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

**CITATION** : IRON MOUNTAIN MINING LTD -v- K & L GATES  
[2015] WASC 291

**CORAM** : REGISTRAR WHITBY

**HEARD** : ON THE PAPERS

**DELIVERED** : 13 AUGUST 2015

**FILE NO/S** : LPA 34 of 2014

**BETWEEN** : IRON MOUNTAIN MINING LTD  
Applicant

AND

K & L GATES  
Respondent

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*Catchwords:*

Costs - Preliminary issue - Whether applicant is third party payer pursuant to s 253(1)(a) of the *Legal Profession Act 2008* (WA)

*Legislation:*

*Corporations Act 2001* (Cth), s 199A, s 199B, s 199C, s 212(2)(i), s 1309(1), s 1309(2)

*Legal Profession Act 2008* (WA), s 212, s 253(1)(a), s 295(3)

*Result:*

Applicant is a third party payer for the purpose of s 253(1)(a) of the *Legal Profession Act 2008* (WA)

*Category:* B

**Representation:**

*Counsel:*

Applicant	:	Ms M L Coulson
Respondent	:	Mr S Forbes

*Solicitors:*

Applicant	:	Coulson Legal
Respondent	:	Stewart Forbes

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

Leckenby v Note Printing Australia Limited [2014] VCS 538  
Note Printing Australia Limited v Leckenby [2015] VSCA 105

1     **REGISTRAR WHITBY:** This is an application for determination of the preliminary issue as to whether the applicant is a third party payer within the meaning of the *Legal Profession Act 2008* (WA) (LPA) (preliminary issue).

2             Pursuant to an order made by consent on 5 May 2015 the parties have filed submissions in relation to the preliminary issue. The parties have consented to the determination of the preliminary issue on the papers.

3             The applicant has applied for an assessment of costs rendered by the respondent to David Alan Zohar (client) which were paid by the applicant.

**The facts**

4             The client was a director of the applicant from 11 February 2005 to 11 February 2014.

5             On 18 April 2012 the client was charged with three offences pursuant to s 1309(2) of the *Corporations Act 2001* (Cth) (the Act).

6             In September 2013, the charges against the client were substituted with six charges pursuant to s 1309(1) of the Act.

7             On 14 February 2014, three of the six charges were discontinued.

8             The client pleaded guilty to the remaining three charges.

9             The client incurred legal costs in relation to defending the criminal proceedings (Costs).

10            The applicant had agreed to provide an indemnity to the client in the following terms:

Iron Mountain Mining Limited (IRM) has agreed to provide the fullest and most comprehensive indemnity available under the law, for all current and past directors of Aluminex Resources Limited (Aluminex) being David Alan Zohar, Shoshana Zohar, Julie Zohar and Simon England. This will apply without limitation for all legal costs arising from legal proceedings connected to or arising from Aluminex or the takeover of Aluminex by IRM. IRM indemnifies the directors of Aluminex as stated above in accordance with section 199A and 199C of the Corporations Act 2011, and any other indemnity as available to the fullest extent of the law.

11            The parties refer to this as the Contractual Indemnity.

12 In addition to the Contractual Indemnity, the applicant had agreed, under its constitution, to indemnify its directors, which included the client, as follows:

Except as may be prohibited by Sections 199A and 199B of the Corporations Act every Officer, auditor or agent of the Company shall be indemnified out of the property of the Company against any liability incurred by him in his capacity as Officer, auditor or agent of the Company or any related corporation in respect of any act or omission whatsoever and howsoever occurring or in defending any proceedings, whether civil or criminal.

13 The parties refer to this as the Constitutional Indemnity.

14 The client called upon the applicant, pursuant to the Contractual Indemnity and the Constitutional Indemnity to pay the Costs and the applicant paid the Costs.

15 After the client pleaded guilty in the criminal proceedings, the applicant commenced proceedings in the District Court against the client seeking recovery of the legal fees it had paid to the respondent on behalf of the client.

16 On 24 November 2014, the client was declared bankrupt. The Trustee in Bankruptcy issued a circular to creditors dated 16 December 2014 which concluded that it was unlikely there would be sufficient funds to pay a dividend to the client's creditors, including the applicant.

17 The applicant then commenced these proceedings seeking an assessment of the invoices rendered by the respondent to the client in relation to the criminal proceedings.

### **Legal principles**

18 Section 253(1)(a) of the LPA provides that:

a person is a third party payer in relation to a client of a law practice, if the person is not the client and -

- i) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
- ii) being under that obligation, has already paid all or a part of those legal costs.

19 Section 295(3) of the LPA provides that:

A third party payer may apply to a taxing officer for an assessment of the whole or any part of a bill for legal costs payable by the third party payer.

20 Accordingly, in order for the applicant to have standing to apply for an assessment of the respondent's invoices to the client, it must satisfy the definition of a third party payer in s 253(1)(a) of the LPA.

**Is the applicant a third party payer as defined by s 253(1)(a) of the LPA?**

21 The question to be determined is whether the applicant is under a legal obligation to pay the legal costs for the legal services provided by the respondent to the client. If it is, then it is a third party payer and the preliminary issue will be determined in favour of the applicant. If it is not, then the applicant is not a third party payer and does not have standing to apply for the assessment of the respondent's legal costs.

22 Section 199A of the Act is relevant to the issue of the applicant's legal obligation to pay the Costs. It provides:

(3) A company or a related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs incurred in defending an action for liability incurred as an officer or auditor of the company if the costs are incurred ...

(b) in defending or resisting criminal proceedings in which the person is found guilty ...

Note 2: The company may be able to give the person a loan or advance in respect of the legal costs (see section 212).

23 Section 199C(2) of the Act provides:

... anything that purports to indemnify or insure a person against a liability, or exempt them from a liability, is void to the extent that it contravenes section 199A or 199B.

24 Section 212(2)(ii) of the Act provides:

... if section 199A applies to the costs - the officer must repay the amount paid if the costs become costs for which the company must not give the officer an indemnity under that section.

25 The issue of whether a director was entitled to be indemnified prior to the outcome of criminal proceedings was considered at first instance in

*Leckenby v Note Printing Australia Limited* [2014] VCS 538 and on appeal in *Note Printing Australia Limited v Leckenby* [2015] VSCA 105.

26        Leckenby issued proceedings claiming he had a present entitlement to be indemnified during the criminal proceedings and before the verdict. Note Printing Australia Limited (NPAL) claimed that the indemnity only arises at the conclusion of the criminal proceedings if there is no finding of guilt.

27        The applicant and the respondent accept that the indemnity relied upon by applicant is, in substance, no different from the indemnity relied upon by Leckenby.

28        At both first instance and on appeal, the Court held that Leckenby had a present entitlement to be indemnified for his legal costs in defending the criminal proceedings.

29        In the Leckenby appeal, Tate JA stated at [38] - [41]:

... Leckenby submits that ... unless and until a finding of guilt occurs ... the obligation on NPAL to 'indemnify' Leckenby for his legal costs and expenses subsists.

I agree.

A person, including an officer of a corporation, cannot be 'found' guilty until a verdict of guilty has been arrived at. At all relevant times before a verdict has been reached, a person charged with an offence is not a person who has been 'found guilty' of that offence. An obligation to indemnify a person charged with an offence for all his or her legal costs and expense during the course of defending criminal proceedings until and unless he or she is, in the future, 'found' guilty is, in my view, consistent with the prohibition in s 199A(3)(b).

... The construction adopted by the [trial] judge of s 199A(3)(b), with which I agree, permits the obligation under cl 2.2(b) [of the indemnity] to be interpreted as a duty to indemnify Leckenby for all his legal costs and expenses prior to verdict. Clause 6.1 [of the indemnity] confirms that Leckenby can 'enforce immediately' that duty; in other words, he has a present entitlement to the payment of his ongoing legal costs and expenses.

30        Further, Tate JA said at [60]:

... what s 199A(3)(b) prohibits is an indemnity that holds the promise harmless against loss despite the promise having been found guilty of a criminal offence; it does not prohibit an entitlement to be indemnified against legal costs incurred in defending or resisting criminal proceedings

until verdict which determines whether or not the promisee is entitled to the benefit of the indemnity permanently.

31 On the issue of whether the indemnity was classified as a loan, an advance or an indemnity, Tate JA said at [65]:

Whatever particular label is given to this type of arrangement is of little consequence; what is important is that a proper construction of s 199A(3)(b) demonstrates that payments can be made up until, and unless, a guilty verdict is reached providing that there is an obligation to repay any such payments in the event of a guilty verdict and the Deed provides for just such an arrangement.

32 In my view, the Leckenby decision support the applicant's submissions that the applicant was under a legal obligation, pursuant to the Contractual Indemnity and the Constitutional Indemnity, to pay the legal costs of the client rendered by the respondent prior to the date on which the client pleaded guilty. This legal obligation continued until the client pleaded guilty to charges on 14 February 2014.

33 It does not matter, in my view, how the indemnity is classified - the only relevant factor for the purposes of s 295(1)(a) is whether the applicant was under an obligation to pay the legal costs of the client. I find that it was.

34 Accordingly, for the purposes of s 253(1)(a) of the LPA, I find that the applicant satisfies the definition of a third party payer.

### **Conclusion**

35 The preliminary issue is determined in favour of the applicant. The applicant is a third party payer under s 253(1)(a) of the LPA and has standing to apply, pursuant to s 295(3) of the LPA, for an assessment of the invoices rendered to the client by the respondent.

36 The parties are required to provide unavailable dates so that the assessment may be listed for a directions hearing to programme the assessment.

37 I will hear the parties' submissions as to the costs of the preliminary issue at that directions hearing.