QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Stewart v Stephens & Tozer Solicitors* [2022] QCAT 182
PARTIES:	**LUCY XIUMEI LIU STEWART** (applicant) **v** **STEPHENS & TOZER SOLICITORS** (respondent)
APPLICATION NO/S:	OCL030-21
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	8 June 2022
HEARING DATE:	4 April 2022
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member
ORDERS:	**1. The costs agreement dated 23 April 2020 is set aside.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – REASONABLENESS – where the applicant alleged the legal costs agreement was not fair and reasonable – whether the costs agreement was induced by misrepresentation – whether the applicant was given time to consider the costs agreement – whether lawyers' fees charged on a time costing basis were fair and reasonable – where there were concerns raised regarding an 'uplift fee' in the costs agreement – where the respondent settled the claim without instructions from the applicant *Legal Profession Act 2007* (Qld), s 313, s 315, s 300, 324, s 328, s 328(2)(e) *Legal Practitioners Act 1981* (SA), s 42(7) *Kasmeridis & Anor v McNamara Business & Property Law* [2006] SASC 200 *McLaren v Wiltshire Lawyers Pty Ltd* [2019] QSC 305 *Winn v Boss Lawyers Pty Ltd* [2018] QCAT 23
APPEARANCES & REPRESENTATION:	
Applicant:	Self-represented
Respondent:	Mr R Sahay of Stephens & Tozer Solicitors

REASONS FOR DECISION

[1] On 11 February 2020, the applicant consulted Mr Sahay of the respondent in relation to the recent termination of her employment. She entered into a costs agreement with the respondent dated 12 March 2020. The agreement related to an application to the Fair Work Commission arising out of the termination (the agreement will be referred to as "the FWC costs agreement"). That agreement is not the subject of these proceedings. The applicant subsequently entered into a costs agreement with the respondent dated 23 April 2020. It related to an application to the Federal Circuit Court of Australia, also arising out of the termination ("the FCC costs agreement"). The applicant seeks to have the FCC costs agreement set aside. She alleges that it was not fair and reasonable, on several grounds. The grounds are identified later in these reasons. They are contested by the respondent.

Background

[2] Mr Roger Sahay is a sole practitioner, conducting his law practice under the name Stephens & Tozer Solicitors. At relevant times the practice employed two other lawyers, Ms Chyrse Lambridis and Ms Shanya Sahay.

[3] Ms Lambridis had the day to day conduct of the FWC application, while Ms Sahay had the conduct of the FCC application.

[4] English is not the applicant's first language. Communications with her were at times made through her husband, Mr Paul Stewart. Both Mr and Mrs Stewart attended at the conference on 11 February, where Mr Sahay took instructions relating to the termination, including matters relevant to a claim for damages for wrongful dismissal.

[5] The FWC costs agreement is not in evidence, but the costs disclosure for that agreement forms part of the record. It indicated that a fixed fee might be charged, or that fees might be charged by reference to hourly rates, specified for various legal practitioners and other employees of the law practice. In fact, a fixed fee was charged for the FWC application.

Grounds for application

[6] The first ground is that the FCC costs agreement was induced by a misrepresentation relating to the outcome of the claim. The misrepresentation is alleged to have been made at the initial conference on 11 February 2020. In the application, it is alleged that Mr Sahay represented that the applicant could recover hundreds of thousands of dollars "for pregnancy discrimination". The application referred to the claim lodged in the Federal Circuit Court as showing how the amount had been derived. The claim in that Court (though more fully particularised) was for compensation totalling $375,638.50 plus loss of superannuation, together with interest and legal costs.

[7] Ground 2 is that the applicant was not given the legally required time (at least 5 clear business days) to consider the FCC costs agreement. The application alleges that the applicant was required by the respondent to pay $3,675 in one day, by an email dated 23 April 2020 (but not received then), in order for the case to continue; and was told by telephone that if the amount were not paid, the law practice would withdraw from the matter immediately.

[8] Ground 3 alleges that the charges made by the law practice were not fair and reasonable. The rates had been increased in the costs disclosure dated 23 April 2020; but costs charged for work done before then were at the higher rate.

[9] Ground 4 alleges that there was no disclosure of the hourly rate increase, nor of an invoice for a court filing fee. The hourly rate increase was said to be for the fees for work done by Mr Sahay, and work done by Ms Sahay. The filing fee is said to be a fee claimed in the email dated 23 April, for an amount of $675, when it is apparent from the tax invoices issued by the law practice that no such fee was paid.

[10] Ground 5 alleges that the FCC costs agreement included an uplift fee; and that section 324 of the *Legal Profession Act 2007* (Queensland) ("the LP Act") required that the practice provide an estimate of the uplift fee, or a range of estimates, and an explanation of the variables which might affect the uplift fee.

[11] Ground 6 alleges that the costs agreement is void because it is not signed by the applicant.

[12] Ground 7 alleges that the costs agreement was required to state that there was a cooling off period, and to advise the applicant of her right to seek independent legal advice before entering into the agreement, but it failed to comply with these requirements.

[13] Ground 8 alleges that the costs agreement made provision for the charging to the applicant of the fee of a costs assessor for assessing the fees charged by the practice; and thus had the effect of passing on to her a cost which she should not have had to pay.

[14] Ground 9 alleges that, before a litigious matter is settled, a law practice must disclose to the client the amount of legal costs payable by the client if the matter is settled; but there was no such disclosure in the present case. Matters raised by the applicant in relation to this ground included the fact that the respondent settled the claim without instructions from the applicant; and that she was subjected to pressure to make her sign a Deed of Release.

Statutory provisions

[15] The application is brought under section 328 of the LP Act, which includes the following:

> **328 Setting aside costs agreements**
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> (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.
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> (1A) An application under subsection (1) to the tribunal must be made as provided under the QCAT Act.
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> (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—
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> > (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;
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> (c) whether the law practice failed to make any of the disclosures required under division 3;
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> (d) the circumstances and conduct of the parties before and when the agreement was made;
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> (e) the circumstances and the conduct of the parties in the matters after the agreement was made;
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> (f) whether and how the agreement addresses the effect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement;
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> (g) whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement.

Some authorities discussed

[16] When dealing with an application made under section 328 of the LP Act, Martin J, in *McLaren v Wiltshire Lawyers Pty Ltd*[1], discussed the expression "fair or reasonable", as used in that section. His Honour referred to a number of authorities. From his Honour's discussion, and those authorities, I take the following propositions as established law on this question:

(a) Fairness of the agreement refers to the mode of obtaining the agreement; and whether the client fully understands and appreciates the agreement;[2]

(b) The terms of the agreement must be reasonable;[3]

(c) The factors to be taken into account when deciding whether an agreement is fair and reasonable will depend on the circumstances of the case, but may vary according to the scope of the retainer, the terms of the agreement, the kind of legal work undertaken, and the client's knowledge and circumstances;[4]

(d) An agreement is unreasonable if it can be shown objectively that the agreement came into being in circumstances which were unreasonable to the client; or that its terms are unreasonable to the client; or that its effect on the client is unreasonable;[5] though these tests are not exhaustive;[6]

(e) The broad position 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 the work done.

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1 [2019] QSC 305, at [18]-[25].

2 See *Re Stuart; Ex parte Cathcart* [1893] 2 QB 201 at 204-205, cited by Martin J in *McLaren* at [18].

3 *Ibid*.

4 *McNamara Business & Property Law v Kasmeridis & Anor* (2007) 97 SASR 129, 138, per Doyle CJ, Gray and David JJ agreeing; cited by Martin J in *McLaren* at [19].

5 *Jovetic v Stoddart & Co* (1992) 7 WAR 208, per Seaman J; cited by Martin J in *McLaren* at [20].

6 See the discussion of Seaman J's statement by Ipp J in *Brown & Ors v Talbot & Oliver* (1993) 9 WAR 70 at 75; cited by Martin J in *McLaren* at [20].

[17] It is also relevant to note that a failure to provide an estimate of fees as part of the disclosure required by statute, even before the parties enter into a costs agreement, does not necessarily mean that the agreement is not fair or reasonable.[7] It is necessary to consider such a failure in the context of all relevant circumstances, including those specified in section 328(2).

[18] The respondent's submission that the question whether the costs agreement is fair and reasonable is to be determined at the time when the agreement was struck was based on a statement of Carmody J in *Winn v Boss Lawyers Pty Ltd*,[8] which in turn relied on a statement of Judge Lunn, a Master of the Supreme Court of South Australia, in *Kasmeridis & Anor v McNamara Business & Property Law*.[9] That case was brought under section 42(7) of *The Legal Practitioners Act 1981* (SA). Section 328 of the Queensland Act makes potentially relevant any misconduct of the legal practitioner in relation to the provision of services under the costs agreement, the circumstances and conduct of the parties after the agreement was made, and a failure to make post-agreement disclosure required by section 315. There was no suggestion that the South Australian legislation contained similar provisions. It seems to me that the view of Judge Lunn is not consistent with the provisions of the LP Act. In my view, post-agreement circumstances are potentially relevant when deciding whether a costs agreement was not fair or reasonable, for the purposes of section 328.

Ground 1

[19] The applicant contended that, during the consultation on 11 February 2020, Mr Sahay had given her an unrealistically high figure for the amount likely to be recovered in proceedings against her former employer; that that induced her to enter into the costs agreement; and that accordingly it should be set aside as not being fair and reasonable.

[20] The respondent's response to the application denied that Mr Sahay had advised the applicant that she could receive a payout of hundreds of thousands of dollars. Its written submissions were to similar effect. Reliance was placed on parts of Mr Satay's affidavit, in which he denied making the representation, and said he did not calculate damages in the first consultation. The oral submissions for the respondent were far from clear. It appeared to submit that the representation was not made; and if it was, it did not provide a basis for setting aside the agreement, because the terms of the agreement were not unfair, the applicant having some other cause of action for misrepresentation.

[21] The applicant provided a statement, as well as an affidavit, and was cross-examined. In her statement, consistent with her application, she said that at the first consultation with Mr Sahay, she had been told that she could receive "a few hundred thousand dollars for my case". Her affidavit was to similar effect. During the cross-examination on this topic, after a reference to the passage in the applicant's statement where she said that Mr Sahay had told her that she could receive a few hundred thousand dollars, Mr Sahay asked the applicant to state exactly what he had said. She said that they (a reference to herself and her husband) asked "Ms Sahay"

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7 See *Don Edward Barclay & Ors v McMahon Clarke (A Firm)* [2014] QSC 20; *Lewis Blyth & Hooper (a firm) v Smith* [2015] WASCA 47 at [97], [111], [115]-[118].

8 *Winn v Boss Lawyers Pty Ltd* [2018] QCAT 233 at [24].

9 [2006] SASC 200 at [4].

what was the possible outcome of the claim, and he replied that the figure was "something like" over $300,000.[10] It is clear that the applicant intended to refer to a statement made by Mr Sahay. She also said she wanted to know if it was "worth to fight"; and that the question was important to her and her husband. She also said that Mr Sahay had not given a breakdown for individual items.

[22] Mr Paul Stewart also provided a statement and an affidavit. In his statement he said that at the first consultation Mr Sahay suggested that "we could get a few hundred thousand dollars for this pregnancy discrimination case". His affidavit was similar. In the course of his cross-examination he was asked to state exactly what Mr Sahay had said about the amount which could be recovered. He said, "It was 320, 340,00000 to – around that figure, yes". In response to further questions he said that the figure was written on a pad, and that Mr Sahay had "added up all the sums". He was shown a copy of a document, which became Exhibit 7. He said that that document was not the document written by Mr Sahay at this consultation.

[23] In his affidavit, Mr Sahay said that he did not advise the applicant that she could receive hundreds of thousands of dollars from a claim, as he did not calculate the damages at the first consultation. In his oral evidence, he confirmed that Exhibit 7 was a copy of the notes he made at the first consultation. It does not record an amount which the applicant might recover. The cross-examination by Ms Stewart highlighted that the note was not a complete record of matters which Mr Sahay in his affidavit said had been discussed at this consultation.

[24] On balance I find that at the first consultation, Mr Sahay made a statement to the effect that, in an action against her former employer for wrongful dismissal, the applicant could recover an amount in excess of $300,000. In substance there is no real difference between the evidence of the applicant and her husband in their statements and affidavits, on the one hand, and their evidence in cross-examination. In each cross-examination, the references to amounts in excess of $300,000 emerged in response to questions asking exactly what Mr Sahay had said. The applicant appeared to have a good recollection of a number of things which occurred at this consultation. She stated, and it seems likely to be true, that she was concerned to know an amount, to decide whether it was worthwhile to pursue the claim. There was a discussion of some matters relevant to the quantum of the claim.

[25] The applicant's evidence receives some support from the evidence of Mr Stewart. I accept that Exhibit 7 is a copy of the notes made by Mr Sahay at the meeting. I do not accept the evidence of Mr Stewart that other notes were made at this meeting. That deprives his evidence of much of the weight which might otherwise be attributed to it, but does not lead me to reject it entirely. It was not suggested that his evidence was not given honestly. The amount which might be recovered was likely to be a matter of some importance to him, too. It was not suggested in cross-examination that the evidence of Mr Sahay on this matter was not honestly given. He may well have simply forgotten making the statement.

[26] The applicant submitted that on 1 September 2020 Ms Sahay recommended settling the claim for $20,000, and said that the amounts given by Mr Sahay were "over exaggerating". At the mediation, the mediator said that the amount in the claim (a little over $375,000) was unrealistic. These submissions appear directed to the

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10 See transcript 24 March 2022 p 32. The reference to Ms Sahay appears simply to be a mistake.

question whether the statement was a misleading representation. The topic was not addressed in the respondent's written submissions. No evidence was adduced to show the representation, if made, was not misleading.

[27] In both her statement and her affidavit, the applicant said that, when she and Mr Stewart went to the respondent's office to sign an affidavit on 1 September 2020, Ms Sahay said, "Mr Sahay's numbers were over exaggerating". That was in the context of a discussion in which, according to the applicant, Ms Sahay tried to convince them to accept an offer of $20,000. In her statement the applicant said that, during the mediation on 28 October, the mediator said "the numbers" were unrealistic, apparently with reference to the amount the applicant was seeking. Her affidavit, on this point, was similar.

[28] In his statement, Mr Stewart said that when he and the applicant met Ms Sahay in September 2020 to sign an affidavit, she tried to convince them to settle the matter for $20,000, and she said that "Mr Sahay's numbers is over exaggerating". At the mediation, the mediator said, "Where are these numbers coming from? They are unrealistic; the judge will never reward (*sic*) that." His affidavit was very similar in effect.

[29] In her affidavit, Ms Sahay said that on 1 September 2020 when the applicant and her husband came to the respondent's offices, an offer of $10,000 was discussed; awards for non-economic loss were often about $20,000; the figures claimed were at the high end; and at no time did she say that Mr Sahay's figures were "over exaggerating". She also said that on 14 September she also recommended a counteroffer, which amounted in total to approximately $90,000 plus interest and costs. In their affidavit evidence, neither Mr Sahay nor Ms Sahay responded to the evidence of Mr Stewart about what happened at the mediation. They said that, following the mediation, neither the applicant nor Mr Stewart expressed any concerns about the damages being sought.

[30] The email which Ms Sahay said contained her recommendation for an offer is attached to the respondent's response.[11] Also attached is an email from the applicant, dated 16 September 2020, in which the applicant gave instructions for an offer more than double the amount recommended by Ms Sahay.[12] Mr Sahay said in his affidavit that, following receipt of the applicant's email, on 16 September 2020 he had a discussion with Mr Stewart in which he suggested more conservative figures, with some agreement from Mr Stewart. That apparently resulted in instructions to make an offer to settle the applicant's claim for a little over $200,000, plus costs and interest. It is to be inferred that Mr Sahay's recommendation was for a lesser amount. On the same day, Ms Sahay sent an email accepting the instructions, but suggesting that the amount was too high, by an amount which I infer to be $60,000.[13]

[31] The representation carried the implication that Mr Sahay considered that there was a real prospect that the applicant might recover a sum in excess of $300,000; and that he had reasonable grounds for holding this view. Nothing has been identified to

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11 See Annexure 7 to the response.

12 Annexure 8.

13 And possibly more. It would depend upon whether the limitation of future loss to a period of 12 months applies only to future earnings (said to be for 18 months); or also to loss of earning capacity (said to be for 5 years).

show that Mr Sahay had a reasonable basis for holding this view. The amount is considerably in excess of the counteroffer recommended by Ms Sahay in September 2020. There has been no suggestion of information received after February 2020 which would explain the difference in views. The claim was ultimately settled by Mr Sahay in January 2021, in circumstances discussed later, for $47,000 including costs. By that time, the amount of unpaid costs recorded by the applicant was almost $34,000 inclusive of GST. Earlier, in December 2020, the applicant instructed the respondent to seek to have the former employer reinstate an offer to settle the matter for $25,000, inclusive of costs, on the basis that the applicant would receive $12,500. The respondent accepted those instructions. There is no suggestion that the applicant was advised that the amount she would receive was well below what she might expect to receive from her claim. In light of these matters, I am satisfied that there was no reasonable basis for the statement made by Mr Sahay at the first consultation, and that accordingly it was misleading. While I accept that the mediator said that the amount claimed was unrealistic, I do not derive much assistance from that. I have not found it necessary to determine whether Ms Sahay made a statement to the effect that the amount of the claim identified by Mr Sahay was "over exaggerating".

[32] There is no direct evidence that the applicant was specifically induced to sign the FCC costs agreement by the statement made at the first consultation. However, she asked about the amount which might be recovered, in order to know whether it was worthwhile to pursue the claim. I am satisfied that Mr Sahay's statement induced her to pursue the claim, and that the inducement extended to entering into the FCC costs agreement. That conclusion is based generally on the applicant's evidence. It finds some support in the fact that it is rather unlikely that a person in the applicant's position would embark on uncertain litigation, which from her point of view was no doubt expensive, unless she was likely to recover a substantial amount of money.

[33] In my view, the findings I have made lead to a conclusion that the agreement was not fair and reasonable, because it was entered into in circumstances which were not fair to the applicant.

Grounds 2, 5, 6 and 7

[34] The LP Act permits a law practice to enter into a conditional costs agreement with a client in matters such as the applicant's claim.[14] There are, however, some restrictions relating to such an agreement. It must be in writing, and it is not sufficient that the client's acceptance is evidenced by conduct.[15] A conditional costs agreement must include a cooling off period of not less than five clear business days during which the client may terminate the agreement; and must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement.[16] If the agreement provides for an uplift fee, it must contain an estimate of the uplift fee, or provide some other specified information relating to it. Grounds 2, 5, 6 and 7 are based on the proposition that these restrictions apply to the FCC costs agreement.

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14 See ss 322 and 323(1).

15 See s 323(3)(c)(i), and the Note to s 322 (3), which may be used to remove any uncertainty relating to the earlier mentioned provision.

16 See s 324(3)

[35] That proposition is incorrect. The restrictions apply to a conditional costs agreement. That expression is defined as follows:[17]

> ***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.

[36] The costs agreement in the present case is not a conditional costs agreement. It does not provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which the costs relate.

[37] Mr Sahay helpfully drew attention to section 313 of the LP Act, which applies to costs agreements generally. If a costs agreement involves an uplift fee, then (with an irrelevant exception), the law practice must disclose in writing a number of things, including the uplift fee, or the basis for calculating it, and the reasons why it is warranted.

[38] However the expression "uplift fee" is defined in section 300. There is no reason to doubt that the definition applies to the expression as used in section 313. The definition is as follows:

> ***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.

[39] It is worth noting the terms of clause 2.1.4. They are as follows:

> **2.1.4 Uplift Fee**
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> We will charge an uplift fee in the bill at our discretion in relation to any agreement pursuant to clauses 2.1.2. This uplift will not exceed 25% of the professional fees claimed in the Bill. The uplift fee is for our care and conduct of a proceeding and is an amount considered by us to be reasonable having regard to the circumstance of the proceeding including, for example:
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> (a) The complexity of the proceeding; and
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> (b) The difficulty and novelty of any question raised in the proceedings; and
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> (c) The importance of the proceeding to you; and
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> (d) The amount involved; and
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> (e) The skill, labour, specialised knowledge and responsibility involved in the proceeding on the part of the solicitor; and
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> (f) The number and importance of the documents prepared or perused, without regard to the length of the documents; and
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> (g) The time spent by the solicitor; and
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> (h) Research and considerations of law and questions of fact.

[40] While clause 2.1.4 makes provision for what is called an uplift fee, it is not a fee which comes within the definition. Payment of the "uplift fee" is not conditioned on

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[17] In s 300 of the LP Act.

success in the litigation. The terms of the clause give the respondent the discretion to increase its fees by up to 25%. The discretion is only fettered by the requirement that the respondent consider that the amount of the uplift fee is reasonable, having regard to certain specified matters. There are two matters of concern relating to this clause. One is that it could provide a means of avoiding the controls which the Act imposes in relation to uplift fees; and perhaps in relation to conditional costs agreements. The other is that its inclusion in an agreement like the present one seems quite unnecessary. The matter did not seem to be of any real complexity. Many of the considerations raised by the clause are adequately covered by the fact that charges are made on a time cost basis, with different rates of charge reflecting the differing levels of skill and experience of those working on the matter. It is at least questionable whether the inclusion of a provision permitting a discretionary charge described as a charge for care and consideration is appropriate in a costs agreement which provides for time costing.[18] However these matters have not been advanced by the applicant, and will not be considered further.

[41] There is a further matter raised by ground 2. It contains at least a suggestion that the agreement was not fair and reasonable because the applicant was given very little time to decide whether to enter into the FCC costs agreement and to make an initial payment under it.

[42] It is correct to say that the applicant had a very short time in which to decide to enter into the agreement, and to make the payment. The difficulty was exacerbated by the fact that an earlier email from the respondent was not received by the applicant. However, as the case was presented to this Tribunal, there was inevitably a very short period of time after the FWC determination, in which proceedings in the FCC could be commenced. It was that constraint (exacerbated by the errant email) which placed the applicant in a position of some difficulty. I am not satisfied it is relevant to the question whether the FCC costs agreement was not fair and reasonable.

[43] It follows that grounds 2, 5, 6, and 7 are not made out.

Grounds 3 and 4

[44] These grounds relate to the fact that the hourly rate charged for Mr Sahay's work in the FCC proceedings was higher than that for the FWC application; the rate for Ms Sahay's work in the later proceeding was higher than that of Ms Lambridis, who was more experienced; and an invoice incorrectly claimed a filing fee of $675. Reference was made to the fact that work done by Mr Sahay in a short period in April 2020 was charged for at the higher rate, and before the higher fee was disclosed.

[45] The only basis for suggesting the fees were not fair and reasonable, or that the increase in rates meant the FCC costs agreement was not fair and reasonable, was the increase itself. There is no evidence to suggest that the rates were not reasonable rates for persons with the qualifications of Mr Sahay and Ms Sahay when carrying out work in relation to a claim in the Federal Circuit Court. The rates charged in relation to the FWC claim are of little assistance on the question.

[46] It is correct that some work was done before the change in rate for Mr Sahay was disclosed, and charged for at the higher rate. That work was done in a period of a

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18 See the concerns identified in *Legal Services Commissioner v Slipper* [2019] QCAT 146 at [79]-[84].

little over a week, in circumstances of some urgency, previously discussed. Although the new rate was disclosed by about 27 April 2020, there was no complaint by the applicant about the change of rate until January 2021. In the circumstances, I do not consider that reliance on the new rate is of any significance in determining whether the FCC costs agreement is not fair and reasonable.

[47] The reference to a filing fee seems to have simply been a mistake. It has no consequence for the costs agreement.

[48] Grounds 3 and 4 are not made out.

Ground 8

[49] Clause 2.4 of the costs agreement is in the following terms:_

> **2.4 Independent assessment of fees**
>
> If we charge you professional fees for the work in accordance with clause 2.1.2 or we will at our discretion obtain an independent assessment of our professional fees from a legal cost assessor (*sic*). It is agreed that the legal costs assessor's fee for the assessment will be charged to you as an expense, as referred to in 2.2. The fee usually charged by the legal costs assessor is 5% of the assessed professional fees, eg professional fees of $1000 equals assessment fee of $50, depending on the cost assessor used it could be more or less.

[50] In *McLaren* Martin J was considering a costs agreement which included the following terms:[19]

> "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.
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> 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.
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> 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."

[51] His Honour said,[20]

> 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.

[52] One of the matters to which his Honour referred was that the effect of these clauses was not explained to the client. His Honour said,

> [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

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19 See *McLaren* at [26].
20 See *McLaren* at [28].

> 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.
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> [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".
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> [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).
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> [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.
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> [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.

[53] Clause 2.4 of the FCC costs agreement is not well drafted. It seems to me that the effect of the first sentence is that the respondent had the option to charge by reference to the hourly rates in clause 2.1.2; or alternatively, at its sole discretion, to engage a costs assessor, at the client's expense, to determine the amount payable by the applicant for the legal services provided by the respondent. There is no suggestion that its effect was explained to the applicant.

[54] Ground 8 was not particularly well expressed. However, in her application, the applicant asserted that clause 2.4 passed on to her a cost which she should not have been required to pay. She invoked other language of *McLaren*, describing the clause as a "piece of contractual legerdemain". At the hearing, the Tribunal attempted to ensure that the respondent understood the nature of the allegation that apparently was being presented.

[55] The respondent submitted that he had not relied upon clause 2.4. In view of section 328(2)(e), that may be one matter to be considered. He also submitted that that feature distinguished the present case from *McLaren*. It appears that an assessment was carried out in that case.[21]

[56] The question remains whether the FCC costs agreement is not fair and reasonable because it included clause 2.4. Even if not invoked, its effect was to enable the respondent to have the cost of preparing an assessment, which would then no doubt

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21 See *McLaren* at [17](c) and [29].

form the basis for the bill, passed on to the respondent, a matter of advantage to the respondent but not to the applicant.

[57] On the other hand, clause 2.4 expressly provided that an assessment was not a substitute for the client's right to request "a formal assessment of any lump sum bill or Itemised Cost Statement". Again, the clause is not well drafted, and it is at least possible that, correctly interpreted, it preserves the client's right to an itemised bill, for which the respondent could not charge. If that is correct, the clause would not protect the respondent from incurring the cost of preparing the bill.

[58] The provisions of clause 2.4 were not adequately dealt with in the submissions. To determine the outcome of the present application, it is unnecessary to determine whether the costs agreement is not fair and reasonable because it includes clause 2.4. It is not proposed to consider it further.

Ground 9: some factual matters

[59] In November 2020, the employer made an offer through the respondent to settle the FCC matter for a total of $25,000. That was rejected shortly after, on the applicant's instructions.

[60] On 4 December Ms Sahay wrote to the applicant, calling for the payment of $9,240 to the respondent in order to engage a barrister. On 14 December, Mr Stewart contacted Ms Sahay, expressing concern about the payment. In the course of the conversation, Mr Stewart asked Ms Sahay, "If we accept $25,000, how much would we take? Your fees currently exceed that." Ms Sahay that the fees were currently about $28,000, which might be subject to a discount, but that she would have to consult Mr Sahay about that. On 16 December Ms Sahay sent the applicant an email stating that, "If you were to accept the figure of $25,000, we could discount our fees so that you receive 50%, being $12,500".[22] The email also stated, "We can talk with the Respondent's Solicitors to see if they will reopen their offer of $25,000". The email had proposed an alternative option, being to brief a barrister. It concluded, "If you do not wish to brief the Barrister and proceed to hearing, we need your written instructions stating this."

[61] According to Ms Sahay and Mr Sahay, on 16 December 2020, Mr Stewart spoke with them by telephone. Mr Sahay said, "What if we can get the respondent to increase the settlement amount to cover our fees, and Lucy receives $18,000? Will you be happy with that?", to which Mr Stewart agreed. In her submissions, the applicant contested this version of events. She relied on Exhibit 3 to her affidavit which included an email of 17 December 2020, soon to be discussed. Mr Stewart gave evidence in his affidavit about conversations with the respondent about this time, but did not refer to the version of events given by Mr Sahay and Ms Sahay. No one was cross-examined about these conversations.

[62] On 17 December 2020, at 12.49 pm, Ms Sahay sent an email to the applicant, with Mr Sahay one of the recipients, which included the following:

> Dear Lucy,
>
> We require your written instructions so that we can continue with the matter.
>
> Please provide your instructions so that either:

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22 See Annexure 5 in the bundle of Annexures.

> 1. Discuss reopening the offer of $25,000 with the respondent's Solicitors; or
>
> 2. Prepare for the hearing, including briefing a Barrister.
>
> In relation to point 1, Paul has proposed that we significantly discount our fees, whereby you receive approximately $18,000 of the $25,000. Please confirm that these are your instructions.

[63] At 1.02 pm, the applicant replied:

> Hi, Shanya :)
>
> Thanks for the email. Please go ahead with reopening of $25,000. Thanks Lucy Stewart.

[64] The respondent then contacted the solicitors for the applicant's former employer. Despite some evasiveness, Mr Sahay finally stated that he asked the solicitors if their client would reopen the $25,000 offer. He then went on to suggest that the re-opening was an offer of $25,000 for compensation. He stated that he asked if the offer could be for $25,000 for compensation plus legal costs. He told the employer's solicitors that the solicitor-client costs were $28,000, so the party-party costs would be something like $22,000. That became the basis on which the claim against the former employer settled.

[65] On 15 January 2021, the applicant received an email from the respondent advising that the matter was settled for a lumpsum of $47,000. The email stated that the respondent had been able to increase the offer to cover the applicant's legal costs. It enclosed a draft Deed of Release. The applicant asked how much she would receive from the sum of $47,000. She was told that unbilled work in progress was about $26,700 plus GST, but that there was further work to be done.

[66] The applicant claimed that, because of the "50/50 agreement" she should receive one half of the settlement sum; and because she had previously paid $5,400 to the respondent for costs, she should receive $28,900. The respondent denied that there was an agreement to divide the settlement moneys evenly between the applicant and the respondent.

[67] On 4 February 2021, Ms Sahay sent an email to the applicant, relating to the signing of the Deed. The email stated,

> When you were inclined to accept the previously made offer of $25,000, we reluctantly agreed to discount our fees. A significant loss to us. To provide you a greater benefit, we managed to convince (the former employer) to increase the settlement amount by $22,000 to cover most of your legal fees incurred. We cannot understand why you require us to give you our legal fees, properly incurred.

[68] On 8 February 2021 the applicant wrote to Ms Sahay stating that she would not sign the Deed until she received written confirmation that she would receive "my half share ($28900 in total)". She complained that she had not been told that she could make a counteroffer. The email made a number of other complaints, generally reflected in the grounds for this application.

[69] On 10 February 2021, Ms Sahay sent an email to the applicant stating,

> We provide this as a precautionary alert.

> If we do not provide a signed copy of the Deed to the Respondent, there is the possibility that you may not receive any settlement amount. Further, if we do not discontinue your matter by 2 March 2021, we must then apply to the Court to seek permission to discontinue the matter.

[70] The email then proposed that a signed copy of the deed be given to the former employer, with the funds to be held in trust until an agreement was reached between the applicant and the respondent about their disposition.

[71] It is convenient to record matters relating to tax invoices issued by the respondent. On 14 May 2020 the respondent issued a tax invoice for $3,565.87, including GST. It covered work done between 15 and 28 April 2020. It was met by an amount from the respondent's trust account, from money the applicant was required to pay before the commencement of the FCC proceedings.

[72] On 3 March 2021, the applicant issued a tax invoice covering work done from 28 April 2020 to 2 March 2021. It included fees for the work done from 18 December 2020, plainly related to negotiations with the employer's solicitors. The amount claimed was $33,962.50, including GST.[23] Subsequent tax invoices claimed interest on the unpaid amount claimed, but it is unnecessary to refer to them.

[73] On 15 February 2021 the applicant made a complaint to the Legal Services Commissioner about a number of aspects of the respondent's conduct. The complaint was dismissed on 11 May 2021.

Ground 9: Contentions of parties and resolution

[74] The applicant's submissions relied on s 312 of the LP Act. It is as follows:

> **312 Additional disclosure—settlement of litigious matters**
>
> (1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, before the settlement is executed, the law practice must disclose the following to the client—
>
> (a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled, including any legal costs of another party that the client is to pay;
>
> (b) a reasonable estimate of any contributions towards those costs likely to be received from another party.
>
> (2) However, a regulation may provide for matters relevant to subsection (1) when there is more than 1 law practice acting on behalf of a client.

[75] The applicant submitted that the respondent did not seek instructions to settle the matter for $47,000 before it had settled. She did not learn of the amount until 15 January 2021. She had not been given a reasonable estimate of the costs she might have to pay; nor of an estimate of the contribution to be received from the former employer. She said that she had agreed to seek to have the employer's offer of $25,000 re-opened only on the basis that she would receive 50%, the amount to be split on a 50-50 basis.

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[23] In fact a further charge was made for work done in March 2021 in an amount of $856.90, including GST: see the tax invoice dated 11 May 2021, exhibited to the applicant's affidavit.

[76] The applicant contended in her written submissions that the respondent put pressure on her to sign the Deed of Release, telling her that she may not receive any settlement monies unless she did so. He also issued the tax invoice on 3 March 2021 for this purpose.

[77] Towards the end of the second day of the hearing, it was suggested to the respondent that one interpretation of the fact that he did not seek instructions before agreeing to the figure of $47,000, was that he knew the client would want substantially more than the previously agreed amount of $12,500. It was also suggested that a substantial part of his motivation during the settlement negotiations was to improve the amount he would receive out of a settlement. It was also suggested that he did not seek instructions before agreeing to the settlement because the client would want him to reduce the costs he was claiming.

[78] The respondent's response was that he was acting in accordance with the instructions of Mr Stewart, who had said that if the applicant was to receive $18,000, then they would be happy. This was a reference to what the respondent and Ms Sahay said had occurred in the telephone conference with Mr Stewart on 16 December.

[79] There are a number of difficulties with the respondent's position.

[80] I have serious reservations about the version of the conversation with Mr Stewart on 16 December, given by Mr Sahay and Ms Sahay, and Mr Sahay's reliance on this conversation. The first difficulty is that, in truth, Mr Stewart was not the client. The applicant was. That is reflected in the fact that the following day, Ms Sahay sought instructions from the applicant. This is emphasised by the fact that, in the email, Ms Sahay sought written instructions from the applicant, notwithstanding the conversation with Mr Stewart the previous day.

[81] The second difficulty is that Ms Sahay's email of 17 December makes no mention of a suggestion (let alone instructions) that the claim might settle on an undefined basis, provided the applicant were to receive $18,000. What was suggested in the email was that Mr Stewart had said that if the matter were to settle for $25,000, the applicant would want the respondent's fees to be reduced further, so that she received $18,000. The email did not suggest that some amount greater than $25,000 might be sought from the former employer. It has been a recurring complaint by the applicant that she was not advised that she might make a counteroffer.

[82] The tax invoice of 3 March 2021 claimed almost $34,000 for costs, with the result that, if enforced, the applicant would receive an amount slightly in excess of the $12,500 which she would have received in accordance with the earlier agreed position. It would appear that from about 16 December, the respondent was aware that the applicant was seeking more from the settlement. What happened is quite inconsistent with the respondent acting on instructions that he could negotiate a better settlement, provided the applicant received $18,000. His position is made more difficult by the subsequent invoices (including claims for interest).

[83] Finally, the respondent's position does not satisfactorily explain his failure to confirm instructions with the applicant prior to agreeing to the amount of $45,000. Had he done so, and informed the applicant that she would receive $18,000 from the settlement, he would have at least by implication substantially complied with s 312 of the LP Act.

[84] It is unfortunate that none of the participants in the conversation of 16 December 2020 were subjected to cross-examination about it. It is difficult not to conclude that the best evidence of what occurred is the email from Ms Sahay the following day (sent also to Mr Sahay). It is not necessary to reach a firm conclusion about what Mr Stewart said in that conversation. It is clear that instructions were sought from the applicant the following day, in writing, and she provided them. Mr Sahay was not acting on those instructions when he agreed to settle the claim for $47,000.

[85] The respondent acted in his own interest, to the disadvantage of the client, in conducting the negotiations and settling the matter for $47,000. Had he accepted the re-opened offer of $25,000, then under the agreement which had been reached with the applicant, she would have received $12,500.[24] He put that position in jeopardy by continuing the negotiations thereafter.

[86] One of the applicant's major contentions was that the respondent did not seek instructions from her before agreeing to the settlement of her claim for $47,000. The contention is correct. The respondent's conduct is relevant to the question whether the Tribunal should find that the agreement is not fair and reasonable. The respondent was able to secure a settlement which was in his interest, but avoided having first to resolve with the applicant any question about whether he would receive the full amount of his costs under the costs agreement, or accept some lesser amount.

[87] Another of the applicant's contentions is that an estimate of the likely amount she would have to pay as a consequence of the proposed settlement was not provided to her, before an agreement was reached to settle her claim. That is correct. If the earlier offer had been re-opened, and accepted, she knew how much of it would be applied to meeting costs. But she had no knowledge of the position at the time when the respondent agreed to the amount of $45,000. Whether this is a breach of section 312 of the LP Act would depend on the meaning of the expression, "the settlement is executed" in section 312. The Tribunal does not have the benefit of submissions on this point. However, it is unnecessary to resolve the question. The question is whether the costs agreement is not fair and reasonable, and in deciding that question, the Tribunal can have regard to "the circumstances and the conduct of the parties in the matters after the agreement was made".

[88] In her submissions the applicant contended that pressure was brought to bear on the applicant to sign the Deed of Release; and that part of that pressure was created by the issue of the invoice of 3 March 2021. The material reveals that pressure to sign the Deed was brought on the applicant. The material does not reveal when the applicant signed the Deed. It is therefore difficult to determine whether the tax invoice of 3 March 2021 played a role in the exertion of pressure on her.

Outcome

[89] The applicant has established that she entered into the FCC costs agreement as a result of a misrepresentation by the respondent.

[90] The respondent achieved a settlement of the applicant's claim without the applicant's instructions, and went beyond her instructions to benefit himself without

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[24] Her contention is that she would have also been entitled to recover the sum of $3,565.87, paid in April 2020. It is unnecessary to decide if this is correct.

materially advancing the applicant's interests. The respondent did not seek instructions, and did not disclose to the applicant the fees she would have to pay, before he agreed to the settlement sum, to avoid having to accept a reduction of fees. Some pressure was exerted on the applicant to sign the Deed of Release. The benefit the respondent sought to achieve by this conduct depended upon enforcement of the FCC costs agreement. In my view, this conduct of the respondent has the effect that the agreement was no longer fair and reasonable (if it had been up till the time of this conduct).

[91] For each of these reasons, the FCC costs agreement should be set aside.