

SUPREME COURT OF QUEENSLAND

CITATION: *O'Neill v Wilson* [2011] QSC 220

PARTIES: **KERRY JOSEPH O'NEILL (trading as O'Neills Business Lawyers)**
(applicant)
v
ROBYN LYNETTE WILSON
(respondent)

FILE NO/S: SC No 3286 of 2011

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Delivered ex tempore 18 July 2011

DELIVERED AT: Brisbane

HEARING DATE: 18 July 2011

JUDGE: Atkinson J

ORDER: **The application is dismissed.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where the applicant solicitor sought an order that the respondent pay him \$34,364.46 together with costs and interest and a declaration that he held an equitable mortgage over her land – where the applicant solicitor relied upon documents entitled ‘Costs Agreement’ that were not signed by the respondent – whether a valid costs agreement existed – whether the applicant was entitled to the relief he sought

Legal Profession Act 2007 (Qld), s 319(1)(b), s 322
Property Law Act 1974 (Qld), s 11(1)(c)

COUNSEL: N R Collins for the applicant
The respondent appeared on her own behalf

SOLICITORS: O'Neills Business Lawyers for the applicant
The respondent appeared on her own behalf

HER HONOUR: An application was made to the Court that the defendant be ordered to pay the plaintiff the sum of \$34,364.46 together with costs and interest, and that there be declarations that:

(a) by clause 13 of each of the costs agreements made between the plaintiff and the defendant on or about 11 February 2009 and 14 May 2009, the defendant granted to the plaintiff an equitable mortgage of all her interest in her land described as Lot 511 on Registered Plan 905762, Count of Stanley, Parish of Kedron, title reference 50155689 ("the land") to secure all amounts owing by the defendant to the plaintiff; and

(b) that the land be charged with the payment of all amounts due by the defendant to the plaintiff.

Otherwise there are applications for the appointment of the trustee for sale and other relief under the *Property Law Act 1974* (Qld). The plaintiff acted as solicitors for the defendant. The application was made *ex parte*, but the defendant attended in person in answer to it.

There are, it seems to me, two major and insuperable problems for the applicant and they both arise from the fact that the applicant is relying upon unsigned documents entitled 'Costs Agreement'. Those unsigned documents purport to create the equitable mortgage and charge over the respondent's real property.

Unfortunately, Mr Collins, who appears for the applicant/plaintiff, was unable to tell me an equitable mortgage could be created by an unsigned document in spite of section 11 of the *Property Law Act*, which *inter alia* provides in section 11(1)(c) that the disposition of an equitable interest in land must be manifested and proved by some writing signed by the person disposing of the same or by the person's agent lawfully authorised in writing or by will.

The second problem which arises from the fact that there is no signature of the respondent, who is the solicitor's client, on the document said to be a costs agreement, is found in the argument that nonetheless it may be considered a costs agreement under section 322 of the *Legal Profession Act 2007* (Qld). In particular, the solicitor relies upon subsection 322(4) which provides that a written offer for a costs agreement must clearly state that it is an offer to enter into a costs agreement and that the offer can be accepted in writing or by other conduct, and the type of conduct that will constitute acceptance.

The problem for the solicitor in this case is found in the letter which accompanied the offer. The offer, if read alone, might suffice. Clause 2 provides that if the client accepts this offer the client will be regarded as having entered into a costs agreement. It includes the way in which acceptance might take place, including by signing and returning a copy of it or giving the firm instructions after receiving the

document or contacting the firm and advising of the client's acceptance.

However, those offers in the two matters in which the solicitor dealt with were enclosed under cover of a letter which must be read with that offer. I refer to the letter from the solicitors of 14 May 2009. That letter repeats what is said in the document to which I have just referred, but then goes on to say, "For completeness, and to avoid any possible future dispute, we require you to sign and return the disclosure notice and costs agreement within seven days and before any further work is undertaken by us. You should retain a copy of each signed document for your records."

That means at the very least that it is far from clear that the offer can be accepted in any way other than by signing and returning it. In fact, the solicitors have made it perfectly clear that they will not do any work unless the disclosure notice and costs agreement is signed and returned. In my view then, since that must be read with the offer, reading those statements together the Court could not be assured that the offer clearly states that there is any way to accept the offer other than by signing and returning it.

Accordingly, because of those two problems, I am not satisfied that there was a valid costs agreement and I am not satisfied that an equitable mortgage was validly entered into.

Accordingly, I propose to refuse the application.

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HER HONOUR: This means that, since there is no valid costs agreement, legal costs are only recoverable under section 319(1) (b) of the *Legal Profession Act* under the applicable scale of costs. Since there is no basis to believe that the amount claimed is under the applicable scale of costs, in my view it is appropriate not only to dismiss the application, but to dismiss the action.

In any event, no such action would be maintainable in this Court because the scale of costs would be well below the jurisdiction of this Court.

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