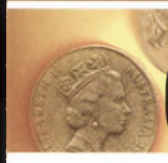

COSTS and CONTRACTUAL ISSUES

By Phillipa Alexander

REGULATED COSTS

In NSW, practitioner/client costs for legal services provided in relation to motor accident claims,[1] work injury damages claims,[2] and personal injury damages matters where the amount recovered does not exceed $100,000,[3] remain subject to regulation.

Practitioners can contract with clients to charge costs that exceed the regulated amount, provided they comply strictly with the requirements of the relevant 'contracting out' legislation. In the author's experience, it is not uncommon for a practitioner who has an agreement with his or her client to charge more than the regulated costs to discover that some aspect of the costs agreement or associated disclosure information was deficient or contrary to the legislation. This discovery is usually not made until the matter has concluded and, in such cases, the practitioner is unable to recover fees that exceed the regulated amount. This is particularly unfortunate where the work done in relation to the matter has extended over a number of years or has involved a lengthy trial, where the differential between the regulated costs and fees which would have been recoverable under a valid costs agreement based on reasonable hourly rates can exceed $100,000.

PERSONAL INJURY CLAIMS

To contract out of the maximum costs prescribed by s339 of the *Legal Profession Act* 2004 (NSW) (the Act) in relation to personal injury damages claims where the amount recovered does not exceed $100,000, the costs agreement must comply with Division 5 of the Act. The costs agreement must be in writing, or evidenced by writing.[4] Difficulties in evidencing the costs agreement arise where the written costs agreement or evidence of the agreement cannot be located. As the costs agreement may well be of substantial value to the practitioner, it should be safeguarded accordingly.

Proper disclosure under s309 of the Act is also essential. Where a practitioner fails to disclose (and update) the required information, the client acquires the right[5] to seek to set the costs agreement aside under s328 of the Act.

In addition to compliance with the Act, clause 116 of the *Legal Profession Regulation* 2005 requires solicitors to give a client a statement *before* entering into any costs agreement informing them of the existence of the maximum costs provisions in the Act and how the maximum costs are calculated; that the costs agreement will exclude the operation of those provisions; and that the costs agreement relates solely to costs payable by the client to the law practice, so that costs that may be recovered from an opposing party will be limited in accordance with the provisions in the Act.

With one exception, if this statement is not provided a practitioner loses his or her entitlement to charge fees in excess of the regulated costs. In cases where a costs agreement is entered into before the law practice could 'reasonably expect' that recoverable damages would not exceed $100,000, clause 116(5) provides that disclosure under the clause is not required.

WORK INJURY DAMAGES CLAIMS

Schedule 7 of the *Workers Compensation Regulation* 2003 (NSW) (the Regulation) regulates costs for legal services provided in relation to work injury damages claims. Clause 88 of the Regulation allows a law practice to contract out of the Schedule 7 costs where disclosure under s309 of the *Legal Profession Act* 2004 is made and a costs agreement is entered into that complies with Division 5 of the Act. While a conditional costs agreement (with a success premium or uplift fee of not more than 10 per cent) remains permissible under this Regulation, the Act prohibits any uplift fee conditional on the success of a matter, in a conditional costs agreement relating to a claim for damages in contracts agreed after 1 October 2005. Such costs agreements are void under s327(1) of the Act.

The client must also be informed *before* entering the costs agreement and in a *separate* written document that, even if s/he obtains a costs order in his or her favour, s/he will remain liable to pay costs to the practitioner that exceed the regulated amount, in accordance with the costs agreement.

Incorporation of this statement in a costs agreement is subject to challenge, on the basis that it fails to meet the requirement for a *separate* document to the costs agreement.

MOTOR ACCIDENT CLAIMS

Section 149 of the *Motor Accidents Compensation Act* 1999 authorises the fixing of maximum costs for legal services provided to a claimant in any motor accidents matter. Clause 9(1) of the *Motor Accidents Compensation Regulation* 2005 (the MAC Regulation) fixes costs in accordance with

the costs set out in Schedule 1 of the MAC Regulation.

Clause 11 of the MAC Regulation allows a practitioner to contract out of the regulated costs in Schedule 1 where s/he has made disclosure under s309 of the *Legal Profession Act* 2004 and has entered into a costs agreement (other than a conditional costs agreement) in accordance with Division 5 of the Act.

Once again, before entering into the costs agreement, the practitioner must advise the client in a *separate* written document that even if s/he is awarded costs, s/he will remain liable for the additional costs calculated in accordance with the costs agreement as they exceed the amount of the regulated costs.

Clause 10 of the MAC Regulation specifies that the maximum costs in Schedule 1 do not apply to matters that are exempt from assessment under s92 of the *Motor Accidents Compensation* Act 1999. An issue arises where a practitioner has inadvertently failed to contract out in accordance with clause 11 in respect of a matter that is exempt from claims assessment under s92; that is, where the insurer denies that its owner or driver was at fault; the insurer claims a reduction of damages of more than 25 per cent for contributory negligence; the claimant is a person under a legal incapacity; the person against whom the claim is made is not a licensed or other CTP insurer; the insurer denies indemnity to the owner or driver; or where the insurer alleges that the claim is fraudulent.

Given that clause 10 is not subject to clause 11, where a matter is exempt under s92, it is arguable that Schedule 1 costs do not apply, irrespective of whether the practitioner has complied with the clause 11 contracting-out provisions.

RECOVERY OF DEREGULATED PARTY/PARTY COSTS

Whether party/party costs on a deregulated basis can be recovered by a plaintiff in a motor accidents claim has recently been considered by the Court of Appeal in *Najjarine v Hakanson*.[6] Their Honours Hodgson JA, Macfarlan JA and Young JA reversed a decision of His Honour Kearns DCJ, who had ordered that the defendant pay the plaintiff's party/party costs on a deregulated basis. The CARS assessor had awarded the plaintiff damages of $16,510.15, which the court had increased to $112,498.87. Section 151 of the *Motor Accidents Act* 1998 provides that the insurer is liable to pay the plaintiff's costs where his or her court-ordered damages exceed the original assessed amount by the greater of at least $2,000 or 20 per cent.

Kearns DCJ considered that no section of the *Motor Accidents Act* 1998 was infringed by the making of an order for deregulated party/party costs and that the limitation in clauses 9 and 10 of the *Motor Accidents Compensation Regulation (No. 2)* 1999 did not apply in determining whether the plaintiff was entitled to an order for costs, nor to the form of the order to which the plaintiff was entitled. Kearns DCJ considered that these matters were covered by s151, by virtue of which the plaintiff's entitlement to costs arose. The insurer appealed, arguing that the costs were limited in accordance with clause 9 and Schedule 1 of the *Motor Accidents Compensation Regulation (No. 2)* 1999. The Court of Appeal considered that where a practitioner had 'contracted out' of Schedule 1 costs in relation to solicitor/client costs, there could be an argument that the effect of the costs agreement was also to remove any limitation on party/party costs, which would otherwise apply following the indemnity principle.[7] The Court considered the respondent's submissions that if party/party costs were to be limited by the Act and the Regulation, it must be by way of a *direct* limit on recoverable *'party/party'* costs. As s149 of the Act does not authorise regulations directly limiting party/party costs, the respondent's counsel argued that to construe the Regulation in that way would mean that it fell outside the authority generated by s149. However, the Court of Appeal considered that s149 should not be given such a narrow construction, particularly as s148(2) provides that Chapter 6 (which includes s149) applies in respect of both party/party and solicitor/client costs, except as otherwise provided. The costs were ordered to be recoverable subject to the Schedule 1 limits.

> It is not uncommon for practitioners to discover – usually after the matter has concluded – that they are unable to recover fees exceeding the regulated amount, despite earlier agreements with their clients.

Hodgson JA did note, however, that in exceptional cases, and for the avoidance of substantial injustice, the limit on party/party costs could be removed by an order under s153(1).[8] This issue did not appear to have been raised before the trial judge.

The costs of the appeal were also held not to be limited by clause 9 and Schedule 1, on the basis that the amounts prescribed under Schedule 1 come to an end with 'finalisation of the matter', which occurs when judgment is given at first instance.[9]

RECOVERY OF GST

The Court of Appeal in *Boyce v McIntyre*[10] has determined that a costs assessor is not entitled to determine amounts in respect of GST. Ipp JA, with whom Macfarlan JA and Hoeben J agreed, considered whether a costs assessor was entitled to determine the right of a law practice, which acted for a lessor, to charge or recover from the lessee, a non-associated third-party payer, an amount for GST. The costs >>

assessor and the review panel had all held that the assessor had that power. Ipp JA disagreed and held that under the *Legal Profession Act*,

> 'a costs assessor is empowered to assess costs that are defined by s302(1) as including "fees, charges, disbursements, expenses and remuneration". GST does not fall under any of these categories and does not come within the ambit of legal costs. GST is an issue in respect of taxation, not legal costs.'

Leave to appeal was granted in relation to the allowance of GST and the appeal was upheld.

This decision raises difficulties for practitioners in recovering GST as part of a practitioner/client costs assessment if a costs assessor cannot determine an entitlement to GST. While a practitioner must retain a contractual right to recover GST under a costs agreement, no such right exists in relation to recovery of GST from an opposing party under a party/party costs order. It appears that it may be necessary to consider whether GST payable by a plaintiff on his or her practitioner/client costs needs to be claimed from a defendant as a head of damage, rather than as a component of the plaintiff's costs. ■

Notes: **1** Section 149, *Motor Accidents Compensation Act* 1999 and clause 11, Motor Accidents Compensation Regulation 2005. **2** Section 337, *Workplace Injury Management and Workers' Compensation Act* 1998 and clause 88, Workers Compensation Regulation 2003. **3** Section 339, *Legal Profession Act* 2004 and clause 116, Legal Profession Regulation 2005. **4** Section 322(2), *Legal Profession Act* 2004. **5** See s317(3) *Legal Profession Act* 2004. **6** *Najjarine v Hakanson* [2009] NSWCA 187 (8 July 2009). **7** The indemnity principle provides that a party may not make a profit on recovery of his or her party/party costs; that is, if the plaintiff is liable to pay practitioner/client costs calculated in accordance with Schedule 1, costs exceeding that amount cannot be recovered from the defendant. **8** *Najjarine v Hakanson* [2009] NSWCA 187 (8 July 2009) per Hodgson JA at [20-21]. **9** *Ibid* at [23-25]. **10** *Boyce v McIntyre* [2009] NSWCA 185 (20 July 2009).

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