DISTRICT COURT OF QUEENSLAND

CITATION:	*Jorgensen v Body Corporate For Cairns Central Plaza Apartments* [2020] QDC 300
PARTIES:	**LEIGH JORGENSEN AS TRUSTEE FOR THE LEIGH JORGENSEN FAMILY TRUST** (Appellant) **v** **BODY CORPORATE FOR CAIRNS CENTRAL PLAZA APARTMENTS COMMUNITY TITLES SCHEME 40022** (Respondent)
FILE NO/S:	BD 2502/19 & 2505/19
DIVISION:	Appellate
PROCEEDING:	Appeal – s 45 *Magistrates Court Act* 1921 (Qld)
ORIGINATING COURT:	Cairns Magistrates Court
DELIVERED ON:	26 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2020
JUDGE:	Muir DCJ
ORDER:	**First Appeal - BD 2502/19** **The order of the court is that:** **1. Leave to appeal the decision of the magistrate to order summary judgment on 19 March 2019 is granted.** **2. The appeal is allowed.** **3. The order for summary judgment made on 19 March 2019 is set aside.** **4. The proceeding is remitted to the magistrate's court for directions, including for the exchange of amended pleadings, for mediation and if no resolution ultimately for trial.** **Second Appeal – BD 2505/19** **The order of the court is that:** **1. The appeal is allowed.**

2. **The order dismissing the appellant application to set aside summary judgment made on 18 June 2019 is set aside.**

Costs – in relation to both Appeals

1. **I direct that any submissions in respect of the costs of the appeals (no longer than 2 pages), or alternatively a proposed draft order if the parties are agreed, be exchanged and emailed to my Associate as follows:**

    (a) The appellant's submissions are to be exchanged and emailed to my Associate by 4:00pm 8 December 2020; and

    (b) The respondent's submissions are to be exchanged and emailed to my Associate by 4:00pm 10 December 2020; and

    (c) The matter is listed for hearing as to costs at 9.30am on 11 December 2020.

CATCHWORDS: APPEAL – CIVIL APPEAL – NATURE OF APPEAL – APPEAL AGAINST SUMMARY JUDGMENT - whether appeal is by way of rehearing or strict appeal – whether decision to grant summary judgment is a final decision

APPEAL – CIVIL APPEAL – NATURE OF APPEAL – APPEAL AGAINST REFUSAL TO SET ASIDE SUMMARY JUDGMENT – whether appeal is by way of rehearing or strict appeal – whether decision to refuse to set aside summary judgment is a final decision

APPEAL – CIVIL APPEAL – PLEADINGS – where summary judgment was granted in favour of the plaintiff for a far larger amount than was pleaded – where pleadings internally inconsistent – where pleadings contained annexures

APPEAL – CIVIL APPEAL – BODY CORPORATES – where appellant is a lot owner – where respondent is a body corporate – where plaintiff claimed unpaid contributions and recovery costs – whether recovery costs were reasonably incurred and reasonable in amount

LEGISLATION: *Body Corporate and Community Management Act* 1997 (Qld) s 196.

Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) ss 142, 143.

Civil Proceedings Act 2011 (Qld) s 58.

District Court of Queensland Act 1967 (Qld), s 113

Evidence Act 1977 (Qld) ss 84, 92.

Legal Profession Act 2007 (Qld) ss 340, 341.

Magistrates Court Act 1921 (Qld) ss 43, 45, 47.

Queensland Civil and Administrative Tribunal Act 2009 (Qld) Sch 3.

Uniform Civil Procedure Rules 1999 (Qld) rr 5, 149, 150, 153, 156, 190, 292, 295, 302, 514, 658, 691, 703, 748, 765, 766, 783, 785, 786, Chapter 17A.

CASES: *28 Careel Developments Pty Ltd & S.O.S. Plumbing Services (Qld) Pty* Ltd; *28 Careel Developments Pty Ltd & P.E.T Services (Aust) Pty Ltd* [2016] QDC 223.

Agar v Hyde (2000) 201 CLR 552.

Amos v Monsour Legal Cost Pty Ltd [2007] QCA 235.

ANZ Banking Group Ltd v Barry [1992] 2 Qd R 12.

Bernstrom v National Australia Bank Limited [2003] 1 Qd R 469.

Body Corporate for Sunseeker Apartments CTS 618 v Jasen [2012] QDC 51.

Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd & Anor (1976) 135 CLR 616.

Carr v Finance Corporation of Australia Ltd (1981) 147 CLR 246.

Chambers v Jobling (1986) 7 NSWLR 1.

Coldham-Fussell v Commissioner of Taxation [2011] QCA 45.

Crawley v Crawley Land & Ors [2012] QSC 294.

Dare v Pulham (1982) 148 CLR 658.

Dat & Anor v Gregory [2016] QCATA 36.

De Innocentis v Brisbane City Council [2000] 2 Qd R 349.

Dearman v Dearman (1908) 7 CLR 549.

Deputy Commissioner of Taxation v Salcedo at [2005] 2 Qd R 232.

Di Iorio v Wagener [2016] QCA 97.

Ebner v Clayton Utz [2012] VSCA 56.

Fox v Percy [2003] HCA 22.

Gould v Mt Oxide Mines Ltd (in liq) (1916) 22 CLR 490.

Hall v Nominal Defendant (1966) 117 CLR 423.

Horne v Commissioner of Main Roads [1991] 2 Qd R 38.

House v R (1936) 55 CLR 499.

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344.

*James & Anor v The Body Corporate Aarons Community Title*s Scheme 11476 [2002] QSC 386.

JBS Southern Australia Pty Ltd v Westcity Group Holdings Pty Ltd [2011] VSC 476.

Jennings v Police [2019] SASFC 93.

Jonathan v Mangera & Anor [2016] QCA 86.

Kambarbakis v G & L Scaffold Contracting Pty Ltd [2008] QCA 262.

KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd [1985] 2 Qd R 13.

Kowalski v MMAL Staff Superannuation Funt Pty Ltd (2009) 178 FCR 401.

LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105.

Mark Bain Constructions Pty Ltd v Avis [2012] QCA 100.

Mbuzi v Torcetti [2008] QCA 231.

McDonald v Queensland Police Service [2018] 2 Qd R 612.

Mulholland v Mitchell [1971] AC 666.

Owners of Strata Plan 36131 v Dimitriou (2009) 74 NSWLR 370.

Pickering v McArthur [2010] QCA 341.

Prins v The Body Corporate for the Wave [2013] QDC 066.

Probert & Anor v Ericson [2014] QSC 4.

Queensland Pork Pty Ltd v Lott [2003] QCA 271.

Re Luck [2003] HCA 70.

Reardon v Deputy Commissioner of Taxation [2013] QCA 46.

Robinson Helicopter Company Incorporated v McDermott [2016] HCA 22.

Shaw v Deputy Commissioner of Taxation [2016] QCA 275.

Spencer v Commonwealth (2010) 241 CLR 118.

The Reserve Vault Pty Ltd v Barrier Reef Arts Pty Ltd [2012] QCA 35

Thiess Pty Lt v FFE Mineral Aus Pty Ltd [2007] QSC 209.

Thomas v Balanced Securities Limited [2012] 2 Qd R 482.

Thompson v Body Corporate for Arila Lodge [2017] QDC 134.

Thomson v Smith [2005] QCA 446.

Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237 [2014] QCA 73.

Vivlios v Westpac Banking Corporation, [2010] QCA 230.

COUNSEL:	WDJ Macintosh for the appellant
	BP Strangman for the respondent
SOLICITORS:	JML Rose for the appellant
	Grace Lawyers for the respondent

Introduction

[2] This is my determination of two appeals (heard together) against related decisions made by the same magistrate sitting in the Cairns Magistrates Court in March and June of 2019.[1]

[3] The **appellant**, in both appeals is Leigh Jorgensen. He is the owner of lot 1203 of the "Cairns Central Plaza Apartments" Community Titles **Scheme** 14237. The **respondent** to both appeals is the residential **body corporate**, comprising the lot owners in the Scheme.

[4] The **First Appeal** concerns the decision of the magistrate on 19 March 2019, to order **summary judgment** against the appellant (in his absence), in the sum of $73,155.62 for

[1] There was no application or order for consolidation. There was no order that the appeals be heard together. The appeals were adjourned by another judge of this court and ultimately listed together before me. The parties were content for the appeals to be heard together. Given that the legal representatives are the same; and many of the issues overlap, this was a sensible way to have the issues determined.

unpaid instalments, penalty interest and recovery costs under the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) ("the **Regulation"**).

[5] The **Second Appeal** concerns the **subsequent decision** of the magistrate on 18 June 2019 to dismiss the appellant's application filed on 17 May 2019 to set aside the summary judgment.

Relevant appeal principles

[6] Section 45(1) of the ***Magistrates Court Act*** 1921 (Qld) allows a party dissatisfied with a judgment in an action in which the amount involved is more than the minor civil dispute limit to appeal to the District Court "as prescribed by the rules".[2] Chapter 18, r 783 of the *Uniform Civil Procedure Rules* 1999 ("**UCPR"**) outlines the procedure for appeals to the District Court from the Magistrates Court.

[7] Rule 748(a) of the UCPR, made applicable to these appeals by UCPR r 785, states that a notice of appeal must, unless the District Court otherwise orders, be filed within 28 days after the date of the decision appealed from. Both notices of appeal were filed on 16 July 2019. It follows that the Second Appeal was filed within time but the First Appeal was filed outside of time and correctly seeks the leave of the court to grant an extension of time to appeal.

Should leave to appeal out of time be granted?

[8] The application for leave concerning the First Appeal is opposed by the respondent. It is common practice for such an application to be heard at the same time as the appeal to avoid unnecessary time, expense and double up.[3] This case is no exception. The considerations relevant to the exercise of the discretion include: the explanation for the delay; the merits of the appeal; prejudice to the respondent; and general considerations of fairness.[4] In the present case the appellant did not appeal the summary judgment but sought to set it aside as he was entitled to do under the UCPR r 302. Although that application was not made within 28 days, the appeal of the decision refusing to set aside the summary judgment order was appealed within time. Ultimately I accept the submissions made on behalf of the appellant that whilst the procedural path followed was misconceived, the appellant was not legally represented at the time and overall his conduct cannot be characterised as dilatory or prejudicial to the respondent – particularly given there was considerable unexplained delay between when the defence was filed and

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2 The minor civil dispute limit is defined under s 45(5) of the MCA as being "the amount that is, for the time being, the prescribed amount under the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)." Schedule 3 of that Act provides that the prescribed amount is $25,000. The amended claim and statement of claim upon which summary judgment was based in this case sought an amount less than $25,000 but summary judgment was ultimately given for an amount in excess of the original amount claimed, so I am satisfied the jurisdiction is properly invoked.

3 UCPR r 786 (8). *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* [1985] 2 Qd R 13 at 15.

4 *Di Iorio v Wagener* [2016] QCA 97 at [28]; *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 349; *Horne v Commissioner of Main Roads* [1991] 2 Qd R 38 at 41.

the application for summary judgment made. In these circumstances and in light of what I have found to be the good prospects of appeal in this case, I find that leave to appeal out of time should be granted.

Nature of the appeals

[9] Rule 765(1) provides that an appeal under Chapter 18 of the UCPR is an appeal by way of rehearing but UCPR r 765(2) provides for appeals from interlocutory decisions to be "brought by way of an appeal" - that is an appeal in the strict sense.[5]

[10] Both parties submitted that the First Appeal was an appeal by way of a rehearing.[6] The respondent submitted that the Second Appeal was also an appeal by way of a rehearing but the appellant submitted that the subsequent decision is an interlocutory decision so the Second Appeal ought to be conducted as a strict appeal.[7]

[11] The question of whether a judgment is final or interlocutory can be a tricky one, "productive of confusion and no entirely satisfactory test has evolved to determine into which category a judgment should be placed."[8] The correct approach in determining the issue is to ascertain whether the legal (as opposed to the practical) effect of the judgment is final or not.[9] This requires a determination of whether the order finally determines the rights of the parties in a principal cause pending between them.[10]

[12] In *Kowalski v MMAL Staff Superannuation Fund Pty Ltd*[11] the full court of the Federal Court made the following relevant observations in relation to summary judgment orders:

> "In our opinion, a case where summary judgment is given for a respondent in the absence of the full and complete factual matrix and full argument thereon, the Court being satisfied that the moving party has no reasonable prospect of successfully prosecuting the proceeding is no different from a case where an order is made dismissing an action because it is frivolous, vexatious, an abuse of the process of the Court or does not disclose a reasonable cause of action (see *Re Luck*) or one dismissing an appeal from an order of a Master refusing to set aside a default judgment (see *Carr v FCA*; *Zoia v Commonwealth Ombudsmen*

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5 *28 Careel Developments Pty Ltd & S.O.S. Plumbing Services (Qld) Pty* Ltd; *28 Careel Developments Pty Ltd & P.E.T Services (Aust) Pty Ltd* [2016] QDC 223 per Dorney QC DCJ at [15] (***Careel***).

6 Paragraph 4 of the appellant's outline in relation to the First Appeal. The respondent filed one outline for the two appeals; see paragraph 15 to 19 of that outline.

7 Paragraph 3 of the appellant's outline of argument in relation to the Second Appeal.

8 *De Innocentis v Brisbane City Council* [2000] 2 Qd R 349 at [33] per Chesterman (with Pincus and Thomas JJA agreeing). ("**De Innocentis**")

9 *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246 per Gibbs CJ at [2]. See also ***Kambarbakis*** *v G & L Scaffold Contracting Pty Ltd* [2008] QCA 262 per Holmes JA at [31]; cf the approach by McMurdo P at [4] in *Kambarbakis* who found that a final decision in a proceeding included a decision refusing an application to extend a limitation period because its practical effect was to end Mr Kambarbakis's chance of success in any claim he might commence against the defendant. Although it is instructive that the Court of Appeal does not seemed to have been referred to *Carr.*

10 In *Re Luck* [2003] HCA 70 McHugh ACJ, Gummow and Heydon JJ at [4].

11 (2009) 178 FCR 401 at [40]; see also *JBS Southern Australia Pty Ltd v Westcity Group Holdings Pty Ltd* [2011] VSC 476 at [27]; cf discussion in *Jennings v Police* [2019] SASFC 93 at [18]-[53] per Kourakis CJ.

> *Department* (2007) 240 ALR 624 ("Zoia") per Spender J, Gilmour J concurring, at [14] and [19] and per French J as his Honour then was at [26]).
>
> We respectfully disagree with the views expressed by Finkelstein J in *Jefferson Ford* 167 FCR 372 at [12] that '[i]n an application for summary judgment, the judge resolves the dispute on the merits', and by Gordon J, by way of obiter dicta, at [164] that "an order granting summary judgment on all claims … is a final order because there are no further substantive rights in issue.
>
> What the judge does, when considering a summary judgment application, is make a determination, on the material then before the court, as to the *prospects* of the moving party successfully prosecuting the proceeding. The *legal effect* of such a judgment is not *final*." [Emphasis added]

[13] It follows in my view that the legal effect of the magistrate's decision to order summary judgment in the absence of the appellant in the present case is best categorised as an interlocutory one.[12] His decision did not finally determine the rights of the parties, rather he made an assessment as to the appellant's (lack of) prospects in defending the respondent's claim. In a practical sense also (given the appellant's non-appearance) the decision is also an interlocutory one as it was open for the appellant to apply (as he did) to set aside that summary judgment under UCPR r 302. I therefore reject the appellant's submission on this point. But I accept his submission in relation to the nature of the subsequent decision. The balance of the authorities support the finding that an application to set aside a judgment made in the absence of a party is not a final decision because it does not finally determine the rights of the parties – again as it is open to the disappointed defendant to apply again to have the judgment set aside (this is the case even if such an application must necessarily fail).[13]

[14] I therefore find that both decisions subject to the current appeals are interlocutory ones and that both appeals ought to be conducted as appeals in the strict sense.[14]

Appeal in the strict sense as opposed to a rehearing

[15] The relevant consideration on a "strict appeal" has been described as "whether the order appealed from was right on the material which the lower court had before it."[15] In contrast, different meanings can be attached to the word "rehearing." [16] For example, an

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12 Cf the approach taken by Butler SC DCJ in *Thompson v Body Corporate for Arila Lodge* [2017] QDC 134 ("***Thompson***"). In that case his Honour conducted the appeal in respect of the order for summary judgment as a re- hearing on the basis that the order for payment of debt was a final decision in the proceeding. But the issue of the legal effect of such a judgment does not seem to have been otherwise considered in that case.

13 *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246 at 248 (per Gibbs J), and 256 (per mason J) citing *Hall v Nominal Defendant* (1966) 117 CLR 423 at 440; *Ebner v Clayton Utz* [2012] VSCA 56 at [13].

14 A discretion is found in r 765(4) UCPR, whereby a court may hear an appeal from an interlocutory decision if the court is satisfied "it is in the interests of justice to proceed by way of rehearing." The interest of justice do not necessitate such a finding in the present case.

15 *Fox v Percy* (2003) 214 CLR 118, 129; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd & Anor* (1976) 135 CLR 616 at 619.

16 As the High Court observed in *Fox v Percy* (with reference to *Sperway*).

appeal by way of rehearing, has been said to have features that include the court having power to take fresh evidence and draw inferences of fact.[17] A rehearing has been said to involve a "real" review of the original record of proceedings below rather than a fresh hearing.[18] The appeal judge is required to review the evidence, to weigh the conflicting evidence, and to draw his or her own conclusions.[19] In undertaking this task, the judge should afford respect to the decision of the magistrate[20] but may interfere if the conclusion is "contrary to compelling inferences" in the case.[21]

[16] But a strict appeal is not limited to errors of law and intervention may be warranted in the case of errors of or in respect of facts, such as errors of factual inference.[22] The appellant submitted that, on a strict appeal, an error in the sense explained in *House v R*[23] must be shown in order for this Court to review the exercise of the magistrate's discretion. I accept this submission. It is well accepted that an appellate court should not interfere with an exercise of judicial discretion unless it can be shown there has been an error such as acting upon a wrong principle; failing to take into account, or give inadequate weight to a relevant consideration; taking into account irrelevant or extraneous matters; or proceeding on an erroneous understanding of the facts.[24] If this court concludes that an error has been shown such that the decision of the magistrate is wrong, the decision below should be corrected.[25]

Powers on appeal

[17] Relevantly, UCPR r 766(1) (a) sets out the general powers of this court on appeal which include the power to make any order the nature of the case requires.[26] The powers in this section are consistent with s 47 of the Magistrates Court Act which provides that on a hearing of an appeal, the District Court may, among other things, draw inferences of fact from facts found by the Magistrates Court,[27] or from admitted facts or facts not

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17 *Sperway* at 619.

18 *Fox v Percy* (2003) 214 CLR 118 at 126.

19 *Mbuzi v Torcetti* [2008] QCA 231 at [17].

20 *Robinson Helicopter Company Incorporated v McDermott* [2016] HCA 22 at [43]; (2016) 90 ALJR 679 at 686 [43]; *Fox v Percy* (2003) 214 CLR 118 at 126-127, citing *Dearman v Dearman* (1908) 7 CLR 549 at 564; [1908] HCA 84.

21 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10; see *Dat & Anor v Gregory* [2016] QCATA 36 at [7].

22 See the discussion by Bowskill J in *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at 617, 618.

23 (1936) 55 CLR 499, 505.

24 *House v R* (1936) 55 CLR 499, 504-5 per Dixon, Evert and McTiernan JJ and per Dixon, Evert and McTiernan JJ at 505

25 *Fox v Percy* (2003) 214 CLR 118 at 127 – 128, [27]; see *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 551; see the discussion by McGill SC in *JJ Richard & Sons Pty Ltd v Precast Concrete Pty Ltd* [2010] QDC 272 at [8]-[19] with reference to *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at 180-181 and *Teelow v Commissioner of Police* [2009] QCA 84 at [4].

26 *Magistrates Court Act* 1921 (Qld), s 47. As this is an appeal under the UCPR, this court also has powers under r 766(1) of the UCPR.

27 This power is relevant to a re hearing as opposed to a strict appeal; See the observations of Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd & Anor* (1976) 135 CLR 616 at 619.

disputed[28] and make any other order, on such terms as it thinks proper, to ensure the determination on the merits of the real questions in controversy between the parties.[29]

[18] Further, under UCPR r 766 (1)(c), this court may also, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit, or in another way.[30] This power is subject to UCPR r 766 (2) which provides that "for subrule (1)(c) further evidence may be given without special leave, unless the appeal is from a final judgment, and in any case as to matters that have happened after the date of the decision appealed against."[31] In other words (and somewhat intriguingly)[32] any further affidavit material sought to be relied upon when the decision appealed from is an interlocutory one needs to be considered on the basis of leave and not of special leave being required.

[19] It follows that (at least on one view) the express provisions of the relevant rules and legislature have created a hybrid of a strict appeal and an appeal on a rehearing. But the distinction intended by legislature is not an issue I consider necessary to resolve in this case.[33] On either approach there are plainly errors which infected both of the decisions below such that they ought not to have been made on the material that was before the magistrate.

Admissibility of further affidavit material

[20] At the hearing of the appeals, the appellant sought leave to rely on two affidavits sworn by him on 11 November 2019. The **first affidavit** was filed in the First Appeal and was relied upon to support the appellant's application to extend the time for appealing.[34] The **second affidavit** was filed in the Second Appeal and was an attempt by the appellant to explain why he had not appeared at the hearing for summary judgment in March 2019 and what his defence would have been if the magistrate had afforded him the opportunity to be heard further at the subsequent application.

[21] The respondent objected to the appellant's reliance on this further material, but by way of response, sought leave to rely on an affidavit sworn on 26 August 2020, by Mr Stanhope, a solicitor employed by Grace Lawyers (the solicitors who acted for the respondent below and on these appeals).

[22] I reserved my rulings until judgment about whether leave (be it special or otherwise) should be granted for the parties to rely on this further affidavit material. Of course any power of the court to receive further factual evidence is always discretionary and is not of right - even where no special leave is necessary such as in the present case.[35]

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28 *Magistrates Court Act* 1921 (Qld), s 47(a).
29 *Magistrates Court Act* 1921 (Qld), s 47(d).
30 UCPR r 766(1)(c).
31 UCPR r 766 (2).
32 Respectfully adopting the observations of Dorney QC DCJ at [23] of *Careel*.
33 Particularly too, this issue was not one ventilated by the parties before me.
34 This affidavit which was sworn on 15 November 2019 contained 12 paragraphs. But at the hearing before me paragraphs 1 to 9 were not pressed by the appellant.
35 *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 37.

[23] The principles upon which further evidence will be received were discussed by the Queensland Court of Appeal in *Thomson v Smith* [2005] QCA 446 where Muir JA cited the reasons of Lord Wilberforce in *Mulholland v Mitchell* [1971] AC 666 as follows:[36]

> "I do not think that, in the end, much more can usefully be said than, in the words of my noble and learned friend, Lord Pearson, that the matter is one of discretion and degree. Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

[24] The authorities establish that fresh evidence can be admitted if it:

(a) could not have been obtained with reasonable diligence for the original hearing;
(b) is such that, if given, it would probably have an important influence on the result of the case; and
(c) is apparently credible.[37]

[25] Having now considered the matter further (in light of the relevant principles), I find as follows:

(a) Paragraphs 10 and 11 of the first affidavit are relevant and admissible as they relate to matters subsequent to the summary judgment and to the issue of the appellant's explanation for the failure to commence the first appeal within time. To this limited extent I grant leave to allow the admission of the first affidavit.[38]

(b) The second affidavit is replete with inadmissible commentary and submission. It is also relevant that none of the matters raised happened after the date of the subsequent decision. I find that there is no basis for a grant of leave to admit this affidavit.

[26] Given my findings about the overall relevance and admissibility of the appellant's further affidavit material, Mr Stanhope's affidavit is irrelevant and in any event replete with unnecessary commentary and observation. I therefore refuse leave to rely on it.

[27] Before turning to an analysis of the respective grounds of the two appeals it is instructive to set out the uncontroversial background to the appeals.

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36 *Pickering v McArthur* [2010] QCA 341 at [21].

37 The principles applicable to the issue of whether leave ought to be granted to adduce further evidence were concisely summarised by the Queensland Court of Appeal in *Jonathan v Mangera & Anor* [2016] QCA 86 at [11] and [21]; See also *Pickering v McArthur* [2010] QCA 341 at [22].

38 These paragraphs are now Exhibit 3.

Relevant background

The pleadings

[28] On 2 March 2017, the respondent filed a claim and statement of claim dated 27 February 2017 in the Magistrates Court at Cairns claiming from the appellant: $9,051.69 for outstanding contributions and recovery costs pursuant to s 143 of the Regulation; penalty interest under the Regulation; electricity metered costs under the *Body Corporate and Community Management Act* (Qld) 1997; and interest under s 58 of the *Civil Proceedings Act* (Qld) 2011.

[29] On 15 June 2017, the respondent filed an application to amend the proceedings, relying on an affidavit of Kelevi Kei Paul Akeai Tuicolo sworn 9 June 2017 setting out the further payments made by the appellant.

[30] On 10 July 2017, the respondent filed a second application to amend these proceedings in identical terms to the application of 15 June 2017, along with a further affidavit of Mr Tuicolo sworn on 27 June 2017, noting that the originating process had still not yet been served upon the appellant.

[31] It is uncontroversial that the claim and statement of claim had not been served upon the appellant at this point.[39]

[32] On 18 July 2017, the respondent's ex parte application to amend the originating process was heard. The submissions filed in support identified that the second application was sent to the Townsville Magistrates Court in error but sought to proceed with the subsequent application and to withdraw the first application with no order as to costs. The submission stated that "[t]he application seeks orders to amend the claim and statement of claim for the purpose of updating the quantum of the debt owed by the Defendant to the Plaintiff."[40]

[33] On 18 July 2017, the magistrate granted leave to amend the originating process and ordered that "the plaintiff's costs of and incidental to the application be costs in the cause."

[34] The amended claim stated as follows:

> "The Plaintiff claims from the Defendant
> 1. ~~$9,051.69~~ $15,705.73 For outstanding contributions and recovery costs pursuant to s143 of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ('**The Regulation'**).
> 2. Further to paragraph 1 above, outstanding contributions and recovery costs pursuant to s 143 of the Regulation continuing until judgment.

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39 Mr Carlson's second affidavit at [27].

40 Written submission on behalf of the plaintiff at [21]; Exhibit 1 – Appeal Book (**AB**), 341.

3. ~~$5.21~~ $645.51 for penalty interest pursuant to an ordinary resolution made by the Plaintiff under s 142 of the Regulation.
4. Further to paragraph 3 above, penalty interest pursuant to s 142 of the Regulation continuing until judgment.
5. ~~$1,704.43~~ $1,010.66 for electricity metered costs and service fees pursuant to s 196 of the *Body Corporate and Community Management Act 1997* (Qld) ('**The Act**').
6. Further to paragraph 5 above, electricity metered costs and service fees pursuant to s 196 of the Act continuing until judgment.
7. ~~$93.79~~ $171.10 for interest pursuant to s 58 of the *Civil Proceedings Act 2011* from 29 April 2016 to ~~30 September 2016~~ 27 June 2017.
8. Further to paragraph 7 above, interest pursuant to s 58 of the *Civil Proceedings Act 2011* continuing until judgment."

[35] The final endorsement on the amended statement of claim stated as follows:

"The Plaintiff Claims the following relief as particularised in the attached Annexure A and Annexure B:

(a) ~~$12,097.83~~ $15,705.73 for Contributions and Recovery Costs;
(b) ~~$5.21~~ $645.51 for Penalty interest and continuing to accrue until the date of payment of the Contributions; and
(c) ~~$1,704.43~~ $1,010.66 for Electricity Costs;
(d) ~~$93.79~~ $171.10 for interest and continuing to accrue until the date of payment of the Electricity Costs; and,
(e) Costs"

[36] The notice under rule 150(3) accompanying the amended statement of claim stated as follows:

"The Plaintiff Claims:

(a) ~~$12,097.83~~ $14,710.44 for Contributions and Recovery Costs;
(b) ~~$5.21~~ $526.07 for Penalty Interest;
(c) $NIL for costs of services fees (noting that the costs of issuing the claim and this statement of claim are included in the claim about for recovery costs of ~~$3,046.14~~ $2,766.27 listed above pursuant to section 143 of the Regulation)
(d) ~~$1,704.43~~ $1,010.66 for Electricity Costs;
(e) ~~$93.79~~ $171.10 for interest.

The proceeding ends if you pay those amounts before the time for filing your notice of intention to defend ends. If you are in default by not filing a notice of intention to defend within the time allowed, the plaintiff is entitled to claim additional costs of $258.00, costs of entering judgment in default."

[37] There is no evidence as to when the amended claim and statement of claim were personally served upon the appellant.[41] But, the appellant clearly became aware of the proceedings against him at some point in early 2018 because he filed a pro forma notice of intention to defend and **defence** on 2 March 2018. The defence contained the following handwriting after the words "[t]he defendant relies on the following facts in defence of the claim" (alongside the word "GENERALLY" written on the side):

> "The applicant has not adhered to our general consumer laws in essence has not issued a correct invoice for payment as requested. Plus there are a number of gauging issues unsolicited fees on their invoice. [sic]"[42]

[38] It was uncontroversial that this defence was not served on the respondent but that the respondent obtained a copy from the registry.

[39] On 19 April 2018 the respondent filed the following **reply** to this defence:

> "In reply to the Defence of the Defendant to the Plaintiff's Amended Statement of Claim, the Plaintiff says that:
>
> 1. Paragraph 1 of the Defence does not comply with the rules [sic] 146, 149, 150, 152 and 157 of the *Uniform Civil Procedure Rules 1999* (Qld) (**the Rules**) and is liable to be struck out.
>
> 5. To the extent paragraph 1 of the Defence contains allegations, the Plaintiff states the following:
>
> (a) the Plaintiff denies the allegation that the Plaintiff has not adhered to "general consumer laws" because the Plaintiff is not subject to the *Competition and Consumer Act 2010* (Cth) as the Plaintiff is not a business supplying goods and services to consumers;
>
> (b) the Plaintiff does not admit or deny the allegation that "*there are a number of gauging issues"* as the Plaintiff is unable to plead to that allegation because it is unclear and does not comply with rules 149 and 157 of the Rules;
>
> (c) the Plaintiff denies the allegation that there are "*unsolicited fees on their invoice"* because the Plaintiff is entitled to recover from the Defendant, pursuant to section 143 of the *Body Corporate and Community management (Accommodation Module) Regulation 2008* (Qld), their

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41 AB at 68. Mr Carlson's first affidavit at [32] on page 8 deposes to service being "successful" "at this time" but does not provide any date or indication of when "this time" is; at [29] on the same page, the Affidavit refers to a service report being exhibited to the affidavit, however the exhibits do not include any such report. At the very least, service of the amended statement of claim and claim was not served until after January 22 2018 per Mr Carlson's first affidavit at [32].

42 AB 355 to 357. Another defence was contained in the Appeal Book material before me (at AB 353 to 356) and referred to in paragraph 11 of the appellant's outline of argument in relation to the First Appeal but it was accepted that this defence was not in the respondent's possession at any relevant time. It follows that I have disregarded this document for the purpose of these appeals.

recovery costs reasonably incurred in recovering from the Defendant outstanding contributions and any penalty interest;

(d) the Plaintiff does not admit or deny the allegation that the Plaintiff "*has not issued a correct invoice for payment as requested*" because the Plaintiff is unable to plead to that allegation because it is unclear and does not comply with the rules 149 and 157 of the Rules [sic]. However, to the extent that the Defendant means that the Plaintiff has not issued correct notice of contribution to the Defendant, the Plaintiff states that:

(i) on 10 March 2014, the Defendant's solicitors acting on his behalf in relation to the Defendants purchase on 1203/58 McLeod Street, Cairns Qld, wrote to the Body Corporate Services, the Plaintiffs managing agent (**BCS**)) [sic] enclosing a Form 8 dated 10 March 2014 which listed the Defendant's address for service of notices to be 1205/58 McLeod Street, Cairns Qld 4870;

(ii) the Plaintiff issued notices of contribution between 19 May 2014 to 11 March 2015 to 1205/58 McLeod Street, Cairns Qld 4870, in accordance with the Form 8 referred to in paragraph (2)(d)(i) above.

(iii) on 22 April 2015, the Defendant notified BCS by email that his address is 1203/58", which the Plaintiff took as being notice of a changed [sic] to his address for service of notices to 1203/58 McLeod Street, Cairns Qld 4870;

(iv) the roll kept by the Plaintiff in relation to the Defendant as at 28 April 2015 lists the Defendant's postal address to be Unit 1203, 58 McLeod Street, Cairns Qld 4870, and email address to be leigh@treknorth.com.au;

(v) the Plaintiff issued notices of contribution from 16 June 205 to Unit 1203/58 McLeod Street Cairns Qld 4870 as directed by the Defendant; and

(vi) the Plaintiff repeats and relies upon paragraph 2(c) above."

The application for summary judgment

[40] On 7 February 2019 (around 10 months after the reply was filed), the respondent filed an **application for summary judgment** (without any supporting affidavit material), made returnable on 19 March 2019, seeking judgment against the appellant as follows:

> "(a) $11,065.11 for unpaid contribution instalments and recovery costs pursuant to s143 of [the Regulation] for the periods claimed in the Amended Statement of Claim;
>
> (b) $19,123.12 for unpaid contribution instalments pursuant to s143 of the Regulation continuing from the date of filing the Amended Statement of Claim to the date of this Application;
>
> (c) $24,879.68 in costs (recovery costs) reasonably incurred by the Plaintiff in recovering the unpaid contribution instalments owing by the Plaintiff, pursuant to s143 (1)(c) of the Regulation from the date of filing the Amended Statement of Claim to the date of this Application;
>
> (d) $3,561.03 in interest pursuant to s142 of the Regulation from 2 October 2016 to the date of this Application.
>
> (e) Further unpaid contribution instalments pursuant to s143 of the Regulation from the date of this Application to the date the Application is determined;
>
> (f) Further costs (recovery costs) reasonably incurred by the Plaintiff in recovering the unpaid contribution instalments owing by the Plaintiff, pursuant to s 143(1)(c) of the Regulation from the date of this Application to the date the Application is determined; [and]
>
> (g) Further interest pursuant to s142 of the Regulation from the date of this Application to the date the Application is determined."[43]

[41] The following affidavits were subsequently filed and served in support of the application for summary judgment:

(a) The **first affidavit** of Jason Alexander Carlson (a partner of Grace Lawyers the solicitors for the respondent) sworn 6 March 2019, which comprised 16 pages of depositions and some 121 pages of exhibits;[44] and

(b) A **second affidavit** of Jason Alexander Carlson sworn 13 March 2019, comprising 5 pages of depositions and 23 pages of exhibits;[45] and

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43 AB 338-339.
44 AB 60-198.
45 AB 199-226.

(c) An affidavit of service of Jelena Milacic[46] (a solicitor employed by Grace Lawyers) sworn 14 March 2019 deposing to service of the application being effected on 7 February 2019; service of an unsealed but sworn copy of the first affidavit being effected on 6 March 2019, and service of an unsealed but sworn copy of the second affidavit being effected on 13 March 2019.

[42] The application for summary judgment was heard in the Cairns Magistrates Court on 19 March 2019. The respondent was represented by counsel instructed by Grace Solicitors. The appellant did not appear.

[43] Counsel for the respondent relied on material to be read which included the pleadings and the three affidavits referred to in paragraph 41 above. The list of material included the relevant sections of the rules and legislation together with four authorities.[47] Written submissions were handed to the magistrate on the day. In both his written and oral submissions counsel for the respondent submitted that the defence was "essentially a deemed admission of the entire claim."[48] After agreeing with this proposition the magistrate was taken to the breakdown of the amounts claimed as set out in the second affidavit of Mr Carlson.

[44] There was no evidence that the learned magistrate had perused any of the pleadings or affidavit material on the court file prior to hearing the application. The entire hearing took seven minutes after which the magistrate immediately gave ex tempore reasons for his decision to order summary judgment.

Magistrates reasons on the summary judgment

[45] In his Reasons, the magistrate observed that the respondent's pleaded case had complied with the legislative scheme under the Regulations, that the contributions, interest and costs were continuing obligations upon the appellant and that, as a consequence, the amounts have increased over time.

[46] The magistrate then stated as follows:[49]

> "The defendant has filed what could be euphemistically referred to as a defence, a document purported be to filed- sorry- filed 2 March 2018. As counsel for the applicant plaintiff rightly notes, the consequences of it failing to adhere to any of the pleading requirements of the Uniform Civil Procedure Rules constitute, in effect a deemed admission of the entirety of the plaintiff's claim."

[47] The magistrate went on to observe:

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46 Exhibit 2.

47 The authorises cited were *Body Corporate for Sunseeker Apartments CTS 618 v Jasen* [2012] QDC 51; *James & Anor v The Body Corporate Aarons Community Title*s Scheme 11476 [2002]QSC 386; *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237* [2014] QCA 73; and *Prins v The Body Corporate for the Wave* [2013] QDC 066.

48 AB 3 at line 49.

49 AB 7 at line 28.

> "that on any view of the defence, the plaintiff has clearly demonstrated, on its material, that the defendant has no prospect whatsoever of successfully defending the claim and there's no need for a trial; and the discretion under UCPR r 292 ought to be exercised in the plaintiff's favour."[50]

[48] The magistrate then turned to what he described as that "next issue for determination" namely that the court needed to be satisfied in relation to the amounts finally sought on the summary judgment. After referring to the second affidavit of Mr Carlson, the magistrate then reasoned as follows:[51]

> "I'm satisfied, having review that, that the contributions properly levied, and in respect of which the defendant has notice, are, as of today's date, $29,033.76. There is penalty interest calculated in accordance with the determination under the legislation as payable by the defendant which I accept is properly calculated on the material before me at $3,841.25.
>
> The recovery costs that the plaintiff – the applicant plaintiff – seeks are fixed by the legislation. That legislation displaces the costs provisions of the Uniform Civil Procedure Rules in these proceedings and the applicant plaintiff's effectively entitled to recover not costs fixed by reference to the scale, but reasonable – recover costs reasonably incurred by the plaintiff in recovering the unpaid contribution instalments. Those are particularised similarly in the affidavit of Mr Carlson. The – they were qualified by reference to the affidavit at paragraph 25 sub (B) up to today's date at $36,750.61.
>
> Additionally, there are counsel's fees in respect of appearance on the application today. They, in my view, are reasonably incurred by the plaintiff and ought be allowed. Those costs in total are $40,280.61. I therefore give judgment in accordance with the draft orders which I initial and place with the file today for a total for the contribution instalments, penalty interests, and recovery costs of $75,155.62." [Emphasis added]

[49] The summary judgment was formally entered as follows:[52]

> "THE JUDGMENT OF THE COURT IS THAT the Defendant pay to the Plaintiff the amount of $73,155.62 being for:
>
> a. $29,033.76 in unpaid contribution instalments levied upon the defendant by the Plaintiff, pursuant to section 139(1) of the *Body corporate and Community Management (Accommodation Module) Regulation 2008;*
> b. $3,841.25 in penalty interest on the contribution instalments not paid by the Defendant by their due date, pursuant to section

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50 AB 7 at line 34-38.
51 AB 8 at line 1-21.
52 AB 366.

143(1)(b) of the *Body corporate and Community Management (Accommodation Module) Regulation 2008;* and

c. $40,280.61 in recovery costs reasonably incurred by the Plaintiff in recovering the unpaid contributions and penalty interest from the Defendant, pursuant to 143(1)(c)of the *Body corporate and Community Management (Accommodation Module) Regulation 2008.*"

[50] On Tuesday 19 March 2019 the appellant received an email from the respondent notifying him that his levy notice was available online.[53]

[51] In an email dated 24 March 2019, the appellant responded directly to the respondent as follows:

> "To whom it may concern,
>
> As previously requested, I want a correct invoice for body corporate fees for above mentioned lot. For a long time now, these statements have reflected legal fees that are simply not justifiable and because of your inability to provide me with a correct statement, I have been unable to remit payment.
>
> As a result of this failure to do your job, things such as interest has [sic] been compounding and now this statement for body corporate fees is simply unacceptable and I believe I may have grounds to sue your firm.
>
> I have been in talks with the relevant Ombudsman and believe I have been making correct requests of you.
>
> I (again) request that you provide me with a correct statement of account for the body corporate fees of above mentioned lot so that I can remit payment.
>
> I thank you in anticipation
>
> Leigh J" [Emphasis added]

[52] On 26 March 2019, the solicitors for the respondent sent a copy of the unsealed summary judgment to the appellant with the request that all further correspondence about his "lot" to be sent directly to them; and with the warning that unless he paid the judgment amount of $73,155.62, enforcement proceedings resulting in bankruptcy may be taken against him.

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53 Affidavit of Jelena Milacic filed 12 June 2019 (the date of swearing is not apparent on the face of this affidavit) AB 248 to 253.

Application setting aside the Judgment

[53] On 17 May 2019, the appellant filed the subsequent application[54] seeking, amongst other orders that the summary judgment be set aside.[55] The appellant swore an affidavit[56] in support, deposing that he had failed to appear at the 19 March hearing due to "oversight while under duress and extenuating circumstances."[57] The explanation was limited to the appellant having "been under enormous duress recently due to other matters before the courts.[58]

[54] The appellant filed a **draft defence** on 17 June 2019. [59]

[55] The subsequent application was heard and dismissed on 18 June 2019 with the appellant legally represented by counsel and the appellant present in person.

[56] I will deal with each of the appeals in turn.

The First Appeal

[57] The respondent's application for summary judgment was made pursuant to UCPR r 292. This rule is to be applied keeping in mind the purpose of the UCPR, articulated in r 5, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum expense.[60] That of course, does not detract from the well-established principle that the exercise of power to summarily terminate proceedings must always be attended with caution and only in the clearest of cases.[61] As Gaudron, McHugh, Gummow and Hayne JJ said in *Agar v Hyde* (2000) 201 CLR 552 at 575-576:

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formula which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[62]

[58] The appellant submitted the following four errors were made by the magistrate in making the decision to enter summary judgment:[63]

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54 AB 367-368.

55 The appellant also sought orders that he have 28 days to file a defence, that enforcement action be stayed and that the application for stay of enforcement action be heard urgently.

56 AB 227-228.

57 AB 227 at [3].

58 AB 227 at [4].

59 AB 372-373.

60 *Bernstrom v National Australia Bank Limited* [2003] 1 Qd R 469 at [38*]; Deputy Commissioner of Taxation v Salcedo* at [2005] 2 Qd R 232 at [2] [3], [17] and [45]; *Coldham-Fussell v Commissioner of Taxation* [2011] QCA 45 at [101]; *Thomas v Balanced Securities Limited* [2012] 2 Qd R 482 at [69].

61 *Spencer v Commonwealth* (2010) 241 CLR 118 at [24] per French CJ and Gummow J and at [60] per Hayne, Crennan, Kiefel and Bell JJ.

62 *Agar v Hyde* (2000) 201 CLR 552 at 575-576 per Gaudron, McHugh, Gummow and Hayne JJ.

63 The notice of appeal set out five grounds (but two of these overlapped); the four grounds were advanced in the appellants written outline of argument [at 4] and at the hearing before me.

(a) **First error**: The magistrate erred in finding that the defence effectively admitted the entirety of the respondent's claim;

(b) **Second error**: On the material before him, the magistrate erred in finding that the respondent had satisfied the test in UCPR r 292;

(c) **Third error**: The magistrate erred in giving judgment in an amount of $73,533 in circumstances when the most recent pleadings claimed a lesser sum of $17,533 plus costs and the respondent did not apply for, and was not granted, leave to amend;

(d) **Fourth error**: The magistrate erred in finding that the effect of s143(1)(c) of the Regulation was to displace Chapter 17A of the UCPR such that the respondent's costs were to be determined by reference to the Regulation rather than the Magistrates Court scale of costs.

The first and third error

[59] There is an overlap between the first and third errors identified above so I have dealt with them together.

[60] It is clear from his Reasons that the magistrate placed significant reliance on the appellant's alleged deemed admissions to the respondent's claim. This begs two questions:

(a) First, and what ought to be a straightforward question – what exactly was the respondent's pleaded claim?

(b) Secondly, was the defence a deemed admission of that claim?

What was the respondent pleaded claim?

[61] Focusing at this point just on the respondent's claim for contributions and recovery costs, the respondent's amended claim and amended statement of claim are on any view confusing.

[62] The amended claim [of 18 July 2017] seeks the sum of $15,705.73 for outstanding contributions and recovery costs under s 143 of the Regulation plus further outstanding contributions and recovery costs under the Regulation until judgment.[64] But the relief sought at the end of the statement of claim [of 27 June 2017] is confined to "Contributions and "Recovery Costs" in the sum of $15,705.73. There is no pleaded case for ongoing contributions and recovery costs.

[63] Consistent with the amended statement of claim, the notice under UCPR r 150(3) does not seek ongoing contributions and recovery costs – but, to add to the melting pot of confusion, that notice seeks the sum of $14,710.44 for "Contributions and Recovery Costs."

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64 As set out in paragraph 34 of these Reasons.

[64] The amended statement of claim does not plead an entitlement to ongoing contributions and recovery costs, but defines those terms and the basis to an entitlement to amounts under these headings as follows:

> "The Contributions Debt
>
> 1. The Plaintiff set contributions for the administrative and sinking fund (the **Contributions**) by ordinary resolution at the scheme's Annual General Meetings pursuant to section 139(1) of *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (the **Regulation**).
> 2. The Plaintiff served the Defendant with written notice of the contribution levied on the Defendant to its administrative and sinking fund (the **Contributions**) pursuant to section 140 of the Regulation.
> 3. The Contributions were not paid by the Defendant in full by the date they became payable as detailed in Annexure A of this Statement of Claim.
> 4. On 7 January 2016 the Plaintiff authorised, by way of ordinary resolution pursuant to section 142 of the Regulation, the imposition of a penalty to be paid by the owners of lots if a contribution is in arrears, being simple interest at the rate of 1.00% for each month a contribution is in arrears.
> 5. The penalty for the Defendant's failure to pay the Contributions from 30 September 2016 to ~~1 February 2017~~ 27 June 2017 is ~~$5.21~~ $645.51 as detailed in Annexure A to this Statement of Claim, and continues to accrue at a monthly rate of 1.00% until the date of payment of the Contributions (the **Penalty Interest**).
> 6. The Plaintiff has reasonably incurred costs in attempting to recover the Contributions as detailed in Annexure A to this Statement of Claim (the **Recovery Costs**).
> 7. The Plaintiff is entitled to recover the Contributions, Recovery Costs and Penalty Interest as a debt pursuant to section 143 of the Regulation."

[65] As can be seen, the allegations in the amended statement of claim are very general. For example the date or dates the respondent is alleged to have served the appellant with written notice of the Contributions [as defined] are not pleaded, nor are dates of the levies or the amounts levied (the implication by the definition being expanded to the plural being that there was more than one written notice).

[66] The specific amounts being claimed as Contributions and Recovery Costs are also not identified on the face of the pleading. But Annexure A [referred to in the statement of claim] contains a table. Unhelpfully, this Annexure uses headings and descriptions which are not easily referenced to the statement of claim.

[67] The table starts with a balance brought forward on 30 September 2019 (under the heading Debt Amount) of "$17,051.44". No particulars are given of when this sum accrued or to what it relates. Is it the total of the outstanding contributions, recovery costs and interest as at 30 September 2016? It is impossible to tell. What is apparent is that a payment of $12,654.92 was received on 1 October 2016 which reduced this "Debt Amount" to one of $4,396.52. Under the heading "Debt Amount", there is then reference to amounts of $2,425.50 on 1 November 2016 and 1 February 2017 and an amount of $2,696.65 on 1 May 2017 (which I assume in accordance with paragraph 3 of the amended statement of claim are the dates they became payable) for what are described as 'Administrative and Sinking Fund Levy and Insurance". There is no reference to a levy amount for insurance in the definition of Contributions contained in paragraph 1 of the amended statement or claim but I otherwise assume that these are the amounts referred to generally in that paragraph and paragraph 2 of the amended statement of claim. These sums total $7,546.65 and when added with the balance brought forward, total $11,944.17. It is that amount that is listed under the heading "Cumm Debt" in the table.

[68] There is also a sum of $3,761.56 listed under the heading "Cumm debt for section 143." By the description costs (being Kemps Petersons Recovery Costs and Grace Lawyers Recovery costs), it is reasonable to infer as I do that these are the Recovery Costs referred in paragraph 6 of the statement of claim.

[69] The sum of the Contributions and Recovery Costs is $15,705.73 - which correlates to the specific amounts claimed in the amended claim and the amended statement of claim, but not the r 150 (3) notice. An additional amount for penalty interest amount of $645.51 also appears as part of Annexure A.

[70] It is a fundamental requirement of procedural fairness that a pleading is to state with sufficient clarity and precision, the case that must be met.[65] Rule 149 of the UCPR sets out the requirement of each pleading and includes a statement of all the material facts on which the party relies and any matter if not stated specifically which may take the other party by surprise.[66]

[71] The respondent submitted that the effect of UCPR r 153 is that if the appellant wished to defend the proceeding on the basis that a condition precedent to the debt arising was not met, then it was for the applicant to plead that in the defence. I reject this submission. As Justice Wilson observed in *Gilbert v Goodwin & Ors* [2003] QSC 380 at [17] "a "condition precedent" within the meaning of r 153 must be distinguished from a material fact which is of the essence of a cause of action." Relevant material facts in the present case include, in my view, the dates of the various resolutions and amounts of the

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65 *Gould v Mt Oxide Mines Ltd* (in liq) (1916) 22 CLR 490 at 517; *Thiess Pty Lt v FFE Mineral Aus Pty Ltd* [2007] QSC 209 at [38] per White J.

66 UCPR r 149 (b) and (c).

contributions levied and the dates each of the notices relied upon were served; [67] together with the total amount of the contributions and recovery costs being sought.

[72] Pleadings that comply with the UCPR and pleading principles assist in facilitating the just and expeditious resolution of the real issues in dispute between the parties at a minimum of expense;[68] and those that don't cause unnecessary costs and delay. Both parties' pleadings exemplify the latter.

[73] The amount claimed by the respondent at the summary judgment hearing for Contributions and Recovery costs was an amount of some $44,000 more than the amount claimed in the amended statement of claim. The magistrate expressly recognised the increase in the claim, but did not turn his mind to the deficiencies in the pleadings I have identified above. There was no application to amend the respondent's amended claim and amended statement of claim to reflect the further amounts sought on the summary judgment either prior to or even at the summary judgment, although, as identified above, an application to amend the claim and statement of claim was previously made and granted, increasing the claim for Contributions and Recovery Costs by about $6,000.[69]

[74] The starting point is that the relief sought (in this case the amount of the Contributions, Recovery Costs and Penalty Interest claimed as a debt pursuant to s 143 of the Regulation) ought to have been included in the amended statement of claim attached to the amended claim in order to comply with UCPR r 149. But I accept UCPR rr 156 and 658(2) empower the Court to make an order even if there is no claim for relief extending to that order in the statement of claim. These rules confer a discretion, which has to be exercised according to the particular circumstances of the case[70] and the relief needs to be consistent with the case pleaded and established by the evidence.[71]

[75] Unsurprisingly, no reasons were given by the magistrate for exercising any discretion under UCPR rr 156 or 658, despite the fact that, because of the increased quantum of the claim, the simplified procedures applicable to claims under $25,000.00 were no longer applicable.[72] The case was one where the respondent relied heavily on compliance with the UCPR pleading rules in the sense that it argued that the defence did not comply with

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67 In *Westpac Banking Corp v Body Corporate for the Wave Community Title Scheme 36237*. [2014] QCA 073 at [46] to [48], the Queensland Court of Appeal addressed the issue of the source of a lot owner's liability to pay contributions. The observations of Mullins J (as her honour then was) with Holmes and Fraser JJA support the conclusion that it is a combination of ss.139 and 140 of the Regulations which gives rise to the relevant liability. That is, both the resolution and notice are required in order to fix a lot owner with liability. It follows that these matters ought to have been specifically pleaded. Cf *Coshott v Owners of Strat Plan No 48892* [2006] NSWSC 308 [30]-[39] (Cooper AJ) which as the appellant submitted was decided under a relevantly different legislative scheme.

68 UCPR r 5.

69 The irony being that the costs of those applications resulted in almost 10 hours of billed time and additional recovery costs being added to the appellant's debt under the Regulations of approximately $4,301.55.

70 In the context of UCPR r 658 (2) see *Mark Bain Constructions Pty Ltd v Avis* [2012] QCA 100, [108] (Fraser JA, with whom Chesterman JA and Fryberg J agreed).

71 See the High Court's observations in *Dare v Pulham* (1982) 148 CLR 658 at 664 per Murphy, Wilson, Brennan, Deane and Dawson JJ.

72 UCPR r 514.

those rules and that the case ought to be decided on the basis of deemed admissions. In those circumstances it was incumbent on the respondent to have complied with the pleading rules itself. It did not. It follows that this was not a case where the magistrate ought to have given judgment for more than the pleaded case. Given the way the case proceeded, the appellant was denied the opportunity to plead in response to the significantly greater amount sought on the application.

[76] I find that any reliance on deemed admissions was confined to respondent's pleaded case – which at its best was confined to the amounts set out in the amended statement of claim [at paragraph 35 above].

Was the Defence a deemed admission of the respondent's pleaded claim

[77] As rudimentary as it was, the defence clearly put in issue the quantum of the respondent's claim – particularly as it concerned recovery costs. This finding is consistent with the fact that the respondent filed a reply which by paragraph 2 attempted to address the allegations it understood to be raised in the defence which included: the issue of there being "unsolicited fees on the invoice" (to which the respondent referred to an entitlement to recover costs reasonably incurred in recovering under s 143 of the Regulation); and the issue of having not issued correct notices of contribution (to which the respondent responded again generally by referring to notices being issued to particular addresses and most relevantly "from 16 June 2015" but again without specifying the dates and the amount of the contributions in those notices – particularly those relevant to the amounts being claimed in the proceeding).

[78] It is also instructive that, whilst submitting that the defence really was an admission of it claim, the respondent was charged nearly five hours (mostly at either a senior associate or partner rate) for the work its solicitors spent reviewing and discussing the defence and drafting and discussing the reply. This amount is of course included in the claim for Recovery Costs said to be "reasonably incurred" (an issue I have addressed at paragraphs [95]-[110] later in these Reasons.)

[79] In order for a matter to proceed on the basis of deemed admissions it is necessary for there to be a clear entitlement to the relief claimed.[73]

[80] Given the deficiencies of the respondent's' pleading – namely, that the 150(3) notice referred to a different amount than claimed in the amended claim and statement of claim; the basis of the amount carried forward is not pleaded; and the definition of Contributions does not include insurance, but an insurance levy is included as part of the levied contributions – and given the matters discussed in the preceding three paragraphs, it was wrong for the magistrate to have concluded that the failure by the appellant to adhere to any of the pleading requirements constituted a deemed admission to the claim as pleaded or as was ultimately sought at the hearing.

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[73] See the observations of Atkinson J in *Crawley v Crawley Land & Ors* [2012] QSC 294, [60]-[61]; although these observations were made in respect of UCPR r 190(1) they remain apposite to the present case.

Conclusion re: first and third errors

[81] I therefore find that as a result of errors one and three, the decision by the magistrate to award summary judgment below was wrong and ought to be set aside. It remains necessary to deal briefly with the remaining errors raised in this appeal because bearing in mind my powers on appeal as outlined above, they are relevant to whether summary judgment ought to be given by this court for a lesser amount.

Errors two and four

[82] There is an overlap between the second and fourth errors identified above so I have dealt with them together.

[83] Section 143 of the Regulation provides for the recovery of the contributions, penalties and recovery costs as a statutory debt as follows:

> *"***Payment and recovery of body corporate debts**
> (1) If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt—
> (a) the amount of the contribution or instalment;
> (b) any penalty for not paying the contribution or instalment;
> (c) any costs (**recovery costs**) reasonably incurred by the body corporate in recovering the amount."[Emphasis added]

[84] The respondent submitted that s 143 of the Regulation is clear. If the respondent [body corporate] has complied with ss 137 to 142, then it may recover the outstanding contributions, penalty interest and recovery costs as a debt and that there is no defence provided for in s 143.

[85] This general proposition overlooks two things:

(a) First, that it must be shown that the body corporate have complied with ss 137 to 142;

(b) Secondly, that before the recovery costs can be recovered as a debt, the body corporate must establish that the recovery costs were reasonably incurred by the body corporate in recovering the amount of the contribution or instalment.

[86] The onus is on the applicant in a summary judgment to satisfy the court of the two requirements set out in UCPR r 292(2). It is only when a prima face entitlement to summary judgment has been established that the evidentiary burden shifts to the respondent to the application.[74] There is no requirement for a respondent to a summary judgment application to adduce evidence. The determination of whether a respondent has a real prospect of defending a claim is not limited to matters raised by the respondent

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[74] *ANZ Banking Group Ltd v Barry* [1992] 2 Qd R 12 at 19; see also *Queensland Pork Pty Ltd v Lott* [2003] QCA 271, per Jones J at [41]; *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105, [22] (White JA, Margaret Wilson AJA and A Lyons J concurring).

- the court may refuse the application if it is satisfied on the material that there is a real issue to be investigated.[75]

Compliance with the Regulation

[87] The appellant submitted that it was a mandatory condition for the success of the respondent's claim for contributions that a valid notice had been given to the appellant. I accept this submission for the reasons discussed in paragraphs [70] & [71] of these Reasons.[76] The fact that notices were served on the appellant was broadly and generally alleged by the respondent at paragraph [5] of the amended statement of claim and paragraph [2](v) of the reply. But the notices relevant to the respondent's claim to the contributions were not specifically pleaded. So the appellant can hardly be said to have been deemed to have admitted something that was not pleaded against him. In these circumstances the relevant notices issued under s 140 of the Regulation ought to have been contained in the supporting affidavit material. They were not.

[88] The only evidence which suggested any liability on the part of the appellant was a document bearing the heading "Owners Statement of **Account**" exhibited to Mr Carlson second affidavit as "JAC2". Mr Carlson identifies this document as follows:[77]

> "I have been provided with an up to date statement of account in relation to the Defendant's lot within the Plaintiff's scheme"

[89] Evidence may be adduced in a summary judgment on the basis of information and belief only "…if the person making the affidavit states the sources of the information and the reasons for the belief…"[78] Apart from swearing generally that "I am instructed by the Plaintiff that the debt remains outstanding," Mr Carlson does not identify who specifically instructed him. He also does not identify whether the appellant was ever sent the Account – although on its face it is addressed to the appellant.[79] Absent evidence which would bring the Account within one of the documentary hearsay exception (ss 84 and 92 of the *Evidence Act 1977* (Qld)), this part of Mr Carlson's affidavit did not comply with UCPR r 295 and ought to have been excluded.[80] But even if I am wrong – the evidentiary value of the document was minimal for two main reasons. Firstly, the Account is not consistent with the pleaded case and secondly it is difficult to reconcile.

[90] The Account on its face is a computer generated a statement of account from January 2014 until March 2019 (with an unexplained balance brought forward at that time of

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75 See the useful discussion by Butler SC in *Thompson v Body Corporate for Arila Lodge* [2017] QDC at 134 at [10] to [11].; citing *Probert & Anor v Ericson* [2014] QSC 4 at [31]; *Reardon v Deputy Commissioner of Taxation* [2013] QCA 46 at [41]; and *Shaw v Deputy Commissioner of Taxation* [2016] QCA 275 at [22].

76 With reference to the Court of Appeals observations in *Westpac Banking Corp v Body Corporate for the Wave Community Title Scheme 36237*. [2014] QCA 073 at [46] to [48].

77 At paragraph [23].

78 UCPR r 295.

79 See *Vivlios v Westpac Banking Corporation*, [2010] QCA 230, [13] (Fraser JA, with whom White JA and Applegarth J agreed).

80 At the time of the application, the respondent's claim was for more than the minor debt amount so under the UCPR, the Court was bound by the rules of evidence.

$7,702.28).[81] The Account has a number of columns with headings. Relevantly one column is headed "NARRATION" and contains items such as interest, GST, debt recovery costs, administration and sinking fund costs. This column shows the total of the debits incurred for these things to be $126,246.27 with payments of $52,806.92 in the "CREDIT" column - leaving a "BALANCE" of $73,439.35. The difficulty with this this system of accounting is that it conflates all of the narrated descriptions so it is impossible to discern what amounts were attributable to what. It is apparent on the face of this document that any amounts paid by the appellant were just paid off the aggregate debt.

[91] Based on this Account, Mr Carlson then swears that "Grace Lawyers" have prepared an updated annexure spreadsheet which was said to reflect "Annexure A of the Amended Statement of claim". The columns heading might reflect Annexure A of the Amended statement of claim but the figures do not. Mr Carlson then swears that as at 12 March 2019 the appellant is indebted a follows:[82]

(a) $29,033.76 in contributions

(b) $36,705.61 in recovery costs

(c) $3,575 including GST for Counsels fees; and

(d) $3,841.25 for interest.

[92] It follows that on any view in the respondent failed to satisfy the evidentiary onus in terms of the proof of an entitlement to any contributions – as pleaded or as ultimately sought at the summary judgment application.

[93] The lack of particularity in the evidence feeds directly into the consistent lament of the appellant – prior to and subsequent to the proceedings being commenced against him – that there was gross overbilling by the respondent's lawyers and unreasonable amounts kept getting added to his accounts.[83] Consistent with these complaints, the defence challenged the accuracy and entitlement of the respondent to charge some of the fees it did.

[94] The issue that then arises is that of the respondent's entitlement to recovery costs.

Recovery costs reasonably incurred

[95] In *Owners of Strata Plan 36131 v Dimitriou*,[84] the New South Wales Court of Appeal considered the question of the recovery of legal costs under the equivalent (though not identical) New South Wales legislation. Relevantly, all members of the Court of Appeal

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81 AB 212; exhibit "JAC2" of Mr Carlson's second affidavit.

82 Paragraph 25 of Mr Carlson's second affidavit.

83 First affidavit of Mr Carlson at [62] to [64].

84 (2009) 74 NSWLR 370 (***Dimitriou***).

found that the costs payable were limited to those reasonably incurred and reasonable in amount;[85]

[96] As the appellant submitted, and I accept, in Queensland, as in New South Wales, there are three potential bases under which to assess costs:

(a) solicitor and client costs under ss 340 and 341 of the *Legal Profession Act* 2007 (Qld),[86] which are in materially the same terms as those in the New South Wales legislation considered by Hodgson JA;

(b) costs on the standard basis under UCPR r 691, which provides that the costs are to be assessed 'in accordance with' the relevant Court scale; and

(c) indemnity costs under UCPR r 703, which relevantly provides:

> "(3) When assessing costs on the indemnity basis, a costs assessor must allow all costs reasonably incurred and of a reasonable amount, **having regard to** –
> **(a) the scale of fees prescribed for the court**; and
> (b) any costs agreement between the party to whom the costs are payable and the party's solicitor; and
> (c) charges ordinarily payable by a client to a solicitor for the work." [Emphasis added]

[97] In *Body Corporate for Sunseeker Apartments v Jasen*,[87] McGill SC DCJ also applied *Dimitriou* but adapted to the Queensland Regulation as follows:[88]

> "It follows that, despite the similarity in wording between the test in r 703 and the test adopted by the Court of Appeal in New South Wales in *Dimitriou*, the tests are to be applied in different ways. If one applies the test in *Dimitriou* to costs payable under s 97, which I consider is the approach that should be adopted, and the Chief Justice's approach to the assessment of indemnity costs under r 703, s 97(1)(c) does not provide for either costs assessed on the standard basis or costs assessed on the indemnity basis, but rather an intermediate test, which may be equated with the old common fund or solicitor and client basis in England. Unlike the situation for indemnity costs, the onus is on the body corporate, and the defendant is to be given the benefit of the doubt." [Emphasis added.]

[98] More recently in this court in *Thompson v Body Corporate for Arila Lodge* [2017] QDC 134, [26]-[28][89] (***"Thompson"***) Butler SC DCJ adopted the reasoning in *Dimitriou* and

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85 Per Hodgson JA at [40]; per Basten JA at [64]; per Handley AJA at [130].

86 For the NSW equivalent provisions considered in *Dimitriou,* see *Legal Profession Act* 2004 (NSW) ss 363 &364.

87 [2012] QDC 051, [43].

88 At [43].

89 Adopting the principles discussed in *Dimitriou.*

determined that the body corporate's costs were limited to those reasonably incurred and reasonable in amount.

[99] It follows that in order for any recovery costs to be recovered as a debt, the respondent must establish that those costs were both reasonably incurred and reasonable in amount. I therefore accept the appellant's submission that the magistrate proceeded on an incorrect principle when he determined that the respondent was entitled to costs reasonably incurred without considering whether those costs were reasonable in amount.[90]

[100] The onus lies on the respondent to establish that the legal costs were reasonably incurred and reasonable in amount - with the appellant to be given the benefit of any doubt. [91] In my respectful view, there was no reasonable basis for the magistrate to have been satisfied of either of these requirements on the material before him.

[101] As a start, I am not satisfied that the magistrate considered the affidavit material before him in any meaningful way.[92] As a review of the transcript reveals, he was more concerned to be taken to the end figure.[93] This of course is explained by the approach he was encouraged to take (and indeed took) that it was a "deemed admission" case.

[102] Further, the evidence which the respondent sought to reply on in order to establish the reasonableness of these costs was inadequate in a number of ways. First, Mr Carlson as a Partner of Grace lawyers exhibited the tax invoices rendered to the respondent in accordance with the various Costs Disclosure Agreements. And in relation to each of these invoices he swore that the work was reasonable and necessary essentially because it was done. This method of proof is self-serving and of little if any probative value in my view. Further, there was no submission or evidence put before me to demonstrate that Mr Carlson possesses any relevant expertise in costs assessment such as would enable him to provide an admissible opinion as to the reasonableness of the costs sought.

[103] Secondly, even if Mr Carlson established he had the necessary qualifications to give this opinion evidence, the reasonableness of the recovery costs both in terms of whether they were reasonably incurred and reasonable in amount do not bear the simplest of scrutiny. Mr Carlson's evidence is replete with deficiencies, irrelevancies and unexplained conclusions. For example:

(a) at paragraph 8 of his first affidavit, Mr Carlson states that internal processes have been "put in place to streamline the debt recovery process and keep the cost of bodies corporate as low as possible." He then gives examples such as issuing letters of demand, using precedents and using the services of a junior lawyer. But there is no evidence of letters of demand being sent in this case. Further, Mr

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90 As set out (and underlined) at paragraph [48] of these Reasons.

91 *Thompson* at [29]; *Sunseeker Apartments v Jasen*, [2012] QDC 51 at [13].

92 As outlined at paragraph 44 of these Reasons, the hearing took seven minutes and there was no evidence that the magistrate has considered in any depth the considerable and lengthy affidavit material before him.

93 See paragraph 46 to 51 of these Reasons.

Carlson alleges that the claim and statement of claim is a precedent document and a fixed fee is charged for their preparation together with disbursements. The Magistrates Court's scale costs for issuing a claim and statement of claim at the time was $1,154.[94] This is not reflected in invoice 83827. This invoice includes work by a senior associate charged at $395 per hour and a law graduate at $150 per hour. Even a cursory glance of the invoice seems to contain double-ups. Further, there is no explanation why it was necessary for a senior associate to be involved. The first entry by the senior associate is for eight units (48 minutes) to email to the plaintiff to provide an update and recommending the course of action to progress the file. The law graduate then spent a total of 4.7 hours to draft the statement of claim (including the annexures).[95]

(b) In circumstances where the appellant was said to have been taken to have admitted the claim, it is difficult to understand how it can possibly be said that the processes were streamlined or the recovery costs reasonable when invoices where rendered to the respondent for amounts such as $4,384.36 and $2,518.90 respectively (mainly at charge out rates for a senior lawyer of $350.00 and $450.00 per hour) for what Mr Carlson summarised as follows:[96]

> "Reviewing Defence, updating and advising the Plaintiff in relation to same; receiving request for advice from client and preparing further advice in relation to allegation in defence; preparing, filing and serving the Reply; preparing advice to client in relation to duty of disclosure and start preparing list of documents."
>
> "Liaising with body corporate manager in relation to obtaining documents to finalise list of documents (various); finalising list of document; sending a copy of the list of documents to the Defendant; conferring with Associate and Counsel in relation to progression of matter."

(c) in paragraph 9 of his first affidavit Mr Carlson irrelevantly states that "of the Claims and Statements of Claim that Grace Lawyers prepares and files, approximately less than 10% of those files are defended"; and

(d) later in paragraph 14 of his first affidavit, without stating the source of his knowledge Mr Carlson states that: "The terms of the Costs Agreement and in particular the rates for which Grace Lawyers charges for professional services are similar to the rates charged by other law firms that also provide legal services to body corporate, including the recovery of outstanding contributions, interest, and recovery costs;"

[104] A simple example of unreasonable charges that appear on the invoices annexed to Mr Carlson's first affidavit is on 12 July 2017, when a staff member from the Cairns

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94 For an amount between $10,000 and $20,000 Scale F.

95 This time includes a phone conference with the client on 25 January 2017 and an email on 23 January 2017.

96 With reference to invoices 97128 and 98996. Paragraph 20 of Mr Carlson' first affidavit.

Magistrates Court Registry speaks to a senior associate about the respondent's application to amend the claim and statement of claim having been incorrectly posted to the Townsville, not Cairns Magistrate Court. The respondent is charged $86.90 for this conversation – which only occurred because of the solicitors' error.[97]

[105] In *Thompson* the court rejected the respondent's submission that the reasonableness of the costs was proven through an affidavit of Mr Carlson (which as far as I am able to discern was in a similar vein to the affidavit of Mr Carlson relied upon in the present case) and made the following relevant observations:[98]

> "[38] I am not persuaded that these assertions of opinion as to the reasonableness of the charges, when regard is had to all the information before the court, are sufficient to satisfy the Court that the defendant has no real prospect of successfully challenging the costs sought.
>
> [39] Firstly, the evidence of Mr Carlson as to his opinion can only be admissible on the basis of special expertise. The conditions for admissibility of expert opinion as stated in *Cross on Evidence* are helpfully set out in the judgment of Applegarth J in *Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors*.32 It is doubtful whether the claim of expertise briefly made in the affidavit is sufficient to justify admissibility of this evidence as expert opinion. Ultimately it will be necessary for the respondent to prove the primary facts founding the opinion and to establish those facts are a proper foundation for the opinion reached. It is enough to observe that costs agreed between solicitor and client, although considered reasonable as between those parties, will not necessarily be reasonably incurred within the meaning of s 145(1)(c) of the Standard Module. The criteria upon which Mr Carlson reached his opinions as to reasonableness is not clearly articulated.
>
> [40] Furthermore, while the affidavit of Mr Carlson attests to the reasonableness of the legal costs and the body corporate costs, it does not specifically attest to the reasonableness of the costs incurred by Kemps Petersons Pty Ltd.
>
> [41] As observed above, the onus of establishing that summary judgment should be given ultimately rests with the applicant. In respect of costs, it was necessary on the summary judgment application for the applicant to satisfy the court that the respondent had no real prospect of defending the claim in respect of costs and that there was no need for a trial of that part of the claim…."[Emphasis added]

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97 Affidavit of Jason Alexander Carlson sworn 06.03.2020, Exhibit "JAC2" page 15.

98 *Thompson v Body Corporate for Arila Lodge* [2017] QDC 134 134

[106] I respectfully agree and adopt the above observations of Judge Butler SC. They remain equally apposite to the present case. At the time of the hearing of the application for summary judgment in this case, the respondent's legal representatives well knew of the evidentiary burden to be met; they also represented the relatively unsuccessful respondent in the decision of *Thompson*.[99] For unknown and unexplained reasons, the decision of *Thompson* was not one of the four decisions handed to the magistrate at the hearing below. It is unclear why it was not provided to the magistrate, but in my view, it ought to have been.

[107] The recovery costs claimed in the present instance are $40,290.61 and the unpaid contributions instalments are said to be $29,033.76. I accept the respondent's submission that legal costs are not always proportional to the amounts in dispute.[100] But the overriding question when considering recovery costs payable under the Regulation is whether the costs were reasonably incurred and reasonable in amount. In determining such a question it remains relevant, in my view, to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue.[101]

[108] I find that on the state of the evidence before him the magistrate below ought not to have been satisfied on balance that the respondent had proved an entitlement to the recovery costs either as pleaded or as claimed under the Regulation.

Conclusion re: second and fourth errors

[109] I therefore find further that as a result of errors two and four, the decision by the magistrate to award summary judgment below was wrong and ought to be set aside.

[110] I have considered whether it is possible for me to enter summary judgment for a lesser amount in this case as it is uncontroversial that the appellant owes the respondent some amount for outstanding contributions and potentially other sums including recovery costs and interest pursuant under the Regulation. It is unsatisfactory and unfair to other lot owners that the appellant is not up to date with his contributions. But due to the deficiencies in the pleading and the evidence discussed above, unfortunately it is not possible for me to unravel the figures and to resolve the obvious impasse between the parties.

Orders – First Appeal

[111] I therefore order as follows:

1. Leave to extend the time to appeal the decision of the magistrate to order summary judgment on 19 March 2019 is granted.

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99 In *Thompson* the court was prepared to vary the judgment for a lesser amount for the outstanding contributions and interest.

100 See *Body Corporate for Sunseeker Apartments CTS 618 v Jasen* [2012] QDC 51 at [45] per McGill SC DCJ (although in this case the court was a review of a decision by a cost assessor under UCPR r 742).

101 See *Thompson* at [45] with reference to the court of appeal observations in *Amos v Monsour Legal Cost Pty Ltd* [2007] QCA 235 at [29]. Although given in the contest of reasonableness in respect of the assessment of costs on an indemnity basis – these observation remain apposite to the present case.

2. The appeal is allowed.

3. The order for summary judgment made on 19 March 2019 is set aside.

4. The proceeding is remitted to the magistrate's court for directions, including for the exchange of amended pleadings, for mediation and if no resolution for trial.

The Second Appeal

[112] By his notice of appeal and his written submissions the appellant submitted that the subsequent decision of the magistrate below failed to take into account material considerations or acted on the following wrong principle in refusing to set aside the summary judgment order:

> "(a) First, in concluding that the appellant had failed to provide, "…any reasonable excuse for that failure to appear…"[102] the magistrate:
>
> (i) did not allow the appellant to tender a bundle of documents which provided relevant material explaining his failure to appear; and
>
> (ii) did not place any, or any sufficient, weight on the affidavit filed by the appellant;
>
> (b) secondly, in concluding that the appellant had failed to "…establish a prima facie defence on the merits…" the magistrate failed to give sufficient weight to the defence on which the appellant sought to rely.

[113] Given my conclusion in relation to the First Appeal it follows that the decision by the magistrate refusing to set aside the summary judgment order was wrong. As the respondent's counsel accepted "It seems as though it would be a[n] unsatisfactory result for your Honour to set aside a summary judgment but then leave a decision where that summary judgment was refused – [it] would produce potentially, an absurd result.[103]

Orders – Second Appeal

[114] I therefore order as follows:

1. The appeal is allowed.

2. The order dismissing the appellant application to set aside summary judgment made on 18 June 2019 is set aside.

Costs

[115] The appellant has been successful in relation to both appeals. Ordinarily, costs follow the event. It follows that the appropriate order as to costs in this case is that the respondent is to pay the appellant's costs of the First and Second Appeals. But I will

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102 AB 36 at lines 29-31.

103 Transcript of Appeal hearing at 1-67, ll 44-48.

allow the opportunity to make submissions as to why another order as to costs is appropriate in this case. To that end, I direct that any submissions in respect of the costs of the appeals (no longer than 2 pages), or alternatively a proposed draft order if the parties are agreed, be exchanged and emailed to my Associate as follows:-

(a) The appellant's submissions are to be exchanged and emailed to my Associate by 4:00pm 8 December 2020; and

(b) The respondent's submissions are to be exchanged and emailed to my Associate by 4:00pm 10 December 2020; and

(c) The matter is listed for hearing as to costs at 9.30am on 11 December 2020.

Otherwise the costs order as foreshadowed will be made.