**REVISED COPIES ISSUED**
State Reporting Bureau

Date: 14 December, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

QSC [2004] 440

FRYBERG J

No BS9148 of 2004

JEZER CONSTRUCTION GROUP PTY LTD (ACN 054 548 319) Applicants

and

NOBEL CONSTRUCTION PTY LTD (ACN 094 329 745)

and

PAN PACIFIC FOODS (AUSTRALIA) PTY LTD (ACN 067 185 362)

and

PAN PACIFIC HOLDINGS (AUSTRALIA) PTY LTD (ACN 067 220 393)

and

MICHAEL CHOI and DORIS CHOI and PETER SCHMITH

and

GEORGE CONOMOS Respondent

BRISBANE

..DATE 07/12/2004

JUDGMENT

HIS HONOUR: There is before the Court an application for a declaration in relation to certain matters arising under the Queensland Law Society Act 1952 in relation to a Bill of Costs.

The applicants were the clients of the respondent solicitor. By an application filed on the 20th of October they sought a declaration that the agreements referred to in an affidavit filed with the application were void and a further order that the respondent deliver bills of costs calculated in accordance with Section 48(I)(1)(b) or (c) of the Act.

The application got off to a bad start. It turned out after the application was served that there was no dispute between the parties in relation to any of the agreements referred to in the application. The solicitor did not claim that any of them was valid under the Act. Instead he relied on another agreement signed by some of the applicants at a later time. That meant that a number of the applicants were unnecessary parties and that there was no utility in relation to a declaration in relation to the agreements referred to in the application.

To overcome the latter problem the applicants sought and were granted leave to amend the application so that it referred to the later agreement. However that was not the end of the difficulties because the applicant Schmith, in his affidavit in support of the application, swore that the later agreement had been delivered by the respondent to the applicant Jezer

Construction Group Proprietary Limited on or about 21st of January 2003 but that that agreement was not agreed upon nor signed by the applicants or any of them.

When it transpired that this was not true and that it had been signed by the applicants Jezer Construction Group Proprietary Limited, Nobel Construction Proprietary Limited and Schmith himself on the 30th of January 2003, Mr Schmith was obliged to make a further affidavit in which he swore that his earlier affidavit had been based upon his memory and the documents and correspondence under his control and that:

> "Although I do not recall signing the document I agree that it appears that the client agreement referred to in paragraph 18 of my affidavit sworn 6 October 2004 was signed on or about 30 January 2004."

Whether that is a reference to 30 January 2004 or a misprint for 30 January 2003 is not apparent, but I suspect that it is a misprint.

Matters were further complicated when it emerged that, having seen the argument of the respondent in its outline, the applicant no longer wished to pursue an order in the form in paragraph 2 of the application, but rather sought an order for an assessment by a Tribunal costs assessor of the respondent's reasonable costs. An amendment was allowed to that effect.

The application before me, therefore, is quite different from that which was filed. The arguments in support of the applicant's position, however, are substantially the same.

The applicants submit that there are two grounds for the declaration sought: first, that the agreement was not made within a reasonable time after the practitioner started work for them; and, second, that the agreement was inconsistent with paragraph 18 of the schedule to the Act.

It is necessary to set out a few of the facts out of which the application arises. The respondent commenced acting as a solicitor for the applicants in or about December 2001 or January 2002. Previously, the applicants had directed their work to the firm Baker Johnson where the work was handled by a Mr Darren Edwards, a managing litigation clerk. Mr Edwards resigned from Baker Johnson and commenced employment with the respondent. As a result of that move, the applicants sought the services of the respondent shortly after Mr Edwards commenced employment with him.

The applicants are a group of companies and persons associated with them carrying on business in the building industry. The services which they required involved a substantial number of disputes with different parties and many of them had the potential to develop into litigation. Indeed, many of them did.

No agreement in accordance with the Act was entered into in the first half of 2002. The work of the applicant appears to have been handled largely by Mr Edwards, although, of course, Mr Conomos as the sole practitioner and owner of the firm must take responsibility for his conduct.

Various deeds and agreements were entered into in relation to limited or other matters in October 2002 and January 2003. The relevant agreement was executed by the three persons I have identified, at the end of January. The question is whether the agreement is void by reason of non-compliance with section 48 of the Queensland Law Society Act 1952. If a client agreement does not comply with that section, it is void. (See section 48F).

Section 48(2) 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."

Subsections (4) and (5) of the same section provide:

> "(4) The notice in the schedule8 must be completed by the practitioner or firm and given to the client, together with a copy of any scale for the work provided under an Act, before the client signs the client agreement.
>
> (5) The client agreement must not be inconsistent with the notice in the schedule."

The first argument advanced on behalf of the applicants is that the time of execution of the agreement, the end of January 2003, was after the expiry of a reasonable time from the solicitor's starting work for the client, something which

happened by February 2001. What is a reasonable time for the purposes of this section depends very much on the circumstances of the case (see Gemstar Corporation Pty Ltd v Barwicks Wisewoulds [2000] QSC 143).

There has been some examination of the circumstances in this case but it is not possible on an application of this nature to enter into a review of all of the circumstances. Whether there is any force in the submission made on behalf of the respondent that it is not possible to determine reasonableness, I need not decide. The respondent has pointed to some evidence suggesting that the matter needs to go to trial in order to have findings made on disputed questions of fact relevant to the question of reasonableness. It is, however, unnecessary to consider these in any detail since, in my view, the matter may be resolved otherwise.

Section 48 provides not that an agreement must state certain things in relation to time, but rather that a practitioner must make an agreement with the client within a reasonable time. Non-compliance with the section may or may not attract a criminal sanction but it does not produce the effect that the agreement made out of time is one which does not comply with section 48.

A similar point arose in Herald v. Worker Bee (Brisbane) Pty Ltd [2004] 2 Queensland Reports 263. There I said at page 266:

> "What is to be noted there [that is, in section 48F], is that the thing that renders the agreement void under subsection 1 is the non-compliance of the client agreement with section 48, not the non-compliance of the solicitor with section 48. The agreement must be compared with the requirements for agreements under that section. It is not required by section 48F that the conduct of the solicitor be compared with the conduct demanded of him by section 48."

That passage attracted the agreement of Mr Justice Chesterman in Struhber v. McNamara & Associates [2003] QSC 372. I see no reason to depart from it.

In my judgment it applies to the circumstances of the present case. If the agreement was not signed within a reasonable time, the solicitor may have breached the requirement of section 48(2) that he make a written agreement within a reasonable time. Such a breach does not in my judgment produce any non-compliance by the client agreement with the section. Consequently I do not accept the first argument advanced by the applicants.

The second argument was that the terms of item 7 of the agreement were inconsistent with paragraph 18 of the schedule to the Act. That paragraph provides -

> "**Advice if work includes litigation**
>
> **18.** If the work involves or is likely to involve litigation, this client agreement must include an explanation and estimate of the range of costs you may recover from another party if you are successful or you may be required to pay the other party if you are not successful."

The client agreement provided under the heading "Costs - Unsuccessful Action" in the following terms:

"

- If you do not succeed in your litigation you may be required to pay the other party's professional fees and costs;
- We estimate those professional fees and costs to be the amounts estimated in item 7 of the schedule but we are not bound by these estimates."

In item 7 against the side note "Estimate Fees and Costs you pay if unsuccessful" the following appeared:

> "Approximately 65 per cent of the total professional fees and the costs that you yourself will have incurred with us at that point in time for the respective matter."

That wording must be understood in the context of the agreement which was to do work involving taking all steps as were reasonable and necessary to defend demands and proceedings against the applicants, to promote and maintain proceedings for the recovery of moneys owing to the applicants and to carry out such further and other instructions as may be delivered by the applicants from time to time. In other words the agreement envisaged further work which in fact was carried out. It also envisaged covering past work as appears from other annexures to it where past work was listed.

The reference to professional fees requires also some reference to item 2 in the schedule which provided that fees for a partner and for professional staff should be $280 per hour plus GST. That hourly rate included expressly secretarial and word-processing services.

The applicants did not contend that the defect in the agreement was an omission to specify in dollar terms the range of costs which the applicants might be required to pay to another party in litigation if they were not successful. Nor was it argued that the explanation of the circumstances in which liability to pay costs to another might arise was inadequate. The submission was that the reference to "approximately 65 per cent of the total professional fees and the costs that you yourself will have incurred with us at that point in time for the respective matter" was insufficiently detailed and insufficiently adapted to the various actions to which it was intended generically to apply.

Such actions were spread over a variety of Courts and Tribunals and the amounts which might be recovered against the applicants in the event that they were unsuccessful in those Tribunals would have ranged from nothing up to the substantial amounts recoverable in Supreme Court proceedings. They would have been infinitely variable. It was therefore submitted that the reference to 65 per cent of the professional fees and costs was too vague and incapable of being an explanation or an estimate of the range of costs in question.

In my judgment this argument is really a criticism of the accuracy of the estimate given. If the argument is correct it would probably follow, though not necessarily, that the estimate was, if anything, too high; that is that in fact it is likely the applicant would find itself less exposed by way of party and party costs than it was warned it would be. The precise amount is, of course, not stated, and since the agreement was intended to deal with future cases, it could not have been stated. It is, however, worth noting that by reason of the standard charge applied by all professional staff and the partner, that is to say the sole proprietor, the amount was not incapable at any given time of determination.

For the respondent it was submitted that any inadequacy, if there was any, did not amount to an inconsistency within the meaning of section 48.5 of the Act. In my view, that submission is correct. The provision of a wrong estimate, and it can only be an estimate, does not produce the result that the estimate ceases to be an estimate. For the applicants it was submitted that this estimate was so vague and so plainly and widely wrong that it did not merit the description estimate, but I do not agree. It may well be that the estimate, in fact in overall terms at least, was not a bad one. The material does not really demonstrate that one way or another. In any event, it seems to me that mere inaccuracy, even substantial inaccuracy in the estimate does not mean that there is no estimate for the purposes of this section.

It follows that in my judgment, this argument also must be rejected. It is consequently unnecessary for me to deal with paragraph 2 of the application. I should, however, briefly record that if it were necessary, no power to make the declaration was identified to me by counsel for the applicants. Counsel relied upon section 48I, particularly subsection (1)(c) thereof as implying a power to make an order for an assessment by a Tribunal costs assessor. I do not so read that section. It is a statement simply of the maximum amount recoverable and does not, in my judgment, confer any such power. There is a power in section 48K to appoint a Tribunal costs assessor to assess an account, but counsel for the applicants conceded that this was exercisable only in a proceeding to recover fees or costs and he did not contend that the present were proceedings of that nature.

For the respondent it was submitted that the explanation for this is that there is no need for an order in these terms because under division 6A of the Act the applicants have a right to follow the procedure set out to bring about an assessment without any order from the Court. I need not look at that aspect of the matter.

It is also unnecessary for me to express any view on the argument advanced by the respondent as to the discretion which would repose in me if there were any power. In my judgment the application should be dismissed.

MR O'DONNELL: I ask for costs of the application, your Honour.

MR WILKINS: I can't resist that, your Honour.

HIS HONOUR: The application is dismissed with costs to be assessed.

---