



Costs for breaching overarching obligations

Bolitho – Costs law experts *can* be liable

Costs lawyers are often engaged to prepare expert reports and appear as expert witnesses in applications for gross sum costs orders, particularly in support of costs applications in major class actions. Parties in litigation are increasingly applying for gross sum costs orders to avoid the time and expense involved in the costs assessment process.

In all circumstances, experts have a paramount duty to court and are bound by overarching obligations.

In *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 (*Bolitho*), a costs lawyer was engaged to opine on the reasonableness of a litigation funder's legal costs. The Court held that the costs expert contravened ss10, 16, and 21 of the *Civil Procedure Act 2010 (Vic) (CPA)* by falsely representing compliance with the Expert Code of Conduct,¹ which materially contributed to deception of the Court by other contraveners.

OVERARCHING OBLIGATIONS

Section 10 of the *CPA* binds experts to overarching obligations listed in ss16–26, including the obligations to comply with the paramount duty to the court;² not mislead or deceive;³ and disclose the existence of documents.⁴

Section 29 of the *CPA* provides significant penalties for anyone bound by the overarching obligations. These include:

- (a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation; and
- (b) an order that the person compensate any person for any financial loss or other loss which was materially

contributed to by the contravention of the overarching obligation [emphasis added].⁵

The phrase 'materially contributed to' is unique to Victoria and suggests a low bar for causation, which means costs experts can have significant penalties even for inadvertently breaching the overarching obligations.

COURT'S CRITICISM OF THE ACTIONS OF THE COSTS EXPERT

In *Bolitho*, several actions of the costs expert likely to be considered usual by industry standards were heavily criticised by the Court.

The litigation funder's costs expert was criticised for failing to disclose that he was the litigation funder's costs consultant of choice, and for failing to disclose the extent to which he provided services to the litigation funder,⁶ instead simply stating that he was providing an independent opinion. The Court said it was not up to the expert to make the assessment of his independence if the expert had done prior work for the client: that was 'a question for the court.'⁷

The costs expert's provision of 'kerbside advice' or advice to the litigation funder about costs that fell within the scope of fair and reasonable costs in the same proceeding was considered to taint the expert's independence.⁸

The costs expert used the sampling process to consider the reasonableness of the litigation funder's costs, and considered claims for perusing documents by a solicitor as reasonable based on the number of pages of such documents. For example, the time of 2.5 hours to review a 51-page witness statement⁹ or 40.5 hours to peruse a 21-volume court

book¹⁰ was considered reasonable based on the length of the documents being perused. The Court criticised this method and said the opinion involved:

'no objective process of independent assessment, applying specialised knowledge, as to why it was necessary for [the solicitor] to review the ... Court Book, what it contained, whether it was reasonable for [the solicitor] to have charged time for that task, and, relevantly, whether any other member of the Bolitho legal team had charged for the same work.¹¹ Further, the complexity of the exercise (such as whether cross-referencing was required, or whether any work product was reasonably created as a result of perusing the document) was not explored.¹²

All of the above was necessary as the solicitor (on whose costs the expert was providing an opinion) confirmed in evidence that he did not have strategic input in the case, the funder/counsel ran the case without supervision by the solicitor, the solicitor did not carefully read documents he was asked to file or send, he was not asked to review discovery or witness statements, and he did not generate any work product when reviewing the documents.¹³ Further, the junior counsel and the former solicitor had charged significant time for reviewing the same court book.¹⁴

The expert was criticised for not expressing his assumption that the law firm's time records were contemporaneous, which was important, as the law firm's time records appeared to be drawn up after the fact.¹⁵

The Court criticised the expert for accepting the counsel's fee slips as an accurate representation of work done by counsel¹⁶ and emphasised that:

'[t]raditional acceptance of fee documentation from counsel as negating the need for independent review is not ... an assumption that should again be made by a costs lawyer in this court, whether it be in an expert report or in a matter before the Costs Court. The assumption lacks the imprimatur of the court. The court requires detailed and transparent disclosure of all assessment processes whenever it is being asked to approve, certify or assess legal costs.¹⁷

The expert was further criticised for failing to provide a supplementary report after his changed opinion on material matters. After the expert had provided a report in 2018, he was instructed to provide a further report, where his

instructions were, in part, to assume that certain costs had been incurred but not yet paid, including all of senior counsel's costs (which the expert was previously instructed to assume had been incurred and paid). The expert was also provided with different copies of invoices that were not stamped 'PAID', whereas previous copies had been stamped 'PAID'.¹⁸

The further report filed by the expert in 2019 mentioned counsel's fees were not paid; however, the expert did not take the further step to clarify that his previous instructions were that fees were paid, supported by invoices stamped as 'PAID', but that factual circumstances had changed wherein he received fee slips not stamped as 'PAID'.¹⁹ The Court said this was a 'significant matter' and needed to be directly drawn to the Court's attention to 'avoid corrupting the proper administration of justice'.²⁰

KEY TAKEAWAYS

When seeking a costs lawyer's expert opinion on costs, ensure that the expert:

- discloses in their report whether they have acted in the past for the client on whose behalf the expert opinion is being prepared;
- refrains from providing costs advice in relation to the same proceeding for which they are preparing an expert opinion, or at the very least discloses the nature of the advice provided;
- provides the rationale for deeming certain charges reasonable, rather than simply stating that costs as charged by lawyers are reasonable. The rationale can be shown by providing consideration of the relevance of the work carried out, the seniority of the person carrying out the work, whether any duplication of work occurred, the complexity of the work, and any work product created in the course of carrying out the work;²¹
- expresses all assumptions on which they are basing their opinion – for example, an assumption that the time records provided are contemporaneous;
- does not accept counsel's fee slips as reasonable without carrying out any review; and
- provides a supplementary report after a change in opinion on material matters, as allowed by the Expert Witness Code of Conduct, cl 4,²² even if instructions to supply a supplementary report are not provided by the client. ■

Notes: 1 *Supreme Court (Chapter 1 Expert Witness Code Amendment) Rules 2016 (Vic)* 2016 - REG 6 (*Supreme Court Rules*), 2 *Civil Procedure Act 2010 (Vic)*, s16. 3 *Ibid*, s21. 4 *Ibid*, s26. 5 *Ibid*, s29. 6 *Bolitho*, [627]. 7 *Ibid*, [618]. 8 *Ibid*, [626]. 9 *Ibid*, [633]. 10 *Ibid*, [636]. 11 *Ibid*, [637]. 12 *Ibid*, [634]. 13 *Ibid*, [474], [479]. 14 *Ibid*, [638]. 15 *Ibid*, [663]. 16 *Ibid*, [656], [667]. 17 *Ibid*, [670]. 18 *Ibid*, [1080]. 19 *Ibid*, [1548]. 20 *Ibid*, [634]. 22 *Supreme Court Rules*, above note 1.

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