SUPREME COURT OF QUEENSLAND

CITATION:	*Clift & Ors v Carter Capner Law* [2019] QSC 78
PARTIES:	**SEAN CLIFT** (first applicant) AND **GARY ERWIN** (second applicant) AND **STEVEN PATTEN** (third applicant) AND **SUZANNE RUSSELL** (fourth applicant) AND **LANA SCHEUBER** (fifth applicant) **v** **CARTER CAPNER LAW ABN 65 600 423 881** (respondent)
FILE NO/S:	SC No 8446 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	29 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2018
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. The respondent must provide to each applicant an itemized bill identifying the legal costs which it claims should be paid to it in the event of a successful outcome of the applicant's personal injuries claim, that itemized bill to be made up in a way that would**

allow the legal costs to be assessed under Part 3.4, Division 7 of the *Legal Profession Act* 2007 (Qld), if occasion for performing such an assessment should ever arise.

2. **It is declared that the costs agreement between each applicant and the respondent is void pursuant to s 327 of the *Legal Profession Act 2007* (Qld).**

3. **I will hear the parties on costs.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where the applicants are former clients of the respondents – where the applicants sought a written report of legal costs incurred pursuant to s 317 of the *Legal Profession Act* 2007 (Qld) – where it was contended that the obligation to provide a written report under s 317 did not extend to former clients – where the order could be made under the inherent jurisdiction of the Court – whether an order to provide a written report of legal costs should be made

PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where the applicants are former clients of the respondents – where the applicants sought a declaration that the costs agreement was void – where it was contended that the conditional costs agreement contained an uplift fee – where the contingent costs agreement did provide for an additional fee to be paid on a successful outcome – where the statutory requirements in relation to uplift fees had not been complied with – whether the costs agreement was void due to contravention of the *Legal Profession Act 2007* (Qld)

Legal Profession Act 2007 (Qld), s 13, s 317, s 324, s 327, s 347

Nominal Defendant v Duntroon Holdings Pty Ltd [2008] 2 Qd R 46, cited

Re Morris Fletcher & Cross' Bills of Costs [1997] 2 Qd R 228, considered

Townsville Trade Waste Pty Ltd v Commercial Union Assurance Co of Australia Ltd [2000] 2 Qd R 682, cited

COUNSEL: N Ferrett for the applicants

K Wilson QC, with G Robinson, for the respondent

SOLICITORS: Compensation Partners Lawyers for the applicants

Carter Capner Law for the respondent

Introduction

[1] The respondent (**CCL**) is an incorporated law practice under the *Legal Profession Act* 2007 (Qld) (**the Act**). Each of the five applicants is a former client of CCL who had engaged CCL to act in that applicant's personal injury claim.

[2] By an amended originating application each of the applicants advances two claims against CCL.

[3] The first claim is for an order requiring CCL to comply with s 317 of the Act by providing a written report of the legal costs incurred by the applicant to the date of the applicant's request. Although not advanced in their amended originating application, at the hearing the applicants also sought to rely on the Court's inherent jurisdiction to justify an analogous order being made.

[4] The second claim is for a declaration that the conditional costs agreement between the applicant and CCL is void because it is to be regarded as providing for an "uplift fee" within the meaning of the Act and because it contravenes other requirements under the Act governing conditional costs agreements which provide for an uplift fee.

[5] The claims for relief are opposed by CCL.

Should an order be made requiring CCL to provide to each applicant a written report under s 317(1)(b) of the Act?

Relevant facts

[6] The relevant chronology of events is set out in the table below:

Event	Mr Clift	Mr Erwin	Mr Patten	Ms Russell	Ms Scheuber
Date of termination of CCL's retainer	5 January 2018	27 December 2017	3 January 2018	27 December 2017	27 December 2017
Entry into tripartite deed	7 February 2018	25 January 2018	7 February 2018	25 January 2018	6 February 2018
Request for s 317 report	15 March 2018	20 March 2018	24 April 2018	28 February 2018	16 March 2018
Response by CCL	10 April 2018	25 May 2018	25 May 2018	10 April 2018	10 April 2018
Nature of response to request for s 317 report	Without prejudice provision of "estimates of costs"	Without prejudice provision of "estimates of costs" and specific reservation of rights in relation to post-handover fees.	Without prejudice provision of "estimates of costs" and specific reservation of rights in relation to post-handover fees.	Without prejudice provision of "estimates of costs"	Without prejudice provision of "estimates of costs"
Further CCL response on 14 August 2018	The reference to "without prejudice" conveyed the estimates were provided on the basis that such	The reference to "without prejudice" conveyed the estimates were provided on the basis that such	The reference to "without prejudice" conveyed the estimates were provided on the basis that such	The reference to "without prejudice" conveyed the estimates were provided on the basis that such	The reference to "without prejudice" conveyed the estimates were provided on the basis that such

	sums would be accepted, provided they were not subjected to disputation.	sums would be accepted, provided they were not subjected to disputation.	sums would be accepted, provided they were not subjected to disputation.	sums would be accepted, provided they were not subjected to disputation.	sums would be accepted, provided they were not subjected to disputation.
Further response on 20 August 2018	If applicant's claims are successful, and subject to [s 347], offer to accept specified amount for fees including GST upon their successful conclusion	If applicant's claims are successful, and subject to [s 347], offer to accept specified amount for fees including GST upon their successful conclusion	If applicant's claims are successful, and subject to [s 347], offer to accept specified amount for fees including GST upon their successful conclusion	If applicant's claims are successful, and subject to [s 347], offer to accept specified amount for fees including GST upon their successful conclusion	If applicant's claims are successful, and subject to [s 347], offer to accept specified amount for fees including GST upon their successful conclusion

[7] The tripartite deeds were in common form and were entered into between each applicant, CCL and the applicant's new solicitor. They relevantly provided:

(a) by the recitals, that CCL had acted for the applicant but the retainer had been terminated; the new solicitor now acted; the applicant owed costs to CCL; and CCL claimed a general lien over the applicant's documents but agreed to transfer the file on satisfactory security for costs and disbursements;

(b) the new solicitor and the applicant accepted certain obligations in relation to paying disbursements to CCL and securing payment to CCL of its costs out of settlement funds; and

(c) CCL agreed to provide the applicant's documents to the new solicitor and, on certain terms, to refrain from commencing action to recover costs.

[8] The applicants were dissatisfied with the responses provided to their requests pursuant to s 317. As is apparent from the table, in each case CCL had not purported to provide "a written report of the legal costs incurred by the client to date" but had only provided an estimate of costs, and, in addition, that estimate had been marked "without prejudice". Moreover, in two cases the response purported to reserve the right to recover additional amounts described as significant fees incurred since handover of the matter. In each case, CCL had subsequently stated that, by marking the responses "without prejudice", CCL intended to convey that the estimates set out in the response would be accepted by CCL, provided they were not subject to disputation. That statement was subsequently further clarified by the further response stated in the letter dated 20 August 2018. (The reference to s 347 in that letter was a reference to a statutory limitation on the maximum payment which a law practice could charge in respect of speculative personal injury claims.)

[9] CCL contends:

(a) first, that it had no obligation to provide a written report pursuant to s 317, because that section does not apply once the retainer of the law practice has been terminated; and

(b) second, its response was satisfactory and there would be no utility in ordering it to make any report whether under s 317 or pursuant to the inherent jurisdiction.

Does the obligation under s 317 survive termination of the retainer?

[10] Section 317 provides:

Progress reports

> (1) A law practice must give a client, on reasonable request—
>
> (a) a written report of the progress of the matter in which the law practice is retained; and
>
> (b) a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter.
>
> (2) A law practice may charge a client a reasonable amount for a report under subsection (1)(a) but must not charge a client for a report under subsection (1)(b).
>
> (3) A law practice retained on behalf of a client by another law practice is not required to give a report to the client under subsection (1), but must disclose to the other law practice any information necessary for the other law practice to comply with that subsection.
>
> (4) Subsection (3) does not apply if the other law practice ceases to act for the client in the matter when the law practice is retained.
>
> (5) A law practice is not required to give a report under subsection (1) to a sophisticated client.

[11] The question of construction is whether subsection (1) should be read as intended to refer solely to a client who is a current client or as intended to encompass both current and former clients.

[12] For the following reasons, the former construction is to be preferred:

(a) The definition of "client" as set out in the Dictionary to the Act, contained in Schedule 2, is:

> **client**—
>
> (a) for part 3.4, division 7—see section 334; or
>
> (b) otherwise—includes a person to whom or for whom legal services are provided.

(b) Section 334 appears in Chapter 3, part 3.4, division 7 of the Act. That division deals with costs assessment. Section 334 specifically defines "client" for that division as "a person to whom or for whom legal services are or have been provided". The reference to both present and past tenses (i.e. "are … provided" and "have been provided") makes it very clear that division 7 applies to both current and former clients.

(c) The fact that the dictionary distinguishes between the s 334 definition and a definition which uses only the present tense (i.e. "are provided") suggests that in circumstances other than division 7, the use of "client" is only intended to capture persons for whom legal services are provided, which suggests that the solicitor/client relationship must be a continuing one.

(d) That conclusion is supported further by the fact that the Act does distinguish between "client" and "former client" in one place: see s 537(2)(g). If the drafters of the Act intended to capture "former client" in s 317, they could have actually used those words.

(e) That conclusion is also supported by the obviously intended operation of subsections (3) and (4). If s 317(1) applied to former clients, there would be no need for s 317(4) to state that s 317(3) did not apply when the "other law practice" ceased to act. Rather it would be appropriate for s 317(3) still to apply so that the other law practice could be provided with the information which it would need to respond to a s 317(1) notice.

[13] In support of their contrary argument, the applicants sought to rely on the proposition that where an Act "is remedial or beneficial in its effect, if any ambiguity exists it should be construed beneficially so as to give the fullest relief which the fair meaning of its language will allow, without straining or exceeding the true significance of the provision": see *Townsville Trade Waste Pty Ltd v Commercial Union Assurance Co of Australia Ltd*

[2000] 2 Qd R 682 at 684 and *Nominal Defendant v Duntroon Holdings Pty Ltd* [2008] 2 Qd R 465 at [25]. I do not think that this principle avails the applicant in this case because the language of the Act draws a clear distinction.

[14] The applicant also relied on the fact that by s 13 of the Act, the inherent jurisdiction of this Court "in relation to the control and discipline of local lawyers and local legal practitioners" is preserved. As to this:

(a) In *Re Morris Fletcher & Cross' Bills of Costs* [1997] 2 Qd R 228 this Court held that it has the power to order that a law practice deliver a bill to a former client and to submit the bill for taxation. Fryberg J observed at 233:

> The making of an order for delivery of a bill is a matter of discretion, but it can fairly be said that the courts lean toward ordering delivery. In *Parramatta River Lodge Pty Ltd v. Sunman* (1991) 5 B.P.R. 12,038 at 12,046 Young J. has said:
>
> > "The whole tone of most of the cases has been that a solicitor is the officer of the court and, no matter how inconvenient it might be, the court expects that in accordance with the highest standard of the profession the solicitor will give a fully detailed list of charges to the person liable to pay the bill and if asked will submit the bill for moderation by an officer of the court. That is the price of being a member of an honourable profession: that is the price of being admitted by this court to practice law in this State."
>
> He was, of course, referring to New South Wales, but what he said is equally applicable in Queensland.

(b) Section 13 therefore explicitly preserves that inherent power. The fact that the power is preserved means that it is not necessary to construe s 317 in the manner for which the applicant intends, in order for the power to require law practices to provide reports to former clients to continue to exist.

(c) I do not see anything in s 13 which supports giving s 317(1) a construction which runs contrary to the explicit language which the legislature has chosen to employ.

[15] The result is that I conclude that s 317(1) should not be construed so as to encompass requests given to a law practice by former clients.

Should an order nevertheless be made?

[16] The analysis under the previous heading means no order could be made requiring CCL to provide the report referred to under s 317(1) of the Act.

[17] However, as already indicated, the applicants also sought to justify an order requiring CCL to provide the information they sought by reference to the Court's inherent jurisdiction.

[18] CCL's argument was that the nature of its responses to the s 317(1) request were such as to render inutile any exercise of the inherent jurisdiction. I disagree. The formal position is that there has as yet been no unconditional response to a perfectly reasonable request from a former client to a law practice to identify with precision the costs to which the law practice claims to be entitled (albeit in the event that there is a successful outcome), set out in a way which would permit a judgment to be formed as to the validity of the entitlement. The initial without prejudice responses could not be so viewed, even in the light of the subsequent explanation of what CCL meant by "without prejudice". And an offer to settle in a lump sum amount is not a proper response either.

[19] I also accept the applicants' argument that a factor which tells in favour of the relief is that the applicants have need of it. It is a desirable common practice in most litigation, but especially in personal injuries litigation, that litigants attempt to negotiate an outcome of their dispute rather than to litigate it to finality. A crucial consideration in any such negotiation is that the parties have a clear understanding of the extent of their costs liability

to their own legal representatives, including their former legal representatives. CCL's responses to the applicants do not promote that consideration.

[20] In my view there is good reason to exercise the inherent jurisdiction referred to by Fryberg J in *Re Morris Fletcher & Cross' Bills of Costs*. Accordingly, CCL should be ordered to provide an itemized bill identifying the legal costs which it claims should be paid to it in the event of a successful outcome, that itemised bill to be made up in a way that would allow the legal costs to be assessed under division 7 of the Act, if occasion for performing such an assessment should ever arise.

Should the costs agreements be declared to be void?

The costs agreements

[21] It is necessary first to identify the terms of the costs agreements. I do so only in relation to the first of the agreements in point of time, namely the agreement between CCL and the fifth applicant. There are some differences between the terms of the agreement applicable to the fifth applicant and those applicable to the first to fourth applicants, but it was not contended that any of the differences were material to the matters which were in issue between the parties.

[22] It is common ground that the costs agreement was formed in the following way:

(a) First, CCL provided the fifth applicant with a document referred to as a "Disclosure Statement". That document was a single page document containing 12 clauses. The Disclosure Statement had another document attached to it, which was referred to as the "Agreement". The "Agreement" was a two page agreement containing 9 clauses and an attached two page scale of fees entitled "Carter Capner Law Scale".

(b) Second, the fifth applicant signed the Disclosure Statement in terms which acknowledged that she had received it and that it had been brought to her attention before she signed the "Agreement".

(c) Third, the fifth applicant signed the Agreement.

(d) Fourth, CCL signed the Agreement.

(e) Fifth, the fact that CCL had signed the Agreement must have been expressly or impliedly communicated to the fifth applicant.

[23] The result of that activity was that the fifth applicant (referred to as "the Client") and CCL entered into a costs agreement pursuant to which CCL agreed to investigate, prepare and pursue a claim for personal injuries received by the Client as a result of a motor vehicle accident which occurred on 5 September 2015. The costs agreement was entirely in writing and comprised –

(a) the Agreement;

(b) the Carter Capner Law Scale; and

(c) the Disclosure Statement.

[24] The Disclosure Statement was specifically incorporated into the costs agreement by clause 9 of the Agreement, which provided:

> The Client acknowledges having read and understood CCL's Disclosure Statement before signing the Agreement and agrees that the terms thereof are deemed part of this Agreement and prevail over it to the extent of any inconsistency.

[25] The relevant terms of the Disclosure Statement which by clause 9 of the Agreement prevailed over the other parts of the costs agreement to the extent of any consistency were as follows:

Legal costs & services generally

1. You are entitled to all or any of the following:

   […]

   - Request an Itemised bill after you receive a lump sum bill from us;
   - Request written reports about the progress of your matter and the costs incurred;
   - Seek costs to be assessed, if you are unhappy, within twelve (12) months of delivery of a bill or request for payment or within such extended time as may be permitted by the court or costs assessor after considering the reason for the delay (except 'sophisticated' clients as defined in [the Act]).
   - […]

2. […]

What your legal costs are comprised of

3. Your Legal Costs for your transaction are made up of:-

   (a) Professional fees. These are charged in accordance with Part 1 of the Scale attached to the Agreement ("Scale") plus "care and conduct" in part 4 and depend on the extent of work performed and Care and Conduct applied;

   (b) Disbursements i.e. moneys we pay to others (examples in Part 2 of the Scale) are charged to you at cost. Cancellation costs for non-attendance at medical appointments and disbursements in excess of $4,000.00 are payable in the first instance by you; and

   (c) Office charges for office services and overheads. These are charged at the rates specified in Part 3 of the Scale,

   (collectively, 'Legal Costs'), in respect of all services etc performed from the time of your initial approach to us.

Legal costs

4. Your obligation to pay Legal Costs is subject to a "successful outcome" as provided in the Agreement.

5. It is not possible at this time to provide an accurate estimate of Legal Costs. Total Legal Costs may range from $10,000 to $100,000.

[…]

[26] It will be noted that clause 3 of the Disclosure Agreement refers to the four parts of the Carter Capner Law Scale. The Carter Capner Law Scale comprised:

(a) Part 1, which was entitled "Fees (Disclosure Statement Clause 3(a))". This part contained 11 discrete items capable of being used to assess legal fees including, for example, items for "drawing documents, drafting correspondence & receiving correspondence"; "producing documents and correspondence"; "perusal of documents" and the like.

(b) Part 2, which was entitled "Disbursements/out-of-pocket expenses/outlays (Disclosure Statement Clause 3(b))". This part contained items (12) to (15), which identified various categories of payment which might have to be made to third parties which would be charged at cost.

(c) Part 3, which was entitled "Office Charges (Disclosure Statement Clause 3(c))". This part provided for items (16) to (24) and covered such things as charges for copies, entering data, postage, telephone, facsimile, email and other charges.

(d) Part 4, which was entitled "General care and conduct" and which was in these terms:

   (25) In addition to an amount that is to be allowed under the above items, a further proportion thereof to reflect the solicitor's care, consideration, skill and conduct of a proceeding or

transaction that is considered by an independent costs assessor to be reasonable having regard to the matter including, for example:-

(a) The complexity of the matter; and

(b) The difficulty and novelty of any question raised in the matter; and

(c) The importance of the matter to the party; and

(d) The amount or value involved; and

(e) The skill, specialised knowledge and responsibility involved in the matter on the part of the solicitor; and

(f) The financing of the matter; and

(g) The time spent by the solicitor and other staff members; and

(h) The consideration of questions of law and fact.

PROVIDED THAT where a fee/cost payment deferral or no-win no-fee arrangement applies, the further allowance must be not less than 15% of the aggregate of all time based items performed.

[27] The relevant terms of the Agreement were as follows.

1. CARTER CAPNER LAW ("CCL") AGREES TO:

- Investigate, prepare and pursue a claim for personal injuries received as a result of a motor vehicle accident (the Work);

  Date of Incident: 5/09/15

- Carry out the Work with professional skill and diligence;

- […]

2. Lana Kathleen Scheuber (Nee Clarey) (the "Client") AGREES TO:

- […]

- Promptly take and act upon the advice of CCL as to the conduct of the Work and with respect to any recommended settlement terms

- […]

- Not settle or compromise a claim without the consent of CCL;

- Permit CCL to perform this contract and the Work in such reasonable manner as in its absolute discretion it may see fit and refrain from conduct that might obstruct or frustrate same;

- Not do any act or thing (or allow any other person so to do) that risks a successful outcome for the Work;

- […]

- Subject to Clause 4, pay fees and costs incurred by CCL for the Work in accordance with this Agreement.

3. FEES AND COSTS

3.1 Subject to Clause 4, the Client must pay Legal Costs for the Work according to the Scale attached.

[…]

3.4 CCL may at its option arrange for its Fees and Costs to be assessed pursuant to this Agreement by an independent solicitor specialising in legal costs assessment, in which event:

(a) The amount so assessed shall be the amount payable by the Client for the Work; and

(b) The Costs of the independent assessment (about 5% of the Fees) shall be borne by the Client.

4. NO-WIN NO-FEE

4.1 If the Client:

(a) observes the terms of this Agreement; and

(b) does not terminate CCL's engagement prior to the finalisation of the Claim,

then the Client is NOT obliged to:

(c) Pay or repay the Disbursements incurred by CCL on the Client's behalf up to the amount specified in Clause 3.2; nor

(d) Pay any Professional Fees, Interest or Office Charges,

UNTIL the Matter has resulted in a successful outcome. The expression "successful outcome" means a Settlement or judgement on any terms whereby another person agrees or is ordered to pay or transfer any money or property to the Client; or a statutory compensation or ex gratia payment by a government authority to the Client.

AND

(e) In the event of a successful outcome, the Professional Fees and Office Charges shall not exceed 50% of the net settlement or statutory payment as provided for in s.347 of the *Legal Profession Act* (Qld) 2007.

5. TERMINATION AND VARIATION OF THIS AGREEMENT

5.1 Any amendments to this Agreement must be made in writing.

5.2 In the event that the Client fails to observe his or her obligations hereunder CCL may:-

I. take such steps to remedy such breach or breaches in which event the Client will be deemed to have instructed CCL therein as to such matters;

II. terminate this Agreement or it may continue to act; and

III. charge and recover from the Client the amounts specified in Clause 3 in respect of all services performed to the date of termination

and the Client consents to any application by CCL for approval of its Fees and Disbursements and Office Charges and must pay its costs of any such application..

5.3 In the event that the Client terminates this Agreement (other than by reason of an unremedied default by CCL of its obligation under Clause 1) then in addition to any other rights available to it at law, CCL may charge and recover from the Client the amounts specified in Clause 3 in respect of all services performed.

5.4 If any of the following events occur subsequent to the date of this Agreement, namely:

(a) The discovery of a significant unforeseen fact;

(b) A significant issue of a complexity arises; or

(c) More than two persons or entities become respondents or Parties to the Claim,

CCL may continue to act or it may terminate this Agreement. In the event of termination, the Client must pay CCL's Fees, Disbursements and Office Charges for services up to such time but ONLY IF a successful outcome subsequently occurs.

5.5 This Agreement shall not be construed as an entire Agreement.

Does each costs agreement contain an "uplift fee" required to be disclosed pursuant to s 324 of the Act?

The legislative framework

[28] Section 300 relevantly provides:

> **300 Definitions for pt 3.4**
>
> In this part—
>
> […]
>
> ***"conditional costs agreement"*** means a costs agreement that provides 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, as mentioned in *section 323*, but does not include a costs agreement to the extent to which *section 325(1)* applies.

[…]

"uplift fee" means additional legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates.

[29] Section 313 provides:

Additional disclosure—uplift fees

(1) If a costs agreement involves an uplift fee, the law practice must, before entering into the agreement, disclose to the client in writing—

(a) the law practice's legal costs; and

(b) the uplift fee, or the basis of calculation of the uplift fee; and

(c) the reasons why the uplift fee is warranted.

(2) A law practice is not required to make a disclosure under *subsection (1)* to a sophisticated client.

[30] Section 323 relevantly provides:

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.

[…]

(3) A conditional costs agreement—

(a) must set out the circumstances that constitute the successful outcome of the matter to which it relates; and

(b) may provide for disbursements to be paid irrespective of the outcome of the matter; and

(c) must be—

(i) in writing; and

(ii) in clear plain language; and

(iii) signed by the client; and

[…]

[31] Section 324 relevantly provides:

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, both of the following—

(a) a range of estimates of the uplift fee;

(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, the uplift fee must not exceed 25% of the legal costs, excluding disbursements, otherwise payable.

(5) However, this Act does not affect the right of a law practice to discount its fees and, if a law practice does discount its fees, the reference in *subsection (4)* to legal costs is the fees the law practice would have charged if the law practice's fees had not been discounted.

[…]

Discussion

[32] Because the costs agreement provided that the obligation to pay was contingent on a successful outcome, the costs agreement was a conditional costs agreement within the meaning of the Act.

[33] The critical question is whether the conditional costs agreement should also be regarded as providing for the payment of an uplift fee.

[34] The wording of the Act reveals a contemplation that not all conditional costs agreement shall be regarded as providing for the payment of an uplift fee. But which ones should be regarded as so providing?

[35] The key to answering that question lies in the word "additional" in the definition of "uplift fee". Absent that word, most conditional costs agreements would provide for an uplift fee because they would provide for the payment of legal costs on the successful outcome of legal costs, those legal costs not being payable otherwise.

[36] The insertion of the word "additional" suggests there is a distinction between legal costs payable on the successful outcome and something extra which is to be regarded as "additional legal costs" payable on a successful outcome. The definition contemplates a form of agreement which provides a baseline position or ordinary manner of calculation of legal costs, and that the form of agreement provides for something extra, which is beyond the base line, and imposed "on a successful outcome".

[37] Such a form of agreement exists in the present case because of the proviso to Part 4 of the Scale. I observe:

(a) Part 4 of the Scale provided for an additional fee to be added to what would flow from the other parts of the Scale. That fee is known in the vernacular of the profession as "care and con".

(b) Under Part 4, "care and con" is an amount (which the part refers to as a further "proportion" or "allowance") objectively worked out by an independent costs assessor as "reasonable", having regard to certain specified variables. That amount could not be regarded as the uplift fee, because it is the amount which would be calculated and objectively ascertainable regardless of whether or not there was a successful outcome. Indeed, clauses 5.2 and 5.3 of the costs agreement would entitled CCL to charge that amount (and other costs) in certain specified circumstances even where there was not a successful outcome.

(c) The Scale was, obviously enough, a document which was capable of being incorporated into costs agreements which had a no-win no-fee arrangement and those which did not. In this case, the form of clause 4 of the Agreement meant that from the outset this form of costs agreement was to be regarded as a contract to which a non-win no-fee arrangement applied. Accordingly, the proviso to Part 4 of the Scale applied.

(d) Where the proviso applies, a particular constraint is imposed, namely that the "care and con" allowance cannot be less than 15% of the aggregate of all time based items. That constraint does not apply where the costs agreement is not to be regarded as a no-win no-fee agreement.

(e) If the ordinary calculation of "care and con" would give rise to a figure which is equal to or greater than the figure which is 15% of the aggregate of all time based items then the proviso would not affect the calculation. There would be nothing which could be regarded as "additional" and so there would be nothing which could amount to an uplift fee as defined.

(f) But if the ordinary calculation of "care and con" could give rise to a figure which was less than the figure which was 15% of the aggregate of all time based items (and the fact of the proviso means that the parties to the agreement must be taken to have contemplated and provided for that possibility) then the proviso would affect the

calculation. The proviso would require the payment of an additional amount on top of the ordinary "care and con" amount to bring the total amount calculated under Part 4 of the scale up to 15%. That additional amount would be the amount of the uplift fee.

[38] The wording of s 324 is such that the question whether the costs agreement provides for the payment of an uplift fee is a question which must be capable of being answered at the time of entry into the agreement. It is not relevant whether the agreement as performed was performed in such a way as imposed an uplift fee. Accordingly, it follows from the analysis in the previous paragraph that I conclude that the conditional costs agreement between the fifth applicant and CCL did provide for an uplift fee. The same conclusion applies for each of the other conditional costs agreements.

[39] I pause to observe that the submission was advanced by the applicants that the entire "care and con" amount should be regarded as an uplift fee. I do not accept that submission. The form of the scale was such that "care and con" was calculable in the same way as all other legal costs and treated the same way in "no-win no-fee" forms of agreement. In this form of agreement, "care and con" could only be regarded as an additional legal cost because it provided for the uplift of the ordinary "care and con" calculation to a 15% minimum in certain contemplated circumstances.

Is the costs agreement void pursuant to s 327 of the Act?

[40] Section 327 relevantly provides:

> **Particular costs agreements are void**
>
> (1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this division is void.
>
> […]
>
> (4) A law practice that has entered into a costs agreement in contravention of *section 324* is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in relation to the uplift fee to the person from whom it was received.

[41] The applicants advanced three contentions in support of the conclusion that the costs agreement should be declared void, namely:

(a) in contravention of s 323(3)(c), the agreement was not relevantly expressed in "clear plain language";

(b) in contravention of s 324(3), the agreement neither contained –

  (i) an estimate of the uplift fee; nor

  (ii) a range of estimates of it together with the variables that might affect its calculation;

(c) in contravention of s 324(4), the uplift fee was not limited to 25%.

[42] The third argument must be rejected. Given my analysis, there is no possibility that the uplift fee could exceed 25%. The uplift fee could be a maximum of 15% and then only if the ordinary calculation of "care and con" would give rise to a nil amount. The argument could only have worked if I had accepted the argument that the entirety of "care and con" should be regarded as an uplift fee.

[43] The second argument must be accepted. It is obvious that the agreement did not contain any estimate or range of estimates of the uplift fee.

[44] In those circumstances it is unnecessary to express a view on the first argument.

[45] The result is that the costs agreement as entered into was void.

[46] I observe the contemplation of the Act is that the consequence of declaring the costs agreement to be void is to alter the basis on which costs are recoverable. I have not been asked to consider the extent to which, if at all, the entry into the tripartite agreement post-termination of the costs agreement, and pre-declaration that it was void, might impact upon the basis of recovery of fees from CCL.

Conclusion

[47] I make the following orders:

(a) The respondent must provide to each applicant an itemised bill identifying the legal costs which it claims should be paid to it in the event of a successful outcome of the applicant's personal injuries claim, that itemised bill to be made up in a way that would allow the legal costs to be assessed under division 7 of the Act, if occasion for performing such an assessment should ever arise.

(b) It is declared that the costs agreement between each applicant and the respondent is void pursuant to s 327 of the *Legal Profession Act 2007* (Qld).

(c) I will hear the parties on costs.