SUPREME COURT OF QUEENSLAND

CITATION:	*Challen v Golder Associates Pty Ltd* [2012] QCA 307
PARTIES:	**CHALLEN, PETER LESLIE TRADING AS HAWTHORN CUPPAIDGE & BADGERY** ABN 96 335 661 027 (appellant) **v** **GOLDER ASSOCIATES PTY LTD** ABN 64 006 107 857 (repondent)
FILE NO:	Appeal No 1982 of 2012 DC No 4082 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2012
JUDGES:	Margaret McMurdo P, Fraser JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal allowed to the extent of setting aside order 6 of the orders made in the District Court on 10 February 2012.** **3. Appeal otherwise dismissed.** **4. Leave to the parties to make submissions as to the costs of the application for leave to appeal and the appeal in accordance with paragraph 52 Practice Direction No 2 of 2010.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – where the appellant solicitor was retained by the respondent to act on behalf of the respondent in defending a Supreme Court proceeding – where bills were issued on a periodic basis – where the respondent obtained orders in the District Court for assessment and itemisation of bills – whether s 333(2) *Legal Profession Act*

2007 (Qld) confers an additional time period for the application for the assessment of an interim bill after the issue of the final bill

PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – TAXATION AND ASSESSMENT OF COSTS – MATTERS RELATING TO BILL – where s 333(2) *Legal Profession Act* 2007 (Qld) refers to "final bill" in determining the time period for applying for assessment of an interim bill – whether the "final bill" is the last in time issued by the solicitor or the last bill for the legal services provided under the retainer

PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – TAXATION AND ASSESSMENT OF COSTS – MATTERS RELATING TO BILL – where the primary judge ordered itemisation of the bills for which assessment was ordered on the application of the respondent client – where the legal services were charged under the costs agreement on the basis of the number of six minute units that each item of work took – where bills were accompanied by time ledgers – where the respondent's in-house lawyer was the conduit for instructions to the appellant – whether complete itemisation of the bills should have been ordered under r 743C *Uniform Civil Procedure Rules* 1999 (Qld)

Legal Profession Act 2007 (Qld), s 3, s 300, s 308, s 333, s 335, s 738
Uniform Civil Procedure Rules 1999 (Qld), r 743C

Dromana Estate Ltd v Wilmoth Field Warne [2010] VSC 308, considered
Re Morris Fletcher & Cross' Bill of Costs [1997] 2 Qd R 228, considered
Retemu Pty Ltd v Ryan (NSW District Court, Coorey DCJ, 4300/08 and 4301/08, 16/4/10, unreported), considered
Robertson, Ward, Suderman & Bowes v BC Transit (1988) 19 BCLR (2d) 1, considered
In re Romer & Haslam [1893] 2 QB 286, considered
Tabtill No 2 Pty Ltd v DLA Phillips Fox (a firm) [2012] QSC 115, considered
Turner v Mitchells Solicitors [2011] QDC 61, considered
Re Walsh Halligan Douglas' Bills of Costs [1990] 1 Qd R 288, considered

COUNSEL: K E Downes SC for the appellant
M S Trim for the respondent

SOLICITORS: Hawthorn Cuppaidge & Badgery for the appellant
DGT Costs Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree with Mullins J.

[2] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the orders proposed by her Honour.

[3] **MULLINS J:** The appellant is a solicitor. The respondent was formerly a client of the appellant and was successful in obtaining orders from the learned primary judge for assessment of 27 bills delivered by the appellant to the respondent between 5 July 2006 and 9 December 2010. The appellant was also ordered to deliver to the respondent itemised bills with respect to each of the 27 bills, setting out full details of each item of work done, the date each item of work was done, the basis of the charge for the work, the amount charged for carrying out each item of work, and the details of the person who carried out the work. The primary judge made orders to facilitate the appointment of the costs assessor and about the service of a notice of objection. The costs of the application were reserved.

[4] The appellant applies for leave to appeal from the primary judge's decision (*Golder Associates P/L v Challen* [2012] QDC 11) and seeks to appeal on the basis that, apart from the last three bills, the respondent was out of time to seek assessment of the bills and, to the extent there was an entitlement of the respondent to seek assessment of the bills, the primary judge erred in ordering complete itemisation of the bills. The respondent opposes leave on the basis that the primary judge's decision turns on the particular facts (where the appellant has not issued a bill for the balance of the work completed to the termination of the retainer, although claiming to be entitled to do so) and there is no demonstrable error in the decision.

The primary judge's reasons

[5] There is no challenge to the facts recited in the primary judge's reasons (the reasons). The appellant was retained by the respondent to act for the respondent who was a defendant in Supreme Court proceeding number 5216 of 2005. The retainer was in writing and comprised a client agreement dated 19 May 2006 (with a schedule of costs dated 19 May 2006 and a subsequent schedule of costs dated 11 July 2006) entered into when the *Queensland Law Society Act* 1952 (*QLSA*) was in force and a costs agreement dated 1 April 2008 entered into after the *Legal Profession Act* 2007 (*LPA*) had commenced. In the case of both agreements the agreed basis for rendering professional fees was for each item of legal service to be costed on the time taken to perform the work recorded in units where each unit is six minutes and the charge is one-tenth of the hourly rate per unit or part of a unit. The respondent was a sophisticated client, as defined in s 300 of the *LPA*, to which disclosure under s 308 of the *LPA* was not required.

[6] Each bill had attached to it a time ledger showing the nature of the work undertaken, the identity of the person who did the work, the charge out rate for that person and the number of units for that item of work. The *QLSA* applied to the 14 bills issued in the period between 5 July 2006 and 18 December 2007. The remaining 13 bills in the period between 17 April 2008 and 9 December 2010 were issued under the *LPA*. Costs assessments of all the bills were governed by division 7 of part 3.4 of the *LPA*: s 738 *LPA*.

[7] All bills were paid in full, except for the bill dated 14 October 2010 and the two bills dated 9 December 2010. The respondent paid the appellant $21,086.44 on 23 December 2010 that was applied in part payment of the bill dated 14 October

2010. The appellant claims that there is due to him the sum of $65,346.10, comprising $45,433.67 for the balance owed under the bill dated 14 October 2010 and $19,932.43 for the two bills dated 9 December 2010. The total amount of fees and outlays claimed in the 27 bills was $355,816.72.

[8] The appellant continued to perform legal services for the respondent pursuant to the retainer between 8 December 2010 and 25 January 2011 when the retainer was terminated by the respondent. The appellant has not yet rendered a bill in respect of those services undertaken between 8 December 2010 and 25 January 2011 which the appellant has recorded in its accounting system as unbilled work in progress. The appellant maintains his right to render a bill for this work.

[9] By letters dated 24 March and 20 April 2011, the respondent requested the appellant to provide itemised bills for each of the bills rendered by the appellant. There had never been any prior request for the appellant to itemise any of the bills. The appellant claimed a lien, because of the unpaid fees of $65,346.10. The primary judge concluded (at [24]) that circumstances did not exist to order the appellant to give up his lien and that aspect of the decision is not challenged.

[10] The appellant argued before the primary judge that all 27 bills were interim bills, as the appellant retained the right to render a bill for the unbilled work and had not rendered a final bill. The respondent argued before the primary judge that the final bill must be the last in time and that the two bills rendered on 9 December 2010 were therefore the final bills rendered by the appellant in the circumstances of this retainer.

[11] The primary judge considered the application of s 333 and s 335 of the *LPA* and followed the approach of McGill DCJ in *Turner v Mitchells Solicitors* [2011] QDC 61 that an effective definition of interim bill was provided in terms of s 333(1) of the *LPA* that it was a bill covering part only of the legal services the law practice was retained to provide. At [33] of the reasons, the primary judge construed the word "final" in s 333(2) of the Act as referring to the last in time and considered that the word "final" should not be construed as "ultimate". The primary judge (at [35] of the reasons) followed the approach in *Turner* (at [16]-[27]) to the construction of the relevant provisions of the *LPA*, such that an assessment can be ordered of all the interim bills once there is a final bill and an application is made within 12 months of that final bill.

[12] The primary judge concluded (at [34] of the reasons) that the bills delivered by the appellant dated 9 December 2010 were final bills despite the uncharged work in progress for the period 8 December 2010 to 25 January 2011 which had not been billed by the appellant. The primary judge therefore held (at [41] of the reasons) that all the bills preceding those final bills were interim bills and that all the interim bills could be assessed, including those delivered more than 12 months before the application was filed.

[13] In determining whether to order itemisation of the bills pursuant to r 743C of the *Uniform Civil Procedure Rules* 1999 (*UCPR*), the primary judge applied the principle that the bill must contain sufficient detail to enable the client to make up its mind on the subject of assessment and to enable those advising the client as to whether assessment was desirable or not and reasoned:

> "[45] In the present matter the time ledgers do set out individual items of work and a claim for those individual items of work. However the time ledgers do not disclose by whom the work was done and what was the size of a letter, fax or email for example that was drafted or perused. Further, the time ledger does not disclose how long a telephone call took. This again is by way of example.
>
> [46] The code in the margin of the time ledger may disclose who did the work. However that is not expressed in the bill delivered by the respondent to the applicant.
>
> [47] Reference to the file may answer these questions. However, the respondent maintains his right to the file.
>
> [48] In the end I have come to the view that the respondent should deliver itemised bills with respect to each of the bills delivered between 5 July 2006 and 9 October 2010. That is despite the applicant being a sophisticated client and having its own in house counsel."

The relevant legislation

[14] The main purposes of the *LPA* are set out in s 3:

> "(a) to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;
> (b) to facilitate the regulation of legal practice on a national basis across State borders."

[15] Part 3.4 of chapter 3 of the *LPA* deals with costs disclosure and assessment. The main purposes of part 3.4 are set out in s 299 of the *LPA*:

> "(a) to provide for law practices to make disclosures to clients regarding legal costs;
> (b) to regulate the making of costs agreements relating to legal services, including conditional costs agreements;
> (c) to regulate the billing of costs for legal services;
> (d) to provide a mechanism for the assessment of legal costs and the setting aside of particular costs agreements;
> (e) to provide for the maximum payment for a law practice's conduct of a speculative personal injury claim, other than practice as or in the manner of a barrister."

[16] Division 5 of Part 3.4 of the *LPA* deals with costs agreements.

[17] The definition of "itemised bill" is set out in s 300 of the *LPA*:

> "***itemised bill*** means 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."

[18] Section 332(1) of the *LPA* provides:

> "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."

[19] Under s 332(2) the law practice must comply with the request for an itemised bill within 28 days after the date on which the request is made.

[20] Section 333 is in division 6 of part 3.4 dealing with billing. Section 333 of the *LPA* provides:

"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."

[21] Section 335 is found in division 7 of part 3.4 of the *LPA* which deals with costs assessment. Subsections (1) to (6) of s 335 of the *LPA* provide:

"(1) A client may apply for an assessment of the whole or any part of legal costs.

(2) A third party payer may apply for an assessment of the whole or any part of legal costs payable by the third party payer.

(3) The costs application may be made even if the legal costs have been wholly or partly paid.

(4) If any legal costs have been paid without a bill, the client or third party payer may nevertheless make the costs application.

(5) 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.

(6) However, a costs application made out of time, otherwise than by any of the following, may be dealt with by a costs assessor or a court if, under the Uniform Civil Procedure Rules, the assessor or the court decides to deal with it after considering the reasons for delay—

(a) a sophisticated client;

(b) a third party payer who would be a sophisticated client if the third party payer were a client of the law practice concerned."

[22] The criteria for a costs assessment that must be considered by the costs assessor are set out in s 341 of the *LPA*:

"(a) whether or not it was reasonable to carry out the work to which the legal costs relate; and

(b) whether or not the work was carried out in a reasonable way; and

(c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 340 applies to any disputed costs."

[23] Under s 340 of the *LPA* a costs assessor must usually assess any disputed costs that are subject to a costs agreement by reference to the rate for calculating the amount of the costs that is specified in the costs agreement. Section 341(2) sets out the matters that a costs assessor may have regard to in considering what is a fair and reasonable amount of legal costs.

The issues

[24] The appellant contends:

(a) that the primary judge erred in failing to find each of the bills (other than the bills dated 9 December 2010) issued by the appellant to the respondent was a final bill and not an interim bill within the meaning of s 333 of the *LPA*;

(b) to the extent that any of the bills was able to be assessed, that the primary judge erred in ordering itemisation of the bill.

Relevant cases

[25] Both parties made submissions by reference to *Turner* and two decisions that were analysed in *Turner*: *Retemu Pty Ltd v Ryan* (NSW District Court, Coorey DCJ, 4300/08 and 4301/08, 16/4/10, unreported) and *Dromana Estate Ltd v Wilmoth Field Warne* [2010] VSC 308.

[26] *Retemu* was concerned with the New South Wales equivalent provision to s 333 of the *LPA* which is s 334 of the *Legal Profession Act* 2004 (NSW) which provides:

"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 11 (Costs assessment), either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid."

[27] Section 350(4) of the New South Wales Act (which is equivalent to s 335(5) of the *LPA*) provides:

"An application by a client or third party payer for a costs assessment under this section 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."

[28] The issue in *Retemu* was whether the client was entitled to have bills of costs assessed that were more than 12 months old at the time of the application for assessment. There was a continuing relationship between the solicitor and the client over the period of time during which 30 bills were sent, some of which were paid by

the client. Coorey DCJ accepted the client's submission "that where there is a 'continuing relationship' in the conduct of legal services it would be dysfunctional to that relationship if the client had to make applications to an assessor for interim bills to be queried while the solicitor was continuing to carry out legal services for the client." Coorey DCJ concluded that s 334 of the New South Wales Act allows all interim bills to be assessed either at the time of the interim bill or at the time of the final bill, stating:

> "I accept the client's submission that there is no conflict between s 334 and s 350 (12 month time limit). S 334 simply allows a client to make an application for an assessment of the interim bills and the final bill at the time of the final bill; the application for assessment is bound by the limitation period of 12 months in s 350. The application for assessment of the final bill must be made within the 12 month limitation."

[29] *Dromana* was concerned with s 3.4.37 and s 3.4.38 of the *Legal Profession Act* 2004 (Vic). Section 3.4.37 (which is equivalent to s 333 of the *LPA*) provides:

> "(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 reviewed 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 reviewed or paid."

[30] Section 3.4.38(5) of the Victorian Act (which is equivalent to s 335(5) of the *LPA*) provides:

> "An application by a client or third party payer for a costs review under this section 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."

[31] Most of the bills of costs in *Dromana* were dated more than 12 months prior to the filing of the application for review of costs pursuant to s 3.4.38 of the Victorian Act. There was a preliminary question whether the client was entitled to seek a costs review of the bills which were given more than 12 months before the date of the application. It was argued on behalf of the client that all interim bills, could be reviewed with the final bill provided the review of the final bill was sought within 12 months. That was referred to as the piggyback concept. The client conceded that there was no disclosure requirement under the Victorian Act to advise the client of the ability to piggyback interim bills to the review of the final bill.

[32] Wood AsJ held in *Dromana* (at [12]) that the term "bill" used in s 3.4.38 includes both an interim bill and a final bill, so that the time limit for review for either an interim bill or a final bill is 12 months. Wood AsJ concluded at [19] that the absence of the requirement to advise by way of disclosure of any piggyback option supported the argument that the limitation of 12 months applies to the review of interim and final bills and s 3.4.37 should be given a restrictive interpretation subordinate to s 3.4.38. This left little work for s 3.4.37(2), as observed in *Dromana* (at [24]):

> "Sub-paragraph 3.4.37(2) enables an interim bill to be reviewed at the time it is delivered and also at the time the final bill is reviewed, even if the interim bill has been paid or if it has been previously reviewed. This is all subject, however, to the application to review both the interim bill and the final bill being filed within 12 months of the bills being received. In practice this might be a small opportunity and convey a small right but the section can still sit with 3.4.38."

[33] McGill DCJ's conclusion in *Turner* on the interpretation of s 333(2) of the *LPA* is set out (at [27]):

> "In my opinion s 333(2) means what it says: if there is an interim bill, then the legal costs which it covers may be assessed at the time of the interim bill or at the time of the final bill. Accordingly, the client may apply under s 335 for an assessment at either time, and will be subject to the applicable limitation at either time. An application in respect of the legal costs covered only by the interim bill will have to be made within 12 months after that bill was given or request for payment made or the costs were paid, but if the legal costs are to be assessed at the time of the final bill, then the application must be made within 12 months of the final bill. It follows that if an application is made within 12 months of the final bill, the legal cost which may be assessed under s 335(1) include (or at least may include) all of the legal costs subject to any interim bill which was part only of the legal services the law practice was retained to provide, even though those costs are not included in the "final bill". For practical purposes, the section preserves the rights that would have been available to obtain assessment if the lawyer could only charge on the basis that the retainer was an entire contract. I agree with and follow the reasoning in *Rotemu (sic) Pty Ltd*, but not the reasoning in *Dromana Estate Ltd*."

[34] The client in *Turner* sought assessment of all the legal costs charged by the practitioner in 44 tax invoices dated between 10 May 2002 and 4 February 2010. There were three categories of legal services that were provided in that case and McGill DCJ concluded there had been a break in instructions until a new retainer after April 2004 to commence the relevant Tribunal proceeding. Before the matter got to a hearing in the Tribunal, the retainer was terminated. McGill DCJ concluded (at [31]) that the client was entitled to have assessed the last bill delivered by the practitioner and all other bills delivered after the commencement of the retainer to carry on the proceeding in the Tribunal as "Those other bills can be regarded as interim bills for the purposes of s 333, and the application is therefore within time."

[35] *Turner* was applied in *Tabtill No 2 Pty Ltd v DLA Phillips Fox (a firm)* [2012] QSC 115 in respect of the effect of a break in the retainer on the characterisation of the bills. McGill DCJ's construction of s 333 and s 335 of the *LPA* is set out without demur in *Tabtill* (at [66]).

Submissions on the construction of s 333(2) of the *LPA*

[36] The appellant's written submissions support the construction of s 333(2) based on the approach in *Dromana*.

[37] In addition, Ms Downes of senior counsel on behalf of the appellant suggests an alternative approach to construing "interim" in s 333(2) that "interim" means "provisional" or "temporary" and s 333(2) could apply only if the bill were issued on account of legal work that would be the subject matter of, and therefore covered by, the final bill. Although the appellant does not abandon the argument he put before the primary judge that all 27 bills were interim bills, he now pursues an argument that was not the focus of his submissions before the primary judge and that is that each of the 27 bills was a final bill in respect of the period of time to which the bill related. The appellant relies on statements made in British Columbia cases, including *Robertson, Ward, Suderman & Bowes v BC Transit* (1988) 19 BCLR (2d) 1 at [38]-[39], that arrangements between the client and the law firm can result in periodic accounts representing the law firm's final and conclusive charge for the work represented in them being final bills, in contrast to an interim account which is a provisional or temporary account.

[38] The appellant relies on the beneficial effect for both client and solicitor that s 333 of the *LPA* makes it clear that the law practice may issue interim bills for part only of the legal services that are the subject of the retainer and those bills may be the subject of assessment before the retainer has been completed or the final bill issued: cf *In re Romer & Haslam* [1893] 2 QB 286, 293, 298. It is therefore submitted that is the purpose of s 333, rather than to provide an additional time period of 12 months from the date of the final bill for the assessment of an interim bill. The appellant also relies on the evolution of the *LPA* and that s 333 is a non-core provision, but s 335 is a core provision, of the national model laws for the regulation of the legal profession. The appellant submits that s 335(5) should be given primacy in setting the time period for bringing an application for assessment of an interim bill.

[39] The respondent submits that "interim" in s 333(2) should be interpreted as meaning periodic, but otherwise embraces the approach in *Retemu* and *Turner*. The respondent submits that the term "interim bill" is used in s 333(2) to distinguish a bill (which is not the final bill) from the final bill. The respondent submits that the appellant's approach to the construction of s 333(2) gives no operation to the words "either at the time of the interim bill or at the time of the final bill," where the provision expressly contemplates that the interim bill may have previously been assessed.

Does s 333(2) of the *LPA* confer an additional time period for the assessment of an interim bill?

[40] If s 333(2) of the *LPA* does confer an additional time limit for the assessment of an interim bill, it is anomalous that provision is found in division 6 concerned with billing, rather than division 7 concerned with costs assessment where the time period for a costs assessment application is otherwise specified in s 335(5). It would also be anomalous if the clear words in s 333(2) were deprived of effect where they contemplate that an interim bill may be assessed either at the time of the interim bill or at the time of the final bill. If the approach in *Dromana* were followed, there would be no opportunity for the assessment of an interim bill at the time of the final bill, unless the final bill were given within 12 months of the interim bill. Taken in conjunction with the time limit in s 335(5) that allows for an application for costs assessment to be made within 12 months of a bill (which must apply both to an interim bill and a final bill), giving meaningful effect to the language of s 333(2) favours the approach in *Retemu* and *Turner*.

[41] There is good reason, as recognised in *Retemu* and *Turner*, for conferring the opportunity for the client to have the interim bill assessed after the retainer has ended and the final bill has issued, as that avoids prejudice to the relationship of the client and the solicitor during the course of the retainer. It also enables consideration of the reasonableness of the work that is the subject of the interim bill, the way in which that work was carried out and the costs for that work to be undertaken in the context of the completed work and the costs claimed by the solicitor for the whole retainer.

[42] This approach in *Retemu* and *Turner* to the construction of s 333(2) of the *LPA* will achieve better the main purpose of the *LPA* set out in s 3(a) than the approach in *Dromana*: s 14A(1) *Acts Interpretation Act* 1954.

[43] There was no error in the primary judge's conclusion that s 333(2) of the *LPA* allows an additional time period for the assessment of an interim bill which is within 12 months after the final bill was given.

What is the final bill?

[44] The conclusion of the primary judge that the final bill is merely the last in time rather than the ultimate bill would have the unsatisfactory consequence that over the course of the retainer the delivery of another bill would give rise to a new right of assessment of an interim bill under s 333(2). Although there is no definition in the *LPA* of "final bill," the expression is used in contrast to "interim bill" which is effectively defined in s 333(1) as a bill for part of the legal services that the law practice was retained to provide. That suggests that the final bill must be the last bill for the legal services that the law practice was retained to provide. Whether a bill is a final bill may not be apparent at the time that it is issued by the solicitor. By way of an example, a bill may be issued in anticipation that further work will be undertaken under the retainer, but that expectation is overtaken by the termination of the retainer immediately after the issue of the bill and before any further work is undertaken, resulting in the bill being the final bill.

[45] The appellant now seeks to characterise each of the bills he rendered as a final bill, on the basis that it applied to a finite period of time in respect of which he was entitled to charge under the costs agreement for the legal services undertaken during the period to which the bill applied. The appellant relies on the terms of the costs agreement to characterise each of the bills as a final bill which was the approach in *BC Transit*. For the purpose of the application of the *LPA*, however, it is relevant what the *LPA* designates as the final bill. As the term "interim bill" is defined in s 333(1) as "covering part only of the legal services the law practice was retained to provide," the term "final bill" must be the last bill rendered by the law practice for the legal services the law practice was retained to provide. The terms "interim" and "final" are used in s 333 of the *LPA* to describe the bills in relation to the legal services the subject of the retainer, rather than the costs rendered by the law practice. The relevance of the costs agreement in determining what is the final bill is that it specifies the extent of the retainer.

[46] This conclusion on the meaning of "final bill" differs from the primary judge's conclusion in [33] of the reasons that "final" means the last in time. It does not mean that the primary judge was wrong, however, in concluding that the bills of 9 December 2010 were the final bills.

[47] It was not an attractive position that was adopted by the appellant before the primary judge that, despite the termination of the retainer on 25 January 2011, as he had not issued a bill for the last work undertaken by him under the retainer, there was no final bill. (It remained the position at the hearing of this application for leave to appeal that the appellant had not issued a bill for the work he undertook between 8 December 2010 and 25 January 2011.)

[48] Despite the appellant's reservation of the right to render such a bill, he failed to do so almost a year after the retainer was terminated, when he was in dispute with the respondent over the quantum of his costs and responding before the court to an application for a costs assessment. The failure to render a bill by the appellant in those circumstances when more than a reasonable time had elapsed for so doing after the termination of the retainer means that by the time the application was heard by the primary judge the last bills that the appellant did render were the final bills in relation to the subject retainer.

[49] There was no error in the primary judge's conclusion that the bills of 9 December 2010 were the final bills under the retainer.

Should itemisation of the bills have been ordered?

[50] It is not in issue that during the retainer, with the exception of the period between mid February 2010 and September 2010, the appellant's instructions from the respondent were received from the respondent's in-house corporate solicitor who was Ms Lombardi until she retired from the respondent's employment in mid February 2010 and Mr Barclay from September 2010 until 25 January 2011.

[51] The application that was filed by the respondent seeking the assessment of the appellant's costs did not expressly request directions for the preparation of itemised bills. The affidavit of Ms Chowdhury filed in support of the application expressly requested the court to make orders for the appellant to provide itemised bills. Although the appellant took the point before the primary judge that there was no application made to have the bills itemised, and that is a ground of appeal, that position was not advanced on the hearing of the application for leave to appeal. It was appropriate that it was not relied on, in view of r 743C of the *UCPR* which confers the discretion on the court to give directions that it considers appropriate for an itemised bill to be prepared, filed and served, if there is no itemised bill for the costs to be assessed under an application for costs assessment.

[52] It is implicit in the oral submissions on behalf of the appellant, that the appellant accepts that itemised bills had not been provided. Instead the appellant submits that the primary judge erred in the exercise of the discretion conferred by r 743C to order the complete itemisation of the bills.

[53] The appellant relies on the observations made by Dowsett J in *Re Walsh Halligan Douglas' Bills of Costs* [1990] 1 Qd R 288 at 293-294, particularly:

> "I consider that the adequacy of the bills must really be considered in the light of all of these factors. If the test be what is adequate in order to enable the client to determine on advice whether to seek taxation, it is reasonable to take into account the degree of business and legal sophistication of the client, whether the client has in-house legal advice, whether another firm of solicitors is also advising, and any agreement reached between the parties as to the basis for charging."

[54] These observations were made in the context of a legislative scheme that prevented the solicitor from commencing an action to recover any fees until the expiration of one month after having delivered a bill which had sufficient details to enable the client to take advice on and decide whether taxation of the bill was desirable. Similar considerations are relevant to the exercise of the discretion under r 743C: *Re Morris Fletcher & Cross' Bill of Costs* [1997] 2 Qd R 228, 238, *Tabtill* at [80]-[83].

[55] Section 332(1) of the *LPA* allows the client to request an itemised bill prior to applying for the costs assessment, when the client is yet to decide whether or not to seek an assessment. In this matter the respondent applied for the costs assessment on the basis of the bills that had been rendered. It was then a matter for the court under r 743C of the *UCPR* whether, and to what extent, itemisation should be ordered. The primary judge appears to have exercised the discretion to order itemisation of the bills on the basis that the time ledgers were not part of the bills and the appellant was maintaining his right to the file (at [45]-[47] of the reasons). The primary judge was not making the determination of whether the bills were itemised for which the question of whether the time ledgers were part of the bills may have been relevant. The information in the time ledgers (whether it was part of the bills or not) was relevant to the question of whether itemisation of the bills should be ordered or whether the appellant should have been ordered to provide further information to the respondent on the aspects of the bills that were of concern to the respondent. The primary judge took into account an irrelevant matter and failed to take into account all relevant matters in deciding to order itemisation of the bills. It is therefore appropriate for this court to consider the exercise of the discretion under r 743C.

[56] The criteria for the costs assessment that are set out in s 341 of the *LPA* and the requirement under s 340 of the *LPA* that the costs assessor must assess any disputed costs by reference to the charge out rate and means for calculating costs set out in the costs agreement is relevant to the exercise of the discretion to order itemisation of the bills. The information that has already been provided in the bills with the accompanying time ledgers is also pertinent. It is apparent from a perusal of those time ledgers that for many of the items of work the respondent has at its disposal much of the information required to assess the costs. This is largely due to the involvement of the respondent's in-house lawyer as the conduit for instructions to the appellant and as the respondent's representative to whom the appellant reported on the progress of the subject litigation that is reflected in the time ledgers.

[57] The time ledgers typically record telephone calls to and attendances on Ms Lombardi, perusing emails from Ms Lombardi, drafting letters to the client, perusal of the client's file, drafting letters to and perusal of letters and emails from the solicitors for the other parties to the litigation, perusal of identified pleadings, and attendances on counsel. The identification of the units charged and the initials of the solicitor who did each item of work whose charge out rate is then reflected in the amount charged for that item of work together with the documents and records that the respondent holds in connection with the retainer would enable the costs assessment to proceed on the basis of the bills that have been rendered.

[58] Another matter relied on by the appellant against the exercise of the discretion to order itemisation are the limited bases on which the respondent challenges the appellant's bills that are set out in the respondent's letters of 24 March and 20 April

2011, such as whether the respondent was entitled to expect lawyers chargeable at a lesser rate than the appellant undertake some of the work that the appellant did, and whether perusal of multiple emails concerned with the same or the similar subject matter on the same day should have been charged as separate perusals. The respondent did not attempt by its affidavits filed in support of the application to provide detail of its concerns about the bills or explain why or in what respects itemisation of the bills was required.

[59] The exercise by the appellant of his lien over the file does not preclude the costs assessment taking place.

[60] For the purpose of the application for leave to appeal the appellant filed a further affidavit in which he dealt with the hardship that providing the itemisation of all bills that was ordered by the primary judge would cause him as a sole practitioner because of the lengthy period of time that had passed since the earlier bills had been rendered. What is the more relevant consideration, however, in this matter is the extensive information that the respondent already has at its disposal from the detailed time ledgers that accompanied the bills and the manner in which the respondent dealt with the appellant through its in-house lawyer.

[61] In all the circumstances, I would not exercise the discretion under r 743C to order itemisation of the bills and the order made to that effect by the primary judge (order 6) should be set aside.

Whether leave to appeal should be granted

[62] This appeal has raised issues about the interpretation of s 333 of the *LPA*, the meaning of "final bill," and the exercise of the discretion to order itemisation of bills, which have significance for both law firms and clients. It is therefore an appropriate case for granting leave to appeal, even though the appeal succeeds only in relation to the order made for itemisation of the bills.

Orders

[63] As each party has had mixed success, the parties should be given an opportunity to make submissions on costs. The orders which should therefore be made are:

1. Application for leave to appeal granted.
2. Appeal allowed to the extent of setting aside order 6 of the orders made in the District Court on 10 February 2012.
3. Appeal otherwise dismissed.
4. Leave to the parties to make submissions as to the costs of the application for leave to appeal and the appeal in accordance with paragraph 52 Practice Direction No 2 of 2010.