By Dipal Prasad

Exceptions to consequences for breaching costs disclosure

Section 204(2)(c) of the *Legal Profession Uniform Law* (*LPUL*),[1] which governs solicitors in NSW, Victoria and Western Australia, clearly stipulates that 'the costs of a costs assessment are payable by a law practice if the law practice's costs have been reduced by 15 per cent or more on assessment' (subject to the discretion of the costs assessor). Similar provisions exist in laws governing solicitors in other Australian jurisdictions.[2]

On 1 February 2021, in *Palmos v Pravlik (No. 3)*,[3] following the taxation of a law practice's costs, the Supreme Court of Victoria made orders allowing a law practice to *recover* the costs of the costs application process due to the following circumstances:

- the law practice was compliant with all of its disclosure obligations as set out in pt 4.3, div 3 of the *LPUL*; and
- the law practice's costs were not reduced by 15 per cent or more; or
- the law practice made an offer of compromise, or *Calderbank* offer, that was ultimately accepted.

The respondent client sought a review of this decision. On 16 September 2022, Efthim AsJ delivered a judgment on the application for review[4] that brought to light the Court's

approach to issues of standing and what constitutes a breach of costs disclosure.

STANDING TO REVIEW A PREVIOUS SOLICITOR'S BILL

In the 1 February 2021 decision, the law practice was allowed to strike off items from the bill that were erroneously claimed and/or clearly not payable by the client. The Judicial Registrar ordered that the previous solicitor's costs erroneously claimed in the bill be struck off instead of taxed off.

The advantage of items being 'struck off' instead of 'taxed off' the bill is that the amounts associated with the 'struck off' items are excluded from the base amount from which the 15 per cent reduction is calculated, pursuant to s204(2)(c) of the *LPUL*.

On review, if more than 15 per cent of the items on the bill of costs were taxed off, the solicitor may be ordered to pay the client's costs of taxation.

It was undisputed that the law practice did not have standing to include the previous solicitor's bill in its bill of costs. Associate Justice Efthim ordered that there was no clear error made by the Judicial Registrar in striking off the previous solicitor's costs, instead of taxing them off, as the law practice provided a plausible explanation as to why the previous solicitor's costs were in the bill (to determine appropriate allocation of party/party costs), and that it ultimately withdrew these items prior to taxation.[5]

COMPLIANCE WITH SS175(1) AND 174(1)(B) IN RELATION TO COUNSEL'S FEES

Section 175(1) of the *LPUL* requires a law practice to provide disclosure of an estimate of counsel's total legal costs and disclosure of counsel's basis of calculating costs, and s175(1)(b) requires the solicitor to provide an update on anything previously disclosed, including counsel fees, if there is any significant change to the previous disclosure.

Associate Justice Efthim accepted that the law practice complied with its obligation by advising about counsel's rates initially, and then immediately after counsel advised of a change in the daily rates.[6] In terms of estimates, the law practice provided compliant estimates of total disbursements but they did not specify the portion relating to counsel's fees. Associate Justice Efthim noted that this was a technical breach but could not be regarded as a 'serious breach'.[7]

The consequences of breaching pt 4.3 of the *LPUL* are set out in s178(1), and apply even if there is a minor or technical breach of any of the disclosure obligations. One consequence is the costs agreement being void. There is no discretion.

However, the Judicial Registrar applied r 72A of the *Legal Profession Uniform General Rules 2015*, which provides that ss178(1) and (2) of the *LPUL* do not apply in special circumstances.[8] These circumstances are if a costs assessor, court or tribunal is satisfied that the law practice took reasonable steps to comply with disclosure obligations before becoming aware of the contravention; the law practice rectified the contravention within 14 days of becoming aware of the contravention; and the contravention was not substantial and it would not be reasonable to expect that the client would have made a different decision in any relevant respect.[9] Importantly, the rectification within 14 days will be valid even if the information or estimate is not provided at the times required by the disclosure obligations of pt 4.3 of the *LPUL*.[10]

Ms Pravlik submitted that the Judicial Registrar erred:

- in applying r 72A, as there was a substantial disclosure failure;
- in finding that Ms Pravlik would not have made a different decision, based on one letter written by Ms Pravlik expressing confidence in counsel; and
- in overlooking the difficult position that Ms Pravlik was in only three weeks away from trial.[11]

Associate Justice Efthim said it was open to the Judicial Registrar to reject Ms Pravlik's evidence and concluded that 'it would be most unlikely that [Ms Pravlik] would have made a different decision in retaining Mr Casey QC and Mr McWilliams'.[12] Associate Justice Efthim said there was no reason senior counsel could not be briefed three weeks prior to the trial as senior counsel had not done any billable work up to then.[13]

Accordingly, due to the operation of r 72A, the Court found that there was no breach by the law practice of its costs disclosure obligations and therefore the conditional costs agreement was not considered void.[14] The Court also found that the basis on which the law practice calculated costs – using the Supreme Court scale of costs plus 25 per cent uplift – was fair and reasonable and would apply even if the costs agreement was void.[15] Counsel's fees of $11,000 for senior counsel and $5,500 for junior counsel in WorkCover damages claims in the Supreme Court were also considered reasonable.[16]

CONCLUSION

Law practices can take some comfort in the addition of r 72A of the *Legal Profession Uniform General Rules 2015*, whereby if a law practice that has omitted to disclose when instructions are first received takes all reasonable steps to comply within 14 days of becoming aware of the contravention they are exempt from the consequences. However, for r 72A to apply, the costs assessor must also be satisfied that 'the contravention was not substantial, and it would not be reasonable to expect that the client would have made a different decision in any relevant respect'. ■

Notes: **1** *Legal Profession Uniform Law 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Uniform Law Application Act 2022* (WA). **2** *Legal Profession Act 2007* (Qld), s342(2); *Legal Profession Act 2007* (Tas), s331(2)(a); *Legal Profession Act 2006* (NT), s350(2)(b); *Legal Practitioners Act 1981* (SA), sch 3, cl 49(2); *Legal Profession Act 2006* (ACT), s 302(2)(b). **3** [2021] VSC 5. **4** *Palmos v Pravlik* (Unreported, Supreme Court of Victoria, S ECI 2019 01099, 16 September 2022) (*Palmos*). **5** Ibid, 23, 20. **6** Ibid, 56. **7** Ibid, 57. **8** Ibid 60–1. **9** *Legal Profession Uniform General Rules 2015*, r 72A(2). **10** Ibid, r 72A(3). **11** *Palmos*, above note 4, 62. **12** Ibid, 65. **13** Ibid, 66. **14** Ibid, 69–70. **15** Ibid, 68, 70. **16** Ibid, 79.

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 or 1800 LAW IN CHECK EMAIL dipal@lawincheck.com.au WEBSITE https://www.lawincheck.com.au.