Defending a claim for counsel's fees: no costs assessment required

Sharna Clemmett reports on *Branson v Tucker* [2012] NSWCA 310

On 26 September 2012, in *Branson v Tucker* [2012] NSWCA 310, the New South Wales Court of Appeal considered whether a claim by a barrister for fees, brought in the District Court, could be defended by on the basis that the fees charged were unreasonable, in circumstances where no assessment of those fees had been sought by the solicitors within the 60 day time limit provided in s 351(3) of the *Legal Profession Act 2004* (NSW) (LPA). Broadly, the solicitors' defence and cross-claim alleged that the fees charged by the barrister were more than was reasonable or necessary and, as such, charging those fees was a breach of an implied term of the retainer between the barrister and the solicitors, or a breach of a duty of care owed by the barrister.

The barrister had moved the District Court to strike out the defence and cross-claim. The District Court determined that the solicitors' defence and cross-claim should *not* be struck out on the basis that the defence and cross-claim were not unarguable. The barrister appealed from that decision to the Court of Appeal. On the appeal, the barrister argued that the costs assessment regime provided for in Division 11 of the LPA constituted an exclusive regime for quantification of costs that precluded raising issues of reasonableness of the costs by way of defence or cross-claim in the proceedings.

In summary, the Court of Appeal concluded that the costs assessment mechanism established by Division 11 of the LPA is not exclusive, so that the reasonableness of legal costs can be ascertained by the District Court by means *other than* that costs assessment mechanism.[1] In particular, that can be done as an exercise of its 'ordinary jurisdiction… in dealing with contested claims', irrespective of no assessment having been sought within the s 351(3) time limit. Where a contract or *quantum meruit* claim is brought seeking payment of legal fees, but there has been no assessment of those costs, the reasonableness of those fees can be called into question by way of a defence of that action.[2]

The main judgment was delivered by Campbell JA, with Beazley JA and Barrett JA agreeing, and Barrett JA making some additional comments.

Campbell JA considered authorities identifying different sources of the courts' jurisdiction to quantify costs, in particular:[3]

- requiring taxation (now assessment) under the relevant statutory jurisdiction (now in the LPA) (which was not applicable in this case);
- under its 'general jurisdiction over officers of the court' (also not applicable in this case); and
- in the ordinary jurisdiction of the court dealing with contested claims.

Importantly, s 366 of the LPA provides that '[Division 11] does not limit the power of a court or a tribunal to determine in any particular case the amount of costs payable'. Campbell JA concluded that the ordinary meaning of those words leaves untouched:

- the District Court's power to make orders within the full scope of s 98 of the Civil Procedure Act;[4] and
- the District Court's 'ordinary jurisdiction' to deal with contested claims.

In reaching that conclusion, his Honour discussed the following earlier decisions in which the assessment mechanism provided for in the LPA had been treated as non-exclusive:

> *In the Matter of Windy Dropdown Pty Ltd* [2010] NSWSC 1099, in which White J held that the Supreme Court had jurisdiction under s 98(4) of the *Civil Procedure Act 2005*[5] to make a lump sum costs order in relation to other earlier proceedings determined by different Judge, pursuant to an application by administrators for directions under s 447D of the *Corporations Act 2001*, in circumstances where there had been no assessment of the costs in those earlier proceedings; and
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> *Attard v James Legal Pty Ltd* [2010] NSWCA 311, in which a solicitor's cross-claim for his legal costs was challenged and the Court of Appeal referred the question of how much was due by the clients to the solicitor to a referee experienced in the assessment of legal costs. In that case Tobias J stated that it would be an error to conclude that the LPA costs assessment provisions '*provided a complete and exclusive code as to how legal costs were to be assessed.*' (The Appellant sought leave to challenge the correctness of aspects this decision, but leave was refused).

This means that if there has been no assessment of the legal costs (even where the time for seeking assessment has elapsed); the costs are recoverable under s 319 of the LPA; and proceedings are commenced seeking payment of those costs, then:

- if there is a contract (in the form of a costs agreement), the question of quantification of the costs still may be dealt with in any defence to the action in the same way as in any other contractual claim; and
- if there is no costs agreement, then the question of quantification of the costs still may be dealt with based on the statutory form of *quantum meruit* created by s 319(1)(c).[6]

Endnotes

1. Affirming *Attard v James Legal Pty Ltd* [2010] NSWCA 311.
2. At [102]-[103] per Campbell JA, and at [131] per Barrett JA.
3. *In re Park; Cole v Park* (1888-1889) 41 ChD 326 (see [71]-[76] of Campbell JA's judgment); *Woolfe v Snipe* (1933) 48 CLR 677 (see [80]-[81] of Campbell JA's judgment).
4. Section 98 also applies to proceedings in the Supreme Court, but does not apply to civil proceedings under Part 3 of the *Local Court Act 2007* that are held before the Local Court sitting in its General Division or its Small Claims Division: see rule 1.6 and Schedule 1, Uniform Civil Procedure Rules.
5. Which section confers wide jurisdiction on the court to deal with costs and, relevantly, in sub-section (4) provides that '*In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to: … (c) a specified gross sum instead of assessed costs.*'
6. Per Barrett JA at [129].

Powers of the courts when parties have engaged in fraud or serious wrongdoing

Carmel Lee reports on *Toksoz v Westpac Banking Limited (No.2)* [2012] NSWCA 288

What role can the court play when it is discovered in the course of the proceedings that a party has engaged in serious misconduct? Recent decisions have considered the role of the court in deterring wrongdoing, whether in the conduct of the litigation or in the facts forming the basis of the action. In *Toksoz v Wetspac Banking Limited (No 2)* [2012] NSWCA 288, the Court of Appeal confirmed that it was within the court's power and in the public interest for the court to forward a copy of judgment onto relevant government agencies where issues raised in the case merited further investigation. In *Fairclough Homes v Summers* [2012] UKSC 26, the Supreme Court of the United Kingdom found that the court had a variety of case management powers that could be effective in discouraging claims founded on fraud, although a cause of action would only be struck out in extreme circumstances.

Tokosz v Wetspac Banking Limited (No 2)

Westpac customers were defrauded of funds totalling more than $1 million through a series of identity theft frauds between 2005 and 2007. Westpac reimbursed its customers for the funds taken and brought proceedings in the Supreme Court against Mr and Mrs Toksoz to recover the funds. Palmer J drew the inference, on the evidence presented, that Mrs Toksoz had actual knowledge that funds received into her account were derived from her husband's acts of fraud on the bank and that in absence of an explanation otherwise, the funds in Mrs Toksoz's bank account were the product of her husband's fraud.

Mrs Toksoz appealed to the court of Appeal, challenging the primary Judge's reasons, and claimed that on the evidence it was not possible for the primary Judge to draw the inference that he did. The Court of Appeal substantially dismissed the appeal[1] finally that the inference made by the primary judge that Mrs Toksov received money the product of fraud could and should be made. The court made several orders, including the following:

> 5.Subject to rescission or variation upon receipt of any submissions by the appellant to the Court (such submissions and any affidavit in support to be filed and served within seven days) and the subsequent reconsideration of the question by the Court, direct the Registrar of the Court of Appeal to forward this judgment and the judgment of the primary judge to the relevant Minister of the Commonwealth of Australia administering social service benefits for single parents, to the Australian Taxation Office and to the Crime Commissions of New South Wales and the Commonwealth.