ADOBE STOCK

Subject to judicial discretion

THIS ARTICLE EXAMINES GROSS SUM COSTS AWARDS WITHIN THE CONTEXT OF GROUP PROCEEDINGS BY REFERRING TO THE APPLICABLE RULES AND RELEVANT CASE LAW, IN PARTICULAR THE CASE OF *SCHMID V SKIMMING*. BY LEMEEZ CHILWAN

SNAPSHOT

- An award for gross sum costs in group proceedings as opposed to a formal assessment at taxation is subject to the Court's discretion.
- In *Schmid v Skimming* the Court assessed whether the gross sum costs assessed in the proceedings were "logical, fair and reasonable".
- Although s43 of the FCA provides a wide discretion, an analysis of case law indicates that courts exercise this discretion judicially and based on the factual circumstances.

Gross sum costs

Section 43 of the *Federal Court of Australia Act 1976* (Cth) (FCA) provides the legislative framework enabling a judge or court to award costs in proceedings before the Court. Further, s43(3)(d) specifically empowers the Court to "award a party costs in a specified sum".

Similarly, r63.07(2)(c) of the *Supreme Court (General Civil Procedure) Rules 2015* (SCR) allows the Court to make an order permitting costs to be calculated as a gross sum rather than taxed costs.

Schmid v Skimming & Ors ("*Schmid*")[1] was a group proceeding in which the plaintiffs entered into a conditional costs agreement and on settlement of the matter claimed "common benefit costs" in the form of a gross sum payment in terms of r63.07 of the SCR.

Apart from determining whether the settlement reached was fair and reasonable, in assessing the legal costs the Court had to decide whether an uplift fee is recoverable in a conditional costs agreement and whether additional loading for skill and care should be allowed.

The Court's discretion

Apart from the obvious benefit of saving time and costs, an award for gross sum costs is particularly advantageous in group proceedings.

There are numerous judgments that assist in identifying the principles that are relevant to the Court's discretion to award gross sum costs.

In *Schmid*, Forbes J stated that "the purpose of a specified gross sum is to minimise the expense and delay that might be associated with a taxation" and requires a "broad brush approach".[2] This requires sufficient information to be submitted to the Court.

In the landmark case of *Beach Petroleum v Johnson* ("*Beach Petroleum*")[3] Von Doussa J asserted that "the purpose of the rule is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation".[4]

Reference is made to the English case of *Leary v Leary* ("*Leary*") where the Court of Appeal permitted an award of a gross sum instead of taxed costs.[5]

In *Leary* the Court had to balance two competing interests: first, to prevent prejudice to the respondents by overestimating the costs and second, not to cause an injustice to the successful party by an arbitrary "fail safe" discount on the cost estimates submitted to the Court.[6]

Additionally, Von Doussa J observed that "the preparation of a bill in a taxable form is an unrealistic demand which would require quite unreasonable time and expense" and, further, that "the enormity and expense of the task demonstrates how inappropriate the old system of taxation is to the modern commercial world".[7]

In an article presented at the National Costs Law Conference[8] Justice Bernard Murphy extrapolated a list of considerations from *Beach Petroleum* and *Leary* which are relevant to the exercise of the discretion conferred on the Court by s43 of the FCA. The most pertinent considerations are summarised as follows:

- in a lengthy and complex case where the process of taxation is likely to be expensive or unduly protracted, an award of a gross sum payment would be appropriate
- the discretion to apply a gross sum award is not contingent on specific characteristics, rather it should be exercised when the circumstances of a case warrant it. For example, in a simple matter, a gross sum award may save the parties from the difficulties and inconvenience of taxation or, conversely, in a complex matter where the costs of taxing a bill may be excessive and disproportionate
- an underlying consideration is that the Court must be satisfied that the approach adopted to estimate costs is logical, fair and reasonable.

In *Schmid*, Forbes J succinctly lists the five additional factors as enunciated by Gordon J in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* (*Modtech*):[9]

- whether the work was undertaken efficiently and appropriately
- whether the work was undertaken by a practitioner with the appropriate level of seniority
- whether the charge out rate was commensurate with the level of seniority of that practitioner and the nature of the work undertaken
- whether the task (and associated charge) was appropriate in relation to the nature of the work and the time taken to complete the task
- the ratio of the work and interrelation of work undertaken by the solicitors and counsel retained.

A further consideration when assessing gross sum costs is to refer to the manner in which the successful party conducted the litigation.

An award of gross sum costs is common in group proceedings. However, it is also an appropriate order where the additional costs of taxation would be detrimental to the successful party due to the likelihood of the unsuccessful party being unable to comply with their costs liability.

The case law regarding gross sum payments suggests that "efficiency is exchanged for accuracy" as a gross sum order is not subject to an in-depth examination of costs that would typically occur at taxation. Further, in exercising its discretion, the Court must pay due regard to the evidence adduced and the particular circumstances of the case before it.[10]

Schmid demonstrates that the evidence before the Court must be sufficiently detailed, accurately identify the various components of the costs incurred and explain the basis on which the amounts have been calculated.

ADOBE STOCK

Loadings and uplift fee

Section 182(1) of the *Legal Profession Uniform Law* (Uniform Law) states that a conditional costs agreement may provide for the payment of an uplift fee on the successful outcome of a matter. It should be noted that unpaid disbursements are excluded.

Conditional costs agreements are commonly referred to as "no win, no fee" agreements with the legal practice engaged, assuming the risk of litigation as payment of fees is contingent on a successful outcome. Accordingly, an uplift fee is essentially a reward to a legal practice for bearing the risk and burden of funding litigation of a proceeding from its inception to its conclusion.

Group proceedings are generally conducted on a conditional fee basis with the legal practice either funding the litigation themselves or securing funds from a litigation funder on behalf of their clients.

In addition to an uplift fee, conditional costs agreements typically provide for a scale loading pursuant to r63.34 of the SCR and special grounds loading in accordance with r63.48 of the SCR.

Rule 63.34(3) provides:

"(3) The Court may, on special grounds arising out of the nature and importance or difficulty or urgency of the case, allow an increase not exceeding 30 per cent of the legal practitioner's charges allowed on taxation with respect to –

- the proceedings generally; or
- to any application, step, or other matter in the proceeding".

Notably, r63.34(1) stipulates that "Subject to paragraph (3) a legal practitioner shall be allowed costs in accordance with the Scale in Appendix A unless the Court . . . otherwise orders", suggesting that the loading allowed under r63.34 is relevant for the purposes of r63.48.

The purpose of discretionary costs is to reward legal practitioners for representing clients in complex matters that deal with difficult issues.

Rule 63.48(2) provides a list of factors that the Court must consider in exercising its discretion to allow a loading on special grounds.

These include:

- the complexity of the matter
- the difficulty or novelty of the questions involved in the matter
- the skill, specialised knowledge and responsibility involved, including the time and labour expended by the legal practitioner.

Interestingly, item 17 in the scale (Appendix A) mirrors the provisions contained in r63.48. This may result in an overlap between the two loadings as the criteria is very similar.

In the event that a claim for loadings under both r63.34 and r63.48 is made, the Court has the authority to modify the loadings claimed to a percentage scale that it considers appropriate under the circumstances.

In *Schmid*, the Court relied on the report of an independent costs assessor to determine the quantum of costs. This inevitably included assessing the applicable loadings pursuant to r63.34 and r63.48 as well as an uplift fee.

Forbes J viewed it necessary to identify special grounds before considering a loading under r63.34 and referred to *Jenkins & Ors v GJ Coles & Co. Ltd*[11] where the Court stated that, in addition to identifying special grounds, they must also arise from the "nature and importance, of the difficulty or urgency of the case".

Forbes J observed that both the fee agreement and the evidence presented to the Court were silent on the "factors that might make out special grounds". Ultimately, the Court was not satisfied that special grounds existed to warrant the application of a loading on special grounds.

The Court held that although the conditional costs agreement made provision for loadings, it did not include an explanation of the discretionary nature of r63.34, nor did it adequately disclose the nature of a special loading.

In determining the appropriate amount for scale loading to be applied to the assessed sum pursuant to r63.48, the Court rejected both the reasons and the 30 per cent scale loading the costs assessor had arrived at.

Forbes J further contended that he "does not accept the distinction between solicitor-client costs and inter partes costs as justification for doubling the percentage loading ordinarily allowed at taxation as standard costs include costs previously only recoverable on a solicitor-client basis".

Although Forbes J acknowledged that "there is skill, experience and complexity in a group proceeding", he allowed a scale loading of 12 per cent for "skill, care, and attention", which is significantly less than the 30 per cent loading recommended by the costs assessor.

Last, the Court granted an uplift fee of 25 per cent for "the risk and expense" of the law practice to settle a group proceeding on a conditional fee basis.

In the more recent case of *Somers & Ors v Box Hill Institute & Anor* ("*Somers*")[12] (which also dealt with a group proceeding and an application for approval of settlement), the Court had to decide whether to allow loading pursuant to r63.48 and the applicable rate.

Unlike *Schmid* which only dealt with one expert report, in *Somers* there were two expert reports that provided contradictory submissions regarding an allowance for a loading of skill, care and responsibility under r63.48 and scale item 17.

Dixon J emphasised that such an allowance does not automatically apply as it falls within the ambit of the Court's discretion and noted that when nominating a percentage, "costs consultants tend to focus on their experience of Costs Court practice rather than undertake an analysis of the matters identified in Rule 63.48(2)".[13]

The Court rejected the recommendations by the two experts of a loading of 25 per cent and 12.5 per cent respectively. Instead, Dixon J suggested that it was necessary to identify in what way the legal practitioner is being "under-rewarded by the scale in complex or novel matters".

Appropriately, Dixon J undertook an analysis of the applicable information contained in the expert reports and allowed a r63.48 loading at the rate of 5 per cent.

The *Somers* case is similar to *Schmid* in that both judges were not satisfied with the loading percentage recommended by the experts and consequently, the percentage was reduced to a much lower rate.

Conclusion

The exercise of judicial discretion in awarding gross sum costs envisaged by s43 of the FCA is unfettered yet requires careful scrutiny of legal fees to ensure that scale loading for skill, care and attention and discretionary costs is justified.

In assessing gross sum costs, the Court must determine whether there is a basis for special grounds loading and the appropriate percentage, and then adjust the scale loading amount to avoid "double dipping".

Further, the impact of each loading and uplift fee on the overall quantum in determining if the legal costs assessed are fair and reasonable is a crucial consideration.

Instead of adopting a "one-size fits all" approach to assessing gross sum costs in group proceedings, case law indicates that there is no specific test for the Court's discretion. Rather, it provides a guideline by establishing the relevant factors a court may consider when exercising its discretion.

As exemplified in both *Schmid* and *Somers*, the Court is not bound by the recommendations made by costs assessors in determining the fairness, reasonableness and proportionality of the assessed fees. In fact, on careful analysis of the evidence presented to the Court, both judges adjusted the loadings to an appropriate amount.

Another significant issue highlighted by case law is the impact of costs disclosures in conditional fee agreements on an assessment of gross sum costs. Practitioners should ensure that the disclosure requirements are met when entering into a fee agreement with clients.

Consequently, while a gross sum costs award assists all parties in expediting a costs dispute and is the preferred order in group proceedings, the loadings and uplift fee are ultimately at the discretion of the Court. ■

Lemeez Chilwan is a legal costs consultant at Law in Check and is an admitted attorney and notary public of the High Court of South Africa with 10 years' experience in legal costs.

1. *Schmid v Skimming* [2020] VSC 493 (17 August 2020)
2. Note 1 above, at [58]
3. *Beach Petroleum NL v Johnson (No 2)* [1995] FCR 119, 123
4. Note 3 above, at [16]
5. *Leary v Leary* [1987] 1 All ER 261
6. Note 5 above, at [16]
7. Note 5 above, at [15]
8. Justice Bernard Murphy, "The Problem of Legal Costs: Lump Sum Costs Orders in the Federal Court" (The National Costs Law Conference, 17 February 2017) 6; https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/20170217
9. *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626
10. *Auspine Ltd v Australian Newsprint Mills Ltd* [1999] FCA 673; (1999) 93 FCR 1, at [21]-[22]
11. *Jenkins & Ors v GJ Coles & Co Ltd* [1993] 1 VR 155, 156
12. *Somers & Ors v Box Hill Institute & Anor* [2022] VSC 730
13. Note 12 above, at [75]

eWill Video Conferencing
Remote Execution Solution For Law Firms

- Automated execution solution to ensure signing sequence and statement compliance
- Compliments your will program and precedents to upload your will
- Use our complete video conferencing and electronic signing system
- ip metadata certificates are issued with secured storage of video conferences

Register for our no obligation limited trial*

Licensing by firm size with unrestricted use - LIV members 10% discount

*subject to terms and conditions from second licence anniversary

www.willzip.com.au