

SUPREME COURT OF QUEENSLAND

CITATION: *LCM Operations Pty Ltd v R Kelly & Ors Trading as Clyde & Co Australia* [2026] QSC 214

PARTIES: **LCM OPERATIONS PTY LTD (ACN 616 451 033)**
(plaintiff)
v
R KELLY & ORS TRADING AS CLYDE & CO
AUSTRALIA (ABN 72 157 316 912)
(defendant)

FILE NO/S: 3804/25

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 3 August 2026

JUDGE: Smith J

ORDER: **1. The answer to question 1 is that the assessment should proceed on the basis of the existing costs agreements.**
2. The answer to question 2 is that the solicitors for the defendant can be heard on the assessment.
3. The answer to question 3 is that it is not for the costs assessor to calculate and impose interest on any refund.
4. I will hear the parties on the question of costs.

CATCHWORDS: CIVIL PROCEDURE – COSTS – whether a costs agreement between a litigation funder and lawyers should be set aside on the grounds that the uplift fee was incorrectly calculated – whether there was disclosure of amounts to be charged such that the agreement was void or should be set aside – whether solicitors for the defendant should be heard on the assessment – whether the costs assessor should calculate and impose interest on any refund

Legal Profession Act 1997 (Qld) s 299, s 300, s 301, s 308, s 311, s 315, s 316, s 318, s 319, s 322, s 324, s 327, s 328, s 334, s 335
Uniform Civil Procedure Rules 1999 (Qld) r 717, r 720, r 737, r 743, r 743H

AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd [2010] NSWSC 985, cited
Australian Broadcasting Commission v Australasian Performing Rights Association Ltd (1972) 129 CLR 99, applied
Barclay & Ors v McMahan Clarke (A Firm) [2014] QSC 20, considered
Bevan v Bingham [2023] NSWSC 19; (2023) 111 NSWLR 7, considered
Codelfa Construction Pty Ltd v State Rail Authority (NSW) [1982] HCA 24; (1982) 149 CLR 337, applied
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640, applied
Lewis Blyth & Hooper (a firm) v Smith [2015] WASCA 47; (2015) 48 WAR 467, cited
McLaren v Wiltshire Lawyers Pty Ltd [2019] QSC 305; (2019) 3 QR 158, considered
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104, applied
Murray Goulburn Co-Operative Co Ltd v Cobram Laundry Service Pty Ltd [2001] VSCA 57, considered

COUNSEL: M F Wilson for the plaintiff
 G J Robinson for the defendant

SOLICITORS: Law in Check for the plaintiff
 Moray & Agnew Lawyers for the defendant

INTRODUCTION

- [1] The plaintiff is a litigation funder. It funded a class action known as the Gladstone Fisheries class action. The action was unsuccessful.
- [2] The defendant is the law firm which provided legal services to the plaintiff and the lead plaintiffs. The defendant delivered bills totalling \$20,384,890.34 to the plaintiff, which were paid.
- [3] On 27 August 2025, the plaintiff filed an application that the bills be assessed.
- [4] On 11 May 2026, the costs assessor Mr Philip Roberts referred three questions to the court pursuant to r 717(2) *Uniform Civil Procedure Rules* (1999) (UCPR) namely:
 - 1. Whether the assessment should proceed on the basis of the existing costs agreements or the Supreme Court scale.
 - 2. Whether Moray & Agnew solicitors appointed by the defendant should be heard on the assessment.

3. Whether the costs assessor may calculate and impose any interest on any sum adjudged to be payable by the defendant to the plaintiff and if so, the applicable rate.

EVIDENCE

Mr Moloney

- [5] Patrick Moloney, in his 2025 affidavit, says that he is a director of the plaintiff. He says that in about September 2017, the plaintiff was approached by the defendant to provide funding for the class action. This led to a retainer agreement signed by the parties in February 2018. The original retainer annexed a budget of \$8,521,900. By clauses 46 and item 5 of schedule 1, the defendant agreed to cap its fees in the sum of \$4,800,000.
- [6] On 14 October 2020, the plaintiff and the defendant entered into an amended retainer agreement because the fees now exceeded \$4,800,000. The fee cap was increased to \$9,775,800. By about September 2021, the defendant had billed to the fee cap. The plaintiff stopped paying fees but continued to pay for disbursements. The retainer was terminated on or about 14 February 2024.
- [7] At no time did the defendant disclose that some \$20,000,000 would be payable for fees.
- [8] In his 2026 affidavit Mr Moloney says:
 - (a) A 25 per cent uplift fee included disbursements.
 - (b) He cannot find any specific explanation of the variables affecting the uplift fee.
 - (c) Originally the defendant agreed to cap fees at \$4,800,000 which later increased to \$9,775,800.
 - (d) There was no updated disclosure after October 2020.

The agreements

- [9] The representative proceeding retainer agreement between all parties was entered into in February 2018. The agreement provided as to the following:
 - (a) Clause 6 acknowledged that the funder was not a client of the lawyers under the retainer or in relation to the action, but the lawyers had obligations to the funder pursuant to the retainer (but not to provide legal services).
 - (b) Clause 9 provided that the lawyers were entitled to charge any amount for their fees or their disbursements in relation to the action, except, as set out in the retainer.
 - (c) Clause 11 noted that the lawyers would take reasonable care to immediately inform the funder in writing of any material or relevant development in relation to the action budget. The action budget was defined in clause 4.1 as the costs budget in schedule 2.
 - (d) Part 3 related to charges.

- (e) Clause 37 provided, “the parties acknowledge and accept that should there be any excess costs reasonably incurred by the lawyers which are outside the Lawyer’s Fee Cap which the funder has not otherwise agreed to pay or reimburse the lawyers for (“excess fees”) that upon any recovery and following the payment of the amounts due in respect of clauses 58.2.1 and 58.2.2 of the member agreement, the lawyers will be entitled to payment of such excess fees from the recovery as agreed in clause 8.5(b) of the client engagement letter (“uplift”).”
 - (f) Clause 38, “the parties acknowledge and accept that upon any recovery and following the payment of the amounts due in respect of clauses 58.2.1 and 58.2.2 of the member agreement, the lawyers will be entitled to an uplift of 25 per cent of the total charges for the professional fees rendered by the lawyers ...” (my underlining.)
 - (g) Lawyers fee caps were discussed at clauses 48 to 57. The fee cap was \$4,800,000, excluding GST (item 5).
 - (h) Schedule 2 was the action budget and program.
 - (i) Schedule 4 enclosed the representative proceeding funding agreement – member.
 - (j) Schedule 5 enclosed the representative proceeding funding agreement – representative.
 - (k) Schedule 6 contained the client engagement letter.
- [10] The conditional client engagement letter contained the following provisions.
- (a) Clause 6.3 noted “We will also engage boutique fisheries law specialists Law Essentials on your behalf to assist in delivering the work to you. The professional fees of Law Essentials will be treated as a disbursement...”
 - (b) Under clause 8.3, “you acknowledge and accept that upon any sufficient recovery, we shall be entitled to invoice the representatives ... and receive payment for:
 - (a) Action costs ...
 - (b) Any excess legal costs ...
 - (c) An uplift of 25 per cent calculated on the total charges for the professional fees rendered pursuant to the client engagement letter including any deferred fees and any excess fees. Such an uplift is permissible pursuant to s 324 (1), (4) and (5) of the LPA.” (my underlining)
 - (c) Clause 8.13 made it clear the uplift fee was payable on professional fees.
 - (d) Estimated costs

“9.2 Given the complexity of the Claims and the Action, it is not currently reasonably practicable for us to give a reliable estimate of the total fees and disbursements likely to be incurred on the matter moving forward for which you may be liable in the event of a sufficient recovery. Instead, we can provide you with the following estimates in the below table:

Estimated Action Costs from service of the Action to resolution at trial (not including the Pre-Retainer Fees) (AUD incl. GST)

9.3 You acknowledge that you have been made aware that:

Lawyers' Fees (@75%)	Barristers' Fees	Disbursements	Lawyers' Deferred Fees (@25%)	TOTAL	Possible Uplift Fees (@25%)
\$4,000,000 - \$5,000,000	\$2,200,000 - \$2,800,000	\$1,200,000- \$1,600,000	\$1,000,000- \$1,250,000	\$8,400,000 - \$10,650,000	\$2,100,000- \$2,662,000

- (a) the above estimates are made on the basis of information available to Us at the date of preparing the Client Engagement Letter and may change as more information becomes available to Us and as the Action progresses; and
- (b) the major variables that will affect the estimate for the total legal costs and disbursements are:
 - (i) how far the Action progresses before it is concluded;
 - (ii) the amount of evidence required to be gathered;
 - (iii) the size of the discovery required in the Action;
 - (iv) the amount of expert evidence required to prove the Claims in the Action;
 - (v) the strategy and tactics adopted both by and on behalf of You, and by GPC as the Action progresses;
 - (vi) the length of any trial in the event that the matter does not conclude prior to trial;
 - (vii) whether the court will be minded to split the action between 'liability' and 'quantum' which could drastically reduce costs if the court were to find against the Representatives on the question of liability (e.g. the effective second part of the trial on quantum would not proceed)
 - (viii) the number of lay witnesses required; and
 - (ix) the complexity of the issues that arise in the Claims and the Action."

[11] The evidence reveals that on 15 October 2020, the defendant wrote to the representatives advising:

- (a) When LCM agreed to finance the case, they expected to work off total legal costs of \$9,370,000. The budget was between the range of \$8.4m and \$10.65m.
- (b) What had happened though is that GPC had dragged the chain and had been obstructive so that the original action budget had not been enough, and they were still one year away from trial. They needed a significant increase in the action budget by LCM if they were going to proceed to trial and win.

- (c) Following discussions LCM accepted an increase to the action budget of \$18,200,000 and the budget LCM would settle for was now \$9,770,000. LCM had doubled the action budget.
- (d) The updated estimate of total costs was:

Estimated Action Costs to resolution at trial (not including the Pre-Retainer Fees*) (AUD incl. GST)

Lawyers' Fees (@75%)	Barristers' Fees	Disbursements	Lawyers' Deferred Fees (@25%)	Possible Uplift Fees (@25%)	Total*
\$9,000,000 to \$10,000,000	\$4,000,000 to \$5,000,000	\$3,000,000 to \$3,200,000	\$3,000,000 to \$3,300,000	\$3,000,000 to \$3,300,000	\$22,000,000 to \$24,800,000

- [12] As a consequence, an amended retainer agreement was entered into in 2020. This provided:
- (a) Recital G – The original action budget was no longer sufficient to satisfy the costs reasonably incurred to date or to finance the work that still needed to be done to prosecute the action.
- (b) Item 5 schedule 1 was amended so that the cap fee was \$9,775,800 (excluding GST).

QUESTION 1 – WHETHER THE ASSESSMENT SHOULD PROCEED ON THE BASIS OF THE EXISTING COSTS AGREEMENTS OR THE SUPREME COURT OF QUEENSLAND’S SCALE OF COSTS

Plaintiff’s submissions

- [13] The plaintiff submits that under s 327(1) of the *Legal Profession Act 1997 (Qld)* (LPA), a costs agreement which contravenes or is entered into in contravention of division 5 of the LPA is void. It is submitted that the conditional costs agreement purports to include an uplift fee. It is submitted that s 324(3) of the LPA requires that the agreement must provide a range of estimates of the uplift fee and an explanation of the variables affecting it. In this case the agreement does not include any explanation of the variables such as the duration or complexity of the matter; the anticipated amount of work required; whether the matter was likely to settle early or proceed to a contested hearing; the need to engage barristers, experts or other professionals and unexpected events or complications that could increase the work required.
- [14] Also, s 324(4) of the LPA provides that the uplift fee must not exceed 25 per cent of legal costs excluding disbursements. In this case the uplift fee was calculated as 25 per cent of total legal costs including disbursements. The plaintiff relies on:
- (a) The table at page 14 of the court book. Barristers’ fees are included.
- (b) The professional fees of Law Essentials were said to be a disbursement and the 25 per cent uplift fee included those costs.

- [15] It is submitted that these breaches render the agreement void and, as a result, under s 319 of the LPA the Supreme Court of Queensland scale of costs applies.
- [16] Alternatively, it is submitted that s 315 of the LPA imposes a continuing obligation on a law practice to provide updated disclosure as to costs. In this particular case the defendant disclosed an initial estimate of \$8,400,000 to \$10,650,000 plus uplift in the conditional costs agreement.
- [17] In February 2018, the defendant agreed to capped fees of \$4,800,000. On 14 October 2020, the defendant increased the cap to \$9,775,800. The ultimate bill was twice this.
- [18] There was no disclosure as to this increase and therefore s 315 of the LPA was breached. This means that the costs agreement should be set aside, or at the least the costs reduced by an amount considered proportionate to the breach.

Defendant's submissions

- [19] It is submitted that the agreement which sets out the plaintiff's obligation to pay is the representative proceeding retainer agreement dated 2 February 2018 as amended in 2020. The conditional client engagement agreement was between the representative plaintiffs and the defendant only. The plaintiff has no entitlement to set aside the conditional costs agreement as the representative plaintiffs were liable to pay 25 per cent if there was sufficient recovery. In this case the litigation was unsuccessful, and the plaintiff was never liable to pay the uplift fee of 25 per cent.
- [20] In any event, the conditional costs agreement does contain an explanation of the variables and does not express an entitlement to charge an uplift fee on disbursements. Clause 9(3) sets out the major variables. This explanation applies to both professional fees and uplift fees. With respect to the argument that the uplift fee included disbursements, it is accepted that at page 14 of the agreement the far-right column includes disbursements. However, it is submitted that is a mere mathematical error. The clear words of the agreement in clause 8 provided that the uplift fee was for professional fees only. The letter dated 15 October 2020 made it clear the uplift fee did not apply to any disbursement. This resolved any arithmetical error.
- [21] Further clause 42.2 does not allow a dispute as to the hourly rates.
- [22] With respect to the non-disclosure point, s 328 of the LPA enables a court to set aside a costs agreement on the basis it is not fair and reasonable on the application of a client. In this matter, the plaintiff was not a client under s 334 of the LPA. The plaintiff was an associated third-party litigation funder. The disclosure obligation did not apply and does not render the agreement void.
- [23] Regardless, in the letter dated 15 October 2020 there was disclosure. Also, the plaintiff falls within the exceptions to the requirement for disclosure in s 311(c)(ii) and (iii) of the LPA as it is a subsidiary of a public company which holds an Australian financial services licence.

Plaintiff's reply

- [24] It is submitted that the affidavit of Mr Moloney dated 25 March 2026, demonstrates that the total of \$8,400,000 and \$10,650,000 included disbursements. This was not a

mere mathematical error. It is submitted the table was a substantial part of the disclosure.

- [25] It is further submitted that clause 8 did not override the clear wording in the table. The entire agreement is void.
- [26] The letter dated 15 October 2020, did not supersede the conditional costs agreement. This is because if the conditional costs agreement contravenes s 324(4) of the LPA it is void from inception.¹ It is also submitted that the letter was not a new costs agreement or formal disclosure document. The letter only made disclosures as to the new fee cap. This was \$9,775,800. The bill was ultimately \$20,384,890.34.
- [27] As to the standing issue it is submitted:
- (a) The application is for an assessment of costs under s 335(3) of the LPA as an associated third-party payer.
 - (b) The plaintiff paid \$20,384,890.34 and the plaintiff's rights are clearly affected.
 - (c) The plaintiff was a signatory to the conditional client engagement letter.
 - (d) The question is not whether the plaintiff is a "client" but whether the agreement is void.
- [28] The variables explanation does not satisfy the statutory requirement in s 324(3)(b) of the LPA. There was a systematic failure to provide updated disclosures. There were no updates after October 2020.
- [29] As to the "client" point:
- (a) There is no provision of the LPA prohibiting a third-party payer from relying on the disclosure provision.
 - (b) As the payer, the plaintiff can rely on breaches of division 3 of the LPA.
 - (c) The court has the power to declare the agreement void under s 327 or to set it aside under s 328.
- [30] As to the s 311 LPA point, it is submitted that the s 315 LPA obligation is owed to the clients and therefore s 311 is irrelevant.
- [31] Clause 42.2 is irrelevant.

DISCUSSION

General

- [32] The starting point here is s 335 of the LPA. Section 335(2) of the LPA permits a third party payer to apply for an assessment of the whole or part of the legal costs payable by them. The plaintiff here was entitled to apply for this costs assessment.
- [33] Part 3.4 of the LPA relates to costs disclosure and assessment. Section 299 of the LPA provides the following:

¹ *Bevan v Bingham* [2023] NSWSC 19; (2023) 111 NSWLR 7 at [66]-[67].

“299 Main purposes of pt 3.4

The main purposes of this part are as follows—

- (a) to provide for law practices to make disclosures to clients regarding legal costs;
- (b) to regulate the making of costs agreements relating to legal services, including conditional costs agreements;
- (c) to regulate the billing of costs for legal services;
- (d) to provide a mechanism for the assessment of legal costs and the setting aside of particular costs agreements;
- (e) to provide for the maximum payment for a law practice’s conduct of a speculative personal injury claim, other than practice as or in the manner of a barrister.”

[34] A distinction is made between a client and a third party payer in the LPA.

[35] A client is defined in s 334 of the LPA as, “means a person to whom or for whom legal services are or have been provided.”

[36] As to third party payers, s 301(1) of the LPA provides:

“301 Terms relating to third party payers

- (1) A person is a *third party payer*, in relation to a client of a law practice, if the person is not the client and—
 - (a) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
 - (b) being under that obligation, has already paid all or a part of those legal costs.”

[37] In this case the plaintiff is not a client. This is also clear from the retainer agreement.²

[38] In those circumstances, not all of the provisions of the LPA relate to the plaintiff, but some do as the plaintiff and the defendant entered into a “costs agreement.” A costs agreement is defined in s 300 of the LPA as, “an agreement about the payment of legal costs.”

The uplift fee

[39] The term “uplift fee” is defined in s 300 of the LPA as “means additional legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates.”

[40] Section 324 of the LPA is contained in division 5 which deals with costs agreements and provides:

² Also see s 301(4) of the LPA.

“324 Conditional costs agreements involving uplift fees

- (1) A conditional costs agreement may provide for the payment of an uplift fee.
- (2) The basis of calculation of the uplift fee must be separately identified in the agreement.
- (3) The agreement must contain an estimate of the uplift fee or, if that is not reasonably practicable, both of the following—
 - (a) a range of estimates of the uplift fee;
 - (b) an explanation of the major variables that will affect the calculation of the uplift fee.
- (4) If a conditional costs agreement relates to a litigious matter, the uplift fee must not exceed 25% of the legal costs, excluding disbursements, otherwise payable.
- (5) However, this Act does not affect the right of a law practice to discount its fees and, if a law practice does discount its fees, the reference in subsection (4) to legal costs is the fees the law practice would have charged if the law practice’s fees had not been discounted.
- (6) A law practice must not enter into a costs agreement in contravention of this section.

Maximum penalty—100 penalty units.”

[41] It may be accepted that the purpose of this provision is to ensure that a person entering into a costs agreement can make an informed choice on whether or not to enter into the agreement.³

[42] In this case the agreement was that the uplift fee was only payable if there was “sufficient recovery.” The litigation here was unsuccessful and as a result the plaintiff was never liable to pay the uplift fee.

[43] Although s 327(1) of the LPA provides that a costs agreement that contravenes a provision in division 5 is void,⁴ the rest of the section must be considered. Section 327(2) of the LPA still permits a lawyer to recover legal costs under a void agreement as set out in s 319(1)(b) or (c) of the LPA, but not an amount “in excess of the amount the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.”⁵

[44] Further, s 327(4) provides:

“(4) A law practice that has entered into a costs agreement in contravention of section 324 is not entitled to recover the whole or any part of the uplift fee and must repay the amount

³ *Bevan v Bingham* [2023] NSWSC 19; (2023) 111 NSWLR 19 at [68].

⁴ In *Bevan v Bingham* [2023] NSWSC 19; (2023) 111 NSWLR 19 at [66]–[67] Bellew J noted that such an agreement is void *ab initio*.

⁵ Section 327(3) of the LPA.

received in relation to the uplift fee to the person from whom it was received.”

- [45] Ultimately, it has not been established there were breaches of s 324 of the LPA as submitted by the plaintiff.
- [46] With respect to the argument there was no explanation of the major variables affecting the calculation of the uplift fee, the fact is clause 9.3(b) (i)-(ix) of the conditional client engagement letter (schedule 6 of the retainer agreement) set out at length the major variables that would affect the total legal costs and disbursements. The variables appear to be a fairly exhaustive list and are within the spirit of the disclosure mentioned in s 308(4)(c) of the LPA. In my view the term “total legal costs” includes reference to an uplift fee.
- [47] It is clear these variables also apply to the uplift fees which were a percentage of the professional costs. I accept the defendant’s submission that clause 8.3(c) of the conditional costs agreement provided, “an uplift of 25 per cent calculated on the total charge for the professional fees rendered pursuant to the client engagement letter ...” meant the uplift was 25 per cent of the professional fees and as the professional fees rise, the uplift would also rise being always 25 per cent of the total professional fees. It follows that there was a sufficient explanation given in accordance with s 324(3) of the LPA.
- [48] Both tables to which I have referred gave a range of estimates.
- [49] With respect to the second argument, it is accepted that the table at clause 9.2 of the client engagement letter included the disbursements in calculating the total including the uplift fee.
- [50] However, I agree with the defendant’s submissions that this is a mere arithmetical error and subject to the express provisions of the agreement. The fact is various clauses of the agreement made it clear that the uplift fee was only to be charged on professional fees:
- (a) Clause 8.3(c) referred to the uplift of 25 per cent “calculated on the total charges for the professional fees rendered pursuant to the client engagement letter.” That clause specifically referred to s 324(1), (4) and (5) of the LPA.
 - (b) Clause 8.10(c) provided, “plus an uplift of 25 per cent on the professional fees ...”
 - (c) Clause 8.10(d) provided, “plus an uplift of 25 per cent on the professional fees;” and
 - (d) Clause 8.10(e) provided, “plus an uplift of 25 per cent on the professional fees.”
- [51] The meaning of the agreements in this case is to be determined objectively by examining the text, context and purpose of the agreements.⁶ The agreements have the meaning that a reasonable businessperson in the position of the parties would have

⁶ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [46].

understood the terms to mean.⁷ One has regard to the language of the contract and the circumstances known at the time the contract was formed.⁸

- [52] The words of an agreement should be interpreted in a way that gives them effect rather than in a way that makes them redundant.⁹ Also, the court is to read the contract as a whole to endeavour to give effect to the intention of the parties.¹⁰ Where there are inconsistent terms in an agreement the courts give effect to the intention of the parties so as to avoid such inconsistency.¹¹
- [53] The plaintiff, as a litigation funder, can be regarded as a sophisticated client and would have understood the clear provisions of the agreement. There was also specific reference to the relevant provisions of the LPA.
- [54] Despite the error in the table, the clear language of the agreement made it clear that the uplift was only on professional fees. Objectively speaking that was the agreement. The error in the table was immaterial and there is no material breach of s 324(4) of the LPA.
- [55] Insofar as the Law Essentials argument is concerned, a distinction is to be made for their work before the agreements commenced and the work afterwards. I infer that their fees were in fact professional costs and not disbursements as contended for by the plaintiff for the following reasons:
- (a) Clause 8.6 referred to the work that Law Essentials and the defendant had done for due diligence prior to the execution of the client engagement letter in respect of professional fees.
 - (b) Law Essentials had performed earlier work under an earlier costs agreement (clause 8.6 (c)).
 - (c) Clause 8.10 (c) referred to Law Essentials pre-retainer work as professional fees.
- [56] Also, the evidential onus was on the plaintiff in this matter to establish that the Law Essentials fees were disbursements. The plaintiff has not established this.
- [57] In addition, one must bear in mind the letter dated 15 October 2020 sent to each of the clients. The table on page 6 made it clear that the 25 per cent uplift was only to be applied to lawyers' fees and lawyers' deferred fees and not to any kind of disbursement. I accept the defendant's argument that the letter dated 15 October 2020 and the amended retainer agreement superseded the original retainer agreement. Any misconception caused by any earlier arithmetical error would have been entirely resolved by the 15 October 2020 letter.

⁷ *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at [35].

⁸ *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24; (1982) 149 CLR 337 at p 352.

⁹ *AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985 at [13].

¹⁰ *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1972) 129 CLR 99 at p 109.

¹¹ *Murray Goulburn Co-Operative Co Ltd v Cobram Laundry Service Pty Ltd* [2001] VSCA 57 at [26].

- [58] In the circumstances the plaintiff's arguments are rejected. The answer to the question is that the assessment should proceed on the basis of the existing costs agreements.

Disclosure

- [59] The next issue which is raised is whether there were breaches of the disclosure obligations here. The plaintiff's argument is that the failure to disclose the increases in the bills should lead to the costs agreements being set aside. The defendant's argument is to the contrary.

- [60] Section 315 of the LPA provides:

"315 Ongoing obligation to disclose

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

- [61] As I have already noted, the plaintiff is not a "client" for the purposes of that section. However, s 318 of the LPA provides as follows:

"318 Disclosure to associated third party payers

- (1) If a law practice is required to make a disclosure to a client of the practice under this division, the law practice must, under subsections (2) and (3), also make the same disclosure to any associated third party payer for the client, but only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs that are payable by the associated third party payer in relation to legal services provided to the client.
- (2) A disclosure under subsection (1) must be made in writing—
 - (a) at the time the disclosure to the client is required under this division; or
 - (b) if the law practice only afterwards becomes aware of the legal obligation of the associated third party payer to pay legal costs of the client—as soon as practicable after the law practice became aware of the obligation.
- (3) Section 314 applies to a disclosure to an associated third party payer under subsection (1) in the same way as it applies to a client.
- (4) An associated third party payer for a client of a law practice has the same right to obtain reports under section 317(1)(b) of legal costs incurred by the client, but only to the extent that the costs are payable by

the associated third party payer in relation to legal services provided to the client, and the law practice must comply with that section accordingly.”

[62] A question is raised about s 311 of the LPA. However, there is no evidence the plaintiff was a financial services licensee. I reject that argument.

[63] Section 318 of the LPA required relevant disclosures to the plaintiff by the defendant as to any substantial changes in the legal costs. Such a disclosure must be clear and is not ordinarily sufficiently constituted by the mere delivery of bills. The written disclosure would ordinarily include a detailed statement of any substantial changes to the original estimated legal costs given under s 308(4)(c) of the LPA.

[64] In this case, it is arguable that there was a lack of timely disclosure by the defendant to the plaintiff in both the period February 2018 to October 2020 and then from October 2020 until the termination of the relationship. The increase of a range of fees from a cap of \$4.8m to \$9.7m was a substantial change which required earlier disclosure by the defendant. I am also satisfied that an increase from the cap of \$9.7m to \$20m was a substantial change which required disclosure by the defendant.

[65] However, I do not consider that any lack of disclosure leads to invalidity of the costs agreement under s 327 of the LPA. I do accept that a discretion to set aside the costs agreement is raised under s 328 of the LPA. This is because s 322(6) of the LPA extends the operation of the section to third party payers.

[66] Returning to the question of whether the costs agreements should be set aside, I do not think they should be.

[67] Section 328(1) of the LPA provides:

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

[68] Section 328(2) of the LPA provides as follows:

“(2) In deciding whether or not a costs agreement is fair or reasonable, and without limiting the matters to which the Supreme Court or tribunal can have regard, the Supreme Court or tribunal may have regard to any or all of the following matters—

(a) whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice or of any representative of the law practice;

(b) whether any Australian legal practitioner or Australian-registered foreign 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;

- (c) whether the law practice failed to make any of the disclosures required under division 3;
- (d) the circumstances and conduct of the parties before and when the agreement was made;
- (e) the circumstances and the conduct of the parties in the matters after the agreement was made;
- (f) 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;
- (g) whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement.”

[69] The plaintiff in this case solely relies on the lack of disclosure. But as Byrne SJA said in *Barclay & Ors v McMahan Clarke (A Firm)*¹² that is only one factor to be considered.

[70] In *McLaren v Wiltshire Lawyers Pty Ltd*, Martin J, when examining s 328 of the LPA, said:

- (a) The term “fairness” refers to the mode of obtaining the agreement. If the client understands it then that satisfies this requirement.¹³
- (b) The factors to be taken into account depend on the circumstances of the case including the scope of the retainer; the terms of the agreement; the kind of legal work undertaken; the client’s knowledge and circumstances and other matters.¹⁴
- (c) A basic consideration is whether the client’s decision to enter into the agreement was a free and informed choice.¹⁵
- (d) An agreement is unreasonable if the client can show objectively that the agreement is unreasonable.¹⁶ In this regard it may be that costs agreements that allow for excessive remuneration are unreasonable.¹⁷

[71] The degree of sophistication of the client is also a relevant factor to be considered.¹⁸

[72] The following factors are relevant on the evidence before me:

- (a) The plaintiff is not a client of the defendant.

¹² [2014] QSC 20 at [24].

¹³ [2019] QSC 305; (2019) 3 QR 158 at [18].

¹⁴ [2019] QSC 305; (2019) 3 QR 158 at [19].

¹⁵ [2019] QSC 305; (2019) 3 QR 158 at [19].

¹⁶ [2019] QSC 305; (2019) 3 QR 158 at [20].

¹⁷ [2019] QSC 305; (2019) 3 QR 158 at [25].

¹⁸ *Lewis Blyth & Hooper (a firm) v Smith* [2015] WASCA 47; (2015) 48 WAR 467 at [76].

- (b) There was no fraud or misrepresentation alleged in this case to enter into the agreement.
 - (c) The plaintiff was not a vulnerable client and could be regarded as sophisticated.
 - (d) The defendant did make further disclosures on 15 October 2020 as to the increase in costs.
 - (e) The fact is the plaintiff paid the bills as it received them.
 - (f) The fact is this was a complex litigation as all parties understood.
 - (g) The letter dated 15 October 2020 to the plaintiff provided reasonable disclosure at that point as to the state of costs.
- [73] The plaintiff on the evidence has not established that the costs agreements are unfair or unreasonable such that they should be set aside.
- [74] However, there is some evidence of a failure by the defendant to disclose the significant increases in costs. In those circumstances the costs assessor should have regard to the provisions of s 316 of the LPA in conducting the assessment.
- [75] Section 316(4) of the LPA provides:
- “(4) If a law practice does not disclose to a client or an associated third party payer anything required by this division to be disclosed, then, on an assessment of the relevant legal costs, the amount of the costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose.”
- [76] I make no further findings on this issue as this is a matter for submissions and findings by the costs assessor.

ISSUE 2 – WHETHER MORAY & AGNEW LAWYERS AS SOLICITORS APPOINTED BY THE DEFENDANT SHOULD BE HEARD ON THE ASSESSMENT OR ONLY ON THE HEARING OF THESE ISSUES

Plaintiff’s submissions

- [77] The plaintiff does not oppose the defendant being represented on the preliminary issues before the court but there should be limited involvement in the assessment process.

Defendant’s submissions

- [78] The decision on how the assessment is conducted is one for the costs assessor subject to UCPR r 720. The procedure is to be fair, efficient and consistent with the rules of natural justice. As a matter of natural justice, the solicitors for the defendant should be permitted to make their submissions.

Discussion

- [79] Rule 720 of the UCPR provides that:

“720 Procedure on assessment

- (1) A costs assessor appointed to carry out a costs assessment is to decide the procedure to be followed on the assessment.
- (2) However, the procedure must be—
 - (a) appropriate to the scope and nature of the dispute and the amount in dispute; and
 - (b) consistent with the rules of natural justice; and
 - (c) fair and efficient....

...

- (4) Without limiting subrule (1) or (2), the costs assessor may decide to do all or any of the following—
 - (a) hear the costs assessment in private;
 - (b) carry out the costs assessment on the papers without an oral hearing;
 - (c) not be bound by laws of evidence or procedure applying to a proceeding in the court;
 - (d) be informed of the facts in any way the costs assessor considers appropriate;
 - (e) not make a record of the evidence given.”

[80] The defendant’s submissions should be accepted. There is no reason why there should be a limitation on Moray & Agnew making submissions as to the assessment on behalf of the defendant. As to how this is done is a matter for the costs assessor.

ISSUE 3 – WHETHER THE COSTS ASSESSOR MAY CALCULATE AND IMPOSE INTEREST ON ANY SUM ADJUDGED TO BE PAYABLE BY THE DEFENDANT TO THE PLAINTIFF IN THE COURSE OF THE ASSESSMENT AND IF SO THE APPLICABLE RATE TO BE APPLIED

Plaintiff’s submissions

[81] This is a case where there has been an overpayment. Interest is a necessary incident of any refund. The costs assessor can and should calculate interest here.

Defendant’s submissions

[82] The role of the costs assessor is to calculate the amount the solicitor is entitled to charge and recover from the client (r 743). The costs assessor’s duty is complete once the certificate is completed. It is the court which issues the orders as to the amount payable.

Discussion

[83] The defendant’s submissions on this point are accepted.

- [84] Rule 737 of the UCPR provides that at the end of a costs assessment the costs assessor files a certificate in the court. Rule 740 of the UCPR refers to judgment for the certified amount. Under r 743H of the UCPR the matter can be relisted in court for further argument. In my view, the issue about repayment and interest calculation is a matter for the court. It is for the court to make final orders.

CONCLUSION

- [85] In conclusion, the questions are answered as follows:

1. The answer to question 1 is that the assessment should proceed on the basis of the existing costs agreements.
2. The answer to question 2 is that the solicitors for the defendant can be heard on the assessment.
3. The answer to question 3 is that it is not for the costs assessor to calculate and impose interest on any refund.
4. I will hear the parties on the question of costs.