THE POWER OF A COSTS ASSESSOR TO INTERPRET A COSTS AGREEMENT

By Peta Solomon

A number of recent cases have considered the power and function of a costs assessor when determining an application for assessment, especially the terms and validity of a costs agreement in respect of both solicitor:client and party:party assessments.

In both solicitor:client and party:party assessments, significant issues often arise about the interpretation of the costs agreement. In solicitor:client assessments, the costs agreement forms the contractual basis of the parties' arrangements, and hence the source of the liability for costs. It also determines the scope of that liability.

ARE COSTS AGREEMENTS RELEVANT PARTY:PARTY?

Section 365(2) of the *Legal Profession Act* 2004 (the 2004 Act) provides that, when assessing party:party costs, the costs assessor 'must not apply the terms of a costs agreement for the purposes of determining appropriate, fair and reasonable costs'. Despite this provision, parties liable to pay costs frequently argue that the indemnity principle should apply to limit their liability to the costs as set out in the costs agreement. Such arguments cause difficulties, because the 2004 Act and its predecessor, the *Legal Profession Act* 1987 (the 1987 Act), did not contemplate that costs assessors would be required to determine issues of contractual interpretation; for example, costs assessors are not bound by the rules of evidence and are not provided with a forum in which oral evidence can be tested. His Honour Kirby J pointed out, in *Ryan v Hansen,*[1] that the Act does not require a hearing before a costs assessor. This was because 'the underlying assumption in the Act is that work was performed for which a bill has been rendered and monies are payable', as was noted by Rothman J in *Hall Chadwick Pty Ltd v Doyle.*[2]

However, despite s365(2) of the 2004 Act, the indemnity principle means that, in all party:party assessments, the terms of the costs agreement remain relevant. In *Wentworth v Rogers; Wentworth & Russo v Rogers*, an issue arose as to whether the claiming party's advisers were acting on a conditional or pro bono basis. Santow JA considered that the case raised the following questions:

'(a) was there a "costs agreement" within the meaning of the Act;

(b) (i) was it rendered void by s184(4) of the [1987] Act and, if so,

(ii) would any costs be recoverable on any other basis, such as quantum meruit;

(c) was the nature of the costs arrangements between Rogers and his legal advisers such that those costs were precluded from recovery under the indemnity principle, if and to the extent that principle applies; and finally

(d) in relation to the costs assessor's interpretation of the nature, terms and construction of the relevant arrangements between Rogers and his legal advisers, did the cost assessor

(i) have power or jurisdiction under the Act to carry out that function, and if he did

(ii) can and should such interpretation be reviewed by a judge of this Court with curial powers to examine witnesses, which powers are denied a costs assessor, in order to determine whether Ms Wentworth (first certificate) or Ms Wentworth and Mr Russo (second certificate) are liable to pay the amounts so certified and, if so

(iii) what should be the scope of such review.'[3]

Santow JA[4] also referred to the comments of Barrett J at first instance in his judgment of 15 August 2002:[5]

> 'The content of the costs agreement may, however, be used for other purposes relevant to the assessment. It will thus be available for consideration by the assessor if, as here, it is asserted that there is a term positively excluding the charging of costs by the lawyer, so that there is no liability for costs by reference to which a costs order can effectively operate. Use of the costs agreement for that purpose goes to the question whether costs should be assessed at all, rather than the question of the amount that is fair and reasonable.'

In party:party assessments, assessors' decisions about whether they have jurisdiction to make the kind of determinations outlined in the above cases have varied. Some have decided that they do have jurisdiction, subject to the oversight of the court (via the appeal provisions in ss384 and 385 of the 2004 Act). Others have decided that they have no jurisdiction and that these matters, if raised, should be determined by a court prior to the assessment of the costs. Recently, some assessors have adjourned assessments or found themselves unable to proceed because

serious issues have arisen, the resolution of which would properly require the giving of oral evidence and cross-examination of witnesses.

Santow JA in *Wentworth*[6] held that a costs assessor does have the power to determine the terms on which the legal practitioner was retained, while the discretion to order review by a court under s208M (s385 of the 2004 Act) remains as a safeguard for exceptional cases. However, Basten JA[7] held in that case that the restraint in s208H (the precursor to s365(2) of the 2004 Act discussed above), could be interpreted to mean 'that the costs assessor is not entitled to determine the extent of the contractual obligation; if there is a dispute in that regard, it must be determined elsewhere, presumably by a Court'.

SOLICITOR:CLIENT: POWERS OF THE ASSESSOR AND JUDICIAL REVIEW

In the solicitor:client context, the issue appears to have been resolved by the recent decision of the Court of Appeal in *Doyle v Hall Chadwick Pty Ltd.*[8] Hodgson JA stated that, in his opinion, s208(3) of the 1987 Act made it clear that a costs assessor does have jurisdiction to construe a costs agreement and determine its effect 'at least where the assessment is between the lawyer and the client'.[9] However, his Honour added a caveat to this view: 'where the existence of the terms of the agreement are in dispute in a way that would require the hearing of evidence to resolve, it may be appropriate for the costs assessor to decline to resolve the dispute'[10] and, further, that 'in a case where there is a real dispute on substantial grounds as to whether any costs are payable, a costs assessor should not complete an assessment by issuing a certificate unless satisfied that the costs are payable, because the certificate can be filed so as to take effect as a judgment'.[11]

An example of the situation, noted by Hodgson JA above, appears to have arisen in *Lyons v Wende.*[12] Lyons applied for assessment of unpaid costs in respect of legal services provided to Mr Wende and others. Mr Wende claimed that the retainer was a 'no win/no fee' arrangement: if the practitioner did not achieve a successful outcome, there would be no entitlement to any costs. The clients did, however, achieve a successful outcome through subsequent solicitors. The practitioner denied having entered into a 'no win/no fee' retainer. The documents before the costs assessor included a letter from Mr Wende to the practitioner dated 15 October 2003, which included the following: 'We accept the terms you have offered which are, in brief, that you charge $300 per hour plus GST, only payable if our case succeeds.' On 24 October 2003, the practitioner sent the clients an email enclosing an unconditional costs agreement that was signed by Mr Wende and another at a conference on 5 November 2003.

The assessor found that the costs agreement had been signed under duress, and that the practitioner had not satisfied him as to the retainer on which he relied. The assessor upheld the clients' submissions and found that the practitioner had no entitlement to costs and assessed them as nil. When the practitioner appealed to the review panel, it confirmed the determination.

On appeal by the practitioner, the court held that the issues to be decided by the costs assessor and the review panel were:

1. what the terms of the agreement were;
2. the meaning or interpretation of those terms; and
3. if the agreement was conditional upon success, was the condition fulfilled in light of the clients' later successful outcome with another solicitor?

Cooper AJ considered that, under s208(3)(b) of the 1987 Act (s359(3) of the 2004 Act), the assessor and the review panel had the power to determine whether a costs agreement exists and, if so, its terms. The assessor and the review panel had done this. However, the court noted that:

> 'the assessor and the panel are limited in the classes of material they can entertain in order to make such a determination, i.e. under s207 their powers are limited to requiring the production of documents and the furnishing of particulars which may be required to be verified. There is no power to conduct an examination of witnesses under oath with cross-examination. There is no power to subpoena witnesses or documents.'[13]

In granting leave to appeal, Cooper AJ[14] held that the resolution of the issues between the parties

> 'can best be determined not only by consideration of documents but by hearing and seeing the respective witnesses give evidence under oath and subject to cross-examination. The ultimate decision, involving as it does the credibility of individuals, can affect detrimentally the reputation of one or more of the parties and in this case one of them is a solicitor of the Supreme Court.
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> In my view, this is an issue which is too grave and significant to be decided by consideration only of documents and that *justice requires it be determined after hearing sworn evidence subject to cross-examination.*'

While Cooper AJ did not consider himself bound to determine the appeal itself, he directed that the matter be listed before the Registrar to make directions for the expeditious hearing of the appeal.

Doyle[15] and *Lyons*[16] appear to resolve the question of whether a costs assessor has jurisdiction to interpret the costs agreement and its effect on a solicitor:client assessment. However, there is still an unresolved question of whether s208(3), on which Hodgson JA based his decision in *Doyle* (now s359 of the 2004 Act), also applies to party:party assessments. Even if it applies only to solicitor:client assessments, Hodgson JA's opinion – that an assessor does have the power to determine a costs agreement – should still apply in party:party assessments. However, Hodgson JA acknowledged the 'divergence of opinion in *Wentworth v Rogers* [2006] NSWCA 145 as to the power of a costs assessor, in assessing party and party costs, to determine the terms and effect of the costs agreement of the party against whom the costs are sought', but did not consider it necessary to determine this issue in *Doyle.*[17]

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ISSUES FOR PRACTITIONERS

The above cases raise important issues – if a practitioner applies for a practitioner:client assessment, and the client challenges the validity of, or a term in, the costs agreement, the assessment may be able to continue, with the assessor determining these issues. But, if the assessment continues and the client later appeals, the practitioner could be liable for both the costs of the assessment and the appeal, if the assessor's determination was later found to be flawed.

Solicitor:client costs assessments will be more expensive where an assessor declines to continue the assessment due to the caveat noted by Hodgson JA. In these circumstances, the practitioner will have no alternative but to institute even more expensive proceedings to seek a declaration about the construction and/or validity of the costs agreement, and/or orders compelling the assessor to make the determination pursuant to the findings of the Court of Appeal in *Doyle*.[18] If the determination is made incorrectly, the practitioner will have to appeal under s385 of the 2004 Act.

Even in a party:party assessment, if the terms of the costs agreement are challenged by the opposing party, the claiming party may be subjected to a subsequent court appeal, as in *Wentworth*,[19] on the basis that the costs assessor has determined the issue without the power to do so. ■

Notes: **1** (2000) 49 NSWLR 184 at 191. **2** [2006] NSWSC 1195 (14 November 2006) at [75]. **3** [2006] NSWCA 145 (7 June 2006) at [3]. **4** At [30]. **5** *Wentworth v Rogers* [2002] NSWSC 709 at [48]. **6** *Wentworth v Rogers; Wentworth & Russo v Rogers* [2006] NSWCA 145 (7 June 2006) at [38] and [40]. **7** At [159]. **8** [2007] NSWCA 159. **9** At [56]. **10** At [61]. **11** At [61]. **12** [2007] NSWSC 101. **13** At [19]. **14** At [27] and [28], emphasis added. **15** *Doyle v Hall Chadwick* [2007] NSWCA 159. **16** *Lyons v Wende* [2007] NSWSC 101. **17** *Doyle v Hall Chadwick* [2007] NSWCA 159 at [62]. **18** *Doyle v Hall Chadwick* [2007] NSWCA 159. **19** *Wentworth v Rogers; Wentworth & Russo v Rogers* [2006] NSWCA 145 (7 June 2006).

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Sophie's Journey by Sally Collings

By Leanne Larosa

Sophie's Journey is the story of young Sophie Delezio who, through her shocking ordeal, has shown Australia the power of courage and love, and should be an inspiration to us all.

On 15 December 2003, a car crashed into the Roundhouse Childcare Centre in the Sydney suburb of Fairlight. Two-and-a-half-year-old Sophie, asleep on a mattress in the Possum Room with 12 of her classmates, was trapped beneath the burning car. She suffered third degree burns to 85% of her body and lost both legs below the knee, her right ear and the fingers on her right hand. She underwent numerous operations during her initial six-month stay at the Children's Hospital at Westmead. The suffering she endured would have been unimaginable, particularly for a child too young to comprehend what had happened to her.

Her hard-fought battle to survive such serious injuries, the dedication, love and support of her parents and family, and Sophie's efforts to return to a normal life, touched the hearts of many. Despite her injuries, two-and-a-half-years later, Sophie was doing many of the things you would expect a five-year-old girl to be doing: attending a local public school, playing with her many friends, and walking (on prosthetic legs).

But on 5 May 2006, the unbelievable happened. While being pushed in a stroller across a pedestrian crossing near her home, Sophie was struck by a car. As a result of this accident, Sophie suffered brain injury, punctured lungs, broken ribs and collarbone, and fractures to her spine. Once again, Sophie survived when the odds were stacked against her.

Sophie's Journey is a collection of stories by more than 80 people who played a part in Sophie's rehabilitation and survival. Contributors include