Costs assessment or summons for taxation

By Dipal Prasad

Can a law practice ever recover its costs?

Whether a costs assessment or summons for taxation of costs[1] is initiated by a client or a law practice, s204(2) of the *Legal Profession Uniform Law* (LPUL),[2] which governs solicitors in NSW and Victoria, clearly stipulates that:

'Unless the costs assessor believes that in all the circumstances it is not fair and reasonable for the costs to be paid otherwise, the costs of a costs assessment are payable by a law practice if-

(a) the law practice has failed to disclose a matter required to be disclosed by Division 3; or

(b) the law practice has failed to disclose a matter required to be disclosed in the manner required by Division 3; or

(c) the law practice's costs have been reduced by 15 per cent or more on assessment.'

Similar provisions exist in laws governing solicitors in other Australian jurisdictions.[3]

While the legislation puts the ultimate discretion on the costs assessor,[4] with phrases such as 'unless the costs assessor believes that in all the circumstances it is not fair and reasonable for the costs to be paid otherwise',[5] a law practice's ability to recover its own costs of an assessment of its costs is limited.

The wording of the legislation is such that a law practice is likely to *not* be liable for its client's costs of costs assessment – provided that the law practice has complied with all of its costs disclosure obligations, and the law practice's costs have not been reduced by 15 per cent or more. However, the legislation does not specify the circumstances where a law practice would be able to recover its costs of assessment from its client.

PALMOS v PRAVLIK (NO. 3)

In *Palmos v Pravlik (No. 3)* [2021] VSC 5, our firm represented the law practice. In an earlier decision,[6] the Court ruled that the law practice had not breached any of its disclosure obligations and its conditional costs agreement was

not found to be void. Accordingly, ss204(2)(a) and (b) of the LPUL were not applicable.

This case was concerned with determining the party that was liable to pay the costs of assessment. After some concerns with respect to calculation of costs, the Judicial Registrar found that the law practice's costs had not been reduced by 15 per cent or more on taxation.

The bill of costs amounted to $553,011.06 and the costs taxed and allowed was $381,256.22. While this appeared to reflect a reduction of more than 15 per cent, the actual reduction to the bill was less than 15 per cent. This was because the law practice sought to 'strike out' items 1–419 and items 1,488–9 of the bill, as they erroneously covered costs and disbursements during the period when prior firms were acting for the client. Ultimately, items 1–419 (totalling $99,835.94) and 1,488–9 (totalling $4,950) were all struck out.

The Court ruled that the items in question were never payable by the respondent client to the applicant law practice and relied on s17D(3) of the *Supreme Court Act 2015* (Vic)[7] to decide that the items were 'not the subject of the review and were not to be treated as taxed off for the purpose of s204(2)(c)'[8] of the LPUL.

Neither party addressed the issue of whether any part of the reduced (taxed off) amount should be 'struck out' of item 1,483 (pertaining to the skill and care loading) insofar as it reflected loading on the professional costs of items 1–419. The Judicial Registrar opined that 'if the issue of the designation of the reduction had been raised, it is likely that I would have increased the amount that I allowed for item 1,483'.[9]

Therefore, the base amount for the 15 per cent reduction would not have been the total bill amount of $553,011.06, but rather the total bill amount less the struck out items. This amounts to either $448,225.12 (without a portion of item 1,483 being struck out) or $438,350.90 (with a portion of item 1,483 being struck out).

The percentage reduction by reference to each base amount was determined to be:

- $438,350.90 – 13.02 per cent reduction;
- $448,225.12 – 14.94 per cent reduction;
- $553,011.06 – 31.06 per cent reduction.

As the $553,011.06 base amount did not apply, it was clear that the law practice's costs had not been reduced by 15 per cent or more on assessment. Therefore s204(2)(c) of the LPUL, in addition to ss204(2)(a) and (b), did not apply in this matter. In such circumstances, s204(2) provides that costs of assessment will not be payable by a law practice subject to the costs assessor's discretion.

> Judicial Registrar Gourlay further declared that s204(2)(c): 'provides that where there has not been a breach of the costs disclosures requirements *the solicitor should be paid the costs of the costs review* unless the costs are reduced by 15 per cent or more or if the Court decided to exercise its discretion to order that the solicitor pay the client's costs on the basis that it was fair and reasonable to do so' [emphasis added].[10]

This suggests that the law practice was entitled to recover its costs on a standard basis as it did not breach any disclosure obligations and its costs were not reduced by 15 per cent.

The law practice's position in this matter was further strengthened by its reliance on evidence that it had made offers of compromise on 1 May 2020 and 1 June 2020 for $355,115. Both offers were accompanied by a letter explaining the method of calculation of the sum offered and stating that the offer was made as a *Calderbank* offer in addition to the offers of compromise.

Judicial Registrar Gourlay ruled that 'each of the offers of compromise were capable of acceptance and the respondent, if properly advised by 1 June 2020, was in a position to understand that on a commercial basis the offer made was a generous reduction of the applicant's legal costs'.[11]

The Court ordered the respondent client to pay the law practice's costs of the proceeding, including reserved costs up to 11:00am on 3 June 2020 on a standard basis; thereafter on an indemnity basis; and the costs to be taxed in default of agreement.

SUMMARY

This decision, while currently subject to an appeal initiated by the client, teaches us that law practices are able to recover costs of the costs application process, subject to the costs assessor's discretion, in the following circumstances:

- where the law practice is compliant with all of its disclosure obligations as set out in Part 4.3, Division 3 of the LPUL (and its equivalent in other jurisdictions); and
- where the law practice's costs are not reduced by 15 per cent or more; and/or
- where the law practice makes an offer of compromise or *Calderbank* offer that is ultimately successful. This allows the law practice to also seek to recover its costs on an indemnity basis.

This decision also reminds us that where a law practice has erroneously claimed costs in their bill, and/or claimed costs that are clearly not payable by their client and should not be subject to costs assessment, the law practice can seek to strike off items from the bill that are reflective of those costs. The advantage of items being 'struck off' instead of 'taxed off' the bill is that the amounts associated with the 'struck off' items can be excluded from the base amount from which the 15 per cent reduction is calculated, pursuant to s204(2)(c) of the LPUL. ■

Notes: **1** The term 'costs assessment' is intended to cover all kinds of review of solicitor/client costs, including the taxation process in Victoria. **2** *Legal Profession Uniform Law 2014* (NSW), s204(2); *Legal Profession Uniform Law Application Act 2014* (Vic), sch 1, s204(2). **3** *Legal Profession Act 2007* (Qld), s342(2); *Legal Profession Act 2007* (Tas), s331(2); *Legal Profession Act 2008* (WA), s304(2); *Legal Profession Act 2006* (NT), s350(2); *Legal Practitioners Act 1981* (SA), sch 3, cl 49(2). **4** Note that in this article the term 'costs assessor' is also intended to cover costs registrars. **5** LPUL, s204(2). **6** *Ellis Palmos v Pravlik* [2020] VSC 112. **7** Provides that the Costs Court is to exercise its jurisdiction with little formality and technicality. **8** *Palmos v Pravlik (No. 3)* [2021] VSC 5, [15]. **9** Ibid, [23]. **10** Ibid, [30]. **11** Ibid, [42].

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