

BAQ

COUNSEL AND COSTS

Richard Douglas QC

20 July 2017

The Touchstone

Disagreements over money can easily lead to rancour and the sundering of relationships, whatever their character. Every sensible barrister wants to avoid a dispute about fees with his or her instructing solicitor and/or with the client.

There was a time when some barristers were reluctant to discuss fees and their expectations as to payment at the outset. Whatever its source, that reluctance was inimical to the interests of the solicitor and the client, and ultimately those of the barrister. Now these issues are regulated by the *Legal Profession Act 2007* (Qld) Part 3.4, which contains provisions about costs disclosure and costs agreements. It was that Act which gave a barrister the right to sue his or her instructing solicitor for unpaid fees.

Per Margaret Wilson J “Barrister and Solicitor: a symbiotic relationship in the interests of the client”, 2014

Solicitor v Direct Access

- The conventional solicitor - counsel brief is what I am addressing.
- Undertake direct accessing briefing at your peril (except accounting professionals, insurers and government agencies). Most complaints the LSC and BAQ receive about barristers concern direct access briefs.
- Direct access briefing is not available to be undertaken by a reader except with the consent of a mentor (formerly 6 months only).
- Precedents for document disclosure and costs agreements are to be found on the BAQ website, but for solicitor briefing, not direct access – draft your own for direct access (again at your peril).

Six Topics

- Costs Disclosure.
- Costs Agreements.
- Lump Sum and Itemised Bills for a Barrister.
- Assessment of Barristers' Bills.
- Cancellation Fees.
- Speculative Uplift Fees.

Costs Disclosure

- LP Act s 308 (solicitor's obligation re client):
 - (1) A law practice **must disclose** to a client under this division ...
 - (a) the basis upon which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs ... and
 - ...
 - (c) an **estimate** [**NOT** a quote] of the **total legal costs if reasonably practicable** or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs ... and
 - (d) details of the intervals, if any, at which the client will be billed ...

Costs Disclosure (cont'd)

- LP Act s 309 (barrister's "information" obligation):
 - (1) If a law practice intends to retain another law practice on behalf of a client, the first law practice must disclose to the client the details mentioned in section 308(1)(a), (c) and (d) in relation to the other law practice, in addition to any information required to be disclosed to the client under section 308.
 - (2) A law practice retained or to be retained on behalf of a client by another law practice is not required to make disclosure to the client under section 308, but must disclose to the other law practice the information necessary for the other law practice to comply with subsection (1).

...

Statutory example –

If a barrister is retained by a firm of solicitors on behalf of a client of the firm, the barrister must disclose to the firm [the information in s 308(1)(a), (c) and (d)] details of the barrister's legal costs and billing arrangements, and the firm must disclose those details to the client.

Costs Disclosure (cont'd)

- LP Act s 310:
 - ... Disclosure under s 309 must be made in writing before, or as soon as practicable after the other law practice is retained ... (but) ... disclosure made ... before the law practice is retained ... is taken to be disclosure to the client for s ... 309.
- LP Act s 311 exceptions to disclosure duty (by solicitor as primary “law practice”).
 - ❖ Total legal costs unlikely to exceed \$1,500.
 - ❖ One or more disclosures have been made to client in previous 12 months, client waives in writing and reasonable grounds decision not required.
 - ❖ Client is (inter alia) a law practice (ie not just engaging law practice but client also), public company or subsidiary thereof, liquidator, administrator, receiver, bankruptcy trustee or financial services licensee.

Costs Disclosure (cont'd)

- LP Act s 315 – disclosure obligation ongoing.
- LP Act s 316 – absence of proper disclosure precludes recovery of fees by barrister and “capable of constituting unsatisfactory professional conduct or professional misconduct”.
- LP Act s 321 – interest entitlement after 30 days of billing.
- See BAQ website precedents under “Forms and Documents” – last entry.

Costs Disclosure (cont'd)

- Disclosure and estimate on initial brief or for each set of instructions? – Yes to latter, at least preferably. See BAQ precedents.
- Notification of fee variation over time? – Yes, eg 12 monthly intervals, not to exceed CPI.
- Daily and hourly rates - demise of the fee on brief. Matter of agreement? – Yes, subject to Regulator arguing the agreement imposed was professional misconduct or unsatisfactory conduct (unlikely).

Costs Disclosure (cont'd)

- *Hennessey v Watpac* [2007] QDC 57 per McGill DCJ as to time costing:

I suspect that the original **notion of a fee on brief** was based on the idea that a barrister was essentially paid for his work in court, on the assumption that relatively little in the way of preparation for trial would be necessary beforehand, although there would usually be a conference as well. **That was no doubt reasonable enough in the old days when most litigation was so simple that all a barrister had to do was read his brief and go into court, but it is an entirely inappropriate approach when dealing with modern litigation with the complexity of the issues which were involved in the hearing of this matter ...** In such a matter, counsel is expected to work in preparation for trial before the day of trial, it is reasonable or proper for that to be paid for and it is to be part of costs assessed on the standard basis.

Costs Disclosure (cont'd)

- GST disclosure need be clear - *Competition and Consumer Act 2010 (Cth)*, Sch 2 Australian Consumer Law s 48 (but note s 6B of Act maintaining \$40,000 limit status for consumer subject to exceptions):

48 Single price to be specified in certain circumstances

(1) A person must not, in trade or commerce, in connection with:

(a) the supply, or possible supply, to another person of ... services of a kind ordinarily acquired for personal, domestic or household use or consumption; or

...

make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies, in a prominent way and as a single figure, the single price for the goods or services.

Note: A pecuniary penalty may be imposed for a contravention of this subsection

Costs Disclosure (cont'd)

(7) The *single price* is the minimum quantifiable consideration for the supply of the goods or services at the time of the representation, including each of the following amounts (if any) that is quantifiable at that time:

...

(b) the amount which reflects any tax, duty, fee, levy or charge imposed on the person making the representation in relation to the supply;

...

Example 2: The GST may be an example of an amount covered by paragraph (b).

Costs Agreements

- *Legal Profession Act 2007 (Qld) s 322.*

322 Making costs agreements

(1) A costs agreement **may be made** between—

...

(c) a law practice and another law practice that retained that law practice on behalf of a client; or

(2) The costs agreement **must be written or evidenced in writing.**

...

(4) The offer **must clearly state—**

(a) **that it is an offer to enter into a costs agreement; and**

(b) **that the offer can be accepted in writing or by other conduct; and**

(c) **the type of conduct that will constitute acceptance.**

(5) **Except as provided by section 344, a costs agreement cannot provide that the legal costs to which it relates are not subject to costs assessment under division 7.**

Note—

Under section 327(1), if a costs agreement attempts to provide that the legal costs are not subject to a costs assessment, the costs agreement will be void.

Costs Agreements (cont'd)

- LP Act s 323:
 - (1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.
 - (2) A conditional costs agreement may relate to any matter, **except** a matter that involves **criminal proceedings or proceedings under the Family Law Act 1975 (Cwlth)**.
 - (3) A conditional costs agreement—
 - (a) must set out **the circumstances that constitute the successful outcome of the matter to which it relates**; and
 - (b) may **provide for disbursements** to be paid irrespective of the outcome of the matter; and
 - (c) must be—
 - (i) in writing; and
 - (ii) in clear plain language; and ...

Costs Agreements (cont'd)

- LP Act s 326 – the advantage is in “enforcement”:
326 Effect of costs agreement
Subject to this division and division 7, a costs agreement may be enforced in the same way as any other contract.
- Acceptance of offer expressly or by conduct - eg see BAQ letter.
- Use of costs agreements by barristers (costs disclosure aside)
uniform? No – variation precedents
- Do solicitors read them? Mostly.
- Are they given to clients? Often not.
- Note, again, BAQ draft letter on website (disclosure and agreement).

Itemised Bills

- LP Act s 329 – bill condition precedent to recovery:
329 Legal costs cannot be recovered unless bill has been served
 - (1) A law practice must not start legal proceedings to recover legal costs from a person until at least **30 days after the law practice has given a bill** to the person under sections 330 and 331 or under provisions of a corresponding law that correspond to sections 330 and 331.
...
 - (3) A court of competent jurisdiction before which any proceedings are brought in contravention of subsection (1) must stay those proceedings on the application of a party or on its own initiative.
 - (4) This section applies whether or not the legal costs are the subject of a costs agreement.

Itemised Bills (cont'd)

- LP Act s 330 – lump sum or itemised but must be given as prescribed:

330 Bills

(1) **A bill may be in the form of a lump sum bill or an itemised bill.**

(2) A bill must be **signed** on behalf of a law practice by an Australian legal practitioner or an employee of the law practice.

...

(5) **A bill is to be given to a person—**

(a) by **delivering** it personally to the person or to an agent of the person; or

(b) by sending it by **post** to the person or agent at—

(i) the usual or last known business or residential address of the person or agent; or

(ii) an address nominated for the purpose by the person or agent; or

(6) A reference in subsection (5) to a way of giving a bill to a person includes a reference to arranging for the bill to be given to that person by that way, including, for example, by **delivery by courier**.

(7) Despite anything in subsections (2) to (6), **a bill may be given to a client electronically if the client consents to [until June 2017 – “requests”] the bill being given electronically.**

Itemised Bills (cont'd)

- LP Act s 332 – request for lump sum bill to be itemised:

332 Request for itemised bill

(1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.

Note—

A bill in the form of a lump sum bill includes a bill other than an itemised bill.

(2) The law practice must comply with the request within 28 days after the date on which the request is made.

(3) If the person making the request is liable to pay only a part of the legal costs to which the bill relates, the request for an itemised bill may only be made in relation to those costs that the person is liable to pay.

Itemised Bills (cont'd)

- (4) Subject to subsection (5), a law practice must not commence legal proceedings to recover legal costs from a person who has been given a lump sum bill until at least **30 days** after the date on which the person is given the bill.
 - (5) If the person makes a request for an itemised bill within **30 days** after receiving the lump sum bill, the law practice must not commence proceedings to recover the legal costs from the person until **30 days** after complying with the request.
- LP Act s 300 definition:
Itemised bill means a bill stating, in detail, how the legal costs are made up **in a way that would allow the legal costs to be assessed** under Div 7.

Itemised Bills (cont'd)

- No question that s 332 applies to barristers with request capable of being made by briefing solicitor (who only, not client, may seek assessment – see s 336 below).
- How much detail is required in a barrister's fee note or bill to transmute it, *ab initio* or by subsequent bill, from one in character being “lump sum bill” to one which is an “itemised bill”?
- Practical features reflect those operative in a solicitor dealing with client in relation to a barrister's fee note.

Itemised Bills (cont'd)

- *Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2010] QDC (18 November 2010) per Reid DCJ:

[32] In my view, the description of the work performed in the various invoices is little more than a recitation of the hours of work performed and a brief and wholly inadequate explanation of the work actually performed.

...

[34] On 21 December 2009 a claim is made for 8.9 hours of work by a solicitor. The charge amounts to some \$2,581, being 8.9 hours at \$290 per hour. The following description is given of the work:

“Various activities including letter to Dibbs Barker re Mitchell Brandtman report; prepare response to show cause notice; peruse affidavits and email to counsel re same.”

Itemised Bills (cont'd)

- Examples - Sufficient? Outcome is fact sensitive:
 - “Drafting reply and answer, and in particular reviewing cases to plead a response to the defence on mistake (6 hours).”
 - “Preparing for application including reading brief – 3 volumes - and research including all correspondence and telephone calls with instructing solicitors (10 hours);
 - reading brief (volumes 1-3) (4 hours);
 - settling affidavit of [X] and reading relevant cases on summary judgment application (2 hours);
 - telephone call with Ms [X] of instructing solicitors on termination issue (30 mins);
 - preparing written submissions to support application and obtaining comment of instructing solicitors as to same (3.5 hours).”

Itemised Bills (cont'd)

- “To reading 6 volume brief, particularly the client file documents which comprise 4 lever arch folders (7 hours).”
- “Preparation for and conference (1 day):
 - reading and preparing for conference with Mr [X] of instructing solicitors and Mr [Y], a witness in the matter, including drafting a series of questions (2.5 hours);
 - attending to meeting Mr [X] and Mr [Y] in conference and drafting Mr [Y] witness statements from conference (6 hours).”

Itemised Bills (Cont'd)

- “To providing written opinion (1 day);
 - drafting advice on prospects for success, including review of pleadings and all disclosed documents (6 lever arch volumes) and attending to research on relevant termination issues (4.25 hours) and;
 - editing proposed opinion (4.25 hours).”
- “Consultation with Mr [X] [Senior Counsel] to review pleadings and settle draft defence and counterclaim, particularly the breach of contract allegations (6 hours).”

Itemised Bills (Cont'd)

- “Telephone attendance upon instructing solicitor re advising on Minister’s consent (30 mins).”
- “Skype conference with instructing solicitor and client to obtain instructions for preparation of pleading (1.5 hours).”

Assessment of Barristers' Bills

- LP Act s 336 – assessment sought by solicitor of barrister's fees:

336 Application for costs assessment by law practice retaining another law practice

- (1) A law practice that retains another law practice to act on behalf of a client may apply for an assessment of the whole or any part of the legal costs.**
- (2) If any legal costs have been paid without a bill, the law practice may nevertheless apply for the costs assessment.**
- (3) The costs application may be made even if the legal costs have been wholly or partly paid.**
- (4) The costs application must be made within 60 days after—**
 - (a) the bill was given or the request for payment was made; or**
 - (b) the costs were paid if neither a bill was given nor a request was made.**
- (5) A costs application can not be made if there is a costs agreement between the client and the other law practice.**
- (6) Subject to this section, the costs application under subsection (1) must be made in the way provided under the Uniform Civil Procedure Rules.**

Assessment of Barristers' Bills (cont'd)

- LP Act s 339- assessment sought by client of solicitors, but barrister brought in as party:

339 Persons to be notified of application

- (1) The applicant for a costs assessment must, under the Uniform Civil Procedure Rules, **give notice of the costs application** to any other person the applicant knows is 1 of the following—
 - (a) **a law practice to whom the legal costs have been paid or are payable;**
 - (b) the law practice that retained a law practice to whom the legal costs have been paid or are payable;
 - (c) the client;
 - (d) a third party payer.
- (2) **A person given notice of the costs application under subsection (1)—**
 - (a) **is entitled to participate in the costs assessment process; and**
 - (b) **is taken to be a party to the assessment; and**
 - (c) **if the costs assessor so decides, is bound by the assessment.**

Assessment of Barristers' Bills (cont'd)

- LP Act s 344, “sophisticated client of a law practice” may contract out of entitlement to assessment.
- “Sophisticated client” is above s 311 legal practice, public company liquidator and the like.

Assessment of Barristers' Bills (cont'd)

- Each of s 336 and 339 are in Div. 7.
- Thus two means of a barrister being drawn into and being bound by a costs assessment:
 - directly by retaining solicitor seeking assessment of barrister's bills;
 - indirectly by client on assessment of solicitor's bills.
- However, a barrister need not be **unduly** concerned if he or she:
 - has a properly worded costs agreement (including giving proper costs disclosure);
 - has delivered an itemised fee note (or bill)

Cancellation Fees

- Matter for agreement – if sought to be levied ought be included in costs agreement letter from barrister.
- Where objectively appropriate? – long trials.
- Client and solicitor attitude? – usually adverse.
- If apt, a cascading cancellation fee ought be agreed – dependent upon the lapse in time between compromise (or adjournment) and trial eg 2 weeks prior 1 day fees, 1 week 2 days fee, on first day 3 days fees.
- NB - LSC retains discretion to characterise agreement imposition as unprofessional conduct or professional misconduct eg 1 month trial settled anytime with 1 month fees payable in any event.

Speculative Uplift Fees

- LP Act s 324:
 - 324 Conditional costs agreements involving uplift fees**
 - (1) A conditional costs agreement may provide for the payment of an uplift fee.
 - (2) The basis of calculation of the uplift fee must be separately identified in the agreement.**
 - (3) The agreement must contain an estimate of the uplift fee or, if that is not reasonably practicable, both of the following—
 - (a) a range of estimates of the uplift fee;
 - (b) an explanation of the major variables that will affect the calculation of the uplift fee.
 - (4) If a conditional costs agreement relates to a litigious matter, the uplift fee must not exceed 25% of the legal costs, excluding disbursements, otherwise payable.**
 - (5) However, this Act does not affect the right of a law practice to discount its fees and, if a law practice does discount its fees, the reference in subsection (4) to legal costs is the fees the law practice would have charged if the law practice's fees had not been discounted.
 - (6) A law practice must not enter into a costs agreement in contravention of this section.
- LP Act s 325 – contingency fees prohibited.

Speculative Uplift Fees (cont'd)

- LP Act s 327(4):
327 Particular costs agreements are void
 - (1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this division is void.
 - (2) Subject to this section and division 7, legal costs under a void costs agreement are recoverable as set out in section 319(1)(b) or (c).
 - ...
 - (4) A law practice that has entered into a costs agreement in contravention of section 324 is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in relation to the uplift fee to the person from whom it was received.
- LP Act s 328 – SC or QCAT may set aside a spec costs agreement.

Practical Tips

- Take a conservative line – you need to avoid dispute, and will not want to sue, be sued or be involved in an assessment.
- Disclose more, not less.
- Disclose early, and often.
- Keep notes of work done and bill frequently (even if spec – for record purposes).
- Bill itemise more, not less – give itemised bill in first instance.
- Avoid direct access briefs.