# SUPREME COURT OF QUEENSLAND

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| CITATION: | *King v King & Ors* [2012] QCA 81 |
| PARTIES: | **JOHN FRANCIS KING**<br>(applicant)<br>**v**<br>**SARAH LOUISE KING**<br>(first respondent)<br>**LYDIA ELLEN KING**<br>(second respondent)<br>**BENEDICT JOHN KING**<br>(third respondent)<br>**SAMUEL DAVID KING**<br>(fourth respondent) |
| FILE NO/S: | Appeal No 7123 of 2011<br>DC No 832 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Civil) – Further Order |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 3 April 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | Heard on the papers |
| JUDGES: | Chesterman and White JJA, and Margaret Wilson AJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Application to vary costs order made on 6 March 2012 be refused.** |
| CATCHWORDS: | APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the applicant succeeded on an appeal – where no cost orders were made – where applicant's lawyers were acting *pro bono* – where costs agreement varied 15 minutes before delivery of judgment – where new costs agreement provided for recovery of costs under *pro bono* arrangement – whether costs should be awarded to the applicant<br><br>*Legal Profession Act* 2007 (Qld), s 308<br><br>*McCullum v Ifield* [1969] 2 NSWR 329, cited<br>*Oshlack v Richmond River Council* (1998) 193 CLR 72, [1998] HCA 11, cited<br>*Wentworth v Rogers* (2006) 66 NSWLR 474, [2006] NSWCA 145, cited |

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: Minter Ellison Lawyers for the applicant
McCarthy Durie Solicitors for the respondents

[1] **CHESTERMAN JA**: The application for leave to appeal was argued on 21 February 2012. No submissions were addressed to the court on the question of costs, but it appearing that the applicant's lawyers were acting for him *pro bono*, the court thought it appropriate to make no order for costs. That opinion was reflected in the orders made when judgment was given on 6 March 2012.

[2] After judgment was pronounced in favour of the applicant his lawyers asked for costs, and were given leave to file written submissions in support of the application. The submissions when received were accompanied by an affidavit to which were annexed a copy of the costs agreement made between the applicant and his solicitors, and a written variation to the agreement.

[3] The costs agreement was made on 13 October 2011 and is titled "(Pro Bono)". The agreement relevantly provided:

> "We will provide advice and assistance and instruct Senior Counsel in relation to appealing the District Court decision to strike out your claim … We will apply for leave to represent you and, if successful, will represent you in QCAT to seek orders to stay proceedings pending a decision in the appeal (work).
>
> We will undertake only the work set out above or changes that are agreed from time to time. …
>
> **4. Charges**
>
> **4.1 Estimate of charges**
>
> We have agreed that there will be no charges in relation to the matter. …
>
> **4.2 Basis on which our charges are calculated**
>
> We have agreed that we will not charge you for the work. …"

[4] The variation to the costs agreement was made at 9.15 am on 6 March 2012, about 15 minutes before delivery of judgment. The variation added a clause, 4.3, to the agreement, in these terms:

> "**4.3 Legal costs recovered from another party**
>
> 4.3.1 If you are successful in your matter, the court may order … that the other party or parties pay certain legal fees and expenses.
>
> 4.3.2 In those circumstances, we may charge you for the legal fees and the expenses we have incurred on your behalf to an amount no greater than the amount of legal fees and expenses recovered from the other party … pursuant to such court order …"

[5] The applicant in agreeing to the variation confirmed that it was to apply retrospectively to all work undertaken by his solicitors in respect of the application for leave to appeal.

[6] The applicant submits that the costs agreement as varied made him contingently liable to pay costs to his solicitors in the event that the court ordered the respondents to pay him his costs of the application. The submission continues that the court should make the order so as to satisfy the contingency thereby giving rise to a liability in the applicant to pay his solicitors which will then provide the basis for the court ordering costs to indemnify him against his liability he will incur to the solicitors on the making of the order.

[7] An order for costs operates as an indemnity to a successful party in litigation. Costs are awarded to recompense a successful party in respect of what it cost to bring or defend successful proceedings. A corollary is that the unsuccessful litigant is not required to pay any more than the costs incurred by his successful opponent. See *Oshlack v Richmond River Council* (1998) 193 CLR 72. Before the right to indemnity can arise the successful litigant must be under a legal liability to his solicitors to pay costs. Another corollary is that if a successful litigant's lawyers act for him without charge he is not entitled to an order for costs. There is nothing to indemnify him against. See *McCullum v Ifield* [1969] 2 NSWR 329 at 330 cited by Santow JA in *Wentworth v Rogers* (2006) 66 NSWLR 474 at 486.

[8] In *Wentworth* the court considered a cost agreement to the same effect as the applicant's. The point of present significance, whether it gave rise to a liability against which the applicant is entitled to an indemnity by way of a costs order, was discussed but was not critical to the result. Different views were expressed. The nature of the contingencies which might arise in costs agreements and their consequences on the need for an indemnity, by way of a costs order against that liability, was discussed most fully by Basten JA. His Honour said (504):

> "As a matter of logic, it may seem curious that an order of the Court, which arguably should not be made unless there is a legal liability, should be relied upon as the justification for its own existence. On the other hand, it would be surprising if the long-standing practice by which lawyers appear in Australian courts on a 'speculative' basis or 'no win/no fee' basis, was based on a misconception, and did not allow for a costs order from which fees could be recovered, in the event of success. However, the conflict is more apparent than real. As noted by Millet LJ in *Thai Trading Co* … conditional fee agreements gave effect to the principle that 'there is nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge cannot afford to pay his costs if the case is lost'. As his Lordship continued … 'Not only is this not improper; it is in accordance with current notions of the public interest that he should do so.'
>
> Once that practice was accepted, it was equally appropriate to formalise the arrangement in contractual terms which would provide that the lawyer would accept a reduced fee in full settlement of his or her account, or would waive his or her right to require payment, in the event that the proceedings were unsuccessful. In each case, there is an immediate and quantifiable obligation imposed on the client

> when the retainer is created, the contingency operating as a condition subsequent."

[9] His Honour drew a distinction between that kind of contractual arrangement and that, like the present, in which a client has no obligation to pay his own lawyers unless and until an order is made by a court that he recover costs from an opponent in litigation. Basten JA said (505):

> "Although it may seem arbitrary to insist that, for the purposes of the indemnity principle, there must be a contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome, there are reasons why that is not so. First, as appears from the costs agreements presented in the present case, a successful outcome will usually involve not merely obtaining a costs order, but actual recovery of costs. It is not possible to make the existence of a right to charge dependent on recovery of the moneys from which the charges would be paid. That would be to take the circularity noted … one step too far."

[10] The circularity "noted" was explained by his Honour (at 500):

> "If the entitlement to recover costs from another party to the proceedings is dependent upon the legal liability to pay those costs to one's legal advisors, but the obligation to pay is contingent upon establishing a right to recover, the circularity is readily apparent. However, if, as in the present case, the obligation to pay depends not on a right to recover an identifiable amount of costs, but on the actual recovery of those costs, there may be no extant legal obligation to be indemnified even when a costs order is made."

[11] Santow JA took a different view. His Honour thought that conditional costs agreements of both kinds, where the payment of the lawyers' costs was contingent on the successful outcome of the matter, should be regarded as giving rise to a liability to pay sufficient to justify the indemnity afforded by a costs order. His Honour thought that it did not matter whether the contingency was "expressed as a condition precedent or subsequent" (see 487). That is to say, a litigant came under a sufficient liability to his own solicitors to justify the court ordering the indemnity by way of costs against the unsuccessful litigant where the costs agreement obliged the client to pay, but provided the obligation would be waived, or not enforced, in the event the litigation failed; and those in which the costs agreement provided that the client would come under no obligation to pay his solicitors unless and until he obtained a costs order.

[12] The third member of the court, Hislop J, expressed no opinion on the point which was not necessary to the result of the proceeding.

[13] I prefer Basten JA's analysis. The distinction described by his Honour is both real and substantial. It is more than a preference for one form of agreement over another. The circularity noted by his Honour, and described in paragraph 6 of these reasons, shows when properly analysed that there is no obligation in the applicant to pay costs until a costs order is made and a costs order cannot be made until there is a liability in the successful litigant to pay his own lawyers' costs. Catch 22 it may be, but the reality is that the client's liability to pay his solicitors stands on a whirligig which moves beneath it, and cannot support the need for an indemnity.

[14] It is, however, not necessary to determine the application for costs on this basis. As well as giving rise to the circularity described, the variation to the costs agreement appears artificial and of doubtful validity. There is not only the singular point in time at which it was made. The promise to accept a retrospective obligation appears to be unsupported by consideration, past consideration being valueless. The costs agreement did not, as required by s 308 of the *Legal Profession Act*, specify the basis of charging. But even if, somehow, the variation were binding and by it the applicant undertook an obligation to pay his solicitors' costs for which they had agreed they would not charge, the court retains a discretion not to order costs against the respondents.

[15] Without expressing any criticism of the applicant's solicitors who, in the best traditions of the profession, agreed to represent him *gratis*, the amendment to the costs agreement appears a contrivance to alter the nature of his representation *ex post facto*, and with it the basis on which the respondents had understood the applicant was represented, and the application was fought. There would be an element of unfairness to the respondents if effect were given retrospectively to the change.

[16] These considerations are, in my opinion, sufficient to require the discretion as to costs to be exercised against making the order sought.

[17] I would reaffirm the orders made when judgment was pronounced, that there be no order for costs.

[18] **WHITE JA:** I agree with the reasons of Chesterman JA that the orders made when judgment was pronounced that there be no order for costs, be affirmed.

[19] **MARGARET WILSON AJA:** There should be no order as to costs. I agree with the reasoning of Chesterman JA in paragraphs [14] – [16]. I do not wish to express any view on the circularity argument or the different views expressed by Santow and Basten JJA in *Wentworth v Rogers* (2006) 66 NSWLR 474.