DISTRICT COURT OF QUEENSLAND

CITATION:	*Golder Associates P/L v Challen* [2012] QDC 11
PARTIES:	**GOLDER ASSOCIATES PTY LTD (ABN 64 006 107 857)** (Applicant) **v** **CHALLEN, PETER LESLIE trading as HAWTHORN CUPPAIDGE & BADGERY AND GARLAND HAWTHORN BRAHE (ABN 96 335 661 027)** (Respondent)
FILE NO:	4082/2011
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	7 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	25 January 2012
JUDGE:	Samios DCJ
ORDER:	**1. The 27 bills delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 be assessed.** **2. Further the respondent deliver to the applicant itemised bills with respect to each of the Bills of Costs delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 setting out:-** **(a) Full details of each item of work done;** **(b) The date each item of work was done;** **(c) The basis of the charge for the work;** **(d) The amount charged for carrying out each item of work; and** **(e) The details of the person that carried out the work**

CATCHWORDS:	Costs – assessment – series of bills – whether application within time – whether some bills interim bills – whether "final" bill delivered *Legal Profession Act* ss 300, 332, 333, 335 Cases: *Clayton Utz Lawyers v P&W Enterprises Pty Ltd* [2011] QDC 5 – referred to *Dromana Estate Limited v Wilmoth Field Warne* 2010 VSC 308 – not followed *Retemu Pty Ltd v Ryan* NSWDC Coorey DCJ 4300/08 and 4301/08, 16 April 2010, (unreported) – followed Re: *Weedman* (1986) FCA 1112 para 41 – followed *Stark v Dennett* [2008] QCA 50 - followed *Turner v Mitchells Solicitors* [2011] QDC 61 - followed
COUNSEL:	Mr Trim for the applicant The respondent was not represented by Counsel
SOLICITORS:	D G Thompson Legal Costs Lawyers & Consultants The respondent represented himself

[1] The respondent is a solicitor practising as the principal of the legal practice which trades under the registered business name Hawthorn Cuppaidge & Badgery.

[2] The applicant is a party to proceedings pending in the Supreme Court.

[3] The respondent until his retainer was terminated on 25 January 2011 was retained by the applicant to act for the applicant in the Supreme Court proceedings.

[4] By this application filed on 14 October 2011 the applicant applies for orders that:-

(a) The respondent release his file to the applicant relating to the proceedings in the Supreme Court; and

(b) There be an assessment of all the legal costs charged by the respondent to the applicant.

[5] Between 5 July 2006 and 9 December 2010 the respondent delivered to the applicant 27 Bills of Costs. Those Bills of Costs are as follows:-

Invoice Ref./No.	**Invoice Date**	**Invoice Amount**	**Payment Date**	**Comment**
EAL:205385	5/07/2006	$6,709.12	15/08/2006	
EAL:205385	31/07/2006	$4,241.05	15/08/2006	
EAL:205385	30/10/2006	$826.52	21/11/2006	
EAL:205385	13/11/2006	$6,517.50	5/12/2006	
EAL:205385	23/11/2006	$3,915.45	5/12/2006	
EAL:205385	30/11/2006	$3,357.20	12/12/2006	
EAL:205385	2/03/2007	$1,151.76	12/04/2007	
EAL:205385	18/04/2007	$439.46	3/10/2007	
SRE:205385	30/07/2007	$3,638.34	3/10/2007	
SRE:205385	3/09/2007	$460.80	18/09/2007	

SRE:205385	29/10/2007	$591.80	20/11/2007	
SRE:205385	30/11/2007	$975.60	19/12/2007	
SRE:205385	7/12/2007	$5,445.00	10/01/2008	
SRE:205385	18/12/2007	$21,847.72	10/01/2008	$5,000 held on trust applied – balance of $16,847.72 paid
No:8007	17/04/2008	$11,010.12	28/07/2008	
No:8101	30/05/2008	$4,985.76	2/07/2008	
No:8235	4/09/2008	$4,695.78	24/09/2008	
No:8385	28/11/2008	$4,458.56	14/10/2009	
No:8421	24/12/2008	$20,096.44	28/04/2009	
No:8486	9/03/2009	$11,543.48	14/10/2009	
No:8598	21/05/2009	$18,303.23	8/07/2009	
No:8759	30/09/2009	$103,791.82	24/11/2009 {$60,000.00} and 8/12/2009 {$43,791.82}	

No:8825	23/11/2009	$1,498.75	24/11/2009	
No:9001	29/06/2010	$28,882.92	5/08/2010	
No:9054	14/10/2010	$66,520.11	22/12/2010	
No:9098	9/12/2010	$13,779.40	22/12/2010	
No:9099	9/12/2010	$6,133.03	22/12/2010	
	Total	**$355,816.72**		

[6] The respondent claims that until 31 December 2007 the provisions of the *Queensland Law Society Act* apply to the assessment of the Bills of Costs and thereafter the *Legal Profession Act* (LPA) applies to the assessment of the Bills of Costs. However in my view the effect of s 738 of the LPA is that all the Bills of Costs in this matter are governed by the LPA.

[7] As the Schedule of the Bills of Costs shows the Bills of Costs amount to $355,816.72. The last bill issued by the respondent to the applicant were two bills dated 9 December 2010 and numbered 9098 and 9099. All the Bills of Costs were paid by the applicant in full up to and including the bill dated 29 June 2010. Of the bills issued since 29 June 2010 $21,056.44 has been paid.

[8] On or about 24 March 2011 and 20 April 2011 the applicant requested an itemised bill of all the invoices issued to date.

[9] The respondent has not released the file nor provided the requisite itemised bills.

[10] The application before me is opposed by the respondent. He submits that he has a lien over the file. Further that as no final bill has been issued by him to the applicant none of the bills can be assessed. Alternatively if he has issued a final bill then there are only three bills namely those numbered 9054, 9098 and 9099 that can be the subject of an assessment of the costs.

[11] There is no dispute about the retainer. Further it is not in dispute that the applicant is a "sophisticated client" as that expression is defined in s 311(c) and (d) of the LPA. Further there is no dispute that the respondent issued the 27 bills pursuant to the retainer agreement. He states his professional fees in all of the 27 bills were calculated on the basis of each item of legal service being costed based on time taken to perform each item of work recorded in units of six minutes.

[12] As the evidence shows each bill had attached to it a time ledger.

[13] Further there is no dispute that all the bills have been paid in full except for the bill dated 14 October 2010 number 9054, the bill dated 9 December 2010, number 9098 and the bill dated 9 December 2010 number 9099.

[14] Further the applicant paid the respondent $21,086.44 on about 23 December 2010. I accept the respondent applied this to the oldest outstanding bill namely the one dated 14 October 2010.

[15] Accordingly I accept the respondent's evidence that there is due to him from the applicant $65,346.10 as follows:-

(a) $45,433.67 ($66,520.11 minus $21,086.44) for the bill dated 14 October 2010 number 9054;

(b) $13,779.40 for the bill dated 9 December 2010 number 9098;

(c) $6,133.03 for the bill dated 9 December 2010 number 9099.

[16] The respondent says except for the requests made on 20 March 2011 and 20 April 2011 the applicant has never requested the respondent to itemise any of the bills.

[17] I also accept the respondent's evidence that he continued to receive instructions from the applicant and continued to perform legal services for the applicant pursuant to the retainer for the period 8 December 2010 up until 25 January 2011 when he was informed by the applicant his retainer was terminated. I also accept the respondent's evidence these legal services which he had performed were recorded in his accounting system as unbilled work in progress and he has informed the applicant that he has the right to render a further bill in respect of those services.

[18] The respondent claims the lien because of the unpaid $65,346.10. However he does not claim a lien in relation to the unbilled work in progress. He has expressed to the applicant that he is prepared to accept satisfactory security as an alternative in which event the lien would not be maintained.

[19] On the hearing of this matter before Dorney DCJ submissions on behalf of the applicant were filed.

[20] In those submissions the applicant submitted that given its stature (a large proprietary company), the respondent's reliance on the applicant having been a "sophisticated client" as those words are used in the LPA, and the fact that there has been a considerable amount of money paid to the respondent, the applicant's undertaking to this court to be bound by the process and pay any sum found to be due to be owing as a result of the assessment process, is sufficient security for the respondent to release the file.

[21] On the hearing before me on 25 January 2011 I encouraged the parties to reach some agreement about the lien. However, in my opinion no agreement was reached upon which I could act on to make orders to resolve the application about the lien.

[22] The respondent in his submissions on the issue of the lien quoted Re *Weedman* (1996) FCA 1112 at paragraph 41 per Drummond J where he said:-

> *"In the absence of a special agreement the right of a solicitor to refuse to hand over his former client's papers in order to force the client to pay his costs has long been recognised under the general law. The principles relevant to the assertion of a solicitor's lien upon a change of solicitor are set out in the judgment of Templeton LJ [sic] in Gamlen Chemical at 624, and have been accepted by this Court in CCom Pty Ltd v Jiejing Pty Ltd and Ors (Cooper J, unreported, 24 June 1992) and Cross v National Australia Bank (Drummond J, unreported, 13 May 1993):*
>
> > *If before the action is ended, the client determines the retainer, the solicitor may, subject to certain exceptions not here material, exercise a possessory lien over the client's papers until payment of the solicitor's costs and disbursements.*
>
> …
>
> *Where it is the client who has terminated the retainer otherwise than for the solicitor's misconduct, I doubt whether there is any residual discretion in the court to order that the former client shall have access to the documents, in the face of the lien, even where the denial of access to the documents may leave the client facing what can truly be regarded as catastrophic disruption to his litigation. Such a discretion could, in my opinion, only be justified on the basis that the*

> *interests of justice may require such an order to be made in some cases. But it is difficult to see why the court should disregard the interests of its own officers and leave them without payment for what is justly due to them because insistence on the lien would deprive the former client of material essential to the conduct of his case, where that situation has been brought about by the client discharging the solicitor without any good reason. However, it is unnecessary for me to reach a concluded view on whether such a discretion exists since even if the court does have that power, I would not regard this as a proper case to exercise it in favour of the applications, for reasons which later appear."*

[23] The respondent also relies upon *Stark v Dennet* [2008] QCA 50 at [40]-[51].

[24] In the circumstances of this application I am not satisfied the circumstances exist to order the respondent to give up his lien. In my opinion a satisfactory alternative has not been put forward by the applicant. As Drummond J said the lien will not be set aside by the court even though that may leave the client facing a catastrophic disruption to his litigation.

[25] Regarding the assessment of the Bills of Costs, the LPA relevantly provides:-

> "The principles to be applied on the Application
>
> 5. Section 335 of the *Legal Profession Act* 2007 (Qld) (LPA) relevantly provides that:
>
> > "*(1) A client may apply for an assessment of the whole or any part of legal costs.*
> >
> > ...
> >
> > *(3) The costs application may be made even if the legal costs have been wholly or partly paid.*
> >
> > ...
> >
> > *(5) A costs application by a client or a third party payer must be made within 12 months after –*
> >
> > *(a) the bill was given ...*
> >
> > …

(10) Subject to this section a costs application under subsection (1) or (2) must be made in the way provided under the Uniform Civil Procedure Rules.

...”

6. Section 333 of the Act provides that:

“*(1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.*

(2) Legal costs that are the subject of an interim bill may be assessed under division 7 either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has previously been assessed or paid.”

7. Section 332 of the Act provides that:

“*(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 itemised bill.*

...

(6) A law practice is not entitled to charge a person for the preparation of an itemised bill requested under this section.”

[26] It is also to be noted that Chapter 17A of the UCPR applies to an assessment under the LPA.

[27] Rule 743C provides that the court may direct the preparation of an itemised bill, if there is no itemised bill for all of the costs to be assessed.

[28] Regarding the provisions of the LPA the respondent’s submission is that as there is no “final” bill because he is entitled (even though he has not) to issue a further bill, the legal costs the subject of the 27 bills cannot be assessed. In the alternative the

respondent submits if the bills of 9 December 2010 were "final" bills then only those within 12 months of this application can be the subject of assessment.

[29] In that case it would be only the bills No. 9054, No. 9098 and No. 9099 that could be the subject of assessment. The respondent submits these amount to $86,432.54. In that event he submits the application should be heard by the Magistrates Court.

[30] The words "interim" and "final" are not expressly defined in the LPA.

[31] However I respectfully agree with his Honour Judge McGill in *Turner v Mitchells Solicitors* [2011] QDC 61 that in the case of interim bills the terms of s 333(1) provides an effective definition: it is a bill covering part only of the legal services the law practice was retained to provide.

[32] The Macquarie English Dictionary (First Edition) defines "final" as "relating to, or coming to an end; last in place, order or time". The Concise Oxford Dictionary (11th Edition) defines "final" as "1. coming at the end of a series ..".

[33] Regarding the word "final" that in my opinion should be construed according to its plain English meaning. That is the last in time. In my opinion "final" in the relevant sections of the LPA should not be construed as "ultimate".

[34] Therefore in my opinion the bills delivered by the respondent and dated 9 December 2010 were final bills despite the uncharged work in progress for the period 8 December 2010 to 25 January 2011 which has not been billed by the respondent.

[35] In *Turner's* case his Honour Judge McGill in my opinion, accepted a construction of the relevant provisions of the LPA such that an assessment can be ordered of all the interim bills once there is a final bill and an application is made within 12 months of that final bill (see paragraphs [16]-[27] of his Honour's judgment).

[36] In *Turner's* case his Honour Judge McGill referred to the different approaches in two other cases. One is the New South Wales decision of *Retemu Pty Ltd v Ryan* (NSWDC), Coorey DCJ 4300/08 and 4301/08, 16 April 2010 (unreported) which his Honour followed and one is the Victorian decision *Dromana Estates Limited v Wilmoth Field Warne* (2010) VSC 2008.

[37] In *Retemu Pty Ltd* Coorey DCJ held it would be dysfunctional to the relationship between the solicitor and the client if the client had to make an application for a costs assessment on every occasion where there was an issue in relation to a claim in an interim bill. His Honour held that a provision similar to s 333 of the LPA allows all the interim bills to be assessed when the final bill is assessed.

[38] In *Turner's* case his Honour Judge McGill said that there was considerable force in the practical observation of Coorey DCJ that the position of a client in relation to the continuing performance of legal services under a retainer may well be prejudiced if there is a dispute in relation to an interim bill. His Honour said in consumer protection legislation such as this, rights to seek assessment ought not to be interpreted in a way which will restrict the protection available to a consumer if two views are fairly open. His Honour states that this principle favours the interpretation in New South Wales because it looks at the practical consideration of

periodical assessment of the costs: it is likely to disrupt the continuing lawyer-client relationship.

[39] In *Dromana Estate Limited* Associate Justice Wood adopted a more restrictive approach. At para 24 he said:-

> "Sub-paragraph 3.4.37(2) enables an interim bill to be reviewed at the time it is delivered and also at the time the final bill is reviewed, even if the interim bill has been paid or if it has been previously reviewed. <u>This is all subject, however, to the application to review both the interim bill and the final bill being filed within 12 months of the bills being received</u>. (my underlining)

[40] As did His Honour Judge McGill I prefer the reasoning of Coorey DCJ in *Retemu Pty Ltd.*

[41] In my opinion, all the bills preceding the final bills were interim bills. In my opinion the effect of s 333 of the LPA is that as a 'final' bill has been delivered by the respondent to the applicant all the interim bills can be assessed including those bills delivered more than 12 months before the application was filed.

[42] Therefore I order the 27 bills delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 be assessed.

[43] The applicant also seeks an order that the bills be itemised. Section 300 of the LPA defines "itemised bill" as being a bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under Division 7.

[44] The applicant referred me to *Clayton Utz Lawyers v P&W Enterprises Pty Ltd* [2011] QDC 5. In that case His Honour Judge Reid found that the bills in that matter ought to be itemised. Examples were given by his Honour in his judgment.

One example showed various matters of work rolled up together and a lump sum of money claimed for that work. That was a different case to the present case. However, the principles referred to by His Honour Judge Reid are applicable to the present matter. In that case His Honour Judge Reid referred to *Re Walsh Halligan Douglas' Bill of Costs* (1990) 1 Qd R 288 where Dowsett J referred to *Malleson, Stewart and Nankivell v Williams* (1930) VCR 410 where Mann J said:

> "These authorities show that the Courts have repeatedly held that a bill of costs must contain such details as will enable the client to make up his mind on the subject of taxation, and will enable those advising him effectively as to whether the taxation is desirable or not."

[45] In the present matter the time ledgers do set out individual items of work and a claim for those individual items of work. However the time ledgers do not disclose by whom the work was done and what was the size of a letter, fax or email for example that was drafted or perused. Further, the time ledger does not disclose how long a telephone call took. This again is by way of example.

[46] The code in the margin of the time ledger may disclose who did the work. However that is not expressed in the bill delivered by the respondent to the applicant.

[47] Reference to the file may answer these questions. However, the respondent maintains his right to the file.

[48] In the end I have come to the view that the respondent should deliver itemised bills with respect to each of the bills delivered between 5 July 2006 and 9 October 2010. That is despite the applicant being a sophisticated client and having its own in house counsel.

[49] Therefore I order that the 27 bills delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 be assessed.

[50] Further I order the respondent deliver to the applicant itemised bills with respect to each of the Bills of Costs delivered by the respondent to the applicant between 5 July 2006 and 9 December 2010 setting out:-

(a) Full details of each item of work done;

(b) The date each item of work was done;

(c) The basis of the charge for the work;

(d) The amount charged for carrying out each item of work; and

(e) The details of the person that carried out the work

[51] I will hear the parties on the period to be allowed for the delivery of the itemised Bills of Costs and any other directions that should be made consequent upon these reasons.

[52] I will hear the parties on the question of costs including the costs before his Honour Judge Dorney.