



Legal costs and the LPUL

Disclosing estimates and calculating costs when a costs agreement is void

Section 178(1)(a) of the *Legal Profession Uniform Law (LPUL)*,¹ which governs solicitors in NSW and Victoria, stipulates that any concerned costs agreement will be void if a law practice contravenes the disclosure obligations of Part 4.3 of the LPUL. Similar sentiments are echoed in the laws governing solicitors in other jurisdictions.²

Recent Victorian decisions have required strict compliance with ss174(1)(a) and (b) of the LPUL: *Shi v Mills Oakley*³ (*Shi*); *Bennett (a Pseudonym) v Farrar Gesini Dunn Pty Ltd*⁴ (*Bennett*); and *Johnston v Dimos Lawyers*⁵ (*Johnston*). These cases have also been cited by NSW costs assessors in their certificates of determination.

ESTIMATE OF TOTAL LEGAL COSTS

While the usual disclosure obligations are well known and clearly stipulated in the LPUL (and equivalent legislation in other jurisdictions), the obligation to provide updated disclosures of an estimate of total legal costs is often misunderstood.

The Legal Services Council defines an estimate of total legal costs as 'a reasonable approximation of the total legal costs that a client is likely to have to pay ... It includes professional costs, disbursements and GST'.⁶

Section 174(1)(b) of the LPUL provides:

'a law practice *must*, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client'. [emphasis added]

In *Johnston*, Wood AsJ stated:

'Demands for progress payments or the delivery of regular invoices for work already completed do not satisfy the Act. Section 174(1) requires an initial estimate of total future legal costs *and a regular updating of this figure when this has significantly changed and is out of date*. Section 174(6) mandates these to be in writing.'⁷ [emphasis added]

This suggests that any subsequent disclosure which only contains information as to an estimate of future costs and ignores costs already incurred, or costs estimated in the initial

disclosure, is arguably unclear or ambiguous, as the client is left with the task of calculating whether the new estimate of future costs should be added to the initial estimate provided or added to costs invoiced to date (if any) in determining total costs to be incurred. This task is unreasonably complex for a client who simply needs to know how much money he or she is likely to spend funding the legal matter. As prescribed by s174(2)(b) of the LPUL, the updated disclosure provided pursuant to s174(1)(b) *must* include:

'[a] sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter'.⁸

Law practices often do not even specify that the new or updated estimate is an estimate of future costs only. This may confuse or inadvertently mislead the client into thinking that the updated estimate is inclusive of past costs and reflects total monies required by the client to fund the matter. This is in contravention of the level of information required to be provided pursuant to s174 to enable a client to provide instructions as to the future conduct of the matter, including whether or not they wish to continue in light of the updated estimate of total legal costs.

The LPUL requires disclosure to be made in a clear, unambiguous manner so that the client is not surprised by the total costs incurred in a matter.

Johnston clarified⁹ and *Shi* confirmed¹⁰ the following:

- any non-compliance with the disclosure provisions in Part 4.3 of the LPUL automatically renders the costs agreement void;
- 'substantial' compliance is no longer a defence that would allow the court to exercise its discretion as to voiding a costs agreement; and
- 'non-compliance' is no longer used as a ground to discount costs at the conclusion of a taxation or assessment, as was the case under the former NSW and Victorian regime in the *Legal Profession Act 2004*.

Additionally, sometimes law practices initially provide a low estimate (presumably to attract the client), and then rely

on providing updated estimates as the matter progresses to satisfy their disclosure obligations. In *Shi*, Gourlay JR indicated that the initial estimate of total legal costs should cover costs of all work identified in the disclosed scope of works.¹¹ For example, if the initial disclosure of the scope of works included a reference to issuing legal proceedings, the estimate of total costs should include reasonable costs 'expected to be incurred in the foreshadowed proceeding'.¹²

Both *Shi* and *Johnston* provide that a costs agreement is void if the disclosure and estimate do not comply with ss174(1)(a) and (b) of the LPUL. It then follows that the costs agreement is not valid¹³ and cannot be enforced in the same way as a contract.¹⁴ There is also no presumption that the legal costs claimed are fair and reasonable.¹⁵

CALCULATION OF COSTS WHEN A COSTS AGREEMENT IS VOID

In the absence of a valid costs agreement, the legal costs are to be assessed on a *quantum meruit* basis where the law practice carries the onus of proof. Costs are required to be assessed with regard to what is fair and reasonable.¹⁶

In *Johnston* and *Bennett*, notwithstanding the fact that both cases involved void costs agreements, the court allowed costs to be assessed by reference to the rates disclosed in the void costs agreements because it was fair and reasonable to do so. In *Johnston*, the Court found that the client was fully informed about the costs from the outset and the disclosure deficiencies were technical in nature, including the estimates being verbal rather than written. In *Bennett*, oral updates as to costs were not provided but there was an initial disclosure of the basis of calculating costs (at hourly rates), and the Court found that these rates were fair and reasonable. One of the reasons for this finding was that the client had agreed to the disclosed rates. However, the increased rates that were applied from a certain point were not found to be fair and reasonable.

Similarly, in *Shi*, the hourly rates initially disclosed to the client were held to be fair and reasonable for the work – such rates were disclosed 'as those rates [that] had been agreed to by the applicant'.¹⁷ From the point a writ was filed in the County Court of Victoria, Gourlay JR determined that there was to be a new retainer, as this work was not covered by the previous costs agreement. However, as no new costs agreement or disclosure was provided for that new retainer, the costs from that point were ordered to be drawn and taxed pursuant to the relevant (County Court) scale of costs as 'this scale reflects the Court's view of reasonable costs at a reasonable rate for work undertaken in the County Court'.¹⁸

In each of these cases, the court simply determined the basis on which any itemised bill was to be drawn and subsequently assessed against at taxation. However, at taxation, the Taxing Registrar had discretion to determine 'the appropriate remuneration level for work performed ... having regard to the criteria and level of scrutiny of the actual work required by the Uniform Law'.¹⁹

These cases clarify that the previous operative legislation's automatic consequence of non-compliance with disclosure or the absence of a costs agreement²⁰ are no longer applicable in the LPUL. In *Bennett*, a matter where the law practice acted

for the client in a family law proceeding, Wood AsJ stated that 'there is now a clear parliamentary intention *not* to make the Family Law scale the automatic default mode of assessment where a costs agreement is void'.²¹ In *Johnston*, the applicant argued that s172(3) of the LPUL provides that regard must be had to the scale, however Wood AsJ was not convinced that the Family Court scale satisfies the definition of a 'fixed legislative provision' provided as one of the factors to be considered under s172(3).

In jurisdictions such as NSW, where the majority of the *inter partes* costs are not calculated pursuant to a scale of costs, the aforementioned decisions of the Victorian courts (to allow the void costs agreement rates if they are generally fair and reasonable) would not differ from the way costs were assessed under the *Legal Profession Act 2004* (NSW) prior to the LPUL.

SUMMARY

- An updated disclosure of an estimate of total legal costs must include: costs already incurred in addition to future costs; disbursements and GST; and costs of the entirety of the work identified in the scope of works.
- Non-compliance with disclosure will automatically void a costs agreement – there is no presumption that the basis of calculation of costs contained in the costs agreement is fair and reasonable.
- It is open to the court to find that, notwithstanding a void costs agreement, costs may be assessed by reference to the rates disclosed in that agreement, or any other moderated rate, if it is fair and reasonable to do so in the circumstances.
- Prescribed scales of costs are no longer the default method of calculating costs where a costs agreement is void. However, such prescribed scales are still used in circumstances where no costs agreement or disclosure of the basis of calculating costs is available. ■

Notes: 1 *Legal Profession Uniform Law 2014* (NSW) (LPUL), s178(1)(a); *Legal Profession Uniform Law Application Act 2014* (Vic), sch 1. 2 *Legal Profession Act 2007* (Qld), s316(3); *Legal Profession Act 2007* (Tas), s300(3); *Legal Profession Act 2008* (WA), s268(3); *Legal Profession Act 2006* (NT), s311(3); *Legal Practitioners Act 1981* (SA), sch 3, s18. 3 [2020] VSC 498 (*Shi*). 4 [2019] VSC 744 (*Bennett*). 5 [2019] VSC 462 (*Johnston*). 6 Legal Services Council, 'Legal costs and costs disclosure obligations' (information sheet, October 2018) 1. 7 *Johnston*, above note 5, [19]. 8 LPUL, above note 1, s174(2)(b). 9 *Ibid.*, [20]. 10 *Shi*, above note 3, [41]–[44]. 11 *Ibid.*, [44]. 12 *Ibid.* 13 LPUL, above note 1, s99. 14 *Ibid.*, s184. 15 *Ibid.*, s172(4). 16 *Ibid.*, ss172(1) and 200(1). 17 *Shi*, above note 3, [48]. 18 *Ibid.* 19 *Ibid.*, [49]. 20 *Legal Profession Act 2004* (Vic), s3.4.19(b) – where costs are to be drawn and assessed on the relevant scale of costs, usually the scale provided by the court in which the matter was heard or the practitioner remuneration order in non-litigious matters. 21 *Bennett*, above note 4, [59].

Dipal Prasad is a senior associate at Blackstone Legal Costing, specialising in legal costs disputes in Victoria, NSW and Queensland. She is also a court appointed costs assessor (Qld). PHONE (03) 9606 0027 EMAIL dipal.prasad@bstone.com.au WEBSITE <http://www.bstone.com.au>.