THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 6

COSTS ORDERS AGAINST PRACTITIONERS

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The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 (LPUL Schedule 4 clause 18).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 (LPULAR clause 59).

6.1 INTRODUCTION

Costs orders can be made against practitioners in a number of circumstances. Such orders are within the discretion of the court. See Young v King *(No. 11)* [2017] NSWLEC 34.

Note that where first instructions are given by the client or where proceedings are commenced on or after 1 July 2015, the Uniform Law applies. Otherwise the LPA 2004 and *Legal Profession Act 1987* ["LPA 1987"] continue to apply. This chapter considers the following range of matters related to costs orders.

6.2 REASONABLE PROSPECTS OF SUCCESS

Under the Uniform Law, the "reasonable prospects" requirement is introduced in section 62 of the LPULAA.

Schedule 2 of the LPULAA contains provisions relating to costs in civil claims where there are no reasonable prospects of success.

Division 10 of Part 3.2 of the LPA 2004 and Schedule 2 of the LPULAA, which is headed "Costs in civil claims where no reasonable prospects of success", applies to all proceedings with a damages component. It is, therefore, not restricted to personal injury damages and is applicable both to plaintiffs and defendants.

In addition, a practitioner or barrister is not to act for a client, aside from preliminary legal work (s. 346 of the LPA 2004), unless there are reasonable prospects of success (s. 345 of the LPA; Schedule 2 cl. 2 of the LPULAA). To do otherwise makes a practitioner liable to costs orders (s. 348 of the LPA 2004; s. 62 and Schedule 2 and cl. 5(1) of the LPULAA).

Practitioners under the LPULAA and the LPA 2004 are required to certify that:

> "... a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success." (s. 347(2) of the LPA and Schedule 2 cl. 4 of the LPULAA).

The Uniform Civil Procedure Rules forms must be signed prior to filing the initiating or defending process. Under Schedule 2 of the LPULAA, the Uniform Law contains similar provisions (applicable both at first instance and on appeal). Compare section 345 of the LPA and Schedule 2 clause 2 of the LPULAA; section 346 of the LPA and Schedule 2 clause 3 of the LPULAA; and section 347 of the LPA and Schedule 2 clause 34 of the LPULAA; and Regulation 118 of the LPR.

While these concepts have relevance to summary judgment applications, the focus of this chapter is where the solicitor can be laid open to a personal costs order.

Practitioners should be aware of the following decisions dealing with the principles governing the application of the phrase "reasonable prospects of success", and that they apply not just in the Supreme Court but also in the District Court and Local Court (*Knaggs v J A Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476 at 485):

- *Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt [2004] NSWCA 45*
- *Degiorgio v Dunn (No 2) [2005] NSWSC 3*
- *Lemoto v Able Technical Pty Ltd & 2 Ors [2005] NSWCA 153*
- *Eurobodalla Shire Council v Wells & 2 Ors [2006] NSWCA 5*
- *Groth v Audet [2006] NSWCA 48*
- *Firth v Latham & Ors [2007] NSWCA 40*
- *Haydon Fowler Corbett Jessop v Toro Constructions Pty Ltd [2008] NSWCA 178*
- *Bon Appetit Family Restaurant Pty Ltd v Patricia Mongey [2009] NSWCA 14*
- *European Hire Cars Pty Ltd v Poulden* [2009] NSWSC 526.
- *Whyked Pty Ltd v Yahoo 7 Pty Ltd* [2008] NSWSC 477 at [12]–[20] per McDougall J
- *Keddie & Ors v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254

6.3 OBLIGATION OF PRACTITIONER

The legislative intention of the requirement to file a certificate for reasonable prospects was to regulate the conduct of the legal profession, not that of the client. In *Groth v Audet* (2006), the Court of Appeal held that a breach of section 198L(2) of the LPA 1987 (s. 345 of the LPA 2004 and Schedule 2 cl. 2 of the LPULAA) did not invalidate or nullify proceedings. However, the court went on to say that it may still have power to strike out proceedings if the default is not rectified by the defaulting practitioner.

Practitioners should note that an application filed to commence a matter in the Federal Circuit Court was determined not to be a pleading, nor court documentation, and therefore, section 198L of the LPA 1987 (s. 345 of the LPA 2004) did not apply. It should be noted that the court did not decide whether section 198L applied to matters in the Federal Circuit Court, if pleadings were filed (*Fuller v Baptist Union of NSW* [2004] FMCA 789).

Other types of "commencing documents" or originating processes that are subject to the overriding obligation as to reasonable prospects, and susceptible to strike out, include Fast Track Statements and Responses in the Federal Court (see 6.7 below).

In *Lemoto v Able Technical Pty Ltd* (2005), the Court of Appeal discussed the discretionary nature of section 198M of the LPA 1987 (s. 348 of the LPA 2004) and the fact that a practitioner who is facing a claim for indemnity of costs must be given procedural fairness to rebut the presumption in section 198M.

6.4 WHAT ARE REASONABLE PROSPECTS?

The definition of "no reasonable prospects of success" was seen in *Degiorgio v Dunn* (No. 2) to be akin to a case "so lacking in merit or substance as to not be fairly arguable". The Supreme Court followed the five elements set out in *Momibo Pty Ltd v Adam* (unreported, 31 August 2004) that would be necessary to satisfy the obligation under section 198M of the LPA 1987 (s. 348 of the LPA 2004; Schedule 2 cl. 4(2) of the LPULAA). These elements were:

- a practitioner's subjective reasonable belief includes the four other elements, and a proposition that there is a logically arguable case
- the reasonable belief must be based on an objective opinion, formed from material at the time of commencement of proceedings
- the available material must form a basis for alleging each relevant fact
- the claim must be managed according to a reasonably arguable view of the law
- there must be reasonable prospects as to the recovery of some damages.

In *Lemoto v Able Technical Pty Ltd* (2005), the Court of Appeal stated that the question for the practitioner is whether they hold a reasonable belief that the provable facts, and a reasonably arguable view of the law, mean that the prospects of recovering damages or defeating a claim are "fairly arguable".

In *Haydon Fowler Corbett Jessop v Toro Constructions Pty Ltd*, the Court of Appeal held that a fact is provable if the practitioner reasonably believes that the available material provides a proper basis for alleging that fact.

In *Eurobodalla Shire Council v Wells & 2 Ors*, the Court of Appeal ordered that the plaintiff's practitioner and counsel indemnify their client for the defendant's costs for their practitioners, in relation to the plaintiff's application for leave to appeal and the appeal. The court held that section 198M of the *Legal Profession Act 1987* (s. 348 of the LPA 2004) applied to appeal proceedings against "an award of damages".

The Court of Appeal held in *Bon Appetit Family Restaurant Pty Ltd v Patricia Mongey* that the obligation pursuant to section 345 exists in appeal cases (in accordance with s. 344(1)). The court also provided a warning to practitioners that the obligations as to certification remained, despite the wishes or instructions of the client (in accordance with s. 345(3)).

That decision should be read with *European Hire Cars Pty Ltd v Beilby Poulden Costello*, where Bryson J found that the respondent practitioners had breached their statutory obligation. However, no adverse finding was made against them because the plaintiff client had significantly contributed to the "disastrous outcome of the litigation".

6.5 NOT FAIRLY ARGUABLE

In *Keddie & Ors v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254 at [58], applying *Degiorgio v Dunn (No 2)* [2005] NSWSC 3; 62 NSWLR 284, the court held that the phrase "without reasonable prospects of success" in sections 345 and 348 of the LPA 2004 means "not fairly arguable". This more recent case also confirms the duty of a solicitor to exercise at least a measure of independent judgment in relation to advice received from counsel: *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48. Orders for costs against the solicitors were also made under section 99 of the *Civil Procedure Act 2005* ["CPA"].

In *Firth v Latham & Ors*, the NSW Court of Appeal upheld the trial judge's finding that the plaintiff's practitioner properly held a reasonable belief, based on provable facts and the law, that his client's claim, against the second defendant, had reasonable prospects of success at the commencement of proceedings. The Court of Appeal also upheld the trial judge's finding that, at the time of the commencement of the trial, there was a lack of evidence against the second defendant and that the plaintiff's case was "without reasonable prospects of success" against the second defendant. The obligation, therefore, imposed by section 345 is a continuing one, meaning that there is an ongoing need by plaintiff and defendant practitioners to ensure that on the "basis of provable facts and a reasonably arguable view of the law" their client's claim of defence has reasonable prospects of success.

In *Glover Gibbs P/L t/as Balfours NSW P/L v Laybutt*, Palmer J noted that the responsibility for "changing the culture of litigation" rests with the profession and the courts. Although these comments were obiter, they underpin the practice of civil litigation in NSW, namely "to facilitate the just, quick and cheap resolution of the issues" (as set out in s. 56 of the CPA). Practitioners may, therefore, need to revise their view and the merits of their client's case during the conduct of the proceedings.

The courts have regularly stated that the power to make personal costs orders is not to be used by practitioners as a tool of intimidation against opponents. In *Degiorgio v Dunn (No 2)*, Barrett J held that the legislation should not be seen as "an instrument of intimidation".

The concern that practitioners will use the threat of a personal costs order against opponents has been expressed by the President of the Law Society of New South Wales in a message to the legal profession. (See Practitioners Making Threats to Seek Personal Costs Orders against Other Practitioners pursuant to Part 11 Division 5c Legal Profession Act 1987 (August 2004).

6.6 LIABILITY OF A PRACTITIONER FOR UNNECESSARY COSTS

NSW courts are empowered by the provisions of section 99 of the CPA to disallow costs to a party, or direct a practitioner to pay costs, if it appears to the court that costs have been incurred by the serious neglect, serious incompetence or serious misconduct of the practitioner, or improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible. This wide power to award costs personally against legal practitioners is in accordance with the overriding purpose as set forth in sections 56–60 of the CPA, and which requires the parties and their representatives to assist the court to further the just, quick and cheap resolution of the real issues in the proceedings: *Furlong v Wise & Young Pty Ltd* [2016] NSWSC 647, Stevenson J *Lemoto* at [92] and *Ideal Waterproofing Pty Ltd v Buildcorp Australia Pty Ltd* [2006] NSWSC 155.

Also potentially relevant to concerns for solicitors is the Anton Piller order obtained by a client over a solicitor's hard disk in a fees dispute: see *Ho v Fordyce* [2014] NSWSC 1404, where there is a dispute between solicitor and client in relation to fees.

Section 99 of the CPA was considered by the Supreme Court in *Karwala v Skrzypczak Re Estate of Ratajczak* [2007] NSWSC 931, where at [9], Windeyer J found that when dealing with an application for costs pursuant to that section: "the proper approach is that determined by Sully J in *Ideal Waterproofing Pty Limited v Buildcorp Australia Pty Limited & Ors* [2006] NSWSC 155, namely that:

- the onus of proof is on the applicant
- the standard of proof is the civil standard understood in the terms set out in Briginshaw *v Briginshaw* (1938) HCA 34, so that reasonable satisfaction as to proof of an issue is not produced by inexact evidence
- facts must be proved to establish serious neglect, serious incompetence or serious misconduct in the handling of the case, which caused costs to be incurred that ought not to have been incurred
- these facts justify the making of an order.

Section 99 causes the court to take into account the overriding purpose of sections 56(3), (4) and (5) of the CPA, which require the parties and their representatives to assist the court to further the just, quick and cheap resolution of the real issues in the proceedings (see *Kendirjian v Ayoub* [2008] NSWCA 194) and also not to cause another party to be unnecessarily burdened with unreasonable costs. The practitioner has a duty to assist the client to ensure that proceedings are conducted efficiently, expeditiously and cost-effectively, and may end in a personal costs order directed against the solicitor.

In *Ireland v Retallack (No 2)* [2011] NSWSC 1096, Pembroke J was highly critical of the conduct of a will construction suit where the solicitors for the plaintiff/executor tendered irrelevant evidence (unnecessary expert reports) and wasted expenditure that was incurred on behalf of the estate. His Honour considered whether the circumstances called for an order disallowing costs pursuant to Section 99(2)(a) of the CPA, and indicated that whether or not he made a section 99 order, he would make fixed-sum costs orders pursuant to Section 98(4) of the CPA. His Honour gave leave for the plaintiff's solicitors to be separately represented by senior counsel. His Honour also described the evidence sought from the expert as "an accountant's nirvana"; that the evidence provided was set out in excruciating and labyrinthine detail; that none of it was necessary for the proceedings, or useful, or facilitated the resolution of the real issues in dispute, namely the questions of construction arising out of certain clauses of the will. Further, that there was insufficient ongoing supervision by the solicitors over the work being undertaken by the accountants.

> **[18]** "No satisfactory attempt was made, while the work was being carried out, to ensure that the accountants were working to the initial estimate. There was insufficient scrutiny and inadequate oversight. There was not the same level of prudence and circumspection that one would expect from a reasonable person of business looking after his or her own affairs."
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> **[29]** "I have by now made clear that, as costs of the proceedings, the estate should not be burdened with so much of (the solicitors) with the costs associated with the tender of the irrelevant factual evidence. These costs are not proportionate to the complexity of the issues in dispute. They were incurred without reasonable cause. It was simply not reasonable to carry out the work to which they relate."
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> **[33]** "Worse however, the expense was all the greater because the combined efforts of the solicitors and accountants were channelled into the creation of unnecessary written reports. Necessarily, those reports were compelled to comply with all of the expectations of due care, and the requirements as to form and content, that are applicable to expert reports to be tendered in proceedings in the court. This substantially increased the expense. As is well known, a fullblown expert report, prepared for tender in proceedings in the court, is vastly more expensive than advice given in conference or by a summary letter."

The Judicial Commission has also listed some older examples: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2008] NSWCA 243 at [8]; *Araf Capital Funding Pty Ltd v Megaloudis* [2006] NSWSC 1255 at [10]; *Ashmore v Corporation of Lloyds* [1992] 2 All ER 486; *Whyte v Brosch* (1998) 45 NSWLR 354 (late submissions).

Conduct that has been held to justify an order that a practitioner personally pay the costs includes:

- abuse of process: *Cahill v Ekstein* (unreported, 5/6/98 NSWSC)
- raising untenable defences for the purpose of delay: *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383 at [34]; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302
- signing a certificate on a false affidavit of discovery: *Myers v Elman* [1940] AC 282
- repeatedly putting untenable submissions: *Buckingham Gate International v ANZ Bank Ltd* [2000] NSWSC 946
- attempting to reagitate previously decided issues: *Vasram v AMP Life Ltd* [2002] FCA 1286; see also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* at [208–216]
- ignorance of the rules: *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SPA* (1989) 63 ALJR 519
- unpreparedness resulting in a hearing date being vacated, or in time being wasted during the hearing: *Stafford v Taber* (unreported 31/10/94, NSWCA)

- liability for these costs may extend to the firm as well as to the solicitor on the record: *Kelly v Jowett* (2009) 76 NSWLR 405 and *Kelly v Jowett* [2009] NSWCA 278.

Other relevant cases include:

- *Lemery Holdings Pty Limited v Reliance Financial Services Pty Ltd; School Holdings Pty Ltd v Dayroll Pty Ltd* [2008] NSWSC 1114
- *Puruse Pty Limited v Council of the City of Sydney* [2009] NSWLEC 163

6.7 FEDERAL JURISDICTION

The Federal Court has emphasised that the duty to comply with the "overarching purpose" contained in sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) has had a significant impact on the obligations of parties to civil proceedings and their lawyers. Rule 40.07 of the Federal Court Rules 2011 also allows the Federal Court to order a practitioner to pay costs or disallow costs to that practitioner, if those costs were incurred improperly, without reasonable cause, or were wasted by undue delay or other misconduct, and it appears to the court that the practitioner is responsible for same.

The Federal Court Rules 2011 state that, for the commencement of certain migration litigation (Rule 31.22), a certificate certifying "that there are reasonable grounds for believing that this migration litigation has a reasonable prospect of success, in accordance with Form 70, must be signed by the applicant's lawyer" and filed. Interestingly, the certificate requires the applicant's practitioner to sign; however, legislation provides that a person must not encourage a litigant to commence proceedings that do not have reasonable prospects of success.

In applications for summary judgment, the Federal Court legislation provides that a proceeding does not have to be "hopeless or bound to fail" for it to have no reasonable prospects of success (see s. 31A(3) *Federal Court of Australia Act 1976* (Cth), s. 25A(3) *Judiciary Act 1903* (Cth) and s. 17A(3) *Federal Circuit Court of Australia Act 1999* (Cth)). The federal courts have interpreted this definition as "lowering the bar" (*White Industries Aust. Ltd v Commissioner of Taxation* [2007] FCA 511) and "softening the test" (*J F Keir Pty Limited v Sparks* [2008] FCA 611) for the making of summary judgment and dismissal orders.

More recently, *Modra v State of Victoria* [2012] FCA 240 makes clear that a failure properly to plead a claim may be regarded as a failure to comply with the overarching purpose. The content of the duty of a legal practitioner in the Federal Court has been significantly changed by the introduction of sections 37M and 37N.

Liability may also extend to an order for such costs to be paid on an indemnity basis: *Mitry Lawyers v Barnden* [2014] FCA 918.

6.8 FURTHER JUDICIAL COMMENT

In a paper delivered on Appellate Advocacy to the New South Wales Bar Association, Sydney CPD Conference, on the 27 March 2015, the President of the Court of Appeal, the Hon. Justice M J Beazley AO discussed *Re Felicity; FM v Secretary, Department of Family and Community Services (No 3)*, [2014] NSWCA 19, especially at [38] and stated:

> **[48]** "As the costs order made against the solicitor in that case reminds advocates, a failure to competently identify legal error before bringing an appeal may expose a legal practitioner to liability for costs under section 99 of the *Civil Procedure Act 2005*."

See also *Ireland v Retallack (No 2)* [2011] NSWSC 1096 discussed above.

There have been a number of decisions and pronouncements regarding the costs incurred in the preparation of materials for "judge's bundles" and disproportionate costs.

In *SDW v Church of Jesus of Letter-Day Saints* [2008] NSWSC 1249, Simpson J excluded from the general costs orders any costs associated with the preparation, photocopying and presentation of seven lever arch folders of documents.

Her Honour concluded:

> **[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 existenceassociated 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."
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> **[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 practitioner from the client for the excessive copying. I propose to make such an order."

In *Tobin v Ezekiel - Ezekiel Estate* [2008] NSWSC 1108, Palmer J expressed his concern that the time of the trial and the number of witnesses were disproportionate to the subject matter. He noted:

> **[39]** "Unrestrained and prolific issuing of subpoenas by a litigant may constitute an abuse of the Court's process. The terms of the subpoenas, considered individually, may not be too wide or oppressive in themselves, but if the number of subpoenas is large and the issues to which they relate are peripheral to the decisive issues for trial, not only are many non-parties to the litigation unnecessarily inconvenienced and put to expense, but a great deal of unnecessary costs will be incurred in the proceedings, bringing the proceedings to trial will be delayed, and the time for trial will be unnecessarily expanded by the raising of false or peripheral issues. All of these mischiefs the Court must be astute to prevent, in accordance with section 56 of the *Civil Procedure Act 2005* (NSW). It has ample power to do so, both in its inherent jurisdiction to control its own process and under the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR): see e.g. *Southern Pacific Hotel Services Inc v Southern Pacific Hotel Corporation Ltd* (1984) 1 NSWLR 710, at 719; *Compsyd Pty Ltd v Streamline Travel Service Pty Ltd* (1987) 10 NSWLR 648; *Botany Bay Instrumentation & Control Pty Ltd v Stewart* (1984) 3 NSWLR 98."
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> **[40]** "None of the propositions I have enunciated is revolutionary. All are enshrined in the *Civil Procedure Act 2005* (NSW) and in the Uniform Civil Procedure Rules. The obligation to ensure that litigation is conducted justly, quickly and cheaply is placed equally upon the Court, the litigant and the legal profession (see CPA Part 6 Division 1, s. 56(2), (3) and

> (4). The Court must ensure that issues in litigation are resolved in such a way that the cost to parties is proportionate to the importance and complexity of the subject matter (CPA s. 60). Amongst the objects which the Court must achieve is the efficient use of available judicial and administrative resources to ensure the timely disposal of all proceedings in the Court (CPA s. 57(1)(c) and (d)). The Court is given ample power to ensure that a trial is conducted, with due regard to these principles (CPA s. 62)."

Practitioners should be aware that specific costs orders may be made against them for the costs of preparation of materials, or that their clients may be deprived of costs. This opens an avenue for a dispute between the practitioner and client for the recovery of that component of the costs.

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