Episode 30 - Transcript

Footing the bill – emerging trends and issues in costs

Intro

Solicitors are subject to strict and ongoing obligations in relation to costs estimates and disclosures. Host Julian Morrow chats with Barrister Michelle Castle about the practicalities of meeting your obligations and explores some key cases on costs.

Julian: Welcome to Risk on Air, I'm Julian Morrow. Costs is always a challenging area. Both clients and solicitors have rights and responsibilities and they can quite often have different expectations. So what are some of the important and emerging issues and risks surrounding costs? Barrister Michelle Castle has some free tips for us. Michelle, welcome to Risk on Air.

Michelle: Thank you very much, Julian, happy to be here.

Julian: It's great to have you. Michelle, could you start by giving us a quick overview of the rules about costs in the Legal Profession Uniform Law?

Michelle: Yes. So the Legal Profession Uniform Law commenced on the 1st of July, 2015 and it brought in a stricter regime in relation to practitioners' obligations to disclose matters pertaining to costs. The structure of it is that solicitors are required to make disclosure to their clients, in writing, of a number of matters about the costs that they're going to charge, and we can go through those. But in addition to that, they are required to take all reasonable steps to obtain the client's consent and understanding to the course of the conduct of the matter and the costs that will be charged. And because this matter requirement is a new one, it's only been in since 2015, a lot of practitioners haven't got their minds across it yet and also haven't implemented procedures within their own practices to both remind them of the requirement, but also to give practical content to it.

Julian: And even just as you stated, the things that jump out to me are that it's consent and understanding, *and* all reasonable steps sounds like quite a high bar.

Michelle: A very high bar and you would need to work really hard to jump over it. And one of the ways that you can do this is to set out for yourself and your employed solicitors what they ought to do as sort of a best practice guideline when a new client comes in. And the steps that that involves is firstly taking them through the costs disclosure that you're required to give, and if you are asking them to enter into a costs agreement, taking them through that.

Now costs disclosure is different to a costs agreement, but often they're included in the same document for convenience and that's an acceptable practice. So you do need to take your client through those documents and explain them and give them the opportunity to ask questions. But the other thing you need to do is take them through what the matter will involve; whether for example, it's going to involve legal proceedings, whether those proceedings will be in a tribunal such as for motor accidents matters or workers' comp or family law, whatever it is, you need to explain the general procedure and you need to remember that unless your client is commercially sophisticated, you'll need to explain it in terms that someone who isn't used to the law can understand. You need to explain how the costs will be incurred and why the quantum of costs that you've estimated will be incurred.

And then it's going to be very hard for any practitioner to say they've taken all reasonable steps unless they really have some note of having had this conversation with the client and even having the client sign off on the note. One recommendation that's out there is to have a bit of a checklist including with boxes that you can tick as you go through and then at the end of the conference to have your client sign that so that you've got a written record of having used your best endeavours. And then the other thing that you should always do is to ask your client firstly, whether they have understood what you've said, and secondly whether they have any questions about what you've said.

Now, this obligation arises at the beginning of a retainer, but it has elements of being a continuing obligation. So for example, if, as often happens during litigation, there's a change in course that was unexpected, you need to explain that to the client and continue to use your best endeavours to make sure that they understand the course and conduct and the costs. The other area where practitioners often fall down is that as well as being required to disclose at the beginning of a matter, they are required to provide ongoing disclosure of any substantial changes. So if, for example, a lawyer has quoted a total estimate of legal costs of $50,000 and they can see that they're approaching that, they have an obligation to re-estimate and update that estimate.

Julian: In terms of ensuring that your client really does understand what you've disclosed to them, do you need to pay particular attention to anything unusual in the arrangements you might be proposing?

Michelle: Yes, there is some case law to support that proposition; that is to say, if you're going to incur any unusual expense, then you have a requirement to get your client's express consent to the incurring of that expense.

Julian: What should you do if you are concerned that your client might not, perhaps, be that capable of understanding a detailed cost agreement or something like that because, you know, clients vary in their level of sophistication and perhaps interest in these matters, but the obligation's still on the practitioner. How would you go about addressing those sorts of scenarios?

Michelle: Yes, you've touched on one of the difficult areas. Some of these concepts are inherently difficult even for lawyers. So the first thing I can mention is that if English is not the client's first language, you ought to translate the documents into their native tongue.

And you also ought to have an interpreter with you when you're explaining all the matters that you're required to explain, going through the documents and also explaining the course of the matter. The other thing you can do is you can advise your client that if there's anything they don't understand, they have liberty to consult an independent solicitor. But beyond all of that, you can recognise two categories of client; your business clients, for example, who know a contract is a contract and even if they're not legally trained will have some idea about the workings of the law. They're an easier category. Then you've got a category of clients who has no commercial or business sophistication and really is difficult there. So you really have to just take extra pains, I suppose, to explain it simply.

And the other thing I say to solicitors about this area of the law because it is burdensome is to treat it like it's part of your insurance policy. If you invest some time in it, time being money, then it's an added form of insurance that you'll be able to recover your fees properly.

Julian: Sometimes matters pop up very urgently. How do you deal with the proper costs disclosures in a situation of urgency?

Michelle: Yes, that's a difficult one. You need to really gear yourself up for urgency. Obviously, you have your precedents and all that sort of thing. And you need to be able to generate documents quickly, even if you can only generate them to the extent that you are able to make an assessment of something like an estimate of total legal costs. And then to make a further one once the matter is settled down a bit and you have a better idea of the costs. So you could, for example, say the matter is arisen in circumstances of urgency and as I don't yet know the scope of it, I'm not able to give you an estimate at this point, but as soon as I can, I will.

Now you only have a very small amount of liberty with that, I'm talking if it was an urgent injunction to go up to the duty judge, I'm not talking taking ages for something that you ought to be able to estimate at the start. So for example, if you're an experienced family lawyer and even if your client comes to you urgently because they want to prevent that partner traveling overseas with the children, for example, you still know what an overall family law matter, even with a twist like that might cost. And my advice to practitioners is to make your best estimate of it and then to the extent that it's wrong, correct it later --

Julian: And don't forget to follow through. I suppose, after the urgency of the situation is dealt with, then yes, get that checklist out and go through it as if you were starting from scratch to make sure everything's done.

Michelle: Very important.

Julian: No surprise perhaps Michelle, that there are quite a few cases that emerge every year on these costs issues. Could we perhaps talk through some of the ones that really stood out to you in 2021? What about the case of Martinez and Al Maha? What was that one all about?

Michelle: That was a very interesting case that practitioners should be aware of. The law firm in that case were acting for a client in a number of disputes, and they had a disagreement about payment of fees and so the retainer was terminated. They subsequently, within a reasonably short time came to an agreement about their disagreement, and the retainer was resumed. It was resumed on the same terms, under the same matter number within the firm, with the same people doing the work, and they were the same disputes.

The question that arose was whether the client was within time to apply for an assessment of costs, that time running from 12 months from the final bill in the matter. The law firm sought to say, well, there were different matters really because there was a first instance Supreme Court matter, there was an appeal, and there was also a conveyance within it. And the argument was the client didn't apply within 12 months if you separate out that work as separate matters. And we as lawyers, I think have an affinity for this argument, because we would think perhaps that acting in first instance Supreme Court proceedings was a different matter to accepting a retainer on the appeal. However, in the context of the Legal Profession Uniform Law, Her Honour, Associate Justice Harrison found that it was all one matter because it related to the client's concerns over a particular transaction and that transaction was the subject of the Supreme Court proceedings, and the appeal, and the conveyance. And so Her Honour held that the application assessment was within time.

Now, there's actually a lot of law in this area of what is the meaning of the word "matter" in this context. And again, it really pays to carefully consider your costs obligations and to have some knowledge of the Act. I find it's an area where a lot of solicitors would like to say, "Oh, I don't understand the Legal Profession Uniform Law, and I don't know the Act very well." But that's a commercially risky strategy because you can run into all sorts of problems if you don't pay close attention.

Julian: And seemed to me that one lesson that can be drawn from that case is that even if a practitioner in their mind has terminated the retainer on a particular matter, that's not going to be necessarily determinative of when the final bill's issued.

Michelle: Yes, absolutely correct, and that even a termination of retainer doesn't necessarily bring a matter to an end.

Julian: So, one of the questions that was before the court in Martinez was "When did the time limit, the 12-month time limit expire?" And this is something that I think solicitors can get quite confused on. Michelle, can you clarify it for us?

Michelle: I sure can. So a solicitor has 12 months from issuing the final bill or demanding payment. Now a lot of solicitors miss this deadline and the difficulty is this; a client can also apply for assessment within 12 months, but a client who fails to meet the deadline can apply for an extension of time, whereas a solicitor cannot apply for an extension of time. It's a lacuna in the Act and we all hope one day it will be remedied, but at the moment, only a client can get an extension of time. And the consequences for a solicitor can be severe because although the cause of action for fees arises when you're entitled to issue a bill and therefore you have six years from that to pursue your clients for your fees, you can't actually commence or maintain proceedings in court if there's been any failure to make disclosure.

What a lot of solicitors find, they look back, they haven't recovered the fees, they think to themselves, "Okay, do I go to assessment or do I sue the client?" If they're within 12 months, they can go to assessment, that's no problem. If they're outside the 12 months, they tend to say, "Well, that's okay, I'll sue in court." But, they can't sue in court if they've failed in any aspect of disclosure. And remembering that the disclosure requirements are both vast and high, it's not uncommon at all to find there may have been some little failure to disclose. So, what I urge solicitors to do is always be aware of the time limits to diarise them and to make sure they get their application for assessment in within the 12 months.

Now, there haven't been many cases about the consequences. Al Maha was a case about whether the application had been made in time, but the consequences in effect are that whereas you may think you have a limitation period of six years, and you do in fact have that, you only are able to take advantage of that six-year limitation if you can sue in court, which means if you've made full disclosure. And that in itself, back to a matter I spoke about at the beginning, means that you really need to pay attention to the disclosure requirements and treat them as an important part of your practice.

Julian: Obviously, the high court case of Pentelow is one that is very important in this area and it's had lots of consideration particularly lately in relation to the question of incorporated legal practices. Could you tell us a little bit about that, Michelle?

Michelle: Yes, Bell Lawyers v Pentelow in the high court changed law which had existed for over a hundred years. In fact, it was law that had been accepted into New South Wales in the early days of the colony. And that law said that "Although the general rule as to cost is that a litigant can't recover costs for their time spent in litigation, that if that litigant party is a lawyer, then they can." The exception to the general rule is known as the Chorley exception. Now, the law on that issue had always been doubted from early days and the high court in two cases had expressed doubt about it, but not overruled it until finally in Bell Lawyers and Pentelow, they declared that the Chorley exception was not part of the Law of Australia.

Now what that has led to is that where legal practitioners are parties, they can recover their disbursements, that is money paid out, but they can't recover for their time. Now, that's easy to apply where you're just talking about solicitors who are in a sole practice, that is, they are the person on the role and they are the entity which does the legal work. But it becomes a bit more complicated now that we're in a day and age where incorporated legal practices are permitted. So there have been a couple of cases since then that have looked at the application of Pentelow to incorporated legal practices. I think the easy way to think about it is this: if there is identity between the party and the lawyer; that is, if Joe Smith's solicitor is the party and Joe Smith the solicitor is doing the work as a sole practitioner, then you offend the general rule. However, if Joe Smith Solicitor is the party, but Joe Smith Lawyers Proprietary Limited is the lawyer providing the services, then Joe Smith the solicitor can recover costs.

Now, there's an artificial element to that, there's absolutely no doubt about that. Justice Keane in the High Court in a case called Coshott v Spencer remarked on the unattractive artificial quality of that. However, it takes us back to Salomon v Salomon and the basic proposition that a company is a different legal entity to its shareholders or directors and that there is separation of identity.

So the state of the law at the moment is just that, that if as a solicitor you are a party but your incorporated legal practice provides the services, then you can recover for the money that you owe your legal practice.

Now, I should just say the circumstances in which that occurs are rare because when a solicitor is sued if they have a incorporated legal practice, you usually join both of them. Although probably a bit different if the solicitor is a plaintiff, but yeah, that's where we're at, at the moment.

Julian: Sometimes there are jurisdictions that have capped costs, but the question can arise whether it's possible to contract out of those capped costs. Michelle, what can you tell us on that issue?

Michelle: This is an area which is very difficult for solicitors and where they need to pay a lot of attention to having the right documents. So we've got a couple of areas, I'll mention three; that is motor accidents, the second is workers' comp, and the third is personal injuries matters where less than a hundred thousand dollars is recovered. In each of those areas, costs are capped, but legislation permits lawyers to contract out of the cap with their client. The difficulty that arises is whether the contracting out is sufficient or valid.

Now, the Law Society of New South Wales publishes precedents, so they're a good place to start to consider whether they're sufficient or not for your purposes. But the other thing is to really pay attention to the legislation and to read the cases that have interpreted the legislation. There was a recent decision of the Court of Appeal in Todorovska v Brydens where the court found that the documents which were presented to the client, that is disclosure and costs agreement, were not capable of contracting out of the legislation, even though that is expressly what they purported to do; that was their purpose, that was their intention, and they referred to the fact that they were intending to contract out, so it can be very, very difficult. In the other area, that is the worker's comp and motor accidents, there are two cases that were heard in the District Court last year, which are on for the hearing of appeals in the Court of Appeal shortly, and they are a case called Pavlovic and another case called Stjepanovic. Pavlovic deals with workers' comps, Stjepanovic with motor accidents. And in that case, the District Court found that the costs document and the procedure followed was sufficient to contract out, but we have to wait the result of the appeal to know whether that holds.

Julian: Another very important case in the area of cost recovery and also conflict is the case of Atanaskovic Hartnell v Birketu. Could you tell us about that one?

Michelle: Yes, that was a very interesting case, which went through first instance hearing in the Supreme Court, and then an appeal to the Court of Appeal. At first instance, Justice McDougall held that a solicitor who had acted in a conflict between his duty and interest was not entitled to recover fees whilst acting in that particular conflict. It's not a surprising result in that it's an application of orthodox equitable doctrine, the point being that solicitors are fiduciaries to their client and that where they act in disregard of the prohibition of preferring their own interests to their client, they won't be entitled to fees. But it may be a stark and sobering reminder to solicitors to be very careful about conflicts of interest and that if one arises, two things; firstly, you simply can't act, but also to think of the financial cost that if you do act and purport to charge for it, then you won't be able to recover fees.

Julian: And the court said exactly what you just said, Michelle, that you simply can't act because in that case, the firm had actually gone to quite extensive efforts to try and disclose and get consent to the conflict, but the court found that all those efforts were worth nothing.

Michelle: Yes, of course, there is the doctrine that a breach of them can be solved by full disclosure and fully informed consent. But in that particular case, it's almost impossible in situations like that to obtain fully informed consent. Solicitors will often consider that there's an alignment of interests and that fully informed consent will overcome any difficulty, but after the Court of Appeal's judgment and Justice McDougall's judgment, it would be prudent for solicitors to not act at all.

Julian: Well, Michelle, thank you so much for that very fulsome disclosure on the issue of costs. I hope that everyone listening fully understands, as I'm sure they do. Thanks very much for joining us on Risk on Air.

Michelle: Thank you very much, Julian.

Outro

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