11 December 2018

Justice James Douglas
Chair
Rules Committee
Supreme Court of Queensland
PO Box 15167
City East QLD 4000

Dear Justice Douglas

Supreme Court Practice Direction 22 of 2018

We refer to the above, to our correspondence to the Chief Justice dated 5 October 2018 (a copy of this correspondence is enclosed) and to our meeting with Justice Morrison and Judge McGill on 30 October 2018. During the meeting, it was suggested that we provide the Rules Committee with some further information about our concerns with respect to the practice direction.

General observations

General care and conduct has long been the subject of judicial guidance as to its application and to the indemnity envisaged for a successful litigant. We enclose for your reference, a copy of the decision of Southern Cross Exploration NL & Ors v Fire & All Risks Insurance Co Ltd & Ors (unreported, judgment delivered 14 April 1986; Waddell CJ in Eq. Supreme Court of New South Wales) (we apologise for the quality of our copy) where his Honour, Chief Justice Waddell, gives a helpful explanation as to care and conduct and the work to which it relates.

As indicated by his Honour in this case, care and conduct relates to conduct of the matter generally, and all work undertaken by the solicitors. Accordingly, any fetter on the discretion (of the court/assessor) to assess and allowance for care and conduct in circumstances where the Scale does not otherwise compensate for this work is of concern to the Society. Given that clients are generally charged pursuant to cost agreements that have been validly created and are highly regulated under the Legal Profession Act Qld 2007 (LPA), such an approach to care and conduct has the potential to reduce the costs recovered by a successful litigant.

In our opinion an increased differential between costs incurred and recovered would further impede access to justice, which the Society believes is a basic right for all Queenslanders. For example, in personal injury claims, particularly those involving infants and those with disabilities, the difference between the costs recovered and the monies paid out of the fund may significantly increase.

In addition, solicitors have an obligation pursuant to section 308(f) of the LPA to advise clients in relation to likely costs in the event of success or failure. The Society believes the introduction of this practice direction may require solicitors to review their estimates for Queensland proceedings going forward, and to consider updating current disclosures (under
Supreme Court Practice Direction 22 of 2018

section 315 of the LPA). We are concerned that this development, along with other factors referred to in our previous correspondence, may impact on recommendations and instructions as to whether to commence in a particular forum (we make further observations in relation to the Supreme Court Scale of Costs and the Federal Court scale in this letter).

Finally, as a general observation and before turning to specific matters, we have an underlying desire to reduce the scope for protracted and costly assessments which will require all the parties to articulate additional arguments in the assessment process and any consequential review.

Paragraph 2 of the guidelines

We repeat our concern, raised in our letter of 5 October 2018, that paragraph 2 of the guidelines appears at odds with Item 1 of the Scale. The potential for tension between the two (the Scale and the guidelines) is an issue that may give rise to disputes, further unnecessary costs for the parties to bear and delays in recovery.

On our reading, paragraph 2 varies the application of Item 1(e) of the Scale in circumstances where the Scale is subordinate legislation. Paragraph 2 essentially seeks to change or add to the Scale’s requirement of a consideration of “the importance of the proceeding to the party” to a consideration of “the special significance of the proceeding” to the opposite party i.e. the party liable to pay. Further, we note that the term, “special significance” is not a term used in Item 1 of the scale and consider that this may cause confusion for a cost assessor or registrar.

As discussed at the meeting, our concern about the application of this paragraph is highlighted by the decision of Commercial Bank of Australia v Amadio (1983) 151 CLR 447C. A literal reading of the guidelines to the practice direction suggests that while the Amadios were successful in the litigation and retained their property, as this had no “special significance” to the bank, this could not be taken into account in assessing care and conduct. Conversely, had the bank succeeded and the Amadios lost their property, this would increase the bank’s assessment of care and conduct as the proceeding would have had “special significance” to the other party (the Amadios).

We refer again to the issues raised in our letter of 5 October 2018 regarding the difficulties a party claiming costs and an assessor may encounter when seeking to determine whether there has been special significance to the other party.

From our recent discussions, it appears that the intent of paragraph 2 is to link the assessment of care and conduct to the other party (the party liable to pay). For example the assessor could consider the relationship between the parties or the liable party’s conduct, but not any other matter. If that is the intent of the paragraph, then we believe that it would be appropriate to reconsider the wording of the Scale and the practice direction for the purposes of consistency and clarity.

Ranges for care and conduct

We appreciate that these guidelines have been drafted to address cases where the amount for care and conduct may have been assessed higher than is reasonable. This should not occur. A party should only recover costs if they are proper or necessary for the attainment of justice (rule 702(2)). However, in our view it is not appropriate to restrict care and conduct in every case solely to ensure that particular costs assessors are complying with the rules. Instead, the Society believes parties, costs assessors and the Court should monitor assessments to ensure these are reasonable.
Supreme Court Practice Direction 22 of 2018

As to the table in paragraph 3 of the guidelines, and as mentioned above, we remain concerned that there is no longer adequate discretion afforded to the court or an assessor to enable them to take into account the relevant circumstances in each case.

The prescribed ranges restrict the ability of a costs assessor or court to use the factors outlined in item 1 of the Scale to assess care and conduct. For example, an assessor could determine that a matter involved significant skill, labour, specialised knowledge and responsibility on the part of the solicitor and that considerable time was spent by that solicitor, including researching and considering of questions of law and fact, but could also determine that the matter fell within a “straightforward claim not otherwise specified”. In this case, we query the reasonableness of restricting the allowance for care and conduct to what is provided for in the guidelines. This example illustrates that the guidelines appear to have changed the concept of care and conduct and the way it has been calculated and applied.

There also appears to be some uncertainty as to the relevance of the factors in Item 1 of the Scale as to the identification of the percentage to be allowed, in light of the requirement of paragraph 3 for the percentage to be “scaled according to the nature of the matter within the range of matters covered by the item”.

The general thrust of the guidelines appears to primarily promote the consideration of the amount of money involved; however, this is only one of a number of important factors outlined in Item 1 of the Scale. There are a number of different types of proceedings which highlight potential anomalies or unfairness to the party seeking to recover costs, including:

- oppression actions;
- actions for equitable relief to protect rights where no money is involved;
- declaratory relief involving real property worth in excess of $2 million dollars; and
- judicial review applications (referred to in Item E in the table in the guidelines) where those applications involve a review of a local authority decision regarding a development worth in excess of $2 million dollars.

Another concern is the disparity between allowances for care and conduct for matters in the Supreme Court compared with those in the District Court (up to a 10% difference). We note the discussion at our meeting about the types of matters dealt with by the Supreme Court, including the argument that these are more complex than those heard by the District Court. However, from the experience of our members we do not consider this is always the case. In many instances, the only difference between matters being heard by each court is monetary value. The questions of law and fact could be the same, or more contentious, in a matter where the claim is for $500,000 rather than $5 million.

As noted above, we are concerned that restricting the amount for care and conduct below what may otherwise have been awarded by an assessor or a court using the factors in Item 1 of the Scale may contribute to a party’s decision not to commence in the Supreme or District Court.

Paragraph 4 of the guidelines

Paragraph 4 of the guidelines provides notes to be used when classifying matters into categories under the table in paragraph 3. The first point under these notes provides that:

The table is comprehensive. Any proceeding not literally described is to be placed in the item for the type of matter which it most closely resembles.
Supreme Court Practice Direction 22 of 2018

In our submission, this is too restrictive and presents difficulties in its application. For instance:

- An application for removal of a caveat may well involve the potential for cross-examination of witnesses, but on the afternoon before the hearing, the matter may resolve. Hence, cross-examination was not required as referred to in item F, but was contemplated and prepared for. Which category should it fall into?

- Generally, what used to be considered an “originating application” where the primary relief is declaratory only. In these cases, the practice direction alters what had been the usual practice of costs assessors evaluating work undertaken by the solicitor, which may not necessarily have regard to the amount involved (refer to our comments above). Examples of the types of matters are:
  
  o statutory wills;
  o setting aside arbitral awards;
  o contractual construction;
  o applications for injunctions;
  o Mareva injunctions; and
  o Anton Piller orders.

- Multiparty proceedings where there are intraparty claims such as third and fourth party proceedings. It would appear that costs are to be assessed by treating this as an originating application, with the allowance at the lower end of the range.

- Class actions merit separate and distinct consideration, particularly from a plaintiff’s perspective. The inherent nature of multiple and sometimes divergent group members creates a burden on the solicitors that is not otherwise adequately compensated for under itemised scale items. Solicitors are often required to address the entitlement of each of the members to the fund which may be created. This example also potentially creates tension with paragraph 2 of the guidelines.

- Assessments under section 319(1)(b) of the LPA.

In relation to subparagraph (a), but particularly subparagraph (b) which defines the “amount involved”, reference is made to “interest” in those calculations but is unclear as to whether that means contractual or discretionary interest or both.

The final paragraph in the Notes section does not intuitively guide a cost assessor in their determination of an individual cost statement. It is also unclear what impact or purpose this paragraph serves for a court in guiding the adjudication of care and conduct.

Costs under the Legal Profession Act 2007

A further concern to the Society relates to the circumstance where section 319(1)(b) of the LPA applies to a matter. We note rule 678 of the UCPR contains the following note:

“Note—The Legal Profession Act 2007, section 319(1)(b) applies to costs that are recoverable under the applicable scale of costs, rather than under a costs agreement.”

The Scale, as previously existed, allowed for its general application in the circumstances of a solicitor and own-client retainer. This is emphasised by Item 1(e) of the Scale. However, the practice direction removes what was otherwise a consideration in these circumstances.
Supreme Court Practice Direction 22 of 2018

Further, paragraph 1 of the guidelines only refers to a percentage of costs on a costs statement. A costs statement is only prepared by a successful litigant to recover their costs and has no application to an assessment under the LPA.

Application of the Practice Direction to District Court matters

We query whether this practice direction should apply to matters in the District Court based on section 17 of the Supreme Court of Queensland Act 1991 and section 125 of the District Court of Queensland Act 1967. Neither provision indicates that one court is able to make a practice direction for another. We similarly note that item 1 in Schedule 1 of the UCPR only refers to "guidelines issued in a practice direction by the Chief Justice".

We believe that this issue should be further considered by the Chief Justice and by the Chief Judge of the District Court.

Federal Court Scale

Finally, for your reference, we enclose a copy of the Federal Court Scale of Costs. We also enclose a schedule we have prepared comparing the main items in this scale with the Queensland Scale. The schedule demonstrates some of the significant differences between costs recoverable in the Federal Court and those recoverable in the Supreme and District courts. You will note that the Federal Court Scale has been in operation since 1 January 2014 and we understand it is likely to be increased shortly.

We particularly draw your attention to number 11 of the schedule where the Federal Court Scale makes a specific allowance for legal research, delegation and collation of documents (on a time basis). No specific allowance is made under the Queensland Scales. The Federal Court Scale also recognises the common practice of solicitors in its allowance for the recovery of costs in 6-minute increments.

Some of our members have estimated that the difference in recovery in the Federal Court, as compared with the Supreme Court, is in the order of 30%. The Society is concerned that this differential may be further increased by the practice direction.

Thank you for the opportunity to provide a further response on this issue. Please do not hesitate to contact Kate Brodnik, Senior Policy Solicitor on (07) 3842 5851 or k.brodnik@qls.com.au to discuss this letter further.

Yours faithfully

Ken Taylor
President

CC. Rebecca Treston QC
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5 October 2018
Our ref KB-LRC

The Honourable Chief Justice Catherine Holmes
Supreme Court of Queensland
PO Box 15167
CITY EAST QLD 4002

Dear Chief Justice Holmes

Issues facing Queensland court users

Thank you for speaking with us recently in respect of Practice Direction 22 of 2018. We note there was some initial consultation on this practice direction in 2016, however, since its publication on 10 September 2018, our members have raised a number of concerns with the document, some of which were raised by us in correspondence in 2016.

In addition to our concerns with the Practice Direction, which we have detailed below, we take this opportunity to highlight some other issues of concern to the profession. These are:

- the outdated nature and levels of the scales of costs, generally, in contrast with the Federal Court approach;
- electronic filing and the lack of technology and infrastructure throughout Queensland courts, including the regions;
- the negative impact of these matters on access to justice;
- the lack of resources provided to the courts and the adverse impact this has, including on the judges, as recorded in the Annual Reports; and
- our overall concern that Queensland courts may be becoming less attractive for prospective litigants.

We have made a number of submissions to the Attorney-General about these issues and will continue to advocate for improvements to funding and resources.

We also take this opportunity to thank members of your Court for their consultation with the profession on a number of issues. We consider that the Court and its users ultimately benefit from this approach.

Practice Direction 22 of 2018

As stated, our members have raised a number of concerns about the drafting and effect of this Practice Direction.

Our first concern relates to paragraph 2 of the Guidelines on the basis that this paragraph may be inconsistent with Item 1 of the Scale and because it is a significant shift in the way costs are currently assessed, which could disadvantage vulnerable parties.
Issues facing Queensland court users

Item 1 of the Scale sets out the circumstances to be taken into account for an allowance for general care and conduct. Item 1(e) provides:

"The importance of the proceeding to the party"

The words, "to the party" indicate reference to the party whose costs are being assessed and paid.

However, paragraph 2 of the Guidelines provides:

"Any special significance of the proceedings to the client should not be relevant to an assessment on the standard basis unless the special significance involves the party liable to pay, so that it is fair to that party to have regard to it."

In our view, the Guidelines are therefore inconsistent with Item 1(e) of the Scale in that the former require the registrar or costs assessor to consider the importance of the proceeding to the party whose costs they are assessing, whereas the Practice Direction requires them to limit their assessment to a factor involving the other party. The Scale is part of the Uniform Civil Procedure Rules 1999 (UCPR), which is subordinate legislation and this means that to the extent that there is any inconsistency between the Scale and Guidelines, the Scale ought to be applied. We would be pleased to hear from the Court on this point.

In addition, we note the Scale will be used as a default position if there is no costs agreement between the solicitor and client pursuant to Section 319(1)(b) of the Legal Profession Act 2007 and the note in rule 678 of the UCPR. In these circumstances, Item 1(e) of the Scale is relevant to such an assessment, whereas, Item 2 of the Guidelines is not and effectively removes this as a consideration in the assessment, despite the subjective nature of a retainer between a solicitor and their client.

This leads to a further concern regarding how a registrar or costs assessor will make a determination about a matter of "special significance to the party liable to pay." A party liable to pay costs may not be forthright in advising how the litigation may have affected it, if it is attempting to limit its costs burden.

Our second concern about paragraph 2 is a related one, in that it endorses a further consideration which has not previously been applied in an assessment and which, in our view, may deprive a person of an amount for care and conduct which they previously would have been entitled to, based on the special circumstances of their case. Paragraph 2 only permits a special circumstance to be relevant to an assessment if it involves the party liable to pay costs and, as stated, we query how an assessor will be able to make the determination.

We believe these same concerns arise in respect of the percentages stipulated in the table in paragraph 3 of the Guidelines.

The purpose of the Scale and standard costs is to provide proper compensation in the nature of an indemnity to the successful litigant. In order for this to be achieved, we do not consider it is appropriate to fetter the discretion of judges by superimposing tests under these new Guidelines which will leave the beneficiary of an order for costs in a less favourable position than they were in before this change and, which is contrary to the Scale and to years of jurisprudence. The importance of the matter to the party has always been an factor which is typically taken into account in the allowance for care and conduct.
Issues facing Queensland court users

Examples may assist in demonstrating our views regarding the Practice Direction. For instance, if the party whose costs are being assessed is an individual plaintiff with a disability, and that disability required the solicitor to undertake significant work to obtain instructions, give advice and take other steps in the proceeding, then this may be a factor that Item 1 of the Scale would allow the registrar or costs assessor to take into account in their assessment. However, this does not appear to be permitted by paragraph 2 of the Guidelines.

If success in litigation by a plaintiff against a multinational corporation has the effect of the plaintiff avoiding bankruptcy, then this is not a factor that can be taken into account in the Plaintiff’s costs, pursuant to the Guidelines, as it does not have special significance to the multinational corporation. If conversely, the multinational corporation succeeds and as a consequence, the plaintiff is bankrupted, this factor could affect the care and conduct assessed for the multinational corporation. Examples like this illustrate what appears to be an unintended consequence of the drafting of the Practice Direction in our view.

We also refer you to a case which demonstrates how we consider the Guidelines may now significantly affect the outcome of assessments. King v. Allianz Australia Insurance Limited [2015] QSA 101 involved a personal injury claim which was resolved for $275,000 plus standard costs and outlays to be assessed on the District Court Scale. Liability was not in contention and the matter was not a particularly complex case (see paragraph 31). The costs assessor allowed 30% for care and conduct and on review, the primary judge reduced this to 25%. The Court of Appeal reinstated the costs assessor’s allowance of 30% as there was no error shown in the way the assessor had approached the allowance for care and conduct. Separate reasons for the judgment were delivered by each member of the Court, each concurring as to the orders made.

We submit that having regard to the new Practice Direction and Guidelines, the care and conduct in this case would have been assessed at between 10% to 18%, pursuant to Item K of the table. This plaintiff would now be in a less favourable position, without reason, when in fact his circumstances had been thoroughly examined by a Court when confirming the 30% allowance.

We also contend that these Guidelines will place parties to litigation in Queensland courts at a disadvantage compared with Federal Court users. While the Federal Court Scale has a recommended guide for skill, care and responsibility, the Scale also allows the recovery of work on an item basis, which traditionally fell under care and consideration, such as research, supervision, collating documents etc. These are not matters which can be the subject of a specific charge under the Queensland Scale in the UCPR.

In this way, the adopted approach is generally at odds with other Federal jurisdictions, as exemplified by the following:

(a) The Federal Court Scale was modified on 1 August 2011 with the introduction of the Federal Court Rules 2011. Prior to this, Item 41(b) of the former Scale provided for an allowance under ‘General care and conduct’ having regard to the importance of the matter to the client. Item 11.1(e)(g)(i) of the current Federal Court Scale captures, as a consideration for skill, care and responsibility, the amount involved, instructions provided to the lawyer as well as other relevant considerations, such as, the importance to the party.

(b) The Federal Court Scale is also applied in the Administrative Appeals Tribunal. This Tribunal hears a range of matters, including appeals regarding the wrongful
termination of workers' benefits. Generally, on the taxation of those bills, the registrar has made an allowance, under general care and conduct, having regard to the impact of the success on the worker, particularly where the worker's benefits were the only source of income for the worker and their family.

Our concern, in addition to the fact that Queensland court users will recover costs differently to users in other jurisdictions, is that class actions are less likely to be commenced in Queensland as the "subjective significance to the plaintiff" has been eliminated by the Guidelines. A plaintiff's costs recovery in the Queensland Supreme Court will be viewed as less favourable than compared to the Federal Court and other states courts.

For all of the above reasons, it is our view that the Guidelines in this practice direction should be reconsidered. We would welcome the opportunity to discuss our concerns further with you and with your Rules Committee.

If you would like to arrange a meeting or if you have any queries regarding the contents of this letter, please do not hesitate to contact Kate Brodnik, Senior Policy Solicitor on (07) 3842 5851 or k.brodnik@qls.com.au.

Thank you again for your ongoing consultation with the Society and we look forward to hearing from you.

Yours faithfully,

Ken Taylor

President
HIS HONOUR: The plaintiffs have applied for review of the decision of a taxing officer on reconsideration in respect of two items in a bill of costs: the amount allowed for care, skill and responsibility and the amount allowed for counsel’s fees. The application is made pursuant to Pt 52 r 62.

The costs were taxed in respect of an order that the plaintiffs pay the defendants’ costs of an application to set aside the proceedings. The hearing of the application took some fifty days before me. The plaintiffs lodged lengthy objections to the defendants’ bill of costs. This was taxed and allowed in the amount of $274,216.85. The plaintiffs filed a notice of motion seeking reconsideration by the taxing officer of his decision together with a statement of objection listing some 236 items pursuant to Pt 52 r 60. On 13 December 1985 an interim
Certificate was issued in respect of items not objected to in the sum of $165,538.14. The taxing officer reconsidered the items objected to on 23 December 1985. He allowed on reconsideration of these items a further $108,563.25, together with costs. He delivered his reasons for his decision on 31 January 1986.

Care, Skill and Responsibility

Pt 52 r 67(1) provides that the provisions of Sch G to the Rules shall apply to a taxation. Table 1 in the schedule is of general application. Appendix A to the table has a total of 42 clauses setting out items of work and providing that each is to be taxed at a specified sum or rate or in a sum in the discretion of the taxing officer. Further appendices provide for increase of these sums and rates in respect of business done after specified dates. The bill relates to business done after 31 December 1983 in respect of which the costs in Appendix A are increased by 294%.

The items mentioned in Appendix A are not exhaustive of the kinds of things which are done in the preparation or conduct of litigation. In a party and party taxation, pursuant to r 67(2), in a special case, costs may, at the discretion of the taxing officer, be allowed in relation to items not mentioned or of an amount higher than that prescribed. This provision should be read with r 23(2) which provides:

"On a taxation on a party and party basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."
Clause 41 in Appendix A to Table 1 reads:

"Skill, care and responsibility, discretionary".

Rule 49(1) provides:

"A bill shall contain -

(a) in short items numbered consecutively, a chronological description of the work done by the solicitor, his servants and agents;

(b) beside each item, the costs claimed for the work described in the item;

(c) at the conclusion of the chronological description of the work done, a description, having regard to the matters mentioned in rule 67(3), of work done justifying an allowance under Schedule G Table 1 Appendix A clause 41 (which relates to skill, care and responsibility) of the amount claimed beside that item;

(d) the disbursements made."

Rule 67(3) provides:

"A taxing officer, when exercising his discretion under subrule (2), or in respect of any item marked 'discretionary' in Schedule G, shall have regard to -

(a) the complexity of the item or of the proceedings in which it arose and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of and the time spent and work done by the solicitor or counsel;

(c) the number and importance of the documents (however brief) prepared or perused;"
"(d) the place and circumstances in which the business involved was transacted;

(e) the importance of the proceedings to the client;

(f) where money or property was involved, its amount or value;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same proceedings, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question."

The defendants' bill of costs at pp 75-34 contains a statement of the matters and circumstances relied upon as relevant to item 41 in respect of which $14,950 was claimed. To get the amount actually claimed, of course, this has to be increased by 294%, that is, to $58,903. The bill does not contain any statement of how the amount claimed was calculated. The taxing officer allowed a basic figure of $5,800 which he arrived at by taking 30% of the other profit costs allowed. Increased by 294% this becomes $22,852.

In his reasons for his decision the taxing officer said:

"The plaintiffs contend that an allowance of 30% of total profit costs is excessive. It was submitted by the plaintiffs that the allowance should be no greater than 10% on the basis that complex commercial matters are being allowed at 7½% to 10%. This submission does not accurately reflect the practice of the taxing officers."
v Nicol & Ors (No 2) 1972 21 FLR 34 (in particular p 49) and a formula devised by them over the past three years since the abolition of item 11A of Schedule G. As a general proposition it could be stated that uncomplicated personal injuries matters, interlocutory applications, short appeals are allowed 3½% to 5%. Matters which seem longer than a day or have some degree of complexity are allowed 5% to 10%. Matters which are in the long list and commercial and defamation matters which seem far more than three days are allowed 10% or 15%.

However, the taxing officers at all times exercise their discretion and use the above as mere guidelines. There have been instances where less has been allowed and instances where taxing officers have allowed between 30% and 50%. Within the profession there seems to be a tendency to mark the item at some figure in excess of 10% of the whole bill.

The complexity and length of this matter was such that it required a great deal of time, effort, management and skill on the part of the solicitors. By the very length of the application this matter could only be described as unusual, therefore, I was of the view that it was a matter which warranted an allowance in excess of 15%. In my view a proper allowance was 30% of the profit costs."

The plaintiffs' statement of objection, in their application for reconsideration of the decision of the taxing officer, said, in respect of this item:

"An allowance of 30% of total profit costs is excessive. Having regard to usual allowances made of 3½% - 5% with complex commercial matters and defamation proceedings being allowed 7½% - 10%, it is submitted this matter does not justify a 200% to 300% increase. All work done has been claimed in the Bill and three Counsel were instructed."
The plaintiffs make a number of submissions in support of their objection. Firstly, it is submitted that the approach of taking a percentage of profit costs is erroneous in principle because it amounts to increasing the sum provided by Appendix A for each of the items in the bill by that percentage and therefore, in effect, to amending the scale provided.

However, I do not think that this is a valid way of describing what was done. "Skill, care and responsibility" is provided as a separate item and the question to be resolved is whether it is permissible, in the exercise of the discretion of the taxing officer pursuant to r 67(3), to calculate the amount to be allowed by taking a percentage of the total of profit costs.

In this respect it is submitted that some items provided by Appendix A cannot rationally be the basis of any additional cost allowed for the exercise of care, skill and responsibility. One example given is item 13 which provides for the making of photographic copies. Others are items such as those for filing a document, for searching the list, for the production of documents for inspection, attending on counsel to deliver brief, and so on. Accordingly, it is said that if it is appropriate to apply a percentage to the total of profit costs, costs allowed for such items should first be excluded.

Further, it is submitted that the amounts provided or allowed for some items include remuneration for the skill, care or responsibility exercised in respect of the work involved. Thus, it is said that in allowing attendances in Court instructing counsel under item 33 at $22 per hour instead of at $15 per hour as provided by item 31, allowance was made for skill, care and responsibility. It is also said that many items in the bill
of costs charged and allowed on a time basis include such remuneration. It is true, I think, that the skill, care and responsibility exercised in respect of the conduct by a solicitor of litigation is to some extent reflected in the amount of time spent on particular items. But I think that the expression "skill, care and responsibility" is directed rather to the quality of work done than to its quantity. Accordingly, it seems to me that it is logical to provide a separate allowance for these matters.

It is also submitted that the skill, care and responsibility required in the application is reflected by the numbers of counsel and solicitors involved for the defendants and that the amounts allowed for such involvement provide remuneration for this item. It is said that the defendants' solicitors are not entitled to charge any substantial amount for skill, care and responsibility when included in their bill are the fees of senior and two junior counsel upon whose advice and guidance they have relied throughout the proceedings, and also included are amounts allowed for discussion between various solicitors in the firm. It is true that much of the skill, care and responsibility exercised in respect of the conduct of the case has been that exercised by counsel briefed and that many of the decisions made have been the result of consultation between solicitors in respect of which an allowance has been made for the time spent. But these considerations do not preclude the making of a substantial allowance under item 4. Selection of suitable counsel and giving appropriate instructions are matters requiring the exercise of skill, care and responsibility.
for which it may be appropriate to make a separate allowance. Similarly, the exercise of skill, care and responsibility may not be adequately taken into account by allowing a sum based merely upon time spent in discussions between solicitors in the same firm.

In Re Federal Deposit Bank Ltd, (1937) QWN No 38, Webb, J said:

"I am of the opinion that the amount to be allowed to a solicitor for general care and consideration should not be reduced because of the employment of a second counsel, unless it is shown that second counsel was brought into the case to relieve the solicitor of a part of the burden ordinarily falling on the solicitor."

R 49(1) requires that all the work done by the solicitor should be described in the bill chronologically in short items numbered consecutively. Such a description does not provide a foundation for assessing skill, care and responsibility. This must be given by a description of the work done, which has regard to the matters mentioned in r 67(3). Item 41 is clearly intended to provide an allowance over and above that provided by the taxation of the individual items which precede it. In the present case, the matters mentioned in r 67(3) which are relevant are the complexity of the proceedings and the difficulty and novelty of the questions involved, and the skill, specialised knowledge and responsibility required by the solicitors, including in the organisation and management of proceedings requiring the attention of three counsel and several solicitors and staff involving large numbers of documents
to the clients, and the amount of money involved, in particular, the amount which had already been spent or incurred by the defendants in resisting the proceedings. The other matters mentioned in r 67(3) appear to me to be more relevant to individual items rather than to item 41.

The description of the work contained at the end of the chronological list of items in the defendants' bill emphasises the matters mentioned and in my opinion is a fair description of what was involved in the application.

The words "skill, care and responsibility" seem to me to have an application to everything which is done by a party's solicitors in the conduct of proceedings. I do not think that it is either practicable or correct to attempt to isolate particular items in respect of which profit costs have been allowed as having no relationship to the exercise of care, skill or responsibility. In a proceeding such as this the management and supervision of the work of the defendants' solicitors was of great importance and I think that work done such as photocopying and filing documents was work which had a relationship to the exercise of care and skill in and the acceptance of responsibility for the conduct and management of the case. Clearly enough, the allowance made under item 41 should have a relationship to the total work done. Once this is accepted there is, I think, justification for assessing the allowance as a percentage or proportion of the other profit costs. It may be that in some cases it would not be right to do so, but in the present case I think it is. In my opinion, the assessment at 30% is
entirely reasonable and justified. In any event, there are no circumstances which would justify me in setting aside the quantum of the allowance as fixed by the Registrar in accordance with the principles mentioned below.

The above approach is supported by the decision referred to in the reasons of the Registrar: Higgins v Nicol & Ors. That was a review by a Full Bench of the Commonwealth Industrial Court of a taxation by the Deputy Industrial Registrar. There the taxing officer included in the item "Instructions for Brief" some 28 other items, including one for time spent in the examination of documents. The court allowed, in addition, an amount for perusal and noting up of transcript and commented that the bulk of the work coming under the item involved the exercise of skill or legal knowledge. Having reached a total for the items coming under "Instructions for Brief" it was then said:

"But according to practice an amount is to be added for skill, responsibility and the general management of the proceedings. In a case of this kind that figure could not be less than one-third." (49)

It seems to me that in that case the proportion was taken of a total which included items of the kind which the plaintiffs submit in this case embody their own allowance for skill, care and responsibility.

Clause 11 in Table A previously provided a similar item headed "Preparing for hearing" but it was deleted in August 1983 at the same time as r 49(1) was amended to its present form and cl 41 added to Appendix A. Cl 11 provided a separate item of "skill, care and responsibility". I understand that it was
the practice to make an allowance for this item by applying a percentage to the other profit costs under cl 11. The amendments mentioned were made so as to make bills of costs entirely chronological and self-explanatory rather than including much of the work in the form of summaries under cl 11. The decision in *Higgins v Nicol* is, I think, parallel to the practice under cl 11. It seems to me to be substantially in accordance with that practice to take the approach which the taxing officer did in the present case. It must be conceded that the present practice is to make an allowance for item 41, "skill, care and responsibility" by applying a percentage to some items which were not included under cl 11. But I do not think that the difference is a matter of any consequence.

In my view, the conduct and management of litigation should, for the purpose of cl 41, be regarded as a whole because there is an element of skill, care and responsibility in the general management of litigation which in a practical sense extends to everything done. In a case such as the present the solicitors acting for the defendants had the responsibility of organising effectively the persons working on it and of instituting and maintaining procedures which would ensure that all material facts and documents were analysed and collated and communicated not only to counsel but to persons from their office working on the case. I do not think that it is practicable to exclude work done such as photocopying or filing documents from consideration although charges for these matters would not have come under the former cl 11. Accordingly, in my view, it was appropriate for the taxing officer to have regard to the
total of the profit costs allowed apart from item 41 in making a decision as to what should be allowed for that item.

It seems to me that the approach of taking a percentage is more likely to produce a reasonable result than simply to try and assess a lump sum and also is more likely to provide consistency. At first sight, the taking of a percentage of proportion may seem to be a rough and ready approach. But over a period of time the taking of such an approach to a variety of cases and the adoption of a consistent attitude should result in the allowance of amounts under item 41 which are reasonable and proper. I cannot think of any other practicable way of considering this item. Certainly, counsel for the plaintiffs had no alternative to suggest. He was content to say that the approach adopted by the taxing officer was not the correct approach.

For the foregoing reasons it is my opinion that there should be no alteration to the allowance made by the taxing officer for item 41. As appears above, he allowed the sum of $22,852.

**Counsel's fees**

Pt 52 r 23(2) provides the authority necessary for the allowance of counsel's fees. A scale of counsel's fees is published as representing that which it is understood the taxing officers of the court are prepared to allow on party and party taxation and is to be found in Ritchie's Supreme Court Procedure, Vol 2 p 6301. This scale does not have any statutory force but is arrived at after consultation with the legal profession. In practice it provides a basis for the allowance of counsel's fees on taxation.
In their bill the defendants claimed counsel's fees in the sum of $236,900. Senior counsel and two junior counsel were engaged. The taxing officer allowed counsel's fees on the basis of the scale plus 25%. The result was that counsel's fees were allowed in the sum of $133,010, $103,890 being taxed off.

In his reasons for consideration the taxing officer said:

"The plaintiffs' objection to counsel's fees was that each item set out in the Notice of Objection should be reduced to scale.

In determining which is the proper fee to be allowed I have a discretion which I must exercise: Higgins v Neal No 2 1972 21 FLR 41; Ethridge v Shire of Berwick 1906 VLR 746; Magna Alloys & Research P/L v Coffee (No 2) (1982) VR p 103 and in Re Ermien 1903 2 Ch 156.

Notwithstanding the complexity and length of the proceedings and the importance to the parties, to allow counsel's fees in full would have been to lose sight of the distinction of taxation on a party/party basis and one on a solicitor/client basis.

However, in my opinion, to allow counsel's fees at scale would have resulted in the abrogation of my responsibility to exercise my discretion when considering these items in the bill.

It has always been accepted that in a suitably difficult case the taxing officer may allow a fee higher than the top of the scale. It has been the practice in such cases to allow the top of the scale plus 10%, 20%, 30%. In recent times some taxing officers have allowed more than 30%. However, in doing so one may lose sight of the basis upon which the taxation is to take place."
"exercised at all, or to have been exercised in a manner which is manifestly wrong: and where the question is one of amount only, will do so only in an extreme case."

This statement was adopted by Kitto, J in Australian Coal & Shale Employees Federation v The Commonwealth, (1953) 94 CLR 621 at 628, and this was referred to in Higgins v Nicol (No 2) above.

My view is that the conduct of the application made very considerable demands upon the skill and application of all three counsel involved for the defendants. In my opinion, there was every justification for the defendants engaging three counsel of the eminence and standing of those they did. The fees which they in fact charged were, as far as I can judge, not out of line with those generally charged by counsel of their skill and competence in matters of the importance of the proceedings. I see no reason to disagree with the approach of the taxing officer in increasing the fees of each counsel by the same percentage. He allowed different basic amounts in respect of each of their fees, thus reflecting the respective contribution which each made to the defendants' case. I can find no reason to disagree with his conclusion that the fees of each counsel should be allowed at the scale figure which he chose, increased by 25%.

Accordingly, there is, in my view, no reason to alter the allowance made by the taxing officer for counsel's fees.

Conclusion

For the foregoing reasons the plaintiffs' application should be dismissed with costs.

I certify that this and the preceding pages are a true copy of the reasons for judgment of his Honour Mr. Justice Waddell.

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<th><strong>PARTICULARS OF JUDGMENT</strong></th>
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<td><strong>COUNSEL FOR PLAINTIFF:</strong></td>
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<td><strong>COUNSEL FOR DEFENDANT:</strong></td>
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<td><strong>SOLICITORS FOR Defendant:</strong></td>
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</table>
Schedule 3—Costs allowable for work done and services performed
(rules 40.29, 40.41, 40.42, 40.43 and 40.44)

1A Application of this Schedule

1A.1 This Schedule, as amended by the Federal Court Amendment (Costs and Other Measures) Rules 2013, applies to work done or services performed on or after 1 January 2014.

1 Attendances

1.1 Attendances by a lawyer requiring the skill of a lawyer (including attendances in conference, by telephone, on counsel, appearing in court, instructing in court and travelling), for each unit of 6 minutes a sum in all circumstances not exceeding $58:
   (a) having regard to the lawyer's skill and experience; and
   (b) having regard to the complexity of the matter or the difficulty or novelty of the questions involved.

1.2 Where any attendance referred to in item 1.1 is capable of performance by a law graduate or articled clerk for each unit of 6 minutes: $22.

1.3 Attendances capable of performance by a clerk or paralegal—for each unit of 6 minutes: $11.

2 Preparing documents

2.1 All documents, whether in printed form or otherwise (but excluding correspondence)—for each 100 words: $52.

2.2 Correspondence (including letters, emails, text messages and instant messaging)—up to 50 words: $22.

2.3 Correspondence (including letters, emails, text messages and instant messaging)—up to 100 words: $42.

2.4 Correspondence (including letters, emails, text messages and instant messaging)—over 100 words: in accordance with item 2.1.

2.5 Bill of costs—at the discretion of the taxing officer.

3 Reading

3.1 All documents, whether in printed form or otherwise (but excluding correspondence falling within item 3.2 or 3.3): in accordance with item 1, or at the discretion of the taxing officer, having regard to the number of pages read.
Schedule 3 Costs allowable for work done and services performed

3.2 Correspondence (including letters, emails, text messages and instant messaging)—up to 50 words: $16.

3.3 Correspondence (including letters, emails, text messages and instant messaging)—up to 100 words: $32.

4 Delegation and supervision

4.1 Where it is appropriate for more than one lawyer to be involved in the conduct of the matter, allowance may be made for attendances to delegate or supervise: in accordance with item 1.

5 Research

5.1 Where it is appropriate to research a legal question of some complexity that is not procedural in nature: in accordance with item 1.

6 Electronic document management

6.1 Database creation, database administration (including establishing design and agreement of protocols), database design and implementation: in accordance with item 1.2.

6.2 Document preparation and document description (including necessary redaction and duplication), in compliance with the Federal Court Practice Note dealing with the use of technology in the management of discovery and conduct of litigation: in accordance with item 1, having regard to the complexity of the issues involved.

6.3 Imaging of documents to searchable format including rendering to PDF and scanning where necessary: in accordance with item 1.3.

6.4 Publishing including:
   (a) electronic exchange and discovery; and
   (b) write-to CD/CD ROM/USB or other agreed media: in accordance with item 1.3.

7 Masking

7.1 Masking documents:
   (a) if the taxing officer is satisfied that the masking required the skill of a lawyer—in accordance with item 1.1;
   (b) otherwise—in accordance with item 1.3.

8 Collation, pagination and indexing

8.1 Collation (including collation for the purposes of copying), pagination and indexing of documents for the purposes of discovery, inspection, briefs to counsel, instruction to expert witnesses, court books, appeal books, exhibits or annexures to court documents or similar (but excluding maintaining files)—in accordance with item 1.3, or at the discretion of the taxing officer, having regard
to the number of pages and the number of documents collated, paginated or
indexed

9 Copying

9.1 Copying documents: at the discretion of the taxing officer.

10 Personal service

10.1 Personal service, inclusive of all attempts (where required): $106.

11 Skill care and responsibility

11.1 An additional amount may be allowed, having regard to all the circumstances of
the case, including the following:
   (a) the complexity of the matter;
   (b) the difficulty or novelty of the questions involved in the matter;
   (c) the skill, specialised knowledge and responsibility involved and the time
      and labour expended by the lawyer;
   (d) the number and importance of the documents prepared and read, regardless
      of their length;
   (e) the amount or value of money or property involved;
   (f) research and consideration of questions of law and fact;
   (g) the general care and conduct of the lawyer, having regard to the lawyer’s
      instructions and all relevant circumstances;
   (h) the time within which the work was required to be done;
   (i) allowances otherwise made in accordance with this scale (including any
      allowances for attendances in accordance with item 1.1); and
   (j) any other relevant matter.

12 Where client not charged on a time costing basis

12.1 In matters where the lawyer has not charged the client on a time costing basis,
items 1 to 11 above do not apply and a fair and reasonable amount will be
allowed, having regard to:
   (a) the complexity of the matter;
   (b) the difficulty or novelty of the questions involved;
   (c) the skill, specialised knowledge and responsibility involved;
   (d) the work actually done by the lawyer;
   (e) the extent to which the work was reasonably necessary;
   (f) the period during which the work was done;
   (g) the time spent on performing the work;
   (h) the quality of the work;
   (i) the number and importance of the documents prepared and read, regardless
      of length;
   (j) the amount or value of money or property involved;
   (k) the terms of the costs agreement between the lawyer and client; and
Schedule 3 Costs allowable for work done and services performed

(I) any other relevant matter.

13 Corporations Act 2001—short form bills

13.1 Short form amount that may be claimed by a plaintiff on the making of a winding-up order or on the dismissal of such an application, up to and including entry and service of the order under section 470 of the Corporations Act 2001 and the obtaining of a certificate of taxation: $3,776.

Additional costs are allowable for any adjournment in which costs have been reserved by the Court in accordance with this scale.

14 Bankruptcy Act 1966—short form bills

14.1 Short form amount that may be claimed by an applicant on the making of a sequestration order: $2,426.

Additional costs are allowable for any adjournment for which costs have been reserved by the Court in accordance with this scale.

14.2 Short form amount that may be claimed by an applicant on the dismissal of a petition: $2,088.

Additional costs are allowable for any adjournment for which costs have been reserved by the Court, in accordance with this scale.

15 Migration Act 1958—short form bills

15.1 Short form amount, including costs and disbursements, that may be claimed by:
   (a) a respondent in a migration case on dismissal or discontinuance of the case: $2,178; or
   (b) a party in an application for leave to file a migration appeal or extension of time within which to file a migration appeal: $1,756; or
   (c) a party in a migration appeal case finalised before a final hearing: $4,098; or
   (d) a party in a migration appeal case finalised after a final hearing: $6,439.

16 Counsel's fees

16.1 An amount may be allowed for counsel's fees according to the circumstances of the case. That amount may be assessed by reference to the National Guide to Counsel Fees. The fees are to be claimed as a disbursement.

16.2 If a lawyer briefs another lawyer as counsel, the fees of the lawyer acting as counsel are to be assessed in accordance with item 16.1.

17 Witnesses' expenses

17.1 Any witness (other than a party or an expert retained in accordance with Practice Note CM 7) may be allowed an amount equal to:
(a) if the witness is paid by way of wages, any wages actually lost by reason of the witness’ attendance at court to give evidence; and
(b) if the witness is paid by way of fees, any fees actually lost by reason of the witness’ attendance at court to give evidence, less a deduction in relation to discretionary overheads, but not to exceed: $527 per day.

17.2 An expert may be allowed an amount equal to the expert’s actual fees for preparing to give evidence and of attending to give evidence.

18 Disbursements

18.1 All court fees and other fees and payments may be allowed in the amounts actually incurred.

19 Fees not here provided for

19.1 An amount may be allowed for work not otherwise contemplated by this Schedule.

20 Notes

20.1 Lawyer is defined in section 4 of the Federal Court of Australia Act 1976.

20.2 The rates specified at item 1.1 should not exceed the rates actually charged by the lawyer to the client. Accordingly, bills of costs should set out the hourly rate (or rates) actually charged by the lawyer.

20.3 The charge for preparing documents (item 2) is inclusive of typing, printing, posting, faxing and emailing, and any other administrative task relating to the preparation or transmission of a document, by whatever means. There is to be no charge for such administrative tasks.

20.4 There is no scale item for printing documents. Accordingly, litigants should not expect to recover the cost of this task.

20.5 The word count for correspondence in items 2.2, 2.3, 3.2 and 3.3 excludes any signature block, disclaimer or similar wording.

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2
The abbreviation key sets out abbreviations that may be used in the endnotes.
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<th>Item:</th>
<th>Federal Court Scale</th>
<th>QLD Supreme Court Scale</th>
<th>Difference</th>
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<tr>
<td>1.</td>
<td>Solicitor’s attendance</td>
<td>Item 1.1: $550.00/hour</td>
<td>Section 16(a): $322.40/hour</td>
<td>Based on the Costs Agreement but QLD Scale potentially up to 41% less</td>
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<td>2.</td>
<td>Law graduate attendance</td>
<td>Item 1.2: $220.00/hour</td>
<td>Section 16(b): $93.80/hour</td>
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<td>3.</td>
<td>Paralegal/Clerk attendance</td>
<td>Item 1.3: $110.00/hour</td>
<td>Section 16(b): $93.80/hour</td>
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<td>Drawing and producing</td>
<td>Item 2.1: $52.00/folio</td>
<td>$27.80/folio</td>
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<td>Short letter OUT</td>
<td>Item 2.2 (up to 50 words): $22.00</td>
<td>S17(1)(a) (up to 20 words): $16.20</td>
<td>Little difference apart from word count</td>
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<td>6.</td>
<td>Letter OUT (over 100 words)</td>
<td>Item 2.1: $52.00</td>
<td>S17(1)(c): $28.15</td>
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<td>7.</td>
<td>Short letter IN (up to 50 words)</td>
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<td>S17(2)(a) (up to 20 words): $16.20</td>
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<td>8.</td>
<td>Perusal of letters IN (up to 100 words)</td>
<td>Item 3.3: $32.00</td>
<td>S17(2)(b): $21.60</td>
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<td>9.</td>
<td>Perusal of letters IN (over 100 words)</td>
<td>Item 3.1 – Time basis up to $580.00 per hour</td>
<td>S17(2)(b)(ii): $21.60 for the first 100 and thereafter $10.80</td>
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<td>10. Examination of documents</td>
<td>Item 3.1 and Item 1 – up to $580.00 per hour</td>
<td>Section 9(a) by a solicitor: $79.45/quarter hour which is a total of $317.00 per hour</td>
<td>Based on the Costs Agreement but QLD Scale potentially up to 45% less</td>
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<td>11. Research of a legal question of some</td>
<td>Items 5.1, 4.1, 7.1(if involving skill of a Lawyer) and 8.1(Discretionary) up to</td>
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<td>Potentially the Supreme Court Scale significantly less by up to $588.00 per hour</td>
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<td>complexity not procedural in nature.</td>
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<td>12. Skill, care and responsibility</td>
<td>Item 11.1: Additional costs having regard to the circumstances of the case.</td>
<td>Section 1: Amount that is to be allowed for a solicitor’s care and conduct of a proceeding is the amount the registrar or a costs assessor considers reasonable</td>
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<td>relevant circumstances, guideline 1st October 2014 (0–15%)</td>
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