JURISDICTION	:	FAMILY COURT OF WESTERN AUSTRALIA
ACT	:	FAMILY LAW ACT 1975
LOCATION	:	PERTH
CITATION	:	PRUNSTER and ROBERTS [2012] FCWA 26
CORAM	:	MARTIN J
HEARD	:	15 NOVEMBER 2010
DELIVERED	:	16 MARCH 2012
PUBLISHED	:	19 MARCH 2012
FILE NO/S	:	PTW 1897 of 2000
BETWEEN	:	SALLY MARIE PRUNSTER Applicant AND RUSSELL WALTER ROBERTS Respondent

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Catchwords:

Family Law - Costs - Very lengthy delay in filing itemised bill of costs - Application for extension of time

Legislation:

Family Law Rules 2004, rr 1.04, 1.07(c)(d), 1.14, 6.22, 6.23, 6.24, 6.25, 6.26, 6.27, 6.29, 6.30, 6.31 & 6.32

Category: Not Reportable

Representation:

Counsel:

Applicant	:	Ms M Coulson
Respondent	:	Mr F Castiglione

Solicitors:

Applicant	:	Summers Legal
Respondent	:	Stewart Forbes

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

AON Risk Services Australia Ltd v ANU [2009] HCA 27
Clivery & Conway [2007] FamCA 1435
Gallo v Dawson (1990) 93 ALR 479
Lewis Blyth & Hooper v Dennis [2007] WASC 177
McMahon and McMahon (1976) FLC 90-038; 1 Fam LR 11,260 at FLC 75,144; Fam LR 11,261
Olsthoorn v Collins [2003] FCWA 93
OP v HM (2002) FLC 98-017
Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146
Tormsen v Tormsen (1993) FLC 92-392; 18 Fam LR 232 at FLC 80,017; Fam LR 234
Wensinger & Summers Partners [2003] FCWA 1

1 The issue for determination was the wife's application pursuant to Rule 1.14 of the Family Law Rules 2004 ("the Rules"), to extend the time in which she has to serve an itemised cost account on the husband, in accordance with Rule 6.22 of Part 6.6 of Schedule 6 of the Rules, pursuant to an order for costs made in her favour on 3 July 2003.

2 The wife filed her application for an extension of time on 6 August 2010 (yet it is stamped as being received on 17 June 2010) together with two affidavits in support. The husband responded by affidavit in October 2010. The wife filed written submissions on 5 November and the husband filed written submissions on 11 November 2010.

3 The wife claimed total costs of $1,259,765.03.

4 The husband opposed the wife's application, and I believe did not file a response seeking any other orders.

5 I apologise to the parties for adding to the lengthy delay in finalising this matter, which was partly for health reasons, especially since, although a very substantial sum of money is involved, the issue to be determined is really quite narrow, and, as it turned out, did not require a detailed examination of the full history of the extraordinarily extensive proceedings.

6 On 16 March 2012, I made the following orders, and now publish reasons for decision.

1. The time in which the Applicant has to serve an itemised cost account, be extended to 1 May 2012.

2. The itemised costs account is to state, and total, the costs set out in relation to each issue.

3. Upon service of the Applicant's itemised costs account, the Respondent's time for filing of a Notice Disputing Itemised Costs account be extended to 1 July 2012, subject to further order.

4. In the event the Respondent files and serves a Form 2 application seeking the extension of time to file an itemised costs account, with supporting affidavit, it be listed before Justice Martin as soon as practicable, but no less than 21 days after filing.

5. By no later than 3 days prior to the hearing, the Applicant have leave to file and serve a Form 2A response with supporting affidavit, in response to the Respondent's documents.

6. The Respondent have leave to file and serve a Form 2 application for costs, in relation to the application filed 6 August 2010.

7. Costs in relation to the Form 2 application filed 6 August 2010 be and are hereby reserved.

8. There be liberty granted to both parties to apply for further directions.

Background

7 I intend to only briefly refer to the extensive background, which is set out in detail in previous judgments.

8 The husband was born on 5 July 1933 and is now 78 years old.

9 The wife was born on 16 October 1955 and is now 56 years old.

10 The parties married on 28 September 1994, having commenced cohabitation in the early 1990's. They separated in about March 2000 and were divorced in May 2002.

11 There are two children of the marriage, Russell Wyatt Roberts born on 25 June 1995 (now 16 years old), and Montana Cubie Jewell Roberts born on 8 November 1996 (now 15 years old). Both children have been diagnosed with severe autism and speech difficulties.

12 Proceedings were commenced in this court on 15 March 2000 by the husband.

13 As the wife correctly describes it, the proceedings were "intricate, complex and drawn-out".

14 The position was complicated by the fact that there were also several appeals filed.

15 The substantive trial in relation to both children's and financial issues, proceeded before the, then, Justice Barlow, and extended over some 29 sitting days, commencing on 21 October 2002.

16 His Honour delivered judgment in relation to the substantive issues on 27 February 2003, and, on 3 July 2003, in relation to costs. Both parties appealed His Honour's decisions.

17 The husband was unsuccessful in his appeal in relation to costs and contraventions, with his application being dismissed by the Full Court of the Family Court of Australia on 3 December 2003.

18 The wife's appeal in relation to parenting orders was successful, the Full Court delivering judgment on 22 December 2003, and on 5 May 2004, the Full Court also found in her favour on the property settlement appeal, awarding her a total sum of $2,374,000, being an additional $974,000 on appeal.

19 The orders as to costs made by the trial judge were:

1. The husband pay the wife's costs and disbursements of the proceedings and the trial up to and including 27 February 2003, in relation to the following issues on a party/party basis, such costs to be taxed if not agreed:

   (a) The nature of the children's disorders and the appropriate treatment for such disorders;

   (b) The husband's concerns about the manner in which the wife performed her parental obligations.

2. The husband pay the wife's costs and disbursements of the proceedings and the trial up to and including 27 February 2003, in relation to the following issues on an indemnity basis, such costs to be taxed if not agreed:

   (a) The nature and extent of his control over the Russell Roberts Family Trust 'the Trust';

   (b) The nature and extent of his control over other entities in which he has an interest (other than Channybearup Wines Pty Ltd) and in particular over R W Roberts Pty Ltd and the value of such interests;

   (c) The date upon which the Deed of Variation of the Trust Deed, pursuant to which the appointors and trustee of the Trust were varied, was executed;

   (d) The date on which the husband and wife commenced cohabitation.

3. The wife pay the second and third respondents' costs and disbursements of the proceedings, such costs to be taxed if not agreed.

4. In assessing the costs to be paid by the husband pursuant to these orders no allowance be made for any additional costs incurred by the wife as a result of her changing solicitors.

20 At para 65 of his judgment, His Honour said:

65. I appreciate that the effect of making orders for costs in relation to particular issues, as distinct from an order covering the whole of the proceedings, is to make the assessment of those costs by the parties and/or the taxation of them a difficult exercise. However in the particular circumstances of this case I have concluded, that there is no alternative which would do justice to the parties in relation to costs.

21 The costs in relation to the appeals are also outstanding, and the subject of this application.

22 The wife at various stages of the main proceedings instructed different solicitors:

- Andrew Davies of Holden Barlow (March 2000 – July 2000) and then of O'Sullivan Davies (July 2000 – February 2001)
- Paula Wilkinson of Kim Wilson & Co (February 2001 – April 2002)
- Nan Jenour of Holden Barlow (April 2002 – May 2005)

23 The wife was also represented by various counsel, namely Mr Walters QC (as he then was), Ms Crisford (as she then was), Mr Hooper, Mr Wilson SC and Mr Dowding SC.

24 The husband, who instructed Messrs Paterson & Dowding, briefed Mr Hedges as counsel for the substantive proceedings, subsequently instructing Sicard and Crisp, I believe between 2003 and 2005, and, since then, his present solicitor.

The Legal Background

25 Rule 1.14 of the Family Law Rules provides as follows:-

(1) A party may apply to the court to shorten or extend a time that is fixed under these Rules or by a procedural order.

(2) A party may make an application under subrule (1) for an order extending a time to be made even though the time fixed by the rule or order has passed.

(3) A party who makes an application under subrule (1) for an extension of time may be ordered to pay any other party's costs in relation to the application.

26 Schedule 6 of the Rules regulates party/party costs for applications not covered by Chapter 19 of the Rules, and charges for lawyers in family law cases that commenced before 1 July 2008.

27 Rule 6.22, and following of Schedule 6 of the Rules provides:

(1) A person entitled to costs must serve an itemised costs account on the person liable to pay the costs within 28 days after:

   (a) for lawyer and client costs – receiving a request for an itemised costs account; or

   (b) for party and party costs – the end of the case.

Note A person entitled to costs may serve an itemised costs account even if the person liable to pay the costs has not requested it.

(2) For party and party costs, the person entitled to costs must serve a costs notice at the same time as the itemised costs account is served under subclause (1).

6.23 Lawyer's itemised costs account

(1) An itemised costs account (the ***account***) must specify each item of costs and expense claimed.

(2) Each item specified in the account must be numbered and described in sufficient detail to enable the account to be assessed.

(3) The account must set out, in columns across the page, the following information:

(a) in relation to each item for which costs are payable:

(i) the date when the item occurred;

(ii) a description of the item, including whether the work was done by a lawyer or an employee or agent of a lawyer;

(iii) the amount payable for the item;

(b) at the end of the column setting out the amount payable -- the total amount payable for the items.

(4) For each expense claimed, the account must include:

(a) the date when the expense was incurred;

(b) the name of the person to whom the expense was paid;

(c) the nature of the expense; and

(d) the amount paid.

Rule 6.24 provides:- Disputing itemised costs account

A person served with an itemised costs account may dispute it by serving on the person entitled to the costs a Notice Disputing Itemised Costs Account within 28 days after the account was served.

Note 1 A person may apply for an extension of time to dispute an account (see rule 1.14).

Note 2 If no Notice Disputing Itemised Costs Account is received and the costs are not paid, the person entitled to the costs may seek a costs assessment order (see clause 6.38).

Note 3 If the parties agree on the amount to be paid for costs, they may file a draft consent order (see Part 10.4 for consent orders).

Rule 6.25 provides:- Assessment of disputed costs

(1) This clause applies if a Notice Disputing Itemised Costs Account has been served under clause 6.24.

(2) The parties to a dispute in relation to costs must make a reasonable and genuine attempt to resolve the dispute.

(3) If the parties are unable to resolve the dispute, either party may ask the court to determine the dispute by filing in the filing registry of the court where the case was conducted the itemised costs account and the Notice Disputing Itemised Costs Account no later than 42 days after the Notice Disputing Itemised Costs Account was served.

(4) The court may take into account a failure to comply with subclause (2) when considering any order for costs.

Note 1 A party may apply for an extension of the time mentioned in subclause (3) (see rule 1.14).

Note 2 A person filing a document must serve the document on each person to be served (see subrule 7.04 (4)).

6.26 Amendment of itemised costs account and Notice Disputing Itemised Costs Account

A party may amend an itemised costs account or a Notice Disputing Itemised Costs Account by filing the amended document with the amendments clearly marked:

(a) at least 14 days before the date fixed for the assessment hearing; or

(b) after that time with the consent of the other party.

Note 1 A party amending an itemised costs account or Notice Disputing Itemised Costs Account may apply for an extension of the time mentioned in paragraph (a) (see rule 1.14).

Note 2 The only items that may be raised at an assessment hearing are those items included in the itemised costs account or Notice Disputing Itemised Costs Account (see subclause 6.33 (2)).

6.27 Fixing date for first court event

(1) On the filing of an itemised costs account and a Notice Disputing Itemised Costs Account under subclause 6.25 (3), the Registrar must fix a date for:

(a) a settlement conference (see clause 6.29);

(b) a preliminary assessment (see clause 6.30); or

(c) an assessment hearing (see clause 6.33).

(2) The date fixed must be at least 21 days after the Notice Disputing Itemised Costs Account is filed.

6.29 Settlement conference

At a settlement conference for an itemised costs account, the Registrar:

(a) must:

(i) give the parties an opportunity to agree about the amount for which a costs assessment order should be made; or

(ii) identify the issues in dispute; and

(b) must make procedural orders for the future conduct of the assessment process.

6.30 Preliminary assessment

(1) At a preliminary assessment of an itemised costs account, the Registrar must, in the absence of the parties, calculate the amount (the ***preliminary assessment amount***) for which, if the costs were to be assessed, the costs assessment order would be likely to be made.

(2) The Registrar must give each party written notice of the preliminary assessment amount.

6.31 Objection to preliminary assessment amount

(1) A party may object to the preliminary assessment amount by:

(a) giving written notice of the objection to the Registrar and the other party; and

(b) paying into court a sum equal to 5% of the total amount claimed in the itemised costs account as

security for the cost of any assessment of the account;

within 21 days after receiving written notice of the preliminary assessment amount.

(2) On receiving a notice and security, the Registrar must fix a date for an assessment hearing for the itemised costs account.

(3) The party objecting may be ordered to pay the other party's costs of the assessment from the date of giving notice under paragraph (1)(a) unless the itemised costs account is assessed with a variation in the objecting party's favour of at least 20% of the preliminary assessment amount.

Note The court may order that a party is not required to pay security under paragraph (1) (b).

6.32 If no objection to preliminary assessment

If:

(a) a Registrar does not receive a notice of objection under paragraph 6.31 (1) (a); and

(b) an amount as security for costs is not paid under paragraph 6.31 (1) (b);

the Registrar may make a costs assessment order for the amount of the preliminary assessment amount.

28 Therefore, in brief summary, the process required is:

(i) The applicant is to provide a properly itemised account within 28 days;

(ii) The respondent is to itemise objections to the account within a further 28 days; and

(iii) The matter may then be listed to a settlement conference, preliminary assessment or an assessment hearing.

29 If the preliminary assessment is objected to, then an assessment hearing may be required about disputed items.

30 The wife, in her written submissions, referred to the case of *OP v HM* (2002) FLC 98-017 at paragraph 19, where the Full Court of the Family Court of Australia said:

19. The principles to be applied in determining an application for an extension of time are fairly well settled. Whilst there is a broad discretion, the fundamental issue is whether an extension of time will enable the court to do justice between the parties. This is normally shown by the applicant demonstrating that there are adequate reasons which explain the delay, that there is a substantial issue to be raised on the hearing of the application, and that no hardship or injustice will be caused to the respondent which cannot be compensated by orders as to costs or otherwise (see *McMahon and McMahon* (1976) FLC 90-038; 1 Fam LR 11.260 at FLC 75,144; Fam LR 11,261, and *Tormsen v Tormsen* (1993) FLC 92-392; 18 Fam LR 232 at FLC 80,017; Fam LR 234).

31 The factors referred to in the authorities listed should not be seen as fettering the broad discretion but rather, as the Full Court said, as matters which are "normally shown" by a successful application for an extension of time.

32 Reference was made by counsel for the wife to the decision of the High Court of Australia, in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 per Dawson, Gaudron and McHugh JJ at 154 said:

> "...Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

33 But, as pointed out by counsel for the respondent, this case has largely ceased to be of authority (*AON Risk Services Australia Ltd v ANU* [2009] HCA 27).

34 Rule 1.04 of the Rules, consistently with that aim, provides that the main purpose of the Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the Court that is reasonable in the circumstances of the case.

35 In *Gallo v Dawson* (1990) 93 ALR 479 at 480-1, McHugh J made it clear that the object of a power to extend time is to ensure that Rules which fix times do not themselves become the objects of injustice.

36 In *Clivery & Conway* [2007] FamCA 1435 the Full Court of the Family Court of Australia (May, Thackray and O'Reilly JJ) said at para 14:

> The principles emerging from *Gallo v Dawson* may be summarised as follows:
>
> - The grant of an extension of time is not automatic.
> - The object is to ensure that Rules which fix times do not become instruments of injustice.
> - Since the discretion to extend the time is given for the sole purpose of enabling the Court to do justice between the parties, the discretion can only be exercised upon proof that strict compliance with the Rules will work an injustice upon the applicant.
> - When determining whether the Rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time.
> - When considering an application for extension of time in which to file an appeal or an application, it is necessary also to consider the prospects of success of that appeal or application.

37 While these principles are broadly relevant, it is undoubtedly the case that the issues in the present case are substantially different. In *OP v HM* (supra) the issue was whether time should be extended by six years to permit the filing an application for a declaration under the Child Support Assessment Act (1989) challenging the applicant's parentage of a child. In *Queensland v JL Holdings Pty Ltd* (supra), the issue was whether a party should have been allowed to amend its defence, which could have led to the vacation of the impending date of a lengthy trial. In *Gallo v Dawson* (supra) the issue was whether leave should be granted to extend the time for filing an appeal brought 16 months out of time, when the appeal appeared to have no chance of success. In *Clivery and Conway* (supra), the issue was whether the applicant could have leave to file an application for security of costs in relation to an appeal filed out of time.

38 In the present case, the wife has a very substantial entitlement to costs, which was upheld on appeal. It would appear her entitlement must be several hundred thousand dollars.

39 A more similar factual background was the first decision of Barlow J in *Olsthoorn v Collins* [2003] FCWA 93, where the Court accepted that the delay in filing a bill by the wife in relation to costs to which she was entitled pursuant to an order of the Full Court may have caused the husband inconvenience, but not necessarily prejudice or hardship. I believe the wife was there to receive half her costs of trial. Despite financial prejudice to the wife, the court was not satisfied that there was any adequate explanation provided by the wife for the delay of nearly 18 months in the filing of the bill of costs, such as would justify the granting of an extension of time to do so. Although there may have been a substantial amount of costs involved in that case, it is likely a much lesser amount was involved than in the present case.

40 As the wife in this case was awarded costs by Barlow J in July 2003, and the costs appeal was dismissed in December 2003, the wife's delay to filing the present application was in excess of six and a half years from the time when the appeal in relation to the order for costs was dismissed.

Brief summary of the parties' cases

41 The wife submits that, if her application is not granted, she will be unable to collect her substantial entitlement pursuant to the costs orders, and the effect of the

orders will be nullified, as the husband's liability in effect would be extinguished. Significant time, effort and cost have been spent and incurred in preparing an itemised bill. The delay, and any prejudice to the respondent in the very unusual circumstances, is not such that my discretion should not be exercised in her favour. Considerable additional expenditure could be avoided by having a preliminary assessment.

42 The husband's position is that the extraordinary delay has not been adequately explained by the wife. A preliminary assessment is not possible, as the bill of costs prepared appears to be inadequate in many respects, and does not make any differentiation between the categories of costs awarded by Barlow J. In addition, there is significant prejudice to the respondent because of the delay, as, for example, it would appear that some documentation is not now available.

The history of the delay

43 The wife, and her solicitor, Mr. Summers, have deposed that the main reason for the delay was the length of time it took the wife's legal advisers to prepare the itemised bill of costs. The position was complicated by the fact that four firms of practitioners had represented the applicant in the proceedings, which made collating and compiling the documents difficult and protracted.

44 Initially, the situation was complicated by the fact that the wife had been charged and convicted of a large number of charges involving the forging and uttering of cheques drawn on the husband's bank account, and sentenced to terms of imprisonment amounting to two years, with each term suspended for two years.

45 Following an appeal heard in October 2004, on 8 March 2005, the Court of Criminal Appeal allowed the appeal, and quashed the convictions.

46 I regard these proceedings, in themselves, by their extraordinary and difficult nature, as providing a reasonable explanation for the delay to that point.

47 The evidence of the wife is that, following the Full Court's dismissal of the husband's costs appeal in December 2004, the wife's then solicitor, Nan Jenour of Holden Barlow, informed the wife that her, then, paralegal, Laura De Maio, would arrange to itemise the costs due to the wife.

48 However, court records show that Bowen Buchbinder & Vilensky was acting for the wife from mid-2004, so the statement that, in early 2005, the wife's bill of itemised costs had still not been completed and Ms De Maio, left Holden Barlow, and took the wife's costs file with her to her next employer, Bowen Buchbinder Vilensky, could not be correct.

49 In April 2005, a determination was made in relation to the costs to be paid by the wife to the second and third respondents ($51,200).

50 On 11 July 2005, an itemised costs account, it appears in relation to children's matters, was filed by Bowen Buchbinder & Vilensky, with the costs estimated as being $322,250.

51 On 6 September 2005, the parties attended a Procedural Conference, as the wife had filed the itemised costs account out of time. The presiding registrar ordered that the wife, by 13 September 2005, file and serve a Form 2 application and an affidavit in relation to the question of leave to proceed out of time. The husband was to file a Form 2A response and any responding affidavit by 20 September 2005. The matter was then listed before a Judge in a Duty Judge List.

52 On 27 September 2005, the matter was listed before the, then, Justice Penny. No application had yet been filed by the wife, so no orders were made.

53 The husband's solicitor, Stewart Forbes, wrote to Bowen Buchbinder Vilensky, on 24 October 2005, about the alleged deficiencies in the itemised bill of costs that had by then been drafted. Mr Forbes invited the wife's solicitors to provide him with copies of a bill of costs in relation to all matters, not limited to matters in relation to which costs had been awarded. Mr. Forbes states that this is the last communication he received from the wife's solicitors in nearly three years.

54 In October 2005, Ms De Maio took the wife's file to her next employers, Pickup Golding, a firm of chartered accountants.

55 The wife instructed Paul Summers, her current solicitor, in November 2005, seeking his advice as to costs. He filed a Notice of Address for Service on 21 December 2005.

56 Mr. Summers deposes, in his affidavit filed on 6 August 2010 in support of the wife's application, that one of the reasons for delay was that the two costs specialists known to Mr. Summers, David Garnsworthy and Stewart Forbes, would be unavailable because both had acted for the parties in the proceedings, and so were conflicted, and that finding a suitable specialist was difficult. Mr. Summers believed that because of the level of complexity of the matter, it was appropriate to brief someone with expertise. He agreed to collate the papers, and find a suitably qualified legal practitioner to undertake the task.

57 For the husband, it was pointed out that David Garnsworthy had in fact acted for the wife, and there was no conflict in that regard, and that the wife's present counsel could well have been available.

58 The wife's evidence at paragraph 18 of her affidavit filed 6 August 2010 is:

> "It took me many months to obtain my files and papers from the law and accounting firms previously retained by me. There were difficulties in this respect due to the breakdown of my relationship with the law firms. I do not believe I was able to secure all files and papers associated with my case. I took all files and papers recovered by me to summerslegal [sic] for the purposes of collation."

59 Mr. Summer's evidence in his affidavit filed 6 August 2010 is:

> "During the next eleven months, Ms Roberts delivered to my office various papers and files at sporadic intervals. The papers and files were not made available to me in any particular order or sequence. It was

necessary to put them in order. Under my overall supervision, these papers and files were collated in a chronological fashion by clerical members of my firm's staff. On 27 October 2006, the collation of the files and papers was complete. There were 89 archive boxes. Of these, 53 are archive boxes contained in excess of 200 lever-arch binders. I did not count the papers in the lever-arch binders but my best estimate is the 53 archive boxes housed 50,000 pages. The remaining 36 boxes contained loose papers, assorted materials (such as expert reports), court documents and bound appeal books. I did not count the papers and appeal books but my best estimate is these archive boxes housed 20,000 pages."

60 In November 2006, Mr. Summers informed the wife that he had instructed a barrister, Michael Rynne, to prepare the bill of costs. Mr. Rynne shortly thereafter returned the brief. There is no evidence as to the explanation for this.

61 In April 2007, Mr. Summers approached a solicitor, Mr. Michael Jones, who had recently moved from Melbourne, to prepare the bill of costs. Mr. Jones was instructed by the wife shortly thereafter, following a conference between the wife, Mr. Jones and Mr. Summers. The documents were delivered to Mr. Jones on 11 May 2007.

62 Mr. Summers stated in his affidavit:

8. On 23 November 2007, Mr Jones reported to me, confirming he had spent 180 hours, entering 5192 items in the bills of costs.

9. On 17 June 2008, Mr Jones reported to me, confirming he had spent 193 hours, entering in excess of 10,361 items in the bills of costs. He reported he was working through the 174th lever-arch binder.

10. On 12 May 2009, Mr Jones reported to me, confirming he had spent 162 hours, settling the narrative content of the bills of costs.

11. On 3 September 2009, Mr Jones delivered to my office four bills of costs:

    11.1. PT 1897 of 2000 (the "trial bill")

    11.2. Appeal 5L of 2000 (the "first appeal bill")

    11.3. Appeal 21 of 2003 (the "second appeal bill")

    11.4. Appeal 3, 5, 8 and 15 of 2003 (which were heard and determined together and here called the "third appeal bill").

12. The trial bill is laid out in two ring-back binders. It contains 9,321 items and occupies 843 pages. Total costs have been assessed at $1,179,606.72 comprising $619,298.59 charges plus $560,308.13 disbursements.

13. The appeal bills are laid out in a third binder.

    13.1 The first appeal bill contains 21 items and occupies 3 pages. Total costs have been assessed at $1,249.00 comprising $1,249.00 charges plus nil disbursements.

    13.2 The second appeal bill contains 392 items and occupies 34 pages. Total costs have been assessed at $42,923.65 comprising $24,419.23 charges plus $18,504.42 disbursements.

    13.3 The third appeal bill contains 391 items and occupies 36 pages. Costs have been assessed at $35,985.66 comprising $22,293.91 charges plus $13,691.75 disbursements.

14. All duly signed and/or sealed cost orders have been collected together and are arranged in date order at the rear of the third binder.

15. In the fourth binder are all disbursements, which have been arranged according to their appearance in the trial and appeal bills. Mr Dowding's fees have been accumulated at the rear of this binder.

16. A factor of 20 per centum has been assessed by Mr Jones as a fair and reasonable reflection of the general care and conduct exhibited by the wife's solicitors in their ultimately successful enforcement of her legal rights.

63 Mr. Jones completed the bill of costs in September 2009.

64 The bill of costs was delivered to the husband's solicitor on 15 September 2009, who subsequently received instructions to accept service, and provided a notice disputing the costs account on 2 October 2009. Neither party sought that the court determine the disputed itemised costs, as per Rule 6.25 of Schedule 6 of the Rules. By then, the respondent's solicitors said there had been no communication with him for some four years.

65 The wife's solicitor engaged the husband's solicitor in communication in relation to this application, which was filed on 6 August 2010 (but, as I have said, stamped received on 16 June 2010 – I have been unable to ascertain an explanation for this).

66 The husband was not served with the application until 26 August 2010.

67 On 13 September 2010, the application was first listed before me, and directions made for the filing of documents.

68 The proceedings were adjourned for hearing to 15 November 2010.

69 Sadly Mr Jones was then diagnosed with a terminal illness and had to withdraw, Mr. Summers being informed of this on 29 September 2010.

Discussion – re delay

The wife's position

70 The wife says her delay in seeking costs can be attributed to her difficulties in finding suitable advisers, her various solicitors, their inattention to her matter, and the length of time needed to draw up an itemised bill, having regard to the magnitude of the case.

The husband's position

71 The wife has not adequately explained the delay. The wife and her lawyers were aware of the time limitation for filing itemised costs.

72 For the respondent, it was submitted that no explanation for the delay from 3 July 2003 until November 2005 has been given.

73 It is also apparent that as early as 19 August 2004, the applicant's solicitors were aware of the impending retirement of the trial judge, which was a complication since His Honour could have dealt with any difficulties in relation to the implementation of his orders.

74 It is apparent from the bills prepared, and the issues that there are a number of difficult questions arising from the trial judges' orders, and these are itemised at para 36 of Mr. Forbes' affidavit filed 21 October 2010.

75 The wife had been ordered by Barlow J to pay the costs of the second and third respondents. It is apparent she was on notice of her obligations in relation to the relevant time limitations in September 2004, when her solicitors filed submissions in relation to extension of time, as the second and third respondent's had sought to serve the wife an itemised bill of costs out of time, as per Barlow J's orders (see annexure B of the affidavit of Stewart Forbes filed on 21 October 2010.

76 The wife had also attended a Procedural Hearing on 6 September 2005, in which a Registrar had ordered that, by 13 September 2005, she file a Form 2 application in a case and a supporting affidavit in relation to the question of leave to proceed out of time.

77 Reference was made to the decision of the then Justice Penny in *Wensinger & Summers Partners* [2003] FCWA 1 where Her Honour had dismissed an application to extend time for a client to seek an itemised account from his solicitor, the delay there being under two years. However, in that case a client was seeking to review the costs charged by his solicitor. As I have already said, I consider that, while the same general principles apply, the present case is distinguishable, since it concerns a very different situation, being the itemisation of costs pursuant to an order for costs upheld on appeal.

Is there a substantial issue to be raised

78 There is no doubt that, having regard to the enormity of the costs incurred, there is a substantial issue at stake. There is no dispute that very substantial costs are to be paid by the respondent to the applicant, and if the applicant is unsuccessful on this application, she will be unable to claim the sum due to her.

Hardship or injustice to the Applicant

79 For the applicant it was submitted that a refusal to grant the application would constitute an injustice, given that the effect of a refusal is to:-

- waste the significant time, effort and costs invested in the preparation of the itemised Bills of Costs.
- prevent the applicant from quantifying and collecting an entitlement to costs pursuant to the costs orders.
- effectively nullify the costs orders, and
- extinguish the respondent's liability for costs pursuant to the costs orders.

80 The respondent asserts that he has already paid the applicant about $300,000 in costs which mitigates the loss to her.

Hardship or injustice to the Respondent

81 For the respondent, a number of issues were raised as to the likely hardship to him, particularly having regard to the practical difficulties. These were in summary:-

- The former solicitor for the husband, Mr. Sicard is unavailable and the location and state of the file relevant to the proceedings in 2003 and 2004 is not clear. In particular, it is asserted that a number of files have been stored in a garage and may be subject to cockroach damage.

82 Reference was made to *Lewis Blyth & Hooper v Dennis* [2007] WASC 177 as stating that once the statutory period has passed, a practitioner is entitled to assume that in the ordinary course there will be no requirement to itemise or tax a bill of costs.

- Significant issues are likely to be raised because of the difficult questions involved in any assessment of costs, and the potential issues arising from the husband's solicitors' cursory inspection of the bill, including inconsistencies between the first Bowen Buchbinder & Vilensky draft and the present Bill.
- The likely time, estimated at 300 to 400 hours, and costs to be incurred, estimated between $288,700 and $331,600, associated with the husband's solicitor preparing a Notice of Objection to the

itemised costs accounts, and attending the assessment of costs hearing, which it was suggested would take about a month.

83 In response to this, it was submitted for the applicant:-

- The Rules provide for processes to enable the efficient determination of costs disputes, consistent with the main purpose of the Rules set out at Rule 1.04, namely in *"to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstance of the case"*.
- The Rules further provide at Rule 1.07(c)(d) that to achieve the main purpose, the court applies the Rules in a way that "is proportionate to the issues in the case and their complexity, and the likely costs of the case" and which "promotes the saving of costs".
- The respondent's solicitor's estimates of costs associated with a traditional assessment amount to between 23% and 26% of the total sum of the itemised costs accounts.
- It is clearly not commercial or efficient for hundreds of thousands of dollars to be expended in an effort to reduce an entitlement to costs that can be assessed efficiently by the Court by using other processes.
- Further, given the terminal illness of Mr. Jones, it is not commercial for the applicant's new counsel to become familiar with each item of costs claimed in the itemised costs accounts.
- Accordingly, the most appropriate process for the assessment of the itemised costs accounts is not a traditional assessment, but rather a preliminary assessment pursuant to Rule 6.31 of Schedule 6 of the Rules.
- A preliminary assessment will obviate the need for argument concerning the issues raised, and will likely take into consideration the issues raised.
- If the respondent is not satisfied with the preliminary assessment, he will have the right to object to the preliminary assessment.

84 For the applicant it was submitted in summary that the respondent will not be prejudiced by the grant of the application as:-

- The respondent has been avoiding the costs order throughout the proceedings.
- A costs specialist represents the respondent.
- A preliminary assessment is likely to resolve the dispute in a simple and cost effective manner.

Conclusion

85 It is apparent that the very lengthy delay in providing the itemised bill within the required time has not been fully explained. However, there is adequate explanation for a substantial portion of the delay, which was clearly more that of the wife's legal advisers, than the wife. There is no doubt that preparation of the bill was a mammoth task which was going to take a lengthy period to undertake. However, this does not justify the extent of the delay.

86 However, while important, delay is only one of the matters to be considered.

87 Clearly, the wife would be prejudiced in the event leave is not granted because of the very substantial sum involved.

88 The husband is obviously prejudiced by the fact that some material may not be in existence, but the evidence is that the wife's is, as is the court file. The husband's documentation, while of significance, is of less importance than that of the wife in assessing the extent of work done by the wife's legal advisers.

89 At judgment, the husband sought to raise issues as to costs owing by the wife to him, and it is appreciated his files would be significant in this regard.

90 The husband has known for years that he owes a very substantial sum in costs to the wife, and for several years, did nothing to get this issue resolved – presumably because he was hoping it would go away. He had no obligation to do so. He was unsuccessful in challenging the costs on appeal.

91 While the matter should have been resolved long ago, any prejudice to the husband is far less than any prejudice to the wife – he has not had to pay the wife hundreds of thousands of dollars he otherwise owed, for several years, and, therefore, has retained use of the funds for an extended period.

92 To the extent that the delay has meant that preparation of notices of objection and any itemised account more difficult, it would be open to the parties, and any assessor of costs, to take this into account in possibly, giving the husband more of the benefit of the doubt on some issues than he may otherwise have had. However, it really was for him and his advisers to ensure his own documents were secured, until the proceedings were definitely finalised – I consider that this not "the ordinary course" referred to in *Lewis Blyth & Hooper v Dennis* (supra) which, again, related to solicitor/client costs.

93 The overarching issue is the interest of justice – the wife's entitlement of costs was achieved after an extraordinarily long and difficult battle, including an appeal.

94 I have concluded that, in these very unusual circumstances, the time for the wife to file an itemised Bill of Costs should be extended.

95 I have given some thought to the appropriate procedure to finalise this matter, and limit the further costs as much as is reasonably practicable.

96 While one cannot have any optimism that these parties could agree on anything, both parties, the husband in particular, have a vested interest in limiting both parties' costs.

97 Perhaps after all these years the heat has gone out of the parties' warfare, and hopefully they will be anxious to finalise the matter.

98 The husband has flagged problems with the wife's bill in that he says it does not appear to address the issues in relation to which the trial judge said the husband should pay costs. The husband has not yet filed a formal notice disputing the account in detail.

99 The wife's counsel has suggested the matter should be referred for a preliminary assessment. This could be appropriate if the area of dispute is very narrow, but this may well be unlikely.

100 I am not prepared, nor is it reasonably practicable having regard to the court's resources, to require a Registrar to undertake such a task on the basis of the present material before the court (it being appreciated the Notice Disputing Itemised Costs has not yet been filed).

101 At judgment, I proposed the following possible directions, and invited further submissions.

1. Upon service of the wife's itemised costs account, the husband's time for filing of a Notice Disputing Itemised Costs account be extended to 1 July 2012.

2. The proceedings then be listed for a settlement conference before a Registrar.

3. There be liberty to the parties to apply for further directions before Martin J.

102 And the following proposed orders:-

1. (1) The time in which the wife has to serve an itemised cost account, be extended to 1 May 2012.

(2) The itemised costs account is to state, and total, the costs set out in relation to each issue.

2. There be liberty to apply for further directions.

3. The application and response otherwise be dismissed.

103 Having published my proposed orders to the parties, counsel for the husband raised the issue that the wife owed the husband some costs, which he had not pursued presumably on the basis he hoped the wife's application would be unsuccessful. There is presently no indication as to the sum involved. He therefore sought that he have leave to file an itemised cost account out of time. Counsel for the wife indicated

the application would be opposed, so I made directions for the filing of further material, and also in relation to the costs of these proceedings.

I certify that the preceding [103] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate