DISTRICT COURT OF QUEENSLAND

CITATION:	*HWL Ebsworth v XYZX Limited* [2015] QDC 178
PARTIES:	**HWL Ebsworth** **(appellant)** **v** **XYZX Limited** **(first respondent)** **and** **Martin Holland** **(second respondent)**
FILE NO/S:	1211/15
DIVISION:	Civil
PROCEEDING:	Application for summary judgment
ORIGINATING COURT:	Brisbane
DELIVERED ON:	23 June 2015 (Ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2015
JUDGE:	Rackemann DCJ
ORDER:	**Summary judgment is granted**
COUNSEL:	CG Curtis for the appellant
SOLICITORS:	HWL Ebsworth for the appellant M Holland (self represented)

[1] HIS HONOUR: This is an application for summary judgment against the second defendant in respect of a claim for unpaid legal fees. The client to whom the services were provided was a company, but the second defendant is pursued on the basis that he agreed to be jointly and severally liable for the payment as principal debtor of the client's legal costs in the matter. The proceedings were commenced in March of this year. On the 26th of May, default judgment was obtained against the first defendant.

[2] Insofar as the second defendant is concerned, a notice of intention to defend and defence was filed on the 6th of May 2015. The second defendant acts for himself. The defence relevantly consisted, in the main, of bare denials. When this application first came on, it was adjourned to permit the defendant to put affidavit material together and an affidavit was forthcoming yesterday. The application has been approached on the basis of seeing whether there is anything in that affidavit, or indeed in the evidence which the respondent was permitted to give from the witness box today, which would prevent the conclusion that he has no real prospects of success and that there is no need for a trial.

[3] The defendant's affidavit material and evidence seeks to raise two matters of potential significance. The first of those is a dispute about the formation of the agreement pursuant to which legal services were provided and, in particular, the terms of that agreement whereby he agreed to be jointly and severally liable for the relevant invoices.

[4] The claim is based on there having been an initial costs agreement and then an amended costs agreement. The first is exhibit NHH2 to the affidavit of Nicholas Amine Humzy-Hancock and the second is exhibit NHH4 to the same affidavit.

[5] In each case, the agreements consisted of a covering email, a letter signed by a partner from the firm and which had a space for the signature of the client by its representative and an annexed standard costs agreement and standard costs disclosure. The covering letter in each case contained the following provision:

> "The terms of our engagement are above and as set out in our attached costs agreement, which may be accepted by you in accordance with that document, including by signing that document or giving us instructions after receiving this offer."

[6] The standard costs agreement contained the following clause in relation to the acceptance of the offer:

> "(4) Acceptance of offer: If you accept this offer, you will have entered into a costs agreement with us. This means you will be bound by the terms and conditions set out in this document, including being billed in accordance with it. Acceptance may be by any one of the following ways: signing and returning a copy of this document; giving us instructions after receiving this document; or oral acceptance. Failure to accept our offer in seven days of dispatching this document can result in the immediate withdrawal of our offer to act on your behalf."

[7] The same standard costs agreement also contained the following clause in relation to the liability for payment of the indebtedness of a corporate client:

> "(10) If you are a corporation or a body corporate: where the client is a corporation or body corporate, you agree that you sign this agreement for and on behalf of that corporation or body corporate and that you will remain jointly and severally liable for payment as principal debtor of all of the client's legal costs in this matter. You further warrant that you have the requisite authority to enter into this agreement on behalf of the client and that both the client and you agree to be bound by the terms and conditions of this agreement."

[8] The plaintiff is unable to produce executed copies of either of the costs agreements. There is a dispute, on the basis of the testimony given by the defendant today, as to whether he ever signed either of them. However, as has already been noted, the

offers were stated to be capable of acceptance not just by signing and returning a copy of the document, but, in the alternative, by giving instructions after receipt of the document. There is no dispute that, after receiving these documents, instructions were given to the firm and it would accordingly appear that there was acceptance of the offer that was made. The factual dispute about whether Mr Holland ever executed either of those agreements is not a dispute which justifies a trial because it would not result in any realistic prospect of his success in defending the claim.

[9] Mr Holland, in his affidavit, said that when he looked at the costs agreement which had been given, he was not "OK" with it and pointed to an email exchange. That email exchange, however, does not evidence a rejection of the offer that had been made by the plaintiff and accepted by the subsequent conduct in giving instructions to perform work. The relevant email exchange simply queried the cost estimate and asked for an explanation as to why the prices were much higher than one of the competitors, but immediately went on to state a preference to build a strong working relationship with the firm.

[10] The conclusion on the facts appears to be that the costs agreement was formed at least by conduct, if not by an execution of the costs agreements, and that agreement was subject to a term that Mr Holland was jointly and severally liable for the fees.

[11] A second matter of some potential significance was raised by Mr Holland. That was a suggestion that he and the relevant partner of the firm were effectively involved in an ongoing speculative business relationship. There was a suggestion, and, indeed, an expression of hope on behalf of Mr Holland, that the partner would become a board member of the client. He sees the relationship as being one in which there was risk which was known to the partner of the firm, and he sees it as somewhat

unjust that, when the business has failed, that he is the one who is expected to bear the burden of that alone. Whilst I am not unsympathetic to his feelings of disappointment in that regard, that does not itself raise any point of defence.

[12] There was some suggestion of a speculative fee arrangement. If it was the case that the agreement actually formed was, or varied in some way became, a speculative fee arrangement, then that may afford an arguable defence which would justify a trial. However, the material before me and the testimony that the defendant was permitted to give today really does not show any realistic prospect of establishing that there was a speculative fee arrangement.

[13] Mr Holland's oral testimony about that was quite vague in terms of any particular discussions with the relevant partner of the legal firm or any particular terms of any agreement at any particular point in time. The best that he could point in terms of any written evidence in relation to this matter were the email exchanges containing exhibit MCH8 to his affidavit. When one has regard to that email exchange, it seems that while the partner of the firm was, indeed, concerned about the firm's exposure in the event that the client's capital raising was not successful, the concern was about the recovery of fees owed, rather than a concern that a contingency to the liability to pay fees would not fall into place. The last of the emails in that series does evince a preparedness to "carry costs from this point forward up till the close of the three IPO round," but that was on the basis that the "firm's current exposure" would be managed by the company settling outstanding accounts. It is not suggested that those accounts were settled.

[14] In short, there is, on the evidence including on the testimony of the defendant, no real prospect of succeeding in defending the claim on the basis of any speculative

fee arrangement, and there is no need for a trial on that account, or, indeed, on any other basis. The matters to the application have otherwise been dealt with appropriately in the applicant's written outline of the submissions. I will grant summary judgment.