No client agreement? WHAT SCALE?

Although there have been recent court decisions on legal costs in the absence of a costs agreement, there are still a number of grey areas, as **Stephen Hartwell** explains.

Section 319(1) of the *Legal Profession Act 2007* (the 2007 Act) provides relevantly that, as between a law practice and its client, the legal costs recoverable will be:

(a) Under a costs agreement, or

(b) If paragraph (a) does not apply – under the "applicable scale of costs", or

(c) If neither paragraph (a) nor (b) apply – according to the "fair and reasonable value of the legal services" provided.

The provision is similar, but not identical, to s48I of the *Queensland Law Society Act 1952* (the 1952 Act).

Whilst the assessment of costs under a client agreement does not present any particular problem, issues arise where there is no agreement and it must be determined whether there is an "applicable scale of costs".

Gilbert v Kozicki[1]

Two recent decisions, one of the Supreme Court and one of the District Court, approach this question in different ways. Both dealt with s48I of the 1952 Act and in both situations the law practice was unable to prove that there was a client agreement in existence.

Justice Lyons, in *Gilbert v Kozicki*, determined that the scale in Schedule 1 of the *Uniform Civil Procedure Rules 1999* (UCPR) titled 'Scale of Costs – Supreme Court', was not a scale provided under an Act for work done in connection with a proceeding in the Supreme Court. Her Honour found that:

(i) it did not purport to be a scale applicable between lawyer and client and applied only to an assessment of costs on a party and party basis, and

(ii) to interpret the section otherwise would be to apply a penalty to the law practice for failing to enter into a client agreement, and

(iii) that such a provision would require clear and precise language.

In coming to this conclusion, her Honour relied upon the dicta of Fryberg J in *Herald v Worker Bee (Brisbane) Pty Ltd*[2] and upon the submission put to her in the course of argument to the effect that, at the time the relevant provisions of the 1952 Act were introduced in 1998, there were no scales under legislation fixing costs as between solicitor and client.

The result was that the law practice was entitled to recover its fees based on an amount assessed as a reasonable amount for the work rather than being limited to the Supreme Court scale of costs.

Bannerot v Garland Waddington[3]

The issue more recently received a thorough examination by Judge McGill of the District Court in *Bannerot v Garland Waddington*. That case involved an application for assessment of legal costs as between a law practice and a client pursuant to s335 of the 2007 Act. Directions were sought regarding the appointment of an assessor and the conduct of the assessment.[4]

It was conceded in the course of the proceedings that the matter would be resolved on the basis that there was no client agreement and the issue considered by the judge was whether there was a scale for the work provided under an Act (s48I(1)(b)). The accounts delivered by the law practice related to matrimonial proceedings in the Federal Magistrates Court. The applicant submitted that Schedules 3 and 4 of the *Federal Magistrates Court Rules* were a scale for work provided under an Act.

For the reasons given subsequently in this article, it was determined that that scale was not applicable. However, in the course of considering the question his Honour looked at the earlier Supreme Court decisions in *Herald v Worker Bee* and *Gilbert v Kozicki* and cast significant doubt as to the basis upon which they were decided.

McGill DCJ made these observations:

1. The submission put to Justice Lyons (and accepted by her) in *Gilbert v Kozicki* to the effect that at the time the relevant provisions of the 1952 Act were introduced by the *Civil Justice Reform Act 1998* (the 1998 Act) there were no scales under legislation fixing costs as between solicitor and client was incorrect.

2. At the time of the enactment of the 1998 Act, the *Supreme Court Rules* provided in Order 91 Rule 30 that solicitors be entitled to charge, and be allowed the fees set forth in Schedule 1. Similar rules existed in the District and Magistrates Court and the notes preceding each of the scales in the Schedule provided specifically for the assessment of costs as between solicitor and client.

The position therefore, at the time of the 1998 amendment, was that there were scales in Queensland which did apply to costs as between lawyer and client in relation to litigation matters and it was obvious that these were scales that the legislation intended to make applicable in these circumstances, that is, where there was no valid client agreement.

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3. When the UCPR commenced in 1999, Rule 678 then provided that Part 2 of Chapter 17, including the rule providing for the Schedules, did not apply to costs to which the 1952 Act Part 2A, Division 6A applied. His Honour found that the purpose of s678(2) was to make it clear that the mechanism provided for in Chapter 17 of the UCPR, which included the process of assessment by the Registrar, did not apply to the process of assessment of costs under the 1952 Act (which from that time was to be dealt with by assessors appointed by the Solicitors Complaints Tribunal). There was, however, nothing in Rule 678(2) which indicated that the Schedules should not apply to costs as between lawyer and client in those circumstances which did not fall within Division 6A of Part 2A of the 1952 Act.

4. His Honour also suggested that it was arguable that Division 6A of Part 2A of the 1952 Act applied only in circumstances where there was a client agreement, that is to say, the situation where s48I(1)(a) of the 1952 Act applied. It is arguable that, in the absence of a valid client agreement, the exclusion provided for in Rule 678, excluding the operation of Rule 690 and the Schedules, would not apply.

5. It is interesting to note that at footnote 7 of his Honour's judgment, he suggests that the current form of Rule 678(2)(a) (introduced by amendments to the UCPR which took effect on December 10, 2007) provides that the section does not exclude the scales. The current version of Rule 678(2) provides that Chapter 17A Part 2 of the UCPR applies to costs payable or to be assessed under the 2007 Act only if s319(1)(b) of the 2007 Act applies to the costs. Section 319(1)(b) refers to the "applicable scale of costs". The applicable scale of costs is not defined in the 2007 Act but "scale of costs" is defined in s300 of the 2007 Act to include "the costs for a court prescribed under the *Supreme Court of Queensland Act 1991* in relation to a matter".[5]

6. His Honour also considered that it was plausible that s48I(1)(b) could be construed to apply to scales not otherwise applicable as between solicitor and client, on the basis that the scales were made applicable by s48I(1)(b) itself. However, his Honour did not elaborate on this issue.

7. Whilst his Honour clearly indicates that the Supreme, District and Magistrates Court Scales of Costs should apply to the assessment of costs as between a legal practice and client in the absence of a client agreement in respect of work done in those courts, what of the work done in other courts?

For the reasons given below, his Honour found that the Federal Magistrates Court Scale was not an applicable scale as contemplated by s48I(1)(b).[6] His Honour determined that s48I(1)(c) would apply in that situation and that costs should be assessed by the costs assessor as a reasonable amount for the work. The basis upon which his Honour came to that conclusion was as follows:

(i) Section 7 of the *Acts Interpretation Act 1954* (Qld) provides that, when the legislature wishes to refer to legislation other than Queensland legislation, it uses the word "law" rather than the word "Act". Accordingly, the scale which s48I(1)(b) could apply to would only be a scale directly or indirectly under the control of the Queensland legislature.

(ii) Whilst it was unnecessary for his Honour to consider whether in any event the Queensland legislation had purported to make the Federal Magistrates Court Scale applicable, he noted that Rule 21.09(3) of the *Federal Magistrates Court Rules* provided that: "Unless otherwise provided, these Rules do not regulate the fees to be charged by lawyers as between lawyer and client in relation to proceedings in the Court."

There is a note following subsection 3 to the following effect: "For any dispute between a lawyer and a client about the fees charged by the lawyer, see the state or territory legislation governing the legal profession in the state or territory where the lawyer practises."

It was submitted on behalf of the applicant that the effect of the note was to specifically make applicable the provisions of the 1952 Act so that they operated by reference to the scale provided in the *Federal Magistrates Court Rules*. His Honour considered that the argument gave too much regard to the terms of the note and insufficient regard to the terms of subsection (3).

His Honour went on to state that, if the Commonwealth legislation provided that the scale was not to be used for a particular purpose, there would be difficulty because of s109 of the Australian Constitution in the state legislation purporting to do that.

Current position

Whilst s319(1) of the 2007 Act is not identical to s48I(1) of the 1952 Act, it is suggested, having regard to the cases discussed here, that the position is as follows:

1. If there is a valid client agreement then costs will be assessed according to the terms of that client agreement (s319(1)(a)).

2. Arguably, the phrase "scale of costs" in s308(1)(a) of the 2007 Act (which deals with costs disclosure) would be given the same interpretation as that advocated by McGill DCJ in *Bannerot v Garland Waddington* and a law practice should, in litigious matters in the state courts, disclose to the client the scales in Schedules 1 to 3 of the UCPR. The consequences of failing to make proper disclosure are set out in s316 of the 2007 Act.

3. If there is no valid client agreement, and the work done the subject of the retainer relates to proceedings in the Magistrates Court, District Court or Supreme Court, then it is arguable (although not clear) that costs should be assessed according to the scales provided for in Schedules 1 to 3 of the UCPR.

Whilst the decision of the Supreme Court in *Gilbert v Kozicki* is contrary to this, it seems clear that this decision was based upon a misunderstanding and, in any event, the problem may be solved by way of operation of Rule 678(2)(a) as discussed above as it has applied since December 10, 2007.

4. In respect of work done in the federal courts in the absence of a client agreement, s319(1)(c) will apply and a law practice would be entitled to recover fees which are a fair and reasonable value for the legal services provided. Presumably, it could be argued that the scales could be used by an assessor as a benchmark for determining a fair and reasonable value. It could also well be argued that evidence of the market rate could be used, but from where would an assessor draw a conclusion as to the market rate?

5. In non-litigious matters, it was long the practice of the taxing officers of the courts to use a scale (usually the Supreme Court scale) to assess costs payable as between a solicitor and client.

Certainly, the cases referred to above give no judicial support to that view although, as stated above, the scales could well be used by an assessor as a benchmark for determining a fair and reasonable value for the work in the absence of a client agreement.■

Notes

1 [2007] QSC 268.
2 [2004] 2 Qd R 263 at pp264-265.
3 Unreported, District Court of Queensland, McGill DCJ, July 25, 2008.
4 In both cases the 2007 Act applied to the application for assessment, whilst the legislation applicable at the time the work was done was the 1952 Act.
5 This position seems to have been contemplated by Deane & Garrett, 'All About Costs '08', Proctor, April 2008, at p26.
6 The Legal Practice Committee of Queensland was of a contrary view in *LSC v Duffield* (unreported, Legal Practice Committee of Queensland, May 26, 2008) when it was accepted, apparently without argument, that the Federal Magistrates Court Scale would apply in such a situation.