

Practice & procedure

A recent Court of Appeal case examines the meaning of 'third party payer' in terms of the Part 3.4 of the *Legal Profession Act 2007*.

Legal Profession Act 2007 s301 – entitlement to itemised bill – meaning of 'third party payer' – whether legal obligation to pay costs

In *Legal Services Commissioner v Wright* [2010] QCA 321, the Queensland Court of Appeal allowed an appeal from the first instance decision. The decision involved the construction of "third party payer" in Part 3.4 of the *Legal Profession Act 2007* (Qld) (the Act).

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).

An order made in the District Court proceedings by consent in 2008 provided for the sale of real property registered in Mr Anderson's name. 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 of the proceeds of sale to be paid 75% to Ms Anderson and 25% to Mr Anderson.

The respondent charged \$7,179.76 for her legal fees on the conveyance, and paid this amount to herself from the proceeds of sale held in her trust account. Ms Anderson asked the respondent for an itemised bill of costs under s332 of the Act. The respondent refused the request on the basis that Ms Anderson was not the respondent's client or a third party payer. Ms Anderson complained to the Legal Services Commissioner.

The commissioner filed an originating application seeking declarations that Ms Anderson was a client of the respondent for the purposes of Part 3.4 of the Act, or alternatively that she was a "third party payer" under that part, and that she was therefore entitled to apply for an assessment of costs under s335 of the Act.

At first instance the commissioner failed on

both arguments (see Practice and Procedure, (2010) 30(7) *Proctor* 42). The commissioner appealed to the Court of Appeal.

Issue

The issue was whether she was a "third party payer" as defined in s301 of the Act. The argument that Ms Anderson was a client of the respondent was not pressed before the Court of Appeal.



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.

Section 301 of the Act defines "third party payer". It provides, so far as is 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

At first instance the Chief Justice had rejected the submission for the commissioner that Ms Anderson was a "third party payer" as defined in s301 of the Act. His Honour had accepted that Ms Anderson was under a legal obligation to discharge certain expenses of the sale, including a proportion of the respondent's costs, but he emphasised that this legal obligation was owed to Mr Anderson and not to the respondent (see [2010] QSC 168 at [26]-[28]).

In the Court of Appeal, McMurdo J noted, however, that the primary judge had made no reference to s301(3) and to its definition of "non-associated third party payer". In his Honour's view, it necessarily followed from the finding that Ms Anderson was obliged to pay a proportion of the legal costs, that she was a third party payer and was entitled to apply for an assessment.

The respondent sought to contest the finding at first instance that Ms Anderson owed a legal obligation to Mr Anderson. She argued the burden of paying 75% of the costs fell upon Ms Anderson as a practical consequence of the agreed distribution of the proceeds of sale, and not because the District Court order conferred a right on Mr Anderson to sue Ms Anderson for his share of the costs. The respondent's argument sought to liken to case to *Amos v Ian K Fry & Company* [2010] QCA 131 (See also Practice and Procedure, (2010) 30(7) *Proctor* 42) ('Amos').

McMurdo J discussed a number of authorities in Queensland and elsewhere relating to the question of whether a person was entitled to challenge a solicitor's bill as being "liable to pay" or "under a legal liability to pay" that bill.

These included: *Amos; Equuscorp Pty Ltd v Short Punch & Greatorix* [2001] 2 QdR 580; *Freehill Hollingdale & Page's Bill of Costs* [1998] 1 QdR 616; *Debney v Semerdziew* [1982] 2 NSWLR 391, and *Andrew Koh Nominees Pty Ltd v Receiver & Manager of the Balneum Joint Venture* [2007] WASC 152. In the latter two decisions, a wide construction of the expression "liable to pay" was adopted, extending to persons whose property could lawfully be applied in paying the legal fees in a bill of costs.

It was submitted for the appellant that a person is under a legal obligation to pay the costs under s301 of the Act in every case in which that person would have been regarded as "liable to pay" the costs under previous statutes in Queensland and their equivalents in other jurisdictions. McMurdo J rejected this submission. His Honour said that s301 was unambiguous, and that it could not be construed as including a case where a person might be "liable to pay" the costs unless the person was also under a legal obligation to pay those costs.

Upon the facts before him, however, McMurdo J was satisfied that Ms Anderson had a legal obligation to cause the proceeds of sale to be paid in various ways according to the order of the District Court. The obligation could have been enforced by Mr Anderson, claiming that she must contribute 75% of the shortfall for which he would have been liable to the respondent. His Honour said (at [31]):

"Moreover, the legal obligation to cause the proceeds of sale to be applied in accordance with the order had its basis and thereby its enforceability primarily from the force of the order itself, as well as its contractual force. It

was thereby an obligation enforceable not only by a money claim, but also by proceedings to compel compliance with the Court's order."

Having confirmed the primary judge's findings as to Ms Anderson's obligation, His Honour said it followed that the appellant ought to have succeeded.

Holmes JA agreed with McMurdo J that the District Court order imposed a legal obligation on Ms Anderson to pay part of the legal costs for legal services provided to Mr Anderson, so as to make her a third party payer under s301(1) of the Act, and as a result to entitle her under s335(2) of the Act to apply for an assessment of the costs payable by her. As she was satisfied Ms Anderson clearly had the relevant legal obligation in this case, her Honour did not find it necessary to resolve where the parameters of the expression "legal obligation" lay. White JA agreed with the reasons of McMurdo J and the orders he proposed.

Order

It was declared that upon the proper construction of Part 3.4 of the *Legal Profession Act 2007* (Qld), the applicant in the District Court proceedings was, and was at all material times, a "third party payer". She was accordingly entitled to apply for an assessment of the legal costs charged and drawn by the respondent from the proceeds of the sale of the real property identified in the order made in the District Court proceedings in August 2008.

Comment

It is worthy of note that White JA included in her judgment a significant retraction from her

own conclusion in *Amos* that Edward Amos was not legally liable to pay the respondent solicitor's costs. Her Honour said in that regard (at [7]): "The extent to which *Amos* might suggest that a person liable to pay any part of a solicitor's costs out of a fund by virtue of an order of the court was not *legally* liable to pay costs must be regarded as incorrect..." However, both her Honour (at [7]) and McMurdo J (at [29]) confirmed the outcome in *Amos* on the basis that the appellant in that case sought an assessment not of a discrete bill for the costs he was legally obliged to pay, but of the solicitors' bills for all of the work performed for the estate. In those circumstances the costs he sought to have assessed were not the costs which he was obliged to pay.

As the primary judge had not explained why Ms Anderson was not a "non-associated third party payer" within subsection (3) of the Act, the decision on the appeal is not surprising. It may be regarded as surprising, however, that the appellant had agreed that he would not seek costs if successful, and there was accordingly no order as to costs below or on appeal. This concession, which must be regarded as generous, was explained as being in recognition of the significant public interest in the proceedings.

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.



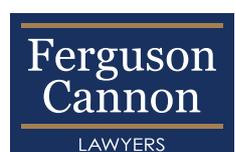
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