SUPREME COURT OF QUEENSLAND

CITATION:	*Motlap v East Coast Lawyers Pty Ltd & Anor* [2019] QSC 183
PARTIES:	**PHILLIP JUSTIN MOTLAP** (Plaintiff) **v** **EAST COAST LAWYERS PTY LTD ACN 128 106 794** (First Defendant) and **EAST COAST LAWYERS PTY LTD ACN 128 106 794 as trustee for EAST COAST LAWYERS TRUST ABN 89744121564** (Second Defendant)
FILE NO/S:	No 225 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	26 July 2019
DELIVERED AT:	Cairns
HEARING DATE:	26 June 2019
JUDGE:	Henry J
ORDERS:	**1. That part of this proceeding which is a representative proceeding under part 13A *Civil Proceedings Act 2011* (Qld) shall no longer continue.** **2. The plaintiff will, if intending to continue the proceeding personally, file a further amended claim and statement of claim, omitting the representative proceeding components, within 28 days hereof.** **3. I will hear the parties as to costs, if not agreed in the meantime, and any consequential orders sought at 10am 30 August 2019 (out of town parties having leave to appear by telephone or videolink).**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY –

where the plaintiff has brought an action against a law firm of which he was formerly a client – where the defendants depose the business of the law firm is conducted by the second defendant, a trust, and the sole function of the first defendant company is to act as corporate trustee of the second defendant – whether the court ought to make an order removing the first defendant from the proceeding

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CLASS ACTIONS OR GROUP PROCEEDINGS – where the plaintiff's claim relates to an allegedly flawed costs agreement between themselves and the defendants' law firm – where the plaintiff has initiated representative proceedings on behalf of group members on the basis the group consists of seven or more persons having entered into costs agreements with the defendants that contained the same flaws alluded to in the plaintiff's claim – where the plaintiff is presently the only group member – where the defendants seek an order that the claim ought to proceed as a representative proceeding – whether the plaintiff has standing to bring such a proceeding – whether the proceeding is an abuse of process – whether costs of such a proceeding would be excessive – whether it is in the interests of justice that the claim no longer proceed as a representative proceeding

Civil Proceedings Act 2011 (Qld) Part 13A, ss103B, 103D, 103F, 103G, 103I, 103J, 103K, 103V, 103X,

Legal Profession Act 2007 (Qld) Part 3.4, ss 249, 308, 314, 316, 317, 322, 323, 324, 328, 420

Uniform Civil Procedure Rules 1999 (Qld) r 69

ACCC v Giraffe World (1998) 156 ALR 273

Allphones Retail Pty Ltd v Weimann [2009] FCAFC 135

Bright v Femcare Ltd (2002) 195 ALR 574

Hodge v Neinstein & Ors [2017] ONC 494

Phillip Morris (Australia) Ltd v Nixon (2000) 170 ALR 487

Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd (2014) 45 VR 585

Wong v Silkfield Pty Ltd (1999) 199 CLR 255

Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 383, 118 ALR 165

COUNSEL: K Wilson QC for the applicant defendants
D Turnbull for the respondent plaintiff

SOLICITORS: Rose Litigation Lawyers for the applicant defendants
Bounty Law for the respondent plaintiff

[1] The plaintiff has initiated a class action, targeting the allegedly flawed cost agreements of the solicitor's firm which previously represented him.

[2] The defendants have applied for orders calculated at removing the first defendant entirely as a defendant in the proceeding and preventing the plaintiff's claim proceeding as a class action.

[3] It is convenient to deal, firstly, with the nature of the proceeding, secondly, the appropriateness of the first defendant's inclusion in the action and, thirdly, the various arguments as to why the plaintiff's claim ought not be permitted to proceed as a class action.

The nature of the proceeding

[4] The plaintiff initiates the claim for himself and on a representative basis as a class action. In Queensland such an action is known as a representative proceeding and is regulated by part 13A *Civil Proceedings Act 2011* (Qld). The nature of the personal proceeding will be considered first.

Nature of the plaintiff's personal proceeding

[5] The plaintiff engaged East Coast Lawyers to act for him in a personal injuries claim, entering into a conditional costs agreement, accompanied by a disclosure notice. The conditional costs agreement entered into by the plaintiff was expressed as entered into pursuant to the *Legal Profession Act 2007* (Qld) ("LPA"). That Act provides at part 3.4 for the making of costs agreements, including conditional costs agreements, between a client and a law practice. A conditional costs agreement is one which makes the payment of some or all legal costs conditional on success in the matter they relate to.[1]

[6] The pleading of the plaintiff's personal claim alleges the costs agreement is void, of no effect at law, unenforceable and or ought be set aside.

[7] The pleading alleges of the conditional costs agreement that:

(i) contrary to s 323(3)(c)(ii) *Legal Profession Act 2007* (Qld) it does not explain in clear, plain language:

(a) the methodology for the calculation of fees on an hourly rate;

(b) the methodology which will be adopted for the calculation of fees and charges on disbursements or the justification for claiming them or the basis upon which they will be claimed;

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[1] *Legal Profession Act 2007* (Qld) s 323.

(ii) contrary to s 322(5) LPA it provides for the unilateral appointment of an independent legal costs consultant to assess costs, ousting the plaintiff's right to have a dispute about costs resolved in accordance with division 7 LPA;

(iii) contrary to s 323(3)(d) LPA it fails to state verbatim that the client has been informed of the client's rights to seek independent legal advice before entering into the agreement;

(iv) contrary to s 323(3)(e) LPA it fails to contain a cooling off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement;

(v) contrary to s 323(3)(a) LPA it fails to set out the circumstances that constitute the successful outcome of the matter to which it relates or contrary to s 323(3)(c)(ii) LPA it fails to set out those circumstances in clear, plain language;

(vi) contrary to s 324(3) LPA it fails to contain an estimate for the uplift fee or alternatively a range of estimates of the uplift fee and an explanation of the major variables that will affect the calculation of the uplift fee;

(vii) the agreement's purported 'authority to receive and expend money held in trust' is not an effective direction per s 249 LPA authorising the law practice's withdrawal of the plaintiff's monies from its trust account;

(viii) contrary to s 316 LPA its disclosure notice failed to:

(a) make complete or adequate disclosure of the basis upon which the legal costs would be calculated pursuant to s 308(1)(a) LPA;

(b) failed to disclose a reasonable estimate of the total legal costs as required by s 308(1)(c) LPA and or failed to make such disclosure in clear, plain language as required by s 314(1)(a) LPA;

(c) failed to clearly disclose as required by s 308(1)(i)(i) LPA the avenues open in the event of a legal costs dispute;

(d) wrongly provided for the plaintiff to pay as a disbursement the amount charged by the costs consultant for the assessment of legal costs;

(e) failed to disclose the defendant must not, per s 317(2), charge the plaintiff for a report of the legal costs incurred;

(iv) it is not fair and reasonable per s 328(2) LPA in that it:

(a) contains insufficient information as to how legal costs are calculated, thus depriving the plaintiff of the opportunity to identify unusual charges and dispute them;

(b) consists of the merger of terms contained in multiple documents leading to ambiguous, conflicting and unclear provisions relating to disclosure and charging of legal costs;

(c) is deliberately crafted to discourage query or application about a division 7 assessment of costs;

(d) is in a standard form not tailored to deal with the plaintiff's matter and instead contains an accumulation of inaccurate and irrelevant information.

Legal nature of representative proceedings

[8] Part 13A *Civil Proceedings Act 2011* (Qld) makes provision for representative proceedings in the Supreme Court. It provides at s 103B that such a proceeding may be started by one or more of a group of seven or more persons who have claims against the same person which "are in respect of, or arise out of, the same, similar or related circumstances" and "give rise to a substantial common issue of law or fact". Pursuant to s 103C a person who has such a claim has sufficient interest to start a representative proceeding on behalf of the other such persons. Section 103B(3) provides such a proceeding may be started whether or not the relief is the same for each person and whether or not separate contracts are involved.

[9] The persons on whose behalf a representative proceeding has been started are referred to in part 13A as group members. Section 103D provides that the consent of a person is not required to be a group member. Section 103F contemplates that while the originating process must describe or otherwise identify the group members to whom the proceeding relates, it is not necessary to name or state the number of the group members. Section 103G accords the right of a group member to opt out of the proceeding by a date fixed by the court and s 103X provides a judgment given in a representative proceeding binds the group members other than a member who has opted out. Section 103V accords various powers of decision making and judgment to the court including declaration of liability and the making of an award of damages for sub-group members or individual group members "consisting of stated amounts or amounts worked out in a stated way".

[10] Section 103I allows the court to order the proceeding no longer continue under part 13A if it appears likely there are fewer than seven group members. Further, s 103K allows the court on its own initiative or an application by the defendant to order a proceeding no longer continue under part 13A if it considers it is in the interests of justice to do so because of a variety of listed reasons.

Nature of this representative proceeding

[11] The plaintiff brings his claim as a representative proceeding on behalf of group members on the basis the group consists of seven or more persons having claims arising out of the same circumstances, giving rise to substantial common issues of law or fact. The amended statement of claim pleads the number of group members is likely to exceed seven, given the magnitude of the legal practice.

[12] The plaintiff pleads the defendant gave each group member an individual disclosure notice and entered into an individual costs agreement with each group member. Its case is those documents contained the same flaws alluded to above in respect of the plaintiff's personal claim. It is pleaded the group members paid costs or became liable to pay legal costs to the legal practice, pursuant to the terms of the costs agreement in respect of each member.

[13] The relief sought on behalf of the group members is very wide ranging and includes:

(a) declarations their cost agreements are void and of no effect and contravene or fail to comply with various sections of the LPA;

(b) declarations the defendants' withdrawal of members' monies held in the defendants' trust account is an offence and that the defendants and their directors are liable to restore those funds forthwith to the trust account;

(c) orders requiring the provision of an itemised bill calculated per the applicable scale of costs and, in the case of a shortfall, the repayment of the excess costs charged;

(d) orders the defendants are not entitled to all or part of uplift fees and must repay any excess received thereof;

(e) orders monies had and received from each plaintiff be paid in full or in such amount as deemed appropriate by the court;

(f) orders setting aside the costs agreements and fixing the legal costs for each plaintiff at such proportion of the original legal costs as deemed appropriate by the court;

(g) interest on all amounts deemed owing;

(h) indemnity costs.

[14] It is immediately apparent from the array of relief sought that there is enormous potential for variation between plaintiffs in the relief which may be appropriate, a point returned to later.

Should the first defendant be removed from the proceeding?

[15] The defendants seek the removal of the first defendant from the proceeding, irrespective of whether it continues as a class action. To that end, it relies upon rule 69 *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") which relevantly provides:

> "**69 Including, substituting or removing party**
>
> (1) The court may at any stage of a proceeding order that –
>
> (a) a person who has been improperly or unnecessarily included as a party, or has ceased to be an appropriate or necessary party, be removed from the proceeding …"

[16] The defendants contend the first defendant has been unnecessarily included because the only function of the first defendant is to act as corporate trustee of the East Coast Lawyers Trust, that is, in its capacity as the second defendant.

[17] The first defendant is the company East Coast Lawyers Pty Ltd ACN 128 106 794, ABN 54 128 106 794, of which Sean Delpopolo is presently the sole director.[2] It was incorporated on 22 October 2007. Mr Delpopolo deposes the sole purpose of the company has always been to act as corporate trustee for the East Coast Lawyers Trust

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[2] Affidavit of Sean Anthony Delpopolo court doc 8 pp 1-11.

(the second defendant), which would carry on the business of the law firm to be known as East Coast Lawyers.[3]

[18] The East Coast Lawyers Trust ABN 89 744 121 564 was established pursuant to a deed of trust dated 25 October 2007.[4] The first defendant has been the trustee since then.

[19] According to the filed affidavit evidence, the second defendant:[5]

- holds the lease for the business premises from which the firm trades;[6]
- has lodged tax returns and business activity statements in connection with the business of the firm;
- employs the staff of the firm;
- controls and operates the firm's two websites; and
- holds, controls and operates the Trust Account and General Account of the firm.[7]

[20] Mr Delpopolo deposes the first defendant has never traded in its own right, nor opened or held any bank accounts in its own name, or in any capacity other than as trustee of the second defendant.[8] However, the business name East Coast Lawyers was registered not to the second defendant but to the first defendant, on 23 October 2007.[9] Mr Delpopolo deposes this was an error, as the intention had always been for the second defendant to trade the business under that name[10] and the business name "has always been used by the Second Defendant on the firm belief held by [Mr Delpopolo] that the business name had been registered in the name of the trust."[11]

[21] The LPA defines law practice as follows:

> "**Law practice** means –
>
> (a) an Australian legal practitioner who is a sole practitioner; or
>
> (b) a law firm; or
>
> (c) an incorporated legal practice; or
>
> (d) a multi-disciplinary partnership."

[22] The disclosure notice accompanying the conditional costs agreement asserted:

> "This Firm is an incorporated practice."[12]

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3 Ibid p 2 [6].
4 Ibid pp 12-48.
5 As deposed to in the affidavit of Melissa Joy Inglis court doc 14.
6 Affidavit of Melissa Joy Inglis court doc 14 pp 1-4.
7 Ibid pp 7-8.
8 Affidavit of Sean Anthony Delpopolo court doc 8 p 2 [7]-[8].
9 Ibid pp 49-50.
10 Ibid p 3 [18].
11 Ibid [19].
12 Affidavit of Robert Anderson court doc 12 p 34.

[23] The conditional costs agreement entered into by the plaintiff was with "East Coast Lawyers (ABN: 89744121564) ("Us", "the Firm", "We" or "Our") of 6 Waterfront Place, Robina Qld 4226". That name is the business name of the first defendant but that ABN is the ABN of the second defendant.

[24] This conflation of the identifying elements, whilst failing to use the legal title of the law practice with which the plaintiff entered the agreement, makes it obvious that the inclusion of the first defendant in the proceeding was prudent.

[25] The aforementioned affidavit material asserts an error regarding the entity to which the business name East Coast Lawyers was registered. Left unexplained is why this law practice would, in a legal document like a costs agreement, choose to describe itself by a business name and not include the correct legal title of the incorporated legal practice. This may in due course be explained as an erroneous economy of language but even if it is, it is premature to forecast what legal consequences such extraneous evidence may have for the interpretation of the agreement's description of the contracting law practice.

[26] A clearer picture may well emerge after the filing of the defence and disclosure. Even then the conflated naming of the law practice in the agreement may mean the potential liability of the first defendant remains a properly triable issue. In any event, on the presently available materials it cannot be concluded that the inclusion of the first defendant as a party is unnecessary or inappropriate.

[27] The component of the application seeking the removal of the first defendant must therefore fail.

Should the plaintiff's claim be permitted to proceed as a representative proceeding?

[28] Four separate bases were advanced as to why the claim ought not be permitted to proceed as a class action, namely:

(a) the plaintiff does not have standing to bring the representative proceeding;

(b) the representative proceeding is an abuse of process;

(c) the costs would be excessive;

(d) it is in the interests of justice that it no longer continue as a representative proceeding.

[29] The first three bases must fail, although they raise issues which collectively inform the fourth basis advanced.

Does the plaintiff have standing?

[30] The defendants submit the plaintiff does not have standing to bring the representative proceeding.

[31] In order to be properly commenced a representative proceeding must meet all three of the "threshold criteria" contained in s 103B(1) *Civil Proceedings Act 2011*.[13] Section 103B(1) provides:

> "**103B Starting proceeding**
>
> (1) A proceeding may be started under this part if –
>
> (a) 7 or more persons have claims against the same person; and
>
> (b) the claims of all the persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all the persons give rise to a substantial common issue of law or fact."

[32] The defendants' Mr Delpopolo deposed to the ways in which the conditional costs agreements of the law practice have changed over the last decade. None of those changes relate to the substantive complaints pleaded by the Amended Statement of Claim. The inference arising is that the same complaints may be made of the various conditional costs agreements entered into with other clients in other cases in that era. Mr Delpopolo estimates there would be between 400 to 500 such cases about which he would have to make disclosure if the representative proceeding continues.

[33] Against this background the defendants accept it can reasonably be inferred there are at least seven persons who had costs agreements with the law practice in the same terms as the plaintiff's. It follows that seven or more persons have potential claims arising from the same flaws in their costs agreements as the flaws alleged in the costs agreement pertaining to the plaintiff. Whether if aware of the alleged flaws they would be desirous that such claims be pursued is another matter. It was not a point taken by the defendants in their argument as to standing. It will be returned to below in considering whether the continuation of the representative proceeding is in the interests of justice.

[34] The defendants place considerable emphasis on the mixed relief which might potentially arise from the different circumstances of the cases of different group members. However, s 103B(1)(c) does not require that their claims give rise to common relief and requires only that they give rise to substantial common issues of law or fact. Here those substantial common issues relate to the various common alleged failings of the costs agreements and disclosure notices to comply with the LPA.

[35] The defendants argue that the plaintiff is not a member of the group of which he must be a member in order to have standing, per s 103C, to bring the representative proceeding. Section 103F(1) requires the group to be identified by the terms of the claim. The Amended Claim defines the group as follows, at [A]:

> "The group members to whom this proceeding relates are all persons who, within the period commencing on 29 April 2013 and ending on 29 April 2019
>
> (1) were given a disclosure notice by the first and/or second defendant (hereinafter referred to as the 'defendant');

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[13] *Phillip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, 514.

(2) entered into a conditional costs agreement with the defendant;

(3) received the benefit of legal professional services from the defendant. pursuant to the costs agreement; and

(4) paid legal costs, or became liable to pay legal costs, to the defendants pursuant to the terms of the costs agreement."

[36] The claim subsequently asserts, at [B5], the plaintiff has standing to start the proceedings by reason of:

> "d. The fact that the plaintiff became liable to pay a sum of money to the defendant on account of legal costs in respect of such legal professional services and the incurring of such disbursements, such payment being claimed by the defendant from the plaintiff, pursuant to the terms of the plaintiff's individual costs agreement."

[37] The defendants argue the plaintiff has not paid or become liable to pay legal costs and is thus not a member of the group.

[38] The plaintiff's conditional costs agreement provides, at [5.1], that "legal costs" are comprised of "professional fees and disbursements". It will be recalled the agreement is a conditional costs agreement, so that liability to pay some costs is contingent upon the successful outcome of the plaintiff's personal injury action. That action is still pending. However, the plaintiff's conditional costs agreement contemplates, at [12], that if a client changes firms, as the plaintiff has, the defendants may charge for professional fees and disbursements incurred and retain the file until all professional fees and disbursements are paid.

[39] The defendants released the file to the plaintiff's present lawyers on the provision of an irrevocable direction regarding payment of an amount of settlement monies to the defendants and a payment of an invoice directed to the plaintiff's new lawyers for disbursements.[14] The invoice was for $371.52, for the obtaining of records from four entities, such as hospitals. The payment of the invoice was made by the plaintiff's new lawyers to the defendants.

[40] The defendants argue the payment for disbursements was not made to it by the plaintiff. This fails to confront the legal reality that the plaintiff's new lawyers had to have made the payment as an agent of the plaintiff. The payment was no less made by the plaintiff merely because it was of an invoice directed to the firm now acting for him or paid by that firm acting on his behalf and on his instruction. The invoice could only have been rendered to his new representatives in their capacity as his representatives and the payment it sought was no less his liability by reason of the invoice being directed to his lawyers rather than him in person. Whether the plaintiff is yet to pay his new lawyers the amount of the payment they made for him is an irrelevant matter, internal to their own arrangements.

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[14] Affidavit of Sean Anthony Delpopolo court doc 8 pp 313 et seq.

[41] Furthermore, the above circumstances in any event make it apparent the defendants took the position that the plaintiff had a liability to pay the disbursements. He either paid or at least became liable to pay legal costs, albeit in a minor amount. It follows he is a member of the group defined by the claim.

[42] This conclusion is sufficient to dispense with the defendants' argument that the plaintiff lacks standing. The fact that the plaintiff relies on such a narrow bridgehead for standing to pursue a representative proceeding will be returned to later as informing the appropriateness of allowing the proceeding to proceed as a representative proceeding.

Should the proceeding be struck out or stayed as an abuse of process?

[43] The defendants submit the proceeding is an abuse of process, having been commenced to generate fees for the plaintiff's solicitor.[15] No direct evidence is advanced in support of this submission.

[44] The submission is asserted as an inference to be drawn from two alleged facts:

(a) the plaintiff is the only client of the plaintiff's solicitor who is a group member; and

(b) the plaintiff has been experiencing mental health issues and is difficult to obtain instructions from.[16]

The argument in essence is that the plaintiff is the type of person who would have no interest in bringing a representative proceeding, leaving fee generation for his lawyer as the real motive for the action.

[45] The evidence of the plaintiff's mental state and acuity in giving instructions need not be outlined at length. Taken at its highest it shows the plaintiff has suffered from depression, to the point of making a suicide attempt, and there has on occasion been difficulty in obtaining instructions from him. It is hardly novel for clients involved in litigation to have psychological struggles and to present occasional challenges for lawyers taking instructions from them. The plaintiff's current solicitor deposes to a belief that the plaintiff has legal capacity. There is no evidence the plaintiff is affected to such a degree that he is incapable of understanding and making the decision to pursue a representative proceeding or that his instructions to do so are not his own.

[46] Some may wonder at the plaintiff's motives in wanting to pursue his former solicitor in this way, particularly bearing in mind the minor financial liability which has manifested against him to date. Some may wonder why the plaintiff would not wait and see whether in the end result his former lawyers seek payment of more than $371.52 from him before instituting not just a proceeding but a representative proceeding against them. Perhaps he sees the need to need to take the defendants to task over their costs agreement practices as involving a matter of principle, beyond his own self-interest. In any event, if litigants have a legal basis to pursue a case it is not an abuse of process to pursue it motivated more by matters of noble principle than financial self-interest.

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[15] Relying on principles discussed in *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585.

[16] Affidavit of Sean Anthony Delpopolo court doc 15.

[47] The fact that the plaintiff is the only group member who is a client of the plaintiff's solicitor says nothing as to the propriety of that solicitor pursuing the representative proceeding for the plaintiff. There is no evidence to suggest the plaintiff's solicitor is not acting on the plaintiff's properly informed instructions.

[48] The inference of an abuse of process is unsustainable.

Would costs be excessive?

[49] The submission the representative proceeding ought not proceed because of excessive costs relies upon s 103J(1) *Civil Proceedings Act*, which provides:

> "**103J Distribution costs excessive**
>
> (1) This section applies if-
>
> (a) the relief sought in a representative proceeding is or includes payment of money to group members, other than for costs; and
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> (b) on application by the defendant, the court considers it is likely that, if judgment were to be given in favour of the representative party, the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive, having regard to the likely total of those amounts.
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> (2) The court may, by order-
>
> (a) direct that the proceeding no longer continue under this part; or
>
> (b) stay the proceeding so far as it relates to relief of the kind mentioned in subsection (1)(a)."

[50] The submission relying on this section is founded on Mr Delpopolo's estimate that the process of retrieving, reviewing and copying relevant material from the 400 to 500 potentially relevant files would take at least eight weeks and cost his firm in excess of $15,000.[17] He deposes the process would have an "enormously detrimental effect" on the day to day conduct of his firm, which consists of only three lawyers and six support staff, and the conduct of its current cases. He additionally deposes there is no uniformity in fees charged as each file is separate. He deposes the cost of preparing an itemised bill on any given matter would range between $2,000 and $15,000 plus GST.

[51] These costs estimates go to the substantive potential costs of conducting the litigation. They are of little immediate relevance to s 103J. That section is concerned with whether "the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive, having regard to the likely total of those amounts". As to the cost of identifying the group members, that involves identifying the clients or former clients since April 2013 who were given a disclosure notice by and entered into a conditional costs agreement with the defendants' law practice. That exercise does not require a full review of client files.

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[17] Affidavit of Sean Delpopolo court doc 8 pp 9-10 [40]-[43].

[52] The other feature with which s 103J is concerned relates to the cost of distributing any amounts ordered to be paid. At this stage it is not possible to make any informed assessment about whether that cost would be excessive having regard to the likely total of those amounts. Indeed no information at all is available as to what total is likely.

[53] It follows the defendants have not demonstrated that this is a case to which s 103J applies.

Is it in the interests of justice to order the proceeding no longer continue as a representative proceeding?

[54] The fourth basis advanced against the proceeding continuing as a representative proceeding is that it would be in the interests of justice to order it not so continue. There is substance to this basis.

[55] Section 103K(1) *Civil Proceedings Act* provides:

> "The court may, on application by the defendant or on its own initiative, order that a proceeding no longer continue under this part if it considers it is in the interests of justice to do so because –
>
> (a) the costs that would be incurred if the proceeding were to continue under this part are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
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> (b) all the relief sought can be obtained by way of a proceeding other than a proceeding under this part; or
>
> (c) the proceeding will not provide an efficient and effective way of dealing with the claims of the group members; or
>
> (d) a representative party is not able to adequately represent the interests of the group members; or
>
> (e) it is otherwise inappropriate that the claims be pursued by way of a proceeding under this part."

[56] It is plain from the terms of s 103K(1) that a decision to order a proceeding no longer proceed as a representative proceeding can be made at any stage in the progression of the proceeding. It has been observed the question to which a provision such as s 103K(1) gives rise will more likely arise after the joining of issues in pleadings.[18] However, it does not follow that the court should await the close of pleadings. The discretion conferred by 103K(1) is not fettered in that way.

[57] The exercise of the discretion to make an order pursuant to s 103K(1) necessarily requires consideration of the interests of justice. In *Bright v Femcare Ltd*,[19] Finkelstein J observed:

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[18] See *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266.
[19] (2002) 195 ALR 574.

> "Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) to promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) to provide a remedy in favour of persons who may not have the funds to bring a separate action, or may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) to protect defendants from multiple suits and the risk of inconsistent findings."[20]

[58] The defendants place particular reliance upon sub-sections (c) and (e) of s 103K(1).

[59] Dealing firstly with sub-section (c), the argument that the proceeding will not provide an efficient and effective way of dealing with the claims of the group members relies upon the variability of potential relief. Consideration of what orders will be appropriate in respect of each client or former client will heavily depend on the individual circumstances of those client's cases. The determination of relief in each instance will likely be individualised,[21] involving issues and factual minutiae regarding costs which are not common. However, in a representative proceeding the fact that there may be a diversity of consequential issues which are not common does not render the proceeding without effectiveness as a means of determining the common issues.[22] To the contrary, assuming there exists a group of plaintiffs who would otherwise initiate separate proceedings, or would wish to do so if they had the resources, there is obvious effectiveness in a singular determination of the common issues. It would avoid the less efficient option of a multiplicity of such proceedings and the repeated arguing and determination of common issues regarding the same impugned content of the disclosure notices and conditional cost agreements. Further, the disparate nature of the potential relief could be catered for by, after determining the common issues, then terminating the representative nature of the proceeding pursuant to s 103K(1).[23]

[60] On the assumption there in fact exists a group of persons who would each be desirous of the pursuit of claims founded upon those common issues it cannot be concluded per s 103K(1)(c) that the proceeding will not provide an efficient and effective way of dealing with the claims. The tenuous nature of that assumption heralds s 103K(1)(e) as the sub-section which is more relevant to the present circumstances.

[61] A major consideration informing the application of s 103K(1)(e) here is the absence of any evidence, direct or circumstantial, that any individual other than the plaintiff would likely desire the pursuit of a claim against the defendants grounded upon the allegedly flawed content of the conditional costs agreement and disclosure notice (I will for brevity hereafter refer to both types of documents as conditional costs agreements).

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[20] Ibid 605-606.

[21] To adopt a term used in the same context in *Hodge v Neinstein and Ors* [2017] ONC 494 [41], a decision of the Court of Appeal for Ontario, the only decision referred to by the parties in respect of a class action about a law firm's fee agreements.

[22] *Bright v Femcare Ltd* (2002) 195 ALR 574, 601.

[23] *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 118 ALR 165; referred to with apparent approval in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266.

[62] In discussing the elements of s 103B(1) above it was assumed that there are seven or more persons who have claims arising from the same flaws in their costs agreements as the flaws alleged in the costs agreement pertaining to the plaintiff. The "claims" to which s 103B refers need not be claims which have fully matured and can include claims for declaratory relief in respect of disputed contracts.[24] In the present case it can be inferred the commonality of alleged flaws in the costs agreements would provide grounds for the potential initiation and pursuit of claims to at least declaratory relief by or on behalf of seven or more persons. But it does not automatically follow that seven or more of those persons would, if aware of the alleged flaws, be desirous of such claims being pursued representatively or at all. Uncertainty as to whether the minimum number of claimants exists is a relevant consideration in exercising the discretion conferred by a provision like s 103K(1)(e).[25]

[63] It may readily be accepted in some types of cases involving a breach of civil law that the breach has or will occasion compensable loss to customers or clients. In such cases it can scarcely be doubted that persons with a potential claim would be desirous of the claim being pursued, in order that they may be compensated.

[64] This is a different type of case in that the wrongdoing complained of does not compel an inference of loss or damage. The mere fact, if ultimately established, that a law firm has failed to comply with legislative requirements regarding the content of conditional costs agreements does not mean the non-compliance will have resulted in excessive charging. Such non-compliance may ground a claim, by providing a basis for a client or former client to seek a declaration as to the non-compliance, but such relief would have no utility unless that person is actually desirous of recovering or avoiding payment for fees or disbursements.

[65] There may of course be representative cases in which declaratory relief is itself critical to resolving a dispute in which the alleged group members have a common interest. For instance, in *All Phones Retail Pty Ltd v Weimann*[26] the members were franchisees inherently disadvantaged by having entered or soon being required to enter a new, allegedly unconscionable, franchisee agreement. The alleged disadvantage could be resolved by declarations favourable to the members. The present case is different in that proof of the alleged statutory non-compliance in the content of the cost agreements would not compel a conclusion of consequential disadvantage.

[66] There is no evidence to suggest the defendants' charging practices are so self-evidently excessive that there must inevitably exist a body of dissatisfied clients or former clients, who would be desirous of financial relief being pursued against the defendants on their behalf. Indeed, Mr Delpopolo has deposed that in the time his practice has been using conditional costs agreements in the form complained of by the plaintiff there has only been one other complaint about the costs agreement. According to Mr Delpopolo, his firm "was able to swiftly resolve that complaint and there have been no other instances of client dissatisfaction with the firm".[27]

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[24] *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135.
[25] *ACCC v Giraffe World* (1998) 156 ALR 273.
[26] [2009] FCAFC 135.
[27] Affidavit of Sean Anthony Delpopolo court doc 8 p 10 [45].

[67] Further, the defendant's solicitor deposes as follows to information from Mr Delpopolo:

> "There is the possibility that the firm has charged some clients less than the costs that were, or may be, assessed as being payable by the client to the firm and that in some cases, the costs that were ultimately payable by the clients would not have exceeded the applicable court scale of costs. In some cases, the costs charged to the client may have been less than the amount that would be payable under the appropriate court scale of costs due to the amount in which the claim was ultimately settled. In those circumstances, some clients of the firm may be worse off if their costs were to be assessed at scale or on some other basis."[28]

Such evidence highlights it ought not be assumed clients or former clients could be desirous of pursuing this action if aware of it and the allegations upon which it is founded. Indeed, it demonstrates that some clients or former clients could be positively inconvenienced by the pursuit of a representative proceeding. The continuation of the representative proceeding may foist upon clients or former clients, who are satisfied with the relevant services and charging, a need to secure independent legal advice about the potential risks for their financial position of the proceeding.

[68] This reinforces the conclusion it cannot be assumed there exist more than seven clients or former clients of the defendants who would be desirous of financial relief by reason of them having a potential claim about legislative non-compliance in the content of their costs agreements. That conclusion is relevant because consideration of the interests of justice in a representative proceeding would usually involve the giving of material weight to those objects of such a proceeding which are beneficial to the court and group members. Here, however, the circumstances do not suggest that if the proceeding is not allowed to proceed representatively there would be a multiplicity of similar claims in which courts would have to decide the same issues afresh each time. Nor does it suggest there are many persons who, if aware of the alleged statutory non-compliance, would likely be desirous of their claims being pursued in a representative proceeding.

[69] In weighing the appropriateness of allowing the continued pursuit of claims as a representative proceeding it is also relevant to consider the consequences of the continuation upon the defendants. In this case any continuation of the proceeding will likely come at a significant immediate cost to the defendants' law practice. That cost is not merely the immediate financial cost of having to locate and provide identifying details of clients and former clients. There is also the added cost of the defendant's law practice fulfilling what it will likely perceive to be its professional obligation to notify and explain to its many clients and former clients the prospect of and reason for them potentially being contacted by the plaintiff's lawyer in an apparent intrusion into the confidential solicitor client relationship. To that can be added the cost of needing to explain the firm's position of ethical conflict if clients or former clients seek its advice as to the consequences for those persons of the alleged legislative non-compliance and of the representative proceeding. Further, the revelation to many clients and former clients, whether from the defendants or the plaintiff or through advertising, that this law practice has allegedly repeatedly breached legislative requirements in the content of its

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[28] Affidavit of Melissa Joy Inglis court doc 14 [3i)].

cost agreements will invariably also carry some reputational cost, adverse to the practice.

[70] Balanced against this invasive, immediately pending financial and reputational toll upon the defendants' law practice is the known existence of only one person desirous of the pursuit of this proceeding, a person who to date has only paid or incurred a liability to pay $371.52 for disbursements to obtain records. It is a significant imbalance. It would be less material if this were the type of case in which it could be inferred, by reason of the alleged wrongdoing, that there exist more than seven clients or former clients of the defendants who would desire the pursuit of this proceeding. But for reasons already explained, this is not that type of case.

[71] The combination of features discussed cause me to conclude it is inappropriate that such claims as may exist continue as a representative proceeding. The nature of the features causing that conclusion and the conclusion itself in turn cause me to conclude it is in the interests of justice to order the proceeding not proceed further as a representative proceeding.

[72] I am fortified in arriving at that conclusion by the feature that, in the event the alleged wrongdoing was to have manifested itself in the charging of excessive costs, such charging would, pursuant to s 420(1)(b) LPA, be capable of constituting unsatisfactory professional conduct or professional misconduct. Chapter 4 LPA provides for the disciplining of legal practitioners in respect of such conduct and redress for complaints about it. It empowers the Commissioner for Legal Services to investigate such complaints and initiate disciplinary action against the relevant practitioners, the outcome of which may include compensation orders. This is relevant in that if, contrary to the inferences presently available, the alleged wrongdoing did manifest in the charging of excessive fees, an action of the present kind is not the only mechanism by which justice can be done on behalf of the person or persons so affected.

[73] I consider it is in the interests of justice to order this proceeding no longer proceed as a representative proceeding because it is inappropriate that the purported claims be pursued under the representative proceeding provisions of the *Civil Proceedings Act 2011* (Qld).

Orders

[74] It will be necessary for the amended claim and amended statement of claim to be amended in light of this conclusion, assuming of course that the plaintiff is desirous of continuing the proceeding alone. I would allow 28 days for the plaintiff to make his decisions in that regard.

[75] It will be necessary to hear the parties as to costs, if costs are not agreed, and as to any consequential orders.

[76] My orders are:

1. That part of this proceeding which is a representative proceeding under part 13A *Civil Proceedings Act 2011* (Qld) shall no longer continue.

2. The plaintiff will, if intending to continue the proceeding personally, file a further amended claim and statement of claim, omitting the representative proceeding components, within 28 days hereof.

3. I will hear the parties as to costs, if not agreed in the meantime, and any consequential orders sought at 10am 30 August 2019 (out of town parties having leave to appear by telephone or videolink).