

STATEMENT OF REASONS

APPLICATION FOR ASSESSMENT OF PARTY/PARTY COSTS

(Cost Assessment File No: 2012/00325132)

Mamdouh Habib

(Costs Applicant)

-v-

Radio 2UE Pty Ltd & Macquarie Radio Network Ltd

(Costs Respondents)

Legal Profession Act 2004 ('the Act')

Legal Profession Regulation 2005 ('the Regulations')

Introduction/Cost Orders

1. By application filed on 19 October 2012 the Costs Applicant states that the amount of costs in dispute is \$532,358.28 (paragraph 4). Objections dated 15 August 2012 come to a total of \$383,119.80.
2. The costs which are the subject of this application are the costs payable by the Costs Respondents as a result of an order made by the District Court on 24 February 2012 in matter number 2006/294377 (paragraph 2 of the application). Paragraph 442 of the judgment states that the '*...defendants are each to pay Mr Habib's costs on the ordinary basis unless otherwise ordered*'.
3. Further, paragraph 1 of the application states that pursuant to '*... the Order of Judge Levy made on 13 July 2012, I apply to have this matter referred to a costs assessor*'. On 12 April 2013 I wrote to the Costs Applicant seeking clarification of this order and in response I received a copy of Orders made by Levy SC DJC on 19 April 2013 stating:
 - i. *Demir Legal be permitted to continue to have the costs of the proceedings assessed;*
 - ii. *Upon receipt of any Certificate of Assessment, any money payable by the defendant be paid into a controlled money account held by Beazley Singleton Lawyers pending further orders;*
 - iii. *(Not applicable)*

Background/Proceedings

4. On 21 June 2006 the Costs Applicant commenced proceedings against the Costs Respondents seeking damages for defamation in relation to three radio broadcasts on stations 2UE and 2GB (matter number 09/287768). The verdicts are set out in paragraphs 440 and 441 of the judgment (2006/294377) and came to total of \$75,000.00. There was a trial heard on 17, 18, 19 October and 23 November 2011 following a jury verdict pursuant to s7A of the Defamation Act 1974.
5. During the proceedings there was an appeal to the Court of Appeal and to the High Court but the application for the assessment of costs is only concerned with the proceedings in the District Court. By

letter dated 15 February 2013 the Costs Applicant confirmed that these costs are not to be intended to be included in the subject application.

Bill of Costs

6. Accompanying the application are bills of costs from solicitor Peter Erman (from 18/8/05 to 23/3/12) and solicitors Demir Legal (2/2/11 to 28/6/12). The latter bill also attaches invoices from barristers Evatt and Rasmussen as disbursements. I have separated professional costs/solicitors' fees from disbursements and for the purpose of assessment re-summarise the claims follows:

Solicitors fees – Peter Erman (\$450 ph)	\$28,578.40 plus GST
GST	\$2,857.84
Solicitors fees - Demir Legal (\$400 ph)	\$79,410.00 plus GST
GST	\$7,941.00
Total	\$118,787.24

Disbursements (including GST)

Disbursements (on Erman's bill)	\$3,312.07
Miscellaneous items	\$4,688.97
Barrister's fees – Clive Evatt	\$243,970.00 (\$1,100ph, \$5,500 - \$6,600 per day)
Barrister's fees – Roger Rasmussen	\$161,600.00 (\$440 - \$450 ph, \$4,500 per day)
Total disbursements	\$413,571.04
<u>Total costs claimed</u>	\$532,358.28

7. The bill by Demir Legal comprises a practitioner/client bill and two practitioner/practitioner bills and as such there was no attempt to present the claims on a party/party basis. This among other things increased the time taken to carry out the assessment.

Consideration of rates claimed by the practitioners

8. The hourly rates charged for solicitors' fees are \$400 for Demir Legal and \$450 for Peter Erman plus GST. The bills appear to have been compiled after the hearing of the matter and do not indicate the person who performed the work. There does not appear to be any appropriate delegation to more junior staff such as paralegals and clerks in respect of both solicitors' bills. There appears to be an over reliance on Counsel (Mr. Evatt) at least as far as Demir Legal's bill is concerned. The fact that Mr Evatt was required to prepare the response to the objections including the specific objections

reinforces this conclusion. Mr Erman was admitted in 1985 and Mr Demir in 2003. An examination of the web site for Demir Legal does not reveal any specialisation in defamation. Mr Erman appears to specialise in compensation law.

9. Mr Evatt's bill does not comply with 111B of the Regulations as the descriptions in the bill of the work performed by Mr Evatt are vague to the extent that it was difficult understand from the bill itself exactly what work was performed. A perusal of Mr Evatts' bill suggests a daily rate of between \$5,500.00 and \$6,600.00 but it is not possible to distil from the bill the hourly rates claimed. The claims appeared to be somewhat arbitrary and do not appear to be based on some form of time measurement system. The claim at item 81 of \$4,400 is particularly arbitrary and appears to be not fair or reasonable. It was prepared after the hearing of the matter. Mr Evatt was admitted in 1956 and is well experienced in defamation matters.
10. Mr Rasmussen's bill has the same problem and the descriptions of the work performed are also vague. It appears that the daily rate claimed is \$4,500.00 plus GST. The claim at item 77 for faxes and emails of \$2,500 appears excessive and arbitrary. He was admitted in 1995 and holds himself out as a specialist in defamation, criminal law and intellectual property.
11. Both barristers claim costs for work from the beginning of the matter many of which appear to be unreasonable such as duplicate claims and internal conferences and the like which were objected to by the Costs Respondent.
12. Taking the matters referred to above I determination that the appropriate rates for Mr Rasmussen is \$400 per hour and \$4,000 per day including GST and for Mr Evatt \$500 per hour and \$5,000 per day including GST. Mr Evatt though highly experienced is not Senior Counsel and his rates must, on a party / party basis (s364 of the Act) fall below that of Senior Counsel. I disagree with the submissions in relation to his rates set out in Demir Legal's letter dated 19 September 2012 (copy attached to the objections).
13. In the absence of details I have not allowed a full day for appearances on motions (4 hours allowed).
14. The appropriate rate for both solicitors, taking into consideration the matters set out in paragraph 8 above is \$300 per hour plus GST and in this regard I also agree with the reasons set out in the objections.

Disclosure Statements

15. Demir Legal's disclosure statement was issued on 22 March 2011 approximately 7 weeks after the commencement of work however the statement otherwise complies with s309 of the Act. There was no update. Recently, McLoughlin DCJ was confronted with an appeal as a matter of law, in relation to a party/party application for assessment of costs (*Sittichichai Laksanabechnarong v F Net Pty Limited*). There was no fee agreement and no fee disclosure to the Costs Applicant by the solicitor. The Costs Respondent took the point that until there were a practitioner/client assessment, one could never know whether the indemnity principle applied. An Assessor had entered a Nil determination. A Review Panel had determined the costs essentially as claimed. His Honour found that the Costs Applicant was entitled to his costs as assessed, but that Panel had erred because as it had not considered s.317 (4) and accordingly remitted the matter back to the Panel.

16. As the subject disclosure statement complied with s309 with the exception that it was issued late I do not consider the failure to be serious in terms of s317 (4) and therefore I do not make any reduction for this factor.
17. By letter dated 15 February 2013 the Costs Applicant advised that a costs disclosure was not issued by Mr Evatt and confirmed that his hourly rate was \$1,100 which I consider to be excessive. The claim of \$4,400.00 at item 81 is arbitrary and excessive.
18. By letter dated 15 February 2013 the Costs Applicant advised that a costs disclosure was not issued by Mr Rasmussen and that his hourly rate was between \$440.00 and \$450.00.
19. A disclosure statement was issued by Mr Erman which does not comply with the requirements of s309 of the Act.

General Objections by the Costs Respondents

20. 1. General Objection as to Cost Orders

There has been no attempt to exclude the costs which are the subject to orders made in favour of the Costs Respondents or not in favour of a party. The following were referred to:

- 16 June 2010 *'Plaintiff to pay Defendants' costs thrown away by the reason of the vacation of the hearing and the amendments referred to the in orders 1 and 2;'*
- 7 March 2011 – *'Costs to be in the cause except those incurred for the listing of 25 February 2011, when the Application was meant to be heard and the parties were not ready, or that the parties bear their own costs.'*
- 16 June 2011 – *'The Plaintiff's application for the costs of 7 and 23 March 2008 and 16 April 2008 to be assessed forthwith is refused with costs.'*
- 17 June 2011 – *'Plaintiff to pay Defendant's costs of and incidental to this motion; and...'*
- 2 April 2012 – *'Defendants' costs of today to be paid by Plaintiff, as agreed or assessed.'*

Determination

Generally agreed and therefore adjustments have been made in the assessment where appropriate (see below).

The Objections also went on to say that claims are made for costs incurred in the Court of Appeal and the High Court which are not to be included in this assessment.

Determination

The Costs Applicant concedes these costs (see letter dated 15 February 2013) as far as Counsels' fees are concerned and an adjustment has been made (see below). This is example of the vagueness of the descriptions of the work performed which, do not indicate, in any way, that these costs relate to Court of Appeal or High Court proceedings. See items 19 to 21, 23, 25 to 27 of Mr Evatt's bill, Items 16 to 21 of Mr Rasmussen's bill, also the narrative to Mr Erman's bill is largely irrelevant and potentially misleading.

21. 2. General Objections as to Serial Charges

Objections are made to attendances to two or more brief tasks in quick succession and it is not fair and reasonable to allow a minimum charge for each brief attendance.

Determination

Noted. Where this has been observed an adjustment has been made (see below).

22. 3. General Objection as to Excessive Time/Insufficient Information

Costs should be disallowed or reduced where it appears that the time claimed is excessive or where there is an insufficient description of the attendance. It was submitted that a global reduction to \$300 per hour plus GST should be applied to both Mr Demir's and Mr Erman's fees. See paragraph 7 above.

Determination

I agree that some time claims are excessive and that the bill for Demir Legal, Mr Evatt and Mr Rasmussen provided inadequate and vague descriptions. Also the rates claimed are excessive for reasons given in paragraphs 8 to 13 above. I have also formed the view that the bills are in fact an ambit claim and not a properly prepared party / party bill such that costs can be easily assessed on a 'fair and reasonable basis' as generally contemplated by s364 of the Act. This had led to a significant increase in the time taken in the assessment and is relevant to the determination of the costs of the costs assessment (that is the costs of the costs assessor and the filing fee for the application, s369(10)) and the question of whether the costs of the Costs Respondents should be allowed and which have been claimed.

23. 4. General Objection as to Hourly Rates

The Costs Respondents assert that the hourly rates for both solicitors are excessive given the nature of the tasks performed and the heavy reliance on Counsel. Solicitors' rates should be reduced to \$300 per hour plus GST.

Determination

Agree with the objections for the reasons given and for the reasons given in paragraphs 8 to 13 above.

24. 5. General Objection as to the role of Counsel and the charges

This objection states that the rates claimed for Counsel are exceedingly excessive and there is an '*...overwhelming double up on the tasks attended by Mr Evatt and Mr Rasmussen*'. Further their rates have been increased without justification.

Determination

Agree with objection for reasons set out in paragraphs 10 to 12 above.

25. 6. General Objection as to the Format of Application for Assessment

This objection simply states that the bill is an amalgamation of a law practice / client invoice of Demir Legal to the client.

Determination

Agreed (see above).

26. 7. Costs of Attempt to Resolve Costs and Assessment

The Costs Respondents say that the bill is really an ambit claim which is reinforced by the Demir Legal's letter advising that they will accept what is recovered on party/party basis (letter dated 7 March 2012 attached to letter dated 15 February 2013). Further was said that:

- The claims are simply based on the tax invoices from the various legal practitioners.
- There has been no attempt to exclude costs where there is a contrary costs order.
- There is no moderation of charges.
- Counsel's fees are claimed regardless of what is properly charged; and
- No offer to settle has been made.

Determination

Noted and discussed above.

Assessment of costs

27. Costs are assessed as follows:

A. Professional Costs (Mr Erman's bill)

	<u>Deduction</u>
Items 1 to 58 deducted as per letter from Costs Applicant 15/2/13	\$5,840.30
Items 91, 103, 107, 110, 111, 137, 138, 138, 139 unexplained, appears excessive	\$975.00
Items, 127, 128 not included in cost orders	\$3,870.00
Item 151 claim for travel excessive, lack of detail	\$450.00
Items 167 to 170 no evidence that tax invoices were issued	\$180.00
Item 174 does not appear to have been done	\$45.00
Items 176 to 191 does not appear to have done	\$2,765.20
Subtotal	\$14,125.50
Total fees claimed excluding GST	\$28,578.40
Balance	\$14,452.90
Reduce balance of bill to \$300 per hour (300/450) and add 10% GST	\$10,598.79
<u>Disbursements</u>	
Item 202 excessive in light of deductions, deduct	\$250.00
Item 203 there is no evidence that this work was done, deduct	\$375.00
Allow plus 10% GST	\$2,727.08
Total amount allowed for Erman's bill including GST and disbursements	\$13,325.87

B. Mr Demir's bill

<u>Professional costs</u>	<u>Deduction</u>
2/2/11 to 9/2/11 not fair and reasonable, change of solicitor	\$1,040.00
10/2/11 not fair and reasonable, s364	\$40.00
11/2/11 I was advised that there was no disclosure by Mr Evatt	\$40.00
25/2/11 (2) general objection allowed	\$1,025.00
4/5/11, 5/5/11, 5/5/11 not party/party costs	\$920.00
9/5/11 to 13/5/11 not party/party costs	\$560.00
9/6/ to 29/6/11 contrary to cost orders as per general objection	\$2,185.00
28/9/11, 29/9/11, 6/10/11 excessive time claimed and over reliance	\$1,800.00
12/10/11, 13/10/11, 18/10/11, 19/10/11, 20 & 21/10/11 excessive time,	\$3,000.00
14/3/12 not a party/party cost	\$40.00
2/4/12 to 10/4/12 contrary to cost orders, objection allowed	\$320.00
6/6/12, 7 to 13/6/12 are not fair and reasonable, s364.	\$440.00
Page 17,13 to 15/6/12 are not fair and reasonable, s364.	\$200.00
Total	\$11,610.00
Amount claimed	\$79,410.00
Balance	\$67,800.00
Reduce balance to \$300 per hour (300/400) plus 10% GST	\$55,935.00

Disbursements (minor items)

Faxes – disallow as these are part of a law practice's overheads	\$128.50
Mr Habib's parking and petrol costs are not party/party costs	\$235.98
Copying is excessive deduct	\$45.00
File maintenance is not fair and reasonable and vague	\$50.00
Telephone, postage and 'miscellaneous' are part of overheads and arbitrary, deduct	\$200.00
Total deductions	\$659.48
Amount claimed excluding GST	\$4,262.52
Amount allowed including GST	\$3,603.04

Disbursements (Barrister Evatt)

	<u>Deductions</u>
Items 1 to 10 allow 21.4 hours at \$500 per hour including GST	\$10,650.00
Item 11 allow 4 hours at \$500 per hour including GST	\$3,500.00
Item 12 over reliance on barrister	\$880.00
Items 13, 14 allow 4 hours at \$500 per hour including GST	\$2,400.00
Items 15, 17, 18, 22, 29, 37, 41, 63, 64 excessive internal conferences, lack of detail	\$22,900.00
Item 16 not fair and reasonable, directions fee allowed and sufficient	\$880.00
Item 23 allow 4 hours at \$500 per hour including GST	\$3,500.00
Page 2	
Items 12 to 15 (repeated numbers) allow 7 hours at \$500 per hour including GST	\$4,200.00
Items 16 over reliance on Counsel	\$880.00
Items 19, 20, 21, 23, 25, 26, 27 not part of assessment, CAs letter 15/2/13	\$26,840.00
Items 22 internal conference	\$1,100.00
Item 24 allow 3 hours at \$500 per hour	\$1,800.00
Items 28 to 32 vacation of s7A trial, contrary to cost orders	\$18,920.00
Items 33 to 36 allow 6 hours at \$500 per hour including GST	\$6,120.00
Item 37 internal conference and contrary to cost order, objection allowed	\$1,320.00
Items 38 to 44 allow 10 hours at \$500 per hour including GST	\$6,880.00
Items 45 to 47 allow \$5,000 per day including GST	\$4,800.00
Items 48 to 51 allow 7 hours at \$500 per hour including GST	\$7,170.00
Items 52 to 55 contrary to cost orders, objection allowed	\$11,220.00
Items 56 to 57, 59 to 62, 66, 67 allow 17 hours at \$500 per hour including GST	\$13,000.00
Items 58, 63 over reliance on Counsel	\$2,200.00
Items 68 to 72 allow 15 hours at \$500 per hour including GST	\$9,000.00
Items 73 to 76, 79 allow 4.5 days at \$5,000 per day	\$10,500.00
Items 77, 78, 80 allow 5 hours \$500 per hour including GST	\$3,220.00
Items 81 lack of details and arbitrary	\$4,400.00
Total deductions	\$178,280.00
Amount claimed	\$243,970.00
Balance	\$65,690.00
Add back a total of 5 hours for conference time	\$2,500.00
Total allowed	\$68,190.00

Disbursements (Barrister Rasmussen)

	<u>Deductions</u>
Item 1 allow 5 hours at \$400 per hour including GST	\$500.00
Items 2, 3 allow 4 hours internal conferences but at \$400 per including GST	\$200.00
Items 4 to 6 allow 7 hours at \$400 per hour including GST	\$1,500.00
Item 7 allow 4 hours at \$400 per hours including GST	\$2,900.00,
Items 8 to 15 allow 9 hours at \$400 per hour, 10, and 12 internal disallowed	\$2,700.00
Items 16 to 21 not part of this assessment as per Costs Applicant letter 15/2/13	\$15,800.00
Items 22 to 26 allow 7 hours at \$400 per hour including GST	\$3,550.00
Items 27 to 29 contrary to cost orders as per objections	\$10,350.00
Items 30 to 39 allow 28 hours at \$400 per hour including GST, 37 disallowed	\$8,450.00
Items 40 to 47 allow 38 hours at \$400 per hour including GST, 46 disallowed	\$9,550.00
Items 48, 49 allow 6 hours at \$400 per hour including GST	\$450.00
Items 50 to 52 contrary to costs orders, objections allowed	\$7,450.00
Items 53 to 69 allow 67 hours at \$400 per hour including GST	\$17,700.00
Item 70 allow	\$00.00
Items 71 to 74 allow \$3,000 per day	\$6,000.00
Items 75, 76 allow 8 hours at \$400 per hour including GST	\$1,800.00
Items 77 arbitrary claim, lack of detail, not fair and reasonable	\$2,500.00
Total deductions	\$91,400.00
Amount claimed	\$161,600.00
Amount allowed including GST	\$70,200.00

Summary (including GST)*Mr Erman's bill*

Professional costs including disbursements: \$13,325.87 (reduction 62%)

Demir Legal's bill

Professional costs \$55,935.00 (reduction 30%)

Minor disbursements \$3,603.04

Mr Evatt \$68,190.00 (reduction 72%)

Mr Rasmussen	\$70,200.00 (reduction 57%)
<i>Total</i>	\$211,253.91 (average reduction 60%)
Allow costs of the Costs Respondents determined at \$4,000 (16 hours at \$250 per hour)	\$4,000.00 (deduct)
Amount allowed on assessment	\$207,253.91 (say \$207,250.00)

Costs of the Assessment

28. Costs of the Assessment are determined in the amount of \$10,136.08 comprising \$4,812.50 for the costs of the costs assessor and \$5,323.58 paid by the Costs Applicant (Mr Habib). See s369 (10).
29. The costs of the assessment as defined by section 369 (10) of the Act, are to be determined in accordance with section 126 of the Legal Profession Regulation 2004 which states:

'In determining under section 369 (3) (b) of the Act by whom and to what extent the costs of the assessment of party/party costs are to be paid, the costs assessor may have regard to the following:

(a) the extent to which the determination of the amount of fair and reasonable party/party costs differs from the amount of those costs claimed in the application for assessment,

(b) whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned,

(c) whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

Note: *Section 369 (8) of the Act provides that the costs of the costs assessor are to be paid to the Manager, Costs Assessment. A certificate of such a determination may, under section 369 (7) of the Act, be filed in a court and operates as a judgment debt.'*

30. The bill of costs has been reduced by over 50%. Some delays were incurred as a result of the format of the bills, excessive claims which meant that all bills had to be recalculated and the need for further requisitions and resultant clarification in the nature of the application.
31. It is appropriate that the costs of the costs of assessment (s369 (10)) be paid by the Costs Applicant and a Certificate of Determination of Costs of the Costs Assessment is issued accordingly. The certificate will not make an adjustment for the payment of the filing fee which has already been paid.

Certificates of Costs

32. A Certificate of Determination of Costs is issued for \$207,250.00 requiring the Costs Respondents to pay this sum to the Costs Applicant.

33. A Certificate of Determination of Costs of the Costs Assessment is issued in the sum of \$4,812.50 to be paid by the Costs Applicant.

Date: 8 July 2013



Mark Campbell
Costs Assessor