Supreme Court of Victoria

Lissenden v Dellios [2021] VSC 520 (23 August 2021)

Last Updated: 23 August 2021

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMON LAW DIVISION

TESTATORS FAMILY MAINTENANCE LIST

S ECI 2019 04182

IN THE MATTER of the *Administration and Probate Act* 1958

- and –

IN THE MATTER of the Will and Estate of SUE LISSENDEN (also known as SUSAN EVELYN LISSENDEN), deceased

NIGEL CHARLES LISSENDEN — Plaintiff

v

PAUL DELLIOS (who is sued as the Executor of the Will of the late SUE LISSENDEN) — Defendant

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JUDICIAL REGISTAR:	Englefield JR
WHERE HELD:	Melbourne
DATE OF HEARING:	15 April 2021
DATE OF JUDGMENT:	23 August 2021
CASE MAY BE CITED AS:	Lissenden v Dellios
MEDIUM NEUTRAL CITATION:	[2021] VSC 520

COSTS - Where family provision proceeding by adult step-son settled at mediation - Whether costs of practitioners fair, reasonable and proportionate - Where executor is a legal practitioner and engages their own law firm to represent the estate - *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ss 169, 172(1)–(4), 174(3), 178; *Supreme Court Act 1986* (Vic) s 24; *Civil Procedure Act 2010* (Vic) ss 8(1), 65C; *Administration and Probate Act 1958* (Vic) s 65A - *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	S F Cherry	Grice Legal
For the Defendant	P Dellios, solicitor	Dellios West & Co

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1 This proceeding is a claim for provision out of an estate made under pt IV of the *Administration and Probate Act 1958* (Vic) (‘***Act***’) (‘**TFM claim**’) which settled at a mediation.

2 On 12 June 2020, the parties jointly applied by email for consent orders dismissing the proceeding with no order as to costs (‘**application for consent dismissal orders**’). The relevant Practice Note required the parties to disclose the total legal costs payable by each party with the application for consent dismissal orders.[1] The solicitors for the parties informed the Court that the costs payable by each of the parties were $70,000.00.

3 By orders of John Dixon J made 13 May 2021, this proceeding was referred to me.

4 For the reasons set out below, I am not satisfied that legal costs of $70,000.00 per side in this matter are reasonable. I fix the plaintiff's total legal costs (inclusive of disbursements and GST) at $54,595.60 and the defendant's at $57,818.88. As outlined below, the defendant's professional fees are allowed on the basis that compliance is established with a specific professional conduct rule.[2]

The Estate

5 Susan Evelyn Lissenden ('**deceased**') died on 24 December 2018, leaving a will dated 25 September 2014 ('**Will**'). The deceased's husband, Clive Norman Lissenden ('**Clive**') predeceased the deceased. The deceased was survived by the plaintiff, her step-son.[3]

6 Pursuant to the Will, as Clive predeceased the deceased, a solicitor, Paul Dellios ('**defendant**') was appointed as the executor and trustee of her estate. The defendant is a principal of Dellios, West & Co (the firm representing him in this proceeding)[4], who drafted the Will and had acted for the deceased and Clive since 2003, including as attorney appointed under an enduring power of attorney, from 2009.

7 By the Will, the deceased left the residue of her estate to a "separate trust" to be called the 'C & S Lissenden Trust' to be held for the following beneficiaries: Jennifer Dawn White (**'Ms White**'), Mount Macedon CFA, Life Education Victoria, The Royal Victorian Eye and Ear Hospital, Guide Dogs Victoria, The Heart Foundation – Victorian Branch, the Royal District Nursing Service Ltd and a class of beneficiaries called "Additional Beneficiaries". The C & S Lissenden Trust is to be a discretionary trust, in the sense that the entitlements of its beneficiaries to distributions depend on the exercise of trustee discretion.[5] The initial trustee and appointor of the C & S Lissenden Trust is the defendant.

8 In the Will, the Additional Beneficiaries includes all persons living or unborn related by blood or marriage to any beneficiary and the spouses, widows or widowers of such persons, wherever they live. The only individual beneficiary is Ms White, so the class of Additional Beneficiaries includes her relatives, her husband's relatives, and their spouses, living and unborn. Further potential beneficiaries in this class include corporations, trusts or schools that are eligible due to a defined link to an existing beneficiary **and** nominated as Additional Beneficiaries. This second category of 'nominated' Additional Beneficiaries has no relevance in this proceeding.

9 The Will made no provision for the plaintiff.

10 On 15 May 2019, probate of the deceased's will was granted to the defendant.

11 The inventory of assets and liabilities, filed as part of the application for a grant of probate ('**the probate inventory**'), valued the estate at $5,425,907.64.

The Proceeding

12 The plaintiff, by his solicitors Grice Legal, filed an originating motion on 13 September 2019. The defendant, by his solicitors, Dellios West & Co, filed a notice of appearance on 19 September 2019.

13 At a directions hearing on 22 October 2019, the parties were ordered to exchange affidavits and

attend mediation by 3 April 2020. Although, the plaintiff's solicitor swore a brief affidavit as to the plaintiff's estimated costs to the end of mediation of $40,242.00 ('**Plaintiff's Solicitor's Costs Estimate**'), as required by the Practice Note[6], the plaintiff filed only one substantive affidavit sworn 5 September 2019, and no material in reply to the defendant's material. The defendant filed seven affidavits in opposition. The plaintiff issued two subpoenas, under which 75 pages and 98 pages of documents were produced. The proceeding settled at mediation on 3 June 2020.

14 The parties subsequently made an application for consent dismissal orders on 16 June 2020. As required by the Practice Note, the total costs payable by each party were disclosed to the Court.[7] At this time, the plaintiff's solicitor, provided an affidavit explaining the calculation of the plaintiff's costs.[8]

15 The plaintiff's solicitors invoiced total legal costs of $90,875.40[9], but reduced the amount payable by the plaintiff to $70,000.00. The defendant's solicitors, his own law firm, invoiced total legal costs of $81,652.43, but had also reduced the amount payable by him to $70,000.00.[10]

16 After initial consideration, the Court requested each practitioner to provide to my chambers further material to explain the quantum of the costs payable by each of the parties, without filing, serving or exchanging their material. Each practitioner responded and, after consideration of this further costs material, the Court remained to be satisfied that the proceeding should be dismissed with no order as to costs.

17 In this process the Court received the following affidavits:

> (a) from the plaintiff, the affidavits of William Grice sworn 12 June 2020 and 25 September 2020, and the exhibits to those affidavits; and
>
> (b) from the defendant, the affidavit of Paul Dellios sworn 25 September 2020 and the exhibits to that affidavit ('**Dellios affidavit**').

18 On 15 December 2020, the Court listed two hearings to deal with the costs orders to be made in this proceeding, one in respect to each party on the same day but at different times, and made a timetable for further affidavits and legal submissions to be filed, but not served, before the hearings. These orders provided in 'other matters' that the parties were each excused from appearing at the hearing dealing with the opposing party's costs, if they informed the Court that they will abide the decision of the Court regarding those costs. Neither party filed further affidavits, and only the plaintiff filed submissions. On this basis, each costs hearing was conducted *ex parte* on 15 April 2021.

19 Subsequently, the defendant applied for Court approval of the compromise reached by the parties at their mediation by summons issued 13 May 2021.

Approval of Compromise

20 At the mediation, the defendant entered unconditional terms of settlement compromising this proceeding with the plaintiff that provide for a substantial payment from the estate to the plaintiff. However, the defendant required the approval of the Court for authority to compromise the proceeding. This issue was raised by the Court at the commencement of each costs hearing. When raised with the defendant, he contended that he had complete power to enter terms of settlement

resolving this proceeding. Nonetheless, I ordered the defendant to seek an approval, so that the finalisation of the proceeding may be regularised and the Court could discharge it's duty to protect the interests of persons affected by compromise of proceedings. In accordance with those orders, an application to approve the compromise was made by the defendant by summons dated 13 May 2021 supported by affidavit sworn by the defendant on 13 May 2021, including an opinion from Counsel who appeared for the defendant at the mediation (**the approval application**).

21 The approval application was required as the residuary estate was left to the C & S Lissenden trust, with discretionary objects that included a broad and open class of Additional Beneficiaries. The payment to the plaintiff comes from the residuary estate. An executor cannot bind the beneficiaries of an estate to a variation to their rights and interests in an estate by entering a settlement of a TFM claim without the fully informed consent of all affected beneficiaries.[11] In this case, because of the way the Will was drafted, it was impossible for the defendant to obtain consent from all "affected beneficiaries" to the terms of settlement he entered with the plaintiff.

22 To put it another way, if the residuary estate had been left directly to legally capable adults or legal entities who all instructed the defendant regarding the impact on their interests of the resolution of the proceeding, no Court approval would be required.[12] Even if the estate were left to a 'discretionary trust', but all potential discretionary objects of the trust created by the will were legally capable adults or legal entities who, acting together, could put an end to the 'discretionary trust' by directing the trustee to pay over the trust fund to them[13], and unanimously instructed an executor regarding the settlement of a TFM claim, it is arguable that no Court approval would be required. In this case, however, the existence of the class of Additional Beneficiaries meant that consent of seven named discretionary objects of the C & S Lissenden had no effect, as they were not, collectively, indefeasibly entitled to the trust fund, once the trust is established.

23 In the application for consent dismissal orders, the defendant advised the Court that the settlement of this proceeding did not affect the interests of any minors or adult persons under disability. However, the Additional Beneficiaries is not only an open and unascertained class of persons who are unrepresented in the proceeding, it is also likely to include minors and even adults under disability (for example, an aged person with dementia). The Court has an obligation to consider and protect the interests of any such persons in any proceedings that come before it. The Court relies on practitioners to identify the need for an approval application when it arises and apply for such approvals whenever appropriate.

24 I have considered the approval application in Chambers. I approve the defendant entering the compromise represented by the terms of settlement entered with the plaintiff under r 54.02(2)(c)(i) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('***the Rules***'), taking into account the interests of the C & S Lissenden trust as a whole, including the interests of the Additional Beneficiaries. As a result, the settlement of this proceeding therefore becomes binding on the beneficiaries of the trust created by the Will, including the Additional Beneficiaries.

25 By his affidavit in support of approval, the defendant deposed to "seek to have the judicial officer who deals with the compromise not eligible to hear any further application in the proceedings if for some reason it should continue."[14] If the approval had been refused, I would not deal with any further contested hearings. I do not consider that the defendant intended that I recuse myself from

handing down my costs decision, which was reserved after being fully heard on 15 April 2021, but which depended on the approval of an application for approval by the defendant, for the ultimate finalisation of the claim.

26 An additional matter arises for the defendant, which is external to this proceeding. In the approval application, the defendant informed the Court that at the mediation, the defendant, Ms White and the six charities who are named beneficiaries of the C & S Lissenden trust, entered a deed that purports to deal with the distribution of the assets of that trust.[15] The disclosure of the deed in the approval application does not transform the application for approval of compromise of this proceeding into an application for 'approval' of this additional deed. I make this observation as some confusion is apparent in the material filed in support of the application for approval. This deed is not before the Court. It is open for the defendant to make any separate application in respect to the deed as he may be advised, perhaps with an appointment to represent the interests of the class of Additional Beneficiaries under r 16.01 of the *Rules*.

Plaintiff's Legal Submissions

Jurisdiction

27 The plaintiff challenges how his own solicitor-client costs come before the Court, as he has not sought an assessment. The plaintiff submits that as he settled for an 'all in' figure, he is effectively paying his own costs rather than the costs being paid out of the estate. The plaintiff contrasts this to the defendant's position, if their costs are to be paid out of the estate.

28 The plaintiff relies on the validity of a costs agreement, sent to him on or around 20 February 2019.[16] The costs agreement incorporated a total costs estimate of $33,000.00. In oral submissions, Counsel for the plaintiff also pointed to two subsequent updated disclosures of costs estimates made to the plaintiff, first to $66,000 and then to $110,000.00, together with an explanation for these increases. Counsel noted that the costs actually charged to the plaintiff were less than the estimates disclosed and the plaintiff's solicitors have complied with the regime of disclosure required by Division 3 of Part 4.3 of the *Legal Profession Uniform Law* ('***LPUL***').[17] The plaintiff is aware, from costs disclosures and statements of rights attached to the invoices, of the available avenues if he wished to have his costs assessed. It was submitted that the twelve-month period for the plaintiff to apply for an assessment of costs, provided by s 198(3) of the *LPUL,* had not yet expired.

29 The plaintiff contrasts the circumstances of this proceeding with reference to cases where the Court's inherent jurisdiction to regulate solicitors' fees arose in situations to 'prevent exorbitant demands'[18] or to order taxation of a solicitor's bill where it is 'suspected that the solicitor has been guilty of serious professional misconduct'[19], submitting that in these cases the solicitor-client bill was squarely before the Court. In any event, it was submitted that if the Court were to deal with the plaintiff's costs on the basis of serious professional misconduct, his solicitors require proper notice and an opportunity to be heard, including by separate representation.

Fairness, Reasonableness and Proportionality

30 The plaintiff submits that fairness and reasonableness are discrete concepts, with fairness relating to the method of obtaining the agreement and reasonableness relating to quantum.[20]

31 As to fairness, it was submitted that the terms of the costs agreement were valid and there was no suggestion of unfairness. There was also no suggestion of a lack of disclosure to the plaintiff. Rather, it was submitted that the costs agreement could be enforced like any other contract, subject to the *LPUL*, and that the plaintiff was repeatedly informed of his rights under the *LPUL*.

32 As to reasonableness, the plaintiff submits that the rates he was charged under the costs agreement were reasonable and the fact that reference to a scale of costs or some other basis might provide a lower amount is irrelevant for non *inter partes* costs. The plaintiff received itemised bills and an explanation as to why the costs exceeded the initial estimate, in compliance with the *LPUL*. Particular reliance was placed on the following five aspects of the proceeding to assert the costs payable by him are reasonable:

> (a) the need to subpoena the deceased's former solicitor and the deceased's treating medical practitioner;
>
> (b) that six beneficiaries were represented, although not joined as parties, and all attended the mediation with separate representation;
>
> (c) that the plaintiff had difficulty locating a charity beneficiary to give notice of an order granting leave to that beneficiary to join the proceeding;
>
> (d) that the COVID-19 pandemic caused extra work in that the mediation was delayed, so a new mediator had to be appointed and directions hearings adjourned; and
>
> (e) that interactions with the defendant were slow, which impacted the conduct of the proceedings.

33 The plaintiff submits the costs are proportionate. In this regard, he submits that an assessment of proportionality is not a mere mathematical exercise and requires an examination of the surrounding circumstances, including the complexity of the litigation and its significance and importance to the plaintiff as an individual.[21] The plaintiff highlights that the costs are 12 percent of the settlement amount and 1.8 percent of the estate. In addition, the plaintiff submits that this was very significant and important litigation to the plaintiff as an individual. The plaintiff relies on the decision of Beach J in *Newstart* to argue that the appropriate test of proportionality is determined by comparing the costs 'with the benefit sought to be gained from the litigation' and it:

> ... cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending $0.50 to recover an expected $1.00 may be proportionate if it is necessary to spend the $0.50.[22]

Defendant's Submissions

34 The defendant did not file any further material or any written submissions in respect of his costs as ordered on 15 December 2020. The defendant relies on the Dellios Affidavit and his oral submissions made on 15 April 2021.

35 At the hearing, the defendant submitted that all the work that was done was reasonably necessary

to defend the plaintiff's application and ended up benefitting the beneficiaries in that it resulted in a favourable settlement. The defendant points to assertions and allegations made in the plaintiff's affidavit that required him to obtain evidence from numerous witnesses, including accountants of the deceased, to rebut. Where charges were made for two solicitors acting together on a specific task for the defendant, the defendant submitted that efficiency was created and costs savings were made, in reducing the overall time taken for the task, rather than creating duplicate charges for the same work. The defendant also submitted that the mediation was particularly complicated, and involved additional work, due to the number of beneficiaries and the fact that they were all separately represented, as well as issues caused by the COVID-19 pandemic.

The Court's Jurisdiction to Consider the Costs of Settled Litigation

36 The question of my jurisdiction to deal with the legal costs of a fully capable adult litigant who has settled their legal dispute and who make no complaint about their representative's legal costs needs to be addressed first.

37 The first source of jurisdiction to deal with the legal costs of the parties to this proceeding is s 24(1) of the *Supreme Court Act 1986* (Vic) ('***SCA***'), which provides:

> Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

38 Jurisdiction to deal with the costs payable by each of the parties to their solicitors in this proceeding is also derived from the *Civil Procedure Act 2010* (Vic) ('***CPA***'). One of the overarching purposes of the *CPA* is to facilitate cost-effective resolution of civil disputes. The Court itself is mandated by s 8(1) of the *CPA* to seek to give effect to the overarching purpose of that Act in the exercise or interpretation of any of its powers, whether those powers are part of the Court's inherent jurisdiction or arise from its statutory jurisdiction, the common law or procedural rules or practices. This sub-section applies despite any other Act (other than the *Charter of Human Rights and Responsibilities Act 2006* (Vic)) or law to the contrary.

39 Therefore, the discretion as to costs in s 24 of the *SCA* is subject to my duty to seek to give effect to the overarching purpose of the *CPA*, in particular the purpose of facilitating the cost-effective conduct of proceedings. Specific powers in relation to costs, which advance this overarching purpose, are provided by s 65C of the *CPA*, in particular, in these circumstances, s 65C(2). The key issue for consideration is the furtherance of the overarching purpose of ensuring costs are reasonable and proportionate.[23]

40 Next I turn to the Practice Note dealing with TFM claims.[24] The Practice Note requires parties to a TFM claim who have settled their proceeding to disclose the costs payable by each party when applying for an order finalising the proceeding.[25] Generally, if these costs exceed an earlier costs estimate given to the Court by a certain percentage or if it appears to the Court that a party's costs may not be reasonable and proportionate, an affidavit from that party's solicitor explaining how their costs are calculated will be required. As was the case in this proceeding, unless such an affidavit satisfies the Court the costs are reasonable and proportionate, the Court will continue to deal with the

matter of costs. The purpose of the process set out in the Practice Note is to bring the quantum of legal costs of settled TFM proceedings forward for independent consideration, in furtherance of the overarching purpose of the CPA. Once the costs jurisdiction of the Court is engaged by a disclosure of costs that do not appear reasonable or proportionate, the Court's own duty to exercise its costs jurisdiction remains present until the issue is finalised. In this context, it is important to highlight that a practice note must be 'understood and applied in the context of the general law, legislation and the rules of court' and it is expected that parties will adhere to them.[26]

41 Further, the costs question comes 'squarely' before the Court as the parties sought orders that the proceeding be dismissed with 'no order as to costs'. The making of an order, even by consent, is a judicial act and the judicial duty to fully consider the matter arises.[27] I was not satisfied by the material provided by the practitioners for the parties in this proceeding as to the calculation of their costs. Therefore, in accordance with my judicial duty, I did not make the order sought by the parties by consent dismissing this proceeding with no order as to costs. Instead, I will make an order fixing costs, after each party has had the opportunity to file further material and appear at a hearing in respect to the costs payable by each of them.

42 In addition to the statutory jurisdiction discussed above, the Court has an inherent jurisdiction to deal with legal costs.[28] While this inherent jurisdiction to reduce solicitor-own client costs has been applied in reported decisions that involve exorbitant demands or serious professional misconduct, that does not mean that the Court's inherent jurisdiction to deal with solicitor-own client costs is limited to such cases. The inherent power of a superior court cannot be restricted to defined and closed categories.[29] The inherent jurisdiction of the Court to deal with a party's solicitor-own client costs does not require a threshold determination of a certain qualifying level of misconduct by their solicitors, it applies when the need arises to ensure that legal costs are "fair and reasonable and no more".[30]

43 Finally, McMillan J in *Re Jabe* said that the statutory scheme set out in the *LPUL* should be seen as complementary to the inherent jurisdiction of the Court.[31] This means that regard can and should be had to the provisions of the *LPUL* in considering costs, even if the consideration arises outside of a costs specific dispute in the Costs Court.

44 Section 172(1) of the *LPUL* provides that a law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that are, in particular:

(a) proportionately and reasonably incurred; and

(b) proportionate and reasonable in amount.

45 Section 172(2) of the *LPUL* sets out a number of matters that must be considered in determining whether s 172(1) has been satisfied. These include factors such as the level of complexity, difficulty, novelty, urgency and public interest of the matter; the quality of the work done; the labour and responsibility involved; the experience, seniority, skill and specialisation of the lawyers involved; the number and importance of the documents involved; the place and time where and when business was transacted; as well as the retainer, instructions and time spent on the matter.

46 Section 172(3) of the *LPUL* provides that '[i]n considering whether legal costs are fair and

reasonable, regard must also be had to whether the legal costs conform to any applicable requirements of this Part, the Uniform Rules and any fixed costs legislative provisions'.

47 The plaintiff submitted that, even if the Court has jurisdiction to deal with the costs payable by him in this proceeding, it may not hear and determine these costs in the complete absence of any complaint by him. Indeed, the plaintiff had been informed in writing of his right to have his costs taxed by the Costs Court at least seven times, by the costs disclosure and invoices provided to him by his solicitors, and has not made a complaint about his legal costs.[32] Rather, in this proceeding the Court, of its own motion, required material in support and a subsequent hearing in respect to the plaintiff's costs. As a consequence, the plaintiff has instructed his practitioners to respond and then appear in support of the costs claimed by his solicitors. The power of the Court to deal with the plaintiff's legal costs arises in this proceeding from the Court's inherent jurisdiction to do justice by parties to litigation by ensuring that solicitors, as officers of the Court, are remunerated properly, but no more, for their work as solicitors.[33] This inherent jurisdiction to supervise and regulate the costs of solicitors arises independently of a complaint by the plaintiff. In *Redfern v Mineral Engineers Pty Ltd* , Tadgell J said:

> The court's surveillance over costs as between solicitor and client is assumed with a view to preventing any unfair advantage by solicitors in their charges to their clients. It stems, it seems, from the notion that ordinarily a solicitor is presumed to be in a position of dominance in relation to his client as a result of his presumed knowledge of the law and of what may and may not be properly charged by way of fees. Were a strict view not taken it might be open to a solicitor to overreach his client or otherwise act oppressively towards him on the matter of costs. Considerations of public policy and undue influence combined to shape the attitude of the courts of equity, by which the general rules in relation to taxation of costs were formulated.[34]

Plaintiff's Costs

Separate Representation

48 The plaintiff was represented at the cost hearing by counsel, Sarah Cherry, on instructions of his solicitors, Grice Legal. The plaintiff's submissions raised the need for notice and separate representation for the plaintiff's solicitors, if the Court were considering a reduction in solicitor-client legal costs on the basis of 'serious professional misconduct' by the plaintiff's solicitors.[35] In addition, Ms Cherry raised the need for notice and separate representation for the plaintiff's solicitors at the hearing if a finding were to be made that there was a failure to comply with disclosure obligations, which is capable of constituting unsatisfactory professional conduct or professional misconduct under the *LPUL*. On behalf of the plaintiff, Ms Cherry submitted the disclosure obligations were complied with.[36]

49 The Court is grateful for the attention given to this important question by experienced counsel. However, unsatisfactory professional conduct or serious professional misconduct did not arise in the material submitted in support of the plaintiff's costs. In other situations, separate representation of a party's solicitor may be required. If that was the situation, it would be a matter for the practitioner to determine prior to the hearing. The Court cannot provide 'notice' that a professional misconduct determination may be made in advance of a costs hearing arising from the Practice Note. Indeed, the

practitioners for both parties were on 'notice' that the costs disclosed by the parties required justification and by orders made on 15 December 2020, opportunity was given to the parties to produce any relevant material and make submissions. In these circumstances, the Court and the clients rely on legal practitioners to satisfy themselves whether the client and the law firm should be separately represented at such a hearing.

Fairness and Proportionality

50 I accept the plaintiff's submissions on fairness and proportionality. However, I do not consider the quantum of costs payable by the plaintiff are reasonable.

Costs Agreement and Disclosure

51 On or about 20 February 2019, the plaintiff was sent a costs agreement by his solicitors. The costs agreement is unsigned, undated and slightly incomplete, but acceptance was implied by the plaintiff's conduct, in particular the conduct of continuing to instruct the solicitors in accordance with the agreement. The hourly rates in the costs agreement are not excessive, although far from modest. The costs agreement set out the legal work to be performed including, if settlement cannot be negotiated, attending mediations and 'ultimately preparing for and presenting your case at a contested hearing in the Supreme Court'. An estimate of total legal costs, including disbursements and GST, of $33,000.00, was disclosed. This disclosure satisfies the requirement in s 174 of *LPUL*.

52 It is noted that the plaintiff's solicitor's costs estimate[37], provided in their affidavit sworn on 11 September 2019, used the scale in the Practitioner's Remuneration Order ('**PRO**')[38] to arrive at an estimate of $40,242.00 by the end of mediation. This is nearly $7,000.00 higher than the amount in the first cost disclosure. Ordinarily, an initial costs disclosure can be expected to be higher, rather than lower, as it should be a realistic estimate of a client's total costs to the end of the matter, not the end of mediation. Here it seems the plaintiff's solicitor has provided a genuine estimate for the Court, just not one based on his costs agreement, but independently calculated by him by reference to the PRO.

53 The plaintiff's solicitors made two 'updated' costs disclosures prior to settlement of this proceeding. One on 18 October 2019, revising the estimate to $66,000.00 and another on 4 March 2020, revising the estimate to $110,000.00.[39] Whenever there is a significant change to total legal costs that will be payable by a client, this must be disclosed to the client in writing, with information about rights and sufficient information to make an informed decision about the future conduct of the matter.[40] In addition, *LPUL* requires a final costs disclosure after the settlement is negotiated and prior to the terms of settlement being executed. This final costs disclosure is to give the client an estimate of their total costs, any contribution to be made toward the client's costs by another party, and to highlight any 'shortfall', so the client knows their estimated 'out of pocket' costs prior to settling.[41] I accept the plaintiff's submissions that the costs disclosure requirements of *LPUL* were met. Therefore, the consequences of non-compliance with disclosure obligations set out in s 178 of the *LPUL* do not apply.

54 However, it is noteworthy that it was after plaintiff's affidavit had been filed and just days before the first directions hearing, that the plaintiff's solicitor disclosed to the plaintiff that his costs estimate had doubled, from $33,000.00 to $66,000.00. The reason given for this substantial increase was that the proceedings had commenced and a mediation was foreshadowed.[42] It is inconceivable that a

mediation, by itself, would cost a party $33,000.00 and in any event, mediation was taken into account in the plaintiff's solicitors' first costs disclosure. The next substantial increase was from $66,000.00 to $110,000.00 in March 2020, which occurred after receiving the defendant's affidavits and issuing a subpoena, but still prior to the delayed mediation. This third costs disclosure took the estimate of costs to more than three times the amount in the initial costs disclosure. The explanation given by the plaintiff's solicitors to their client for this second increase was:

> (a) the delay in obtaining affidavit material from the defendant;
>
> (b) the need to subpoena the deceased's former solicitor's file and the deceased's medical file;
>
> (c) the general delay by the defendant in responding communications and arrangements for mediation; and
>
> (d) the anticipated complexities in dealing with the numerous beneficiaries.

55 The quantum and timing of these costs disclosures raises a serious question about the ability of the plaintiff to negotiate the terms of his representation as the solicitors were already retained and the proceeding had already commenced. It also runs contrary to one of the purposes of costs disclosure, namely, to ensure that clients of law practices can make informed choices about their legal options and the costs associated with pursuing those options.[43] In addition, a law practice must ensure a client understands and consents to proposed costs as disclosed.[44] These circumstances reinforce the need for the Court to independently consider the costs payable by the plaintiff in this matter, notwithstanding the compliance with the costs disclosure regime in the *LPUL*.

Fair and Reasonable Costs

56 As there is compliance with the *LPUL*, the costs agreement is prima facie evidence that the legal costs disclosed in it are fair and reasonable.[45] The hourly rate itself is within the PRO scale,[46] although it results in charges that are far in excess of what would have been charged on the Supreme Court Scale of Costs, as the plaintiff's counsel readily and rightly conceded.[47]

57 As previously stated, the plaintiff submits that additional work was required in this claim as the defendant, a solicitor who drafted the will, did not consent to production of an earlier solicitor's will file and access to medical notes, which the plaintiff's solicitors viewed as relevant to their preparation of the matter. They subsequently issued subpoenas to obtain this information, after correspondence. They also submitted that complexity arose due to the number of beneficiaries of the C&S Lissenden Trust, which is created by the Will, including being required by orders of this Court to serve them with certain documents, where the defendant did not supply their contact details. As for many litigants in Australia since March 2020, the COVID-19 pandemic had an adverse effect on the costs of the plaintiff, in general and in particular with the mediation arrangements.

58 However, the invoices reveal, among other things, that:

clerical work has been charged at solicitor rates (which is unreasonable even if performed by a solicitor);
items are included for intra-office communications and for review of case-law and practice notes;

charges are made for two different solicitors perusing the same material, attending the same conference and the mediation;
some clearly excessive charges are made, for example:
for filing the Originating Motion and Affidavit of the plaintiff, one solicitor claimed one hour and another solicitor claimed two hours as well as another hour for the CPA certificates;
the solicitor's costs estimate affidavit was charged at 1.5 hours, when it may have just relied on the initial costs disclosure and not have taken longer than half an hour; and
three hours are charged for reviewing and settling the summons for directions and consent orders.
59 Despite the need to issue subpoenas, this proceeding was not overly complex from the plaintiff's perspective. It is unfortunate that the effects of the COVID-19 pandemic meant some time was wasted in 2020, but thankfully the costs of that delay are comparatively insignificant in this case. The initial estimate was $33,000.00, in the costs agreement. The final amount on the invoices was $90,875.40. Even though this was later reduced to $70,000.00, the material before the Court does not fully explain this increase from the amount in the costs disclosure given when instructions were first received.

60 I find that the costs payable by the plaintiff in this proceeding are unreasonable in amount. However, in this case, rather than order a taxation, the principles of finality, timeliness and cost effectiveness require that I make a gross sum order for costs.[48] Further, I have had the benefit of extensive material submitted by the plaintiff in support of his solicitor's costs, written submissions and an oral hearing. This familiarity with the costs aspect of this proceeding places me in the best position to quantify what amount would be reasonable.[49] Taking a broad-bush approach,[50] I determine that the professional fees will be fixed at $43,600.00. The disbursements of $10,995.60 seem reasonable and I will not order any reduction. This results in total legal costs of $54,595.60. This is much higher than a usual TFM claim resolved at mediation, but a detailed analysis of the invoices, and taking into consideration the submissions means that, in this unique case, I am satisfied this amount is reasonable.

Defendant's Costs

Conflict of Interest: Defendant

61 At the costs hearing, the defendant appeared for himself, as solicitor from the firm "Dellios West & Co" (not as the defendant in person unrepresented by Dellios West & Co). The inherent conflict of interest in this appearance highlights the underlying difficulty of the position in which the defendant placed himself in respect to his legal costs. During the costs hearing, I asked the defendant on three occasions to address the question of his 'conflict of interest', and each time the defendant responded by raising issues relating to the justification of the quantum of his professional fees.

62 The following issues arise for the defendant in respect to conflicts of interest:

(a) the appointment as executor where he drafted the Will, including a charging clause;

(b) the retainer of his own legal firm to act for him as executor; and

(c) professional conduct issues relating to excessive legal costs.

Will Drafter appointed as executor and permitted to charge legal costs

63 There are many reasons why appointing a solicitor as executor may be in the interests of the beneficiaries of an estate, including the lack of a suitable family member, as well as the professional capacity and high ethical standards a practising solicitor will bring to the role.[51] In this case, the defendant had a long standing relationship with the deceased and was well qualified to act in the estate administration and thereafter as the trustee of the C & S Lissenden trust.

64 However, executors have no automatic entitlement to be paid for performing their duties. If a solicitor intends to charge for their efforts as executor, a conflict of personal interest and duty to act in the client's interests arises.[52] In addition, an executor, as a fiduciary, cannot profit from that position by way of professional fees from which the executor receives a profit.[53] However, a solicitor who intends to charge the estate either for executorial services or legal costs, or both, is aware that a clause can be included in the will which will give the solicitor-executor an 'automatic' ability to charge an estate, without consent of the beneficiaries or an order of the Court.[54] It is permissible for a solicitor to include a such a clause in a will drafted by the solicitor for the solicitor's own benefit if, following specific advice in writing, the testator gives fully informed consent prior to signing the will.[55]

65 In this case, the Professional Conduct and Practice Rules 2005 ('***2005 Conduct Rules***') applied at the time the Will was drafted.[56] Rule 10.1 of the 2005 Conduct Rules provides:

> 10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner or an associate of the practitioner an executor must inform the client in writing before the client signs the will –
>
> > 10.1.1 of any entitlement of the practitioner, or the practitioner's firm or associate, to claim commission;
> >
> > 10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs in relation to the administration of the estate, and;
> >
> > 10.1.3 if the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.

66 By Clause 8 of the Will, the following charging clause was included:

> I APPOINT the office of DELLIOS, WEST & CO. to be the solicitors of my estate and I declare that the said DELLIOS, WEST & CO. of which my trustee PAUL DELLIOS is a partner, may charge, retain and be paid all usual professional or other charges in priority to all other bequests hereby made for business done by the firm in relation to the trusts hereof, and also their reasonable charges in addition to disbursements for work and business done and all time spent by them in connection with matters arising in the promises (sic) including matters which might or should have been attended to in person by a trustee not being a Solicitor but which such trusts may reasonably require to be done by a Solicitor. the office of DELLIOS, WEST & CO. Solicitors to be the solicitors of my estate (sic).

67 As can be seen, clause 8 of the Will it does not give any entitlement to commission nor any entitlement to 'non-professional' charges in lieu of commission, but only permits 'professional costs'. The distinction between professional costs and 'non-professional' charges was explained in *In the Will of Sheppard*:

> ...professional costs, that is to say costs which an executor would have been entitled to incur and charge against the estate from the use of independent persons in the role of solicitor accountant and estate agent in the necessary work of administering the estate... ...non-professional activities, that is to say duties in administering an estate which could have been adequately performed by persons not exercising the skills or performing the duties of a solicitor, estate agent or accountant...[57]

68 Therefore, on the basis that the defendant complied with r 10 of the *2005 Conduct Rules*, there is no impediment for his firm charging professional fees in accordance with clause 8 of the Will, but he cannot charge his time in respect to non-professional work. For example, the defendant may engage his firm act in the sale of estate real property, but not charge for his time in engaging a gardener to perform pre-sale works at the real property, the second task not being reasonably required to be done by a solicitor, to paraphrase clause 8 of the Will. The relevance to this litigation is that the professional charges of acting as solicitor, subject to compliance with r 10 of the *2005 Conduct Rules*, are permissible, but personal time dedicated to the litigation in the character of executor is not, unless a solicitor were reasonably required to perform the task. For example, attendance at mediation, whether as solicitor acting or executor appearing personally and directly instructing counsel, would seem chargeable under clause 8 of the Will.

69 The defendant has not produced any material showing compliance with r 10 of the *2005 Conduct Rules*. In addition, there are no direct beneficiaries of the estate capable of consenting to the legal costs charged to the estate by his firm.[58] I will consider the defendant's costs of this litigation on the basis that he has complied with r 10 of the *2005 Conduct Rules* and may rely on the charging clause in the will to engage and pay his own law firm from the estate. However, the final orders disposing of this proceeding, will not permit the defendant to take his professional fees unless compliance with r 10 of the *2005 Conduct Rules* is established.

70 The beneficiaries of the C & S Lissenden Trust, when it comes into existence, will no doubt be provided accounts regarding the professional fees charged by the defendant's firm in the course of the administration of the estate. The defendant sought to make submissions regarding his charging in the administration of the estate in the course of the hearing, but these charges are not before the Court in this proceeding

The retainer of the defendant's own legal firm to act for him as executor

71 The defendant's retainer of his own law firm to act for him also raises other issues, beyond the question of charging addressed above, such as objectivity and professionalism. In *Bell Lawyers,* the High Court, by majority, said in the context of litigation, that 'it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation'.[59] The decision in *Bell Lawyers* precludes a lawyer, acting for themselves, from recovering costs if successful, on the basis that self-represented litigants cannot recover compensation for their own time in litigation.[60] This principle also covers law firms, however structured.[61] In this proceeding, other than in respect to his

costs, the defendant, acting as executor, is undertaking a personal role, not acting as solicitor. His firm is not representing itself, as would be the case, for example in a dispute over its costs. However, the High Court's reservations must be borne in mind when considering a solicitor acting for himself as executor in litigation.

72 Subject to being permitted to charge an estate, often a solicitor-executor may conveniently have their own law firm act in uncontentious matters, for example obtaining a grant of representation or conveyancing. However, when the estate becomes embroiled in litigation for any reason, it can be preferable to instruct independent solicitors for numerous reasons. In this case, the plaintiff's affidavit in the proceeding contained hearsay and opinion material regarding the deceased's personal feelings around the time of the will instructions which, if held by the deceased, reflected negatively on the defendant. The defendant filed seven responding affidavits, some of which, among other things, sought to deal with the deceased's personal feelings about the defendant over an unspecified time period and other material thought relevant to the defendant's conduct and professional reputation. The filing of this material raises questions of independence as required by rr 12.1, 17.1 and 17.3 of the current *Legal Profession Uniform Law Australian Solicitor's Conduct Rules* 2015 ('***2015 Conduct Rules***'), as well as the overriding duty to the Court under r 3 of the *2015 Conduct Rules*.

73 In particular, the defendant's own affidavit, which was the longest of any of his witnesses, covered legal, financial and personal matters of the deceased and her husband since 2003, as well as making a number of observations about the plaintiff. This affidavit raises the question of the applicability of r 27 of the *2015 Conduct Rules* preventing a solicitor acting where they are a material witness if it would prejudice the administration of justice.[62] This rule, like the Court's resistance generally to solicitors acting for themselves, is directed toward having litigants professionally and independently represented, in the interests of the administration of justice generally. A solicitor who accepts a retainer to act where they are likely to be a material witness places themselves in this position and can risk costs being awarded against them.[63]

74 The issue of the line between professional fees and non-professional activities in clause 8 of the Will arises for the defendant in respect to the time spent on his own affidavit, as giving evidence in a proceeding is a non-professional activity, yet taking instructions from a witness for the purposes of drafting an affidavit for that witness is legal work. This may also offend the rule in *Bell Lawyers* that a solicitor, acting for himself personally, cannot charge for his time, particularly as much of the content of the affidavit related to the defendant's professional reputation.[64] It is safest to remove any professional fees relating to the defendant's own affidavit from the costs charged by his firm, and treat him as a witness who produced a written form of his instructions to his solicitors.

Professional conduct issues relating to quantum of legal costs

75 As noted above with respect to the plaintiff's costs, in certain circumstances a finding that the defendant's cost are unfair or unreasonable, may lead to disciplinary action under the *LPUL*. This gives rise to the question of need for separate representation for the client and the law firm, discussed above.[65]

76 The defendant appeared as solicitor at the costs hearing, from the firm Dellios West & Co, not as the defendant-executor personally. He elected to make that appearance, so he was 'separately' representing his firm at the hearing of this matter. The defendant has either obtained independent

advice regarding the Court's listing of a hearing regarding his costs or advised himself or elected not to obtain advice. However, this again highlights the conflict of interest and duty that arises where a solicitor-executor acts for himself as solicitor. His interest as a solicitor in responding to any issues of misconduct in respect to legal costs conflicts not just with his duty to his client but also with his duties as executor to preserve the estate. Further, as per the principles from *Bell Lawyers*, he cannot recover costs for work or appearances on his firm's behalf in support of the costs as charged or in response to potential adverse findings.[66]

Jurisdiction under s 65A of the *Act* to deal with costs

77 In addition to the sources of jurisdiction outlined above in respect to the Court's ability to consider the costs of a settled TFM claim of its own motion,[67] the Court has additional powers with respect to an executor's costs in litigation involving a deceased estate. In 2017, the *Act* was amended and section 65A was inserted, with effect for deaths after 1 November 2017.[68] Section 65A empowers the Court, on an application of an interested beneficiary of an estate, a creditor, or importantly, of its own motion in any proceeding, to reduce or order repayment to an estate, if it considers either or both of the following are excessive:

> (a) a commission or fee charged by a Legal Personal Representative ('**LPR**') or retained or payable to an LPR under the terms of a will;
>
> (b) any fee, costs, expense or disbursement for which an LPR has been reimbursed or claims to be reimbursed out of an estate.

78 Section 65A of the *Act* is an independent and additional power of the Court. There is no definition of 'excessive' for the purposes of s 65A in the Act and this section has not yet been subject to judicial interpretation.

79 The plurality of the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* summarised the correct approach to statutory interpretation as follows*:*

> (a) the task of statutory construction must begin with a consideration of the text itself;
>
> (b) historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text;
>
> (c) the language which has actually been employed in the text of legislation is the surest guide to legislative intention; and
>
> (d) the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[69]

80 Further, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. Section 35(b) of the *Interpretation of Legislation Act 1984* (Vic) also permits consideration to any relevant material to aid interpretation, including reports of Law Reform Commissions.

81 Amending the Act to introduce Section 65A was a recommendation of the Victorian Law Reform Commission's Succession Laws: Report which was tabled in Parliament on 25 October 2013 (**'Succession Laws Report**').[70] The Succession Laws Report, in chapter 7, sets out the problem of 'generous' or unnecessary or 'excessive' charges depleting an estate to the detriment of its beneficiaries. All submissions received by the Victorian Law Reform Commission (VLRC) in respect to this issue supported the introduction of some form of review of executor's commissions and charges, but differed on the form of this review. The VLRC settled on s 65A as its preferred mode of introducing a review of costs, charges and commissions to LPRs, as it covered what is necessary, is generally consistent with s 86A of the *Probate and Administration Act 1898 (NSW)* and empowers beneficiaries and the Court to initiate a review.[71] Section 86A of the *Probate and Administration Act 1898 (NSW)* has been in force since 1981, and was considered to be a prime reason why the Probate Office of the Supreme Court of New South Wales rarely sees evidence of abuse of charging or commission clauses.[72] The VLRC noted the broader regulatory framework on solicitor-executors, including the costs disclosure required by LPUL and professional conduct rules, in reasoning against any broader review power, and relying only on s 65A, despite some submissions calling for stronger reform.

82 The Succession Laws Report assists me in determining that the 'mischief' s 65A seeks to remedy is the risk that estate assets may be depleted by 'excessive' charges by professional executors, such as solicitors, where an 'unfair advantage' may be taken of the vulnerability of the estate beneficiaries. These concerns also underpin the recommendations in the Succession Law Report that lead to the introduction of sections 65B to 65E into the Act, which deal with other aspects of executors' benefits from an estate.[73]

83 Before considering the meaning of 'excessive' in context of the Act, taking into account its purpose, I note that s 65A of the *Act* introduces a new limit on the general principle that a trustee (which includes an executor) is entitled to an indemnity for expenses incurred in the proper performance of that role.[74] The right to indemnity from the trust assets is a proprietary right, taking priority even over the beneficial rights of the beneficiaries of the trust.[75] This is consistent with r 63.26 of the *Rules* that provides that:

> Unless the Court otherwise orders, a party who sues or is sued as trustee or mortgagee shall be entitled to the costs of the proceeding out of the fund held by the trustee or out of the mortgaged property in so far as the costs are not paid by any other person.

84 This right of indemnity is limited to proper expenses, which means that improperly incurred costs, expenses or liabilities fall outside the right to indemnity.[76] Improperly incurred costs, expenses or liabilities may arise from acting beyond power, in bad faith or without the care and diligence of a person of ordinary prudence.[77] Where a trustee commences litigation for their own personal benefit, the onus falls on the trustee to demonstrate that the costs were not improperly incurred, although, it is possible that such litigation does remain a proper administration of the trust.[78]

85 A particular form of 'improper' costs are those that may be described in the authorities as extravagant or disproportionate or, in the words of s 65A the *Act*, excessive. Incurring 'excessive'

costs may be considered a breach of the duty to exercise care and diligence.[79] The Court will not order costs out of a trust fund that are not reasonable in the circumstances.[80] However, the Courts have long been very cautious about depriving a trustee of their indemnity.[81] For example, a trustee may defend their own character and actions in the course of litigation yet still retain an indemnity for costs, so long as the litigation as a whole is conducted in the interests of the trust.[82]

86 An executor's right to indemnity ultimately protects the interests of beneficiaries of an estate, for reluctance to risk incurring personal costs liability could have an adversely dampening effect on executors unfortunate enough to be involved in estate litigation. To strengthen this protection for the beneficiaries, if doubt exists about the executor's right of indemnity for legal costs in a particular situation, the Court may be approached for an order justifying the executor's active involvement in the litigation and confirming the indemnity for legal costs.[83]

87 There is generally no doubt involved about actively defending a family provision claim. It is the duty of the executor to 'uphold the will', put before the Court all the relevant evidence and compromise the claim where appropriate.[84] Indeed, *the Rules* require the LPR to defend TFM claims (unless of course it is the LPR who is making the claim).[85]

88 However, even in a TFM claim, if the executor's defence of the application is not conducted properly, the right to be indemnified for their legal costs from the estate may be lost.[86] Examples of such 'improper' conduct include where beneficiaries are forced to intervene to protect their interests resulting in duplication of costs where it is the executor's costs that ought be disallowed,[87] failing to give proper evidence as to estate value and contesting the litigation in their own interests[88] and unmeritorious appeals.[89]

89 Section 65A of the *Act* does not empower the Court to consider the full question of whether fees, costs, expenses or disbursements paid or reimbursed to an LPR are proper in every aspect, taking into account the duties and powers relating to the costs or expense.[90] This broader question ought be considered with an appropriate contradictor, with notice and on adequate material. Under s 65A of the *Act*, the Court is empowered to do no more than consider whether a commission, fee, cost, expense or disbursement is 'excessive'. Taking this issue in isolation out of the general concept of impropriety allows a summary determination even, as noted above, on the Court's own motion. To the extent that legal costs are excessive, the right to indemnity under s 36(4) of the *Trustee Act 1958* (Vic) and in common law is not lost, as it was not present in the first place. Nonetheless, a careful balance must be struck between the need to fully indemnify the executor for proper legal costs incurred in the interests of the estate and the need to protect the estate from excessive legal costs.

90 To return to the meaning of 'excessive' in s 65A of the *Act*, there does not seem to any judicial guidance on the meaning of 'excessive' in s 86A of the *Probate and Administration Act 1898 (NSW)*. Decisions dealing with denying a trustee's indemnity for legal costs use terms such as 'disproportionate' or 'extravagant' to describe legal costs which are improper as to quantum.[91] The Macquarie Dictionary defines excessive as 'exceeding the usual or proper limit or degree, characterised by excess: *excessive charges, excessive indulgence*.'[92] *The Rules*, in reference to taxations of costs on an 'indemnity basis' require that all costs be allowed, unless they are of an 'unreasonable' amount or 'unreasonably incurred', with any doubt as to reasonableness resolved in

favour of the party to whom they are payable.[93] In my view, the natural and ordinary meaning of excessive legal costs, in the context of the *Act* as a whole and in light of the purpose of s 65A, includes those legal costs that are disproportionate or are unreasonable, either in amount or by being incurred. The importance to the estate of the trustee's indemnity means that any doubt that a legal cost is 'excessive' should be resolved in favour of the LPR.

91 The review of costs that arises from the implementation of the Practice Note is predicated on a TFM matter that has been run efficiently through to mediation and resolved. It may be that few, if any, LPRs find themselves facing questions as to the application of s 65A of the *Act* in these circumstances.

92 Section 65A of the *Act* operates independently of any informed consent of a testator or beneficiaries. That is, even though r 10 of the *2005 Conduct Rules* may be fully complied with and the charges are within the terms of the will (which here means no non-professional charges are included), if I am satisfied the amount of the defendant's legal costs is excessive, I may order that they be reduced or repaid by him to the estate.

93 The defendant's material does not make clear if the legal costs were paid to his firm as a separate entity. That is, I am not confident whether he has received the legal costs personally, where s 65A(1)(a) of the *Act* applies, or the legal costs have been paid to his firm, such that s 65A(1)(b) applies. In either case, if the legal costs are excessive, I may order that it be reduced or repaid to the estate. The defendant did not submit otherwise.[94]

94 In other cases, where a non-professional LPR, who does not receive any financial benefit from the legal costs paid or payable by them in a settled TFM claim, comes before the Court as a result of the costs review required by the Practice Note, separate representation may be required if the Court is considering making orders under s 65A of the *Act*. The effect of an order under s 65A is that the estate is exonerated to the extent that the indemnity for legal costs is reduced, but the LPR remains liable for the full amount of the legal costs, in the absence of an order capping costs payable to the legal practitioners. This issue does not arise here as the defendant is familiar with s 65A, a fixed costs order will be made and the defendant has a unified legal interest in defending his costs from orders under s 65A, as executor and as his own solicitor. This last remark highlights again the conflict between the defendant's personal interest and his duty to the estate, discussed above, excused only to the extent provided by clause 8 of the Will and compliance with r 10 of the *2005 Conduct Rules*.

The General Jurisdiction to consider the Defendant's Legal Costs

95 As outlined above and in addition to the power provided under s 65A of the Act, the Court is empowered to consider the defendant's costs, independently of the defendant's support for the quantum of those costs as executor.[95] The statutory power in the *SCA* and *CPA*, as well as the inherent power of the Court to supervise solicitors applies equally to the defendant's costs.

Fairness, Reasonableness and Proportionality of the Defendant's Solicitors' Costs

Cost Agreement

96 On 19 September 2019, the defendant in his capacity as executor of the estate entered a costs agreement with his firm, Dellios, West & Co.[96] The costs agreement provides for charging on a basis that appears to be an amalgamation of items relating to the PRO[97] and more than one

Supreme Court Scale of Costs, although each scale replaced its predecessor in operation.[98] Significantly, the basis of charging for time spent by staff is per quarter hour or part thereof. The Principal solicitor (the defendant) is charged at $133.00 per quarter hour. Other staff are charged at a lower rate, but on the same basis. Therefore, if the defendant spent only one minute on the file, his rate of $133.00 would apply. The bill of costs does not specify time spent unless it exceeds 15 minutes.

97 The costs agreement also provides a minimum loading of:

> "33% of the individual items of solicitors fees *or such higher amount which the solicitors deem appropriate* in the circumstances. All amounts listed may change from time to time in accordance with the increases in the Practitioners Remuneration Order".[99]

98 The terms of the costs agreement in respect to the hourly rate and the loading are unreasonable. If a loading of only 33% is applied, the defendant's hourly rate becomes $778.32 (including GST). For a matter of this type, a standard TFM claim by a step child, the quantum of the hourly rate and the method of application of the rate provided under the costs agreement are not reasonable and proportionate. The ability of the solicitors to increase the loading at a whim and change all rates 'from time to time' in line with increases in the PRO effectively renders the cost agreement vague and uncertain. For example, if an increase were made to the PRO, all rates in the costs agreement might increase yet not all items in the costs agreement appear in the PRO and vice versa. There may be a serious question as to whether the defendant would have entered such a costs agreement with an independent law firm engaged to act for him in this matter.

99 The defendant's firm disclosed to him an estimate of total costs of $148,500.00 to the end of the TFM claim dated 19 September 2019.[100] The absurdity of a solicitor making a costs disclosure to himself as client where he will seek to be reimbursed for those costs from an estate as its LPR, highlights again the conflicts of interest and duty that abound for the defendant in his conduct of this litigation.

100 In the current matter, it is sufficient for me to find that the rates in the costs agreement are not binding on this Court in its consideration of the defendant's costs. Instead I will look to the rates in the Supreme Court Scale of Costs in my consideration of the defendant's costs.[101]

Conduct of the Litigation

101 The conduct of the litigation itself was relatively straightforward, although the estate valued at approximately $5 million is relatively large, and various issues arose in respect to the administration of the estate relating to the impact of the COVID-19 pandemic, such as maintenance and timing of sale of rural properties.

102 Curiously, at the first directions hearing, the defendant applied for orders granting leave to join as defendants to the proceeding Ms White and the six charities named as express discretionary objects to the L & S Lissenden Trust. Two things arise from this application. First, there was no provision for any representative for the Additional Beneficiaries. Second, there does not seem any need for this step. The defendant, as an independent executor, could notify all appropriate persons. None of the persons or entities that were given leave to join as a party made any applications to join.

103 The defendant filed seven affidavits in opposition. The defendant submits that these affidavits were required to rebut the plaintiff's description of the relationship with the deceased and the plaintiff's asserted degree of involvement with the deceased's life.[102] He also submits that these affidavits were instrumental in reducing the plaintiff's claim from the amount specified at the first directions hearing to the amount of the settlement.[103] That may be right. However, a solicitor's duty to perform good quality legal work at a fair and reasonable price does not fall away if their client is successful in defeating or significantly reducing their opponent's claim. That is, the estate should not be charged more than is fair and reasonable, notwithstanding any amount 'saved' or the 'value' of the legal services, in terms of the outcome of the litigation itself. This argument, if followed too far, could run foul of s 183 of the *LPUL*, which prohibits contingency fees. It is also a self-serving argument, similar to the argument that a larger estate necessarily incurs higher costs. I reject this 'good result' argument as a justification for the quantum of the costs in this matter. However, I accept that a significant amount of work went into the defendant's many affidavits, which were considered necessary in defence of the will.

104 As noted above, the charges in respect to the preparation of the defendant's own affidavit should not be allowed.[104]

105 As the plaintiff issued subpoenas, there were documents produced that needed to be perused. Valuations were also obtained for two rural properties held in the estate.

106 The mediation was attended by Ms White and six charities named as discretionary objects of the C & S Lissenden trust. Ms White and five of the charities were legally represented at the mediation. In these circumstances, the role of explaining the mediation, the proceeding, their rights to come under the C & S Lissenden trust were all undertaken by others, except in respect to the one legally unrepresented charity. That is, in light of the separate legal representation, the work of the defendant was minimised. Further, the defendant briefed Senior Counsel to represent him at the mediation. Therefore, I do not agree that the defendant ought to charge for the attendance of two solicitors at the mediation. Only one solicitor for 10 hours at mediation is reasonable.

107 There are additional items in the bill of costs provided by the defendant that are of concern. For example, charges are made for two solicitors (or the defendant and a trainee solicitor) to attend the one conference or where $3.00 per page is charged for copies of attachments to emails (resulting in significant amounts) which are already in digital format or where multiple re-engrossment of entire affidavits for amendments or where work that is clerical in nature is charged at solicitors' rates. Such charges are excessive and should be reduced.

108 The defendant's claimed disbursements of $12,418.88 (including GST) are reasonable.

109 However, I find that the professional fees payable by the defendant (or more accurately, the estate) in this proceeding are unreasonable. As with the plaintiff, I will not order a taxation. The principles of finality, timeliness and cost effectiveness again require that I make a gross sum order for costs.[105] I have had the benefit of hearing from the defendant in an oral hearing and the material he has presented in support of his costs. My familiarity with the costs aspect of this proceeding places me in the best position to quantify what amount would be reasonable.[106] Taking a broad-bush

approach[107], I determine that professional fees of $45,400.00 (including GST), are fair and reasonable. I have erred on the side of caution in favour of the defendant, which results in a figure which is even higher than the plaintiff's costs.

Concluding Observations

110 Under s 65C of the *CPA*, I will fix the plaintiff's disbursements at $10,995.60 and professional fees at $43,600.00 (each inclusive of GST) up to and inclusive of the application for dismissal orders. As the settlement was on an 'all in' basis, this has the result that the plaintiff retains the benefit of the reduction in his costs. I will consider the plaintiff's costs since the making of the application for dismissal orders on the papers, unless a hearing is requested.

111 Under s 65A of the Act and s 65C of the *CPA*, I will fix the defendant's disbursements at $12,418.88 and professional fees at $45,400.00, on the basis that he has complied with r 10 of the *2005 Conduct Rules,* up to and inclusive of the application for dismissal orders. I will consider the defendant's disbursements[108] since the making of the application for dismissal orders on the papers, inclusive of the application for approval, unless a hearing is requested. In addition, the defendant will need to submit a further affidavit as to his compliance with r 10 of the *2005 Conduct Rules*.

112 Taken together, the practitioners in this matter will receive over $110,000.00 in costs in a relatively simple TFM claim that resolved at mediation. The costs allowed for each side are relatively close and reflect that each has performed a significant amount of additional, but apparently necessary and worthwhile, work in this fiercely contested matter in difficult circumstances during the COVID-19 pandemic. It would be a mistake to consider that this decision may be relied upon to seek to support similar amounts in other TFM claims without sufficient justification.

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[1] Supreme Court of Victoria, *Practice Note SC CL 7: Testators Family Maintenance List*, 1 April 2020 ('**Practice Note**').

[2] Law Institute of Victoria Limited, *Professional Conduct and Practice Rules 2005* (at 25 September 2014) r 10.

[3] See the Act s 90, 90A; *Scott-Mackenzie v Bail* [2017] VSCA 108 (Beach and Ferguson JJA and McMillan AJA).

[4] The defendant's firm is actually Ausfund Legal Pty Ltd, trading as "Dellios West & Co. Solicitors", but nothing turns on this.

[5] *Commissioner of Taxation (Cth) v Vegners* [1989] FCA 480; (1989) 90 ALR 547, 551-2 (Gummow J).

[6] Practice Note (n 1), para 7.4.

[7] Practice Note (n 1), para 11.3.

[8] Affidavit of William Grice sworn 12 June 2020.

[9] Affidavit of William Grice sworn 25 September 2020 [4]-[5], Exhibit WJG-3.

[10] Transcripts of Proceedings, *Lissenden v Dellios* (Supreme Court of Victoria, S ECI 2019 04182, JR Englefield, 15 April 2021) 73 [15-6], [20-1] ('*The Transcript*'); Affidavit of Paul Dellios sworn 25 September 2020 [12]-[13], Exhibits PDA and PDB ('Dellios Affidavit').

[11] *Hodge v De Pasquale* [2014] VSC 143 [70]-[83] (McMillan J) ('***Hodge***').

[12] Ibid.

[13] See CPT Custodian Pty Ltd v Commissioner of State Revenue of the State of Victoria [2005] HCA 53; (2005) 224 CLR 98 (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

[14] Affidavit in Support of Application for Approval of Compromise of Paul Dellios sworn 3 May 2021 [15].

[15] Ibid [8], Exhibit PA-C3B.

[16] Affidavit of William Grice sworn 25 September 2020 [2].

[17] The *Legal Profession Uniform Law* ('*LPUL*') is set out at Sch 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) and pursuant to s 4 of that Act, applies as if it were an Act.

[18] Citing *Wolf v Snipe* [1933] HCA 5; (1993) 48 CLR 677 (Dixon J).

[19] Citing *Pryles & Defteros (a firm) v Green* [1999] WASC 34; [1999] 20 WAR 541 [22]-[24], citing *Harrison v Tew* [1989] 1 QB 307, 320.

[20] Citing *Re Stuart, ex parte Cathcart* [1893] UKLawRpKQB 119; [1893] 2 QB 201 (Lord Esher).

[21] Citing s 24 of the *Civil Procedure Act 2010* (Vic); *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 [45] (Beach J).

[22] *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 [45] (Beach J).

[23] *Bare v Small* [2013] VSCA 204; (2013) 47 VR 255, [35] (Hansen and Tate JA).

[24] Practice Note (n 1).

[25] Ibid, para 11.

[26] *Allen v G8 Education Ltd* [2021] VSC 173, [8] (Nichols J).

[27] *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 [96] (Mason CJ and Deane J), [103] (Brennan J), [124] (Dawson J).

[28] *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106 [44] (McMillan J) ('*Re Jabe*'), citing *Pryles & Defteros (a firm) v Green* [1999] 20 WAR 412, [22]-[23] (Parker J).

[29] *Reid v Howard* (1995) 184 CLR 1, 16 (Toohey, Gaudron, McHugh and Gummow JJ).

[30] *Harrison v Tew* [1990] 2 AC, 523, 532 (Lord Lowry).

[31] *Re Jabe* (n 28) [46] (McMillan J), citing *Pryles & Defteros (a firm) v Green* [1999] WASC 34; [1999] 20 WAR 541, [22]-[23].

[32] The Transcript (n 10), 22 [7-30].

[33] *Re Jabe* (n 28) [44], citing *Pryles & Defteros (a firm) v Green* [1999] 20 WAR 412 [22]-[23] (Parker J).

[34] Redfern v Mineral Engineers Pty Ltd [1987] VicRp 47; [1987] VR 518, 523 (Tadgell J) (Citations Omitted).

[35] Citing *Woolf v Snipe* [1933] HCA 5; (1933) 48 CLR 677 *(*Dixon J*); Pryles & Defteros (a firm) v Green* [1999] WASC 34; [1999] 20 WAR 541 (Parker J). Cf s 202 the *LPUL*.

[36] The Transcript (n 10) 21[16]-22[30]. See s 178(1)(d) of the *LPUL*.

[37] Made in compliance with Practice Note (n 1), para 7.4(b)

[38] Made under the *Legal Profession Uniform Law Application Act 2014* (Vic) s 94 ('the PRO').

[39] Affidavit of William Grice sworn 25 September 2020, Exhibit WJG-2.

[40] *LPUL* s 174.

[41] *LPUL* s 177.

[42] Affidavit of William Grice sworn 25 September 2020, Exhibit WJG-2

[43] *LPUL* s 169.

[44] *LPUL* s 174(3).

[45] *LPUL* s 172(4).

[46] The Transcript (n 10) 47 [5].

[47] The Transcript (n 10) 40 [4–8].

[48] GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd Edition, 2009) [15.15].

[49] Cf *WM Wrigley JR Company v Cadbury Schweppes Proprietary Limited* [2006] FCA 1186 (Sundberg J) ('*Wrigley v Cadbury Schweppes*').

[50] *Harrison v Schipp* [2002] NSWCA 213; (2002) 54 NSWLR 738, [22] (Giles JA) ('*Harrison*').

[51] *Re Will and Estate of Foster (dec'd)* [2012] VSC 315 [29] (AsJ Daly).

[52] A solicitor-client relationship is a fiduciary relationship, where the duty to avoid a conflict of duty of loyalty and personal interests applies. See *Beach Petroleum NL v Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1 [188] (Spigelman CJ, and Sheller and Stein JJA); *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 169–71 (Street CJ).

[53] *In Re Barber; Burgess v Vinicome* [1886] UKLawRpCh 198; (1886) 34 ChD 77, 80-1 (Chitty J).

[54] Defined in s 3 of the Act as a remuneration clause.

[55] Section 65B of the Act, for wills executed after 1 November 2017, requires this consent to be evidenced in writing.

[56] Law Institute of Victoria Limited, *Professional Conduct and Practice Rules 2005* (at 25 September 2014).

[57] *In the Will of Sheppard* [1972] 2 NSWLR 714, 718 (Helsham J).

[58] That is, as the Will left the residue to a trust which had not yet come into existence, with only discretionary objects, those discretionary objects including the Additional Beneficiaries, a class that includes unborn and potentially minors and adult persons under disability.

[59] *Bell Lawyers Pty Ltd v Pentelow* (2019) ALJR 1007 [19] (Kiefel CJ, Bell, Keane and Gordon JJ) ('*Bell Lawyers*').

[60] Ibid [3], [22], [24], [25], [32], [39] (Kiefel CJ, Bell, Keane and Gordon JJ, Gageler J agreeing at [63], Nettle J dissenting at [70] and Edelman J agreeing at [99]).

[61] *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 [119]-[120] (Whelan, McLeigh and Niall JJA); *Guneser v Aitken Partners* (Cross appeal on costs) [2020] VSC 329 [73] (Macaulay J).

[62] *The Queen v Silverstein* [2020] VSCA 233 [118] (Kyrou, Kaye and McLeish JJA).

[63] *Brown v Guss* (No 2) [2015] VSC 57 (McMillan J).

[64] *Bell Lawyers* (n 59).

[65] See above [48]-[49].

[66] *Bell Lawyers* (n 59).

[67] See above [36]-[47].

[68] *Administration and Probate and Other Acts Amendment (Succession and Related Matters) Act 2017* (Vic).

[69] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted).

[70] Victorian Law Reform Commission, *Succession Laws: Report* (Report, August 2013).

[71] Ibid, 158-65 [7.115-7.162].

[72] Ibid 162 [7.136].

[73] Ibid, Chapter 7.

[74] *Trustee Act 1958* (Vic) s 36(2). *Trustee Act 1958* (Vic) s 3 defines a trustee to including a personal representative, being an executor or administrator for the time being of a deceased person.

[75] *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 [32]-[33] (Kiefel CJ, Keane and Edelman JJ) [83]-[84] (Bell, Gageler and Nettle JJ).

[76] Re Beddoe, Downes v Cottam [1892] UKLawRpCh 180; [1893] 1 Ch 547, 588 (Lindley LJ) ('*Re Beddoe*'); Nolan v Collie [2003] VSCA 39 (Ormiston, Batt and Vincent JJA); *Di Bendetto v Kilton Grange Pty Ltd* [2017] VSCA 119 [63] (Ferguson, McLeish JJA and Cameron AJA) ('*Di Bendetto*').

[77] *Di Bendetto* (n 76) [64].

[78] *Di Bendetto (*n 76) [65], citing *Re Beddoe* (n 76).

[79] *Hopkins v Edwards* [2020] VSC 456 [242] (Lyons J) ('*Hopkins*').

[80] Dal Pont (n 48) [10.6].

[81] *Hopkins* (n 79) [234] (Lyons J).

[82] J D Heydon and M Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2109].

[83] *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66, 93-4 [70]-[71] (Gummow A-CJ, Kirby, Hayne and Heydon JJ), derived from *Re Beddoe* (n 76).

[84] *Smith v Whittaker* [2016] VSC 287 [37] (Derham AsJ).

[85] *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018* (Vic) r 16.04.

[86] *In the Will of Lanfear* (1940) 57 WN (NSW) 181, 183 (Williams J) ('*Lanfear*'), quoted in *Vasiljev v Public Trustee* [1974] 2 NSWLR 497, 503 (Hutley JA).

[87] *Lanfear* (n 86).

[88] *Ellis v Leeder* (1951) 892 CLR 645, 657 (Dixon CJ, Williams and Kitto JJ).

[89] *Lathwell v Lathwell* [2008] WASCA 256. See also partially in *Forsyth v Sinclair (No 2)* [2010] VSCA 195.

[90] *Nolan v Collie* [2003] VSCA 39; (2003) 7 VR 287 [51]–[53] (Ormiston JA).

[91] *Adsett v Belrouis* [1992] FCA 368; (1992) 37 FCR 201 (Northrop, Wilcox and Cooper JJ); *Re Beddoe* (n 76)

[92] *Macquarie Dictionary* (online at 20 August 2021) 'excessive'.

[93] *The Rules* r 63.30.1.

[94] The Transcript (n 10), 72-3.

[95] See above [36]-[47].

[96] Dellios Affidavit (n 10), Exhibit PDB.

[97] The PRO (n 38).

[98] *The Rules*, Appendix A. The most recent Supreme Court Scale of Costs commenced on 23 November 2015, as specified in r 1.03 of *the Rules*, although they have been amended since.

[99] Dellios Affidavit (n 10), Exhibit PDB (Emphasis added).

[100] Dellios Affidavit (n 10), Exhibit PDB

[101] *The Rules*, Appendix A.

[102] The Transcript (n 10), 68 [16-31], 69 [1-15].

[103] The Transcript (n 10), 70 [26-31], 71 [1-2].

[104] See above [74].

[105] *Harrison* [22] (n 50).

[106] Cf *Wrigley v Cadbury Schweppes* (n 49) [2006] FCA 1186 (Sundberg J).

[107] Dal Pont (n 48) [15.21]

[108] See above [76] as to why professional fees will not be allowed.