

COSTS AGREEMENTS AND VCAT – THE CHALLENGE OF ST YVES*

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I REGULATION (OF COSTS) – WHEN TOO MUCH IS NOT ENOUGH?

In a 2003 unreported decision of the Victorian Court of Appeal¹ – the facts of which are irrelevant for the present purposes² – Ormiston JA asked the appellant, who was self-represented: ‘Do you want to say anything about costs?’ She replied: ‘I don’t like costs, who does?’ Most, if not all, clients are likely to share this sentiment, whether from the perspective of paying their opponent’s costs in litigated proceedings (as in the scenario facing Ormiston JA) or their own lawyer’s fees. Some years ago, a law reform commission noted what it described as the ‘uncomfortable tension between legal costs and justice’, adding that ‘there is something inherently inconsistent in the notion that justice is a right which must be paid for’.³ Some years earlier, an English commentator (and now appellate judge), in the same vein remarked that ‘the most baneful feature of ... civil justice is the incidence of costs’.⁴

Many lawyers too, albeit for entirely different reasons, have a disdain for costs. Surveys reveal that keeping a detailed record of chargeable costs is one of the least enjoyable aspects of legal practice. Also, preparing a bill of costs is no pleasant experience, and is improved only by the prospect of (hopefully) receiving the amount billed.

Without a quantum shift to the cost of all legal services being met entirely from the public purse, though, the charging of legal fees remains a necessary evil. This evil is one that both the general law and statute has sought fit to regulate in copious detail. In some ways this reflects no more than the modern trend towards greater regulation of various professions, occupations and trades. Yet the legal profession is subject to more legal regulation than any other calling.

When New South Wales enacted its *Legal Profession Act 2004* (NSW), it was rumoured that it was the single largest piece of legislation ever passed by the New

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1 *Walter v Registrar of Titles* [2003] VSCA 122 (Unreported, Ormiston, Chernov JJA and Ashley AJA, 31 July 2003) [27], [28].

2 The main issue before the court was whether a beneficiary of a discretionary trust had an interest sufficient to give standing to lodge a caveat on trust property, which it answered in the negative.

3 Western Australian Law Reform Commission, *Review of the Criminal and Civil Justice System in Western Australia*, Consultation Drafts, Project No 92 (1999) Vol 1, 466.

4 Jack Jacob, *The Fabric of English Civil Justice* (1987) 45.

South Wales Parliament. Although the same cannot necessarily be said of the equivalent 2004 Victorian legislation – for instance, length-wise it was pipped by the *Gambling Regulation Act 2003* (Vic), which collapsed several Acts in the one large Act – the level of statutory regulation it imposes is significant. Indeed, it is more detailed and comprehensive than that imposed by statute on real estate agents, travel agents, accountants, financial advisers, motor vehicle dealers and health practitioners.

The foregoing is sobering, at least if it is assumed that what inclines the law to regulate the provision of a service is a fear that, unregulated, its providers will not act consistently with the public good. Of course, lawyers may maintain that legal practice is so heavily regulated because the profession is ordinarily the prism through which access to the law (or more broadly, to justice) is secured. So important is access to justice, it may be reasoned, that the copious level of regulation highlights more the value of legal services than the potential for abuse of power.

When speaking in terms of accessing legal services, or accessing justice, more often than not the inquiry descends to the costs of those services. Again it should come as no surprise that the passage of time has witnessed increasing regulation of costs. A concern being that legal services are too expensive for an average person, an avenue for regulation could be to statutorily cap what can be charged for a legal service. Yet regulators have moved away from any such attempt – the tendency has been to downplay the role of scales of costs, interestingly enough, for fear that these functioned as barriers to a (desirable) competitive environment. Rather, the message to the profession has been that it must foster competition, the subtext here being that it is greater competition that will drive down the cost of legal services.

A truly competitive environment, one could legitimately assume, is one with only a modicum of regulation. Most businesses, to this end, are regulated principally via the *Trade Practices Act 1974* (Cth) or its fair trading equivalents, being general statutes directed at fostering competition while at the same time protecting the consumer. The provision of legal services can be effected by these enactments, but is impacted upon more significantly by specific legislation. It also attracts the application of various equitable doctrines aimed at deterring the abuse of a stronger position, fiduciary law and undue influence being perhaps the main examples. So while the legal profession is expected to compete in a market like other businesses, various elements of both statute and the general law are designed to ensure that its members do not behave like ordinary business people.

So far as the charging and recovery of fees are concerned, lawyers are subject to restrictions and controls unheard of in other professions, occupations and businesses. In addition to restrictions on the timing of fee recovery, the requirements for a bill of costs, controls on the transfer of trust moneys for costs, and the entire contract doctrine in its application to retainers, there are various restrictions on the manner in which legal services can be charged. Charging

according to a percentage of a result for a client is *verboden* for lawyers,⁵ but perfectly acceptable for, say, accountants and bankers. Any uplift on usual fees (as a risk management exercise) to assist a client to access justice is strictly controlled by statute.⁶ Also, a failure to make any one or more of the requisite costs disclosures can sound in a reduction of an amount otherwise contractually recoverable from a client.⁷

II REGULATION OF COSTS AGREEMENTS

The focus of this article, though, is on the regulation of costs agreements, and the reasonableness of terms of those agreements and of the fees charged thereunder in particular. This is no academic inquiry. The push to a competitive market has meant that, more so than in the past, legal work is undertaken pursuant to a costs agreement negotiated between lawyer and client. That a costs agreement is no more than a simple contract is recognised by statute,⁸ but this does not prevent statute, and also the general law, from effecting the validity and content of these agreements in a fashion unknown to other contracts for services.

Importantly, these judge-made and statutory regulatory initiatives do not oust existing contract law. It follows that costs agreements are not immune from the requirements of contract, including the need for *consensus ad idem*. It stands to reason, therefore, that the grounds that serve to vitiate consent in contract law generally apply to costs agreements. But the legal profession is unique in being the only recognised profession subject both to the full spectrum of fiduciary responsibility and the application of a presumption of undue influence as a matter of law.

A Fiduciary Law

Fiduciary law proscribes conflicts of interest and duty, and negotiating a costs agreement with a prospective client places the lawyer's interest necessarily in conflict with that of the client – it is in the lawyer's interest to charge as much as possible, and it is in the client's interest to pay as little as possible. With limited exception,⁹ though, courts have not been especially proactive in using fiduciary law as a vehicle to reduce or deny lawyers' contractual claims to remuneration. There is both a legal and a practical reason for this: legally speaking, the law has other avenues to address this conflict, as discussed below,¹⁰ and practically speaking, strict application of fiduciary principle in this context would effectively

5 *Legal Profession Act 2004* (Vic) s 3.4.29(1).

6 *Legal Profession Act 2004* (Vic) s 3.4.28.

7 *Legal Profession Act 2004* (Vic) s 3.4.17.

8 *Legal Profession Act 2004* (Vic) s 3.4.30(1).

9 See, eg, *Re Morris Fletcher & Cross' Bill of Costs* [1997] 2 Qd R 228, noted below nn 70–1 and accompanying text. See also *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, 57, 62.

10 See also below nn 21–34 and accompanying text.

require costs agreements to be negotiated through an intermediary who acts as representative of the client, which in turn may impede more than promote access to justice.

B Undue Influence

A lawyer-client relationship gives rise, *as a matter of law*, to a presumption of undue influence because, it has been said, ‘solicitors are trusted and confided in by their ... clients to give them conscientious and disinterested advice on matters which profoundly effect ... their material well-being’, making it ‘natural to presume that out of that trust and confidence grows influence’.¹¹ There is an inherent risk that a lawyer may take advantage of that relationship of trust and confidence to put his or her interests ahead of those of the client.

Yet the case law reveals few occasions where a costs agreement (or, more generally, a retainer) has been set aside because of the influence exercised by lawyer over client in securing it.¹² A reason may be that it is the client who seeks out the lawyer for advice, as opposed to the lawyer actively soliciting for this purpose, thus lacking a common hallmark of undue influence cases, namely a stronger party’s approach to a weaker party being part of the influence.¹³ Rebutting the presumption of undue influence, moreover, may require that the weaker party receive independent advice, which, for the practical reason noted above in relation to fiduciary principle, may inhibit as opposed to facilitate access to legal services. Again, in any case, there are other routes that the law has adopted to address any underlying concern.¹⁴

The position is different once the lawyer-client relationship comes into being, as there is within it the opportunity for a lawyer to exercise undue influence. Although the role of undue influence in this context has centred on lawyers securing benefits, such as gifts or legacies, from a client in addition to their contractual entitlement to a fee – a scenario addressed by both the case law¹⁵ and professional rules¹⁶ – there may be scope for its application to attempts by a lawyer to modify a costs agreement with an existing client, or if any fees beyond the outer parameter of a reasonable fee could be viewed as a gift from client to lawyer under the lawyer’s influence.

11 *Goldsworthy v Brickell* [1987] Ch 378, 404 (Nourse LJ).

12 Cf *Re P’s Bill of Costs* (1982) 8 Fam LR 489, 495–6 (Evatt CJ and Fogarty J); *Weiss v Barker Gosling* (1993) 16 Fam LR 728, 762 (Fogarty J).

13 This may form a reason why touting for business (and historically advertising) has been seen as professionally inappropriate. See Richard C Teece and W N Harrison, *Law and Conduct of the Legal Profession in New South Wales* (1949) 53–4; G E Dal Pont, *Lawyers’ Professional Responsibility*, (3rd ed, 2006) 437–8.

14 See also below n 21–34 and accompanying text.

15 See, eg, *Barry v Bullin* (1838) 2 Moo PCC 480, 481; 12 ER 1089, 1090 (Parke B); *Wright v Carter* [1903] 1 Ch 27, 50 (Vaughan Williams LJ), 57 (Stirling LJ); *Wintle v Nye* [1959] 1 WLR 284, 291 (Viscount Simonds).

16 See *Professional Conduct and Practice Rules 2005* (Vic) rr 9.1.2, 10.2.

C Review and Taxation of Costs

As foreshadowed above, although the nature of the lawyer-client relationship is such as to attract restrictions imposed by equitable doctrine, at least so far as the validity of costs agreements is concerned, there are more pointed ways the law has approached a fear that lawyers could secure agreements unduly favourable to them. The traditional control on the legitimacy of lawyers' fees – the process of taxation (now termed 'review' in Victoria) – is restricted in scope when a costs agreement is in place. The *Legal Profession Act 2004* (Vic) provides that, in conducting the review, the Taxing Master must, inter alia, consider 'the fairness and reasonableness of the amount of legal costs in relation to the work'¹⁷ and may, for this purpose, have regard to any or all of the matters prescribed.¹⁸ However, it is now clear that where a costs agreement is in place, the Taxing Master must review the amount of disputed costs 'by reference to the provisions of the costs agreement', where a relevant provision of that agreement 'specifies the amount, or a rate or other means of calculating the amount, of the costs'.¹⁹ The latter applies unless the parties otherwise agree, there has been material non-disclosure, an illegitimate percentage or uplift fee agreement, or the agreement has been set aside by the Victorian Civil and Administrative Tribunal ('VCAT').²⁰

D The Court's Inherent 'Fair and Reasonable' Jurisdiction

This last exception deserves closer consideration. In being directed to the fairness and reasonableness of costs agreements generally, it prima facie appears to parallel an inherent jurisdiction the courts have assumed from the earliest times. Although the concepts of fairness and reasonableness in this context did not take statutory form until 1870 in the United Kingdom,²¹ and later in the Australian jurisdictions that enacted legislation on the point, the court's jurisdiction to set aside costs agreements on the grounds of unfairness or unreasonableness was one already exercised at general law. Rather than creating the jurisdiction, the 1870 English Act did no more than provide a procedure for the control of costs agreements, leaving the substance of the law unaltered.²² In *Clare v Joseph*, for example, Lord Alverstone CJ remarked as follows:

Agreements as to costs were often made before 1870 and upon the application of the client, they were considered and examined by the courts, and they were not infrequently held to be binding, both on the solicitor and

¹⁷ *Legal Profession Act 2004* (Vic) s 3.4.44(1)(c).

¹⁸ The matters prescribed are listed in *Legal Profession Act 2004* (Vic) s 3.4.44(2).

¹⁹ *Legal Profession Act 2004* (Vic) s 3.4.44A(1)(a) (inserted by the *Legal Profession Amendment Act 2007* (Vic), with effect on 9 May 2007). This likely represents a clarification of the legal position, though, as existing case authority indicates: See *Cerini v McLeods (a firm)* [2004] WASC 45 (Unreported, Pullin J, 23 March 2004) [44], [45]; *McNamara Business & Property Law v Kasmeridis* (2007) 95 SASR 129, [41], [42] (Doyle CJ, with whom Gray and David JJ concurred).

²⁰ *Legal Profession Act 2004* (Vic) s 3.4.44A(1)(b)–(e).

²¹ See *Attorneys and Solicitors Act 1870* (UK) s 9.

²² *Clare v Joseph* [1907] 2 KB 369, 376 (Fletcher Moulton LJ).

the client. The inquiry was always directed to the question whether the agreement was fair and reasonable ...²³

Various Australian judges have reiterated this view, independent of any provision in a statute that confers such a jurisdiction.²⁴ The common law interpreted the phrase ‘fair and reasonable’ disjunctively rather than conjunctively, distinguishing the concept of ‘fairness’ from that of ‘reasonableness’. A leading judicial expression of this dichotomy is found in the judgment of Lord Esher MR in *Re Stuart*:

With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement, he satisfies the requirement as to fairness. But the agreement must also be reasonable and, in determining whether it is so, the matters covered by the expression ‘fair’ cannot be reintroduced. As to this part of the requirement of the Statute, I am of opinion that the meaning is that when an agreement is challenged, the solicitor must not only satisfy the court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the court that the terms of that agreement are reasonable. If, in the opinion of the court, they are not reasonable, having regard to the kind of work, which the solicitor has to do under the agreement, the courts are bound to say that the solicitor as an officer of the court has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for the remuneration in such a manner.²⁵

Though the seminal English cases are vague in identifying the source of the relevant jurisdiction, Dixon J in *Woolf v Snipe*²⁶ remarked that superior courts possess a jurisdiction to ascertain, ‘by taxation, moderation, or fixation’, the costs, charges and disbursements claimed by a lawyer from a client.²⁷ His Honour identified three sources of that jurisdiction, namely:

- A jurisdiction founded upon the relation to the court of lawyers considered as its officers, which enables it to regulate the charges made for work done by officers of the court, ‘and to prevent exorbitant demands’;

23 Ibid 372.

24 See, eg, *Richardson v Lander* (1948) 65 WN (NSW) 74; *Re Budziszewski* (1981) 7 Fam LR 284, 289 (Baker J); *Emeritus Pty Ltd v Mobbs* (1991) NSW ConvR ¶55-588, 59, 321 (Studdert J); *Ilic v Michael Radin & Associates* (Unreported, Supreme Court of New South Wales, Finlay J, 18 December 1991) 10–16; *McInnes v Twigg* (1992) 16 Fam LR 185, 193–6 (Moss J); *Schiliro v Gadens Ridgeway* (1995) 19 Fam LR 196, 197–8; *McNamara Business & Property Law v Kasmeridis* (2007) 95 SASR 129, [19]–[34] (Doyle CJ, with whom Gray and David JJ concurred). It must be noted, though, that Victorian authorities seem to be expressed in vaguer and more equivocal terms on this point: See, eg, *Bear v Waxman* [1912] VLR 292; *Woolf v Trebilco* [1933] VLR 180.

25 [1893] 2 QB 201, 204.

26 (1933) 48 CLR 677.

27 Ibid 678–9.

- When a contested claim for costs comes before the court it has jurisdiction to determine by taxation or analogous proceeding the amount of costs; and
- Statutory jurisdiction.²⁸

It is the first source that best supports the jurisdiction to set aside costs agreements that are unfair or unreasonable. This has not prevented various Australian legislatures translating this jurisdiction – using the terms ‘fair’ and ‘reasonable’ – to a statutory form. That much of the Australian case law, which in any case is recent in large part due to the increased prevalence of costs agreements in the last 30 years or so, is consequently decided by reference to these statutory provisions²⁹ does not deny the existence of an inherent jurisdiction to this end. Rather, it simply appears that statutory expression of the relevant jurisdiction has to some degree caused the inherent jurisdiction to fall into desuetude.

The inherent jurisdiction may retain significance, though, for at least three reasons: first, not all states have translated it into statutory form; second, some states that have adopted a statutory ‘fair or reasonable’ standard vest the relevant jurisdiction in a person or body other than a court (such as a taxing officer/costs assessor or a tribunal); and third, the discussion below suggests that in the Victorian context, the VCAT jurisdiction may not have been intended to replicate the parameters of the inherent jurisdiction in any case.

D The VCAT ‘Fair and Reasonable’ Jurisdiction

As noted earlier,³⁰ where a valid costs agreement is in place, on a review ‘the fairness and reasonableness of the amount of legal costs’ is determined not by the statutorily listed factors but by giving effect to the terms of the agreement. The statute does not purport to modify or oust contractual entitlements, to this end, unless there are grounds for the agreement itself to be set aside. The latter is prescribed by s 3.4.32(1) of the *Legal Profession Act 2004* (Vic), which states that, on application by a client, VCAT ‘may order that a costs agreement be set aside if satisfied that the agreement is not fair or reasonable’. That this provision, like the Taxing Master’s task, is phrased in terms of fairness and reasonableness does not mean that it invokes the same or equivalent concepts of fairness and reasonableness. There is a difference between the fairness and reasonableness of a fee (the inquiry of the Taxing Master) and the fairness and reasonableness of a

²⁸ Ibid.

²⁹ See, eg, *Legal Practitioners Act 1970* (ACT) s 191(1) (repealed); *Passay v Chanaka Bandarage* [2002] ACTSC 105 (Unreported, Higgins J, 28 October 2002); *Legal Practitioners Act 1974* (NT) s 129H(1) (b) (previously s 130(1); both repealed); *Athanasiou v Ward Keller (6) Pty Ltd* (1998) 122 NTR 22; *Legal Practitioners Act 1981* (SA) s 42(7); *McNamara Business & Property Law v Kasmeridis* (2007) 95 SASR 129; *Legal Profession Act 1993* (Tas) s 129(2), 129(3); *Legal Practitioners Act 1893* (WA) s 59(5) (repealed); *Legal Practice Act 2003* (WA) s 222(2); *Stoddart & Co v Jovetic* (1993) 8 WAR 420; *Brown v Talbot and Olivier* (1993) 9 WAR 70; *Cerini v McLeods (a firm)* [2004] WASC 45 (Unreported, Pullin J, 23 March 2004); *Family Law Rules 2004* (Cth) r 19.17(a) (previously *Family Law Rules 1984* (Cth) O 38 r 27); *Weiss v Barker Gosling* (1993) 16 Fam LR 728.

³⁰ See above n 17 and accompanying text.

costs agreement.³¹ Each is informed by different factors,³² and therefore takes on a different meaning.

The reference to the concepts of ‘fairness’ and ‘reasonableness’, at first blush, may suggest an attempt to follow an historical lead. Indeed, had Victorian legislators not, via s 3.4.32(2), chosen to specify those matters to which VCAT may have regard in determining whether or not a costs agreement is ‘fair or reasonable’, it would have been legitimate to define that phrase solely by reference to its case law antecedents.³³ As it currently reads, the sub-section lists seven matters, the last four of which are the product of a 2007 amendment, with effect from 9 May 2007, to bring Victoria into line with the second edition of the national Model Laws.

It is therefore apt to consider each of the matters in turn, bearing in mind that s 3.4.32(2) gives no indication of the relative importance to be given to one or more of the matters, or as to how the presence or absence of any one or more of them is to affect VCAT’s determination. That some appear to overlap does not help. This is potentially complicated by the fact that s 3.4.32(1) envisages that setting aside of a costs agreement is an ‘all or nothing’ exercise; there is no provision for ‘partial’ setting aside (rescission). Instead, this apparent inflexibility is addressed via s 3.4.32(4), which gives VCAT some discretion to make an order in relation to the payment of costs the subject of the agreement,³⁴ at least where there is no applicable scale of costs or practitioner remuneration order. If there is such a scale or order that applies to the work the subject of the retainer, VCAT must apply the quantum set by that scale or order.³⁵ The consequences for the lawyer could be significant, as it is likely that scale or practitioner remuneration order costs will be (significantly) lower than those calculated under the terms of an (impugned) costs agreement.

Also, the last four matters, which unlike the first three matters lack counterparts in previous Victorian legislation, are expressed in terms so vague as to give little in the way of specific guidance to the Tribunal. This makes it all the more unfortunate that explanatory memoranda to the amending legislation sheds little light on the point (nor do the explanatory notes to the equivalent New South Wales amending Act assist).

31 That is not to deny, however, that the latter can impact on the former.

32 Compare *Legal Profession Act 2004* (Vic) s 3.4.32(2) (fairness and reasonableness of costs agreements) with s 3.4.44(2) (fairness and reasonableness on review).

33 Indeed this is the approach adopted by Australian courts dealing with bare statutory references to ‘fair’ and ‘reasonable’ in this context: See, eg, *Stoddart & Co v Jovetic* (1993) 8 WAR 420; *Brown v Talbot and Olivier* (1993) 9 WAR 70; *Weiss v Barker Gosling* (1993) 16 Fam LR 728; *Athanasiou v Ward Keller (6) Pty Ltd* (1998) 122 NTR 22; *Passey v Chanaka Bandarage* [2002] ACTSC 105 (Unreported, Higgins J, 28 October 2002); *Cerini v McLeods (a firm)* [2004] WASC 45; *McNamara Business & Property Law v Ksmeridis* (2007) 95 SASR 129.

34 VCAT must determine the ‘fair and reasonable costs in relation to the work to which the agreement related (*Legal Profession Act 2004* (Vic) s 3.4.32(5)(b)), taking into account, inter alia, the factors listed in s 3.4.32(7).

35 *Legal Profession Act 2004* (Vic) s 3.4.32(5).

1 **Fraud or Misrepresentation – s 3.4.32(2)(a)**

The Tribunal may, in determining whether a costs agreement is fair and reasonable, have regard to whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice or its representative. Equivalent provision was made in the 1996 Victorian legislation,³⁶ which vested the jurisdiction in the (then) Legal Practice Tribunal, and earlier in s 68(1)(a) of the *Supreme Court Act 1986* (Vic), which vested the jurisdiction in the court. Directed as it is to the process leading to the agreement (and so can be described as ‘procedural’), this matter appears to replicate the general law, which recognises the ability to rescind a contract induced by misrepresentation. There is no justification, as the provision is worded, to limit misrepresentation to fraudulent misrepresentation; it can encompass innocent misrepresentation. The nature of the misrepresentation (fraudulent as opposed to innocent), and its effect (how material was it to the client’s decision and expectations?), may be relevant to ascertaining how it should be reflected in the Tribunal’s order.

It is unclear, though, what is meant by the term ‘fraud’ in the statutory context. It is unlikely to be intended to refer to fraudulent misrepresentation (the tort of deceit), which is sometimes described in terms of fraud, because it would make mention of ‘fraud’ in this context superfluous. In a general sense, ‘fraud’ is often equated with ‘dishonesty’, and so the term could have an independent operation where there has been dishonesty by the law practice (or a representative) that does not constitute a misrepresentation. In civil law ‘fraud’ has broader connotations, especially so in equity. Various equitable doctrines are triggered by conduct that equity views as ‘fraud’. Undue influence, unconscionable dealing, pressure and mistake, potentially relevant here, are examples; as proof of these undermines consent in contract law generally, it stands to reason that they are relevant to the validity of a costs agreement. Indeed, as s 3.4.32 is ostensibly a vehicle to protect the consumers of legal services, in line with the usual approach to construction applied to consumer protection legislation, no restrictive interpretation of the term ‘fraud’ is justified.

2 **Finding of Misconduct – s 3.4.32(2)(b)**

The second factor to which VCAT may have regard is whether any lawyer acting on behalf of the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct ‘in relation to the provision of legal services to which the agreement relates’. Again, this appeared in at least two earlier enactments.³⁷ That it is not new does not make it any clearer. At a general level, it suggests that a *link* between the services that are to be, or have been, supplied under the costs agreement and a disciplinary finding against a lawyer involved in

³⁶ *Legal Practice Act 1996* (Vic) s 103(1)(a) (repealed).

³⁷ *Legal Practice Act 1996* (Vic) s 103(1)(b) (repealed); *Supreme Court Act 1986* (Vic) s 68(1)(b) (s 68 repealed).

providing those services may be relevant to whether the agreement itself is fair and reasonable.

As misconduct can take many forms, it is not evident that a finding of misconduct in providing the legal services should necessarily impugn the validity of the agreement. Presumably the type of misconduct that carries weight for this purpose is one that in some way relates to the client being charged an excessive amount for the service supplied. This is because it is difficult to imagine its potential relevance to the fairness and reasonableness of a costs agreement were the misconduct in no way associated with the legitimacy of the fees charged under that agreement. This need not be limited to a disciplinary finding of overcharging – and it must be borne in mind here that a disciplinary inquiry into overcharging is informed by different considerations and objectives than the setting aside of a costs agreement (or, for that matter, the review of costs by the Taxing Master)³⁸ – and may include, for instance, a lawyer acting a conflict of interest situation where this has meant that the fees charged under the costs agreement do not reflect the value that a lawyer without that conflict would have brought to the retainer. It arguably does not apply to misconduct taking the form of illegitimate inducement of the client to enter the costs agreement (such as misrepresentation, undue influence, duress, and so forth), as this appears to be the province of s 3.4.32(2)(a).

Aside from the uncertainty as to the scope of (and weight accorded to) this factor, it is relevant to note that it is within VCAT's jurisdiction, pursuant to an application to resolve a 'costs dispute',³⁹ to order the lawyer, inter alia, to provide legal services to the client either free of charge or at a specified cost, or to waive or repay costs, or that the costs payable by the client be reduced.⁴⁰ An equivalent power is vested in VCAT on a finding of unsatisfactory professional conduct or professional misconduct.⁴¹ So where a disciplinary finding has been made against a lawyer, and the conduct that led to this finding had adverse costs consequences for the client, there is likely to *already* be an order in place relieving the client from those adverse consequences. In this event, it is unclear what weight VCAT should accord to a disciplinary finding for the purposes of assessing the fairness and reasonableness of a costs agreement.

3 Non-Disclosure – s 3.4.32(2)(c)

Like s 3.4.32(2)(a), this factor has a *procedural* focus; it is directed to the process that led to the creation of the costs agreement, given that the disclosures in question must be made in writing before, or as soon as practicable after, a law practice is retained.⁴² A failure to make the required disclosures can make a costs agreement

38 See Dal Pont, above n 13, 565–7.

39 *Legal Profession Act 2004* (Vic) s 4.2.2(2).

40 *Legal Profession Act 2004* (Vic) s 4.3.17.

41 *Legal Profession Act 2004* (Vic) s 4.4.19(a).

42 See *Legal Profession Act 2004* (Vic) s 3.4.11.

unfair or unreasonable,⁴³ and amenable to being set aside by VCAT. Importantly, s 3.4.32(2) does not mandate that VCAT set aside an agreement infected with non-disclosure. It follows that, at least for the purposes of VCAT's jurisdiction in this context, it is likely to be the extent or materiality of the non-disclosure, coupled with the weight accorded to the other factors listed in s 3.4.32(2), that determines whether or not VCAT will set aside a costs agreement. Assuming that VCAT exercises its power to set aside the costs agreement, the extent of disclosure or non-disclosure can *also* influence the *quantum* of 'fair and reasonable' legal costs for the purposes of s 3.4.32(5)(b).⁴⁴ Here, though, the disclosure issue focuses on a different inquiry; it is not focused on whether the agreement is fair or reasonable, but on the quantum of costs that would be fair and reasonable aside from the agreement. The Act thus gives the issue of non-disclosure a dual function in the context of VCAT's jurisdiction to set aside costs agreements.

But the foregoing hardly exhausts the relevance of non-disclosure in its potential impact on lawyers' entitlement to costs. Non-disclosure has other statutorily prescribed consequences, listed in s 3.4.17(1) and 3.4.17(2). These stipulate that a failure to meet any of the applicable disclosure requirements found in Div 3 of Pt 3.4⁴⁵ dictates that the client need not pay the costs, and the law practice cannot maintain proceedings against the client for the recovery of those costs, unless they have been reviewed by the Taxing Master under Div 7 of Pt 3.4. That review is not, however, conducted entirely at large, but by reference to the terms of the costs agreement if these specify the amount (or a rate or other means for calculating the amount) of the costs.⁴⁶ This is so unless, *inter alia*, the costs agreement has been set aside by VCAT⁴⁷ or the Taxing Master is satisfied that the agreement does not comply 'in a material respect' with any of the applicable disclosure requirements of Div 3.⁴⁸ In the latter case, s 3.4.17(4) states that the Taxing Master may reduce the costs payable by an amount he or she considers to be *proportionate* to the seriousness of the failure to disclose.

That the foregoing represents an alternative or additional course of action available to a dissatisfied client beyond applying to VCAT to set aside the costs agreement is made clear by s 3.4.17(3). It provides where there has been non-disclosure to a client who has entered into a costs agreement the client may 'also' apply to VCAT under s 3.4.32 for the agreement to be set aside. However, as an application to the Taxing Master for review is likely to be simpler, less costly and more timely

43 Cf the possibility that it could also fall foul of the statutory proscription against misleading and deceptive conduct: see *Alexander v Home Wilkinson Lowry* [2007] VCAT 2297 (Unreported, Gerard Butcher, 30 November 2007). Although the Tribunal did not address the threshold requirement that the conduct in question be 'in trade or commerce'; it cannot be assumed, without further inquiry, that the conduct of legal practice is 'in trade or commerce' for this purpose: See *Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd* (2003) 11 BPR 21-129, [54] (Young CJ in Eq); *Gray v Morris* [2004] QCA 5, [53] (McMurdo J).

44 *Legal Profession Act 2004* (Vic) s 3.4.32(7)(b).

45 See *Legal Profession Act 2004* (Vic) ss 3.4.9–3.4.14.

46 *Legal Profession Act 2004* (Vic) s 3.4.44A(1)(a).

47 *Legal Profession Act 2004* (Vic) s 3.4.44A(1)(b).

48 *Legal Profession Act 2004* (Vic) s 3.4.44A(1)(c).

than an application to VCAT, a client whose complaint focuses chiefly on non-disclosure is more likely to pursue the review route than the VCAT route.

4 Circumstances and Conduct – s 3.4.32(2)(d), (e)

Prior to the amendment of the *Legal Profession Act 2004* (Vic) by the *Legal Profession Amendment Act 2007* (Vic), with effect on 9 May 2007, s 3.4.32(d) simply read ‘the time at which the agreement was made’. It also represented the last listed factor to which the Tribunal could have regard in exercising its jurisdiction to set aside costs agreements. Underscoring the previous s 3.4.32(d) appeared to be the unstated notion that there are circumstances in which the making of a costs agreement after the commencement of the retainer could be unfair or unreasonable, presumably because the lawyer could take advantage of a client’s existing reliance to secure an agreement to which the client would not have agreed at the nascent stage of the representation.⁴⁹

Be that as it may, the current s 3.4.32(d) and (e) direct VCAT to ‘the circumstances and conduct of the parties’ *both* ‘before and when the agreement was made’ *and* ‘in the matters after the agreement was made’. The latter, rather than encompassing the scenario mentioned above – the ‘late’ costs agreement – appears aimed at ousting the potential application of the parol evidence rule. It could, though, encompass the scenario of a lawyer seeking to recover a fee in excess of that provided in the costs agreement⁵⁰ or to otherwise pressure the client to alter an existing agreement to the lawyer’s advantage.

But beyond this the scope of these factors is very much open to interpretation. The paragraphs give no indication as to what specific circumstances or conduct are capable of influencing whether or not an agreement is fair and reasonable. Nor is it clear whether the word ‘circumstances’ qualifies the phrase ‘of the parties’. If it does, there is some basis for concluding that the *relative* position of the parties – presumably their knowledge and experience in particular – is relevant to fairness and reasonableness. The experienced client, it may be reasoned, is better positioned to make a judgment as to the wisdom or otherwise of entering into the costs agreement in issue than an inexperienced one.⁵¹ What follows from this is that a lawyer ‘may need to do little to ensure that his client fully understands and appreciates the agreement where the client is an intelligent, well educated

49 See, eg, *Stoddart & Co v Jovetic* (1993) 8 WAR 420. Where a costs agreement was executed three years into a litigious matter that was supposed to be ready for trial, and in respect of which the lawyers had received substantial moneys on trust for fees without ever furnishing the client a statement of account; it was held insufficient merely to advise the client that costs calculated in accordance with the agreement ‘may exceed the statutory scale’, that ‘another legal firm may well’ do the work for less and that the client ‘may obtain independent legal advice’ in respect of that agreement. The Full Western Australian Supreme Court remarking that such a letter one might expect at the commencement of an engagement, not when nearing its completion: 431.

50 In *Symonds v Vass* [2007] NSWSC 1274 (Unreported, Patten AJ, 14 November 2007), [180]–[182], Patten AJ, in obiter remarks, viewed such an attempt as potentially giving rise to a claim for breach of fiduciary duty.

51 See, eg, *Cerini v McLeods (a firm)* [2004] WASC 45 (Unreported, Pullin J, 23 March 2004); cf *Passey v Chanaka Bandarage* [2002] ACTSC 105 (Unreported, Higgins J, 28 October 2002).

person with commercial experience’ but would need to do ‘considerably more’ where, say, a client ‘is ill educated, unable to read English, and quite without any commercial experience’.⁵²

However paragraphs (d) and (e) are interpreted, they do not appear to focus on the substantive fairness or otherwise of the actual terms of the costs agreement. Instead the reference to conduct and circumstances aligns itself with concerns underscoring the *process* leading to the agreement. The very vagueness of the terms used, and the lack of statutory direction, may justify VCAT resorting to the case law elucidating the general law concept of ‘fairness’, noted below,⁵³ to assist in giving colour to the terms.

5 Changed Circumstances – s 3.4.32(2)(f), (g)

Under s 3.4.32(2)(f) and (g) the Tribunal may have regard to ‘whether and how the agreement addresses the effect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement’ and ‘whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement’. I have grouped a discussion of these paragraphs because each has a *future (predictive) focus*.

Paragraph (f), which is clumsily expressed, appears to be directed at how well the agreement informs the client of the costs consequences of variables (‘matters and changed circumstances’) that influence the scope of legal services to be provided under the retainer. And paragraph (g) focuses on how billing under the terms of the costs agreement reflects those variables; unlike most of the other factors listed in s 3.4.32(2), this paragraph can arguably invite inquiry into the *substantive* fairness or otherwise of terms within the costs agreement. But it presumably hinges on a relevant finding under paragraph (f) – such as the failure of the agreement to inform the client adequately regarding relevant costs variables – for its operation.

The paragraph (f) inquiry seems to parallel disclosure obligations. For instance, where it is not practicable to give a (prospective) client an estimate of the total legal costs for which the client may become liable under the retainer, s 3.4.9(1) (c) requires that the law practice supply a range of estimates coupled with ‘an explanation of the major variables that will affect the calculation of those costs’. And s 3.4.16 prescribes an ongoing obligation to disclose ‘any substantial change’ to anything included in a disclosure already made. To the extent that this is the case, it may be queried what the paragraph adds to s 3.4.32(2)(c). Of course, it cannot be assumed that costs disclosure necessarily operates within the terms of a costs agreement – there may, in any case, be good practical reason for separating

⁵² *Ilic v Michael Radin & Associates* (Unreported, Supreme Court of New South Wales, Finlay J, 18 December 1991) 15.

⁵³ See below nn 60–8 and accompanying text.

disclosure documents from costs agreements⁵⁴ – but it does make sense to ensure that costs agreements address costs variables, as in the terms of a costs agreement, as opposed to the costs disclosure statement, that are likely to be construed as having *contractual* force, and form the foundation for the lawyer’s entitlement to remuneration.

III WHERE DOES THIS LEAVE VCAT?

A VCAT Jurisdiction Compared to Inherent Jurisdiction

The above observations regarding the factors listed in s 3.4.32(2) that are intended to inform the exercise of VCAT’s jurisdiction to set aside costs agreements reveal that VCAT is left in a potentially invidious position. Those factors appear to represent an *exhaustive* statement of VCAT’s avenues of inquiry; they are not prefaced by the phrase ‘including the following’, nor are they enveloped by words such as ‘any other factor VCAT thinks fit’. Here the Victorian provision differs from its counterparts in New South Wales, the Northern Territory and Queensland (which are prefaced by the words ‘without limiting the matters to which the costs assessor [or court] can have regard’),⁵⁵ and in the Australian Capital Territory (which, in listing the factors, adds ‘any other relevant matter’).⁵⁶ The factors are directed to the process of securing the agreement (procedural) more than the fairness of its terms (a substantive inquiry). Also, some appear superfluous, as clients are likely to pursue other avenues to address shortcomings reflected by their content, while others are so open-ended as to give little concrete guidance in their application. This is the more concerning because the consequences of a costs agreement being set aside could be significant for the lawyer.

It cannot be assumed, therefore, that the VCAT jurisdiction is intended to replicate the parameters of the court’s historical jurisdiction to set aside costs agreements that are not fair or reasonable. In s 3.4.32(1), when viewed in the light of s 3.4.32(2) factors, it is legitimate to construe the words ‘fair or reasonable’ conjunctively as compared to the disjunctive approach adopted at general law. Its Victorian antecedents likewise reveal a shift away from the historical general law approach. Section 68(1) of the *Supreme Court Act 1986* (Vic) vested the court with a jurisdiction to cancel costs agreements on the grounds of fraud or misrepresentation, or because the lawyer had been guilty of default, negligence, delay or other improper conduct in the performance of his or her duties under the agreement. When this section was repealed by the *Legal Practice Act 1996* (Vic), its substance was nonetheless replicated in s 103(1), albeit by vesting the

54 Separating a costs disclosure statement from the retainer or costs agreement may avoid the impression that all aspects of the statement are legally enforceable (cost estimates, for instance), and may also be justified in that the disclosure statement may need to be given before the retainer and itself makes reference to the client’s right to negotiate a costs agreement: See Mark Brabazon, ‘Costs Disclosure’ (2005) 43(6) *Law Society Journal* 59, 62.

55 *Legal Profession Act 2004* (NSW) s 328(2); *Legal Profession Act 2006* (NT) s 323(2); *Legal Profession Act 2007* (Qld) s 328(2).

56 *Legal Profession Act 2006* (ACT) s 288(3)(h).

jurisdiction in the (then) Legal Practice Tribunal. Neither was expressed by reference to the terms 'fair' or 'reasonable', and so it appears that there was no intention to replicate the inherent jurisdiction, assuming it continued to apply in Victoria.

As foreshadowed above,⁵⁷ most of the Australian cases dealing with the jurisdiction to set aside unfair or unreasonable costs agreements have sourced that jurisdiction from a specific provision in the legal profession legislation conferring jurisdiction in these terms, lacking a statutory definition of 'fair' or 'reasonable'. It is no surprise that the courts have given meaning to those terms by reference to their understood meaning at general law. The modern move to a factor-based inquiry in determining what is fair and reasonable may be an attempt to add precision to the jurisdiction but, as noted earlier, leaves something to be desired if this is its aim, especially in Victoria where it appears that the factors are exhaustive as opposed to illustrative.

B The Previous New South Wales Provision – What Could Have Been

Interestingly, the former New South Wales legislation, the *Legal Profession Act 1987* (NSW), addressed the issue more clearly and explicitly than the current approach in that State, albeit not couched in terms of 'fairness' and 'reasonableness'. Section 208D(1) empowered a costs assessor, in the course of assessing a bill of costs, to determine whether a term of a particular costs agreement was 'unjust' in the circumstances relating to it at the time it was made. For that purpose, s 208D(2) required the assessor to have regard to the public interest and to all the circumstances of the case, and allowed the assessor to have regard to ten factors. These encompassed, and even extended, the matters to which a court would have regard in determining whether a costs agreement was fair and reasonable at general law. The factors going to 'fairness' as understood at general law were the following:

- The relative bargaining power of the parties;
- Whether or not, at the time the agreement was made, its provisions were the subject of negotiation;
- Whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the agreement;
- Whether or not any party to the agreement was reasonably able to protect his or her interests because of his or her age or physical or mental condition;
- The relative economic circumstances, educational background and literacy of the parties to the agreement and of any person who represented any of those parties;

⁵⁷ See above nn 21–9 and accompanying text.

- The extent to which the provisions of the agreement and their legal and practical effect were accurately explained to the applicant, and whether or not the applicant understood those provisions and their effect;
- Whether the lawyer or any other person exerted or used unfair pressure, undue influence or unfair tactics on the applicant and, if so, the nature and extent of that pressure, influence or tactic(s).

These factors focused chiefly on the relative position of lawyer to client, specifically as to how that position manifested itself in the securing of the costs agreement. In so far as the substantive focus of ‘reasonableness’ was concerned, a costs assessor could take into account:

- The consequences of compliance, or non-compliance, with all or any of the provisions of the agreement;
- Whether or not any of the provisions of the agreement impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to it;
- The form of the agreement and the intelligibility of the language in which it is expressed.

The focus here was the terms of the agreement, and its effect on the client. These factors went some way to replicating those prescribed by s 9(2) of the *Contracts Review Act 1980* (NSW), which is general legislation that empowers the Supreme Court to grant relief for unjust contracts. There is, in any event, case authority that a costs agreement can be set aside under that Act, without resort to a costs assessor under the *Legal Profession Act 2004* (NSW).⁵⁸

Little more than a cursory perusal of the above factors highlight that, although there is some overlap with the factors that VCAT may take into account in determining whether a costs agreement is fair or reasonable, there is certainly no identity between them. The (apparently exhaustive) factors listed in s 3.4.32(2) of the Victorian legislation, aside from not appearing to focus specific inquiry on the substantive terms of a costs agreement, are relatively confined in their application to procedural concerns. This is not to deny that the factors listed aligned with fairness can give some colour to s 3.4.32(2)(d), relating to the circumstances and conduct of the parties. And when one looks at case law that defines ‘fairness’ at general law – which is aimed at ensuring the agreement is made with a client who fully understands and appreciates its content and effect, and has voluntarily entered it⁵⁹ – it appears that the modern broader disclosure requirements go a considerable way to fulfilling fairness.

58 See *Liu v Adamson* (2003) 12 BPR 22, 205 where a costs agreement, under which husband and de facto wife directors of a corporate client guaranteed the client’s costs liability to the solicitor by granting security over their home, was set aside under the *Contracts Review Act* on the ground that the agreement had not been explained to the wife, and that she lacked independent advice.

59 *Re Stuart* [1893] 2 QB 201, 204–5 (Lord Esher MR); *Bear v Waxman* [1912] VLR 252, 301–2 (Cussen J); *Richardson v Lander* (1948) 65 WN (NSW) 74, 76 (Walker, Deputy Prothonotary); *Re P’s Bill of Costs* (1982) 8 Fam LR 489, 497 (Evatt CJ and Fogarty J).

IV FAIRNESS AT GENERAL LAW – BROADER AGAIN?

Yet the concept of ‘fairness’ as defined at general law may be broader in scope than the statutory disclosure requirements, and also the other factors listed in s 3.4.32(2). The point is illustrated via two main examples discussed below.

A Disclosure of Unusual Charging

The Full Court of the Supreme Court of the Australian Capital Territory has noted that ‘[i]t is timely to remind solicitors of the duty a solicitor has to warn a client of unusually expensive charges’.⁶⁰ The court was referring to the rule in *Re Blyth and Fanshawe*,⁶¹ which applies not just to unusual disbursements but also to unusual charges, including charges for costs.⁶² Although not explicitly identified as a subject for disclosure by statute, a failure to disclose such charges may impact on the fairness of any costs agreement prescribing the charge. Mere disclosure, without explanation and, in some cases, the urging to seek independent legal advice, may be insufficient to protect the lawyer.⁶³ As explained by de Jersey CJ in *Council of the Queensland Law Society Inc v Roche*, in remarks that justify quotation:

The extent to which a solicitor need explain to his or her client a prima facie unusual basis of charging may depend on the extent to which that basis is unusual. Should it be proposed, for example, as in this case, and one would hope very unusually, that the time of a non-legally qualified paralegal, performing essentially secretarial or administrative tasks, be chargeable at rates approaching those appropriate to an employed solicitor or partner, then one would expect some compelling explanation: has, for example, the charge out rate been set appreciably lower than that which would usually apply to a partner, reflecting appropriately the mix of professional/non-professional work, in the interests of convenience to the client? It would be unprofessional, as happened in this case, to set a high, across-the-board rate, albeit less than a commandable partner rate, which resulted in a windfall because of the high proportion of non-qualified work to be accomplished.

60 *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, 146.

61 (1882) 10 QBD 207.

62 *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, 146; *Passey v Chanaka Bandarage* (Unreported, Higgins J, 28 October 2002), [29]: ‘In any case in which the retainer agreement contains any unusual terms, where those terms favour the solicitor’s interests, the client not only should be frankly and fully so advised by the solicitor, but should be urged to take competent independent advice.’

63 The same has been repeated in the family law context, where the proffering to a client of the pamphlet required by the former *Family Law Rules 1984* (Cth) O 38 r 26(4) (repealed) (now *Family Law Rules 2004* (Cth) r 19.15), has been held to be no substitute for ‘fairness’ of a costs agreement: *Weiss v Barker Gosling* (1993) 16 Fam LR 728, 760 (Fogarty J) (who noted that the requirements of fairness at common law appear to be wider and more general than the requirements of *Family Law Rules 2004* (Cth) O 38 r 26(4)); *Twigg & Co v Rutherford* (1996) 20 Fam LR 862, 884.

A careful explanation should ordinarily be offered for what have, in this case, been termed ‘blended’ rates. A client would usually be astonished to think he or she had to pay for the solicitor’s secretary or clerk at the same rate as for the solicitor. Cases like this one should cause careful clients to be circumspect about entering upon blended fee arrangements. A solicitor proposing such an arrangement should offer a most careful justification for what is proposed, to assure the client he or she is not being disadvantaged, and to inform the client appropriately so the client may make the requisite fully informed decision whether or not to agree to the proposal.⁶⁴

B Advertising Other Lawyers’ Services?

Multiple judges have invoked ‘fairness’ as a vehicle to castigate lawyers who failed to explain to their (prospective) clients that the manner of charging (often time charging) could generate a fee higher than may be the case on an alternative charging method.⁶⁵ In *Passey v Chanaka Bandarage*⁶⁶ Higgins J held that the lawyer should have explained that, inter alia, a flat rate hourly charge would result in a significant overcharge relative to the scale, and that other competent lawyers in the relevant field of practice might well charge significantly less. Even accepting that this statement in the context of an inexperienced client, a level of (considerable) disparity between the experience (and knowledge) of lawyer and client is hardly unusual. It is difficult to think, to this end, of any other service agreement operating in a competitive market that attracts a duty to disclose the fact that a ‘competitor’ may provide the ‘same’ service for lower fee. Higgins J’s statement is not unprecedented in the case law. In 1859 Turner LJ, in a case involving an agreement between solicitor and client to allow the solicitor interest on his bill of costs, made the following remarks:

It is the bounden duty of a solicitor, before he enters into any such bargain, to inform the client that the law allows of no such charge of interest, and that although he may decline to conduct the client’s business without such an allowance, others, of equal ability, may be found who will conduct it upon the scale of allowances which is sanctioned by the law.⁶⁷

Although the analogy is not perfect – statute now, in any case, permits the charging of interest on solicitor-client costs⁶⁸ – it is close enough to merit consideration. Yet the Victorian disclosure (and Model Laws) obligations in this context – ‘the basis on which legal costs will be calculated, including whether a practitioner remuneration order or scale of costs applies to any of the legal costs’⁶⁹ – certainly go nowhere near to imposing such a duty.

64 [2004] 2 Qd R 574, 584–5.

65 See, eg, *Brown v Talbot and Olivier* (1993) 9 WAR 70; *Weiss v Barker Gosling* (1993) 16 Fam LR 728; *Athanasiou v Ward Keller (6) Pty Ltd* (1998) 122 NTR 22.

66 [2002] ACTSC 105 (Unreported, Higgins J, 28 October 2002) [39]; see also *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138.

67 *Lyddon v Moss* (1859) 4 De G & J 104, 130–1; 45 ER 41, 51.

68 *Legal Profession Act 2004* (Vic) s 3.4.21.

69 *Legal Profession Act 2004* (Vic) s 3.4.9(1)(a).

C *Fiduciary Avenue – No Need for Fairness?*

That it is by no means certain that such an approach can be shoehorned into a s 3.4.32 fairness and reasonableness inquiry should not necessarily lead Victorian lawyers to sleep easy. In *Re Morris Fletcher & Cross' Bill of Costs*⁷⁰ Fryberg J held that a law practice retained by a Japanese national inexperienced with Australian litigation should, in discharging its fiduciary duty, have disclosed to the client that:

- In Queensland time charging was normal among large commercial firms but would not necessarily be used by other firms;
- There was a risk that time charging might result in a higher bill than a 'tasks performed' basis;
- Task-based charging was the conventional and traditional method of charging by Queensland lawyers; and
- The Federal Court scale, which applied in the litigation, was limited to the amount chargeable by reference to the tasks performed regardless of the time spent on the task.⁷¹

In *Council of the Queensland Law Society Inc v Roche*,⁷² McMurdo P characterised lawyers who place their own and their firm's interests before those of clients by 'importuning them to enter into costs agreements charging exorbitant fees, whether or not in speculative cases' as breaching their fiduciary duty.⁷³ Lawyers who persist in this behaviour, according to her Honour, 'can expect heavier deterrent penalties for their professional misconduct'.⁷⁴ In the parallel Australian Capital Territory case, the Full Court went so far as to opine that, especially for clients who are particularly vulnerable and reliant on their lawyer, a failure to fully and frankly advise as to the *relative* level of the fees proposed to be charged or to secure the client is independently advised is, where those fees are exorbitant, 'no better than theft'.⁷⁵

V REASONABLENESS AT GENERAL LAW

The concept of reasonableness – which arguably represents the general law's only foray into denying effect to contractual terms due solely to their *substantive* unfairness – in the context of costs agreements has a lengthy history. It originated from the inherent jurisdiction of courts to prevent exorbitant or excessive charges. In 1742, for instance, Lord Hardwicke LC said: 'If an attorney ... prevails upon a client to agree to an exorbitant reward, the Court will either set

70 [1997] 2 Qd R 228.

71 Ibid 243.

72 [2004] 2 Qd R 574.

73 Ibid 592.

74 Ibid.

75 *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, 149.

it aside entirely, or reduce it to the standard of those fees to which he is properly entitled'.⁷⁶ What is unclear is whether such a jurisdiction survives in the modern statutory environment, where, as noted earlier, the parameters of fairness and reasonableness are stated by legislation, and the factors that inform VCAT's jurisdiction in that context do not explicitly focus on the substantive unfairness of terms of a costs agreement.

A Time Charging – The Modern Chestnut

Examples of unreasonableness in the case law – almost always involving the application of an unfettered statutory 'reasonableness' criterion – seem to fall outside the s 3.4.32(2) factors, but may on policy grounds justify a judicial response. They focus mainly on the lawyer's rate of and approach to charging. And it is time charging that has seen the greatest judicial scrutiny in this regard, which is not surprising in view of well documented judicial concerns about time charging.⁷⁷ There is a clear indication in the case law that the charging of a flat hourly rate irrespective of experience or seniority, or the nature of the work, is unreasonable.⁷⁸ Although the failure of a set hourly charge to discriminate as to the type of work done – say whether the lawyer is engaged in a highly skilled, or a more mundane, task – can be compensated *to some extent* by varying the charge out rates for persons of greater or lesser skill, this is not invariably so.⁷⁹ This lack of discrimen of itself may suggest that an agreement of this kind is so unreasonable that a court should not give effect to it.⁸⁰ Also clearly unreasonable is any attempt at unilateral setting of hourly rates (and fees generally) in a costs

⁷⁶ *Saunderson v Glass* (1742) 2 Atk 296, 298.

⁷⁷ See, eg, *Chamberlain v Boodle & King (a firm)* [1982] 3 All ER 188, 191 (Lord Denning, MR): 'Is the client to be charged double the rate because a slow partner has been put on the case?'; *Re Ladner Downs and Crowley* (1987) 41 DLR (4th) 403, 428 (Southin J); likening the practice of getting a client to commit to pay by the hour to giving a blank cheque; *New South Wales Crime Commission v Fleming* (1991) 24 NSWLR 116, 141 (Kirby P): denial of the incentive to avoid unnecessary work or inefficient practices, and rewarding the inefficient and the incompetent; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 437 (Mahoney JA): raises questions as to actual, not merely potential, conflict of interest; *Re Morris Fletcher & Cross' Bill of Costs* [1997] 2 Qd R 228, 239 (Fryberg J): may create 'inherent scope for error in the number of hours charged'; *McNamara Business & Property Law v Kasmeridis* (2007) 95 SASR 129, [51] (Doyle CJ, with whom Gray and David JJ concurred).

⁷⁸ *New South Wales Crime Commission v Fleming* (1991) 24 NSWLR 116, 126 (Gleeson CJ); *Major Projects Pty Ltd v Sibmark Pty Ltd* [1992] ANZ Conv R 349, 350 (McLelland J); *Weiss v Barker Gosling [No 2]* (1993) 17 Fam LR 626, 649 (Fogarty J), where a costs agreement, which prescribed a set hourly charge 'for any other solicitor' without reference to experience or specialisation, which well exceeded both scale and the rate for comparable family law specialists elsewhere in the city, was held unreasonable.

⁷⁹ *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103, 109 (Rogers CJ): 'the lower charge out rate may not sufficiently compensate for the greater amount of time occupied'.

⁸⁰ *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103, 109 (Rogers CJ); *Major Projects Pty Ltd v Sibmark Pty Ltd* [1992] ANZ Conv R 349, 350 (McLelland J); *D'Alessandro & D'Angelo v Bouloudas* (1994) 10 WAR 191, 222 (Ipp J), time costing is not the sole arbiter of the costs to be determined, and the assumption that it represents an unexceptionable means of determining costs is fallacious.

agreement, such as a clause entitling the lawyer to charge 'at rates notified to the client from time to time'.⁸¹

B Quantum of Time Charge – Can it be Ousted?

There is some indication, moreover, in the case law that courts can, in line with Lord Hardwicke's statement earlier, declare that the *actual quantum* of the fee as between lawyer and client is excessive. That the fee exceeds scale is not enough;⁸² rather, a finding of unreasonableness 'involves no mere conclusion that it may be marginally or arguably outside a legitimate range' but 'a conclusion that the terms of the agreement take it outside the parameters of what could legitimately be regarded as a reasonable or appropriate charge for the work, having regard to all the circumstances of the case'.⁸³ Factored into this determination is the seniority and expertise of the lawyer, and the nature and extent of work involved, including its novelty, difficulty and complexity. It is more reasonable for a higher charge to be made where the lawyer is highly experienced, or where the work assumes a level of difficulty exceeding the norm.⁸⁴ Conversely, the charging of costs far exceeding scale for routine work, much of which could be performed by a non-lawyer or a more junior lawyer under supervision, is not reasonable.⁸⁵ For example, in *Athanasiou v Ward Keller (6) Pty Ltd*⁸⁶ Mildren J held a costs agreement to be unreasonable because:

- The difference between scale costs and the costs payable under the agreement was significant;
- There was nothing to suggest that the case was one of particular difficulty or complexity;
- The charges were applied arbitrarily to all work done by the firm;
- The agreement set the same hourly rate regardless of the experience of the lawyer; and
- Much of the work could have been delegated to a junior lawyer.⁸⁷

81 *Catto v Hampton Australia Ltd (in liq)* (2007) 251 LSJS 164, [16] (Judge Lunn).

82 *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, 149; *Passy v Chanaka Bandarage* [2002] ACTSC 105 (Unreported, Higgins J, 28 October 2002) [43].

83 *Weiss v Barker Gosling [No 2]* (1993) 17 Fam LR 626, 642 (Fogarty J). See, eg, *Alman v MacDonald Rudder* [2001] WASC 65 (Unreported, Wheeler J, 16 March 2001) [27], that \$17 000 was the maximum payable pursuant to the scale but the amount claimed under the costs agreement was \$36 000 suggested that the effect of the agreement upon the client was unreasonable.

84 See, eg, *Burgundy Royale Investments Pty Ltd (receivers and managers appointed) (in liq) v Westpac Banking Corporation (No 3)* (1992) 37 FCR 492, 500 (Einfeld J).

85 *Burgess v D'Alessandro & Associates* [1993] ANZ Conv R 14, 17 (Anderson J); *Harrison v Hocking* [2000] WASC 188 (Unreported, Hasluck J, 28 July 2000) [111].

86 (1998) 122 NTR 22.

87 *Ibid* 33.

VI WHERE DOES THE FOREGOING LEAD?

What the above discussion reveals is that VCAT's statutory jurisdiction to set aside costs agreements on the grounds that they are not 'fair or reasonable' is, as a result of the vague and potentially restrictive nature of the factors listed in s 3.4.32(2), likely to be more confined than a jurisdiction grounded on the common law meaning of the terms 'fair' and 'reasonable'. If this is correct, it marks a step away from some of the expansive interpretations adopted by Australian judges in recent times of lawyers' obligations in securing costs agreements, and in crafting their terms. Yet on another level, the lack of specificity does little to promote certainty and predictability in the exercise of VCAT's function.

Clarification is required at various levels; *first*, as to whether the factors in question are intended to be exhaustive; *second*, whether or not this is the case, the court retains its historical jurisdiction to set aside costs agreements on the grounds of unfairness or unreasonableness. The case law from other Australian jurisdictions indicates that such a jurisdiction remains, but it awaits judicial resolution in Victoria. It may be queried, to this end, how the court could be presented with an opportunity to exercise its inherent jurisdiction. A party seeking to appeal VCAT's order under s 3.4.32 must fulfil the standing requirements in s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), where an appeal can only be made on a question of law, and with leave of the court. Although the court may make any order it thinks appropriate on hearing the appeal,⁸⁸ this statutory jurisdiction is presumably limited to the question of law raised in the appeal itself. Although the uncertainties discussed above arising out of the construction of s 3.4.32 may provide fodder for an appeal on a question of law, there remains the question of whether the court, on an appeal, retains an inherent jurisdiction to set aside a costs agreement. If the court's jurisdiction is limited, there may be good reason for a dissatisfied client to circumvent VCAT and instead petition the court directly, seeking to invoke its inherent jurisdiction, which, as noted above, appears to furnish potentially broader grounds for relief.

VII CONCLUDING REMARKS – THE MORAL OF THE STORY

Issues relating to the legitimacy of costs agreements are unlikely to recede. Access to justice remains a 'hot' political issue, and the legal profession is often (inaccurately) targeted as the main culprit in denying that access.⁸⁹ At the same time, the profession is under pressure to compete in a crowded marketplace while being subjected to what is arguably the most restrictive regulatory environment applicable to any 'business'. This environment functions against the backdrop of increasing consumerism – aside from regulatory efforts to empower the (legal) consumer – when clients are far more inclined to question the cost of services

⁸⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(7)(d).

⁸⁹ See G E Dal Pont, 'Lawyers' Charging and Access to Justice' (Paper presented to the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 17 September 2006).

(and indeed question the provision of the services generally), and for which loyalty runs in only one direction in professional (and other) relationships.

The upshot is unlikely to be fewer client complaints and disputes about costs, or a reduction in client expectations. A decade ago an American academic remarked that '[l]awsuits by clients for unfair billing, virtually unknown a few years ago, have become commonplace'.⁹⁰ That the majority of cases that govern the lawyer-client costs relationship have been decided in the last 20 years or so indicates that, although the costs system in the United States differs in several material ways from its Australian counterpart, this comment also has considerable force here. The lawyer, more so than in the past, may provide a convenient scapegoat to vent client frustrations and dissatisfactions, only some of which may be justifiably costs-related.

Of course, this is no licence for members of the profession to descend into the likes of a mere business when charging is concerned, even were the regulatory environment (far) less restrictive. In this context, there is, in the words of a senior Queensland judge, 'a large role for discretion and conservative moderation'.⁹¹ The restraint, in the words of a senior New South Wales judge, is 'the practitioner's sense of professional responsibility', which for most members of the profession 'is a real one'.⁹²

It is apposite in this regard to conclude by reference to the statue of St Yves.⁹³ A great advocate of thirteenth century France, St Yves became the patron saint of lawyers. St Yves is portrayed as carrying in his left hand a bag marked 10 000, referring to the 10 000 sesterces⁹⁴ fixed by Roman law as the maximum he could take as an honorarium. This highlighted that St Yves was so great an advocate that everyone always gave him the maximum fee by way of gift, and yet so honest and law abiding that his bag would hold no more. Herein perhaps lies the challenge – maybe not a new one – for Victorian lawyers in the twenty-first century. At least if they, unlike the litigant mentioned at the outset of this paper, like costs!

90 W G Ross, 'Kicking the Unethical Billing Habit' (1998) 50 *Rutgers Law Review* 2199, 2199–2200.

91 *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, 585 (de Jersey CJ).

92 The Honourable J J Spigelman AC, 'Opening of the 2004 Law Term' (Speech delivered at the Opening of Law Term Dinner, Sydney, 2 February 2004) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_020204> at 8 December 2008.

93 This is recounted in R Pound, *The Lawyer from Antiquity to Modern Times* (1953) 53–4.

94 An Ancient Roman coin.