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PERSONAL COSTS CLAIMS

Personal costs claims against lawyers and how best to avoid them

It is important that legal practitioners (solicitors and barristers) are mindful of the provisions of section 99 of the *Civil Procedure Act* 2005 (**CPA**) and Schedule 2 of the *Legal Profession Uniform Law Application Act 2014* (NSW) (**Uniform Act**) when bringing or defending claims on behalf of clients. These provisions provide a mechanism by which clients and/or opposing parties in litigation can seek personal costs against legal practitioners in connection with an unsuccessful claim or defence.

It is tempting to be motivated by or be sympathetic towards your client's cause or pursuit for justice, but it is important to remember that the legal practitioner's professional obligations must take priority over the client's instructions so that the legal practitioner only pursues or defends claims which have reasonable prospects of success, and to ensure that they are conducted efficiently.

Subject to the terms and conditions of the policy, claims made for personal costs against solicitors by clients or by the opposing party in litigation are covered by their professional indemnity insurance policy.

Whilst claims for costs against legal practitioners in practice have proven difficult to make out, it is best that all necessary steps are taken to avoid these types of claims.

This article sets out some issues which commonly result in claims being made against solicitors pursuant to the personal costs legislation and guidelines as to how the Courts approach such claims, and some tips as to how to avoid such claims.

CPA, Section 99

In short, section 99 of the CPA provides that if it appears to a court that costs have been incurred:

- by the serious neglect, serious incompetence, or serious misconduct of a legal practitioner[1]; or
- improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible[2];

the court may order the legal practitioner (after being given a reasonable opportunity to be heard) to pay part or all of the costs of the client or opposing party[3].

The rationale behind these provisions includes the following:

- The courts have a right and duty to supervise the conduct of legal practitioners[4].
- The source of the duty owed to the Court by legal practitioners is defined by public interest in the administration of justice[5].
- Legal practitioners should be penalised where their conduct is likely to defeat justice in the very cause in which that practitioner is engaged[6].

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[1] CPA section 99(1)(a).
[2] CPA section 99(1)(b).
[3] CPA section 99(2).
[4] *Myers v Elman* [1940] AC 282 at [302]-[336]; *Kelly v Jowett* [2009] NSWCA 278 at [60]-[68].
[5] *Rondel v Worsley* [1969] 1 AC 191 at [227]; *Kelly v Jowett* at [60]-[68].
[6] *Myers v Elman* at [302-336]; *Kelly v Jowett* at [60]-[68].

- Litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their own lawyers or of their opponent's lawyers[7].
- Making a costs order pursuant to section 99 against a legal practitioner in respect of the costs of the opposite party reflects the duty of the court 'to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned'[8].

Uniform Act, Schedule 2

Legal practitioners will be familiar with the obligation placed upon them to certify certain types of claims or defences as having reasonable prospects of success[9]. The costs provisions set out in Schedule 2 of the Uniform Act (which supersede the former provisions of the *Legal Profession Act 2004* ss 345-349) are more limited than section 99 of the CPA, as those provisions only apply to claims for damages[10] brought on behalf of the client by the legal practitioner. Some of the relevant factors which the Court will take into consideration when determining whether or not a claim has reasonable prospects of success include:

- Whether the material available to the legal practitioner provides a proper basis for alleging a fact, since provable facts are necessary to establish the claim or defence.
- Whether there are reasonable prospects of damages being recovered on a claim (or a cross claim), or reasonable prospects that a defence can defeat a claim or lead to a reduction in the damages recovered on a claim.

The Court may look to the trial judge's findings to form a presumption that the facts established by the evidence before the trial court did not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success. The legal practitioner will then be provided with an opportunity to rebut the presumption and must demonstrate that at the time legal services were provided, there were provable facts that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success.

It is important to note that the above step may involve producing information or evidence which is the subject of a duty of confidentiality to the client. In the circumstances, the legal practitioner will be required to seek the consent of his or her former client to produce such documentation or information in order to defend themselves against the claim. If the client refuses to waive privilege, it may hinder a legal practitioner's ability to defend themselves in the absence of the material in order to fully explain why and how the claim was commenced and prosecuted or how the defence was pursued. There is however authority for the proposition that a solicitor should be given the benefit of the doubt if his or her ability to rebut the presumption is hindered by their duty of confidentiality to their client[11].

If the legal practitioner is unable to rebut the presumption, the Court in its discretion can order the legal practitioner to pay the costs to the other party, or provide an indemnity in respect of costs ordered to be paid by the legal practitioner's client to the opposing party[12]. The Court can also order the legal practitioner to repay their own client's costs[13].

There are a number of factors the Court will take into account in making such an order. A leading authority on the costs provisions, *Lemoto v Able Technical* [2005],[14] provides a useful guideline as to how the costs provisions, particularly in relation to the Uniform Act, should be applied, as follows:

- The purpose is to deter the legal practitioner from representing a client in pursuing or defending a claim for damages when the legal practitioner has formed the view that the claim or defence has no reasonable prospects of success[15].

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[7] *Ridehalgh v Horsefield* [1994] Ch 205; *Kelly v Jowett* [2009] NSWCA at [60]-[68].
[8] *Re Jones* (1870) 6 Ch App 497 at [499]; *Kelly v Jowett* [2009] NSWCA at [60]-[68].
[9] Schedule 2, Clause 4 of the *Uniform Act*. Formerly sections 345-349 of the *Legal Profession Act* 2004 (NSW).
[10] Uniform Act, Schedule 2, Clause 2(1).
[11] *Orchard v South Eastern Electricity Board* [1987] 1 All ER 95.
[12] *Uniform Act*, Schedule 2, Clause 5.
[13] *Uniform Act*, Schedule 2, Clause 5.
[14] *Lemoto v Able Technical* [2005] NSWCA 153; 63 NSWLR 300.
[15] Ibid.

- This question turns on whether the legal practitioner held a reasonable belief that the provable facts and a reasonably arguable view of the law meant that there were reasonable prospects of recovering damages or defeating a claim or obtaining a reduction in the damages[16].
- The question whether a legal practitioner reasonably could not have believed that they had material which objectively justified proceeding with a claim or a defence, turns on whether that belief 'unquestionably fell outside the range of views which could reasonably be entertained'[17].
- The obligation on the legal practitioner is a continuing one. There may be a stage in a claim where the fact a legal practitioner could not then reasonably believe that the evidence available would be admissible to enable the claim to be proved or defended, may lead to a prima facie case of a contravention of the provisions[18].
- The mere fact litigation is resolved adversely to a party does not mean costs should be ordered against the legal practitioner. The question whether an order should be made is discretionary[19].
- When considering whether to make an order the court should consider the nature of the contravention which has been established and the possibly serious implications of making the costs order and determine whether it is just, in all the circumstances, that an order should be made and whether it should be as to the whole or part of the costs[20].
- The procedure to be adopted is a matter for the judge. The procedure must be devised having regard to the principles of natural justice and should be fair and 'as simple and summary as fairness permits'[21].
- Any application seeking a personal costs order against a legal practitioner is to be made by notice of motion supported by an affidavit[22].
- The Court must ensure that the legal practitioner has full and sufficient notice of the complaint and full and sufficient opportunity of answering it[23].
- The power to order costs against a non-party must be exercised judicially and except for exceptional circumstances, in the presence of the legal practitioner. It should be determined by the delivery of a judgment which adequately exposes the reasons for the outcome[24].

The Courts have said that the powers given by these provisions are to be exercised with caution and sparingly[25]. Also, it has been held that a legal practitioner is not to be held to have acted improperly, unreasonably or negligently simply because they have acted for a party who pursues a claim or a defence which is plainly doomed to fail[26].

Claims pursuant to these provisions are ordinarily made shortly after the final judgment in a matter, but this is not always the case[27].

Although the Courts are cautious about making orders against legal practitioners, the making of such claims against solicitors by other parties or clients is becoming more prevalent in recent years.

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[16] Lemoto; *Degiorgio v Dunn (No 2)* [2005] NSWSC 3.
[17] Lemoto at [132]; *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120.
[18] Lemoto at [127]; *Cahill v Ekstein* (Smart J, unreported, Supreme Court of NSW, 5 June 1998).
[19] Lemoto at [92]. *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383; *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470; *Commonwealth of Australia (Department of Defence); Ex parte Marks* (2000) 75 ALJR 470; *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 416.
[20] Lemoto at [138].
[21] Lemoto at [143]. *Brendon v Spiro* [1938] 1 KB 176; *Bahai v Rashidian* [1985] 1 WLR 1337; *Ridehalgh v Horsefield*.
[22] Lemoto at [145]. *Sorridimi v Moros & Anor* [2004] NSWCA 168.
[23] Lemoto at [146]. *Myers v Elman*; *Ridehalgh v Horsefield*.
[24] Ibid at [148]. *Knight v FP Special Assets Ltd* [1992] HCA 28; (1992) 174 CLR 178; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.
[25] *Lemoto* at [92].
[26] *Ridehalgh v Horsefield* at [233].
[27] There are a number of cases where proceedings were brought years after the final determination of the matter. Whilst it does not appear to be a barrier to making the claim, it will be a factor which will relevant to the Court's discretion as to whether a costs order should be made.

Common issues in claims for personal costs

Claims are commonly brought in circumstances where costs have been incurred as a result of:

- A legal practitioner's failure adequately to plead a claim or defence, and frequent amendments to pleadings.
- A legal practitioner's failure to prepare the case properly, for example, bringing a claim in circumstances where there is no evidence to substantiate all of the elements of the cause of action, such as the causation and damages components of the claim. This includes expert evidence adduced by an individual who lacked the relevant expertise to provide the opinion expressed.
- A proliferation of expert evidence and documentation adduced in the proceedings and at trial which may prove to be irrelevant or ill-conceived, and resulted in wasted costs.
- Frequent and persistent breaches of court orders due to the solicitor's conduct.
- A legal practitioner's failure to review the merits of the claim after the proceedings had been commenced or a defence has been filed, to determine if the prospects of success have diminished as a case progresses.
- A legal practitioner's failure to act in accordance with the client's express or implied instructions or authority.
- A legal practitioner who pleads defences for the purposes of delaying proceedings.
- A claim which appears to be an abuse of the court's process.

Matters that will not result in a costs claim

- Preliminary work performed by the legal practitioner for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.
- Furthermore, the Court is unlikely to make an order when the failure of the claim or defence depended on the credibility of the witnesses. The Courts have held that a legal practitioner is not required to be the judge of his or her client's own credit[28].

Steps to take to avoid a possible claim

There are a number of steps solicitors should take generally by way of risk management to avoid personal costs claims, including the following:

- Ensure the evidence covers **all** of the elements necessary to prove the claim or defence, and importantly, the issues of causation and damages.
- Ensure lay and expert evidence is obtained prior to commencing proceedings to support the claims to be made and ensure that material is objectively admissible and actually supports the allegations. In particular, ensure the expert has the relevant expertise to provide the opinion sought from them.
- Attempt to get the pleadings right the first time around by obtaining detailed instructions from the client, to avoid the need to re-plead and thus delays and wasted costs.
- Only seek relevant material when issuing requests for discovery, subpoenas for production and notices to produce.
- Regularly review claims after proceedings have been issued to ensure the merits of the cause of action have not diminished by conflicting facts/evidence. This includes up until the hearing of the matter.
- Brief counsel early if there is a need to obtain more specialised advice about the claim and the evidence required to support the claim.

[28] Lemoto at [92].

- Ensure file notes are kept of all advices given to clients regarding the prospects of success of the claim.
- Ensure effective supervision of the work performed.

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