SUPREME COURT OF QUEENSLAND

CITATION:	*Qld Law Group – A New Direction Pty Ltd v Crisp* [2018] QCA 245
PARTIES:	**QLD LAW GROUP – A NEW DIRECTION PTY LTD ACN 064 877 425** **(applicant)** **v** **ABBY CRISP** (respondent)
FILE NO/S:	Appeal No 4229 of 2018 DC No 207 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport – [2018] QDC 42
DELIVERED ON:	28 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2018
JUDGES:	Sofronoff P and Morrison and Philippides JJA
ORDERS:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. Orders (a), (b) and (c) of Kent QC DCJ made on 23 March 2018 and order 1 made on 1 May 2018 are set aside.** **4. The respondent's appeal to the District Court is dismissed.** **5. The matter is remitted to the District Court in order that the respondent's appeal against the learned Magistrate's refusal to extend time can be dealt with.** **6. The respondent is to pay the appellant's costs in this Court.** **7. The costs of the proceedings in the District Court and Magistrates Court are reserved until the determination of the respondent's appeal against the order dismissing her application for an extension of time.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the case involves a question of the true construction of s 335(5)(a) *Legal*

Profession Act 2007 (Qld) – where the question is one of importance to the legal profession in Queensland and in Australia generally – whether leave to appeal should be granted

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – where the applicant is a law firm that represented the respondent in a personal injuries proceeding – where the applicant sent the respondent a letter on 28 April 2015 enclosing a tax invoice that set out a lump sum for the applicant's professional fees including GST – where the respondent requested an itemised bill on 21 March 2016 – where the respondent received an itemised bill from the applicant on 19 May 2016 – where the respondent filed an application for a costs assessment pursuant to s 335 *Legal Profession Act* 2007 (Qld) almost one year after receiving the itemised bill from the applicant – where s 335(5) *Legal Profession Act* 2007 (Qld) provides that a costs application must be made within 12 months after the bill was given, or the request for payment was made – where the applicant contended that this 12 month limitation period commenced with the provision of the bill on 28 April 2015 – where the respondent contended that the 12 month time period began running again when the later itemised bill was provided – where the learned Magistrate found that the respondent's costs application had been brought out of time – whether there is a distinction between different kinds of bills in s 335(5), such that the subsequent provision of an itemised bill after the provision of a lump sum bill causes a new 12 month period to commence in which a costs application can be brought

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – where the respondent seeks to support the orders made by the learned District Court judge by a notice of contention – where two of the grounds raised by the notice of contention were expressly abandoned in the District Court – whether the respondent ought to be allowed to advance the grounds of contention that were expressly abandoned below

Legal Profession Act 2007 (Qld), s 330, s 332, s 335

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
Metwally v University of Wollongong [No 2] (1985) 59 ALJR 481; (1985) 60 ALR 68; [1985] HCA 28, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited

COUNSEL: D A Skennar QC, with M Lazinski, for the applicant
T H S Jackson for the respondent

SOLICITORS: Qld Law Group – A New Direction Pty Ltd for the applicant
Byrne & Lovel Lawyers for the respondent

[1] **SOFRONOFF P:** This is an application for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 against orders made by Kent QC DCJ.

[2] The respondent was a plaintiff in a personal injuries proceeding. The applicant is a firm of solicitors who acted for her in that matter. The proceeding was settled on 17 February 2015 and, in due course, settlement monies were paid into the applicant firm's trust account. On 28 April 2015 the applicant delivered a letter to the respondent. That letter informed the respondent about the terms upon which her claim had been settled. The letter set out a calculation of the amount payable to the respondent after deduction of costs, outlays and GST. The letter enclosed a "tax invoice" that set out a lump sum for the applicant's professional fees including GST. The "tax invoice" also set out, in itemised form, the outlays payable to third parties.

[3] The respondent signed a form of authority authorising the distribution of funds in the applicant's trust account in accordance with the terms of the letter of 28 April 2015. Over the course of the next week or so the applicant drew monies from its trust account, in accordance with the signed authority in its possession, to satisfy the amount due to it under the tax invoice.

[4] About a year later, on 21 March 2016, the respondent requested the applicant to furnish her with an itemised bill. She received an itemised bill on 19 May 2016.

[5] Almost another year then elapsed until the respondent filed an application for a costs assessment pursuant to s 335 of the *Legal Profession Act* 2007.

[6] Section 335(5) of the Act is central to this application. It provides:

> "A costs application by a client or a third party payer must be made within 12 months after –
>
> (a) the bill was given, or the request for payment was made, to the client or third party payer; or
>
> (b) the costs were paid if neither a bill was given nor a request was made."

[7] The point at issue between the parties concerns the time limitation contained within that provision. If "the bill" was the lump sum bill constituted by the "tax invoice" given to the respondent on 28 April 2015 then the respondent's costs application was out of time. If "the bill" was the itemised bill given to the respondent on 19 May 2016 then the respondent's application was within time.

[8] The matter came before Magistrate Philipson who concluded that "the bill" for the purposes of s 335(5)(a) was the lump sum bill constituted by the tax invoice and, accordingly, determined that the respondent's costs application had been made out of time.

[9] Section 335(6) permits an extension of time to be granted within which to make such an application if "the court decides to deal with it after considering the reasons

for delay". The learned Magistrate found that the respondent had not provided any reason for her delay and refused to extend time.

[10] The respondent then appealed against this decision, out of time, to the District Court. She sought leave for an extension of time within which to appeal to the District Court against the Magistrate's decision. Kent QC DCJ granted an extension of time within which to appeal and then allowed the appeal. His Honour concluded that, as a matter of statutory construction, each of the two bills delivered by the applicant to the respondent was a relevant bill for the purposes of s 335(5)(a) and that, notwithstanding that the time had expired within which to make a costs application in respect of the lump sum bill, a fresh period of 12 months arose upon the delivery of the itemised bill. His Honour allowed the appeal, set aside the orders made by the learned Magistrate and ordered that the application for the assessment of costs be returned to the Magistrates Court to be dealt with according to law. Having regard to his conclusion that the application had been made within time, his Honour did not have to deal with the appeal against the Magistrate's refusal to extend time to make that application.

[11] The applicant now seeks leave to appeal to this Court against his Honour's orders.

[12] The term "bill" is not defined in the *Legal Profession Act*. However, s 330 provides:

> "**330 Bills**
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> (1) A bill may be in the form of a lump sum bill or an itemised bill.
>
> (2) A bill must be signed on behalf of a law practice by an Australian legal practitioner or an employee of the law practice.
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> (3) It is sufficient compliance with subsection (2) if a letter signed on behalf of a law practice by an Australian legal practitioner or an employee of the law practice is attached to, or enclosed with, the bill.
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> (4) A bill or letter is taken to have been signed by a law practice that is an incorporated legal practice if it—
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> (a) has the practice's seal affixed to it; or
>
> (b) is signed by a legal practitioner director of the practice or an officer or employee of the practice who is an Australian legal practitioner.
>
> (5) A bill is to be given to a person—
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> (a) by delivering it personally to the person or to an agent of the person; or
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> (b) by sending it by post to the person or agent at—
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> (i) the usual or last known business or residential address of the person or agent; or

(ii) an address nominated for the purpose by the person or agent; or

(c) by leaving it for the person or agent at—

(i) the usual or last known business or residential address of the person or agent; or

(ii) an address nominated for the purpose by the person or agent;

with a person on the premises who is apparently at least 16 years old and apparently employed or residing there; or

(d) if the legal costs or the basis on which they have been calculated have or has been agreed as a result of a tender process—in a way provided as part of the tender process or by later agreement between the client and the law practice.

(6) A reference in subsection (5) to a way of giving a bill to a person includes a reference to arranging for the bill to be given to that person by that way, including, for example, by delivery by courier.

(7) Despite anything in subsections (2) to (6), a bill may be given to a client electronically if the client consents to the bill being given electronically.

(8) In this section—

agent, of a person, means an agent, law practice or Australian legal practitioner who has authority to accept service of legal process on behalf of the person."

[13] Section 300 defines an "itemised bill" to mean a "bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under division 7". The same section defines "lump sum bill" to mean "a bill that describes the legal services to which it relates and specifies the total amount of the legal costs". The section defines "costs application" to mean an application for an assessment of the whole or any part of legal costs and a "costs assessment" as an "assessment of legal costs".

[14] Section 331 requires that a bill must include information about certain matters relating to a client's right to have a cost assessment. Section 332 provides as follows:

"**332 Request for itemised bill**

(1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.

Note—

A bill in the form of a lump sum bill includes a bill other than an itemised bill.

(2) The law practice must comply with the request within 28 days after the date on which the request is made.

(3) If the person making the request is liable to pay only a part of the legal costs to which the bill relates, the request for an itemised bill may only be made in relation to those costs that the person is liable to pay.

(4) Subject to subsection (5), a law practice must not commence legal proceedings to recover legal costs from a person who has been given a lump sum bill until at least 30 days after the date on which the person is given the bill.

(5) If the person makes a request for an itemised bill within 30 days after receiving the lump sum bill, the law practice must not commence proceedings to recover the legal costs from the person until 30 days after complying with the request.

(6) A law practice is not entitled to charge a person for the preparation of an itemised bill requested under this section.

(7) Section 330(2) to (8) apply to the giving of an itemised bill under this section."

[15] Section 333 provides for interim bills as follows:

"**333 Interim bills**

(1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.

(2) Legal costs that are the subject of an interim bill may be assessed under division 7, either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has previously been assessed or paid."

[16] Section 335 then makes provision for a "costs application", namely an assessment of the amount charged by way of a bill, and contains the time limitation that has already been quoted.

[17] The statute does not make the delivery of an itemised bill, or indeed the delivery of any kind of bill, a condition precedent to the right to make a costs application. This is consistent with the absence of an idea that it is a bill that is to be assessed. Section 335 does not refer to an assessment of a bill but to "an assessment of the whole or any part of legal costs". The legal costs may be those referred to in a lump sum bill or an itemised bill. But they may also be the legal costs that have been the subject of the "request" or the payment that are also referred to in s 335(5). It is not only the delivery of a bill that triggers the beginning of the limitation period; it is triggered by a solicitor's request for payment or by a client's payment of costs. It can therefore be concluded that there is nothing in s 335 that, for the purposes of an application for an assessment of legal costs, promotes the importance of an itemised bill over a lump sum bill or even that distinguishes between them.

[18] In other places the statute expressly distinguishes between the effects of the delivery of particular kinds of bill. Section 333 makes an express exception about the limitation period in the case of an interim bill being delivered. Such a bill is a bill

"covering part only of the legal services the law practice was retained to provide". In such a case the legal costs contained in the interim bill may be assessed at the time that bill is delivered or they may await delivery of "the final bill". That "final bill" may, of course, take the form of a lump sum bill or an itemised bill.

[19] Section 332 also distinguishes between the effect of the delivery of a lump sum bill and the delivery of an itemised bill. Pursuant to s 332(4) a law practice must not commence proceedings to recover legal costs until 30 days after the delivery of a lump sum bill. There is no similar restraint upon commencing proceedings in the case of a delivery of an itemised bill. Moreover, s 332(1) entitles a client who is in receipt of a lump sum bill to request the delivery of an itemised bill. Section 332(2) obliges the law practice to deliver the itemised bill within 28 days of the request. Section 332(5) restrains the law practice from commencing recovery proceedings until 30 days after the request for the itemised bill has been complied with.

[20] These express provisions that distinguish between the legal effects of the delivery of one kind of bill from the legal effects of the delivery of another kind of bill suggest strongly that the absence of any similar distinction in s 335 means that, for the purposes of s 335(5), there is no distinction.

[21] It is true that s 300 defines "itemised bill" as a bill made up in a way that would allow legal costs to be assessed. This suggests that, before there can be a useful assessment, such a bill must be brought into existence and, consistently with that consideration, s 332(1) empowers "any person who is entitled to apply for an assessment" to request the delivery of such a bill. However, none of these provisions can be read as meaning that an "itemised bill" is a bill that is made up in a way that would allow a client to determine whether to apply for an assessment or that it is a bill that is made up that way for that purpose. There is no need for such a provision because the Act allows ample time for an application to be made even if an itemised bill is not delivered in the first instance. Within the interval of 12 months, a request for delivery must be met by the law practice within a mere 28 days. In the case of inordinate delay beyond the limitation period, such delay would furnish a ground upon which to extend time under s 335(6).

[22] There are considerations that militate against the conclusion that the delivery of an itemised bill after a lump sum bill has already been delivered triggers a fresh limitation period. If that were the case, then the client who has received a lump sum bill would be in a position to extend the limitation period to one of two years merely by making a request for an itemised bill. Nothing in the statute suggests that such a form of self-help was intended.

[23] It is true, as Kent QC DCJ observed, that Chapter 3 of the *Legal Profession Act*, to which the relevant provisions belong, constitutes a form of consumer protection. However, that consideration cannot justify according a meaning to these provisions which the text cannot justify.

[24] For these reasons, in my respectful opinion, the learned District Court judge erred in his construction of the Act.

[25] The respondent also seeks to support the orders made by Kent QC DCJ by reference to three grounds of contention.

[26] The first of these grounds involves a contention that the lump sum bill was merely an interim bill because it covered only part of the legal services. The respondent also seeks to agitate the question whether the lump sum bill was actually delivered on 28 April 2015. The learned Magistrate found that the bill had been delivered. Although originally that finding was challenged before Kent QC DCJ, like the first ground of contention, this ground was also expressly abandoned.

[27] Subject to there being exceptional circumstances present, it would be impossible to conduct cases in a fair and orderly manner if parties who deliberately chose to abandon particular grounds then seek to re-agitate them on appeal.[1]

[28] Nothing has been put forward by the respondent that could justify permitting her to renege upon the course she adopted before Kent QC DCJ. Mr Jackson, who appeared for the respondent on this appeal but not below, submitted that this course could be justified by his client's prospects of success on that argument, that no reasons were given below for the abandonment, there would be no prejudice to the appellant by now raising the abandoned grounds, that "what is at stake" is that a costs assessor should be appointed, that the resolution of these abandoned issues are important to the case at hand and that the interests of justice would be thereby be served.

[29] None of these are capable of constituting grounds to justify the course proposed. The prospects of success, the relevance of such issues to the appeal and "what is at stake" simply do not matter. If they did, there would be no practical restraint upon parties who choose to abandon grounds. Parties are bound by the way in which they conduct litigation. The orderly administration of justice could not be maintained if parties were permitted to deviate on appeal from a course deliberately undertaken at trial without showing a good reason for so doing. That, upon further reflection, perhaps by a different legal adviser, it now seems that the argument had legs is not such a reason. Nor can this court inquire into the reasons for the adoption of a particular course. Such an inquiry is impossible.[2] The prejudice to the appellant is that issues that have been abandoned finally are re-enlivened. The resulting affront to the principle of finality, without good reason, means that it would rarely be in the interests of justice for a ground that has been deliberately abandoned to be permitted to be argued on appeal.

[30] It is not necessary to consider the other large obstacle in the respondent's way. These are arguments about matters of fact that were not litigated below.

[31] The final ground of contention involves a submission that the learned Magistrate erred in failing to grant an extension of time. That was an issue not agitated before Kent QC DCJ because his Honour found that the period of the limitation had not lapsed. The question, therefore, does not arise in this appeal.

[32] The application for leave to appeal should be granted because the question concerning the true construction of s 335(5)(a) is one that is of importance to the legal profession in Queensland and, because of similar legislation in other States, it is important to the legal profession in Australia generally. It is right that the erroneous construction that formed the basis for the decision below should be

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1 *Cf. Metwally v University of Wollongong [No 2]* (1985) 60 ALR 68 at 71 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

2 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [49] per McHugh and Gummow JJ; *Simic v The Queen* (1980) 144 CLR 319 at 332 per Gibbs, Stephen, Mason, Murphy and Wilson JJ.

corrected. Consequently, I would grant leave to appeal, allow the appeal, set aside orders (a), (b) and (c) made by Kent DCJ on 23 March 2018 and order 1 made on 1 May 2018 and, instead of those orders, order that the appeal to the District Court be dismissed, remit the matter to the District Court in order that the respondent's appeal against the learned Magistrate's refusal to extend time can be dealt with. The respondent should pay the cost in this Court but the costs of the proceedings in the District Court and the Magistrates Court should be reserved until the determination of the respondent's appeal against the order dismissing her application for an extension of time.

[33] **MORRISON JA:** I agree with the reasons of Sofronoff P and the orders his Honour proposes.

[34] **PHILIPPIDES JA:** I agree with the orders proposed by Sofronoff P for the reasons given by his Honour.