Court of Appeal
Supreme Court

New South Wales

Case Name:	Voicu v The Owners-Strata Plan No 1624
Medium Neutral Citation:	[2020] NSWCA 52
Hearing Date(s):	17 February 2020
Date of Orders:	27 March 2020
Decision Date:	27 March 2020
Before:	Basten JA at [1]; McCallum JA at [59]; Simpson AJA at [64]
Decision:	(1) Set aside the costs order made in the District Court on 6 December 2018 and substitute an order that the plaintiff (Mr Voicu) pay the costs of the Owners-Strata Plan No 1624 to be assessed on the ordinary basis. (2) Dismiss the applicant's notices of motion filed on 18 and 28 October 2019. (3) Otherwise dismiss the summons in this Court, with no order as to costs.
Catchwords:	JUDICIAL REVIEW – remedies – materiality – review of appeal of costs assessment – incorrect application of repealed statute – application of the correct statute would have led to the same order – whether error jurisdictional – refusal of relief on discretionary grounds COSTS – appeal – cost assessment – costs assessment appeal – repealed Legal Profession Act 2004 (NSW) applied instead of Legal Profession Uniform Law Application Act 2014 (NSW) – effect of savings provisions – Interpretation Act 1987 (NSW), s 30

COSTS – appeal to District Court – indemnity costs ordered – incorrect law relied on by successful party – correct law resulted in same substantive order – costs of successful party

WORDS AND PHRASES – "proceeding" – "proceedings to which the costs relate commenced" – Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59

Legislation Cited:	District Court Act 1973 (NSW), s 127 Interpretation Act 1987 (NSW), s 30 Justices Act 1901 (NSW), s 112 Legal Profession Act 2004 (NSW), ss 384, 385 Legal Profession Uniform Law Application Act 2014 (NSW), ss 7, 82, 83, 89, 167; Pt 7, Div 6 Strata Scheme Management Act 1996 (NSW), s 80D Supreme Court Act 1970 (NSW), s 69 Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59 Uniform Civil Procedure Rules 2005 (NSW), r 59.10
Cases Cited:	Amaca Pty Ltd v Cremer (2006) 66 NSWLR 400; [2006] NSWCA 164 BVD17 v Minister for Immigration and Border Protection (2019) 93 ALJR 1091; [2019] HCA 34 CNY17 v Minister for Immigration and Border Protection (2019) 94 ALJR 140; [2019] HCA 50 Coleman v Shell Co of Australia Ltd (1943) 45 SR(NSW) 27 Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123; [2018] HCA 34 Majak v Rose (No 4) [2017] NSWCA 170 Maxwell v Murphy (1957) 96 CLR 261; [1957] HCA 7 Nobarani v Mariconte (2018) 92 ALJR 806; [2018] HCA 36 Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19 Proust v Blake (1989) 17 NSWLR 267 Re McBain; Ex parte Australian Catholic Bishops Conference (2002) 209 CLR 372; [2002] HCA 16 Re Minister for Immigration and Multicultural and

	Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1; [2003] HCA 6 Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57 Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54 The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389; [1949] HCA 33 The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd [2010] NSWSC 612 Voicu v The Owners Strata Plan 1624 [2019] NSWCA 254 Wende v Horwath (NSW) Pty Ltd (2014) 86 NSWLR 674; [2014] NSWCA 170
Texts Cited:	D C Pearce and R S Geddes, Statutory Interpretation in Australia (8th ed, Lexis Nexis, 2014)
Category:	Principal judgment
Parties:	Ilie Gheorghe Voicu (Appellant) Owners-Strata Plan No 1624 (First Respondent) District Court of NSW (Second Respondent) Terence Leland Stern in his capacity as a Costs Assessor (Third Respondent)
Representation:	Counsel: Ms A Powers (First Respondent) Solicitors: Applicant – self-represented J S Mueller & Co (First Respondent) Crown Solicitor’s Office (Second and Third Respondents)
File Number(s):	2019/226773
Decision under appeal:	
Court or Tribunal:	District Court
Jurisdiction:	Civil
Date of Decision:	6 December 2018
Before:	Kearns ADCJ

File Number(s): 2015/303700

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Decision under review

JUDGMENT

1 **BASTEN JA**: On 22 July 2019 the applicant, Ilie Gheorghe Voicu, commenced proceedings in this Court's supervisory jurisdiction seeking review of a decision of the District Court delivered on 6 December 2018. The judgment below concerned an appeal from three certificates issued by a costs assessor relating to costs ordered in proceedings between the applicant and the respondent, The Owners-Strata Plan No 1624 (owners corporation).

2 There is no right of appeal from the judgment in the District Court in such a matter;[1] accordingly, the applicant appropriately invoked the supervisory jurisdiction of this Court pursuant to s 69 of the *Supreme Court Act 1970* (NSW). To obtain relief he needed to demonstrate jurisdictional error or error of law on the face of the record of the District Court.

3 The grounds in the summons were obscure, and read as follows:

> "1 Conform *District Court Act 1973* – sect 127
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> 2 Conform *Legal Profession Uniform Law Application Act 2014* – s 83".

The only relevance of s 127 of the *District Court Act* 1973 (NSW) is that it provides for an appeal from a judgment or order "in an action"; the appeal in relation to the costs assessor's certificates was not a proceeding in an action and the judgment was therefore not subject to appeal under s 127. The reference to s 83 of the *Legal Profession Uniform Law Application Act 2014* (NSW) is obscure; s 83 provides for a party to a costs assessment to seek a

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[1] Wende v Horwath (NSW) Pty Ltd (2014) 86 NSWLR 674; [2014] NSWCA 170 at [20].

review of the determination by a review panel. It will be necessary to return to the provisions of the Application Act shortly.

4 Filed with the summons was an affidavit of the applicant dated 22 July 2019. The affidavit referred interchangeably to the proceedings as an “appeal” and as a “review”. Properly understood, as the summons stated, it is an application for review in the supervisory jurisdiction of the Court. The decision sought to be reviewed is that of Kearns ADCJ delivered on 6 December 2018. Pursuant to Uniform Civil Procedure Rules 2005 (NSW) (UCPR), Pt 59, r 59.10(1), the proceedings were to be commenced within three months of the date of the decision. That did not happen. Nevertheless, the applicant stated in his affidavit that he had filed a notice of intention to appeal on 28 December 2018 and sought a copy of the transcript. The transcript, as is usual, did not contain the reasons for judgment delivered by Kearns ADCJ, which were no doubt provided to the judge for correction. The applicant stated that he did not receive those reasons until 15 July 2019, a date which was not challenged.

5 In these circumstances, it is appropriate to grant an extension of time within which to file the summons in the supervisory jurisdiction of this Court. It is necessary, therefore, to address the relief sought in the summons.

6 However, the applicant did not attend the hearing on 17 February 2020, although he had been provided with notice of the date and time of the listing, which was fixed at a directions hearing on 16 December 2019. On 31 January 2020 the applicant filed a lengthy affidavit correctly referring in pars 2, 3, and 4 to the hearing details; in par 4 it was described as an “unlawful listing”. That epithet may have reflected dissatisfaction with the Registrar’s failure to recuse himself at the hearing on 16 December 2019 (which the applicant failed to attend), or because he had proffered medical certificates in support of a lengthy adjournment application which was not granted. The material before this Court cast no doubt on the correctness of those rulings and provided no basis for not proceeding with the hearing. It goes without saying that a party refused an adjournment will not obtain the desired result by simply not attending the hearing.

Grounds of review

7 Beyond providing a basis for an extension of time, the applicant's affidavit provided limited assistance in identifying the basis on which he sought review of the District Court judgment. He stated that the hearing on 6 December 2018 had a "duration only of 20 minutes, when the documents presented by me to the Court for hearing, was about one thousand pages". The affidavit failed to focus on the issues before that Court, namely whether there were errors of fact or law in the impugned costs assessments.

8 There were in fact two judgments delivered in the District Court on 6 December 2018. The first reached the following conclusion:

> "I have read through the report of the costs assessor in which he details his reasons and deals with each of the items in the bill of costs. I do not detect any matter of law there within the meaning of s 384 that would give rise to a right in Mr Voicu to have an appeal under that section. Mr Voicu's summons does not make it clear that he seeks any relief under s 385, [but] the defendant in its statement of issues has put it there ….
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> There is no basis upon which the Court should give leave to Mr Voicu to appeal the decision. For these reasons the summons must be dismissed and I, accordingly, dismiss the summons."

9 The second judgment dealt with costs. The judge characterised the proceedings as vexatious and a waste of the Court's time. He continued:

> "They were either a vehicle for the plaintiff to air the grievances he has or a result of a complete misunderstanding by him of what the law requires and expects in an application of this nature. Even on the latter interpretation of events the conduct of the plaintiff is such that an order on an indemnity basis is warranted, and the orders I make then are the summons is dismissed and the plaintiff is to pay the defendant's costs on the indemnity basis."

10 In the earlier of the two judgments, the references to s 384 and s 385 are references to provisions of the now repealed *Legal Profession Act 2004* (NSW). Section 384 provided that an appeal lay to the District Court from a decision of a costs assessor "as to a matter of law arising in the proceedings"; s 385 provided for an appeal to the District Court against the determination of an application for a costs assessment, by leave of the court, which, if leave were granted, would provide an appeal by way of a new hearing.

11 Early in the judgment, Kearns ADCJ identified these two provisions as raising the relevant basis of jurisdiction in the Court. He stated, "[b]y reason of the

timing of the events in question it is that Act [the *Legal Profession Act*] which is in play rather than the successor Act."

12 Although not raised in the applicant's material served on the respondent, there is on the Court file an affidavit of 4 November 2019 which contained five grounds which were to be sought by way of amendment to the summons filed on 24 September 2019.[2] The first alleged that there were errors in the transcript of the proceedings before Kearns ADCJ. It is not obvious that there were any errors (although it is true that on a number of occasions the transcription officer was unable to understand what the applicant was saying). In any event, the content of the transcript can only be in issue in a challenge as to the legal validity of the proceedings and judgment before the District Court if it reveals (or fails to record) something which demonstrates a relevant error. None was identified in this context; the first ground was without substance.

13 The second ground took objection to the identity of the respondent. The applicant asserted that the correct name is "Owners-Strata Plan No 1624 and 3245", and that applied since 16 March 1968 when a strata plan of subdivision of Lot 11 was registered with the Council. This point has no substance. An affidavit sworn by the solicitor for the respondent, Mr Faiyaaz Shafiq, annexed a certificate of title for the applicant's unit, showing it to be within Strata Plan 1624, and a certificate of title for Strata Plan 1624.

14 The third ground alleged that the engagement of the solicitors for the respondent was not approved by resolution of the general meeting of the owners corporation, in accordance with s 80D(1) of the *Strata Scheme Management Act 1996* (NSW). Mr Shafiq's affidavit annexed the minutes of the annual general meeting of the owners corporation held on 8 December 2016. A resolution with respect to overdue levy contributions generally approved the engagement of the respondent's solicitors to take such legal action as might be necessary to recover unpaid contributions and related expenses, including by commencing, maintaining, defending or discontinuing court proceedings against any lot owner. There was otherwise no reason to doubt the solicitors'

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[2] In fact the affidavit accompanied a draft amended summons, which contained grounds not in identical terms to those set out in the affidavit. What follows is an attempt to identify and address the substance of the matters raised.

authority to act and charge fees. It was not explained how this issue arose as a challenge to the costs assessment. The third ground is not tenable.

15 The fourth ground was that the initial proceedings instituted by the owners corporation were premature as there was no debt owed in respect of the applicant's lot. The evidence in respect of that matter was a statement made by Mr Shafiq at the hearing in the Local Court to the effect that the levies had been paid and the only outstanding issue was legal costs. Where an amount is paid after proceedings have been commenced, but not accepted in full settlement of any outstanding debt, the question of costs will not be disposed of. In any event, this was a matter to be agitated in the first appeal taken from the Local Court judgment to the District Court, being proceedings determined in 2016. Further, doubt was cast on the accuracy of the statement ascribed to Mr Shafiq in the District Court costs assessment proceedings. The fourth matter raised no basis for challenging the validity of the judgment of the District Court in relation to the applicant's appeal from the assessment of the costs of the earlier District Court proceedings.

16 If the application to amend were properly before the Court it would be dismissed as to the first four grounds.

17 Proposed ground 5 stated that "because 'the costs orders were obtained', was after 1 July 2015, in fact on 23 September 2015, in Local Court Sutherland, the Assessment of Costs pursuant to the Costs Orders, must be made and governed by [the Legal Profession Uniform Law Application Regulation 2015 – Reg 59]." Although this statement misapprehends the real issue, it is necessary to consider whether it indirectly reveals an error of law on the face of the record of the District Court, and if so, what consequences should follow in this Court. If the judge applied the wrong statute, there was an error of law on the face of the District Court record, as defined in the *Supreme Court Act*, s 69(4).

Procedural background

18 As the judge noted, the proceedings in the District Court related to three certificates issued by a costs assessor, Mr T L Stern, provided in two batches. On 14 May 2018 he assessed costs ordered to be paid by Judicial Registrar Howard in the District Court by an order made on 20 May 2016. The costs

were assessed in an amount of $6,670.39. A week later, on 21 May 2018, Mr Stern assessed the costs payable pursuant to a costs order made in the District Court on 4 March 2016 in an amount of $16,241.34. He issued a separate certificate with respect to the costs of the latter costs assessment, in an amount of $1,126.13. In total, the certificates were for an amount of $24,037.86.

19 The short history of the litigation over the last four and a half years commenced with the owners corporation bringing proceedings on 5 June 2015 in the Local Court at Sutherland, seeking payment from the applicant and his wife, Lucia Voicu, of an amount of $1,648 on account of levies payable with respect to a lot they owned in the strata plan managed by the corporation. Judgment was given in the Local Court in favour of the owners corporation for the amount claimed, together with legal costs in an amount of $4,077.90.

20 On 16 October 2015 Mr and Mrs Voicu lodged an appeal in the District Court. The appeal was heard and dismissed by Judge M L Williams on 4 March 2016. The Voicus were ordered to pay the costs of the appeal.

21 On 31 March 2016, and again on 19 May 2016, Mr and Mrs Voicu filed motions in the District Court, although there were no longer any proceedings on foot. Those motions were dismissed by the judicial registrar on 20 May 2016, and resulted in a further costs order against them.

Applicable statutory provisions

22 This chronology is of critical importance in determining what legislation applied to the assessment of costs of the proceedings before the District Court. On 1 July 2015 the *Legal Profession Act 2004* was repealed and replaced by the *Legal Profession Uniform Law* (NSW) and the *Legal Profession Uniform Law Application Act 2014* (NSW) (Application Act).

23 Part 7 of the Application Act provided for the assessment of legal costs. However, pursuant to the Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59, the repealed legislation continued to apply to a matter "if the proceedings to which the costs relate commenced before 1 July 2015."

24 The applicant's proposed amendment to the summons misstated the operation of cl 59 and failed to identify the critical issue, which was the date on which the proceedings in the course of which the costs orders were made were commenced. Further, the reference to orders made in the Local Court at Sutherland was misleading: those orders were not the basis of the costs assessments from which the appeal was taken to the District Court.

25 In this Court, the respondent did not concede that it had been wrong to rely in the District Court on the provisions of the *Legal Profession Act* as governing the appeal in that Court. It did, however, come prepared to refer the Court to authority which supported the view that the respondent's claim in the Local Court was a different proceeding from the applicant's appeal in the District Court.

26 Most of the authorities in relation to the meaning of "proceeding" and "proceedings" have emphasised the importance of the particular legislative context.[3] In *The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd*[4] Ward J observed:

> "… a review of the cases which have considered the term in other legislative contexts would certainly suggest that, at least for the purposes of the court rules, the concept of "proceedings" includes all claims brought within the umbrella of the set of proceedings comprised within the one court file."

There is no doubt that each of the claim brought by the owners corporation in the Local Court, and the appeal brought by the applicant and his wife in the District Court, was equally a proceeding; it does not follow that they were one and the same proceeding. Indeed, unless a statutory context prescribes otherwise, the very fact that they took place in separate courts militated against such a conclusion. Although the underlying claims were common to each, the moving party was different and the jurisdiction and functions of the separate courts were distinct.

27 To similar effect, in *Proust v Blake*[5] the Court of Criminal Appeal held that where a particular step was required to be taken within seven days after

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[3] Majak v Rose (No 4) [2017] NSWCA 170 at [14] (White JA); Amaca Pty Ltd v Cremer (2006) 66 NSWLR 400; [2006] NSWCA 164 at [75], [77] (McColl JA), [163]-[164] (Brereton J).

[4] [2010] NSWSC 612 at [385].

[5] (1989) 17 NSWLR 267.

proceedings in the Supreme Court under s 112 of the *Justices Act 1901* (NSW) were determined, those proceedings were determined when the trial judge made orders, and not when the Court of Appeal refused leave to appeal from that judgment.[6]

28 It remains to consider whether the language of cl 59 supports a different construction. It envisages that the former legislation relating to ordered costs may continue to apply "to a matter". The words "to a matter" seem to be largely otiose; the provision would have the same meaning if they were omitted. Thus the "matter" may be the assessment of costs, or a review of the assessment: the content of the concept will depend upon the provision of the statute which is engaged in the particular case. The regulation then refers to the temporal element, namely the time at which "the proceedings to which the costs relate commenced". In the context of "ordered costs" the point of reference will be the proceeding in which they were incurred. (That will not necessarily be the proceeding in which they were ordered, as an appeal court may uphold an appeal and vary the costs order made in the trial court.) If the trial commenced before 1 July 2015, any costs order in relation to that trial will be subject to the *Legal Profession Act*, but the costs of the appeal, commenced after 1 July 2015, will be subject to the new regime.

29 This is consistent with the apparent underlying purpose of the transitional provision. The *Legal Profession Act* ceased to have effect on 1 July 2015, when it was repealed by s 167 of the Application Act. That consequence was subject to statutory provision to the contrary. The general savings provision, found in s 30 of the *Interpretation Act 1987* (NSW), maintains the rights, privileges, obligations and liabilities which had been acquired, accrued or incurred under an Act prior to its repeal.[7] According to general law principles, it is then necessary to consider whether a particular statutory provision has created a right or liability prior to its repeal, which will survive for the purposes of litigation at a later date. To take an obvious example, the terms of an offence

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[6] Proust v Blake, 269D-270B and 270G (Samuels JA, Mathews J agreeing). Note the reference at 269C-D in the paragraph beginning "In my opinion the appellant is correct…" appears to be in error; the respondent's submissions were accepted, not the appellant's.

[7] The provision of the Legal Profession Uniform Law, s 7(1), applying the Interpretation of Legislation Act 1984 (Vic) to that legislation, does not apply to the Application Act.

will operate with respect to conduct which occurs while the offence is so described, but will not apply to conduct after the provision has been amended or repealed. Absent statutory authority to the contrary, a person is liable to be sentenced according to the penalties prescribed at the time of the offending, and disregarding later increases in the relevant penalties. The general proposition is that a law having substantive effects will continue to apply despite the repeal or amendment of the statute, whereas a law involving procedural effects will operate as from the time of its commencement because it does not retrospectively impinge on existing rights and obligations.[8] There is a distinction between retrospectively varying an accrued right or liability (which is presumed not to be the statutory intention) and imposing new rights or liabilities upon the existence of past facts (which is not seen as having a retrospective effect). In many cases, to resolve such difficult questions of interpretation, the individual statute indicates in a transitional provision how it is intended to operate.

30 The effect of cl 59 is to ensure that procedural steps available with respect to ordered costs in litigation commenced before the provisions of the Application Act took effect will continue to operate; there is no arguable case that particular provisions with respect to ordered costs should operate in relation to proceedings which were not commenced before the Application Law took effect. Although the appeal did "relate to" the trial, the costs orders made on the appeal did not: they related only to the costs of the appeal.

31 In the present case, the proceeding in the Local Court was commenced before 1 July 2015 and, accordingly, costs in that proceeding were to be assessed in accordance with the *Legal Profession Act* (and the Legal Profession Regulation 2005 (NSW)). However, the appeal lodged in the District Court was a fresh proceeding; any costs orders in that proceeding were to be assessed in accordance with the Application Law. The trial judge was therefore in error in identifying the provisions with respect to appeals in the *Legal Profession Act* as

[8] Maxwell v Murphy (1957) 96 CLR 261 at 267 (Dixon CJ); [1957] HCA 7; Coleman v Shell Co of Australia Ltd (1943) 45 SR(NSW) 27 at 31 (Jordan CJ); D C Pearce and R S Geddes, Statutory Interpretation in Australia (8th ed, Lexis Nexis, 2014) pars 10.1-10.4.

the basis of his jurisdiction. That was an error of law on the face of the record, permitting the intervention of this Court.

32 Relief in the supervisory jurisdiction does not necessarily follow as of right upon identification of a material error. In the present case there is a live issue as to whether, in the Court's discretion, relief should be refused. However, for reasons more fully explained below, the proceedings may be dismissed without reaching the question as to discretionary relief on the basis that the error identified above was not material. The error was the failure of the District Court judge to apply the new law, rather than the old; however, if the new law had been applied, it would inevitably have led to rejection of the appeal because it did not provide for an appeal against a costs assessment, but only from a decision of a review panel. An error which, if corrected, would inevitably lead to the same result, is not a "material error" in the sense identified in *Hossain v Minister for Immigration and Border Protection*[9] discussed below.

Discretionary considerations

33 The first question is to identify the extent to which, had the matter been addressed under the Application Act, a different approach would have been required. Appeals are provided for in Pt 7, Div 6 of the Application Act (ss 89-91). The critical provision for present purposes is s 89 which provides as follows:

> **89 Appeal on matters of law and fact**
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> (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—
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> (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
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> (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.
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> (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

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[9] (2018) 264 CLR 123; [2018] HCA 34 at [31].

> 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.

34 There are a number of aspects of this provision which vary the appeal provisions under the *Legal Profession Act*. First, although not material to the present case, there is a bifurcated jurisdiction permitting an appeal to either the District Court or the Supreme Court. (That is of no consequence for present purposes, although an amendment to the *Legal Profession Act* in 2008 had changed the destination of all appeals from the Supreme Court to the District Court.)

35 Secondly, and more significantly, there is an appeal as of right in the District Court with respect to an amount of costs of $25,000 or more. That appeal is by way of a rehearing and fresh or additional evidence may be given on the appeal: s 89(4). By contrast, the appeal to the District Court under s 384(1) of the *Legal Profession Act* was limited to a decision of a costs assessor as to a matter of law; it was not an appeal by way of rehearing. On the other hand, where leave was given pursuant to s 385, the appeal was more expansive than an appeal by way of rehearing, being by way of a “new hearing”, providing for fresh or additional evidence to be given.

36 If it were necessary to consider the effect of the new provision, and even if one could properly address the three separate certificates together, the amount in issue was a fraction under $25,000, thereby engaging the requirement for leave to appeal to the District Court. Because the amount was close to the floor for appeals as of right, if all three certificates were looked at cumulatively, it is arguable that leave would have been given. On the other hand, that result would not have been inevitable for two reasons. One is that arguably each certificate must be considered separately; secondly, if no tenable ground was presented for a review, the Court would have been entitled to refuse leave for that reason.

37 However, there is a further factor having real consequences in the present case. The District Court appeal involved three certificates of a costs assessor; there had been no application for a review of those certificates and therefore there was no decision of a review panel. Pursuant to s 89(1) of the Application Act, the right of appeal is only against a decision of the review panel. It follows that had the Application Law been applied, the District Court would have had no jurisdiction to review the costs assessments.

38 In any event, because the District Court had no jurisdiction to hear the appeal, and still has no jurisdiction to hear the appeal, the grant of relief in these proceedings would be futile. Discretionary refusal of relief in the supervisory jurisdiction may operate differently with respect to jurisdictional errors and errors of law on the face of the record. The considerations which may operate with respect to the latter were considered in *Re McBain; Ex parte Australian Catholic Bishops Conference*,[10] a case in which it was alleged that a judge of the Federal Court had made an error of law in determining that an aspect of the *Infertility Treatment Act 1995* (Vic) providing for certain procedures to be available only to a married woman, or a woman living in a de facto relationship, was discriminatory on the ground of marital status and the limitation was to that extent invalid. There was no suggestion that the Federal Court did not have jurisdiction to determine the issue.

39 Although the Federal Court, unlike the District Court, is a superior court, the same principles will apply in relation to the present matter. There were two statutory provisions which permitted an appeal to the District Court with respect to a costs assessment; the question was which of the two operated in the particular circumstances. That required a decision as to the relevant transitional provision discussed above. At least in principle, that was a matter to be determined by the District Court judge. Giving the wrong answer by accepting the submissions of the defendant did not involve jurisdictional error.

40 In *Pelechowski v Registrar, Court of Appeal (NSW)*,[11] the High Court held that the District Court had no power to grant Mareva-type relief and punish a person in contempt for non-compliance. The majority (Gaudron, Gummow and

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10 (2002) 209 CLR 372; [2002] HCA 16.

11 (1999) 198 CLR 435; [1999] HCA 19.

Callinan JJ) spoke of a lack of power in the District Court and not a lack of jurisdiction. The minority judgments of McHugh J and Kirby J spoke in terms of both jurisdiction and power, but, as they held that the District Court had both in the circumstances of the case, it was not necessary for them to distinguish between the two.

41 More generally, there is no doubt that relief is discretionary, even if the error is jurisdictional. As the High Court explained in *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*,[12] ordering that the Court below entertain an application which it had refused on the ground that it had no power:

> "The writ of mandamus is not a writ of right nor is it issued as of course. There are well recognized grounds upon which the court may, in its discretion, withhold the remedy.
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> For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made."

42 In *Re Refugee Review Tribunal; Ex parte Aala*,[13] Gaudron and Gummow JJ described that passage in *Ex parte Ozone Theatres* as providing "guidance, though it cannot be exhaustive". Gleeson CJ stated:

> "[5] I agree with what has been said by Gaudron and Gummow JJ as to availability of prohibition as a remedy, under s 75(v) of the *Constitution*, in a case of denial of procedural fairness, and as to the discretionary nature of the remedy."

43 In the civil case of *Stead v State Government Insurance Commission*,[14] the High Court upheld a claim that there had been procedural unfairness at a trial when the trial judge had indicated that he accepted an expert on a particular point, directing counsel to move to another aspect of the case, and then, in his judgment, rejected the expert opinion. The High Court accepted that it would be a futility to order a second trial if it were satisfied that a properly conducted trial "could not possibly have produced a different result." The Full Court of the South Australian Supreme Court erred in holding either that it could not assess

[12] (1949) 78 CLR 389 at 400; [1949] HCA 33.

[13] (2000) 204 CLR 82; [2000] HCA 57 at [56].

[14] (1986) 161 CLR 141; [1986] HCA 54.

the effect of the error on the outcome or that a new trial "would probably make no difference to the result".

44 These principles were applied in *Hossain v Minister for Immigration and Border Protection*. The case involved a question of error on the part of the Administrative Appeals Tribunal, which was not satisfied as to two prescribed criteria having been met. One related to the timing of the making of the application; the other involved a public interest criterion. It was accepted that the Tribunal had erred in its construction of the first criterion; the question was whether on the facts found it was open to the Tribunal to be satisfied that the public interest criterion was met. The Court held that it was not so open.[15] The principle was explained in the following passage in the joint reasons of Kiefel CJ, Gageler and Keane JJ:

> [29] That a decision-maker 'must proceed by reference to correct legal principles, correctly applied'[16] is an ordinarily (although not universally[17]) implied condition of a statutory conferral of decision-making authority. Ordinarily, a statute which impliedly requires that condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.
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> [30] Whilst a statute on its proper construction might set a higher or lower threshold of materiality,[18] the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of 'the possibility of a successful outcome',[19] or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was 'so insignificant that the failure to take it into account could not have materially affected' the decision that was made.[20]
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> [31] Thus, as it was put in *Wei v Minister for Immigration and Border Protection*,[21] '[j]urisdictional error, in the sense relevant to the availability of relief under s 75(v) of the *Constitution* in the light of s 474 of the *Migration Act*,

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15 Hossain at [35].

16 Plaintiff M61/2010E v Commonwealth (Offshore Processing Case) (2010) 243 CLR 319 at [78].

17 eg, Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 92 ALJR 248.

18 cf SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294.

19 Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326 at [56], quoting Stead v State Government Insurance Commission (1986) 161 CLR 141 at 147; eg, Minister for Immigration and Border Protection v WZAPN (2015) 254 CLR 610 at [78].

20 Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 40; cf Martincevic v Commonwealth (2007) 164 FCR 45 at [67]-[68].

21 Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22 at [23].

> consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act'. Ordinarily, as here, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision."

45 Nettle J, agreeing with the majority that the appeal was to be dismissed, for the reasons given by Edelman J, also stated:

> "[43] I wish also to observe that the exercise of residual discretion to refuse relief in a case of jurisdictional error may, in an appropriate case, depend on a backward-looking test of whether there could possibly have been a different outcome. Much depends on the circumstances of the case. But as the Tribunal's error in this case was not a jurisdictional error, it is unnecessary and undesirable to say anything further on the residual discretion."

46 As explained by Edelman J, the adoption of the concept of materiality is not necessarily the same as the application of a residual discretion:

> "[73] It is also necessary to distinguish the concept of materiality from the residual discretion to refuse relief, which was also the subject of submissions on this appeal. The concept of materiality, whether it is express or implied, is necessary for a conclusion that (i) a decision is beyond power or (ii) whether or not the decision is beyond power, there is an actionable error of law on the face of the record. In contrast, the residual discretion arises if certiorari would otherwise be available for one of those reasons.
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> [74] There has long been a residual discretion to refuse to issue a writ of certiorari even where a jurisdictional error is established. In [*Ex parte Ozone Theatres*],[22] this Court said that discretion might be exercised to refuse a writ of certiorari 'if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made'. Reference to the potential exercise of discretion where no useful result could ensue thus looks forward to the utility of another hearing. Although the residual discretion is not confined to being 'forward looking', it contrasts with the usual consideration of materiality, discussed above, which looks backwards to whether the error would have made any difference to the result."[23]

47 The distinction between backward-looking and forward-looking considerations is valuable in clarifying the separate factors involved; for present purposes, either may provide a basis for the exercise of the residual discretion. The key factor in this case is that if he had applied the right test, the District Court judge would have been bound as a matter of law to dismiss the appeal; a further appeal with respect to the same subject matter would suffer the same fate.

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[22] 78 CLR 389 at 400. See also SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190 at [28].

[23] See further BVD17 v Minister for Immigration and Border Protection (2019) 93 ALJR 1091; [2019] HCA 34 at [66]-[67] (Edelman J); CNY17 v Minister for Immigration and Border Protection (2019) 94 ALJR 140; [2019] HCA 50 at [125]-[128] (Edelman J).

This circumstance may be compared with *Nobarani v Mariconte*,[24] a civil trial in which *Stead* was invoked unsuccessfully. In any event, it is not in doubt that, even with respect to an administrative decision, the court will refuse an applicant relief where the tribunal was bound by the governing law to refuse the application.[25] The reason is that the tribunal cannot have acted without jurisdiction if it made the only order available to it. The exercise of the supervisory jurisdiction, as with an appeal, is directed to the legally effective order of the tribunal; the court does not intervene merely to correct error in the reasons.

48 There are other factors which militate in favour of the same result, but because the foregoing is determinative of the outcome, they may be identified briefly.

49 First, the applicant's conduct of the proceedings in this Court, while not warranting the description of actual bad faith, has militated against the grant of any indulgence on the part of the Court. The failure of the applicant to serve documents on the respondent has been ongoing and unacceptable. It is quite improper for one party to file any material in Court, with the intent that it be available to the Court at the hearing of his case, whilst failing or refusing to provide copies simultaneously to the other party. An occasional breach by a self-represented litigant may be excused on the basis of ignorance; that does not apply in the present case. Explicit orders were made directing the service of material on the solicitors for the owners corporation on 19 August 2019, 30 September 2019, 21 October 2019, 4 November 2019 and 16 December 2019. Several affidavits upon which the applicant might have been expected to rely at the hearing on 17 February 2020 were not served. The failure to do so would likely have led to the rejection of them as evidence, had they been sought to be read and if objection were taken. Neither ignorance nor the applicant's medical conditions, so far as they are revealed by the material he has filed, excuse such flagrant disregard for court orders.

50 Further, the affidavits are replete with language alleging criminal conduct on the part of the respondent, its solicitors, and most of the judicial officers who have been involved in the matter. That material need not form part of the public

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24 (2018) 92 ALJR 806; [2018] HCA 36 at [38], [48].

25 Ex parte Aala at [58] (Gaudron and Gummow JJ).

record because there has been no attempt to read the affidavits in court and the matter has proceeded so far by considering only the proposed amendments contained in paragraph 2 of the affidavit of 4 November 2019.

51 Finally, had it been necessary to consider the merits of the appeal in the District Court, a real issue would have arisen as to whether it would have been open on the material before the District Court judge, properly advised as to the matters relied upon in a proceeding in which the Court had jurisdiction, to uphold the appeal. While a discretionary refusal of relief on the merits may place a heavy burden on the respondent to establish that a different outcome was not open, an applicant cannot avoid the practical obligation to indicate some material error of law or fact in order to maintain the merit of his appeal, which would otherwise risk summary dismissal as frivolous or vexatious. The situation is analogous to that in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.[26] Mr Lam had been accepted as a refugee, but had then committed a number of serious criminal offences. The Minister proposed to cancel his visa if not satisfied that the applicant passed the character test. The applicant's relationship with his children who resided in Australia was a material consideration. Departmental officers undertook to contact a Ms Tran who had information as to his relationship with the children, and then obtain further submissions from him on the basis of that material. Neither step was taken. Gleeson CJ noted:

> "[22] The applicant was unable to point to any additional information, or any argument, that might have been put before the respondent if there had been contact between the Department and Ms Tran following 7 November 2000, or if the applicant had been told that there would be no such contact. There is nothing to justify a view that, considered objectively, proper decision-making required further contact with Ms Tran."

The Chief Justice continued:

> "[34] … if a decision-maker informs a person affected that he or she will hear further argument upon a certain point, and then delivers a decision without doing so, it may be easy to demonstrate that unfairness is involved. But what must be demonstrated is unfairness, not merely departure from a representation. …
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> …

[26] (2003) 214 CLR 1; [2003] HCA 6.

> [37] A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations. ... A particular example of such detriment is a case where the statement of intention has been relied upon and, acting on the faith of it, a person has refrained from putting material before a decision-maker. In a case of that particular kind, it is the existence of a subjective expectation, and reliance, that results in unfairness. Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

It may be inferred that the Chief Justice was, in the second sentence of [37], distinguishing the facts in *Stead*.

52 McHugh and Gummow JJ reasoned to similar effect:

> "[106] The applicant by the statement in the letter to him of 7 November 2000 did not acquire any vested right to oblige the Department to act as it indicated, at peril of the ultimate decision by the Minister exceeding his jurisdiction under the Act. It was not suggested that in reliance upon that letter the applicant had failed to put to the Department any material he otherwise would have urged upon it. Nor was it suggested that, if contacted, the carers would have supplemented to any significant degree what had been put already in the letter of 17 October 2000. The submission that the applicant, before the making by the Minister of his decision, should have been told that the carers were not to be contacted, thus lacks any probative force for a conclusion that the procedures so miscarried as to occasion a denial of natural justice."[27]

53 Although these comments were made in the context of a finding as to whether procedural unfairness had occurred, they are material to the question of futility.

54 For these reason, although the District Court applied the wrong legislation, relief should be refused.

Notices of motion

55 It remains to note one further procedural matter which appears to be outstanding. The applicant has filed a number of notices of motion in this Court. One dated 16 September 2019 sought to review orders made at a directions hearing on 19 August 2019 by the Registrar. That notice of motion was dismissed by White JA on 14 October 2019.[28] Four days later, on 18 October 2019, the applicant filed a further notice of motion which appeared to identify as a separate issue the proper name of the respondent. That issue has been dealt with above; the notice of motion of 18 October 2019 must be dismissed,

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[27] See also Hayne J at [122] and Callinan J at [148], agreeing with McHugh and Gummow JJ.

[28] Voicu v The Owners Strata Plan 1624 [2019] NSWCA 254.

as must a further notice of motion seeking to amend the motion of 18 October 2019. These notices were not served on the respondent.

Costs

56 The remains an issue as to the costs order in the District Court and the appropriate costs in this Court. It appears from the Court's judgment that the respondent owners corporation treated the appeal in the District Court as brought under the *Legal Profession Act*. In that it was wrong. While it had a legally sound basis for having the proceedings dismissed, it did not raise it before the Court and, to that extent, may have been partly responsible for the proceedings in this Court. Whether the owners corporation should be wholly deprived of its costs in the District Court is less clear; the better approach is to vary the order by refusing to award indemnity costs, so that it is entitled to costs on the ordinary basis only.

57 Further, it did not raise in this Court the possibility that it had misled the judge below as to the applicable law, although the bills of costs relied on the Application Act and counsel was aware of the issue and came armed with authorities relevant to the meaning of "proceedings" in cl 59. There should be no order as to the costs of the proceedings in this Court. Orders

58 The Court should make the following orders:

(1) Set aside the costs order made in the District Court on 6 December 2018 and substitute an order that the plaintiff (Mr Voicu) pay the costs of the Owners-Strata Plan No 1624 to be assessed on the ordinary basis.

(2) Dismiss the applicant's notices of motion filed on 18 and 28 October 2019.

(3) Otherwise dismiss the summons in this Court, with no order as to costs.

59 **McCALLUM JA:** I agree with Basten JA that the appeal in the District Court was a fresh proceeding and that the assessment of any costs orders in those proceedings was accordingly governed by the Application Law rather than the Legal Profession Act. As Basten JA has explained, the Application Act does not confer a right of appeal from a costs assessment that has not been the subject of a review under Pt 7 of the Act.

60 Adopting a statement of issues "helpfully" provided by the owners' corporation, the primary judge mistook the question raised by the summons and instead

proceeded to determine the appeal by reference to issues framed in accordance with ss 384 and 385 of the Legal Profession Act. Justice Basten has characterised that as an error of law on the face of the record: at [31]. If what is meant by that characterisation is that the error was within jurisdiction, I respectfully disagree. It is not clear to me that the classifications "error of law on the face of the record" and "jurisdictional error" necessarily describe a binary choice in that sense but that is perhaps a question of taxonomy. In my respectful opinion, the primary judge did not have authority to determine an appeal from the costs assessments applying the provisions of the Legal Profession Act.

61 I accept that there could be cases in which the application of the wrong statute would be characterised as an error within jurisdiction. However, the present case is not an instance of a Court which otherwise has jurisdiction identifying the wrong statute to be applied to some aspect of the case; the primary judge had no authority to determine the appeal at all. He did not have authority to determine it under the provisions of a repealed statute. While it is perhaps another way of saying the same thing, in applying the Legal Profession Act rather than the Application Law, he asked himself the wrong question or mistook his task. And, as Basten JA has explained, he did not have authority to determine an appeal on the merits applying the provisions of the Application Law.

62 On any analysis, in my view, the error went to jurisdiction and cannot be said to have been immaterial in the sense explained in *Hossain*.

63 However, as Simpson AJA has explained, the order made by the primary judge (dismissing the summons) had the effect of achieving the correct outcome, which was that the proceedings were brought to an end. In that circumstance, I would in the exercise of my discretion refuse to grant the relief sought in this Court. For those reasons, which differ slightly from those given by Basten JA, I agree with the orders his Honour proposes.

64 **SIMPSON AJA:** As the relevant facts and circumstances are fully set out in the judgment of Basten JA (which I have read in draft) I am able to keep my observations to a minimum.

65 It seems to me that the salient facts are as follows. On 5 June 2015 the respondent (the Owners Corporation of the Strata Plan in which the applicant and his wife, Ilie and Lucia Voicu, owned a lot) commenced proceedings in the Local Court at Sutherland against Mr and Ms Voicu, claiming unpaid levies, interest and costs. Judgment was given in favour of the respondent, and Mr and Ms Voicu were ordered to pay the costs of the proceedings.

66 On 16 October 2015 Mr and Ms Voicu lodged an appeal to the District Court against those orders. On 4 March 2016 the appeal was dismissed and, again, Mr and Ms Voicu were ordered to pay the respondent's costs of the proceedings.

67 On 31 March 2016 and 19 May 2016 Mr and Ms Voicu filed in the District Court two Notices of Motion, each of which was dismissed by a judicial registrar on 20 May 2016. Again, a costs order was made against Mr and Ms Voicu. Each of those costs orders related to the appeal filed by Mr and Ms Voicu on 16 October 2015 (against the orders of the Local Court at Sutherland).

68 The costs ordered on 4 March 2016 and 20 May 2016 were assessed by a costs assessor on 21 May 2018. The costs assessor also assessed the costs of the assessment. The assessments resulted in three certificates totalling $24,037.86.

69 On 2 July 2018 Mr Voicu filed in the District Court a document that bore the heading, "Summons Commencing an Appeal" and "Summons Seeking Leave to Appeal". In an affidavit apparently filed with that document, he said that his "appeal" was against the assessments of costs, and that he relied on s 384 of the *Legal Profession Act 2004* (NSW) (now repealed). That proceeding came before Kearns ADCJ on 6 December 2018. On the same day, in separate judgments, his Honour dismissed the "appeal" and ordered Mr Voicu to pay the respondent's costs of the proceeding. In doing so, he referred to ss 384 and 385 of the *Legal Profession Act*. It was therefore clear that he purported to dismiss the proceeding on its merits (more accurately, the lack thereof).

70 Section 384 made provision for appeals to the District Court "as to a matter of law" from decisions of costs assessors. Section 385(1) made provision for

appeals to the District Court, with leave of the Court, from determinations of costs applications.

71 The "proceeding" in relation to which Mr Voicu sought to appeal to the District Court was the appeal filed on 16 October 2015. As Basten JA has shown, the relevant legislation was not the *Legal Profession Act* but the *Legal Profession Uniform Law Application Act 2014* (NSW) ("the Application Act"). The only appeal from costs assessment for which the Application Act provides is that contained in s 89, which is limited to an appeal against a decision of a Review Panel established under s 82 thereof. Mr and Mrs Voicu had not taken advantage of the provisions of s 83 of the Application Act which would have entitled them to apply to a Review Panel for review of the costs assessment determination. Accordingly, s 89 did not provide an avenue of appeal to the District Court. Nor, as I have indicated, did any other provision of the Application Act.

72 The District Court therefore had no jurisdiction to hear or determine the "appeal" brought by Mr Voicu. The proceeding was not properly before the District Court. In purporting to determine the "appeal" the District Court judge assumed a jurisdiction he did not have.

73 I agree with McCallum JA that for the District Court judge to embark on a hearing of an "appeal" (and to do so on its merits) constituted jurisdictional error.

74 It was correct, and inevitable, in those circumstances for the District Court judge to bring the purported "appeal" to an end. In my opinion the most appropriate order to make in the circumstances would have been to strike out the originating process as reciting relief that was outside the jurisdiction of the District Court.

75 The order made by the District Court judge dismissing the proceeding had the same effect. Although, in my opinion, the District Court judge purported to exercise a jurisdiction that he did not have, the end result was, correctly, to terminate that proceeding.

76 There is no utility in seeking to rectify the position by quashing an order made without jurisdiction and returning the matter to the District Court in order for the proceedings to be struck out. The order dismissing the proceedings achieves the same result as would an order striking out the proceedings. I am content to join in the orders proposed by Basten JA.

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