Court of Appeal. Supreme Court of New South Wales before Mason P; Hodgson JA; Campbell JA. 9th July 2007

Judgment : MASON P:

1. I have had the benefit of reading in draft the reasons of Hodgson JA.

2 My sole point of disagreement arises at a critical point for the resolution of the appeal (par [74] of Hodgson JA's reasons).

3 The Arbitrator's final award was in favour of Grosvenor Constructions (NSW) Pty Ltd (Grosvenor) in the sum of $8,499. The Arbitrator made no order as to the costs of the arbitration save that the parties were to pay their own respective costs and share equally the expenses of arbitration.

4 At that time, indeed from prior to the date of the relevant Costs Agreement, Grosvenor was liable to Musico for costs previously ordered by the Supreme Court. These costs were quantified by cost assessors' certificates in sums exceeding $74,000. Significantly, these were not costs of the arbitration and they had been incurred as between Grosvenor and Musico prior to Hall Chadwick's entry into the relevant Costs Agreement with Dr Doyle.

5 These Supreme Court costs obligations were not pleaded as a set off in the arbitration nor were they in any way made part of the disputes referred to arbitration. They could not have been, having regard to their derivation in orders of the Supreme Court. They were liabilities that were incapable of being defeated whatever the result of the arbitration and that could have been enforced and satisfied before the conclusion of the arbitration.

6 Grosvenor might have discharged these obligations before the arbitration was finalised. Indeed, after finalisation, it would have been open to Grosvenor to pay the Supreme Court costs in full and to have recovered in full the award sum of $8,499. Instead, Grosvenor and Musico sensibly netted off their respective obligations by Grosvenor paying what it owed in relation to the Supreme Court costs, less the $8,499 owed to it in relation to the arbitration.

7 It does not follow, in my view, that Grosvenor "recovered" nothing from Musico within the terms of cl F(i) of the Costs Agreement. On the contrary, Grosvenor derived a benefit in money's worth from the net balance of monies awarded by the Arbitrator that was *"sufficient … to enable payment of the conditional fees or part thereof"*. Grosvenor chose to apply that benefit in offsetting part of its larger obligation to Musico that had nothing to do with the arbitration save in the irrelevant sense that it arose out of an earlier stage of the Grosvenor-Musico disputes in the different venue of the Supreme Court of New South Wales.

8 At a technical level, the implemented arrangement for netting off constituted an accord and satisfaction that discharged Musico's obligation under the award (see ***Smith v Trowsdale*** (1854) 3 E & B 83, 118 ER 1072).

9 The parties may not have had these principles at the forefront of their minds when they negotiated the Costs Agreement, but the meaning of the terms they adopted 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) 219 CLR 165 at 179).

10 Here the arbitration resulted in an award in favour of Grosvenor and Grosvenor obtained moneys worth for it to the value of 100 cents in the dollar. In my view, that was a "recovery" that enabled payment of part of the conditional fees. Merely because Grosvenor put the money to another use in a transaction to which Dr Doyle was not a party could not affect the legal situation.

11 I would therefore uphold the appeal from the orders of Rothman J with costs in this Court and below. The judgment obtained on 12 July 2006 with effect from 7 July 2006 when the Certificate as to Determination of Costs was entered in the Supreme Court should be restored. There should be liberty to apply with regard to any questions of interest that the parties are unable to resolve. The respondent should have a certificate under the **Suitors' Fund Act 1951** if qualified.

12 I agree with Hodgson JA that the application for leave to appeal from Harrison AsJ should be refused with costs.

HODGSON JA:

13 On 4 July 2006, a costs assessor G. Salier issued a Certificate as to Determination of Costs pursuant to ss.208A and 208J of the Legal Profession Act 1987 (1987 Act), naming as applicant Dr. David Doyle trading as the Builders' Lawyer and as respondent Hall Chadwick, stating that the sum of $177,109.10 was to be paid by the respondent to the applicant. Hall Chadwick is a firm of chartered accountants.

14 On 7 July 2006, Dr. Doyle filed this certificate with the Supreme Court, and pursuant to s.208J(3) of the 1987 Act, the certificate was taken to be a judgment of the Court.

15 On 1 August 2006, Hall Chadwick filed a summons in the Supreme Court seeking to set aside the costs assessor's certificate and to have the costs assessment re-determined, on the ground of errors of law.

16 On 15 August 2006, Harrison AsJ granted a stay of the judgment taken to have arisen on 7 July 2006.

17 On 14 November 2006, Rothman J allowed the appeal against the determination of the costs assessor, set aside the certificate and the judgment, declared that no fees were payable by Hall Chadwick to Dr. Doyle, and ordered Dr. Doyle to pay Hall Chadwick's costs of the costs assessment and the proceedings in the Supreme Court.

18 Dr. Doyle has applied for leave to appeal from the decisions of Harrison AsJ and Rothman J. The application for leave has been heard on the basis that, if leave is granted, the appeal will be dealt with without further argument.

CIRCUMSTANCES

19 On or about 26 November 2002, two partners of Hall Chadwick were appointed as joint voluntary administrators of Grosvenor Constructions (NSW) Pty. Limited (Grosvenor); and a Deed of Company Arrangement was entered into on or about 10 January 2003.

20 From about February 2003 to May 2005, Dr. Doyle was retained by Hall Chadwick as its solicitor to advise and pursue claims which Grosvenor might have had against parties for whom Grosvenor had carried out construction work. One of these claims related to work done on a shopping complex owned by Joseph Musico and others (Musico).

21 An adjudication determination was obtained by Grosvenor pursuant to the Building & Construction Industry Security of Payment Act 1999 (SOP Act) for about $760,000.00. Musico applied to the Supreme Court for an order that the determination be quashed; and an order to that effect was made by McDougall J on 31 October 2003. McDougall J also ordered that Grosvenor pay Musico's costs of these proceedings.

22 On 5 December 2003, there was a further determination made under the SOP Act for about $486,000.00 in favour of Grosvenor against Musico, and on 16 December 2003 this was filed as a judgment pursuant to the SOP Act. Musico applied for a stay of that judgment, relying among other things on a Report to Creditors dated 11 December 2002 to the effect that unsecured creditors' claims against Grosvenor amounted to $4,791,504.00 at the time the administrators were appointed, with the amount available for unsecured creditors being $528,294.00. Dr. Doyle acted for Grosvenor in resisting that application. Einstein J granted the stay on 27 April 2004.

23 The dispute between Grosvenor and Musico was referred for arbitration to Mr. R.L. Hunter QC. Grosvenor was required to provide security for costs in the sum of $150,000.00, and did so. This followed a Report to Creditors dated 30 April 2004, reporting that a threshold requirement for deed compliance, namely realisation of a minimum sum of $1 million, was fulfilled by 10 January 2004.

24 On 27 August 2004, a Certificate as to Determination of Costs to be paid by Grosvenor to Musico was issued, in the sum of $62,795.44. (A review application was made by Grosvenor in respect of this assessment, and the assessment was confirmed by the Review Panel on 15 March 2005.) A further such certificate was issued on 19 October 2004, this time for $11,731.50.

25 On 30 September 2004, Hall Chadwick entered into the costs agreement with Dr. Doyle that is the subject of this dispute. In paragraph 1 of this agreement, the work to be done by Dr. Doyle was identified:

> The legal work that you want us to do is to continue the arbitration before Mr Hunter QC against Musico and Genua parties carried out pursuant to the cost agreement, as amended, between us dated 4th February 2003 SAVE ONLY that the fees applicable after 30 September 2004 shall be as set out in the terms hereinunder set out in respect of conditional fees.

26 Under the heading "Conditional Costs Agreement (s.187 of "the Act")", there were the following provisions:

> *A. You pay all disbursements and expenses.*
>
> *B. Fees paid on success will be paid at the success rate stated above.*
>
> *C. If we do not achieve success you will not be liable for any legal fees payable (save as set out in D below) (other than disbursements) although you will be liable to pay any costs awarded to the other party.*
>
> *D. You pay all fees incurred prior to this date strictly in accordance with the terms and conditions of the costs agreement then obtaining between us prior to 30 September 2004 ("the overdue fees"), and these overdue fees shall be paid upon the receipt of payment pursuant to the Arbitrator's Award or by way of settlement, and FURTHER these overdue fees shall be payable whether or not the arbitration is successful.*
>
> *E. It may be that the enhanced fees will amount to a greater sum than the savings to you which may accrue from a successful outcome, and/or will be due and payable even if the Full Court do not make a costs order in relation to the appeal in favour of you.*
>
> *F. Success is deemed to occur if any of the following occur:*
>
> *(i) there is a net balance of monies awarded by the Arbitrator to Grosvenor Constructions Pty Ltd (subject to Deed of Company Arrangement) and sufficient monies are recovered from the respondents to enable payment of the conditional fees or part thereof);*
>
> *(ii) a settlement is reached between the parties prior to the Arbitrator's Award irrespective of the terms of that settlement;*
>
> *(iii) the Arbitrator dies or becomes incapacitated prior to publishing his award.*

27 On 28 February 2005, Mr. Hunter delivered an interim award; and on 24 March 2005, Grosvenor commenced proceedings in the Supreme Court against Musico seeking to set aside orders arising from that award. On 14 April 2005, Mr. Hunter delivered the final award, awarding a balance of $8,499.00 to Grosvenor and making no order as to costs. The award dealt with and disposed of a counter claim by Musico against Grosvenor in excess of $1.3 million.

28 On 21 April 2005, the two costs certificates obtained by Musico were filed, that of 27 August 2004 in the District Court and that of 19 October 2004 in the Local Court, in both cases taking effect as judgments of the respective courts. It appears that Hall Chadwick later paid Musico the amount of these judgments less the $8,499.00 awarded by Mr. Hunter, as reflected in the submissions referred to in par.[19].

29 At about this time, Hall Chadwick withdrew instructions from Dr. Doyle; and on 17 May 2005, the proceedings commenced on 28 February 2005 challenging Mr. Hunter's award were dismissed, apparently following a decision not to pursue them.

30 On 20 June 2005, Dr. Doyle filed in the Common Law Division of the Supreme Court an application for assessment of costs. Mr. Salier was appointed as costs assessor.

31 The submissions made by Hall Chadwick to the costs assessor included submissions contained in a letter of 8 August 2005. These submissions referred to the "second arm" of clause F(i), and in that regard made the following submissions:

32. To further emphasise this submission, it should be borne in mind that the Respondent did not in fact receive the sum of $8,499.00 due to the fact that the same was effectively "set off' against the value of the costs Orders made in favour of the Musico interests.

33. As the Respondent never actually "recovered" the funds ($8,490.00) or any other amount, there are no fees available to enable payment of the conditional fees or part thereof as required by the relevant clause of the Costs Agreement.

32 On 4 July 2006, Mr. Salier published his certificate and a statement of his reasons. In that statement, Mr. Salier recorded the communication he had made to the parties some time after 1 September 2005, noting among other things the following:

I am conscious of the fact that the Costs Respondent submits that in interpreting clause 2F(i) of the second costs agreement that clause has two arms. I presently do not lean to that interpretation. I have particular regard to the word "and" in the second line of (i). I have always understood the word "and" to be what is known as a conjunction and if that is so it seems to me said clause (i) is to be read in its entirety and not the subject of two separate constructions.

33 The reasons went on to record that Hall Chadwick had paid Dr. Doyle amounts claimed in four invoices, pursuant to an earlier costs agreement, amounting to something over $80,000.00. In relation to clause F of the subject agreement, the assessor gave the following reasons:

The Costs Applicant submitted an initial draft of the second costs agreement to the Costs Respondent in which draft clause 2(F)(i) stated as follows:- *"There is a nett balance of monies awarded by the Arbitrator to Grosvenor Constructions Pty Ltd (in administration) whether the amount of such monies be large or small and irrespective of whether any such monies are actually paid."*

On 29 September, 2004 the Costs Respondent returned an amended draft agreement to the Costs Applicant, one of the amendments being an amendment to clause 2(F)(i) in the following terms:- *"There is a nett balance of monies awarded by the Arbitrator to Grosvenor Constructions Pty Ltd (subject to Deed of Company Arrangement) and sufficient monies are recovered from the Respondents to enable payment of the conditional fees."*

In the events that happened the wording of clause 2(F)(i) as agreed and settled by the parties was as first appearing above namely that there was a nett balance of monies awarded by the Arbitrator and sufficient monies recovered from the Respondents to enable payment of the conditional fees or part thereof. …

The Costs Respondent submitted that in considering any nett amount awarded the Costs Respondent's costs of the arbitration must be taken into account. I reject that submission. In my experience respective parties to arbitration proceedings of the nature in which Grosvenor Constructions Pty Ltd (in administration) and Musico and Genua were involved are well aware that, prior to any decision of the appointed Arbitrator as to costs the expenses of the arbitration such as room hire, the Arbitrator's fees, transcription services and the like are to be shared equally. In my opinion, it was open to the Costs Respondent to negotiate for the provision in the second costs agreement of a term to the effect that any nett amount must be reckoned on the basis the expenses incurred by the Costs Respondent in the arbitration (other than the Costs Applicant's costs and disbursements) be deducted from any nett award. That was not done.

Annexure "E" to the submissions in reply of the Costs Applicant dated 25 November, 2005 to the Costs Respondent's general objections of 17 November, 2005 is the final award of the Arbitrator. Paragraphs 15 and 16 of the final award stated as follows:-

"15. Given that finding, it is clear from the correspondence to which I have referred that the parties are agreed that the effect of the interim award on their respective entitlements is as follows:
contract price $3,870,000.00
agreed variations $250,344.00
arbitrated variations $297,942.00
payments made by the Respondents $3,766,056.00
cost of rectification $406,231.00
liquidated damages $237,500.00

16. Leaving aside considerations of the application of goods and services tax that results in a nett award in favour of the claimant in the sum of $8,499.00. I have marked the correspondence between the solicitors referred to in this section of the award Ex 17."

In the premises I am of the opinion that in respect of the second costs agreement success was deemed to occur because there was a nett balance of monies awarded by the Arbitrator to Grosvenor Constructions Pty Ltd (subject to Deed of Company Arrangement) to enable payment of the conditional fees or part thereof. As noted in paragraph 15 quoted above the nett balance arose after taking Into account the Arbitrator's findings as to the gross amount that should be awarded to the Applicant on its claims and the gross amount which should be awarded to the Respondent on its claims.

34 As noted earlier, the Certificate was filed on 7 July 2006; and Hall Chadwick commenced proceedings in the Supreme Court on 1 August 2006, challenging the costs assessor's construction of the contract.

STATUTORY PROVISIONS

35 Although the Legal Profession Act 2004 is now in force, the assessment in this case is required to be dealt with in accordance with the 1987 Act. Relevant provisions of the 1987 Act are ss.201, 208, 208C, 208D, 208H, 208J, 208K, 208KA(1), 208KC, 208KE, 208KF, 208KI, 208L and 208M:

201 Application for assessment of costs by barrister or solicitor giving bill

(1) A barrister or solicitor who has given a bill of costs in accordance with this Part may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs.

(2) An application may not be made unless at least 30 days have passed since the bill of costs was given or an application has been made under this Division by another person in respect of the bill of costs.

208 Consideration of applications by costs assessors

(1) A costs assessor must not determine an application for assessment unless the costs assessor:

(a) has given both the applicant and any barrister, solicitor or client or other person concerned a reasonable opportunity to make written submissions to the costs assessor in relation to the application, and

(b) has given due consideration to any submissions so made.

(2) In considering an application, a costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit.

(3) For the purposes of determining whether an application for assessment may be or is required to be made, or for the purpose of exercising any other function, a costs assessor may determine any of the following:

(a) whether or not disclosure has been made in accordance with Division 2 and whether or not it was reasonably practicable to disclose any matter required to be disclosed under Division 2,

(b) whether a costs agreement exists, and its terms.

208C Costs agreements not subject to assessment

(1) A costs assessor is to decline to assess a bill of costs if:

(a) the disputed costs are subject to a costs agreement that complies with Division 3, and

(b) the costs agreement specifies the amount of the costs or the dispute relates only to the rate specified in the agreement for calculating the costs.

(2) If the dispute relates to any other matter, costs are to be assessed on the basis of that specified rate despite section 208A. The costs assessor is bound by a provision for the payment of a premium that is not determined to be unjust under section 208D.

(3) This section does not apply to any provision of a costs agreement that the costs assessor determines to be unjust under section 208D.

(4) This section does not apply to a costs agreement applicable to the costs of legal services if a barrister or solicitor failed to make a disclosure in accordance with Division 2 of the matters required to be disclosed by section 175 or 176 in relation to those costs.

208D Unjust costs agreements

(1) A costs assessor may determine whether a term of a particular costs agreement entered into by a barrister or solicitor and a client is unjust in the circumstances relating to it at the time it was made.

(2) For that purpose, the costs assessor is to have regard to the public interest and to all the circumstances of the case and may have regard to:

(a) the consequences of compliance, or non-compliance, with all or any of the provisions of the agreement, and

(b) the relative bargaining power of the parties, and

(c) whether or not, at the time the agreement was made, its provisions were the subject of negotiation, and

(d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the agreement, and

(e) whether or not any of the provisions of the agreement impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the agreement, and

(f) whether or not any party to the agreement was reasonably able to protect his or her interests because of his or her age or physical or mental condition, and

(g) the relative economic circumstances, educational background and literacy of the parties to the agreement and of any person who represented any of the parties to the agreement, and

(h) the form of the agreement and the intelligibility of the language in which it is expressed, and

(i) the extent to which the provisions of the agreement and their legal and practical effect were accurately explained to the applicant and whether or not the applicant understood those provisions and their effect, and

(j) whether the barrister or solicitor or any other person exerted or used unfair pressure, undue influence or unfair tactics on the applicant and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics.

(3) For the purposes of this section, a person is taken to have represented a person if the person represented the other person, or assisted the other person to a significant degree, in the negotiations process up to, or at, the time the agreement was made.

(4) In determining whether a provision of the agreement is unjust, the costs assessor is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the agreement was made.

208H Effect of costs agreements in assessments of party/party costs

(1) A costs assessor may obtain a copy of, and may have regard to, a costs agreement.

(2) However, a costs assessor must not apply the terms of a costs agreement for the purposes of determining appropriate fair and reasonable costs when assessing costs payable as a result of an order by a court or tribunal.

208J Certificate as to determination

(1) On making a determination, a costs assessor is to issue to each party a certificate that sets out the determination.

(1A) A costs assessor may issue more than one certificate in relation to an application for costs assessment. Such certificates may be issued at the same time or at different stages of the assessment process.

(2) In the case of an amount of costs that has been paid, the amount (if any) by which the amount paid exceeds the amount specified in any such certificate may be recovered as a debt in a court of competent jurisdiction.

(3) In the case of an amount of costs that has not been paid, the certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs, and the rate of any interest payable in respect of that amount of costs is the rate of interest in the court in which the certificate is filed.

(4) For this purpose, the amount of unpaid costs does not include the costs incurred by a costs assessor in the course of a costs assessment.

(4A) To avoid any doubt, this section applies to or in respect of both the assessment of costs referred to in Subdivision 2 of this Division (practitioner/client costs) and the assessment of costs referred to in Subdivision 3 of this Division (party/party costs).

(5) If the costs of the costs assessor are payable by a party to the assessment (as referred to in section 208JA), the costs assessor may refuse to issue a certificate relating to his or her determination under this section until the costs of the costs assessor have been paid.

(6) Subsection (5) does not apply:

(a) in respect of a certificate issued before the completion of the assessment process under subsection (2), or

(b) in such circumstances as may be prescribed by the regulations.

208K Determination to be final

A costs assessor's determination of an application is binding on all parties to the application and no appeal or other review lies in respect of the determination, except as provided by this Division.

208KA Application for review of determination

(1) A party to an assessment who is dissatisfied with a determination of a costs assessor may, within 28 days after the issue of the certificate under section 208J that sets out the determination of the costs assessor or within such further time as the Manager, Costs Assessment may allow, apply to the Manager, Costs Assessment for a review of the determination.

208KC General functions of panel in relation to review application

(1) A panel constituted under this Subdivision may review the determination of the costs assessor and may:

(a) affirm the costs assessor's determination, or

(b) set aside the costs assessor's determination and substitute such determination in relation to the costs assessment as, in their opinion, should have been made by the costs assessor who made the determination that is the subject of the review.

(2) For the purposes of subsection (1), the panel has, in relation to the application for review, all the functions of a costs assessor under this Part and is to determine the application, subject to this Subdivision and the regulations, in the manner that a costs assessor would be required to determine an application for costs assessment.

208KE Effect of review on costs assessor's determination

(1) If the Manager, Costs Assessment refers a determination of a costs assessor to a panel for review under this Subdivision, the operation of that determination is suspended.

208KF Certificate as to determination of panel

(1) On making a determination in relation to an application for review of a costs assessment under this Subdivision, a panel is to issue to each party concerned a certificate that sets out the determination.

(2) If the panel sets aside the determination of the costs assessor, the following provisions apply:

(a) if the amount of costs has already been paid, the amount (if any) by which the amount paid exceeds the amount specified in the determination of the panel may be recovered in a court of competent jurisdiction,

(b) if the amount of costs has not been paid, the certificate is, on filing of the certificate in the office or registry of a court having competent jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs,

(c) if the costs assessor issued a certificate in relation to his or her determination under section 208J:

(i) the certificate ceases to have effect, and

(ii) any judgment that is taken to have been effected in relation to that certificate also ceases to have effect, and

(iii) any enforcement action taken in respect of that judgment is to be reversed.

208KI Appeal against determination

(1) Subdivision 4B applies in relation to a decision or determination of a panel under this Subdivision as if references in Subdivision 4B to a costs assessor were references to the panel.

208L Appeal against decision of costs assessor as to matter of law

(1) A party to an application who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the Supreme Court, appeal to the Court against the decision.

(2) After deciding the question the subject of the appeal, the Supreme Court may, unless it affirms the costs assessor's decision:

(a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or

(b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.

(3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

208M Appeal against decision of costs assessor by leave

(1) A party to an application relating to a bill of costs may, in accordance with the rules of the Supreme Court, seek leave of the Court to appeal to the Court against the determination of the application made by a costs assessor.

(2) A party to an application relating to costs payable as a result of an order made by a court or a tribunal may, in accordance with the rules of the court or tribunal, seek leave of the court or tribunal to appeal to the court or tribunal against the determination of the application made by a costs assessor.

(3) The Supreme Court or court or tribunal may, in accordance with its rules, grant leave to appeal and may hear and determine the appeal.

(4) An appeal is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

(5) After deciding the questions the subject of the appeal, the Supreme Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor."

DECISION OF PRIMARY JUDGE

36 The primary judge (Rothman J) dealt with a contention advanced by Dr. Doyle that the appeal was incompetent, because the determination of the costs assessor had merged into a judgment, so that the underlying basis of the appeal had disappeared, and because the judgment itself was conclusive and beyond recall. The primary judge rejected that contention.

37 The primary judge expressed the view that the construction of the contract was a question of law, and therefore an appeal lay without leave; but also said that, if necessary, he would grant leave.

38 The primary judge expressed the view that construction of contracts was not an exercise contemplated by the 1987 Act as being within the jurisdiction of a costs assessor. The primary judge then proceeded to address the construction of clause F of the contract, giving the following reasons:

83 The defendant submits, in my view correctly, that there are clearly and unambiguously "only two distinct outcomes: either no liability for any legal fees if no success achieved or payment of all fees at the premium rate if success is deemed to have been achieved." Further, the defendant submits that Clause 2F is to be read conjunctively or in its entirety; it is unambiguous. The defendant submits that the definition of success requires there to be a nett balance on the award in favour of the claimant in an arbitration, as, they say, there was. The defendant submits that all

that is required is for there to be "sufficient funds to be recovered from the respondent [in the arbitration] to enable payment of the conditional costs or part thereof. The happening of that cannot be doubted since the award is $8449 (sic) in favour of the arbitration Claimant, and equally clearly, indicates on its face sufficient funds recovered to enable payment of part of the conditional costs".

84 The above submission ignores two salient facts. First, the arbitrator's award, while providing for the payment of $8499 in favour of the plaintiff in these proceedings, at the same time did not allow costs and required the plaintiff to pay half of the costs of the arbitration. The costs of arbitration are disbursements for the purpose of the costs agreement. Half of the costs of the arbitration was significantly more than $8499. As a matter of fact the nett balance of monies awarded by the arbitrator did not result in any nett gain, even of an insignificant amount, to the arbitration claimants. However, it may be that the costs of the arbitration may not be allowed to be brought to bear in determining the net balance of monies pursuant to the terms of clause 2F.

85 Clause 2 must be read as a whole and the conditional costs agreement conditions read consistently. Paragraph D of those conditions requires the payment of "all fees incurred prior to this date strictly in accordance with the terms and conditions of the Costs Agreement then obtaining… and these overdue fees shall be paid upon the receipt of payment pursuant to the Arbitrator's Award or by way of settlement, and FURTHER these overdue fees shall be payable whether or not the arbitration is successful".

86 Condition F(i) requires the satisfaction of two conditions: a nett balance of monies awarded by the arbitrator; "and sufficient monies are recovered from the respondents to enable payment of the conditional fees or part thereof". The submission of the defendant in these proceedings reads out of that provision the word "sufficient". On one view it reads out all words after and including "and".

87 On the submission of the defendant, any nett balance in favour of the plaintiff would suffice to satisfy the provisions of Condition F. Condition F(i) must be read in conjunction with Condition D. There was a pre-existing costs agreement which required payment of fees whether or not success had been obtained. Those fees were paid but the monies paid were recoverable or that part of that money referable to the particular proceedings was able to be claimed as part of the costs of the proceedings before the Arbitrator. Those fees were significantly more than $8499. Sufficient monies would be recovered to enable payment of the conditional fees if and only if an amount of money was received which would cover the overdue fees referred to in condition D (whether or not already paid). If and only if those prior fees were recovered (or a nett amount greater than the prior fees recovered) could an amount over and above those fees enable payment of part of the conditional fees payable pursuant to the agreement of 30 September 2004.

88 It would also be necessary for any such amount to cover the disbursements referred to in Condition C. It is not suggested that the $8499 would cover disbursements or the previous fees and therefore no amount of the $8499 would go towards the conditional fees.

89 The construction put by the defendant, and the Costs Assessor, ignores the priority of amounts allocated by the Conditional Costs Agreement from any award which requires: first the payment of any disbursements; and, second, the allocation of monies from the award to pay any outstanding fees or overdue fees referable to any earlier costs agreements. No part of the $8499 would survive the payment of disbursements and therefore insufficient monies were recovered from the respondents to enable payment of any part of the conditional fees charged in the agreement of 30 September 2004.

39 The primary judge made the following orders disposing of the proceedings:

(i) Appeal against the determination of Costs Assessor Salier of 4 July 2006 between the parties hereto is allowed;

(ii) The certificate issued by Costs Assessor Salier on 4 July 2006 is set aside;

(iii) The judgment dependent upon the said Costs Certificate, purportedly entered on 12 July 2006 and taken out on 27 July 2006, is set aside;

(iv) The Court declares that no fees are payable pursuant to the terms of the Conditional Costs Agreement between the parties dated 30 September 2004;

(v) The defendant shall pay the plaintiff's costs, as agreed or assessed, of the Costs Assessment before Costs Assessor Salier;

(vi) The defendant shall pay the plaintiff's costs of and incidental to these proceedings, as agreed or assessed.

(vii) An Indemnity Certificate pursuant to the *Suitors' Fund Act 1951* is issued to the defendant for any costs arising out of these orders.

ISSUES

40 It is clear that the decision of Harrison AsJ is now academic. Accordingly, I will focus on the issues raised in connection with the judgment of Rothman J. Many grounds are set out in the proposed Notice of Appeal. These grounds give rise to three broad issues:

(1) Was the appeal incompetent because the Certificate had been filed and was to be taken as a judgment?

(2) Did the costs assessor have "jurisdiction" to determine a question of construction?

(3) Was the primary judge in error in his construction of the agreement?

41 In relation to issue (3), Dr. Doyle also raised questions of natural justice. However, the issues that he considered to have been addressed by the primary judge without being ventilated before him have been fully ventilated before the Court of Appeal; so it will not be necessary to consider the question of natural justice.

COMPETENCY OF APPEAL

Submissions

42 Dr. Doyle relied on the rule concerning finality of Court judgments exemplified by *Bailey v. Marinoff* (1971) 125 CLR 529.

43 He referred to the judgment of Master Harrison in *Katingal Pty. Limited v. Amor* [2004] NSWSC 36, in which the Master dismissed a summons seeking to appeal from a decision of a costs assessor, on the ground that the appeal was filed after a judgment had been obtained under s.208J of the 1987 Act.

44 The Master referred to *Bailey*, and continued:

> *14 It is my view that this appeal has been filed after judgment had been entered. An appeal lies only against a determination of a costs assessor. Once a court's judgment has been entered there has been a final disposal of the matter. This appeal has been filed after judgment had been entered and is incompetent. If an appeal is to be competent, the judgment to which it relates must have been property (sic) set aside.*

45 Dr. Doyle also referred to ***Timms v. Commonwealth Bank of Australia (No.3)*** [2004] NSWCA 25 and ***Yevad Products Pty. Limited v Brookfield*** [2005] FCAFC 263; and he submitted that a judgment pursuant to s.208J was analogous to a judgment obtained by filing an adjudication determination under the SOP Act.

46 Dr. Doyle also relied on the absence of any express provisions dealing with the setting aside of such a judgment, as existed in relation to appeals made to the review panel rather than to the Court: s.208KF of the 1987 Act.

Decision

47 Dr. Doyle accepted that, on his submissions, the judgment pursuant to s.208J could qualify as a judgment of the Court in proceedings in a Division, and thus (with leave) be the subject of an appeal to the Court of Appeal under s.101 of the Supreme Court Act 1970. However, the problem with that approach is that there would be no ground on which such an appeal could be upheld, unless the relevant certificate underlying the judgment was set aside; and s.208K of the 1987 Act prevents that happening except pursuant to the appeal procedure provided by the 1987 Act.

48 The 1987 Act discloses a plain legislative intention that there be an appeal to the Supreme Court in a Division against decisions of costs assessors; and in my opinion it was plainly not the intention of the legislature either that the possibility of such an appeal should be wholly lost if a judgment was obtained under s.208J, because the certificate then merges into the judgment and can no longer be set aside; or that there would have to be also an application for leave to appeal to the Court of Appeal pursuant to s.101 of the Supreme Court Act.

49 Accordingly, in my opinion the clear legislative intention is that an appeal to the Supreme Court should be able to proceed after a judgment has been obtained under s.208J. Further, in my opinion, there is no difficulty in giving effect to this legislative intention. It is well recognised that there are judgments that are not based on any decision of the Court of which they are taken to be judgments, but have some other basis; and such judgments may be set aside or varied if that basis is defeated or varied.

50 One example is judgments entered by consent. They are "mere creatures" of the agreement, and may be set aside, without an appeal, on any ground on which the underlying agreement may be set aside: ***Logwon Pty.Limited v. Warringah Shire Council*** (1993) 33 NSWLR 13 at 28-30.

51 Another example is judgments arising from the registration of a certificate of judgment from another jurisdiction. If the judgment in that other jurisdiction is set aside or varied, then the judgment arising from registration can similarly be set aside or varied: ***Remilton v. City Mutual Life Assurance Society Limited*** (1907) 24 WN(NSW) 177, *Bell v. Bell* (1954) 73 WN(NSW) 7.

52 A judgment arising from a certificate pursuant to s.208J(3) of the 1987 Act is this kind of judgment; and is liable to be set aside or varied if the certificate on which it is based is set aside or varied: cf. ***Croker v. Commissioner of Taxation*** [2005] FCA 127, (2005) 145 FCR 150 at [14]. A further limitation of the effect of such a judgment is considered in ***Khoury v. Hiar*** [2006] NSWCA 47.

53 In relation to an appeal to the Supreme Court, there is no need for a provision of the kind contained in s.208KF. The Supreme Court has power to make appropriate orders in relation to its own judgments, and to make orders preventing parties from relying on judgments of other courts.

54 Accordingly, in my opinion ***Katingal*** was wrongly decided, and Dr. Doyle fails on this issue.

JURISDICTION OF COSTS ASSESSOR

55 Both parties submitted that a costs assessor does have jurisdiction to construe a costs agreement and determine its effect.

56 In my opinion, s.208(3) of the 1987 Act makes it clear that this is so, at least where the assessment is between the lawyer and the client. However, I do not entirely agree with either of the opposing views expressed in the ***Muriniti*** litigation, that is, the view of Davies AJ in ***Muriniti v. Lyons*** [2000] NSWSC 680 and that of Dunford J in ***Muriniti v. Lyons*** [2004] NSWSC 135.

57 In that litigation, there was a dispute as to the terms of an agreement between a solicitor and a barrister, where the agreement was apparently not in writing and the barrister was deceased. The barrister's widow applied to the Supreme Court for a costs assessment under the 1987 Act; and when, over objection of the solicitor, the costs

assessor indicated an intention to proceed, the solicitor commenced proceedings in the Supreme Court, seeking among other things a declaration to the effect that any agreement with the barrister was subject to a condition that had not been fulfilled.

58 Davies AJ dismissed those proceedings, holding that any questions as to the terms of the agreement were to be determined by the costs assessor, not the Court.

59 The costs assessor proceeded with the assessment, and issued a certificate, although he stated explicitly that he was only determining a fair and reasonable amount of costs, not whether they were payable. The barrister's widow filed the certificate of assessment, obtained a judgment under s.208J and pursued execution of that judgment.

60 The solicitor commenced further proceedings in the Supreme Court, seeking a declaration that he was not liable to pay the costs; and those proceedings were subsequently amended to seek an extension of time to appeal from the determination of the costs assessor. Dunford J granted that leave. In the course of his decision, he said this:

> *55 A Costs Assessor under the Act is not an officer of the Court when acting as such; s.208S(4), is not part of the Supreme Court and has no power to take sworn evidence or resolve conflicts of evidence: **Ryan v Hansen** [2000] NSWSC 354, 49 NSWLR 184.*
>
> *56 Having regard to the status and powers of Costs Assessors and the ordinary meaning of the word "assessor", I am satisfied that the powers of Costs Assessors are limited to determining the value of the work done or services rendered in circumstances where there is no dispute that costs are payable and the only issue is as to the amount. It is no part of their function to determine whether or when such costs are payable. The matters set out in s 208A which they must, and in s 208B which they may, take into account are all matters relevant to putting a value on the work done or services rendered and the fairness or justice of the amount claimed; but are not matters which relate to the terms of a costs agreement (particularly if oral) and whether any conditions precedent to payment have been fulfilled. The determination of such questions requires the reception of sworn evidence, which can be tested by cross-examination, and an assessment of such evidence. Costs Assessors do not have the power to deal with such matters.*
>
> *57 For similar reasons it has been held that a Costs Assessor has no power to hear a cross-claim by a client against a solicitor based on negligence, nor to award damages: **Ryan v Hansen**, supra per Kirby J; or to make an assessment when no costs are presently due and payable: **Lace v Younan** [1999] NSWSC 1072 per Master Harrison (no bill of costs rendered); **Baker v Kearney** [2002] NSWSC 746 per Master Malpass (judgment in District Court that applicant for assessment not entitled to costs). I am therefore satisfied that on being notified of the dispute as to the plaintiff's liability to pay the costs, the Costs Assessor should have declined to make a determination or issued a certificate unless and until such issue was resolved.*
>
> *58 It could never have been the intention of the legislature that where the liability for a debt for costs was disputed, a party to the dispute could render the other party to the dispute liable for the debt without any judicial determination of the disputed issues between them simply by having the value of the work assessed by a Costs Assessor and the certificate of determination registered as a judgment in a court of competent jurisdiction. Yet this is precisely what the defendant has sought to do in the present case.*
>
> *59 In his judgment of 14 July 2000 in no 12152/99 at [13] Davies AJ appears to have taken a different view and indicated that the plaintiff's contentions as to the agreement and otherwise were matters to be determined in the first instance by the Costs Assessor and then be dealt with by this Court on appeal pursuant to s 208L or 208M, although para [4] of the judgment suggests that the issue now under consideration was not raised in that case. With all respect to his Honour, for the reasons already given, I take a different view.*

61 In my opinion, Davies AJ was correct to say that a costs assessor, assessing costs between a lawyer and client, can determine disputes as to the terms of the costs agreement, and Dunford J was wrong to say otherwise. However, where the existence of the terms of the agreement are in dispute in a way that would require the hearing of evidence to resolve, it may be appropriate for the costs assessor to decline to resolve the dispute; and in the ***Muriniti*** litigation, it would in my opinion have been open and reasonable for Davies AJ to have permitted the question to have been determined in the proceedings before him. As it turned out, the costs assessor did decline to resolve this question; and in my opinion, in those circumstances, the costs assessor should not have issued a certificate which could be converted into a judgment. That is, in a case where there is a real dispute on substantial grounds as to whether any costs are payable, a costs assessor should not complete an assessment by issuing a certificate unless satisfied that the costs are payable, because the certificate can be filed so as to take effect as a judgment.

62 In my opinion, this approach is consistent with the views of the Court of Appeal in ***Graham v. Aluma-Lite Pty. Limited*** (NSWCA, unreported, 25/3/97) and ***Wentworth v. Rogers*** [1999] NSWCA 403. In so far as there is a divergence of opinion in ***Wentworth v. Rogers*** [2006] NSWCA 145 as to the power of a costs assessor, in assessing party and party costs, to determine the terms and effect of the costs agreement of the party against whom the costs are sought, it is not necessary to address that divergence of opinion in this case.

CONSTRUCTION OF THE AGREEMENT

Submissions

63 Dr. Doyle submitted that, at the time the costs agreement was entered into, both he and Hall Chadwick were aware that the requirement of the deed to realise $1 million had been satisfied; and that there were funds

available to pursue the arbitration, including the provision of $140,000.00 for Grosvenor's own costs and $150,000.00 for security for costs.

64 Also, at the time the costs agreement was entered into, Grosvenor was already liable to Musico for costs previously ordered. A certificate for $62,795.44 had already been issued (although, presumably by the time the agreement was made, it was the subject of a review application), and a further certificate for $11,731.50 was issued just a little later. That liability would not be defeated whatever the result of the arbitration, and could well have been enforced and satisfied before the conclusion of the arbitration.

65 In those circumstances, Dr. Doyle submitted that, in the "*second arm*" of clause F(i), "*recover*" meant simply "*become presently entitled by virtue of the arbitrator's award*" (cf. ***Rosser v. Marine Ministerial Holding Corporation (No.2)*** [1999] NSWCA 214); and that this was satisfied by the award for $8,499.00.

66 Dr. Doyle also submitted there was no basis for saying the balance was not sufficient to enable payment, because it first had to be applied towards payment of disbursements and expenses under clause A and/or overdue fees under clause D. Clause F simply did not expressly or impliedly provide for this.

67 Alternatively, if it were held that "the second arm" of clause F(i) was not satisfied by the making of the award, but required further consideration as to whether monies were recovered from Musico to enable payment of some of the conditional fees, Dr. Doyle submitted:

(a) Grosvenor in fact recovered $652,230.00 plus GST from Musico; Musico's cross-claim was reduced from $1.4 million to $643,731.00 plus GST; and not only did Grosvernor get the balance of $8,499.00 plus GST, but also the benefit of recovery of the $150,000.00 provided for security for costs, plus interest.

(b) It could not have been intended that "success" depend on whether Musico had or had not obtained payment of their prior costs orders by the time the arbitration was concluded, the possibility of set-off arising only in the event that it had not done so.

(c) In any event, having the benefit of $8,499.00 by way of set-off was equivalent to "recovery of monies".

(d) The agreement contained an implied term that each party would do what was necessary to enable the other party to have the benefit of the agreement (***Butt v. McDonald*** (1896) 7 QLJ 68 at 70-71), so that Hall Chadwick could not defeat Dr. Doyle's entitlement by refraining from recovering monies but agreeing to set them off.

Decision

68 The "second arm" of clause F(i) is in my opinion meant to add something to the first arm, and it requires recovery of monies so as to enable payment of some part of the fees. Thus, for example, it would not be satisfied if Musico became bankrupt and no money was recoverable for that reason. Accordingly, I reject Dr. Doyle's first submission.

69 I would add that, in my opinion, the second arm requires recovery of monies so as to enable payment *from those monies* of some part of the fees. It is not enough that there be something that might loosely be called "recovery of monies" and that Hall Chadwick have at their disposal some other fund from which they could pay. That is, the ability to pay must be causally linked to the recovery of monies.

70 I accept Dr. Doyle's submission that, if monies are recovered in the relevant sense, it does not defeat the satisfaction of clause F(i) that those monies are not sufficient to pay disbursements and expenses in accordance with clause A or Dr. Doyle's own prior fees in accordance with clause D.

71 So the question is, does the circumstance that $8,499.00 was set off against the costs owing to Musico, and not otherwise recovered from Musico, defeat satisfaction of clause F(i)?

72 I accept that Hall Chadwick could not avoid payment of fees by refraining from recovering monies that they could recover. I am also inclined to accept that, if Musico had obtained payment of their costs prior to the making of the award, and had then paid Hall Chadwick $8,499.00 following the making of the award, then clause F(i) would have been satisfied.

73 However, that did not happen; and in the circumstances that did occur, Hall Chadwick could not have obtained payment of the $8,499.00 without paying Musico's previous costs in full. This in turn gives rise to two questions:

(1) Does the benefit of a set-off against Musico's costs amount to the recovery of monies from Musico so as to enable payment of some of the conditional fees?

(2) If not, was the course taken by Hall Chadwick, of not paying Musico's costs in full so as to be able to receive $8,499.00, a breach of its implied obligation not to avoid payment of fees by refraining from recovering monies that they could recover?

74 In my opinion, the achieving of a set-off reducing amounts otherwise payable to Musico (who are "the respondents" referred to in clause F(i)) does not amount to recovery of monies from the respondents so as to enable payment of some of the conditional fees: it is merely a reduction of amounts otherwise payable to the respondents. In my opinion, Mason P's view that the recovery of "a benefit in money's worth" amounted to the recovery of "sufficient monies … to enable payment" does not give effect to the ordinary meaning of the latter expression, particularly in the context of the administration of a company whose liabilities greatly exceed its assets, where there can be a significant difference between an administrator actually receiving money and the administrator merely obtaining a set-off which reduces some liability of the company. It is only in the former case that the administrator actually recovers money out of which payments can be made.

75 In my opinion also, it was not a breach of Hall Chadwick's implied obligation for them to refrain from paying Musico's costs in full. It would in my opinion be unreasonable to hold Hall Chadwick contractually bound to pay Musico a larger amount than they were required by Musico to pay, simply to bring it about that monies be recovered from Musico in satisfaction of clause F(i).

76 There is force in the contention that this may have the capricious result that Dr. Doyle's entitlement to fees was determined by whether payment of Musico's costs happened to take place before or after the making of the award. However, there are in any event elements of caprice in clause F, for example in providing to the effect that payment of tens of thousands of dollars could depend on whether a balance was $1 in favour of Musico or $1 in favour of Grosvenor, or upon whether or not the arbitrator became incapacitated; and in my opinion, the correct course is to follow the ordinary meaning of the words actually used.

77 In my opinion, following that ordinary meaning, sufficient monies were not in the event recovered from Musico to enable payment of any part of the conditional fees. Accordingly, in my opinion, the conditions in clause F(i) were not satisfied, and Dr. Doyle was not entitled to the conditional fees.

CONCLUSION

78 For those reasons, in my opinion the following orders should be made:

1. Leave to appeal from Harrison AsJ refused with costs.
2. Leave to appeal from Rothman J granted, Notice of Appeal to be filed within 14 days.
3. Appeal dismissed.
4. Dr. Doyle to pay Hall Chadwick's costs of the application and appeal.

79 **CAMPBELL JA:** I agree with Hodgson JA.

Dr. Doyle appeared for himself with Mr Cheung : The Builders' Lawyer, Ultimo for claimant
Mr. N. Perram SC with Mr. A. Kaklik for opponent : Knowles Lawyers Pty. Limited, Sydney for opponent