Court overrides costs assessment limits

Branson v Tucker [2012] NSWCA310

by Sheryl Jackson

Given similarities in the relevant provisions of New South Wales and Queensland legislation relating to costs, practitioners can anticipate that a court may examine the reasonableness of costs, even under a costs agreement and even though applicable time limits have passed.

Costs – barrister claiming amount in bill of costs rendered to firm of solicitors – amount claimed under costs agreement – amount disputed after expiration of time for assessment under *Legal Profession Act 2004* (NSW) – whether District Court had jurisdiction to determine reasonableness of costs – whether jurisdiction ousted by statutory costs assessment regime

In *Branson v Tucker* [2012] NSWCA310 a barrister who had been retained by solicitors to provide legal services for the benefit of the solicitors' client sued those solicitors in the District Court to recover his fees.

The barrister and solicitors had entered into a costs agreement. The key question for determination was whether, in circumstances where there had been no application under the *Legal Profession Act 2004* (NSW) (LPA) for an assessment of the costs the subject of the barrister's bill and it was no longer possible for such an application to be made, the solicitors were unable to dispute their liability for the amount claimed.

Background

The applicant was a barrister and the respondents were a firm of solicitors.
The respondents briefed the applicant in September 2009 to advise and appear for some clients of the respondents in litigation then pending in the Federal Court of Australia in Sydney. In the Federal Court proceedings the applicant had been successful in all respects, with the proceedings resulting in orders very favourable to the respondents' clients.

A costs agreement had been entered into between the applicant and the respondents, providing hourly rates for various work and a daily rate for hearing days. An initial estimate of a total fee of about $65,000 was provided, but there were several subsequent revisions of that estimate with the final estimate being for $179,000. There was also a provision that interest would be charged, at a specified rate, on any fees that were outstanding more than 30 days.

The amount of fees ultimately rendered, excluding GST, was $229,225. One of the memoranda of fees rendered by the applicant as the matter progressed, for an amount of $109,532.50, was questioned and at least initially, not paid. On 1 March 2010, the respondents sought to have that memorandum of fees assessed under the LPA, but they were unsuccessful because the 60-day period allowed by s351(3) of the LPA for the making of such an application had elapsed.

The applicant sued the respondents in the District Court of New South Wales seeking to recover the amount of unpaid fees, together with interest as allowed under the costs agreement, and costs. In their defence and cross-claim, the respondents pleaded that the charges were far in excess of the estimates, that the hours charged exceeded what was reasonably and necessarily required, that there was a breach of the implied term of the retainer in this regard and that the respondents had suffered loss by reason of the breach. The cross-claim repeated matters pleaded in the defence.

The applicant filed a notice of motion for orders including the striking out of that defence and cross-claim under r14.28 of the *Uniform Civil Procedure Rules 2005* (NSW). It was contended that the defence and cross-claim were clearly untenable and could not succeed.

On 23 May 2011, Judge Quirk dismissed the applicant's notice of motion and granted leave to the respondents to file and serve an amended defence and cross-claim.

The applicant sought leave to appeal to the Court of Appeal. The application for leave was heard on the basis that the court heard all of the argument that would be put if leave to appeal were to be granted. It was common ground that the relevant law to apply was the law of New South Wales.

Legislation

The application was assessed against a background of the provisions contained in the LPA governing the manner in which barristers can be engaged, and the charging and assessment of legal costs.

Part 3.2 of the LPA relates to costs disclosure and assessment, with the purpose for that part set out in s301. Paragraph (d) of that section specifies as one such purpose: "to provide a mechanism for the assessment of legal costs and the setting aside of certain costs agreements".

Sections 319 provides:

> **319 On what basis are legal costs recoverable?**
>
> (1) Subject to the provisions of this Part, legal costs are recoverable:
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> (a) in accordance with an applicable fixed costs provision, or
>
> (b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or
>
> (c) if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.

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Section 326 provides:

> **326 Effect of costs agreement**
>
> Subject to this Division and Division 11, a costs agreement may be enforced in the same way as any other contract.

Division 11 of Part 3.2 (ss349A to 395A) deals with costs assessment. Section 366 (Court or tribunal may determine matters) states that Division 11 does not limit any power of a court or a tribunal to determine in any particular case the amount of costs payable or that the amount of the costs is to be determined on the indemnity basis.

Analysis

It was submitted for the applicant that Division 11 of Part 3.2 of the LPA provides an exclusive scheme whereby bills of costs are assessed by costs assessors; and that this scheme is one of the exceptions that the LPA recognises to a costs agreement being enforceable in the same way as any other contract. Since the respondents did not seek an assessment under Division 11 within the 60-day period allowed under s351(3) of the LPA (Application for costs assessment by law practice retaining another law practice) the applicant argued that they could not subsequently seek to question the reasonableness of the costs by a different procedure.

The leading judgment was delivered by Campbell JA, with whose reasons Beazley and Barrett JJA agreed. His Honour examined a number of decisions relied on by the applicant, but found nothing in any of these decisions to advance the contention that the costs assessment process provided by the LPA is the only means by which the reasonableness of legal costs can be ascertained.

The applicant also sought to support his contention by pointing to the absence of any provision in the LPA conferring power on the District Court to decide the reasonableness of costs. Campbell JA noted however, that it was the jurisdiction conferred by s44(1) of the *District Court Act 1973* (NSW) that the applicant invoked in his claim against the respondents for breach of contract. His Honour was satisfied that it was also that jurisdiction that the respondents sought to invoke in their defence and cross-claim, in contending that there had been a breach of a term implied in the same contract.

It was noted that s319 is the only specific provision in the LPA which assists with assessing the reasonableness of legal costs. Campbell JA accepted that, as there was an applicable costs agreement, s319(1)(c) did not apply here so as to allow the costs to be recoverable according to the fair and reasonable value of the legal services provided. His Honour emphasised however, that the respondents implicitly accepted in the defence and cross-claim that the applicant was entitled to recover whatever fees were properly payable to him in accordance with the costs agreement. They asserted that it was an implied term of the costs agreement itself that imposed a limitation on that right. The limitation was that the applicant was entitled to be paid only for those services that were reasonable and necessary, in light of his standing and level of professed skill as evidenced by the rate of fees he charged, to carry out the retainer.

Campbell JA then considered in some detail relevant legislation and authorities relating both to the circumstances and manner in which barristers are entitled to sue for their fees; and also to the question of whether reasonableness of fees could be contested other than by assessment. His Honour noted in this context that s301 of the LPA states that one of the purposes of Part 3.2 of the LPA is "to provide **a** mechanism for the assessment of legal costs"; and that it was not "to provide **the** mechanism for the assessment of legal costs."

His Honour also referred to s98 of the *Civil Procedure Act* 2005 (Courts power as to costs) and found this would provide a very significant exception to any exclusivity there might otherwise be of the assessment scheme created under Division 11 of the LPA.

The decision of the New South Wales Court of Appeal in *Attard v James Legal Pty Ltd* [2010] NSWCA 311 presented a particular difficulty for the applicant. In that case Tobias JA (with whose reasons on this issue Beazley and Giles JJA agreed) had stated (at [179]-[181]) that Division 6 of Part 11 of the then *Legal Profession Act 1987* (NSW) (Assessment of Costs) did not provide a complete and exclusive code as to how legal costs were to be assessed. The applicant sought leave to argue that *Attard* was wrongly decided. After analysing the submissions put for the applicant however, Campbell JA was not persuaded that the decision in *Attard* was wrong, or that there was sufficient prospect that the Court of Appeal would overrule its previous decision so as to warrant the grant of leave. The requested leave was refused.

The court concluded that Division 11 of Part 3.2 of the LPA did not provide an exclusive means by which the reasonableness of legal costs could be ascertained. Accordingly, the defence and cross-claim that the respondents sought to raise (in both their original and amended forms) were not precluded by any such exclusivity. The applicant was granted leave to appeal, and the appeal was dismissed, with costs.

Comment

As the court acknowledged, the key issue for determination in this case ultimately depended on construction of the *Legal Profession Act 2004* (NSW). Any decision considering a similar issue in the context of the *Legal Profession Act 2007* (Qld) (the Queensland Act) must involve examination of the provisions of that Act, as well as other relevant Queensland legislation and case law.

It may be noted, however, that the Queensland Act contains provisions which correspond to several of the key provisions examined in this decision. In particular ss319 and 326 correspond in material respects to their New South Wales counterparts. In relation to the purposes of Part 3.4 (Costs disclosure and assessment), paragraph (d) of s299 is in almost identical terms to s301 of the LPA. It identifies as one of the main purposes of Part 3.4 of the Queensland Act "to provide *a* mechanism for the assessment of legal costs and the setting aside of particular costs agreements". Also, the rules in Chapter 17A of the *Uniform Procedure Rules 1999* (Qld) include rules which provide the court with wide powers in relation to costs, which may be compared with those found in s98 of the *Civil Procedure Act 2005* (NSW).

The decision will accordingly be relevant and persuasive in the context of the Queensland Act. Practitioners should anticipate that the reasonableness in the circumstances of their costs may be examined by the court even when those costs are charged under a costs agreement and even though the applicable time periods for applications for assessment under Division 7 of Part 3.4 of the Queensland Act have expired.

Sheryl Jackson is an associate professor at the QUT School of Law. The Litigation Rules 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.