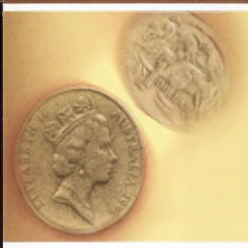

Costs of Expert Evidence

By Phillipa Alexander

The costs of expert evidence that a practitioner may recover from a client and the expert's fees which a successful client may then recover from an opposing party give rise to a number of issues.

DISCLOSURE

The *Legal Profession Act* 2004 (NSW) (LPA) and corresponding Acts in other jurisdictions require disclosure of an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs.[1] Many practitioners make full disclosure of their own fees but overlook disclosing the costs of expert evidence which may be required in the proceedings. Disclosure of these fees is mandatory as the LPA defines 'costs' for the purposes of disclosure as including fees, charges, disbursements, expenses and remuneration.[2]

If particular expert evidence is not contemplated at the outset of the matter, disclosure of an estimate of the expert's fees would be required as soon as is reasonably practicable once the law practice becomes aware that the fee is to be incurred, as reflecting a change to the disclosure already made.[3]

UNUSUAL EXPENSES

Where the costs of expert evidence are likely to amount to an unusual expense, it is recommended that a *Re Blyth and Fanshawe: Ex parte Wells*[4] warning be provided. As stated by Baggallay LJ:

> 'It is to be the general rule of law, and an important rule which is to be observed in almost all cases, that if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party, whatever may be the result of the trial.'[5]

If the solicitor fails to provide such a warning, the full costs of the unusual expense may not be recoverable from the client and the failure to warn may even amount to professional misconduct.[6]

CIVIL PROCEDURE ACT 2005 (NSW)

The overriding purpose of the *Civil Procedure Act* 2005 (NSW) (CPA) is to facilitate the 'just, quick and cheap resolution of the real issues in the proceedings'.[7]

A party is under a duty to assist the court in this regard and a solicitor or barrister must not, by his or her conduct, cause his or her client to be in breach of that duty.

In order to comply with the overriding purpose of the CPA, practitioners faced with the prospect of particularly expensive expert evidence should consider whether there is a less expensive alternative; for example, a local rather than an overseas expert.

In *Marshall v Fleming*,[8] Rothman J considered the costs of expert evidence required in relation to the law of Pennsylvania. His Honour confirmed that the court's discretion must have regard to the policies embodied in the CPA which involve exercising discretion in a manner which gives effect to the overriding purpose of the CPA. His Honour further stated that the practice and procedure of the court is required to be implemented with the object of resolving issues between the parties in a manner such that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute. The proceedings involved a total claim for damages of just over $1 million. His Honour considered that the mere fact that expert evidence of Pennsylvania law was required did not mean that the expert must derive from Pennsylvania and that local academics and legal practitioners in Australia who were expert in US and/or Pennsylvania law could be utilised. Even if an expert from Pennsylvania was required, evidence could be adduced by video link without necessitating the US expert's attendance in Australia.[9]

The overriding purpose of the CPA may also operate to disallow late service of a report as occurred in *Dolores Correa and The Spanish Club Limited (subject to Deed of Company Arrangement) v Kenneth Michael Whittingham*.[10] Black J considered he should act consistently with the policy of the CPA in recognising that the community and the parties to litigation bear significant costs where expert evidence is served late and cases are adjourned, hearing time is lost and costs are thrown away. In the absence of exceptional circumstances, leave to read the report was refused.

It may also be important to limit the scope of the expert's brief in order to minimise the cost of the evidence. If the court considers there has been an unnecessary expenditure of the client's funds, the court can order the practitioner to pay the costs of their client. Such orders were made in *Blake v Norris*,[11] when the solicitor was ordered to pay, *inter alia*, the costs of obtaining an expert's report in relation to the costs of altering the plaintiff's home, as the court regarded the extent to which the report went as unreasonable. On appeal by the solicitor in *Kelly v Norris*[12] Santow JA held:

> 'To the extent to which costs were incurred as a result of what may be described in the extravagance in the claim

they should in my view be laid at the solicitor's door.'[13] It is also noted that Rule 31.22 of the *Uniform Civil Procedure Rules* 2005 (NSW) (UCPR) provides that an expert witness must disclose any arrangements under which the charging of fees is contingent on the outcome of the proceedings or the payment of any fees to the expert witness is to be deferred. The court may then direct disclosure of the full terms relating to the engagement.

RECOVERY OF EXPERTS' FEES FROM A DEFENDANT

Where a client is successful in the litigation and obtains a costs order in his or her favour, recovery of experts' fees may form a substantial component of the costs sought to be recovered.

Where medical or other reports are unserved, recovering the costs of the reports from the defendant can be difficult. Historically, the costs of obtaining medical reports from treating doctors where the reports were not served has usually been allowed, provided that there are not an excessive number of such reports.

Where reports from examining specialists or other experts remain unserved, the costs of obtaining such evidence may be determined to be unreasonable and not recoverable from an opposing party, unless the solicitor can justify the decision to obtain the report. The test is not one of hindsight; the reasonableness of the work is to be determined 'by the state of things known or which ought reasonably to have been known to a diligent solicitor at the time when the expenditure was made'.[14]

While Rule 31.19 UCPR requiring parties to seek directions before calling expert evidence excludes professional negligence claims, defendants routinely object to the costs of obtaining more than one expert in the same specialty when party:party costs are being negotiated or assessed.

Recovery of experts' fees on a party:party assessment remains constrained by reasonableness, even where costs are ordered on an indemnity basis. In *Henley & Anor v State of Queensland & Anor*,[15] McGill DCJ approved the decision of the Court of Appeal in England in *EMI Records Ltd v Wallace Ltd*.[16] In this case, the Vice Chancellor noted that had costs been unreasonably incurred, the fact that they had been expressly authorised by the client would not make them recoverable. Examples were where the successful party had authorised half a dozen conferences with three expert witnesses, when two conferences with a single expert would plainly have been ample, or employing the most expensive experts which could be regarded as 'outlandish' costs.

Written advice on evidence from counsel directing that specific evidence is required to be obtained may assist in establishing the reasonableness of the costs. Where appropriate, include a specific reference to the costs of experts' fees when negotiating the terms of settlement, or request the court to direct that the party:party costs include the costs of the specific or multiple experts. ■

Notes: **1** Section 309(1)(c), *Legal Profession Act* 2004 (NSW). **2** *Ibid*, s302. **3** *Ibid*, s316. **4** (1882) 10 QBD 207. **5** *Re Blyth and Fanshawe: Ex parte Wells* (1882) 10 QBD 207 at 210. **6** *The Law Society of The Australian Capital Territory v Ernest David Lardner and William Michael Charles Andrews* [1998] ACTSC 187 (9 April 1998) at [29]. **7** Section 56, *Civil Procedure Act* 2005 (NSW). **8** *Marshall v Fleming* [2010] NSWSC 86 (19 February 2010). **9** *Ibid*, at 61-3. **10** *Dolores Correa and The Spanish Club Limited (subject to Deed of Company Arrangement) v Kenneth Michael Whittingham* [2012] NSWSC 266 (20 March 2012). **11** *Blake v Norris [Solicitor Costs]* [2003] NSWSC 199 (28 March 2003). **12** *Kelly v Norris & 1 Ors* [2004] NSWCA 260 (30 July 2004). **13** *Ibid*, at 21. **14** *W & A Gilbey Limited v Continental Liqueurs Pty Limited* (1963) 81 WN (NSW) 1. **15** *Henley & Anor v State of Queensland & Anor* [2005] QDC 94 (29 April 2005) at [40]. **16** *EMI Records Ltd v I C Wallace Ltd* [1983] 1 Ch 59.

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