

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : LM -v- K LAWYERS [No 2] [2015] WASC 245

**CORAM** : REGISTRAR C BOYLE

**HEARD** : ON THE PAPERS

**DELIVERED** : 13 JULY 2015

**FILE NO/S** : LPA 13 of 2012

**MATTER** : Section 232 of the *Legal Practice Act 2003* (WA)  
A Bill of Costs

**BETWEEN** : LM  
Client

AND

K LAWYERS  
Solicitor

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*Catchwords:*

Lawyer client costs - Review - Basis of assessment and review

*Legislation:*

*Legal Profession Act 2008* (WA), s 301, s 302

*Rules of the Supreme Court 1971* (WA), O 66 r 53

*Result:*

Assessment not varied on review

*Category:* C

**Representation:**

*Counsel:*

Client	:	Ms M L Coulson
Solicitor	:	Mr D J Garnsworthy

*Solicitors:*

Client	:	Coulson Legal
Solicitor	:	K Lawyers

**Case(s) referred to in judgment(s):**

LM v K Lawyers [2015] WASC 244

Mathieson Nominees Pty Ltd v AJH Lawyers [2013] VSC 325

Nicholson Clement Lawyers v Alexander Christopher Hewson by his next friend

Christopher Robert Hewson [2014] WASC 416

Vella and Bowden [2011] WASAT 56

1     **REGISTRAR C BOYLE:** The practitioner has brought in objections under O 66 r 53 of the *Rules of the Supreme Court 1971* (WA) following an assessment of practitioner-client costs under pt 10 div 8 of the *Legal Profession Act 2008* (WA). The bill was drawn so as to claim total professional fees of \$364,417.31. I allowed that portion of the bill at \$220,000. At the time of taxation, I provided the parties with written reasons indicating why I had approached the matter as I had. As the objections refer to those reasons and because this review raises questions of principle that may be of interest to a broad part of the profession, I have now published those earlier reasons: *LM v K Lawyers* [2015] WASC 244. For the same reasons as set out there, the names of the parties have been anonymised in these reasons.

**The first class of objections: the costs agreement**

2             There was a costs agreement in place between the client Mr M and the practitioner Mr K. As the objections note, this agreement was unchallenged. The objection as to the approach taken at assessment to the costs agreement is articulated in the following paragraphs of the objections:

3.40.1 Insufficient regard was had to the unchallenged costs agreement between the client and the solicitors. The taxing officer ought to apply s 302 of the *Legal Profession Act* (the Act) with the result that charges ought to be assessed by reference to the costs agreement. No issues were raised by counsel for the client suggesting the agreement ought not to be applied.

3.40.2 In reaching his conclusion about the amount to be allowed regard can only be had to s 301 of the *Legal Profession Act* though the taxing officer has a discretion about whether to apply all of the factors in s 302 (2). How the factors are to be weighted is not clear. The legislation does not suggest that any specific factor carries greater weight than another.

3.40.3 Having reached the conclusions set out in the reasons it appears that greater weight has been accorded so s 301(2)(g) than other factors despite having regard to complexity and other relevant matters in s301(2)(j) conduct by the wife and her advisers. On page 5 the learned Registrar excludes distorting the result of the Family Court trial but that factor was and is clearly open to him.

3             It is necessary to consider the effect of a costs agreement on an assessment of costs under the *Legal Profession Act*.

**The effect of a costs agreement**

4 I have recently had cause to consider the operation of the relevant provisions of the *Legal Profession Act* where there is a costs agreement in *Nicholson Clement Lawyers v Alexander Christopher Hewson by his next friend Christopher Robert Hewson* [2014] WASC 416.

5 The objection raised here concerns a point that in my view follows from the authorities I relied on in *Nicholson Clement v Hewson* but needs to be emphasised here.

6 It is the relationship between s 301 of the Act and s 302 (1). Section 301(1) provides,

(1) In conducting an assessment of legal costs, a taxing officer must Consider -

- (a) whether or not it was reasonable to carry out the work to which the legal costs relate; and
- (b) whether or not the work was carried out in a reasonable manner; and
- (c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 302 or 303 applies to any disputed costs.

7 Section 302(1) provides,

(1) A taxing officer must assess the amount of any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if -

- (a) a relevant provision of the costs agreement specifies the amount, or a rate or other means for calculating the amount, of the costs; and
- (b) the agreement has not been set aside under section 288, unless the taxing officer is satisfied that -
- (c) the agreement does not comply in a material respect with any applicable disclosure requirements of Division 3; or
- (d) Division 6 precludes the law practice concerned from recovering the amount of the costs; or
- (e) the parties otherwise agree.

8 In this case, as noted, there was an unchallenged costs agreement. The operation of the statutory provisions is therefore than on assessment the assessing officer must consider:

1. whether it was reasonable to carry out the work (s 301(1)(a));
2. whether the work was carried out in a reasonable manner (s 301(1)(b)); and
3. The rate of remuneration provided for in the costs agreement (s 302(1)(a)).

9 As I put it in *Nicholson Clement Lawyers v Hewson* at [10] and [11], if there is a costs agreement then the assessing officer does not apply s 301(2) to assess what is a fair and reasonable amount of legal costs. However, in *Mathieson Nominees Pty Ltd v AJH Lawyers* [2013] VSC 325 Ferguson J pointed out that, in addressing the questions required to be addressed by s 301(1)(a) and (b) respectively, the rate charged under the costs agreement might be taken into account. That is, it may be relevant to the question of whether it was reasonable to do work at all whether it was reasonable to do it at the fixed rate provided in the costs agreement; and it may be relevant to the question of whether work was done reasonably how much was charged for it.

10 The result of the statutory scheme is in my view that a taxing officer assessing a practitioner-client bill of costs where there is a costs agreement providing for fixed rates may decide that it was not reasonable to do work, or that the work was not done reasonably, by reference to the rate specified in the agreement.

11 The result of that in turn is that the taxing officer must disallow the item concerned entirely.

12 This may be illustrated by an example. In my earlier reasons on the assessment, I drew attention to item 911 of the bill. That was a charge by the practitioner of three units of time for finding someone to witness an affidavit. It was charged at \$27 per unit, or \$270 per hour.

13 If the costs chargeable by this practitioner had been governed by a determination by the Legal Costs Committee, I might have allowed three units of time at a rate applicable for a clerk or paralegal. But where the costs agreement mandates that time spent by a practitioner is to be charged at \$270 an hour, a finding that it was not reasonable for Mr K to do that work because of the rate he was charging means that he is not

entitled to anything for that item. That conclusion can in fact be reached independently by either of two methods: either finding under s 301(a) or (b) that the work either was not necessary to be done by a practitioner, or that it was done unreasonably, in each case because of the rate charged; or by reference to the costs agreement, which provides that the practitioner is entitled to remuneration for 'Time reasonably spent by a lawyer on work requiring the skill of a lawyer'. That is a form of words long used in the former *Family Law Rules*, and before them from the dawn of the *Family Law Act* in the former *Regulations* that once governed the remuneration of practitioners.

- 14       The material before me on the assessment indicated that Mr K was a sole practitioner who did not have the support of any of an employed practitioner, a skilled paralegal, or even significant secretarial resources. This inevitably meant that he spent a great deal of time doing work that did not require the skill of a lawyer, and doing which diluted his capacity to give his client professional care.
- 15       If the costs agreement provided that Mr K's time was to be charged at \$270.00 an hour for work requiring the skill of a lawyer, and (for want of appropriate support staff) he did work that did not require the skill of a lawyer, he is not entitled to charge at all for it.
- 16       If that seems harsh on the practitioner, the response is that it is an inevitable consequence of s 301 and s 302 of the Act and the detail of this costs agreement. The agreement could have provided for a different and lower rate to be charged by Mr K for work that did not require the skills of a lawyer. It did not. Consequences follow.

### **Assessment and taxation**

- 17       There is a further preliminary matter that I need at least to touch on here, even if this is not the occasion for a full exploration of it. The *Legal Practitioners Act 1893* and the *Legal Practice Act 2003* both referred to 'taxing' as the method for determining the remuneration properly to be allowed to lawyers as against their clients. The process of taxation of costs is one with a long history, and the use of the word 'taxing' or 'taxation' in professional regulatory statutes thus imported a known body of law. Apart from requiring taxing officers to advert to some obvious matters such as whether there was a costs agreement (and tax in accordance with it if there was one) neither of the earlier acts contained any such directions as s 301 of the *Legal Profession Act*.

18       The *Legal Profession Act 2008*, as part of a national scheme, conspicuously departs from that traditional language of taxation. It is trite as a principle of statutory interpretation that when parliaments change their language, particularly if they abandon a long-established form of words known to import a body of law, that they intend to change their meaning. In my view the change of language in the *Legal Profession Act* was such a considered departure. An assessment of a lawyer's costs is the discharge of a statutory function to be conducted in compliance with the statute. It is s 300 to s 304 of the Act that are paramount. As their headings indicate, s 300 to s 304 are respectively to do with procedure on assessment, criteria for assessment, assessment by reference to a costs agreement, assessment by reference to a costs determination, and costs of the assessment.

19       The court does not have a set of rules dealing specifically with assessments under the *Legal Profession Act*. The general assumption has been that O 66 applies to assessments. For want of anything better, that must be accepted as a starting point, but with one important qualification. That is that because O 66 is subordinate legislation, nothing in it can avail to override or contradict the principal legislation, which is the *Legal Profession Act*. A registrar conducting an assessment under the *Legal Profession Act* is assessing, not taxing. The process is not taxation. While as a matter of convenience one might apply O 66 as the only available analogue, and the Rules are necessary to provide procedures not set out in the Act, that qualification must always be borne in mind.

### **The objections**

20       The objections lodged are not helpful. It is difficult to discern a clear structure from them. However, some can be disposed of summarily.

21       There is a group of objections that are not objections of principle, but are in reality merely assertions about quantum or weight. The paragraphs of the objections that fall into this category include 3.40.1 to 3.40.5.

22       In essence, the objection is simply that on assessment I took too much off what the practitioner had charged. That is not a proper objection. No error in principle has been identified.

23       In my earlier reasons, I made it clear that I could not rely on the practitioner's time records. That causes a fundamental problem where a practitioner wishes to charge by time spent. Bearing in mind the ultimate statutory obligation to assess the reasonableness of the costs charged, I was therefore obliged to resort to considering the identifiable work

product in the forms of filed documents and correspondence, and inferring what time a competent practitioner would have reasonably spent in producing those. My assessment was that a reasonable charge for the time that the practitioner had demonstrated would have been required to produce that product was \$220,000.

24 Secondly, paragraphs 3.40.6 and 3.40.7 respectively raise the questions of demands made of Family Law practitioners given the nature of the jurisdiction and the demands for service made by particular clients.

25 I considered those questions in my earlier reasons and the mere assertions in the objections do not give me any reason to alter the views there expressed.

26 Indeed, the very raising of this objection reinforces my reasons for being critical of the practitioner in the first place. The observations of the State Administrative Tribunal (Justice JA Chaney President, Judge T Sharp Deputy President and Ms M Connor Member) in *Vella and Bowden* [2011] WASAT 56 [27] - [28] are relevant.

The law in relation to the duties of counsel is summarised in Dal Pont, *Lawyers Professional Responsibility* (4th ed, 2010) at [17.40] as follows:

'A lawyer pressed by clients to "make every point conceivable and inconceivable without judgment or discrimination" must exercise professional judgment so as "not to use public time in the pursuit of submissions which are really unarguable". This does not mean refraining from pursuing points unlikely to succeed, but that the lawyer must determine those points that are reasonably arguable and jettison the rest. Mason CJ made the point as follows in *Giannarelli v Wraith*:

[I]t is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.'

Counsel for Mr Bowden also drew the Tribunal's attention to the observation by Gleeson CJ in *Ali v The Queen* (2005) 214 ALR 1 at [6] that:



'... It is not a mark of competent advocacy to pursue at trial every line of argument that can be imagined, regardless of its consistency with other arguments, and regardless of its prospects of success. On the contrary, such an approach is the hallmark of incompetence'.

27           In my earlier reasons, I noted how the practitioner's approach to the conduct of the proceedings had led, not to judicial statements of approval of his endeavour, but to severe criticism from the court. The objection has no merit.

28           Nothing in the objections is in my view sufficient to cause me to review the amount allowed on assessment, and I decline to do so.