SUPREME COURT OF QUEENSLAND

CITATION:	*Davies & Anor v Noosa Cat (Australia) Pty Ltd & Ors* [2014] QSC 153
PARTIES:	**GREGORY ERIC DAVIES and JANELLE VERONICA DAVIES** (plaintiffs) **v** **NOOSA CAT (AUSTRALIA) PTY LTD (ACN 056 475 506)** (first defendant) **WAYNE LESLIE HENNIG** (second defendant) **VOLVO GROUP AUSTRALIA PTY LTD (ACN 000 761 259)** (third defendant) **AQUA MARINE (AUST) PTY LTD (ACN 123 471 830)** (fourth defendant) **ANTONY KROKOWSKI** (fifth defendant)
FILE NO:	332 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2014
JUDGE:	Ann Lyons J
ORDER:	**I will hear from the parties as to the form of the order**
CATCHWORDS:	PROCEDURE - JUDGMENTS AND ORDERS - AMENDING, VARYING AND SETTING ASIDE - GENERL RULES - where the applicants applied to have an order of the registrar to appoint a cost assessor varied to replace the cost assessor on the basis of apprehended bias *Uniform Civil Procedure Rules* r 366(2), r 367(1), r 668 and r 713(2) *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; 75 ALJR 277 (7 December 2000)

Lessbrook v Whap & Ors [2014] QCA 63
Sirius Shipping Corporation v The Ship 'Sunrise' [2007] NSWSC 766
Willis v Edgar [1963] NSWR 664 at 669; 80 WN (NSW) 1369

COUNSEL: R B Dickson for the applicants
J W Lee for the respondents
SOLICITORS: Schultz Toomey O'Brien Lawyers for the applicants
Wellners Lawyers for respondents

[1] The applicants seek orders for the removal of a costs assessor appointed by the registrar of the Supreme Court on 7 January 2014 on the grounds of apprehended bias. The application, pursuant to the *Uniform Civil Procedure Rules* (UCPR) r 366(2), r 367(1), r 668 and r 713(2) or the inherent jurisdiction of the Court was filed on 11 March 2014 and listed for hearing on 14 March 2014.

[2] However, on 13 March 2014 the costs assessor appointed by the registrar filed the Certificate of Costs with the Court and delivered a copy to the parties pursuant to r 737. Written reasons for the decision were not been requested by any party pursuant to r 738. Neither was a review of that assessment pursuant to r 742 filed by any party.

[3] On 14 March 2014 Byrne SJA ordered that the operation of the certificate of the costs assessor dated 13 March 2014 be "stayed until further order". The application was adjourned to a date to be fixed.

[4] The applicants relisted the application for hearing on 16 June 2014. The respondents argued that as the matter was part heard before Byrne SJA the application should be adjourned until August 2014 when the application could next be relisted before his Honour. After a preliminary argument on this issue and after a perusal of the transcript of proceedings on 14 March 2014, I was satisfied that his Honour had not in fact commenced to hear the substantive application. The transcript indicated that there had been some argument about procedural issues, the future conduct of the matter and the prospects of an agreement between the parties, but there was no argument regarding the substantive issues. I also note that his Honour also intimated that the matter might best be adjourned to the Civil List. I was satisfied that his Honour had not in fact embarked upon a hearing of the application and had not heard any substantive argument from the parties with respect to the merits of the application.

[5] Accordingly as the application was not part–heard I proceeded to hear and determine the matter.

Background

[6] The applicants were the plaintiffs in the substantive proceedings which settled prior to trial. A Deed of Settlement was entered into on 1 August 2013 and clause 4(b) provided that the first and second defendants jointly and severally agreed to pay to the plaintiffs costs of and incidental to the proceeding on the standard basis "to be assessed or agreed (less any costs recoverable by the plaintiffs from the third, fourth

and fifth defendants under the terms of settlement between the plaintiff, the third, fourth and fifth defendants)".

Apprehended bias?

[7] The registrar subsequently appointed Mr Gregory Ryan as the costs assessor. Several arguments are now advanced for his removal with the applicants essentially arguing that he should be removed on the basis of apprehended bias because he works out of the same premises as Mr Moffatt the solicitor who drew up the objections on behalf of the first and second defendant to the applicants' costs statement. The major concern raised is that it appears that there is a close working relationship between the costs assessor Mr Ryan and Mr Moffatt due to the proximity of their respective offices and the fact they share expenses. The applicants indicated that their inquiries have ascertained that Mr Ryan and Mr Moffatt have joint offices and a common telephone number. They also argue that the fact of their association was not previously revealed to them. The applicants' submit that the closeness of the working relationship is also shown by the fact that on a particular issue in relation to deductions of $55,000, Mr Ryan and Mr Moffatt both went off on the same "frolic" which raises concerns about their association.

[8] Objection is also taken by the applicants to Mr Ryan's rejection, without reasons, of their request for a ruling that the respondent's objections to the costs statement were non-compliant. The applicants further argue that the form of the objections drawn by Mr Moffatt were substantially in the same form as the objections usually drawn by Mr Ryan and that they bore the "distinctive format of Ryan Costs Consultants with many lists of numbers."[1] The submission is that such an identical approach reinforces the closeness of the association.

[9] The applicants also indicate that they have no confidence in the appointed assessor given that the appointment process was flawed and was not in accordance with the decision of *Lessbrook v Whap & Ors.*[2] In that decision the practice of the registrar of appointing the first in time to file a consent was criticised by Muir JA (with whom Gotterson JA and Daubney agreed) in the following terms:

> "[33] As the above discussion suggests, there will normally be a variety of competing considerations to be assessed and weighed in a registrar's determination under r 713(2)(a). The fact that the selection of a costs assessor is entrusted to the exercise of a registrar's discretion and that there is an avenue of review by the Court militates against arbitrary decision making and the fettering of the registrar's decision by the adoption or application of a rule of thumb or practice. So too does the existence of the right to approach the Court under r 713(2)(b) in lieu of applying to a registrar under r 713(2)(a). Although the registrar's role is administrative in nature there is, nevertheless, an obligation not to take into account irrelevant considerations and to take into account the parties' submissions and all other relevant considerations that the registrar is bound to take into account."

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1 Affidavit of D Kerr sworn 12 March 2014.

2 [2014] QCA 63.

[10] The applicants indicated that they submitted three potential costs assessors and the respondents only nominated Mr Ryan. Mr Ryan was appointed by the registrar as he was the first to file his consent to act. I note, however, that the applicants did not apply pursuant to r 791 for a rehearing and/or appeal of the decision of the Registrar on 7 January 2014. Under r 791 "A party to an application who is dissatisfied with a decision of a judicial registrar or registrar on the application, may, with the leave of the court, have the application reheard by the court."

[11] The applicants also raise concerns in relation to the conduct of Mr Ryan, arguing that it falls below the level to be demonstrated by a costs assessor performing a judicial function. In support of this argument, the applicants submit that the costs assessor forced the parties to the expense of an unnecessary amendment application which was heard by Byrne SJA on 21 February 2014 due to the approach the assessor took to the assessment and his unreasonable refusal to consider an amendment they sought.

[12] The applicants also argue that Mr Ryan acted unprofessionally in proceeding to complete the costs assessment when he had been asked to suspend his assessment while the application for the appointment of a substitute assessor was on foot. The applicants pointed to the fact that the costs assessor stated on 10 March 2014 that he had done 13 hours work and had finished about one-fifth of the assessment. He was then asked later that day to stand aside but refused to do so. The matter was then listed for hearing on Friday 14 March and Mr Ryan was advised of that hearing date. On 11 March 2014, however, he undertook a further 25.5 hours of work and finalised his assessment. He also finalised the assessment without waiting for a response to objections.

[13] The applicants also relied on a letter from the Queensland Law Society dated 13 March 2014 which indicated that Mr Moffatt only has a certificate to practice as an employed solicitor. It is on that basis that the applicants argue that Mr Moffatt is in fact employed by Mr Ryan.

The costs certificate

[14] The final certificate was filed by the assessor on 13 March 2014. The Costs Certificate stated that the Costs Assessor assessed the standard costs payable by the first and second defendants to the plaintiffs to be $298,095.17. That amount comprised Professional Fees of $173,572.41 and Disbursements of $ 124,522.76. As an amount of $585,289.76 had been claimed the assessor allowed approximately half of the claims in the Costs Statement.

[15] On 14 May 2014 Mr Ryan emailed the parties and the associate to Byrne SJA advising that "The matter as far as I am concerned is concluded".

The Jurisdiction of the court

[16] It is clear that the decision of the registrar to appoint the costs assessor was not appealed and no review was sought. The costs assessor therefore proceeded to assess the costs sought pursuant to the Costs Statement. Ultimately the assessor filed a Cost Certificate in the Court on 13 March 2014 although that certificate was stayed on 14 March 2014 by order of this Court. Written reasons for that assessment have not been requested or provided.

[17] I also note that an application for review has not been filed pursuant to r 742 and indeed none of the requirements of r 742 (2), (3) or (4) have been complied with. which provides as follows:

> **"742 Review by court**
> (1) A party dissatisfied with a decision included in a costs assessor's certificate of assessment may apply to the court to review the decision.
> (2) An application for review must be filed within—
> (a) if reasons are requested under rule 738(1)—14 days after the party receives those reasons; or
> (b) otherwise—14 days after the party receives the certificate.
> (3) The application must—
> (a) state specific and concise grounds for objecting to the certificate; and
> (b) have attached to it a copy of any written reasons for the decision given by the costs assessor; and
> (c) state any other matter required by a practice direction made in relation to this rule.
> (4) The applicant must serve a copy of the application on all other parties to the assessment within 14 days after the application is filed.
> (5) On a review, unless the court directs otherwise—
> (a) the court may not receive further evidence; and
> (b) a party may not raise any ground of objection not stated in the application for assessment or a notice of objection or raised before the costs assessor.
> (6) Subject to subrule (5), on the review, the court may do any of the following—
> (a) exercise all the powers of the costs assessor in relation to the assessment;
> (b) set aside or vary the decision of the costs assessor;
> (c) set aside or vary an order made under rule 740(1);
> (d) refer any item to the costs assessor for reconsideration, with or without directions;
> (e) make any other order or give any other direction the court considers appropriate.
> (7) Unless the court orders otherwise, the application for review does not operate as a stay of the registrar's order."

[18] Accordingly the issue in this application is not the correctness or otherwise of the costs assessors decision. The application is made pursuant to r 713 or pursuant to r 366(2), r 367(1) or r 668 or the Court's inherent jurisdiction for directions that the costs assessor appointed by the registrar on 7 January 2014 be replaced even though that cost assessor has completed the assessment.

[19] The current application raises several issues for consideration. Can a costs assessor who has been validly appointed and who has proceeded to file his costs certificate be replaced? Is the costs assessor *functus officio*? Is the Court actually undertaking a review of the actions of the costs assessor despite their being no application to do so in accordance with the rules? Should the Court intervene in this case given the

general reluctance of the Courts to intervene in matters involving the discretion of the taxing officer as discussed in *Willis v Edgar*[3] by Else-Mitchell J who stated:

> "That function is not a judicial one in the strict sense and is better left to be exercised by the administrative officers of the Court who, by their long and constant experience in taxing costs, are better fitted to develop and apply rules of a reasonably uniform and consistent character than judges who deal with these problems on rare occasions only.
>
> Cases will nevertheless arise from time to time when the Court's power of review has to be invoked because the quest for uniformity and consistency may on occasion lead to undue rigidity and consequent error. In some respects, too, the judges may be in a better position as a result of their own experience in presiding at and, formerly, conducting trials, to determine relevant questions as, for example, whether a difficulty which is claimed to have been present in a case was not more imaginary than real. It is on this basis and to correct what may be erroneous tendencies that I think the Court's power to review decisions of the taxing officers should in appropriate cases be exercised."

[20] In *Sirius Shipping Corporation v The Ship 'Sunrise'*,[4] Palmer J also discussed the principles relating to the need for finality in litigation in the following terms in relation to the NSW *Uniform Civil Procedure Rules*:

> "37 The policy of the law is that there should be finality in litigation. Accordingly, the general rule is that a Court has no power to set aside its own final judgment once it has been passed and entered: *Bailey v Marinoff* (1971) 125 CLR 529, at 530, 539; *DJL v Cental Authority* (2000) 201 CLR 226, at 245. Yet, powerful as is the policy of finality, it is subservient always to the fundamental requirements of justice that a litigant is to receive a fair hearing and is to have a determination by the Court of the case on its merits. If a proceeding in the Supreme Court is brought to conclusion without substantial compliance with these requirements, the Court by which the proceeding was heard and determined itself has jurisdiction – inherent and not deriving from the "slip rule" – to re-open the proceedings and to make substituted or additional orders; and this is so even when the previous orders have been perfected by entry. The principle applies both in civil and in criminal cases: see, for example, *Bailey v Marinoff* (supra) at 539-545 per Gibbs J; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29, at 38-39; *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, at 132; *DJL v Central Authority* (supra) at [94].
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> …
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> 39 …However, sub-rule (4) makes it clear that any limitation on the statutory power conferred on the Court by UCPR 36.16 does not

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3 [1963] NSWR 664 at 669; 80 WN (NSW) 1369.

4 [2007] NSWSC 766.

> inhibit the Court's inherent jurisdiction founded upon the requirements of justice.
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> 40 A superior court of record, such as the Supreme Court, is never functus officio when *its procedures have miscarried by denial of the fundamental requirements of justice.* This is not to diminish the importance of adherence to procedure. Procedure is the cornerstone of justice: due observance of procedure guarantees, so far as is possible in any system of human devising, that decisions of the Courts are not made capriciously or with partiality or clandestinely so that they cannot be examined in the light of public scrutiny. By insisting on observance of established procedure the Court – which often must stand between the State and the citizen, between the powerful and the weak, the popular and the unpopular – insists on its independence in administering justice fairly, evenly and consistently according to law.
>
> 41 Yet the Court is not a slave to its own procedure. Procedure has largely been devised by Judges in decisions or rules made over the centuries and is now encapsulated in rules of Court. Circumstances sometimes arise when observance of the letter of procedure would offend against the very notions of justice which procedure is designed to protect: see e.g. *Mulholland v Mitchell* [1971] AC 666, at 679-680; *D v Director General, Department of Community Services* [2005] NSWCA 474, at [46]. For that reason, the superior courts have always insisted that the procedure which they administer is subject to a retained inherent jurisdiction in the Court to do justice. That inherent jurisdiction cannot be exercised in accordance with the idiosyncratic notions of justice held by any particular judge; the jurisdiction is exercised only to accommodate the anomalous circumstances of a particular case within already established and accepted principles of justice according to law.
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> 42 The limits of the Court's inherent jurisdiction to depart from the policy of finality in litigation and to set aside its own perfected orders where justice so requires are probably best left undefined in exact terms, lest justice be thwarted in any particular case: see e.g. *Meier v Meier* [1948] P 89, at 95 per Evershed LJ; *Bailey v Marinoff* (supra) at 542, 544 per Gibbs J; *DJL v Central Authority* (supra) at [95] per Kirby J. However, the jurisdiction is always exercised with great caution and is never available where a claim has in fact been finally determined on the merits in accordance with the requirements of justice and what is sought is, in truth, a review of such decision by way of appeal: *R v Bow Street Magistrate* (supra) at 132; *Postiglione v R* (1997) 189 CLR 295, at 300; *R v Burrell* (supra) at [22]."

[21] It would seem clear therefore that if there is real concern about a denial of justice in a particular situation the Court should intervene. I will therefore turn to the substance of the application before me given the allegations of apprehended bias and also it would seem to me an allegation that there has been a breach of the rules

of natural justice given the concern that the costs assessor proceeded to assess the costs when there was an outstanding objection to the form of the objections.

[22] Should the appointment of the cost assessor be set aside as well as the Certificate filed on 13 March 2014 by the assessor given the fundamental failures as alleged by the applicants?

Has there been apprehended bias?

[23] The relevant test in relation to the question as to whether there has been apprehended bias was discussed by the High Court in *Ebner v Official Trustee in Bankruptcy*:[5]

> [7] The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.
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> [8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the *asserted connection with the possibility of departure from impartial decision making, is articulated.* Only then can the reasonableness of the asserted apprehension of bias be assessed. (my emphasis)

[24] When one examines the substance of the allegations, the allegations of apprehended bias are based on a belief that because both solicitors are co-located in offices

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5 [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; 75 ALJR 277 (7 December 2000).

adjoining each other there is an appearance that Mr Ryan cannot bring an impartial mind to the assessment of costs in this case.

[25] I have read all of the affidavit material filed in this case. The allegations reach can be summarised as follows:

(a) Mr Ryan and Mr Moffatt have offices located close to each other;
(b) there is a common phone number for Mr Moffatt and Mr Ryan;
(c) Mr Moffatt uses a style for objections to Costs Statements which is similar to that used by Mr Ryan; and
(d) as Mr Moffatt only has an employee's practising certificate he must be employed by Mr Ryan.

[26] Exhibited to the affidavit of Mr Schultz dated 12 March 2014 is an email from Mr Ryan dated 10 March 2014 setting out the nature of his professional relationship with Mr Moffatt. He states that Mr Moffatt occupies a room a Ryan Cost Consultant Pty Ltd offices and that is a fact which is well-known. He states:

> "He is own identity and has been for the 26 years of the association. He is not and never has been an employee of Ryan Cost Consultant Pty Ltd."
>
> There a number of QICS employees who are court appointed costs assessors and who from time to time are Court appointed cost assessors for or against clients for whom QICS do other work, I see nothing wrong with this concept as long as there is no conflict and if the appointed costs assessor concerned says he/she has no conflict that is an end to the matter unless there is evidence to the contrary."

[27] Mr Ryan also rejected any submission that Mr Moffatt's style of producing a notice of objection was an adoption of his style. Mr Ryan also stated that he did not agree with any of the propositions in Mr Schultz's letter of 10 March 2014 in which he stated:

> "Because of the close association between yourself and Mr Moffat (sic), our client, having discovered this non-disclosed association, and in the circumstances of stealth in which you came to be appointed, believes it would be appropriate for you to agree to stand aside as the appointed cost assessor so that another independent cost assessor can be appointed. Would you mind letting us know whether you are prepared to do so?"

[28] In his email of 10 March 2014 Mr Ryan rejected any proposition that his relationship with Mr Moffatt was other than a professional one. He stated that he has been in a professional relationship with Mr Moffatt since 1988 and that he has never hidden his association with Mr Moffatt or any other costs assessor. He also stated that other costs assessors, some of whom are now employed by QICS, have in the past enjoyed the same status with Ryan Cost Consultant Pty Ltd as does Mr Moffatt; that is, as a self-employed lawyer. He stated that his association with any legal professional "is in the same context as counsel that share chambers /rooms and secretarial services, a concept you would be familiar with." He continued, "I don't believe I have any conflict in my appointment in this present matter."

[29] In the same email, Mr Ryan dealt with the applicants' objection to the form of the notice of objection of the respondents. He stated that he was of the view that:

> "… the UCPR form 61 Notice of Objection has been followed by the first and second defendants in this matter and in my reasons if they are sought I will explain my position.
>
> I am attaching a copy of UCPR form 61 which I have downloaded; the first and second defendants Notice of Objections, which I have on my file, is as far as I can see following the UCPR form 61."

[30] In relation to the request to cease working on the file, Mr Ryan stated "I am appointed to do the assessment and I will continue unless the Court otherwise directs or orders."

[31] I have taken into consideration the affidavit of Mr Wellner filed by leave at the hearing on 16 June 2014 which states that Mr Moffatt is not a costs assessor but rather prepares costs statements and objections to costs statements only. Mr Moffat has stated that because he is not a cost assessor and as he does not appear in Court he is not required to hold an unrestricted Practising Certificate. In his affidavit Mr Wellner swears that he wrote to the Queensland Law Society on 5 May 2014 seeking advice as to whether a person who "prepares costs statements or objections to costs statement is required to hold a principal's practising certificate.

[32] On 11 June 2014 Alec Dean, the Manager of Records and Member Services from the Queensland Law Society, advised that:

> "I can confirm the Society's position is that a person is not required to hold a practising certificate when they are only preparing cost statements and objections to cost statements. Without holding a practising certificate, they may not engage in legal practice as that phrase is understood."

[33] In his affidavit Mr Wellner states that on 21 May 2014 he wrote to Mr Ryan explaining that the matter was adjourned for the parties to arrange either a conference or for Mr Ryan to have certain questions answered in relation to whether he had a conflict of interest with Mr Moffatt. Mr Wellner indicated that Mr Lee of counsel had drafted some questions to assist the court in determining the issue of conflict of interest. The document was in the following terms:

> "1. The question arises as to whether Mr Ryan and Mr Moffat were in some form of commercial relationship which might give rise to concerns about the suitability of Mr Ryan being appointed as assessor.
> 2. In order to respond to that concern, Mr Ryan should be asked to answer the following questions:
>
> (a) are there any proprietary limited companies in which you and Mr Moffat each hold shares? If so, give details;
> (b) are there any trusts in respect of which both you and Mr Moffat are beneficiaries? If so, give details;

(c) have you and Mr Moffat ever entered into any formal partnership agreement? If so, please provide a copy;
(d) do you give Mr Moffat access to the details of your practice income?
(e) do you give Mr Moffat access to the details of your practice expenditure?
(f) does Mr Moffat give details to you of his practice income and expenditure?
(g) do you and Mr Moffat (or entities controlled by you) hold any capital equipment jointly? If so, give details;
(h) have you and Mr Moffat ever lodged any Tax return for any activity carried on by you in partnership;
(i) does either of you or Mr Moffat employ the other as a full-time or part-time employee?
(j) are you and Mr Moffat joint signatories to any lease, hire purchase or chattel mortgage agreement?
(k) do you and Mr Moffat together employ any other person or persons?
(1) have you ever received a distribution of profit from any business activity carried on by Mr Moffat?
(m) have you ever paid to Mr Moffat any distribution of profit from any business activity carried on by you?
(n) does Mr Moffat have access to your books of account, or you to his?
(o) are you joint signatories on any bank account?
(p) are you and Mr Moffat joint signatories to any lease, hire purchase or chattel mortgage agreement?
(q) do you and Mr Moffat together employ any other person or persons
(r) have you ever received a distribution of profit from any business activity carried on by Mr Moffat?
(s) have you ever paid to Mr Moffat any distribution of profit from any business activity carried on by you?
(t) does Mr Moffat have access to your books of account, or you to his?
(u) are you joint signatories on any bank account?"

[34] On Tuesday, 27 May 2014, Mr Ryan replied by email to Mr Wellner in the following terms:

> "I have read your email 21st May 2014 and the attached list of questions although I am not obliged to answer the same my answer to each is 'NO'.
>
> My email to all parties of the 10th March 2014 clearly set out my personal, professional and business position with Mr Moffatt.
>
> I am the appointed costs assessor and as such in the same position as an assessing Registrar, (I refer to the provisions of civil Proceedings Act 2011 sections 76-79 regarding the position of a Court Appointed

> Costs Assessor), but with limited powers that are set out in the Uniform Civil Procedure Rules.
>
> I have completed the task given to me by the court appointment and I have filed the costs assessors' certificate as required by the Uniform Civil Procedure Rules.
>
> I note the Courts order dated 14th March in relation to my certificate filed on the 13th March 2014."

[35] Having considered the information provided by Mr Ryan and Mr Wellner, It would seem clear to me that Mr Moffatt is not in fact employed by Mr Ryan but rather is a self employed solicitor who only prepares costs statements and objections. In particular his business activities are completely separate from those of Mr Ryan. They are not joint signatories on any bank accounts or documents and they do not employ anyone jointly. They do not have access to each other's books of account and they do not employ the other as a full time or part time employee. They have never received any profit from each other's business.

[36] Whilst he obviously shares premises and expenses with Mr Moffatt, I cannot see that there is any basis for an allegation that he would not bring an independent mind to bear on any cost assessment before him. I am also satisfied that because an assessor uses a form of objections which is similar to another assessor that does not of itself indicate an inappropriately close business relationship such that it would give rise to an apprehension of bias.

[37] I am also satisfied that Mr Ryan was aware of the applicant's objections about the form of the Objections to the Cost Statement prepared by Mr Moffatt. Mr Ryan had indicated that it was in the proper form and was in his view compliant with the UCPR. No further reasons were requested.

[38] Furthermore I am not satisfied that there has been a breach of natural justice because Mr Ryan continued to assess the costs as requested, particularly as no review was ever sought of his appointment. There was no order of the Court requiring that he cease acting. There was clearly no requirement that he should do so.

[39] In determining an application for a costs assessor to be replaced because of apprehended bias it is important to remember that there are in fact two aspects to the determination. The first step requires the identification of what might lead the cost assessor Mr Ryan to determine the costs assessment other than on its merits. As I have indicated I am not satisfied that because they have co-located offices that would necessarily give rise to a concern in this regard. Significantly however I am not satisfied that the second aspect of the test would be satisfied. The second requirement is that there must be a logical connection between that fact and the concern that the costs assessment would not be determined on its merits. As held in *Ebner* "The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the *asserted connection with the possibility of departure from impartial decision*

making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed".[6] There is no evidence before me in this regard.

[40] I am not therefore satisfied that there is any basis for the allegations of apprehended bias and the application should accordingly be dismissed.

[41] I will hear from Counsel as to the form of the order and as to costs.

[6] [2000] HCA 63 at [8].