

## COSTS UPDATE OCTOBER 2018

*"Nothing excites the zeal, the ardour and the passion of the legal profession more than an argument about costs."*

Neilson DCJ: *Jones v The Owners Strata Plan No. 69008* [2017] NSWDC 430.

### **Time Limit to Apply for Assessment**

Section 198(3) *Legal Profession Uniform Law (NSW)* ("LPUL") limits the time for practitioners to apply for assessment to 12 months after--

- (a) the bill was given to, or the request for payment was made to, the client, third party payer or other law practice; or
- (b) the legal costs were paid if neither a bill nor a request was made.

Practitioners have no entitlement to apply for an extension. Practitioners should ensure that if their costs are not paid within a reasonable time after the issue of a bill or request for payment that an application for assessment is made within the 12 month period if the costs are required to be assessed.

### **Disclosure Not Retrospective**

In *Jones v The Owners Strata Plan No. 69008* [2017] NSWDC 430, Neilson DCJ has struck out part of a solicitor's claim for costs relating to work done prior to the solicitor making disclosure and which had not been assessed by a costs assessor. The solicitor's argument that delivery of the costs agreement including disclosure should be regarded as extending back to the commencement of the retainer was rejected and the client was entitled to rely on the prohibition against maintaining proceedings in s182(2) *Legal Profession Act* 1987 (now s178(1)(c) *LPUL*).

Where retainers are under the LPUL, noting the 12 month time limit to apply for assessment, if there is any non-disclosure and a practitioner has not applied for assessment within that period, the practitioner may be left with no avenue to recover the costs. Under the former *Legal Profession Acts* there was no time limit for a practitioner to apply for assessment, subject to the 6 year limitation period under the *Limitation Act* 1969.



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### **Action for Recovery of Overpaid Costs Not Statute Barred**

Dicker SC DCJ has upheld an application made by a client in 2018 for repayment of \$186,141 being the difference between the costs paid to his solicitor in 2009-2010 and the costs as assessed in 2015: *Bennie v Grace* [2018] NSWDC 229. The solicitor disputed that the amount was payable and claimed that the cause of action was statute barred. The solicitor argued that the cause of action commenced on 15 May 2009 when the verdict moneys were receipted to his trust account (from which the costs were transferred); or alternately it commenced no later than 4 March 2011 when the client received a bill of costs. The proceedings were not commenced within 6 years of either date.

It was conceded by the client that the statement in the certificate of determination that the solicitor was to pay the client \$186,141 was not binding on the parties. The court held that a separate statutory cause of action under s208J(2) *Legal Profession Act* 1987 (now s70(4) *Legal Profession Uniform Law Application Act* 2014) arises upon issue of a certificate of determination and the client was entitled to judgment in his favour.

### **Appropriate Forum where Dispute as to Costs Agreement**

In *WKA Legal Pty Ltd v Gleeson* [2018] NSWSC 318, Kunc J has restrained an assessment of costs to enable factual and legal issues regarding the existence and terms of a costs agreement, to be resolved in Local Court proceedings. The solicitors had commenced Local Court recovery proceedings in November 2017. In February 2018, the client filed an application for assessment. The client sought an order that the Local Court proceedings be stayed pending the assessment and the solicitors applied for a stay of the assessment. The court upheld the solicitors' application stating that the issues raised regarding the costs agreement could not be dealt within by way of written submissions on assessment that accorded procedural fairness to the parties due to the conflicting evidence about alleged oral communications.

### **Offsetting Costs Orders**

Robb J has stayed a judgment for costs against the applicants until an order for costs in favour of the one of the applicants has been quantified by assessment in accordance with s135 of the *Civil Procedure Act* 2005. The application was commenced by notice of motion in the District Court which ordered that the proceedings be transferred to the Supreme Court Equity Division on the grounds of jurisdiction. The Supreme Court granted the application on the basis of the court's inherent jurisdiction to prevent possible unfairness and not on the basis on an equitable set-off. The court further held the matter could have been dealt with by the District Court.

If you have any costs queries please contact Peta Solomon on 90061033 or by email [petas@costspartners.com.au](mailto:petas@costspartners.com.au)