SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Wright* [2010] QCA 321
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant/appellant) **v** **DIANE MARIE WRIGHT** (respondent/respondent)
FILE NOS:	Appeal No 6248 of 2010 SC No 6224 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2010
JUDGE:	Holmes and White JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal and declare that upon the proper construction of Part 3.4 of the *Legal Profession Act* 2007 (Qld), the applicant in District Court proceedings number 1207 of 2008 is and was at all material times a "third party payer" who was entitled as such to apply for an assessment of the legal costs charged and drawn by the respondent from the proceeds of the sale of the real property identified in the order made on 12 August 2008 in those proceedings.** **2. The order for costs made by the primary judge be set aside.** **3. There be no order as to the costs below or on appeal.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – TAXATION AND ASSESSMENT OF COSTS – APPLICATIONS AND REFERENCES – where the respondent performed the conveyancing work upon the sale of a house which was the subject of proceedings in the District Court between a former de facto couple, one of whom was the respondent's client – where the Court ordered that the proceeds of sale were to be applied firstly to pay "all costs, commissions and expenses of the sale", secondly to

discharge the mortgage over the property and thirdly to pay outstanding rates, with the balance to be divided 75% to the applicant in those proceedings and 25% to the respondent's client – where the respondent charged for the conveyancing work – where the appellant, in response to a complaint, asked the respondent for an itemised account which the respondent refused to give – where the primary judge held that the applicant in the District Court proceedings was under a legal obligation to pay all or part of the conveyancing costs but was not a "third party payer" under Part 3.4 of the *Legal Profession Act* 2007 (Qld) and so was not entitled to apply for an assessment of those costs – whether the primary judge erred in finding that the applicant in the District Court proceedings was not a "third party payer"

Legal Profession Act 2007 (Qld), s 301, s 335

Amos v Ian K Fry & Company [2010] QCA 131, considered
Andrew Koh Nominees Pty Ltd v Receiver & Manager of the Balneum Joint Venture (2007) 33 WAR 561; [2007] WASCA 152, considered
Debney v Semerdziev [1982] 2 NSWLR 391, distinguished
Deputy Commissioner for Taxation v Moore Bank Pty Ltd [1987] 1 Qd R 414, cited
Equuscorp P/L v Short Punch & Greatorix & Ors [2001] 2 Qd R 580; [2000] QCA 407, considered
Legal Services Commissioner v Wright [2010] QSC 168, related
Littlewood v George Wimpey & Co [1953] 2 QB 501, cited
Official Trustee in Bankruptcy v Mateo (2003) 127 FCR 217; [2003] FCAFC 26, cited
Re Early [1897] 1 IR 6, cited
Re Freehill Hollingdale & Page's Bill of Costs [1998] 1 Qd R 616, considered

COUNSEL: J McKenna SC, with A Musgrave, for the appellant
M K Conrick for the respondent

SOLICITORS: Crown Solicitor for the appellant
DM Wright & Associates for the respondent

[1] **HOLMES JA**: I agree with McMurdo J that the order which required Mr A and Ms A to distribute the proceeds of the sale of Mr A's house as prescribed, including payment of the respondent's costs, was an order which imposed a legal obligation on Ms A "to pay ... part of the legal costs for legal services provided to [Mr A]" so as to make her a third party payer under s 301(1) of the *Legal Profession Act* 2007 (Qld). That sufficed under s 335(2) of the Act to entitle Ms A to apply for an assessment of the costs payable by her.

[2] Although the respondent's argument focussed largely on whether Ms A was a "non-associated third party payer" under ss 301(3), it was not necessary for the appellant in establishing Ms A's entitlement to an assessment of costs to take the further step of showing that the legal obligation was owed to or could be enforced by any

particular individual (although to do so might be a useful means of confirming the existence of the obligation to pay). It was sufficient that the order created, at the least, an obligation owed to the court to pay the funds in settlement of the legal costs. The real relevance of s 301(3) to this case was, in my view, to show that the learned primary judge's construction of s 301(1) was too narrow.

[3] While grateful to McMurdo J for his analysis, I do not find it necessary either to resolve where the parameters of the expression "legal obligation" lie (since this case so clearly fell within them) or to reach any concluded view of whether the facts in *Debney v Semerdziev*[1] would fall within them.

[4] I agree with the orders proposed by McMurdo J.

[5] **WHITE JA:** I have read the reasons for judgment of McMurdo J and agree with his Honour's reasons for allowing the appeal and with the orders he proposes.

[6] Since counsel for the respondent have referred to my decision in *Amos v Ian K Fry & Company*[2] in support of the proposition that Mr A was not legally liable to pay the respondent solicitor's costs, I should make some reference to it. At para 46 of *Amos* I concluded:

> "Mr Edward Amos is not legally liable to pay the respondent solicitor's costs. The respondent solicitor, were he minded to do so, could not recover his costs incurred in work for the estate from a beneficiary. The decision in *Equuscorp* supports that conclusion."

[7] The analysis which preceded this conclusion does not sufficiently take into account the essentially remedial nature of the legislation which has led courts in cases such as *Re Early*,[3] *Debney v Semerdziev*[4] and *Andrew Koh Nominees Pty Ltd v Receiver & Manager of the Balneum Joint Venture*[5] to adopt a broad construction of the expression "liable to pay". The latter two cases were not referred to in *Amos*. The extent to which *Amos* might suggest that a person liable to pay any part of a solicitor's costs out of a fund by virtue of an order of the court was not *legally* liable to pay costs must be regarded as incorrect, although noting that in *Amos* the applicant was seeking to have the whole of the bill assessed, not that part for which he was legally liable.

[8] **McMURDO J:** The respondent is a practising solicitor. Her firm, D M Wright & Associates, performed the conveyancing work upon the sale of a house in Brisbane at a price of about $300,000. Ms Wright charged $7,179.76 for this work, which she paid to herself from the balance of the proceeds of sale held in her trust account.

[9] Most of the burden of her fees fell upon someone who had not retained her, whom I will call Ms A. When she complained to the Legal Services Commissioner about the fee, he asked the respondent for an itemised account which the respondent refused to give. The Commissioner then brought these proceedings, seeking a declaration that Ms A is and was, at all material times, a client of the respondent for the purposes of Part 3.4 of the *Legal Profession Act* 2007 (Qld) or alternatively,

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1 [1982] 2 NSWLR 391.
2 [2010] QCA 131.
3 [1897] 1 IR 6.
4 [1982] 2 NSWLR 391.
5 (2007) 33 WAR 561; [2007] WASCA 152.

that she is and was a "third party payer" under that Part. And he sought a declaration that, upon either basis, Ms A is a person who is entitled to apply for an assessment of these costs, according to s 335 of the Act.

[10] In the judgment appealed from, the Commissioner failed on both arguments, his application was dismissed and he was ordered to pay the respondent's costs assessed upon the standard basis.[6] In this appeal, the argument that Ms A was a client of the respondent is not pressed. The issue is whether she was a "third party payer" as that term is defined in s 301 of the Act. Before going to that provision, it is convenient to set out the primary facts all of which are uncontroversial.

[11] Ms A brought proceedings in the District Court against her former de facto partner, whom I will call Mr A. The respondent acted for Mr A in that case. It was settled and was the subject of consent orders made in August 2008. It is necessary to refer only to those terms of the settlement which were concerned with the house in which the parties had lived. Paragraph 2 of the order recorded that Mr A was the registered proprietor and that the house was then the subject of an uncompleted contract made between him and certain purchasers. Paragraph 3 of the order provided that in the event of that sale not being completed, the parties were to do all things necessary to effect another sale in accordance with certain provisions which were there set out. One of those was that "D M Wright & Associates will act on the Respondent's [Mr A's] behalf in the conveyance of the sale of the property". As it happened, that particular sale was completed and it was the subject conveyance in which the respondent acted (having been retained by Mr A). Pursuant to that settlement there were further consent orders in relation to this house as follows:

> "4. The Respondent [Mr A] and the Applicant [Ms A] shall do all things necessary to cause the proceeds of the sale of the property to be distributed as follows:
>
> i) To pay all costs, commissions and expenses of the sale;
>
> ii) To pay the amount required to discharge the mortgage number, 708631455 to Bananacoast Community Credit Union Limited;
>
> iii) To pay the Redland Shire Council all outstanding rates and charges owing in respect of the property;
>
> iv) To divide the balance 75% to the Applicant and 25% to the Respondent, by way of payment of same to the trust account of Dargan Kelly Lawyers and the trust account of D M Wright & Associates Solicitors.
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> 5. That up to the completion of the sale:
>
> i) The Applicant shall have the sole right to occupy the property;
>
> ii) Neither party shall mortgage or otherwise offer the property for security;

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6 *Legal Services Commissioner v Wright* [2010] QSC 168.

iii) Neither party shall effect a redraw or otherwise increase the amount in respect of the mortgage without prior written consent of the other party."

[12] A schedule to that order set out the parties' assets, liabilities and financial resources. It listed this house at a value of $320,000 and the liabilities as including a mortgage over the house securing $220,000 and outstanding rates of an estimated $6,500. Although the house was in Mr A's name alone, both parties were borrowers of the mortgage debt.

[13] The sale settled about a week after the consent order was made. The balance remaining after payment of the mortgage debt and the rates was in total $83,570.43 which was paid to the respondent's trust account. Most of that was paid to her trust account on 18 August 2008 from what she described in her trust account statement as "settlement proceeds" and the balance, paid on 20 August 2008, was the deposit after payment of the agent's commission. On 28 August 2008, the respondent paid the relevant sum of $7,179.76 to herself and distributed the remainder in the shares of 75% and 25% according to the consent order.

[14] On 1 September 2008, the solicitors who had acted for Ms A in those proceedings wrote to the respondent asking for an itemised bill of her costs and outlays, upon the basis that she was a "third party payer". On 18 September 2008, the respondent replied, denying that Ms A was a third party payer and refusing to provide any itemised bill or other details upon the basis that these matters were confidential to her client. Ms A complained to the Legal Services Commission, which then began extensive correspondence with the respondent and solicitors retained by her. Ultimately the present proceedings were commenced by the Legal Services Commissioner by an originating application filed in June 2009, which was heard in May 2010. The evident purpose of the declaratory relief which was sought was to establish that Ms A was entitled to apply for an assessment of these costs.

[15] Section 335 of the Act prescribes the persons who are entitled to an assessment and the conditions of that entitlement. Relevantly, s 335 provides as follows:

"**335 Application by clients or third party payers for costs assessment**

(1) A client may apply for an assessment of the whole or any part of legal costs.

(2) A third party payer may apply for an assessment of the whole or any part of legal costs payable by the third party payer.

(3) The costs application may be made even if the legal costs have been wholly or partly paid.

(4) If any legal costs have been paid without a bill, the client or third party payer may nevertheless make the costs application.

…

(7) If the third party payer is a non-associated third party payer, the law practice must provide the third party payer, on the written request of the third party payer, with sufficient information to allow the third party payer to consider making, and if thought fit to make, a costs application.

…

(9) If there is a non-associated third party payer for a client of a law practice -

(a) nothing in this section prevents –

(i) the client from making 1 or more costs applications in relation to costs for which the client is liable; and

(ii) the non-associated third party payer from making 1 or more costs applications in relation to costs for which the non-associated third party payer is liable;

and those applications may be made by them at the same time or at different times but must be dealt with separately; and

(b) the client –

(i) may participate in the costs assessment process if the non-associated third party payer makes a costs application under subsection (2) in relation to the legal costs for which the non-associated third party is liable; and

(ii) is taken to be a party to the assessment and is bound by the assessment; and

(c) the law practice –

(i) must participate in the costs assessment process; and

(ii) is taken to be a party to the assessment; and

(d) despite any other provision of this division, the assessment of the costs payable by the

non-associated third party payer does not affect the amount of legal costs payable by the client to the law practice.

…

(11) In this section –

client includes the following –

(a) an executor or administrator of a client;

(b) a trustee of the estate of a client.

third party payer includes the following –

(a) an executor or administrator of a third party payer;

(b) a trustee of the estate of a third party payer."

[16] The appellant argued before the primary judge that Ms A was a client for the purposes of s 335(1) or alternatively a third party payer within s 335(2). As noted already, the former argument is not now pursued.

[17] The term "third party payer" is defined by s 301 as follows:

"**301 Terms relating to third party payers**

(1) A person is a ***third party payer***, in relation to a client of a law practice, if the person is not the client and –

(a) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or

(b) being under that obligation, has already paid all or a part of those legal costs.

(2) A third party payer is an ***associated third party payer*** if the legal obligation mentioned in subsection (1)(a) is owed to the law practice, whether or not it is also owed to the client or another person.

(3) A third party payer is a ***non-associated third party payer*** if the legal obligation mentioned in subsection (1)(a) is owed to the client or another person but not the law practice.

(4) A legal obligation mentioned in subsection (1) can arise by or under contract or legislation or otherwise.

> (5) A law practice that retains another law practice on behalf of a client is not on that account a third party payer in relation to that client."

[18] The primary judge discussed s 301(1) and accepted that Ms A was under a legal obligation to pay all or part of these costs. But he reasoned as follows:

> "[25] It may be accepted that because of the court order, Ms [A] was under a legal obligation. That was an obligation owed to Mr [A].
>
> [26] The order obliges Mr [A] and Ms [A] to apply the proceeds of sale first in payment of costs. The legal costs were primarily payable by Mr [A], because the respondent, entitled to the payment, was his solicitor. Mr [A] presumably remained primarily liable notwithstanding the court order, to which the respondent was not a party.
>
> [27] All that has happened is that as between Ms [A] and Mr [A], there has been agreement about how the costs will be paid, which would result in Ms [A] bearing three-quarters of them and Mr [A] one-quarter.
>
> [28] But by force of the court order, Ms [A] undertook no legal obligation vis-à-vis the respondent, and that is I believe the sort of obligation which section 301 has in mind."

However, the primary judge made no reference to s 301(3) and to its definition of a "non-associated third party payer".

[19] For the respondent it is suggested that something said in the course of the argument before the primary judge shows that his Honour did consider s 301(3) but rejected its application here. In my view however, the reasons for judgment are inconsistent with that suggestion. His Honour held that s 301 was confined to a legal obligation "vis-à-vis the respondent", so that it did not apply because Ms A's obligation was one which was owed to Mr A. Nevertheless, that was an obligation to pay the costs, as his Honour described at [26], by applying the proceeds of sale first in payment of the costs of sale. According to his Honour's findings then, it should have been held that Ms A was a third party payer and entitled to apply for an assessment.

[20] The respondent now contests those findings. She argues that the burden (as to 75%) of these costs fell upon Ms A, not because she was obliged to pay that amount, but simply as a practical consequence of the agreed distribution of the proceeds of sale. It is argued that in particular, the order did not confer upon Mr A a right to sue Ms A for this share of the costs.

[21] The respondent's argument would seek to liken this case to *Amos v Ian K Fry & Company*.[7] In that case, Mr Edward Amos, his brother and his sister were entitled to the residuary estate of their late father. In the course of extensive litigation between him and his siblings, several orders for costs were made against Mr Amos and further orders were made with the intended effect that those costs should be deducted by the solicitor acting in the sale of the estate's property from what would otherwise be distributed to him. The relevant term of those orders was as follows:[8]

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7 [2010] QCA 131.

8 As set out at [2010] QCA 131 at [5].

> "It is directed that LEONARD RALPH AMOS as sole executor and sole trustee of the estate or his agent Ian Kennedy Fry for the sale of the estate property at 58 Melville Tce, Wynnum, may deduct such costs from the Respondent's [Edward Amos'] share of the estate or his share of the proceeds of sale and pay the same to Ian Kennedy Fry as the solicitor for the Applicant."

Mr Edward Amos sought to challenge the amount of costs and expenses charged by Mr Fry for his work overall in the estate and applied to have them assessed. It appears that Mr Fry had not billed separately for the costs which had been ordered against Mr Amos, but that his brother's evidence was that about $245,000 which had been billed was in that category, so that this had been deducted from Edward Amos's share. In making that application, and in seeking to appeal its dismissal, Mr Amos first had to obtain leave of the Court, because in the face of earlier proceedings to have him declared a vexatious litigant, he had undertaken not to bring any proceeding against his brother or any agent employed by him without leave. His application for leave to a judge in the trial division was dismissed, in part because that judge held that he was not a third party payer as defined in s 301, having no legal obligation to pay the costs. He filed a notice of appeal against that decision which was struck out by White JA, sitting alone. Her Honour agreed that Mr Amos had no standing so that at least upon this basis, the appeal had no prospects of success and should be struck out. White JA discussed several authorities dealing with the similar but not identical provisions of previous statutes in Queensland and elsewhere, which had defined who was entitled to challenge a solicitor's bill in terms of whether a person was "liable to pay" or "under a legal liability to pay" that bill. In particular, her Honour discussed *Equuscorp Pty Ltd v Short Punch & Greatorix & Ors*[9] and *Re Freehill Hollingdale & Page's Bill of Costs*[10] and concluded that Mr Amos did not have standing because "[t]he respondent solicitor, were he minded to do so, could not recover his costs incurred in work for the estate from a beneficiary".[11]

[22] In *Equuscorp*, the relevant statute was the *Queensland Law Society Act* 1952 (Qld) by which an assessment could be sought by a "client", which was defined to include "a person who has paid, or is liable to pay, the account of a client". The applicant owned the majority of units in a unit trust and brought proceedings against its trustee and manager. The trustee and manager were represented by the solicitors whose bill the applicant sought to challenge. The unanimous view of the Court, albeit *obiter dicta*, was that the applicant was not a person "liable to pay" the solicitors' account.[12] The Chief Justice equated the words "liable to pay" with "responsible in law",[13] so that a person liable to pay was "a person against whom payment … can be enforced".[14] Observing that the applicant could not have been sued by the solicitors or their "true clients" (the trustee and the manager), he held that the applicant was not liable to pay the account in the required sense. McPherson JA reasoned somewhat differently, holding that a person who contributed or was bound to contribute to a fund out of which a solicitor's bill was to be paid was not by that circumstance a person liable to pay the solicitor's bill. So

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9 [2001] 2 Qd R 580.

10 [1998] 1 Qd R 616.

11 *Amos v Ian K Fry & Company* [2010] QCA 131 at [46].

12 The applicant there lacking standing for another reason: [2001] 2 Qd R 580 at 582.

13 [2001] 2 Qd R 580 at 582 citing *Littlewood v George Wimpey & Co Ltd & Ors* [1953] 2 QB 501, 515.

14 Citing *Deputy Commissioner for Taxation v Moore Bank Pty Ltd* [1987] 1 Qd R 414, 416.

in that case, where the solicitors might be paid by the trustee from a fund raised by levying the unit holders, being a fund used not only for meeting those legal costs but also for other expenses of the trust, it could not be said that a unit holder was "liable to pay" the solicitor's account, as distinct from being "liable to pay the amount of the levy to the trustee or manager, who was the person or persons liable to pay that account".[15]

[23] In *Freehill Hollingdale & Page's Bill of Costs*, a lessee covenanted to pay the lessor's legal costs and upon that basis was held "liable to pay" costs within s 13 of the *Legal Practitioners Act* 1995 (Qld).[16]

[24] A wide interpretation of "liable to pay" was employed by the New South Wales Court of Appeal in *Debney v Semerdziev*.[17] A first ranking mortgagee had sold mortgaged property and its debt and the bill from its solicitors had been paid from the proceeds. What remained was insufficient to pay the second mortgagee on which the burden of the solicitors' bill thereby effectively fell. Hope JA (with whom Reynolds and Glass JJA agreed) remarked that "[i]t can thus be said that in substance it was his money that was liable to pay the costs and which in fact paid the costs".[18] Upon the basis that this burden fell upon the subsequent mortgagee, it was held to be a party "liable to pay" the solicitor's bill. Hope JA adopted the construction placed upon those words in an equivalent statute in *Re Early*,[19] in which a beneficiary under an estate applied for an order for taxation of the executor's legal costs, which had diminished the amount available to distribution to her and to another beneficiary. In that case, FitzGibbon LJ held that she was a "person liable to pay" and was thus entitled to an order for taxation, saying: "[that he was] quite prepared to extend the protection of the section to everyone whose money is liable to pay costs. It certainly ought to extend to such a case as this, where the duty of properly administering a fund rests on the executor who retains the solicitor, but the beneficial ownership of the net residue is in another, who would be helpless, if not entitled to tax the costs claimed by the executor's solicitor".[20]

[25] Adopting that reasoning in *Debney*, Hope JA said:[21]

> "In my opinion the same construction should be applied to s 32. The section is a remedial provision in respect of costs charged by officers of the court. It is not concerned with the person directly liable to the solicitor, that is, the party chargeable; other provisions of the Act deal with his right to taxation. It is concerned with persons upon whom the burden of costs falls although they are not the solicitor's clients. It is not necessary, although of course it may be relevant, that the third party be subject to an independent obligation to pay the costs, as the mortgagor was in the present case bound to pay the first mortgagee. It may be that the third party cannot succeed if he is 'a mere volunteer', but it is not possible to place a person such as the respondent in that category. If in substance the third person is liable to pay or has paid the bill, he comes within the scope of the section."

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15 [2001] 2 Qd R 580 at 585.
16 [1998] 1 Qd R 616 at 617.
17 [1982] 2 NSWLR 391.
18 Ibid at 394.
19 [1897] 1 IR 6.
20 [1897] 1 IR 6 at 8.
21 [1982] 2 NSWLR 391 at 396-397.

[26] A similarly broad construction of the expression "liable to pay" was adopted by Buss JA, with whom Steytler P agreed, in *Andrew Koh Nominees Pty Ltd v Receiver & Manager of the Balneum Joint Venture*.[22] The costs in question were the legal costs incurred by the receiver and manager appointed to a joint venture and they were challenged by the appellant which was one of the joint venturers. The costs had been paid from moneys in a bank account in the name of that joint venture. The question was whether the appellant was a party "charged with a bill of costs", which it was only if it was "liable to pay" those costs.[23] After referring to several authorities, including *Debney*, *Re Early* and *Equuscorp*, Buss JA said:[24]

> "In my opinion, a person will be 'liable to pay' costs in a bill, within s 228(2)(a)(iii), if, relevantly:
>
> (a) the person is under a legally enforceable personal obligation to pay the legal fees in a bill of costs to the legal practitioner who rendered the bill;
>
> (b) the person is under a legally enforceable personal obligation to reimburse another person for the legal fees in a bill of costs which that other person has paid to the legal practitioner who rendered the bill; or
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> (c) the person's property may lawfully be applied in paying the legal fees in a bill of costs to the legal practitioner who rendered the bill, or in reimbursing another person for the legal fees in a bill which that other person has paid to the relevant practitioner.
>
> It is not essential that there be a contractual or other relationship between the person who is under a legally enforceable personal obligation to pay or reimburse the legal fees, or whose property may lawfully be applied in paying or reimbursing the legal fees, on the one hand, and the legal practitioner in question, on the other. Where a person's property may lawfully be applied in paying the legal fees in a bill of costs etc, that person will in substance be 'liable to pay' costs in a bill, within s 228(2)(a)(iii). It would be inconsistent with the evident intention of the Parliament and with the remedial character of s 228(2)(a) to hold that such a person was not 'liable to pay'. The reasoning in *Debney*, at 394, 396 – 397, is, with respect, persuasive and should be applied, by analogy, in the present case."

Buss JA distinguished *Equuscorp*, correctly in my respectful view, in this way:[25]

> "The present case is distinguishable from cases such as *Equuscorp* and *Re Barber*. In those cases, the person who sought to have the solicitors' costs taxed or assessed merely contributed, with others, to a fund out of which the solicitors' account was to be paid. The fund in question was not the property of the party seeking taxation or assessment, even though it was comprised of amounts which, before

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22 [2007] WASCA 152.

23 *Legal Practice Act* 2003 (WA) ss 228(2)(a), 232(3).

24 [2007] WASCA 152 at [34].

25 Ibid at [36].

> payment into the fund, had been the property of that person and others. By contrast, in the present case, at all material times the credit balance from time to time in the joint venture bank account which Mr Trevor applied in payment of the bills of costs rendered by Phillips Fox was the appellants' property."

[27] Under the present statute, there must be a "legal obligation" and it must be an obligation to pay the costs in question. Thus a case with the facts of *Debney* would not seem to entitle the second mortgagee to apply for an assessment under s 335, because although the burden of the costs would fall upon that party, it would not be legally obligated to pay them. However, counsel for the appellant argued that there was relevantly no change from the enactment of the present statute, submitting that a person was under a legal obligation to pay the costs (under s 301) in every case in which that person would have been regarded as "liable to pay" the costs under the previous statutes in Queensland and their equivalents in other jurisdictions. It was submitted that the intention in changing the language was to make it clear that a mere volunteer could not seek an assessment, a question which was said to have been left open by Hope JA in *Debney* in the passage I have set out above. However, that argument cannot be accepted. Unambiguously, s 301 requires the existence of a legal obligation to pay the costs. As the judgments in *Debney* and in *Andrew Koh Nominees* specifically recognised, a person might have been "liable to pay" the costs in the relevant sense whilst not being under a legal obligation to pay them. Some of the *obiter* in *Equuscorp* might have supported a narrower construction which would have required a legal obligation. But what must be considered now are the terms of the present statute which in my view cannot be construed, in its requirement for a legal obligation to pay the costs, as including a case where there is no such obligation.

[28] As *Equuscorp* illustrated, there are likely to be many cases where the burden of a lawyer's bill will fall to a substantial extent upon someone other than the client and who therefore has more than an academic interest in having the costs assessed. But where the line is to be drawn, in defining who apart from the client should be entitled to an assessment, has been decided by the Parliament in unambiguous terms: it is according to the existence or otherwise of a legal obligation to pay the costs.

[29] A case such as *Equuscorp* would not entitle the unit holder to an assessment of the trustee's legal costs under s 335, because the unit holder's obligations would not include an obligation to pay *the costs*, as distinct from having to pay to a fund from which those costs and other expenses might be paid. But the case of a lessee which covenants to pay a lessor's costs of the lease would clearly be within s 301(3) and thus entitle the lessee to seek an assessment. The difference there, of course, would be that the relevant legal obligation would be to pay the costs. In *Amos*, the appellant was legally obliged to pay costs, but he sought an assessment not of a discrete bill for those costs, but of the solicitors' bills for all of the work performed for the estate. Accordingly, the costs he sought to have assessed were not the costs which he was obliged to pay.

[30] Returning to the present case, the obligation identified by the primary judge was an obligation to pay the costs, or as his Honour put it, Mr A and Ms A were obliged by the order to apply the proceeds of sale first in the payment of costs. Unambiguously, paragraph 4 of the order was in terms which required them to "do

all things necessary to cause the proceeds of the sale of the property to be distributed (first) [t]o pay all costs … of the sale …". This was consistent with the respective beneficial interests in the land and in its proceeds of sale which were created by the terms of this order.[26] She was also to have the benefit of the discharge of the mortgage debt for which she was a co-debtor, a further circumstance indicating that the entitlement to the proceeds of sale, before their distribution, had been affected by this order. For the respondent it was argued that Ms A's interest was limited merely to 75% of the balance of the proceeds, and that the order required Ms A to do no more than to "cooperate" in the distribution of the proceeds of sale as it prescribed. Just what that would have required of Ms A was not explained satisfactorily. Instead, the order was unambiguously one which required both Mr A and Ms A to cause the proceeds of sale to be distributed. It was not an order which obliged Mr A to do so and which simply entitled Ms A to a share of the balance.

[31] The obligation of Ms A, to cause the proceeds of sale to be paid in the various ways according to the order, was enforceable against her. In the unlikely event that the respondent here had not seen that all of her costs were paid from the proceeds of sale, and something of her bill had remained outstanding after those proceeds had been distributed to the parties, Ms A's obligation could have been enforced by Mr A, claiming that she contribute 75% of the shortfall for which he would have been liable to the respondent. Moreover, the legal obligation to cause the proceeds of sale to be applied in accordance with the order had its basis and thereby its enforceability primarily from the force of the order itself, as well as its contractual force. It was thereby an obligation enforceable not only by a money claim, but also by proceedings to compel compliance with the Court's order.

[32] It follows that the primary judge's findings as to Ms A's obligation were correct. In that event, the appellant ought to have succeeded. I would allow the appeal and declare that upon the proper construction of Part 3.4 of the *Legal Profession Act* 2007 (Qld), the applicant in District Court proceedings number 1207 of 2008 is and was, at all material times, a "third party payer" who was entitled as such to apply for an assessment of the legal costs charged and drawn by the respondent from the proceeds of the sale of the real property identified in the order made on 12 August 2008 in those proceedings.

[33] The order for costs made by the primary judge should be set aside. Because of the public interest in these proceedings, the appellant had agreed that he would not seek costs if he succeeded. Accordingly, there should be no order as to costs. It should be noted that the respondent had sought costs from the primary judge upon the indemnity basis and had sought to appeal his Honour's rejection of that argument, which of course need not be considered now.

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[26] cf *Official Trustee in Bankruptcy v Mateo & Ors* (2003) 127 FCR 217.