

FEDERAL COURT OF AUSTRALIA

Parties: **DIRECTOR OF THE FAIR WORK BUILDING INSPECTORATE v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION AND JOSEPH MCDONALD AND MICHAEL BUCHAN**

File number(s): WAD 106 of 2009

Registrar: **DEPUTY DISTRICT REGISTRAR TROTT**

Date of judgment: 27 July 2015

Catchwords: **COSTS** – objections to estimates – whether notices of objections validly filed – whether appropriate to dispense with compliance with orders - whether respondents entitled to attend taxation of bills of costs

Legislation: *Federal Court of Australia Act 1976* (Cth) ss 35A, 37M, 51
Federal Court Rules 2011 (Cth) rr 1.34, 1.35, 40.25, 40.26
40.27

Cases cited: *Arifin v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2014] FCAFC 61
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2014) 226 FCR 240; [2014] FCAFC 138
Fernance v Nominal Defendant (1989) 17 NSWLR 710
Jackamarra v Krakouer (1998) 195 CLR 516
Outboard Marine Australia Pty Ltd v Byrnes [1974] 1 NSWLR 27
Ratnam v Cumarasamy [1965] 1 WLR

Date of hearing: Determined on the papers

Place: Perth

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 28

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Counsel for the Respondents: K Vernon

Solicitor for the Respondents: J Nicholas (until 9 April 2015)

- 3 Subsequently, on 4 September 2012, Buchanan J ordered that the first and second respondents should pay certain further sums by way of fines for contempt and also pay the applicant's costs of the applicant's Notice of Motion for Contempt dated 20 July 2011, save and except for all costs associated with the applicant's application for the use of a court book.
- 4 On 2 May 2013, the applicant filed two bills of costs. The first bill was drawn in respect of the applicant's costs of the proceeding in relation to the issue of the payment of penalties ('**First Bill**'), whereas the second was drawn in respect of the applicant's costs of the proceeding in relation to the issue of compensation ('**Second Bill**'). On 5 September 2013 the applicant filed a further bill drawn pursuant to the orders of Buchanan J referred to above ('**Third Bill**').
- 5 On 5 February 2014, a Registrar made an estimate of costs in respect of each bill. The Registrar gave notice to the parties pursuant to r 40.20(3) of the *Federal Court Rules 2011* ('Rules') of the estimate of the approximate total in each bill for which, if the bill were taxed, a certificate of taxation would be likely to issue. The respondents objected to each of the estimates under r 40.21(1) of the Rules. Subsequently however, the respondents withdrew their objection to the estimate made in respect of the Second Bill.
- 6 For the purpose of identifying the remaining issues in dispute and in order to try to reach a resolution of the First Bill and of the Second Bill, the parties were directed to attend a confidential conference before the Registrar on 4 June 2014, pursuant to r 40.21(2)(a)(i). A further confidential conference was convened before a different Registrar on 24 June 2014. As the parties were unable to resolve their differences, the Registrar subsequently listed these bills for taxation and, amongst other things, ordered the respondents to file and serve "a detailed Notice of Objections to each of the 2 remaining Bills of Costs" by 4 August 2014 with the applicant to file and serve responses by 25 August 2014. These orders were subsequently varied at the request of the respondents to extend the dates to 11 August 2014 and 1 September 2014, respectively.
- 7 In its responses filed on 1 September 2014, the applicant's primary submission was that the respondents' Notices of Objections filed 11 August 2014 do not comply with the requirements of r 40.25(1) and that, accordingly, the objections ought to be disregarded in their entirety and not taken into account by the taxing officer at the taxation. By way of summary, the applicant contended that, "the objections are not in accordance with Form 130 in that they do not identify each item or part of an item to which objection is taken, stating

briefly but specifically why each item or part of an item should be disallowed, the amount by which each item should be reduced, and any authority relied on. Rather, the objections state in blanket form the items to which objection is taken without referring to those items consecutively, and without providing any sub-totals of the sum offered, or the sums objected to". In the alternative, the applicant provided detailed responses to the respondents' objections in respective schedules that were attached to its responses.

- 8 At the commencement of the taxation held on 2 September 2014, the applicant's representative maintained that the respondents' objections did not comply with the requirements of r 40.25(1). In addition to submitting that they ought to be disregarded in their entirety and not taken into account it was also submitted that, by reason of non-compliance, no valid notices of objection should be taken to have been filed in which case only the applicant, being the party who filed the bills, could attend the taxation. This was said to follow from and pursuant to the operation of r 40.27(1) in such circumstances.
- 9 Not unexpectedly, the respondent's representatives sought to resist these submissions. They did however concede, properly in my view, certain non-compliance issues including for example that the objections did not identify the particular amounts by which it is contended that each item in the bill should be reduced. After further considering the situation, it was agreed between the parties that the taxation be adjourned for a short period during which time the respondents' representatives would be able to attempt to overcome the non-compliance issues by providing more detailed particulars in respect of each item to which objection was taken.
- 10 Immediately prior to the adjourned taxation on 4 September 2014, the respondents filed two documents in respect of each remaining bill entitled, "Respondent's [sic] reply to Applicant's response to notice of objection – Penalty Proceedings" and "Respondent's [sic] reply to Applicant's response to notice of objection – Contempt Proceedings". At the resumption of the taxation, the applicant repeated the submission previously put that the respondents' filed documents were altogether inadequate to maintain any proper objections and again sought orders that the taxation of each of the remaining bills should proceed in the absence of the respondents. The respondent's representatives continued to resist these submissions. To resolve the impasse, the taxation was adjourned to a date to be fixed and the applicant was ordered to file and serve short submissions in support of its contentions that:

- i) the respondents' Objections to the applicant's Bills do not comply with r 40.25(1) of the Federal Court Rules 2011 (Cth); and
- ii) by reason of the above, the respondents are not entitled to attend the taxation of the Bills of Costs.

The respondents were ordered to file and serve short submissions in response and the applicant was also ordered to file and serve short submissions in reply.

APPLICANT'S SUBMISSIONS

11 For the applicant, it is contended that the taxation of the remaining bills should proceed in the absence of the respondents. In addition to referring to and repeating paragraphs 1 to 8 inclusive of the applicant's Responses, the applicant submits that, notwithstanding the opportunity to potentially remedy the deficiency regarding the objections as to part items ("the Part Objections") which was afforded to the respondents by consent of the parties and with the benefit of the applicant's Schedule to the Responses ("the Applicant's Schedule") the Respondents' Schedules dated 3 September 2014 ("the Respondents' Schedules") fail to remedy the Part Objections Deficiency. In its short submissions, the applicant then goes on to state examples of this 'failure' as follows:

- 5.1. There are numerous part claims that are sought to be claimed as whole objections. *See*: for example, items 144, 145, 146 of the Contempt Bill and items 238, 287 and 879 of the Penalties Bill.
- 5.2. In many cases the Part Objections are also the subject of another code objection in relation to the whole of that item. Accordingly, it is not possible to ascertain the extent of the Part Objection. *See*: for example, items 63, 136, 202, 224, 281, 304, 751 and 822 of the Penalties Bill.
- 5.3. The totals in the columns are not always accurate. *See*: for example, pages 82, 212, 224, 243, 246, 260, 262, 267, 299 of the Contempt Bill.
- 5.4. There are no revised grand totals.
- 5.5. Items not objected to (apparently incorrectly) have an amount in the 'Amount to be Reduced' column. *See* for example, items 148, 261 and 654 of the Contempt Bill.
- 5.6. Items objected to do not have anything entered (apparently incorrectly) in the 'Amount to be Reduced' column. Note that these items are objected to in full, as stated in the original Notice of Objections, but it is necessary to have figures in this column in order to obtain accurate sub-totals. *See*: for example, items 805 and 806, 868 to 870 of the

Contempt Bill (Note, in relation to items 868 to 870, there is no amount to be reduced by, however, the sub-total is accurate). Further, items objected to in part do not have anything in the 'Sum not objected to' column. While the amount to be reduced has been shown, it is necessary to have figures in the "Sum not Objected to" column in order to obtain accurate sub-totals. See: for example, items 67, 87 and 284 of the Penalties Bill.

- 5.7. The versions served were slightly different (in relation to the totals on the final page) from the versions filed.
6. Note that the examples at points 5.1 to 5.6 inclusive above are illustrative only, and are not exhaustive.

Direction to Dispense with Compliance

7. The Respondents rely on the general discretion to dispense with compliance with the Rules set out at rule 1.34 of the Rules. Rule 1.34 provides that: "*The Court may dispense with compliance with any of the Rules, either before or after the occasion for compliance arises.*"
8. A Registrar has the power to dispense with compliance under rule 1.34. See: section 35A of the Federal Court Act 1976 (Cth) [sic] ("the FCA").
9. There are few decisions interpreting rule 1.34. However, there are decisions interpreting the predecessor section, Order 1 rule 8 of the repealed Federal Court Rules, worded in almost identical terms, namely: "*The Court may dispense with compliance with any of the requirements of the Rules, either before or after the occasion for compliance arises.*"
10. In *Lazar v Taito (Aust) Pty Ltd* (1985) 5 FCR 395, McGregor J (at 403-4) stated that the power conferred by Order 1 rule 8 may be exercised in contempt proceedings, particularly "*where there is no apparent injustice and the alleged error can only be one of procedure.*"
11. In *Grey v Mango Pre Paid Calling Cards Pty Ltd* [2004] FCA 1664, Nicolson J [sic], at [54] states that "*the making of the orders for entry of judgment without compliance with FCR O 19 is An irregularity, not a matter of procedure*".
12. In *Melaleuca of Australia & New Zealand Pty Ltd v Duck* [2005] FCA 1481, Bennett J (at 9) stated that "*by Order 1 Rule 8 the court may dispense with compliance with any of the requirements of the Rules. This gives the court a wide discretion, which is not to be used to amend the Rules for the purpose of conferring a power on the Court which it otherwise would not have had*".

13. In *Attorney General v Portier* [2014] NSWSC 118, McCallum J [at 74] stated that “*The discretion to dispense with the requirement to pay the amount required as security was contained in Order 1 Rule 8 of the Federal Court Rules. That rule conferred a general discretion to dispense with the requirements of the rules. The registrar had held that a lack of funds was not in itself a reason for exercising the discretion to waive security. Stone J evidently agreed, holding that the obligation should only be waived ‘for very compelling reasons’.*”
14. Whilst “*justice is the paramount consideration*”, this must be viewed in the context of *Aon Risk Services Australia Ltd v ANU* {2009} 239 CLR 175, in particular:
 - 14.1. The financial strain on the Applicant of the taxation proceeding with the burden of the inadequate Objections;
 - 14.2. The efficient use of court resources; and
 - 14.3. The need to maintain public confidence in the judicial system.
15. Further, the overarching purpose of the Rules is set out at section 37M of the FCA, which emphasises efficiency and cost effectiveness of the Court’s process. In particular, the principle of proportionality is embedded in the Rules at section 37M(2), namely “the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute”.
16. Lastly, delay and non-compliance with the rules will weigh heavily on the discretion under rule 1.34. *See: Commentary, Butterworths, Practice and Procedure High & Federal Court at [43,057].*

Applying the Principles to the Facts

17. In this case, the Applicant submits that:
 - 17.1. The Objections have caused the Applicant to incur substantial costs in preparing for the Applicant’s Schedule.
 - 17.2. The deficiencies in the Objections will have the effect of unnecessarily prolonging the taxation process, which was commenced when the Applicant filed the Penalties Bill on 24 April 2013 (almost 17 months ago), and the Contempt Bill on 23 August 2013 (over 12 months ago).
 - 17.3. There is little ‘apparent injustice’, as the taxation process will still progress to ensure the sums claimed are reasonable, albeit in the absence of the Respondents.
 - 17.4. In any event, the Applicant objects to the Respondents being granted leave to make oral submissions pursuant to Rule 40.27(5), given counsel for the

Respondents foreshadowed (at the hearing before Deputy District Registrar Trot on 2 September 2014) making “supplementary submissions” in relation to the Objections at the taxation hearing.

18. In the circumstances, the Applicant seeks the orders set out [at point 3] above.

RESPONDENTS' SUBMISSIONS IN RESPONSE

- 12 In its reply submissions, the Respondents state the following:

1. The Respondents make the following submissions in response to the Applicant's written submissions dated 10 September 2014 (**Applicant's Submissions**). The Respondents oppose the orders sought at paragraph 3 of the Applicant's Submissions. In summary, the Respondents submit that they have complied with r. 40.25(1) of the *Federal Court Rules 2011* (Cth) (**Rules**) such that r. 40.27 of the Rules has no application.
2. In the alternative to the submission at paragraph 2.1 above, to the extent that there has been any non-compliance with r.40.25 of the Rules, the Respondents seek the Registrar exercise his discretion to either dispense with compliance with the Rules by reference to r. 1.34 of the Rules or make an order that is inconsistent with r. 40.27(1) by reference to r. 1.35 of the Rules.

The Respondents Should Attend the Taxation

3. While not referred to in the Applicant's Submissions (except by reference to their 1 September 2014 Responses), the only basis in the Rules upon which the Respondents might be excluded from the taxation is by reference to r. 40.27(1). There is otherwise an implicit assumption in the Rules that the objector (in this case, the Respondent's) may attend the taxation in the absence of the operation of r. 40.27(1). That assumption is a reflection of basic principles of fairness. It is clear that r. 40.27(1) only operates in circumstances of non-compliance with r. 40.25(1).
4. On 2 September 2014 the Applicant agreed to the Respondents' supplementing their Objections dated 11 August 2014, and the Respondents have done so by their replies dated 3 September 2014 (**Respondent's Schedules**). The Applicant now presses its submission as to non-compliance with 40.25(1) on the basis that it alleges the Respondents' Schedules have not remedied the purported deficiencies of the Respondent's Objections dated 11 August 2014. In total the Applicant alleges inaccuracies in only 16 items in the Respondents' Schedules. There are 2081 items across both the Bills. The Respondents submit that the alleged deficiencies, which are not admitted, have been remedied by the Respondent's Schedules.
5. The Respondent's Schedules identify each item or part of an item to which objection is taken

(r. 40.25(a)), state briefly but specifically why the item or part of the item should be disallowed (r. 40.25(b)(i)) and the amount by which it is contended the item should be reduced (r. 40.25(b)(ii)). It is noted that the Respondents have not relied on any authority. As such, r. 40.25(b)(iii) is irrelevant.

6. The gravamen of the complaint at paragraph 5 of the Applicant's submissions appears merely to be that the Respondents' Schedules contain a degree of inaccuracy (subparagraphs 5.1, 5.3, 5.5, 5.6), state a reduction of the whole amount of an item where there is both a whole and part objection (subparagraph 5.2) and include revised totals on the final pages of the filed Schedules (subparagraph 5.7).
7. It is significant to note that the Applicant's Submissions do not identify the alleged deficiencies by reference to any specific part of r. 40.25(1). Whatever the reason for that, upon proper analysis, none of the complaints support such a deficiency.

The Alleged Inaccuracy is Irrelevant (r. 40.25(1))

8. The Applicant complains at subparagraph 5.1 of its Submissions that 2 items in the Respondent's Contempt Schedule and 3 items in the Penalties Schedule that are "*part claims ... are sought to be claimed as whole objections*". The Respondents assume the complaint is by reference to r. 40.25(b)(ii). Firstly, the Respondents submit that, by stating that the items should be reduced by the whole amount, they have complied with r. 40.25(b)(ii). Secondly, in the alternative, if there is any remaining noncompliance with r. 40.25(b)(ii), it is properly characterised as merely a formal defect or irregularity, in the sense that the amounts by which it is contended the 6 items should be reduced are potentially overstated. Section 51(1) of the *Federal Court Act 1976* (Cth) (Act) provides:

51 Formal defects not to invalidate

(1) No proceedings in the Court are invalidated by a formal defect or an irregularity, unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

9. The test as to whether there is any substantial injustice should be by reference to r.40.27(3)(b). That is, does any overstatement prevent the Applicant from complying with r.40.26(1) such that they are at risk of having an item disallowed because they have not been able to properly respond to the objection? The Applicants have been able to include the necessary r.40.26 particulars to those 6 items in their Responses. Given that, it is difficult to see how there can be any injustice. The taxation can proceed to determine what costs the Applicant is properly entitled to consistent with r. 40.27(4). Any potential remaining non-compliance is in the

nature of formal defects or irregularities. Section 51 of the Act operates such that the Objections are not thereby invalidated.

10. The Applicant complains at subparagraph 5.3 of its Submissions that 9 "*totals in the columns are not always accurate*". Neither r. 40.25(1) nor Form 130 require *totals* be included. Such inaccuracies cannot amount to non-compliance such as to trigger r. 40.27.
13. The Applicant complains at subparagraph 5.4 of its Submissions that "*there are no revised grand totals*". Again, neither r. 40.25 nor Form 130 require totals be included. As such, the alleged inaccuracies cannot amount to non-compliance such as to trigger r. 40.27.
12. The Applicant complains at subparagraph 5.5 of its Submissions that 3 "*items not objected to (apparently incorrectly) have amounts specified in the 'Amount to be Reduced' Column*". The Respondent confirms there is no objection to the items so identified. The complaint does not amount to non-compliance with r. 40.27.
13. The Applicant complains at subparagraph 5.6 of its Submissions that 4 items objected to in the Respondent's Contempt Schedule do not state an amount by which they should be reduced. It is notable that the Applicant concedes that these items are objected to in full, but states that "*it is necessary to have figures in this column in order to obtain accurate sub-totals*". The Respondents repeat that there is no requirement for totals arising from r.40.25(1).
14. The Applicant also complains at subparagraph 5.6 of its Submissions that some items objected to in part "*do not have anything in the 'Sum not Objected to ' Column.*" Neither r. 40.25(1) or Form 130 require the identification of such a sum.

Stating a reduction of the whole amount of an item where there is both a whole and part objection complies with r. 40.25(1)

15. The Applicant complains at subparagraph 5.2 of its Submissions that 7 items of the Respondents' Penalties Schedule that contain "*Part Objections are also the subject of another code objection in relation to the whole of that item*". Where there are both objections to the whole of an item and further objections to part of an item, the Respondents have identified the amount by which it is contended the item should be reduced by reference to the whole of the amount. As such, the Respondents have identified an amount by which it is contended the item should be reduced and complied with r. 40.25(1). Alternatively, if the Registrar decides there is any substance to the complaint, in essence it is in the nature of a formal defect or irregularity to which s. 51 of the Act would apply.

The inclusion of revised totals is irrelevant to r. 40.25(1)

16. The Applicant complains at subparagraph 5.7 of its Submissions that *"(t)he versions served were slightly different (in relation to the totals on the final page) from the versions filed"*. The Respondents note they conferred with the Applicant's representative before providing the revised Schedules. Further, neither r. 40.25 or Form 130 require totals be included in any event.

The Respondent's Should Not Be Ordered to Pay the Applicant's Costs

17. The issue of costs is dealt with in r. 40.33. It is inappropriate to make any order as to costs now. Rather, costs should be dealt with at the conclusion of the taxation. In any event, the Applicant's submission that it should be entitled to its costs thrown away does not survive proper scrutiny, by reference to its own conduct in unreasonably and unnecessarily:
- 17.1. delaying its application (or providing any notice that it would do so) until 1 day before the taxation was listed to commence;
 - 17.2. proceeding to incur costs that, by its own submission, it was not required to incur.

Dispensing with Compliance with the Rules or Making an Order that is Inconsistent with the Rules

18. In the event that it is considered there is any non-compliance with r. 40.25(1), the Respondents seek an order under by reference to:
- 18.1. r. 1.34, dispensing with compliance r. 40.25(1) to the extent necessary such that they be taken to have filed an objection under that rule; or
 - 18.2. r. 1.35, that is inconsistent with r. 40.27(1) such that the Respondents may attend the taxation.
19. Section 35A(1)(h) of the Act provides that a registrar may exercise a power of the Court prescribed by the Rules of Court. Rule 3.0(1)(b) of the Rules prescribe both r. 1.34 and r.1.35 as powers of the Court that may be exercised by a Registrar. Section 37M(3) of the Act provides that the powers under the Rules must be exercised consistently with the overarching purpose of the Act outlined ins. 37(1) and (2).
20. Section 51 of the Act is also relevant in this context, as discussed at paragraphs [8] and [9] above. As Justice Gray noted in *Asian Meal Industry Employees' Union v RJ Gilbertson (Qld) Pty Ltd (1988) 26 IR 237* at p. 246:
- The strictness which might otherwise attend the provisions of The Federal Court Rules is ameliorated automatically by this provision, where any error or omission*

can properly be described as a formal defect or an irregularity. Subsection (2) gives to the court power to make an order declaring that a proceeding is not invalid by reason of a formal defect or irregularity. It is open to a party to apply under that subsection to ensure that the proceeding can continue. Such a declaration is unnecessary, however, as subs (1) operates in its own right with respect to every formal defect or irregularity.

21. Also, as the Full Court of the Federal Court (Tamberlin, Jacobson and Rares JJ) noted in *Johnston v Vintage Developments Pty Limited* [2006] FCAFC 171 (at [26]):
As Bowen LJ said in the well known passage in Cropper v Smith (1884) 26 Ch D 700 at 710 (cited with approval in Queensland v JL Holdings Pty Limited [1997] HCA 1; (1997) 189 CLR 146 at 152-153 per Dawson, Gaudron and McHugh JJ):
'... it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party.'
22. It is not apparent how the Applicant asserts the cases it refers to are relevant to the present matter.
23. The Respondents submit that granting the orders it seeks would in the circumstances be consistent with the overarching purpose described in s. 37M of the Act. There would be a real injustice if, having now complied with r. 40.25(1) in all respects except for the very small number of claimed remaining deficiencies, the Respondents were prevented from attending the taxation and having the benefit of r. 40.27(5). An opportunity to be heard is fundamental to justice. At the same time, the fact that the Respondents have foreshadowed making an application under r. 40.27(5) does not, as the Applicant seems to suggest, weigh against exercising the discretion under r. 1.134 (or r. 1.35) in the Respondents favour.
24. In contrast, the Applicant points to no real injustice if the Respondent's attend the taxation. Fundamentally and despite the alleged deficiencies, the Applicant has been able to file responses to both the notices of objection. The Applicant complains of the "*financial strain on the Applicant of the taxation proceeding with the burden of the inadequate Objections*". It is relevant to note that the remaining alleged deficiencies in the Schedules are minor in the context of the totality of the objections and the scope of the taxation.
25. The Applicant also agreed to the Respondent providing further details by way of the Respondent's Schedules. It is difficult to see what financial strain it would suffer if the Respondent attended the taxation. The Applicant prepared its Responses prior to raising its

r. 40.25 objection. It appears the Applicant decided for itself to take on the task of preparing its Responses under those circumstances. While there is a bald claim that the Objections caused the Applicant to incur substantial cost in preparing its Schedules, it is not clear what the nature of that cost was. It is important to note that it was open to the Applicant to raise its issues with the Objections much earlier if it considered it was under some disadvantage. It did not, despite being required to act in accordance with the *Directions on The Commonwealth's Obligation to Act as a Model Litigant*, including the obligation to act fairly and promptly and not cause unnecessary delay.

26. Proceeding on the basis that the Respondent has not complied with r. 40.25 may itself cause the taxation to be less efficient or be prolonged. The Respondents Objections and Schedules, together with the Applicant's Responses reduce the scope of the taxation by reference to r. 40.27(3). Without those documents and the benefit of r.40.27(3), the taxing officer would be required to consider every item in the 2 bills by reference to r. 40.27(4) and rr 40.29 and 40.30. On the other hand, the Applicant barely asserts without any explanation, that the remaining deficiencies "*will have the effect of unnecessarily prolonging the taxation process*". Given the very small scope of the remaining alleged deficiencies it is difficult to see how the assertion can be made out.
27. It is also significant to note that on 11 September 2014 the Respondent filed amended Responses that seek to remedy inaccuracies in their own Schedules (described as "*discrepancies*").

Conclusion

28. The Respondents have complied with r.40.25(1) of the Rules and there is no basis for the taxation to proceed in their absence. In the alternative, any remaining deficiencies are in the nature of formal defects or irregularities that do not invalidate their objections. In the alternative, to the extent that there is any remaining non-compliance with r. 40.25(1), the interests of justice and efficiency favour the exercise of the Registrar's discretion such that the Respondents may attend the taxation.

APPLICANT'S REPLY SUBMISSIONS

14 In its reply submissions, the applicant states as follows:

1. The Applicant makes the following submissions ("the Submissions in Reply") in reply to the Submissions of the Respondents dated 15 September 2014 ("the Responsive Submissions"). The Responsive Submissions are in response to the Applicant's Submissions dated 10 September 2014 ("the Submissions").
2. The Applicant adopts the definitions in the Submissions.

3. The Applicant does not reply to each paragraph of the Responsive Submissions individually. This approach should not be construed as being an admission of the accuracy of each paragraph.
4. In response to paragraphs 4, 6, 7 and 24 of the Responsive Submissions, it is noted that:
 - 1.1 The opportunity afforded to the Respondents to remedy the Objections was provided by consent of the parties.
 - 1.2 As submitted at the hearing before Deputy District Registrar Trott on 4 September 2014, the thrust of the Applicant's case is in relation to the Objections, irrespective of the Respondents' attempts to correct the various deficiencies by filing the Respondents' Schedule.
 - 1.3 The alleged deficiencies by reference to rule 40.25 are specified in detail at paragraphs 1 to 8 of the Response, contrary to the submission made at paragraph 7 of the Responsive Submissions.
2. In response to paragraph 9 of the Responsive Submissions, the Applicant submits that there is a substantial injustice to the Applicant, in that it is not possible to proceed to tax on the basis of the Objections, it was necessary for the Applicant to incur significant costs to prepare the Applicant's Schedule, and a taxation of costs hearing is likely to be significantly prolonged, contrary to the objects and purposes of the Rules as set out at section 37M of the FCA.
3. In response to paragraph 17 of the Responsive Submissions, the Applicant submits as follows:
 - 1.4 The submission that the Applicant delayed its application until 1 day before the hearing is without substance. As clarified at the hearing before Deputy District Registrar Trott on 2 September 2014, the timetable had been extended at the Respondents' request.
 - 1.5 The submission that the Applicant proceeded to incur costs that, by its own submission, it was not required to incur is also without substance. As submitted orally at the hearing before Deputy District Registrar Trott on 4 September 2014, it was not open for the Applicant to run its primary argument, without providing the Applicant's Schedule in the alternative, given the operation of Rule 40.27 (3) (b) which provides that "*no amount will be allowed for any item to which objection has been taken in the notice of objection but not responded to in the notice of response*".
4. Lastly, in response to the references at paragraph 25 of the Responsive Submissions to the Applicant's obligation as a model litigant, the Applicant at all times acted in accordance with its model litigant obligations, implementing significant resources to attempt to

understand the nature of and extent of the Objections. As this was a time consuming process, the task could not be completed any earlier than 1 September 2014.

SHOULD THE TAXATION PROCEED IN THE ABSENCE OF THE RESPONDENTS?

15 Although the respondents say that there is no basis for the taxation to proceed in their absence, they do acknowledge the deficiencies in their objections which they say are in the nature of formal defects or irregularities and which, it is also said, do not invalidate them as no substantial injustice has been caused to the applicant.

16 In responding to the applicant's primary submission that the taxation of the remaining bills should proceed in their absence, the respondents say that they have complied with r 40.25(1) of the Rules and that there is no basis for the taxation to proceed in such a manner. However, in the alternative they say that any remaining deficiencies are in the nature of formal defects or irregularities that do not invalidate their objections, referring to s 51 of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act"). Finally, to the extent that there has been any non-compliance, they point to and seek to rely on the exercising of discretion to dispense with compliance with the Rules, referring to r 1.34 of the Rules, or seek the making of an order that is inconsistent with r 40.27(1), by referring to r 1.35 of the Rules.

17 Section 51 of the FCA Act is in these terms:

51 Formal defects not to invalidate

- (1) No proceedings in the Court are invalidated by a formal defect or an irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

18 Rules 1.34 and 1.35 are in these terms:

1.34 Dispensing with compliance with Rules

The Court may dispense with compliance with any of these Rules, either before or after the occasion for compliance arises.

1.35 Orders inconsistent with Rules

The Court may make an order that is inconsistent with these Rules and in that event the order will prevail.

19 In *Arifin v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2014] FCAFC 61, at [30], a Full Court of the Federal Court constituted by North, Flick & Jagot JJ, “respectfully considered that greater hesitation and caution may be required before too readily departing from requirements imposed by the Federal Court Rules 2011”. The paragraph is repeated below in full to provide context, given that the non-compliance with the Federal Court Rules referred to therein involved an unrepresented litigant and in somewhat different circumstances to those that are present in this matter:

30 *A residual ground of concern should, however, be expressly mentioned. Unrepresented litigants pose unique problems for this and other courts. In the present proceeding, and as correctly noted by the primary Judge, the Notice of Appeal from the decisions of the Administrative Appeals Tribunal failed to identify any “question of law”. The Notice of Appeal from the decision of the primary Judge did not comply, inter alia, with r 36.01(2)(c) of the Federal Court Rules 2011 requiring an appellant to state “briefly but specifically, the ground relied on in support of the appeal”. Particularly in cases involving an unrepresented party, the Court looks beyond compliance with particular rules of court and seeks to address the substantive merit of the application before it. But in many cases it must necessarily be recognised that to do so places the unrepresented party’s opponent – and the Court itself – in a difficult if not invidious position. The opponent can be easily prejudiced and impressions can emerge as to the Court’s lack of impartiality. In resolving the present appeal, the Court has again engaged in the all too familiar process of seeking to ensure that an unrepresented party is not prejudiced – and again to the potential prejudice of the Respondent. Where an appeal is nevertheless dismissed, a Respondent may not wish to complain as to the ultimate result. But the risks of prejudice and the necessity to ensure that the Court is in all cases perceived as impartially administering justice cannot be dependent upon the lack of success on the part of an unrepresented party. Cases do occur where an unrepresented party is successful despite substantial non-compliance with rules of the court. It is respectfully considered that greater hesitation and caution may be required before too readily departing from requirements imposed by the Federal Court Rules 2011. Those Rules, after all, are there for the benefit of all parties and the public interest in ensuring the proper administration of justice.*

20 In *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FCAFC 138, (“*BHP Coal*”) at [20] – [23], their Honours, Dowsett, Kenny and Flick JJ, considered that:

20 The Rules should not be seen as the authority by which the Court acts. Rather, they are a guide to the parties and their legal advisers as to the way in which the Court will conduct proceedings. Hence they set out the Court’s expectations as to how the parties and their representatives will proceed. See *Ratnam v Kumarasamy* [1965] 1 WLR 8 at 12 where Lord Guest said:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation.

21 However, in *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 729 Kirby P said:

The Rules of Court must never become the master of the court. They are servants for the better administration of justice.

Rules of Court, it has been said, “should never be allowed to be an instrument of tyranny”: *Outboard Marine Australia Pty Ltd v Byrnes* [1974] 1 NSWLR 27 at 30 per Reynolds, Hutley and Bowen JJA.

22 In *Jackamarra v Krakouer* (1998) 195 CLR 516 at 526 – 527, Gummow and Hayne JJ, after discussing the adverse consequences of delay in litigation, said:

It is with these considerations in mind that the rules of court prescribe times for the taking of certain steps in a proceeding. They are not prescribed for the purpose of implementing what Roscoe Pound referred to more than ninety years ago as the “sporting theory of justice” They are prescribed as aids to the attainment of justice. Just as case management is not an end in itself, but an aid to the prompt and efficient disposal of litigation ... , so, too, the rules of court and the time limits which are prescribed there are not to be seen as ends in themselves. But they are aids to the attainment of justice and the times that they fix are prescribed as sufficient to take the step or steps identified while maintaining the general momentum of the litigation.

23 The Rules, and these observations concerning rules of court generally, must be considered in light of s 51 of the FCA which provides:

(1) No proceedings in the Court are invalidated by a formal defect or an irregularity, unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

(2) The Court or a Judge may, on such conditions (if any) as the Court or Judge thinks fit, make an order declaring that the proceeding is not invalid by reason of a defect that it or he or she considers to be formal, or by reason of an irregularity.

21 By order dated 30 June 2014, as varied on 7 August 2014, the respondents were ordered to file and serve detailed objections to the remaining bills. In my view, the applicant’s complaint that the documents that were filed by the respondents on 11 August 2014 did not fully comply with the requirements of the Registrar’s order or appear to conform with Form 130 has validity. The content of the documents could not be said to have provided much in the way of detail in support of the objections or indeed as contemplated by the terms of the Registrar’s orders for the provision of detailed objections. It is understandable that, at the time of the making of the order, the applicant would have been entitled to expect that the respondents would be providing such material to support their objections as was necessary and to comply, or substantially comply, with all requirements.

- 22 Quite properly in my view, the applicant consented to providing the respondents with an opportunity to overcome these deficiencies through provision of further details in support of their objections which the respondents have attempted to do by filing the reply documents (schedules) that was done on 4 September 2014. The applicant submits however that this has not remedied the respondents' non-compliance with r 40.25(1) and says a number of defects remain so that, by operation of r 40.27(1), only the applicants should be entitled to attend the taxation.
- 23 I have had some difficulty in reconciling the tensions that exist in the arguments. On the one hand, the respondents need to comply, or substantially comply, with the Court's practice and procedure if difficulties in properly understanding the bases for the objections that will otherwise arise in a taxation are to be avoided. As has been pointed out in the cases referred to above, not to do so could be unjust and place the applicant and the Court itself in a difficult if not invidious position. On the other hand, if the applicant is correct in its contentions, the taxation will proceed without affording the respondents a fair hearing of their objections, whether validly filed or not. As the applicant submits, there may effectively be no 'apparent injustice' if the taxation proceeds in the absence of the respondents, given the requirements of r 40.27 which requires the taxing officer to ensure the sums claimed are reasonable in any event.
- 24 I accept the applicant's submissions that quite a few deficiencies remain with the respondents' 'revised' objections (Schedules). However, I also note the respondents have endeavoured to remedy the deficiencies by identifying each item or part of an item to which objection is taken, stating briefly but specifically why the item or part of the item should be disallowed and stating the amount by which it is contended the item should be reduced. At the very least it is clear that the respondent's Schedules go some way to redressing the inadequacies complained of by the applicant.
- 25 As the respondent submits, the gravamen of the applicant's complaint is that the schedules contain a degree of inaccuracy (referring in particular to subparagraphs 5.1, 5.3, 5.5 and 5.6 of the applicant's submissions) state a reduction of the whole amount of an item where there is both a whole and part objection (subparagraph 5.2) and include revised totals on the final pages of the filed Schedules (subparagraph 5.7). It is also submitted that the test as to whether there is any substantial injustice should be by reference to r 40.27(3)(b) so that the question becomes whether the applicant is prevented from complying with r 40.26(1) such

that it is at risk of having an item disallowed because of being unable to properly respond. As the respondents state, the applicant has included in its responses, filed 11 September 2014, such particulars.

26 It is clear that the respondents have not complied in a strict sense with all of the requirements of the Rules or of the orders of the Registrar made in relation to the filing of their documents in support of their contended objections. However, in my view, it cannot be said that the respondents have not, at a bare minimum, substantially complied with these requirements and I find accordingly. It follows that the applicant's contention that the respondents have not filed any valid objections pursuant to r 40.25(1) and that the taxation should proceed in their absence by operation of r 40.27(1) must fail. In view of my finding of substantial compliance, it unnecessary for any order to be made under r 1.34.

27 I will hear from the parties as to their available dates prior to reconvening the taxation.

ORDERS

28 The following order will be made:

1. The taxation be relisted on the next available dates that are convenient to the Court and all parties.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Decision herein of Deputy District Registrar Trott.



Registrar's Legal Assistant:

Dated: 27 July 2015