SUPREME COURT No 512 of 1999

CIVIL JURISDICTION

WILLIAMS J

IN THE MATTER OF THE QUEENSLAND LAW SOCIETY ACT 1952

and

IN THE MATTER OF AN APPLICATION OF WATLING ROCHE AGAINST STEPHEN COLLINS

BRISBANE

..DATE 22/02/99

JUDGMENT

HIS HONOUR: In the matter of an application of Watling Roche against Stephen Collins and I have prepared reasons for judgment which I publish. For those reasons, the application will be dismissed. Gentlemen, the order for costs that I proposed was that the applicant should pay the costs of the respondent, Stephen Collins, and of Wayne Lesley Corke to be taxed. Mr Taylor, is there any submission you want to make on that? I should say I held that Corke should have been made a formal party to the application and that is why I then put it in those terms.

MR TAYLOR: No, Your Honour, I have no submissions.

HIS HONOUR: Well, the formal order will be application dismissed. The applicant should pay the costs of the respondent, Stephen Collins and Wayne Lesley Corke, to be taxed.

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IN THE SUPREME COURT OF QUEENSLAND No. 512 of 1999

Brisbane

Before Williams J

IN THE MATTER of the QUEENSLAND LAW SOCIETY ACT 1952

- and -

IN THE MATTER of an application of WATLING ROCHE against STEPHEN COLLINS

JUDGMENT - WILLIAMS J

Delivered the 22nd day of February 1999

**CATCHWORDS:**

**Costs - assessment - Queensland Law Society Act 1952 - sections 6ZA, 48M and 48O considered - solicitor's lien on documents - entitlement of client to peruse file at taxation.**

Appearances: Robinson of Counsel for applicant.
S B Collins, solicitor, for respondent Collins.
M Horvath, solicitor, for respondent Corke.
Solicitors: Watling Roche for applicant.
Clarke & Kann for respondent Collins.
Quinn & Scattini for respondent Corke.
Hearing Date: 22 January 1999.

IN THE SUPREME COURT OF QUEENSLAND No. 512 of 1999

Brisbane

Before Williams J

IN THE MATTER of the QUEENSLAND LAW SOCIETY ACT 1952

- and -

IN THE MATTER of an application of WATLING ROCHE against STEPHEN COLLINS

JUDGMENT - WILLIAMS J

Delivered the 22nd day of February 1999

1. In circumstances which will be outlined shortly the respondent, Stephen Collins, was appointed pursuant to s.6ZC of the Queensland Law Society Act 1952 to assess the account for costs rendered by the applicant solicitors, Watling Roche, to their former client W L Corke. The respondent, acting pursuant to s.48O(1) of the Act held a directions hearing at which he gave certain directions relating to information which should be supplied to him to facilitate his assessment. The applicant solicitors objected to the respondent perusing the client file in question until they had flagged or removed therefrom material "the subject of privilege". The respondent intimated that nothing which might occur during the course of the assessment would "affect questions of privilege, confidentiality or the Respondent's lien." Against that background the respondent issued the following directions which were formally recorded in a letter dated 14 January 1999:

> "... I make the following directions in order to ensure a speedy and just Assessment:
>
> 1. On or before 22 January, the Respondent [the solicitors] may attend at my office to inspect their file and to flag documents which are not to be seen by the Applicant [client] during the course of the Assessment;
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> 2. On or before 28 January, the Applicant may attend at my office, for a period not exceeding six hours, to inspect the Respondent's file. That inspection:
>
> (a) must be carried out by a person who will not be involved in the carriage of the action on behalf of the Applicant;

(b) can only occur if the person who carries out the inspection provides to me, before the inspection, a written undertaking not to disclose any information obtained during the course of the inspection except for the limited purpose of this Assessment;

(c) will be supervised by one of my staff so that there will be no question of any document being copied or removed from the Respondent's file.

...

3. Within 3 working days of the inspection referred to in paragraph (2), the Applicant must deliver any amended objections, if any, to the Bill to me and the Respondent.

4. Within 3 working days of the receipt of the amended objections, if any, or within 3 days of notification that the objections will not be amended, the Respondent must deliver any amended response to the objections.

5. Within 10 days, a preliminary Assessment will issue to each party.

6. Within 3 working days of receipt of the preliminary Assessment, either party may deliver to me and the other party any further written submissions about any matter raised by the preliminary Assessment.

7. The final Assessment will issue within a further 7 days thereafter."

2. The applicant solicitors challenge those directions numbered 2, 3 and 4, and pursuant to s.48O(2) of the Act applied to this court by summons, naming the assessor as respondent, for an order that those directions be set aside.

3. Some preliminary points were raised with respect to the proceedings.

4. The respondent, Collins, questioned whether the appropriate proceeding was an application pursuant to

s.48O(2) of the Act rather than an application pursuant to the Judicial Review Act. Without commenting on the circumstances, if any, in which a decision of an assessor may be reviewed pursuant to the Judicial Review Act I am satisfied that this application comes within s.480(2) which provides that the client or practitioner may apply "for an order about disclosure of the requested information".

5. Another issue raised by the respondent was that the sub-section refers to the "court having jurisdiction for the amount in the account". The total amount of this account is just over $20,000, a sum within the jurisdiction of the Magistrates Court. However, having regard to the fact that this is the first occasion on which a question such as this has arisen for determination it is appropriate, in my view, for the matter to be dealt with in the Supreme Court.

6. The client, Corke, appeared by his new solicitor and submitted that he should be a party to the proceedings. The direction in question was given on the client's reference of the bill for assessment under the Act. I am of the view that on an application such as this all parties interested in the assessment should be before the court. In consequence I allowed Corke to intervene and heard submissions on his behalf.

7. In or about August 1994 Corke injured his right foot in an accident at work and subsequently it was determined that he had a disability of the order of 80% of the right foot. He consulted the applicant solicitors with respect to commencing an action for common law damages. They accepted the retainer on a speculative basis and a Costs Agreement was signed. Work was done by the applicant, including the commencing of proceedings in the District Court. In about October 1998, before the matter had come to trial, Corke terminated the retainer and appointed Messrs Quinn & Scattini to be his solicitors. When a request was made that the applicant solicitors hand the file over to

Quinn & Scattini that was refused; the applicant claimed a lien until such time as all outstanding fees were paid.

8. The applicant solicitors then caused a Bill of Costs to be prepared claiming $10,561.50 for costs and disbursements of $10,901.50, a total of $21,463.00.

9. Quinn & Scattini, on behalf of the client, prepared a “notice of objection” within s.6ZA(1)(b) of the Act and applied to the Solicitors Complaints Tribunal for appointment of an assessor. As noted above the respondent, Collins, was appointed to fill that role.

10. Quinn & Scattini are content to comply with the requirements of direction number 2 quoted above, and a written undertaking has been placed before the court from the person in their employ who will carry out the inspection if permitted. The observation should however be made that the limitations thereby imposed should only apply until the lien is discharged.

11. Whilst the former Rules of Court which relate to the taxation of a solicitor and client bill will, no doubt, provide some guidance to assessors from time to time, it is clear that those rules are not binding on assessors. A reading of the legislative provisions is sufficient to justify that conclusion, but any doubt is removed by reading the Minister's Second Reading Speech. The clear legislative intent is that there be a new regime put in place designed to ensure a speedy, cost effective, and objective review of such Bills.

12. Much was said in the material filed for and against the application, and in the course of oral submissions, about legal professional privilege. There is no doubt that, whether on a taxation under the Rules of Court or an assessment pursuant to the Act, a party thereto cannot be compelled to produce a document which is the subject of a proper claim of legal professional privilege (see Giannarelli v Wraith (No.2) (1991) 171 CLR 592, Pamplin v Express Newspapers Ltd. (1985) 1 WLR 689 and

Goldman v Hesper (1988) 1 WLR 1238). All of those cases were concerned with the taxation of a party and party bill. I can readily see, particularly in a case such as Pamplin where the litigation had not concluded, that it would be essential to maintain and protect a claim of legal professional privilege at the taxation stage.

13. But I have real difficulty in comprehending what might be included in a claim for such privilege made by the solicitors here. One would ordinarily think that all material on the file in question related to the client's claim for damages, and if there was any privilege it would be vested in the client; the claim is vested in the client and not the solicitor. (See for example, per Gibbs CJ in Attorney-General for Northern Territory v Maurice (1986) 161 CLR 475 at 480-1). Subject to the solicitor's lien, the client has the right to all material on the file relating to his case; it is only the client who, for example, can waive privilege. I do not understand how the solicitor could withhold from the client documents on the client's file on the basis of legal professional privilege.

14. In the absence of any detail in the material indicating some particular document where privilege was vested in the solicitor and not the client I proceed on the basis that there is nothing on the file in question which the solicitor could refuse to produce to the client on that ground.

15. It is also clear from Giannarelli at 605-6 that documents, not privileged, produced in support of a bill being taxed or assessed must be shown to the other party to the taxation or assessment if requested. It would be contrary to natural justice to allow the assessor to consider such documents without them being available to the other side.

16. It is clear from s.48M(4) and s.48O(3) of the Act that an assessment does not affect the right of the solicitor to maintain and enforce a lien for unpaid fees. In such circumstances the competing principles are the

rules of natural justice which require disclosure of material to the other side and the right of the solicitor to withhold from the client documents subject to a lien. Those competing principles in my view can be reconciled by taking steps of the type set out in direction number 2. If those steps are adhered to then the assessment can proceed in an appropriate and fair way and yet the solicitor's lien is protected. Similar procedures have been utilised in the past in comparable situations and I can see no reason for this court setting aside that direction.

17. The only other point raised was whether or not the client could deliver amended objections after perusal of the file. Order 91 r.41 A of the Rules of Court deals with the delivery of objections to Bills of Costs which are being taxed pursuant to those rules. Notwithstanding the specific time limitations provided for therein there is authority that the taxing officer has power to extend time for compliance. Equally I can see no reason why, in an appropriate case, the taxing officer could not permit an amendment to objections particularly after the objector had seen documents allegedly supporting the bill for the first time. But in any event, as noted above, those Rules are not applicable to an assessment under the Act. The directions given by the respondent assessor here would appear to be designed to ensure a speedy, efficient and fair assessment of the bill. I am not persuaded that any basis has been established for setting aside that direction.

18 It follows that the application should be dismissed.

19. As noted above the client was represented on the hearing of this application, notwithstanding that he was not named as a respondent. As I indicated earlier, the client is a necessary party to the application, and should have formally been made a respondent. The solicitor for the client specifically asked for a costs order if the application was unsuccessful and counsel for the applicant had the opportunity of being heard on that point.

20. In the circumstances the application should be dismissed and the applicant should pay the costs of the respondent, Stephen Collins, and of Wayne Lesley Corke, to be taxed.