

# Navigating legal hurdles

## Debt recovery, time extension for costs assessment by law practices and costs consequences

The case of *Marshall & Dent & Wilmoth v Tandos* (*Marshall's*) has brought to the forefront three crucial legal issues. First, the right of a law practice to commence debt recovery actions against clients for unpaid legal fees; second, its ability to initiate costs assessment proceedings after the statutory limitation period has lapsed; and third, its obligation to cover legal costs incurred by former clients in defending extension of time applications initiated by law practices.

Since the implementation of the *Legal Profession Uniform Law (LPUL)*,<sup>2</sup> law practices have encountered hurdles in pursuing unpaid costs and disbursements from clients where:

- a law practice breaches any of its costs disclosure obligations
- a costs assessment hasn't been conducted and
- 12 months have lapsed since the last invoice or payment request.

Sections 178(1)(b) and (c) of the *LPUL* specify that law practices failing to fulfill disclosure obligations, such as providing an estimate of total legal costs, are prohibited from commencing debt recovery proceedings for unpaid legal fees. However, they still have the option to recover reasonable costs through a costs assessment application. In such cases, clients are not required to pay the legal costs until they have been assessed by the court or determined by a Legal Services Commissioner.

Complications arise when law practices are time-barred from seeking assessments of their costs. Section 198(3) of the *LPUL* allows clients and law practices to request cost assessments within 12 months of invoicing or payment requests. Section 198(4) permits applications outside this timeframe, yet

notably excludes law practices from this extension. Consequently, law practices failing to adhere to disclosure obligations face significant challenges in recovering costs if assessments are not commenced within the 12-month window.

### DEBT RECOVERY

While *Marshall's* pertains to an extension of time application for costs assessment, it also serves to illustrate the consequences of improperly commencing debt recovery proceedings.

The firm Marshall's & Dent & Wilmoth (*Marshall's*) represented Mr Tandos and the Tandos Family Trust in two separate County Court matters between November 2020 and October 2021. During this period, invoices totalling \$56,378.03 were issued, of which \$22,985 was outstanding. Marshall's pursued this outstanding amount, along with interest, by filing proceedings in the Magistrates' Court on 14 April 2022.<sup>3</sup>

Despite Tandos' defence being raised 11 months after the proceedings were filed, the Magistrates' Court issued orders on 16 August 2023 staying the law practice's claim under s178(1) of the *LPUL*. The Court's decision was influenced by its finding that Marshall's costs agreement and disclosure statement were void and therefore unreliable.<sup>4</sup>

Similarly, in *Eventus Lawyers Pty Ltd v Richens*,<sup>5</sup> another case involving a law practice seeking an extension of time to assess costs, the Court deliberated over whether Eventus could sustain proceedings against Ms Richens in the County Court of Victoria for unpaid disbursements. Ms Richens' defence raised concerns about whether required costs disclosures were provided by Eventus.

Eventus applied to stay the County Court proceedings 15 months after

recovery proceedings were filed, acknowledging potential disclosure defects. The delay in resolving these issues was criticised by Judicial Registrar Burchell, who stayed the County Court proceeding to allow Eventus to apply to the Costs Court for an assessment. The Judicial Registrar's comments as follows are of importance to law practices who commence debt recovery proceedings when they are prohibited from doing so pursuant to s178 of the *LPUL*:

"The plaintiff's conduct is in breach of the overarching purposes and obligations under the *Civil Procedure Act 2010* (Vic). The delay in making the application hampers the just, efficient, timely, and cost-effective resolution of the real issues in dispute. The plaintiff's affidavit in support of the vacation of the trial date did not address the issue of the delay of the application. Such matters are

### VOCATIONAL ASSESSMENTS

#### Suzanne George

Registered Occupational Therapist

B.Sc.; B.AppSc(OT); Grad Cert WHS

#### Comprehensive Medicolegal Reports

- Workers Compensation
- TAC / Compulsory Third Party
- Medical and Professional Negligence
- Extensive experience
- Claimants of all ages
- Complex or multiple injuries

Level 13/200 Queen St, Melbourne VIC

[www.suzannegeorge.com.au](http://www.suzannegeorge.com.au)  
[info@suzannegeorge.com.au](mailto:info@suzannegeorge.com.au)



relevant to the application of case management principles.<sup>6</sup> Of further importance is Supreme Court Justice Ginnane's deliberation at the extension of time hearing: 'If those defences were established, Eventus would have been unable to maintain the County Court proceeding until the Costs Court assessed the legal costs charged under the Agreement.'<sup>7</sup>

Her Honour then specified that this is because s178 of the *LPUL* states that if a law practice breaches disclosure obligations, the costs agreement becomes void, the client isn't required to pay costs until they are assessed or disputes are resolved, the law practice can't pursue debt recovery until costs are assessed, and such breaches can constitute professional misconduct.

#### EXTENSION OF TIME

Justice Ginnane granted Eventus the opportunity to seek assessment of costs, despite their application falling outside the 12-month period. Initially, there was uncertainty regarding Eventus' eligibility for an extension under s198(4) of the *LPUL*, which permits clients and costs assessors (but excludes law practices) to seek an extension beyond the 12-month period.

Justice Ginnane clarified that Eventus, as a law practice, did not make an application for its costs to be assessed outside the 12-month period, as that would not be a valid application. The validation under s198(4) stemmed from the issuance of the summons for taxation by Eventus, with subsequent referral by the Judicial Registrar, as costs assessor, for determination on whether the application for cost assessment should proceed after the 12-month period.<sup>8</sup>

Perceptions within the legal costs community suggested that Eventus obtained an extension largely because they waived their professional costs, and solely sought reimbursement of disbursements totaling \$188,559.42, mainly counsel fees. Indeed, that was a significant factor in deciding the matter.<sup>9</sup>

However, in *Marshalls*, Justice Quigley accepted the law practice's plea for an extension of time for the assessment of its professional costs under s198 of the *LPUL*. Marshalls filed their application

for cost assessment on 6 October 2023 and, on 8 November, a Judicial Registrar referred the application to the Practice Court for determination as to whether it was 'just and fair' for the application to be dealt with more than 12 months after the final bill.<sup>10</sup>

Tandos contested Marshalls' standing to request an extension, citing s198(4) of the *LPUL*, which delineates who may make such applications. However, the Court, referencing precedent cases,<sup>11</sup> reaffirmed the authority of the Costs Court, acting through the Judicial Registrar, functioning as the 'costs assessor', to refer matters to a Supreme Court Judge, as the designated tribunal, for extension requests post the 12-month period.<sup>12</sup>

The Court dismissed Tandos' reliance on *Lin v WJ Legal (Aust) Pty Ltd*<sup>13</sup> where Justice Dixon refers to the application being made by the client, despite the referral by the Judicial Registrar of the Costs Court. The Court rejected Tandos' claim that the role of the costs assessor is an administrative one, and when the Judicial Registrar referred the matter to the Supreme Court, he was essentially acting in his judicial capacity, not as a costs assessor as required by s198(4).<sup>14</sup> Justice Quigley concluded that the comments in that case were not binding and dismissed Tandos' standing-based arguments.<sup>15</sup>

After evaluating the reasons for delay, lack of prejudice and futility, based on the criteria outlined in *Rohowskyj v Tomyrn & Co*,<sup>16</sup> the Court determined that an extension of time should be granted to Marshalls. In making this decision, the Court considered that Tandos' defence concerning the validity of the costs agreement was raised in the Magistrates' Court five months after the expiration of the statutory time limit, despite the debt recovery proceeding commencing well within the 12-month timeframe.<sup>17</sup>

#### COSTS

In extension of time applications under s198, whether initiated by the client or the law practice, the general principle dictates that the party seeking the extension, as a form of indulgence from the Court, bears the costs.<sup>18</sup> However, Marshalls requested costs from 2 January 2024, marking the expiration date of their offer of compromise, and citing principles

of judicial discretion and the *Civil Procedure Act 2010* (Vic).<sup>19</sup> They argued that costs follow the event, highlighting their success and Tandos' unmeritorious arguments.<sup>20</sup> In contrast, Tandos contended that Marshalls should shoulder the costs per the general principle.<sup>21</sup>

The Court, after considering factors such as the uncertainty surrounding the application's outcome and Marshalls' plea for court indulgence, found no compelling reason to deviate from the standard rule. Additionally, it did not find it unreasonable for the respondent to decline the offer.<sup>22</sup> Consequently, the Court decided not to order costs to either party, allowing them to lie where they fell.<sup>23</sup>

This outcome presents an intriguing scenario where a law practice not only successfully obtained an extension of time, a rarity, but also avoided bearing the former client's costs of the application for extension, contrary to the usual rule.

It is noteworthy that the law practice could have circumvented this entire process, along with the substantial costs involved, over a relatively modest sum in dispute of just under \$23,000, had it diligently adhered to its costs disclosure obligations outlined in pt 4.3 of the *LPUL*. ■

**Notes:** 1 [2024] VSC 44 (*Marshalls*). 2 *Legal Profession Uniform Law* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic), sch 1; *Legal Profession Uniform Law Application Act 2022* (WA). 3 *Marshalls*, above note 1, [1]–[2]. 4 *Ibid*, [3], [22], [45]. 5 [2021] VSC 370 (*Eventus*). 6 *Ibid*, [11]. 7 *Ibid*, [9]. 8 *Ibid*, [37]. 9 *Ibid*, [43]. 10 *Marshalls*, above note 1, [4]–[5]. 11 *DLA Piper Australia v Triclops Technologies Pty Ltd* [2020] VSC 93, *Eventus*, above note 5, and *Peter Szabo Family Law Pty Ltd v Young* [2023] VSC 756. 12 *Marshalls*, above note 1, [29]–[38]. 13 [2023] VSC 52, [4]. 14 *Marshalls*, above note 1, [31]. 15 *Ibid*, [41]–[42]. 16 [2015] VSC 511. 17 *Marshalls*, above note 1, [51]. 18 *Marshalls & Dent & Wilmoth v Tandos (Costs)* [2024] VSC 123, [16], [22]; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.14. 19 *Ibid*, [4]–[6]. 20 *Ibid*, [7]. 21 *Ibid*, [14]. 22 *Ibid*, [17]–[18]. 23 *Ibid*, [30].

**Dipal Prasad** is Director of Law in Check, specialising in representing clients in solicitor-client costs disputes. She is also a court-appointed costs assessor (Qld). Law in Check has offices in Victoria, NSW and Queensland. PHONE 1800 529 462  
EMAIL [dipal@lawincheck.com.au](mailto:dipal@lawincheck.com.au)  
WEBSITE <https://www.lawincheck.com.au>.