SUPREME COURT OF QUEENSLAND

CITATION:	*Alexander v Connor and others* [2009] QSC 14
PARTIES:	**DAVID RITCHIE ALEXANDER** (plaintiff/cross-respondent) **v** **PENELOPE JAYNE CONNOR** (first defendant) **and** **BARRY CONNOR** (second defendant) **and** **MARY SUZANNE LYNN** (third defendant/cross-applicant)
FILE NO:	2621 of 2003
DIVISION:	Trial
PROCEEDING:	Application
COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 February 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2009
JUDGE:	Fryberg J
ORDER:	**1. Plaintiff have leave to take a further step in the proceeding.** **2. The third defendant's application of 12 December 2008 dismissed.** **3. No order as to costs.**
CATCHWORDS:	Professions and trades – Lawyers – Remuneration – Bill of costs – Actions to recover costs – Generally – No client agreement between solicitor and client – Unnecessary to assess the account of costs prior to commencement of recovery proceedings *Queensland Law Society Act 1952* (Qld) s 6ZA(1),s 48I(1), s 48J(1)
COUNSEL:	Plaintiff: AG Reilly Third respondent: P Hackett

SOLICITORS: Plaintiff: Butler McDermott & Egan Solicitors
Third respondent: Patane Lawyers

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

[2009] QSC 14

No 2621 of 2003

DAVID RITCHIE ALEXANDER	Plaintiff
and	
PENELOPE JAYNE CONNOR AND OTHERS	Respondent

BRISBANE

..DATE 03/02/2009

ORDER

HIS HONOUR: This is an application by the plaintiff for leave to proceed after a delay of more than two years. There is also a cross application by the defendant to strike out the action for want of prosecution.

...

HIS HONOUR: The plaintiff is a solicitor and the only defendant who has been served is the third defendant who is the respondent in the present application. The plaintiff seeks to recover his fees pursuant to an alleged retainer. A number of matters are in dispute in the action. The parties are agreed that leave to proceed should be given if a point of law, which as been argued before me today, is resolved in the plaintiff's favour, and that the action should be struck out if that point is resolved in the defendant's favour.

The point arises because the plaintiff did not enter into a client agreement in respect of the retainer which he alleges from the defendant. The retainer was allegedly given before the legislation mandating client agreements came into operation, but it is common ground that the legislation when it did come into force operated to require the making of a client agreement.

The defendant submits that the action should be struck out and leave should not be given because the action is, in any event, doomed to fail. It is doomed on the defendant's submission, because of the provisions of section 48J(1) of the Queensland Law Society Act 1952. That section provides:

> "**48J Prerequisite to legal proceeding to recover payment for work**
>
> (1) A practitioner or firm may start a proceeding in a court to recover fees or costs from a client only if the practitioner or firm has given the client an account that—

(a) is in a form agreed to in a client agreement between the practitioner or firm and the client; or

(b) clearly sets out all items of work done for the client and the amount charged (whether by way of fees or costs) for each item."

The defendant submits that in this case the claim could be recovered, only under subsection (1)(b), and it is common ground that this is correct. It is also common ground that the plaintiff has given the defendant an account that clearly sets out all items of work done for the client. The account goes further and sets out for each item an amount charged for that item.

The defendant submits that the amounts that are set out, are amounts derived from the Supreme Court scale of costs as it stood at the relevant time and are not amounts derived pursuant to an assessment carried out under section 48I(1)(c). That is also common ground. The parties are agreed that there has been no assessment under that provision. The defendant submits that self evidently the assessment must precede the recovery, that is because section 48I(1)(c) provides:

"**48I Maximum payment for work**

(1) The maximum amount of fees and costs a practitioner or firm may charge and recover from a client for work done is—

...

(c) if there is no client agreement and there is no scale for the work provided under an Act — an amount assessed as a reasonable amount for the work by a tribunal costs assessor."

The defendant submits that to comply with section 48J(1) the solicitor must set out in the account amounts assessed as described in section 48I(1)(c). In my judgment that is not the proper way to interpret the Act. I think that for several reasons.

First, the wording of the Act gives no support to that meaning. Section 48J is concerned with the commencement of proceedings, although, in form it is structured as if it were setting out conditions precedent to the commencement of proceedings. The form is really similar to that used in the various limitation of actions statutes which have existed over the years. It is well settled that those sections do not deny a right of action or a right to bring proceedings unless raised by the defendant.

More importantly, section 48J is concerned with the bringing of the proceedings. Section 48I is concerned to establish not what the amount of fees charged should be, but rather what amount should not be exceeded by those fees. If a practitioner wished to charge less than the maximum he would be at liberty to do so. If he did that there is nothing in the wording of section 48I or section 48J to suggest that an assessment of the maximum which could be charged would be required.

If the interpretation contended for by the defendant were correct it would seem that an assessment would be required in every case where there was no client agreement, even if the defendant conceded that the amounts charged in the account were reasonable. For example, if a defendant wished to defend proceedings on the ground that it was not he who entered into relations with the solicitor, but was someone else, and did not contend that the amount charged was unreasonable, it would on the interpretation suggested here be open to that defendant to plead the absence of an assessment as a defence notwithstanding that he did not contend that the maximum amounts provided for in section 48I were exceeded. To require an assessment in such a case as a condition precedent or, indeed, even as an element in a cause of action would be futile. It is an unlikely interpretation.

In addition, the defendant places weight on the word "recover" in section 48I that word appearing in subsection (1)(c) and being the same word as appears in section 48J.

If that is correct then it would seem to follow from the argument that the assessment would have to take place not only before proceedings commenced to recover, but also before the charge was levied under section 48I(1), because the expression in that provision is, "may charge and recover". The notion that an assessment was required before a charge could be made is inconsistent with section 6ZA(1) of the Act and has nothing to commend it from a commonsense point of view.

For these reasons in my judgment it is not necessary for an assessment to take place under section 48I prior to the commencement of proceedings under section 48J. I should add that the defendant also submitted that if regard was had to section 48J(2) other conditions precedent to the commencement of an action were apparent, but under paragraph (a) of that subsection it seems reasonably clear that leave could be given nunc pro tunc and the same applies to paragraph (b).

It follows from the concessions made by the parties therefore that the orders sought by the plaintiff should be granted and the defendant's application should be dismissed.

...

HIS HONOUR: I order that the plaintiff have leave to take a further step in the proceeding, and I dismiss the defendant's application filed on the 12th of December 2008.

...

HIS HONOUR: In my judgment the plaintiff is seeking an indulgence. He has been successful, but it is his own lack of attention which had brought about the situation, a lack of attention deplorable in a solicitor. In my judgment there should be no order as to costs.
