SUPREME COURT OF QUEENSLAND

CITATION:	*McLaren v Wiltshire Lawyers Pty Ltd* [2019] QSC 305
PARTIES:	**RHONDA GAYE McLAREN** (applicant) **v** **WILTSHIRE LAWYERS PTY LTD** ACN 132 100 255 (respondent)
FILE NO:	BS No 7217 of 2019
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	3 and 4 October 2019
JUDGE:	Martin J
ORDER:	**The applicant is to bring in minutes of order reflecting these reasons.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – where the applicant engaged the respondent and received from it a disclosure statement and a costs agreement which she executed – where the respondent then acted for her in a mediation and performed other work before she fell out with them over the level of their fees – where the costs agreement contained clauses which vested in the respondent a discretion to have its work assessed and to then issue a bill in accordance with that assessment – where no information was given to the applicant about the effect of the clauses before she entered into the agreement – where the applicant seeks an order setting aside the costs agreement – whether the costs agreement was "fair and reasonable" – whether the applicant was induced to enter into the costs agreement by a misrepresentation of the respondent – whether the respondent failed to make disclosures as required by the *Legal Profession Act* 2007 *Legal Profession Act* 2007, s 300, s 308, s 309, s 310, s 311, s 315, s

322, s 328, s 332

Brown & Ors v Talbot & Olivier (1993) 9 WAR 70, cited

Casey v Quabba & Anor [2005] QSC 356, cited

Jezer Construction Group Pty Ltd & Ors v Conomos [2004] QSC 440, cited

Law Society of New South Wales v Foreman (1994) 34 NSWLR 408, cited

McNamara Business & Property Law v Kasmeridis & Anor (2007) 97 SASR 129, cited

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

Re Stuart; Ex parte Cathcart [1893] 2 QB 201, cited

Russells (A Firm) v McCardel & Ors [2014] VSC 287, applied

Tyrrell v Bank of London (1862) 11 ER 934, cited

Weiss v Barker Gosling (No 2) (1993) 118 FLR 218, cited

COUNSEL:	GJ Robinson for the applicant SK Hartwell for the respondent
SOLICITORS:	Australian Law Partners for the applicant Wiltshire Lawyers Pty Ltd for the respondent

[1] In 2017, Ms McLaren engaged a firm of solicitors to represent her in a property dispute proceeding in the Family Court of Australia but became dissatisfied by what she regarded as their excessive fees and sought different representation.

[2] In October 2018, she engaged the respondent who provided her with a disclosure statement and a costs agreement which she executed. The respondent then acted for her in a mediation and performed other work before she fell out with them over the level of their fees.

[3] The respondent sought to secure their fees by, on 28 May 2019, lodging a caveat over property owned by Ms McLaren. The caveat prevented her from using the property as security for a loan to enable her to pay money to her former husband in accordance with an order of the Family Court of Australia.

[4] On 9 July 2019, the applicant filed an originating application seeking the following orders:

(a) that the costs agreement between the applicant and the respondent dated 13 October 2019 be set aside pursuant to s 328(1) of the *Legal Profession Act* 2007,

(b) that the caveat be removed, and

(c) that proceedings brought by the respondent in the Magistrates Court be stayed.

[5] The matter was commenced in this court, rather than the Queensland Civil and Administrative Tribunal, because of the relief sought with respect to the caveat.

[6] When the matter first came on for hearing on 25 July 2019, the applicant was not aware, and the court was not informed, that the caveat had been rejected by the Department of Natural Resources and Mines on 17 July 2019. Thus, the application to set it aside became unnecessary.

[7] The applicant still seeks an order setting aside the costs agreement and the parties agree that the fate of that application will dictate the fate of the application for a stay of proceedings in the Magistrates Court.

***Legal Profession Act* 2007**

[8] The *Legal Profession Act* 2007 (LPA) makes provision for costs disclosure and assessment of costs in Chapter 3.

[9] Section 308 relevantly provides that a law practice must disclose to a client a number of matters, including:

> "(a) the basis on which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs; and
>
> (b) the client's right to—
>
> …
>
> (iv) be notified under section 315 of any substantial change to the matters disclosed under this section; …
>
> (c) an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs;
>
> …"

[10] Section 310 provides:

> "310 How and when must disclosure be made to a client
>
> (1) Disclosure under section 308 must be made in writing before, or as soon as practicable after, the law practice is retained in the matter.
>
> (2) Disclosure under section 309(1) must be made in writing before, or as soon as practicable after, the other law practice is retained.
>
> (3) Disclosure made to a person before the law practice is retained in a matter is taken to be disclosure to the client for sections 308 and 309."

[11] Section 311 provides exceptions for the requirement for disclosure but it was not suggested that the applicant came within any of the exceptions.

[12] The LPA provides for the creation of costs agreements between the client and, in this case, a firm of solicitors.

[13] Section 322 provides that an agreement may be made between a client and a law practice retained by the client, that the agreement must be written or evidenced in writing, and that it must clearly state that it is an offer to enter into a costs agreement and the manner in which an acceptance may be made.

[14] A costs agreement may be set aside under s 328:

> "(1) On application by a client, the Supreme Court or the tribunal may order that a costs agreement be set aside if satisfied the agreement is not fair or reasonable.
>
> …
>
> (2) In deciding whether or not a costs agreement is fair or reasonable, and without limiting the matters to which the Supreme Court or tribunal can have regard, the Supreme Court or tribunal may have regard to any or all of the following matters—
>
> (a) whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice or of any representative of the law practice;
>
> (b) whether any Australian legal practitioner or Australian-registered foreign lawyer acting on behalf of the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in relation to the provision of legal services to which the agreement relates;
>
> (c) whether the law practice failed to make any of the disclosures required under division 3;
>
> (d) the circumstances and conduct of the parties before and when the agreement was made;
>
> (e) the circumstances and the conduct of the parties in the matters after the agreement was made;
>
> (f) whether and how the agreement addresses the affect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement;
>
> (g) whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement.
>
> …"

[15] Another section which will fall to be considered is s 332 which provides that a client can request an itemised bill but may not be charged for the preparation of such a bill:

> "(1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.
>
> Note—
>
> A bill in the form of a lump sum bill includes a bill other than an itemised bill.
>
> …
>
> (6) A law practice is not entitled to charge a person for the preparation of an itemised bill requested under this section."

[16] In s 300 "itemised bill" is defined to mean a bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under Division 7 of the LPA.

The case for the applicant

[17] Ms McLaren says that the costs agreement is not fair or reasonable for the following reasons:

(a) She was induced to enter into the costs agreement by the misrepresentation of the respondent (s 328(2)(a)).

(b) The respondent failed to make any of the disclosures required under Chapter 3 Division 3 of the LPA (s 328(2)(c)).

(c) The respondent should have paid for the costs assessment undertaken at the request of the applicant (s 328(2)(e)).

What does "fair or reasonable" mean in s 328?

[18] Chapter 3 of the LPA is consistent with other jurisdictions in Australia concerning the charging of and payment for costs. It has adopted the term "fair or reasonable" which is used in most of the other Australian statutes on this subject. In doing so, it has picked up the common law test which was described by Lord Esher MR in the frequently cited case of *Re Stuart; Ex parte Cathcart*[1] where his Lordship said:

> "… the Court may enforce an agreement if it appears that it is in all respects fair and reasonable. With regard to the **fairness** of such an agreement, it appears to me that **this refers to the mode of obtaining the agreement**, and that **if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness**. But the agreement must also be **reasonable**, and in determining whether it is so the matters covered by the expression 'fair' cannot be reintroduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also **satisfy the Court that the terms of that agreement are reasonable**. If in the opinion of the Court they are not reasonable, having regard

[1] [1893] 2 QB 201 at 204-205.

> to the kind of work which the solicitor has to do under the agreement, the Court are bound to say that the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner." (emphasis added)

[19] That expression was adopted by the Full Court of the Supreme Court of South Australia in *McNamara Business & Property Law v Kasmeridis & Anor*.[2] Chief Justice Doyle (with whom Gray and David JJ agreed) said:[3]

> "… I consider that this Court should, as I have already said, follow the approach taken by the English cases, and the approach taken in other Australian jurisdictions under similar legislation. It is for the practitioner to show that the agreement is fair and reasonable, if the client raises a challenge on those grounds and those terms are to be applied in the manner indicated by Lord Esher in the passage set out above.
>
> **The factors to be taken into account when deciding whether an agreement is fair and reasonable will depend upon the circumstances of the case. It is neither practicable nor desirable to try to set out a standard list of relevant matters. The relevant matters will vary according to the scope of the retainer; the terms of the agreement; the kind of legal work undertaken; the client's knowledge and circumstances, and, no doubt, other circumstances**.
>
> However, the cases emphasise as **a basic consideration the question of whether the client's decision to agree to the terms of the costs agreement was a free and informed choice, the client having been given the advice that would give the client a fair understanding of the operation and effect of the costs agreement**: see, for example, *Brown v Talbot* (1993) 9 WAR 70 at 77; *Law Society (NSW) v Foreman* (1994) 34 NSWLR 408 at 435-437 per Mahoney JA.
>
> This is not surprising, having regard to the foundation on which the Court's inherent power over solicitors and costs agreement is based: see *Clare v Joseph*. The cases have emphasised the fiduciary nature of the solicitor and client relationship, and the importance of the solicitor dealing with a potential conflict between the solicitor's interests and the solicitor's duty to the client by making full disclosure to the client." (emphasis added)

[20] Chief Justice Doyle then went on to refer to the helpful guidance in the decision of Ipp J in *Brown & Ors v Talbot & Olivier*.[4] In that case, Ipp J, under the heading "The inquiry into reasonableness" said:[5]

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[2] (2007) 97 SASR 129.

[3] At 138.

[4] (1993) 9 WAR 70.

[5] At 75.

> "In *Jovetic v Stoddart & Co* (1992) 7 WAR 208, Seaman J, in a passage with which, with respect, I entirely agree, said … :
>
> > '… whatever else may be embraced by the words of the section, **an agreement is unreasonable** for the purposes of s 59 **if the client can show objectively that it came into being in circumstances which were unreasonable to him, or that its terms are unreasonable to him, or that its affect upon him is unreasonable**.'
>
> By these remarks his Honour identified three categories in respect of which an agreement might be regarded as unreasonable for the purposes of s 59. He made it plain, however, that he was not intending to suggest that an agreement would be regarded as unreasonable only if it were to be unreasonable in regard to one or more of those categories. It may well be, in a given case, that if each of the three categories identified is looked at in isolation, without reference to the circumstances within the other categories, none independently leads to a conclusion of unreasonableness. Nevertheless, it is quite possible that, despite such a conclusion when the categories are considered separately, an agreement may be unreasonable when all the relevant factors are considered as a whole." (emphasis added)

[21] In *Brown v Talbot & Olivier*, the questionable provision in the costs agreement purported to entitle the solicitors to charge whatever they considered appropriate without reference to the relevant scale of costs. This was a provision which was inserted into the agreement after the matter the subject of the case became litigious. Ipp J held that the solicitors were duty bound to inform their client that there was a real risk that the costs for which he would be liable under the costs agreement might be materially higher than under the scale. Further, he said that the failure to make such disclosure seriously impinged upon the reasonableness of the costs agreement.

[22] The clause in question clause purported to entitle the solicitors:

> "to charge such hourly rate from time to time as it considers appropriate to its practice but without regard to or limited by the scales set forth … or any other statutory enactment or rules relating to the forum in which the proceedings are or may be undertaken."

[23] His Honour described the nature of the clause in this way:

> "… **the dangers to the client in leaving the hourly rate within the discretion of the solicitors, and tying it to what is appropriate to the solicitors' particular practice, are self-evident.** Even if the solicitors are entitled only to charge such hourly rate from time to time as they 'reasonably' consider appropriate to their practice – as suggested by their counsel – **the client's position is fraught with uncertainty; he is susceptible, to a large degree, to the subjective decision of**

> **the solicitors, and he is dependent on the exigencies of the practice of the solicitors – something about which he knows nothing.**"[6] (emphasis added)

[24] The situation where a costs agreement allows for charges to be made by reference to the "subjective decision of the solicitors" was considered in *Weiss v Barker Gosling (No 2)*[7] in which the relevant agreement contained a clause which left all decisions about the retention of counsel (apart from briefing Queens Counsel) to the discretion of the solicitor and provided that the client agreed to pay counsel's fees actually incurred. Fogarty J said that the relevant clauses were extremely wide and gave to the solicitor an unrestrained discretion to retain any counsel, however appropriate or inappropriate that might have been by objective standards, and oblige the client to pay whatever fee was negotiated whether or not that fee was reasonable having regard to the seniority and experience of counsel, whether the briefing of counsel was necessary, and whatever was the scale or understood range of fees. He said:[8]

> "It is a very significant matter for a costs agreement to **hand over to the solicitor complete discretion on this issue. If the solicitor desires the client to enter into a costs agreement which contains such a provision, the significance of that must be clearly brought to the client's attention.**" (emphasis added)

[25] Many of the cases which deal with the principles applicable in this area are concerned with costs agreements which allow for remuneration which is held to be excessive in the circumstances. The broad position though is as set out in *Tyrrell v Bank of London*[9] which, put simply, is that a lawyer is not, in his or her relations with the client, to make a gain at the expense of that client, beyond an amount that is just and fair for professional remuneration that the lawyer is entitled to receive for work done.

[26] With those principles in mind, I turn first to consider the three clauses which the applicant argues mean that the costs agreement is not reasonable. They are:

> "2.7 All work undertaken by us may, in our discretion, be assessed by an independent legal costs consultant and our bills (tax invoices) will be issued in accordance with independent costs assessment.
>
> 2.8 In the event that we elect to engage a legal costs consultant as set out in Clause 2.7, a copy of the independent certificate of assessment will be sent with each bill (tax invoice) to you.
>
> 2.9 You agree to reimburse us for the fees charged by the legal costs consultant and these fees will be charged to you as a disbursement."

[27] I deal below with the contention by the applicant that an employee of the respondent told her something about the assessment of costs by an independent consultant. For the purposes of

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6 At 80-81.

7 (1993) 118 FLR 218.

8 At 246.

9 (1862) 11 ER 934.

this part of the consideration it is sufficient to note that there is no evidence that the respondent explained or sought to explain the effect of these clauses upon the applicant.

[28] The effect of these clauses is to vest in the respondent a discretion to have its work assessed and to then issue a bill in accordance with that assessment. While that, of itself, might not be regarded as unreasonable, the applicant says that the provision which requires the applicant to pay for the assessment is unreasonable. The assessment of the work is not something which needs to be done for the purposes of any litigation or other work desired to be done by the applicant.

[29] This costs agreement is in a standard form used by the respondent which is varied according to the client and the type of matter. The template used by the respondent was amended (at a time before the applicant consulted them) to include these clauses after consideration was given by the respondent to a suggestion made by Mr Graham, the costs assessor who prepared the assessments pursuant to these clauses. In cross-examination, Mr Wiltshire, who is the principal of the respondent, said that the clauses were prepared by Mr Graham.

[30] Mr Wiltshire was asked:

> "Who prepared the bills before Michael Graham?---We did, internally.
>
> Did you charge the client for that?---No."

[31] There was no suggestion by the respondent that these clauses, or their effect, were brought to Ms McLaren's attention. On this point, the respondent's submission was: the client was given the documents in writing, the respondent told her to read them, the documents showed the basis upon which the firm would act, and if she had any questions she should ask them. That, it was said, was sufficient.

[32] Another matter which tells against these unexplained clauses being reasonable is that the respondent was, as all solicitors are in these circumstances, in a fiduciary position with respect to Ms McLaren. The respondent had obligations to Ms McLaren. Those obligations were referred to by Mahoney JA in *Law Society of New South Wales v Foreman*[10] where he extracted the following propositions from authority:

(a) The obligations to a client exist not merely in the carrying out of an agreement already made between a solicitor and client but also in respect of the making of it,

(b) The content of such obligations, that is, what is necessary to be done in order to discharge them, varies with the circumstances of the particular case,

(c) Such obligations ordinarily or at least frequently involve: that the client, because of independent advice or otherwise, be seen not to have entered into the agreement in reliance upon her relationship with or trust of the solicitor; that there be full and frank disclosure to the client of all

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[10] (1994) 34 NSWLR 408 at 435-436.

> information known to the solicitor which the client should know, and that **if there be aspects of the contract in respect of which the solicitor may be in a position of advantage with respect to the client, then those matters be brought to the client's attention so the client can decide whether or not to enter into the contract**.

[33] In this case, no information was given to Ms McLaren about the effect of clauses 2.7 to 2.9. One substantial effect of those clauses is that the respondent could, at its discretion and without consultation with the client, incur a fee which the client had to pay but which was essentially to the advantage of the solicitor. The respondent did attempt to argue that the effect of these clauses was not to provide a detailed bill but to undertake an assessment of costs. While it is true that the clauses do refer to an assessment of costs, they also provide that that assessment will become the bill because the bill was to be "issued in accordance with independent costs assessment". The costs incurred in the creation of a bill had, before these clauses were inserted into the template agreement, been absorbed by the respondent.

[34] I have not overlooked the fact that a third party's assessment of the costs incurred for a client is not the same as a detailed bill prepared by the solicitor. But, in this case, it was treated as such. Clause 2.7 provides that "our bills (tax invoices) will be issued in accordance with independent costs assessment".

[35] The effect of these clauses is to pass to the client a cost which the client should not be required to pay. If a lump sum bill had been given to Ms McLaren she could have, under s 332(1), requested an itemised bill. An itemised bill must be in a form (s 300) that would allow an assessment to take place. And the solicitor may not charge for its preparation – s 332(6).

[36] Mr Hartwell argued that Ms McLaren had not been charged for preparation of the bill. In his words the respondent had "charged for having their work valued, but they haven't actually charged for preparing the bill". The work done by Mr Graham was, it was contended, not done solely for the benefit of the solicitors but was done "for the benefit of both the solicitors and the client to ensure that what the client is billed is a fair and reasonable amount." It might be said that, as a fiduciary, a solicitor should only bill the client a fair and reasonable amount but that does not seem to have crossed the respondent's corporate mind.

[37] Mr Hartwell went on to submit that this procedure "gives the client the peace of mind knowing that it's not an employee of Wiltshire who is coming up with the value of the work done, but it is someone who stands outside Wiltshire Lawyers." But, that peace of mind can only be obtained by the solicitor, not the client, deciding whether to refer the file to Mr Graham and then passing on the cost to the client. The client has no say in that. The client need not be told that a reference to an assessor has been made. The client has no say in who is appointed as the assessor. The client has no say in the fees which are charged for the assessment.

[38] These clauses allow the solicitor to escape the cost of preparing a bill – even a lump sum bill – and transfer that cost to the client. It is a piece of contractual legerdemain which places the

solicitor in a position of advantage with respect to the client and, so, should have been brought to the client's attention.[11] It was not.

[39] In the absence of any explanation to the client and in the absence of any acceptance by the client in light of such an explanation, these clauses render the costs agreement unreasonable and on that basis alone I would set the agreement aside. There are, though, other grounds to consider.

Was Ms McLaren induced to enter into the costs agreement by a misrepresentation of the respondent?

[40] The applicant says that when she decided to seek different representation she contacted a number of firms and sought information from them. She says that when she telephoned the respondent firm she spoke to an employee of the firm, Jerome Hey.

[41] Ms McLaren says that she spoke to Mr Hey on about 3 September 2018 and had a discussion with him about the costs and billing structure of the respondent. She says that he explained to her that the firm was unlike other legal firms because it did not charge in six minute intervals. Rather, he said, their billing related to the level and complexity of documents and the level of legal skill and knowledge required to undertake that work. He also told her, she said, that the firm engaged an independent party to assess all of their billing to their clients as a general practice and at no charge to the client.

[42] The question of the level of fees was very important to Ms McLaren. She had explained to Mr Hey that she had left her previous solicitors because she could no longer afford to engage them. She said that she needed to keep her costs down.

[43] Mr Hey was a solicitor in the employ of the respondent at that time. He had become a partner in 2013. He says that it was the respondent's firm policy not to provide legal advice or discuss specific matters during initial conversations over the telephone. He also said it was a firm policy to take file notes of any conversation where legal advice was provided or where specific billing matters were discussed. He recalled having a conversation with Ms McLaren and being told by her that she was unable to continue with the firm which she had then engaged because they had recently raised their hourly rates. He says he provided Ms McLaren with his hourly rate and that she would need to obtain a copy of her file from the previous solicitors. He said that he did not give a list of legal costs or discuss specific billing matters and, thus, did not take a note of the conversation. He denies having told her about the firm's billing structure and any reference to six minute intervals or that the firm engaged an independent party to assess the firm's billings at no charge to the client. He did not explain, though, why he did not take any note of the conversation at all. While there may have been a policy to take file notes in particular circumstances, it is unusual for a solicitor not to take any note of any kind about a conversation even if it is just to record that it took place.

[44] Ms McLaren, on the other hand, did take a note of the conversation.

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[11] *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; *Re Morris Fletcher & Cross' Bills of Costs* [1997] 2 Qd R 228.

[45] Exhibit 2 is a notepad containing notes in the handwriting of Ms McLaren concerning the details of her matrimonial matter and details of costs provided to her by solicitors whom she had telephoned. That note contains the following in both longhand and shorthand and it reads:

> "Wiltshire Family Law GC 55541555
>
> Julann Tiernan will CB
>
> Spoke to Jerome H.
>
> We are not like other firms. No 6-min - fairer
>
> Works out more cost effective
>
> Fees are assessed by indep. Comp. - no cost to client - just something they do for all clients."

[46] It was put to Ms McLaren that the note was a fabrication and that it had been written at some other date. She denied that and gave her reasons for not having brought it to her current solicitors' attention more quickly.

[47] Ms McLaren's main concern when she was making inquiries of other firms of solicitors was with respect to the level of fees that she would be charged. The handwritten notes of other conversations show details of hourly charging and the experience of the particular firm in family law matters. I accept that the note made by her in exhibit 2 was a note made at the time of the conversation with Mr Hey and that it was a note that she would have been particularly interested to make given that it concerned matters which were uppermost in her mind at the time. Mr Hey took no notes of the conversation and had to rely on what he said was in practice in discussing these matters or not discussing these matters in an initial telephone conversation. The difficulty I have in accepting Ms McLaren's version of events is that the likelihood of Mr Hey telling her something which was completely contrary to a clause in the costs agreement with which he was familiar is very low. He had nothing to gain, nor did the respondent, in making a representation of that misleading nature. Ms McLaren was, for Mr Hey, another possible client and nothing more. In those circumstances, I think it more likely that Ms McLaren has misunderstood what was said. The balance of her note accords with the practice of the respondent with respect to the manner in which they conducted the practice and was a reasonable summary of those points set out in her note. I find that Mr Hey did speak to her about matters concerning "six minute charging" and independent costs assessment but did not tell her that the costs assessment would be at no cost to the client. Ms McLaren is mistaken in her recollection of that conversation.

Did the respondent fail to make any disclosures as required under the LPA?

[48] Section 308(1)(c) of the LPA provides that a law practice must disclose:

> "an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs;"

[49] Section 315 of the LPA provides:

> "A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this division as soon as is reasonably practicable after the law practice becomes aware of that change."

[50] For these purposes, an estimate is a judgment as to the sum which is likely to be incurred for the matter or for a particular step in the matter. It is not a quotation. It is an approximation which is based upon a number of matters which will change according to the type of legal issue involved but will usually include:

(a) the general nature of the matter,

(b) the practitioner's knowledge of the client's circumstances,

(c) the practitioner's reasonable expectation (informed by experience and knowledge of the law and the practical problems associated with the area) of what might be required to undertake the work which the client instructs be undertaken.

[51] The disclosure notice and the costs agreement were given to the applicant on 8 October 2018. There are a number of estimates given for different steps which might be taken in the applicant's matter. This occurred before the respondent had received the applicant's file from her previous solicitors but after they had taken some instructions about the nature of her case. Clause 3.1 of the Disclosure Notice provides:

> "It is not possible at this time to provide an accurate estimate of the total fees and costs for your matter. We have set out below our estimate of the range of total fees and costs (excluding GST) for your matter. There may be a number of stages in your matter, which may vary according to its complexity, and this will affect the estimate of the total fees and costs. The total fees and costs may be affected by a range of factors which are not apparent or predictable at this stage, including:
>
> (a) How efficiently we are able to obtain instructions from you and other parties;
>
> (b) The extent to which you assist us with your matter;
>
> (c) Action (or inaction) taken by opposing parties in your matter;
>
> (d) Which experts and Barristers (if any) are engaged;
>
> (e) How long it takes to finalise your matter.
>
> The range of estimates set out below is not a quotation and is subject to change. The range of estimates for your matter is as follows: …"

[52] The clause concludes with this statement:

> "These estimates are made on the information available at this time and the estimates will probably change when more information is available to us."

[53] The applicant complains about two of the estimates given. The first is in 3.1(h) which states:

"To prepare for and attend Mediation or Settlement Conference/Case Assessment Conference.

$1,500.00 to $10,000.00."

[54] The second item complained about is in 3.1(j) and it states:

"First Mention/Interim Hearing to Trial

$10,000.00 to $250,000.00."

[55] The applicant says that with respect to the estimate for the mediation, it was significantly in error. The mediation was held on 29 October 2018. Two days later the respondent wrote to the applicant stating: "We can advise that your approximate work in progress is $15,000". But when a short form bill was sent five days later, it was for $25,725.98.[12] The applicant submits that the respondent failed to provide timely notice to her of such a substantial increase above the estimate and this was a clear breach of s 315 of the LPA.

[56] The mediation took place on a Monday. The applicant's file did not arrive at the respondent's offices until late on the preceding Thursday. The applicant accepted that a reasonable estimate could not be given until the file had been seen and considered. In submissions the applicant sensibly accepted that, given the shortness of time available between the receipt of the file and the conduct of the mediation, that preparation for the mediation had to take priority over the provision of an estimate and that it would have been open to the respondent to provide the disclosure after mediation.

[57] The respondent did inform the applicant of an "approximate work in progress" shortly after the mediation. But that advice contained with it a note that it was an "unrevised time based method of capturing work undertaken on your file".

[58] In the circumstances of this case, given the requirement for a solicitor to become familiar with the client's file and to prepare for a mediation would mean that an estimate was not "reasonably practicable" and so a range of legal costs could be provided together with the variables referred to in 3.1 of the disclosure notice. I do not regard this difference between estimate and final fee as demonstrating a breach of the requirements of the LPA. Further, some of the work which was done for the mediation would have been work which would have been done in any event for other aspects of the case. It could not be said that the charge was purely for the mediation in the sense that some of the work would continue to be valuable given that the mediation did not succeed.

[59] The second complaint concerns the estimate of costs from "First Mention/Interim Hearing to Trial" of "$10,000.00 to $250,000.00". The applicant says that this tells her nothing of use and does not comply with the LPA.

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[12] That included the fee for the "independent" assessor of $2,200.

[60] The ordinary meaning of the word "estimate" is "an approximate judgment or opinion regarding the value [or] amount' of something"[13] and should be adopted in the interpretation of this legislation.[14] The nature of an "estimate" in these circumstances was considered by Fryberg J in *Jezer Construction Group Pty Ltd & Ors v Conomos*[15] where he applied s 48[16] of the *Queensland Law Society Act* 1952. In holding that the inadequacy of an estimate did not amount to an inconsistency with s 48(5) of the *Queensland Law Society Act* he said:[17]

> "The provision of a wrong estimate, and it can only be an estimate, does not produce the result that the estimate ceases to be an estimate. For the applicants it was submitted that this estimate was so vague and so plainly and widely wrong that it did not merit the description estimate, but I do not agree. It may well be that the estimate, in fact in overall terms at least, was not a bad one. The material does not really demonstrate that one way or another. In any event,

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[13] *Macquarie English Dictionary* (Macquarie Dictionary Publishers, 7th ed, 2017).

[14] See *Russells (A Firm) v McCardel & Ors* [2014] VSC 287 at [43].

[15] [2004] QSC 440.

[16] 48 Usual client agreement

(1) This section does not apply to urgent work or work if the maximum amount a practitioner or firm charges as fees for the work is $750 or less.

(2) Within a reasonable time after starting work for a client, a practitioner or firm must make a written agreement with the client expressed in clear plain language and specifying the following matters—

(a) the work the practitioner or firm is to perform;

(b) the fees and costs payable by the client for the work.

(3) The fees and costs payable by the client for work must specify—

(a) a lump sum amount; or

(b) the basis on which fees and costs will be calculated (whether or not including a lump sum amount).

(4) The notice in the schedule must be completed by the practitioner or firm and given to the client, together with a copy of any scale for the work provided under an Act, before the client signs the client agreement.

(5) The client agreement must not be inconsistent with the notice in the schedule.

(6) Subsections (4) and (5) do not apply if the client is 1 of the following—

(a) a public company, a subsidiary of a public company, a foreign company or a registered Australian body (within the meaning of the Corporations Law);

(b) the Commonwealth or a State;

(c) a partnership if 1 of the partners is an entity mentioned in paragraph (a) or (b);

(d) a joint venture if 1 of the joint venturers is an entity mentioned in paragraph (a) or (b).

[17] At 11.

> it seems to me that mere inaccuracy, even substantial inaccuracy in the estimate does not mean that there is no estimate for the purposes of this section."

[61] Those remarks were agreed in by Jones J in *Casey v Quabba & Anor.*[18] In that case the estimate being considered was expressed in this way:

> "The firm estimates that the total of fees and costs to complete the work detailed in clause 1 is between nil and $250,000.00 (approximately) depending on the following: – [a series of conditions similar to those in cl 3.1 of the subject agreement in this case]"

[62] A number of arguments were advanced to support the estimate as being compliant with the *Queensland Law Society Act.* Justice Jones said:

> "[39] … Whatever may be the standard necessary to meet the statutory requirement, the solicitor in this instance has not, in my view, made any genuine attempt to inform the client as required by the schedule. An estimate for fees and cost in a range between nil and $250,000 is not an estimate which provides any guidance for a client in the position of this plaintiff. It was not necessary to provide a single estimate to cover the extreme possibilities for the conduct of the claim. …"

[63] It is always open under the LPA for a solicitor to amend an estimate, for example, when new information becomes available or some unforeseen event occurs. The evidence about the creation of this document supports a finding that Mr Hey provided some information for the purposes of the template which the firm used and this estimate (among others) was the result. It was not suggested that any significant time was given to the production of these estimates. While I accept that, in the circumstances of this case, the respondent did not have much information on which to proceed it seems that the "boilerplate" nature of the clauses in the template led to the provision of an estimate which did not provide any guidance for a client in the position of this plaintiff. It follows that the respondent did not make disclosures to the extent required and so the agreement was not reasonable within the meaning of s 328.

Conclusion

[64] I am satisfied that the costs agreement is not reasonable. I order that it be set aside. I require the applicant to bring in minutes of order reflecting these reasons. I will hear the parties on costs.

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[18] [2005] QSC 356.