

Practice & procedure

by Sheryl Jackson

Two recent decisions in the Supreme Court of Queensland consider the scope of some provisions of the *Legal Profession Act 2007* (Qld), including the definition of “third party payer” in s301 of the Act.



Legal Profession Act 2007 – entitlement to itemised bill – meaning of “client” – meaning of “third party payer” – whether beneficiary entitled to seek costs assessment order against trustee’s solicitor – whether beneficiary had legal obligation to pay costs.

***Legal Services Commissioner v Wright* [2010] QSC 168**

Facts

The respondent solicitor (the respondent) acted for Mr Anderson in proceedings flowing from the breakdown of his de facto relationship with Ms Anderson. This included a proceeding in the District Court under Part 19 of the *Property Law Act 1974* (Qld).

The parties reached an agreement that led to the making of a consent order in the District Court on 12 August 2008. The order provided for the sale of real property registered in Mr Anderson’s name, and the distribution of the net proceeds in the proportions of 75 percent to Ms Anderson and 25 percent to Mr Anderson. The order further provided: “D M Wright and Associates will act on the Respondent’s (Mr Anderson’s) behalf in the conveyance of the sale of the property.” Various amounts were to be paid under the order, including all costs and expenses of the sale, with the balance to be paid 75 percent to Ms Anderson and 25 percent to Mr Anderson.

The respondent charged \$7,179.76 for “legal fees associated with the sale”. Ms

Anderson sought an itemised bill of costs under s332 of the *Legal Profession Act 2007* (Qld) (the Act). This was refused on the basis that Ms Anderson was not the respondent’s client or a third party payer.

Ms Anderson lodged a complaint with the Legal Services Commissioner. The commissioner filed an originating application seeking declarations that Ms Anderson was a client of the respondent, or a third party payer in relation to Mr Anderson, or was otherwise entitled to apply for an assessment of the costs.

Legislation

Section 335 of the Act grants an entitlement to apply for an assessment of the whole or any part of legal costs to “a client”, and to a “third party payer” in relation to any such costs payable by the third party payer.

Section 332 enables any person who is entitled to apply for an assessment of legal costs to which a lump sum bill relates to request the law practice to give the person an itemised bill. The law practice must comply with the request within 28 days after the date on which the request is made.

“Client” is defined in s334 to mean “a person to whom or for whom legal services are or have been provided”.

Section 301 of the Act defines “third party payer”. It provides, so far as relevant:

(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.

(3) A third party payer is a *non-associated third party payer* if the legal obligation mentioned in subsection (1)(a) is owed to the client or another person but not the law practice.

(4) A legal obligation mentioned in subsection (1) can arise by or under contract or legislation or otherwise.

Analysis

It was submitted for the commissioner that

the respondent had provided legal services to Ms Anderson, and that she was “a client” of the respondent. It was argued that, in receiving the fund of money on the sale of the property and purporting to distribute it according to the court order, the respondent took on the role of solicitor for Ms Anderson, so that an implied retainer arose.

The Chief Justice concluded that no implied retainer arose. Among the factors his Honour regarded as persuasive was the specification in the consent order that the respondent would be acting on Mr Anderson’s behalf “in the conveyance of the sale of the property”; that Ms Anderson was separately represented by other solicitors at the time of the consent order, and there was no suggestion those solicitors would cease to act; and the prospect of conflict of interest if the respondent’s firm were to be acting for both parties.

His Honour accepted it would be unsatisfactory if Ms Anderson was left with no capacity to pursue a challenge to the respondent’s account, but noted that there were other avenues for relief. These included the possibility that, if the amount of the bill of costs were unreasonable, it was likely Ms Anderson could bring a proceeding against Mr Anderson for an accounting in respect of this excess. Another possible avenue would be for Ms Anderson to request the Legal Services Commissioner to exercise his power under the complaint to require production of the itemised bill, which could lead to a proceeding for an order for compensation.

An alternative submission for the commissioner was that Ms Anderson was a “third party payer” as defined in s301 of the Act. This argument was also rejected. The Chief Justice accepted that under the consent order Ms Anderson was under a legal obligation to discharge certain expenses of the sale, including the respondent’s costs, but the Chief Justice found that legal obligation to be owed to Mr Anderson. His Honour said (at [26]-[28]):

[26]“The order obliges Mr Anderson and Ms Anderson to apply the proceeds of sale first in payment of costs. The legal costs were primarily payable by Mr Anderson, because the respondent, entitled to the

payment, was his solicitor. Mr Anderson presumably remained primarily liable notwithstanding the court order, to which the respondent was not a party.

[27]“All that has happened is that as between Ms Anderson and Mr Anderson, there has been agreement about how the costs will be paid, which would result in Ms Anderson bearing three-quarters of them and Mr Anderson one-quarter.

[28]“But by force of the court order, Ms Anderson undertook no legal obligation vis-a-vis the respondent, and that is I believe the sort of obligation which section 301 has in mind.”

Order

As it was not suggested there was any basis for an application for assessment other than Ms Anderson being a client of the respondent or a third party payer, the application was dismissed.

Amos v Ian K Fry & Company [2010] QCA 131

Facts

A number of proceedings had been conducted, to which Edward Amos (Amos) and his brother (the executor), who was the executor and trustee of their late father's estate, were parties. The two brothers and their sister were the beneficiaries of the estate.

In proceedings in the Supreme Court relating to the administration of the estate, an order had been made requiring Amos to pay the “unnecessary costs of the administration of the estate” flowing from the conduct of Amos. The order also provided for the sale of the main asset of the estate, with the executor to then deduct the costs payable to Ian K. Fry and Company (the solicitor), who had been retained by the executor, from Amos' share of the estate of the proceeds of sale, and to pay those costs to the solicitor.

Amos sought leave to commence proceedings for a costs assessment order against the solicitor in respect of invoices prepared by the solicitor for costs. That application was dismissed. Lyons J held that Amos was not a third party payer as defined in the Act, because he had no legal obligation to pay the costs and therefore was not entitled to an order that the costs be assessed. Amos filed a notice of appeal from this order.

The solicitor then brought an application seeking a number of orders, including orders that the appeal be dismissed or stayed permanently, or alternatively, that it be struck out as vexatious and an abuse of process and as disclosing no prospect of success. One of the issues to be considered on the application

“His Honour had suggested that provision may have been “inadvertently” omitted.”

was whether Amos had standing to seek a costs order.

Analysis

It was submitted for Amos that by virtue of the order authorising the deduction of the solicitor's costs from the share of the estate otherwise payable to Amos, Amos became a third party payer of the solicitor's fees “absolute”. This was said to be because nothing was distributed to him under his late father's will but his share went to pay the solicitor's bill of costs.

White JA was referred to the decision of the Court of Appeal in *Equuscorp Pty Ltd v Short Punch & Greatorix* [2000] QCA 407. In that case *Equuscorp Pty Ltd* was the owner of the majority of the units in a unit trust and brought proceedings against the trustee and the manager of the trust. Each of the trust and manager retained firms of solicitors who rendered bills of costs to their respective client.

Equuscorp sought to challenge those bills under the *Queensland Law Society Act 1952* (Qld). The Chief Justice held that the words “liable to pay” as appearing in the definition of “client” in section 3 of that Act carried their usual meaning. His Honour concluded that the ownership of the units created no liability to pay the solicitor's costs.

In considering the judgments in *Equuscorp*, White JA noted the observation of McPherson JA in that case that s31 of the *Costs Act 1867* (Qld) (repealed) had given a right to a beneficiary or other person interested in property out of which costs were paid or to be payable, to obtain an order for taxation. His Honour had suggested that provision may have been “inadvertently” omitted. White JA said, however (at [44]): “If that were so, the legislature has had ample opportunity since the 1952 Act and the decision in *Equuscorp* to insert such an enabling provision but has not.”

White JA was satisfied the solicitor, were

he minded to do so, could not recover his costs incurred in work for the estate from a beneficiary, and that Amos was not legally liable to pay the solicitor's costs. Her Honour said the status of Amos as a beneficiary was not altered by the earlier orders. It was the executor/trustee who had approved the solicitor's bill of costs for the costs authorised by the court to be deducted from Amos' share of the estate, and it was to him Amos should have looked.

Order

It was concluded that Amos had no standing to bring the proceedings, and that Lyons J was correct to refuse leave on the ground that there was no prospects of success on the application. The Notice of Appeal by Amos was dismissed.

Comment

It may be noted that in his decision in *Wright*, the Chief Justice accepted that under the court order Ms Anderson may have a legal obligation to Mr Anderson in respect of the costs, but found this insufficient to fall within s 301 of the Act. However the decision does not specifically consider why Ms Anderson was not in consequence a “non-associated third party payer” within subsection (3).

In *Amos*, there was no finding of any legal obligation to pay the solicitor's legal costs. That decision does not exclude situations where the liability is owed to someone other than the solicitor, such as a mortgagee or lessor: see *Boyce v McIntyre* [2009] NSWCA 185, where the obligation of a sub-lessee to pay legal costs was held to be a legal obligation to pay.

It should also be noted that in neither case was there any suggestion that the costs charged by the solicitors were in fact excessive, or their conduct otherwise inappropriate. Such circumstances may enliven the inherent jurisdiction of the Supreme Court, preserved in s27 of the *Legal Profession Act 2007* (Qld), to control and discipline its officers.

This column is prepared by Sheryl Jackson of the Queensland Law Society Practice & Procedure Committee. The committee welcomes contributions from members. Email details or a copy of decisions of general importance to: s.jackson@qut.edu.au. The committee is interested in decisions from all jurisdictions, especially the District Court and Supreme Court.