

SUPREME COURT OF QUEENSLAND

CITATION: *Challen v Golder Associates Pty Ltd* [2012] QCA 339

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
(respondent)

FILE NO: Appeal No 1982 of 2012
DC No 4082 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 4 December 2012

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P, Fraser JA and Mullins J
Judgment of the Court

ORDER: **The appellant is to pay 50 per cent of the respondent’s costs of the application for leave to appeal and the appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant filed notice of appeal – where the appellant required leave to appeal from the court under s 118(3) of the *District Court of Queensland Act 1967* (Qld) – where the appellant required an extension of time for filing the application for leave to appeal – where leave to appeal was granted – where the appellant was partially successful on appeal – whether costs should be awarded and on what basis
District Court of Queensland Act 1967 (Qld), s 118(3)
Legal Profession Act 2007 (Qld), s 333
Challen v Golder Associates Pty Ltd [\[2012\] QCA 307](#), related

COUNSEL: P L Challen (sol) for the appellant
M S Trim for the respondent

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

- [1] **THE COURT:** The parties were given leave to make submissions on the costs of the application for leave to appeal and the appeal when the court granted leave to appeal and allowed the appeal to the extent of setting aside the order made by the primary judge for the itemisation of the 27 bills rendered by the appellant for legal services: *Challen v Golder Associates Pty Ltd* [2012] QCA 307 (the appeal judgment).
- [2] The appellant had filed a notice of appeal against the orders of the primary judge, when leave to appeal was required from the court under s 118(3) of the *District Court of Queensland Act 1967*. The appellant had incorporated in the orders sought in the notice of the appeal that, to the extent necessary, the appellant be granted leave to bring the appeal, but that did not fulfil the requirements for making an application for leave to appeal. The respondent took the point in its outline filed on 27 April 2012 that leave to appeal was required and opposed the grant of leave. On 13 July 2012 the appellant finally filed the requisite application for leave to appeal and the same application also sought the required extension of time until 13 July 2012 to file the application for leave to appeal. The application also sought that the costs of the application be costs in the appeal. At the commencement of the hearing in this court on 19 July 2012, the extension of time for filing the application for leave to appeal was granted, without any objection from the respondent to the extension of time.
- [3] The appellant was successful in obtaining leave to appeal. He was unsuccessful in challenging the order for the assessment of all 27 bills, but was successful in having the court find error in the primary judge's exercise of the discretion to order itemisation of the bills. In exercising the discretion on appeal, the court did not order itemisation of the bills and set aside the order that had been made by the primary judge for itemisation of the bills.

Appellant's submissions

- [4] On the basis that the appellant was granted both an extension of time and leave to appeal and the respondent was unreasonable in opposing the granting of leave to appeal, the appellant seeks an order for costs in his favour in respect of both applications.
- [5] The appellant relies on the observations made in [62] of the appeal judgment and submits that it was reasonable for the appellant to pursue the appeal in relation to the issues of the interpretation of s 333 of the *Legal Profession Act 2007* (Qld) and the meaning of "final bill" due to the public interest arising from the national legislative scheme and the conflicting authorities. This is despite the appellant's lack of success in challenging the order for the assessment of the bills to which these issues related. Because of the appellant's success in appealing against the order for itemisation of the 27 bills and the unreasonableness of the respondent in applying for those bills to be itemised in the circumstances of the case, the appellant submits that he should be awarded 50 per cent of his costs of the appeal and all his costs in the District Court which relate to the itemisation of the bills and that otherwise there be no order as to the costs in respect of the appeal.

Respondent's submissions

- [6] The respondent submits that the appellant should pay 75 per cent of its costs of the application for leave and the appeal. This is on the basis that the issue concerning

the entitlement of the respondent to have the bills assessed occupied the majority of the appeal in written and oral submissions and that was reflected by the proportion of the appeal judgment concerning that issue.

- [7] The conduct of the appellant in making the late application for leave to appeal should be taken into account in making orders as to the costs of the application and the appeal. The respondent relies on the observations made about the appellant's position on whether the bills were interim or final bills in [37] and [47] of the appeal judgment. As the court upheld the primary judge's orders for assessment of the 27 bills (even though dispensing with itemisation of those bills), the bills will still be assessed.

What order for costs is appropriate?

- [8] The order for extension of time in which to appeal was made as part of the application for leave to appeal and it is not necessary to make any separate costs order in respect of the extension of time to apply for leave to appeal.
- [9] The order for costs of the appeal should reflect that the respondent's success was on the main issue and the appellant's success was on the subsidiary issue. Neither party's suggested order sufficiently accommodates both these circumstances. This is an appropriate case for making one order for costs of the appeal, rather than endeavouring to make separate orders for costs of each issue. An order that the appellant pay 50 per cent of the respondent's costs of the appeal reflects appropriately the outcome on the issues of the appeal. The application for leave to appeal does not warrant any different treatment.
- [10] The costs of the application before the primary judge were reserved. Although the notice of appeal did seek that order be set aside and that the appellant's costs of the application before the primary judge be paid by the respondent or be the appellant's costs in any event, that would have been an appropriate course if the order for assessment of the bills (or most of the bills) had been set aside. The assessment will now proceed. The question of the costs before the primary judge will be able to be dealt with appropriately in the light of the appeal judgment and the assessment. The order made by the primary judge reserving the costs of the application before the primary judge should therefore stand.

Order

- [11] The order which should therefore be made is:
The appellant is to pay 50 per cent of the respondent's costs of the application for leave to appeal and the appeal.