[2020] WADC 90

JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	**:**	PERTH
CITATION	**:**	PARKER -v- CITY OF ROCKINGHAM [2020] WADC 90
CORAM	**:**	VERNON DCJ
HEARD	**:**	6 DECEMBER 2019
DELIVERED	**:**	19 JUNE 2020
FILE NO/S	**:**	APP 69 of 2019
BETWEEN	**:**	DALE PARKER Appellant AND CITY OF ROCKINGHAM Respondent

ON APPEAL FROM:

Jurisdiction	**:**	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	**:**	MAGISTRATE ATKINS SM
File Number	**:**	PER/GCLM/7997/2017

Catchwords:

Local government - Statutory interpretation - The costs of proceedings

Legislation:

District Court Rules 2005 (WA), r 50(1)(d)
Fire and Emergency Services Act 1998 (WA), s 36Z(2)
Local Government Act 1995 (WA), s 6.56
Magistrates Court (Civil Proceedings) Act 2004, s 40(1), s 40(3), s 40(4)

Result:

Appeal allowed in part

Representation:

Counsel:

Appellant	:	Mr B W Ashdown
Respondent	:	Mr J C Yeldon

Solicitors:

Appellant	:	Rowe Bristol Lawyers
Respondent	:	C S Legal

Case(s) referred to in decision(s):

Acuthan v Coates (1986) 6 NSWLR 472
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27
Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172
Australian Education Union v Department of Education and Children's Services [2012] HCA 3; (2012) 248 CLR 1
Bell Lawyers v Pentelow [2019] HCA 29; (2019) 372 ALR 555
Bow Ye Investments Pty Ltd (in liq) v Director of Public Prosecutions (No 2) [2009] VSCA 278
Cachia v Hanes [1994] HCA 14; (1994) 179 CLR 403
EMI Records Ltd v Ian Cameron Wallace Ltd [1983] 1 Ch 59
Flotilla Nominees Pty Ltd v Western Australian Land Authority (2003) 28 WAR 95, [2003] WADC 122
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd (1988) 81 ALR 397
Josephson v Walker [1914] HCA 68; (1914) 18 CLR 691
Keet v Ward [2011] WASCA 139

Koutlakis v City of West Torrens [2009] SASC 140
Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534
Mustac v Medical Board of Western Australia [2007] WASCA 128
O'Dea v Shire of Coolgardie [2013] WADC 150
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Re JJT; Ex Parte Victoria Legal Aid [1998] HCA 44
Rodwell v Hutchinson [2010] WASCA 197
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WADCA 129 (S)
Unioil International Pty Ltd v Deloitte Touche Tohmatsu (a firm) (No 2) (1997) 18 WAR 190
Walker v Bowry [1924] HCA 28; (1924) 35 CLR 48
Western Planning Commission v Narcom Holdings Pty Ltd [2011] WASC 259 (S)

VERNON DCJ:

1 The appellant appeals from a decision of a magistrate in proceedings brought by the respondent to recover arrears of rates and service charges imposed under the *Local Government Act 1995* (WA) (LGA) and levies imposed under the *Fire and Emergency Services Act 1998* (WA) (FESA) (collectively 'rates'). The respondent also claimed the legal costs the respondent had incurred in the proceedings, relying on s 6.56 of the LGA.

2 The magistrate ordered that judgment be entered in favour of the respondent in the sum of $13,232.62, for rates, and that further judgment be entered in favour of the respondent in the sum of $62,344.96, for legal costs the respondent had incurred in relation to the proceedings.[1]

3 At a hearing on 2 May 2019 the magistrate was informed that the appellant would consent to judgment for the arrears of rates but opposed the claim for costs.[2] The appellant sought further disclosure of documents relevant to the issue of the reasonableness of the costs claim.[3] The magistrate heard argument on those issues and the hearing was adjourned to 14 August 2019.[4] The appellant filed further written submissions on the costs issue before that hearing.[5]

4 On 14 August 2019 the magistrate delivered oral reasons in which her Honour decided, in summary, that, pursuant to s 6.56 of the LGA, the respondent had a statutory entitlement to recover the legal costs it had incurred in relation to the proceedings, upon proof of that amount, and that the magistrate had no discretion to assess those costs. In doing so, her Honour relied on the decision of Judge Davis in ***O'Dea v Shire of Coolgardie***.[6]

5 As the magistrate considered the only issue was whether the respondent had, in fact, incurred the costs, her Honour refused to order that the respondent disclose further documents relevant to the assessment of the reasonableness or otherwise of the costs claimed.[7]

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[1] Order dated 14 August 2019, see also ts 54, ts 75 and ts 76, 14 August 2019.
[2] ts 3, ts 2 May 2019, on the basis that the respondent had withdrawn its claim to recover the legal costs of previous recovery proceedings in the amount of $9,972.
[3] At that stage the claim for costs was about $52,000: ts 26 and ts 28, 2 May 2019.
[4] ts 33, 2 May 2019.
[5] ts 47, 14 August 2019.
[6] ts 49 - ts 54, 14 August 2019; ***O'Dea v Shire of Coolgardie*** [2013] WADC 150.
[7] ts 53 - ts 54, 14 August 2019.

6 Subsequently, at the same hearing, the respondent called the respondent's Director of Corporate Services, John Pearson, and tendered:

(a) Mr Pearson's witness statement dated 27 July 2018 (exhibit 1).

(b) The costs agreement dated 1 August 2017 between the respondent and its solicitors whereby the solicitors agreed to act for the respondent in the proceedings against the appellant (exhibit 2).

(c) The costs agreement dated 18 July 2018 between the respondent's solicitors and counsel engaged to act in the proceedings (exhibit 3).

(d) Itemised invoices from the respondent's solicitors including counsel's itemised invoices (exhibits 4 and 5).

7 The appellant did not contest that the respondent had paid the amounts claimed to its solicitors, or was liable to do so, and, in light of the magistrate's decision, the documents were tendered without objection.[8]

8 The appellant appeals, principally, on the basis that the magistrate erred in the interpretation of s 6.56 of the LGA.

9 Whilst the respondent's claim was made, in part, in reliance on s 36Z(2) of the FESA, the focus of the hearing before the magistrate and the appeal was on s 6.56(1) of the LGA, and it was apparently common ground that the two sections should be interpreted in the same way.

10 The appeal proceeds by way of a re-consideration of the evidence that was before the magistrate.[9] The court may only substitute its decision for that of the magistrate if the appellant demonstrates that the orders the subject of the appeal are the result of a legal, factual or discretionary error by the magistrate, based on the material before the magistrate, and any additional evidence the appellant has leave to adduce.[10]

[8] ts 54 - ts 55, 14 August 2019.
[9] *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 40 (4); *District Court Rules 2005* (WA) r 50(1)(d).
[10] ***Allesch v Maunz*** [2000] HCA 40; (2000) 203 CLR 172 [23].

Grounds of appeal

11 The notice of appeal raises seven grounds. Ground 5 was withdrawn at the hearing. The remaining grounds are set out below:

> Ground 1
>
> The learned Magistrate erred in fact and in law in entering judgment against the Appellant in the sum of $13,232.62 when such claimed arrears of rates had been paid by the Appellant prior to judgment.
>
> Ground 2
>
> The learned Magistrate erred in law in finding that section 6.56 of the *Local Government Act 1995* (WA) gave rise to an independent right to levy and/or a substantive cause of action to recover, any legal costs incurred by the City of Rockingham (whether upon an indemnity basis, without a court order for legal costs or without assessment of legal costs, or otherwise).
>
> Ground 3
>
> The learned Magistrate erred in law in finding that section 6.56 of the Local Government Act 1995 (WA) gave rise to an entitlement to levy or recover legal costs upon an indemnity basis.
>
> Ground 4
>
> The learned Magistrate erred in law in finding that section 6.56 of the *Local Government Act 1995* (WA) gave rise to an entitlement to legal costs otherwise than:
>
> (a) by the making of a costs order by a court;
>
> (b) the quantification or assessment of those legal costs upon a party and party basis;
>
> in accordance with section 25 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA) and Part 15 of the *Magistrates Court (Civil Proceedings) Rules 2015* (WA).
>
> Ground 6
>
> The learned Magistrate erred in law in finding that the City of Rockingham in making a claim for legal costs pursuant to section 6.56 of the *Local Government Act 1995* (WA):
>
> (a) was not obliged to disclose to the Appellant any documents other than the invoices for legal costs claimed; and

(b) that there had not been a waiver of legal professional privilege in those documents:

(i) evidencing or relating to the work done in respect of which legal costs were claimed; or

(ii) which were relevant to the assessment of the relevance of the legal costs to the proceedings; and/or

(iii) which were relevant to the reasonableness of the work done and the legal costs incurred.

in accordance with section 25 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA) and Part 15 of the *Magistrates Court (Civil Proceedings) Rules 2015* (WA).

Ground 7

The learned Magistrate erred in fact and law in determining the quantum of legal costs recoverable by the City of Rockingham, whether pursuant to section 6.56 of the *Local Government Act 1995* (WA) or otherwise:

(a) based solely on the invoices for legal costs received by the City of Rockingham; and

(b) without taking account or undertaking any assessment of:

(i) the nature of the legal costs incurred;

(ii) the reasonableness of the work undertaken in respect of which legal costs were to be awarded;

(iii) the quantum of the legal costs incurred and the reasonableness of the quantum of each item of legal costs incurred; and/or

(iv) the proportionality of the quantum of legal costs incurred to the quantum of the substantive claim for unpaid rates.

12 Grounds 2, 3, 4, 6 and 7 concern the interpretation of s 6.56 of the LGA, in light of the decision in ***O'Dea***. Accordingly, I will first outline the decision in ***O'Dea*** and the parties' submissions, and then address the interpretation issue. Upon determining the interpretation issue, I will specifically address the grounds of appeal.

O'Dea v Shire of Coolgardie

13 The magistrate considered herself bound by the decision of Judge Davis in ***O'Dea***, in which her Honour considered the scope of the words 'as well as the costs of proceedings, if any, for that recovery' in s 6.56 of the LGA.

14 In ***O'Dea***, the claim included costs of $249.10, being the costs of recovery proceedings in 2009, which had been discontinued, and where no order for costs had been made. A further amount of $446.20 was claimed, being costs awarded on the default judgment in the claim the subject of the appeal.[11] There was no issue on the appeal in relation to the latter costs.[12] Mr O'Dea argued that the amount of $249.10 could not be recovered by the Shire unless and until there was an order for costs or a judgment in proceedings against him.[13]

15 Judge Davis held that the Shire had had a statutory entitlement under s 6.56 of the LGA to recover any costs incurred in recovery proceedings, and that entitlement was not consequential upon the court making a costs order or entering judgment. Her Honour said as follows:

> [119] It is significant, in my view, that s 6.56 does not confine the right to recovery to the local government to only rates and service charges. Applying the principles of statutory construction, in my view the addition of the words 'as well as the costs of proceedings, if any, for that recovery' in the context of permitting the local government to recover rates and charges, means that a local government may recover whatever costs it may have incurred in proceedings to recover its rates and charges and it is not necessary for the proceedings to have been concluded to judgment.
>
> [120] That construction is, in my view, consistent with the provisions in s 6.51(1) giving a local government the ability to impose interest on 'any costs of proceedings to recover any such charge'.
>
> …
>
> [123] In my view the clear words and context of s 6.56 dictate that 'the costs of proceedings, if any, for that recovery', include any costs incurred in proceedings and do not require the local government to obtain a cost order or judgment against the ratepayer.

[11] ***O'Dea v Shire of Coolgardie*** [2013] WADC 150 [33], [36].
[12] ***O'Dea v Shire of Coolgardie*** [2013] WADC 150 [41].
[13] ***O'Dea v Shire of Coolgardie*** [2013] WADC 150 [107].

> [124] If, as Mr O'Dea has argued, a local government's recovery costs must be consequent upon a costs order or judgment, the words 'as well as the costs of proceedings, if any, for that recovery' in s 6.56 would be superfluous. This is because once a costs order is made in judicial proceedings the costs are recoverable as a judgment of the court, enforceable pursuant to the *Civil Judgments Enforcement Act 2004*. Section 3 of that Act defines 'judgment sum' to mean the 'amount of money ordered to be paid under a monetary judgment, whether or not the money is or includes costs or pre-judgment interest'. 'Monetary judgment' is defined to mean 'a judgment or an order of a court that requires or has the effect of requiring a person to pay money, whether or not the judgment or order contains any other requirements.' There would thus be no need to issue a claim for those costs in a court of competent jurisdiction.
>
> [125] The construction urged upon me by Mr O'Dea is also contrary to pt 6 of the LGA and the intent and purpose of s 6.51. His construction would leave a local government which had commenced recovery proceedings, but in the meantime received payment from the defendant, without the means to recover the costs it had incurred in issuing the proceedings which led to the payment. That is, in my view, contrary to the express words and purpose of this section, in the context as they appear in the LGA. The intent is to allow a local government to recover its rates and charges and ensure that the local government is not out of pocket by reason of having to commence proceedings for recovery.

Submissions

16 The appellant submits that ***O'Dea*** has no application the present case, because the costs claimed in that case were calculated on the relevant scale of costs. Whilst the claim for costs of $249.10 was small, which suggests reference to a scale, and there does not appear to have been an issue about quantum, there is no information in the judgment about the basis upon which those costs were calculated, and there is no reference to scale costs in Judge Davis' reasoning. Accordingly, I do not consider that ***O'Dea*** may be distinguished on that basis.

17 Alternatively the appellant submits that ***O'Dea*** was incorrectly decided and that, upon a proper construction, s 6.56 of the LGA does not create a substantive right to recover costs without an order for costs and their taxation pursuant to the normal processes of the court.

18 The appellant submits, in summary, that:

(a) the words 'the costs of proceedings, if any, for that recovery' in s 6.56 are necessary because a local government, as an entity of the Crown, would otherwise be unable to recover costs in legal proceedings;[14]

(b) section 6.56 does not expressly confer power on any court to award costs, nor state the basis on which it is to be exercised, which must be found under some other statutory provision, in this case s 25 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (MCCPA);[15]

(c) the word 'costs' in s 6.56 should be given a limited meaning, essentially 'reasonable costs', as at common law 'costs' are understood to be awarded by way of only a partial, and not complete, indemnity for professional legal costs actually incurred in the conduct of litigation;

(d) the interpretation placed on s 6.56 by the magistrate, following ***O'Dea***, gives a local government a right to indemnity costs without taxation, which would confer greater rights on the local government than other litigants, who are subject to the court's discretion as to the award of costs, and the effect of Calderbank offers, settlement offers, and taxation of costs,[16] and is inconsistent with s 295 of the *Legal Profession Act 2008* (WA) (LPA).[17]

19 The respondent submits that the magistrate was bound to follow Judge Davis' decision in ***O'Dea***.[18] Judge Davis' decision on the interpretation of s 6.56 was obiter dicta, as her Honour determined the appeal on other grounds.[19] However, the magistrate would usually be required (as am I) to follow the decision unless it was considered to be clearly wrong.[20]

[14] Appellant's submissions dated 8 November 2019, pars 15 and 16.
[15] Appellant's submissions, pars 17 and 19.
[16] Appellant's submissions, par 21.
[17] Appellant's submissions, par 23.
[18] Respondent's submissions dated 22 November 2019, par 12.
[19] ***O'Dea v Shire of Coolgardie*** [2013] WADC 150 [100], [102], [104] and [105].
[20] As a matter of judicial comity: see ***Mustac v Medical Board of Western Australia*** [2007] WASCA 128 [38].

20 Alternatively, the respondent submits that ***O'Dea*** was correctly decided, that a local government is not 'the Crown' within the meaning of the LGA,[21] and that there is no basis for limiting the construction of the words 'the costs of proceedings' as contended by the appellant.[22]

Interpretation of s 6.56 of the LGA

21 Section 6.56(1) of the LGA provides:

> If a rate or service charge remains unpaid after it becomes due and payable, the local government may recover it, as well as the costs of proceedings, if any, for that recovery, in a court of competent jurisdiction.

22 In summary, the following issues concerning the interpretation of s 6.56 of the LGA are raised in the appeal:

(a) Does s 6.56 give rise to a right to recover costs independently of the exercise of the magistrate's power to order costs of the proceedings pursuant to s 25 of the MCCPA?

(b) If s 6.56 does give rise to an independent right to recover costs, is a local government, such as the respondent, entitled to recover costs under that section on an 'indemnity' basis or is a local government entitled to 'reasonable' costs? and

(c) If s 6.56 entitles a local government to recover costs on an indemnity basis, is that local government entitled to recover the costs it has actually incurred in pursuing the recovery proceedings, upon proof of that amount, without any further assessment?

[21] Respondent's submissions, pars 22, 23.
[22] Respondent's submissions, pars 24 - 27 and 32.

Principles of statutory interpretation

23 The starting point for interpreting the meaning of a statutory provision is the ordinary and grammatical meaning of the words, having regard to their context and legislative purpose.[23] The context of the words of a statute includes the general purpose and policy of a provision, in particular the mischief it seeks to remedy.[24] Extrinsic material, including explanatory memoranda, may be taken into account in determining the meaning of legislation.[25]

24 Each word of the section must be given meaning, if possible.[26]

Legislative history of s 6.56

25 The predecessor to the LGA, the *Local Government Act 1960* (WA) (LGA 1960) contained a similar provision in s 565(1)(a) of the LGA 1960, which provided:

> A council may recover rates which have been imposed under this Act, or another Act and are payable to the council, and payment of which is in arrear, as well as the costs of proceedings, if any, for the recovery of them, either by complaint or by action at the suit of the council in a court of competent jurisdiction.

26 The LGA 1960 repealed legislation governing predecessors to local governments established under that Act, namely the *Municipal Corporations Act 1906* (WA) and the *Road Districts Act 1919* (WA).

27 Section 262(1) of the *Road Districts Act* provided for recovery of arrears of rates and 'the costs of any proceedings for recovery thereof' by way of complaint or action in a competent jurisdiction.[27] However, s 420(1) of the *Municipal Corporations Act*, which allowed municipal councils to recover arrears of rates either by complaint or action, did not provide for the recovery of the costs of such proceedings.

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[23] ***Australian Education Union v Department of Education and Children's Services*** [2012] HCA 3; (2012) 248 CLR 1 [26] (French CJ, Hayne, Keifel & Bell JJ).

[24] ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** [2009] HCA 41; (2009) 239 CLR 27 [47].

[25] Sections 19(1)(a) and (b) of the *Interpretation Act 1984* (WA).

[26] ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [71] (McHugh, Gummow, Kirby & Hayne JJ).

[27] See s 262(1) of the *Road Districts Act 1919*. Its precursor s 235(1) of the *Roads Act 1911* (WA) also provides for costs recovery. Section 147 of the *Roads Act 1902* (WA), which provided for the recovery of rates by complaint or action instead of proceedings by distress and sale, did not include reference to costs of proceedings to recover rates.

28 No assistance on the interpretation of s 6.56 of the LGA is to be found in the second reading speeches relating to the LGA, the LGA 1960 or the *Road Districts Act*.[28]

Legislative history of s 36Z(2) of the FESA

29 Section 36Z(2) of the FESA provides:

> If the levy remains unpaid after it becomes due and payable, the local government or the FES Commissioner may recover it and any levy interest, as well as any costs of proceedings for that recovery, in a court of competent jurisdiction as a debt due to the local government or the State, as the case requires.

30 Section s 36Z(2) of the FESA was introduced to the FESA by the *Fire and Emergency Services Legislation (Emergency Services Levy) Act 2002* (WA), which enabled local governments to collect emergency service levies (ESL) together with rates. In the second reading speech it was noted that 'the ESL legislation has been developed to closely mirror the Local Government Act in relation to the collection process, definitions and the like'.[29]

31 At that time s 36Z(2) did not include the words at the end of the section, 'as a debt due to the local government or the State, as the case requires'. These words do not appear in s 6.56 of the LGA. Those words, and replacement of 'the Authority' with 'the FES Commissioner', were introduced by the *Fire and Emergency Services Legislation Amendment Act 2012* (WA) (2012 Act). The 2012 Act abolished the Fire and Emergency Services Authority, and created the position of Fire and Emergency Services Commissioner, who is the Chief Executive Officer of the department assisting with the administration of the FESA.

32 The second reading speech in respect of the 2012 Act does not address the reason for the introduction of the words 'as a debt due to the local government or the State, as the case requires'. The Explanatory Memorandum to the *Fire and Emergency Services Legislation Amendment Bill 2012* says, in relation to the proposed s 36Z, only that the section 'allows the recovery of any unpaid ESL for a landowner. The section is amended so that the amount owed becomes a debt due either to the local government or to the State'.

[28] Neither is there any such assistance to be found in relation to s 262(1) of the *Road Districts Act 1919*.
[29] Second reading speech on Wednesday 25 September 2002, Mr John Kobelke Hansard at p 1,572.

33 It appears from this that the words were introduced to make it clear that, when proceedings to recover the ESL were brought by the FES Commissioner rather than the local government, the debt was due and payable to the State, in the context where the Authority, which could collect the debt on its own account, had been replaced by an officer of the relevant department. As such this does not apparently assist in ascertaining the meaning of words 'the costs of proceedings, if any'.

Purpose of s 6.56 of the LGA

34 In ***Josephson v Walker*** Issac J said:[30]

> Prima facie, where the same statute creates a new right and specifies the remedy, that remedy is exclusive. The natural presumption to begin with is that Parliament in creating the novel right attaches to it the particular mode of enforcement as part of its statutory scheme.

35 Accordingly, s 6.56 of the LGA appears to be necessary to ensure a local government has a right to recover arrears of rates in an action for debt, given the specific provision in the LGA that such arrears are a charge against the land and allowing a local government to recover the arrears by exercising a power of sale. Again this is not of assistance in interpreting the meaning of the relevant words.

Does s 6.56 confer an independent right to recover costs?

36 The word 'proceedings' in s 6.56 of the LGA, in context, refers to proceedings for recovery of rates in a court of competent jurisdiction: that is, legal proceedings. 'The costs' must therefore refer to the costs of legal proceedings brought to recover rates: that is the costs incurred by a local government in relation to engaging legal representatives to conduct proceedings, and to represent the local government at any hearing, and any relevant disbursements. This does not appear to have been in dispute.

[30] ***Josephson v Walker*** [1914] HCA 68; (1914) 18 CLR 691, 701. See the discussion on this in relation to the interpretation of rate recovery provisions of the *Local Government Act 1999* (SA) in ***Koutlakis v City of West Torrens*** [2009] SASC 140 [38] - [54].

37 Each of the jurisdictions in Western Australia in which proceedings might be brought to recover the payment of rates by a local government has power to order the payment of costs of civil proceedings before that court as follows:

(a) Section 37 of the *Supreme Court Act 1935* (WA) confers power to order costs of civil proceedings on a judge of that court;[31]

(b) Section 64 of the *District Court of Western Australia Act 1969* (WA) confers the same power on a judge of the District Court in relation to the costs of any party as a Supreme Court judge has; and

(c) Section 25(1) of the MCCPA confers power on a magistrate to order a party to any proceedings in the civil jurisdiction of the Magistrates Court to pay the whole or part of another party's costs in those proceedings. Before that, s 81 of the *Local Courts Act 1904* (WA) conferred the same power to order such costs.

38 Where costs are in the discretion of a court the power is not unfettered and must be exercised judicially.[32] The usual costs disposition is that costs are awarded to the successful party.[33] Section 25(2) of the MCCPA specifically provides that a successful party is entitled to an order that the whole of its costs be paid by the unsuccessful party, unless the court considers there is good reason not to make such an order, or the claim falls within the minor cases jurisdictional limit.

39 As Judge Davis said in ***O'Dea***, where costs are ordered that order may be enforced pursuant to the *Civil Judgments Enforcement Act 2004* (WA).

40 Accordingly, subject to considering the appellant's submission concerning the ability of Crown entities to recover costs, the apparent effect of limiting a local government's right to recover 'the costs of proceedings, if any, for that recovery' under s 6.56 of the LGA, to costs recoverable under a costs order made by the court in which proceedings to recover arrears of rates were brought, pursuant to that court's existing statutory power, is to render the relevant words of the section superfluous, as found by Judge Davis.

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[31] Section 37(2) provides that nothing in s 37(1) alters the practice in proceedings in relation to the prerogative and criminal jurisdictions of the court.

[32] ***Keet v Ward*** [2011] WASCA 139 [17].

[33] Order 66 r 1 of the *Rules of the Supreme Court* provides that the court will generally order the successful party to any action or matter recover his costs.

Crown entity submission

41 The submission referred to in [18(a)] above implicitly acknowledges the uncontroversial proposition that, in interpreting s 6.56 of the LGA, each word of the section must be given meaning, if possible.[34]

42 Even assuming a local government is an entity of the Crown, in my view there was nothing preventing the Crown from obtaining a costs order in civil proceedings before s 6.56 of the LGA, or its predecessor, were enacted.

43 The appellant submits that, absent statute, the Crown neither paid nor received costs, relying on ***Latoudis v Casey***[35] and ***Acuthan v Coates***.[36]

44 ***Latoudis*** concerned the award of costs in criminal proceedings. In that case:

(a) Mason CJ said:[37]

> The old rule was that the Crown neither receives nor pays costs, notably in criminal proceedings. That rule has been displaced. Indeed, it could not survive once courts of summary jurisdiction were given a statutory discretion to award costs in criminal proceedings.

(b) Dawson J said that, after the Judicature Acts were enacted, 'all costs were in the discretion of the court' and (after discussion about the exercise of that discretion in civil matters) said, 'Different considerations arise in criminal proceedings which are brought, not for private ends, but for public purposes';[38] and

(c) McHugh J said:[39]

> True it is that public officials should launch prosecutions only when the public interest requires it. This is the chief, but not the only, rationale for the rule that historically the Crown neither paid nor received costs.

[34] ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [71] (McHugh, Gummow, Kirby & Hayne JJ).
[35] ***Latoudis v Casey*** [1990] HCA 59; (1990) 170 CLR 534.
[36] ***Acuthan v Coates*** (1986) 6 NSWLR 472.
[37] ***Latoudis v Casey*** [1990] HCA 59; (1990) 170 CLR 534, 538.
[38] ***Latoudis v Casey*** [1990] HCA 59; (1990) 170 CLR 534, 557.
[39] ***Latoudis v Casey*** [1990] HCA 59; (1990) 170 CLR 534, 567.

45 ***Acuthan*** concerned the interpretation of s 41A of the *Justice Act 1902* (Cth), which provided that a magistrate could make an order for costs in criminal proceedings, and in which Kirby P said, 'It was enacted to reverse the old rule that the Crown neither receives nor pays costs',[40] his Honour having also said, 'Originally, the Crown and its various emanations were not liable for the costs of failed criminal proceedings'.[41]

46 Neither case specifically concerns the existence of such a rule in civil proceedings, although Dawson J referred to the general position after the Judicature Acts were enacted. However, each case acknowledges that any such rule could be overridden by statute, and Dawson J appears to have considered that the civil position was altered when the Judicature Acts were enacted, in the late 19th century.

47 Whether or not that is the case, as I have said, each court in which a claim under s 6.56 of the LGA could be brought in Western Australia[42] has, and had at the time that section, or its predecessor, was enacted, the power to order the payment of costs by and to parties in civil proceedings.

48 The power to award costs to a party must include the Crown, if a party to civil proceedings, and override any historical rule that the Crown could not recover costs in civil proceedings, if such a rule existed before those provisions were enacted. The specific reference to recovery of the costs of proceedings to recover arrears of rates in s 6.56 of the LGA, or its predecessor, was not necessary to achieve this.

49 In any event, in my view, it is doubtful that s 6.56 should be interpreted on the basis that a local authority created under the LGA to be regarded as an entity of the Crown. No authority for that proposition was referred to in the appellant's submissions.

50 Pursuant to s 2.5(2) and s 2.5(6) of the LGA a local government is a body corporate with a perpetual succession and a common seal, and it may take proceedings in its corporate name.

[40] ***Acuthan v Coates*** (1986) 6 NSWLR 472, 480.
[41] ***Acuthan v Coates*** (1986) 6 NSWLR 472, 474.
[42] Subject to the amount claim falling within any jurisdictional limit.

51 A number of provisions in the LGA refer to 'the Crown' in terms which are inconsistent with a local government being an entity of the Crown under the LGA. These include:

(a) section 1.6, which provides that 'the Crown' is not bound by the LGA unless expressly stated. Clearly local governments, created by the LGA, are intended to be governed by the provisions of the LGA;

(b) section 6.66(2)(c), which preserves the rights of the Crown in right of the State and in right of the Commonwealth over rights conferred by the Act on a lessee of a local government;

(c) section 6.71(1), s 6.73(2) and s 6.73(3), which use the terms 'Crown in right of the State' and 'the local government' separately; and

(d) section 6.75(1)(b), which uses the phrases 'transferred to the local government' and 'transferred to the Crown' separately.

52 However, in light of my view concerning the ability of the Crown to claim costs in civil proceedings, it is not necessary for me to finally determine this point.

Conclusion on whether s 6.56 confers an independent right to costs

53 I agree with Judge Davis' reasoning that, in order to avoid rendering the words 'as well as the costs of proceedings, if any, for that recovery' superfluous, those words confer on a local government an entitlement to recover the costs of proceedings to recover arrears of rates independently of the exercise of that court's discretion to order costs.

54 In other words, in my view, s 6.56 confers a substantive right to recover costs, subject to the claim for costs being otherwise within the court's jurisdiction.

55 The only provision under which the Magistrates Court could have jurisdiction to make an order for payment of a claim under s 6.56 of the LGA for the costs of recovery proceedings, separately from the court's power to order costs under s 25 of the MCCPA, is found in s 6(1)(a) of the MCCPA. That section provides that the Magistrates Court's civil jurisdiction includes:

> a claim for an amount of money that is a debt or damages, whether liquidated or unliquidated, where the amount claimed, even if it is a balance after allowing for a payment on account or for any admitted set-off or for any other amount, is not more than the jurisdictional limit.

56 In my view, s 6.56 is to be interpreted as providing for recovery of the costs as a debt due to the local government, in the same way as that provision allows for the recovery of rates and service charges as a debt. This view is consistent with the words subsequently added to s 36Z of the FESA. I do not consider that the authorities referred to by the appellant, concerning the limitations on the recovery of costs as damages, to be of assistance.

57 Accordingly, in my view, the magistrate had power to order payment of a claim for the costs of recovery proceedings pursuant to s 6.56 of the LGA subject to that claim being within the Magistrates Court's monetary limit.[43] For the following reasons I do not accept the appellant's submissions that an alternative interpretation should be preferred.

58 The appellant submits that this interpretation of s 6.56 effectively ousts the jurisdiction of the court to order and assess the legal costs of proceedings and that can only be done by clear and unambiguous language.[44] The authority relied on concerned the interpretation of a provision which was argued to exclude the court's power to order the costs of a successful party be paid at all.

59 In my view, s 6.56 of the LGA does not exclude the power of the court to order the recovery of costs by a successful party, but rather confers an additional right to recover costs.

60 The appellant also submits that this interpretation is not open because s 25 of the MCCPA does not provide that the power to order costs is subject to the provisions of 'any other Act', such as the LGA, unlike s 37 of the *Supreme Court Act*.[45]

61 In my view, however, the interpretation of s 6.56 cannot be limited by the provisions of the MCCPA which concern only one of the courts in which recovery proceedings could be brought. If s 6.56 confers a substantive right to recover costs incurred, as I consider it does, the Magistrates Court must have power to order judgment for those costs, if it otherwise falls within its jurisdiction.

[43] $75,000 under s 6(1)(a)(i) of the MCCPA.
[44] Appellant's submissions, par 45, relying on ***Bow Ye Investments Pty Ltd (in liq) v Director of Public Prosecutions (No 2)*** [2009] VSCA 278 [18].
[45] Appellant's submissions, par 20.

62 The appellant also relied on ***Rodwell v Hutchinson***[46] in its submission that the power to award costs must be found in s 25 of the MCCPA. That case concerned the interpretation of s 215(3) of the *Legal Practice Act 2003* (the LPA 2003). Section 215(1) of the LPA 2003 provided that the taxation of bills of costs either as between legal practitioner and client or party and party, and any other aspect of the remuneration of legal practitioners the subject of a determination, was regulated by a legal costs determination in force. Section 215(3) provided:

> Nothing in subsection (1) is to be construed as limiting the power of a court, a judicial officer or a taxing officer of a court to determine in any particular case before that court or judicial officer the amount of costs allowed.

63 Newnes JA said, in ***Rodwell***:[47]

> In my view, s 215(3) does not, of itself, confer any power on a court to determine costs otherwise than in accordance with the applicable costs determination. It simply provides, in effect, that nothing in s 215(1) derogates from any power the court otherwise has to determine costs outside the applicable costs determination. The power of a court to do so, if it exists, must be found elsewhere. No such power exists in the Magistrates Court. On the contrary, s 25(8) of the *Magistrates Court (Civil Proceedings) Act* provides that in the Magistrates Court costs are to be determined under the applicable costs determination.

64 Section 215(3) of the LPA 2003 clearly did nothing more than not limit existing powers, rather than confer power. Accordingly, in my view this case does not assist in the interpretation of s 6.56.

65 The proposition that the power of a court to order costs must be derived from statute may be accepted.[48] I note that, in ***Rodwell***, Newnes JA expressed the view that s 215(2) of the LPA 2003, in accordance with its express words, did confer power on a magistrate to make a special costs order.[49]

66 The appellant does not appeal on the basis that the orders made were not within the Magistrates Court's monetary limit. Neither was it a ground of appeal that there was any distinction to be made between costs claimed by the respondent that had been paid at the time the magistrate made the order pursuant to s 6.56 of the LGA and costs that had been

[46] ***Rodwell v Hutchinson*** [2010] WASCA 197.
[47] ***Rodwell v Hutchinson*** [2010] WASCA 197 [38].
[48] ***Re JJT; Ex Parte Victoria Legal Aid*** [1998] HCA 44 [40] (Kirby J).
[49] ***Rodwell v Hutchinson*** [2010] WASCA 197 [27], see also [24].

incurred but not paid at that time, or that the claim was for costs which had not been incurred before the proceedings commenced. Accordingly, those issues do not arise for determination in this appeal.

Does s 6.56 entitle the respondent to recover costs on an indemnity basis?

67 The effect of the magistrate's decision was to interpret the words as granting an indemnity for the amount the respondent had actually paid, or was liable to pay, its lawyers in relation to the proceedings. The appellant says that s 6.56 does not give rise to an entitlement to indemnity costs[50] and that the magistrate was obliged to make an assessment of the legal costs.[51] The thrust of the appellant's argument at the hearing of the appeal was that the magistrate was required to assess whether the costs were reasonable on a party and party basis.[52]

68 The ordinary meaning of the words 'the costs of proceedings, if any, for that recovery' would appear to be to entitle a local government to recover the costs it has paid, or is liable to pay, to its legal representatives in pursuing the recovery proceedings; that is by way of indemnity. That interpretation is supported, in my view, by use of the definite article 'the' before costs.

69 An award of costs is purely compensatory in nature and a party is not entitled to recover an amount greater than their liability to their lawyers.[53] Accordingly, a costs order made in the exercise of a court's discretion is always made on an indemnity basis, however described. However, those costs will usually be ordered on a party and party basis, the effect of which is to provide only a partial indemnity to the successful party.

70 In ***Bell Lawyers v Pentelow***,[54] the plurality said:[55]

> The courts have long regarded the statutory power to make an order for costs as confined by the concern to provide the successful party with a measure of indemnity against the expense of professional legal costs actually incurred in the conduct of litigation. Thus the majority in ***Cachia*** said:

[50] Ground 4.
[51] Ground 7.
[52] See for example pars 64 - 72 of the appellant's submissions.
[53] ***Rodwell v Hutchinson*** [2010] WASCA 197 [24].
[54] In which the High Court determined that the Chorley exception, allowing lawyers to recover for work done in pursuit of litigation to which the lawyer was a party, was not part of the law in Australia.
[55] ***Bell Lawyers v Pentelow*** [2019] HCA 29; (2019) 372 ALR 555 [33] referring to ***Cachia v Hanes*** [1994] HCA 14; (1994) 179 CLR 403 [11].

> It has not been doubted since 1278, when the Statute of Gloucester introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant.

71 The majority of the High Court in ***Cachia v Hanes*** also said:[56]

> Whilst the restricted basis upon which party and party costs are awarded may be debated as a matter of policy, it is to be borne in mind that party and party costs have never been regarded as a total indemnity to a successful litigant for costs incurred … The partial indemnity which the law allows represents a compromise between the absence of any provision for costs (which prevails as a matter of policy in some jurisdictions) and full recompense. In these days of burgeoning costs, the risks of which is a real disincentive to litigation, the proper compromise is a matter of both difficulty and concern.

72 However, whilst costs orders made in the exercise of a court's discretion they will usually be ordered on a party and party basis, there are alternative bases on which a court may order costs, should the circumstances warrant. The District and Supreme Courts each have power, within their general discretion to order costs, to order those costs on a solicitor and client, or 'indemnity', basis.[57]

73 An 'indemnity' costs order departs from that usual order, and will properly be ordered in appropriate cases where there is some special or unusual feature to justify the court exercising its discretion in this way.[58]

74 In Western Australia, 'indemnity' costs more or less equate with costs calculated on a solicitor and client basis, and unless there is an agreement in writing between a solicitor and his client pursuant to s 271 of the *Legal Profession Act 2008* (WA), the fees allowed under the applicable scale of costs apply both as between party and party and solicitor and client.[59]

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[56] ***Cachia v Hanes*** [1994] HCA 14; (1994) 179 CLR 403 [20].

[57] ***Rodwell v Hutchinson*** [2010] WASCA 197 [9] (Newnes JA, Pullin & Murphy JJA agreeing).

[58] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WADCA 129 (S) [10], citing ***EMI Records Ltd v Ian Cameron Wallace Ltd*** [1983] 1 Ch 59 and ***Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd*** (1988) 81 ALR 397, 400 (Woodward J).

[59] ***Unioil International Pty Ltd v Deloitte Touche Tohmatsu (a firm) (No 2)*** (1997) 18 WAR 190, 194 (Ipp J) referring to s 59 of the *Legal Practitioners Act 1893*. See also ***EMI Records Ltd v Ian Cameron Wallace Ltd*** [1983] 1 Ch 59, 65 (Sir Robert Megarry VC).

75 However, even where a court makes an indemnity costs order, and there is an agreement in writing between the solicitor and the client, the client is not necessarily entitled to recover all the costs charged by the solicitor pursuant to the agreement. An indemnity costs order is understood to be limited to exclude costs that are 'of an unreasonable amount or have been unreasonably incurred'.

76 In ***Western Planning Commission v Narcom Holdings Pty Ltd,*** Justice Edelman said:[60]

> [T]he term 'indemnity costs' is used in contradistinction to party and party costs. This is unfortunate. Like party and party costs, 'indemnity costs' are also usually between parties. Like party and party costs, indemnity costs also provide indemnity against legal costs incurred by the party who obtains the benefit of the order. Like party and party costs, 'indemnity costs' do not provide a complete indemnity against all legal costs.

77 In ***Flotilla Nominees Pty Ltd v Western Australian Land Authority***, Pullin J said that the appropriate form of an indemnity costs order was that:[61]

> The applicant pay the respondent's costs of the action, including reserved costs, and such costs are to include all costs except in so far as they are of an unreasonable amount or have been unreasonably incurred so that, subject to those exceptions, the respondent will be completely indemnified by the applicant for its costs and the amount of such costs be taxed.

78 His Honour said further:[62]

> I pause to mention that this means that even under an indemnity costs order, costs will not automatically be taxed on the basis of the hourly rates provided for in a costs agreement under s 59 of the Legal Practitioners Act. The test of reasonableness will apply even where there is a costs agreement. Unreasonable costs, or costs unreasonably incurred will not be recovered under an indemnity costs order.

[60] ***Western Planning Commission v Narcom Holdings Pty Ltd*** [2011] WASC 259 (S) [6].
[61] ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** (2003) 28 WAR 95, [2003] WADC 122 [28]. See also ***Re Bond Corp Holdings Ltd*** (1989) 1 WAR 465, 479 (Ipp J).
[62] ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** (2003) 28 WAR 95, [2003] WADC 122 [28].

79 In ***EMI Records Ltd v Ian Cameron Wallace Ltd***, Sir Robert Megarry VC said of the difference between party and party costs and indemnity, or solicitor and client, costs:[63]

> To say that on a taxation 'all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred' seems to me to be giving the litigant a complete indemnity, shorn only of anything that is seen to be unreasonable. The litigant does not have to establish that the costs were necessary or proper, or that the costs were of a reasonable amount and properly incurred. Provided they are costs of and incidental to the proceedings, he is entitled to recover them, subject only to the qualification that they are liable to be reduced in respect of anything that the taxing master considers to fall within the headings 'unreasonable amount' or 'unreasonably incurred'. In a word, the difference is between including only the reasonable and including everything except the unreasonable. In any taxation there must be many items or amounts that are plainly allowable, and many others which are plainly not allowable. In between, there must be many items or amounts which do not fall clearly within either extreme. On a party and party taxation … many such items may fail to be allowed; on a taxation on an indemnity basis, they will all be included.
>
> … On a party and party taxation, nothing will be included unless the taxing master reaches the conclusion that it satisfies the requirement of 'necessary and proper' … Nothing is included unless it satisfies the words of the inclusion. The indemnity basis, as I would construe it, is the other way round. Everything is included unless it is driven out by the words of the exclusion, namely 'except in so far as they are of an unreasonable amount or have been unreasonably incurred'.

80 The Magistrates Court does not have power to award indemnity costs when making a costs order under its statutory powers in the MCCPA.[64] As with the Supreme and District Courts, however, the Magistrates Court has power to make a special costs order under s 280(2) of the *Legal Profession Act 2008*, ordering payment of costs above the applicable costs determination, on the basis that the determination is inadequate because of the unusual difficulty, complexity or importance of the matter.[65] It has been held that a properly crafted special costs order may obviate the need for an 'indemnity' costs order.[66]

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[63] ***EMI Records Ltd v Ian Cameron Wallace Ltd*** [1983] 1 Ch 59, 71 (Sir Robert Megarry VC).

[64] ***Rodwell v Hutchinson*** [2010] WASCA 197 [40] (Newnes JA, Pullin & Murphy JJA agreeing). Currently the applicable costs determination is under s 275 of the *Legal Profession Act 2008*.

[65] ***Rodwell v Hutchinson*** [2010] WASCA 197 [27] (Newnes JA, Pullin & Murphy JJA agreeing), referring to s 215(2) of the *Legal Practice Act 2003* of which s 280 of the *Legal Profession Act 2008* is the equivalent (see [18]).

[66] ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** (2003) 28 WAR 95, [2003] WADC 122 [20] - [24]. ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129(S) [10.10].

81 A local government that is successful in proceedings to recover arrears of rates would be entitled (in the absence of some exceptional circumstances) to recover costs assessed on a party and party basis, and on the applicable scale, without the relevant words in s 6.56 of the LGA being necessary. There may, in a particular case, be circumstances that warrant the exercise of discretion to order the local government's costs on a solicitor and client, or indemnity basis, or to make a special costs order. In that respect, I note that there are few apparent defences in the LGA to a local government's claim for arrears of rates. Non-compliance with the provisions of the LGA is not a defence,[67] the failure to deliver a rate notice will not necessarily result in the local government failing to recover arrears,[68] and a ratepayer is obliged to pay a rate notice even where an objection has been lodged, and rejected, and that decision is the subject of review by the State Administrative Tribunal.[69]

82 Interpreting the recovery of 'the costs of proceedings, if any, for that recovery', by implying the word 'reasonable' before the word 'costs' is contrary to the plain words of the section. The words, so interpreted, would add nothing to the recovery that the local authority was already entitled in the Magistrate's Court, if successful in proceedings to recover the rates, rendering superflous the specific reference to costs in s 6.56. Such an interpretation could, potentially, limit the basis on which a local government might be entitled, in the Supreme and District Court, to obtain costs. As I have said, I do not consider that the words in s 6.56 can be differentially interpreted according to the legislation governing the individual court in which the proceedings to recover arrears might be brought.

83 The appellant's submission that the word 'costs' in s 6.56 should be interpreted as providing for only for a partial indemnity was based on what was said by Hayne J in ***Re JJT; Ex Parte Victoria Legal Aid***.[70] The issue in that case was whether s 117(2) of the *Family Law Act 1975* (Cth), which provided that in specified circumstances the Family Court 'may make such orders as to costs … as the court considers just', permitted the court to order a person who was not a party to proceedings pay the costs of a child the court had ordered be separately represented in those proceedings.[71] The High Court held that such an order was a

[67] Section 6.57 of the LGA.
[68] Section 6.58 of the LGA.
[69] Section 6.76, s 6.77 and s 6.81 of the LGA.
[70] ***Re JJT; Ex Parte Victoria Legal Aid*** [1998] HCA 44.
[71] Under s 68L(2) of the *Family Law Act 1975* (Cth).

maintenance order, or an order for the provision of legal aid, and not a costs order.

84 Hayne J referred to ***Cachia v Hanes*** where, as noted above, it was held that costs are awarded by way of indemnity, or partial indemnity, for professional legal costs actually occurred in the conduct of litigation,[72] and said:[73]

> On its face then, the reference in s 117 to 'costs' is a reference to 'costs' as that word is ordinarily understood at law: the amount which the person to whom the order is directed must pay to some party to the litigation as partial indemnity for professional legal fees and expenses incurred by that party in the course of litigation.

85 The section considered, however, concerned the meaning of the word 'costs' in a provision granting discretion to a court to award costs between parties to all proceedings before it, rather than a provision which is apparently in addition to existing entitlements to claim the costs of proceedings. Accordingly, I do not consider that this authority furthers the appellant's argument.

Section 295 of the LPA

86 Section 295 of the LPA provides, relevantly, as follows:

> (3) A third party payer may apply to a taxing officer for an assessment of the whole or any part of a bill for legal costs payable by the third party payer.
>
> …
>
> (8) If the third party payer is a non-associated third party payer, the law practice must provide the third party payer, on the written request of the third party payer, with sufficient information to allow the third party payer to consider making, and if thought fit to make, an application for a costs assessment under this section.

87 The reference in ss 295(2) and (8) to a 'third party payer' is a reference to a person who is not the client of a law practice, but is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client. A non-associated third party payer is a person who owes that legal obligation to the client or another person, and not the law practice.

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[72] ***Cachia v Hanes*** (1994) 179 CLR 403, 410.
[73] ***Re JJT***; ***Ex Parte Victoria Legal Aid*** [1998] HCA 44 [91].

88 Whether or not the appellant falls within the meaning of a 'third party payer' in the LPA, about which I express no view, this section appears within Div 8 of the LPA, which concerns costs assessments by 'a taxing officer' which term is defined as a taxing officer of the Supreme Court. In my view that provision is not relevant to the construction of s 6.56.

Conclusion on whether s 6.56 entitles the respondent to an indemnity for costs

89 In my view the words 'the costs of proceedings, if any, of that recovery' means the costs the respondent has incurred pursuing recovery proceedings on an indemnity basis.

90 In my view this interpretation is consistent with the evident purpose of pt 6 of Div 6, in which s 6.56 appears. Part 6 of Div 6 is directed to protecting a local government's revenue, which is essential to it performing its statutory functions. This is achieved by restricting the defences available to a ratepayer as explained in [81] above, by facilitating the ability of a local government to recover rates, and by providing for the recovery of enforcement costs. In particular:

(a) section 6.43 provides that rates and service charges together with 'the costs of proceedings, if any, for [their] recovery' are a charge on the land rated or in relation to which the service charge is imposed;

(b) section 6.51 provides for the payment of interest on rates or service charges that remain unpaid and 'any costs of proceedings to recover any such charge' at a rate set by resolution of the local government at the time of imposing the rateable service charge;

(c) section 6.52(4) provides for the recovery of rates or service charges from those under a joint liability to pay, even where there is an unsatisfied judgment against another person under a joint liability to pay, overriding the rule in ***Walker v Bowry***;[74]

(d) section 6.60 provides that a local government may require the lessee of land in relation to which unpaid rates or service charges have been imposed, to pay rent to the local government, and to recover the amount as a debt from the lessee if the rent is not paid to the local government; and

[74] ***Walker v Bowry*** [1924] HCA 28; (1924) 35 CLR 48.

(e) section 6.64 entitles the local government to sell or lease land, or cause land to be transferred to itself, or the Crown, where rates are unpaid for three years.

91 It is accepted, as the appellant submits, that this interpretation of s 6.56 of the LGA gives a local government greater rights than other litigants, who are subject to the limits of a court's discretion as to the award of costs and assess those costs on a taxation.[75] However, in my view, that consideration does not warrant the imposition of limits to the right of recovery contrary to what I consider to be the legislative intention.

Does the court have a role in assessing indemnity costs?

92 In my view, however, a local government's entitlement to recover the costs of proceedings on an indemnity basis under s 6.56 is not unfettered. An order for indemnity costs made within a court's discretion does not entitle a party to recover costs that are in an unreasonable amount or are unreasonably incurred, consistently with what was said in ***EMI Records Ltd*** and ***Flotilla Nominees***, referred to in [77] - [79] above.

93 Justice Edelman said, in ***Western Planning Commission***, following ***EMI***, that:[76]

> [O]ne significant distinction between party and party costs and indemnity costs was that the onus of proof that costs were reasonable is borne by the party entitled to the costs order in the party and party costs, but in the case of indemnity costs it falls to the person against whom the order is made to show that the costs are unreasonable. The difference in onus may be a significant matter.

94 In my view, by granting a local authority an indemnity for its costs, the legislature cannot have intended to completely exclude the oversight of the court as to the assessment of those costs, and grant a greater entitlement to indemnity for its costs than might ever have been ordered by a court. In my view, a local government's entitlement to an indemnity for those costs is still limited to exclude recovery of costs which a court finds to be in an unreasonable amount or which were unreasonably incurred.

[75] Appellant's submissions, par 21.
[76] ***Western Planning Commission v Narcom Holdings Pty Ltd*** [2011] WASC 259(S) [8].

95 Accordingly, based on what has been said in ***EMI*** and ***Western Planning***, I consider that in the absence of a ratepayer meeting their evidentiary onus to prove the claimed costs were in an unreasonable amount or unreasonably incurred, prima facie a local authority is entitled to be compensated for the legal costs it had actually incurred pursuing the proceedings. The local authority does not have to establish the costs were necessary, or proper, or in a reasonable amount. However, it is open to the ratepayer to seek to prove that the claimed costs were in an unreasonable amount or unreasonably incurred, in which case the matter will fall to the determination of the court.

Ground 1

96 The order made by the learned magistrate on 14 August 2019 was as follows:

> Judgment be entered in favour of the claimant in the sum of $13,232.62 and further judgment is entered in favour of the claimant for costs of proceedings pursuant to section 6.56 *Local Government Act 1995* in the sum of $62,344.96.

97 The appellant says that he paid the sum of $13,232.62 on 7 August 2019 and says that, accordingly, no such sum was owing on 14 August 2019 when the judgment was entered.

98 There is no dispute that a week before the magistrate handed down her Honour's decision on the costs issue and ordered judgment in the amount of those costs and the amount of the arrears that the appellant had consented to, the arrears had been paid. However, the appellant had consented to judgment in that amount on 2 May 2019, and the appellant's counsel made no objection to the order made on 14 August 2019. In addition, the respondent could not enforce a judgment that had been satisfied. The appellant's issue is with the respondent's recovery of the costs of the proceedings, not recovery of the amount of arrears that had already been paid.

99 In the circumstances, ground 1 is dismissed.

Grounds 2, 3 and 4

100 For the reasons outlined in [36] - [91] above, I have found that s 6.56 of the LGA does confer a substantive cause of action, in debt, to recover the legal costs of proceedings to recover arrears of rates, on an indemnity basis, and that it is not necessary for the magistrate to separately exercise the power to order costs under s 25 of the MCCPA.

101 Accordingly, grounds 2, 3 and 4 of the appeal are dismissed.

Grounds 6 and 7

102 At the hearing on 2 May 2019, the appellant sought disclosure of documents underlying the costs items in the accounts. That disclosure was sought in the context of what was described by the appellant's counsel as a straightforward debt recovery, which counsel said did not apparently require the work of a barrister, solicitor and paralegal, and where the respondent had been 'denied any chance to criticise [the respondent's] claim for $52,000 which vastly dwarfs the actual claim for rates and services'.[77]

103 For the reasons outlined in [75] - [79] and [92] - [95] above, I have found that, although prima facie the respondent was entitled to recover the costs actually incurred, it was open to the appellant to dispute the quantum of the costs claim on the basis that those costs were in an unreasonable amount or unreasonably incurred. That issue was clearly raised by the appellant at the hearing. Although I make no comment on the merits, I consider that it was open to the appellant to raise the issue of the unreasonableness of the costs on the face of the invoices, in light of the apparent disproportion between the costs claimed and the amount of the arrears of rates, the costs ultimately ordered being nearly five times the amount recovered for arrears of rates. As a result, in my view, the issue of whether the costs claimed were in an unreasonable amount or unreasonably incurred was before the court.

104 In those circumstances, I find that the magistrate erred in law:

(a) in refusing to order disclosure of relevant documents underpinning the costs claim, and relevant to the issue of whether the costs were in an unreasonable amount or unreasonably incurred. Accordingly, I would allow ground 6 of the appeal; and

(b) in determining the quantum of the respondent's claim for legal costs pursuant to s 6.56 bases solely on the invoices proved by the respondent, and without undertaking an assessment to determine that the costs claimed were not in an unreasonable amount and unreasonably incurred. Accordingly, I would allow ground 7(a) and (b)(i), (ii) and (iv). Whilst ground 7(b)(ii) is worded in terms of reasonableness, I consider that the scope of

[77] ts 19, ts 26, ts 27 and ts 28, 2 May 2019.

the wording of that ground is sufficiently wide to encompass an assessment of the unreasonableness or otherwise of the costs claim.

105 I do not, however, consider that the court is required to assess the quantum and reasonableness of each item of legal costs incurred, as claimed in ground 7(b)(iii), which to my mind fall within an assessment on a party and party basis. Accordingly, that ground is dismissed.

106 I make no finding, however, about precisely which documents should be disclosed and whether the claim of privilege on any of the documents might be maintained, given those issues were not fully considered by the magistrate, in light of her Honour's view that no such documents were relevant to the issues to be determined.

Conclusion

107 The appeal is allowed in part.

108 I consider the appropriate orders to be that the judgment entered in favour of the respondent on 14 August 2019 in the sum of $62,344.96 be set aside and that the matter be remitted to the Rockingham Magistrates Court before the same or another magistrate for determination of what orders for disclosure of documents, relevant to the issue of the assessment of the respondent's costs, should be made and determination of the issue of the assessment of the respondent's costs, in particular whether the respondent's costs were in an unreasonable amount or unreasonably incurred. However, I will hear from the parties as to the appropriate orders, including orders as to the costs of the appeal.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

JG
Associate to Judge Vernon

17 JUNE 2020