

Episode 37: Summary

Episode name: Costs assessments: fair, reasonable... and proportionate?

Guest(s): Mike Dudman

What area(s) of law does this episode consider?

The costs assessment process, particularly in New South Wales, Victoria and Queensland.

Why is this topic relevant?

Understanding the costs assessment process is important for all lawyers, but particularly for litigation and dispute resolution lawyers in the event costs are assessed under a court order, or the client raises an issue regarding costs.

Ordinarily, in a costs assessment the lawyer will have to provide itemised bills and detailed timesheets that detail the time and costs incurred. The costs assessment process can be difficult to navigate due to determining: the applicable legislation, whether the assessment is made within time, the fees associated with the costs assessment, who's liable to pay those fees, rights of appeal, and the correct way to communicate with both the assessor and the other side in the costs assessment.

What legislation is considered in this episode?

Legal Profession Uniform Law 2015 (NSW), specifically,

- Section 172 – sets out the current test in NSW of costs being incurred on the 'fair and reasonable' basis and lists what considerations the court must have regard to.
- Section 174 – costs disclosure obligations of a law practice to their clients.
- Section 198 - an application for a costs assessment must be made within 12 months of receiving the bill.
- Section 298 – charging more than a fair and reasonable amount for legal costs can amount to unsatisfactory professional conduct or professional misconduct.

[Bayley & Associates Pty Ltd v DBR Australia Pty Ltd \[2014\] FCA 346](#)

What cases are considered in this episode?

This case involved a costs dispute arising from a cost order made in the Applicant's favour in a 2013 judgment. In 2014 the Applicant sought an order that its costs be paid on a lump sum basis by the second and fourth Respondents.

Mike Dudman gave evidence as an expert in the assessment of legal costs. He was instructed to 'provide his opinion as to the amount likely to be considered by a taxing officer as the necessary and proper costs and disbursements incurred by the applicant (for the period up to 31 July 2011) and as the reasonable costs and disbursements incurred thereafter if the applicant's costs and disbursements were to be taxed in accordance with the relevant rules of Court on the party/party basis.' [8] He concluded that the amount of costs and disbursements likely to be awarded to the applicant was \$729,223.98.

Mike Dudman's cost analysis led him to conclude that costs would likely be reduced by no more than 10%. With regard to taxation on the disbursements incurred in the proceedings, they would be likely be reduced by not more than 5% given that, in his professional opinion, they were incurred on a 'necessary or proper' or 'reasonable' basis.

[Armstrong Strategic Management and Marketing Pty Limited v Expense Reduction Analysts Group Pty Ltd \(No 10\) \[2017\] NSWSC 16](#)

Similarly, this case involved a costs dispute arising from a principal judgment made in July 2016 in favour of the Defendants, whereupon the proceedings were dismissed, partial cost orders were made in the Defendant's favour.

In September 2016 the Defendants, by notice of motion, sought an order under s 98(4)(c) of the *Civil Procedure Act 2005* (NSW) that the Plaintiff pay the Defendants' cost of the proceedings, assessed on a gross sum basis, and fixed in the amount of \$6,481,994.94 as arrived at by costs consultant, Mike Dudman.

Ball J found in favour of the Defendants and relied exclusively on Dudman's expert evidence in arriving at a costs order of \$5.75 million. Ball J noted that the figure of \$6,481,994.94 was derived from a conservative approach to the costs assessment by Dudman, which was made based on invoices totalling \$9,140,147.35.

[Shi v Mills Oakley \[2020\] VSC 498](#)

In this case, Mr Shi retained Mills Oakley to represent him in a shareholder dispute. In November 2016, a solicitor from Mills Oakley told Mr Shi said that it was difficult to estimate the costs of the litigation, but that it could potentially be around \$100,000. The following day Mills Oakley sent a costs agreement to Mr Shi that listed the total fee estimate as '\$50,000 (+ disbursements + GST).' Following an unsuccessful mediation between Mr Shi and the other party, Mills Oakley informed Mr Shi that the costs would be approximately \$60,000, which included counsel's fees and fees associated with trial preparation.

However, in October 2019 when the trial concluded, Mr Shi was told that the cost of the proceedings totalled \$267,888, which comprised \$74,000 in disbursements and \$169,500 in legal fees. Mr Shi argued that his lawyers did not provide a valid costs agreement, nor a valid estimate of his legal costs, and failed to disclose the basis on which costs were to be charged. Mills Oakley claimed that Mr Shi failed to properly analyse the costs agreement, but the court disagreed, ruling that Mills Oakley failed to comply with their requirements under the Legal Profession Uniform Law. The Supreme Court determined that Mills Oakley failed to disclose hourly rate increases for partners and senior associates over the course of the case and failed to provide a reasonable estimate of disbursements and total legal costs.

What are the main points?

- Costs assessments are an expensive and lengthy process that should be avoided, with an emphasis on the parties reaching a consensual agreement.
- The costs assessment process varies in each state. NSW and VIC apply the 'fair and reasonable test' while QLD uses the 'necessary or proper' test.
- Having multiple practitioners, or engaging multiple counsel on a matter, is a common objection to costs.
- Issues with apportionment in matters with multiple parties and issues also raises concerns as to the true liability of costs.
- As a lawyer, maintaining detailed time entries and keeping good records is key to ensuring that you're not exposed to objections from other parties in the event of a dispute.

What are the practical takeaways?

- The proportionality approach used in the UK is a hot topic for costs assessors in Australia, but data shows it is not currently being applied regularly as a reason for disallowing costs in Australian decisions, notwithstanding the inclusion of proportionality in the LPUL.
- In NSW, the appropriate range for recoverable hourly costs is \$450-\$750 for senior solicitors with 10 years+ experience.
- The party who pays the cost of the assessment is often dependent on which party has made the more genuine attempt to negotiate costs to avoid a formal assessment.
- In NSW:
 - The test applied in NSW is whether costs are 'fair and reasonable' – however, s 172(1) of the LPUL states that this test includes an assessment of whether costs are proportionate.
 - The first step in a costs assessment is to make an application to the Supreme Court of NSW to have costs formally assessed by a costs assessor.
 - The other party will have 21 days to file an objection, after which a costs assessor will be appointed and take submissions.
 - Once the cost assessor has made a decision, he or she will issue a certificate of determination which can be enforced by the parties.
 - A party can make an application for review within 30 days of receiving the determination which will be conducted by a review panel of two costs assessors.
 - Appeals against a decision of the review panel can be made to either the District Court (the party must seek the leave of the court if the amount is less than \$25,000) or the Supreme Court (the party must seek the leave of the court if the amount is less than \$100,000).
- In QLD:
 - The test in QLD is that costs are incurred 'necessarily and properly.'
 - Applications for a costs assessment are heard in different courts depending on the quantum of the disputed amount.
 - If the amount is more than \$750,000 it will be heard in the Supreme Court, if it is between \$150,000 - \$750,000 it will be heard in the District Court and if it is under \$150,000 it will be heard in the Magistrates Court.
 - The costs assessor will issue a certificate of costs within 14 days.
 - In a standard matter, a party can appeal within 21 days after receiving the certificate to request written decisions. This time limit is 14 days in solicitor/client matters.
 - The costs assessor then has 21 days to provide reasons.
 - If a party still wants to appeal, they can do so within 14 days of either receiving the certificate of costs or written reasons for the decision.
- In VIC:
 - The test in VIC is the 'fair and reasonable' test similar to NSW.
 - Costs matters are heard in the costs court, a division of the Supreme Court of Victoria.

- After the costs court has made a decision, a party has 14 days to seek a review.
 - A review can be conducted by the registrar who performed the initial assessment before being reviewed by a costs judge.
 - A Supreme Court judge can then review a costs judge's review if necessary.
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- It is recommended that solicitors inform clients if certain tasks will be non-recoverable in the event of a costs dispute.

 - If the costs for a matter is being contributed to by the client's own frequent communications, it is a good idea to explain that to the client in writing as early as possible.

Show notes

[Supreme Court of NSW's guideline on costs payable between parties under court orders \(Word doc. download\)](#)

[Supreme Court of NSW's information sheet on communication between parties and with costs assessors](#)

[Law Society of NSW 'Costs Guide' 7th edition \(2017\) Chapter 4: Uniform Law and Costs Assessment \(PDF download\)](#)