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|  | Supreme CourtNew South Wales |

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| Case Name:  | Bevan v Bingham & Ors |
| Medium Neutral Citation:  | [2023] NSWSC 19 |
| Hearing Date(s):  | 12 May 2022 |
| Date of Orders: | 7 February 2023 |
| Decision Date:  | 7 February 2023 |
| Jurisdiction:  | Common Law |
| Before:  | Bellew J |
| Decision:  | (1)   The proceedings are dismissed. (2)   The plaintiff is to pay the defendants’ costs as agreed or assessed. |
| Catchwords:  | LEGAL PRACTITIONERS – Costs – Statutory interpretation – Where legal practitioner entered into a costs agreement and estimated his costs at $60,000.00 – Where the practitioner failed to provide updates of estimated costs – Where the practitioner’s costs ultimately totalled $349,360.00 – Where Review Panel found that the failure on the part of the practitioner to provide updated estimates rendered the costs agreement void ab initio – Whether that finding reflected error – Whether the reasons of the Review Panel were adequate – No error established – Proceedings dismissed LEGAL PRACTITIONERS – Duty to the Court – Obligation upon legal practitioners to exercise judgment in determining what evidence is to be filed and relied upon in proceedings – Obligation upon legal practitioners not to burden the Court with material which is extraneous and duplicitous |
| Legislation Cited:  | Bankruptcy Act 1966 (Cth)Legal Profession Uniform Law Application Act 2014 (NSW)Legal Profession Uniform Law (NSW) |
| Cases Cited:  | AAI Limited trading as AAMI v Boga [2020] NSWSC 1903; (2020) 95 MVR 17Agricultural and Rural Finance Pty Limited v Gardiner (2008) 238 CLR 570; [2008] HCA 57 Bevan v Bingham [2022] NSWSC 863Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 248 CLR 378; [2012] HCA 56Insurance Australia Limited t/as NRMA Insurance v Milton [2016] NSWCA 156; (2016) MVR 78Insurance Australia Limited t/as NRMA Insurance v Milton (No 2) [2016] NSWCA 173Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1990] HCA 28SAS Trustee Corporation v Miles (2018) 265 CLR 137; [2018] HCA 55SDW v Church of Jesus Christ of Latter-Day Saints [2008] NSWSC 1249; (2008) 222 FLR 84STZAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34Thiess v Collector of Customs (2014) 250 CLR 664; [2014] HCA 12 |
| Category:  | Principal judgment |
| Parties:  | Christopher John Bevan – PlaintiffJohn David Bingham – First DefendantEvangelina Francesca Kessly – Second DefendantJohn Anthony Levingston – Third DefendantFrances Alexandra Hutley – Fourth Defendant |
| Representation:  | Counsel:M Cashion SC and C Carroll – PlaintiffD Robinson SC and M Hazan– First DefendantSelf-represented – Second DefendantSolicitors:Breene & Breene Solicitors – PlaintiffBicknell & Monteith Lawyers – First DefendantSelf-represented – Second DefendantNSW Crown Solicitor’s Office – Third DefendantNSW Crown Solicitor’s Office – Fourth Defendant |
| File Number(s):  | 2021/141373 |
| Publication Restriction:  | Nil |

Judgment

INTRODUCTION

1. By an amended summons filed in Court (without objection) on 12 May 2022 Christopher John Bevan (the plaintiff) seeks the following orders:
2. An order that the decision of the Review Panel constituted by the third and fourth defendants (“the Review Panel”) under Division 5 of the *Legal Profession Uniform Law Application Act 2014* (NSW) (“the Application Act”) dated 22 April 2021 (“the Review Panel Decision”) be set aside in its entirety, including its determination of the concurrent Applications for Review filed, firstly, by the second defendant on 3 December 2020, secondly, by the first defendant on 9 December 2020 and, thirdly, by the plaintiff on 17 December 2021 (“the Relevant Applications for Review”).
3. An order that Certificates of Determination issued by the Review Panel on various dated (sic) as from 22 April 2021 to The Manager, Costs Assessment in respect of its determination of the Relevant Applications for Review pursuant to ss 87 and 88 of the Application Act be set aside pursuant to sec. 89(2) of the Application Act.
4. An order that new Certificates of Determination, which give effect to the findings of this Court on this appeal from the Review Panel Decision in respect of the fair and reasonable costs of each of the plaintiff and the first defendant respectively (“the New Certificates of Determination”) be issued to the Registrar of this Division and to each of the parties to this proceeding pursuant to ss 87 to 89 of the Application Act and, thereafter, that they be dealt with by The Manager, Costs Assessment in accordance with Division 2 of Part 7 of the Application Act.
5. An order that, subject to paragraphs 5-8 below, the Registrar of this Division, upon receipt of the New Certificates of Determination from The Manager, Costs Assessment, register the New Certificates of Determination as judgments of this Court against the first defendant and the second defendant respectively, as the judgment debtors of the plaintiff and the first defendant respectively, pursuant to ss 70(5) and 71(3) of the Application Act.
6. A declaration that the first defendant is liable to the plaintiff for the assessed costs certified in the Certificates of Determination issued pursuant to paragraph 3 above subject to satisfaction by the first defendant of costs for payment imposed in clauses 4 and 7 of the costs agreement between them dated 16 September 2019.
7. A declaration that the second defendant is unconditionally liable to the first defendant for the assessed costs certified in the Certificate of Determination issued pursuant to paragraph 3 above in respect of the first defendant’s claim for costs.
8. An order that the first defendant specifically perform all the executory promises he made to the plaintiff pursuant to the plaintiff’s costs agreement dated 16 September 2019, firstly, by enforcing the judgment debt entered in the first defendant’s favour against the second defendant for the amount of the first defendant’s assessed costs as certified pursuant to paragraph 3 above and, secondly, by paying to the plaintiff the amount of his assessed costs and interest accrued on those costs as certified pursuant to paragraph 3 above and in accordance with paragraph 8 below.
9. An order that the second defendant do all things, execute all documents and pay all moneys that are necessary to make a payment or payments to the first defendant which is or are sufficient to enable the first defendant to make the payments which are required to be made by the first defendant to satisfy the following obligations owed by the second defendant to the first defendant and also owed by the first defendant to the plaintiff as the case may be, namely:
10. the second defendant’s judgment debt owed to the first defendant for his assessed costs and disbursements;
11. the first defendant’s judgment debt owed to the plaintiff for the plaintiff’s assessed costs as counsel;
12. the assessed costs of the plaintiff and of the third and fourth defendants incurred in this proceeding which the defendants are ordered to pay either jointly or severally;
13. the costs of the implementation of these orders by the plaintiff’s solicitors after the day of these orders; and
14. the plaintiff’s costs as ordered to be paid pursuant to paragraph 8(4) above as agreed; or
15. An order that the first and second defendants jointly and severally pay the costs of the appeal to this Court of each of the plaintiff and the third and fourth defendants on the ordinary basis.
16. Such further or other relief as seems appropriate to the Court.

THE EVIDENCE

1. Before setting out the evidence which was ultimately relied upon by the parties, it is necessary for me to make some preliminary observations.
2. Prior to the hearing, the plaintiff’s solicitor filed with the Court:
3. 3 volumes of documentary material labelled “Court Book”, extending to more than 900 pages;
4. 2 further volumes labelled “Plaintiff's tender bundle”, extending to a further 520 pages; and
5. 3 further volumes labelled “Plaintiff's bundle of authorities – Legislation and extrinsic materials cited in oral argument", extending to what I estimate was in excess of 1,200 pages.
6. In the course of reading the material prior to the hearing, it became increasingly apparent that there was a considerable degree of duplicity within it. I also formed the preliminary view that much of it seemed surplus to what appeared would be likely to be necessary in order to allow the issues between the parties to be considered and determined.
7. These preliminary views and impressions were confirmed at the outset of the hearing when senior counsel for the plaintiff, in response to observations made by me about the amount of material which had been filed, commented that “not very much of it matters”.[[1]](#footnote-1) Senior counsel for the first defendant took a similar view[[2]](#footnote-2), before observing that I would “never have to read the whole of the material”.[[3]](#footnote-3) Subsequently, senior counsel for the plaintiff candidly acknowledged that there was “not only too much material, there (was) a duplication of it,”[[4]](#footnote-4) to the point where I could “ignore the tender bundles”.[[5]](#footnote-5)
8. These various observations beg the obvious question, although in saying that I emphasise that I level no criticism whatsoever towards senior counsel for the plaintiff, or senior counsel for the first defendant. Their respective assessments of the material, and the relevance of much of it, were completely in accordance with my own. I accept that neither had any input into this aspect of the preparation of their respective cases. Nevertheless, a number of matters need to be emphasised.
9. To begin with, when preparing any proceedings for hearing there is a fundamental obligation upon all legal practitioners to give careful consideration to, and to identify, the evidence which is necessary to put before the Court to allow the issue(s) to be determined.[[6]](#footnote-6) That obligation was not discharged by the plaintiff’s solicitor in the present case. In *SDW v Church of Jesus Christ of Latter-Day Saints*[[7]](#footnote-7) Simpson J (as her Honour then was) made a number of observations which are particularly apt:

[35] To my observation, it has become too common a practice for legal practitioners to produce to the court copies of every document that has come into existence associated with the facts the subject matter of the litigation. It denotes, at best, the exercise of no clinical legal judgment and the abdication of the responsibility that lies upon legal practitioners to apply thought and judgment in the selection of the material to be presented to the court. A common example is the photocopying and presentation of hospital files, from which every page is reproduced, and copied multiple times – documents such as histology reports, x-ray reports, nursing notes, and quite irrelevant charts and print outs of complex investigations. This case is no different. The costs to the parties are astronomical. The practice casts immense burdens on the legal representatives of the opposing party, who are obliged to read all of the material, further increasing the costs.

[36] The practice must cease. If legal representatives will not voluntarily accept the responsibility of making appropriate selections of the material to be put before the court, then judicial officers must act to ensure that they do. One appropriate sanction, in cases of excess, is an order that, no matter what the outcome of the proceedings, no costs be recoverable from the losing party in respect of the excess, and, further, no costs be recoverable by the solicitor from the client for the excessive copying. I propose to make such an order.

1. The plaintiff’s solicitor engaged in the common practice to which her Honour referred. He failed to exercise the requisite clinical legal judgment, and he abdicated his responsibility to determine what evidence was actually necessary to allow the issue(s) to be determined. It is self-evident that the costs incurred in preparing such material, and the costs incurred as a result of counsel for each party having to read it, would have been significant. It is sadly ironic that all of this occurred in a case concerning costs of $349,360.00 which are said to be owing to a legal practitioner, in circumstances where it was originally estimated that such costs would be $60,000.00.
2. The extent of the failures on the part of the plaintiff’s solicitor in these respects can be gauged from the material which was actually relied upon at the hearing. In that regard:
3. the plaintiff read his affidavit of 7 July 2021, and tendered exhibit CJB1 to that affidavit;[[8]](#footnote-8)
4. the plaintiff tendered Volumes 1 and 2 of the folders marked “plaintiff’s tender bundle”;[[9]](#footnote-9)
5. the first defendant read his affidavit of 13 August 2021, and tendered exhibit JDB1 to that affidavit;[[10]](#footnote-10)
6. the first defendant tendered the Certificate of Annulment of the second defendant's bankruptcy of 25 March 2022;[[11]](#footnote-11)
7. the second defendant read (subject to relevance) her affidavit of 2 July 2021;
8. the plaintiff read his affidavits of 10 August 2021 and 23 August 2021 in reply.
9. I should also note that of the 32 authorities which were copied and provided to me, I was taken to 2 in the course of oral argument.
10. I am simply left to reiterate that the practice of burdening the Court with extraneous and unnecessary material is unacceptable. That is particularly so in a case such as the present where, as will be evident from the summary which follows, the facts are in relatively short compass, and where the primary issue for determination, although not without its complications, is essentially a narrow one.

THE FACTS

The plaintiff’s retainer

1. The plaintiff is a Barrister who was admitted to practice in 1991. He was retained by the first defendant, a solicitor, to appear for the second defendant in proceedings seeking to annul an order made against her pursuant to the *Bankruptcy Act 1966* (Cth).
2. The plaintiff executed a costs agreement dated 16 September 2019 (the plaintiff’s agreement) with the first defendant pursuant to s 180(1)(c) of the *Legal Profession Uniform Law* (NSW) (the LPUL). The preamble to the plaintiff’s agreement stated the following:[[12]](#footnote-12)

The [first defendant] has retained [the plaintiff] on behalf of [the second defendant]. This is a costs agreement between [the plaintiff] and [the first defendant] under the *Legal Profession Uniform Law* (NSW) (‘UL’), section 180(1)(c). This is not a retainer agreement specifying the terms on which [the first defendant] has retained [the plaintiff] to perform the legal services specified in the definition above of the brief for [the second defendant].

1. The plaintiff’s agreement set out the terms of the plaintiff's retainer as follows:[[13]](#footnote-13)

Advise, settle court process and appear on hearings in the Federal Court of Australia and the Supreme Court of New South Wales respectively to apply for an annulment of the sequestration of the bankrupt estate of [the second defendant] ordered by the Federal Circuit Court in July 2019 pursuant to section 153B of the *Bankruptcy Act 1966* and to apply to set aside the judgment entered on 1 July 2016 in Supreme Court proceeding no. 2016/200224 at the suit of Benjamin & Khoury Pty Ltd as judgment creditor or in respect of legal costs payable to that firm as assessed pursuant to the *Legal Profession Uniform Law Application Act 2014* in 2016 pursuant to UCPR 36.15 (‘the Brief').

1. Clause 2 of the plaintiff’s agreement made provision for the plaintiff’s fees as follows:[[14]](#footnote-14)

$8,000 per day for all appearances in court occupying more than 6 hours, including preparation on the day of any hearing up to a maximum of 10 hours per day;

$4,800 for all appearances in Court occupying less than 6 hours including all interlocutory hearings;

$800 per hour for all written and oral advice, research and reading and consideration of the brief, and all conferences and preparation for court appearances;

$400 per hour for all written and oral advice, research and reading and consideration of the Brief and all conferences and all preparation for court appearances rounded up to the nearest half-hour for time spent on the Brief of less than 30 minutes;

Any travelling expenses, accommodation expenses and other out-of-pocket expenses;

The amount for the goods and services tax ('GST') which shall be added to the above.

1. The estimate of the costs which were expected to be incurred was set out in Clause 3 of the plaintiff’s agreement in the following terms:[[15]](#footnote-15)

[The plaintiff] estimates his total fees for the brief of $60,000 plus GST plus travelling and out-of-pocket expenses for the three likely stages of the proceedings, made up as follows:

(a)    initial advice and conferences – $12,000 plus GST;

(b)   commencement of the Federal Court proceeding – $20,000 plus GST;

(c)    commencement of the Supreme Court proceeding – $24,000.

1. It should be noted that these amounts total $56,000.00 and not $60,000.00 which was the plaintiff’s stated estimate of his fees.
2. Clause 4 of the plaintiff’s agreement was in the following terms:[[16]](#footnote-16)

[The first defendant’s] liability for the payment of fees under this agreement is conditional upon him recovering [the plaintiff’s] fees from either [the second defendant] or the respondent to the appeal, Scott Darren Pascoe, [sic] to the intent that [the first defendant] will only be liable for [the plaintiff’s] fees under this agreement to the extent that one or more of those parties has put him into the necessary funds to pay [the plaintiff’s] fees. However, liability to pay [the plaintiff’s] fees is not otherwise dependent upon the success of the proceedings which is the subject of this costs agreement.

1. Clause 7 of the plaintiff’s agreement further provided as follows:[[17]](#footnote-17)

Subject to paragraph 4 above, [the first defendant’s] obligations under this agreement are personal him. [The first defendant] is liable for [the plaintiff’s] fees rather than the [second defendant] being liable. [The first defendant] will use his best endeavours at his expense to recover [the plaintiff’s] fees from either the [second defendant] or the respondent to the appeal, Scott Darren Pascoe, [sic] expeditiously, irrespective of the outcome of the proceedings which are the subject of this costs agreement and the Brief.

1. The references in clauses 4 and 7 to “the respondent to the appeal, Scott Darren Pascoe” are to be ignored. They were obviously inserted into the plaintiff’s agreement in error.
2. Notwithstanding his original estimate of costs of $60,000.00, the plaintiff rendered the following Memoranda of Fees to the first defendant:[[18]](#footnote-18)

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| Number  | Date | Amount |
| 1 | 26 September 2019 | $31,460.00 |
| 2 | 28 November 2019 | $56,100.00 |
| 3 | 13 December 2019 | $15,840.00 |
| 4 | 9 April 2020 | $192,720.00 |
| 5 | 23 June 2020 | $20,240.00 |
| 6 | 24 July 2020 | $33,000.00 |
| TOTAL $349,360.00 |

1. It is common ground that having provided his original estimate of costs, no ongoing updates of his estimated costs were provided by the plaintiff at any time.

The first defendant’s agreement

1. The first defendant executed a costs agreement with the second defendant (the first defendant’s agreement)[[19]](#footnote-19) which set out the schedule of work to be performed as follows:[[20]](#footnote-20)

To act for you in connection with the annulment of bankruptcy include [sic] attending on you & taking instructions, conferences with you & barristers/counsel, advising you, communications with various parties, including solicitors Boyd House & Partners and Teneo Legal, Manager Costs Assessment, & Supreme Court, Court of Appeal, District Court & Federal Circuit Court of Australia, preparing applications for filing with the Federal Court of Australia and Supreme Court of NSW and attending to filing of same, and attending court hearings.

1. The first defendant’s agreement nominated an hourly rate of $380.00 plus GST, and in addition stated the following:[[21]](#footnote-21)

You will be proportionately charged for work involving shorter periods less than an hour. Our charges are structured in 6 minute units. For example, the time charged for an attendance of up to 6 minutes will be 1 unit and the time charged for an attendance between 6 and 12 minutes will be 2 units.

Our rates are reviewed on a regular basis and may change during the course of a matter. In relation to lengthy matters this may affect our cost estimates (which may be revised accordingly). You will be given 30 days' notice in writing of any changes to our charge-out rates.

The annulment of the second defendant’s bankruptcy

1. On 10 July 2020 in the Federal Court of Australia, Burley J ordered, upon certain conditions being satisfied, that the second defendant's bankruptcy be annulled pursuant to s 153B of the *Bankruptcy Act 1966* (Cth). A significant breakdown in the professional relationship between the plaintiff and the first defendant followed, the nature and extent of which is clearly evident from exchanges of email correspondence between them. It is not necessary for me to canvass that any further.

The plaintiff’s application for an assessment of costs

1. On 29 July 2020, the plaintiff filed an application for an assessment of his costs of $349,360.00, naming the first defendant as the costs respondent.[[22]](#footnote-22) He claimed an additional amount of $6,983.48 by way of interest.[[23]](#footnote-23)
2. The plaintiff's application was referred to Michael Eagle, Barrister, for assessment.[[24]](#footnote-24) On 6 November 2020, Mr Eagle advised the plaintiff and the first defendant that he had completed his assessment.[[25]](#footnote-25) He issued a Certificate in respect of the plaintiff’s application which stated (inter alia) the following:[[26]](#footnote-26)

The amounts determined in the assessment are as follows:

1.    Amount of costs assessed $218,792.20.

2.   Interest on costs to date $2,661.99.

3.   Add in respect of filing fee $3,493.60.

4.   Total amount specified in this certificate $224,947.79.

1. In respect of the separate application brought by the first defendant, the certificate provided as follows:[[27]](#footnote-27)

1. The Application is determined by assessing as a fair and reasonable amount of costs to be paid by [the first defendant] to [the plaintiff] $218,792.20.

2. [The first defendant] is to pay [the plaintiff] the filing fee of $3,493.60.

3. The total amount payable by [the first defendant] to [the plaintiff] is $222,285.80.

The reasons of the costs assessor

1. Mr Eagle provided a statement of reasons for his assessment.[[28]](#footnote-28) Whilst it is not necessary, for present purposes, to canvass the entirety of those reasons, the following matters are relevant.
2. In addressing the rates charged by the plaintiff, Mr Eagle said the following:[[29]](#footnote-29)

Having regard to s 172 of the LPUL a fair, reasonable and proportionate amount having regard to the level of skill, experience and specialisation and seniority of the lawyers concerned and the level of complexity, novelty and difficulty of the issues involved at the time the work was conducted are as follows:

$6,000 per day brief on hearing fee;

$600 per hour for other work.

1. Mr Eagle went onto determine:[[30]](#footnote-30)

Having regard to the complexity and general nature of the matter, I formed the view that the time allowed for performance of certain of the items should be reduced so that they represented in my opinion a, ‘*fair and reasonable amount of costs for the work*’ (emphasis in original).

The applications by the plaintiff and the first defendant for review

1. By notice dated 10 December 2020, the plaintiff sought a review of Mr Eagle’s determination.[[31]](#footnote-31) In doing so, he advanced a number of grounds in which were in the following terms:[[32]](#footnote-32)

1. The Costs Assessor erred at para 5(2) of his reasons by failing to find that, although ‘*the agreement between [the first defendant] and [the plaintiff] was made on the basis that [the first defendant] would only be liable for [the plaintiff’s] costs if he [the first defendant] was put in funds by [the second defendant] or by way of order of the court [by virtue of clause 4 of the costs agreement*]":

a.    Clause 4 of the costs agreement operated as a condition for payment in the nature of a surety by [the second defendant] for [the first defendant’s] personal liability to [the plaintiff] for payment of counsel's fees;

b.    [The plaintiff] had, as at 1 September 2020, fully performed his obligations to [the first defendant] under the costs agreement by fully performing his retainer to advise and appear in the Federal Court application for an annulment of [the second defendant’s] bankruptcy;

c.   The costs agreement remained executory on the part of [the first defendant] as at 1 September 2020, to the extent of his obligation to pay to [the plaintiff] his fees for fully performing his retainer;

d.    In consequence of [the first defendant] sending an email to [the plaintiff] on 1 September 2020, in which [the first defendant] refused to recover from [the second defendant] the funds necessary for payment of [the plaintiff’s] fees unless [the plaintiff] financed the recovery of his fees from [the second defendant] including the payment of costs assessment filing fees and counsel's fees for taking the necessary recovery action against [the second defendant], [the plaintiff] was released from the condition for payment of fees in cl. 4 of the costs agreement.

2. The Costs Assessor erred at paras 5(2) and 6 of his reasons when he substituted, purportedly pursuant to s. 172 of the *Legal Profession Uniform Law 2014* (NSW) ("Uniform Law"), rates for [the plaintiff’s] fees of $6,000 per day and $600 per hour in place of the rates expressly agreed upon by [the plaintiff] and [the first defendant] in the costs agreement dated 16 September 2019, being an agreement as to the rates of fees which the Assessor upheld as valid for the purposes of the determining [the plaintiff’s] entitlement to interest on his unpaid fees at par 10(2) of his reasons and which [the second defendant] herself expressly approved of during a conference with [the plaintiff] and [the first defendant] on 17 September 2019. The grounds must clearly and concisely identify which aspects of the determination(s) under review are contested.

3. The Assessor erred at paras 5(2) and 6 of his reasons by failing to adopt and apply the rates for counsel's fees which were expressly agreed upon in the costs agreement dated 16 September 2019 (namely, $8,000 per day and $800 per hour) pursuant to:

a.   s. 172(4) of the Uniform Law (providing that the rates agreed upon are prima facie evidence of their fairness and reasonableness if there were no breaches of Divisions 3 or 4 of the Uniform Law and no such breaches were found in this case by the assessor); and

b.    s. 184 of the Uniform Law (providing that, subject to the Uniform Law, that costs agreement may be enforced by [the plaintiff] in the same way as any other contract as between himself and [the first defendant] as the retaining law practice).

4. The Costs Assessor erred at paras 7-9 of his reasons by failing to give any reasons, or alternatively, adequate reasons, for his reduction of [the plaintiff’s] fees (or the hours of work that he was entitled to bill for) from $349,360.00 to $218,454.19 including GST but excluding interest.

5. The Costs Assessor erred at paras 7-9 of his reasons by not determining that the fair and reasonable amount of [the plaintiff’s] fees is the amount which [the plaintiff] had billed, namely, $349,360.00, at the rates expressly agreed upon between [the plaintiff] and [the first defendant] in the costs agreement dated 16 September 2019 plus interest accrued on that amount pursuant to s. 195(1) of the Uniform Law and rule 75 of the *Legal Profession Uniform Rules 2015* ("Uniform Rules").

1. On 8 December 2020, the first defendant filed an application for a review of the Mr Eagle’s determination.[[33]](#footnote-33) In doing so, the first defendant said the following in terms of the grounds of the application:[[34]](#footnote-34)

This application is simply a 'submitting application' because [the second defendant] has made an application for review in the assessment 2020/247053 in respect of my bill of costs which included [the plaintiff's] costs as a disbursement.

I have no further submissions to make in relation to this review application other than (1) the costs determined by the review panel as payable by me to [the plaintiff] cannot fairly and reasonably be determined at an amount greater than the cost payable by [the second defendant] to me in relation to [the plaintiff's] costs and (2) the learned assessor correctly determined that I have no obligation to pay [the plaintiff] until I am put in funds to do so, and (3) the same review panel appointed to [the second defendant’s] review application should deal with this review application.

The decision of the Review Panel

1. The review applications were referred to John Levingston and Frances Hutley who are the third and fourth defendants respectively in the present proceedings (the Review Panel). On 16 April 2021, the Review Panel dismissed both applications.

The reasons of the Review Panel

1. Bearing in mind the issues for determination it is necessary to set out a number of aspects of the reasons of the Review Panel.
2. To begin with, the Review Panel found the following:[[35]](#footnote-35)

[The second defendant] did not comply with the obligations under LPUL s 174(1)(a) and (b) as he did not provide an Estimate of the total legal costs as it did not:

provide a single inclusive estimate;

include [the plaintiff's] fees; and

include GST.

1. Having cited the provisions of ss 174(1)(a) and (b) of the LPUL, the Review Panel concluded that there was no discretion in terms of the obligation imposed by s 174(1)(a), the consequence of which was that the first defendant’s agreement was void.[[36]](#footnote-36) In this regard, and in terms of the plaintiff's agreement, the Review Panel further concluded:[[37]](#footnote-37)

[56] [The plaintiff] had an obligation to comply with LPUL s 175(2), which incorporates the obligation in LPUL s 174(b) to provide an updated estimate. He did not do so, and the consequence is that (the plaintiff's agreement) is also void.

1. The Review Panel went on to find:[[38]](#footnote-38)

[57] Both [the plaintiff's agreement] and [the first defendant's agreement] are void for non-compliance with LPUL, s 174(1)(a) and or (b). The consequence is there is no contractual basis for Legal costs claimed by either. Further, neither of them gets the benefits LPUL, s 172(4), providing that the agreed rates are prima facie evidence they are fair and reasonable, as there were breaches of LPUL s 174(1)(a) and (b) by [the second defendant]; and a breach of LPUL s 185(2) by [the plaintiff] who failed to prove an updated estimate to enable [the second defendant] to comply with LPUL s 174(1)(b). In addition, neither gets the benefit of LPUL s 184 (Effect of costs agreement) and cannot enforce an agreement that is void.

[58] In the absence of an enforceable agreement, the costs are to be determined on a quantum meruit, being so much as the party reasonably deserves to have … in a costs assessment being restitutionary in character or to prevent unjust enrichment … contrary the contractual term which no longer apply. This is the fair and reasonable value of the legal services assessed.

1. The Review Panel found[[39]](#footnote-39) that the plaintiff’s costs had been proportionately and reasonably incurred, except for the costs reduced or disallowed by Mr Eagle, before going on to state:[[40]](#footnote-40)

[72] The Panel has considered [the plaintiff's] level of skill, experience, specialisation and seniority, and finds [the plaintiff] was admitted in 1991 and has many years' experience. The Panel finds that the hourly and daily charge rates claimed by [the plaintiff] were not fair and reasonable and the amounts claimed were also not fair and reasonable. The Panel agrees with the reduced rates allowed by the Assessor are [sic] fair and reasonable and the amount of legal costs allowed by the Assessor for [the plaintiff's] work was fair and reasonable.

1. The Review Panel also found:[[41]](#footnote-41)

[73] Proceedings to have a bankruptcy set aside are complex. The judgement creditor had entered a judgement in the NSW Supreme Court and the bankruptcy order was made in the Federal Court. An application for annulment was opposed by the judgement creditor and was heard for 2 days in the Federal Court and a conditional order was made, but [the second defendant] did not satisfy the conditions and a further hearing for further conditions was involved, and an order was obtained to set aside the sequestration order.

1. Finally, the Review Panel found that:
2. the reduced rates assessed by Mr Eagle were fairly and reasonably reflective the plaintiff's labour and responsibility as the person doing the work;[[42]](#footnote-42) and
3. the work done by the plaintiff was of an appropriate quality and resulted in the sequestration order being set aside.[[43]](#footnote-43)

THE RELEVANT STATUTORY PROVISIONS

1. It is convenient at this point to set out a number of provisions of the LPUL.
2. To begin with, the objectives of the LPUL are set out in s 3 in the following terms:

**Objectives**

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by—

(a) providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and

(b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and

(c) enhancing the protection of clients of law practices and the protection of the public generally; and

(d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and

(e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and

(f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

1. Section 172 is in the following terms:

**Legal costs must be fair and reasonable**

(1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are—

(a) proportionately and reasonably incurred; and

(b) proportionate and reasonable in amount.

(2) In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect—

(a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and

(b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and

(c) the labour and responsibility involved; and

(d) the circumstances in acting on the matter, including (for example) any or all of the following—

(i) the urgency of the matter;

(ii) the time spent on the matter;

(iii) the time when business was transacted in the matter;

(iv) the place where business was transacted in the matter;

(v) the number and importance of any documents involved; and

(vi) the quality of the work done; and

(f) the retainer and the instructions (express or implied) given in the matter.

(3) In considering whether legal costs are fair and reasonable, regard must also be had to whether the legal costs conform to any applicable requirements of this Part, the Uniform Rules and any fixed costs legislative provisions.

(4) A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if—

(a) the provisions of Division 3 relating to costs disclosure have been complied with; and

(b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4.

1. Section 174 sets out disclosure obligations in (inter alia) the following terms:

**Disclosure obligations of law practice regarding clients**

(1) A law practice--

(a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and

(b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client--

together with the information referred to in subsection (2).

…

1. Section 175 is in the following terms:

**Disclosure obligations if another law practice is to be retained**

(1) If a law practice (the "first law practice" ) intends to retain another law practice (the "second law practice" ) on behalf of a client, the first law practice must disclose to the client the details specified in section 174(1) in relation to the second law practice, in addition to any information required to be disclosed to the client under section 174.

(2) If a law practice (the "first law practice") retains or intends to retain another law practice (the "second law practice" on behalf of a client, the second law practice is not required to make a disclosure to the client under section 174, but must disclose to the first law practice the information necessary for the first law practice to comply with subsection (1).

(3) This section does not apply if the first law practice ceases to act for the client in the matter when the second law practice is retained.

1. Section 178 is in (inter alia) the following terms:

**Non-compliance with disclosure obligations**

(1) If a law practice contravenes the disclosure obligations of this Part--

(a) the costs agreement concerned (if any) is void;

(b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation …..

…

1. Section 184 is in the following terms:

**Effect of costs agreement**

Subject to this Law, a costs agreement may be enforced in the same way as any other contract.

1. Finally, s 185 is in (inter alia) the following terms:

**Certain costs agreements are void**

(1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.

THE ISSUES

1. Although senior counsel for the plaintiff articulated a number of issues for determination, the hearing proceeded on the basis that there was a principal issue, the resolution of which would largely determine those that remained. In these circumstances it is appropriate to address that principal issue at the outset.

Did the Review Panel err in concluding that the plaintiff’s agreement was void?

The reasons of the Review Panel

1. The relevant parts of the reasons of the Review Panel have been previously set out.
2. In finding that the plaintiff’s agreement was void, and although not expressly stated, the Review Panel obviously concluded that the agreement was void ab initio.

Submissions of the plaintiff

1. Senior counsel for the plaintiff submitted that for a number of reasons, the provisions of the LPUL did not operate in the way in which the Review Panel found that they did.
2. To begin with, senior counsel emphasised that a valid disclosure of estimated costs had been made in the plaintiff's agreement at the time at which it was entered into. He submitted that, in accordance with s 184 of the LPUL, such an agreement could be enforced in the same way as any other contract, such that in all of the circumstances, any failure by the plaintiff to provide updated estimates of his fees could not result in the plaintiff's agreement being declared void ab initio.
3. Senior counsel further submitted that on its proper interpretation, the effect of s 178(1)(a) of the LPUL was that the plaintiff's agreement could only be regarded as void ab initio if the contravention of the relevant obligation occurred at the same time as the agreement was entered into. Senior counsel submitted that this interpretation was supported by the objectives of the LPUL set out in s 3, and particularly that in s 3(e).
4. Finally, senior counsel submitted that the Review Panel's findings reflected an approach which was repugnant to established principles of statutory interpretation, because there was nothing in the text, purpose or context of s 178(1)(a) of the LPUL to suggest that it should operate retrospectively, so as to strike down the entirety of the plaintiff’s agreement.

Submissions of the first defendant

1. Senior counsel for the first defendant submitted that no error on the part of the Review Panel had been established. He submitted, by reference to s 178(1)(a) of the LPUL, that no distinction was to be drawn in terms of the time at which any disclosure obligation was breached, and that upon any breach being made out, the proper conclusion was that the agreement was void ab initio.
2. Senior counsel for the first defendant also relied on the objectives set out in s 3 of the LPUL, and particularly emphasised that in s 3(d). He submitted that this particular objective reflected an intention that a person be placed in a position to make an informed decision, in terms of legal services and costs, in their own interests at any time. He submitted that, viewed in this way, that there was no basis on which to conclude that the necessity for a person to be able to make an informed choice did not endure for the entirety of the period of the relevant contractual relationship.

CONSIDERATION

1. Whether the Review Panel erred in concluding that the plaintiff’s agreement was void ab initio raises a question of statutory construction. In that regard, the relevant principles may be summarised as follows.
2. First, the primary objective of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute. The meaning of the provision must therefore be determined by reference to the language of the statute as a whole.[[44]](#footnote-44)
3. Secondly, the task of statutory construction begins and ends with a consideration of the text, which must be considered in light of its context, its legislative purpose, the relevant legislative history, and any relevant extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.[[45]](#footnote-45)
4. Thirdly, context should be considered in the first instance, and not merely when ambiguity is said to arise.[[46]](#footnote-46)
5. Fourthly, although the legal meaning of a particular provision will ordinarily correspond with its grammatical meaning, the context of the words, the consequences of a literal or grammatical construction, and the purpose of the statute, may require the provision to be read in a way that does not correspond with the literal or grammatical meaning.[[47]](#footnote-47)
6. Fifthly, a construction that promotes the purpose of the legislation is to be preferred over one which does not.[[48]](#footnote-48)
7. Finally, it is a circular, and erroneous, approach to statutory construction to construe the words of a definition by reference to the term defined.[[49]](#footnote-49)
8. There is no issue in the present case that the plaintiff was under an obligation to disclose updated estimates of his costs, nor is there any issue that he failed to do so. Pursuant to s 178(a) of the LPUL, if a law practice contravenes the prescribed disclosure obligations (as the plaintiff accepts that he did) the relevant costs agreement is void. Although not expressly stated, it is evident that the Review Panel came to the conclusion that the plaintiff's agreement was void ab initio. For the reasons that follow, I am of the view that that conclusion was correct.
9. I accept that at common law, a contract can only be construed as at the date on which it was made, and without regard to subsequent events.[[50]](#footnote-50) However, the present issue turns on a question of statutory construction. Bearing in mind the principles I have set out, there is nothing in the text of s 178(1)(a) of the LPUL which supports the proposition that the plaintiff’s agreement could only be determined to be void ab initio if the relevant contravention occurred at the time at which the agreement was entered into. Section 178(1)(a) draws no distinction whatsoever as to the time at which the relevant contravention might have occurred.
10. It is difficult to see how the construction which was advanced on behalf of the plaintiff promotes the objective in s 3(e) of the LPUL, which is directed towards the efficient, effective, targeted and proportionate regulation of the legal profession. More importantly, such a construction runs entirely contrary to the objective in s 3(d), namely that of empowering a person to make an informed choice about the legal services that he or she might access, and the costs involved. Nothing in the LPUL draws a distinction between a person being so empowered when considering whether to initially enter into a costs agreement on the one hand, and when considering whether to continue to access the legal services to which the agreement relates once it has been entered into, on the other. In the latter case, it is not possible for a person to make any informed choice unless the proper disclosures are provided. The present case serves as a stark example of why that is the case. The plaintiff's fees were, in the end result, almost 6 times his original estimate, a circumstance of which the second defendant was entirely unaware in the absence of the plaintiff providing updated estimates. Absent provision of that information, no person could ever be in a position to make an informed choice as contemplated by the objective in s 3(d). It follows that the construction submitted on behalf of the plaintiff fails to advance, and indeed is entirely inconsistent with, the stated objective in s 3(d) of the LPUL.
11. I should note that following the hearing, and prior to delivering this judgment, I was referred to a judgment of Walton J in *Bevan v Bingham*,[[51]](#footnote-51) the facts of which had some similarities to the present. However, an important point of distinction was that in that case, there was no issue as to the costs assessor’s conclusion that the particular costs agreement was void.[[52]](#footnote-52) In these circumstances, his Honour was not required to determine the issue which confronts me.
12. It was accepted that if I came to the view that there was no error on the part of the Review Panel in relation to its determination that the plaintiff’s agreement was void, the majority of the remaining issues would not require determination. The one remaining issue raised by the plaintiff is that the reasons of the Review Panel were inadequate. It is that issue which I now turn.

THE ADEQUACY OF THE REVIEW PANEL'S REASONS

1. The essence of the complaint made by the plaintiff is that the Review Panel failed to properly disclose its reasoning process in determining the amount of costs to which he was entitled. In considering this issue, it is necessary to bear firmly in mind that the reasons of an administrative decision maker are not to be scrutinised by overzealous judicial review seeking to discern whether some inadequacy may be gleaned from the way in which the reasons have been expressed, nor are such reasons to be minutely construed with an eye keenly attuned to the perception of error.[[53]](#footnote-53)
2. It is evident that in reaching its decision, the Review Panel expressly took into account the various matters set out in s 172(2) of the LPUL,[[54]](#footnote-54) and in doing so, agreed with, and adopted, the conclusions reached by Mr Eagle.[[55]](#footnote-55) Whilst Mr Eagle's reasons were brief, it is apparent that he concluded (inter alia) that the complexity, novelty and difficulty of the issues involved warranted the daily and hourly rates which were determined as being appropriate.
3. It is also plain from the Review Panel's reasons[[56]](#footnote-56) that in reaching its determination, it considered and took into account:
4. the plaintiff's level of skill, experience, specialisation and seniority;
5. the complexity of the proceedings; and
6. the course of the proceedings.
7. In those circumstances, and bearing in mind the principles to which I have referred, I am of the view that the reasons of the Review Panel were adequate.

ORDERS

1. For the foregoing reasons I make the following orders:
2. The proceedings are dismissed.
3. The plaintiff is to pay the defendants’ costs as agreed or assessed.
1. T1.44; T 1.50. [↑](#footnote-ref-1)
2. T 2.15 – T 2.16. [↑](#footnote-ref-2)
3. T 5.17. [↑](#footnote-ref-3)
4. T13.43. [↑](#footnote-ref-4)
5. T 12.42. [↑](#footnote-ref-5)
6. See Insurance Australia Limited t/as NRMA Insurance v Milton [2016] NSWCA 156; (2016) MVR 78 at [67] and the authorities cited therein; Insurance Australia Limited t/as NRMA Insurance v Milton (No 2) [2016] NSWCA 173 at [24]; [↑](#footnote-ref-6)
7. [2008] NSWSC 1249; (2008) 222 FLR 84 at [35] – [36]. [↑](#footnote-ref-7)
8. Exhibit A. [↑](#footnote-ref-8)
9. Exhibit B. [↑](#footnote-ref-9)
10. Exhibit 1. [↑](#footnote-ref-10)
11. Exhibit 2. [↑](#footnote-ref-11)
12. Exhibit A at 2. [↑](#footnote-ref-12)
13. Exhibit A at 2.. [↑](#footnote-ref-13)
14. Exhibit A at 2. [↑](#footnote-ref-14)
15. Exhibit A at 2 – 3. [↑](#footnote-ref-15)
16. Exhibit A at 3. [↑](#footnote-ref-16)
17. Exhibit A at 3. [↑](#footnote-ref-17)
18. Exhibit A at 21-43. [↑](#footnote-ref-18)
19. Exhibit A at 147. [↑](#footnote-ref-19)
20. Exhibit A at 149. [↑](#footnote-ref-20)
21. Exhibit A at 147. [↑](#footnote-ref-21)
22. Exhibit A at 121 - 122. [↑](#footnote-ref-22)
23. Exhibit A at 123. [↑](#footnote-ref-23)
24. Exhibit A at 133. [↑](#footnote-ref-24)
25. Exhibit A at 310 – 311. [↑](#footnote-ref-25)
26. Exhibit A at 316. [↑](#footnote-ref-26)
27. Exhibit A at 408. [↑](#footnote-ref-27)
28. Exhibit A at 319 – 323. [↑](#footnote-ref-28)
29. Exhibit A at 322. [↑](#footnote-ref-29)
30. Exhibit A at 322. [↑](#footnote-ref-30)
31. Exhibit A at 331 – 332. [↑](#footnote-ref-31)
32. Exhibit A at 333 – 334. [↑](#footnote-ref-32)
33. Exhibit A at 325 - 326. [↑](#footnote-ref-33)
34. Exhibit A at 327. [↑](#footnote-ref-34)
35. At [49]. [↑](#footnote-ref-35)
36. At [50] – [55]. [↑](#footnote-ref-36)
37. At [56]. [↑](#footnote-ref-37)
38. At [57] – [58] (citations omitted). [↑](#footnote-ref-38)
39. At [69]. [↑](#footnote-ref-39)
40. At [72]. [↑](#footnote-ref-40)
41. At [73]. [↑](#footnote-ref-41)
42. At [74]. [↑](#footnote-ref-42)
43. At [76]. [↑](#footnote-ref-43)
44. Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1990] HCA 28 at [69] – [70] per McHugh, Gummow, Kirby and Hayne JJ. [↑](#footnote-ref-44)
45. Thiess v Collector of Customs (2014) 250 CLR 664; [2014] HCA 12 at [22] – [23]; SAS Trustee Corporation v Miles (2018) 265 CLR 137; [2018] HCA 55 at [20]; [41]; [64]. [↑](#footnote-ref-45)
46. STZAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34; at [14]; [36]. [↑](#footnote-ref-46)
47. Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 248 CLR 378; [2012] HCA 56. [↑](#footnote-ref-47)
48. Project Blue Sky at [78]. [↑](#footnote-ref-48)
49. The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc (1994) 181 CLR 404; [1994] HCA 54 at [419] citing Wacal Developments Pty Limited v Realty Developments Pty Limited (1978) 140 CLR 503; [1978] HCA 30. [↑](#footnote-ref-49)
50. Agricultural and Rural Finance Pty Limited v Gardiner (2008) 238 CLR 570; [2008] HCA 57 at 582; 625. [↑](#footnote-ref-50)
51. [2022] NSWSC 863. [↑](#footnote-ref-51)
52. At [91]. [↑](#footnote-ref-52)
53. AAI Limited trading as AAMI v Boga [2020] NSWSC 1903; (2020) 95 MVR 17 at [75] – [76] and the authorities cited therein. [↑](#footnote-ref-53)
54. At [71] and following. [↑](#footnote-ref-54)
55. At [6]. [↑](#footnote-ref-55)
56. At [72] – [73]. [↑](#footnote-ref-56)