

Costs assessment and review in NSW



Lessons from *Ahern v Aon Risk Services Australia*

In NSW, party/party and solicitor/client costs are assessed 'on the papers' by costs assessors. Costs assessors are appointed by the Chief Justice under s93C of the *Legal Profession Uniform Law Application Act 2014 (NSW) (LPUL)*. In NSW, there are around 45 court-approved costs assessors, some of whom are review panellists. A list of the current costs assessors and the members of the Costs Assessment Rules Committee is available on the Supreme Court's website.¹

Review panellists are those assessors on the list maintained under rule 44(2) of the *Legal Profession Uniform Law Application Regulation 2015 (NSW)* who are entitled to form a panel to review a costs assessor's determination.

RIGHT TO REVIEW UNDER THE LPUL

At the conclusion of an assessment, costs assessors issue a certificate or determination of costs² and a certificate or determination of costs of a costs assessment.³

Either party or the Manager, Costs Assessment can seek a review of a costs assessor's determination within 30 days of the date that the court forwards the certificate of determination to the parties.⁴ A review panel consisting of two costs assessors conducts the review,⁵ either affirming the costs assessor's determination or setting it aside and substituting the determination that, in its opinion, should have been made.⁶

At the conclusion of an assessment, the review panel issues a certificate of substituted determination of costs⁷ and a certificate of determination of costs of the review panel.⁸

Either party may appeal against a decision of the review panel, on matters of law and fact,⁹ to:

- the District Court. However, it first must apply for the leave of the Court if the amount in dispute is less than \$25,000; or
- the Supreme Court. However, it first must apply for the leave of the Court if the amount in dispute is less than \$100,000.

The District Court or the Supreme Court (as the case requires) has all the functions of the review panel.¹⁰ However, the appeal is by way of a rehearing, and fresh evidence or evidence in addition to or in substitution for the evidence before the review panel or costs assessor may, with the leave of the court, be given on the appeal.¹¹

The decision of the District Court or Supreme Court can be appealed to the appellate division of the Supreme Court.

THE COURTS ON COSTS ASSESSORS' POWERS

Ahern v Aon Risk Services Australia Ltd [2021] NSWCA 166 (*Ahern NSWCA*) is a judicial review by the NSW Court of Appeal of a District Court judgment.¹² The District Court judgment reviewed the review panel's decision, which reviewed the costs assessor's decision.

The parties' dispute about costs arose out of settlement of litigation commenced in the Supreme Court of NSW in 2012 against the respondent (originally the defendant) and two other parties alleging that the applicants (originally the plaintiffs) were significantly underinsured because of the negligence of their broker, due to which the applicants faced loss when their premises and contents were damaged by fire in 2006. The Supreme Court proceedings were settled in February 2015 pursuant to a deed and orders entered the same day. By consent, the respondent was ordered to pay the applicants \$1,375,000 plus costs as agreed or assessed. Since then, the parties have engaged in a long, drawn-out battle as to how much the applicants should recover for costs from the assessment process.

As the costs order was made prior to July 2015, the applicants applied for costs assessment pursuant to the old legislation – the *Legal Profession Act 2004 (NSW) (LPA)*. However, the decisions made pursuant to this application are equally applicable to matters for assessment before the new legislation. The applicants' bill totalled \$1,748,077. After costs assessment, the costs assessor determined the fair and reasonable amount of costs as \$1,262,598, including the applicants' costs of the assessment process. A certificate of determination of costs of the costs assessment, including the assessor's costs, was issued in the amount of \$21,040 and was ordered to be payable by the respondent.

Both parties sought a review of this determination and the review panel set aside the assessor's determination and certificate, and issued a substituted certificate in the amount of \$1,165,851. This amount included the applicants' costs of the assessment process, which were assessed at \$66,000 by determining a lump sum figure and without specific reference to the items in the applicants' original bill of costs. A separate certificate of determination of the costs of review was also issued.

The applicants appealed to the District Court on questions of law, on the following grounds:

- the panel failed to give any or any adequate reasons for affirming the costs assessor's decision to reduce hourly rates (ground 1);

- (b) the panel erroneously adopted an approach whereby it reassessed completely the costs assessment, rather than substituting the determination that the costs assessor should have made (grounds 2 and 3); and
- (c) the panel failed to give reasons for deciding the issue of costs of the assessment as it did, and erroneously adopted a global assessment of the costs of the negotiation and costs assessment process (ground 4).¹³

The District Court dismissed the appeal. The applicants appealed to the Court of Appeal, querying whether the primary judge erred in determining that the review panel gave adequate reasons for its decision that the lawyers' hourly rates for work done in prosecuting the applicants' underlying claim were fair and reasonable, and for its determination of the applicants' costs of the assessment process.

Main takeaways

The Court of Appeal held, *inter alia*, that there was no error by the primary judge in determining that the reasons of the review panel were adequate. The main takeaways from the District Court and Court of Appeal judgments are as follows:

- Applying reductions to hourly rates, for example from \$550 to \$460 per hour, based on intuition and a synthesis of a variety of considerations (for example, the experience of a practitioner, the Costs Assessment Rules Committee Guidelines, or the complexity of a matter) is a reasonable approach, and one that does not require detailed reasons to be provided. Abadee DCJ noted:

'An invariable and inevitable feature of [a costs assessor's] task is to select the appropriate hourly rate, or rates.

After a sufficient period of experience, dealing with a great many assessments, many costs assessors would, I apprehend, select an hourly rate somewhat intuitively. It is not a concept that is necessarily reducible to simple articulation of everything that a costs assessor has taken into account in arriving at the hourly rate selected.¹⁴

- Even under the old *LPA* regime (which, unlike the *LPUL*, does not explicitly refer to 'proportionality' as a test for determining fair and reasonable costs), the application of principles relating to proportionality when considering costs and determining lower hourly rates is appropriate

when considering costs sought relative to the 'outcome' of proceedings per s364(2)(f) of the *LPA*.¹⁵

- Taking a 'global' approach to determine the quantum of costs reasonable *inter partes* is a legitimate approach by a costs assessor and by a review panel. In this case, the review panel disallowed the applicants' professional costs of assessment (costs of the work in negotiating costs and the application and process for the assessment of costs) and substituted that amount by allowing costs of assessment as a percentage (10 per cent) of the fees. The Court found that the review panel had no statutory obligation to determine the costs of the assessment process by undertaking a line-by-line assessment of the costs incurred by the applicants. The panel was required to give a reasoned explanation for its exercise, and explanation about the methodology applied (the global approach) was deemed to be adequate reasoning.¹⁶

CONCLUSION

Costs assessors' determinations are reviewable by a review panel, whose determinations are in turn reviewable by the NSW District and Supreme Courts. Costs assessors and review panellists have a wide discretion as to determining costs, and therefore the courts appear to be less inclined to significantly overturn the discretion of a costs assessor or a review panellist. ■

Notes: 1 See <https://www.supremecourt.justice.nsw.gov.au/Documents/Practices%20and%20Procedure/Costs_Assessment_Assessors_2021.pdf>. 2 *Legal Profession Uniform Law Application Act 2014* (NSW), s70. 3 *Ibid.*, s71. 4 *Ibid.*, s83. 5 *Ibid.*, s82. 6 *Ibid.*, s85. 7 *Ibid.*, s87. 8 *Ibid.*, s88. 9 *Ibid.*, s89(1)(a)-(b). 10 *Ibid.*, s89(2). 11 *Ibid.*, s89(4). 12 *Ahern & Anor v Aon Risk Services Australia Limited* [2020] NSWDC 159. 13 *Ibid.*, [35]. 14 *Ibid.*, [73]. 15 *Ibid.*, [61], [63], [76] and [77]. 16 *Ahern NSWCA*, [89]-[93] (Meagher JA); [122] (White JA); [125] (Brereton JA).

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