time allowed for the performance of the work, two days' preparation and one day hearing, is inadequate having regard to the complexity and importance of the matter and my assessment as case manager of the amount of work which was reasonably necessary. The Receivers should receive a fair and reasonable indemnity for their costs but not a complete indemnity. The Receivers did not apply for, and I have not made, an order for indemnity costs, that is that the plaintiffs should pay all the costs incurred by the Receivers except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that subject to those exceptions the Receivers are completely indemnified by the plaintiffs for their costs.

41 The Receivers were represented by senior and junior counsel. That was appropriate having regard to the complexity and importance of the matter. The maximum allowable hourly and daily rates under the Determination are \$363 and \$3,630 respectively for junior counsel and \$638 and \$6,380 respectively for senior counsel. There is no evidence of the hourly or daily rate charged by senior and junior counsel but there is evidence of the rates charged by the solicitors at Mallesons working on the matter. Those rates are up to 48% in excess of the maximum allowable hourly rate under the Determination. Having regard to the complexity and importance of the matter I would allow rates somewhat in excess of that for the counsel engaged by the Receivers. The appropriate order is to raise the hourly rates provided for in the scale by 50%.

42 The fees billed by Mallesons and counsel in relation to the disallowance application amount to \$160,417. That is more than 15 times the amount allowed for by the Determination. Notwithstanding the complexity and importance of the matter it is not appropriate to allow that amount or an amount approaching that amount for the costs of the disallowance application. The Receivers should receive a reasonable and proper indemnity for their costs but not a complete indemnity. Costs in an amount of, or approaching, \$160,000 are disproportionate to the nature and subject matter of the application. The appropriate order in this case is to raise the total amount allowed to \$50,000.

Conclusion

43 The appropriate orders are as follows:

1. The plaintiffs and Mr Norman Carey do jointly and severally pay the second, third and fifth defendants' costs of their application to disallow the amendments to the re-amended statement of claim and any reserved costs to be taxed.
2. Pursuant to s 280(2) of the *Legal Profession Act 2008* (WA) the costs the subject of order 1 be taxed in accordance with item 10 of the Supreme Court Scale of Costs 2012 set out in Table B of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* with the following limits substituted for the limits of costs fixed in the scale:
 - (a) the maximum hourly and daily rates allowed in respect of each fee earner shall be increased by 50%; and
 - (b) the costs (inclusive of GST and counsel fees but exclusive of other disbursements) shall not exceed \$50,000.

44 It will be for the taxing officer to determine, in relation to the work performed, whether it was reasonable to incur the costs of doing each item of 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, up to the maxima I have specified.