SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 6006 of 2007

TRUSTEE FOR PETER AND TANYA ZUFIC FAMILY TRUST TRADING AS CLIENTCARE SOLICITORS	Plaintiff
and	
MARINA EYEARS	Defendant

BRISBANE

..DATE 17/12/2008

ORDER

HER HONOUR: The plaintiff acted as solicitor for the defendant in family law matters between March 2005 and early February 2007. He seeks to recover costs of acting for the defendant in those proceedings.

On 13 July 2008, a claim and statement of claim were filed. The amount claimed was in excess of $235,000 plus interest.

On 30 October 2008, the plaintiff obtained a freezing order against the defendant. That order was to have effect until 4 p.m. on Wednesday 5 November 2008.

It was subsequently extended until further order. However, after that extension had been granted, on 4 December 2008, Justice Applegarth amended the order to provide that it should have effect only until 4 p.m. on 18 December 2008: that is tomorrow.

There are two applications before me:

A. an application by the plaintiff filed on 9 December 2008, for a continuation of the freezing order, and
B. an application by the defendant also filed on 9 December 2008, seeking relevantly a stay of the principal proceeding as well as discharge of the freezing order.

In order to obtain a freezing order, an applicant must establish a prima facie cause of action and that there is a danger that assets will be removed or disposed of if the order is not granted.

Is there a prima facie cause of action? Under the Family Law Rules 2004, Schedule 6 Costs - Rules before 1 July 2008, there are prescribed steps which must be taken before a lawyer may start or continue a case to recover costs from a client. See rule 6.14 which provides that a lawyer may do so only if he or she has served on the client an account and a costs notice, and no request for an itemised costs account has been made, or an itemised costs account has been served on the client and there has not been a notice disputing the itemised costs account.

A "Costs Notice", is defined as being a brochure approved by the Principal Registrar of the Family Court. The approved brochure includes Schedule 3, an itemised scale of costs. That schedule sets out with some particularity, item numbers, a description of the matter for which a charge may be made, and the allowable charge.

In the present case, the defendant client executed a Costs Agreement. At the time, she was not given a Costs Notice in the form approved by the Registrar of the Family Court. She was given certain information which the plaintiff has submitted was adequate to meet the requirements for a Costs Notice. It seems to me that prima facie it was inadequate. One startling example is the absence of a schedule in terms of schedule 3.

The plaintiff then drew my attention to rule 1.12 of the Family Law Rules by which the Family Court may dispense with

compliance with the rules. Of course, dispensation with compliance with the Family Law Rules is a matter for the Family Court and not for this Court. Nevertheless, this Court has to be satisfied that there is a prima facie cause of action before it may grant or continue a freezing order.

The plaintiff did serve a compliant Costs Notice in June 2007. Without determining whether a notice could be given at that late stage, I am going to dispose of this matter on the basis that prima facie an itemised Costs Account was not provided to the client. Rule 6.23 of the Family Law Rules 2004 Schedule 6 Costs - Rules before 1 July 2008 sets out what must be included in an itemised Costs Account. Amongst the matters are -

"A description of the item, including whether the work was done by a lawyer or an employee or agent of a lawyer."

The account provided in the present case simply did not meet that criterion. The plaintiff pointed out that in the Costs Agreement it was provided that the work would be done by him and that he is a sole practitioner; that is not the point: the account itself must show by whom the work was actually done.

Again, any question of whether the account might be satisfactory as a result of dispensing with compliance with rule 6.23 is a matter for the Family Court, but prima facie, the rule was not complied with. Prima facie, therefore, the

plaintiff may not start or continue the action for the recovery of his costs pursuant to rule 6.14.

It follows that the freezing order should be discharged. And further, that the principal proceeding should be stayed.

I will make an order staying the principal proceeding until further order and give both parties liberty to apply to lift the stay. Accordingly, if the Family Court makes orders dispensing with compliance with the rules to which I have referred, it will be open to the plaintiff to bring the matter back before the Court.

The orders I make are as follows:

1. That the order of 5 November 2008 as amended on 4 December 2008 be discharged.
2. That the proceeding (S6006 of 2007) be stayed until further order.
3. That both parties have liberty to apply to lift the stay.
4. That the application filed by the plaintiff on 9 December 2008 be dismissed.

HER HONOUR: Is there anything else?

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HER HONOUR: The defendant has sought costs of and incidental to the applications on the indemnity basis.

My attention has been drawn to a letter written on 24 November 2008 by the solicitor for the defendant, in the context of seeking an explanation for non-disclosure of the absence of the proffering of an undertaking before Justice Applegarth.

In that letter, the basis of the defendant's case today was disclosed. Senior counsel for the defendant submitted that in the circumstances, the application for an extension of the freezing order should never have been brought. Further, the defendant relied on an affidavit by her solicitor Mr Jiear, filed by leave today, in which he estimated his client's indemnity costs of the application and cross application at $19,800 and the standard costs at $14,400. I was asked to fix costs.

Indemnity costs are always the exception rather than the rule. One of the circumstances in which they are sometimes ordered is that the proceeding was always doomed to failure and should never have been brought.

I think this case is a borderline one with respect to whether the costs ought to be on the indemnity or the standard basis, but in the end I have concluded that they should be standard costs.

There has been no agreement as to the quantum of the standard costs.

While as a matter of general policy the Court encourages the fixing of costs, in all of the circumstances of this case I think those costs ought to be assessed if not agreed.

So there will be an order that the plaintiff pay the defendant's costs of and incidental to both applications on the standard basis, the quantum thereof to be agreed or in the absence of agreement to be assessed.
