

AUSTRALIA / JUDGMENT

Lambourne v Baker (No 5) [2024] NSWCA 241

COURT

Court of Appeal

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: **Lambourne v Baker (No 5) [2024] NSWCA 241**

Hearing dates: 9 September 2024

Date of orders: 11 October 2024

Decision date: 11 October 2024

Before: Ward P at [1]; Mitchelmore JA at [108]; Kirk JA at [109]

Decision: 1. Applicants' notice of motion dated 6 June 2024 dismissed with costs.

2. Respondents' notice of motion dated 3 September 2024 dismissed with costs.

Catchwords: CIVIL PROCEDURE – Costs – Judgment in favour of applicant stayed pending assessment of respondent's costs – Whether condition for operation of stay satisfied – Whether respondent's costs set off against judgment debt – Application for review dismissed

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 3, 101, 133

Legal Profession Uniform Law Application Act 2014 (NSW), 71(3)

Supreme Court Act 1970 (NSW), s 46

Uniform Civil Procedure Rules 2005 (NSW), rr 7.2, 36.17, 41.3, 41.11, 51.58, Pt 41

Cases Cited: *Alexandria Landfill Pty Ltd v Transport for New South Wales* (2020) 103 NSWLR 479; [2020] NSWCA 165*Australian Competition Consumer Commission v Shell Co of Australia Ltd* (1997) 72 FCR 386*Baker v Punters Show Limited, in the matter of Baker* [2022] FCA 1303*Barnes v Addy* (1874) LR 9 Ch App 244*Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233*Broken Hill Cobalt Project Pty Ltd v Lord* [2022] NSWCA 271*Collier v Lancer* [2013] NSWCA 185*Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; [1990] HCA 39*David Barry Logistics Pty Ltd v State of Victoria (No 3)* (2022) 68 VR 157; [2022] VSC 575*Eckert v Roberts* (2021) 405 ALR 515; [2021] SASCA 73*Frumar v The Owners of SP36957* [2010] NSWCA 172*Housing Commission of New South Wales v Tatmar Pastoral Co Ltd* [1983] 3 NSWLR 378

In the matter of Punters Show Pty Limited [2019] NSWC 1777
In the matter of Punters Show Pty Ltd [2022] NSWSC 43
Infact Consulting Pty Ltd v Kyle House Pty Ltd [2007] NSWSC 56
Lambourne v Baker [2021] NSWCA 229
Lambourne v Baker (No 2) [2021] NSWCA 282
Lambourne v Baker (No 3) [2022] NSWCA 25
Lambourne v Baker (No 4) [2024] NSWCA 132
New South Wales Land and Housing Corporation v Orr (2019) 100 NSWLR 578; [2019] NSWCA 231
Patterson v Humfrey (No 2) [2016] WASC 343
Public Service Board of New South Wales v Osmond (1986) 159 CLR 656; [1986] HCA 7
Rinehart v Welker (2011) 93 NSWLR 311; [2011] NSWCA 403
Soulemezis v Dudley Holdings (1987) 10 NSWLR 247
Texts Cited: David Ipp, 'Lawyers Duties to the Court' (1998) 114 Law Quarterly Review 63

Category: Procedural rulings

Parties: Marc Alan Lambourne (First Applicant)

Glenn Craig Pollett (Second Applicant)

Punters Show Pty Ltd (Third Applicant)

Dallas Matthew Baker (First Respondent)

Todd Cameron Buckingham (Second Respondent)

BetMakers Technology Group Limited (Third Respondent)

12 Follow Pty Limited (Fourth Respondent)

Operis Momentum Pty Limited (Fifth Respondent)

Representation: Counsel:

MA Lambourne (First Applicant) (Self represented)

AP Cheshire SC with D Helvadjian (Respondents)

Solicitors: Vintage Law (Respondents)
File Number(s): 2019/00407870
Publication restriction: Nil
Decision under appeal Court or tribunal: Supreme Court of New South Wales
Jurisdiction: Court of Appeal
Citation: [2024] NSWCA 132
Date of Decision: 31 May 2024
Before: Basten AJA
File Number(s): 2019/407870
[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]
HEADNOTE
[This headnote is not to be read as part of the judgment]
On 31 May 2024, orders were made for the payment out of court of moneys paid into court in March 2022 by or on behalf of Mr Dallas Baker (Respondent) in connection with a stay granted of payment of a monetary sum order in favour of the second applicant (Punters Show Pty Limited).
The dispute between the parties at first instance arose out of a falling out in relation to an online thoroughbred racing joint venture. The Applicants were unsuccessful in

their claims at first instance (In the matter of Punters Show Pty Limited [2019] NSWSC 1777 (Punters Show (No 1))), but the second applicant succeeded in part on appeal (Lambourne v Baker [2021] NSWCA 229 (Lambourne (No 1))), there being an order against Mr Baker in favour of the Applicants in the sum of \$210,249.

What followed was a series of applications in both the Court of Appeal and the Equity Division of the Supreme Court in relation to the costs of the appeal and first instance proceedings. In Lambourne v Baker (No 2) [2021] NSWCA 282, the Court of Appeal ordered that the Applicants were to pay 65% of the Respondent's costs of the appeal, and that the question of costs of the proceedings in the Equity Division be remitted to the Equity Division. On remittal (In the matter of Punters Show Pty Ltd [2022] NSWSC 43), Williams J ordered the Applicants to pay the Respondent's costs of the first instance proceeding (other than costs associated with certain claims in respect of which the Applicants were successful). Then, in Lambourne v Baker (No 3) [2022] NSWCA 25 (Lambourne (No 3)), the Court of Appeal granted a stay of the payment out of the judgment sum awarded in Lambourne (No 1), conditioned upon the payment of the judgment sum into court, pending an assessment of the costs of the appeal in Lambourne (No 2). The Court in Lambourne (No 3) also ordered that the judgment sum awarded in favour of the Applicants in Lambourne (No 1) was to be set off against the costs of the appeal (as determined).

On 31 May 2024, in Lambourne v Baker (No 4) [2024] NSWCA 132 (Lambourne (No 4)), Basten AJA ordered that (pursuant to the previously ordered set-off): of the sum of \$210,249.00, the amount of \$186,214.86 was to be paid out the Respondent and various other respondents, and the remainder be paid to the Applicants.

The Applicants sought a review of the decision of Basten AJA in Lambourne (No 4) pursuant to s 46(4) of the Supreme Court Act 1970 (NSW) and r 51.58 of the Uniform Civil Procedure Rules 2005 (NSW) on two grounds: first, that Basten AJA failed to apprehend or fairly deal with the issue of quantum; second, that Basten AJA failed properly to address the entitlement of the respective parties to the sum paid into court.

The Court held (Ward P, Mitchelmore and Kirk JJA agreeing), dismissing the application for review with costs:

* As to the first issue, the order in Lambourne (No 1) was for the entry of judgment in the sum of \$210,249. The payment of that sum into court was what was required as a condition of the stay imposed in Lambourne (No 3). The stay was not conditional on the payment into court of the sum as expressed in Lambourne (No 1) together with any additional interest that may have accrued in the intervening period. The impracticality of a condition requiring the payment of a variable amount into court as a condition of the stay tends against the construction of the orders for which the Applicants contend: [75]-[87] (Ward P); [108] (Mitchelmore JA); [109] (Kirk JA).

* As to the second issue, the crux of the Applicants' complaint is as to the perceived unfairness of Punters Show being held out of its judgment sum by operation of the stay. However, the effect of the set-off that was ordered in Lambourne (No 3) was that its entitlement to the judgment sum in Lambourne (No 1) was subject to the order as to the costs of the appeal. The lack of registration of the costs certificate and enforcement of the judgment debt to which registration gives rise does not alter the fact that the Respondent has an entitlement to those costs as assessed or agreed: [88]-[97] (Ward P); [108] (Mitchelmore JA); [109] (Kirk JA).

JUDGMENT

1. WARD P: Before the Court for hearing on 9 September 2024 was an application for review pursuant to s 46(4) of the Supreme Court Act 1970 (NSW) (Supreme Court Act) and r 51.58 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), of orders made by Basten AJA on 31 May 2024 for the payment out of Court of certain moneys that had been paid into Court in March 2022 by or on behalf of Mr Dallas Baker (the first respondent) in circumstances to which I will refer in more detail in due course.
2. The application was made by notice of motion dated and e-filed on 6 June 2024 (the 6 June 2024 motion). The three applicants are Mr Marc Lambourne, Mr Glenn Pollett and Punters Show Pty Limited (Punters Show), a company of which Mr Lambourne is the sole director and he and Mr Pollett are shareholders. I refer to them collectively as the applicants (though in some instances referred to in the chronology of this matter they would more accurately be described as appellants or plaintiffs as the case may be). The application was supported by an affidavit affirmed on 6 June 2024 by Mr Lambourne.
3. There are five respondents to the application: Mr Baker (who is also a shareholder of Punters Show and was formerly the sole director of the company), Mr Todd Buckingham, and three companies with which Mr Buckingham is or was associated.
4. The respective parties have been involved in litigation since 2016 relating to disputes arising out of arrangements pursuant to which Messrs Lambourne, Pollett and Baker formed and conducted a business involving the production of an internet TV programme known as "Punters Show" and Punters Show website relating to the thoroughbred racing industry ([2019] NSWSC 1777, [9]). Suffice to say that the business venture ended in acrimony. Although the applicants were unsuccessful at first instance (In the matter of Punters Show Pty Limited [2019] NSWC 1777 (Punters Show (No 1))), an appeal from the first instance decision succeeded in part, there being an order for judgment to be entered against Mr Baker in favour of Punters Show in the sum of \$210,249 (Lambourne v Baker [2021] NSWCA 229 (Lambourne (No 1))).
5. What followed (described by Mr Lambourne, not without some force, as wasteful satellite litigation) was a series of applications both in this Court and in the Equity Division in relation to the costs of the appeal and first instance proceedings and, relevantly for present purposes, the stay of the order made by the Court of Appeal in Lambourne (No 1) in relation to the judgment entered in favour of Punters Show, pending determination of the costs of the appeal from the decision in Punters Show (No 1). The dispute now before this Court relates to the determination by Basten AJA of the respondents' subsequent application for payment out of Court of the moneys paid into Court in March 2022 in connection with the stay obtained by the respondents and, in particular, the construction of the stay order made on 2 March 2022 (set out in due course).

6. At the hearing of the 6 June 2024 motion, Mr Lambourne (who appeared with leave on behalf of Punters Show and who represented all of the applicants) sought leave to amend the notice of motion (AT 3.41). There was no objection to that amendment application and leave was granted for the filing of the amended notice of motion. By the amended notice of motion, the applicants seek additional orders, including a permanent stay of the orders made by the Court of Appeal on 19 November 2021 in *Lambourne v Baker* (No 2) [2021] NSWCA 282 (*Lambourne* (No 2)), which varied the 24 September 2021 orders in *Lambourne* (No 1) (see below).
7. In support of the application for review, Mr Lambourne also sought leave to rely on an affidavit affirmed by him on 16 August 2024 (an affidavit which self-evidently was not before Basten AJA at the time the 31 May 2024 orders were made). Leave was granted for the filing in Court of the 16 August 2024 affidavit and it was provisionally read, together with the earlier 6 June 2024 affidavit (AT 4.11). Particular reliance was placed by Mr Lambourne on parts of the 16 August 2024 affidavit to explain why there should be leave to file the affidavit and submissions out of time, though Mr Lambourne sought to rely generally on the whole of the affidavit in support of his claim for relief in respect of Basten AJA's decision (see T 5.16-26). Mr Lambourne also relied on the materials in the Court Book filed on this application and the various materials identified at [8] of his submissions in reply.
8. The respondents, who oppose the relief sought in the applicants' amended notice of motion, relied on the evidence that was put before Basten AJA (three affidavits sworn by their solicitor, Nicola Craven, on 15 December 2023, 12 March 2024 and 28 May 2024, respectively) (AT 7.9). The respondents also sought (and were granted) leave to file a further amended notice of motion dated 3 September 2024 in the review proceedings, seeking in effect to amend their application for payment out of Court (that had been determined by Basten AJA) in order to provide for the disbursement to them of the entirety of the funds held in Court together with all accrued interest and to vary the stay order of 2 March 2022 (invoking the slip rule) in order to add reference to the proceedings at first instance (AT 29.17).
9. At the hearing of the 6 June 2024 motion, the respondents accepted that the Court would not uphold their 3 September 2024 motion if the enquiry were limited to a review of Basten AJA's orders but it was submitted that if there were to be some broader enquiry as to the payment of moneys out of Court (as contemplated by the applicants' claim to be entitled to interest on the judgment debt to be taken into account), then the respondents should be entitled to raise their claim for the whole of the moneys in Court (see the discussion at T 23.45-24.13; T 27.49).

10. As noted, Mr Lambourne appeared with leave on behalf of Punters Show, handing up in Court a copy of minutes of meeting on 22 January 2024, attended by him and Mr Pollett, resolving that he be authorised to represent the company in all matters pertaining to the notice of motion (see the requirement under r 7.2 of the UCPR where a company seeks to be represented otherwise than by a solicitor) (AT 1.24). The respondents were represented by Mr AP Cheshire SC and Mr D Helvadjian of Counsel, instructed by Vintage Law solicitors.

Background

1. It is necessary to set out in some detail the procedural history by way of background to the present applications.
2. In 2016, the applicants (as plaintiffs) commenced proceedings in the Equity Division of the Supreme Court (Punters Show (1)) against the present respondents (the third of which was then named TopBetta Holdings Pty Ltd (TopBetta) but is now named Betmakers Technology Group Limited) (Betmakers Technology Group). In that proceeding, Mr Lambourne claimed an amount of \$30,000 plus GST from Mr Buckingham and TopBetta (a money claim based on an alleged agreement for payment for promotional work done and in the alternative invoking the principles of promissory estoppel); and the applicants claimed equitable compensation from the respondents, invoking the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 (Punters Show (No 1) at [57]-[64] in relation to the money claim; [65]-[69] in relation to the equitable compensation claim). On 13 December 2019, Rees J dismissed the proceeding and awarded costs against the applicants.
3. The applicants appealed that decision. On 24 September 2021, as adverted to above, the appeal was allowed in part (Lambourne (No 1)), the Court of Appeal upholding what was referred to as the "improper withdrawals" claim against Mr Baker (see at [27]). An order was made that judgment be entered in favour of Punters Show against Mr Baker in the sum of \$210,249 (order (1)). The Court expressly made no order as to the costs of the appeal or the proceeding at first instance (order (3)) but ordered that the parties be permitted to reopen order (3) by a notice of motion filed within 14 days in the ordinary course (order (4)). Mr Lambourne here emphasises that order (1) made on 24 September created a "judgment debt", referring to the definitions of "judgment debt", "judgment debtor" and "judgment creditor" in s 3 of the Civil Procedure Act 2005 (NSW) (Civil Procedure Act).
4. On 8 October 2021, the respondents sought to exercise that liberty to apply, forwarding a notice of motion of that date to the Registry accompanied by an affidavit sworn by the respondents' solicitor (the 8 October 2021 notice of motion). The notice of motion dated 8 October 2021 sought orders concerning the costs of both the appeal and first instance proceedings as well as interest on costs. The orders sought included an order that the applicants pay the second to fifth respondents' costs of the first instance proceeding and the appeal other than the costs associated with the "money claim".

5. Relevantly, for present purposes, the 8 October 2021 notice of motion also sought a stay of the 24 September 2021 judgment in favour of Punters Show until the costs payable by the applicants to the respondents had been determined. The stay was sought in the following terms:

9 Upon an undertaking by the First Respondent [Mr Baker] to pay the judgment debt against him into court or into an account agreed by the parties or directed by the Court, the payment of the judgment debt to the Third Appellant [Punters Show] be stayed until the date on which all costs orders in favour of the Respondents are assessed or agreed.

1. The 8 October 2021 notice of motion was determined on the papers. It was stamped in the Registry as e-filed on 8 October 2021. (There seems to have been some doubt as to the date of filing. Mr Lambourne submitted that the 8 October 2021 notice of motion was in fact filed on 15 October 2021, and Basten AJA referred to this as the date on which it was filed in the judgment now the subject of challenge). Mr Lambourne has relied on this for the complaint that it was filed out of time having regard to the orders made on 24 September 2021 which permitted the reopening of order (3) by the filing of a notice of motion within 14 days. However, the document appearing on JusticeLink bears the e-filed stamp dated 8 October 2022.
2. On 19 November 2021 (in *Lambourne (No 2)*), the Court of Appeal (Basten JA, Gleeson JA and Emmett AJA) made orders, among other things, setting aside order 3A made on 24 September 2021 and substituting in its place the following orders:

3A(1) Order that the appellants pay 65% of the respondents' costs of the appeal;

- (2) Remit the question of costs of the proceedings in the Equity Division to the Equity Division.
1. In the course of that judgment (*Lambourne (No 2)*), the Court noted (at [8]) that the "money claim" (i.e., the claim by Mr Lambourne for the sum of \$30,000) had been settled with consent judgment entered against Betmakers Technology Group.
2. The Court did not deal with the stay sought by the respondents in prayer 9 of the 8 October 2021 notice of motion. Rather, as the reasons make clear (see [2]; [16]), it was misapprehended that the stay sought was of the judgment debt entered by consent in favour of Mr Lambourne against Betmakers Technology Group (i.e., in relation to the "money claim").
3. On 14 December 2021, the respondents filed a further notice of motion (14 December 2021 notice of motion) seeking that the Court revisit or address the stay sought in prayer 9 of the 8 October 2021 notice of motion. That notice of motion was also dealt with on the papers (*Lambourne v Baker (No 3) [2022] NSWCA 25 (Lambourne (No 3))*) (see below). While Mr Lambourne had there submitted that this notice of motion was filed out of time (see [2] of *Lambourne (No 3)*), the respondents had invoked the "slip rule" under r 36.17 of the UCPR, which power may be exercised at any time (or in the alternative the inherent jurisdiction of the Court).

4. On 31 January 2022, before the determination by the Court of Appeal of the respondents' 14 December 2021 notice of motion, costs orders were made in the Equity Division by Williams J in respect of the first instance proceeding (In the matter of Punters Show Pty Ltd [2022] NSWSC 43), following the remittal of the matter by the Court of Appeal to the Equity Division in relation to those costs. Those costs orders required: the applicants to pay Mr Baker's costs of the first instance proceeding other than costs associated with the "Improper Account Withdrawals Claim"; Mr Baker to pay Punters Show's costs associated with the "Improper Account Withdrawals Claim"; and the applicants to pay the remaining respondents' costs of the proceeding other than costs associated with the "Money Claim". Williams J also ordered that, notwithstanding any orders made, all outstanding interlocutory costs orders in favour of any party not be disturbed; and, to the extent that it was opposed, the applicants pay the respondents' costs of the application in relation to those costs orders.
5. On 2 March 2022, the Court of Appeal (Basten JA, Gleeson JA and Emmett AJA) (in *Lambourne* (No 3)), granted the respondents' application for a stay "conditioned upon the payment into Court of the judgment debt" (see at [6]). The Court said that:

In principle, in circumstances where a party obtaining a money judgment is required to pay costs it will often be permissible to allow that there be a set-off, particularly in circumstances where there is an evidential basis to anticipate that the party likely to be the debtor after the set-off is either impecunious or otherwise at risk of not meeting the financial obligation. If the costs payable by the appellants exceed the judgment debt owing to the third appellant (which is possible), there is doubt that they would be recoverable from the third appellant, if the judgment debt is paid now and not retained by the company.

1. The Court ordered, relevantly, that:
 1. Upon the first respondent [Mr Baker] paying into Court the judgment debt created by order (2) [sic: order (1)] made on 24 September 2021, payment of that amount to the third appellant [Punters Show] is stayed pending determination, by assessment or agreement, of the costs payable by the appellants pursuant to order 3A(1) entered on 19 November 2021.
 2. The amount to be paid to the third appellant will be the balance, if any, after setting off the costs determined to be payable by the appellants to the respondents.
1. Pausing here, it is apparent on the terms of order (1) that the stay was granted pending the determination of the costs payable by the applicants in respect of the appeal (and did not extend to the costs of the first instance proceeding). It is also clear that the orders encompassed: first, a stay in respect of payment of the amount of the "judgment debt" (order (1)); and, second, a setting off, as against the amount to be paid to Punters Show, of the costs determined to be payable by the applicants to the respondents (order (2)). Mr Lambourne here emphasises that order (1) refers to payment by the first respondent (Mr Baker) of the "judgment debt" and that the stay is to be pending "determination" of the costs (which, as I understand it, he maintains requires the issue and/or registration of a costs certificate issued by a costs assessor in relation to those costs). I address those submissions in due

course.

2. On 21 March 2022, the sum of \$210,249 was paid into Court. The respondents say that Mr Baker caused this sum to be paid into Court "in purported compliance" with the condition on which the stay was granted. (The description of this as "purported" compliance is mystifying since the respondents contend that it did amount to compliance.) Mr Lambourne disputes that there was compliance with the condition of the stay in part on the basis that Mr Baker did not personally pay the relevant amount into Court, such that there was no operative stay and the judgment debt was payable (with interest running on the judgment debt once it was not paid within 28 days after judgment AT 9.29). Again, I address those submissions in due course.
3. The respondents then applied for assessment of their costs of both the appeal and the first instance proceedings. Separate costs certificates were ultimately issued on the applications by Mr Baker and the remaining respondents, respectively (although it appears that the costs assessments in respect of those respective costs assessment applications were dealt with together by assessment dated 21 March 2023).
4. On 21 March 2023, a cost certificate was issued by the costs assessor and sent to the Manager, Costs Assessment in respect of Mr Baker's costs. The Manager, Costs Assessment certified on 29 May 2023 the amount payable as determined by the costs assessor (i.e., certified the sum of \$207,067.43 as payable to Mr Baker by the applicants). Although the certificate states that it was sent to the parties on 29 May 2023, Mr Lambourne did not receive the certificate (see his correspondence with the Registrar in July/August 2023 seeking an extension of time for an application to review the determination).
5. Following receipt of that costs certificate, and after expiry of the time for an application for review of the costs assessor's determination, on 20 June 2023, the respondents' solicitor wrote to the Finance Registry, Court of Appeal, proposing that the funds in Court (\$210,249) be accounted for as to: \$201,544.61 to Mr Baker; and the balance of \$8,704.39 to the applicants (there referred to as the cost respondents).
6. On 28 June 2023, Registrar Bellach sent an email to the parties advising that the Court proposed to pay out the funds in Court (in essence as proposed by the respondents' solicitor) as follows: \$201,544.61 to Mr Baker; and \$8,704.39 (and interest accrued thereon) to the applicants.
7. On 29 June 2023, Mr Lambourne sent an email to the Court advising that he had not received and was not aware of the costs assessor's certificate dated 29 May 2023.
8. In those circumstances, on 24 July 2023, the Registrar indicated that the parties should proceed by way of notice of motion if orders were sought in relation to payment out of the funds in Court.

9. Although Mr Lambourne engaged in correspondence with the Manager, Costs Assessment, in relation to an extension of time to review the costs assessment in August 2023, he accepts that no application to review the costs certificate was made (see T 13.17).
10. On 12 October 2023, a separate cost certificate was issued by the Manager, Costs Assessment in respect of the costs incurred by the second to fifth respondents (as determined by the costs assessor on 21 March 2023), certifying that a total of \$315,956.56 was payable to the second to fifth respondents by the applicants.
11. Out of the total assessed costs in respect of the first instance proceeding (being \$523,023.99), the total costs assessed as owing by the applicants in respect of the appeal are \$186,214.86. Although there was some debate in this Court as to whether that figure represented the 65% fixed by the Court as to the percentage of costs to be paid by the applicants, it is clear from the materials on the present application that the sum of \$186,214.86 does represent the costs assessor's determination of the 65% appeal costs for which the applicants are liable (see, in particular, the costs assessor's calculations of the breakdown of appeal costs in the costs assessor's reasons under the heading "Court of Appeal Costs" at p 301 of the reasons).
12. On 15 December 2023, Mr Baker filed a notice of motion (the 15 December 2023 notice of motion) seeking orders that the funds in Court be paid: as to \$201,544.61 to him; and as to \$8,704.39 to the applicants. The figure of \$201,544.61 comprised both Mr Baker's costs of the appeal and the second to fifth respondents' costs of the appeal, together with the filing fee of \$1,840.54 (which was calculated by reference to the whole of the assessed costs, not only those of the appeal). The infelicities in the order there sought as to the disbursement of funds were identified by Basten AJA in his subsequent judgment (Lambourne v Baker (No 4) [2024] NSWCA 132 (Lambourne (No 4)) at [23]). The respondents accepted that the proposed order was in error in that Mr Baker, standing alone, could only possibly seek an order that he be paid \$90,296.43 (his costs of the appeal), a portion of \$1,840.54 (the filing fee) and a portion of \$5,522.82 (the assessor's costs).
13. A second notice of motion dated 11 March 2024 was filed by the respondents on 13 March 2024 (the 13 March 2024 notice of motion), seeking to invoke the slip rule or in the alternative the inherent jurisdiction of the Court to correct the orders made on 2 March 2022 so as to create a stay "until all costs orders" in favour of the respondents had been assessed or agreed (see Lambourne (No 4) at [24]).
14. On 18 April 2024, both notices of motion were amended.
15. The 15 December 2023 notice of motion (referred to by Basten AJA as the payment motion) was amended in order to add the second to fifth respondents as applicants and to amend the amount to be paid out to \$186,214.86, representing 36% of the total amount of the total costs to which they are entitled comprising:
 1. \$90,296.43 (Mr Baker's costs of the appeal);

2. \$90,296.43 (the second to fifth respondents' costs of the appeal);
 3. \$1,685 (36% of the filing fees); and
 4. \$3,937 (36% of the assessor's costs).
1. The 13 March 2024 notice of motion (referred to by Basten AJA as the slip rule motion) was amended by adding an order that the whole amount be paid out to the respondents. Basten AJA noted that this seemed to assume that the orders of 2 March 2022 would be varied to permit the setting off against the judgment debt of the Equity Division costs in addition to the costs of the appeal (see *Lambourne* (No 4) at [26]). The significance of this amendment was that if that application were to be granted then the respondents say that the entirety of the funds in Court should be applied to discharge the applicants' indebtedness on account of the costs orders made both in the appeal and first instance proceeding since the assessed amount of those costs orders well exceeds the funds in Court. The respondents identified the reason for the amendment to this notice of motion as being to add an operative order that would cause the funds to be paid in that way.
 2. On 31 May 2024, Basten AJA heard and determined the two amended notices of motion filed by the respondents (*Lambourne* (No 4)). His Honour dismissed the slip rule motion (at [33]). As to the payment motion, his Honour granted the application there made and ordered, relevantly, that:
 5. Order that the sum of \$210,249.00 paid into Court on 21 March 2022, together with such interest as may have accrued on that sum, be disbursed as follows:
 - (a) payment of \$186,214.86 to the respondents; and
 - (b) payment of the balance to the third appellant (*Punters Show Pty Ltd*).
 6. There be no order as to the costs of the motions with the intention that each party bear its own costs.
 1. For completeness, I note that at the outset of the judgment in *Lambourne* (No 4), Basten AJA set out his reasons (at [9]-[14]) for refusing a recusal application that had been made by Mr Lambourne. There is no challenge to that decision although Mr Lambourne raises this as a relevant consideration in his submissions (see below).
 2. On 31 May 2024, at the request of the appellants, Basten AJA made directions for a review pursuant to s 46(4) Supreme Court Act and UCPR r 51.58 of his Honour's orders made earlier that morning. Hence the present application.
 3. As can be seen from the above, the dispute in essence is as to the payment of money out of Court in circumstances where the money was paid into Court in compliance (or purported compliance) with conditions imposed on the grant of a stay of orders made in favour of *Punters Show*, pending a determination of the costs orders made in relation to the appeal.

4. The applicants' notice of motion, as amended, seeks the following relief:
 1. That UNTIL FURTHER ORDER the respondents be enjoined from taking any enforcement proceedings in relation to any costs being claimed by them in relation to these proceedings as well as Supreme Court proceedings 2016/344608, in particular any claim arising from the Costs Certificate issued by Costs Assessor Ferguson in Costs Assessment Matters: 2022/0001114001 and 2022/00113977.
 2. That within seven (7) days, the Registrar provide to the parties a statement of all interest accrued in relation to the sum paid into court on 21 March 2022.
 3. That pursuant to the provisions of s 46(4) of the Supreme Court Act and UCPR 51.58 the orders made by his Honour Basten AJA on 31 May 2024 be discharged.
- 3A. That the orders made on 19 November 2021 in these proceedings be permanently stayed.
4. That the time for filing of written submissions by the Applicant be extended to 28 August 2024.
- 4A. That the Applicants be granted leave to rely upon the affidavit of Marc Alan Lambourne filed and served on 20 August 2024.
5. Further, pursuant to the Court's inherent jurisdiction and s 23 of the Supreme Court Act, the orders made on 31 May 2024 be set aside on the ground that they would damage public confidence in the administration of justice, and they would otherwise constitute an abuse of the Court process.
6. A Declaration to the effect that the 'judgment debt' that was due and payable on 21 March 2022 in relation to Order (1) made by this Court in these proceedings on 24 September 2021 was in the sum of \$216,503.48.
7. [deleted]
8. That the parties be granted liberty to move the Court to deal with any issue related to the Costs Assessments Reasons published in Costs Assessment Matters: 2022/0001114001 and 2022/00113977.
9. That the parties will have fourteen (14) days from the date of Order (5) being made to so move the Court.
10. That pursuant to UCPR 41.3, the Registrar cause all funds held in Court (including any interest accrued on the funds since payment into court) of the sum of \$210,249 on 21 March 2022 be forthwith transferred to Punters Show Pty Limited.
11. That the Registrar's responsibility for the funds will be discharged in full upon receipt of an appropriate discharge document signed by Mr Marc Alan Lambourne, the sole director of Punters Show Pty Limited.

12. Liberty to the parties to seek any other order necessary in relation to the amount of interest due and payable to Punters Show Pty Limited pursuant to the provisions of s 101 of the Civil Procedure Act 2005.
13. That the Respondents pay the Applicants' costs of the proceedings in the gross sum of \$20,000.
1. As Mr Lambourne accepts, an application for review pursuant to s 46(4) of the Supreme Court Act is not an appeal (Applicant Reply at [55]). What must be shown is that there has been an error of principle in the exercise of the power or the decision was plainly wrong (see *Collier v Lancer* [2013] NSWCA 185 at [19] and the authorities there cited). Further, it has been recognised that there is a heavy burden on a person seeking a s 46(4) review of a decision of an appellate judge (see *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [48]).
2. For the reasons that follow, the applicants' amended notice of motion should be dismissed with costs, and the respondents' further amended notice of motion should also be dismissed with costs.

Applicants' submissions

1. The applicants rely on a number of sets of submissions, including submissions prepared by the solicitor (Mr Rodney Kent) formerly acting for the applicants; and Mr Lambourne also made oral submissions.
2. Distilling those various submissions, which overlap to an extent, the principal basis on which the applicants contend that Basten AJA erred in making the orders for payment out of the funds is the contention that his Honour did not properly address or apprehend the "quantum issue" raised by the applicants; and wrongly proceeded on the basis that the respondents were "entitled" to the amount ordered to be paid out to them in circumstances where the costs certificate in relation to the appeal costs had not been registered and hence was not enforceable as a judgment. That said, the "core argument" identified in Mr Lambourne's reply submissions is that the orders as to no costs made on 24 September 2021 are final because the court became "functus officio" on Ms Craven's "election" not to file a notice of motion within 14 days.
3. As to the "quantum issue", the applicants contend that the stay granted on 2 March 2022 was never operative for two reasons: first, because Mr Baker did not himself pay the judgment debt into Court (the moneys being paid by the fifth respondent as authorised by Mr Buckingham), and second, because the amount required to be paid into Court (the judgment debt) included interest as from 24 September 2021 pursuant to s 101(3) of the Civil Procedure Act, and hence what was required to be paid into Court as at 21 March 2021 was more than the amount actually paid in. The applicants say that no order was made on 2 March 2022 to "countermand the work" of s 101 of the Civil Procedure Act and hence that interest commenced to accrue in accordance with s 101 in circumstances where the judgment debt

was not paid within 28 days. Mr Lambourne has calculated that the amount of the judgment debt, including interest, as at 21 March 2022 (when the payment into Court was made), was \$216,503.48 (see [30] of his 6 June 2024 affidavit).

4. The applicants submit that his Honour erred in 'avoiding' the quantum issue by saying that no interest had accrued on the judgment debt because the payment into Court was made within 28 days of the 2 March 2022 order.
5. On the position advanced in the applicants' submissions, the argument is that the consequence of the asserted error as to the quantum issue is that there was never any operative stay of payment of the judgment debt (and hence Punters Show was entitled to payment of that amount as at 31 May 2024 when the payment motion was determined).
6. An alternative basis on which the 'no stay' argument is put in Mr Lambourne's submissions turns on when the notice of motion seeking payment out (the 8 October 2021 motion) was filed. The 24 September 2021 orders included order (3) (that there be no order as to costs in respect of the appeal and the first instance proceedings) and order (4) which permitted the parties to reopen the question of costs by affidavit filed within 14 days in the ordinary course. As I have earlier noted, Mr Lambourne contends that the respondents' motion, although forwarded to the Registry by email on 8 October 2021, was not stamped as filed until 15 October 2021. The JusticeLink document does not support that contention.
7. Mr Lambourne argues that the Court became functus officio once the respondents' solicitor failed to file a notice of motion within 14 days "in the ordinary course"; and that therefore the 24 September 2021 order (that there be no order as to the costs of the respective proceedings) remained in force and that therefore each party must bear its own costs in the Supreme Court and in the appeal proceedings. Hence, Mr Lambourne argues that there is no set-off to be considered; and that the orders made on 19 November 2021 are inconsistent with the 24 September 2021 orders and thus otiose. Mr Lambourne relies on this argument in support of his application for a permanent stay of the 19 November 2021 orders, contending that the respondents' solicitor elected not to repair the procedural mishap (as to the filing of the 8 October 2021 notice of motion) and the respondents are bound by that election (citing *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; [1990] HCA 39). Mr Lambourne maintains that the respondents' solicitor became aware of this issue on receipt of the applicants' 25 February 2022 submissions and hence that since at least that date there has been an abuse of the Court process. I address this submission (notwithstanding that it appears to proceed on a wrong premise) in due course.
8. If the applicants' 'core argument' not be accepted, then the applicants raise the further challenge to his Honour's orders based on the contention that Punters Show has the better entitlement to the moneys for the purposes of r 41.11 of the UCPR (having the benefit of the 24 September 2021 order for payment of the judgment sum, which for the reasons above they maintain has never been stayed). The applicants contend that the 31 May 2024 determination was based on the erroneous premise that as at that date the costs certificates

gave the respondents an immediately enforceable legal right to the costs as assessed.

9. The applicants submit that, as at 28 May 2023 (the day before the costs certificate was issued), the respondents were not entitled to have the funds released to them because there is no evidence of registration of the costs certificate under s 71(3) of the Legal Profession Uniform Law Application Act 2014 (NSW) (Legal Profession Uniform Law Application Act), reference also being made to s 133(2)(b) of the Civil Procedure Act (which deals with, inter alia, enforcement of unpaid assessed costs).
10. Thus, Mr Lambourne argues that, as at 31 May 2024, Punters Show was the only party "entitled" to the moneys in Court (for the purposes of r 41.3 of the UCPR) because the respondents had not registered the costs certificates issued by the Costs Assessor (the first step required for enforcement of the costs judgment).
11. Further, Mr Lambourne argues that, even if the costs certificates had been registered at that stage, they lacked the status of a judicial determination (referring to authority to the effect that registration is merely a "ministerial act", and that the mere fact of registration does not convert the certificate into a judicial determination, citing *Frumar v The Owners of SP36957* [2010] NSWCA 172 at [42] where it is said that registration makes the certificate enforceable as a judgment but otherwise does not alter its legal effect).
12. Complaint is also made in the course of the applicants' submissions as to the alleged inadequacy of his Honour's reasons (reference being made to the statement by McHugh JA, sitting in this Court as his Honour then was, as to the function performed by the articulation of reasons in *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247 (*Soulemezis*)) and as to the fact that his Honour did not refer to Pt 41 of the UCPR (which deals, among other things, with the circumstances in which payment out of Court can be made and Mr Lambourne argues should have been the starting point for resolution of the controversy before his Honour).
13. Various other issues are raised in Mr Lambourne's submissions, which fall outside the scope of the applicants' review application but which, for completeness, I note as follows.
14. Mr Lambourne refers in his submissions to an article published by the Hon David Ipp, formerly a judge of appeal of this Court, entitled "Lawyers Duties to the Court" (1998) 114 Law Quarterly Review 63 as a preface to making accusations against the respondents' legal representatives of breach of their duty to disclose the law and not to mislead as to the facts (and abuse of process). It is not necessary here to explore these issues, which do not arise on the review application presently before the Court. I simply note that accusations of this kind are serious ones to be made against officers of the Court and it is difficult to see on the material before this Court how those accusations could be made out. Mr Lambourne also makes allegations against Mr Baker as to the use of the "improperly withdrawn" funds while he was sole director of Punters Show (those funds being the subject of the successful *Improperly Withdrawn Moneys* claim). Again, it is not relevant to consider those matters, which seem only to go to the perceived unfairness of the overall outcome of the proceedings

(see [11(d)] and [55(t)] of Mr Lambourne's August affidavit).

15. In addition, Mr Lambourne's submissions make complaint in some detail as to alleged flaws in the costs assessment process (which he submits would need judicial determination before the costs certificate could be enforced) and (as mentioned above) alleged abuse of process in relation to the conduct of the proceedings on the part of the respondents and their legal representatives (including complaint as to the "smoke and mirrors" processes allegedly used by them) (see Mr Lambourne's August affidavit). None of those matters is relevant to the question here to be determined as to whether his Honour erred in making the orders made on 31 May 2024. It is conceded by Mr Lambourne that there has been no application for review of the costs assessments (AT 13.17); and the complaints as to the conduct of the proceedings largely seek to reagitate the merits of the impugned decision or the manner in which the respondents dealt with the application which led to the decision. I do not propose here to set out the various matters said to amount to an abuse of process. Such a finding could not possibly be made without embarking on a proper hearing of the allegations and in my opinion they could not affect the question as to whether his Honour erred in ordering the payments out.
16. Mr Lambourne also complains that Mr Baker "managed to delay and ultimately avoid payment of the judgment debt" through Federal Court bankruptcy proceedings started on 24 February 2022 and dismissed on 3 November 2022 (referring to the judgment of Markovic J in *Baker v Punters Show Limited*, in the matter of Baker [2022] FCA 1303 at [69]). This, too, is of no relevance to the present application. Mr Lambourne in his submissions also sets out various matters surrounding the transfer of \$210,249.00 into Court which he says must raise questions about good governance and transparency. Concerns of this kind (such as the true source of the funds or purpose of payment into Court and whether the payment was properly authorised; or who would have been the "ultimate true beneficiary" if the funds were to have been paid out of Court pursuant to the initial request made) are not relevant to the present application. The fact is that funds were paid into Court and his Honour was addressing an application for the payment out of those funds. It is not to the point how those funds might have been disbursed when released.
17. As adverted to above, complaints of this kind all seemingly go to the unfairness Mr Lambourne perceives in the fact that Punters Show has been held out of its judgment sum (and denied the fruits of its victory) since 24 September 2021; and his submission that were relief of the kind he seeks not to be granted this would bring the administration of justice into disrepute.
18. Mr Lambourne also appears to re-agitate the recusal issue, although as I have noted there was no application for leave to appeal from his Honour's rejection of that application. Again, this is of no relevance to the present application.

19. As to the additional order sought by Punters Show in the amended notice of motion (for a permanent stay of the orders made on 19 November 2021, i.e., the costs orders made in the appeal proceedings), the applicants say that this would effectively stop the abuse of the Court's process in this satellite litigation involving only costs that has occurred since 8 October 2021.

Respondents' submissions

1. As to the applicants' contention that the "judgment debt" referred to in the orders of 2 March 2022 included post judgment interest accruing from 24 September 2021 pursuant to s 101 of the Civil Procedure Act, the respondents contend that the reference to the judgment debt in order (1) of the 2 March 2022 orders as being the one created by the 24 September 2021 orders, and the reference to payment of "that amount", directed attention to order 1 of the orders of 24 September 2021 where the judgment sum was defined as the sum of \$210,249.
2. The respondents say that, had the Court intended that interest be added to the judgment sum, this could have been made clear by including a statement to the effect that the condition of the stay required payment of the judgment debt "plus interest pursuant to s 101 of the Civil Procedure Act... calculated up until the date of the payment into Court of the judgment debt".
3. The respondents argue that this conclusion is reinforced by the absence of any reference to interest in order (2) addressing the issue of set-off. The respondents argue that if post judgment interest was to be taken into account in order (1), and then likely in respect of both of the sums to be set-off, the precise date on which the set-off was to operate would have needed to have been clearly defined; whereas this was not necessary where the set-off was as to a defined judgment sum and a defined sum of assessed costs. The respondents say that if the stay required the payment of post-judgment interest, this would have produced a difficult position for Mr Baker of having to calculate precisely when the payment into Court would take effect, including when any funds would clear, and calculating in advance what the post judgment interest would be to that date, with the risk that if the calculation fell short, there would have been no compliance and the stay would not be in operation. The respondents say that it is unlikely that such a result was intended in the absence of clear words to give that effect.
4. In any event, the respondents maintain that the question as to whether the stay was in fact operative is now irrelevant since the application before Basten AJA was for payment out of moneys that had in fact been paid into Court and in respect of which there was already a separate order for set-off that operates irrespective of whether there was in fact a stay. The respondents say that the set-off provided for does not include interest (being a set-off in respect of the fixed judgment sum ordered on 24 September 2021 and the fixed assessed costs ordered on 19 November 2021).

5. Further, the respondents argue that if the payment into Court did not have the effect of achieving a stay, then there has been a failure of the purpose for which the moneys were paid into Court and they should be returned to the respondents in full (and that considerations of set-off and enforcement would then be considered separately). (This submission seems to conflict somewhat with the respondents' submission that the set-off provided for in order (2) operates separately and irrespective of whether there was a stay since on that submission there would be a set-off rather than the return of all moneys that had been paid into Court but in any event I do not consider it necessary to delve into the question whether restitutionary principles in relation to failure of consideration are apt to apply in the context of the imposition of conditions on which a stay is granted.)
6. As to the respondents' notice of motion, as adverted to earlier this is pressed in the event that, in determining the set-off, the orders of 2 March 2022 are construed to take into account interest on the judgment sum. If that is the case, then the respondents say that there should be mutuality; i.e., that interest should be taken into account on both sides: interest on the judgment sum and interest on the amounts under the costs certificates. The respondents point to the fact that the costs certificates addressed the costs not only of the appeal but also of the proceedings at first instance and they say that on that basis, there would be a net balance owing to the appellants far exceeding the total sum in Court (attaching a spreadsheet of calculations demonstrating that position as Annexure A to the submissions).
7. The respondents argue that the issue of payment out is to be addressed separately not only to the question of whether there was a stay but also to the question of any formal set-off; and that it would be artificial not to take into account all relevant debts between the parties and to ignore the fact that the costs of the first instance proceeding have been assessed. They submit that in the proper exercise of the general discretion for the payment out of moneys held in Court, consideration is given to all possible claims over the moneys in Court, often without requiring formal pleadings between all relevant parties on all the possible claims.
8. Thus it is submitted by the respondents that if the full position between the parties, including the judgment debt, that all assessed costs and interest is taken into account then the result would be an order for the payment out of all moneys (together with accrued interest) to the respondents.

Determination

1. As outlined above, the errors identified in Basten AJA's reasons, as I understand the applicants' submissions, are: first, as to the "quantum issue", namely that his Honour failed to apprehend or fairly deal with this issue (and in particular the contention that there was no operative stay); and, second, that his Honour failed properly to address the entitlement of the respective parties to the sum paid into Court. As part of those issues, complaint is made as to the adequacy of his Honour's reasons, which I understand to be a further error that the applicants contend was made.

Quantum issue

1. As to the first, which encompasses a number of issues, I do not accept that error of the kind required on an application for review has been established.
2. Insofar as the applicants' argument rested in part on the identity of the person or entity which made the payment into Court, his Honour addressed this at [37] and did not accept that it had substance. His Honour there said that:

As to the second matter [i.e., uncertainty as to when the stay actually commenced and would expire – see [35]], although there was a suggestion at one point that the stay had not actually operated at any time because Mr Baker had not made a payment into Court, there was no substance in that point. The payment in had been made on his instructions within the time allowed for payment of a judgment debt without incurring interest. As to the expiration, there may have been an issue as to precisely when the balance was payable, but in terms of the order, that appears to have been when the relevant costs determination was made.

1. What his Honour was there addressing was a submission that he understood that the applicants were making as to the uncertainty as to the commencement and expiry of the stay (not whether interest had accrued on the judgment debt or was required to be included in the amount paid into Court as a condition of the stay). However, in the course of so doing, his Honour was clearly aware of the assertion that there was no stay because Mr Baker had not himself paid the funds into Court. I am not persuaded that there was error in rejecting that argument as being of no substance. His Honour accepted that the payment had been made on Mr Baker's instructions. That suffices for the purpose of satisfaction of a condition as to payment into Court. There would not ordinarily be enquiry into the precise identity of the payer – the question is on whose behalf or instructions the payment was made.
2. I would, however, note that insofar as his Honour suggested that payment into Court had been made within the time allowed for payment of a judgment debt without interest appears to be in error. As Mr Lambourne has pointed out, the judgment debt was outstanding for more than 28 days from the date that judgment was entered on 24 September 2021. Therefore, subject to dispensation under s 101(3), if the amount of the judgment is not paid in full within 28 days after the judgment takes effect, then in the ordinary course (and in the absence of an order otherwise) interest commences to run from the date on which the judgment takes effect (s 101(2)) on so much of the amount of the judgment (exclusive of any order for costs) as is from time to time unpaid. His Honour appears to have here been referring to the fact that the payment into Court was made within 28 days of the order granting the stay but I do not see why the imposition of the stay of payment of the judgment would have negated a claim for post-judgment interest up until the time of the stay.
3. In the absence of the stay order having retrospective operation (and I do not understand it here to be argued that it did), there is, therefore, some force in Mr Lambourne's contention that interest had already commenced to run on the judgment debt by the time of the payment into Court. However, that does not answer the question as to whether the condition

imposed on the grant of the stay required the payment into Court of not simply the judgment sum but also post-judgment interest accrued up to the time of the payment into Court.

4. At [38], his Honour addressed what he understood to be the applicants' contention that the amount to which Punters Show was entitled should include interest, which had not been calculated (the third matter identified in the reasons at [35] as a ground on which Mr Lambourne resisted payment out of the moneys). His Honour said that:

As to the third matter, the suggestion that interest on the judgment debt was payable pending payment out of court, was inconsistent with the stay and appeared to be based on the proposition that the stay had never had effect. Whether interest (other than interest accruing on the amount held by the court) was payable from the date the whole of the respondents' costs were calculable, that was not until the second determination made in October 2023. To the extent that there is a dispute as to whether interest should be paid by the respondents from that time on the balance of the judgment, that is not a matter which affects the rights of the parties under the orders made by this Court.

1. The inconsistency to which his Honour was there referring was, as I read the reasons, the suggestion that during the period in which payment of the judgment debt was stayed interest on the judgment debt was payable to the applicants. I do not understand his Honour to be suggesting that interest would not have accrued pursuant to the provisions of the UCPR on the monetary sum held in Court (and payable in due course when the moneys held in Court were to be paid out). In oral submissions, the respondents acknowledged that the imposition of the stay would not deprive the applicants of an entitlement to post-judgment interest (or interest on the funds held in Court) subject to the operation of the set-off.
2. I do not see any error in his Honour's conclusion that what order (1) of the 24 September 2021 orders required was payment of the judgment debt which had been entered in a fixed sum. True it is that the definition of "judgment debt" in the UCPR (see s 3) includes (b) any interest after judgment that is payable on that amount under s 101. However, the use of the term "judgment debt" in order (1) of the 2 March 2022 orders is within the phrase "judgment debt created by [the 24 September 2021] order". That order in terms was for the entry of judgment in the sum of \$210,249. The common sense reading of the stay of payment of "that amount", reading the orders of 2 March 2022 and 24 September 2021 together, is that what was required as a condition of the stay was for the payment into Court of the sum of \$210,249, that being the amount for which entry of judgment was ordered on 24 September 2021. As the respondents submit, the impracticality of a condition requiring the payment of a variable amount into Court as a condition of the stay tends against the construction for which Mr Lambourne contends (as does the lack of any reference to interest in either of the 24 September 2021 orders – for a stay or for set-off).

3. Hence there is no error as to the "quantum issue". Even had there been error in this regard, and there was no operative stay, I would have concluded that nothing turned for present purposes on this error since, once the costs had been determined through the costs assessment process, the operation of the set-off provided for under order (2) of the 24 September 2021 orders meant that Punters Show was only entitled to the balance of the sum paid into Court after that set-off (and the respondents were entitled to payment out of the costs as so determined). This turns on the determination of the "entitlement issue", which I discuss below.
4. Mr Lambourne's complaint that the 2 March 2022 orders operated in effect as providing security for costs in the respondents' favour but without having regard to the relevant discretionary considerations for such an order amounts to a complaint as to the stay being granted in the first place, which is not within the scope of the review of Basten AJA's 31 May 2024 decision.
5. As to the complaint that there was no operative stay because the 8 October 2021 motion was not filed until 15 October 2021 (and the contention that by then the Court was *functus officio*), the Court was not *functus* in circumstances where liberty to apply had been given to reopen the question of costs. As was observed by Drummond J in *Australian Competition Consumer Commission v Shell Co of Australia Ltd* (1997) 72 FCR 386, at 395, superior courts of record do not become *functus officio* merely upon the making and entry of the judgment or order that determines the rights of the parties: they retain power in the same suit to make supplemental orders thereafter in aid of the enforcement and working out of the orders determining the parties' rights.
6. A court is *functus officio* where it has exhausted its judicial functions in a case and is precluded from further considering the matter (see *Patterson v Humfrey* (No 2) [2016] WASC 343 at [8] per Le Meire J). Where parties are afforded the liberty to apply, that expressly reserves the future exercise of judicial function in respect of that matter. The essence of that power was explained by Bleby JA (with whom Kelly P and Doyle JA agreed) in *Eckert v Roberts* (2021) 405 ALR 515; [2021] SASCA 73 (at [50]) as being "to make any orders necessary to address any issues arising on account of the final orders determining the claim and which therefore remain within the court's jurisdiction so engaged..." (emphasis added). Unlike in *David Barry Logistics Pty Ltd v State of Victoria* (No 3) (2022) 68 VR 157; [2022] VSC 575, the respondents were not attempting to circumvent the 24 September 2021 orders; rather, they were acting within the scope of the reservation.
7. There was clearly discretion for the Court to extend the time for the filing of the 8 October 2021 motion or to dispense with the time requirement for the leave that had been given to be exercised. Even if Mr Lambourne's assertion as to the date of the filing of the 8 October 2021 notice of motion were correct, in circumstances where the notice of motion had been forwarded to the Registry within the time specified and there (hypothetically) was only a short delay before it was formally filed, it is difficult to see why leave would not have been given. In any event, there was no appeal or application for leave to appeal from the 19

November 2021 orders and, again, a challenge to those orders is not within the scope of the present review application.

Entitlement issue

1. Turning then to the "entitlement issue", which is the contention that his Honour erred in proceeding on the basis that the respondents were "entitled" to a payment out of the amount assessed as the costs of appeal (or as Mr Lambourne puts it, making a determination based on the major premise that the costs certificates gave the respondents an immediately enforceable legal right), this assumes that entitlement for the purposes of r 41.11 of the UCPR is to be equated with the enforceability of the right giving rise to that entitlement (as I explain below).
2. First, however, I address the complaint that his Honour did not expressly refer to Pa 41 of the UCPR, which Mr Lambourne maintains should have been the starting point for his Honour's consideration of the application (or to legal principle or authority in relation to the operation or application of Pt 41 as Mr Lambourne suggests).
3. What his Honour was clearly doing was determining the entitlement of the respective parties to the funds in Court, irrespective of the fact that no reference was made to Pt 41. Mr Lambourne emphasises that r 41.11 of the UCPR provides that:

Subject to these rules, funds in court may not be paid out of court except to the party entitled or (on the party's written authority or by order of the court) to the party's solicitor.

1. Mr Lambourne argues that the question posed by his Honour in the course of argument (as to what was the basis for opposing the order for payment out now being made) should have been a question as to what was the basis for the respondents' entitlement to be paid.
2. In my opinion, no error has been demonstrated in this regard. Understandably, his Honour's reasons focused on the arguments raised in opposition to the payment out, since his Honour was quite properly addressing the applicants' opposition to the application. The question of the respondents' entitlement to their costs of the appeal was clear – there were costs orders in their favour which had not been set aside. Nor could the entitlement of Punters Show to the judgment sum have been in dispute. However, what the orders of 2 March 2022 clearly contemplated was that, once the respondents' costs had been determined "by assessment or agreement" then there was to be a set-off of those costs against the amount of the judgment debt created by the 24 September 2021 order in favour of Punters Show. In other words, the entitlement of Punters Show to payment of the judgment sum (or judgment debt) was subject to the set-off ordered in order (2) of the 2 March 2022 orders.
3. The nub of the complaint by Mr Lambourne is as to the perceived unfairness of Punters Show being held out of its judgment sum by operation of the 2 March 2022 orders. However, the effect of the set-off that was ordered was that its entitlement to that sum was subject to the order as to costs of the appeal. The delay while that process was being undertaken was

capable of being met by the payment of interest on the amounts held in Court (and, prior to their payment into Court when the payment order was stayed, any post-judgment interest that had accrued since judgment was entered). That entitlement to post-judgment interest (other than for the period when the stay was in operation) remains; it would fall to be recovered in the ordinary course (subject to any other set-off as against other costs orders in the respondents' favour); simply not out of the funds held in Court (which are first to be applied to the respondents' assessed costs of the appeal). Further, given that the overall costs position must be taken into account it is difficult to see any unfairness on the stay operating in accordance with its clear terms.

4. As to the submission that Mr Baker and the respondents have no "entitlement" to the assessed costs in the absence of registration of the costs certificate and enforcement of the judgment debt to which registration gives rise, as adverted to above, that conflates legal entitlement with enforceability of the judgment in relation to that entitlement. Since the 19 November 2021 judgment, the respondents have been entitled to 65% of their costs of the appeal (as assessed or agreed). They have a judgment in their favour to that effect and it is a final judgment. The fact that steps had to be taken for enforcement of the costs orders (and that until costs were assessed there was not a determination of the precise amount owing to the respondents as a consequence of the said costs orders) does not alter the fact that there was an entitlement to those costs as assessed or agreed.
5. The effect of s 71(3) of the Legal Profession Uniform Law Application Act is that the filing of a costs certificate in the relevant court constitutes a judgment. While in some cases there has been a relevant distinction between filing and lodgement for filing of costs certificates (see, for example, *Infact Consulting Pty Ltd v Kyle House Pty Ltd* [2007] NSWSC 56 per White J (as his Honour then was) at [15]), here there is no dispute that the registration process in relation to the costs certificates had not been taken as at the time of the application for payment out of the moneys (and so no enforcement action in respect of the judgment that would have been constituted by the filing of the costs certificates could have been taken).
6. However, the fact that the registration of the costs certificates is a "ministerial act" rather than a judicial determination and the recognition that registration of a costs certificate does not convert it into a judicial determination (matters to which Mr Lambourne in his submissions refers) are matters that do not affect the conclusion that the costs order itself gave rise to a legal entitlement on the part of the respondents to the costs the subject of that order and made provision for those costs once determined to be set-off against the judgment debt. There is no basis for the suggestion that the "determination" of those costs "by assessment or agreement" required the registration of the costs certificates (as opposed to the requirement for the set-off to occur being satisfied simply on the determination of those costs by the issue of a costs certificate). In this regard, the absence of any review of that costs assessment is significant because it means that there was no challenge to the determination of those costs within the requisite time.

7. Thus I consider that there was no error on the "entitlement issue".
8. As to the complaint as to inadequacy of reasons, that can be disposed of relatively briefly. As noted above, reliance has been placed by Mr Lambourne on the well-known observations of McHugh JA in *Soulemezis* (a case in which the trial judge had given no reasons) as to the purpose for which reasons are given. It is relevant in this context to note that, in *Soulemezis*, McHugh JA said that:

If an obligation to give reasons for a decision exists its discharge does not require lengthy or elaborate reasons: *Ex parte Powter*; *Re Powter* (1945) 46 SR (NSW) 1 at 5; 63 WN 34 at 36. But it is necessary that the essential ground or grounds upon which the decision rests should be articulated. In many cases the reasons for preferring one conclusion to another also need to be given: *Wright v Australian Broadcasting Commission* [[1977] 1 NSWLR 697] (at 701, 713). ...

1. Similarly, in *Soulemezis*, Mahoney JA (at 269-270) reiterated his earlier observations in *Housing Commission of New South Wales v Tatmar Pastoral Co Ltd* ([1983] 3 NSWLR 378 at 385-386) to the effect that it is not the duty of the judge to decide every matter raised in argument and that the judge may decide in a way which does not require the determination of a particular submission if the decision on a particular submission is not within the judge's reasoning to the final conclusion.
2. Accepting that a recognised purpose for the giving of adequate reasons by judicial officers is to enable the parties to see the extent to which their arguments have been understood and accepted, as well as the basis for the relevant decision (*Soulemezis* at 279), it has been said that the standard of reasons is properly defined negatively (*Alexandria Landfill Pty Ltd v Transport for New South Wales* (2020) 103 NSWLR 479; [2020] NSWCA 165 at [29] per Basten JA) namely that:

... it must be shown that the decision has not been reached capriciously or arbitrarily, but rationally. The reasons must thus reveal that all material factors have been identified and addressed, and that no prohibited considerations have been operative. If there is an available process of reasoning from the evidence to the outcome which has been adopted, either expressly or by implication, the appellate court should be slow to reach the conclusion that the function of the trial court has not been exercised according to law.

1. The adequacy of reasons is not to be judged as against a standard of perfection (see *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233 at 255); rather, the question is whether the reasons attained the minimum acceptable standard (see *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231 at [66] per Bell P (as his Honour then was); *Broken Hill Cobalt Project Pty Ltd v Lord* [2022] NSWCA 271 (*Broken Hill Cobalt*)). As I noted in *Broken Hill Cobalt* at [105], a minimum requirement is that the reasons be given in a form that will enable the losing party to understand properly the grounds on which the case was lost, and will not frustrate the losing party's right of appeal (there referring to *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666-667; [1986] HCA 7).

2. In the present case, the context in which the reasons were given was that there was a hearing on 28 May 2024 on a discrete issue – the application for payment out of moneys that had been paid into Court as a condition of a stay of payment of the judgment debt. The application was consequential on the earlier orders in relation to entry of the judgment sum and then the stay of payment. There was not a need for an elaborate discussion of statutory provisions, legal principle and authority. The reasons given by his Honour in my opinion were more than sufficient to meet the minimum acceptable standard. Although Mr Lambourne, in identifying the perceived flaws in the 31 May 2024 reasons, submits that Punters Show (and, he says, most members of the public) would find it difficult to make sense of the statement at [37] to which I have already referred (i.e., that payment in had been made on Mr Baker's instructions within the time allowed for payment of a judgment debt incurring interest), I consider that his Honour's reasons overall made clear the basis on which his Honour ordered the payment out of Court of the moneys in question and there was no inadequacy of reasons such as to give rise to any reviewable error. Disagreement with the outcome of the reasoning process does not demonstrate inadequacy of reasons.
3. Thus, the heavy burden on a s 46(4) review of a decision of a judge of appeal has not been met.
4. As to the particular relief sought in the amended notice of motion, having regard to the conclusions reached above for completeness, I note as follows (adopting the numbering from the amended notice of motion):
 1. there is no basis established for the interlocutory injunction sought in respect of any enforcement proceedings by the respondents in relation to the costs ordered in their favour;
 2. it is not necessary for there to be a direction as to provision of a statement of interest accrued in relation to the sum paid into Court on 21 March 2022; such a request may be made of the Registry;
 3. no error has been demonstrated in relation to the 31 May 2024 orders and the application for review should be dismissed;

(3A) there is no basis for a permanent stay of the orders made on 19 November 2021 in these proceedings;

1. although now strictly unnecessary since the submissions have been considered by the Court, the time for filing of written submissions by the applicant be extended to 28 August 2024;

(4A) leave be granted for the applicants to rely upon the affidavit of Marc Alan Lambourne filed and served on 20 August 2024 limited to the content relevant to the s 46(4) application;

1. the application to set aside the orders made on 31 May 2024 should be refused (it has not been established that those orders were in error, nor would they damage public confidence in the administration of justice or otherwise constitute an abuse of the Court process);

2. I note that the declaration (to the effect that the 'judgment debt' that was due and payable on 21 March 2022 in relation to Order (1) made by this Court in these proceedings on 24 September 2021 was in the sum of \$ 216,503.48.") was not pressed.
3. [Deleted]
4. any application sought to be made by the applicants in relation to the costs assessments issue does not arise in the scope of this review application and the liberty sought is not granted;
5. not applicable in light of (5) and (8) above;
6. the application for an order for payment out pursuant to r 41.3 is dismissed in light of the conclusion reached on the review application;
7. not applicable in light of (10);
8. not applicable in light of the conclusion reached on the review application;
9. application for a gross sum costs order is refused, there being no basis established for the making of such an order in relation to the only costs order here made in the applicants' favour (which is limited to the costs of the respondents' amended notice of motion which is being dismissed).

Conclusion

1. For the reasons above, I consider that the stay did become operative on the payment into Court (on Mr Baker's instructions or behalf) of the funds on 21 March 2022 and that there was no error in the order for payment out of the moneys held in Court after the respondents' costs had been determined by reference to the costs assessment process and the set-off process that was provided for by order (2) was undertaken (i.e., after the assessed appeal costs were set off against the amount of the fixed sum judgment). The orders made by Basten AJA correctly provided for the payment to Punters Show of the amount to which it was entitled (out of the funds in Court) in respect of the judgment sum in its favour and for the balance of the funds in Court to be paid to the respondents in satisfaction of the assessed costs of the appeal proceedings. I would therefore dismiss the applicants' notice of motion.
2. I would also dismiss the respondents' notice of motion. I do not consider it appropriate to revisit the basis on which Basten AJA made the orders for payment out of Court. The costs of the first instance proceeding were not part of the costs regime for which provision was made on 19 November 2021. While there is no doubt merit in reaching finality in the satellite litigation over costs, I do not consider it appropriate in the context of a review application in relation to his Honour's decision now to embark upon a separate exercise in relation to the costs of the first instance proceeding (and I note that the circumstance in which the respondents urged this to be done – namely if Mr Lambourne's contention were to be accepted as to the interest payable on the judgment sum forming part of the amount

required to be paid into Court – does not arise on the conclusion I have reached as to that issue).

3. I see no reason why costs should not follow the event. Each notice of motion should be dismissed with costs.
4. MITCHELMORE JA: I agree with Ward P.
5. KIRK JA: I agree with Ward P.

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