APPEALS FROM COSTS DETERMINATIONS

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1. Undetected Seismic Shift?

It has been over 3 ½ years since the *Legal Profession Uniform Law Application Act 2014* (NSW) **(Application Act**) and the *Legal Profession Uniform Law (NSW)* (**Uniform Law**) commenced, replacing the *Legal Profession Act 2004* (NSW) (**LPA**)[1], yet thus far there has been very little judicial action with respect to the quite significant re-writing of the provisions concerning appeals from costs assessments. No doubt this is in part due to the transitional provisions which have kept the operation of the LPA alive in respect of many party/party and practitioner/client costs disputes. Consequently, this paper is little more than a mud map of the new appeal terrain, for use by those intrepid explorers, forced to don the boots and

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[1] Section 167(a) of the *Application Act* repealed the *Legal Profession Act 2004* (NSW) (**LPA**) from 1 July 2015, which had in turn repealed the *Legal Profession Act 1987* (NSW) from 1 October 2005. (Section 167(a) was itself repealed on the following day pursuant to s 30C(1)(b) and (2) of the *Interpretation Act 1987* (NSW). Section 4 of the *Application Act* applies the *Uniform Law* set out in Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* of Victoria as a law of NSW.

embark upon a journey into this largely uncharted territory. Contours lines and other significant topographical features it seems, will have to await the effluxion of further time.

This paper is also limited to appeals from costs determinations and does not canvass the circumstances in which it may be appropriate to seek judicial review pursuant to s 69 of the *Supreme Court Act 1970* (NSW.

2. What's changed under the *Legal Profession Uniform Law (NSW)* and the *Legal Profession Uniform Law Application Act 2014 (NSW)*?

The introduction of the *Uniform Law* and the *Application Act* have brought about some quite significant, and in my view very sensible, changes to the appeal terrain. Such terrain is now delineated by the following provisions of the *Uniform Law* and the *Application Act*.

Uniform Law

s.205 Right of Appeal or Review

> *(1) An applicant for assessment or the law practice concerned may, in accordance with applicable jurisdictional legislation, appeal against or seek a review of a decision of a costs assessor in the jurisdiction for which the costs assessor exercised his or her functions in relation to the decision.*
>
> *(2) The court or tribunal hearing the appeal or reviewing the decision may make any order it considers appropriate on the appeal or review.*
>
> *(3) This section does not apply where the designated local regulatory authority determines a costs dispute under Part 5.3.*

The 'applicable jurisdictional legislation' in New South Wales is the *Application Act*.[2] Section 205 is the only provision dealing with appeals from costs assessment in the *Uniform Law* and none of the *Legal Profession Uniform General Rules 2015* or *Legal Profession Uniform Regulations 2015* concern appeals from costs assessments.

Pursuant to s 196 of the *Uniform Law*, s 205, (and the other provisions of Division 7 of Part 4.3) of the *Uniform Law* applies only to *"legal costs payable on a solicitor-client basis"*. The use of this phrase is perplexing. The other provisions of Part 4.3 of the *Uniform Law* concern practitioner/client costs and consistent with that regime, Division 7 may be regarded as having application only to practitioner/client costs assessments, i.e. not to assessments of court ordered costs, which are otherwise governed by the Application Act. This is consistent with the finding of White JA in *Ferella v Stomo* [2017] NSWCA 268 at [22] that: *"The Uniform Law (as distinct from the Application Act) does not apply to a costs assessment consequent upon the making of a costs order."*

However, the phrase, "solicitor-client basis" was historically used (and is still used in some jurisdictions) to indicate that court ordered costs were/are be assessed or taxed on a more

[2] S 6 of the Application Act: ""jurisdictional legislation" means legislation of a jurisdiction; "jurisdiction" means a State of the Commonwealth, the Australian Capital Territory or the Northern Territory of Australia;

generous basis than the standard "party/party basis" or "ordinary basis". The use of this phrase in s 196 suggests that it applies to court ordered costs, and White JA's remarks at [24] of *Ferella* to the effect that the *"Uniform Law could not apply to the assessment of the costs the subject of the orders of Young AJ and the Court of Appeal …* [as the] *costs ordered to be paid were not to be assessed and were not payable on the "solicitor-client basis", but on the ordinary basis"* only confuses the issue further. Thus it is unclear whether Division 7 (and hence s 205) applies only to practitioner/client costs, as one might expect. All that can be said with certainty at the moment is that Division 7 of Part 4.3 of the *Uniform Law* does not apply to the assessment of court ordered costs on the ordinary basis.

Application Act

The mechanism for appeals from costs assessment are otherwise dealt with in Division 6 of Part 7 the Application Act. Pursuant to s 205 of the *Uniform Law* and s 64 of the *Application Act* the provisions in this Division govern both appeals from practitioner/client costs assessments ("Uniform Law costs") and party/party costs assessments ("ordered costs"). There are only three sections in Division 6 and none of the regulations in the *Legal Profession Uniform Law Application Regulation 2015* (NSW) concern appeals from costs assessments.

When the *Application Act* first came into operation on 1 July 2015 two of the provisions of Part 7, namely ss 89 and 90, were in a different form to what currently appears in the Act. Those sections were amended with effect from 24 November 2015 by the *Courts and Other Justice Portfolio Legislation Amendment Act 2015*. As explained in Part 2.1 below, there are no specific transitional provisions relating to these sections and so the versions of ss 89 and 90 that applied as at 1 July 2015 apply to appeals and applications for leave to appeal instituted on or after 1 July 2015, but before 24 November 2015 in respect of assessments to which the *Uniform Law* and/or *Application Act* otherwise apply. Given that it is now 2019 it would seem unlikely that there are any matters caught in this legislative web, so while the issue is canvassed further below, for present purposes only the present version of Division 7 is set out below and discussed.

Division 6 Appeals

89 Appeal on matters of law and fact

> *(1) A party to a costs assessment that has been the subject of a review under this Part may appeal against a decision of the review panel concerned to:*
>
> > *(a) the District Court, in accordance with the rules of the District Court, but only with the leave of the Court if the amount of costs in dispute is less than $25,000, or*
> >
> > *(b) the Supreme Court, in accordance with the rules of the Supreme Court, but only with the leave of the Court if the amount of costs in dispute is less than $100,000.*
>
> *(2) The District Court or the Supreme Court (as the case requires) has all the functions of the review panel.*

(3) The Supreme Court may, on the hearing of an appeal or application for leave to appeal under this section, remit the matter to the District Court for determination by that Court in accordance with any decision of the Supreme Court and may make such other order in relation to the appeal as the Supreme Court thinks fit.

(3A) The Supreme Court may, before the conclusion of any appeal or application for leave to appeal under this section in the District Court, order that the proceedings be removed into the Supreme Court.

(4) An appeal is to be 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.

90 Effect of appeal on review panel decision

(1) If an appeal against a decision of a review panel under section 89 or an application for leave under that section in relation to a determination by a costs assessor is pending in the District Court, either the review panel or the District Court may suspend the operation of the determination or the decision.

(2) The review panel or the District Court may end a suspension made by the review panel. The District Court may end a suspension it made.

(3) A suspension ends when (as the case may be):

(a) the appeal is determined, or

(b) the application for leave is dismissed, discontinued or struck out or lapses.

91 Notices of appeal

The party initiating an appeal or an application for leave to appeal must serve a copy of the initiating process on the Manager, Costs Assessment and every other party to the review from which the appeal is brought or to which the application relates.

LPA

It is helpful for present purposes to contrast the above provisions with the appeal provisions in the LPA. Subdivision 6 of Division 11 of Part 3.2 of the LPA previously governed appeals from both practitioner/client and party/party costs assessments. There were five sections in Subdivision 6, namely:

Subdivision 6 Appeals

384 Appeal against decision of costs assessor as to matter of law

(1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the District Court, appeal to the Court against the decision.

(2) After deciding the question the subject of the appeal, the District Court may, unless it affirms the costs assessor's decision:

(a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or

(b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.

(3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

385 Appeal against decision of costs assessor by leave

(1) A party to an application for a costs assessment relating to a bill may, in accordance with the rules of the District Court, seek leave of the Court to appeal to the Court against the determination of the application made by a costs assessor.

(2) A party to an application for a costs assessment relating to costs payable as a result of an order made by a court or a tribunal may, in accordance with the rules of the court or tribunal, seek leave of the court or tribunal to appeal to the court or tribunal against the determination of the application made by a costs assessor.

(3) The District Court or court or tribunal may, in accordance with its rules, grant leave to appeal and may hear and determine the appeal.

(4) An appeal is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

(5) After deciding the questions the subject of the appeal, the District Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor.

386 Effect of appeal on application

(1) If a party to an application for a costs assessment has appealed against a determination or decision of a costs assessor, either the costs assessor or the court or tribunal to which the appeal is made may suspend, until the appeal is determined, the operation of the determination or decision.

(2) The costs assessor or the court or tribunal may end a suspension made by the costs assessor. The court or tribunal may end a suspension made by the court or tribunal.

387 Assessor can be party to appeal

A costs assessor can be made a party to any appeal against a determination or decision of the costs assessor by the District Court.

388 Notices of appeal

A copy of every document initiating an appeal against a determination or decision of a costs assessor must be served on the Manager, Costs Assessment by the party making the appeal.

389 Court may refer unreviewed determination to review panel

(1) If an appeal is made under section 385 (Appeal against decision of costs assessor by leave) against a determination of a costs assessor and the determination to which the appeal relates has not been reviewed by a panel in accordance with Subdivision 5 (Review of determination by panel), the court or tribunal to which the appeal is made may refer the appeal to the Manager, Costs Assessment for a review by a panel under that Subdivision.

(2) For the purposes of Subdivision 5 (Review of determination by panel), the referral of an appeal by a court or tribunal under subsection (1) to the Manager, Costs Assessment is taken to be a duly made application for a review under that Subdivision.

1.1 The costs assessment must have been the subject of a review

As will be observed, under s 89 of the Application Act, an appeal can only be commenced if the costs assessment has first been the subject of review under Part 7 of the Application Act.

Under the LPA it was possible to appeal a costs assessor's decision without first applying, pursuant to s 373 of the LPA, to have the determination reviewed by a costs review panel. There was no express prohibition or pre-condition imposed by the LPA upon the commencement of an appeal or the making of an application for leave to appeal from the decision of a single costs assessor. In practice, following the introduction of a right of merits review by a panel of two costs assessors in 1999,[3] appeals in fact generally only proceeded from the decisions of review panel.

As most litigation practitioners are now aware, appeals from costs assessments under the LPA proceeded via one of two routes. Section 384 of the LPA provided a party with a right to appeal to the District Court,[4] without leave, in relation to "a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application". An appeal in relation to any other matter required leave (of the District Court, in the case of a practitioner/client costs assessment or of the court which made the order for cost, in the case of a party/party costs assessment), pursuant to s 385. Commonly an appeal under s 385 was described as a 'merits appeal' and was the route to be taken where a party was unhappy with a decision of fact and/or a mixed

[3] *Legal Profession Act 1987* Part 11, Div 6, Subdiv 4A, inserted by *Legal Profession Amendment (Costs Assessment) Act 1998* (NSW) Sch 1 [13].

[4] Amendments made to the LPA, effected on 1 July 2008 by the *Courts and Crimes Legislation Amendments Act 2008* changed the references in both section 384 and 385 from the 'Supreme Court' to the 'District Court'. Consequently, from that date, appeals under section 384 were heard by the District Court rather than the Supreme Court.

decision of fact and law. The somewhat vexing distinction between these two routes is discussed at section 2.2 below. It suffices to note at this juncture that a failure by an aggrieved party to first apply for a review was regarded as a significant factor against the grant of leave under s 385, which was supported by s 389(1) of the LPA, but strictly there was no statutory prohibition against applying for leave directly from the decision of a single costs assessor. That has changed under the new regime.

1.2 Vale "Decision as to a matter of law" and Uncertainty as to Forum

The bifurcated approach to costs appeals under the LPA created two distinct and significant issues. First, was the difficulty in determining whether the alleged error or errors made by the costs assessor or review panel was in fact "a decision … as to a matter of law arising in the proceedings to determination the application", for which an appeal as of right lay pursuant to s 384, or not. This was often a far from easy question and undoubtedly led to much time being taken up by practitioners and courts alike, for questionable utility or social benefit.

The second issue was that if an appeal was not available as of right to the District Court under s 384 and had to be brought, with leave, under s 385, the forum for the proposed appeal had to first be ascertained and was dependent upon whether the costs assessment related to costs payable as a result of an order made by a court or a tribunal (i.e. in relation to party/party costs) or whether it related to practitioner client costs. In the case of the party/party costs, leave had to be sought from the court or tribunal that made the order for costs,[5] while in the case of practitioner/client costs, leave had to be sought from the District Court. In party/party costs assessments an aggrieved party could assert both an error as to a matter of law in which case an appeal was to brought to the District Court and separately, an error as to fact and/or a mixed question of law and fact, in which case leave had to be sought of the Court that made the costs order, which may not have been District Court. Not only was it difficult therefore, in some cases to determine where to commence an appeal, but costs appeals could and were sometimes brought in fora that had little exposure to costs jurisprudence (e.g. the Industrial Relations Commission), requiring the judicial officer hearing the application for leave to be 'brought up to speed' and hence increasing the time spent at the hearing.

The *Application Act* post 23 November 2015 (thankfully), makes no distinction between fact and law appeals, but is directed instead to the quantum involved in the appeal or proposed appeal. As will be observed above, under the Application Act an appeal lies as of right to the District Court if the amount of costs in dispute is at least $25,000 and to the Supreme Court if that amount is at least $100,000. Above $100,000, an appeal lies to either court. The relevant appellate jurisdiction of the

[5] *Turner v Pride* [1999] NSWSC 850 , *Poole v. Turner* [2004] NSWSC 708; *Legal Employment Consulting and Training Pty Ltd v Patterson* [2009] NSWDC 357and see obiter remarks in *Frumar v. The Owners of Strata Plan 36957 [*2006] NSWCA 278 and *Randall Pty Ltd v. Willoughby City Council* [2009] NSWDC 118 .

District Court is unlimited.[6] Below the stipulated thresholds, an appeal lies only by leave of the Court in question.

While the identification of an error as to a matter of law is no longer required in order to bring an appeal as a matter of right, that is not to say that the identification of such an error will not be important in any appeal. The Courts have always shown a reluctance to interfere with the factual findings of the trier of fact, *a fortiori* in reviews/appeals from taxations and costs assessments. Being able to demonstrate an error of law will no doubt continue to provide a stronger basis for an appeal (and for leave to be granted in respect of an appeal brought under the statutory threshold), than errors of fact or discretion.

While choice of Court is no longer as vexed as it was, the ability to seek leave to appeal to the Supreme Court, regardless the sum involved, does mean that a choice of forum remains. This is discussed further below, but it should be noted, lest some be tempted by the aura of the superior court, that pursuant to s 89(3) the *Application Act* the Supreme Court may, on the hearing of an appeal or application for leave to appeal under this section, remit the matter to the District Court for determination by that Court in accordance with any decision of the Supreme Court.

Parties should also be aware of the potential costs ramifications by virtue of UCPR 42.34, whereby an order for costs will not ordinarily be made in favour of a successful plaintiff where the plaintiff obtains a judgment in an amount of less than $500,000 and the proceedings could have been commenced in the District Court. In order to be relieved of this costs penalty the successful party will need to satisfy the Supreme Court that the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted. While the granting of leave might indicate that the proceedings were appropriate commenced in the Supreme Court, the Court may take a different view after granting leave and hearing the appeal.

It is also important to note that if an appeal is brought before the District Court, such decision cannot be subsequently appealed to the Supreme Court pursuant to s 127 of the *District Court Act 1973* (NSW) as the statutory appeal to the District Court is not an 'action' within the meaning of the appeal right in s 127.[7]

1.3 Change in the Nature of the Appeal

An appeal brought under s 384 of the LPA was a strict appeal in the sense that the appeal was on a question of law alone, with the court's function limited to identifying

[6] The jurisdictional limit of the District Court is defined in s 4 of the *District Court Act* 1973 (NSW) (**DCA**) to be $750,000. Section 44 of the DCA prescribes the Court's jurisdiction in relation to "actions" and therein picks up the Court's "jurisdictional limit". However jurisdiction in a statutory appeal does not depend on s44 at all. A statutory appeal to the District Court is not an 'action' within the meaning of the appeal right in DCA s127 (cf s 4): *Cook v Head* [1976] 1 NSWLR 176; *Muldoon v Church of England Children's Homes Burwood* (2011) 80 NSWLR 282.

[7] (cf s 4): *Wende v Horwarth (NSW) Pty Ltd* [2014] NSWCA 170 at [20]; *Cook v Head* [1976] 1 NSWLR 176; *Muldoon v Church of England Children's Homes Burwood* (2011) 80 NSWLR 282.

an error of law. While the court could "correct" any such error and substitute its own decision, it could not engage in fact-finding or receive further evidence.[8]

If leave to appeal was granted under s 385 of the LPA the appeal was de novo, that is, there was a new hearing of the matter. The appellant was not confined by grounds of appeal; the evidence was tendered again, without any restriction on further or fresh evidence; there is no requirement to demonstrate error; and the court had to, in effect re-perform the assessment process.

By contrast, under the new regime, at least post 23 November 2015, an appeal (with or without leave as required) is to be 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. As the appeal is by way of rehearing, it is necessary for an appellant to identify error (of law, of fact or of discretion) in the determination of the review panel. The Judicial Commission's Civil Trial Bench Book records the following in relation to the appeals under the new regime:

> *"In such appeals, the court may adopt a less rigorous view to the receipt of fresh evidence than applies in appeals to the Court of Appeal, not least because there is no facility for oral evidence and cross-examination before an assessor. In particular, where there are contested questions of fact which have not been the subject of oral evidence and cross-examination before the costs assessor or review panel, a relatively liberal approach to the reception of fresh evidence may be anticipated: Cf Wentworth v Rogers (2006) 66 NSWLR 474 at [190]."*[9]

1.4 The Supreme Court is Back in Business

As noted above, the appellate and supervisory role of the Supreme Court is restored by the new Acts, consistent with its traditional responsibilities in this area.

1.5 A Query – Do clients have a right of appeal where a law practice was the applicant for assessment?

As will be observed, pursuant to s 205 (1) of the *Uniform Law* an applicant for assessment or the law practice concerned may appeal, as of right, against a decision of a costs assessor. Consequently, it appears that, pursuant to s 205(1), if a law practice was the applicant for assessment and the client is dissatisfied with the outcome of the assessment, the client may have, under the *Uniform Law*, no appeal rights.

While s 89 of the *Application Act* provides that any *"party to a costs assessment"* that has been the subject of a review under Part 7 may appeal against a *decision* (not 'determination' as was the case under the LPA) of the review panel, it seems that s 89

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[8] *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481; *Madden v NSW IMC* [1999] NSWSC 196.

[9] At [5-0570].

of the *Application Act* may be subject to s 205 of the *Uniform Law*, by virtue of s 64 of the *Application Act* which provides:

> **64 Application of this Part**
>
> *(1) This Part applies to Uniform Law costs and ordered costs.*
>
> *(2) This Part has effect subject to:*
>
> *(a) any other legislation, or*
>
> *(b) any order or direction of the court or tribunal concerned (except as regards section 74 (3)).* (Emphasis added)

Thus, Part 7 of the *Application Act* may be subject to all of the provisions of *Uniform Law* and hence in the event of any inconsistency the *Uniform Law* may prevail. No doubt this is a matter which will be clarified in time.

2. Which is the correct appeal court?

2.1 The Transitional Provisions

The starting point for working out the correct Court in which to bring an appeal from a costs assessment is the transitional provisions contained in both the *Uniform Law* and the *Application Act.* Those provisions are found in Schedule 4 of the *Uniform Law*[10] and Schedule 9 of the *Application Act.*[11]

Put simply, the appeal provisions of the LPA continue to apply to:

- Practitioner/client and third party payer costs assessments where the principal law practice was first instructed before 1 July 2015[12]; and
- party/party costs assessments where the proceeding to which the costs relates (which may not be the proceedings in which the costs order is made) commenced before 1 July 2015.[13]

Less simply put, the appeal provisions of the initial version of the *Application Act*[14] applies to:

- "uniform law" (formerly practitioner/client) costs assessments and appeals where the client first instructed the law practice on or after 1 July 2015; and

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[10] The provisions of Schedule 4 of the *Uniform Law* have effect pursuant to s 476 of the *Uniform Law*.
[11] The provisions of Schedule 9 of the *Application Act* have effect pursuant to s 64A of the *Interpretation Act 1987* (NSW).
[12] *Uniform Law*, Sch 4 cl 18.
[13] *Legal Profession Uniform Law Application Regulation* 2015, reg 59: *"The provisions of the Legal Profession Act 2004 and the Legal Profession Regulation 2005 relating to ordered costs continue to apply to a matter if the proceedings to which the costs relate commenced before 1 July 2015."*; *Ferella v Stomo* [2017] NSWCA 268.
[14] See Historical version of *Application Act* for 2 July 2015 to 23 November 2015.

- "ordered costs" (formerly known as party/party costs) assessments and appeals where the proceedings to which the costs relate were commenced on or after 1 July 2015.[15]

And, the appeal provisions of the revised version of the *Application Act* applies to:

- "uniform law" costs assessments and appeals where the client first instructed the law practice on or after 24 November 2015; and
- "ordered costs" assessments and appeals where the proceedings to which the costs relate were commenced on or after 24 November 2015.[16]

The initial versions of ss 89 and 90 of the *Application Act* were as follows:

> ***89 Appeal to District Court on matters of law and fact***
>
> *(1) A party to a costs assessment that has been the subject of a review under this Part may, in accordance with the rules of the District Court, appeal to the Court against a decision of the review panel concerned as to a matter of law.*
>
> *(2) A party to a costs assessment that has been the subject of a review under this Part may, in accordance with the rules of the District Court, seek leave of the Court to appeal to the Court against a decision of the review panel concerned.*
>
> *(3) The District Court has all the functions of the review panel.*
>
> *(4) An appeal is to be 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.*
>
> ***90 Effect of appeal on review panel decision***
>
> *(1) If an appeal against a decision of a review panel under section 89 or an application for leave under that section in relation to a determination by a costs assessor is pending in the District Court, either the review panel or the District Court may suspend the operation of the determination or the decision.*
>
> *(2) The review panel or the District Court may end a suspension made by the review panel. The District Court may end a suspension it made.*
>
> *(3) A suspension ends when (as the case may be):*
>
> *(a) the appeal is determined, or*
>
> *(b) the application for leave is dismissed, discontinued or struck out or lapses.*

[15] Ibid.
[16] Ibid and the *Courts and Other Justice Portfolio Legislation Amendment Act* 2015.

2.2 The Correct Court under the LPA

As has already been discussed above, if the provisions of the LPA apply, s 384 provides a party with a right to appeal to the District Court, without leave, in relation to a "decision of a costs assessor as to a matter of law arising in the proceedings to determine the application". An appeal in relation to any other matter requires leave pursuant to section 385. Pursuant to s 385(1), such leave is to be sought from the District Court, in the case of a practitioner/client costs assessment, but pursuant to s 385(2), is to be sought from the court or a tribunal which made the order for costs in the case of a party/party costs assessment. [17]

2.3 The Correct Court under the New Regime

If the new regime applies, but the 'trigger date' falls within the period 1 July 2015 to 23 November 2015 an appeal, or leave to appeal, is to be brought in the District Court, following a review by the review panel.

On and from 24 November 2015 a party to a costs assessment that has been the subject of a review may appeal against a decision of the review panel to:

- the District Court, but only with the leave of the court if the amount of costs in dispute is less than $25,000, or
- the Supreme Court, but only with the leave of the court if the amount of costs in dispute is less than $100,000.

As noted above, an appeal may be brought in the District Court in respect of an amount that exceeds the Court's general jurisdictional limit. The Supreme Court may remit the matter to the District Court, and may remove proceedings from the District Court.[18] This power may be exercised to remove into the Supreme Court matters in which important questions of principle are involved, and to remit matters which do not involve issues warranting the attention of the Supreme Court. As also noted above, the costs penalty resulting from the provisions of UCPR 42.34 need to be considered before rushing to the superior court.

As has often been said, the requirement for leave is to provide a "filter", so as to avoid burdening the resources of the courts and the parties with inappropriate appeals.[19] There is no exhaustive description of the factors relevant to a grant of leave to appeal, other than the overall justice of the case.[20] Drawing on cases decided under the LPA and its predecessor, it may be expected that the following matters will be regarded as relevant:

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[17] *Turner v Pride* [1999] NSWSC 850 , *Poole v. Turner* [2004] NSWSC 708; *Legal Employment Consulting and Training Pty Ltd v Patterson* [2009] NSWDC 357and see obiter remarks in *Frumar v. The Owners of Strata Plan 36957 [*2006] NSWCA 278 and *Randall Pty Ltd v. Willoughby City Council* [2009] NSWDC 118.

[18] *Application Act* ss 89(3), (3A).

[19] *Chapmans Ltd v Yandell* [1999] NSWCA 361 at [11].

[20] *Busuttil v Holder* (unrep, 7/11/96, NSWSC); *Chapmans Ltd v Yandel.*

- The existence of a seriously arguable case of error;
- A significant quantum in dispute;
- The proportionality of the costs to the outcome;
- Whether there are questions of fact upon which it is desirable that there be an opportunity for oral evidence and cross-examination, which was not available before the assessor;
- Whether there is a right of appeal.

In *Ferella v Stomo* the primary judge indicated she would not grant leave if s 89 of the *Application Act* applied (which she held, correctly, that it did not), because:

- Not all of the costs the subject of the assessment had been the subject of objection and thus the sums challenged were very modest;
- the "need for finality and for proportionality, having regard to the history of the legislation and the modesty of the amounts involved, is high";
- the issue as to which legislation was applicable had not been raised before the Review Panel;
- neither party suggested that either statutory scheme contained any substantial difference in the way the costs assessor or the Review Panel should approach the assessments;
- it was undesirable to entertain appeals on technical grounds that did not relate to the substantial merits of the dispute; and
- no cogent argument for the grant of leave had been identified.[21]

3. Practice and procedure

Part 50 of the UCPR – Appeal to the Court – governs the procedure for costs appeals. An appeal or application for leave to appeal under section 89 is commenced by Summons in UCPR Form 84[22] which must be filed within 28 days of the material date.[23]

The 'material date" is defined in UCPR r50.1. Where the decision appealed from was given by a person other than a court as in the case of a costs assessment the 28 days start to run on the day after the day that the decision is received (section 36(1) *Interpretation Act 1987*) and concludes at midnight on the 28th days: see *Currabubula Holdings Pty Ltd v. State Bank of New South Wales* [2000] NSWSC 232 at [86].

An extension of time is possible.[24] If an extension is sought such relief should be included in the Summons and an affidavit in support of an extension should be served prior to the first directions hearing. The decision of his Honour Justice Einstein provided a helpful overview of the principles upon which a party can obtain an extension of time in which to appeal in *Currabubula & Paola Holdings v. State Bank of NSW* [2000] NSWSC 232 at [87]:

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[21] See *Ferella v Stomo* [2017] NSWCA 268 at [31].
[22] UCPR rr 6.4(1)(b); 50.4(1); 50.12(3).
[23] UCPR 50.3(1); 50.12(1).
[24] UCPR 50.3(2) and 50.12(2)

> *"An extension of time in which to appeal is not granted automatically or as of right: the Rules of Court governing time steps for pursuing an appeal are to be complied with. However, those Rules of Court are not to be used to effect an injustice: the object of the power of the Court to extend time is to do justice as between the parties. The Court will extend time where not to do so would work an injustice. Relevant considerations in exercising the discretion include the history of the proceedings, the conduct of the parties, the nature of the litigation, the consequences to the parties of the grant or refusal of the extension of time, the prospects of the appeal's success and any prejudice caused to the respondent by extending the time. The trend of recent authorities is towards a growing liberality in granting extensions of time in which an appeal can be lodged: Moulieux v Girvan NSW Pty Ltd (unreported, Court of Appeal, 20 September 1991), Gallo v Dawson [1990] HCA 30; (1990) 93 ALR 479 at 480-481, Jess v Scott (1986) 12 FCR 187 at 194-195, Morris v Public Transport Commission of NSW (unreported, Court of Appeal, 28 May 1984)."*

The Summons must state the relief claimed: UCPR r6.12. Pursuant to UCPR r50.4(1) (Summons commencing an appeal) and UCPR r50.12(3) (Summons seeking leave to appeal) the Summons must contain a statement as to:

(a) whether the appeal relates to the whole or part only, and what part, of the decision of the court below, and
(b) what decision the plaintiff seeks in place of the decision of the court below.

Pursuant to UCPR r 50.4(2) a Summons commencing an appeal must also contain a statement setting out briefly but specifically the grounds relied on in support of the appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below.

Pursuant to UCPR r 50.12(4) a Summons seeking leave to appeal must also contain a statement of:

(a) the nature of the case, and
(b) the reasons why leave should be given, and
(c) if applicable, the reasons why time to apply for leave should be extended,

setting out briefly but specifically the grounds relied on in support of the appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below.

Summonses filed in the Supreme Court will be assigned to the Common Law Division.[25] Upon filing the Summons it will be allocate a return day. Defendants need to file and serve a Notice of Appearance before the return date: UCPR rr 6.9 and 6.10.

The first return is a directions hearing at which a timetable is usually set for the serving of any evidence and submissions. It is usual to serve (and ultimate file) an affidavit annexing the

[25] SCA s 53(1); UCPR r 1.18.

documents used by the costs assessor/review panel to make their decision and a copy of the Certificate(s) of Assessment and Reasons for Determination.

The matter is usually returned once more, to obtain a hearing date.

Finally, and crucially, the party commencing an appeal must comply with the provisions of s of the *Application* which provides:

> *The party initiating an appeal or an application for leave to appeal must serve a copy of the initiating process on the Manager, Costs Assessment and every other party to the review from which the appeal is brought or to which the application relates*.

5 March 2019