PARTIES:	TREVOR ROBERT BURSLEM
	v
	PATTI LOU ROBERTS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY
FILE NO:	7 of 1995
DELIVERED:	16 March 1995
HEARING DATES:	7 and 16 March 1995
JUDGMENT OF:	Kearney J

CATCHWORDS:

Costs - Certificate for costs - Whether Workers' Compensation Court has discretion to award costs on a scale other than that prescribed by the Rules -
Workers' Compensation Act (NT), s6B(1)
Workers' Compensation Tribunal Rules, rule 30.

Costs - Scales of costs - Workers Compensation Tribunal Rules (NT) - Prescribed scale of costs totally out of date - No attempt made to keep pace with inflation - Failure of scale to provide any real indemnity - Whether these are factors relevant to exercise of costs discretion.

Legal Practitioners - Misconduct, unfitness and discipline - Agreement with client as to costs for work in workers' compensation jurisdiction - Costs agreement based on Supreme Court scale - Fees charged substantially in excess of amount allowable on taxation in Workers' Compensation Court - Question of propriety - Whether properly referable to Law Society -

Re Veron; ex p. Law Society of New South Wales (1966) 84 WN (Pt1) (NSW) 136, referred to.

REPRESENTATION:

Counsel:

Appellant:	I.D. Nosworthy
Respondent:	A. Wyvill

Solicitors:

Appellant:	Elston & Gilchrist
Respondent:	Philip & Mitaros

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 7 of 1995

IN THE MATTER OF the Workers' Compensation Act

AND IN THE MATTER OF an appeal against a decision of the Workers Compensation Court

BETWEEN:

TREVOR ROBERT BURSLEM
Appellant

AND:

PATTI LOU ROBERTS
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 16 March 1995)

The appeal and cross-appeal

This is an appeal and cross-appeal from a decision of the Workers' Compensation Court at Darwin (herein "the Court") on 6 December 1994 in which the Court ordered:-

"Pursuant to Section 6B(1A) of the Workers' Compensation Act the costs which are payable to Patti Lou Roberts by Trevor George Burslem pursuant to:

(a) an agreement between the parties, recorded and dated 8 February 1989;

(b) the judgement of His Worship Mr McPherson SM delivered 21 June 1989; and

(c) the judgement of His Worship Mr McGregor SM delivered 3 August 1990;

be taxed at the rate of 75% of the Supreme Court scale applicable at the time each item of work was performed."

Section 6B(1A) of the Workers' Compensation Act (herein "the Act") is the crucial provision for the purposes of the appeal. It provides:-

"The Tribunal [that is, the Court] may make such orders as to costs, disbursements and witnesses' expenses as it thinks fit."

In his appeal the appellant relies on alternative grounds of appeal, as follows:-

(1) The learned Magistrate erred in law in finding that pursuant to s6B(1A) of the Workers' Compensation Act, the Court had a discretion to award costs to a party based on a scale of fees and charges different to the scale of fees and charges approved by the Chief Magistrate pursuant to the Rules made under Section 6F of the said Act.

The two propositions advanced in support of this ground are that:-

(a) the power in s6B(1A) of the Act relates to the discretion of the Court to award costs to a party, and not to the scale thereof; and

(b) in order for the scale of costs awarded to be altered, the alteration must be promulgated by the Chief Magistrate.

(2) In the alternative, if there is a discretion in the Court to alter the scale of costs awarded to a party from that approved by the Chief Magistrate, the learned Magistrate erred in law in finding that there was sufficient material before him to justify the exercise of that discretion.

The three propositions advanced in support of this alternative ground were that:-

(a) it is not a sufficient fact for the exercise of that discretion that the Workers' Compensation Scale of Costs in the Rules:

(i) was totally out of date, and that no attempt had been made to keep pace therein with inflation;

(ii) fail to provide any real indemnity to a successful party;

and

(b) the learned Magistrate failed to take into account the provisions of the Legal Practitioners Act, in dealing with the reason why the successful party paid more than scale costs as per the Rules to her own solicitors.

The respondent cross-appeals against the decision of 6 December, on the following 2 grounds:-

(1) The learned Magistrate erred in the exercise of his discretion by not awarding costs on the full Supreme Court scale.

(2) The learned Magistrate erred when he used the ratio that the Workers' Compensation Scale Costs bore to the Supreme Court scale applicable in 1978 [75%], to determine the costs payable by the appellant to the respondent.

The reasons for decision of 9 December

The application before the Court (Mr Trigg SM) was that the costs of the 3 matters in question - (a), (b) and (c) at pp1-2 - be taxed on the Supreme Court scale.

He considered that the effect of s6B(1A) of the Act (p2) was that "the Court has a wide discretion and may make whatever orders as to costs as is justified in the circumstances"; this construction of s6B(1A) is crucial to his decision.

His Worship referred to s6F(1) of the Act, and to r30 of the Workers' Compensation Tribunal Rules, made pursuant to s6F(1), which came into effect on 1 January 1978. Section 6F(1) provides, as far as relevant:-

> "(1) The Chief Magistrate of the Court may make Rules not inconsistent with this Act - - - for regulating and prescribing the award of costs - - - scales of such costs and taxation of such costs and for regulating and prescribing all matters and things incidental to or relating to - - - any such costs, - - - ."

Rule 30 is headed "Costs and Witness Fees" and provides, as far as relevant:-

> "1 Any costs allowed by the [Court] or directed by the [Court] to be paid by one party to another shall, in default of agreement between the parties as to the amount of such costs, be taxed by the Registrar upon the scale of costs set out in the Second Schedule.
>
> 2 Any party, having been awarded costs which he requires to be taxed by the Registrar, shall -
>
> (i) prepare a bill of costs, and file a copy of it with the Registrar;
>
> (ii) serve the party or parties ordered to pay costs with a copy or copies of the bill of costs; and
>
> (iii) obtain an appointment to tax with the Registrar and advise the party or parties ordered to pay costs of the time and place of the appointment.
>
> - - -
>
> 4(a) The Registrar may, on the taxation of a bill of costs, disallow in whole or in part fees, disbursements or charges that, in his opinion were incurred or increased -

(i) by a payment of unusually high fees to counsel or unusually high charges or expenses to witnesses or other persons;

(ii) improperly, unreasonably, negligently or unnecessarily; or

(iii) in any other unusual manner.

- - -

5 Such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses shall be allowed.

- - -

7(a) Where the amount of a fee or allowance is discretionary, the Registrar, in the exercise of his discretion, shall take into consideration -

(i) the other fees and allowances of the solicitor and counsel (if any) in respect of the work to which such a fee or allowance applies;

(ii) the nature and importance of the proceeding;

(iii) the amount involved;

(iv) the interest of the parties;

(v) the general conduct and costs of the proceeding; and

(vi) the other circumstances of the particular case.

(b) Notwithstanding any other provision of these Rules, where the Registrar is of the opinion that the amount that would otherwise be allowed in respect of an item in a bill of costs, being an amount calculated by reference to an item in the Second Schedule, is, in the circumstances of the particular case, inadequate having regard to the nature or amount of the work performed to which the item relates, the Registrar may allow such larger amount as he considers reasonable.

(c) For work and labour performed and not specifically provided for by these Rules but which, in the opinion of the Registrar, was necessarily and properly performed, the Registrar shall allow an amount which he, at his discretion, thinks is reasonable.

- - -

10(a) Subject to these Rules, the party whose bill of costs or charges is being taxed is entitled to have allowed by the taxing officer all disbursements that, in the opinion of the Registrar, have been properly incurred.

- - -

11(a) Subject to sub-rule 10(a) - - - the Registrar may, on the taxation of a bill of costs, allow such sums in respect of fees paid to counsel as he considers reasonable in the circumstances.

- - -

14 The amount of witnesses' expenses shall be at the same rates and subject to the same conditions as the witnesses' expenses that are from time to time provided for under Rules of Court made under section 86 of the Judiciary Act 1903-1976."

(emphasis mine)

His Worship continued:

> "The Second Schedule of the Rules sets out the scale of practitioner's costs. In the ordinary course of events, if a party were ordered to pay the costs of another party before the Workers' Compensation Court, then this scale of costs would apply to itemise the costs which may be charged against the opposite party under the order for costs."
> (emphasis mine)

I respectfully agree; see r30(1). Impliedly, his Worship must have considered that the matters he listed at p10 took the respondent's case out of "the ordinary course of events".

His Worship continued:-

> "Mr Wyvill argues, and I accept, that the Court has power to order costs in excess of the scale in the Second Schedule."

This re-states his Worship's conclusion on the point in issue; the view that the Court has the power referred to clearly stems from his Worship's construction of s6B(1A) of the Act.

His Worship noted that the application before him - that the costs of various workers' compensation proceedings be taxed on the Supreme Court scale - appeared to be novel. That in itself no doubt gave pause for thought. The only authority to which he had been referred was *Harris v Burrows* (1950) WCR 29 (NSW) where Lamond J said at pp30-31:-

> "- - - some question arose as to the power of the Commission to award costs, notwithstanding that the Act made provision for rules as to scales of costs. Accordingly in 1929 an amending Act (No.36 of 1929) provided that the Commission might -
>
> > "Make such order as to the payment of costs as it may think just, and assess the amount of such costs.""

I interpose to note that this provision is quite similar in effect to s6B(1A) of the Act (p2).

Lamond J continued at p31:-

> "Since this enactment no alteration has been made by the Commission to Rule 16. It must be assumed, therefore, that Rule 16(2) and (8) is not in conflict with what the Commission considers to be "just", in cases falling within such Rule.
>
> Inasmuch as under section 38(3) the Rules are made by the Commission itself, and may be altered by the Commission - - - it may well be that the Commission is not in the strict sense "bound" to apply such Rules, but they have formed the basis for the settlement of costs in the case to which it is intended they should apply for very many years and I can see no reason why in the present case they should not be applied.

> Accordingly I make an order for costs in favour of the applicant in accordance with Rule 16(8)." (emphasis mine)

It may be noted that the rationale his Honour gave for his conclusion that "it may well be" that the Commission was not "bound" to apply its own Costs Rules was that those Rules were made (and were alterable) by the Commission itself, under statutory power. In contrast, in the Act, the statutory power to make Costs Rules is vested not in the Court or its members, collectively or individually, but in the Chief Magistrate as such.

In the light of Lamond J's observations and what was implied by his comment "it may well be", his Worship clearly considered that the effect of s6B(1A) was that he was not bound by the costs scale in the Second Schedule to the Rules though as he said at p6 "in the ordinary course of events - - - this scale of costs would apply." Accordingly, he considered, that:-

> "- - - it is incumbent upon the Applicant worker [the respondent here] in the instant case to satisfy me that this is a proper matter for the Court to order that a scale of costs different to the Workers' Compensation scale [in the Rules] should apply."

His Worship then turned to that aspect, the consideration relevant to his exercise of the perceived discretionary power under s6B(1A). He noted that in support of her application the respondent relied on the following matters: that there had been no change in the scale of costs fixed by the Rules since they were introduced on 1 January 1978; that that scale involved an "approximately 3 times difference" when compared to the Supreme Court costs scale, so that the costs of the professional work in question would be allowed at a sum $22,896.70 more than permitted by the Second Schedule, if it were assessed on the Supreme Court costs scale, a large difference; and that under-

compensating a successful applicant for compensation in respect of her costs defeated the purpose of the Act. He observed that the employer (here the appellant) conceded that there was a wide discretion under s6B(1A) of the Act, and did not dispute the respondent's figures.

He noted that the respondent's arrangement with her former solicitors, who had acted for her in the relevant proceedings (a), (b) and (c) on pp1-2, was that she would pay them their professional fees calculated on the Supreme Court costs scale; however, he accepted that that "should not necessarily be the starting point", when considering whether a different scale to that set out in the Second Schedule should apply. His Worship considered that "a useful starting point" in that respect was "to compare the Workers' Compensation Costs Rules with the Supreme Court Costs Rules applicable around January of 1978." That is to say, he sought to compare the costs scales in the two jurisdictions, as they stood when the Court's Costs Rules came into force. He gave no reason for selecting Supreme Court costs as a reference point. As will be seen, he used the resulting ratio as it stood in 1978 as the guiding star, when making his decision as to the quantum of costs applicable to the proceedings which apparently commenced about 1986. He proceeded to carry out that exercise comparing the scale items in considerable detail, as far as practicable, and concluded:-

> "In my view, a comparison of the Workers Compensation Costs Rules and the Supreme Court Rules with the closest temporal connection (namely Rule 18 of 1978) suggests that in terms of hourly rates for practitioners time, [costs under] the Workers Compensation Rules [in 1978] were roughly 75% of the Supreme Court rates. There has been no increase at all in the Workers Compensation Scale of costs since they were first introduced in 1978. I am aware of no good reason (of policy or otherwise) why this occurred. I am not aware whether it was a deliberate and

> conscious decision by somebody (and who) not to increase (and why) or whether it was simply overlooked.
>
> In the end result, in my view, the Workers Compensation Scale of Costs are totally out of date and have made no attempt even to keep pace with inflation.
>
> I find that the Workers Compensation Scale of Costs fail to provide any real indemnity to a successful party and in the instant case are inequitable.
>
> It would, in my view, be unjust to insist that the successful party could recover against the other side no more than the scale laid down in 1978. These proceedings were commenced in 1986, and even by that time the scale was unaltered for 8 years.
>
> In my view, justice would be done between the parties if I ordered the employer to pay the Applicant's costs to be taxed at the rate of 75% of the Supreme Court scale applicable at the time each item of work was performed.
>
> Mr Brown [of counsel for the employer-appellant] has not suggested any prejudice to the employer if an order in excess of the scale was made." (emphasis mine)

His Worship then made the order now under appeal; see pp1-2.

Two threshold matters

(a) The order of 6 December, as to item (b) on p1

Mr Nosworthy first raised a threshold point as to the order insofar as it applied to item (b) on p1. It appeared that in fact an application had been made to the presiding member of the Court, Mr McPherson SM, that the costs of the proceedings leading to his judgment of 21 June 1989 should be allowed on the Supreme Court scale. His Worship had rejected that application and no appeal from his decision had been lodged; Mr Nosworthy submitted that it was now too late to appeal from that decision. Consequently, the application to Mr Trigg for the same order in respect of item (b) on p1

had clearly been made in error; there was no jurisdiction to entertain it, the question of those costs was res judicata, item (b) should be treated as having been included in Mr Trigg's costs order per incuriam, and the order in relation to that item had to be set aside.

Mr Wyvill of counsel for the respondent eventually conceded this point. He informed me that early at the hearing on 5 September 1994 the respondent had informed Mr Trigg that she no longer sought any order in respect of item (b) on p1, acknowledging that that matter was res judicata. Clearly, that oral variation to the application had been overlooked when the order was made on 9 December. Accordingly, the appeal must succeed in relation to item (b) on p1 on the ground that his Worship lacked jurisdiction to deal with that matter. Accordingly, the order of 6 December in relation to item (b) on p1 is quashed and set aside.

(b) The order of 6 December, as to item (c) on p2

Mr Nosworthy also raised what appeared to be a similar point in relation to item (c) on p2. In his judgment, Mr McGregor SM had ruled that the respondent was to have her costs of the proceedings, up to the time when the only matter remaining in contention between the parties was her claim for the cost of alterations under s11(2A) of the Act. Mr Nosworthy submitted that those costs in favour of the respondent were clearly intended by his Worship to be assessed in accordance with the Second Schedule, and (erroneously, as it turned out) that there had been no appeal against that decision. I

note that what Mr McGregor said about costs, at p13 of his reasons for decision of 3 August 1990, was simply:-

> "As to costs, I am of the view that the worker should not have costs occasioned by the application [under s11(2A)] for the alteration, but otherwise should have the costs of the proceedings."

If that was all that had occurred, it would appear that Mr Nosworthy's submission was essentially that the question of costs as to item (c) was also res judicata.

Mr Wyvill informed me, however, that Mr Hiley QC of counsel for the respondent before Mr McGregor, had submitted to his Worship at transcript pp380-3 on 25 May 1989 that the costs of the application should be awarded on the Supreme Court scale. I note that Mr Hiley there relied, as does Mr Wyvill, on s6B(1A) of the Act to found his submission that the Court had jurisdiction to order costs on that basis. He submitted in support as follows: the complexity and size of the case warranted an award for costs on the Supreme Court scale; his Worship should direct the Registrar as to the scale he should apply, to overcome the effect of r30(1); that Rule could not fetter the statutory power under s6B(1A); it was to be noted that the Work Health Act applied the Supreme Court costs scale; since the respondent was paying her solicitors on the Supreme Court scale, the employer should not be allowed a "windfall" at her expense, by paying her less; and the Second Schedule rate was $30 an hour while the Supreme Court scale was a minimum of $110 per hour.

It turned out that Mr Nosworthy was wrong in saying there had been no appeal from the judgment of Mr McGregor. Mr Wyvill referred to a Notice of Appeal of 31 August 1990, instituting proceedings no. 519 of 1990, by which the respondent

appealed against Mr McGregor's judgment. That appeal does not appear to have been prosecuted; it presently lies dormant. However, in par6 of that Notice of Appeal the respondent contends:-

> "6. His Worship erred in law in failing to make any determination in response to the Appellant's [here the respondent's] submission that costs awarded in favour of the Appellant [here the respondent] should be awarded at the Supreme Court Scale."

That is, the respondent's contention is that Mr McGregor, in his brief reasons at p12, failed to rule upon the issue raised by Mr Hiley Q.C. that costs should be assessed on the Supreme Court costs scale, and left that issue undecided. Amongst the orders sought by the respondent in that appeal is Order no.4, viz:-

> "4. That the respondent [here the appellant] pay the Appellant's [here, the respondent's] costs and disbursements of the whole of the proceedings before the Workers' Compensation Court at the Supreme Court Scale."

That is to say, the relief sought from this Court in those proceedings in 1990 is identical with the relief sought in the application before Mr Trigg whose decision is under appeal in these proceedings, as regards item (c) on p2.

Mr Wyvill first objected to the point raised by Mr Nosworthy on item (c) being entertained; he submitted that it had not been taken before Mr Trigg, had not been properly raised in the Notice of Appeal and leave to amend should not now be given to enable it to be raised. I ruled against that submission and granted leave to the extent necessary, to enable the point to be raised and argued. I should say that the reason for this contretemps in the proceedings before Mr Trigg, probably stemmed from several changes in solicitors by the respondent.

This led to an application by Mr Wyvill to have the issue in par6 of proceedings 519 of 1990 heard with this appeal. This was resisted by Mr Nosworthy, unless the balance of the relief sought by the respondent in proceedings 519 of 1990 was now withdrawn. Mr Wyvill accepted that it would be an abuse of process for both the issue in par6 of proceedings no. 519 of 1990 and the issue raised as to Mr Trigg's order on item (c) on p2 in these proceedings to remain alive in different proceedings. He informed me that the respondent would consent to a stay of proceedings on the issue raised in par6 of the Notice of Appeal in proceedings 519 of 1990, if Mr Trigg's decision of 6 December were upheld; but if that decision were held to be a nullity, the respondent wished to have the issue in par6 dealt with when that appeal was heard. Mr Nosworthy said that this was unfair; he submitted that the respondent should now be made to elect which proceedings to pursue. I ruled against that submission, and accepted Mr Wyvill's last mentioned proporal.

In the course of argument later, Mr Wyvill advanced the following submissions relevant to this aspect. Mr Trigg had jurisdiction under s6B(1A) to deal with the application in respect of item (c) at p2. The then (and still) pending appeal in proceedings 519 of 1990 did not go to Mr Trigg's jurisdiction to hear that application, but was relevant to the separate question whether the proceedings before Mr Trigg constituted an abuse of process. The appellant had not taken that point before Mr Trigg, and should now be treated as having waived it. Alternatively, if the proceedings before Mr Trigg amounted to an abuse of process, the respondent's proposal (see p14) cured it. Mr McGregor plainly had not adjudicated on the issue raised before Mr Trigg of the

appropriate scale, even though it had been raised before him. An objection by the appellant to the decision of 6 December on item (c), based on "res judicata", should have been pleaded, and did not go to jurisdiction.

I will rule on this matter at this point, in terms of the submissions set out above.

It is clear, in the light of what transpired before Mr McGregor, and of the terms of the pending appeal from his decision on the costs aspect, that the respondent should not have applied to Mr Trigg for the relief sought in item (c) on p2. Had the position concerning Mr McGregor's decision of 3 August 1990 and the relief sought in the pending appeal therefrom been made known to Mr Trigg, his Worship should have declined to entertain the application in relation to item (c) on p2, since it involved an issue which was then pending in this Court on appeal. It was an abuse of process in the circumstances for the respondent to have made the application. It cannot be treated as having been waived. The respondent cannot be permitted to retain the decision which is the fruits of proceedings, his institution of which were an abuse of the process of the Court. This Court has inherent jurisdiction to correct such an abuse of the process of the Court. I consider that correction would best be made by the following order. The appeal against the order made on 6 December as to item (c) on p2 is allowed, and the order quashed and set aside; if the matter rested only on an abuse of process, the proceedings in the Court by way of an application in respect of item (c) on p2 should be permanently stayed. However, the ultimate disposition is affected by the outcome of the appeal on the merits, to which I now turn.

The appellant's submissions

Mr Nosworthy submitted that his Worship had no power to make the order of 6 December; second, if he had that power, he had wrongly exercised it in making the order at pp1-2.

Mr Nosworthy conveniently grouped his submissions under various headings. I have not attempted to deal with them all.

He submitted that s6F of the Act constituted a code for the determination of the issue of costs before the Court, and accordingly the decision by Mr Trigg, which went beyond that code, was made without jurisdiction. He referred to *Churcher v Edwardstown Carpets (Reg)* (1992) 60 SASR 503, but that case turned on the construction of certain statutory provisions. *Howard v Graves* (1858) 52 LT 858 bears some similarities to the present case, but again turns on the construction of certain statutory provisions relating to the power to order costs.

He submitted that his Worship was obliged to use the costs machinery provided by the Rules. He referred to *Pryor v City Offices Company* (1883) 10 QB 504, which concerns the exercise of power by a Recorder; but again that case turns on the interpretation of a statutory provision.

He submitted that Mr Trigg lacked power to make the order at pp1-2, in light of the power as to costs vested in the Chief Magistrate under s6F(1) of the Act. I accept that Mr Trigg's powers are limited by the provisions of the Workers' Compensation Act; see *Smith v Smith* [1925] 2 KB 145. The question, however, is as to what those powers are, a matter turning on the interpretation of the provisions of Act.

I accept that his Worship could not give himself jurisdiction by wrongly construing the Act; see *R v Hickman; ex p. Fox* (1945) 70 CLR 598, per Latham CJ at p606.

Mr Nosworthy noted that in this case the respondent had entered into a costs agreement with her former solicitors whereby she agreed to pay their costs on the Supreme Court scale. He conceded that it was not clear whether his Worship had taken this into account, in making his order, but submitted that it should not have formed any part of his consideration. I do not think that it did. He submitted that in relation thereto, his Worship had not taken into account the provisions of s130 of the Legal Practitioners Act which provides for reduction of the amount of costs agreed between solicitor and client where it is not "fair and reasonable". Since his Worship did not treat the costs agreement as relevant, I consider he did not have to consider the effect of s130.

The respondent's submissions

Mr Wyvill's primary submission was that his Worship had correctly interpreted s6B(1A) of the Act. In support he relied on 6 propositions.

(1) This was an appeal on a question of law only; to succeed, the appellant had to show an error of law. I accept that.

(2) Section 6B(1A) of the Act on its proper construction vests in the Court a general discretion as to costs, fettered only by the rule that it must be exercised judicially. This is clearly the crucial submission.

(3) The purpose of a discretionary award of costs is to ensure that a successful party is properly indemnified for the costs he has incurred, and that is clearly what his Worship sought to do by his order in this case. I accept that, as a general proposition.

(4) It is only if a matter is unconnected with the litigation, that it is improper to take it into account when exercising the discretion.

(5) The Costs Rules cannot fetter the exercise of a statutory discretion under s6B(1A). I accept that; see *Clarke v Cameron* (1880) 6 VLR 449 and *Hartmont v Foster* (1881) 8 QB 82 at pp85-6. I note that the prior question is whether s6B(1A) imports the discretion contended for.

(6) It was proper for his Worship to depart from the Second Schedule scale, because it would have been unjust to have applied it, since to do so would not have given the successful party, the respondent, a proper indemnity for her costs.

Mr Wyvill relied on many matters in seeking to establish these general propositions.

He noted the different result to that he contended for, in common form provisions such as O65 R1 of the (former) Rules of the Supreme Court of Victoria, and s24(1) of the Supreme Court Act 1986 (Vic), which made it clear that the Court's discretionary power as to costs was subject to any express provision in "the Rules"; and the similarity of wording in that respect, of r63.03(1) of the Supreme Court Rules, which itself has statutory force. He submitted that, in contrast, the discretionary power in s6B(1A) is not expressed to be subject to s6F(1), or to the Rules made thereunder.

He referred to s293 of the Local and District Criminal Courts Act (S.A.) and the commentary thereon in Hannan: 'Local Court Practice'. However, I note that the costs dealt with in s263 are those "not herein otherwise provided for", which means those not otherwise provided for by the Rules.

Mr Wyvill also relied on what Lamond J had said in *Harris v Burrows* (supra). He noted the provisions of R30(7)(b) - see p5 - as indicating a power in the Registrar to allow a larger amount for items than that in the Second Schedule where in the circumstances of the particular case he considered the Schedule amount to be "inadequate".

He referred to authorities in Western Australia: however, they have to be understood against the quite different way in which costs are determined in Western Australia and they turn upon O66 R12(1) of the Rules of the Supreme Court of Western Australia allowing for a special order by which increased amounts of costs beyond the scale may be awarded if "unusual complexity or importance of the case" or "any other good or sufficient reason" is shown. There the Rules scale is used as a starting point.

He submitted that the matters which his Worship had taken into account (see p10) were all matters which were proper to have been taken into account in the exercise of the discretion under s6B(1A).

Mr Wyvill pressed the cross-appeal only should it be found that his Worship had discretionary power under s6B(1A); in that event the submission was that he had wrongly exercised his discretion, as indicated at (1) and (2) on p3. He relied in that respect on the matters put in the submission to Mr McGregor SM by Mr Hiley; see p12.

Conclusions

At the root of this costs litigation is the unexplained fact that the costs in the Second Schedule, which came into force on 1 January 1978, have never been adjusted since. The whole rationale for the existence of costs provisions such as this is to provide an indemnity to a successful party for his costs. Undoubtedly, there should have been increases in the Schedule amounts over time, to accord with this raison d'etre. The result of a lack of increases over time is that there is great force in Mr Trigg's criticism at p10 to the effect that the scale now is "totally out of date" no attempt having been made "even to keep pace with inflation", with the result that it now does not provide "any real indemnity" to a successful party; and since in the present case the application of the scale would accordingly yield a result which is "inequitable", it would be "unjust" to restrict the respondent to that scale.

Nevertheless, the question remains one of the proper construction of s6B(1A), read in the light, in particular, of s6F(1). I consider that the better view is that

propositions (a) and (b) on p2 are correct. The Act contemplates that a scale of costs for proceedings under the Act will be fixed by the Chief Magistrate under s6F(1), and the power in s6B(1A) does not extend to applying a different scale of costs to that so fixed. The Rules contemplate that above-scale amounts may be awarded by the Registrar in cases which fall within R30(7)(b), while R30(7)(c) provides for "reasonable" amounts in cases "not specifically provided for" in the Schedule.

This construction has the merit of keeping the Court in line with the general approach to costs in other Courts.

It follows that I uphold ground of appeal (1) on p2. It is therefore unnecessary to deal with the alternative ground of appeal (2) on p2; if it were necessary to do so, I would accept proposition (a) on p3 and I would consider that his Worship erred in the exercise of his discretion by taking into account the factors he mentions at p10.

It also follows that the cross-appeal, which was not pressed in the light of this finding, must be dismissed, though ground (2) on p3 is made out.

A separate matter which should be mentioned is the basis of the costs paid by the respondent to her former solicitors, referred to by his Worship (see p9) and during argument. Section 129(2) of the Legal Practitioners Act permits a legal practitioner to agree with his client on the amount of costs for the professional work he is to undertake for the client. Theirs is a fiduciary relationship; accordingly such an agreement is enforceable only if it is just, fair and reasonable in the circumstances. See generally *Clare v Joseph* [1907] 2 KB 369 and *Weiss v Barker Gosling* (1993) 16 Fam

L.R. 728. It must also meet the requirements of s129(3) and (4). This Court may scrutinize such agreements as part of its general disciplinary function in relation to legal practitioners, to ensure that solicitors do not charge exorbitant fees. See generally *Tarry v Pryce (No.2)* (1987) 88 FLR 270 at p272; *Burgundy Royale Investments Pty Ltd (Receivers and Managers Appointed (In liq)) v Westpac Banking Corporation* (1992) 37 FCR 492 at pp496-9; and *McInnes v Twigg* (1992) 16 Fam LR 185 at pp192-8; and the authorities there cited. In general, a solicitor's fees for legal work in a particular Court must be reasonable, a matter in the assessment of which existing cost scales are usually taken into account. That is one reason why costs scales need always to be kept up-to-date. In certain circumstances the charging of fees substantially in excess of those which would be allowed on taxation may amount to professional misconduct; see s45(2)(e) of the Legal Practitioners Act and *Re Veron; ex p. Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136 at p144. Here, the suggestion that a firm of solicitors entered into a costs agreement with a client based on the Supreme Court scale of costs to carry out work in the Workers' Compensation Court is sufficiently unusual, on the face of it, to warrant the question of its propriety in the circumstances being referred to the Law Society for consideration; this I now do, without intending any reflection on the firm involved.

Orders

(1) The appeal against the orders made by the Court on 6 December 1994 is allowed; the orders are quashed and set aside.

(2) In lieu thereof it is ordered that the costs which are payable to the respondent by the appellant, pursuant to an agreement between them recorded and dated 8 February 1989, be taxed in accordance with the Workers' Compensation Tribunal Rules.

(3) The cross-appeal is dismissed.

I will hear the parties as to costs.