

## UNPAID LEGAL COSTS: COSTS ASSESSMENT AFTER THE 12-MONTH LIMIT?

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Since the introduction of the *Legal Profession Uniform Law (LPUL)*<sup>1</sup> it has become difficult, or even impossible, for law practices to seek recovery of unpaid costs and disbursements from their clients where:

- the law practice has contravened a costs disclosure obligation; and
- a costs assessment has not been conducted; and
- 12 months have passed since the last date of the solicitor-client invoice, or since the request for payment was made.

Sections 178(1)(b) and (c) of the LPUL provide that if a law practice contravenes the disclosure obligations of Part 4.3 of the LPUL:

- the client does not have to pay the legal costs until they have been assessed or determined; and
- the law practice is prohibited from commencing or maintaining proceedings for the recovery of any or all of the legal costs until they have been assessed or determined.

Therefore law practices that have contravened any of their disclosure obligations (for example, by failing to provide an estimate of total legal costs) cannot seek debt recovery. However, they can seek recovery of reasonable costs by making an application for assessment of their costs.

Difficulties arise when law practices are statute barred from seeking assessment of their own costs.

Section 198 of the LPUL allows clients, third party payers and law practices to seek assessment of costs. However, such an application for assessment is required to be made within 12 months of the law practice giving a bill or making a request for payment, or within 12 months of the date that legal costs were paid (if neither a bill was given nor a request for payment was made).<sup>2</sup>

Section 198(4) of the LPUL allows 'the costs assessor or the client or third party payer' to make an application to have the costs assessed even if an application for assessment is made outside the 12-month period. However, the legislation does not provide *law practices* with the right to seek assessment of their costs outside the 12-month period.

This essentially makes it impossible for law practices that failed to comply with their disclosure obligations to seek costs recovery if their costs were not assessed within the 12-month period.

Recently, however, in the case of *Eventus Lawyers Pty Ltd v Richens*,<sup>3</sup> Ginnane J allowed a law practice to seek assessment of costs even though they filed the application for assessment outside the 12-month period.

### BACKGROUND

In this matter, Richens retained Eventus Lawyers to advise her and appear on her behalf in a Federal Court proceeding against the Commonwealth for adverse action. Richens and Eventus entered into a conditional costs agreement, and part of that agreement was that Richens was required to pay disbursements, regardless of the outcome of proceedings.

In February 2019, Richens instructed Eventus to withdraw the brief to counsel and engage new counsel. At this point, counsel fees and other disbursements totalled over \$188,000. The original counsel to Richens issued a creditor's statutory demand against Eventus for fees in April 2019, and then issued winding up proceedings in May. To avoid being wound up, Eventus paid these fees out of its own pocket. On 21 May 2019, Eventus issued proceedings against Richens in the County Court of Victoria seeking recovery of unpaid disbursements. Richens argued that Eventus did not comply with its costs disclosure requirements (for various reasons such as providing a range of estimate total legal costs instead of a one-figure estimate) and that, accordingly, it could not maintain proceedings in the County Court. Ultimately, in August 2020, Eventus successfully stayed the County Court proceedings and filed a summons for taxation in the Costs Court of the Supreme Court of Victoria.

## DECISION

Firstly, Ginnane J clarified that the law practice (Eventus) did not make an application for its costs to be assessed outside the 12-month period, as this would not be a valid application. The application to extend time pursuant to s198(4) of the LPUL was valid because while Eventus issued the summons for taxation, it was the Judicial Registrar, as costs assessor, who referred to a judge for determination of the issue of whether the application for an assessment of legal costs should be dealt with after the 12-month period.<sup>4</sup>

Section 198(4) requires consideration of whether it would be just and fair for the application for assessment to be dealt with after the 12-month period. Justice Ginnane referred to the considerations in *Rohowskyj v S Tomy & Co*<sup>5</sup> in determining the proper application of s198(4), being the period of the delay; the reasons for the delay; whether the costs assessment would be futile; the extent of any prejudice to the respondent; and consideration of the right of one party to seek an assessment against the right of the other party to have that assessment conducted in the statutory period.<sup>6</sup>

The period of delay was 13 weeks after the expiration of 12 months. The reason for the delay was that the County Court proceedings were already on foot for the recovery of unpaid disbursements, and as such Eventus believed an assessment of costs to be unnecessary. There were 11 days between Eventus' application to vacate the County Court trial date and the commencement of an application for an assessment of costs. Justice Ginnane found that this was *not* a case where an application was made 'a considerable time after a proceeding is completed and costs have been paid'.<sup>7</sup>

His Honour said that he could not treat the application for assessment as futile because of Richens' claim that the County Court proceedings were commenced before the 30-day period after the giving of the new bill, or because of Richens' submissions that the costs agreement was void and Eventus was not entitled to sue to recover legal costs according to s178 of the LPUL. His Honour reasoned that these issues were appropriate for determination by the County Court and 's178 does not prevent legal costs being assessed'.<sup>8</sup>

Richens was found to have undoubtedly incurred prejudice as she had lost the County Court trial date and was facing an application to allow the assessment to occur out of time. Despite this, Ginnane J concurred that this prejudice was mitigated by the fact that Richens was aware for a reasonable period of time that Eventus was seeking disbursement monies from her, which were paid by the firm to allow the advancement of the Federal Court case she had originally retained them to act in. The fact that the delay was deemed not to be considerable further reduced the bearing of prejudice on the outcome of this case.<sup>9</sup>

Perhaps the most compelling factor in His Honour's decision was the fact that the costs to be assessed were disbursements rather than professional costs. They were incurred by Eventus on behalf of Richens, and 'provided no direct benefit to the firm' but directly benefited Richens as her case required the briefing of counsel, even though her case against the Commonwealth was unsuccessful.<sup>10</sup>

Having regard to all aspects of the application, Ginnane J found it just and fair for Eventus' application for an assessment of legal costs to be dealt with after the 12-month period fixed by s198(3) of the LPUL, and referred the proceeding to the Judicial Registrar in the Costs Court for that assessment to be conducted.

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<sup>1</sup> *Legal Profession Uniform Law 2014* (NSW) (LPUL). The LPUL also applies in Victoria under Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic).

<sup>2</sup> LPUL, above note 1, s198(3).

<sup>3</sup> [2021] VSC 370 (*Eventus*).

<sup>4</sup> *Ibid*, [37].

<sup>5</sup> [2015] VSC 511.

<sup>6</sup> *Eventus*, above note 3, [38].

<sup>7</sup> *Ibid*, [49].

<sup>8</sup> *Ibid*, [47].

<sup>9</sup> *Ibid*, [49].

<sup>10</sup> *Ibid*, [43].