

**CITATION:** Morales v Murray Lyons Solicitors (a firm)  
[2010] QCATA 87

**PARTIES:** Cristobal Murillo Morales  
v  
Murray Lyons Solicitors (a firm)

**APPLICATION NUMBER:** APL194-10

**MATTER TYPE:** Appeals

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** Judge Fleur Kingham,  
Deputy President  
Dr Bridget Cullen Mandikos,  
Member

**DELIVERED ON:** 26 November 2010

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

1. The default decision of QCAT in Cairns Claim 183/10 is amended to reflect that the Respondent is appropriately named "Cristobal Murillo Morales".
2. The Respondent, Murray Lyons Solicitors (a firm), must file in the Tribunal and serve on the Appellant, Mr Christobal Murillo Morales, an affidavit exhibiting material which establishes compliance with Chapter 3, Part 3.4 of the *Legal Profession Act 2007* (Qld) by 3 December 2010.
3. If the Respondent does not comply with Order 2 above, the default decision will be set aside and the matter remitted for hearing by QCAT in Cairns.
4. If the Respondent does comply with Order 2 above, the Application to set aside the decision in default will be dismissed.

**CATCHWORDS :** APPEALS IN QCAT – Nature of Appeal –  
Whether an appeal or application to set aside  
default decision.

**For more information on QCAT**

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DEFAULT DECISION – grounds to set aside decision made in default by QCAT, whether regularly or irregularly entered

MINOR CIVIL DISPUTE – jurisdiction of QCAT to hear disputes seeking recovery of legal fees as a demand for a debt or liquidated sum – conditions precedent to the recovery of legal fees that arise under the *Legal Profession Act 2007* (Qld).

*Legal Profession Act 2007* (Qld), Chapter 3, Part 3.4 “Costs disclosure and assessment”; ss 319, 328 – 331

*Queensland Civil and Administrative Tribunal Act 2009*, ss 11, 61, 50(5), Schedule 3

*Uniform Civil Procedure Rules* (Qld), r 290

*Alexander v Ajax Insurance Co Ltd* [1956] VLR 436

*City Pacific Limited (in liq) & Anor v Ballandean Investments P/L* [2010] QCA 113

*Early Property Group Pty Ltd t/a Early Group Valuers v Cavallaro* [2010] QCATA 65

*Green v Tri-Barfen Pty Ltd* [2006] QDC 160

*Spain v Union Steamship Company of New Zealand Ltd* [1923] HCA 21; (1923) 32 CLR 138

*Unique Product Marketing Pty Ltd v Bortek Sales Pty Ltd* [2000] QDC 314

**APPEARANCES and REPRESENTATION (if any):**

On the papers decision.

**REASONS FOR DECISION**

**Dr Bridget Cullen Mandikos, Member**

## **Nature of claim and background**

- [1] This is an appeal by Mr Cristobal Murillo Morales (“Mr Morales”) from a default decision of the Queensland Civil and Administrative Tribunal (“QCAT”), in relation to a minor debt claim involving the non-payment of solicitor’s fees. Mr Morales’ had failed to lodge any response to an application brought by Murray Lyons Solicitors (“ML Solicitors”) in relation to the non-payment of fees. Consequently he was ordered to pay the sum of \$24,588.99.
- [2] The originating application in this matter<sup>1</sup> reveals that ML Solicitors made application for fees it alleged were payable under a client agreement that existed between the parties, for the provision of legal services. ML Solicitors acted on Mr Morales’ behalf in a personal injuries claim for a period of time, following which the client agreement was terminated, by ML Solicitors. Whilst the fees were to be deferred until the matter concluded, ML Solicitors alleged that the fees became immediately payable upon Mr Morales’ breach of the client agreement, in failing to make and full and frank disclosure of matters relevant to his personal injury claim. Mr Morales disputes ML Solicitors entitlement to the legal fees, but the merits of the underlying dispute have obviously not been adjudicated, in view of the default decision in favour of ML Solicitors.
- [3] Mr Morales has since filed an *Application for leave to appeal or appeal* in QCAT, seeking the “chance to tell the Magistrate exactly what happened,”<sup>2</sup> for the reason that he alleges he was not served with the originating application.
- [4] The default decision entered against Mr Morales reflects the name “Cristobal Murillo”. It seems, however, based upon the material before QCAT (in particular the *Application for leave to appeal or appeal*) that Mr Morales actually uses the name “Cristobal Murillo Morales”. For this reason, I order that the default decision of QCAT be amended so as to reflect that the respondent is appropriately named “Cristobal Murillo Morales”. This may be important at a future juncture, should enforcement of the default decision become an issue.

## **Nature of the appeal**

- [5] Though Mr Morales has cast his arguments in terms of an “appeal”, and has utilised QCAT Form 39 for these purposes, this matter is more aptly categorised as an application to set aside a decision by default. This matter should have been commenced utilising QCAT Form 40 “Application for miscellaneous matters”. Section 61 of the QCAT Act allows me to waive compliance with procedural requirements, such as the use of appropriate forms. I am satisfied that the procedural defect in having

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<sup>1</sup> QCAT Application in Minor Civil Dispute Case No.183/10, filed in the Cairns Registry on 12 April 2010.

<sup>2</sup> Application for leave to appeal or appeal, filed in QCAT on 6 September 2010.

commenced this matter by way of appeal, rather than as an application to set aside a decision by default, should be waived, in these circumstances. Mr Morales is a self-represented person, and has raised arguments in support of an application to set aside a decision by default, addressing the merits of any defence he may have to the underlying application, in cursory fashion only.

- [6] QCAT directed Mr Morales to file and deliver written submissions in support of his application by 4.00pm on 29 September 2010. His submissions were not received by QCAT until 18 October 2010. The primary submission by Mr Morales is that:

*"I got a default decision letter because I never appeared in Court. I never had any paper served on me to appear in Court. I rang and they asked me why I didn't respond to this form. I said what form, I haven't received any form."*

- [7] And further,

*"I got Legal advice and they told me to go to the Court and get a copy of the Affidavit of Service. On the form it states on the 3<sup>rd</sup> June 2010 a Bailiff came to my house at 6.30pm and asked are you Chris Murillo and I had say yes. Nobody came to my house on that day. Also my friend who was there at that time a Robyn Reeves did not recall anyone coming and if they had delivered a letter she would have told me to respond immediately. I don't understand why I should have to pay this amount when I haven't even had a chance to defend myself."*

- [8] In the circumstances, I intend to treat this matter as an application to set aside a default decision, and not as an appeal. An appeal is a creation of statute, premised on the notion that the merits of a matter were ventilated in the court or tribunal below. Where there has been no proper hearing, as is the case in a decision by default, there can be no appeal.

### **Setting aside decision by default**

- [9] In order to obtain a decision by default for a debt or liquidated demand of money in QCAT, the applicant must firstly prove that the respondent has been given a copy of the application: s50(5) QCAT Act. In this matter, Mr Morales disputes service, alleging that he did not receive the application. Naturally, in circumstances where a respondent has not received the application, it is not possible for them to respond within the relevant timeframe. Mr Morales has not filed a response to ML Solicitors' originating application.

- [10] Section 51 of the QCAT Act provides that:

*"The tribunal, on application by the respondent, may set aside or amend a decision by default under section 50 on terms, including terms about costs and the giving of security, the tribunal considers appropriate."*

- [11] If QCAT were satisfied that Mr Morales had not received the application, this would amount to an irregularity, such that the default decision should

be set aside pursuant to s.51 of the QCAT Act, and a new hearing ordered.

- [12] In addition to irregularities with respect to service, there are several further factors that might persuade QCAT to set aside a default decision. The factors that would be considered by the courts under the comparable provision of the *Uniform Civil Procedure Rules 1999* (Qld), r.290 were outlined by His Honour Judge Shanahan DCJ in *Unique Product Marketing Pty Ltd v Bortek Sales Pty Ltd* [2000] QDC 314 at [11]:

*“Rule 290 Uniform Civil Procedure Rules provides that the court may set aside or amend a judgment by default under that division of the rules, and any enforcement of it, on terms, including terms about costs and the giving of security that the court considers appropriate. The relevant considerations to be taken into account are:*

- (a) whether there is a good reason why the defendant failed to file a defence;*
- (b) whether there has been any delay by the defendant in bringing the application;*
- (c) the defendant's conduct in the action before and after judgment;*
- (d) the defendant's good faith;*
- (e) whether the defendant has raised a prima facie defence on the merits (raising triable issues); and*
- (f) whether the plaintiff would be irreparably prejudiced if the judgment is set aside which cannot be adequately compensated by a suitable award of costs.”*

- [13] These factors would also, in my view, form equally relevant considerations for QCAT when considering whether to set aside a default decision.

- [14] On the material before QCAT, there is insufficient material to justify the setting aside of a regularly entered default decision. Mr Morales has not addressed any of the substantive matters that might justify the setting aside of a regularly entered default decision in any meaningful way in his submissions.

- [15] There are several factors, apparent on a reading of the material before QCAT, that are relevant to a consideration of this point, and support my view that there are insufficient grounds to justify the setting aside of a regularly entered decision in default:

- Mr Morales has clearly had the benefit of legal assistance in considering the steps he should take once the default decision was made;
- Mr Morales has not endeavoured to file a substantive defence to the application, and has not provided any explanation for this delay; and
- There has been no allegation by Mr Morales that work to the value claimed by ML Solicitors was not performed on his behalf, or that the fees were beyond the level of agreement.

### **Was the default decision regularly entered?**

- [16] In these circumstances there are two matters that must be considered in deciding whether the default decision was regularly entered. The first is whether Mr Morales received the application; the second is whether QCAT

had jurisdiction to make a decision in this matter. I propose to address each of these.

***Did Mr Morales receive the application?***

- [17] As set out above, Mr Morales disputes having been served with a copy of ML Solicitors' originating application.<sup>3</sup>
- [18] ML Solicitors submits that Mr Morales was served with a sealed copy of the Application<sup>4</sup>, and further submits that the process server's affidavit proving same was filed with the QCAT Registry.<sup>5</sup> It is plainly apparent from a viewing of the process server's affidavit that this is the case.
- [19] There are several other matters that are addressed in the submissions of ML Solicitors that have led me to accept that Mr Morales was, in fact, served with the originating application in this matter. While these factors are not relevant to a consideration as to whether Mr Morales was actually served in the first place, they have led me to favour the submissions made by ML Solicitors on this issue. These matters are:
- Mr Morales was subsequently served with an Enforcement Hearing Summons and Statement of Financial Position, following registration of the decision with the Magistrates Court<sup>6</sup>;
  - Mr Morales subsequently made an offer to settle the matter, with the assistance of a legal advisor<sup>7</sup>; and
  - Mr Morales has since made part payments in acknowledgement of the debt<sup>8</sup>.
- [20] It is my view that the process server's affidavit conclusively establishes that Mr Morales was served with the originating Application, and was not therefore irregular. There has been insufficient evidence placed before us to now displace the evidence of service upon Mr Morales provided by the process server's affidavit.

***QCAT's Minor Civil Dispute Jurisdiction***

- [21] As there is no enabling Act conferring jurisdiction upon QCAT to hear matters of this nature, jurisdiction would need to be found within the QCAT

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<sup>3</sup> Mr Morales' Written Submissions, filed in QCAT on 18 October 2010.

<sup>4</sup> ML Solicitors' Written Submissions, filed in QCAT on 21 October 2010, in particular paragraphs [15] – [17]; and further Submissions of 25 October 2010.

<sup>5</sup> Affidavit of Mathew Armando Crowther, Process Server, sworn to 29 May 2010.

<sup>6</sup> Exhibit "B" to ML Solicitors' Response, filed in QCAT on 25 October 2010.

<sup>7</sup> Exhibit "C" to ML Solicitors' Response, filed in QCAT on 25 October 2010; I note that I have considered the settlement offer only in the context of considering the credibility of Mr Morales' claim he was not served with the Application, and not with respect to the merits of same.

<sup>8</sup> ML Solicitors' Response, filed in QCAT on 25 October 2010, paragraphs [28] – [30].

Act itself. Section 11 of the QCAT Act provides that QCAT has jurisdiction to hear and decide “Minor Civil Disputes”. Relevant to this appeal, Schedule 3 of the QCAT Act defines a “Minor Civil Dispute” in a two limb test:

- (a) a claim to recover a **debt or liquidated demand of money**, with or without interest, of up to the prescribed amount; or
- (b) a claim arising out of a **contract between a consumer and trader**, or a contract between 2 or more traders, that is--
  - (i) for payment of money of a value not more than the prescribed amount; or
  - (ii) for relief from payment of money of a value not more than the prescribed amount; The solicitors, in their application for the minor debt claim, included a copy of the client retainer. They also provided a sworn affidavit in support of the default decision identifying the amount owed.

[22] In view of Her Honour Judge Kingham’s recent decision in *Early Property Group Pty Ltd t/a Early Group Valuers v Cavallaro* [2010] QCATA 65 (“*Early Property*”), it is clear that ML Solicitors will not fall within the definition of “trader” under the QCAT Act. In *Early Property*, her Honour decided that the preparation of a valuation report by a property valuer did not fall under the definition of “trader” for the reason that valuers must bring “an independent mind to the question of land value” and “must apply the methodology and principles developed and accepted in the discipline of valuation”. I would consider the position with regard to legal practitioners and the practice of law to be similar.

[23] Thus, if jurisdiction is to be found within the QCAT Act with respect to the originating application, it must be found within the first limb of the Minor Civil Dispute definition, being a claim to recover a “*debt or liquidated demand of money*”.

### ***Debt or liquidated demand of money?***

[24] The phrase “debt or liquidated demand” has had the benefit of extensive judicial exegesis. A reasonably comprehensive definition is to be found in the judgment of Justice Sholl in *Alexander v Ajax Insurance Co. Ltd.*<sup>9</sup>:

*“The best statement which can be attempted of the meaning of the expression “debt or liquidated demand (in money)”, as used in 1851, is that it covered any claim :-*

- (a) *for which the action of debt would lie.*
- (b) *for which an indebitatus (or “common”) count would lie – including those cases formerly covered by the quantum meruit or quantum valebat counts, notwithstanding that the only agreement implied between the parties in such cases was for payment at a “reasonable rate”.*
- (c) *for which covenant, or special assumpsit, would lie, provided that the claim was for a specific amount, not involving in the calculation thereof elements the selection whereof was dependent on the opinion of a jury.”*

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<sup>9</sup> *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at paragraph [445].

- [25] What constitutes a liquidated claim was also discussed by the High Court in *Spain v Union Steamship Co. of New Zealand Ltd*<sup>10</sup>, in the joint judgment of Chief Justice Knox and Justice Starke, who acknowledged the definition contained in Odgers' *Pleading and Practice*:

*"whenever the amount to which the plaintiff is entitled....can be ascertained by calculation or fixed by any scale of charges, or other positive data, it is ....liquidated."*

- [26] More proximately and recently, his Honour Justice Alan Wilson, has declared the usual test for a liquidated demand to be "*whether or not the claim can be calculated or ascertained by a formula*".<sup>11</sup>

- [27] In assessing whether ML Solicitors' claim in the origination application was for a "debt or liquidated demand of money", attention must be given to the Client Agreement in existence between the parties. Relevantly, Clause 3 of the Client Agreement provided that:

*Costs Payable*

*All professional fees will become payable in full upon the happening of any of the following events:*

- (a) If the matter is successfully resolved by:
  - (i) A Judgement awarding damages made in favour of the Plaintiff; or*
  - (ii) An Order for costs of the matter is made in favour of the Plaintiff; or*
  - (iii) A Settlement of the matter providing for the payment of the sum of money to the Plaintiff;**
- (b) If the Plaintiff fails to make, or unreasonable [sic] delays making, full and frank disclosure of material matters which are known to the Plaintiff and may or will preclude a successful outcome of the matter;*
- (c) The client unreasonably refuses to act in accordance with the firms advice;*
- (d) The client does not within fourteen (14) days comply with the request to pay a disbursement;*
- (e) The client instructs other Solicitors to act in the matter;*
- (f) The client fails to provide adequate instructions within a reasonable time of being requested to do so;*
- (g) Any other circumstance in which the firm is otherwise required by ethical considerations or by law to cease acting for the client.*

- [28] As I interpret Clause 3 of the Client Agreement, if any of subclauses (a) or (g) transpires, the legal fees incurred to date become immediately payable. Here, ML Solicitors submits that the fees became due after Mr Morales breached the Client Agreement, subclause (b) by failing to make full and frank disclosure of matters relating to his legal dispute. Solicitor's fees are, applying the test set out by Justice Wilson in *Green v Tri-Barfen*

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<sup>10</sup> *Spain v Union Steamship Company of New Zealand Ltd* [1923] HCA 21; (1923) 32 CLR 138 (24 May 1923).

<sup>11</sup> *Green v Tri-Barfen Pty Ltd* [2006] QDC 160 at [6].

*Pty Ltd*, capable of being calculated by reference to a formula. Here, Clause 4 of the Client Agreement set out that the fees would be incurred on a time-costed basis, according to particular hourly rates. Clause 6 of the Client Agreement set forth the basis for the charging of “outlays” such as photocopying.

- [29] In view of the Client Agreement, I am confident that the originating application sought to recover a debt or liquidated demand of money, and therefore falls within limb “(a)” to the definition of “Minor Civil Dispute” contained in Schedule 3 of the QCAT Act. On this basis, I conclude that QCAT had jurisdiction to hear this matter as a Minor Civil Dispute

### ***Does QCAT have jurisdiction?***

- [30] The only other basis upon which Mr Morales might argue that there was an irregularity in the entry of the default decision - such that it should now be set aside - relates to QCAT’s jurisdiction. In *City Pacific Limited (in liq) & Anor v Ballandean Investments P/L* [2010] QCA 113 at [27] “*City Pacific*”, her Honour Justice Holmes, citing earlier authority, restated the principle that:

*“A judgment entered in favour of a party who has no entitlement to it is irregular.”*

- [31] Thus, if QCAT did not have jurisdiction to hear this dispute relating to payment of legal fees in the first instance, that would be an irregularity, sufficient to justify setting aside the default.

- [32] As this is a matter involving the payment of legal fees, regard must be had to the *Legal Profession Act 2007* (Qld) (“LP Act”), in particular Chapter 3, Part 3.4 “Costs disclosure and assessment”. Section 319(1)(a) provides that legal costs are recoverable under a compliant costs agreement. In this matter, there is a written client agreement, drafted pursuant to s48 of the *Queensland Law Society Act 1952* (as it applied at the time).<sup>12</sup>

- [33] There are further provisions contained within the LP Act, relating to the recovery of legal costs, which must be complied with before a law practice commences proceedings to recover legal costs. Section 329 of the LP Act provides that:

***Legal costs can not be recovered unless bill has been served***

(1) *A law practice must not start legal proceedings to recover legal costs from a person until at least 30 days after the law practice has given a bill to the person under sections 330 and 331 or under provisions of a corresponding law that correspond to sections 330 and 331.*

(2) *A court of competent jurisdiction may make an order authorising a law practice to start legal proceedings against a person sooner if satisfied the person is about to leave this jurisdiction.*

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<sup>12</sup> Exhibit “A” to ML Solicitors’ Response, filed in QCAT on 25 October 2010.

(3) *A court of competent jurisdiction before which any proceedings are brought in contravention of subsection (1) must stay those proceedings on the application of a party or on its own initiative.*

(4) *This section applies whether or not the legal costs are the subject of a costs agreement.*

[34] It is my view that, if a firm does not properly serve a bill to the client in accordance with s329 of the LP Act, in the form required by Chapter 3, Part 3.4 of the LP Act, that the firm does not have an entitlement to commence proceedings to recover legal costs as a debt or liquidated demand in QCAT. Any orders made in proceedings that had been commenced without having complied with the LP Act would be irregular, and set aside in accordance with the reasons espoused in *City Pacific*.

[35] Minimally, a Minor Civil Dispute Application filed by a law firm in QCAT, seeking to recover legal fees as a debt or liquidated demand, will need to annex the following material:

A solicitor's affidavit annexing:

1. Any applicable costs agreement, or the relevant scale of costs, or the basis for calculation of fair and reasonable costs (s319 LP Act);
2. Evidence indicating that a legal costs bill has been served, and that at least 30 days have passed (s329 LP Act);
3. A copy of the legal costs bill, which complies with s330 of the LP Act; and
4. Evidence indicating that a "Notification of client's rights" has been served (s331 LP Act).

[36] It is worth noting that a client may apply to QCAT to set aside a costs agreement that is not fair or reasonable (s328 (1) and (1A)). These provisions are not, however, applicable here.

[37] On the evidence before QCAT, it is unclear whether ML Solicitors have complied with the provisions of the LP Act before commencing the application that led to the default decision. It may be that these matters have inadvertently been omitted from ML Solicitors' material, as the nexus between recovery of legal fees in QCAT and the LP Act has not yet been traversed in a QCAT decision.

[38] In consideration of my having been satisfied that ML Solicitors has established that Mr Morales was served with the originating application in this matter, I think it appropriate to provide ML Solicitors with an opportunity to indicate whether it complied with the provisions of the LP Act before commencing the application, prior to making a final determination with respect to Mr Morales' Application to have the default decision set aside.

[39] This further material will be helpful to the Tribunal in determining whether the default decision was made following ML Solicitor's full compliance with the conditions precedent to making an application to recover legal fees in

QCAT; or whether it has been entered following an irregularity in complying with the LP Act and should therefore be set aside.

**Judge F Kingham, Deputy President**

1. I have had the advantage of reading the reasons prepared by Dr Cullen Mandikos in this appeal. I agree with the reasons and orders set out.
2. The Respondent will be given the opportunity to establish compliance with the requirements of the *Legal Profession Act 2007* (Qld). If it is able to do so, the decision obtained by default should stand, there being no other ground for disturbing it. If the Respondent cannot establish compliance the matter should be remitted for further hearing.

**Orders**

1. The default decision of QCAT in Cairns Claim 183/10 is amended to reflect that the respondent is appropriately named "Cristobal Murillo Morales".
2. The Respondent, Murray Lyons Solicitors (a firm), must file in the Tribunal and serve on the Appellant, Mr Christobal Murillo Morales, an affidavit exhibiting material which establishes compliance with Chapter 3, Part 3.4 of the *Legal Profession Act 2007* (Qld) by 3 December 2010.
3. If the Respondent does not comply with Order 2 above, the default decision will be set aside and the matter remitted for hearing by QCAT in Cairns.
4. If the Respondent does comply with Order 2 above, the Application to set aside the decision in default will be dismissed.