

District Court of New South Wales

S Partners (a pseudonym) v Jones (a pseudonym) [2021] NSWDC 619 (17 November 2021)

Last Updated: 17 November 2021

District Court
New South Wales

Case Name: S Partners (a pseudonym) v Jones (a pseudonym)

Medium Neutral Citation: [\[2021\] NSWDC 619](#)

Hearing Date(s): 7-8 October 2021

Date of Orders: 17 November 2021

Decision Date: 17 November 2021

Jurisdiction: Civil

Before: Russell SC DCJ

Decision: (1) Appeal dismissed.

(2) Subject to Order (5) below, the decision of the Review Panel is affirmed.

(3) Order the plaintiff to pay the costs of the first defendant.



(4) No order as to the costs of the second and third defendants.

(5) Order that the following Certificates of Determination be set aside and re-issued, in the same terms, so that the solicitors nominated in paragraph 1 of “MFI 9” are named as the Review Respondents wherever appearing:

(a) Certification of Determination of Costs Assessment (Form C-LPA-3) issued by the Review Panel on 20 October 2020 and sent by the Manager, Costs Assessment on 3 November 2020;

(b) Certificate of Determination of Review – Substitution (Form C-LPA-7) issued by the Review Panel on 8 October 2020 and sent by the Manager, Costs Assessment on 3 November 2020; and

(c) Certificate of Determination of Review Panel Costs (Form C-LPA-8) issued by the Review Panel on 8 October 2020 and sent by the Manager, Costs Assessment on 3 November 2020.

Catchwords: COSTS – appeal to District Court from  **Costs Review Panel**  – principles applicable on appeal – setting aside costs agreement – obligation to estimate total

legal costs and disclose any substantial change in such estimate – whether Review Panel erred in law in setting aside costs agreement – whether Review Panel made findings contrary to the evidence – whether Review Panel denied procedural fairness to the law practice

Legislation Cited: [Legal Profession Act 2004 \(NSW\)](#), ss 301, 302, 309, 311, 313, 315, 316, 317, 319, 328, 350, 355, 357, 358, 359, 361, 363, 367, 368, 370, 372, 373, 374, 375, 378, 380, 382, 384, 385, 387, 390

[Legal Profession Uniform Law 2014 \(NSW\)](#), Sch 4, cl 18

Cases Cited: [Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd \[2011\] NSWDC 55](#)

[CSR Limited v Eddy \[2008\] NSWCA 83](#); (2008) 75 NSWLR 725

[Fox v Percy \[2003\] HCA 22](#); (2003) 214 CLR 118

[Frumar v Owners of Strata Plan 36957 \[2006\] NSWCA 278](#); (2006) 67 NSWLR 321

[House v The King \[1936\] HCA 40](#); (1936) 55 CLR 499

[Matter of The Bill of Costs of Lamrock, Brown & Hall \[1908\] ArgusLawRp 4](#); [1908] VLR 238

[Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam \[2003\] HCA 6](#); (2003) 214 CLR 1

[Russells v McCardel \[2014\] VSC 287](#)

[Wende v Horwath \(NSW\) Pty Ltd \[2014\] NSWCA 170](#); (2014) 86 NSWLR 674

Texts Cited: [Dal Pont, Law of Costs, 4th Edition \(2018\) LexisNexis](#)

[Legal Profession Reform Bill 1993 \(NSW\)](#)

[Second Reading Speech \(Legislative Council, 16 September 1993\)](#)

Category: [Principal judgment](#)

Parties: [S Partners \(a pseudonym\) \(Plaintiff\)](#)

[Ms Jones \(a pseudonym\) \(First Defendant\)](#)

[Alexandra Hutley \(Second Defendant\)](#)

[Christopher Wall \(Third Defendant\)](#)

Representation: [Counsel:](#)

[M Castle \(Plaintiff\)](#)

[D Pritchard SC with J McDonald \(First Defendant\)](#)

[Solicitors:](#)

[DGT Costs Lawyers \(Plaintiff\)](#)

[Levitt Robinson \(First Defendant\)](#)

File Number(s): [2020/00339811](#)

1 In accordance with Part 52 Rule 3 of the [District Court Rules 1973 \(NSW\)](#) no person, other than a party to the proceedings or the solicitor for a party, may search the court file except by leave of the court or a Registrar.

2 In the first instance, any such application should be made to me.

3 Order that the plaintiff in these proceedings be henceforth referred to as “S Partners” and the first defendant be henceforth referred to as “Ms Jones”.

4 Pursuant to s 7 of the Courts Suppression and Non-Publication Orders Act 2010 (NSW) I make a suppression order prohibiting the publication or other disclosure of information tending to reveal the identity of the parties to proceedings SYC 2018 of 2011 in the Family Court of Australia, or the identity of any person who is related to or associated with those parties.

5 The grounds for the suppression order are:

(1) To prevent prejudice to the proper administration of justice.

(2) To ensure compliance with s 121 of the [Family Law Act 1975 \(Cth\)](#).

(3) It is otherwise in the public interest for the order to be made, in particular to protect any children of the parties from publicity, and that public interest significantly outweighs the public interest in open justice.

6 The suppression order applies throughout the Commonwealth of Australia as the court is satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made.

7 These orders remain in force until further order of the court.

TABLE OF CONTENTS

JUDGMENT

Introduction

Background to the Engagement of the Solicitors

The Applicable Law: Which Act Applies?

The Applicable Law: Costs Assessment

The Applicable Law: Review Panels

The Applicable Law: Appeals

General Principles in a Costs Appeal to the District Court

The Amended Summons

The Court Book

Scope of the Review Panel's Determination

ISSUE 1: DISCLOSURE AND SETTING ASIDE COSTS AGREEMENT

Overview of Determination of the Review Panel on Issue 1

The Applicable Law: Costs Disclosure

The Purpose of Disclosure

The Applicable Law: Setting Aside Costs Agreements

Material Before the Costs Assessor: Costs Agreement and Disclosure

The Costs Agreement

Further Submissions and Material

Preliminary Determination of the Costs Assessor: Disclosure and Setting Aside Costs Agreement

Application for Review of Determination of Costs Assessor

Preliminary View of the Review Panel

Further Submissions Received by the Review Panel

Disclosure Documents Relied Upon by the Solicitors

Document (a) Letter dated 28 November 2011

Document (b) Letter dated 19 March 2012

Document (c) Letter dated 26 July 2012

Document (d) Letter dated 3 October 2012

Document (e) Letter dated 29 November 2012

Document (f) Letter dated 13 December 2012

Document (g) Letter dated 4 March 2013

Document (h) Email Communication with the Client dated 6 March 2013

Document (i) Email dated 19 April 2013

Document (j) Email dated 6 May 2013

Document (k) Letter dated 27 June 2013

Document (l) Costs Memorandum dated 24 July 2013

Document (m) Letter dated 26 July 2013

Document (n) Costs Memorandum dated 7 August 2013

Document (o) Letter dated 25 September 2013

Document (p) Costs Memorandum dated 15 October 2013

Document (q) Letter dated 8 November 2013

Document (r) Emails dated 17 and 18 November 2013 re Fees for Counsel

Document (s) Estimate of Costs for Final Hearing for Five Weeks Commencing 3 February 2014

Document (t) Letter dated 15 April 2015

Document (u) Letter dated 15 July 2015

Document (v) Emails dated 15, 16 and 22 July 2016

Affidavit of Client in the Family Court

Summary of the Cost Disclosures Relied Upon by the Solicitors

Certificate of Determination of Review

Reasons of Review Panel re Initial Costs Estimate

Submissions in Relation to Initial Costs Disclosure

My Findings in Relation to the Review Panel's View of the Initial Costs Disclosure

Reasons of Review Panel re Updates to Disclosure

Submissions in Relation to Disclosure Updates

My Findings in Relation to the Review Panel's View of Disclosure Updates

Findings of the Review Panel re Conduct after the Costs Agreement was Created

Submissions in Relation to Conduct after Entry Into the Costs Agreement

Discretionary Decision to Set Aside the Costs Agreement

ISSUE 2: WHETHER FINDINGS WERE CONTRARY TO THE EVIDENCE

Overview of the Determination of the Review Panel on Issue 2

Complexity of the Matter

Telephone Calls: Material Before the Costs Assessor

Telephone Calls: Determination of the Costs Assessor

Telephone Calls: Application for Review

Telephone Calls: Reasons of the Review Panel

Telephone Calls: Submissions to this Court

Telephone Calls: Error of Law?

ISSUE 3: COUNSELS' FEES

Overview of the Reasons of the Review Panel

Appeal Ground 4

Counsel's Fees: Material Before the Costs Assessor

Counsel's Fees: Preliminary Determination by Costs Assessor

Counsel's Fees: Additional Material Before the Review Panel

Counsel's Fees: Determination of the Review Panel

Counsel's Fees: Appeal to this Court

Counsel's Fees: Error of Law?

ISSUE 4: DENIAL OF PROCEDURAL FAIRNESS

Appeal Ground 6a

Overview of the Decision of the Review Panel

Quantum of Counsel's Fees: Material Before the Costs Assessor

Quantum of Counsel's Fees: Material Before the Review Panel

Appeal Ground 6b

Appeal Ground 6c

Overview of the Decision of the Review Panel

Balance Sheet: Material Before the Costs Assessor

Balance Sheet: Determination of the Review Panel

Balance Sheet: Error of Law?

JUDGMENT

Introduction

1 Between 2011 and 2016 the plaintiff (“the Solicitors”) acted for the first defendant (“the Client”) in relation to contested property and parenting proceedings in the Family Court of Australia (“Family Court”). The Solicitors issued 52 invoices to the Client and claimed total costs of \$3,793,930.13. This amount was made up of \$2,228,320.71 in professional fees and \$1,565,609.42 in disbursements, including counsels’ fees.

2 On 6 October 2017 the Client filed an application for assessment of costs.

3 On 1 October 2019 the Costs Assessor (Mr Paul) issued a Certificate of Determination and Reasons. The Costs Assessor reduced the claim for costs made by the Solicitors by an amount of \$17,338.31. As a result the Client paid costs to the Solicitors in the slightly reduced amount of \$3,776,591.82.

4 On 19 November 2019 the Client filed an Application for Review.

5 On 3 November 2020 the Review Panel issued Certificates of Determination and Reasons. The Review Panel found that the fair and reasonable costs to be paid by the Client to the Solicitors was the amount of \$3,162,181.10 and that the Solicitors were obliged to refund to the Client the amount of \$631,749.01.

6 By an Amended Summons filed in this court on 4 February 2021 the Solicitors seek to have the Certificates of Determination issued by the Review Panel set aside. The second and third defendants to these proceedings are the members of the Review Panel. They have been joined as a matter of formality only and took no part in the hearing.

7 By a Notice of Contention filed in this court on 19 May 2021 the Client contends that the decision of the Review Panel should be affirmed on grounds other than those relied upon by the Review Panel, but does not seek a discharge or variation of any part of the Review Panel’s decision.

8 Two of the key issues on this appeal concerned a Costs Agreement entered into between the Solicitors and the Client and whether the Solicitors had complied with their statutory duties of disclosure of costs to the Client. In her application to the Costs Assessor, the Client sought an order setting aside that Costs Agreement. The Costs Assessor declined to make such an order. The Review Panel did make an order setting aside the Costs Agreement. This decision was part of the reason for the reduction in costs determined by the Review Panel.

Background to the Engagement of the Solicitors

9 The Client first instructed the Solicitors in June 2011 to act for her in property and parenting proceedings between herself and her husband in the Family Court. The Client had instructed a previous firm of solicitors but became unable to pay their outstanding costs of \$167,000. She transferred her file to the Solicitors. Senior Counsel had been engaged by the previous solicitors and the Client requested the Solicitors to continue to engage that Senior Counsel.

10 The Client alleged that the joint assets of the parties to the marriage were worth around \$200 million. Her position was that she was entitled to 50% of the assets. The Client’s husband maintained that the asset pool was worth \$88 million and that the Client was entitled to 10% of that figure.

11 The litigation in the Family Court was complex, hard-fought and at times bitter. Some idea of the work involved can be gained from a consideration of several of the key documents.

12 The Client’s primary affidavit in the Family Court ran to 213 pages and 929 paragraphs: Court Book (“CB”) 1190-1402. My impression from reading the affidavit is that it was very carefully drafted so as to comply with the rules of evidence. The affidavit alone must have required hundreds of hours of the time of lawyers.

13 Another document prepared by the Solicitors was a “Chronology of Real Properties” (CB 1693-1809). This document listed all of the properties which were the subject of the proceedings in the Family Court. It took over 100 pages to list those properties, along with a relatively short summary for each property of the date of acquisition, the registered proprietor and the purchase and sale price. Again, my impression is that this document must have taken many hours of work to create.

14 Another important document was a "Balance Sheet as at 1 December 1999" (CB 2147-2195). This set out the assets and liabilities of the parties to the marriage, together with the assets and liabilities of a considerable number of companies and trusts which held some of the real property. The Balance Sheet listed the value put on each asset and liability by the wife and by the husband. The Balance Sheet listed the report of a valuer or the business records in support of the contention of each party as to values. My impression is that there was a large amount of work necessary to create this document. For each value placed against an asset or a liability on the Balance Sheet, an expert report had to be obtained and read, or the relevant business records had to be obtained and read.

15 The Client's husband filed extensive documentation in the Family Court. The list of the documents relied upon by the husband was 16 pages long (CB 1675-1690). Part of the Client's primary affidavit in the Family Court proceedings dealt with her allegation that she had made a substantial contribution to the business dealings of her husband. In response to that, the husband filed 51 affidavits in the Family Court. These are listed at CB 1678-1681. The Solicitors needed to read those, take instructions upon them and provide their Client's evidence in response. That development in the litigation must have greatly increased the work done by the Solicitors and consequently the costs incurred by the Client.

16 Adding to the complexity of the litigation were parenting issues. Quite a deal of the wife's primary affidavit dealt with interactions between the husband and the wife and the children.

The Applicable Law: Which Act Applies?

17 Both parties agreed that the appeal was governed by the *Legal Profession Act 2004* (NSW) ("the Act"). The Act applied despite its repeal, by reason of cl 18 of Sch 4 of the *Legal Profession Uniform Law 2014* (NSW).

18 Chapter 3 of the Act deals with the conduct of legal practice. Part 3.2 deals with costs disclosure and assessment.

19 Section 301 of the Act (contained in Div 1 of Pt 3.2) deals with the purposes of Pt 3.2, which are:

- (a) to provide for law practices to make disclosures to clients regarding legal costs,
- (b) to regulate the making of costs agreements in respect of legal services, including conditional costs agreements,
- (c) to regulate the billing of costs for legal services,
- (d) to provide a mechanism for the assessment of legal costs and the setting aside of certain costs agreements.

20 Section 302 of the Act contains definitions. The word "costs" includes "fees, charges, disbursements, expenses and remuneration". The word "disbursements" includes outlays.

21 Division 3 of Pt 3.2 of the Act deals with costs disclosure. Division 4 of Pt 3.2 deals with legal costs generally. Division 5 of Pt 3.2 deals with costs agreements.

22 Division 11 of Pt 3.2 of the Act deals with costs assessment. Within Div 11 are the following subdivisions:

- (1) Applications.
- (2) Assessment.
- (3) Party/party costs.
- (4) Determinations.
- (5) Review of Determination by Panel.
- (6) Appeals.
- (7) General.

The Applicable Law: Costs Assessment

23 By s 350(1) of the Act a client may apply to the Manager, Costs Assessment for an assessment of the whole or any part of legal costs. By s 355(b) of the Act if an application for costs assessment is

made, the law practice must not commence or maintain any proceedings to recover the legal costs until the costs assessment has been completed.

24 By s 390 of the Act the Chief Justice of New South Wales may appoint persons to be costs assessors under the Act.

25 By s 357 of the Act the Manager, Costs Assessment is to refer each application for costs assessment to a costs assessor. Section 358 gives the costs assessor power to require documents or further particulars.

26 By s 359 of the Act a costs assessor must not determine an application for assessment unless the assessor has given both the applicant and any law practice a reasonable opportunity to make written submissions in relation to the application and has given due consideration to any submissions so made. A costs assessor is not bound by the rules of evidence. A costs assessor may determine whether or not disclosure has been made in accordance with Div 3 of Pt 3.2 (Costs Disclosure).

27 By s 361 of the Act a costs assessor must assess the amount of any disputed costs that are the subject of a costs agreement by reference to the provisions of that agreement unless the assessor is satisfied that the agreement does not comply in a material respect with any applicable disclosure requirements of Div 3 of Pt 3.2 (costs disclosure).

28 By s 363(1) of the Act the costs assessor must consider, in assessing legal costs:

- (1) Whether or not it was reasonable to carry out the work to which the legal costs relate.
- (2) Whether or not the work was carried out in a reasonable manner.
- (3) The fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that s 361 or s 362 of the Act applies to any disputed costs.

29 Section 363(2) of the Act sets out the matters to which the assessor may have regard in considering what is a fair and reasonable amount of legal costs. These matters include any disclosures made by the law practice under Div 3 of Pt 3.2 (costs disclosure); and the complexity, novelty or difficulty of the matter.

30 By s 367 of the Act a costs assessor is to determine an application for a costs assessment by confirming the bill, or if the assessor is satisfied that the disputed costs are unfair or unreasonable, by substituting for the amount of the costs an amount that, in the assessor's opinion, is a fair and reasonable amount.

31 By s 368 of the Act, once a determination of costs has been made, a costs assessor is to issue a certificate that sets out the determination.

32 By s 370 of the Act a costs assessor must ensure that a certificate under s 368 which sets out the determination is accompanied by a statement of the reasons for the costs assessor's determination.

33 By s 372 of the Act, a determination by a costs assessor is binding on all parties to the application and no appeal or other assessment lies in respect of the determination, except as provided by the Division.

The Applicable Law: Review Panels

34 By s 373(1) of the Act a party to a costs assessment who is dissatisfied with the determination of a costs assessor may apply to the Manager, Costs Assessment for a review of the determination. By s 374 the Manager, Costs Assessment, is to refer the application to a panel constituted by two costs assessors.

35 By s 375(1) of the Act a panel may review the determination of the assessor and may:

- (1) Affirm the cost assessor's determination, or
- (2) Set aside the costs assessor's determination and substitute such determination in relation to the costs assessment as, in their opinion, should have been made by the costs assessor.

36 By s 375(2) of the Act the panel has all the functions of a costs assessor and is to determine the application in the manner that a costs assessor would be required to determine an application for costs assessment.

37 Section 375(3) of the Act provides that the assessment is to be conducted on the evidence that was received by the costs assessor and, unless the panel determines otherwise, the panel is not to receive submissions or fresh evidence.

38 Section 378(1) of the Act provides that on making a determination in relation to an application for review of a costs assessment, the panel is to issue a certificate that sets out the determination. Section 380 provides that the certificate must be accompanied by a Statement of Reasons for the panel's determination.

39 Section 382 of the Act provides that Subdiv 6 (appeals) applies in relation to a decision or determination of a panel as if the references in Subdiv 6 to a costs assessor were references to the panel.

The Applicable Law: Appeals

40 Section 384 of the Act deals with appeals against the decision of a costs assessor (and a review panel) as to a matter of law. Section 384 provides as follows:

“384 Appeal against decision of costs assessor as to matter of law

(1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the District Court, appeal to the Court against the decision.

(2) After deciding the question the subject of the appeal, the District Court may, unless it affirms the costs assessor's decision:

(a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or

(b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.

(3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.”

41 Section 385 of the Act provides for an appeal to the District Court against the decision of a costs assessor (or Review Panel) by leave. An appeal by leave involves a new hearing and fresh evidence. While the Amended Summons filed by the Solicitors in these proceedings sought, as an alternative, a grant of such leave as is necessary, counsel for the Solicitors indicated that the appeal from the decision of the Review Panel was made under s 384 of the Act as to a matter of law, and that the Solicitors were not pursuing an appeal by leave under s 385 of the Act (Tcpt 57/1).

42 Section 387 of the Act provides that a costs assessor can be made a party to any appeal.

General Principles in a Costs Appeal to the District Court

43 In *CSR Limited v Eddy* [2008] NSWCA 83; (2008) 75 NSWLR 725 the Court of Appeal said that while a costs assessor is not bound by the rules of evidence and has broad powers to inform himself or herself on any matter in issue, he or she is required to comply with the rules of procedural fairness. In that case certain costs agreements had been provided to a costs assessor, but they were not made available to a party liable to pay party/party costs. The court said at [38] that the appellants were entitled to be provided with copies of those agreements so that they could make appropriate submissions in support of their objection to the costs sought. However, the loss of the opportunity to make submissions did not by itself establish procedural unfairness. The appellants still needed to establish that failure to provide them with the costs agreements caused them “practical injustice” – *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* [2003] HCA 6; (2003) 214 CLR 1. The High Court said at [14]:

“In a case of that particular kind, it is the existence of a subjective expectation, and reliance, that results in unfairness. Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”

44 The Court of Appeal said at [39]:

“There is a distinction to be drawn between a complaint of unfairness where, on proper examination, it may be perceived that the unfairness is not established, and a case where unfairness has been established but the decision was inevitable, so that a grant of relief would be futile.”

45 In *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278; (2006) 67 NSWLR 321 the Court of Appeal said that a Review Panel must provide a Statement of Reasons that is detailed enough to inform the parties why the decision was made and provide a dissatisfied party with a real, and not illusory, right of appeal on questions of both law and fact. The court held in that case that the panel failed to provide adequate reasons for its determination. It was not sufficient for the panel merely to assert that a particular amount was in all the circumstances a fair and reasonable amount for costs. The facts and assumptions which led to that calculation should also have been identified in the reasons.

46 At [45] the court said:

“The delay and expense of an excessively onerous obligation to provide reasons is material, particularly when assessment of costs by costs assessors was intended to provide a faster, easier and cheaper system. In my opinion, however, the observations of Meagher JA in *Beale v Government Insurance Office (NSW)* (at 444) are applicable; that the balancing act in considering the sufficiency of a standard of reasons ‘involves the adoption of, at the least, a minimum standard which places the parties in a position to understand why the decision was made sufficiently to allow them to exercise any right of appeal’.”

47 In *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170 at [179]; [2014] NSWCA 170; (2014) 86 NSWLR 674 the Court of Appeal said that in giving reasons for its decision it was sufficient for a review panel to say, in effect, that it shared and endorsed reasons for conclusions stated by the assessor that the panel, in turn, considered to be correct.

48 The court considered the meaning of “review” in the context of a determination of a costs assessor. The court said at [158]:

“In the present context, it is the task of a review panel to review an assessment that has been made necessary because the person ordered to pay costs and the person to whom they are payable have not agreed the amount. One person wishes to see the assessor determine a large amount, the other a small amount. Each is able to present a case to the assessor. While the circumstances are not adversarial in any strict sense, the panel must consider competing contentions and make up its mind in the light of them.”

49 At [162] the court said that a review panel is not required to make a new assessment as if the original assessment had never been made. The starting point would generally be the original determination of the costs assessor. At [163] the court said:

“Where the person making an application for review elects to raise particular objections, a review panel will be entitled to proceed on the basis that that person is, in all other respects, content with the original assessment. In such a case, the panel will adequately perform its function by dealing with the expressed grounds of objection and giving each of them separate and distinct consideration.”

50 An appeal as of right under s 384(1) of the Act is a strict appeal, where the duty of the court is to determine whether error has been shown in the decision being appealed. It is not the court’s task to decide where the truth lies as between competing versions of evidence or whether some further evidence may have led to a different conclusion: *Fox v Percy* [2003] HCA 22 at [32]; [2003] HCA 22; (2003) 214 CLR 118; *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* [2011] NSWDC 55 at [10].

51 In an appeal as of right under s 384(1) of the Act the court is not concerned with the facts except to the extent that the decision is based on the facts found. It is not the purpose of the court to ascertain whether the facts were wrongly decided, incorrect, inadequate or incomplete. The court is not concerned with absent facts, undisclosed facts or undiscovered facts. It is not contemplated that the facts upon which the matter of law was decided will be reviewed, complimented, varied or added to. The appeal is concerned with the decision as to the matter of law: *Bellevarde Constructions* at [12].

The Amended Summons

52 The Solicitors sought orders setting aside three Certificates of Determination issued by the Review Panel. The primary certificate, dated 8 October 2020, reduced the costs payable to the Solicitors by the Client. The other two certificates concerned Review Panel Costs and the Costs of Assessment.

53 As previously recited, the application for leave to appeal (Order 2 in the Amended Summons) was not pursued.

54 The Solicitors sought the setting aside of the Certificates of Determination issued by the Review Panel, which would have had the effect of reinstating the determination of the Costs Assessor. In the alternative, the Solicitors asked for the matter to be remitted to a differently constituted Review Panel for determination in accordance with law. The Solicitors also sought the costs of the appeal.

55 The Appeal Grounds were set out in the Amended Summons. Two of those grounds were not pursued by the Solicitors. The Appeal Grounds were as follows:

“1 The Review Panel erred in law in determining that the Plaintiffs had failed to make disclosure in accordance with the [Legal Profession Act 2004](#). The Review Panel erred in law in setting aside the Costs Agreement.

2 The Review Panel erred in law in failing to give proper reasons for setting aside the Costs Agreement.

3 The Review Panel erred in law in making findings contrary to the evidence in relation to:

- a. Disclosure;
- b. Telephone calls;
- c. The complexity of the matter.

4 The Review Panel erred in determining that the Defendant was not properly advised in relation to counsels’ cancellation fees in circumstances where:

- a. there was insufficient evidence to support that finding, and
- b. the Defendant did not contend that she had not been properly advised, and
- c. the Review Panel did not give the Plaintiffs an opportunity to be heard in relation to whether the Defendant had been properly advised.

5 [Not pursued]

6 The Review Panel denied procedural fairness to the Plaintiffs in:

- a. reaching a conclusion in relation to counsel’s fees for which the Defendant did not contend, and
- b. [Not pursued]
- c. determining that the:
 - i. compilation of the joint assets, and
 - ii. preparation and updating of the Balance Sheet

should be reduced without giving the Plaintiffs and opportunity to be heard in relation to those issues.”

56 Counsel for the Solicitors made it clear that each and every ground was an allegation that the Review Panel had committed an error of law in reaching its determination and in giving its reasons.

57 The parties helpfully put all of the material relevant to the appeal in a Court Book. This comprised:

- (1) Amended Summons filed 4 February 2021 (CB 3-10).
- (2) Notice of Contention (CB 11-13).
- (3) Written Submissions on Appeal for the Solicitors (CB 14-53).
- (4) Written Submissions on Appeal for the Client (CB 54-86).
- (5) Affidavit of Barry Frakes sworn 25 March 2021 (CB 87-108).
- (6) Annexures to the affidavit of Mr Frakes, being the material considered by the Review Panel (CB 109-2565).
- (7) Certificates and Reasons of the Review Panel (CB 2467-2505).
- (8) Application for Assessment of Costs filed 6 October 2017 (CB 2566-2572).

58 It is necessary to consider most of that material, as the documents put before the Costs Assessor were also put before, and considered by, the Review Panel. The Costs Assessor and the Review Panel also had the privilege of considering 52 boxes containing the file created by the Solicitors in acting for the Client. Mercifully, that material has not been put before this court on the appeal.

Scope of the Review Panel's Determination

59 The Costs Assessor had declined to set aside the Costs Agreement entered into between the Client and the Solicitors. That assessor determined that costs should be assessed in accordance with the Costs Agreement, subject to a minor reduction of \$17,338.31 in relation to photocopying charges. The Costs Assessor declined to consider counsels' fees, including cancellation fees, as he took the view that the Client would need to join those counsel to a separate application for an assessment of their fees.

60 The ultimate conclusions of the Review Panel were as follows (CB 2485):

- (1) On a global basis the professional costs of \$2,228,320.71 should be reduced by 20.8%.
- (2) The professional costs payable by the Client to the Solicitors were thus reduced by \$463,490.70.
- (3) The Client was to pay the Solicitors' professional costs of \$1,764,830.
- (4) On a global basis the disbursements allowed by the Costs Assessor should be reduced by \$150,920, in addition to the reduction allowed by the Costs Assessor for photocopying charges of \$17,338.31.
- (5) Disbursements were allowed by the Review Panel at \$1,397,351.10.
- (6) Total costs and disbursements were allowed by the Review Panel at \$3,162,181.12.
- (7) As a result the Solicitors had to repay the Client \$631,749.01.

61 The Client had sought a review of the determination of the Costs Assessor upon 13 grounds. The Review Panel found some of those grounds established and others not established. The Client did not appeal to this court from those parts of the determination of the Review Panel which rejected some of the grounds put forward by the Client to the Review Panel. The Solicitors have challenged some of the adverse findings of the Review Panel but not all of them. This means that I do not have to consider those findings made by the Review Panel which are not challenged on this appeal.

62 I propose to consider the determination made by the Review Panel in the light of the grounds of appeal set out in the Amended Summons filed in this court. In doing so I will summarise the evidence and the submissions put before the Costs Assessor and before the Review Panel on each issue.

63 My taxonomy of the separate issue is as follows:

- (1) Issue 1: Disclosure and setting aside the costs agreement (Grounds 1 and 2 in the Amended Summons).
- (2) Issue 2: Findings contrary to the evidence (Ground 3 in the Amended Summons).
- (3) Issue 3: Cancellation fees of counsel (Ground 4 in the Amended Summons).
- (4) Issue 4: Denial of procedural fairness (Grounds 6a and 6c in the Amended Summons).

64 I propose to deal with each Issue listed above separately, by identifying:

- (1) The material and submissions put before the Costs Assessor.
- (2) The findings of the Costs Assessor.
- (3) The additional material and submissions put before the Review Panel.
- (4) The findings of the Review Panel.

ISSUE 1: DISCLOSURE AND SETTING ASIDE COSTS AGREEMENT

Overview of Determination of the Review Panel on Issue 1

65 As previously recited the Costs Assessor declined to set aside the Costs Agreement. Ground 1 of the grounds for review submitted by the Client to the Review Panel was: “The Costs Assessor erred in failing to set aside the terms of the Costs Agreement” (CB 2474-2476, pars 34-40).

66 The Review Panel noted that the Solicitors and the Client had entered into a Costs Agreement in June 2011. The Client withdrew instructions from the Solicitors in September 2016. During the period of the retainer the Solicitors sent the Client 52 invoices and charged the amounts totalling \$3,793,930.12 set out above.

67 The Review Panel determined that the Costs Agreement should be set aside on three bases:

- (1) Because the Solicitors failed to initially disclose an estimate of the total costs that would be incurred – s 309(1)(c) of the Act.
- (2) Because the Solicitors failed to disclose any significant change to that prior disclosure – s 316 of the Act.
- (3) Because of the conduct of the parties after the Costs Agreement was entered into – s 328(2)(e) of the Act.

(CB 2475, par 37)

68 I will return to deal in more detail with the reasons of the Review Panel for reaching that decision. I turn to consider the costs disclosure obligations of the Solicitors, which in large part founded the determination by the Review Panel to set aside the Costs Agreement.

The Applicable Law: Costs Disclosure

69 As previously recited, one of the purposes of Pt 3.2 of the Act is “to provide for law practices to make disclosures to clients regarding legal costs” – s 301(a). Division 3 of Pt 3.2 deals with costs disclosure obligations, which arise in two ways. Firstly, s 309(1)(c) requires a law practice to disclose to a client “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”.

70 A disclosure under s 309 of the Act must be in writing and must be made before, or as soon as practicable after, the legal practice is retained in the matter – s 311(1).

71 Section 315(1)(a) of the Act requires a written disclosure to be expressed in clear plain language.

72 The obligation to disclose an estimate of total legal costs under s 309 of the Act thus arises when the client first instructs the legal practice. This is the disclosure which Annexure A to the Costs Agreement purported to make (“Annexure A”).

73 The second costs disclosure obligation imposed by Div 3 of Pt 3.2 of the Act arises from s 316 which says:

“Ongoing obligation to disclose

A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this Division as soon as is reasonably practicable after the law practice becomes aware of that change.”

74 Section 317 of the Act deals with the effect of a failure to disclose. Section 317(1) of the Act provides that if there is a failure to disclose, the client need not pay the legal costs until they have

been assessed. Section 317(2) of the Act provides that if there has been a failure to disclose, the law practice may not maintain proceedings against the client for recovery of legal costs unless the costs have been assessed.

The Purpose of Disclosure

75 A formal requirement to disclose costs in writing was first introduced into legislation by the Legal Profession Reform Bill 1993 (NSW). During the Second Reading Speech (Legislative Council, 16 September 1993) the Attorney-General said (at p 3276):

“Fee disclosure will allow consumers to better compare legal fees and to make more informed decisions.”

76 In *Russells v McCardel* [2014] VSC 287 Justice Bell said (of similar legislation in Victoria) at [10]:

“The protective policy of requiring disclosure by lawyers and enhancing freedom of informed choice by clients underpins this legislation, reflecting the modern conception that clients are not just clients but also consumers who are typically in a position of negotiating disadvantage, that lawyers are not just professionals but also suppliers of legal services and that the provision of legal services is not just an indispensable ingredient of the system of justice but also a (national) market in which information and bargaining power are imperfectly distributed. In response to increasing concerns about the level of legal costs and disputes about this subject, the legislative expression of this policy has evolved over recent years such that the [statutory] requirements... are stronger now than they have previously been.”

77 Professor Dal Pont in *Law of Costs*, 4th Edition (2018) LexisNexis says (at 2.20):

“Hence, costs disclosure aims to empower the client vis-a-vis the lawyer, by giving the client the opportunity to make an informed choice costs-wise whether or not to retain the lawyer or to continue with the representation. As the retainer is what attracts practically all duties and liabilities owed by lawyer to client, disclosure obligations present lawyers with an opportunity to give proper consideration to setting the boundaries of the retainer. By clearly explaining to the client the parameters of the retainer through the disclosure regime, the lawyer can reduce the client-lawyer expectation gap and the prospect of client dissatisfaction. Setting these parameters also serves to alert the lawyer to the circumstances that, if the matter progresses beyond or differently to that anticipated, may amount to a new retainer. This assumes importance in both managing client expectations, and in alerting the lawyer to circumstances that may attract new disclosure obligations.”

The Applicable Law: Setting Aside Costs Agreements

78 Unless it is set aside, a costs agreement is the primary document governing the recovery of legal costs. Section 319(1) of the Act says:

“319 On what basis are legal costs recoverable?”

(1) Subject to the provisions of this Part, legal costs are recoverable:

- (a) in accordance with an applicable fixed costs provision, or
- (b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or
- (c) if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.”

79 Section 317(3) of the Act provides as follows:

“If a law practice does not disclose to a client or an associated third party payer anything required by this Division to be disclosed and the client or associated third party payer has entered into a costs agreement with the law practice, the client or associated third party payer may also apply under section 328 for the costs agreement to be set aside.”

80 Section 317(4) of the Act provides:

“If a law practice does not disclose to a client or an associated third party payer anything required by this Division to be disclosed, then, on an assessment of the relevant legal costs, the amount of the costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose.”

81 As previously recited, s 317(3) of the Act gives a client the opportunity to apply under s 328 of the Act for the costs agreement to be set aside, if there has been a failure to disclose.

82 Section 328(1) of the Act provides:

“(1) On application by a client, a costs assessor may order that a costs agreement or a provision of a costs agreement be set aside if satisfied that the agreement is not fair or reasonable.”

83 Section 328(2) of the Act provides a list of matters which a costs assessor may have regard to, in determining whether or not a costs agreement is fair or reasonable. The third such matter is:

“(c) whether the law practice failed to make any of the disclosures required under Division 3,”

84 The fifth factor listed in s 328(2) of the Act is:

“(e) the circumstances and the conduct of the parties in the matters after the agreement was made,”

85 Section 328(4) of the Act provides:

“(4) If the costs assessor determines that a costs agreement or a provision of a costs agreement be set aside, the assessor may make an order in relation to the payment of legal costs the subject of the agreement or the provision of the agreement.”

86 Section 328(5) of the Act provides that if the costs assessor makes an order setting aside the Costs Agreement, the costs assessor must determine “the fair and reasonable legal costs in relation to the work to which the agreement or the provision of the agreement related”. By s 328(5) of the Act the costs assessor takes into account:

“(a) the seriousness of the conduct of the law practice..., and

(b) whether or not it was reasonable to carry out the work, and

(c) whether or not the work was carried out in a reasonable manner.”

87 Section 328(7) of the Act sets out a number of matters that a costs assessor may take into account in determining the fair and reasonable legal costs payable where a Costs Agreement has been set aside. The second such factor is:

“(b) any disclosures made by the law practice under Division 3, or the failure to make any disclosures required under that Division,”

88 The sixth factor listed in s 328(7) of the Act is:

“(f) the complexity, novelty or difficulty of the matter,”

89 Among the other matters to be taken into account are the skill, labour and responsibility displayed by the legal practitioner, the retainer and whether the work done was within the scope of the retainer, the quality of the work done and the time within which the work was required to be done.

90 By s 328(9) of the Act the costs assessor may order the payment of the costs of and incidental to determining an application under the section for the setting aside of the Costs Agreement. Such an order or determination must be accompanied by a Statement of Reasons: s 328(9A).

Material Before the Costs Assessor: Costs Agreement and Disclosure

91 The Client filed a Notice of Objection which contained General Objections and Specific Objections (CB 113-137 and CB 274-285).

92 General Objection 1 concerned failure to meet disclosure obligations. The Client pointed to the Costs Disclosure in the Costs Agreement and drew attention to the fact that the higher end of the estimated costs was \$123,000 (CB 114, par 1.4). The Client submitted that: the estimate that was

provided was so grossly inadequate that it did not fulfil the obligation to estimate the likely costs which would be incurred in the matter; the Solicitors should have been well aware of the likely magnitude of future costs; and the estimate was unrealistic from the outset (CB 115, pars 1.6, 1.7 and 1.8).

93 The Client also submitted that there was a failure to properly update the estimate (CB 116). The Client submitted (at par 1.9):

“Save and except for updated [sic] in relation to rates and charges which were sent on a yearly basis the [Client] cannot recall receiving any substantive updates with respect to costs throughout the matter.”

94 The Client acknowledged that yearly letters were received, setting out new rates of charge, around the middle of the years 2011, 2012, 2013 and 2014. The Client submitted that such updates did not provide an update in relation to a costs estimate but simply provided for increased hourly rates year on year (CB 116, par 1.11).

95 The Client submitted to the Costs Assessor that the failure to meet disclosure obligations meant that the appropriate course for the Costs Assessor would be to disallow costs claimed in accordance with the Costs Agreement (CB 121, par 1.28).

96 The Client put the Costs Agreement, together with the initial disclosure in Annexure A, before the Costs Assessor (CB 274-288).

The Costs Agreement

97 The Costs Agreement including the initial disclosure in Annexure A was signed by the Client in June 2011 (CB 274-288).

98 The document was expressed to be an offer by the Solicitors to enter into a Costs Agreement with the Client. The work which the Solicitors had been instructed to do was “to represent you in your Relationship matter” (CB 274, par A). Clause D of the Costs Agreement provided that if the Client accepted the offer she would be bound by the terms and conditions set out in the Costs Agreement, including being billed in accordance with it (CB 274, par D).

99 Clause C of the Costs Agreement said:

“The disclosure requirements which we are required to provide you are contained in Annexure A (Costs Disclosure) which forms part of this document.”

100 Annexure A to the Costs Agreement was headed “Costs Disclosure”. That part of the agreement was said to disclose information about the costs of legal services and the rights of the Client, as required by the Act.

101 Clause 2.1 of Annexure A said that the Solicitors would charge professional fees for their work in accordance with a Schedule of Charges reproduced at the end of Annexure A. Charges were structured in six minute units. Rates would usually be adjusted at the beginning of each financial year. Clause 2.3 of Annexure A referred to the Solicitors incurring expenses and disbursements on behalf of the Client. These included barrister’s fees.

102 Clause 3 of Annexure A was headed “Estimate of Costs”. Clause 3.1 said:

“The following estimates are based on the information available to us to date (and we note this agreement has been prepared prior to us having the opportunity to obtain instructions from you about your case). They are estimates, not quotes and are subject to change.”

103 Clause 3.2 of Annexure A said:

“3.2. It is not possible at this time to provide an accurate estimate of the total costs. Instead a range of estimates of total costs (excluding GST) is provided for different stages. As indicated earlier in this agreement, we will provide you with actual estimates of costs and advise of the amount therefore required to be placed in trust, stage by stage during your case. The following are estimates based on our experience. The cost of your case could vary for many reasons. There may be a number of stages in your matter, and these can vary (with complexity and what is in dispute), but the usual stages may broadly be divided into:

3.2.1. Stage 1: Initial instructions and investigations: \$1,000 to \$3,000;

3.2.2. Stage 2: Initial advices/communications/negotiations, a further \$1,000 to \$5,000;

3.2.3. Stage 3A: Documenting a settlement or commencement of proceedings (for final orders only i.e.; no interim applications), a further \$1,000 to \$5,000; OR,

3.2.4. Stage 3B: Commencement of proceedings including interim application; a further \$10,000 to \$15,000;

3.2.5. Stage 4: Resolution phase of proceedings, a further \$3,000 to \$25,000;

3.2.6. Stage 5: The Determination phase of proceedings a further \$15,000 to \$70,000.”

104 Clause 3.3 of Annexure A set out a list of 10 “major factors” which would affect the estimates. The material put before the Costs Assessor and the Review Panel demonstrated that all 10 factors loomed large in the Family Court proceedings.

105 Clause 8 of Annexure A said:

“Substantial Changes to Disclosure

You will be informed, as soon as is reasonably practicable, of any substantial changes to anything contained in this disclosure document.”

106 The Costs Agreement contained a summary of the rights given to a client in relation to costs generally (CB 285).

107 The Costs Agreement contained a schedule of charges applicable from 1 July 2010 (CB 286-287). This set out the hourly rates for various lawyers and paralegals who might work on the matter. It also set out charges for drafting, conferring and telephone calls.

Further Submissions and Material

108 The Client also put before the Costs Assessor the yearly letters referred to above which updated charges and hourly rates (CB 289-296).

109 There was correspondence between the parties and the Costs Assessor as to whether the application to set aside the Costs Agreement should be dealt with as a preliminary matter (CB 806-810). It was decided to determine the application to set aside the Costs Agreement as a preliminary matter.

110 The Client filed submissions in relation to the application to set aside the Costs Agreement (CB 820-830). Those submissions made it plain that the Client was applying under s 328(1) of the Act for the Costs Agreement to be set aside on the basis that it was not fair and reasonable having regard to:

(1) The failure by the Solicitors to make the disclosures required under Division 3 of Part 3.2 of the Act – s 328(2)(c) and s 317(2).

(2) The circumstances and conduct of the parties before and when the Costs Agreement was made – s 328(2)(d).

(3) The circumstances and conduct of the parties in the matters after the agreement was made – s 328(2)(e).

(4) The inclusion of unusual and unreasonable terms (which were specified).

(CB 821, par 7)

111 The Client also submitted that the only estimate of total legal costs given to her was the range of \$31,000 to \$123,000 set out in Annexure A. The Client asserted that the Solicitors had failed to provide any update to the estimate of total costs. This was said to be a clear and serious breach of the disclosure obligations in Div 3 of the Act and one which warranted the setting aside of the Costs Agreement (CB 825, par 17).

112 The further submissions of the Client also dealt with the circumstances and conduct of the Solicitors after the Costs Agreement was made (CB 826, pars 22-24). Such circumstances and conduct were identified as:

- (1) The Client not being provided with any update to the original estimate of costs.
- (2) The Client being advised on a yearly basis of upward revisions to charges and hourly rates, including an upward revision of 22% six days after the retainer was signed.
- (3) The Client needing to make an application in the Family Court for interim orders for the husband to pay her a sum in part for payment of her legal fees.
- (4) Due to the considerable time and cost and given the complexity of the proceedings, the Client felt she had no option but to continue to retain the Solicitors and pursue the application for interim orders.

113 I pause to note that this list of circumstances of conduct of the Solicitors after the Costs Agreement was made does not include the matter taken into account and relied upon by the Review Panel as one of the reasons for setting aside the Costs Agreement. I will return to that matter when later considering the determination of the Review Panel.

114 The Solicitor made written submissions in response to the application to set aside the Costs Agreement (CB 839-866).

115 The Solicitors relied upon the Costs Disclosure contained in the Costs Agreement. The Solicitors submitted that the Client "was well aware of the amount of the costs she was incurring throughout the course of her matter" (CB 841, par 2.6). The Solicitors submitted that they wrote to the Client regularly in relation to legal costs and provided updated estimates (CB 841, par 2.6).

116 The Solicitors submitted that when the Client first approached their practice, it was not possible for them to anticipate how the matter would proceed. They pointed out that the first estimate was provided before they had seen the Client's file material or taken instructions (CB 841, par 2.7).

117 The Solicitors submitted as follows (CB 841, par 2.8):

"Once the [Solicitors] were aware of the scope of the matter, the original estimate was revised and updated. As the matter proceeded and circumstances changed, the [Solicitors] continued to disclose to the [Client] information in relation to costs as required."

118 The Solicitors pointed to an application made in the Family Court in relation to an interim payment order, part of which was to cover legal costs. The Solicitors pointed to the Client's detailed affidavit in support of the application, which is to be found at CB 889-931. In par 115 of that affidavit the Client deposed that she had been advised of significant costs which would be incurred in the Family Court proceedings in the future, which would be "a further \$750,000 at the very least" (CB 930).

119 The Solicitors pointed out that the application supported by the Client's affidavit of 1 August 2011 was heard on 20 December 2011 and judgment was given on 31 May 2012. The Solicitors submitted as follows (CB 843, par 2.14):

"A copy of the [Solicitors'] costs memorandum dated 15 December 2011 setting out a total estimate of costs on the information available at that time being which had by then [sic] been updated to be between \$985,000 and \$1,120,000. This costs estimate was relied on by the [Client] at the hearing of her Application in a Case on 20 December 2011."

A copy of that costs estimate dated 15 December 2011 was annexed to the submissions (CB 1023-1024).

120 I pause to note that the judgment of the Family Court delivered on 31 May 2012 (which is reproduced at CB 996-1022) does not refer to the Costs Memorandum dated 15 December 2011. In par 14 of the judgment (CB 1002) the judge listed the six documents relied upon by the wife. The Costs Memorandum dated 15 December 2011 was not in that list.

121 The Costs Memorandum dated 15 December 2011 is reproduced at CB 1023-1024. There is no covering letter serving that Costs Memorandum. I return to consider that document below.

122 The Solicitors submitted to the Costs Assessor that they continually updated their estimates of likely costs as required by s 316 of the Act (CB 843, par 2.16).

123 In par 2.17 (CB 843-844) of their submissions the Solicitors listed 22 documents, copies of which were annexed to the submissions. The Solicitors submitted that those documents provided ongoing disclosure as required by s 316 of the Act. These documents require close analysis to determine whether they discharge the statutory obligation of the Solicitors in relation to costs disclosure. I will set out below a detailed consideration of those documents.

124 The Solicitors submitted that they had communicated regularly with the Client with respect to costs and provided detailed estimates which were updated and revised from time to time. They submitted that they clearly met their ongoing obligation to disclose information in relation to costs as set out in s 316 of the Act. They submitted that there was no failure on their part to comply with disclosure (CB 845, pars 2.18-2.21).

125 The submissions by the Solicitors returned to deal with failure to disclose at CB 858-860. In par 4.30 (CB 858) the Solicitors submitted that even if the Costs Assessor determined that the Solicitors had failed to comply with the disclosure obligations by "providing an initial estimate that might be considered to be inadequate" that was not an appropriate reason to set aside the entire Costs Agreement for such failure alone.

126 The Client responded to the submissions from the Solicitors by a Response dated 5 June 2018 (CB 1459-1462). Those submissions largely concern the alleged failure to give proper disclosure of the quantum of counsels' fees, and in particular disclosure in relation to cancellation fees. That is a matter considered in further detail below.

Preliminary Determination of the Costs Assessor: Disclosure and Setting Aside Costs Agreement

127 The Costs Assessor determined not to set aside the Costs Agreement and delivered reasons for his decision (CB 1474-1481). It is noted that the Review Panel later reached the opposite conclusion.

128 The Costs Assessor made the following findings:

(1) The initial Costs Disclosure estimated that the proceedings might cost the Client \$123,000, whereas in fact more than \$3 million was ultimately charged (CB 1475, par 14).

(2) The Costs Estimate quote "was of course manifestly inadequate and insufficient attention was then taken by the [Solicitors] in that regard" (CB 1475, par 15).

(3) It was not reasonably practicable initially to give an estimate although the Solicitors "should have been more realistic" (CB 1476, par 16).

(4) The fact that the estimate was manifestly inadequate was overcome by subsequent disclosures (CB 1476, par 19).

(5) There was "a great deal of updating disclosure" (CB 1476, par 21).

(6) While it might be desirable for a solicitor to attempt each month to revise the initial estimate of the overall likely costs, it is not necessarily practicable to do that and in major litigation of this nature it is not possible to give a realistic estimate (CB 1476, par 23).

(7) The retainer agreement will not be set aside (CB 1480, par 41). There were updating disclosures on top of the monthly bills (CB 1481, par 45).

(8) The material in the Client's affidavit "speaks for itself in relation to her knowledge of the costs that she was to incur and was likely to incur" (CB 1481, par 45).

129 At this point I note the following:

(1) An estimate is necessarily prospective and must refer to costs to be incurred in the future.

(2) The Solicitors did not submit to the Costs Assessor that it was not reasonably practicable to give an initial estimate or to update that estimate.

(3) The Solicitors submitted that they did give a proper initial estimate.

(4) The Solicitors submitted that they did give valid updating disclosures on 22 occasions.

(5) The requirement in the Act for disclosure focusses upon whether a written disclosure in plain English has been made, rather than upon whether the Client displays knowledge or understanding of

the likely costs to be incurred (which might be knowledge given to her other than by means of a formal disclosure required by the Act).

130 Having decided that he would not set aside the Costs Agreement, the Costs Assessor proceeded to assess costs on the basis of that Costs Agreement (CB 2213-2249). As previously recited, the only reduction in the costs charged by the Solicitors was a figure of \$17,338.31 which related to photocopying charges.

Application for Review of Determination of Costs Assessor

131 The Client lodged an Application for Review of the determination of the Costs Assessor on 19 November 2019 (CB 2250-2259).

132 In relation to the determination by the Costs Assessor to decline to set aside the Costs Agreement, Ground 1 of the Application for Review asserted that the Costs Assessor erred in failing to set aside the terms of the Costs Agreement, on the basis of the material put before him (CB 2253).

133 By a letter dated 13 December 2019 the Review Panel called for submissions (CB 2264-2265).

134 By a letter dated 10 January 2020 the Solicitors provided further submissions for consideration by the Review Panel (CB 2268-2277). In relation to Ground 1 of the Application for Review (being the application to set aside the Costs Agreement), the Solicitors relied upon the interim determination of the Costs Assessor made on 27 August 2018, saying that it gave carefully considered attention to the submissions and provided clear reasons and correctly applied the applicable legislative tests (CB 2269, par 2).

135 The Client provided submissions in reply (CB 2279-2287). In relation to Ground 1 of the Application for Review the Client reiterated her previous submissions made to the Costs Assessor (CB 2280-2281).

136 Apart from these submissions there was no additional material put before the Review Panel on this issue.

Preliminary View of the Review Panel

137 The Review Panel wrote to the parties by a letter dated 11 June 2020 (CB 2289-2297). The letter set out some preliminary observations of the Review Panel, emphasising that such views were not a determination but would be the subject of further consideration after submissions were received.

138 The Review Panel said that it had examined the grounds and the assessor's determination and was "likely to set aside the assessor's determination" (CB 2294, par 9.2).

139 The letter dealt specifically with disclosure (CB 2294-2296). It pointed out that estimates of costs must be prospective. It is not enough that bills are frequently sent to a client. Such bills inform a client that costs have been incurred, not the costs that will be incurred in the estimation of the law practice. The Review Panel had a preliminary view, on the material received from the Solicitors, that there were failures to disclose. The Review Panel set out its views as to what the consequences were if that became their final view.

140 In par 10.6.6 (CB 2295) the Review Panel pointed out that if there is a failure to disclose, then an assessor or a Review Panel may reduce the amount of costs by an amount considered to be proportionate to the seriousness of the failure to disclose – s 317(4) of the Act. I pause to record that while the Review Panel did ultimately set aside the Costs Agreement, it did not go on to exercise its discretion under s 317(4) of the Act.

141 In par 12 of the letter dated 11 June 2020 (CB 2297) the Review Panel required both the Solicitors and the Client to provide further submissions concerning disclosure and the consequences of failure to disclose. In particular, it requested submissions on the effect on the Client of failure to disclose and what she might have done had disclosures been made as and when required.

Further Submissions Received by the Review Panel

142 The Solicitors provided further submissions dated 24 June 2020 (CB 2298-2301). In relation to the issue of disclosure the Solicitors referred to the submissions put before the Costs Assessor and emphasised that there had been "22 written updates/costs disclosure... during the course of the matter" (CB 2299, par 2.4). The Solicitors also referred to the lengthy and comprehensive affidavit sworn by the Client on 1 August 2011 "being only weeks after the date of the initial Costs Agreement,

in support of an urgent application for an interim financial order or property settlement from her former Husband to cover, amongst other things, past and future legal costs" (CB 2299, par 2.4).

143 The Solicitors submitted that the Client had "a very clear understanding of the likely quantum of costs to be incurred should the litigation continue on its then current protracted and highly contested path" (CB 2299, par 25).

144 The Solicitors submitted that any changes to the costs estimates were largely as a result of the manner in which the husband conducted the proceedings and that the Solicitors could not possibly have anticipated at the outset, or even when the matter was set down for hearing, that such conduct would occur (CB 2300, par 2.7).

145 The Solicitors described the application by the Client to set aside the Costs Agreement as "most disingenuous". They provided a copy of the disclosure submissions made to the Costs Assessor. Again the Solicitors referred to "copies of the various disclosure documents" and "copies of the affidavit and judgment referred to" (CB 2300, par 2.9).

146 The Client provided further submissions dated 9 July 2020 (CB 2302-2465). Those submissions did not specifically address the issue of costs disclosure and the application to set aside the Costs Agreement. The Client relied upon earlier submissions in that regard. However, the Client did provide a document referred to as "Timeline of Instructions which goes to the [Solicitors'] early understanding of the scope of the retainer". The Client submitted that this material was provided to the Solicitors "right from the time of the first engagement" (CB 2309, par 3.3). The Client said that she provided a detailed chronology of the marriage at her first meeting with the Solicitors (CB 2305 par 2.2(c)). The Client annexed a copy of the document, which set out a lengthy and detailed narrative of the time from the first meeting between the husband and wife, their marriage, and the property dealings conducted during the marriage (CB 2312-2370).

147 The Client also submitted that at the first meeting with the Solicitors she provided a letter from the husband's accountant setting out details of relevant documents in the proceedings, a summary of her family's average annual expenditure, a full list of properties owned by her husband and the associated rent roll for those properties (CB 2305, par 2.2(c) and (d) and CB 2373-2385).

148 The Client also submitted that at the first meeting she provided a document dealing with property information for capital gains tax, a "mud map" for the group of entities owned directly or indirectly by the husband and emails relating to mortgage documentation (CB 2306-2307, par 2.2(e) and CB 2386-2389).

149 In relation to the initial estimate contained as an annexure to the Costs Agreement the Client submitted at par 2.7 (CB 2306):

"Given the extensive information provided at the outset of instructions and bearing in mind the former husband's background and business experience, it was not unreasonable of our client to expect that they would provide her with a carefully thought out estimate."

150 The Client also submitted that it was not possible to partly or substantially comply with disclosure duties. It was submitted that the Costs Assessor erred in not finding that the limited future estimates that were provided were insufficient to amount to disclosure as required by the Act (CB 2306-2307, par 2.8).

Disclosure Documents Relied Upon by the Solicitors

151 For the initial disclosure the Solicitors relied upon Annexure A to the Costs Agreement. I have summarised this document above and will consider it further below after I deal with the reasons given by the Review Panel for its determination. At this point I note that Annexure A provided a range of estimates of the total legal costs, as permitted by s 309(1)(c) of the Act, on the basis that it was not reasonably practicable to provide an estimate of the total legal costs.

152 The Solicitors in their submissions (CB 843-845) set out a list of 22 documents which they said constituted updates to the initial estimate, as required by s 316 of the Act, where there is a substantial change to anything included in a disclosure already made. The documents were provided to the Costs Assessor and the Review Panel and are to be found at CB 1025-1121. I will adopt the description of each of the 22 documents given in the Solicitor's submissions at CB 843-845.

153 Counsel for the Solicitors submitted that this court did not have to determine whether disclosure was made or not. Counsel submitted that the issue on appeal was “whether the review panel properly engaged with the issue and determined it on its proper merits and by reference to the relevant material” (Tcpt 18/35). To deal with that submission I turn to examine the “relevant material”. On appeal I cannot engage in fact-finding or receive further evidence. However I can and must look at the material which was before the Costs Assessor and the Review Panel.

Document (a) Letter dated 28 November 2011

154 The Solicitors wrote to the Client by a letter dated 28 November 2011 (CB 1025 - 1026) which commenced:

“We refer to your matter. We provide you with an estimate of costs between now and the interim hearing set down on 20 December 2011 herein.”

155 The letter referred to a hearing on 20 December 2011 of the Client’s partial property application. The letter assured the Client:

“As your matter moves forward we will, as we have, endeavour to minimise the expenses incurred between now and 20 December 2011 in the management of your matter and preparation thereof towards the hearing.”

156 The letter then points out that there is much work to be done and it lists nine legal tasks which will have to be undertaken to prepare for the hearing. The letter then says:

“We have no doubt that the costs of proceeding to the interim hearing on 20 December 2011, and preparing for same, and otherwise managing the ongoing carriage of your matter pending determination of the extant applications on 20 December 2011, will be at least a further \$25,000. Should we be required to prepare further material, following the recommendations of ... in his expert’s report, we have no doubt that the costs will be at least a further \$35,000.”

157 This is the first updating disclosure document relied upon by the Solicitors. In other words, there was no update provided between Annexure A to the Costs Agreement executed in June 2011 and Document (a) dated 28 November 2011.

158 The Solicitors provided to the Costs Assessor a document dated 15 December 2011 entitled “Costs Figures” (CB 1023-1024). This stated that as at 15 December 2011 the total legal costs and disbursements charged by the Solicitors to the Client amounted to \$256,464.48 and in addition there was \$19,802.09 of unbilled work. This document was not one of the 22 documents put before the Costs Assessor as documents which satisfied the Solicitors’ disclosure obligations. Nor was there evidence that this document was provided to the Client.

159 Even adding the estimate in Document (a) to the estimate given in the Costs Agreement, it is clear that before the hearing listed for 20 December 2011 (i.e. by 15 December 2011) the legal costs incurred by the Client to the Solicitors were much more than the upper initial estimate plus the Document (a) estimate.

Document (b) Letter dated 19 March 2012

160 A letter dated 19 March 2012 (CB 1027) from the Solicitors to the Client spoke of annexing a copy of a Costs Agreement from a barrister retained by the Solicitors to act for the Client. A copy of the Costs Agreement was not annexed to Document (b) as part of the Solicitors’ submissions to the Costs Assessor. It is therefore impossible to know what figure, if any, was estimated for the further legal costs to be incurred as a result of retaining that barrister.

Document (c) Letter dated 26 July 2012

161 In a letter dated 26 July 2012 (CB 1028-1032) from the Solicitors to the Client, the Solicitors informed the Client that:

(1) The sum of \$139,153.53 had been billed to the Client over the past year.

(2) The Client had incurred further legal costs and disbursements of approximately \$130,000 which had not yet been billed.

(3) The accountants for the Client were owed \$150,000 and were requesting the Solicitors to pay that amount to them.

162 The letter informed the Client that the case was “presently listed for the first day of Less Adversarial Trial on 21 August 2012 in the Family Court of Australia”. The letter advised that given the work required up to and including the first day of that trial, including barrister’s fees, “your costs will be approximately a further \$100,000 between now and the end of August”. There was no update between Document (a) on 28 November 2011 and Document (c) on 26 July 2012.

163 The letter asked the Client to authorise the amount of \$520,000 to be paid into the Solicitor’s account from the amount that the husband had been ordered by the Family Court to pay as part of an interim property order. Clearly this figure of \$520,000 was to encompass and discharge the three amounts listed above plus the additional \$100,000 estimated for legal costs between 26 July 2012 and the end of August 2012.

164 The letter also said that the Solicitors would “provide you with estimates on a regular basis”. It said that there would be significant costs in the future for experts. Enclosed was a copy of a “Notice As To Costs” (“Notice”) sent to the husband by his own solicitors.

165 It is instructive to consider the Notice (CB 1031-1032). The Notice commenced by stating that the husband had incurred costs up to 19 December 2011 of \$332,816.87. The estimate of his future costs, including a 15-20 day trial was a range of \$1,402,816.87 to \$1,932,816.87. Notes to the Notice gave information as to the reasons for the range being given. While the Notice is a fairly basic document, considering the quantum of past and estimated costs dealt with, it appears to satisfy the formal disclosure requirements in the Act. No similar document was ever sent by the Solicitors to the Client with an estimate in relation to her total legal costs.

Document (d) Letter dated 3 October 2012

166 In a letter from the Solicitors to the Client dated 3 October 2012 (CB 1033-1035) the Solicitors advised that the Client had incurred further legal costs and disbursements which had not yet been billed of approximately \$63,693.04. The letter said that the Solicitors were “currently attending to preparing a budget for the work to and including the trial set down for three weeks from 22 July 2013 and you will receive same in due course”.

167 The letter asks for payment of the figure for work done but not yet billed, and requests payment of an additional \$50,000 “on account of future, anticipated costs and disbursements”.

168 There is no basis put forward for the estimate of \$50,000, and it is clearly a request for monies “on account”. The letter says that a budget is being prepared and will be provided to the Client, but Document (d) is not that budget and is not an estimate of the costs up to and including the hearing.

Document (e) Letter dated 29 November 2012

169 By a letter dated 29 November 2012 (CB 1036-1040) the Solicitors wrote to the Client concerning a proposal received from the solicitors for the husband concerning payment of past costs. The letter gave advice concerning the difference between party/party costs and indemnity costs. The advice contained in the letter was that indemnity costs should not be pursued, and that some agreement should be negotiated concerning the quantum of a past costs order. The letter concluded by seeking instructions to accept a proposal put by the husband in respect of the costs of the Client being met on a party/party basis as agreed or assessed.

170 Document (e) has nothing to say about an estimate of future costs or total costs.

Document (f) Letter dated 13 December 2012

171 A letter from the Solicitors to the Client dated 13 December 2012 (CB 1041-1052) enclosed an “Estimate of Costs”. That document set out 17 different categories of legal work necessary to be done for a 15-day hearing commencing on 22 July 2013 (CB 1044-1052). Item 16 was fees for junior counsel to prepare for and appear at the final hearing, in a total amount of \$143,000. Item 17 was fees for senior counsel for preparation and appearance in a total amount of \$264,000.

172 The total estimate was \$883,728. It was noted that this did not include allowances for costs in relation to expert witnesses.

173 In summary, the Estimate of Costs was a detailed document which set out a number of steps to be taken to prepare for the final hearing, and which set out within those steps information concerning the work which would have to be done and an estimate of the time and cost for such work.

174 I pause to indicate that, in my view, the document does provide the Solicitors' estimate of the costs likely to be incurred between 13 December 2012 and the conclusion of a 15-day hearing commencing on 22 July 2013. There is no similar document which pre-dates document (f). While the document speaks in detail of future costs, it has no figure for past costs and is thus not an estimate of total legal costs, as required by the Act.

Document (g) Letter dated 4 March 2013

175 By a letter dated 4 March 2013 (CB 1053) the Solicitors wrote to the Client attaching a draft letter which they proposed to forward to the husband's solicitors in relation to costs issues (CB 1059).

176 Document (g) has nothing to say about an estimate of future costs or total costs.

Document (h) Email Communication with the Client dated 6 March 2013

177 On 6 March 2013 the Solicitors sent an email to the Client (CB 1060-1061) requesting a payment of \$125,800 by 18 February 2013. The Client responded by saying that she would make payment that day.

178 Document (h) has nothing to do with estimating or disclosing costs. It is a request for payment.

Document (i) Email dated 19 April 2013

179 By an email dated 19 April 2013 (CB 1062-1064) the Solicitors wrote to the Client reminding her that \$93,500 was payable by 1 April 2013. The Client responded on the same date saying that she would pay this amount in three days time. On 23 April 2013 the Solicitors sent an email to the Client giving her the payment details. That reminder referred to "our costs budget letter dated 13 December 2012". This is a reference to Document (f) discussed above.

180 The email dated 19 April 2013 was a request for payment and had nothing to do with disclosing or estimating costs.

Document (j) Email dated 6 May 2013

181 An email from the Solicitors to the Client dated 6 May 2013 was a request for further payment (CB 1065-1066). It had nothing to do with disclosing or estimating costs.

Document (k) Letter dated 27 June 2013

182 By a letter dated 27 June 2013 the Solicitors wrote to the Client referring to the "budget letter" dated 13 December 2013 [sic: 2012] (CB 1067). The Solicitors requested that further payments be made in accordance with the schedule set out in the budget letter. This letter had nothing to do with disclosing or estimating costs.

Document (l) Costs Memorandum dated 24 July 2013

183 This document is headed "Costs Memorandum" and is dated 24 July 2013 (CB 1068-1071). It stated that the total legal costs and disbursements charged to date are \$1,867,005.70. In addition there were further legal costs and disbursements of \$116,392.80 which had not yet been charged to the Client. The Memorandum also listed three amounts which had been paid to previous firms of solicitors.

184 Item 4 in the Memorandum refers to the Solicitors' estimated fees for hearing. It makes an estimate of \$3,542 for an Associate to attend for seven hours per day and \$2,464 for a senior legal clerk to attend for seven hours per day. Presumably these are additional costs over and above those set out in the December 2012 document, but that is not made plain by the Memorandum.

185 Item 5 in the Memorandum is "counsel's estimated fees for hearing". The figure for senior counsel is \$276,200 and the figure for junior counsel is \$143,000.

186 Annexed to the Costs Memorandum was a statement of payments made towards legal costs either by the Client or her husband pursuant to a court order. The total of the receipts to 28 June 2013 from those two sources was \$2,498,868.60. The document also recorded that disbursements totalling

\$122,664.52 had been paid from the Solicitors' office account and disbursements of \$542,254.52 had been paid from the Solicitors' trust account.

187 It is noted that between Document (c) on 26 July 2012 and Document (l) on 24 July 2012 the past costs had increased from approximately \$500,000 to \$2,148,806.40 (the total of items 1, 2 and 3).

188 There was no covering letter or any indication that Document (l) was sent to the Client.

Document (m) Letter dated 26 July 2013

189 A letter dated 26 July 2013 from the Solicitors to the Client (CB 1072-1074) indicated that various experts had required payment of further fees. In addition, there was a tax invoice for \$12,100 from a barrister, which had not been budgeted for in the letter dated 27 June 2013. As noted above, that earlier letter promised to deliver a budget but did not itself contain a budget.

190 The letter said that the husband had served an extra 51 affidavits over and above what was anticipated in the previous estimate. There was a substantial increase in the work which had to be done. The letter said:

"The trial will proceed for considerable [sic] greater than the current time estimated. We expect that our fees will be approximately \$65,000 greater than that which we have previously estimated in light of that strategy."

191 The Solicitors said that they would render a bill at the conclusion of the time allocated for the hearing, being 9 August 2013. The Solicitors said:

"We will then have to do a further updated budget for further funds to be placed into our trust account given that trial of this matter will be adjourned part heard to another date hopefully in October 2013."

192 The letter requested funds to cover the additional fees charged by the experts, the tax invoice received from the barrister, and a further amount for fees estimated at \$65,000.

193 The letter also said that the Solicitors expected that senior and junior counsel "will update us with their costs soon".

194 This letter does provide an estimate of an additional \$65,000 lump sum for work necessary because of the late service of 51 extra affidavits by the husband. There was no breakdown of the practitioners who would be performing work, their hourly rate, or what was required to be done by various lawyers. In addition, the letter said nothing about any fees which might be incurred to senior and junior counsel for the future.

Document (n) Costs Memorandum dated 7 August 2013

195 There is a Costs Memorandum dated 7 August 2013, to which is attached a statement of payments and disbursements made (CB 1075-1080). There is no accompanying document indicating that this Memorandum was given to the Client. It is a confusing document in relation to counsels' fees as there are two different figures provided. Item 5 is "Counsel's estimated fees for hearing" which gives figures of \$276,200 for senior counsel and \$98,400 for junior counsel, described as "\$143,000 less account paid \$44,600". Item 5 might relate to past costs or it might be referring to monies held in trust.

196 Below Item 5 in the Memorandum is a box headed "Estimate as to further hearing dates". It says that there will be another five weeks of hearing in early February 2014.

197 Under this heading Item 6 estimates the Solicitors' fees from 12 August 2013 to final hearing of \$374,495. There is no breakdown of how this precise figure has been reached. Item 7 is counsels' estimated fees for hearing, being \$288,000 for senior counsel and \$214,500 for junior counsel. Item 8 is estimated expert fees of \$25,000.

198 Why this document came into existence, or who saw it, is not the subject of any material put before the Costs Assessor. For example, there is no covering letter to indicate that this was ever given to the Client. In any event, there are four figures for estimated fees (one for the Solicitors, two for counsel and one for experts) but they are lump sum figures with no indication of how those figures were calculated.

Document (o) Letter dated 25 September 2013

199 The Solicitors wrote to the Client by a letter dated 25 September 2013 (CB 1081-1087) referring to an interim hearing listed for three to five days commencing on 28 October 2013. The letter enclosed an Estimate of Costs for the interim hearing (CB 1085-1086) and an Estimate of Costs in relation to expert fees (CB 1087).

200 The estimated legal fees comprised of three items being General, Counsel and Solicitors. Detail was given in relation to the days or hours required for each practitioner. The total estimate was \$126,962. In relation to experts there were five figures given for five different experts, which totalled \$99,400. It was noted that \$36,405 was already held in trust, meaning that the Client would have to provide \$62,995 for the expert fees for the interim hearing.

201 These estimates of costs were sent with a covering letter and the estimates provided some detail as to how individual figures were made up. The estimates also gave a total for future legal costs and expert costs, limited to additional costs for the interim hearing. The document does not give an estimate of total legal costs.

Document (p) Costs Memorandum dated 15 October 2013

202 The Solicitors created a Costs Memorandum dated 15 October 2013 (CB 1088-1092). It seems to refer entirely to legal costs incurred to date. Item 1 is total costs and disbursements paid by the Client to date in the amount of \$2,678,446.46. Item 2 is unbilled legal costs and disbursements of \$59,819.32. Item 3 notes the legal costs paid to three previous solicitor firms.

203 There is no indication that this document was sent to the Client and in any event it deals with matters in the past rather than disclosure or estimates in relation to total costs or future costs.

Document (q) Letter dated 8 November 2013

204 By a letter dated 8 November 2013 from the Solicitors to the Client (CB 1093-1098) reference was made to an impending mediation. The letter stated that its purpose was to update the Client in relation to her current costs and provide an estimate of fees for the mediation. After dealing with some recent invoices, the letter requested payment of \$97,752 for anticipated costs for the mediation in accordance with an attached Estimate of Costs (CB 1097-1098).

205 The Estimate of Costs stated that the matter was listed for mediation for two days on 13 and 14 November 2013. The Estimate set out the fees for two solicitors to attend, at a daily rate. The Estimate set out fees for Senior Counsel involving two days preparation, two days at the mediation, and air fares and accommodation. The Estimate set out junior counsel's fees being one day of preparation and two days attendance at the mediation. The Estimate then set out the mediator's fees and a 50% share of the cost of room hire. The total for the mediation was \$97,752.

206 The letter gave no figure for past costs to date, apart from listing some recent invoices from experts and counsel. The letter did not provide an estimate of total legal costs.

Document (r) Emails dated 17 and 18 November 2013 re Fees for Counsel

207 On 17 November 2013 the Client sent an email to the Solicitors referring to the retainer agreed between the Solicitors and junior and senior counsel (CB 1099-1105). The Client asked the Solicitors to inform her in writing "as to the latest possible date that I could cancel without a charge for the February dates". This is clearly a reference to a possible cancellation fee, or as counsel described it a "reservation fee". The Client said that from memory she thought that cancellation fees would not be incurred until 45 days prior to a proposed hearing. The Client made it plain that this was an important matter which affected her consideration of settlement negotiations then in train.

208 The Solicitors replied by an email dated 18 November 2013 which referred to a telephone call with the Client that morning. The Solicitor said that in summary they were already within senior counsel's 25% reservation fee range and that reservation fees for junior counsel would start on 6 February 2014.

209 An attachment to the email set out selected pages from the fee agreements between the Solicitors and counsel (CB 1102-1105). Both contained a section headed "Reservation Fees".

210 This document did not contain an estimate of total legal costs. Given that the Client was concerned about incurring further costs, this was an occasion when it would have been important to provide a proper disclosure as required by the Act.

Document (s) Estimate of Costs for Final Hearing for Five Weeks Commencing 3 February 2014

211 There was an Estimate of Costs relating to the final hearing listed for five weeks commencing on 3 February 2014 (CB 1106-1109). The Estimate included the following amounts:

(1) Correspondence, telephone communications and general discussions between the Solicitors and the Client, estimated at two hours per day from 4 November 2013 to 3 February 2014, for two solicitors - \$99,528.

(2) Preparation for hearing for two solicitors - \$23,210.

(3) Attendance at final hearing to instruct counsel \$130,130.

(4) Fees for junior counsel for preparation and appearance at hearing \$192,500.

(5) Fees for senior counsel for preparation and appearance at hearing \$333,700.

(6) Expert fees (listing five experts and setting out their preparation charges and daily rates) - \$99,400.

212 The document concluded with a "Summary Page" setting out the above amounts, then taking into account monies held on trust for the experts, the balance of an account dated 17 September 2013 still owing and work in progress up to 18 September 2013 (CB 1109). The Summary set out total fees of \$997,273.80.

213 There was no covering letter or covering email in relation to this document.

214 The Costs Estimate relates to work to be done between 4 November 2013 up to the commencement and conclusion of the hearing due to start on 3 February 2014. Thus the Costs Estimate, commencing from 4 November 2013, pre-dates Documents (q) (8 November 2013) and Document (r) (18 November 2013) referred to above. There was no material put before the Costs Assessor to suggest that this estimate had been given to the Client.

215 Further, on the assumption that a mediation was held on 13 and 14 November 2013, there is no indication that Document (s) was updated in any way to reflect the fact that discussions were then under way as a result of the mediation. Document (r) referred to above would suggest that this was so.

Document (t) Letter dated 15 April 2015

216 A letter dated 15 April 2015 from the Solicitors to the Client referred to an Interim Hearing listed on 4 May 2015 (CB 1110-1112). The letter enclosed an Estimate of Costs for the Interim Hearing (CB 1113-1114).

217 The future anticipated costs and disbursements totalled \$23,826. The Estimate of Costs attached to the letter estimated the following:

(1) Analysis of husband's case - \$1,000.

(2) Preparation by solicitors for hearing - \$2,500.

(3) Attendance at hearing to instruct - \$4,160.

(4) Counsels' fees of one day for preparation and one day for hearing - \$14,000.

218 The Estimate of Costs document does not give an estimate of total legal costs.

Document (u) Letter dated 15 July 2015

219 A letter dated 15 June 2015 from the Solicitors to the Client (CB 1118 – 1121) referred to the hearing of an appeal by the husband listed for 5 August 2015. The letter attached an Estimate of Costs for the appeal as follows:

(1) Conferences with counsel, settling summary of argument and considering husband's summary of argument - \$3,500.

(2) Attendance of solicitor at hearing - \$4,280.

(3) Counsels' fees being one day of preparation and one day at hearing - \$11,000.

Document (v) Emails dated 15, 16 and 22 July 2016

220 The Client having received Document (u) sent an email dated 15 July 2015 indicating that she was extremely concerned and wished to discuss the Costs Estimate (CB 1116). The Solicitors responded by an email dated 16 July 2015 (CB 1115 – 1116) setting out their approach to a recalculation and reducing the estimate by \$3,500.

221 By an email dated 22 July 2015 (CB 1115) the Solicitors referred to the Costs Estimate and the agreed reduction and asked for a payment of \$36,500 on account. Part of this money was for past fees and the balance was for the reduced estimate for the hearing of the appeal. There was no estimate of total legal costs.

Affidavit of Client in the Family Court

222 That completes the review of the 22 documents relied upon before the Costs Assessor and then the Review Panel. In this court counsel for the Solicitors also relied upon an affidavit sworn by the Client for use in the Family Court application for an interim property order. Part of the reason for seeking such an order was to obtain funds to pay the Solicitors. The affidavit commences at CB 889. Paragraphs 112 to 115 of the affidavit deal with future legal work and its cost.

223 At par 115(g) of the affidavit (CB 930) the Client deposed:

“Ultimately, I have been advised that I can expect that if this matter proceeds to trial on a fully defended basis and including both property and parenting matters, the costs will be a further \$750,000 at the very least.”

224 I asked counsel for the Solicitors whether there was ever a written disclosure by the Solicitors of the \$750,000 figure. Counsel’s response (Tcpt 39/36-48) was that “the affidavit is the writing”. I felt that the submission was put with little enthusiasm, and rightly so. The affidavit is a record that the Client has somehow been given that estimate, but the Act requires the disclosure to be an estimate of total and future legal costs, given in writing by a solicitor to a client. The affidavit speaks after the event. Counsel for the Solicitors frankly conceded that there was no piece of paper which preceded the affidavit, which could be said to be a disclosure given to the Client by the Solicitors, in writing, that future costs were estimated at \$750,000.

225 I reject the submission that the Client’s affidavit can be a discharge of the disclosure obligations of the Solicitors. Further, that document was not one of the 22 disclosure documents put before the Review Panel. The Review Panel can hardly be criticised if they did not take it into account when it was not a listed disclosure document.

Summary of the Cost Disclosures Relied Upon by the Solicitors

226 The requirements under the Act for proper disclosure are set out above and can be summarised as follows:

- (1) There must be an estimate of total legal costs, or if this is not reasonably practicable, there must be a range of estimates and an explanation of the major variables that will affect the calculation of those costs – s 309(1)(c) of the Act.
- (2) The disclosure must be in writing – s 311(1) of the Act.
- (3) The written disclosure must be expressed in clear plain language – s 315(1)(a) of the Act.
- (4) There must be written disclosure of any substantial change to anything included in a disclosure previously made – s 316 of the Act.

227 I turn to consider whether the 22 documents put forward by the Solicitors can be said to satisfy their disclosure obligations under the Act. It must be kept in mind that the Review Panel expressed the view in its reasons that there was no satisfactory ongoing disclosure.

228 The 22 disclosure documents relied upon by the Solicitors are summarised in the following table:

DOCUMENT	SUMMARY
Document (a) Letter dated 28 November 2011	This letter does not satisfy the disclosure requirements under the Act as it does not give an estimate of total legal costs, nor does it disclose any substantial change to anything included in a disclosure previously made.
Document (b) Letter dated 19	This letter does not satisfy the disclosure requirements under the Act as it does not give an estimate of total legal costs, does not give an estimate of future legal costs, and does not give disclosure of any substantial

March 2012.		change to anything included in a disclosure previously made.
Document Letter dated 26 July 2012	(c)	This document does estimate a further \$100,000 in costs between 26 July 2018 and the end of August. It gives no breakdown of how that figure is reached. It does not give an estimate of total legal costs and is not a written disclosure of any substantial change to anything included in a disclosure previously made. In addition, it is hard to reconcile the statement that \$139,153.53 has been billed to the Client over the past year, with the billing of \$256,464.48 set out in the document at CB 1023-1024. The letter does not satisfy the disclosure requirements under the Act.
Document Letter dated 3 October 2012	(d)	This letter does not satisfy the disclosure requirements under the Act as it does not give an estimate of total legal costs, does not give an estimate of future legal costs, and does not give disclosure of any substantial change to anything included in a disclosure previously made.
Document Letter dated 29 November 2012	(e)	This letter does not satisfy the disclosure requirements under the Act as it says nothing about future costs or an estimate of total legal costs. It is not a written disclosure of any substantial change to anything included in a disclosure previously made.
Document Letter dated 13 December 2012	(f)	While this letter does provide a detailed estimate of future costs for a hearing commencing on 22 July 2013, it only speaks of the future and not the past. It says nothing about what has been billed to date or is unbilled to date, and therefore does not satisfy the disclosure requirement to give an estimate of total legal costs. Further, it is not disclosure of a substantial change to anything included in a disclosure previously made.
Document Letter dated 4 March 2013	(g)	This letter has nothing to do with estimating total or future legal costs and is not a written disclosure of any substantial change to anything included in a disclosure previously made. It is not an appropriate disclosure under the Act.
Document Email Communication with the Client dated 6 March 2013	(h)	This email is a request for payment, and has nothing to do with estimating or disclosing costs.
Document Email dated 19 April 2013	(i)	This email is a request for payment, and has nothing to do with estimating or disclosing costs.
Document Email dated 6 May 2013	(j)	This email is a request for payment, and has nothing to do with estimating or disclosing costs.
Document Letter dated 27 June 2013	(k)	This letter is a request for payment, and has nothing to do with estimating or disclosing costs.
Document Costs Memorandum dated 24 July 2013	(l)	This Costs Memorandum does not give an estimate of total legal costs and does not satisfy the disclosure requirements of the Act. It does record (CB 1069) that the Solicitors have already received payment from the Client towards legal fees in the amount of \$2,498,868.60. By the time this total amount was received, there had not been an appropriate updating disclosure under the Act. The Costs Memorandum does set out estimates of future costs, but does not total them, and does not give an estimate of total legal costs or update any previous disclosure. In any event, there was no covering letter to indicate that these documents were ever sent to the Client.
Document Letter dated 26 July 2013	(m)	This letter gave an estimate of \$65,000 for fees necessary as a result of the husband serving 51 extra affidavits. The letter refers to anticipated additional fees for experts and for the Solicitors. It specifically excludes fees for counsel but indicates that such fees would be updated. The letter says nothing about an estimate of total costs and does not provide a full estimate of additional costs as a result of the service of the 51 additional affidavits. It is not an appropriate disclosure under the Act.
Document Costs Memorandum dated 7 August 2013	(n)	There is no evidence that this Costs Memorandum was ever given to the Client. It does refer to legal costs and disbursements charged to date of \$1,867,005.70 and gives an estimate for Solicitors and counsel for a further five week hearing commencing in early February 2014. The confusing aspects of the document have been referred to above (i.e. two different estimates for counsels' fees for the hearing). It gives little detail of how figures are calculated (for example the Solicitors' estimated fees are simply stated to be \$374,495). How such a precise amount was reached is not disclosed. Even if it was given to the Client, it is not a disclosure of an estimate of total legal costs, and in the light of the confusing inclusion of two lots of fees for counsel, it

		cannot be said to have been expressed in clear plain language. The document is not an appropriate disclosure under the Act.
Document (o) Letter dated 25 September 2013		This letter did set out appropriate estimates for increased costs for an Interim Hearing commencing on 28 October 2013. The letter was not an estimate for total legal costs, nor was it a written disclosure of a substantial change to anything included in a disclosure previously made. It does not satisfy the disclosure requirements under the Act.
Document (p) Costs Memorandum dated 15 October 2013		There is no indication that this Costs Memorandum was sent to the Client. It seems to relate only to past costs, and is therefore not a prospective estimate of total legal costs, but rather a statement of what has been paid to date. The document does not satisfy the cost disclosure requirements under the Act.
Document (q) Letter dated 8 November 2013		This letter is an estimate of further costs relating to a proposed mediation. It does not set out an estimate of total legal costs, nor is it a disclosure of any substantial change to anything included in a disclosure previously made. It does not satisfy the cost requirements under the Act.
Document (r) Emails dated 17 and 18 November 2013 re Fees for Counsel		These emails concern a request for advice regarding cancellation fees and the provision of that advice. The emails do not give an estimate of total legal costs and do not advise of any change to anything included in a previous disclosure. The emails do not satisfy the disclosure requirements under the Act.
Document (s) Estimate of Costs for Final Hearing for five weeks commencing 3 February 2014		There is no evidence that this Estimate of Costs was ever sent to the Client. In any event the document does not estimate total legal costs, nor is it an update to any disclosure previously made. It does not satisfy the disclosure requirements under the Act.
Document (t) Letter dated 15 April 2015		This letter does set out an Estimate of Costs for an Interim Hearing listed on 4 May 2015. The document does not give an estimate of total legal costs, nor is this a disclosure of any change to anything included in a previous disclosure. The document does not satisfy the disclosure requirements under the Act.
Document (u) Letter dated 15 July 2015.		This letter gives an estimate of future costs in relation to an appeal listed for 5 August 2015. It does not give an estimate of total legal costs, nor is it an update of any disclosure previously made. It does not satisfy the disclosure requirements under the Act.
Document (v) Emails dated 15 and 16 July 2016		These emails concern the negotiation downwards of estimated fees for the appeal. The document does not provide an estimate of total legal costs, nor are they a disclosure of any change to anything included in the previous disclosure. They do not satisfy the disclosure requirements under the Act.

Certificate of Determination of Review

229 The Review Panel issued a Certificate sent to the Manager, Costs Assessment on 8 October 2020 (CB 2503-2504). The Review Panel set aside the cost assessor's determination and substituted the following determination:

- (1) The Review Panel assessed a fair and reasonable amount of costs to be paid by the Client to the Solicitors at \$3,162,181.10.
- (2) The Client was to have credit for the amount of \$3,793,930.12 paid on account.
- (3) The Solicitors were to refund to the Client the sum of \$631,749.01.

230 The Review Panel set out its reasons in a Statement of Reasons for Review Determination (CB 2467-2499). The reasons for setting aside the Costs Agreement, which were based upon the findings of the Review Panel that the Solicitors had failed to provide proper disclosure, are set out at pars 34-40 (CB 2474-2476). In summary the Review Panel determined that the Costs Agreement should be set aside pursuant to s 328(2)(c) and (e) of the Act, upon three bases:

- (1) The Solicitors failed to disclose an estimate (or a range) of the total costs that would be incurred – s 309 of the Act.
- (2) The Solicitors failed to advise of any significant change to that disclosure – s 316 of the Act.
- (3) Because of conduct after the Costs Agreement was entered into – s 328(2)(e) of the Act.

Reasons of Review Panel re Initial Costs Estimate

231 The Review Panel's reasons were as follows.

232 The Review Panel noted the obligation under s 309 of the Act to give the Client an estimate of the total costs for which she would be liable. When the Client first engaged the Solicitors, they were made aware that the Client was looking to change solicitors as she had been unable to meet costs of \$167,000 owed to her previous solicitors for work done at the preliminary stage of litigation. The Solicitors were also aware that the matter was going to be hard-fought by the parties and that there were issues regarding children and that the value of the property in dispute was significant. The Solicitors estimated total costs of \$123,000 and did not send the Client an amended Costs Agreement throughout the period they were instructed. The Solicitors could not rely on regular updates setting out the increases in the hourly rates of legal personnel to satisfy its obligations under s 309 of the Act (CB 2474, par 34).

233 The Review Panel did not accept that it was impossible for the Solicitors to estimate the total costs that would be payable. The estimate would have needed to be amended from time to time but the Solicitors "made no reasonable attempt to comply with the Act" (CB 2474, par 35).

Submissions in Relation to Initial Costs Disclosure

234 The submissions for the Solicitors (CB 28-34) on this appeal did not specifically address or allege an error of law in relation to the finding of the Review Panel regarding the initial costs disclosure.

235 The written submissions for the Client submitted that the upper estimate of \$123,000 for total legal costs in the Costs Agreement was not bona fide and consequently was not an estimate of total legal costs within the meaning of s 309(1)(c) of the Act (CB 61, par 19). These written submissions said that the Solicitors had provided "no explanation as to why the initial estimate (or range of estimates) was objectively so low in the circumstances" (CB 62, par 21).

236 As noted above the Costs Assessor found that the initial estimate of \$123,000 was "of course manifestly inadequate". He found that the Solicitors "should have been more realistic".

237 As recited above, the Review Panel found that the Solicitors "made no reasonable attempt to comply with the Act".

238 It does seem extraordinary to me that, even given the limited information available to the Solicitors when they were first instructed, the disclosure contained in the Costs Agreement gave a range of between \$31,000 to \$123,000. This was to take the case through to a final defended hearing. The Estimate of Costs set out dollar figures for six stages described as follows (CB 280-281):

- (1) Stage 1: Initial instructions and investigations.
- (2) Stage 2: Initial advices/communications/negotiations.
- (3) Stage 3A: Documenting a settlement or commencement of proceedings.
- (4) Stage 3B: Commencement of proceedings including interim application.
- (5) Stage 4: Resolution of proceedings.
- (6) Stage 5: Determination phase of proceedings.

239 While there was no evidence about it, the Estimate of Costs set out in Annexure A appears to be a pro forma document. Such costs might be realistic in the case of a fairly "simple" [Family Law Act](#) case, but must have been known to be completely inadequate and unrealistic, where the Solicitors knew from the start that a large amount of money had been spent by the Client with previous solicitors at a preliminary stage, the asset pool was huge, and there was a significant and bitter dispute between the parties concerning property and parenting issues. An initial file note of the first telephone call with the Client (CB 2000) set the scene.

240 There was no submission made by the Solicitors in the present case that their initial estimate was realistic, or upon what material they based that estimate. As previously recited, there was no specific attack made on this appeal upon the finding of the Review Panel (which was the same as the finding of the Costs Assessor) that the Solicitors had not made a realistic estimate of costs in the initial disclosure.

My Findings in Relation to the Review Panel's View of the Initial Costs Disclosure

241 In the light of the above I find that there was no error in law in the finding that there was a failure to provide an adequate initial costs disclosure, and further, that this was a factor to be taken into account in deciding whether or not to set aside the Costs Agreement.

Reasons of Review Panel re Updates to Disclosure

242 The Review Panel found that the Costs Estimate would need to have been amended from time to time but that the Solicitors "made no reasonable attempt to comply with the Act". The Review Panel found that the Solicitors were able to draw on their expertise as specialists in the area of family law and make an appropriate assessment of the costs of the proceedings. That was demonstrated in the application for interim payment in November 2013 (CB 2474-2475, par 35).

243 The Review Panel found that there was a failure to update the initial estimate of total legal costs (CB 2475, par 36). The ultimate finding was that the Solicitors had failed to advise of any significant change to the initial disclosure (CB 2475, par 37). The Review Panel found that the annual letters to the Client setting out increased hourly rates and correspondence advising of the costs of future hearings did not satisfy the disclosure requirements under the Act. The Review Panel said:

"Disclosure must be prospective, not retrospective. Total legal costs must be estimated, and the estimate revised. 'Total legal costs' means fees, disbursements (meaning barrister's fees) and GST."

(CB 2475, par 38)

Submissions in Relation to Disclosure Updates

244 On this appeal the Solicitors submitted that the Review Panel had failed to engage with, or take into account, what were said to be the numerous disclosures of costs made to the Client during the course of the retainer. The submission was (CB 32, par 71):

"Apart from reciting, in a general way that they did so, there is no evidence that the Review Panel actually considered the additional disclosures and made the necessary findings of fact in relation to them, ie, that they did or did not constitute disclosure under s 309."

245 The Solicitors submitted (CB 32-33, par 72) that the Review Panel was guilty of the following errors:

"(a) Failed to take into account, or to give adequate weight to, the numerous documents which did contain disclosure;

(b) Misconstrued what constitutes a 'disclosure';

(c) Permitted those errors to infect their findings in relation to whether adequate disclosure had been made;

(d) Used the erroneous misconception and failure to take into account relevant documents as a link in its chain of reasoning to set aside the costs agreement, thereby permitting those errors to infect the process undertaken to consider whether the costs agreement should be set aside;

(e) Made findings contrary to the evidence, ie, found that there was a failure to disclose when evidence, which they failed to take into account, demonstrated to the contrary

and in doing so erred in finding that the [Solicitors] had failed to make disclosure of the estimate of costs. This in turn led the Review Panel to set aside the Costs Agreement."

246 If there were adequate costs disclosures, and if the Review Panel misunderstood them or ignored them, then there would arguably be an error in that part of the decision of the Review Panel.

My Findings in Relation to the Review Panel's View of Disclosure Updates

247 The findings of the Review Panel in relation to the important issue of ongoing disclosure were brief in the extreme. They found that the Solicitors failed to advise of any significant change to the disclosure, as required by s 316 of the Act (CB 2475, par 37). The Review Panel found that correspondence advising of the costs of future hearings did not satisfy the disclosure requirements of

the Act (CB 2475, par 38). The Review Panel said, correctly in my view, that disclosure must be prospective not retrospective. Total legal costs must be estimated and the estimate must be revised (CB 2475, par 38).

248 The Review Panel did not go into detail about the 22 documents said to be disclosures. Instead, the Review Panel announced its conclusion as a bare ipse dixit without giving reasons. There was a considerable volume of material to be considered and analysed, but the Review Panel failed to set out the reasoning for its conclusion.

249 On the face of it, this could be an error of law. The Review Panel must provide a Statement of Reasons that is detailed enough to inform a party why the decision was made and to provide a dissatisfied party with a real, and not illusory, right of appeal – *Frumar*. In that case it was held not to be sufficient for the panel merely to assert that a particular amount was in all the circumstances a fair and reasonable amount for costs. The facts and assumptions which led to that calculation should also have been identified in the Statement of Reasons.

250 This is particularly so in the present case, because the Costs Assessor found that the later documents were adequate and that they discharged the obligations of the Solicitors to estimate and disclose legal costs in accordance with the Act. The Review Panel came to the contrary view, but without stating any reasons why it did so, apart from saying that it reached the opposite conclusion.

251 As recited above, in *CSR Limited v Eddy* at [39] the Court of Appeal said:

“There is a distinction to be drawn between a complaint of unfairness where, on proper examination, it may be perceived that the unfairness is not established, and a case where unfairness has been established but the decision was inevitable, so that a grant of relief would be futile.”

252 I have gone into some detail above in my own analysis of the 22 documents said by the Solicitors to constitute estimates of total legal costs as required by the Act.

253 For the reasons set out earlier in this judgment, I find that none of the documents constituted compliance by the Solicitors with their obligation under the Act to provide an estimate of total legal costs, and to update that estimate from time to time. In those circumstances the Solicitors have a genuine grievance in that no proper reasons were advanced by the Review Panel, nor did they set out any consideration of each of the disclosure documents. However, on a proper analysis of each of the 22 nominated disclosure documents, the conclusion reached by the Review Panel was correct.

254 I find that the Review Panel failed to give reasons for its conclusion that the Solicitors had not complied with their ongoing disclosure obligations under the Act. However there is no point in referring the matter back to the Review Panel, as on my analysis of the documents there was no compliance with the Act and thus such a referral would be futile. Counsel for the Solicitors accepted that the Solicitors had to show “materiality” i.e. they had to demonstrate that, if the matter was remitted to be dealt with according to law, a different outcome was possible (Tcpt 94/45). I have reached the conclusion that while the Review Panel was in error in failing to provide reasons for its finding that there had not been proper disclosure as required by the Act, there is no possibility of a different result being reached once the “disclosure” documents are properly considered.

Findings of the Review Panel re Conduct after the Costs Agreement was Created

255 The Review Panel found that cl 7 of the Costs Agreement suggested that the Solicitors “would look carefully at any decision to have additional staff work on [the Client’s] matter and would only do so in particular circumstances”. The Review Panel found that this was not how the matter was conducted. The Review Panel found that the Solicitors did not disclose to the Client that on many occasions multiple personnel were working on the Client’s matter at the same time. The Review Panel found that: “Throughout the litigation there were never less than three members of staff working almost full-time on the matter”. The Review Panel found that this was a quite different approach to the conduct of the matter to that set out in the Costs Agreement, and further found that the decision to put multiple members of staff on the matter, and have multiple lawyers attending conferences, was never discussed with the Client. It had the effect of significantly increasing the Client’s costs. The Review Panel found that while the Client may have been a wealthy woman, she was not a sophisticated litigant. She was reliant on the Solicitors for all legal advice and she was assured that the Solicitors were mindful of her costs concerns. The Review Panel found that the Client was “likely unaware of

the level of attention that was necessary to properly conduct her matter, and whether that was being adhered to" (CB 2476, par 39).

256 The conduct of the Solicitors in having multiple lawyers working on the matter at any one time, and the views of the Review Panel as summarised above, constituted the third reason for setting aside the Costs Agreement. The Review Panel found that this was conduct after the Costs Agreement was entered into which it took into account under s 328(2)(e) of the Act in making a finding that the Costs Agreement should be set aside (CB 2475, par 37).

Submissions in Relation to Conduct after Entry Into the Costs Agreement

257 The written submissions for the Solicitors on this appeal (CB 15-52) did not attack this part of the reasons of the Review Panel. This was pointed out in the written submissions for the Client (CB 59, par 15). The Client submitted that even if the Review Panel misconstrued what constituted disclosure, the facts as found by the Review Panel with respect to the conduct of the Solicitors after the Costs Agreement was entered into entitled the Review Panel to be satisfied that the Costs Agreement was not fair and reasonable and should thus be set aside. The submission said:

“Notably the [Solicitors] have not addressed this finding in their submissions, or asserted any error on the part of the **Costs Review Panel** in respect of this third basis upon which the **Costs Review Panel** determined that the costs agreement should be set aside.”

258 As previously recited, the submissions for the Solicitors were completely silent on this issue and in those circumstances I find that there was no error on the part of the Review Panel in taking into account conduct of the Solicitors after the Costs Agreement was entered into.

Discretionary Decision to Set Aside the Costs Agreement

259 The applicable law in relation to the setting aside of costs agreements is set out above. By s 328(1) of the Act a costs assessor may order that a costs agreement be set aside if satisfied that the agreement is not fair or reasonable. By s 328(2)(c) of the Act one of the matters a costs assessor may take into account is whether the law practice failed to make any of the disclosures required under Div 3 of the Act. Further, by s 328(2)(e) of the Act, another factor which can be taken into account is the circumstances and conduct of the parties in the matter after the agreement was made.

260 The Review Panel set aside the Costs Agreement because it made findings that the initial estimate as to costs and the ongoing estimates as to costs and the conduct of the parties after the Costs Agreement was made meant that the agreement was not fair and reasonable. Thus the Review Panel set aside the Costs Agreement.

261 On the present appeal the Solicitors challenged the findings concerning the initial estimate and the ongoing estimates. I have found above that those challenges fail. As a consequence, I find that the Review Panel had material before it upon which it could exercise its discretion to set aside the Costs Agreement.

262 The Client submitted (CB 57-58, par 10) that since the Review Panel had a discretion to set aside the Costs Agreement, the Solicitors needed to establish a *House v The King* [1936] HCA 40; (1936) 55 CLR 499 type of error to demonstrate that there had been a failure to properly exercise the discretion. This would require a finding that: the Review Panel had acted on a wrong principle; was guided by extraneous or irrelevant facts; mistook the facts; failed to take into account a material consideration; or reached a result upon the facts that was unreasonable or unjust.

263 On the findings I have made, none of those matters have been made out. There was a sound basis for the Review Panel to exercise its discretion to set aside the Costs Agreement as it was satisfied that the agreement was not fair or reasonable in the circumstances.

264 Appeal Ground 1 in the Amended Summons asserts that the Review Panel erred in law in determining that the Solicitors have failed to make disclosure in accordance with the Act. I have found to the contrary.

265 Appeal Ground 2 in the Amended Summons asserts that the Review Panel erred in law in failing to give proper reasons for setting aside the Costs Agreement. I have found this to be so, in respect of its finding that there was no ongoing disclosure. However, for the reasons set out above (relating to futility) the Solicitors are not entitled to relief on Appeal Ground 2.

ISSUE 2: WHETHER FINDINGS WERE CONTRARY TO THE EVIDENCE

267 Appeal Ground 3 in the Amended Summons says that the Review Panel erred in law in making findings contrary to the evidence in relation to disclosure, telephone calls and the complexity of the matter. I have already found in my consideration of disclosure above, that while the Review Panel did not give sufficient reasons in relation to disclosure, there was evidence to support its ultimate finding on this issue. Thus Appeal Ground 3a fails.

Overview of the Determination of the Review Panel on Issue 2

268 I will limit my summary of the Determination to Appeal Grounds 3b (telephone calls) and 3c (complexity of the matter).

269 The Review Panel did not accept that the Solicitors were entitled to all costs claimed for telephone calls. The Review Panel found that it was fair and reasonable to reduce the cost claimed for calls when the Solicitors were unable to provide details of the content of those communications. The Review Panel reduced the costs allowed for “unexplained telephone calls” to half the amount claimed. The Review Panel said (CB 2481, par 54):

“Where costs are placed in dispute, the law practice claiming the costs must provide sufficient details for the client to know the nature of the claim for costs she has to meet. If details are not provided, the items may be disallowed.”

270 In relation to the complexity of the matter, the written submissions for the Solicitors simply say (CB 42, par 108):

“The Review Panel had before it a substantial amount of material which evidenced the complexity of the matter.”

271 The Review Panel was not asked to make a specific finding about the complexity of the matter, but undoubtedly was obliged to have regard to the complexity and difficulty involved, when conducting a review of the determination of the Costs Assessor. The following parts of the Statement of Reasons of the Review Panel mention the complexity:

(1) The Review Panel noted that the Client stated that the joint assets were worth around \$200 million of which she argued she was entitled to \$100 million. The husband maintained that the assets were worth \$88 million of which the wife was entitled to 10% (CB 2470-2471, par 19).

(2) The Review Panel accepted that “this was a difficult matter that was hard-fought by both sides”. The Review Panel also accepted that the litigation was “time consuming, involving a number of court appearances, some of several days, and required more than one solicitor to perform the work” (CB 2477, par 41).

(3) The Review Panel recited, in dealing with the disclosure issue, that the Solicitors were aware that the matter was going to be hard-fought by the parties, that there were issues concerning the children of the marriage and that the value of the property in dispute was significant (CB 2474, par 34).

(4) The finding of the Review Panel that the Solicitors made no reasonable attempt to comply with the Act (CB 2474, par 35) in providing the initial estimate of total costs, is a recognition by the Review Panel that the litigation was out of the ordinary and was going to be extremely expensive.

272 In view of the Delphic nature of the Solicitors’ submissions on complexity, I will deal with that matter first.

Complexity of the Matter

273 It can be accepted straight away that the submission for the Solicitors that there was a substantial amount of material before the Review Panel which evidenced the complexity of the matter is completely correct. As recited above, the Review Panel at several points in its Statement of Reasons indicated that it was well aware of the complexity of the matter. It could not have failed to be aware of this issue, given that it was presented with 52 boxes of the Solicitors’ file, and it made a detailed examination of all of the work done on a selection of the tax invoices (CB 2487-2499).

274 Nowhere in the Reasons of the Review Panel did it express the view that the matter was simple or straightforward. The submissions for the Solicitors do not point to any particular paragraph or even

phrase in the Statement of Reasons of the Review Panel to suggest that the Review Panel made findings contrary to the evidence in relation to the complexity of the matter. Appeal Ground 3c fails. I turn to deal with the issue of telephone calls.

Telephone Calls: Material Before the Costs Assessor

275 In her initial Notice of Objection the Client submitted that there was insufficient detail to support the times claimed in relation to telephone calls (CB 130-131). The Client complained that the descriptions of telephone calls in the tax invoices were almost exclusively limited to “telephone call from you” and “telephone call to you” without providing the most basic of details as to the purpose of the call. The Client noted that when the file was supplied to her, all of the file notes had been removed. The Client submitted that she had no option but to object to all claims for telephone calls, subject to and pending production of the file notes to support the time claimed for the calls. The Client noted that she was not suggesting that she did not have the telephone discussions, but until such time as she had detail as to the calls, she could not accept that they were charges which were reasonable.

276 The Solicitors provided their response and described the blanket objection to each and every telephone call as “most disingenuous” (CB 1616, par 3.1). The Solicitors pointed out that it would be impossible to run a matter of this nature without obtaining instructions from the Client and the majority of those instructions were obtained by telephone. Issues arose nearly every day and the Client was in constant contact with her Solicitors, on many occasions demanding that they be available to her at all times. She was an active participant in the litigation (CB 1617, par 3.4).

277 The Solicitors concluded this part of their response by saying (CB 1618, par 3.9):

“The [Solicitors do] not propose to make any further submissions as to telephone calls other than to state that the attendances were as recorded by the solicitors working on the matter and are pressed.”

278 The Client provided further submissions and submitted that the objection to telephone calls clearly provided the Solicitors with an opportunity to produce the notes or other documentation to support the claims in respect of telephone calls. The Solicitors had chosen not to do so (CB 1818, par 3.2). The Client submitted that all she was asking for was “a basic level of detail which, we submit, should reasonably have been expected to be provided in the first instance in the Solicitor/Client tax invoices” (CB 1818, par 3.3).

279 The Solicitors responded by submissions dated 22 May 2019. They enclosed copies of the file note material relevant to invoices 1-5, as requested by the Costs Assessor (CB 1864). The Solicitors acknowledged that there were telephone calls with the Client that were not evidenced by a written file note. Once again the Solicitors pointed to the significant amount of work required in the matter, and the extensive and active involvement of the Client, often by telephone. The Solicitors suggested that these calls happened daily, and at times, there were many calls in a day. The Solicitors submitted that all attendances charged for and specified in the invoices were carried out and that where there were no specific file notes of telephone calls, certain inferences could be drawn (CB 1864.7-1865.4).

280 With that written submission the Solicitors provided photocopies of a large number of file notes taken during telephone calls (CB 1867-2000).

281 The Client provided a further written submission in which she submitted that in respect of tax invoices 4 and 5 there was no record of the majority of attendances (CB 2006-2007, par 1.11). The Client submitted that the Costs Assessor should take the lack of documentation into account in a global manner in making an allowance for telephone attendances (CB 2007, par 1.12).

Telephone Calls: Determination of the Costs Assessor

282 The Costs Assessor said that he was going to take “a holistic approach whilst noting any specific areas or claims in dispute” (CB 2217, par 9). The Costs Assessor noted that the Client did not suggest in her submissions that the calls did not take place, but that she wanted to know what they were all about (CB 2223, par 47). Having noted that the work had been carried out, that there was no basis for suggesting otherwise, and that charges were made in accordance with the Costs Agreement, the Costs Assessor found that he did not have any basis for rejecting the charges as being unfair and unreasonable (CB 2223, par 52). Accordingly the Costs Assessor rejected the objections to the telephone calls (CB 2224, par 55).

Telephone Calls: Application for Review

283 In her Application for Review dated 19 November 2019 the Client submitted that the Costs Assessor did not give proper consideration or weight to the fact that little or no detail was provided in respect of each and every telephone call claimed in the tax invoices. In the absence of sufficient detail the Client submitted that she was unable to identify whether the charges were individually or collectively fair and reasonable (CB 2255, par 6).

284 The Solicitors provided their response by letter dated 10 January 2020. They submitted that the Costs Assessor did not err in determining that their submissions should be preferred to those of the Client in relation to telephone calls (CB 2273, par 15).

285 The Client provided written submissions in reply dated 27 January 2020. In relation to telephone calls she simply reiterated her earlier submission (CB 2283, par 5.1).

286 Having received the material summarised above, the Review Panel wrote to the parties by letter dated 11 June 2020. They indicated that where costs are disputed, the Solicitors who claim the costs must provide sufficient detail so that the paying party knows the nature of the claims for costs she has to meet. In addition, sufficient details have to be provided so that the Review Panel could form a view as to whether the costs were reasonably incurred and whether they were fair and reasonable in amount (CB 2296, pars 11.1-11.2).

287 The Review Panel expressed the view that if there are insufficient details, and if it is not reasonably possible for the Review Panel to infer what was done, whether it was reasonable to do the work, how long it took, and what is a reasonable cost for the work, then if the item is disputed that item must be disallowed (CB 2296, par 11.5).

288 The letter concluded by asking both parties to provide further documents and information.

289 The Solicitors responded by a letter dated 24 June 2020. They submitted that given the size of the matter, the amount of costs in dispute and the number of tax invoices, the global approach taken by the Costs Assessor was appropriate. It was submitted that it would not be appropriate to conduct an item by item assessment given the costs involved (CB 2301, pars 3.1-3.2).

290 The Client provided further written submissions dated 9 July 2020 (CB 2302-2311 plus annexures). There was no additional specific submission regarding telephone calls. Issue had clearly been joined at an earlier date.

Telephone Calls: Reasons of the Review Panel

291 The Review Panel dealt with the issue of telephone calls as follows (CB 2480-2481, par 54):

“The Panel does not accept that [the Solicitors are] entitled to all costs claimed for unexplained telephone calls by relying on a general assertion the calls were necessary for the progression of [the Client’s] claim and that it would be unfair to disallow the costs as it is some time since the work was performed. The Panel notes that most of the calls charged for were not recorded in [the Client’s] file. The Panel finds it is fair and reasonable to reduce the costs claimed for calls when [the Solicitors are] unable to provide details of the content of those communications. The Panel has reduced the costs allowed for unexplained telephone calls to half of the amount claimed. Where costs are placed in dispute, the law practice claiming the costs must provide sufficient details for the Client to know the nature of the claim for costs she has to meet. If details are not provided, the items may be disallowed.”

292 This paragraph harks back to the letter dated 11 June 2020 from the Review Panel, referred to above. In par 11.6 of that letter the Review Panel said:

“The role of an assessor, and if a panel in review reassess the costs, the role of a panel, is to determine whether the costs were reasonably incurred, and whether those costs are fair and reasonable in amount. The criteria are set by LPA 2004 in this case. The criteria do not involve in any way, looking at whether the Client... did or did not dispute the costs at the time the work was done or at the time she received the bill. The criteria have to be applied by looking at the information provided and looking at the circumstances at the time the work was done, without the benefit of hindsight. No part of the criteria involves the attitude of the Client... at the time the work was done, or the bill was sent.”

293 Division 11 of Part 3.2 of the Act deals with costs assessment. The matters to be taken into account by costs assessors are referred to above and can be summarised as follows:

- (1) A costs assessor must give both parties a reasonable opportunity to make written submissions in relation to the application – s 359(1)(a) of the Act.
- (2) A costs assessor must give due consideration to any submission so made – s 359(1)(b) of the Act.
- (3) A costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit – s 359(2) of the Act.
- (4) In conducting an assessment of legal costs, the costs assessor must consider: whether or not it was reasonable to carry out the work to which the legal costs relate; whether or not the work was carried out in a reasonable manner; and the fairness and reasonableness of the amount of legal costs in relation to the work – s 363(1) of the Act.
- (5) In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to a list of matters set out in s 363(2) of the Act. Included in this list are the following:

“(e) the skill, labour and responsibility displayed on the part of the Australian legal practitioner... responsible for the matter,

(f) the retainer and whether the work done was within the scope of the retainer,

(g) the complexity, novelty or difficulty of the matter,

(h) the quality of the work done,

(i) the place where, and the circumstances in which, the legal services were provided,

(j) the time within which the work was required to be done,

(k) any other relevant matter.”

Telephone Calls: Submissions to this Court

294 The written submissions for the Solicitors submitted that the determination of the Review Panel to reduce telephone calls by 50% ignored that the majority of them were from the Client to the Solicitors. The submission was that “the reduction of all calls by the Review Panel on the basis that they are not fair and reasonable is against the evidence” (CB 41, par 106). Annexed to the Solicitors’ submissions was an analysis of the invoices, showing that most telephone calls were with the Client (CB 49-53).

295 The Solicitors submitted that the Review Panel erred by failing to consider the invoices properly, and making findings of fact in disregard of, or contrary to, the evidence that was before them (CB 42, par 107).

296 The written submissions for the Client submitted that the fact that the Client initiated most of the calls does not of itself mean that the costs associated with taking the calls were fair and reasonable. The submissions recited (CB 75, par 80) the decision of *Matter of The Bill of Costs of Lamrock, Brown & Hall* [1908] ArgusLawRp 4; [1908] VLR 238 at 248 where Justice Cussen said:

“Prima facie, when a client calls and takes up the time of a solicitor about the client’s business, an attendance should be allowed... Sometimes a client may need protection against himself or herself... If the solicitor can say nothing more than that there were a number of attendances in the course of preparing for the hearing of an action, and can give no information as to the specific advice given, the Taxing Officer may, I think properly, come to the conclusion that some of the attendances charged for were unnecessary, and disallow them.”

297 The Client submitted that where costs are disputed it was for the law practice to provide sufficient information to enable the Costs Assessor or Review Panel to be satisfied that the cost for the work undertaken was fair and reasonable. The Client pointed out that initially the Solicitors had declined to provide further information about the telephone calls, but even when they did provide extensive copies of file notes in relation to the calls, there were “a majority of telephone calls” where no

information was given as to the content and purpose of the calls (CB 76, par 84). The Client submitted that the Review Panel did not err in law and did not make findings contrary to the evidence in relation to telephone calls (CB 76, par 86).

Telephone Calls: Error of Law?

298 Appeal Ground 3b asserts that the Review Panel erred in law in making findings contrary to the evidence in relation to the telephone calls. The only evidence to which the Solicitors pointed in their submissions to this court was that the tax invoices showed that the telephone calls were made, the Client did not dispute that the calls were made, and some but not all of the calls were supported by a file note showing the subject of the telephone call or recording any advice given.

299 The Review Panel took the view that it was the obligation of the Solicitors to show that the charges made for telephone calls to and from the Client were fair and reasonable. The Review Panel did consider a selection of the invoices, and made findings of fact based upon those invoices. While the invoices were evidence that the calls had taken place, the invoices said nothing about the subject of the calls or the topics dealt with in each call.

300 I find that there is no indication in the Statement of Reasons of the Review Panel that the Review Panel made findings contrary to the evidence in relation to the calls. The Solicitors simply did not produce evidence in relation to many of the calls, apart from the fact that the call took place.

301 Costs assessors are appointed by the Chief Justice of New South Wales – s 390(1) of the Act. In the Second Reading Speech referred to above, the Attorney-General said (at p 3277):

“The Legal Fees and Costs Board suggested that the system of taxation be replaced by a system of assessment of costs by practitioners well versed in the running of a legal practice. Such persons would be part-time assessors appointed by the Supreme Court.”

302 The Attorney-General also said that the assessor “will deal mainly with documents, determining whether they show that the amounts charged are commensurate with the services received”.

303 The Review Panel in relation to telephone calls has not been able, from the documents put before it, to say that it was fair and reasonable to make all of the charges in the tax invoices relating to telephone calls for contact with the Client.

304 The decision of Justice Cussen, referred to above, suggests that there is an obligation on a solicitor to give information as to the content of the telephone call, and not just that it took place.

305 The challenge to the decision of the Review Panel set out in Appeal Ground 3b fails. The Review Panel did not make findings contrary to the evidence in relation to the telephone calls and did not err in law.

ISSUE 3: COUNSELS' FEES

Overview of the Reasons of the Review Panel

306 The Review Panel made two findings which led it to reduce counsels' cancellation fees:

(1) It found the Client was not properly advised regarding cancellation fees (CB 2478, par 44). It found that the cancellation fees should have been carefully discussed with the Client and the Solicitors should have ensured that the Client was aware of the total amount that would be charged in the circumstances of a settlement (CB 2478, par 46). In that same paragraph the Review Panel said that the Client “should not be liable for total cancellation fees where she had not been properly advised as to the amounts involved”.

(2) It found that “counsels' fees are on the high side of what is fair and reasonable for this area of practice” (CB 2478, par 45). It found that the amount charged was “excessive” and “not in line with fees charged by counsel of similar seniority in other complex areas such as commercial law” (CB 2478, par 46).

307 The Review Panel reduced the cancellation fees for senior counsel by \$67,200 plus GST and the fees for junior counsel by \$70,000 (CB 2479, par 47).

Appeal Ground 4

308 The challenge to this part of the determination of the Review Panel is set out in Appeal Ground 4 which asserts that the Review Panel was in error in determining that the Client was not properly advised in relation to counsels' cancellation fees in circumstances where:

- (1) There was insufficient evidence to support that finding.
- (2) The Client did not contend that she had not been properly advised.
- (3) The Review Panel did not give the Solicitors an opportunity to be heard in relation to whether the Client had been properly advised.

309 Appeal Ground 4 does not challenge the finding by the Review Panel that the quantum of the cancellation fees was not fair and reasonable, in that they were found to be "excessive" and "not in line with fees charged by counsel of similar seniority in other complex areas such as commercial law".

310 I will consider the material and submissions put before the Costs Assessor and the Review Panel.

Counsels' Fees: Material Before the Costs Assessor

311 In her initial Notice of Objection the Client said that she did not have a complete set of tax invoices for counsel. She requested a full copy of all tax invoices and said that she would provide any objections once she had those documents (CB 136-137, par 9.1).

312 In her submission in support of the preliminary application to set aside the Costs Agreement, the Client submitted that the Solicitors had failed to provide her with any information in relation to counsels' fees (CB 825, par 20a).

313 The Client also set out specific objections to counsels' fees (CB 831-836). In relation to cancellation fees the Client submitted that these were "excessively high" and "outside any reasonable allowance for cancellation fees" (CB 832, pars 1.7-1.9).

314 The Solicitors submitted that the Client had been provided with disclosure in relation to counsels' fees. The Solicitors said that the usual procedure was to obtain a Costs Agreement from counsel and provide a copy of the Costs Agreement to the Client. The Solicitors said that they had not been able to locate copies of all of the Costs Agreements with counsel (CB 1405, pars 2.3-2.5).

315 The Solicitors also submitted that they had provided updated disclosures in relation to counsels' fees. The Solicitors referred to the 22 documents considered above in relation to cost disclosure and identified those which it was said disclosed updates to the fees for counsel (CB 1408-1409). These were Documents (b), (f), (k)-(o) and (q)-(u).

316 My analysis as to whether those documents discharged the disclosure requirements under the Act is set out above. I repeat my ultimate conclusion that those documents were not proper estimates of total costs, as required under the Act.

317 Some of those documents did provide estimates of counsels' fees on the assumption that hearings set down would run their course. None of the documents, with one exception, drew attention to cancellation fees. The exception is Document (r) being the emails of 17 and 18 November 2013. The email from the Client did demonstrate some understanding of cancellation fees, although her memory of when they would start to run was incorrect. The Solicitors did correct this mistaken impression.

318 Nowhere in the 22 documents relied upon by the Solicitors was there an estimate of total legal costs in which the estimate set out a dollar figure for cancellation fees at any point in time. On occasions when the Client was considering settlement proposals, and the meter was ticking on cancellation fees, one would have expected the Solicitors to have set out in writing (s 311(1) of the Act) and in clear plain English language (s 315(1)(a) of the Act) an updated estimate of total legal costs (s 316 of the Act) including cancellation fees.

319 The Act makes specific provision for such a disclosure when a settlement is being considered. Section 313 of the Act is headed "Additional disclosure – settlement of litigious matters". Subsection (1) provides:

" If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed:

(a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay), and

(b) a reasonable estimate of any contributions towards those costs likely to be received from another party.”

320 The Client provided further submissions in response (CB 1459-1462). She clearly asserted that she was not made fully aware of the potential costs consequences of all Costs Agreements (CB 1459-1460, par (c), CB 1461, pars (g) and (i), CB 1462, par 2.18).

321 The Client concluded these submissions as follows (CB 1462):

“The Cost Applicant reiterates her previously expressed concerns as to the adequacy of the disclosure provided to her and submits that taking into account all issues considered to date the conclusion should be reached that the Cost Respondent failed to properly and fully advise her in respect of the likely costs incurred in the matter.”

Counsel’s Fees: Preliminary Determination by Costs Assessor

322 The Costs Assessor made a preliminary determination in relation to counsels’ fees. He noted that these fees were in total over \$1 million. He said that his task was to consider the fairness and reasonableness of the incurring of disbursements for counsels’ fees.

323 In relation to cancellation fees the Costs Assessor made the following finding (CB 1468, par 36):

“The claim for cancellation fees however cannot be dismissed on the above basis because those claims are based upon the retainer agreement. It seems to me that whilst the costs applicant might well have succeeded in a claim against counsel in respect of some or all of the cancellation fees charged, in my opinion that is a matter that should have been addressed as between the costs applicant and counsel involved at the time.”

324 In short, the Costs Assessor in his preliminary determination found that any dispute as to cancellation fees could only be agitated in a separate costs assessment conducted between the Client and counsel.

325 The Review Panel disagreed with this view and found that counsels’ fees were a disbursement and were thus properly the subject of an assessment between the Solicitors and the Client. On the hearing of the appeal, counsel for the Solicitors expressly accepted that this was correct and the Costs Assessor was wrong (Tcpt 29/18).

326 Because the Costs Assessor came to the preliminary determination that he could not properly consider an objection to counsels’ fees, including cancellation fees, the further material and submissions put before him did not relate to those topics.

Counsel’s Fees: Additional Material Before the Review Panel

327 In her Application for Review the Client challenged the correctness of the decision of the Costs Assessor that the Client should have objected to counsels’ fees in a separate costs assessment, in which those counsel were the costs respondents (CB 2253-2254, par 3).

328 The Solicitors submitted that the Costs Assessor had correctly determined the matter. Further, it was submitted that counsels’ fees were all charged in accordance with their disclosure/fee agreements (CB 2270, pars 4, 6).

329 In further submissions the Client again stated that the approach of the Costs Assessor was erroneous and that there was no need for a separate application for assessment of counsels’ fees (CB 2282, par 3.3).

330 The Review Panel wrote to the parties by a letter dated 11 June 2020. That letter indicated that the Review Panel was likely to set aside the determination made by the assessor (CB 2294, par 9.2). The Review Panel indicated that it had a preliminary view that there were failures to disclose (CB 2295, par 10.5). The Review Panel pointed out that if there was a failure to disclose, that could mean that costs did not have to be assessed in accordance with the provisions of a Costs Agreement (CB 2295, par 10.6.4-10.6.5). The Review Panel asked for further submissions and documents.

331 The Solicitors provided a response to the matters raised by the Review Panel by a letter dated 24 June 2020. That letter largely dealt with disclosure and the notion of a global assessment (CB 2298-2301).

332 The Client served further written submissions dated 9 July 2020. The Client reiterated its previous objections to counsels' fees (CB 2304, par 1.4(f)).

Counsels' Fees: Determination of the Review Panel

333 The Review Panel noted that the Client did not enter directly into agreements with counsel and was therefore not personally responsible for counsels' fees. Rather, counsels' fees were a disbursement payable by the Client as a reimbursement to the Solicitors, "and as such, are costs that she is entitled to have assessed" (CB 2477, par 43).

334 The Review Panel specifically stated that it did not accept the position of the Costs Assessor that the Client needed to join counsel separately as parties to an assessment to have her fees assessed (CB 2477, par 43). In oral submissions this proposition was specifically accepted by counsel for the Solicitors as correct.

335 The Review Panel then went on to make findings that the Client was not properly advised regarding the cancellation fees. These have been summarised above. As recited, the Review Panel found that counsels' fees were on the high side of what was fair and reasonable for this area of practice. Further, the Review Panel found that the cancellation fees were excessive and not in line with fees charged by counsel of similar seniority in other complex areas such as commercial law.

Counsels' Fees: Appeal to this Court

336 In written submissions the Solicitors said that in finding that the Client had not been properly advised about cancellation fees, the Review Panel was determining a matter for which the Client did not contend (CB 46, par 126). The written submissions also said that even if such contention had been advanced by the Client, there would have been a significant hurdle on the evidence, being the email which the Client sent to the law firm on 17 November 2013 enquiring about the last possible date that she could settle the matter without a charge for cancellation fees. This is a reference to Document (r) discussed above as one of the disclosure documents put forward by the Solicitors.

Counsels' Fees: Error of Law?

337 Appeal Ground 4b, that the Client did not contend that she had not been properly advised, is rejected. The summary above of the submissions put before the Costs Assessor and the Review Panel clearly shows that the Client did contend that she had not been properly advised in relation to cancellation fees.

338 Appeal Ground 4c, that the Review Panel did not give the Solicitors an opportunity to be heard in relation to whether the Client had been properly advised in relation to cancellation fees, is also rejected. Not only was that opportunity given, but the Solicitors asserted that many of the documents in the 22 "disclosure" documents constituted sufficient disclosures in relation to cancellation fees.

339 Above I have analysed whether or not the nominated "disclosure" documents did properly advise the Client concerning cancellation fees. The conclusion expressed above is that they did not. That was also the view reached by the Review Panel. It was a correct view. Appeal Ground 4a, that there was insufficient evidence to support a finding that the Client was not properly advised in relation to cancellation fees, is also rejected.

340 This challenge to the determination of the Review Panel fails for the reasons set out above.

ISSUE 4: DENIAL OF PROCEDURAL FAIRNESS

Appeal Ground 6a

341 Appeal Ground 6a asserts that the Review Panel denied procedural fairness to the Solicitors in reaching a conclusion in relation to counsels' fees for which the Client did not contend.

Overview of the Decision of the Review Panel

342 As recited above the Review Panel made two findings to found their conclusion that the cancellation fees should be reduced. The first finding was that the Client was not properly advised in

relation to cancellation fees. Above I have found that the Client did so contend. Further, the Solicitors took their opportunity to make submissions that she had been properly advised.

343 The second relevant finding of the Review Panel was that the cancellation fees were excessive and thus were not fair and reasonable. I will summarise the material put before the Review Panel.

Quantum of Counsels' Fees: Material Before the Costs Assessor

344 As recited above, this issue was put fairly and squarely before the Costs Assessor. The Client submitted that the cancellation fees were "excessively high" and "outside any reasonable allowance for cancellation fees" (CB 832, pars 1.7-1.9).

345 In their preliminary submissions concerning disclosure of counsels' fees the Solicitors reserved their position as to the quantum of cancellation fees (CB 1404 par 1.5).

346 In submissions which post-dated the preliminary determination by the Costs Assessor concerning counsels' fees, the Solicitors said that specific responses to the objections to counsels' fees would be provided separately (CB 1624 par 9.2). Those separate submissions are at CB 1645-1648 and specifically dealt in par 1.9 (CB 1646) with the justification advanced by the Solicitors for cancellation fees for counsel.

347 In later submissions by the Client she indicated reliance upon previous submissions in relation to cancellation fees (CB 1826, par 9.15)

Quantum of Counsels' Fees: Material Before the Review Panel

348 In her initial Application for Review of the determination of the Costs Assessor the Client included Ground 3 in relation to counsels' fees (CB 2253-2254).

349 In their submissions to the Review Panel the Solicitors relied upon previous submissions and said that all fees for counsel were charged in accordance with their fee agreements (CB 2270, pars 4-6).

350 The Client continued to rely upon her previous submissions (CB 2282, pars 3.1-3.3).

351 The letter dated 11 June 2020 from the Review Panel warned that the Costs Agreement could be set aside, which meant that the Review Panel would not necessarily assess costs in accordance with that Costs Agreement (CB 2295, par 10.6.5).

352 In response the Solicitors indicated that they relied on their previous submissions (CB 2301, par 4.1).

353 The Client indicated that she relied on previous submissions, and specifically mentioned her existing objections to counsels' fees (CB 2304, par 1.4(f)).

354 It can be seen from that summary of the material before the Review Panel that the issue of the quantum of the cancellation fees arose for consideration and both sides put material on this topic before the Review Panel. It cannot be said that the Client did not contend that the cancellation fees were not fair and reasonable, in fact she went so far as to characterise them as "excessively high", "outside of any reasonable allowance" and even "grossly excessive" (CB 832). The Client's contention could hardly have been made plainer.

355 I find that the Client did put before the Review Panel both reasons which ultimately found favour i.e. that the Client was not properly advised in relation to cancellation fees; and that the cancellation fees were excessive and thus were not fair and reasonable. What is more, the Solicitors put their submissions on both issues before the Review Panel. Appeal Ground 6a is rejected.

Appeal Ground 6b

356 This was not pursued before this court.

Appeal Ground 6c

357 Appeal Ground 6c asserts that the Review Panel denied procedural fairness to the Solicitors in determining that there should be a reduction in costs for:

(1) Compilation of the joint assets.

(2) Preparation and updating of the Balance Sheet.

358 The written submissions for the Solicitors in this court said that Appeal Ground 6c related “to disallowances in relation to the Balance Sheet” (CB 47, par 136). No written submission was put forward in relation to Appeal Ground 6c(i) referring to compilation of the joint assets. This was not a phrase used by the Review Panel, and the Solicitors have not identified what they mean by this phrase, over and above their complaint concerning the work done on the Balance Sheet. The Balance Sheet was one which did set out the joint assets of the parties. Appeal Ground 6c will be confined to the Balance Sheet, as that is all that has been put forward on this appeal on behalf of the Solicitors.

Overview of the Decision of the Review Panel

359 Review Ground 5 put forward by the Client to be dealt with by the Review Panel was: “The Costs Assessor erred in failing to reduce the costs allowed for non-legal staff”. The Review Panel found that the invoices which recorded charges by paralegals for property searches and preparation of documents rarely contained details of the work performed or its purpose. Individual non-legal staff were sometimes charging upwards of \$1,000 per day. The amount of \$35,000 was charged for non-legal staff between August 2012 and March 2013, but the Solicitors provided no explanation for that substantial amount (CB 2480, par 51).

360 The Review Panel did not accept that the compilation of the joint assets was as complicated as the Solicitors said. The husband did not have intricate financial arrangements involving different trusts or offshore tax investments. He owned property in Australia and received rental income from that property. The Client provided the Solicitors with details of most of the property at the first conference. The Review Panel noted that frequently large costs were charged for non-legal staff for updating the document referred to as the Balance Sheet. The Review Panel did not find the substantial cost charged for the amendments to the Balance Sheet to be fair or reasonable. On reviewing the sample invoices the Review Panel found that charges for non-legal staff for property searches, preparation of schedules and chronologies were excessive (CB 2480, par 52).

361 Ground 9 dealt with by the Review Panel was:

“The Costs Assessor erred in failing to reduce the costs allowed for drafting and producing documents.”

362 The Review Panel said that the Client had not set out the documents for which she claimed she was overcharged. The Review Panel thought it was likely that the Client was referring to her affidavits, the Balance Sheet and chronologies. The Review Panel found that the total cost for drafting the affidavits was excessive. The Review Panel did not deal with the Balance Sheet in considering Ground 9, as it had already dealt with that document in par 51 (CB 2480) concerning Ground 5. The Review Panel said that on reviewing the sample invoices, it found the costs charged for the chronologies were excessive (CB 2482, par 60).

Balance Sheet: Material Before the Costs Assessor

363 Written submissions dated 7 June 2019 listed 50 “big ticket items” in invoices 6-52 (CB 2011-2013, par 4.5). The Client submitted that the Costs Assessor did not have to do a line by line assessment but asked the Costs Assessor to conduct a general review of these “big ticket items” on the basis that they would demonstrate a pattern of charging, across a broad range of items, that the Client considered to have been excessive (CB 2010, par 4.3).

364 In their response to the “big ticket items” the Solicitors, in dealing with Item 1 attached a copy of a draft Balance Sheet as at December 1999 which “provides some insight into the extent of the assets”. The Solicitors submitted that it was important and necessary for them to draft accurate records and lists that provided a summary of the extensive interests and the complicated company arrangements (CB 2018, Item 1).

365 The Balance Sheet as at 1 December 1999 was annexed to the written submissions (CB 2147-2195). The Balance Sheet in columns dealt with the ownership of assets, their descriptions, the value put on each asset by the wife, the value put on each asset by the husband, and where supporting evidence could be found for those valuations.

366 While the Client did not specifically refer to the Balance Sheet as a “big ticket item”, various entries in the 50 “big ticket items” selected by the Client mean that some of the costs she was challenging, which she said was representative of excessive charging across a broad range, involved

work done on that Balance Sheet. The 50 “big ticket items” selected by the Client are at CB 2011-2013. To check which particular entries concern work on the Balance Sheet would require an examination of the invoices and the item selected by the Client to be examined by the Costs Assessor.

367 Part of the Application for Review from the Determination of the Costs Assessor was a complaint by the Client that the Costs Assessor did not properly consider the Client’s argument that there should be a reduction for costs for non-legal staff (CB 2254-2255). The Client complained that the Costs Assessor had failed to consider the particular tax invoices that he was called upon to assess and instead took the approach that the costs charged were what was expected in a matter of the nature and complexity of the litigation.

Balance Sheet: Determination of the Review Panel

368 As previously recited Review Ground 5 raised by the Client was that the Costs Assessor erred in failing to reduce the costs allowed for non-legal staff. Clearly the preparation of the Balance Sheet was raised before the Costs Assessor both by the Solicitors and by the Client. It was part of the extensive work done by the Solicitors and some of that work was done by non-legal staff. The Costs Assessor may well have declined to make a line by line assessment of the invoices or even of the “big ticket items”, but the Review Panel took the approach urged upon it by both parties. That approach was to review sample invoices and then come to a finding as to whether there should be a percentage reduction across the board by reference to items disallowed by the Review Panel in the sample invoices.

369 The line by line review of the sample invoices was part of the Statement of Reasons of the Review Panel and is found at CB 2487-2499. For each invoice the Review Panel went through disputed items and indicated whether an amount was allowed, disallowed or regarded as excessive and thus reduced.

370 The Review Panel found that the average reduction in professional costs arising from its disallowance or reduction of items in the targeted invoices resulted in a 20.8% reduction in professional costs (CB 2499).

371 Underlying this determination, in part, was the finding by the Review Panel that costs charged by non-legal staff for property searches and preparation of schedules and chronologies were excessive (CB 2480, par 52). This finding included consideration of the work done by non-legal staff on the Balance Sheet (also specifically referred to in CB 2480, par 52). However the reduction in costs for non-legal staff was not confined to the Balance Sheet. That document was simply an example of a document upon which work was done by non-legal staff, where the charges for such staff were considered by the Review Panel to be excessive.

372 A similar finding was reached in relation to work done in preparing chronologies (CB 2482, par 60). The Review Panel specifically excluded the Balance Sheet from this finding, stating that it had already been dealt with in par 51 (CB 2480) in relation to Ground 5.

Balance Sheet: Error of Law?

373 The preparation and updating of the Balance Sheet was one of the many matters considered by the Review Panel in determining whether professional costs charged were excessive. It should be noted that the Solicitors themselves raised the volume of work that had to be done on the Balance Sheet. Thus the Solicitors had their say in relation to this document, and had the opportunity to address that as part of the “big ticket items” put forward by the Client, and also as part of the targeted invoices which both parties urged the Review Panel to assess, rather than looking at each and every invoice.

374 I find that there was no denial of procedural fairness to the Client by the Review Panel determining that the costs for preparation and updating of the Balance Sheet should be reduced. The work done on the Balance Sheet was merely one of the tasks identified in both the “big ticket items” and the targeted invoices. The Solicitors had notice that the Balance Sheet, and work of a similar nature, was in contest, and they put the material and submissions upon which they wished to rely before the Costs Assessor and before the Review Panel. There was no denial of procedural fairness. Appeal Ground 6c fails.

CONCLUSION AND ORDERS

375 The end result is that the Appeal should be dismissed as I have found that none of the Grounds of Appeal in the Amended Summons have been made out.

376 In those circumstances I do not need to consider the alternative bases put forward in the Notice of Contention in support of the Determination of the Review Panel.

377 There was an issue raised concerning the proper identification of the Solicitors in the Certificates of Determination issued by the Review Panel. The parties agreed in the document marked "MFI 9" on orders to be made to correct the name of the Solicitors. I will make the orders agreed as necessary by the parties and set out in par 1 of MFI 9. That paragraph reserves the rights of the Solicitors to seek judicial review of my decision. The paragraph also notes that the order in relation to the name of the Solicitors is made pursuant to s 384(2)(a) of the Act.

378 In the end result I affirm the decision of the Review Panel, save for the order to be made by consent correcting the identity of the Solicitors.

379 My orders are:

- (1) Appeal dismissed.
- (2) Subject to Order (5) below, the decision of the Review Panel is affirmed.
- (3) Order the plaintiff to pay the costs of the first defendant.
- (4) No order as to the costs of the second and third defendants.
- (5) Order that the following Certificates of Determination be set aside and re-issued, in the same terms, so that the solicitors nominated in paragraph 1 of "MFI 9" are named as the Review Respondents wherever appearing:
 - (a) Certification of Determination of Costs Assessment (Form C-LPA-3) issued by the Review Panel on 20 October 2020 and sent by the Manager, Costs Assessment on 3 November 2020;
 - (b) Certificate of Determination of Review – Substitution (Form C-LPA-7) issued by the Review Panel on 8 October 2020 and sent by the Manager, Costs Assessment on 3 November 2020; and
 - (c) Certificate of Determination of Review Panel Costs (Form C-LPA-8) issued by the Review Panel on 8 October 2020 and sent by the Manager, Costs Assessment on 3 November 2020.
