COSTS – THE PROPORTIONALITY PRINCIPLE

The Hon Justice Paul Brereton, RFD[1]
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In *Skalkos v T & S Recoveries Pty Ltd* [2004] NSWCA 281; (2004) 65 NSWLR 151, Ipp JA – with whom Sheller JA and Grove J agreed – said (at [8]):

> [8] In my opinion, in determining whether costs have been reasonably and properly incurred, it is relevant to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue. See in this regard *Szlazko v Travini* [2004] NSWSC 610, *Moore v Moore* [2004] NSWSC 587, *Gallagher v CSR Limited* (unreported, Supreme Court of Western Australia, 31 March 1994). This conclusion is supported by s 208G(f) of the *Legal Profession Act*.

Former (NSW) *Legal Profession Act* 1987, s 208G(f), is replicated in present (NSW) *Legal Profession Act* 2004, s 364(2)(f), and refers to "the outcome of the matter" as a matter to which a costs assessor may (not must) have regard in considering what is a fair and reasonable amount of legal costs.

Since *Skalkos*, the (NSW) *Civil Procedure Act* 2005 has commenced, s 60 of which provides as follows:

> **60 Proportionality of costs**
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> In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

Civil Procedure Act, s 98, provides as follows:

> **98 Courts powers as to costs**
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> (1) Subject to rules of court and to this or any other Act:
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> (a) costs are in the discretion of the court, and

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[1] A Judge of the Supreme Court of New South Wales; Chair of the Cost Assessment Users Group. The author wishes to acknowledge the assistance derived for this presentation from papers prepared by John Sharpe, "The Principle of Proportionality: Is there such a Principle?"; and Steve Lancken, "Proportionality of Costs: principle, aspiration, guiding light, mirage or just a feeling about what "justice" would expect".

(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and

(c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

(2) Subject to rules of court and to this or any other Act, a party to proceedings may not recover costs from any other party otherwise than pursuant to an order of the court.

(3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.

(4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:

(a) costs up to, or from, a specified stage of the proceedings, or

(b) a specified proportion of the assessed costs, or

(c) a specified gross sum instead of assessed costs, or

(d) such proportion of the assessed costs as does not exceed a specified amount.

(5) The powers of the court under this section apply in relation to a married woman, whether as party, tutor, relator or otherwise, and this section has effect in addition to, and despite anything in, the *Married Persons (Equality of Status) Act* 1996.

(6) In this section, costs include:

(a) the costs of the administration of any estate or trust, and

(b) in the case of an appeal to the court, the costs of the proceedings giving rise to the appeal, and

(c) in the case of proceedings transferred or removed into the court, the costs of the proceedings before they were transferred or removed.

In *Roberts v Rodier* [2006] NSWSC 1084, Campbell J, as his Honour then was, said in the context of an application under s 98 to fix a gross sum or cap the amount of costs recoverable:

> [40] Even if it were otherwise appropriate, there is no evidentiary basis whatever upon which I could fix a gross sum for costs. Even if it were the case that, for some kinds of regularly repeated litigation the Court has knowledge of what reasonable costs should be, this is not one of those cases. An order under s 98(4) can be made only

> when it has a proper factual foundation: *Sherborne Estate (No 2); Vanvalen and another v Neaves and another; Gilroy v Neaves and another* (2005) 65 NSWLR 268 at 276, [41], [45]–[46].
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> [41] For the same reason, it would not be possible for me to fix an amount which provided a cap to the recoverable costs.
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> [42] One basis on which the defendants submit that I could fix a sum for costs is by fixing an amount *"proportional to the outcome the plaintiff has obtained."*
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> [43] It is clear that proportionality is a matter which can be taken into account in the quantification of costs. In *Skalkos v T & S Recoveries Pty Ltd* (2005) 65 NSWLR 151 Ipp JA (with whom Sheller JA and Grove J agreed) said at [8], 153:
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>> In my opinion, in determining whether costs have been reasonably and properly incurred, it is relevant to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue. See in this regard *Szlazko v Travini* [2004] NSWSC 610; *Moore v Moore* [2004] NSWSC 587; *Gallagher v CSR Ltd* (unreported, Supreme Court of Western Australia, 31 March 1994). This conclusion is supported by section 208G(f) of the Legal Profession Act.
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> [44] See also *Sherborne Estate (No 2); Vanvalen and Another v Neaves and another; Gilroy v Neaves and Another* [2005] NSWSC 1003 ; (2005) 65 NSWLR 268 at [30], 274 per Palmer J. However in the vast majority of cases the appropriate way for proportionality to be taken into account is in the course of the assessment process. I do not see any reason for this case being distinguishable from that vast majority. I note that *Skalkos* was itself an appeal concerning the principles which had been applied in an assessment of costs.

Accordingly, there are judicial statements, of at least great persuasive force for costs assessors,[2] to the effect that in determining whether costs have been reasonably and properly incurred, it is relevant to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue. The question is, what does this mean for the process of costs assessment?

The legislation that governs the assessment of costs by assessors – both solicitor/client and party/party – does not in terms include any reference to proportionality, although an assessor may have regard to, *inter alia*, "the complexity, novelty or difficulty of the matter", and, in a party/party

[2] Although both Ipp JA's statement in *Skalkos* and that of Campbell J in *Roberts* are *obiter*.

assessment, "the outcome of the matter". *Legal Profession Act*, s 363, which deals with solicitor/client assessments, provides as follows:

363 Criteria for costs assessment

(1) In conducting an assessment of legal costs, the costs assessor must consider:

(a) whether or not it was reasonable to carry out the work to which the legal costs relate, and

(b) whether or not the work was carried out in a reasonable manner, and

(c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 361 or 362 applies to any disputed costs.

(2) In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to any or all of the following matters:

(a) whether the law practice and any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf complied with any relevant legislation or legal profession rules,

(b) any disclosures made by the law practice under Division 3 (Costs disclosure),

(c) any relevant advertisement as to:

(i) the law practice's costs, or

(ii) the skills of the law practice or of any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf,

(d) (Repealed)

(e) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,

(f) the retainer and whether the work done was within the scope of the retainer,

(g) the complexity, novelty or difficulty of the matter,

(h) the quality of the work done,

(i) the place where, and circumstances in which, the legal services were provided,

(j) the time within which the work was required to be done,

(k) any other relevant matter.

In respect of party/party assessments, s 364 provides:

364 Assessment of costs—costs ordered by court or tribunal

(1) In conducting an assessment of legal costs payable as a result of an order made by a court or tribunal, the costs assessor must consider:

(a) whether or not it was reasonable to carry out the work to which the costs relate, and

(b) whether or not the work was carried out in a reasonable manner, and

(c) what is a fair and reasonable amount of costs for the work concerned.

(2) In considering what is a fair and reasonable amount of legal costs, a costs assessor may have regard to any or all of the following matters:

(a) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,

(b) the complexity, novelty or difficulty of the matter,

(c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,

(d) the place where and circumstances in which the legal services were provided,

(e) the time within which the work was required to be done,

(f) the outcome of the matter.

(3) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs and any relevant regulations.

(4) If a court or a tribunal has ordered that costs are to be assessed on an indemnity basis, the costs assessor must assess the costs on that basis, having regard to any relevant rules of the court or tribunal and relevant regulations.

In my view, both these provisions permit a costs assessor to have regard, as a step in determining what is a fair and reasonable amount for the work concerned, to questions of proportionality. But they do not authorise a process of assessment which proceeds simply or substantially on the footing that the amount of a bill is disproportionate to the amount in issue or the amount recovered. In each of s 363 and s 364, sub-s (1) contains three issues that the assessor must consider. While there are slight differences between the sections, it suffices to refer to the issues that must be addressed under s 364(1), which are (a) whether or not it was reasonable to carry out the work to which the costs relate, (b) whether or not the work was carried out in a reasonable manner, and (c) what is a fair and reasonable amount of costs for the work concerned. Those provisions dictate that the primary consideration is what is a fair and reasonable amount for the work done, but the answer can be affected by whether it was reasonable to do it and whether it was reasonably done.

Then, in each section, sub-s (2) lists a number of matters to which an assessor may have regard. These are the potentially relevant factors that inform "what is a fair and reasonable amount of costs"; necessarily, I think, that means costs for the work done. Whether it was reasonable to do certain work can be influenced by, *inter alia*, "the complexity, novelty or difficulty of the matter", and, at least in a party/party assessment, "the outcome of the matter".

This has the consequence, in my view, that it is permissible for an assessor to reason that, in light of the ultimate outcome of a matter, certain work done by the practitioner was not reasonable, and to reduce the bill accordingly. For example, it may be unreasonable to undertake extensive inquiries into the financial affairs of an opposing party in a case which was self-evidently a small one. However, it is not permissible simply to reason that a bill of $50,000 is disproportionate to a claim in which $25,000 was recovered; that is merely "capping" – which is the province of the court under s 98 – and not assessment, which requires evaluation of the work done against the result, rather than against the quantum of the bill.

In my view, the statements of Ipp JA and Campbell J amount to no more than that. Their Honours' observations are expressed in terms of whether *costs have been reasonably and properly incurred* – not whether costs are reasonable – a formulation which directs attention less to the quantum of the charge than to the work which generated it. I do not take their Honours to have said any more than that whether it was reasonable to do the work that generates costs claimed may be influenced by the value and importance of the subject matter. It remains essential for an assessor to form a view as to whether the work done was reasonable in the particular case, having regard *inter alia* to its importance, complexity and outcome. The arbitrary capping of costs by assessors according to the amount in issue or recovered in the litigation is not authorised.

What then of the provisions, mentioned above, of the *Civil Procedure Act*?

The first and fundamental point to be made and understood about s 60 is that its focus is not costs at all, but the practice and procedure of the Court. It appears in Part 6 of the Act – which is concerned with case management and interlocutory matters – not in Part 7, Div 2, which deals with costs in proceedings. Its command – which is addressed to courts, not to costs assessors – is to implement practice and procedure with the object of resolving issues in such a way that the cost to the parties is proportionate to the importance and complexity (not necessarily the quantum in monetary terms) of the subject matter in dispute. The reference to cost to the parties is, I think, a reference to solicitor-client costs.

This object is achieved by moulding the practice and procedure applicable to litigation according to the subject matter in dispute – for example, by limiting discovery and other interlocutory processes, and even hearing time, in less important or complex cases; by making directions which facilitate disposal of subsidiary issues. Thus in simple cases, the courts will exercise their powers (such as under *Civil Procedure Act*, ss 61, 62) to impose appropriate limits on

the scope of both interlocutory and final hearing procedures, in an endeavour to limit costs according to the requirements of proportionality.[3]

The importance of the subject matter is not solely dependent on quantum, although the amount in issue is one relevant criterion. Others may include the status of the parties and the nature of the cause of action.[4]

In England, though so far as I am aware not yet in New South Wales, the dictates of proportionality, in the context of the overriding purpose (in *Civil Procedure Act*, s 56) and the relevant criteria (in ss 57(1) and 58(2)), have been held to warrant summary dismissal of proceedings where the court is not satisfied they involve a substantial claim that is reasonably proportional to the likely cost, complexity and duration of the proceedings.[5]

On the other hand, the ample powers that s 98 gives to the courts are powers in respect of party-party costs, not solicitor-client costs: an order under s 98 limiting or capping the costs recoverable by one party from the other has no effect overall on "the cost to the parties" referred to in s 60.

However, s 98 does provide a means by which the court can limit the exposure of an unsuccessful party to a successful but over-zealous opponent. An otherwise successful plaintiff may be deprived of a usual costs order, including an indemnity costs order that would ordinarily result from bettering an unaccepted offer of compromise, if the costs appear disproportionate to the case.[6]

This is particularly so if there is an established practice of "capping" costs orders in particular classes of case, as knowledge that the court may be inclined to make such an order may operate as an indirect disincentive against the incurring of disproportionate costs. This is a problem often

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[3] *Sita v Sita* [2005] NSWSC 461 (Macready M).
[4] *Toomey v John Fairfax & Sons Ltd* (NSWSC, 22 May 1985, unreported) (proceedings for defamation where imputation of breach by barrister of professional obligations).
[5] *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296; *Wallis v Valentine* [2003] EMLR 8 (modest claim involving estimated two week trial struck out as abuse of process); *Jameel v Dow Jones & Co Inc* [2005] QB 946.
[6] *Jones v Sutton (No 2)* [2005] NSWCA 203; BC200504148.

encountered in smaller claims under the (NSW) *Family Provision Act* 1982. In *Moore v Moore* [2004] NSWSC 587, Young CJ in Eq said that ordinarily some special justification would be needed to warrant an order for more than $35,000 for costs of a successful claimant in a family provision application. In the context of proceedings under the (NSW) *Property (Relationships) Act* 1984, in *Deves v Porter* [2003] NSWSC 878, Campbell J suggested that a useful rule of thumb in such proceedings was that the costs awarded ought not exceed the amount recovered. But in *Van Zonneveld v Seaton* [2005] NSWSC 175, Campbell J recognised that, while *Deves v Porter* provided a useful rule of thumb, it was one which had to be applied with caution and having regard to the circumstances of the individual case. In *Parker v Parker* [2006] NSWSC 473, with reference to those cases, in the context of an estate of $347,000, reduced to $125,000 after costs, with three plaintiffs claiming provision where the estate had been left to the defendant, orders were made for the plaintiffs for legacies of $25,000, $47,000 and $80,000, with the defendant to receive the rest and residue of the estate. While the costs of each of the plaintiffs on the party/party basis and the defendant on the indemnity basis were ordered to be paid or retained as the case may be out of the estate of the deceased, the costs recoverable by the plaintiff who obtained a legacy of $47,000 were capped at $45,000, and the costs recoverable by the plaintiff who obtained a legacy of $25,000 were capped at $20,000.

To sum up, then:

- a costs assessor may, as a step in determining what is a fair and reasonable amount for the work concerned, have regard to questions of proportionality, in that it is permissible for an assessor to reason that, in light of the ultimate outcome of a matter, certain work done by the practitioner was not reasonable, and to reduce the bill accordingly. Whether it was reasonable to do certain work can be influenced by, *inter alia*, “the complexity, novelty or difficulty of the matter”, and, at least in a party/party assessment, “the outcome of the matter”.

- However, an assessor may not proceed simply or substantially on the footing that the amount of a bill is disproportionate to the amount in

issue or the amount recovered. It is not permissible for an assessor arbitrarily to cap costs according to the amount in issue or recovered in the litigation.

- *Civil Procedure Act*, s 60, is primarily concerned with the practice and procedure of the Court, and not with costs. It is addressed to courts, not to costs assessors. Its object is achieved by moulding the practice and procedure applicable to litigation according to the subject matter in dispute to regulate the steps that may incur additional costs.

- *Civil Procedure Act*, s 98, provides a means by which the court can limit the exposure of an unsuccessful party to a successful but over-zealous opponent, and create at least an indirect disincentive against the incurring of disproportionate costs.

It is appropriate to conclude with the observation that this paper is written uninformed by evidence, and unassisted by argument by counsel. There can accordingly be no expectation that, should any of these issues ever come before the court for decision, the views expressed above would necessarily prevail.