Crown Solicitor's Office

THE SUITORS' FUND ACT 1951

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During the Second Reading of the *Suitors' Fund (Amendment) Bill 1987* in the Legislative Assembly of the Parliament of New South Wales, Mr John Dowd of the Opposition, as his Honour then was, remarked:

> • "The Suitors' Fund has been an integral part of the court system, but unnoticed by the public."[1]

Mr Dowd may well have added that the *Suitors' Fund Act 1951* ("the Act") has been unnoticed by the legal profession as well. The Act for many is a mysterious statute at the back of court services and at the end of Court of Appeal judgments. This paper hopes to dispel the mystery of the Act.

1. History of the Act

1.1 The Attorney General, The Honourable Clarence Martin, introduced the Second Reading of the *Suitors' Fund Bill 1951* in the Legislative Assembly with these words:

> • "The principle enunciated by this Bill is, I believe, quite novel, but I do not claim that the thought underlying it is original. The principles it lays down have been referred to on more than one occasion as desirable by various writers in learned legal periodicals. However, as far as I am aware, nowhere in the world has an attempt been made to translate those desirable ideas into a legislative enactment. That is what I hope will be done by this measure, and so legal history will be created."[2]

1.2 The Minister for Justice, introducing the Second Reading of the *Suitors' Fund Bill 1951* in the Legislative Council, explained the nature of the Fund:

> • "In effect, it will be a form of insurance: every litigant will pay some additional court fees as a premium to insure himself against a possible liability for appeal costs incurred through no fault of his."[3]

1.3 Attorney General Martin gave this example of the Fund in operation:

> • "Take a concrete case. Assume Mrs Jones sues Mr Chips for libel in the District Court and obtains a verdict. Mr Chips appeals to the Supreme Court, which upholds his appeal and directs that a verdict be entered for him. Now the Supreme Court will ordinarily order that Mrs Jones pay the costs of the District Court action and of the Supreme Court appeal – she has to pay her own costs and the costs of Mr Chips. Now, if the District Court had come to a correct decision it would have given a verdict for the defendant, and Mrs Jones would have been ordered to pay the costs in the District Court. Under this Bill, in such a case, she would and will still have to pay the costs of the first proceedings in the District Court. But she will not have to pay the appeal costs. Why should she? It was no fault of hers that the District Court Judge gave a wrong decision. Under the bill she receives an indemnity certificate entitling her to receive out of the fund the amount of the appeal costs in the Supreme Court which she was ordered to pay and did pay to Mr Chips, plus her own costs in the Supreme Court."[4]

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1 New South Wales, Legislative Assembly 1987, Debates, 24 November 1987, p.17258.

2 New South Wales, Legislative Assembly 1951, Debates, 1 May 1951, p.1699.

3 New South Wales, Legislative Council 1951, Debates, 15 May 1951, p.1929.

4 New South Wales, Legislative Assembly 1951, Debates, 1 May 1951, p.1701.

1.4 The *Suitors' Fund Bill 1951* was passed by Parliament. The *Suitors' Fund Act 1951* commenced on 1 November 1951. The relief provided by the Act, illustrated in the above example of Mrs Jones and Mr Chips, was embodied in s.6 of the Act.

1.5 The Act was amended in 1959 to enlarge the circumstances permitting payments from the Fund. If:

> (a) Any civil or criminal proceedings are rendered abortive by the death or protracted illness of the judge or magistrate before whom the proceedings were had, or if
>
> (b) Any civil or criminal proceedings are rendered abortive because a two judge appeal bench is divided in opinion as to the decision determining the proceedings, or if
>
> (c) An appeal on a question of law against the conviction of a person convicted on indictment is upheld and a new trial is ordered, or if
>
> (d) The hearing of any civil or criminal proceedings is discontinued and new trial ordered by the presiding judge or magistrate for a reason not attributable in any way to a disagreement on the part of the jury, where the proceedings were with a jury; or to the act, neglect or default, in the case of civil proceedings, of any of the parties or their legal representatives; or to the act, neglect or default, in criminal proceedings, of the accused or the accused's legal representatives; and the judge grants to the parties in the civil proceedings, or to the accused in the criminal proceedings a certificate;

then, if any party in the civil proceedings, or the accused in the criminal proceedings, incurs additional costs by reason of the new trial that is had thereafter, the Director General of the Attorney General's Department ("DG") may, upon application, authorise the payment from the Fund to the parties or the accused of the costs they incurred in the proceedings before they were rendered abortive, or the conviction was quashed, or the hearing was discontinued, as the case may be.

This relief was embodied in the new s.6A.

1.6 The 1959 amendments also added a new s.6B, permitting costs to be paid from the Fund in proceedings where the Full Court of the Supreme Court had ordered a new trial on the ground that the verdict on damages was inadequate or excessive. This section was included as the original s.6 of the Act permitted payments from the Fund only on an appeal where a question of law had succeeded. *Wagner v Moran* (1957) 75 WN (NSW) 60 held that a successful appeal only on the question of damages was not an appeal on a question of law.

1.7 In 1987 the Act was amended to enable applicants unable to satisfy all of the requirements for a claim under either ss.6, 6A or 6B to apply to the Director General for a payment from the Fund. The Attorney General, The Honourable Terence Sheahan, during the Second Reading of the *Suitors' Fund (Amendment) Bill 1987* in the Legislative Assembly, said of this new provision, s. 6C:

> • "Owing to the complexity of legal proceedings it is not feasible to attempt to separately define every circumstance giving rise to a claim on the fund. Hence item (7)[s.6C] contains a new provision for payment of costs, not exceeding $10,000, in circumstances falling within the spirit and intent of the Act. Such payments will only be authorised with the concurrence of the Attorney General."[5]

1.8 The worthiness of the Act was eventually recognised by most of the other Australian jurisdictions, who passed their own version of the Act:

Western Australia	*Suitors' Fund Act 1964*,
Victoria	*Appeal Costs Act 1964*, replaced by the *Appeal Costs Act 1998* ("the ACA"),
Tasmania	*Appeal Costs Fund Act 1968*,
Queensland	*Appeal Costs Fund Act 1973*,
Commonwealth	*Federal Proceedings (Costs) Act 1981* ("The FPCA"),
ACT & NT	*Federal Proceedings (Costs) Regulations 1991*.

1.9 In South Australia the *Appeal Costs Act 1979* was passed, but was never proclaimed.

2. Purpose of the Act

2.1 There are many cases discussing the operation of various sections of the Act, but few cases discussing the general purpose of the Act.

2.2 In *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772 at 774 Moffitt J said that the litigants entitled to apply to the Fund for some relief from the burden of legal costs were those litigants:

> • "where at least, prima facie, it appeared that the unnecessary costs had been incurred by some error, mischance or wrong decision for which it could be presumed no responsibility lay on the party to be helped by the grant of the certificate."

2.3 In *Evatt v New South Wales Bar Association* [1968] 3 NSWR 573 at 574 Nagle J said that:

> • "the purpose of the Suitors' Fund Act was to relieve litigants from the expenses consequent upon errors of courts which must inevitably occur in the course of the administration of justice".

2.4 In *Re Richard Pitt & Sons Pty Ltd* (1980) 4 ACLR 917 at 921 Cosgrove J of the Full Court of the Supreme Court of Tasmania said of the *Appeals Costs Fund Act 1968 (Tas)*:

[5] New South Wales, Legislative Assembly, Debates, 19 November 1987, p. 16529.

> • "It is plain that the scheme of the Act is a form of compulsory insurance. Litigants built up a Fund which protects them against judicial death, illness, retirement, accidental abortion of proceedings, disagreements of juries, perverse verdicts and errors of law by judicial officers."

2.5 However, the Act only confers benefits in limited circumstances.[6] In *Steele v Mirror Newspapers Limited* [1975] *2* NSWLR 48 at 51 Moffitt P said:

> • "The relief provided by the Act by no means covers all cases, and in particular does not even extend to many cases where a party has incurred costs through no fault of his own."

2.6 After considering all the case law cited in this paper, I believe that the purpose of the Act is to provide litigants in certain circumstances with relief from the burden of unnecessary costs incurred by some mishap in the court system which has prevented proceedings from concluding when they were anticipated to conclude, so long as no responsibility for the mishap lay on the party to be assisted by the Act.

2.7 Notwithstanding the beneficial intent of the Act, the Act is not a treasure chest for litigants. Maguire J said in *Pataky v Utah Construction & Engineering Pty Ltd* [1966] 1 NSW 689 at 695 that the objects and purposes of the Act:

> • "do not extend to the promotion of litigation; nor is it an Act to provide legal aid or legal assistance in the broad sense at the expense of the Fund."[7]

2.8 In *Repatriation Commission v Cornelius* (2002) 69 ALD 250 Branson J of the Federal Court observed at [11]:

> "The restricted circumstances in which cost certificates may be granted indicates the Act is not intended to provide, in effect, an alternative source of legal aid but is intended to advance a more specific public interest. That public interest would seem to be the alleviation of the costs burden that can fall on an individual who appropriately and successfully institutes a proceeding before the Administrative Appeals Tribunal or a federal court yet thereafter finds himself or herself a respondent to a successful "appeal" on a question of law or as to the amount of damage awarded at first instance."[8]

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6 See also *Monie v Commonwealth of Australia* [2005] NSWCA 25 at [70], *Boreland v Docker (No 2)* 2007 NSWCA 275 at [27], and *Keramianakis v Regional Publishers Pty Ltd (No 2)* [2008] NSWCA 3 at [4].

7 Maguire J's comments were approved by the Full Court of the Supreme Court of Western Australia in *Richards v Faulls Pty Ltd* [1971] WAR 129 at 138 and by Wallace J of the same Court in *Appeal Costs Board v Holloway* [1985] WAR 57 at 63; by the Full Court of the Supreme Court of Queensland in *Brisbane City Council v Ferro Enterprises Pty Ltd* [1976] Qd.R 332 at 334; and by the full bench of the Federal Court of Australia in *Bullock v Federated Furnishing Trades Society of Australasia (No. 2)* (1985) 59 ALR 373 at 375.

8 Cited in *Australian Trade Commission v Isaac Jewellery Pty Ltd (No. 2)* [2009] FCA 218 at [28].

3. Interpretation of the Act

3.1 Two judgments of the Court of Appeal have considered how the Act is to be interpreted: *Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1985) 1 NSWLR 491 and *Australian Postal Commission v Dao (No. 2)* (1986) 6 NSWLR 497.

3.2 In *Mir Bros* at 494 Kirby P and Samuels JA said of the Act that:

> "beneficial legislation of this kind should not be narrowly construed by imposing on its language meanings which would frustrate its plain purpose, where other meanings are equally available." [9]

3.3 In *Dao* at 516 McHugh JA said:

> "Statutory interpretation may not be a creative art; but it has at least ceased to be a mechanical task. The Court's function is to give effect to the purpose of the Act. That function can not be performed by isolating the word 'court' and asking whether the constitution and procedures of the Tribunal come within the supposed essence of that term. English nouns do not have the fixed meaning of scientific symbols. Dictionaries and decisions on the word 'court' in other context are guides not determinants. The meaning of a statutory word or phrase is best ascertained when considered in its context and with the authors purpose in using it in mind."

McHugh JA continued at 516:

> "To grant a certificate, at the request of the respondents, is to promote the purpose of the Act. To hold that the Tribunal is a 'court' for the purpose of the Act contradicts no express or implied provision of the Act. The Court should, therefore, declare that the respondents are entitled to a certificate under the Act."

I now discuss ss.6, 6A, 6B and 6C.

4. Section 6 – Appeals

4.1 Section 6(1) provides that if an appeal against the decision of a court to the Supreme Court on a question of law or fact, or to the High Court from a decision of the Supreme Court on a question of law, succeeds, then the Supreme Court may grant to the respondent to the appeal an indemnity certificate. This certificate will permit the respondent to claim under s.6(2) payment from the Fund.

4.2 In *Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1985) 1 NSWLR 491 at 494 Kirby P and Samuels JA said of the section:

> "The history of the legislation, and indeed its terms, make it plain that the purpose which must be kept in mind in its interpretation and application is the relief of litigants against costs inevitably incurred when appeal review discloses an error of law requiring correction. The

[9] This passage was followed in *Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal (No. 2)* [2004] NSWCA 337, at [25].

> object is to ensure that litigants do not, as in the past, bear the costs thereby occasioned that these costs are spread, by way of the fund, to mitigate the hardship to litigants that would otherwise flow."[10]

4.3 In *Australia Postal Commission v Dao (No. 2)* (1986) 6 NSWLR 497 at 515 McHugh JA said of the section

> "the legislation was designed to protect the litigant against a judge's errors of law but not his or a jury's errors of fact. The introduction of s.6A and s.6B into the Act has extended the purposes of the Act. But provision of an indemnity for costs to a party who has lost an appeal for error of law still remains the chief purpose of the Act."[9]

4.4 There are therefore five requirements for the grant of a s.6 certificate:

(a) an appeal,

(b) the appeal must be against a decision,

(c) the decision appealed against must be a decision of a court,

(d) the decision of the court must be a decision on a question of law or fact,

(e) the appeal must have been successful on a question of law or fact, and the appeal succeeds.

I consider these five requirements.[11]

What is an appeal?

4.5 Section 2(1) defines "appeal" to include "any motion for a new trial in any proceeding in the nature of an appeal". This definition, Santow J said in *Wentworth v Wentworth* (1999) 46 NSWLR 300 at 320 [affirmed (2001) 52 NSWLR 682], may extend the normal notion of an appeal "to encompass what is in some respects bears some of the elements of an appeal". The courts' beneficial approach to the interpretation of the Act has held these proceedings to be appeals for the purpose of s.6:

- An application for a writ of prohibition to correct an error of a lower court: *Ex parte Parsons* (1952) 69 WN (NSW) 380, *Re Oscar* [2002] NSWSC 887;

- An application for a writ of mandamus to correct an error of a lower court: *Director General of Fair Trading v O'Shane* (unreported, NSWSC, Graham AJ, 22 August 1997);

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10 Section 6(1) was amended in 1987 to permit a certificate to be granted for an error of fact corrected by the Supreme Court.

11 See the enumeration of first four of these requirements in *Anderson Stuart v Treleaven* [2000] NSWSC 536.

- A stated case: *Ex parte Neville* (1966) 85 WN (Part 1) (NSW) 372, *Castlepoint Holdings Pty Ltd v Frederici* (1967) 86 WN (Part 1) (NSW) 225, *Builders Licensing Board v Pride Constructions Pty Ltd* [1979] 1 NSWLR 607, *R v Hookham [No 2]* (1993) 32 NSWLR 345;

- A reference from the Prothonotary of the Supreme Court, exercising powers under delegated legislation, to a judge of the Supreme Court in chambers: *Onions v GIO of NSW* (1956) 73 WN (NSW) 270;

- A review of a Registrar's decision by an Associate Justice of the Supreme Court: *Tisdale v Ballanday* [2009] NSWSC 56.

- An appeal from a Master of the Supreme Court to a judge of the Supreme Court: *X v Y* [2000] NSWSC 952.

- An appeal from the judge of the Supreme Court to the Court of Appeal: *Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1985) 1 NSWLR 491 at 498.

4.6 An appeal to the Supreme Court includes an appeal to the Court of Appeal: *Mir Bros supra*, at 494.

What is a "decision"?

4.7 In *McNamara v Malco Industries Ltd* [1964-5] NSWR 1526 the Full Court of the Supreme Court decided upon a stated case from the Workers' Compensation Commission, "and the terms of the case stated expressly provide that the case was stated before any decision was given by the Commission" (at 1529). The Full Court held that it had no jurisdiction to grant a s.6 certificate. In *Ex parte Neville* (1966) 85 WN (Part 1) (NSW) 372, Maguire J had to decide whether on an obscenity charge a stated case from the Chairman of Quarter Sessions to the Court of Criminal Appeal, a stated case referred prior to the making of any final order by the Chairman, could entitle the respondent to the stated case to a s.6 certificate. The Judge felt himself bound to follow the decision in *McNamara* and refused the application.

4.8 There was a similar result with different reasoning in *Gallen v Strathfield Municipal Council* [1971] 1 NSWLR 122. Street J, during the hearing before him, referred a question of law for decision to the Court of Appeal. The Court of Appeal dismissed the reference and ordered the plaintiff to pay the costs of the reference. The respondent to the reference then unsuccessfully applied for a certificate under the Act. Holmes JA said at 129:

> • "There was, in my opinion, neither an appeal nor a proceeding in the nature of an appeal as those words are used in s.2 of the *Suitors' Fund Act*."

4.9 The issue was again before the Court of Appeal in *Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1985) 1 NSWLR 491. Enderby J, pursuant to the *Arbitration Act 1902*, heard a stated case from an arbitrator on a question of law. There was then an appeal from the opinion of Enderby J to the Court of Appeal. The appeal was successful and the respondent sought a certificate under s.6. McHugh JA said at 502:

> • "I am of the opinion that 'decision' in s.6 covers any conclusion of a court which finally disposes of the proceedings before that court. The opinion of Enderby J was a conclusion which disposed of the proceedings before him. Consequently, it was a 'decision' within the *Suitors' Fund Act*, s.6."

4.10 The other Judges in *Mir Bros*, Kirby P and Samuels JA, at 496 distinguished *McNamara* and *Neville* for the reason that in those two cases "The proceedings involved the direct invocation by the primary tribunal of the opinion of the appellate court. There was no intermediate determination as there was in the present case". The Judges added that had the litigation ended before Enderby J then "the reasoning in *McNamara* and in *Neville* would probably have precluded the application of the *Suitors' Fund Act*, s.6(1) to the proceeding with which Enderby J dealt. But neither of these cases determines the answer to the present problem". The Judges held for these reasons that Enderby J's decision was a "decision" within the meaning of the Act:

> • "His Honour's expression had the following features. It was a separate and formal step, specifically provided for by statute. It was not a mere expression of opinion in the course of a hearing directed to other issues for trial. Enderby J expressed his opinion formally and after the completion of full legal argument. The expression of opinion was accompanied by an order for costs. It was subject to a specific right of appeal to this Court."

4.11 It is clear from the three judgments in *Mir Bros* that where there has been a "direct invocation by the primary tribunal of the opinion of the appellate court", the respondent cannot receive a s.6 certificate if the proceedings in the primary tribunal are yet to be concluded.

4.12 This reasoning in *Mir Bros* however, conflicts with three Court of Criminal Appeal ("CCA") decisions. The CCA has granted s.6 certificates to an unsuccessful respondent notwithstanding that the proceedings in the primary tribunal were continuing: *R v Hookham (No. 2)* (1993) 32 NSWLR 345*; R v Rima* [2003] NSWCCA 405; and *R v NKS* [2004] NSWCCA 144. The only one of these cases to discuss in detail the Court's jurisdiction to grant a certificate was in *Hookham*, where Priestley JA at 346 cited *Mir Bros* as authority permitting the CCA to grant a certificate to a respondent on a stated case from an uncompleted criminal trial:

> • "In view of the approach taken to the meaning of the words in question in the decision of this Court in *Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd* [1985] 1 NSWLR 491, and in particular what the court there said about the approach to be taken of the word 'decision' it

> seems to me that we should treat the matter before us as being an appeal against a decision of a court."

4.13 Given that *Mir Bros* considered the question in detail, it is the decision in *Mir Bros*, rather than that of the three decisions of the CCA, which I would regard as the most persuasive authority on the construction of the word "decision".

What is a "court"?

4.14 Section 2 of the Act defines "court" to include "such tribunals or other bodies as are prescribed". The regulations have never prescribed a tribunal or other body as a court.

4.15 In *Australian Postal Commission v Dao (No. 2)* (1986) 6 NSWLR 497 at 513-514 Kirby P said of the Equal Opportunity Tribunal:

> • "It would seem unlikely, given the history and the purpose of the Suitors' Fund Act 1951, the increase since its enactment in the number and kind of statutory tribunals and the relationship established between the Tribunal and the Supreme Court, that appeals should lie on questions of law but not attract the protection of the *Suitors' Fund Act* because the Tribunal is not a court."

4.16 In *Dao* at 516 McHugh JA said after observing the liberal construction by courts of the word "appeal" in the Act, that:

> • "The word 'court' should likewise be given a liberal and beneficial construction to accord with the purpose and policy of the Act. The correct approach is for the Court to ask itself whether, bearing in mind the general purpose of the *Suitors' Fund Act*, Parliament must be taken to have intended that the Tribunal should qualify as a court? I think that the question should be answered in the affirmative. Whether the Tribunal is a 'court' for purposes other than the Act is beside the point."

4.17 Consistent with this beneficial interpretation of the Act, the following tribunals have been held for the purposes of the Act to be courts;

- The Equal Opportunity Tribunal: *Dao, supra*;
- The Government and Related Employees Appeal Tribunal: *Reid v Sydney City Council* (1995) 35 NSWLR 719 and *Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal* [2004] NSWCA 337;
- The Full Bench of the Industrial Relations Commission: *Moama Bowling Club Limited v Armstrong (No 2)* (1995) 64 IR 264 (application under s.6(1A));
- The Medical Disciplinary Tribunal and its successors: *Qidwai v Brown* [1984] 1 NSWLR 100, *Walton v McBride* (1995) 36 NSWLR 440, *Macarthur v Walton* (unreported; NSWCA; Priestley, Handley & Powell JJA; 31 August 1995), and *Health Care Complaints Commission v A Medical Practitioner* [2001] NSWCA 158.

- The Consumer Traders and Tenancy Tribunal: *Krslovic Homes v Sparkes* [2004] NSWSC 374, *Rural and General Insurance v Fair Trading Tribunal* [2004] NSWSC 396, and *Burringbar Real Estate Centre Pty Ltd v Ryder* [2008] NSWSC 891.

- Strata Titles Board: *Anderson Stuart v Treleaven* [2000] NSWSC 536;

- The Administrative Decisions Tribunal: *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 68 NSWLR 366, [2006] NSWCA 387 at [74].

- The Registrar of the Supreme Court: *Tisdale v Ballanday* [2009] NSWSC 56.

4.18 The following tribunals have been held for the purposes of the Act not to be courts:

- The Board of Subdivision Appeals – *Gosford Shire Council v Anthony George Pty Ltd* (1969) 89 WN (Part 1) 350,

- The Railways Appeal Board – *Ex parte Commissioner for Railways*; *Re Locke (No 2)* [1970] 3 NSWR 386.

- A Justice of the Peace issuing a witness summons: *Civil Aviation Safety Authority v Illingworth* [2009] TASSC 57.

What is a question of law or fact?

4.19 The question of the inadequacy of damages is a question of fact: *Wagner v Moran* (1957) 75 WN (NSW) 60. Questions properly submitted to the jury are questions of fact and not of law: *Zullo v Callipari* (unreported; NSWCA; Kirby P, Hope and McHugh JJA; 15 February 1985). and *Public Transport Corporation v Sartori* (unreported; VCA; Brooking, Charles and Callaway JJA; 29 April 1996). Accordingly, an application for a s.6(1)(b) certificate, after the High Court upheld an appeal only on the ground of the inadequacy of damages, failed: *Cole v The Commonwealth* [1964] NSWR 1035. "The cases dealing with whether a challenge to a finding of fact as against the evidence raises a question of law do not distinguish between findings of juries and those of judges": *Sartori,* per Brooking JA. Therefore, McHugh JA said in *Australia Post Commissioner v Dao (No. 2)* (1986) 6 NSWLR 497 at 515 that "The legislation was designed to protect the litigant against a judge's errors of law but not his or a jury's errors of fact."

4.20 For further cases discussing the question of law/fact dichotomy, see *Littlewood v Resource Underwriting Pty Ltd* [2005] NSWSC 52, *Crown Glass & Aluminium Pty Ltd v Ibrahim* [2005] NSWCA 195 and *South East Fibre Exports Pty Ltd v WGE Pty Ltd* [2008] NSWSC 231.

When does an appeal succeed?

4.21 An appeal may succeed if there is at least an agreement to settle the appeal with a concession by the respondent of an error of law or fact by the trial judge, and the appeal court hears some argument permitting it to dispose the appeal.

4.22 In *Reeve v Fowler* [1965] NSWR 110 the Full Court of the Supreme Court was told by the parties "they have not agreed that the appeal should be upheld and that the verdict and judgment be set aside and a new trial had, or that anything else should follow. They have made a sort of inchoate or contingent agreement that, provided an indemnity certificate is granted by the Court, they will settle this litigation on terms that the appeal be upheld for the purpose of facilitating the grant of that certificate" (Maguire J at 111).

4.23 The Court refused the application. Firstly, because the grant of an indemnity certificate was not a matter for bargaining between the parties, but rested entirely within the discretion of the Court. Secondly, no application for such a certificate could be entertained by the Court until the fate of the appeal had been decided, and here the parties had not agreed in their terms of settlement that the appeal would be upheld. Walsh J said at 112:

> • "It does not follow, in my opinion, that a certificate may never be granted in a case in which the parties have agreed that the appeal will succeed, and in which the actual appeal itself has not been fully argued. There may be a case in which it appears that counsel on both sides have agreed that there was an error of law, and the Court before which the appeal comes is told of that, and what the suggested error of law was. Then, in a proper case, the Court might well act on the matter and allow the appeal without itself hearing full argument on it. If that was the course taken, then the question of the grant or refusal of the certificate could also arise in these circumstances."

4.24 In *Commonwealth Bank Corporation v Duncan* (unreported, NSWCA, Kirby P, 28 September 1987) the respondent Ms Duncan discontinued her opposition to the appeal after a recent High Court decision had made it clear that the appeal would succeed. She consented to an order that the appeal be allowed. Kirby P, sitting as a single judge exercising the powers of the Court of Appeal pursuant to s.46 of the *Supreme Court Act 1970*, made no order as to the payment of the costs in the Court of Appeal. Ms Duncan then applied for a s.6 certificate. Kirby P refused as s.6 certificates:

> • "… may only be granted where an appeal 'on a question of law succeeds'. I consider that this means 'succeeds' by virtue of a determination of the court. In the present case, the appeal has, in effect, succeeded by virtue of the agreement of the parties. There could be many reasons for the abandonment of proceedings. Such abandonment, without more, should not carry an entitlement to a certificate. No doubt in cases such as the present, where a governing principle has been conclusively determined by litigation in a case conducted in tandem, it might be possible for the court, without extensive argument, to dispose of an appeal and make an order which

> would attract an entitlement under s.6(1) of the *Suitors' Fund Act 1951*. But such is not the present case. Here the unsuccessful party simply abandoned her case. No decision on the merits is made by the Court. The application for the certificate under the *Suitors' Fund Act* must therefore be refused."

4.25 In *Gee v Council of the City of Gosford* [2003] NSWCA 157 the parties settled their appeal, the terms of settlement ordered that the appeal be upheld, and the court was advised of the reasons why the parties agreed that the appeal should be upheld. Sheller JA granted the respondent a s.6 certificate.

4.26 In *RTA v Macri* [2009] NSWSC 15 the respondent conceded that the appellant was entitled to relief due to the trial judge's error. The appeal was upheld and the respondent granted a s.6 certificate.

4.27 In *Quadrant Constructions Pty Ltd (in liq.) v Morgan Smith Barney Pty Ltd (No. 2)* [2009] VSC 535 at [7] Forrest J of the Supreme Court of Victoria said of an application under s.4 of the *Appeal Costs Act 1998* (Vic):

> "It is not a question of an application being made by consent of the parties as was, at one stage, suggested by Quadrant's solicitors. Rather, the issue is whether the Court is satisfied on the application of the respondent that the circumstances warrant the granting of an indemnity certificate pursuant to s.4 of the Act."

4.28 In *DPP v Moradian* [2010] NSWCCA 27 the DPP's appeal to the CCA under s.5F of the *Criminal Appeal Act 1912* was withdrawn when it commenced. The respondents' application for a s.6 certificate failed because the DPP's appeal did not succeed. The Court at [11] explained the reason why the Act provided no relief to the respondents:

> "the expense incurred by the successful respondent is not caused by failure of the court system, but by the erroneous attempt by the appellant, in this case the Director acting on behalf of the State, to overturn the decision of the court below. The arguable injustice arises from the lack of any statutory entitlement for the respondents to recoup their costs from the Director."

4.29 *Hemmes Cassell & Associates Pty Ltd v Nasr* (1994) 8 ANZ Ins Cases is an example of a beneficial approach to the construction of the Act being applied to the construction of the word "succeeds". There Allen J of the Supreme Court of NSW awarded a verdict for the respondent for only $1 and ordered the respondent to pay the appellant's costs of the appeal. This was a successful appeal in everything but name. Despite the verdict for the respondent, the Judge granted to the respondent a s.6 certificate.

Court's discretion to grant a certificate

4.30 The grant of a certificate is discretionary, and no appeal lies against any such grant or refusal: s.6(5) and *Gurnett v Macquarie Stevedoring Company Pty Ltd (No 2)* (1956) 95 CLR 106. The Act fails to provide specific guidance as to the criteria that a court

should consider in exercising the discretion: *Burringbar Real Estate Pty Ltd v Ryder* [2008] NSWSC 891 at [33]. In *Robinson v Zhang* (2005) 158 A Crim R 575; [2005] NSWCA 439 at [38] Basten JA said where the power exists to issue a certificate "a certificate is usually granted as a matter of course, in the absence of particular considerations which would warrant withholding a certificate". See *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772, *Steele v Mirror Newspapers Limited* [1975] 2 NSWLR 48, *Builders Licencing Board v Pride Constructions Pty Ltd* [1979] 1 NSWLR 607*, Commissioner of Police Service v Hall* (2005) 158 A Crim R 10; [2005] QSC 388 at [19]; and *Mustac v Medical Board of Western Australia* [2007] WASCA 128 at [12] for a discussion of the circumstances when a respondent satisfying the formal requirements of the Act should nevertheless have their application for a certificate refused. However, a number of judgments in other jurisdictions have held that the applicant for a certificate "must show something more than the fact that an appeal has succeeded on a question of law"[12] and that the discretion "is a discretion to grant: it is not a discretion to refuse."[13]

4.31 Recent examples of judgments in other jurisdictions refusing the grant of a s.6 certificate include: *HWC v Corporation of the Synod of the Diocese of Brisbane (No. 2)* [2009] QCA 202, *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2009] QCA 406, *Civil Aviation Safety Authority v Illingworth* [2009] TASSC 57, and *Re Psychologist (No. 2)* [2009] TASSC 76.

4.32 In *Cordell v Goodwin* [1976] 1 NSWLR 417 a Supreme Court judge refused an application of two respondents for certificates. The respondents appealed the decision to the Court of Appeal. The Court of Appeal held, by reason of the clear terms of s.6(5), that the appeal was not competent. Nor could the applicant to the Court of Appeal make a fresh application under s.6.

Who may not receive a certificate?

4.33 Only respondents are entitled to a certificate. Successful appellants are not entitled to a certificate: *R v King* (2003) 59 NSWLR 472; [2003] NSWCCA 399 at [101], *AG-NSW v World Best Holdings Ltd* [2005] NSWCA 261 at [137], and *Mahenthirarasa v SRA* [2008] NSWCA 101 at [69].

4.34 A contradictor may be regarded as a respondent: *Re Psychologist (No. 2)* [2009] TASSC76 at [3].

4.35 Under s.6(7) a certificate shall not be granted in favour of the Crown, a corporation that has a paid up share capital of $200,000 or more, or a corporation that does not have such a paid up share capital, but is related to such corporation. In *Sydney City*

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12 *Greenco Pty Ltd v Wilden Pty Ltd* (unreported, WASC-FC, Kennedy & Pidgeon JJ, 18 March 1998)

13 *Lawson v Gault* [2002] FCAFC 308 at [5], *Melnik v Melnik* [2005] FCAFC 207 at [11], *Jones v Dalcon Construction Pty Limited* [2006] WASCA 205 at [4], *Mustac v Medical Board of Western Australia* [2007] WASCA 128 at [12].

Council v Reid (1994) 34 NSWLR 506 it was held that a local council is not the Crown.[14] For examples of councils being granted certificates see *Archibald v Byron Shire Council (No 2)* [2004] NSWCA 349, *Hornsby Shire Council v King* [2005] NSWCA 67 and *Western Districts Developments Pty Ltd & Turnpike Lane Pty Ltd v Baulkham Hills Shire Council (No. 2)* [2009] NSWCA 311. In *Smith v Visser (No 2)* [2001] TASSC 118 Crawford J of the Supreme Court of Tasmania declined the grant a certificate to the unsuccessful prosecutor respondent as, with the prosecutor's costs being paid for by government funds, the certificate would be a grant in favour of the Crown. In *Mustac v Medical Board of Western Australia* [2007] WASCA 128 at [14] the Court of Appeal of Western Australia refused to grant a certificate to the Board as it was statutory instrumentality. In *Builders Licencing Board v Pride Constructions Pty Ltd* [1979] 1 NSWLR 607 at 619 Cross J said that he would grant the respondent company a certificate under s.6 if it satisfied him that it had a paid up share capital of less than $200,000.

4.36 The Court of Appeal often grants a certificate to a respondent "if eligible" or "is qualified". The meaning of these expressions was discussed by Santow J in *Anderson Stuart v Treleaven* [2000] NSWSC 536 at [13]:

> • "References to 'if eligible' or 'if qualified' are standard expressions relating not to these basic jurisdictional requirements. Those requirements may be taken to be resolved in favour of the applicant. Rather they probably relate to eligibility in the narrower sense, namely the absence of disqualifying features as set out in s.6(7) of the Act."

Standing to apply for a certificate

4.37 It is clear from the decision of the High Court in *Gurnett v Macquarie Stevedoring Company Pty Ltd (No 2)* (1956) 95 CLR 106 that the only party with the standing to make the application is the respondent:

"The *Suitors' Fund Act* does not make the appellant a party to the application by the respondent for a certificate": McTiernan J at 115[15]

"The successful appellant has no legal interest whatever in the fate of the application. He has at most a practical interest because in order to be reimbursed the respondent must first pay his costs.": Williams J at 117,

"It is not submitted, or even suggested, that on an application for a certificate to the Supreme Court any party other than the applicant is entitled to be heard. I think no other party is entitled to be heard, as the application is outside the limits of the contest between the parties: it is a consequence of the appeal without being incidental to the appeal, as it has no link with or bearing on the merits of the contest.": Webb J at 118.

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[14] Followed in *Townsend v Waverley Council* [2001] NSWSC 384 and *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178.

[15] McTiernan J left undecided the question of if the Attorney General could be a party.

4.38 Therefore, in *Sergi v Jurcevic (No 2)* [1999] NSWCA 296, where the respondent had appeared to file a submitting appearance and it was inappropriate that he be ordered to pay the appellant's costs of the successful appeal, the application by the appellant for a costs order against the respondent, limited to the sum the respondent could recover under the Act, was rejected. The Court said at [5]:

> • "The grant of an indemnity certificate presupposes that the respondent has been ordered to pay the appellant's costs of the appeal. We do not think such an order should be made so that the appellant can get access to the Fund. The order must be an order appropriate to be made independently of any question of access to the Fund."

The Act and bankruptcy

4.39 If the respondent is a bankrupt, then their Trustee in Bankruptcy is entitled to be granted the certificate, so long as the Trustee gives an undertaking that any moneys received from the Fund would be used to pay the appellant's costs, and not to swell the general funds available for creditors: *Jones v Skelton (No 4)* [1966] 2 NSWR 167, (1966) 9 FLR 318.

4.40 In *Keenan v Skinner* [1999] FCA 1011 the creditor, owed litigation costs by the debtor, sought to bankrupt the debtor. The creditor's impatience with the debtor's failure to reimburse the creditor's costs by making a claim upon the Suitors' Fund had compelled the creditor to try to bankrupt the debtor. During the bankruptcy proceedings the creditor received from the debtor a part payment of the costs claimed, being the debtor's recovery of the costs from the Suitors' Fund. However, the creditor continued with the bankruptcy application, attempting to bankrupt the debtor for the failure to pay interest on the costs. Einfeld J refused the creditor's application on the ground that the debtor, litigating under a disability, was unrepresented by a solicitor. Had this formality been complied with though, the Judge would still have rejected the application. One of the reasons that the Judge gave, at [37], for refusing to bankrupt the creditor was the "morality if not legality of a claim for interest in the case of the Suitors' Fund direct payment". The creditor took four years after receiving its costs order to make a claim for interest on costs.

Appeals to the High Court

4.41 Section 6(1)(b) permits a certificate to be granted to an unsuccessful respondent in an appeal to the High Court on a question of law. The now repealed s.6(1)(c) and (d) allowed similar certificates to be granted in respect of appeals to the Privy Council. For examples of applications for a certificate relating to High Court and Privy Council appeals see *Anderson v Anderson* [1961] NSWR 150, *Cole v The Commonwealth,* [1964] NSWR 1035; *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772, *Pataky v Utah Construction & Engineering Pty Ltd* [1966] 1 NSW 689*, Jones v Skelton (No. 4)* [1966] 2 NSWR 167*,* (1966) 9 FLR 318, *Evatt v New South Wales Bar Association* [1968] 3 NSWR 573*, Re Locke; Ex Parte Commissioner*

for Railways (No. 2) (1970) 3 NSWLR 386; *Cordell v Goodwin*, [1976] 1 NSWLR 417, and *Berryman v Joslyn (No 2)* [2004] NSWCA 239.

4.42 The High Court itself has no jurisdiction to grant a certificate: *Gurnett v Macquarie Stevedoring Company Pty Ltd (No 2)* (1956) 95 CLR 106. The application for a certificate in relation to a High Court appeal is to be made to the Supreme Court: s.6(1).

Appeals to other courts

4.43 Section 6 permits a respondent in a successful appeal on a question of law to the Industrial Relations Commission or to the District Court (s.6(1A)) or to the Land and Environment Court (s.6(1AA)) to apply for a certificate. For examples of applications for certificates to the Industrial Relations Commission see *DNR Commercial Pty Ltd v Flood (No 2)* (2003) 130 IR 21 and *Hilton Hotels of Australia Ltd v Pasovska* (2003) 122 IR 428. For an example of an application for a certificate being rejected by the Land and Environment Court see *Director General of NSW National Parks and Wildlife Service v L Sides Pty Ltd* [1994] NSWLEC 132.

Payments from the Fund

4.44 Section 6(2A) provides that the maximum amount payable for any one appeal to the High Court is $20,000, and $10,000 in the case of any other appeal. A respondent could theoretically receive from the Fund payment of $40,000: for example, $10,000 for being the unsuccessful respondent in an appeal from the Local Court to the Supreme Court, $10,000 for being the unsuccessful respondent in a subsequent appeal from the Supreme Court to the Court of Appeal, and $20,000 for being the unsuccessful respondent in a subsequent appeal from the Court of Appeal to the High Court.

4.45 In *Chapman v Taylor* [2005] NSWCA 11 Hodgson JA said at [8]:

> • "In my opinion, the provisions of the *Suitors' Fund Act* and the limits provided by that Act are matters that can be taken into account in determining costs orders. One possibility, then, is to order that the Taylors pay Vero's costs of its appeal and have a certificate under the *Suitors' Fund Act*, and to limit the quantum of Vero's costs to $10,000."

4.46 Subject to the limitations on payments, s.6(2) entitles the respondent to be paid from the Fund:

(a) An amount equal to the appellant's costs of the appeal in respect of which the certificate was granted ordered to be paid and actually paid by the respondent;

(b) 50% of the amount payable from the Fund pursuant to (a) or, where no amount is so payable, an amount equal to the respondent's costs of the

appeal in respect of which the certificate was granted, as taxed and not ordered to be paid by any other party; and

(c) Where the costs referred to in (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having those costs taxed.

4.47 If the appeal court orders a new trial, then the definition of costs in s.2 of the Act includes as the costs the respondent can claim from the Fund the costs of the first trial.

4.48 Under the repealled *Legal Profession Act 1987* ("LPA") references in the Act to taxation were to be read as references to assessment: see Clause 45 of Schedule 8 of the *LPA* and *Illawong Village Pty Ltd v State Bank of NSW* [2005] NSWSC 524 at [27]. There appears to be no equivalent to Clause 45 in the *Legal Profession Act 2004*.

4.49 The discussion at [4.44] above on the $40,000 maximum payment relates to a "sequence of appeals". A sequence of appeals is defined in s.2 as "a sequence of appeals in which each appeal that follows next after another appeal in the sequence is an appeal against the decision in that other appeal." The recipient of a "sequence of appeals" certificate only needs to be a respondent in the final appeal. The recipient does not need to have been the respondent in the prior appeals in the sequence: s.6(2)(a)(ii) and *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772. Examples of the grant of "sequence of appeals" certificates are *Grygiel v Baine (No 2)* [2005] NSWCA 434 and *Honeywood v Munnings* (2006) 67 NSWLR 466; [2006] NSWCA 215.

4.50 For the respondent to receive payment of its costs it is unnecessary that it has first been ordered to pay the costs of the appellant. In *Anderson v Anderson* [1961] NSWR 150 the respondent was granted a certificate notwithstanding that the High Court ordered each party to bear its own costs of the appeal there. The CCA is prohibited by s.17 of the *Criminal Appeal Act 1912* from awarding costs, but the Court has granted certificates to unsuccessful respondents in *R v Hookham (No. 2)* [1993] 32 NSWLR 345*; R v King* (2003) 59 NSWLR 472; [2003] NSWCCA 399 at [101]; *R v Rima* [2003] NSWCCA 405*; R v NKS* [2004] NSWCCA 144 and *Robinson v Zhang* (2005) 158 A Crim R 575; [2005] NSWCA 439. In *Re Katherine* (unreported, NSWSC, Studdert J, 26 November 2004) the respondents in a Children's Court appeal against whom no costs orders were made were granted a certificate. In the *Treasurer for the State of New South Wales v Wade & Dukes* (unreported; NSWCA; Mahoney, Handley and Powell JJA; 16 June 1994) the appellant sought no costs, yet the Court granted a certificate to the unsuccessful respondents.

4.51 When the court has ordered no costs, even a partially successful respondent may be entitled to a certificate for the portion of its appeal costs it was ordered to pay that was

related to its unsuccessful defence of part of the appeal: *Wyong Shire Council v MCC Energy Pty Ltd (No 2)* [2005] NSWCA 196.[16]

4.52 In *Steel v The Appeal Costs Board* [1981] WAR 299 Wickham J of the Supreme Court of Western Australia held that if the respondent is seeking payment of its own costs, and it is intended that the appellant's costs also be paid from the Fund, then the Fund should decline to authorise payment of the respondent's costs until it knows what the appellant's costs are. This is because the respondent's costs payable from the Fund can only be calculated by reference to what the appellant's costs payable from the Fund will be. Furthermore, if the appellant and the respondent disagree as to the priority of payment of their costs, it is the respondent's costs who should be paid first and "if there is anything left over it [the Fund] can give consideration to the exercise of its discretion to pay the whole or part of the appellant's costs on behalf of the respondent".

4.53 The intent of the Act is to relieve hardship. If an unsuccessful respondent is not suffering hardship because it has the benefit of a costs undertaking given by the appellant, or has their costs paid for by a third party such as an insurer or the Crown, then a certificate cannot be issued to that respondent.

4.54 *McLaughlin v Utah Construction & Engineering Pty Ltd* was a 3 March 1965 decision of the Full Court of the Supreme Court, reproduced in part in the 22 June 1966 judgment of Maguire J in *Pataky v Utah Construction & Engineering Pty Ltd* [1966] 1 NSWR 689 at 690. In *McLaughlin* the Full Court considered an application by Utah for leave to appeal to the Privy Council. The Full Court proposed to grant leave on the condition that Utah undertook to pay McLaughlin's costs of the appeal, whatever the result of the appeal. On 22 February 1965 The Full Court, by consent, modified this undertaking so that the obligation imposed on Utah to pay McLaughlin's costs would not extend to those costs covered by any Privy Council "sequence of appeals" certificate later granted to McLaughlin[17]. On 3 March 1965, however, the Full Court, of whom Maguire J was a member, appeared to reconsider the propriety of the modified costs undertaking:

> • "This Court should make it clear that an order in this form is not to be taken as any expression of opinion by this Court that the Court or judge to whom, in the event contemplated a possible event, application is made for a certificate under the *Suitors' Fund Act* should, in the circumstances of this case, grant such a certificate. It has to be borne in mind, after all, that the dominant purpose of the provisions made by the *Suitors' Fund Act* is to relieve the respondent to an appeal who has obtained a decision in the court below through error of law on the part of the trial judge and who is afterwards left in the position, as the result of a

[16] Followed in *State of NSW v Fahy* [2006] NSWCA 64, *Wentworth v Rogers* [2006] NSWCA 145, *Gordon v Ross* [2006] NSWCA 157, *Law Society of NSW v Glenorcy Pty Ltd* [2006] NSWCA 250 and *Fallon Street Properties Pty Limited v Steel & Stuff Pty Ltd* [2006] NSWCA 296.

[17] The long repealed s.6(1)(c) of the Act permitted a "sequence of appeal" certificate to be granted for an appeal from the High Court to the Privy Council. The similarly long repealed s.6(1)(d) permitted a certificate to be granted for an appeal from the Supreme Court to the Privy Council.

> successful appeal that he would have to bear the costs of the appeal. That seems to have been the dominant purpose of the Act, to relieve unsuccessful respondents against what might be considered to be a real hardship which has fallen upon them, through no fault of their own but only through some miscarriage which has occurred in the decision below. In view of the undertaking which will be given in this case by the appellant, no such hardship can fall upon the respondent."

4.55 In *McLaughlin* Utah, soon after 3 March 1965, decided not to proceed with its appeal to the Privy Council: *Pataky* at 691. A court therefore later did not have to decide, in the event that Mr McLaughlin was the unsuccessful respondent to the Privy Council appeal, whether a certificate in the circumstances should have been granted. However, the question of whether such a certificate could have been granted was answered in *Pataky v Utah Construction & Engineering Pty Ltd*, a 22 March 1965 decision of the same Full Court as in *McLaughlin*. The 22 March 1965 *Pataky* decision is also reported in part in *Pataky v Utah Construction & Engineering Pty Ltd* [1966] 1 NSWLR 689 at 691-92.

4.56 In the 22 March 1965 *Pataky* decision the Full Court again considered on what conditions it should grant leave to Utah to appeal to the Privy Council. The Full Court declined to make as a condition of the grant of leave to appeal that Utah give to Mr Pataky the same costs undertaking that it gave in *McLaughlin*. The Full Court held that leave to appeal should not be granted only on the condition that Utah bear all the costs of the appeal whatever the result of the appeal. The Full Court added:

> • "It follows that the respondent would be under no need to be indemnified out of the Suitors' Fund in any event (it being remembered that the granting of indemnity out of that fund is in general, and certainly in this type of case, discretionary in the Court) and that it would be unlikely that an indemnity would be granted, and indeed it would seem that an indemnity should be granted in the event that the respondent had no need for it because he was already indemnified from another source and on the basis of another principle than that which is embodied in the *Suitors' Fund Act*."

4.57 In *Cordell v Goodwin* [1976] 1 NSWLR 417 the Court of Appeal heard an appeal against a decision of a Supreme Court judge refusing to two applicants a "sequence of appeals" certificate under s.6(1)(b) of the Act for appeals to the High Court.

4.58 Moffitt P at 419 explained the reason for the applications being refused by the trial judge:

> • "The reason for a refusal of a certificate was on the ground that the respondents had been granted legal assistance under the *Legal Assistance Act 1943*, that counsel was briefed by the Public Solicitor, that s.8(6) of the *Legal Assistance Act* was brought into operation, and that the certificate was not necessary to cover the respondents' liability

> to the appellant for costs, as these were provided for by s.14A of the *Legal Practitioners (Legal Aid) Act 1970*."[18]

4.59 An insured respondent was refused a certificate when the construction of the s.6(2) words "actually paid" was considered by the Full Court of the Supreme Court of Western Australia in the *Appeal Costs Board v Holloway* [1985] WAR 57. Mr Holloway was the unsuccessful respondent in an appeal to the Supreme Court against the inadequacy of damages awarded by the District Court for injuries suffered in a motor vehicle accident. He was ordered to pay the appellant's costs. An application in his name was made to the Appeal Costs Board by his third party insurer. Wallace and Olney JJ (Burt CJ dissenting) held that Mr Holloway was not entitled to be paid a sum from the Fund since he had not actually paid either the appellant's costs or those of his legal representatives. Both of these expenses had been paid by his third party insurer.

4.60 In *Smith v Visser (No 2)* [2001] TASSC 118 at [6] one of the reasons the unsuccessful prosecutor respondent was not granted a certificate was that, as a government employee, "he is never required to pay such costs".

4.61 The final paragraph of s.6(2)(a) provides that when a respondent has been granted a certificate, but has not paid the appellant's costs, then the appellant may apply to the DG that it be paid directly from the Fund if the appellant can satisfy the DG that:

- The respondent is unable to through lack of means to pay the costs, or
- Payment of those costs would cause the respondent undue hardship, or
- The respondent cannot be found after such strict enquiry and search as the DG may require, or
- The respondent unreasonably refuses or neglects to pay the costs.

5. Section 6A – Proceedings not completed

5.1 The purpose of 1959 amendments to the Act, which introduced ss.6A and 6B, was explained by Moffitt J in *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772 at 777:

> • "The 1959 amendment of the Act enlarged the field to relief, but again the principle appears to have been directed to bringing into the scheme other cases where at least, prima facie, it appeared that the unnecessary costs had been incurred by some error, mischance or

[18] The Court of Appeal did not question the correctness of the refusal to grant the certificates. The Court of Appeal simply held that the appeal was incompetent as s.6(5) provided that no appeal lay against a decision to refuse the grant of a certificate. Sections 6, 6A and 6B of the Act have subsequently been amended to deem the recipient of legal aid as a person who has incurred costs: see ss.6(5A), 6A(1A), and 6B(5).

> wrong decision for which it could be presumed no responsibility lay on the party to be helped by the grant of the certificate."

5.2 There are few reported New South Wales decisions on s.6A. That is because the only role for a court to play in the section is during an application under s.6A(1)(c), where the court can grant a certificate. Applications for relief under s.6A are made merely by writing to the DG, except for an application under s. 6A(1)(c) , which before the application to the DG is made requires the grant by the court of a certificate: *Richard Pitt & Sons Pty Ltd* (1980) 4 ACLR 917 at 921, *Brazier* (2002) 135 A Crim R 48; [2002] WASCA 273 at [23].

Section 6A(1)(a) –Death or protracted illness of judge or magistrate

"Protracted Illness"

5.3 This sub-section provides that when proceedings are aborted by the death or protracted illness of a judge or magistrate the parties may apply to the DG for reimbursement of their costs. In *The Marriage of Dean* (1988) 94 FLR 32 at 45 the Full Family Court of Australia rejected an application under the Federal equivalent of s.6A(1)(a) when the commencement of the appeal before the Full Bench was delayed a day by an illness of one of the members of the Bench. An illness of a day's duration was not a protracted illness.

5.4 In *The Marriage of Redshaw* (1989) 98 FLR 371 the only judge sitting at a registry of the Family Court of Australia was unable to hear any proceedings at the registry between 29 June – 5 July 1989 because of illness. The parties were to have had their custody dispute listed for hearing on 4 and 5 July but no hearing could commence. The parties thereafter applied to Mullane J for a certificate under the FPCA equivalent of s.6A(1)(a). The Judge rejected the application as the FPCA provision, referring to a "discontinuance" of the hearing, required there to have been a commencement of the hearing.

"Rendered Abortive"

5.5 The only New South Wales decision on s.6A(1)(a) I am aware of is *R v Hoon Chin Ho* (unreported: NSWCCA; Street CJ, Slattery CJ at CL, and Yeldham J; 11 February 1988, BC8802482). After the Court refused to grant Mr Ho leave to appeal against a sentence for conspiring to supply heroin, the following exchange took place between senior counsel for Mr Ho, and Street CJ:

> • "Dr Woods: I ask your Honours to note 6A(1) of the Suitors' Fund Act (1951) that the first hearing of this appeal on 9 October 1987 was rendered abortive by the protracted illness of Reynolds J, necessitating a complete rehearing.
>
> • Street CJ: We will formally note that, Dr Woods. You have the benefit of it. If you are entitled, under the Act, to be eligible for

> assistance under the Suitors' Fund Act this would plainly be a case where that entitlement should be recognised."

It seems from Street CJ's comments that if the protracted illness of a judge necessitates a "complete rehearing", then the hearing has been aborted, and one is entitled to claim under s.6A(1)(a).

5.6 The only other authorities on the expression "rendered abortive" are *Foody v Horewood* (2000) 96 FLR 386 at [7] and *Brazier* (2002) 135 A Crim R 48; [2002] WASCA 273 at [14], authorities that proceedings are only "rendered abortive" if they are terminated before judgment by the protracted illness of the judge or magistrate.

Section 6A(1)(b) – New trial ordered after an appeal on a question of law against a conviction on indictment succeeds and a new trial is ordered

5.7 A Victorian example of a claim under this provision is *Murphy v Obst* [1996] 2 VR 613.

5.8 In *R v Gilfillan* [2003] NSWCCA 102 Mr Gilfillan successfully applied to the CCA for an order that his part-heard trial be terminated and that a new trial be had. Mr Gilfillan, because of s.17 of the *Criminal Appeal Act 1912*, sought a certificate under the *Suitors' Fund Act*. Smart AJA said at [89] that s.6A(1)(b) did not assist Mr Gilfillan, as that section only applied to an appeal against a conviction, and Mr Gilfillan had yet to be convicted.

Section 6A(1)(c) – Hearing of any civil or criminal proceedings discontinued with a new trial ordered

5.9 This sub-section provides that if:

(a) the hearing of any civil or criminal proceedings is discontinued, and

(b) a new trial is ordered,

(c) by the presiding judge or magistrate, and

(d) the reason for the new trial is not attributable in any way to:

(i) disagreement on the part of the jury, where the proceedings are with a jury, or

(ii) to the act, neglect or default of any of the parties or their legal representatives in the case of civil proceedings, or

(iii) to the act, neglect or default, of the accused or the accused's legal representatives, in the case of criminal proceedings;

the presiding judge may grant a certificate entitling any party in the civil proceedings or the accused in the criminal proceedings to apply to the DG for reimbursement of the costs incurred in the original proceedings before they were discontinued. The presiding judge has a discretion as to whether to issue a certificate.

5.10 In *Santoro v Santoro* [2010] FAMCA 126 at [9] Watts J of the Family Court held that under the s.6A equivalent in the *Federal Proceedings (Costs) Act 1981 (Cth)*, only the

Court in which the hearing was initially reported or discontinued could hear the application:

> • "If the Parliament intended for a court other than a court where the discontinuance occurred and granted such an application for a certificate it would have specifically said 'a court may'."

What is a hearing or proceeding?

5.11 The New South Wales legislation does not define "hearing" or "proceedings". "Appeal" is defined as "appeal includes any motion for a new trial and any proceeding in the nature of an appeal."

5.12 Section 3(1) of the Federal Proceedings (Costs) Act 1981 (Cth) defines proceedings as:

> **Proceedings** includes a Federal appeal and a trial.

In *Cundy v ACT Cross Country Club Inc* [2009] FCA 1461 Perram J of the Federal Court issued to the parties a certificate under that Act's s.6A(1)(c) equivalent when a directions hearing could not continue due to a faulty video link connecting the respondents' Canberra legal representatives to the Sydney Registry of the Court.

Commencement and discontinuance of hearing

5.13 It is implicit in the definition of "discontinued" that the discontinued hearing must have commenced.

5.14 There are many NSW, Federal, Australian Capital Territory and Western Australian judgments considering the question of when proceedings have been, for the purposes of Suitors' Fund legislation, commenced and discontinued.

5.15 In *Coulson v Gosford Meats Pty Ltd* (1985) 7 FCR 106 a Federal Court matter was listed for hearing on 26 November 1984. On that day the matter was not listed in the local newspaper's law list. When further enquiries were made at the Registry the litigants were told no judge of the court was available to hear the matter on that day. The parties thereafter applied for a certificate under s.10(3) of the FPCA. Gray J of the Federal Court of Australia held at 106 that the proceedings of 26 November 1984 had discontinued:

> • "Although, in a sense, the hearing had not actually begun, it had been specially fixed for a particular date, time and place, and did not proceed at the appointed time, on the appointed date, at that place, or at all. In those circumstances I have no hesitation in holding that the hearing was discontinued, within the meaning of that word as used in s.10(3)."

5.16 In *The Marriage of Lindner* (1985) FLC 91-638 the matter was listed for hearing before Purdy J of the Family Court of Australia at Parramatta on 14 October 1985. A second matter had also been listed on that day before a second Parramatta judge. The second Parramatta judge had retired in August 1985. However, the retired judge

had not been replaced. Purdy J was therefore faced with hearing two cases on one day. The second matter, a custody dispute, was decided by Purdy J to be the most urgent matter on 14 October. The Lindner matter was therefore not heard. The Lindner parties then applied for a certificate under s.10(3) of the FPCA.

5.17 Purdy J acknowledged that the Lindner matter was not called on for trial, but merely for mention. The Judge, then noting the beneficial purpose of the Act, held:

> • "I feel it is right to conclude that a case has commenced to a state capable of discontinuance when counsel have announced their appearance on a day notified to the parties unequivocally as a date for hearing."

5.18 In *Morris v Maroudas* (1986) 66 ALR 699 the matter was listed for hearing before Muirhead J of the Federal Court of Australia on 10 April 1986. However, the hearing did not commence as the respondent, due to a registry error in notifying the parties of the hearing date, only learned of the hearing two days before. The applicant, who lost the substantive hearing and was ordered to pay costs, later applied for a certificate under s.10(3) of the FPCA to pay for the wasted costs of 10 April 1986.

5.19 The Judge refused the application. He said at 700 – 701:

> • "The word 'discontinuance' has a well established meaning. It envisages the cessation of something that was on foot.
>
> • * * * *
>
> • The adjournment I granted was not a discontinuance of the hearing of the application. The hearing had not commenced. Nor did I order a 'new hearing' as a hearing had neither been conducted nor initiated. I simply postponed the hearing to a later date.
>
> • In my opinion sub-s (3) as is the case with sub-s (2), seeks to grant relief to litigants whose liability for costs is increased by reason of the fact that a hearing on foot is aborted by circumstances not contributed to by fault or neglect of any party to the proceedings. It is in my view an extension to the relief granted in sub-s (2) which is more specific in setting out the circumstances. It may for instance be referable to cases where the sickness or death of counsel intervenes under circumstances which require a discontinuance of the hearing which is under way at the time – probably a rare event – but one which as a matter of justice may persuade a court in the interests of justice to recommence the hearing de novo. It may also apply to disruption of a hearing or interference with the court's capacity to continue the hearing by external causes.
>
> • Finally I comment that had the legislature intended to cover adjournments it would surely have inserted the words 'or adjourned', or 'adjournment' after the words 'discontinued' and 'discontinuance' respectively in s.10(3).
>
> • To grant a certificate in the present circumstances would be to place an interpretation on the sub-section which would not only have wide ramifications but which would unduly strain the wording of the sub-section in a manner contrary to the apparent legislative intent."

5.20 In *The Marriage of Redshaw* (1989) 98 FLR 371 Mullane J of the Family Court of Australia considered an application by parents in a custody proceedings for a certificate under s.10(3) of the FPCA when the only judge at a registry could not hear the matter as the judge had been ill for a week beforehand. The hearing simply did not commence because there was no judge to hear it.

5.21 Mullane J rejected the parents' application. Mullane J, distinguishing *Lindner's* case, preferred to follow *Morris v Maroudas* over *Coulson v Gosford Meats Pty Ltd*. The Judge said at 374:

> • "I do not agree with the suggestion that there can be a discontinuance of the hearing when there has been no appearance before the court and nothing which could be called a commencement."

5.22 In *Ingram v Orman* (unreported, NSWSC, Studdert J, 3 March 1992, BC 9302034) the Judge rejected an application for a certificate under s.6A(1)(c) of the SFA when a part -heard hearing for 27 November 1991 could not resume because the Judge that day also had a part-heard jury trial. Studdert J, in refusing the joint application, said:

> • "It does not seem to me that I can accede to the joint application made by counsel. Under s.6A of the Suitors' Fund Act if civil proceedings are rendered abortive by the death or illness of the Judge or if the hearing of any civil proceedings is discontinued then there is provision for the granting of a certificate pursuant to the statute. However it does not seem to me that there is to be found in the Act any relevant provision upon which I could act in response to the present application even if minded to do so."

5.23 In *Re Palmdale Insurance Ltd* (1994) 122 ACTR 33 Higgins J of the Supreme Court of the Australian Capital Territory granted a certificate under s.10(3) of the FPCA after a 30 September 1994 hearing of a motion could not occur because the motion judge had been delayed in the Northern Territory Supreme Court, and the Chief Justice had reviewed the files and determined that no matter listed in the 30 September motion list required urgent attention. Higgins J, noting *Coulson, Lindner, Morris*, and *Redshaw*, preferred to follow *Coulson*. The Judge said at 37:

> • "It seems to me that the view expressed by Gray J [in *Coulston*] is to be preferred. Section 10(3) is intended to provide compensation to a party deprived of a hearing and put to the expense of a new hearing due not to the default of any party but the failure of the court system or other adventitious cause whereby a hearing has to be aborted and recommenced. That abortion may be at the very outset of the hearing or part-way through. The explanatory memorandum circulated prior to the passage of the FP(C) Act reveals that the purpose of s.10(3) was to empower a court to issue a certificate under the Act where proceedings are rendered abortive or discontinued through no fault of any party. That intent seems consistent with the approach taken by Gray J."

5.24 In *Perpetual Trustee Company (Canberra) Limited v Lewis* [1996] ACTSC 19 Miles CJ of the Supreme Court of the Australian Capital Territory granted to the parties under s.10(3) of the FPCA a certificate for the day the hearing was not reached. The Chief Justice said at [19]:

> • "The hearing had been commenced on 5 October only in the sense that the matter had been called on. The priority of other matters was such that the hearing could proceed no further that day and the hearing was in that sense discontinued. The case was not part-heard by me and could have been heard on the adjourned day [7 October] by any Judge."

5.25 The Chief Justice, in granting the certificates, followed the decision of Higgins J in *Palmdale Insurance*.

5.26 In *Furnari v Furnari* [1998] FamCA 171 the Full Court of the Family Court of Australia rejected an application for a certificate under s.10(3) of the FPCA by a husband who had abandoned his appeal before it was heard. Finn, Kay and May JJ held at [12] that s.10(3) of the FPCA did not apply in such a circumstance and was only available:

> • "In cases where a matter begins but the hearing is aborted due to matters beyond a party's control resulting in a re-hearing being required. The abandonment by the husband of this appeal because events overtook proceedings is not covered by s.10."

5.27 In *Foody v Horewood*, (2000) 96 FLR 386, Finkelstein J considered an application for a certificate under s.10(2) of the FPCA when the action before him was permanently stayed as a High Court decision had held that the Federal Court lacked the jurisdiction to grant the order. The Judge, in refusing the application, said at [7]:

> • "Prima facie, a proceeding is only 'rendered abortive' or is 'discontinued' within the meaning of s.10 if, for a reason that is usually beyond the control of the parties, the proceeding is terminated before judgment. The proceeding must be rendered abortive or discontinued in consequence of the occurrence or non-occurrence, as the case requires, of one of the events specified in subs (2) or (3). The section assumes that in the absence of such circumstances the trial would have continued uninterrupted. In order words the assumption that underlies subss (2) and (3) is that an aborted or discontinued proceeding is one which is temporarily interrupted and when the cause for the interruption has been removed, the proceeding can be taken to judgment. Obviously, this is not such a case.

The Judge at [9] gave a second reason for declining the application:

> • "There is yet another difficulty. It does not seem to me that s.10 is directed to a case where a court is required to rule that it lacks jurisdiction to entertain a suit. That is to say, s.10 is directed to a situation where the trial judge is for one reason or another unable to deal with or continue hearing a case that is within the jurisdiction of the court to adjudicate. It would require a strained construction of the section to have it apply to a case where a party has commenced an action that is beyond jurisdiction."

5.28 *Foody v Horewood* was considered by Roberts-Smith J of the Supreme Court of Western Australia in *Brazier* (2002) 135 A CrimR 48; [2002] WASCA 273.

Roberts-Smith J paraphrased Finkelstein J's reasons at [17]:

> • "His Honour had difficulties with that argument. He expressed the view that a proceeding is only rendered abortive or is discontinued within the

> meaning of s.10 if, for a reason that is usually beyond the control of the parties, the proceeding is terminated before judgment for one of the reasons or events specified in subs (2) or (3). In other words, his Honour concluded, the assumption that underlies those subsections is that an aborted or discontinued proceeding is one which is temporarily interrupted and when the cause for the interruption has been removed, the proceeding can be taken into judgment."

Roberts-Smith J at [22] added a gloss to Finklestein J's reasoning:

> • "In my view what his Honour was saying in that case should not be taken too restrictively. His Honour was not referring to a temporary interruption of the hearing but rather a temporary interruption of the proceeding itself. Clearly if there were to be a new trial, there would be a new hearing ab initio. That this was his Honour's intention is apparent from his remarks which I have just quoted from [8] and [9] of his reasons."

5.29 In *Official Trustee in Bankruptcy; Re Forrest v Forrest* [2000] FCA 907, Kiefel J of the Federal Court of Australia rejected the Official Trustee's application for a certificate under s.10(3) of the FPCA. An examination summons could not be heard because illness prevented the Deputy District Registrar from hearing the matter. The examination was then adjourned to a later date. The Judge, noting the decisions in *Coulson*, *Morris* and *Palmdale Insurance*, followed the decision of Muirhead J in *Morris*. The Judge said at [6]:

> • "I respectfully agree with his Honour. The word "discontinuance" has a well established meaning with respect to court proceedings. It conveys something having commenced and then ceasing prior to its conclusion. As the title to the section notes, the proceedings are 'incomplete'. That is not the same as the adjournment of proceedings, which may be stood over prior to or after commencement. An important practical distinction between the two is that discontinued proceedings are likely to involve the incursion of costs which are entirely wasted, because the proceedings have to be started again afresh. The additional circumstance to which the section refers is that those costs are not able to be recovered against the other party, for the reasons that the discontinuance occurred without either of the parties' default. There may be many reasons for an adjournment, but it is not so likely, even where no party is at fault, that substantial costs will be entirely duplicated. In the present case I would not have thought that to be the situation. To hold that the section applies to adjournment is, in my respectful view, to give it an unwarranted extension."

5.30 In *Blackman v Blackman* [2003] NSWSC 1200 Hamilton J rejected an application for a certificate under s.6A(1)(c) of the SFA when a two day hearing was vacated two days before its commencement due to a case of pressing urgency which the Judge had to hear. The Judge after the vacation had sent the matter to the Registrar for a new hearing date. The matter, prior to the new hearing date, settled.

5.31 The Judge said at [4]:

> • "Unfortunately, in my view the situation where a trial has not commenced and where after vacation of the fixture new trial dates are fixed by the Registrar cannot be forced within the concept that the

> proceedings are "discontinued" and that there is "a new trial ordered". Those words appear to me to apply only to a situation where a hearing or a trial has actually commenced and is aborted and a fresh hearing is ordered to commence de novo. I was referred to and have been able to find no authority which casts light upon the construction of this provision."

5.32 In *W v S* (2005) 192 FLR 214, Guest J of the Family Court of Australia refused to grant a certificate under s.10(3) of the FPCA in similar circumstances to those in *Morris*.

5.33 On 10 August 2004 the mother's solicitors had forwarded an application to the Family Court for filing. The Court gave the application a 30 August 2004 return date. However, the Court only ever sent a sealed application to the father. The mother's legal representatives only by chance learnt of the 30 August hearing of the application when they were at the Court that day for an unrelated matter. The mother's application was on 30 August adjourned to 13 September 2004. The father then applied for a certificate under s.10(3) of the FPCA for his costs of 30 August 2004.

5.34 Guest J, surveying all of the Federal and ACT authorities previously considered in this paper, followed *Redshaw, Morris*, and *Forrest*. The Judge said at [27]-[31]:

> • "In my view, and with due respect to that Purdy J had to say in *Lindner*, a hearing cannot be said to have commenced in circumstances that merely addressed the issue of priority. The mere announcement by counsel of their appearance on the day notified for trial is insufficient to conclude that, for the purpose of s.10(3) of the Act, the proceedings had commenced in the sense intended by the statute. I further agree with Muirhead J in *Morris v Maroudas* that it would place an interpretation upon the sub-section that would have wide ramifications and place undue strain upon the wording of the sub-section in a manner contrary to its legislative intent. For the same reasons, I am in disagreement with the approach of Higgins J in *Re Palmdale Insurance*.
>
> • Doubtless it is that the enactment is one clearly directed to enable litigants to recoup costs thrown away through no fault of their own. It is further clear that the father incurred legal costs to defend the application and through counsel, was ready to proceed on the due date. However, and notwithstanding any sympathy one might have for him in the circumstances, it is plain to me that the hearing had not commenced to sensibly find within the meaning of s.10(3) of the Act that it had been discontinued. I prefer the reasoning advanced in *Redshaw, Morris v Maroudas* and in *Forrest's* case.
>
> • The terms of the legislation are clear. The dominant purpose in its interpretation and application is monetary relief to litigants against costs inevitably incurred when a hearing is discontinued in circumstances not attributable to the 'neglect default or improper act' of any party to the proceedings. It is designed to mitigate hardship to clients that would otherwise follow from the discontinuance of the proceedings. It is also, in my view, proper to take into account the protection of public funds, given the high cost of litigation and to ensure that funds are disbursed only in circumstances where it is justified within the meaning of the statutory provision.

> • The current pressure on court administration to address delays in the hearing and determination of cases is such that defended lists are designed in a number of courts with a primary listing and reserve cases, all of which are prepared and ready for trial. In addition, a primary listing, for example, may be fixed for two days with another listed to commence on the third day. If the view taken in *Lindner's* case, *Re Palmdale Insurance* and *Perpetual Trustee Company v Lewis* were to prevail, for example, it would be open for practitioners in cases not reached in circumstances I have described, including reserve cases, to apply for a costs certificate pursuant to the Act relying upon such authority. This would place an intolerable burden upon public funds required to mitigate hardship to litigants that meet the terms, purpose and intent of the statute. In my view, it may also be open to abuse.
>
> • The provision of a certificate pursuant to the Act is a benefit provided by the statute, but on conditions and in circumstances whereby a hearing has been 'discontinued'. It is plain that, for such an event to occur, it must have commenced, in my view, in a real and litigious sense, and not just by way of mention by reason of a prior supervening event or discussion arising from judicial availability. I agree with Kiefel J that the word 'discontinuance' does indeed have a 'well established meaning', namely, that 'it conveys something having commenced and then ceasing prior to its conclusion'."

5.35 The reasoning in *Ingram v Orman* is consistent with the Federal decisions in *Morris v Maroudis, Redshaw, Furnari, Foody v Horewood, Forest*, and *W v S*. It is also consistent with the reasoning in the other New South Wales decision, *Blackman*. The effect these cases, the majority of the authorities on the definition of the word "discontinued" in the New South Wales and Federal Suitors' Fund legislation, is that a hearing can only discontinue if it has commenced in a litigious sense and has then terminated for a reason beyond the parties' control. Furthermore, a part-heard hearing is not a discontinued hearing.

5.36 The decision in *Forest* is useful in determining hearings that are entitled to receive the certificate. A hearing with all of its costs wasted is, for the purposes of the legislation, a "discontinued" hearing and may be the subject of a grant of a certificate. However, a hearing with only part of its costs wasted is not a hearing that may be the subject of a grant of a certificate.

"Act, neglect or default"

5.37 *Greaves v Blackborrow* (1961) 78 WN (NSW) 517 was the first authority on the definition of "act, neglect or default". In *Greaves* Else-Mitchell J discharged the jury because the plaintiff and one of the jurors had conversed in a public place near the court, even though no conversation about the case took place between them. Both parties unsuccessfully applied for certificates under s.6A(1)(c). Else-Mitchell J, in declining the application, said at 518-519:

> • "It is for me to be satisfied whether the reason for that [the discontinuance of the trial] occurring was in any way attributable to the 'act, neglect or default' of any party. It has been contended that 'act' in

> this collocation of words means wrongful act or act of a similar character to neglect and default and the *ejusdem generis* and *noscitur a sociis* rules were invoked in support of this view. I do not agree with this submission because there is no genus (cf. *R v Regos* 74 CLR 613): neglect and default are both passive in quality and, though they may postulate non-compliance with a duty, I do not see how any element in the connotations attached to those words can be applied to the word 'act' which is antithetic."

5.38 The Judge said, at 519, that the "act, neglect or default" need not be the sole reason for the discontinuance of the trial:

> • "The course I have already taken by reason of that act [of the plaintiff in talking to the juryman] seems to me to prevent me certifying that the reason for the discontinuance of the hearing was not attributable in any way to that act; it may not have been solely attributable to that act but that is not what the section provides as the criterion."

5.39 In *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772 at 774 Moffitt J, citing *Greaves v Blackborrow* when considering the s.6A expression "act, neglect or default", said:

> • " 'Act, neglect or default' does not mean wrongful act and includes a mere act of a party leading to the discharge of the jury."

5.40 In *Steele v Mirror Newspapers Limited* [1975] *2* NSWLR 48 at 53 Hutley JA said these words in an application for a certificate under s.6 of the Act, also relevant to an application for a certificate under s.6A(1)(c) of the Act:

> • "Because of this identity of interest between the appellant and the respondent, it behoves the Court to be vigilant to protect what is a public fund. As the funds for litigation are more and more derived, directly or indirectly, from the public purse, the Courts should use the powers vested in them to see that the public purse is not permitted to be used to finance litigation in which Counsel *deliberately misconduct themselves, or even where it arises from ignorance or incompetence*."
>
> • (my emphasis)

5.41 In *Veney v Veney* [1983] FLC 78370 Hogan J of the Family Court of Australia considered an application under s.10 of the FPCA.

5.42 In *Veney* Pawley SJ on 2 April 1980 approved a maintenance agreement between the parties. Three years later the wife applied for an order extending the time for filing a Notice of Appeal against the approval.

5.43 Hogan J at 78377 gave this description of the application to extend time for appeal:

> • "the application to extend time for appeal came on for hearing before Pawley SJ on 28 April 1983. After discussions and submissions, his Honour reserved his decision. On 4 May 1983 his Honour had the matter put back into his list and, for the reasons set out in the transcript, announced his decision that he should not hear nor decide the matter. In summary, what his Honour concluded was that he embarked upon the hearing of the application on 28 April l983 under the impression that the

> application was based upon some sort of confusion or lack of understanding upon the part of the applicant. This was a fresh issue of fact, the resolution of which would have occasioned his Honour no great problem. Such issue, however, was abandoned and counsel for the wife then indicated that he relied upon the two alleged substantial issues with which I dealt. His Honour, upon consideration, cited that the resolution of such issues required a determination as to whether he had erred. He thought, and in my view quite correctly so, that such a determination should best not be made by him and he directed a new hearing before another Judge. It was in this way that the matter then came on for discussion before me. Upon the conclusion of such discussion, I indicated my intention to consider the matter. Thereupon, counsel for the husband sought an order granting his client a costs certificate in respect of the proceedings discontinued before Pawley SJ pursuant to s.10(3) of the Federal Proceedings (Costs) Act 1981."

5.44 Hogan J, at 78378-78379, after holding that there was "no default" or "improper act" by a party, proceeded to discuss the meaning of the word "neglect" in s.10 of the FPCA:

> • "What then is meant by neglect in the context of this sub-section? In my view, whatever else it may include, it certainly does include the failure to do some act or thing during the hearing of proceedings which ought reasonably to have been done and the failure to do so which results in the discontinuance in the hearing and a new trial being ordered. A legal representative has a duty to the court to bring to its attention or notice any matter or thing which could reasonably be anticipated as requiring that such particular hearing should not proceed. If such representative is in fact conscious of such matter or thing and deliberately refrains from drawing it to the attention of the Court, then perhaps default and an improper act may be involved. If he is not in fact conscious of such matter or thing but reasonably should have been and fails to draw it to the Court's attention, then I am satisfied that neglect for the purposes of this sub-section exists."

5.45 Hogan J, at 78379, then proceeded to decide if the conduct of the wife's counsel constituted, for the purposes of s.10 of the FPCA, "neglect":

> • "It is clear from a reading of the transcript of 28 April 1983 that counsel for the wife was aware at some time before the hearing commenced before Pawley SJ that he proposed to call into question the way in which his Honour conducted the original proceedings on 2 April 1980 and the correctness of his Honour's order in approving the maintenance agreement. It should reasonably have been apparent to him that the matters he proposed to raise would place his Honour in a position where he could not reasonably be expected to refuse to hear the matter. They were not brought to his Honour's notice until the application had proceeded some distance. Obviously his Honour did not, there and then, realise the impact of this change of ground on the part of counsel for the wife, a fact which is hardly surprising, and proceeded to hear submissions, and, as I have mentioned, reserved his decision. Then, having had some time in which to consider the situation, he had the matter put back in the list with the consequences to which I have referred. It would have been reasonable for counsel for the wife to have appreciated the consequences on his Honour or his change in the 'substantial issues' relied upon and, in my view, he should reasonably

> have specifically drawn attention to such consequences. Failing to do so, he was, in my view, of such neglect as is envisaged by the sub-section, and I am satisfied that the discontinuance and new hearing were attributable to such neglect."

5.46 Hogan J then rejected the husband's application for a certificate under FPCA.

5.47 In *Woodhead v Capricorn Caravans Pty Ltd* (unreported; VSC FC; Crockett, King and Tadgell JJ; 30 November 1987; BC8700437) Woodhead appealed a trial judge's dismissal of both his personal injury claim for want of prosecution, and his claim for a certificate under s.18(1)(c) of the ACA. Woodhead's trial had been discontinued during his cross examination as supposed psychological distress caused him to flee the Victorian courtroom to travel to Port Augusta, South Australia. The Full Court of the Supreme Court of Victoria reversed the trial judge's dismissal of Woodhead's claim, but upheld the trial judge's refusal to grant Woodhead a s.18(1)(c) certificate.

5.48 Crockett and King JJ held that Woodhead's actions constituted a default barring him from receiving a certificate. However, the Justices declined to follow *Greaves v Blackborrow*:

> • "In our opinion it is not possible upon the facts of the present case to say that the reason why the trial was discontinued 'was not attributable in any way to the act, neglect or default' of the appellant so as to entitle him to a certificate under s.18(1)(c) of the *Appeal Costs Act 1964*. We do not, however, think it is satisfactory to found that conclusion on the reasoning of Else Mitchell, J in *Greaves v Blackborrow* (1961) 78 WN (NSW) 517. It may be going too far to assert that both 'neglect' and 'default' are necessarily passive in connotation and are both necessarily antithetical to 'act' when placed in apposition to it, so that there is no relevant genus to which the three words can be allocated. Irrespective of what is meant in the provision by the word 'act', and whether or not it takes colour from the words 'neglect' or 'default' that follow it, we consider that the discontinuance of the trial was at least in part attributable to a default of the appellant.
>
> • 'Default', said Bowen, LJ in *In Re Young and Harston's Contract* (1885) 31 ChD 168, 174, ' … is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances – not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction'.
>
> • To say that the word 'default' means not doing what is reasonable, or not doing something which you ought to do, does not imply that a default can arise only from a non-act. Those who do those things which they ought not to have done are guilty of a default equally with those who have left undone those things which they ought to have done. The same is true of an 'act' of negligence which may involve activity or passivity, as we are used to telling juries every day."

5.49 King J, in shorter reasons, also upheld the refusal to award Mr Woodhead a s.18(1)(c) certificate:

> • "I think also that the appellant's act in running away from the Court room made it necessary for the learned trial judge to discharge the jury, so that this was not a case where the discontinuance of the hearing was not attributable to the act of one of the parties thereto."

5.50 In *Grimwade* (1990) 51 A Crim R 470 the Victorian Supreme Court trial of Sir Andrew Grimwade and his three co-accused was adjourned after the death of Lady Grimwade. Twelve days after the death of Lady Grimwade, McDonald J ordered that the trial be discontinued. To require Sir Andrew to continue to give evidence, given his then state of ill-health, would have been unfair and unjust both to him and to the other accused. All four accused successfully applied for a certificate under s.18 of the ACA. McDonald J approved of the first passage of Else-Mitchell J and the passage of Moffitt J I have both cited in this advice. The Justice then addressed the meaning of "act", "neglect", and "default":

(a) An "act" occurs "if something is done by an accused or his legal practitioners and it results in a trial being discontinued and a new trial being ordered whether or not the act is wrongful" (at 475);

(b) The word "neglect" means "to fail to perform a duty or obligation or to omit or to fail, through carelessness or negligence, to do something. The omission to do something, however, in this context, in my view, should be an omission to do something which the accused or his legal practitioner is able to do." (at 476);

(c) The word "default" "means rather a breach or failure to perform a duty or an obligation." (at 476).

5.51 In *Primerano v Thayer* (unreported, VSC, Harper J, 30 May 1995, BC9503875) Primerano's committal hearing on a charge of committing an act of indecency with a child under the age of 16 was listed before Magistrate McGrane a few days after the Magistrate had dealt with the guilty plea of one Gavin Royle. Royle's daughter was the complainant in Primerano's charge. Royle had assaulted Primerano after hearing allegations his daughter had been the victim of Primerano's act of indecency.

5.52 A few days before Primerano's committal hearing was to commence the prosecutor advised Primerano's counsel that Magistrate McGrane was likely to be presiding over the committal. Primerano's counsel advised the prosecutor that Primerano would seek to have Magistrate McGrane disqualify himself should the Magistrate indeed be listed to hear the matter. "The prosecutor replied that he would speak to the Clerk of Courts and ask whether another Magistrate could be allocated to the case, but if not, the Police would oppose any application for Mr McGrane's disqualification."

5.53 The Clerk of Courts advised the prosecutor that no other Magistrate could be allocated to hear the case. The committal hearing was then listed before Magistrate McGrane. The Magistrate disqualified himself from hearing the matter, ordered

Primerano to pay $90 costs and rejected Primerano's application for a certificate under s.18(1)(c) of the ACA.

5.54 The Magistrate considered that the discontinued hearing before himself could not entitle Primerano to a certificate as the discontinuance was attributable to Primerano's "act, neglect or default".

5.55 Harper J of the Supreme Court of Victoria disagreed. Harper J found that both the prosecutor and Primerano's counsel had erred in reacting to the possibility of Magistrate McGrane being listed to hear the committal hearing. Primerano's counsel should have joined with the Police in an approach to the Clerk of Courts. The prosecutor should have realised that once he was aware that Magistrate McGrane was to hear the committal hearing, the Magistrate's disqualification "was inevitable".

5.56 Harper J, though, disagreed that the discontinued hearing before Magistrate McGrane was attributable to Primerano's act, neglect or default:

> • "It is true that the appellant's advisors ought to have joined with the police in an approach to the Clerk. It seems to me, however, that the primary reason that the proceeding was brought on 3 February was the refusal by the police to accept that Mr McGrane was not in the circumstances qualified to hear the charges against the appellant. Had the police conceded, as they should have done, that the rostering of another Magistrate was necessary, then the parties could have made a joint approach to the clerk, and that approach being by consent, doubtless to necessary administrative arrangements could have been made."

5.57 In *Beeby* (1999) 104 A Crim R 142; [1999] NSWCCA 30, Beeby, after a voir dire, pleaded guilty to drug charges. The Crown later filed a notice of motion seeking orders that Beeby's plea of guilty be rejected, or in the alternative that the Crown had leave to withdraw its acceptance of the plea of guilty; and that the Crown be permitted to present a fresh indictment. The Crown had belatedly realised that Beeby had pleaded guilty to a lesser charge than he was indeed guilty of. The trial judge granted the Crown leave to withdraw its acceptance of the plea of guilty and to present a fresh indictment, and granted Beeby a certificate under s.6A(1)(c) of the Act. The trial judge however, refused to order a stay or proceedings until certain of Beeby's costs were paid by the Crown. Beeby appealed to the Court of Criminal Appeal against the orders made in the Crown's favour.

5.58 Dunford J, with whom Powell JA and Dowd J agreed on this point, said at [24] of the trial judge's decision to grant a s.6(A)(1)(c) certificate:

> • "… I consider His Honour took a somewhat benevolent view when he said that what had happened was in no way attributable to any fault on the part of the applicant or his representatives. In my view, although the Crown may have been primarily to blame for the situation which developed, a major contributing cause of that situation was the act of the applicant, (on the advice of his legal representatives) in pleading guilty for tactical reasons to a charge which he knew he was not guilty of."

5.59 In *R v Bissette* [2004] WADC 225 the trial of the defendant began after he pleaded not guilty and a jury was empanelled. Immediately after empanelment the first juror swore her oath, and then immediately slammed her Bible hard onto the bench immediately in front of her. "The gesture was one which clearly displayed an attitude of annoyance, anger and disinterest." Furthermore, after the jury was sworn, a prospective juror, earlier excused from service, heard the charges being read out and began to sob loudly.

5.60 The trial judge, Mazza DCJ of the District Court of Western Australia, asked counsel if the trial could continue after both the first juror had slammed her Bible on the bench and the prospective juror had sobbed loudly. Both counsel agreed that the trial should be discontinued. The Judge agreed and granted the defendant a certificate under s.14(1)(c) of the *Suitor's Fund Act 1964* (WA), the Western Australian equivalent of s.6A(1)(c).

5.61 In *The State of Western Australia v Barbour* [2008] WADC 43 Keen DCJ of the District Court of Western Australia rejected Barbour's application for a certificate under s.14(1)(c) of the *Suitor's Fund Act 1964* (WA).

5.62 Barbour had on 3 September 2008 requested an adjournment of his sexual assault trial for two reasons. Firstly, he sought an analysis of the complainant's first urine sample. Secondly, there was late service by the prosecutor of treatment notes of the complainant's treating doctor. The prosecutor conceded that the doctor's notes had been served late.

5.63 The adjournment was granted. The Judge then rejected Barbour's application for a certificate because of his request in relation to the urine sample was belated, and because this belated request (at [15]) was the principal reason that the adjournment was required. The trial was adjourned. The hearing was therefore adjourned because of the act, neglect or default of Barbour.

5.64 Judgments from jurisdictions outside NSW query the correctness of the approach of the NSW judgments *Greaves v Blackborrow* and *Acquilina.* The NSW authorities state that any if act, neglect or default of the accused or the accused's legal representatives, irrespective of whether the act, neglect or default was wrongful, contributed to the discontinuance, then the applicant is barred from applying for a certificate under s.6A(1)(c). A majority of the Full Bench of the Supreme Court of Victoria in *Woodhouse v Capricorn Caravans* refused to follow *Greaves v Blackborrow*. Other judgments, such as the Victorian Supreme Court judgment in *Primerano v Thayer*, and the District Court of Western Australia judgment of *Barbour*, bar the accused from applying for a certificate only if the accused's "act, neglect or default" was the "major" or "primary" reason for the discontinuance. Despite the variation in the judgments across the jurisdictions, the binding authorities are the NSW authorities.

Claims where court lacked jurisdiction to hear matter

5.65 In *Foody v Horewood* (2000) 96FLR 386 Mr Foody had applied for various orders under the *Corporations Law* against Mr Horewood. The application was to be heard shortly after the High Court had handed down its decision in *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839. The High Court's decision made it clear that the Federal Court lacked the jurisdiction to hear Mr Foody's application. The parties then applied for a certificate for their costs wasted as a result of the discontinued hearing. Finkelstein J of the Federal Court of Australia held, in a decision under the FPCA, that where an action is stayed for want of jurisdiction, the court does not have power to grant a costs certificate. The FPCA was directed only to the situation where the discontinued hearing was within the jurisdiction of the Court to adjudicate.[19]

5.66 As the FPCA also refers to the discontinuance of the hearing, the decision in *Foody v Horewood* is relevant to New South Wales legislation.

"New trial ordered"

5.67 In *R v Pack* [1999] NSWCCA 316 a part-heard appeal in the CCA by Mr Pack against his conviction on charges of sexual assault had to commence afresh before a differently constituted court. Mr Pack applied to the Court under s.6A(1)(c) for relief from the costs he incurred for the hearing of the abandoned appeal. The Court rejected Mr Pack's application as the new appeal hearing was not a new trial ordered.

5.68 In *Blackman v Blackman*, [2003] NSWSC 1200 Hamilton J held that the new trial had to be ordered by the presiding judge, and not a registrar at a subsequent callover.

Quantum of payment from Fund

5.69 The final paragraph of s.6A(1) permits a party entitled to apply to the DG under the sub-section to seek reimbursement of the costs they incurred in the proceedings before they were rendered abortive, or quashed, or discontinued. The DG has a discretion as to what sum, if any, is paid: *Hanna v Horler* (1999) 154 FLR 166; [1999] NSWSC 1159 at [18].

5.70 The meaning of "incurred" was considered by the Full Court of the Supreme Court of Western Australia in *Re Appeal Costs Board; Ex parte Legal Aid Commission of Western Australia & French* (2001) 120 A Crim R 361. Kennedy J said at [14]:

> • "Costs may be taken as being incurred only if the costs had been paid, or if the accused has undertaken liability to pay them. There is no suggestion that Mr French has paid any costs as a consequence of the adjournment, nor any suggestion that he has undertaken any obligation to pay any costs."

[19] *Foody v Horewood* was followed in *Brazier* (2002) 135 A Crim R 48; [2002] WASCA 273.

5.71 Else-Mitchell J in *Greaves v Blackborrow* (1961) 78 WN (NSW) 517 said at 517 that a person entitled to apply to the Director General "would be entitled to recoupment from the Fund of the costs incurred by them and wasted".

5.72 In *Murphy v Obst* [1996] 2 VR 613; (1996) 86 A Crim R 51, the headnote reads Tadgell and Phillips JJA held that the applicant's only entitlement to payment was:

> • "Of such costs as the board was satisfied were thrown away when they were replicated by costs incurred on the second occasion as a consequence of the order for a new trial."

5.73 In *Beeby* (1999) 104 A Crim R 142; [1999] NSWCCA 30, the headnote reads that Dunford and Dowd JJ held:

> • "There was no basis on which Beeby could be entitled to any costs in respect of the *voir dire* hearing, as those costs had not been 'thrown away', and if the same issue of admissibility arose in the new trial the parties would be bound by the ruling of the trial judge."

5.74 In *AG-NSW v World Best Holdings Limited* [2005] NSWCA 261 Spigelman CJ said at [136], in a comment specific to the facts of that case but applicable to the Act, that:

> • "It is not necessarily the case that the time and effort involved in the first hearing is entirely wasted. A second hearing will not necessarily require everything to be repeated."

5.75 I therefore consider that costs "wasted" are costs of attendances in the aborted, or quashed or discontinued hearing which need to be "replicated" for the second hearing.

5.76 The maximum payment from the Fund under s.6A(1) is $10,000: s.6(1B)(a)

5.77 Section 6A has provisions similar to ss.6(2A), (5A), and (7): ss.6A(1B), (1A), and (2) respectively.

6. Section 6B – Appeals on quantum of damages

6.1 Section 6B permits the Court of Appeal to grant the respondent to a successful appeal on the question of excessive or inadequate damages a certificate entitling the respondent to the same benefits as a certificate granted under s.6. The Court has a discretion as to whether a certificate is granted.

6.2 There are few decisions on this provision.

6.3 The comments of Moffitt P in *Acquilina v Dairy Farmers Co-Operative Milk Co. Ltd (No. 2)* [1965] NSWR 772 on the purpose of s.6A are equally applicable to the purpose of s.6B.

6.4 In *Cole v The Commonwealth* [1964] NSWR 1035 the respondent to a High Court appeal that succeeded only on the question of damages had his application for a

certificate under s.6(1)(b) rejected as such an appeal was not an appeal on a question of law. The final words of the judgment of Asprey J queried whether the absence in s.6B of any reference to the High Court indicated an intention by Parliament to limit the respondent's right under the section only to appeals dealt with by the Full Court of the Supreme Court. However he did not feel the need to answer this question.

6.5 In *Uren v Australian Consolidated Press Ltd* [1965] NSWR 371 at 397 Walsh J left open the question of whether s.6B applies when an appeal succeeds both on a challenge to the quantum of damages and on other grounds.

6.6 In *Zullo v Callipari*, (unreported; NSWCA; Kirby P, Hope and McHugh JJA; 15 February 1985) the Court of Appeal overturned a jury's award on damages and ordered a re-trial on the issue of damages. The respondent sought a s.6 certificate. The Court rejected the application as the successful appeal, challenging only the quantum of damages, raised only a question of fact. Kirby P said: "Those questions may be matters proper to be considered in the application of s.6B(1) of the Act. However, the application for a certificate under s.6(1) must be refused."

6.7 These three cases refer to awards of damages by juries. As explained at [4.19]-[4.20] above, the authorities state that a challenge to a judge's assessment of damages also involves no question of law.

6.8 Soon after the decision in *Zullo,* the *Suitors' Fund (Amendment) Act 1987* amended s.6 of the Act to permit the Supreme Court in applications under s.6(1)(a) to grant a certificate when an appeal had succeeded on a question of fact. In *Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1985) 1 NSWLR 491 it was held that the s.6(1)(a) words "Supreme Court" also included the Court of Appeal. There is therefore, since the passing of the 1987 amendments, no difference in the powers of the Court of Appeal under ss.6 or 6B to grant a certificate when there is a successful appeal solely on the quantum of damages. It therefore seems that there is no need for the continued existence in the Act of s.6B.

6.9 The maximum payment from the Fund under s.6B is $10,000: s.6B(1)(ii).

6.10 Section 6B has provisions similar to ss.6(2A), (5A), and (7): ss.6B(1)(ii), (5) and (6) respectively.

7. Limitation periods for grant of certificate/The Act and the slip rule

7.1 There is no limitation period for the grant of a certificate under the Act but a court should generally not grant an application made long after the delivery of the substantive judgment: *Hometeam Constructions Pty Ltd v McCauley (No 2)* [2007] NSWCA 278 at [11]. The *Limitation Act 1969* does not apply to an application to the

Director General for payment from the Fund: *Furber v Gray* [2002] NSWSC 1144 at [22].

7.2 Orders under the Act can be amended under the slip rule: *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (unreported; NSWCA; Spiegelman CJ, Handley & Beazley JJA; 2 August 2006); *Killen v Rennie* [2006] NSWCA 189.

8. Section 6C

8.1 Section 6C permits "a party to an appeal" who is not entitled to a payment under ss.6, 6A or 6B of the Act, to receive a payment from the Fund if the payment falls within the "spirit and intent of those sections".

8.2 The maximum payment from the Fund under s.6C is $10,000: s.6C(2).

Effect of recommendation for a Section 6C payment

8.3 Litigants often request courts to recommend to the Director General or Attorney General a payment under s.6C. There is contradictory case law on the validity of such a recommendation.

8.4 In *Hales v Consumer Claims Tribunal* (unreported, NSWSC, Allen J, 30 November 1990) Allen J recommended that payment be made under s.6C to the successful appellant, Hales. Hales was forced to appeal when the Supreme Court Registry mistakenly issued to the respondent a writ of execution on Hales' property prior to the respondent's taxation of costs payable by Hales.

8.5 In *Director General of NSW National Parks and Wildlife Service v L Sides Pty Ltd* [1994] NSWLEC 132 the Land and Environment Court could not grant a certificate to the unsuccessful respondent under s.6(1AA) because the successful appeal was not one under s.56A of the *Land and Environment Court Act 1979*. Instead, the Court suggested to the respondent an application to the Director General under s.6C.

8.6 In *Kingsford v Kavanagh* (unreported; NSWCA; Meagher, Handley and Sheller JJA; 21 November 1994), Meagher and Handley JJA recommended to the Under Secretary of the Attorney General's Department that the unsuccessful appellant, Kingsford, receive a payment under s.6C. They believed that Registry errors had caused the appeal to take eight years to be heard, so increasing Kingsford's costs of the appeal.

8.7 In *The Owners – Strata Plan No 6522 v Thomas* (unreported, NSWSC, Howie AJ, 19 December 1997) a prosecutor brought to the Supreme Court two stated cases concerning determinations by a magistrate dismissing two complaints of contraventions of the *Strata Titles Act 1973* notwithstanding the Defendants had pleaded guilty. Howie AJ, despite finding the Magistrate was in error in dismissing the two complaints, declined to remit the matter back to the Magistrate simply on a

question of costs. The summons was dismissed and the prosecutor was ordered to pay the defendants costs. Howie AJ concluded:

> • "It is unfortunate that the plaintiff who was justifiably aggrieved by the magistrate's decision should be left to foot the bill not only of the proceedings which were quite appropriately taken before the magistrate but also of these proceedings. However, it would not be just to allow the appeal and remit the matter simply because of an issue of costs. Unfortunately I cannot give a certificate under the Suitors' Fund Act where I am dismissing a stated case notwithstanding that the magistrate was erroneous in point of law. However, I commend s.6C of the Act to the plaintiff."

8.8 In *R v Pack* [1999] NSWCCA 316 the Court rejected Mr Pack's application under s.6A(1)(c), but the Court at [10] made a tacit recommendation to the Director General that a payment under s.6C would be within the spirit and intent of s.6A(1)(c):

> • "This Court can make no order under s.6C of the Suitors Fund Act but in our opinion there is merit in the submission that a payment from the Fund would be within the spirit and intent behind s.6A(1)(c) of the Suitors Fund Act."

8.9 In *R v Lilley* (2000) 111 A Crim R 468; [2000] NSWCCA 57 Lilley was the unsuccessful respondent in a prosecution appeal against Lilley's sentence. Lilley requested the Court of Criminal Appeal to recommend to the Director General that he receive a payment under s.6C. Smart AJ (Fitzgerald JA, Barr J agreeing) at [34]-[37] refused to make the recommendation because s.6C gave no role for a Court.

8.10 In *Knudsen v Kara Car Holdings Pty Ltd (No 2)* [2000] NSWSC 943 the unsuccessful defendants at a re-trial foreshadowed they would apply under the *Suitors Fund Act* for payment. Austin J at [67] held that he had no jurisdiction to grant a certificate under ss.6, 6A or 6B, but recommended to the Director General that the defendants be paid under s.6C:

> • "This is a case where the defendants were successful in their appeal [to the Court of Appeal], with the result that a point not properly considered at the first hearing was the subject of determination of the hearing [before Austin J], the point was decided against them and so they have failed in the proceedings and will have to pay costs and interest. Circumstances do not fall within any of ss. 6, 6A and 6B, but the Director-General has a discretion to authorise a payment under s.6C. Given the success of the appeal, the fact that the point raised for determination was difficult in fact and law and certainly arguable, and therefore it was reasonable for the defendants to raise it, my view is that this may be a proper matter for the favourable exercise of the Director-General's discretion. The defendants may therefore think it appropriate to make an application to the Director-General under s.6C."

8.11 In *R v Gilfillan* (2003) 139 A Crim R 460; [2003] NSWCCA 102 the Court, after refusing at [87]-[92] to grant a certificate under s.6A(1)(b), followed *Lilley* and refused to make a recommendation to the Director General for payment under s.6C.

8.12 In *Blackman v Blackman* [2003] NSWSC 1200 at [5] Hamilton J after rejecting the plaintiff's application under s.6A(1)(c), recommended that a payment under s.6C be made. However, the Judge conceded his recommendation was not the relevant opinion:

> • "It certainly seems to me that such a payment 'would be within the spirit and intent of' s.6A. But under s.6C my opinion is not the relevant opinion and the matter is to be decided entirely by the opinion of the Director-General."

8.13 In *R v King* (2003) 59 NSWLR 472; [2003] NSWCCA 399, the Crown successfully appealed to the Court of Criminal Appeal under s.5F(2) of the *Criminal Appeal Act 1912* against the decision of the trial judge to order a permanent stay of the trial. The Court granted King's application for a certificate under s.6(1) of the Act. Dunford J (Spigelman CJ and Adams J agreeing) at [98]-[105] observed, though, that had King been the successful appellant in a s.5F(3) appeal, his only costs remedy would have been to apply to the Director General under s.6C.

8.14 In *Krslovic Homes Pty Ltd v Sparkes* [2004] NSWSC 374, Krslovic Homes successfully sought judicial review of the purported decision of a member of the Consumer Trader and Tenancy Tribunal, who at the time of the decision was no longer a member of the Tribunal. Shaw J at [18] held that no responsibility for the events that brought the matter to the Supreme Court lay upon any of the parties. The Judge, as Hamilton J did in *Blackman*, at [49] recommended to the Director-General that a s.6C payment to Krslovic Homes would be within the spirit and intent of ss.6, 6A or 6B of the Act, but conceded that the decisions as to whether payment was within the spirit and intent, and if so, whether a payment should be made "are essentially for the Director-General of the Department and for the Attorney General".

8.15 In *Re Katherine* (unreported, NSWSC, Studdert J, 26 November 2004) a plaintiff brought a successful application for judicial review of a decision of a court below. Studdert J at [17] did not consider it appropriate that any of the defendants pay the plaintiff's costs. "However it does seem to me to be altogether appropriate for the Director-General to make a payment from the Fund pursuant to s.6C of the Suitors Fund Act in respect of the plaintiffs' costs."

8.16 In *Monie v The Commonwealth of Australia* (2005) 63 NSWLR 729; [2005] NSWCA 25, the Court of Appeal ordered a retrial of damages as the trial judge failed to give an adequate judgment, and ordered that the costs of the first trial be decided in the new trial. Hunt AJA (Giles and Bryson JJA agreeing) appeared to indicate at [70] that had the parties addressed the Court on the issue of some reimbursement under s.6C, then the Court would have considered the submissions.

8.17 In *Boreland v Docker & Ors (No. 2)* [2007] NSWCA 275 the Court at [29] ordered, because each party had equal success on the appeal, that each party pay their own costs of the appeal. When the appellant asked that the respondent be granted a certificate under the Act the Court said at [27]:

> • "The appellant also sought an order be made that the respondents have a certificate under the *Suitors' Fund Act 1951* (NSW) (the Suitors' Fund Act) in respect of the costs of trial. We do not propose to make such an order. The circumstances in which a payment may be made out of the Suitors' Fund for the costs of a trial are limited and relevantly, in a case such as the present, dependent upon the Director-General, with the Attorney-General's concurrence, forming an opinion that a payment should be made: see s.6C of the Suitors' Fund Act. That is not a matter for the Court."

8.18 In *DPP v Moradian* [2010] NSWCCA 27 at [9] the Court said:

> • No question arises in the present case as to the operation of s 6C. It permits the exercise of a discretionary power by the Director-General, but is not based upon and indeed assumes the absence of, a certificate granted by the Court under s 6, or another relevant provision. As has been said on a number of occasions, this Court has no role in respect of any possible application to the Director-General under this provision: see *R v Pack* [1999] NSWCCA 316 at [9]-[10]; *R v Lilley* [2000] NSWCCA 57; 111 A Crim R 468 at [35]-[37]; *R v Gilfillan* [2003] NSWCCA 102; 139 A Crim R 460 at [91].

8.19 There judgments show that the courts have adopted three different approaches to s.6C:

- courts occasionally make recommendations for payment to the Director-General,
- court occasionally make recommendations for payment to the Director-General, but concede that the final decisions for payment are to be made by the Director-General and the Attorney General,
- other courts have considered they have no role to play under s.6C, and make no recommendation.

8.20 As four appeal judgments – *Lilley, Gilfillan*, *Boreland and Moradian* – have expressly held that a court has no role to play under s.6C, I consider that the weight of authority is against courts making s.6C recommendations for payment.

9. How to make a claim upon the *Suitors' Fund*

9.1 Claims are submitted to the Legal Services Branch of the Department of Justice and Attorney General.

9.2 The appendix to this paper reproduces the Department's homepage for the making of claims upon the *Suitors' Fund*, and contains that site's web address.

10. Acknowledgments

I acknowledge the assistance provided by the texts *Law of Costs* (2009) Butterworths, by Professor Dal Pont, and the Law Book Company service *Quick on Costs*. Without their chapters on the *Suitors' Fund Act* I could not have prepared this paper. For further reading I recommend these texts.

11. Short Biography of Attorney General Clarence Martin

Martin was born in Ballarat on 9 February 1900 and was elected for the Labor Party to the Legislative Assembly seat of Young in October 1930. He served as Attorney General from 1941 to 1953.

He had ambitious plans for substantial law reform. His most notable achievement was widening legal aid through establishing the posts of public defender (1941) and public solicitor (1944). In the face of wartime pressures, party hostility and indifference, he failed in his endeavours to abolish the death penalty and to reform the married women's property law.

Following Premier James McGirr's resignation in April 1952, Martin decisively lost the leadership ballot to John Joseph Cahill.

Martin, then the Member for Waverley, died of a haemorrhage from a duodenal ulcer on 5 September 1953 at his Centennial Park home. His wife and 14-year-old son survived him.[20]

[20] These biographical facts are taken from Martin's biography in the *Australian Dictionary of Biography – online edition* http://adbonline.anu.edu.au/biogs/A150371b.htm

Suitors Fund Act 1951

PLEASE NOTE!

When providing documentation to the Department of Justice and Attorney General (Legal Services Branch), it will be necessary to provide a copy of the costs agreement **made out to the client** and invoices, plus any other evidence in support of disbursements.

All applications and supporting material should be sent to:

The Director
Legal Services Branch
Department of Justice and Attorney General
DX 1227
GPO Box 6
Sydney NSW 2001

The *Suitors' Fund Act 1951* provides for the establishment and maintenance of a fund to mitigate costs incurred in court proceedings through no fault of the parties, in certain circumstances. These circumstances are set out in sections 6, 6A and 6B of the Act.

Administration of the Fund

The Director General of the Attorney General's Department is designated as a Corporation Sole for the administration of the Fund and has the responsibility for its proper functioning and compliance with audit requirements. The Director General is the Fund's legal figurehead.

The Director General must approve all applications made under the Act, except for applications under section 6C, which must be approved by the Director General with the concurrence of the Attorney General.

Procedure

There are three broad categories of circumstances which may give rise to applications for payment from the Fund. They are:

· appeals under sections 6 and 6B,
· aborted or discontinued trials under section 6A and
· applications which do not fall under section 6, 6A or 6B and where section 6C may apply.

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Appeals

Section 6 relates to successful appeals on a point of law (or fact, but only in the Supreme Court) and section 6B relates to a successful appeal on quantum only.

Judicial officers have the discretion to grant an indemnity certificate to an unsuccessful respondent. No appeal lies against a decision not to grant an indemnity certificate (section 6(5)).

An indemnity certificate entitles the respondent to make an application for payment from the Fund. The original sealed indemnity certificate or a certified copy must be produced before an application can be finalised.

Only the unsuccessful respondent(s) to proceedings is entitled to an indemnity certificate. An indemnity certificate cannot be granted to a successful respondent, or to the appellant under any circumstances. Only one indemnity certificate can be granted to a respondent in respect of an appeal. A certificate can be granted to more than one respondent to an appeal.

The Courts Legislation Further Amendment Act 1997 limits payment from the Fund in respect of any one appeal to $10,000 (or $20,000 for High Court appeals). If a number of certificates are granted by the Court, the Act provides for payment to be apportioned between the respondents. This amendment applies to appeals lodged on or after 2 February 1998.

Sections 6(7) and 6B(6) specify that an Indemnity Certificate cannot be granted to the:

· Crown, or
· a corporation with a paid-up share capital of $200,000 or more, or a corporation RELATED to a corporation with a paid-up share capital of $200,000 or more.

Applications may be made by the unsuccessful respondent, his or her legal representative or a trustee appointed over the respondent's estate in bankruptcy or in probate. Where an unsuccessful respondent was in receipt of a grant of legal aid for the appeal proceedings, the application must be

made by the Legal Aid Commission.

However, an appellant, or his or her legal representatives etc. can apply to the Fund where the respondent has been granted an indemnity certificate, but unreasonably neglects or refuses to pay the appellant's costs, or after diligent search and inquiry, the appellant cannot locate the respondent to enforce the order for costs (section 6(2)(a)).
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What costs can be paid from the Fund?

A respondent who has been granted an indemnity certificate may, or may not, be ordered to pay the appellant's costs of the appeal. However, most indemnity certificates are granted where the respondent has been ordered to pay the appellant's costs of the appeal.

Where an indemnity certificate has been granted to a respondent who has not been ordered to pay the appellant's costs, the respondent may only recover his own costs as assessed. The costs of having the respondent's bill assessed may also be included in any payment from the Fund (section 6(2)(b)).

Where an Indemnity Certificate has been granted to the unsuccessful respondent, and the respondent has been ordered to pay the appellant's costs, the respondent may make an application for payment from the Fund for:

- reimbursement of the costs of appeal paid to the appellant; PLUS
- payment of their own assessed costs of the appeal; OR
- a sum equal to 50% of the appellant's costs provided this is less than or equal to the respondents own assessed costs. The election of 50% may assist the respondent in avoiding further costs and inconvenience.

NOTE: The combined costs paid to the appellant and respondent cannot exceed the applicable limit (usually $10,000).

Payment of the respondent's costs cannot exceed that of the appellant's (section 6(2)((c)(i)). For example, if the appellant's assessed costs are $4,000, and the respondent's assessed costs are $6,000, the respondent is only entitled to $4,000 for his own costs AS WELL AS $4,000 for the appellant's costs (total $8,000).

If the appellant's costs exceed the sum payable from the Fund, the respondent remains liable for the payment of the remainder of the costs.

NOTE: The respondent must be personally liable for the payment of the appellant's costs. An example of where a respondent may not be personally liable is where a third party, such as an insurance company, has agreed to meet these costs.
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Assessment of costs

Only assessed costs are normally allowed. Assessment ensures the parties claims are reasonable. The parties will usually need to provide a certificate, issued by a costs assessor, pursuant to the Legal Profession Act 1987.

If the assessment is not contested, the Director General has the authority under section 6D to pay only those costs he considers reasonable.
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Assessment may be dispensed with in these circumstances

If the appellant's costs are well over the applicable limit (eg. $20,000 Counsel's fees alone) it may be possible to dispense with the requirement for assessing the appellant's costs. This might also apply in relation to the respondent's costs where they have not been ordered to pay the appellant's costs.

If the parties reach agreement as to the costs to be paid. In this case, evidence is required from the appellant that an agreement has been reached (such as a formal agreement or advice on their letterhead). Further, evidence of negotiation of costs is needed to assist in determining the reasonableness of the agreed amount.
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Appellants Costs to be Paid

Before any payment can be made to the respondent the appellant's costs must have actually been paid by the respondent (section6(2)(a)). A receipt is required as evidence of this payment. A receipt may be in the form of a letter of acknowledgment from the appellant's solicitor, or a letter acknowledging the appellant's costs have been set off against an award of monies to be paid to the respondent.

However, pursuant to the requirements in section6(2)(a), if payment of the costs by the respondent would cause undue hardship, the respondent may request that payment from the Fund be made direct to the appellant.
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Appeals in sequence

Where a certificate is granted to an unsuccessful respondent, and a subsequent appeal is commenced, no payment can be made from the Fund until such time as the subsequent appeal is finalised. In short, all proceedings must be completed and no further appeals contemplated before a payment can be made from the Fund. This is because the orders of the previous court may be overturned on appeal, ie., the granting of the certificate may be rescinded.

Where a subsequent appeal does succeed the respondent is no longer entitled to payment from the Fund pursuant to the certificate granted in the earlier appeal (section 6(3)(b)).

Where a subsequent appeal does not succeed but a further indemnity certificate is granted and the respondent is a party to that appeal, the certificate granted is vacated, whether the respondent is granted the new certificate or not.

Where the respondent is granted an indemnity certificate following a sequence of appeals, they are entitled to the costs associated with all previous appeals as well, subject to the applicable limit (section 6(2)(b)).
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Documents and other Information required for Applications Under Section 6 or 6B

The documents required to be provided to the Department in support of an application are:

- The sealed Indemnity Certificate issued by the Court.
- The Minute of Order upholding the appeal or a certified copy of a

transcript of the judgment on appeal.
· The Certificate of Assessment of the appellant's costs of the appeal, OR
· Evidence of an agreement as to costs (evidence of negotiation of costs will be required), OR
· Evidence that the appellant's costs are well in excess of $10,000 (evidence in the form of a detailed bill of costs will be required).
· Either
(i) evidence that the appellant's costs have been satisfied, or
(ii) A statutory declaration from the respondent indicating his or her inability to pay the appellant's costs and requesting that the Fund pay these costs direct to the appellant, or
(iii) A statutory declaration or affidavit from the appellant setting out the respondent's refusal to pay, or the appellant's inability to locate the respondent, and requesting payment be made direct to the appellant. Substantive evidence in support must also be provided.
· Either
(i) The Certificate of Assessment of the respondent's costs of the appeal, or
(ii) An election by the respondent to accept 50% of the appellant's assessed costs.

NOTE : All documents must be originals or certified copies.
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Other information required

· Confirmation that the respondent is personally liable for the payment of the costs.
· Where the respondent is a corporation, a copy extract from the annual report or an Australian Securities Commission search which establishes that the respondent does not have a paid-up share capital of $200,000 or more and is not related to a corporation with such a paid-up share capital.
· Where the respondent was in receipt of legal assistance, either under the Legal Aid Commission Act 1979 or from any other source, details of the grant including amounts paid and any contributions imposed on the respondent.

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Other information which may be required

· A form of authority, witnessed by a Justice of the Peace, if payment is to be made in any name other than the principal.
· Details of the cause of action and grounds of appeal

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Aborted and Discontinued Trials

Before payment can be made pursuant to section 6A of the Act additional costs must have been incurred by way of a new trial having been had.

Under section 6A parties may be entitled to a payment from the Fund where:

· a trial is aborted or discontinued because of the death or protracted illness of a Judge, Magistrate or Justice;
· an appeal on a question of law against conviction on indictment is

upheld and a new trial is ordered;
· an appeal against damages or an appeal against sentence heard by 2 judges is rendered abortive where the judges who heard the proceedings were divided in opinion as to the decision determining the proceedings;
· the hearing is discontinued by the presiding Judge, Magistrate or Justice and a new trial is ordered for a reason not attributable to:
· disagreement on the part of the Jury; or
· the act, neglect or default of all or of any one or more of the parties in civil proceedings; or
· the act, neglect or default of the accused in criminal proceedings.

Note In category (4) above, an application can only be made when a party or the accused, as the case may be, is granted an indemnity certificate by the court. The presiding Judge or Magistrate has a discretion as to whether to grant an Indemnity Certificate. There is no right of appeal against a decision not to grant an indemnity certificate.

Additional costs must be incurred by way of the new trial had. No payment can be made where no new trial has been had. So, notwithstanding that the previous proceedings have been aborted, if the matter is no-billed, or not proceeded with, or settled without a hearing commencing, payment cannot be made from the Fund.
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When does a hearing commence?

In matters with a jury, it is generally accepted that a trial is commenced when the jury is empanelled and not at the mere reading of the indictment or charge. In matters without a jury, it is when the matter is called before the court for hearing and the parties indicate they are ready to proceed.

If a matter is finalised, whether by settlement, withdrawal or in some other manner after the jury has been empanelled or the parties have indicated they are ready to proceed and the court calls the matter on for hearing, a new trial has been had, and the applicant may be entitled to payment from the Fund.

The same test applies for determining whether a trial has been aborted or discontinued. A matter has not been discontinued or aborted because it has not been reached, ie. there has not been sufficient time to hear the matter, or because it has been adjourned.
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What costs are payable?

The Act permits the Director General to pay the applicant their original costs, or such part thereof, of the aborted or discontinued proceedings, so long as additional costs have been incurred (section 6A(1)(c)).

The original costs are restricted to those costs which are lost, thrown away or duplicated by virtue of the discontinued or aborted proceedings and the need for a new trial. So if a solicitor has done some preparatory work for a case which does not need to be done again for the new trial, the costs of this work will not be met from the Fund.

No appeal lies against the Director-General's decision to refuse a claim or to reduce a claim.

NOTE: The respondent must be personally liable for the payment of the appellant's costs. An example of where a respondent may not be personally liable is where a third party, such as an insurance company, has agreed to

meet these costs.
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Determining what costs should be paid

In order to determine what costs should be paid from the Fund, the applicant must provide

1) A memorandum clearly indicating details of the costs lost, duplicated or thrown away by reason of the aborted proceedings and subsequent new trial, complete with copies of counsel's memoranda and evidence in support of disbursements claimed.

2) A bill of costs for the new trial. This enables the assessing officer to be satisfied that additional costs have been incurred and to gauge what work was required for the new trial. This bill does not have to be itemised.

Bills are assessed for reasonableness by the Crown Solicitor, who advises as to what costs should be paid.

A payment cannot be made to the Crown (which includes the Legal Aid Commission), a corporation with a paid-up share capital of $200,000 or a company related to such a corporation.
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Documents Required for Application Under section 6A

The following documents are required in support of an application:-

· The original sealed or a certified copy of the Indemnity Certificate issued by the Court under section 6A(c) only.
· A memorandum clearly indicating details of the costs lost, duplicated or thrown away by reason of the aborted proceedings and subsequent new trial, complete with copies of counsel's memoranda and evidence in support of disbursements claimed.
· A general assessment of costs for the new trial had.

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Applications Pursuant to Section 6C

The Director General, with the concurrence of the Attorney General may authorise payment in cases where:-

· a party to an appeal or other proceedings incurs or is liable to pay costs in the appeal or proceedings;
· the party is not otherwise entitled to a payment from the Fund in respect of the costs; and
· the Director General is of the opinion that a payment from the Fund in respect of the costs, although not authorised by section 6, 6A or 6B would be within the "spirit and intent" of the Act.

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Not otherwise entitled to payment from the Fund

This means the application cannot be paid from the Fund pursuant to section 6, 6A or 6B. For example, if a judicial officer resigns before finalising a matter, the application does not fall under section 6A(1)(a) because that

section only provides for the death or protracted illness of a Judge. The application cannot be paid pursuant to section 6A(1)(c) either as the proceedings have not been discontinued and a new trial has not been ordered. Therefore, the claim can be considered under section 6C.
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"Spirit and Intent" of the Act

The general intent of the Act is to mitigate costs incurred in proceedings through no fault of the parties, in certain circumstances. The fundamental principle underlying the Act is that parties should not have to have two sets of proceedings to determine the one matter. It is not the purpose of the Act to assist in meeting costs unreasonably incurred, or incurred through the vicissitudes of litigation (including where proceedings are adjourned).

Applications should be made in writing to the Director General, clearly setting out the circumstances of the proceedings, and stating why it is believed the application should be considered under section 6C.
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