

SUPREME COURT OF QUEENSLAND

CITATION: *Legal Services Commissioner v Wright* [2010] QSC 168

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
DIANE MARIE WRIGHT
(respondent)

FILE NO/S: SC No 6224 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 19 May 2010

JUDGE: Chief Justice

ORDERS: **1. The application filed 12 June is dismissed.**
2. Costs reserved.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – GENERALLY – where respondent solicitor refused to provide itemized bill on the basis that the party seeking the itemized bill was not a client or third party payer – where complaint lodged with Legal Services Commissioner – where Commissioner filed originating application seeking declarations that the complainant was a client of the respondent, a third party payer or otherwise entitled to apply for an assessment of the subject costs – where applicant submitted that an implied retainer arose between the complainant and respondent solicitor – whether complainant was a client of the respondent solicitor – whether complainant was a third party payer within the meaning of the *Legal Profession Act 2007* (Qld)

Legal Profession Act 2007 (Qld), s 301, s 302, s 332, s 335, s 443(1)(a)

Apple v Wily [2002] NSWSC 855, applied

COUNSEL: A M Musgrave for the applicant
M K Conrick for the respondent

SOLICITORS: Legal Services Commission for the applicant
D M Wright & Associates for the respondent

Introduction

- [1] **CHIEF JUSTICE:** The respondent solicitor, whose firm is D M Wright & Associates, acted for Mr Anderson in proceedings flowing from the breakdown of his de facto relationship with Ms Anderson. They included a proceeding in the District Court under Part 19 of the *Property Law Act 1974* (Qld).
- [2] Mr Anderson and Ms Anderson reached an agreement which led to the making of a consent order in the District Court on 12 August 2008. That order provided for the sale of real property registered in Mr Anderson's name, and the distribution of the net proceeds of sale in the proportions 75 per cent to Ms Anderson and 25 per cent to Mr Anderson.
- [3] The court order provided:
 "D M Wright and Associates will act on the Respondent's (Mr Anderson's) behalf in the conveyance of the sale of the property."
- [4] Paragraph 4 of the order provides:
 "4. The Respondent and the Applicant 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."
- [5] The respondent charged \$7,179.76 for "legal fees associated with the sale". Ms Anderson sought an itemized bill of costs pursuant to s 332 of the *Legal Profession Act 2007* (Qld), which was refused on the basis Ms Anderson was not the respondent's client or a third party payer.
- [6] Ms Anderson lodged a complaint with the Legal Services Commissioner. There was correspondence between the Commissioner and D M Wright & Associates which did not lead to a resolution of the matter.
- [7] I note that having received the complaint, in his subsequent investigation the Commissioner could have required the respondent to produce "any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce" (s 443(1)(a)(iii) *Legal Profession Act*), which would include any itemized bill. The Commissioner apparently did not follow that course.
- [8] Instead, the Commissioner filed an originating application seeking declarations that Ms Anderson was a client of the respondent; or a third party payer in relation to Mr Anderson; or otherwise entitled to apply for an assessment of the subject costs.

Was Ms Anderson a client of the respondent?

- [9] It is necessary to have regard to the definition of “client” in the *Legal Profession Act*, because the entitlement to be provided with an itemized bill arises under that Act.
- [10] Section 335 provides:
- “(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.”
- [11] Section 332 provides:
- “(1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemized bill...
 - (2) The law practice must comply with the request within 28 days after the date on which the request is made.”
- [12] For the purpose of those provisions, the term “client” is defined to mean “a person to whom or for whom legal services are or have been provided”.
- [13] For the Commissioner, Mr Musgrave submitted that the definition of “client” should be construed widely, and that legal services were provided by the respondent to or for Ms Anderson, being “the discharge by the respondent, on behalf of (Ms Anderson), of (Ms Anderson’s) obligations under the terms of the Consent order, in particular (Ms Anderson’s) obligations at cl 4 of that order.”
- [14] He went on to submit that “upon the making of the order by consent...(Ms Anderson) obtained an enforceable interest in the proceeds of sale of the property. Upon the completion of the sale, the respondent received a fund of money which the respondent knew was encumbered with the interest of (Ms Anderson). (Ms Anderson’s) own solicitor played no role in the creation of the fund and its distribution. Only the respondent was involved. In taking on that role, in receiving that fund of money and purporting to distribute it according to paragraph 4, the respondent took on the role of solicitor for (Ms Anderson). An implied retainer arose.”
- [15] For the respondent, Mr Conrick submitted a variety of considerations precluded any implied retainer: that Ms Anderson had her own solicitor throughout; because having the respondent acting for both parties would involve a potentially serious conflict of interest; and because Ms Anderson never gave instructions to the respondent, so that the applicability of Part 3.4 of the *Legal Profession Act*, which contains ss 335 and 332, was not triggered (s 302). He pointed out that the circumstance that one person benefits from the provision of legal services directly to another does not of itself make that first person a client of the solicitor. For example, “the solicitor for a buyer of real property may prepare and forward to the solicitor for the seller...transfer and other documents necessary to complete the sale. The seller benefits from that work. However, the work was not done by the provision of legal services ‘to or for’ the seller.”

- [16] An implied retainer arose if the parties intended it to arise, in other words, if Ms Anderson and the respondent should be taken to have intended as much. Whether they did depends on what may objectively be ascertained as to their intentions. See *Apple v Wily* [2002] NSWSC 855, paras 7 and 11.
- [17] A consideration which runs strongly against implying this retainer is the provision in the consent order that the respondent's firm would be acting on Mr Anderson's behalf in "the conveyance of the sale of the property". That property was Mr Anderson's property. It is hardly surprising to hear that his solicitors would be acting in the sale. But that the parties dealt expressly with that implies that the respondent's firm were not to be taken to be acting for anyone else. If "the conveyance of the sale of the property" extends to the distribution of the proceeds of sale, which would ordinarily be the case, then the provision would not sit comfortably with a view that following the sale proper, and during the distribution phase, the respondent's firm would also be acting for Ms Anderson.
- [18] Another consideration telling against a view that the respondent also acted for Ms Anderson following the sale and during the distribution phase is that Ms Anderson was, at the time of the consent order, separately represented by other solicitors, with no suggestion that they were to cease to act. Indeed, cl 4(iv) provides that the moneys to which Ms Anderson is entitled are to be paid into those solicitors' trust account.
- [19] A further negative consideration is the prospect of conflict of interest were the respondent's firm to be acting for both parties, even though one would ordinarily have expected that following completion of the sale, the residual process would be uncontroversial. Then again, the dispute over this bill shows that in this case it was not.
- [20] Going the other way, and arguably favouring the implying of a retainer, was the circumstance that Ms Anderson was prepared to commit to the respondent the running of the process required by cl 4 of the order, the outcome of which was of significance to her financial interests. In the situation which arose, for example, where Ms Anderson challenged the respondent's account, it would be unsatisfactory were Ms Anderson left bereft of any capacity to pursue that challenge. Certainly the existence of that capacity would be put beyond doubt were Ms Anderson the respondent's client. But even if not, there would be arguable avenues for relief. For example, the "costs" referred to in cl 4(i) of the order would be limited to reasonable costs, and were the amount of the bill unreasonable, then Ms Anderson could presumably bring a proceeding against Mr Anderson for an accounting in respect of the excess. Also, Ms Anderson could request the Legal Services Commissioner to exercise his power under the complaint to require production of the itemized bill, which could lead to a proceeding and order for compensation.
- [21] I consider that the considerations which tell against implying a retainer substantially outweigh the considerations running the other way.
- [22] I conclude that Ms Anderson was not at material times a client of the respondent's firm.

Was Ms Anderson a third party payer

- [23] The term "third party payer" is defined in s 301 of the Act. It provides:

- “(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...”

- [24] Mr Musgrave submitted that:
 “The obligation to pay in this case arises under clause 4 of the consent order. Clause 4 casts the obligation directly on (Ms Anderson) to discharge certain expenses of the sale, including the respondent’s costs. That obligation may be construed as either joint or several (or both). In any event it answers the description of a legal obligation at s 301...”
- [25] It may be accepted that because of the court order, Ms Anderson was under a legal obligation. That was an obligation owed to Mr Anderson.
- [26] The order obliges Mr Anderson and Ms Anderson to apply the proceeds of sale first in payment of costs. The legal costs were primarily payable by Mr Anderson, because the respondent, entitled to the payment, was his solicitor. Mr Anderson 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 Anderson and Mr Anderson, there has been agreement about how the costs will be paid, which would result in Ms Anderson bearing three-quarters of them and Mr Anderson one-quarter.
- [28] But by force of the court order, Ms Anderson undertook no legal obligation vis-à-vis the respondent, and that is I believe the sort of obligation which section 301 has in mind.

Other entitlement to apply for assessment

- [29] In relation to the third declaration sought, it was not suggested there was any basis for an application for assessment other than Ms Anderson’s being a client of the respondent or a third party payer.

Conclusion

- [30] It follows that none of the declarations which have been sought should be made.

Orders

- [31] There will be an order that the application filed 12 June 2009 is dismissed. I will hear submissions as necessary in relation to costs.