representation. If the group of clients, notwithstanding this advice, chooses to proceed with the same representation, the conflict advice should be confirmed in writing and each client asked to sign an acknowledgement.

In terms of how the pool is to be distributed among claimants, advice should be sought from an independent barrister who can be asked to advise on how distribution of the pool should occur with reference to a percentage of the pool depending on severity of impact and proof of loss. Asking counsel to nominate a percentage share, rather than a specific amount, allows for flexibility in negotiations in dealing with an asset pool that may change over time and where there is no guarantee that the whole of the pool will be available for distribution in a negotiated settlement.

There would appear to be no conflict if the matters go to hearing and the judge makes the relevant awards, but it is not unusual for *SA* matters to be the subject of negotiations given that settlement can be to the advantage of all parties.

CONCLUSION

Abuse claims are a growth area in compensation law and while most claims are pursued against institutions, there is increasing interest in suing individual perpetrators where there is a sufficient asset pool.

In *ZAB v ZWM*,[16] an undefended claim for sexual assaults perpetrated by a father upon his son, the Chief Justice of the Supreme Court of Tasmania awarded the plaintiff a total of $5,313,500.

Although the defendant was reputedly a highly regarded medical scientist and businessman with considerable wealth, it appears that he did transfer assets to a family member/s and, as a result, the plaintiff has had significant difficulty in recovering the damages that were awarded to him in December 2021. ■

Notes: **1** Australian Government, 'Access to offenders' superannuation for victims and survivors of child sexual abuse' (2023) <Access to offenders' superannuation for victims and survivors of child sexual abuse | Treasury.gov.au>. **2** (1989) 18 NSWLR 319, 321–322. **3** [2022] NSWSC 1406 (*Bennett*). **4** Ibid [23]. **5** Ibid [34]. **6** [2018] QSC 204 (*PJM v AML (No 2*)). **7** [2013] VSCA 260 (*Jew*). **8** Ibid [6]. **9** Ibid [45]. **10** *Sentencing Act 1991* (Vic) (*SA*), s85K. **11** Pursuant to s85(1) of the *SA* an order for restitution may be enforced by the court. **12** See *AA v Buckley* [2016] VCC for an example of an *SA* award in an historical child abuse claim. **13** K Hagan, 'Xydias to pay victims $1 million', *The Sydney Morning Herald* (22 December 2009) <https://www.smh.com.au/national/xydias-to-pay-victims-1-million-20091222-lbdd.html>. **14** *Dee v Bernard* [2017] VCC. **15** Above note 10, s85I. **16** [2021] TASSC 64 (*ZAB v ZWM*).

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By Dipal Prasad

When is a costs agreement void if the initial estimate is not updated?

BACKGROUND

A barrister, Christopher John Bevan, commenced proceedings in the Supreme Court of NSW against his instructing solicitor, John David Bingham, as well as Mr Bingham's client and two costs review panellists. Mr Bevan was seeking dismissal of the review panel's decision concerning the barrister's costs.[1] The action was ultimately dismissed by Bellew J. However, the case provides an important lesson in regard to the consequences that flow from failures to disclose – whether to an instructing solicitor or a barrister.

The barrister had been retained by the instructing solicitor to appear for the solicitor's client in proceedings seeking to annul an order made against the client pursuant to the *Bankruptcy Act 1966* (Cth). The barrister and the solicitor entered into a costs agreement pursuant to s180(1)(c) of the *Legal Profession Uniform Law* (*LPUL*).

In that costs agreement, the barrister disclosed his rate as $8,000 per day for brief on hearing fee, and $800 per hour for other work, totalling an estimated $60,000 plus GST plus travelling and out-of-pocket expenses for the three likely stages of the proceedings.

In contrast to this disclosure, the fees rendered by the barrister came to a total of $349,360, without having given any update to the original estimate of costs.

As the barrister's fee was not paid by the solicitor, the barrister applied for an assessment of costs in the amount of $349,360 plus interest of $6,983.48.

The costs assessor assessed that costs came to an amount of $224,947.79, a reduction of more than $131,000. The costs assessor and the review panel took into account breaches of disclosure pursuant to s174(1)(a) and/or (b) of the *LPUL* and found the barrister's costs agreement to be void due to the operation of s178 of the *LPUL*, which automatically voids a costs agreement where there has been any failure to disclose.[2]

WHEN DO DISCLOSURE OBLIGATIONS APPLY?

The facts of the case suggest it is not a valid argument that barristers are exempt from costs-disclosure obligations when

their client is a law practice because law practices are 'commercial or government clients'[3] to whom pt 4.3 'legal costs' do not apply. This is because s175(2) of the *LPUL* provides that if one 'law practice' (usually an instructing solicitor) retains another 'law practice' (usually a barrister) on behalf of a client, the latter (say, a barrister) is not required to make a disclosure to the client under s174, but *must* disclose to the former 'law practice' (say, the instructing solicitor) the information necessary for the instructing solicitor to comply with s175(1) – that is, to disclose to the client the barrister's basis of calculating costs, an estimate of the barrister's total legal costs, and any changes to these disclosures.

Since the barrister had not provided an updated estimate, the barrister's costs agreement was void.[4] As a result, the barrister could not rely on s172(4) of the *LPUL*, which requires that agreed hourly and daily rates be fair and reasonable.[5] In addition, the barrister did not have a right to enforce his costs agreement as a contract[6] due to the costs agreement being void. The review Panel stated the following in its reasons:

> '[58] In the absence of an enforceable agreement, the costs are to be determined on a *quantum meruit*, being so much as the party reasonably deserves to have ... in a costs assessment being restitutionary in character or to prevent unjust enrichment ... contrary the contractual term which no longer apply. This is the fair and reasonable value of the legal services assessed.'[7]

As the barrister's costs agreement had been declared void, the costs assessor reduced the barrister's rates to $6,000 per day plus GST brief on hearing fee and $600 per hour plus GST for other work, which the costs assessor considered fair and reasonable, having regard to s172 of the *LPUL*.[8] These rates replaced the $8,000 per day and $800 per hour rate (plus GST) expressly agreed by the barrister and the solicitor, as the costs assessor and the review panel did not find these rates to be fair and reasonable.[9]

WHEN ARE COSTS AGREEMENTS VOID?

The barrister argued that his initial disclosure was adequate at the time it was made, and the costs agreement should not be void until the initial disclosure of $60,000 was exceeded, because at common law a contract can only be construed as it was on the date it was made, and without regard to subsequent events.[10] The case of *Wills v Woolworths Group Ltd* (*Wills*),[11] while not mentioned by Bellew J, is of relevance here.

In *Wills*, Beach J held that the costs agreement was only void from the date of the contravention, rather than from the date of commencement. That is, the costs agreement only had effect from the date after the last estimate was exceeded.[12]

In *Bevan*, however, Bellew J emphasised the importance of statutory construction and held that the costs agreement was void *ab initio*[13] (from the beginning) because:[14]

1. otherwise, the objective of the *LPUL*, s3(e), directed towards the efficient, effective, targeted and proportionate regulation of the legal profession, would not be promoted; and
2. a statutory construction in line with the barrister's argument would be entirely contrary to the objective of s3(d), namely that of empowering a person to make an informed choice about the legal services that one might access, and the costs involved.

Justice Bellew emphasised that the *LPUL* does not distinguish between a person's ability to make an informed choice when entering into a costs agreement and when continuing to access legal services after that agreement. Proper disclosures are necessary in both cases to enable informed choices. The plaintiff's (that is, the barrister's) fees ended up being almost six times the original estimate, of which the second defendant (the solicitor's client) was entirely unaware due to the barrister's failure to provide updated estimates to the instructing solicitor. Without this information, it was impossible to make an informed choice as intended by the objective in s3(d) of the *LPUL*.

CONCLUSION

Bevan serves as a reminder of the importance of complying with disclosure requirements under the *LPUL*, particularly the requirement to update any estimate of total legal costs that is out of date. Failure to do so will result in the costs agreement being void *ab initio* (rather than void from the date of contravention), as confirmed by the Court's decision in this case. The Court emphasised the importance of statutory construction in interpreting the law and its objectives, which in this case is to promote efficient, effective, targeted and proportionate regulation of the legal profession, while empowering clients to make informed choices about legal services and costs. Therefore, it is crucial for practitioners, including barristers, to fully understand and comply with costs-disclosure obligations to avoid adverse consequences, such as the one faced by Mr Bevan. ■

Notes: **1** *Bevan v Bingham* (2023) NSWSC 19 (*Bevan*). **2** Ibid, [38]. **3** *Legal Profession Uniform Law*, s170(2). **4** *Bevan*, above note 1, [37]. **5** Ibid, [38]. **6** Above note 3, s184. **7** *Bevan*, above note 1, [38]. **8** Ibid, [30]. **9** Ibid, [39]. **10** Ibid, [54–56]. **11** [2022] FCA 1545. **12** Ibid, [28]. **13** *Bevan*, above note 1, [66–67]. **14** Ibid, [68].

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