

PERSONAL COSTS ORDERS AGAINST SOLICITORS



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By Peter Moran

Each year, a number of costs orders are sought against legal practitioners personally. This article examines the court's jurisdiction to make such orders, outlines what the authorities suggest the court ought take into account, and looks at some Lawcover claim examples.

Practitioners should note that claims made against them by opponents to litigation (or, in rare cases, third parties) may be covered under their Lawcover policy.

Jurisdiction

The court's jurisdiction can arise in different ways. For example, section 99 of the *Civil Procedure Act 2005* (NSW), provides:

- '(1) ... if it appears to the court that costs have been incurred:
- (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or
 - (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
- (2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following:
- (a) ...
 - (b) ... direct a legal practitioner:
 - (i) ...
 - (ii) ... to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person ...
 - (c) ... direct a legal practitioner to indemnify any party ... against costs payable by that party.'

Matters the court will take into account

- The jurisdiction to order a legal practitioner to pay costs personally must be exercised with care and

Snapshot

- Each year a number of costs orders are sought against legal practitioners personally.
- The Court's jurisdiction to make such a costs order arises where costs have been incurred by serious neglect, incompetence or misconduct.
- Lawyers can be ordered to indemnify the client or pay the opposing party.
- Lawyers' duty of confidentiality to the client needs to be taken into account.

discretion and only in clear cases (*Ridehalgh v Horsefield* [1994] Ch 205, at [231]).

- A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence which is plainly doomed to fail (*Ridehalgh* at [233]; *Medcalf v Mardell* [2002] UKHL 27; *White Industries (Queensland) Pty Limited v Flower & Hart* [1998] FCA 806).
- The legal practitioner is not the judge of the credibility of the witnesses or the validity of the argument (*Tomblin v Universal Bulb Company* [1951] 2 TLR 289). If the solicitor reasonably decides to believe their client, criticism cannot be made (*Myers v Elman* [1940] AC 282; [1939] 4 All ER 484).
- A judge considering making a personal costs order arising out of a solicitor's conduct of court proceedings must take full allowance for the exigencies of acting in that environment (*Ridehalgh* at [236]). The solicitor must be given full and sufficient notice of the complaint and full and sufficient opportunity of answering it (*Myers v Elman*).

- Where a solicitor's ability to rebut a personal costs application is hampered by the duty of confidentiality to the client, he or she should be given the benefit of the doubt (*Orchard v South Eastern Electricity Board* [1987] QB 565, [1987] 1 All ER 95). In such circumstances, the court should not make an order against a solicitor who is precluded by legal professional privilege from advancing his/her full answer to the complaint against him/her without satisfying itself that it is in all the circumstances fair to do so (*Medcalf* at [23]).

Occasions where personal costs orders against solicitors have been made

- where costs have been incurred as a result of conduct that would otherwise constitute serious misconduct;
- where costs have been incurred contrary to a client's express or implied instructions;
- failure to comply with court rules or interlocutory directions that lead to costs being wasted or unnecessarily incurred;
- conducting proceedings without a client's authority;
- relying on untenable defences for the mere purpose of delaying proceedings;
- allowing an unqualified client to assume the effective conduct of proceedings; and
- failing to prepare evidence for trial proceedings or effectively conduct such proceedings.

Lawcover case examples

1. Wrongful arrest proceedings

The solicitor's client was detained by police investigating airline ticket fraud. Charges brought against the client were later withdrawn for lack of evidence.

The solicitor then acted for the client in a wrongful arrest civil action; the issue in the civil case being whether the arresting officers had reasonable grounds to suspect that the client had committed an offence. A junior solicitor handled the matter. The court hearing the client's civil action did not view his evidence favourably. The damages claim was unsuccessful. The defendant to the damages claim then sought personal costs against the solicitor.

Risk management/claim avoidance

Carefully check the activities of employed solicitors, especially prior to commencing court proceedings, to ensure adequate evidence is available such that the proceedings have reasonable prospects of success. If in doubt, brief counsel to advise. Have a paper trail of advice to the client (file note or letter) if prospects of success are doubtful, warning of costs consequences etc.

2. Non-responsive family law client

Solicitors acted for a respondent husband in Family Court property proceedings. The client failed to respond to communications from the solicitors

who eventually ceased to act. When the applicant/wife was subsequently successful in the proceedings, a claim for personal costs was made against the husband's solicitors asserting that when they were acting they improperly maintained proceedings that were frivolous. Further, it was claimed that their costs arrangements were such that they were a funder of frivolous and speculative proceedings. The solicitor successfully avoided a costs order being made.

Risk management/claim avoidance

Advise clients – especially in Family Court proceedings – of the necessity for full and frank disclosure of financial information, and of the cost consequences of failing to do so.

If possible (i.e. if no issue of privilege is involved) inform opponents of reasons for delay in provision of information or documentation. Consider ceasing to act at an early point in circumstances of non-cooperation from clients or lack of response to communications.

3. Amendment in possession proceedings

The solicitor acted for a client in the defence of Supreme Court possession proceedings, where the client had also instructed for misleading/deceptive conduct allegations against the lender. In the days leading up to a scheduled hearing, an application was made by the solicitor to substantially amend the pleadings. On the application of the lenders/opposing parties, the solicitor was ordered to pay the opponents costs.

Risk management/claim avoidance

Obtain full and detailed instructions and documentation at the earliest possible stage in litigation to avoid 'last minute' information coming to light warranting pleading amendments. If possible, brief counsel well prior to a hearing to ensure pleadings do not require amendment and that the case is otherwise in order and ready to proceed. Ensure a 'paper trail' exists of advice to litigants – preferably early on – about the necessity of providing all relevant information and documentation. **LSJ**

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