

## Importance of Costs

No conflict rule – to not act in contrary to a client and their own self-interest – *Hospital Products v US Surgical Corp* (1984).  
*Tyrrell v Bank of London* (1862) 10 HL 26, cited with approval in *Harrison v Schipp* (2002) 54 NSWLR 612:

*There is no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honorable observance, than the relation between solicitor and client ... a solicitor shall not in any way whatever in respect of the subject of any transactions in the relations between him and his client make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled*

Law of costs will determine the limit of the balance between operating a successful business and upholding that fiduciary responsibility outlined above.

Not just statutory obligations (*LPA* 2008 (WA)) but also statutory ethical duties (*Legal Profession Conduct Rules* 2010 (WA)).  
Can get so bad one is struck off the roll (*O'Hallaran* [2013]).

Access to justice is a right not a privilege (*Ocean Sunline* (1988)). As such, restricting access by having exorbitant costs or a gap between solicitor/client costs and party/party costs is impinging a right.

Courts view themselves as the forerunners in strictly applying fairness and reasonableness of solicitor/client charging (*Redfern v Mineral Engineers Ltd* [1987] VR 518).

Various Court Acts – SC act s 37; DC act s 64; MC act s 25; SC rules O 66 r 4 create the discretion.

### Time Based Billing

Calculating costs in 6-minute units at an hourly rate is ubiquitous. At the solicitor/client stage, this is either done to scale (rarely), or according to a costs agreement (common). Problem is, it rewards taking longer on a task, so rewards inefficiency.

## Cost Agreements & Cost Disclosure

Entered into freely, and is enforceable under the same principles as any other contract – *LPA* s 286. But, there is a presumption of undue influence (*Clare v Joseph* [1907]).

### Disclosure

*LPA* s 260 – Solicitor must disclose to client:

1. the basis costs will be calculated (sub-s 1(a)); and,
2. if practicable, an estimate of total legal fees (sub-s 1(c)),
3. else an estimated range (sub-s 1(c)(i)) and major variables affected the total estimate (sub-s 1(c)(ii));
4. billing intervals (sub-s 1(d));
5. any interest scheme (sub-s 1(e));
6. an estimate of the costs order if successful (sub-s 1(f)(i)) or unsuccessful (sub-s 1(f)(ii))
7. **N.B** sub-s 2 disclosure is not required – sub-s 2(b) if the client received disc in last year, and waived right, and principal that disc is not warranted. Sub-s 2(c)(i)-(viii) certain bodies.

*LPA* s 262 – disclosure must be made as close to being retained as practicably possible (sub-s 1).

*LPA* s 267 – disclosure is ongoing.

*LPA* s 268 – if disclosure failed to transpire, including ongoing disclosure, the agreement is set aside, and costs set back to scale.



## Party/Party

'The amount which the person to whom the order is directed must pay to some party to the litigation as **partial indemnity** for the professional legal fees and expenses incurred by that party in the course of the litigation' – *Re JJT* (1998) per Hayne J.

I.e. the winner should be awarded some indemnification of legal costs. In WA this partiality is achieved by awarding the costs to the relevant scale. Usually this is around 60%-65% less than solicitor client costs.

## Solicitor/Client

S/C orders can be given and generally are where there was vexatious litigation, trust matters etc.

This is somewhere between scale and costs agreement. On a 'more generous scale' (*Re Marsland* [1902] Qld).

*Burden is on claiming party* to show costs were reasonably incurred and are of a reasonable amount. As a general rule, it won't be an unreasonable amount until you are around twice the scale.

## Indemnity

*Burden is on paying party* to show that costs were not reasonably incurred and of a reasonable amount. (*Rumball Decision*)

Compensatory in nature not penal, so will only be allowed to recover up to what was actually incurred for all costs that were reasonably incurred and of a reasonable amount (*Milosevic v Insurance NSW* (1993)).

## Interlocutory

These are those awarded at a chamber summons, directions hearings etc. They come in the forms of:

1. Costs in the cause – costs awarded as a tag on to the final costs orders.
2. Costs in any event – irrespective of final outcome, costs are ordered for that event.
3. Costs reserved – costs not allowed to either party for that event until a further order of the court. E.g. costs orders for a chamber summons will be ordered reserved until further submissions are made as to costs.
4. No order as to costs – each party bears their own costs.

## Costs Thrown Away

Costs ordered to one party to cover costs wasted as the result of the other party failing to comply with procedure etc. (*Simmons v Love* [2016]).

A common occurrence is an amendment to statement of claim with leave of court. The amending party will pay the other party's costs now wasted on the previous statement of claim, so long as they were properly and reasonably incurred (*Laing v Dampier* [2007]).

When costs are thrown away, 'the court will still have regard to the nature and extent of the amendments, together with the reasonableness of the other party's conduct' *Scaffidi v Montevento* [2011] WASCA 146 Murphy JA.

'Costs thrown away are costs incurred which must be incurred a second time' – (*Quick on Costs* cited by Martin CJ in *Simmons*).

2 stage test as in *Simmons* per Martin CJ:

1. The claimed costs thrown away must be reasonably and properly incurred; and
2. The claimed costs must have indeed been wasted.

## Payable Forthwith

Payment ordered now or at some date soon rather than at the end of the proceedings.

*Rules of the Supreme Court* 1971 (WA) Order 66 rule 10(1):

*Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings, and any order of the Court for the payment of costs may require the costs to be paid forthwith notwithstanding that the proceedings are not concluded*

*Supreme Court of WA, Consolidated Practice Directions* 2009 cl 4.7.1, cl 3, cl 7:

*where a costs order is made against a party in interlocutory proceedings, the costs are generally 'to be paid forthwith or by a particular date'*

The issue is, is there a reason to not give orders for costs payable forthwith. To not give a party costs forthwith and to make them wait years until the end of the whole proceedings would be an injustice (*Danzone v Westerncare* [2016]).

## Settlement Offers Costs implications

A common law *Calderbank* offer for settling the matter as follows:

1. Precise, certain terms capable of acceptance;
2. Representing a genuine compromise;
3. Clearly indicated to have costs consequences (without prejudice save as to costs);
4. Whether rejection of the offer was reasonable (e.g. time of offer first day, or twenty minutes before etc, amount of compromise, surety of outcome etc.).

If the offer was better than the outcome at the end, it is grounds to seek an indemnity costs order.

A statutory equivalent exists in *Rules of the Supreme Court Order 24A* which applies also to the District Court:  
In summary, if P made an offer that was not accepted by the defendant and plaintiff gets judgment that is less favourable to the defendant than the offer, the plaintiff will be entitled to an order as follows: if the court is satisfied that the rejection was not reasonable, then the costs from that point on are awarded on indemnity basis.  
Same as reverse for defendant.  
See order 24A

## Security for Costs Applications

*Rules of the Supreme Court 1971 (WA) Order 25* gives power of ordering security for costs to be paid.

### GROUND FOR AWARDING SECURITY FOR COSTS

Order 25 Rule 3 - in determining whether an order for security should be made, the court takes the following into consideration:

- (a) the prima facie merits of the claim;
- (b) what property within the jurisdiction may be available to satisfy any order for costs against the plaintiff;
- (c) whether the normal processes of the Court would be available within the jurisdiction for enforcement of any order for costs made against the plaintiff.

Order 25 Rule 2 – award if; Resident out of the jurisdiction or about to depart; Immunity within the jurisdiction; Undischarged bankrupt; Company in liquidation; Vexatious litigant (in the past); Litigant is suing the Sheriff.

### NOT GROUND FOR AWARDING SECURITY FOR COSTS

Order 25 Rule 1 – ‘The Court may order security for costs to be given by a plaintiff, but no order shall be made **merely on account of the poverty** of the plaintiff or the **likely inability** of the plaintiff to pay any costs which may be awarded against him’.

Court can direct the form and manner of giving security – Order 25 Rule 5.

Proceedings are stayed until the security has been furnished – Order 25 Rule 6.

The defendant need not prove the plaintiff would be unable to meet a costs order. It is a risk assessment involving a practical, common sense examination of the plaintiff’s financial affairs (*Living Spring Pty Ltd v Kilger Partners* [2008] VSCA 93 cited in *Huntingdale v Perpetual Nominees* [no 2] [2014] WASC 217).

Onus is on the party seeking security to put forth an estimate of likely costs of litigation (*Remm Construction v Allco NewSteel* (1992) SASR 180).

**FLA WA** – section 237 – (1) subject to (2) parties bear own cost. (2) – If court hears proceedings that justify it, can make costs orders or security for costs orders whether interlocutory or otherwise as the court thinks just. Includes Calderbank offers.

## Special Costs Orders

Usually involves lifting the scale limits in respect of a specific item.

Can be sought under *LPA* s 280(s):

“...if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, the court or officer may do all or any of the following –

- (a) order the payment of costs above those fixed by the determination;
- (b) fix higher limits of costs than those fixed in the determination;
- (c) remove limits on costs fixed in the determination;
- (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or assessed.”

It’s a two-limb test (*Heartlink*):

1. Is there a fairly arguable case to be put before a taxing officer that the bill of costs should tax out at more than the limit of the relevant scale?
2. Is there an unusual difficulty, complexity, or importance?

An affirmative to the second should cause the first to be answered affirmatively. Complex, difficult, important is not to do with volume of work, but rather the conduct of the other party making accessing discovery hard, an order for further or better discovery, importance if it was on the news etc. Complexity is to the legal issue, if reasonably needed to brief an expert barrister then the limit on the brief of counsel could be lifted.

*Verdell v Nominees* [2002] – don’t repeat what the judge already knows; explain why it was 1 of 3 not just, volume so difficult; detailed schedules in draft bills are unhelpful

*EDWF Holdings* – per Martin CJ inadequate or lack of evidence will be reason to not award special costs.

*Crawley Investments v Elman* [2014] – keep it succinct; avoid blanket orders; address hourly rates.

*Heartlink* – a special costs order does not mean the taxing officer must assess using the upper limit of the order. It is to free the taxing officer of the constraint of the inadequate scale.



### **283. Conditional costs agreements**

- (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 —
  - (a) criminal proceedings; or
  - (b) proceedings that relate to or involve child protection, custody, guardianship or adoption; or
  - (c) proceedings under either of the following Acts —
    - (i) the Family Court Act 1997;
    - (ii) the Children and Community Services Act 2004; or
  - (d) proceedings under any of the following Acts of the Commonwealth —
    - (i) the Family Law Act 1975;

- (5) If a client terminates an agreement within the period referred to in subsection (3)(e), the law practice —
  - (a) may recover only those legal costs in respect of legal services performed for the client before that termination that were performed on the instructions of the client and with the client's knowledge that the legal services would be performed during that period; and
  - (b) without affecting the generality of paragraph (a), may not recover the uplift fee (if any).

### **284. 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 —
  - (a) a range of estimates of the uplift fee; and
  - (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 —
  - (a) the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely; and
  - (b) the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.
- (5) A law practice must not enter into a costs agreement in contravention of this section.  
Penalty: a fine of \$10 000.

### **285. Contingency fees are prohibited**

- (1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.  
Penalty: a fine of \$10 000.
- (2) Subsection (1) does not apply to the extent that the costs agreement adopts an applicable costs determination.

### **286. Effect of costs agreement**

Subject to this Division and Division 8, a costs agreement may be enforced in the same way as any other contract.

## **287. Certain costs agreements 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 8, legal costs under a void costs agreement are recoverable as set out in section 271(b) or (c).
- (3) However, a law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.
- (4) A law practice that has entered into a costs agreement in contravention of section 284 is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in respect of the uplift fee to the person from whom it was received.
- (5) A law practice that has entered into a costs agreement in contravention of section 285 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.
- (6) If a law practice does not repay an amount required by subsection (3), (4) or (5) to be repaid, the person entitled to be repaid may recover the amount from the law practice as a debt in a court of competent jurisdiction.