Pitfalls in the *Legal Profession Uniform Law* costs assessment regime

By Christopher Bevan

This article analyses four deep pitfalls in the Uniform Law costs assessment regime which members of the Bar should acquaint themselves with in deciding how to recover their fees.

Pitfall (No 1) is the limited jurisdiction of the Supreme Court to review a decision of the District Court on an appeal from a Review Panel under s 89(1)(a) of the *Legal Profession Uniform Law Application Act 2014 (NSW) (Application Act)*.

As a consequence, avoid where possible having regard to the amount in issue, appealing any Review Panel decision to the District Court and instead appeal to the Supreme Court.

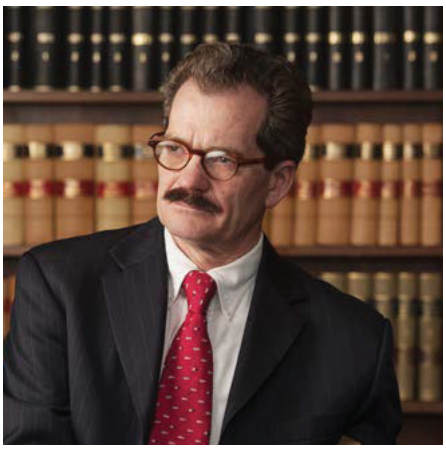
There is a right of appeal to the District Court involving disputed costs of $25,000 or more and with leave under that threshold (s 89(1)(a)). There is a right of appeal to the Supreme Court involving disputed costs of $100,000 or more and with leave under that threshold (s 89(1)(b)).

Although the District Court has a jurisdictional limit of $750,000 '*in any action of any kind*' (see s 44(1)(a)(ii) of the *District Court Act 1973 (DC Act)* and definition of '*jurisdictional limit of the Court*' in s 4(1) of the DC Act), an appeal is not '*an action*' within the meaning of s 44 of the DC Act (defining jurisdiction of the District Court) or s 127(1) of the DC Act.

In *Muldoon v Church of England Children's Homes Burwood* [2011] NSWCA 46; (2011) 80 NSWLR 282, the Court of Appeal held at 284-285 [6]-[8] and 288-289 [26]-[37]; 291 [45] and 293-294 [63]-[66] that the Court's jurisdiction to hear appeals from the District Court is limited to a judgment or order made '*in any action*' and that the statutory appeal in that case was not an appeal to the District Court '*in any action*' for the purposes of s 127(1) of the DC Act.

The Court of Appeal's jurisdiction to review a decision of the District Court in an appeal from a Review Panel to the District Court under s 89(1)(a) of the Application Act is limited to strict judicial review of the District Court under s 69 of the *Supreme Court Act 1970 (SC Act)*.

The 'straitjacket' imposed on the Court



of Appeal in reviewing decisions of the District Court in an appeal from a Review Panel under s 89(1)(a) of the Application Act was analysed in *Wende v Horwaths (NSW) Pty Ltd* [2014] NSWCA 170; (2014) 86 NSWLR 674 (*Wende (No 1)*). In *Wende (No 1)*, the Court of Appeal issued separate judgments on the scope of judicial review of the District Court for '*error on the face of the record*' and '*jurisdictional error*'.

In *Wende (No 1)*, the majority (Beazley JA and Basten JA) set aside the decision of Taylor SC DCJ in the District Court and remitted to his Honour the appeal to that Court from the Review Panel filed by Mr and Mrs Wende. (See *Wende (No 1)* at 698 [102(3)].) Unfortunately, Taylor SC DCJ had difficulty ascertaining the precise *ratio* of the Court of Appeal's decision so he redetermined the appeal from the Review Panel in substantially the same terms a second time.

Mr and Mrs Wende applied again to the Court of Appeal to review the second decision of Taylor SC DCJ. See *Wende v Horwaths (NSW) Pty Ltd* [2015] NSWCA 416 (*Wende (No 2)*). On this occasion, there was a readily-identifiable *ratio*. See *Wende (No 2)* at [142]-[144].

The solution is to avoid an appeal from the Review Panel to the District Court wherever possible, until s 127 of the DC Act is amended to give the same right of appeal to the Court of Appeal from the District Court in which it has to hear appeals from the Supreme Court, and instead appeal from the Review Panel to the Supreme Court.

Pitfall (No 2) concerns voiding a costs agreement for nondisclosure under s 178(1)(a) of the *Legal Profession Uniform Law 2014 (UL)* or due to a breach of Division 4 of Part 4.3 of the UL regulating the terms of, and the circumstances of the entry into, a costs agreement.

The question is whether the costs agreement is voided ab initio or in futuro. A costs agreement which contravenes Division 4 is voided ab initio. The consequence is that the assessment of the costs occurs on a *quantum meruit*. Does this quantum meruit occur at common law, as one view suggests, or under s 178(1)(b) of the UL, as the marginal note to s 185(1) suggests?

Section 178(1)(a) operates to void the costs agreement from the moment the obligation to give or update disclosure is passed. This is no academic question. Once a costs agreement is voided under s 178(1)(a) it ceases to have any effect in the quantum meruit assessment exercise under s 178(1)(b).

The costs disclosed in a costs agreement is *prima facie* evidence that the costs disclosed and, accordingly, billed in terms of the disclosure, are fair and reasonable. (See s 172(4) of the UL).

If the voiding of a costs agreement occurs ab initio, the barrister loses the benefit of the agreed rates and agreed scope of the work. The assessor is at liberty to impose a lower hourly rate and limited scope of permissible work ***from the commencement of the retainer*** notwithstanding that, for the first part of the retainer, there might have been full and adequate disclosure of costs under a costs agreement which was valid and enforceable as from its inception but which has lost its validity and enforceability ex post facto under s 178(1)(a) of the UL.

Pitfall (No 3) is waiting more than 12 months to seek an assessment given the lack of any right to seek an extension of time. Section 198 (1) of the UL gives the right to apply for assessment of 'UL costs' to the client, 'a third-party payer' (see s 171 of the UL), 'the law practice' and 'another law practice' (retained practice).

However, s 198(3) mandates ('*must*') the making of the application for assessment

within 12 months of the date after '*and the bill was given to … the client*'.

Section 198(4) gives the Manager, Costs Assessment power to extend the time to apply for assessment, as the '*designated tribunal*' empowered to extend the time under the Application Act: see s 11 of the Application Act, Table 2 item 6.

However, the categories of applicant permitted to seek the extension of time within s 198(4) are limited to the client and the third-party payer. There is no right to apply to extend the time given to the law practice or the other law practice because they are not stated in s 198(4).

Accordingly, practitioners have no right to apply for an extension of time to seek an assessment of costs where they have not done so within 12 months of the issue of their final tax invoice.

The result of this inability to extend time for assessment is that the practitioner must sue in contract for the recovery of his or her costs if he or she has not sought a timely assessment.

Pitfall (No 4) arises where a practitioner fails to give an updated reliable estimate of costs having given a reliable initial estimate.

Once a costs agreement has been voided, the costs assessor ***must*** assess the costs on a quantum meruit (as to which see *Pavey & Matthews v Paul* (1986) 162 CLR 221 at 227-228, 250-251, 255-257, 263-269) and do so without paying ***any*** regard to the (now voided) costs agreement.

Following a contravention of Division 3 of Part 4.3, which occurs the moment a barrister bills in excess of estimated costs, '*the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority*'. (See s 178(1)(c) of the UL.)

Furthermore, where a costs agreement is voided by s 178(1)(a) for nondisclosure of costs, '*the client … is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority.*' (See s 178(1)(b) of the UL.)

Section 178(1)(c) provides that, in addition to the alternative of seeking an assessment of the costs where the costs agreement has been voided, the law practice can have its '*costs dispute determined by the designated local regulatory authority or under jurisdictional legislation*'.

The '*designated local regulatory authority*', for the purposes of resolving costs disputes where the costs agreement is voided by s. 178(1)(a) of the UL, is the Legal Services Commissioner (LSC). (See s 11 of the Application Act, Table 1 item 13.)

The criteria for determination of a costs dispute where a costs agreement has been voided by s 178(1)(a) are in s 412(2) of the UL. The UL, Uniform Regs. and Uniform Rules contain no provisions which specifically address the resolution of costs disputes arising under voided costs agreements. This leaves the LSC with a relatively unfettered discretion to assess disputed costs.

A further problem concerns the consequences of a voiding pursuant to s 185(1) of the UL.

The voiding of the costs agreement pursuant to s 185(1) occurs because of the contravention of Division 4 of Part 4.3 of the UL, for example, s 180.

Pitfall (No 4) arises where a practitioner fails to give an updated reliable estimate of costs having given a reliable initial estimate.

However, voiding of costs agreements under s 185(1) has nothing to do with the nondisclosure of costs unless the nondisclosure occurs ***within*** the costs agreement. The costs disclosure obligations on practitioners are imposed by Division 3. It is the work of s 178(1)(a) where nondisclosure is the contravention.

This problem arises because the UL draughtsman assumes every voiding of costs agreements under s 185(1) engages the costs assessment regime by quantum meruit provided for in s 178(1)(b) (first limb) or in the regime for resolution of the costs dispute by the LSC which is provided for in ss 178(1)(b) and (c) (second limb) for a voiding under s 178(1)(a) of the UL.

The existence of that assumption is established by the marginal note to s 185(1). This marginal is probably wrong on two grounds. First, it ignores the right to apply to the LSC to determine the costs dispute under ss 178(1)(b) and (1)(c), assuming that they are engaged for a voiding occurring under s 185(1) ***as well as*** for a voiding occurring under s 178(1)(a) of the UL.

Secondly, it assumes that voiding under s 185(1) engages the assessment regime in ss 178(1)(b) and (1)(c). However, s 185(1) does not engage s 178(1). Section 178(1)(a) voids the costs agreement because, and ***only*** because, '*a law practice contravenes the disclosure obligations of this Part.*' Those disclosure obligations are stated in Division 3. But section 178(1)(a) does ***not*** void the costs agreement because the costs agreement rules specified in Division 4 are contravened. That is the exclusive work of s. 185(1) of the UL.

Although a marginal note has a role to play as an aid to interpretation of ss 178(1) and 185(1): see s 34(2)(a) of the *Interpretation Act 1987*, it is not part of the provision because it is not part of the text: see s 35(2)(c) of the *Interpretation Act 1987*. See *Project Blue Sky Inc. v ABA* (1998) 194 CLR 335 at 381-382 [69]-[71]. Section 185(1) rises or falls on its text and context. Section 185(2), like the marginal note to s 185(1), assumes that the costs of the practitioner whose costs agreement has been voided by s 185(1) will be entitled to apply to have his or her costs assessed if the application for assessment is made within time under s 198(1) of the UL.

The barrister who does not apply for an assessment within the 12-month period in s 198(3)(a), and whose costs agreement is voided pursuant to s 185(1), must fall back on his or her right to redress unjust enrichment of the solicitor and client and recover the costs on a quantum meruit

A considered opinion on overcoming each of these four pitfalls

The better view, it would seem, for resolution of Pitfall No. 1 is to avoid, where possible having regard to the amount in issue, appealing any Review Panel decision to the District Court and instead appeal to the Supreme Court. For Pitfall No. 2, the better course is to take up with the assessor a statutory interpretation approach on voiding costs agreements which seeks a voiding only *in futuro* and take unsatisfactory decisions to a Review Panel and, thereafter, the Supreme Court. For Pitfall No. 3, practitioners simply must apply for assessment of their fees within 12 months of the end of their retainer regardless of the solicitors' spin on payment. For Pitfall No. 4, where there is a right of assessment by an assessor, take it. Where the right of assessment is statute-barred, seek an assessment by the LSC and approach it as if it were an assessment by an assessor. However, if and how one seeks a review of the LSC's costs decision is unknown. BN