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Date: 25 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 10373 of 2002

ANTHONY ROBERT HERALD	First Plaintiff
and	
KAREN JAN HERALD	Second Plaintiff
and	
HERALD INVESTMENT HOLDINGS PTY LTD ACN 078 116 364	Third Plaintiff
and	
WORKER BEE (BRISBANE) PTY LTD ACN 011 026 869	First Defendant
and	
CRAIG FRANCIS VENN WILLIAMS	Second Defendant
and	

[2003] QSC 223

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

MARK ROWLANDS	Third Defendant
and	
GARY MURPHY	Fourth Defendant
and	
FINANCIAL DIRECTIONS (AUSTRALIA)	Fifth Defendant
and	
FUNDS MANAGEMENT AUSTRALIA PTY LTD ACN 082 457 252	Sixth Defendant
and	
WATTLETREE GROVE NOMINEES PTY LTD ACN 087 904 916	Seventh Defendant
and	
RESTCOM PTY LTD ACN 088 267 065	Eighth Defendant
and	
CHURCHILL FINANCE (BRISBANE) PTY LTD ACN 052 100 240	Ninth Defendant
and	
CHURCHILL FINANCE (SYDNEY) PTY LTD ACN 051 118 748	Tenth Defendant
and	
VENN CHARLES WILLIAMS	Eleventh Defendant
and	
ALLAN RICHARD FARRAR	Twelfth Defendant

BRISBANE

..DATE 18/07/2003

ORDER

HIS HONOUR: This is an unusual application. The twelfth defendant is the applicant and the only applicant and I shall refer to him as such. He seeks orders from the Court that a decision of the Senior Deputy Registrar made in the course of taxing a bill of costs, if I may use that phraseology, on an indemnity basis was wrong, and he seeks directions designed to right that wrong. One might have thought in reading the application that he also sought a direction but senior counsel for the applicant, Mr Hack SC, disclaimed any desire to invoke the jurisdiction of the Court in that respect.

One might have thought that to come to a Judge in the middle of an assessment is a somewhat premature thing to do. The Registrar has made rulings on his approach to the assessment but has not in fact completed the assessment.

Ordinarily one does not seek to review or appeal a decision until the decision maker has completed his task. Mr Hack submitted that I had jurisdiction to deal with the case by reason of either or all of rules 706(1)(h) of the Uniform Civil Procedure Rules, section 118E(1) of the Supreme Court of Queensland Act 1991 and the inherent jurisdiction of the Court. For that proposition he relied upon the decision of Justice Mullins in National Australia Bank Limited v Clanford Pty Ltd [2002] QSC 361. He submitted a ruling would save much time and cost.

No argument to the contrary was advanced on behalf of the respondent plaintiff and therefore I shall proceed on the

assumption that I have jurisdiction without actually making a ruling on the point.

The matter before the Registrar involved the assessment of a bill pursuant to an order made by the Court in December 2002. The plaintiffs had sought Mareva injunctions against a number of defendants and in respect of the present applicant they were unsuccessful. Costs were ordered against them to be assessed on the indemnity basis.

The proceedings were started by a claim filed on 14 November 2002 and the application for a Mareva order filed on or about the same date. Obviously the application was served and sometime between 14 November and 25 November the applicant engaged Messrs Clarke and Kann as his solicitors. On 25 November they sent him a letter enclosing a formal written agreement for their retainer. He signed the terms of that agreement which incorporated the letter by reference, at least in some respects, deposited $8,000 with them as requested and returned the agreement to them.

Four days later on 29 November the application for the Mareva orders was as against the applicant dismissed by consent. On 12 December the Court ordered the plaintiffs to pay the applicant's costs of the application to be assessed on the indemnity basis. That order was made the day after Clarke and Kann delivered a bill, pursuant to the agreement, for just under $9000. That bill has now been paid.

The point that is raised by the case arises because the agreement sent by the solicitors to the applicant did not include with it a copy of the scale which is schedule 1 to the Uniform Civil Procedure Rules. That schedule is the scale for assessing costs on a standard basis under part 2 of chapter 17 of the Uniform Civil Procedure Rules.

Section 48 of the Queensland Law Society Act, provides that, within a reasonable time after starting work for a client, a solicitor must make a written agreement with the client, expressed in clear language, specifying certain matters, specifying the work that the solicitor is to perform and the fees and costs payable. The fees and costs payable must specify either a lump sum amount or the basis on which fees and costs will be calculated.

Subsection (4) provides:

> "The notice in the schedule must be completed by the practitioner or firm and given to the client, together with a copy of any scale for the work provided under an act, before the client signs the client agreement."

The schedule is the schedule to the Queensland Law Society Act which consists of an information sheet for clients.

The first question is whether it was necessary for the solicitors not only to send the schedule but to send the scale of fees set out in the schedule to the Uniform Civil Procedure Rules. The second question is whether, if so, a failure to do so rendered the agreement void. The third question is

whether, if so, regard may be had to the agreement by the Registrar in carrying out the assessment.

Rule 678 provides that part 2 of chapter 17 applies to costs payable or to be assessed under an Act, the rules or an order of the Court. However, by subrule (2) it is expressly provided that the part does not apply to costs to which the Queensland Law Society Act 1952, part 2A, division 6(a) applies.

The schedule to the Act, which sets out a number of matters of information to the client contains no reference to the scale of costs. Apparently the requirement of the Act is simply to include the scale without any requirement to state what it is. On the face of things, this is a somewhat surprising approach. The scale is used for the purposes of assessing costs on a party and party basis and on the standard basis, that is, for assessing costs on the standard basis between parties.

It expressly does not apply to an assessment of costs as between a solicitor and his client. To include it in the documents sent out with a solicitor's agreement would be, in my view, to create confusion. If the scale meant anything, it would be likely to convey to the client that the solicitor's fees would be calculated on the basis of it. If this scale is anything, it is certainly not that.

For the respondent plaintiff, Mr Greinke argued that the purpose of the scale was to enable the client to determine for

himself the difference between what he might recover if successful on a party and party basis and what he is liable to pay his solicitor. With respect to that argument, the chances of a client being able to carry out such a calculation are extremely remote. Vast industries have been built upon assessing costs. The arcane world of costs assessment is not one in which the client would have, in my view, the slightest skill. His chances of carrying out such a calculation are small.

Moreover, there is no reason why the scale should be included for this purpose because the solicitor is, in any event, obliged to include an explanation of and an estimate of the range of costs which may be recovered from another party if the client is successful, or which the client might be required to pay if unsuccessful: see schedule to the Queensland Law Society Act, paragraph 18. The solicitor is much more likely to be able to make such an estimate than the client.

That fact, together with the misleading effect which the inclusion of the scale would have, leads me to think that it is most unlikely that the Act requires this scale to be included with the agreement. It is much more likely that the Act was drafted with scales in mind which fixed solicitor and client costs. Until the 1990's, such scales were common in the District and Magistrates Courts, and in other inferior Courts.

I do no know whether there are now any such scales for litigation, nor do I know whether there are any scales for solicitor and client charges for non-litigious work, but it does not seem to me that the meaning of the section must change merely because, from time to time there may happen to be or not be more or fewer such scales.

Whether such scales are enacted or not is something which is dependent upon the economic philosophy of the majority in the Parliament from time to time. The terms of section 48I of the Act clearly envisage that there may or may not be a scale in existence at a given time. The absence of a scale therefore is, if it is in fact the current position, not a conclusive argument against this conclusion.

In the end I do not think I need to decide this case on this basis. If it were necessary I would conclude, as I have indicated, that there was not a requirement to include the scale. I prefer, however, to rest my decision on a different basis. It is this. The obligation under section 48(4) is to give the client a completed schedule notice, together with a copy of the relevant scale, before the client signs the client agreement. The schedule notice and the scale are, therefore, clearly envisaged as being separate documents from the client agreement.

The client agreement is required to be consistent with the notice in the schedule, but does not incorporate it. There

is, therefore, a degree of latitude in what may be in the client agreement.

If the client agreement does not comply with section 48 the agreement is void. That is provided by section 48F(1). That section reads as follows:

> "(1) If a client agreement to which section 48 applies does not comply with that section the client agreement is void.
>
> (2) If a provision is included in a client agreement and inclusion of a provision is prohibited by this part that provision is void."

What is to be noted there is that the thing that renders the agreement void under subsection (1) is the non-compliance of the client agreement with section 48, not the non-compliance of the solicitor with section 48. The agreement must be compared with the requirements for agreements under that section. It is not required by section 48F that the conduct of the solicitor be compared with the conduct demanded of him by section 48.

In the present case the parties have assumed that apart from the failure to forward the scale the agreement complied with section 48. The failure to forward the scale was, in my view, conduct required of the solicitor under section 48, but was not something which meant that the agreement did not comply with the section. In my view the failure to send the scale does not amount to something which renders the agreement void.

It is, therefore, unnecessary for me to address the applicant's third argument in relation to whether the Registrar should have had regard to the agreement even though he held it void.

I should record that although the applicant submitted that the client agreement here in fact complies in all respects with section 48 there are arguably other respects in which the agreement does not so comply. These matters were not raised before the Registrar and for that reason have not been canvassed before me. The fact that, when the matter goes back before the Registrar, there may now be further issues raised as to the validity of the agreement demonstrates the unwisdom of proceedings in the nature of interlocutory appeals.

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HIS HONOUR: I direct that the assessment proceed on the basis that the agreement, Exhibit KEH 2, is not void by reason of the fact that a copy of schedule 1 to the Uniform Civil Procedure Rules was not given to the applicant before he signed the agreement.

...

HIS HONOUR: I order that the respondents pay the applicant's costs of and incidental to the application to be assessed.
