

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : NICHOLSON CLEMENT LAWYERS -v-
ALEXANDER CHRISTOPHER HEWSON by his
next friend CHRISTOPHER ROBERT HEWSON
[2014] WASC 416

CORAM : REGISTRAR C BOYLE

HEARD : 5 NOVEMBER 2014

DELIVERED : 7 NOVEMBER 2014

FILE NO/S : LPA 22 of 2014
LPA 23 of 2014

MATTER : Section 297 of the *Legal Profession Act 2008* (WA)

BETWEEN : NICHOLSON CLEMENT LAWYERS
Applicant

AND

ALEXANDER CHRISTOPHER HEWSON by his
next friend CHRISTOPHER ROBERT HEWSON
Respondent

Catchwords:

Assessment of costs as between lawyer and client - Costs agreement - Effect of costs agreement on assessment

Legislation:

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

Rules of the Supreme Court 1971 (WA), O 66 r 45

Result:

Ruling as to approach

Category: C

Representation:

Counsel:

Applicant	:	Ms M L Coulson
Respondent	:	Mr P Sheavyn

Solicitors:

Applicant	:	Coulson Legal
Respondent	:	Public Trustee (WA)

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

Law Institute of Victoria v Keen (Unreported, VSC, 25 July 2008)
Mathieson Nominees Pty Ltd v AJH Lawyers [2013] VSC 325

1 **REGISTRAR C BOYLE:** I am required to assess under pt 10 div 8 of the *Legal Profession Act 2008* (WA) two bills of costs as between practitioner and client. The requirement for assessment arises not because there is a particular dispute about the amount of the costs, but because the client is an infant and the proceeds of an action are held on behalf of the infant by the Public Trustee. The Public Trustee wishes to be assured that it pays to the practitioner from that fund no more and no less than a proper amount for legal services rendered to the infant.

2 A preliminary point has arisen. It appears to be a point that is not the subject of judicial authority in Western Australia. These reasons are published so that:

- a) the parties to the assessment have as clear an explanation as I can provide of my reasons for approaching the assessment as I do;
- b) if I am correct, there is available to practitioners a published explanation of a point of some significance at least in this corner of the legal world; and
- c) if I am wrong, judicial correction will be facilitated by having written reasons to correct.

3 The point is this. There was a costs agreement in place. It prescribed hourly rates for various classes of practitioners and paralegals.

4 Section 302 (1) of the *Legal Profession Act* 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 s 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.

5 Counsel for the practitioners submits that the effect of s 302 is that once the taxing officer has found that work has been done, the practitioner is entitled to be paid for that work at the rate provided by the agreement. Questions of whether it was reasonable to carry out the work, and whether the work was carried out in a reasonable manner, do not arise. Nor is there any possibility of reducing the hourly rate provided in the costs agreement to some lower rate.

6 In support of that submission, counsel relied on the Victorian decision of *Mathieson Nominees Pty Ltd v AJH Lawyers* [2013] VSC 325.

7 In that case a judicial registrar had referred to the court two questions for determination under the Victorian equivalent of our *Rules of the Supreme Court 1971* (WA) (RSC) O 66 r 45. Those questions and the reasons for their framing were explained this way:

2 ...

(1) On the proper construction of s 3.4.44 and s 3.4.44A of the *Legal Profession Act 2004* (Vic), do the criteria in s 3.4.44(1)(c) and s 3.4.44(2) apply to a costs review where there is an applicable costs agreement and s 3.4.44A applies?

(2) Is a Judicial Registrar entitled to adjust costs on the basis of the criteria set out in s 3.4.44(2) where s 3.4.44A applies?

3 The questions arise because the Judicial Registrar followed Law Institute of *Victoria v Keen* (Unreported, Supreme Court of Victoria, Wood ASJ, 25 July 2008), and ruled that the Costs Court is required to consider what is the fair and reasonable amount of legal costs under s 3.4.44 (1) (c) and 3.4.44 (2) in conducting a review of costs in a solicitor own client case to which a costs agreement applies. The taxation is not yet concluded.

8 Section 3.4.44 of the *Legal Profession Act 2004* (Vic) is in material terms identical to s 301 of the *Legal Profession Act 2008* (WA), and s 3.4.44A of the Victorian Act is in material terms identical to s 302 of the WA Act. It should also be added that, in the Victorian scheme, what we would call an assessment is described as a review. 'Review' is the primary determination and Western Australian readers should not confuse it with a review under our O 66 r 53, r 54 or r 55 of the RSC. The point at issue was summarised by Her Honour in this way:

As I have mentioned, the amended provisions were considered in *Law Institute of Victoria v Keen*. In that case, the applicant argued that the Taxing Master was able to look at the fairness and reasonableness of the amount of legal costs because the *Legal Profession Act* required that all three elements contained in s 3.4.44(1) were mandatory, including the fairness and reasonableness of the amount of legal costs in relation to the work specified in s 3.4.44(1)(c). The applicant submitted that where there was a costs agreement so that s 3.4.44A applied, that simply meant that the review occurred by reference to the hourly rate specified in the costs agreement and did not prevent an evaluation of the fairness and reasonableness of the amount of the work [9].

- 9 In *Law Institute of Victoria v Keen* (Unreported, VSC, 25 July 2008) (Wood ASJ) the Associate Judge had held that s 3.4.44 (that is, the equivalent of our s 301) applies to all reviews; s 3.4.44A (s 302) just meant that the hourly rate provided in a costs agreement was the 'the primary basis' (which I understand to mean the starting point) of any review; in the view of the learned Associate Judge, there was nothing that prevented the concept of fairness and reasonableness and the provisions in the equivalent of s 301(2) from being considered. Ferguson J noted that a different approach had been taken both by courts in Queensland and New South Wales, and by commentators. Her Honour continued:

12. The task of statutory construction 'begins with the ordinary and grammatical sense of the words having regard to their context and legislative purpose' and the task must end with a consideration of the statutory text.
13. With respect to the learned Associate Judge, I prefer the approach to interpretation which has been adopted in Queensland and New South Wales. In my opinion, it is clear from the text of the legislation that where there is a costs agreement that has not been set aside, then the Costs Court must review the amount of any disputed costs in accordance with that agreement unless the Costs Court is satisfied that the agreement does not comply in a material respect with the disclosure requirements, or div 5 precludes the lawyer from recovering the amount of the costs, or the parties have otherwise agreed. Where there is a costs agreement, ss 3.4.44(1)(c) and (2) have no work to do in respect of the amount of the costs charged.
14. ...
15. Moreover, before one reaches the question of the amount of the legal costs, the Costs Court has to determine two matters: first, that it was reasonable to carry out the work and secondly, that the manner in which the work was carried out was reasonable. The legislation does not set out the factors that the Court may take into

account in determining those issues. However, particularly in relation to the second issue, it may be that the Costs Court would have regard to matters which appear in s 3.4.44(2) such as the quality of the work done or the skill, labour and responsibility displayed amongst other things. Those matters would not be taken into account as a result of their inclusion in s 3.4.44(2). Rather, they would be considered because in the particular circumstances of the case they were matters that were independently relevant to the issues to be determined under s 3.4.44(1) (a) and (b) albeit that coincidentally they appear in s 3.4.44(2).

- 10 If I may paraphrase those reasons with specific reference to the West Australian legislation, it seems to me that the position is as follows. In all assessments of costs, a taxing officer is compelled by s 301(1) to consider the three factors enumerated. They are whether or not it was reasonable to carry out the work, whether the work was carried out in a reasonable manner, and the fairness and reasonableness of the amount of legal costs. Section 302(1) operates only in relation to the third of those tasks. That is, if there is a costs agreement, then (unless the operation of the costs agreement is excluded by one of the provisos) the taxing officer must assess the amount charged for disputed costs by reference to the provisions of the costs agreement.
- 11 As Ferguson J points out, that does not mean that where there is a costs agreement the taxing officer is not to consider the questions of whether it was reasonable to carry out the work, or whether the work was carried out reasonably. Consideration of those questions is mandated by s 301(1). If there is a costs agreement, then s 301(1)(c) has no operation: the amount of the legal costs to be awarded for work that it has been found it was reasonable to do, and was done reasonably, is the amount prescribed by the costs agreement. Where there is a costs agreement, the taxing officer does not apply s 301(2) to consider what is a fair and reasonable amount of costs.
- 12 As Her Honour notes, the legislation does not prescribe the factors to be taken into account in determining the issues of whether or not it was reasonable to carry out work or whether the manner in which the work was carried out was reasonable. But it may be that a taxing officer could have regard to at least some of the factors set out in s 301(2) in considering those questions. They would be considered, however, not because the taxing officer was addressing the criteria in s 301(2), but rather was addressing the questions required to be considered by s 301(1)(a) and (b).

- 13 From the practical perspective of a taxing officer, it seems to me that the existence of a costs agreement may be said to make this difference. In all assessments, the questions of whether it was reasonable to carry out work, and whether it was carried out reasonably, must be considered. If there is no costs agreement and the assessment is to be made pursuant to a scale set out in a relevant determination of the Legal Costs Committee, the hourly rates prescribed in those determinations are maxima. If a bill charges for an identified number of hours of work at the rate of a senior practitioner and the taxing officer forms the view that the work could properly have been done by a junior practitioner, then the taxing officer may allow the work at the lower rate of the junior practitioner. But if the assessment is governed by a costs agreement that provides (as almost all do) simply for a fixed hourly rate for each category of fee earner, no such option is available to the taxing officer. No lower hourly rate may be substituted for that claimed. However, if (for example) a senior practitioner charges at his or her hourly rate for work that in the opinion of the taxing officer could easily have been performed by a clerk or paralegal, then the taxing officer could form the view under s 301(1)(b) that the work was not carried out in a reasonable manner. The result would be that the charge would be disallowed wholly.
- 14 In the absence of Western Australian (or High Court) authority directly on point, it is appropriate to refer to decisions at a corresponding level of authority in other Australian jurisdictions. Where it appears - as it does - that there is a uniform view of judges in several jurisdictions, it is incumbent on me to follow those authorities. I do so.
- 15 This, as already indicated, is an assessment where there is a costs agreement providing for fixed hourly rates. It is my intention to approach the assessment on the basis I have just outlined.