SUPREME COURT OF QUEENSLAND

CITATION:	*Kirkman & Anor v The Salvation Army (Qld) Property Trust & Ors* [2007] QSC 120
PARTIES:	**DAVID ALEXANDER KIRKMAN** (first applicant) **ALAN JOHN BENNETT** (second applicant) v **THE SALVATION ARMY (QUEENSLAND) PROPERTY TRUST** (first respondent) **THE TRUSTEES OF THE DE LA SALLE BROTHERS** (second respondent) **QUEENSLAND CANCER FUND** (third respondent) **PREVENT BLINDNESS FOUNDATION** (fourth respondent) **XAVIER CHILDREN'S SUPPORT NETWORK** (fifth respondent)
FILE NO:	S9786 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	2 May 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 December 2006
JUDGE:	Douglas J

ORDER:

1. The examination of an account pursuant to r. 649 requires a registrar to enquire into any objection or exception taken to the account or allowance of commission at the hearing;

2. The examination may be in the nature of an audit if the circumstances warrant it. It is not limited to the verification of the claims by an inspection of vouchers only but may require a registrar to determine whether the account is accurate or erroneous and whether payments have been made properly or improperly.

3. A registrar shall inquire into any objection or exception taken to the account or allowance of

commission in respect of items 6, 85, 94, 112, 113, 175, 230, 270, 303 to 305, 307, 313, 354, 360, 361, 366, 368 to 371, 376, 377, 382, 391, 395, 406 and 412 to 417 in the account and state whether any and which of those disputed items are accurate or erroneous and whether the payments have been made properly or improperly and are proper to be allowed in respect of the calculation of commission and to what amount.

4. That the applicants pay the first, third and fifth respondents' costs of the reference and the costs thrown away as a result of the adjournment of the application before the senior deputy registrar on the standard basis with no right of the applicants to indemnity from the estate in respect of the costs of the first, third and fifth respondents or in respect of the applicants' own costs of and incidental to the senior deputy registrar's reference and the costs thrown away as a result of the adjournment of the application before the senior deputy registrar, and

5. That the first, third and fifth respondents be entitled to be paid out of the estate the difference between the standard costs referred to above and their costs on the indemnity basis as assessed or as agreed with the applicants.

CATCHWORDS: SUCCESSION - EXECUTORS AND ADMINISTRATORS - COMMISSION - JURISDICTION AND DISCRETION OF COURT - approach to the passing of accounts that should be taken when assessing the commission to which the administrators and executors may be entitled - whether a registrar should audit the account or merely check the accuracy of vouchers – "moderation" of costs in the absence of the ability to tax a bill of costs on application by a third party.

Constitution of Queensland 2001, s 58
Costs Act 1867, s 31
Rules of the Supreme Court 1900, s 78
Succession Act 1981, s 6(1), s 69, s 70
Supreme Court Act 1867, ss 20-25, s 34
Trusts Act 1973, s 44(c)
Uniform Civil Procedure Rules 1999, r 5, r 647, r 648, r 649, r 650, r 651
Queensland Law Society Act 1952, s 6ZF

Allen v Jarvis (1869) LR 4 Ch App 616, cited
Brown v Burdett (1888) LR 40 Ch D 244, cited
Christensen v Christensen [1954] QWN 37, cited

Equuscorp Pty Ltd v Short Punch & Greatorix [2001] 2 Qd R 580, cited
In the Estate of Orre (Supreme Court of New South Wales; No 10673 of 1990, Powell J, 19 December 1991, unreported), followed.
In the Will of Macnamara (1895) 6 QLJ 219, considered
In the Will of Lucas-Tooth (1932) 50 WN (NSW) 86, cited
Jackson v Sterling Industries Ltd (1987) 162 CLR 612, cited
In re Kent [1905] QWN 28, cited.

COUNSEL: D W Marks for the applicants
M J Liddy for the first, third and fifth respondents

SOLICITORS: Cartwrights Tebbett and Ostwald for the applicants
Minter Ellison Solicitors for the first, third and fifth respondents

[1] **Douglas J**: The applicants, Mr Kirkman and Mr Bennett, were the administrators of the estate of Alfred Henry Spring and have applied to be allowed commission as his personal representatives. Mr Kirkman continues to be the executor of the estate and has applied for commission in that role also. This application deals with the approach to the passing of those accounts that should be taken when assessing the commission to which the administrators and executor may be entitled. It is important to note that this is not a procedure designed to challenge whether they should have made particular payments from or should be liable to repay any such payments to the estate.

[2] Mr Spring died on 8 April 1999. Proceedings to prove his will in solemn form were brought which led to an order of 4 November 1999 granting both applicants letters of administration pendente lite. The solemn form action was resolved by agreement, the grant of letters of administration was revoked on 30 April 2002 and the administrators were discharged by the grant of probate on 29 May 2002. On 20 December 2004 Muir J ordered the filing of accounts and directed that the provisions of rr. 647, 648, 649 and 650 of the *Uniform Civil Procedure Rules* 1999 apply to the examination of the account. The applicants have prepared an account of their administration and have produced a report from a costs assessor dealing with a number of approaches to the quantification of their claim for commission. The first, third and fifth respondents are a number of charities who are beneficiaries under the will and who have appeared before a senior deputy registrar on the examination of the account.

Background

[3] The commission sought in the application was $32,000 for Mr Kirkman and $56,000 for Mr Bennett during their joint administration, while an additional $60,000 was sought as executor's commission for Mr Kirkman. Until the respondent beneficiaries were served with the application for commission they had no detailed knowledge of how the applicants had administered the estate or what had occurred in the solemn form action. The accounts had not been passed and amounted to approximately $550,000 claimed as remuneration for the personal representatives and for legal fees from the residue of the estate, which was estimated to be $1 million.

[4] The solemn form action was said to have incurred costs and outlays of $218,044.51. That action challenged the testamentary capacity of the testator and settled at a mediation. The firms of solicitors for some of the opposing parties to that action later merged to form one firm. That firm has continued to act for the executor and was the solicitor on the record in this application for commission. None of the legal fees have been assessed.

[5] I was told that, on the application before Muir J on 20 December 2004, it was submitted on behalf of the respondents that the accounts of the estate could not be understood and that it was necessary for them to be passed before commission could be determined, so that the account should be referred to the registrar for examination.

[6] The original accounts were not filed until 9 March 2005. Amended accounts were filed on 25 May 2005 and the examination of the accounts was adjourned five times. Further amended accounts were delivered in October 2006 which were criticised as being incapable of explanation on their face and unable to be reconciled to the earlier accounts. When the examination of the account commenced on 19 October 2006 it was apparent that the applicants and the respondents disagreed as to the type of examination of the accounts that should be adopted by the senior deputy registrar. That encouraged him to refer these questions to the court in the expectation that whatever approach he adopted was likely to be tested by the lodging of an appeal.

[7] The first contentious issue debated by the applicants and the respondents was whether, when examining the accounts, to determine the amount of commission to allow, a registrar of this Court should do so as if he or she were auditing them or conduct an examination of a more limited nature.

[8] Another issue raised by the senior deputy registrar himself related to legal costs which had been incurred in respect of the administration of the estate and which form part of the accounts. The respondents are seeking itemised bills of costs to allow them to ascertain the proper account that should bear some of the claims for legal expenses and to allow them to determine whether the claims are reasonable. They were not parties to the payment or incurring of those costs by the applicants and the questions asked touch on whether third parties, such as these respondents, are bound to accept the form of account agreed between solicitor and client, and whether a third party will be entitled to take issue with the validity of client agreements between parties whose costs have been paid out of the estate and their solicitors.

[9] In the registrar's reference the questions were formulated as follows:

> (1) Whether the examination of an account is in the nature of an audit or of a more limited nature?
>
> (2) If such an examination is limited, in what manner is it limited?

[10] The further question raised in respect of the inquiry into the assessment of costs agreed between solicitor and client, which I shall describe as the third question, is as follows:

(3) In the absence of bills in taxable form and an avenue for the assessment of costs by a registrar of the Court how should the respondent's objections to items 6, 85, 94, 112, 113, 175, 230, 270, 303 to 305, 307, 313, 354, 360, 361, 366, 368 to 371, 376, 377, 382, 391, 395, 406 and 412 to 417 in the account be resolved?

The nature of the examination of an account

[11] Section 6(1) of the *Succession Act* 1981 provides:-

> "6.(1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect."

[12] It replaced s 23 of the *Supreme Court Act* 1867 which was rather more elaborate in saying:

> "**23. Ecclesiastical jurisdiction. 20 & 21 Vic. c. 77 s. 23.** The Supreme *Court* shall have the same powers and its grants and orders shall have the same effect throughout all Queensland and in relation to the personal estate in all parts of Queensland of deceased persons as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively had aforetime in the province of Canterbury or in the parts of such province within its jurisdiction and in relation to those matters and causes testamentary and those effects of deceased persons which were within the jurisdiction of the said prerogative court and all duties which by statute or otherwise were aforetime imposed on or should be performed by ordinaries generally or on or by the said prerogative court m respect of probates administrations or matters or causes testamentary within their respective jurisdictions shall be performed by the Supreme Court and the said court shall have full and entire ecclesiastical jurisdiction throughout Queensland and its dependencies **Proviso.** Provided that no suits for legacies or suits for the distribution of residues shall be entertained save by the Supreme Court in equity."

[13] The applicants' argument is that the registrar's function here is limited when passing accounts under Pt 10 of the *UCPR* and, in particular under rr. 648, 649, 650 and r. 651, to seeing that sums entered on the disbursement side of the accounts have, in fact, been disbursed and that proper vouchers or receipts have been produced and little more. It was submitted that anything more extensive than such an examination required the commencement of an administration action.

[14] In this context it is worth noting that s. 69 of the *Succession Act* gives the registrar "all such powers and authorities as may be conferred on the registrar from time to time by the court and by the rules of court and otherwise all such powers and authorities as the registrar exercised before the passing of this Act". Rule 648 allows an interested person to be heard and to file an objection to the account or

allowance of commission while r. 649(2) provides that the registrar "must inquire into any objection or exception taken to the account or allowance of commission at the hearing." There is no limit expressed in r. 648 as to the grounds of objection that may be taken.

[15] In making the submission that the registrar's powers in passing accounts were limited in this fashion, Mr Marks for the applicants, relied on s. 23 of the *Supreme Court Act* 1867, the decision in *In the Will of Macnamara* (1895) 6 QLJ 219 and an argument that such a system formerly operated in the ecclesiastical courts in England and continued to operate here in spite of the more general language now found in the *Succession Act* and the *UCPR*. That submission relied on s 70 of the Act which provides:

> "70. The practice of the court shall, except where otherwise provided in or under this or any other Act or by rules of court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the court before the passing of this Act."

[16] The practice was said to be different from that operating in New South Wales, see *In the Estate of Orre* (Supreme Court of New South Wales; No 10673 of 1990, Powell J, 19 December 1991, unreported). There the process is described as being akin to an audit, concerned not only with ascertaining whether alleged disbursements have in fact been made, but also with determining whether they have been made properly or improperly. Powell J distinguished that approach from "the position when such matters were dealt with by the Ecclesiastical Courts in England" which he characterised as requiring those courts to see "that sums entered on the disbursements side of the Accounts have in fact been disbursed and proper vouchers or receipts produced". There are also statements in Ballow, *A Treatise of Equity* (5th ed. Fonblanque, 1820) vol. II at 416-419, fn. (d), to the same effect, that, in the ecclesiastical courts, an executor could not be obliged to prove the items of his account or to swear to the truth of them, so that creditors were required to commence a suit in equity to obtain such relief.

[17] The decision in *Macnamara* recognises that this Court inherited the ecclesiastical jurisdiction of the Prerogative Court of the Archbishop of Canterbury introduced by s. 23 of the *Supreme Court Act* 1867, after the separation of Queensland from New South Wales; see at 222-223. It seems to me to be another question, however, whether the exercise of that jurisdiction was as limited in practice as is contended by Mr Marks either under the *Supreme Court Act* 1867 or now under s. 6(1) of the *Succession Act*. If there were any scope for the proviso to s. 23 of the *Supreme Court Act* 1867 to limit the nature of the registrar's examination, the Court did not state that in *Macnamara* and the terms of the proviso, relied on to some extent by Mr Marks in his submissions, are not reflected in the current legislative scheme.

[18] Such a practice of limiting the nature of the registrar's examination of the account does not seem to have been current in Queensland so far as one can tell from the reported decisions. Sir Samuel Griffith, for example, said in *Macnamara* at 223:

> "It only remains to consider the extent of the jurisdiction of the Prerogative Court as to dealing with objections to executors' and administrators' accounts. Titles 234 to 237 of Oughton's *Ordo* Judiciorum are devoted to the consideration of this subject. It is there laid down that it is competent to object that goods are omitted from the inventory, and the mode by which the accounting party is to

> discharge himself is fully discussed. The case of *Telford v Morison* is to the same effect. Sec 6 of *The Probate Act of* 1867, already referred to, expressly recognises the authority of the court to 'pass' executors' and administrators' accounts. And, apart from express authority as to the ancient jurisdiction of the Prerogative Court, the term 'passing accounts' seems to us necessarily to involve an inquiry into their accuracy. Otherwise the proceeding, which is a solemn one undertaken by a court of justice, would be absolutely futile. We think, therefore, that the court has authority on passing executors' or administrators' account to examine them and inquire whether they are accurate or erroneous. The rules of 1845 appear to us to be apt for regulating the exercise of this jurisdiction, which is merely a continuation of the similar jurisdiction previously conferred on the court by other words. We are of opinion that they are still in force, except so far (if at all) as they may be inconsistent with the proviso to section 23 of the Act of 1867. They recognise the right of all persons who have claims on the estate or are otherwise interested in it to 'object' to the account, and they require the 'exception,' if any, to be inquired into and disposed of. We can see no reason for limiting the words 'objection' and 'exception' to one side of the account. An account becomes incorrect just as much by erroneous omissions as by erroneous inclusions. We are therefore of opinion that the Registrar had authority in the present case to inquire into and dispose of the objections lodged by the present applicants."

[19] In *Macnamara*, the registrar decided that an asset not included in the account was wrongly excluded, an approach that went beyond a mere checking of vouchers and one that is supported by Sir Samuel Griffith's view that the court has power to examine accounts to determine whether they are accurate or erroneous, including circumstances where the account becomes incorrect because of an erroneous omission as well as by an erroneous inclusion.

[20] There is also little reason why any such practice should have developed. It is not as if that ecclesiastical jurisdiction was the only source of power available. This court is and was at all relevant times the superior court of record in Queensland and the supreme court of general jurisdiction having, subject to the Commonwealth *Constitution*, unlimited jurisdiction at law, in equity and otherwise; see s. 58 of the *Constitution of Queensland* 2001; ss 20-25 and 34 of the *Supreme Court Act* 1867; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 618 and McPherson, *The Supreme Court of Queensland* (1989) at pp. 95-96. Earlier procedural differences that may have applied to the examination of an account depending on the identity of the court where relief was sought should not continue to bedevil the exercise of jurisdiction by this court, one that has consciously been set up by parliament as possessing plenary jurisdiction.

[21] The current legislation in s. 69 of the *Succession Act* gives the registrar "all such powers and authorities as may be conferred … from time to time by the court and by the rules of court and otherwise all such powers and authorities as the registrar exercised before the passing of this Act." Rule 649 (2), which requires the registrar to enquire into *any* objection or exception taken to the account or allowance of commission at the hearing, is also inconsistent with the approach advanced by the applicants. That rule does not suggest that the registrar's inquiry is limited merely

to checking that vouchers or receipts exist in respect of items of expenditure claimed nor does the history of the reported decisions since *Macnamara* suggest such a limitation; see *In re Kent* [1905] QWN 28 and *Christensen v Christensen* [1954] QWN 37.

[22] Even if such a practice existed before the passage of the *Succession Act*, the effect of s. 6(1), s. 69 and r. 649(2) is to provide otherwise for the purposes of s. 70 of that Act. Nor is the proposed limitation on the registrar's function consistent with r. 5's injunction "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense." It would be inappropriate to require the respondents to institute an administration action to resolve their concerns about the applicants' entitlement to commission and it is appropriate to recognise that here, as in New South Wales, "the passing of accounts is practically an *ex parte* official audit"; see *In the Will of Lucas-Tooth* (1932) 50 WN (NSW) 86, 87 and *Orre*.

The resolution of the respondents' objections in respect of payments of bills of costs by the applicants to their solicitors

[23] The legal costs in the account detailed in the registrar's third question have been divided notionally into two categories. The first category consists of the costs payable in respect of the solemn form proceedings which settled and that were ordered to be paid out of the estate on 30 April 2002. One of the complicating factors is that the solicitors for the applicants are a firm formed by the merger of two firms each of which had previously acted for opposing parties in the solemn form proceedings. Amounts paid to those earlier firms are sought to be examined before the registrar in these proceedings.

[24] The second category of costs consists of the costs and outlays to be paid by the applicants to their lawyers in respect of the administration of the estate.

[25] The respondents submitted to the senior deputy registrar that the vouchers in respect of both categories were not itemised or described in sufficient detail to allow them to determine whether the costs were reasonable. The applicants contend that it is not enough to say that an objector has insufficient information of that type when he or she has been invited to inspect the relevant documents. There have been no bills of costs taxed as between solicitor and client and there is now no explicit statutory power, as existed previously under s. 31 of the *Costs Act* 1867, for the Court to give leave to allow such bills to be taxed at the request of a third party. That omission has been criticised previously in the Court of Appeal; see *Equuscorp Pty Ltd v Short Punch & Greatorix* [2001] 2 Qd R 580, 583 at [16], 584 at [22]-[24] and 585 at [29].

[26] There was also a power under the *Rules of the Supreme Court* 1900 O.91 r. 78 that facilitated such an approach. It provided:

> "When an account consists in part of costs which have not been required to be taxed by an order of the Court or a Judge, or are not required to be taxed by these rules, the Court or a Judge may direct, or the registrar may request, the taxing officer to assist in settling such costs, and the taxing officer, on receiving such direction or request, shall proceed to tax such costs and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing officer by an order; and the

> taxing officer shall certify the result of the taxation in the same manner."

[27] The senior deputy registrar's reference says that, under that rule, the registrar, having examined the accounts, also taxed the costs and accounts were expected to contain details appropriate to allow taxation to take place. His reference goes on to say:

> "With the introduction of the UCPR, no similar provision has been retained. This may be the result of the removal of the assessment of costs between solicitor and client to assessors appointed by the clerk to the Solicitors Complaints Tribunal under section 6ZC Queensland Law Society Act 1952.
>
> Order 91 rule 78 RSC existed in addition to section 31 Costs Act 1867 which allowed a 'third party' taxation by a person interested in the fund from which a trustee had paid legal fees. Although a third party taxation may still be possible under Queensland Law Society Act 1952, there is some doubt. Section 3 defines 'client' as including a person who has paid, or is liable to pay, the account of a client. Arguably, properly construed, this provision may not include persons who might have had the right to taxation under section 31 Costs Act. If a third party taxation is possible, where there is a client agreement, is the third party bound to accept the form of account that has been agreed between solicitor and client? Where there is a client agreement, is the third party entitled to take issue with the validity of the client agreement? If so, will the Court be the only forum for such an objection?
>
> Is the Applicant's recourse in respect of the legal costs in the account limited to a third party assessment?"

[28] The applicants here argue that the absence of a power to order a third party taxation of costs prevents the registrar from taxing these bills. In Mr Marks' submission the registrar is to ascertain by reference to the vouchers whether the costs were reasonable expenses incurred in the conduct of the office of administrator or executor.

[29] The respondents contend that the costs paid out of the estate pursuant to the Court's order consequent on the settlement on the solemn form proceedings are no different in character to other disbursements and may be examined under rr. 649 and 650 to determine whether the account is accurate and has been paid properly. Issues which Mr Liddy submitted could be examined in that context included whether the parties who were paid had valid fee agreements with their own solicitors entitling the solicitors to be paid costs above the Court's scale for litigation work, failing which the estate would not have been required to pay amounts above scale out of the estate. In that context he submitted that the applicants did not have those costs assessed as they could have done under s. 6ZF of the *Queensland Law Society Act* 1952.

[30] Mr Liddy submitted that any payment that was not obligatory was not required to be paid out of the estate. From that proposition he argued that any such non-obligatory

payment was made improperly. That consequence does not follow as a general proposition, however, as a payment may well be made properly where a payee is arguably entitled to less than the amount claimed in order to resolve the claim without incurring further expense. Otherwise the commercial resolution of disputes would be inhibited seriously.

[31] The evidence relevant to these issues has not been canvassed before me and I am naturally reluctant to express any views about the propriety of any payments made out of the estate in respect of the costs order of 30 April 2002 to the parties to the solemn form proceedings. It does seem to me, however, consistently with the answers I have given to the first two questions posed by the senior deputy registrar, that it is open to him to determine whether those accounts are accurate or erroneous and whether the payments have been made properly or improperly when he decides the amounts in respect of which commission should be allowed.

[32] The second category of costs incurred by the estate for legal advice are said not to have been calculated up to date but to be substantial. The respondents argue that on the examination the registrar should "moderate" each bill by considering, amongst other things, the validity of any fee agreement, that the legal costs have not been assessed, the submissions (if any) made on behalf of any person to be heard upon the examination, the registrar's experience in assessing costs and "any other matter".

[33] Mr Marks submits that the law about "moderation" of costs is only relevant to an action for an administration in equity and that the registrar should, in respect of both types of costs referred to, ascertain, by reference to the vouchers, whether the costs were reasonable expenses incurred in the conduct of the office of administrator or of executor and, in the absence of an objection going to the propriety of incurring the expense, the expense should be allowed.

[34] Beneficiaries are entitled to a determination of the amount that it is proper to allow to the executor as an outgoing from the estate as commission by the process of moderation. It was described by Powell J in *Orre* as follows:

> "It is perhaps as well to point out, here, that, strictly, taxation involves a determination of what amount is properly payable by the executor to his solicitor, while moderation involves a determination of what amount it is proper to allow to the executor as an outgoing from the estate (see *Brown v Burdett* (1888) LR 40 Ch D 244, 254-255 per Kay J.; 265 per Cotton LJ, 267 per Lindley LJ; *In the Estate of Purton* (supra); *In the Will of Kerrigan* (1935) 35 SR 242, 251) it following that the amount allowed to a solicitor on a taxation of his bill against an executor will not necessarily be allowed to the executor as a proper outgoing on a moderation against the estate. Although, strictly, moderation involves the preparation of a detailed bill of costs and a process akin to taxation (Supreme Court Rules 1970 Pt52 r68), in an endeavour to avoid the delay and expense involved in formal moderations, there has been instituted in the Registry a practice pursuant to which solicitors produce bills in narrative form, which bills are then informally assessed by the Registrar; the course which will need to be followed if, the Registrar's assessment is not accepted by the executor or his solicitors is a matter to which I will return later in these reasons."

[35] The policy behind this approach is that even where a bill was not subject to taxation as between solicitor and client, as against an executor the persons beneficially interested were entitled to question its amount as an item of discharge; see *Allen v Jarvis* (1869) LR 4 Ch App 616, 620-621 where the form of order was altered to a direction that the "Taxing Master shall inquire and state whether any and which of the disputed items … are fair and proper to be allowed, and to what amount respectively". It was based on the view that the Court has always had and exercised the power of making executors personally liable for the costs of useless and improper litigation "even in an administration suit"; *Brown v Burdett* (1888) LR 40 Ch D 244, 254.

[36] In my view, for the reasons I have expressed earlier, it remains within the jurisdiction of this Court to permit such an examination even where no administration action is on foot as part of its power in equity to supervise the conduct of executors and administrators and, in this case, to determine the amount of commission to which they are entitled. Such a moderation will also entitle the registrar to require an itemised bill to assist him or her to determine whether the account should be passed although the practice in New South Wales of the production of bills in narrative form for informal assessment in the first place may be more practical in the majority of cases.

[37] There is no need to consider whether that power is now limited by s. 44(c) of the *Trusts Act* 1973, which provides that a trustee may pay or allow any debt or claim on any evidence that the trustee thinks sufficient without being responsible for any loss occasioned by any act or thing so done by the trustee in good faith, as this is a claim for commission that has not yet been paid, the amount of which is a question for this Court to determine.

Answers to the questions

[38] Accordingly my answers to the questions asked in the reference by the senior deputy registrar are:

1. The examination of an account pursuant to r. 649 requires a registrar to enquire into any objection or exception taken to the account or allowance of commission at the hearing;

2. The examination may be in the nature of an audit if the circumstances warrant it. It is not limited to the verification of the claims by an inspection of vouchers only but may require a registrar to determine whether the account is accurate or erroneous and whether payments have been made properly or improperly.

3. A registrar shall inquire into any objection or exception taken to the account or allowance of commission in respect of items 6, 85, 94, 112, 113, 175, 230, 270, 303 to 305, 307, 313, 354, 360, 361, 366, 368 to 371, 376, 377, 382, 391, 395, 406 and 412 to 417 in the account and state whether any and which of those disputed items are accurate or erroneous and whether the payments have been made properly or improperly and are proper to be allowed in respect of the calculation of commission and to what amount.

Costs

[39] On the delivery of these reasons I heard further submissions as to costs. I had ruled against the submissions of the applicants in respect of the approach that should be adopted by the senior deputy registrar in passing accounts in order to enable the calculation of commission payable to the applicants as administrators or executor of the estate of Alfred Henry Spring, deceased. There were issues raised as to the nature of the account, whether it should be in the nature of an audit and whether bills of costs paid by the executors from the estate could be examined by the process of moderation in the absence of a power to order third party taxation. It seemed to me that the arguments against permitting the senior deputy registrar a more extensive power to examine the accounts were wrong and contrary to the clear language of r. 649 of the UCPR and that the submissions in respect of moderation which were canvassed before the senior deputy registrar flew in the face of the normal and practical way of examining such bills of costs on the application of the beneficiaries of the estate.

[40] In other words, it seemed to me that the applicants were not justified in taking this stance before the senior deputy registrar and that they were not advancing a novel argument in respect of an issue that was unclear. Rather they were advancing a novel argument that was clearly wrong and contrary to the rules and previous practice. It seemed to me, therefore, that the order for costs sought by the first, third and fifth respondents was the appropriate order.

[41] Accordingly I order:

1. that the applicants pay the first, third and fifth respondents' costs of the reference and the costs thrown away as a result of the adjournment of the application before the senior deputy registrar on the standard basis with no right of the applicants to indemnity from the estate in respect of the costs of the first, third and fifth respondents or in respect of the applicants' own costs of and incidental to the senior deputy registrar's reference and the costs thrown away as a result of the adjournment of the application before the senior deputy registrar, and
2. that the first, third and fifth respondents be entitled to be paid out of the estate the difference between the standard costs referred to above and their costs on the indemnity basis as assessed or as agreed with the applicants.