DO YOU CATCH MY DRIFT?

Several factors led to Butler's success, but mainly record keeping:

- Butler gave clear evidence of the state of the crop just prior to the spray drift event.
- The spring onions were inspected by an agricultural expert shortly after the spray drift event.
- Burrell had knowledge of the spring onions and agreed to them being grown.
- Burrell's contractor was not properly certified with the correct permits in place.
- Precautions were not taken for the elements, particularly wind.
- The instructions for the use of the chemicals were not read or were not read properly.
- There was clear evidence of the loss suffered by Butler by reason of the loss of the Coles contract.

Farming is a dangerous business. Agriculture, forestry and fishing are Australia's most dangerous industries. They account for more deaths per 100,000 people (13.1) than the next two industries combined (transport, postal and warehousing (7.8) and construction (3.1)).[12] Agricultural spray drift incidents are not new to farmers, their insurers, or lawyers, and continue to cause harm. In January this year, the ABC reported on a spray drift incident which occurred in the Darling Downs basin in Queensland and caused an estimated $100 million in damage to a crop of cotton.[13] The cost of the chemicals, according to one agronomist, might have been $500. In that article, Crop Consultants Australia 'confirmed there had been spray drift detected across every cotton valley planted in Australia so far this season'.

Several factors affect the increased use of chemicals and other additives in agriculture, a major factor being climate change and the knock-on effects. Parts of Australia have suffered long drought and in recent times have had unprecedented rain. As a result, weeds have become more difficult to control without the use of farming inputs. Weeds also become more resistant to commonly used poisons. There are state-by-state regulatory requirements for agricultural aerial spraying, but being state based, the requirements vary.[14] When advising on liability in this space, this is worth remembering – and if all else fails, read the instructions (both on the product label, and elsewhere).

Lastly, remember to be a good neighbour. ■

Notes: **1** [2018] VSC 768 (*Butler*) (Richards J). **2** Ibid [109]. **3** [1966] UKPC 1; [1967] 1 AC 617 (*Wagon Mound (No. 2)*). **4** *Butler*, above note 1, [95] quoting *Wagon Mound (No. 2)*, 639. **5** *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, 109 (Collins MR). **6** *Butler*, above note 1, [92]–[99]. **7** *Butler,* above note 1, [93] quoting *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79; (2012) 42 WAR 287, [118] (McClure P, Buss JA agreeing). **8** *Butler*, above note 1, quoting *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13, [41]. **9** *Butler*, above note 1, quoting *Meandarra Aerial Spraying Pty Ltd v GEJ Geldard Pty Ltd* [2012] QCA 315; [2013] 1 Qd R 319, [8]. **10** [2017] VSC 379 (*Riverman*). **11** Ibid [197]–[205]. **12** Safe Work Australia, *Key work health and safety statistics, Australia 2021* (25 Oct 2021) <https://www.safeworkaustralia.gov.au/doc/key-work-health-and-safety-statistics-australia-2021>. **13** E Bradfield and A Felton-Taylor, 'Spray drift damages up to $100 million in cotton, prompting calls for more herbicide controls', *ABC News* (6 Jan 2023) <https://www.abc.net.au/news/rural/2023-01-06/spray-drift-damages-100-million-dollars-of-cotton-darling-downs/101816638>. **14** For example see NSW National Parks and Wildlife Service, *Aerial Spraying Guidelines,* State of NSW and Department of Planning and Environment (2022) <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Pests-and-weeds/aerial-spraying-guidelines-220396.pdf>.

Vaughan Hager is a Melbourne based lawyer specialising in commercial litigation. He is the principal of his own firm, Hager & Co., having established the practice in 2022 after several years with large, mid-tier and boutique firms.

By Dipal Prasad

Considerations in seeking an extension of time for costs assessment

In the legal landscape, s198 of the *Legal Profession Uniform Law* (LPUL)[1] governs the provisions for clients, third-party payers and law practices seeking a costs assessment in NSW, Victoria and Western Australia. Typically, such applications should be made within 12 months of receiving a bill or making a payment. However, there are circumstances where an extension of time can be sought.

Section 198(4) of the LPUL allows for an application for costs assessment to be made after the 12-month period

if it is just and fair to do so. This provision ensures that parties are not unduly prejudiced by strict adherence to the timeframe. The criteria for granting an extension of time and the circumstances in which extensions are granted are demonstrated by the following relevant cases.

ROHOWSKYJ v TOMYN & CO[2]

In this case, Dixon J provided the following list of factors for determining whether a particular situation is just and fair for the purpose of warranting an extension of time:[3]

1. the delay period;
2. the reasons for it;
3. if it is just and fair, having regard to –
   a) whether the costs assessment would be futile;
   b) the extent of any prejudice to the respondent; and
   c) the right of one party to seek an assessment balanced against the right of the other party to have the assessment conducted in the statutory period.

Justice Dixon suggested that a party opposing the extension must offer some good reason 'beyond unmeritorious reliance on the strict terms of the statute'.[4] Thus, an objection to oppose an extension application merely because it was made out of time is inadequate.

GALLIN v SC LAWYERS PTY LTD[5]

In this case, Macaulay J dismissed an application under s198(4) following a delay of about 29 months. When applying the test to ascertain whether it was just and fair for the application to be dealt with after the 12-month period, Macaulay J gave due regard to the delay and reasons for the delay.[6]

His Honour accepted that a lay person's ignorance of their rights may explain some delay, but found that this carried little weight as the applicant had been informed of her rights at the outset. Furthermore, while the applicant was distracted by a family law battle, underlying family problems and her apparent perilous financial predicament, and this did have some bearing on his Honour's discretion, Macaulay J averred that 'financial hardship is not in itself a justification to seek or be granted a more lenient taxation of costs'.[7]

In essence, when counterbalancing the applicant's reasons for the delay against the firm's commercial entitlement to be paid fees for professional services rendered in a reasonably timely way, Macaulay J held that it was not just and fair for the applicant to pursue a taxation of the respondent's costs 29 months outside the prescribed 12-month period.

LIN v WJ LEGAL (AUST) PTY LTD[8] (LIN)

In this case, Dixon J allowed an application under s198(4) where an applicant was out of time by more than 2 years as a result of difficulties obtaining legal advice during the COVID-19 lockdowns, ongoing commitments in other litigation, and the applicant's limited understanding of his rights and obligations.

His Honour took into account the applicant's limited English, that the client had misunderstood the process, and the fact that there was:

> 'no evidence … that clearly establishes that [the applicant] had, no matter what explanation he may have received from others and bearing in mind the language barriers, a full understanding of what was required of him in order to effectively challenge the bill of costs. Indeed, [the applicant] submitted that it was not really until 9 June 2022 that he was clearly aware of his rights and proceeded to exercise them promptly thereafter.'[9]

Although his Honour did 'not regard this as a particularly good explanation', and possibly even a 'weak' one, he accepted that it was nonetheless an explanation which met the legislative requirements of s198(4).[10] His Honour then considered competing prejudices, finding that the 'belated contest' the respondent had to face regarding his entitlement to fees before the Costs Court was not relevant prejudice. Relevant prejudice would include matters such as loss of a key witness, loss of documents or other circumstances which did not arise.[11]

Other relevant considerations Dixon J cited included:[12]

> '[W]hether the client was aware of the right to seek a costs assessment; whether there is evidence suggesting the bill may be excessive; whether the client has paid the bill without demur; and the lawyer's reasons for opposing the assessment, it being important that, as an officer of the court, the lawyer is seen to act honestly, ethically and with proper motives, not merely to prevent the assessment of a bill taking place … the lawyer's conduct in dealing with the contest of the bill may also be relevant. For example, an unjustified reluctance to provide an itemised bill or a serious delay in providing one may tip the scales in favour of allowing an application for assessment out of time.'

Lin provides a valuable insight into the criteria the courts use in determining whether the test of just and fair has been met for an application in terms of s198(4).

CONCLUSION

It is vital to understand the circumstances under which an extension of time can be granted for costs assessment. Failure to do so may lead to a client incurring unnecessary costs in seeking an extension, losing and having to pay the lawyer's costs of defending the application. ■

Notes: **1** *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Uniform Law Application Act 2022* (WA). **2** [2015] VSC 511. **3** Ibid [3]. **4** Ibid [17]. **5** [2020] VSC 80. **6** Ibid [17]. **7** Ibid [20]. **8** [2023] VSC 52. **9** Ibid [15]. **10** Ibid [16] and [17]. **11** Ibid [20]. **12** Ibid [23].

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 WEBSITE https://www.lawincheck.com.au.