

SUPREME COURT OF QUEENSLAND

CITATION: *Struber v McNamara & Associates* [2003] QSC 372

PARTIES: **ANITA CHRISTINE STRUBER**
(**applicant**)
v
McNAMARA & ASSOCIATES
(**respondent**)

FILE NO: S8979 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 3 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 24 October 2003

JUDGE: Chesterman J

ORDER: **1. Application dismissed**

CATCHWORDS: COST AGREEMENT – Where cost agreement for professional fees– s48 *Queensland Law Society Act (1952)* - whether professional fees should be calculated in accordance with the client agreement or the Supreme Court scale – whether client agreement can be avoided for non-compliance with the Act – consideration of the term “form of account”

Queensland Law Society Act (1952) (QLD), Part 4A, s48
Uniform Civil Procedure Rules

Herald & Ors v Worker Bee (Brisbane) Pty Ltd [2003] QSC 223

COUNSEL: Mr G. Robinson for the applicant
Mr R. Cameron for the respondent

SOLICITORS: Clewett Corser and Drummond Lawyers for the applicant
McNamara & Associates Solicitors for the respondent

[1] The respondent is a firm of solicitors who practise in Toowoomba and the Darling Downs. For about a year the applicant was a client of the firm whom she retained to enforce the proper administration of her late parents' estates. A dispute has arisen between them with respect to the professional fees charged by the respondent. The applicant has determined their retainer and paid part only of the bills delivered by the respondent.

- [2] By her originating application, the applicant seeks:
1. A declaration that a cost agreement between the applicant and the respondent is void.
 2. That the respondent prepare a detailed account in accordance with the Supreme Court scale and serve it on the applicant's solicitors by ... 10 December 2003.
 3. A declaration that the respondent is limited in the amount it can claim for costs for acting in the estate ... for the period 7 June 2002 to 27 March 2003 to the maximum sum of \$59,267.76.
 4. That the respondent pay the applicant's costs of and incidental to this application.
- [3] The respondent has delivered two bills to the applicant. The amounts charged aggregate the sum set out in para 3 of the application. The applicant, as I mentioned, has paid part only of the amount claimed, namely the sum of \$33,000. Following a discussion between the parties on 29 April 2003 in which the applicant expressed dissatisfaction with the amount charged she required the bills to be examined by a costs assessor. The respondent then submitted their files to Ryan Cost Consultant Pty Ltd who determined that the respondent's fees should be for a substantially higher amount.
- [4] The applicant disputes the respondent's right to withdraw its original bills and re-submit bills for that higher amount. That is the subject of the third order sought in the application.
- [5] The parties, however, agree that the court consider only the relief sought in paragraphs 1 and 2 of the application. If the applicant succeeds, the respondent will have to prepare its account in accordance with the Supreme Court scale rather than the client agreement made between the applicant and the respondent. If the application should fail, the respondent would contend that it has delivered detailed accounts, being those prepared by Ryan Cost Consultant Pty Ltd, but the applicant would seek to have those submitted to a costs assessor. Only if the assessment resulted in a bill greater than \$59,267.76 would there be a need to resolve the question of whether the respondent could withdraw its bills and re-submit fresh ones. The point may not arise.
- [6] On 20 November 2002, the respondent sent the applicant a copy of a proposed client agreement. The letter which accompanied the agreement read:
- 'We would be pleased if you could read these documents carefully and seek independent advice if you feel the need. Once you have read the documents, we ask that you sign one copy of the client agreement and notice to client and return to them to our office ..'
- The applicant signed the agreement two months later, on 5 February 2003.
- [7] Relevant terms of the agreement were:

‘1. The work

...

The firm will ... act on behalf of the client in respect to pursuing the executors of the estates of William John Handley and Maureen Frances Handley to administer the estates properly and quickly so that the client receives the proper entitlements as soon as possible.

2. Persons who will perform the work

Partner	Kerian McNamara
Solicitor (Associate)	Shane McDonald
Articled Clerk	Jay Fleming
Secretary	Jodie Butcher

3. Fees – how calculated

Scale of fees:

ITEM CHARGES

The following are minimal allowances for itemised Bills of Costs in respect of this matter and forms the basis upon which our costs will be charged.

Correspondence

Formal	\$ 20.00
Ordinary	\$ 27.50
Special	\$ 55.00

Or such fee as is reasonable having regard to the length of the letter, the question involved and other appropriate items and charges in this scale.

Formal attendances and telephone calls

Up to 5 minutes duration	\$ 20.00
All other attendances and telephone calls per hour	
Telephone messages left or received	\$ 5.00

Partner	\$250.00
Associate	\$220.00
Solicitor	\$200.00
Clerk	\$120.00

Shorter periods in proportion

Documents

Drawing	per folio	\$ 20.00
Engrossing	per folio	\$ 7.50
Perusing	per folio	\$ 5.00
Copying all methods	per folio	\$ 1.50

Facsimile Transmission and receipt – in addition to any applicable professional fee.

First page	\$ 6.50
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Each subsequent page \$ 4.50

The above item charges do not include any amount for care, consideration, skill and responsibility and a charge will be included for such matters in appropriate circumstances up to a maximum of thirty percent.

Counsel’s fee as per agreement between Counsel and Solicitor or as is appropriate in the circumstances.

This is our current scale of fees and is current as at 1 July 2002 and will vary from time to time in accordance with the percentage variation increase in the Federal Court Scale of Fees during the term of this agreement. The above scale is applicable to all the work that would otherwise be calculated in accordance with the jurisdiction in respect of which the court proceedings have been, or would have been, commenced. Attached are copies of the current Magistrates Court, District Court and Supreme Court Scales.

This matter is of a deferred payment type and our firm reserves the right to charge upon the successful completion a care and consideration component of thirty percent. The Client will need to pay our fees at the conclusion of this matter or when funds are received from the estate, whichever is the sooner.

...

5. Estimate of fees and costs

- (i) The Firm estimates that the total of fees and costs to complete the work ... is between \$15,000 if the matter were to settle now and \$50,000 if it goes to trial ...

...

The Firm is not bound by this estimate.

...

9. Accounts

- (i) All accounts submitted by the firm to the client will be in the agreed form as per the sample attached marked “Example Account”.

[8] The example of the tax invoice attached to the agreement was in the following form:

**TAX INVOICE
“EXAMPLE ONLY”**

(Date)

To (client)

DAMAGES CLAIM

Professional Fees:

To our professional costs of acting on your behalf in the abovementioned matter with all necessary attendances and as detailed in discussions with you and previous correspondence.

Total fees given due care and consideration \$

- [12] The applicant submits that the client agreement she made with the respondent is void because of provisions in Part 4A of the *Queensland Law Society Act 1952* (“the Act”).
- [13] Section 48I(1) of the Act provides that:
- ‘The maximum amount of fees and costs a practitioner or firm may charge and recover from a client ... is –
- (a) an amount calculated in accordance with the client agreement ... or
 - (b) if there is no client agreement and there is a scale for the work provided under an Act – an amount calculated in accordance with the scale; or
 - (c) ...’.
- [14] The applicant submits that her case is covered by s 48I(1)(b) on the ground that, her client agreement being void, “there is no client agreement”. There is a scale for the work done by the respondent namely those found in the schedules to the *Uniform Civil Procedure Rules*.
- [15] Section 48 of the Act provides:
- (2) Within a reasonable time after starting work for a client, a practitioner or firm must make a written agreement with the client expressed in clear plain language and specifying the following matters –
 - (a) the work the practitioner or firm is to perform;
 - (b) the fees and costs payable by the client for the work.
 - (3) The fees and costs payable by the client for work must specify –
 - (a) a lump sum amount; or
 - (b) the basis on which fees and costs will be calculated (whether or not including a lump sum amount).
 - (4) The notice in the schedule must be completed by the practitioner or firm and given to the client ... before the client signs the client agreement.
 - (5) The client agreement must not be inconsistent with the notice in the schedule.
 - (6) ...’.
- [16] Sections 48C, 48D and 48E prohibit solicitors from including certain terms in their client agreements. Section 48F provides:

- ‘(1) If a client agreement to which s 48 applies does not comply with that section, the client agreement is void.
- (2) If a provision is included in a client agreement and inclusion of the provision is prohibited by this part, the provision is void.’

Subsection 2 would seem to be a reference to the prohibitions contained in ss 48C, D and E.

[17] The applicant’s argument is that the client agreement she made with the respondent does not comply with s 48 and is therefore made void by s 48F(1). The non-compliance relied on is with sub-section 5, the requirement that agreements not be inconsistent with the notice in the schedule. The schedule is headed, “Important Notice to Client”. The relevant clause with which the client agreement is said to be inconsistent is cl 16. Clause 15 also appears relevant. They provide:

- ‘15. An account from your solicitor or firm must be in the form agreed to in this client agreement or must clearly set out all items of work done for you and the amount charged for each item.
- 16. If a form of account is agreed to, it must be a form resulting in the inclusion in each account of sufficient details of the work done to allow you to decide whether the fees and costs in the account are reasonable’.

[18] The applicant’s point is that the “example only” invoice attached to the agreement sets out the form of account agreed to, and that form does not “result in the inclusion of sufficient details of the work done to allow (the client) to decide whether the fees are reasonable”. The example provides for a brief description of work done but does not include such things as the identity of the persons who did the work, or how long each item of work took, or what degree of complexity was involved. The description culminates in a gross sum in round figures.

[19] There can be no doubt that the bills as delivered do not meet the description set out in cl 16 of the schedule. It is said that they were in the form which the client agreement stipulated as being the manner in which bills would be expressed. There is therefore, it is submitted, an inconsistency between the agreement which specified that form of rendering bills, and the requirement of cl 16.

[20] The argument is, I think, erroneous. The respondent submits, correctly in my opinion, that a client agreement is not avoided merely because a bill rendered by a solicitor does not comply with the requirement of cl 16. A client who is given a bill which does not set out sufficient details of the work done so as to permit a decision about the reasonableness of the charge has remedies. It can be scrutinised by a costs assessor. That, however, is not to say that the client agreement pursuant to which the bill was delivered is void.

[21] I was referred to the judgment of Fryberg J in *Herald & Ors v Worker Bee (Brisbane) Pty Ltd* 2003 QSC 223, in which his Honour, having referred to s 48F of the Act, said:

‘What is to be noted there is that the thing that renders the agreement void under sub-section 1 is the non-compliance of the client agreement with s 48, not the non-compliance of the solicitor with s 48. The agreement must be compared with the requirement for agreements under that section. It is not required by s 48F that the conduct of the solicitor can be compared with the conduct demanded of him by s 48’.

[22] I agree with his Honour’s remarks. The result is that consideration must focus on the terms of the client agreement as it relates to the manner in which bills are to be composed. The comparison called for is between the requirements of cl 16 and the terms of the agreement, not the performance of the agreement. If by the terms of the agreement bills will be delivered in a form which do not itemise work, or to use the words of the clause, do not include sufficient details to allow a decision on the reasonableness of the fee, then the agreement will be inconsistent with cl 16 of the schedule and will be void. It is only an agreement of that type which will be inconsistent and hence void. If the client agreement describes a form of account which is capable of providing the detail demanded by cl 16, it cannot be said to be inconsistent with the schedule, whether or not the bill as delivered satisfies the requirements of cl 16.

[23] In order to determine whether a client agreement is inconsistent with the notice, and therefore void, one looks to see whether the form of account provided for in the agreement is such that if the contract is performed strictly according to its terms, the account will not give sufficient detail of the work done to allow the client to decide whether the charges are reasonable. If the parties have stipulated in the agreement that the account should not provide that detail, then it is inconsistent with cl 16 and the agreement is void. If, however, it is not plain by the terms of the agreement that the solicitor’s account will be deficient in detail, the agreement will not be inconsistent with the notice.

[24] By s 48(2) and (3) a client agreement must contain a description of the work the solicitor is to perform and the fees and costs payable for that work. The “form of account” referred to in cls 15 and 16 must be something other than this description of the work and the basis for charging. This is for the reason that those clauses contemplate that the parties may not agree upon a form of account, but there is no doubt they must agree upon the subject matter of those sub-sections or there will not be a client agreement. The “form of account” must, I think, be a “model, type or pattern” for the formulation of the solicitor’s account. If the parties agree upon a form, and its “model, type or pattern” is such that it would not include “sufficient detail ... to allow (the client) to decide whether the fees ... are reasonable”, it will be a form inconsistent with cl 16 and therefore the client agreement would be void.

[25] It is not easy to reconcile clauses 15 and 16 in the schedule. Clause 15 appears to offer a choice to the solicitor when delivering a bill. The account must be in the form agreed to or must clearly set out all items of work done and the amount charged for each item. Implicit in this choice is that the form agreed to may not set out the requisite detail. However cl 16 compels a form which will result in a fully

detailed bill. The probable meaning of the clauses is that parties to a client agreement have a choice as to whether or not they agree upon a form of account. If they do not then, by cl 15, the solicitor must deliver a detailed bill. If they do agree upon a form it must comply with cl 16.

- [26] To summarise, it is the agreement which must be inconsistent with the schedule if it is to be void. It is not the solicitor's performance of the agreement which avoids it. The test must be whether the form of account, where there is one, makes it plain on its face that the client has bargained away its right to a detailed account.
- [27] Viewed in this light, the client agreement made between the applicant and the respondent is not inconsistent with cl 16. The agreement sets out in some detail the charges to be made for attending to correspondence, telephone attendances and preparing documents. Otherwise, charges were to be based on the time spent in performing the work and the amount charged would depend upon the rank of the person performing it. The ranks were identified as was the hourly charge for each. The "example" account attached to the client agreement and which constitutes the agreed form was enigmatic in relation to the amount of detail that would be included in an actual bill. If the items comprising the charges for "professional fees" were identified individually and if the bill showed who performed the work and how long each item took, then the client could readily assess whether the account was reasonable.
- [28] It cannot be said that a bill delivered in the form of the example would necessarily lack detail. In such a case the agreement is not void but the solicitor is obliged to render a detailed bill. The agreement itself appeared to contemplate that the bill would be detailed. It was, of course, possible that the bills would not condescend to particularity but that would be a consequence of the manner in which the solicitor performed the agreement. The terms of the agreement did not mandate that result. Accordingly, for the reasons I have endeavoured to express, the form of the account is not prohibited and the agreement is not void.
- [29] The application was argued on the basis that this was the only relevant point. The applicant has sought an assessment of the respondent's accounts. The reasonableness of the charge and whether the respondent was entitled to withdraw its initial bills and re-submit fresh bills in a higher amount are to be submitted to the determination of the assessor. Accordingly, the appropriate order is to dismiss the application with costs to be assessed.