REASONS FOR DECISION

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CORAM	:	REGISTRAR DIXON
HEARD	:	ON THE PAPERS
DELIVERED	:	28 November 2012
FILE NO/S	:	LPA 27 of 2011
BETWEEN	:	HAKUNA MATATA CORPORATION PTY LTD Applicant v McDONALD PYNT LAWYERS Respondent

Catchwords:

Interim bill – time for application for costs assessment

Legislation:

Legal Profession Act 2008 (WA)
Legal Profession Act 2004 (Vic)
Legal Profession Act 2007 (Qld)

Counsel:

Applicant	:	On the papers
Respondent	:	On the papers

Solicitors:

Applicant	:	Stewart Forbes
Respondent	:	Coulson Legal

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

Golder Associates Pty Ltd v Challen [2012] QDC 1
Turner v Mitchells Solicitors [2011] QDC 61 at [3]
Romer & Haslem [1893] 2 QB 286
Tabtill No 2 Pty Ltd & ors v DLA Phillips Fox (a firm) [2012] QSC 115
Lynch & Co Bill of Costs [2000] QSC 003
Lewis Blyth & Hooper v Dennis [2007] WASC 177
Retemu Pty Ltd v Ryan (NSW District Court, Coorey DCJ, delivered 16 April 2010, unreported)
Dromana Estate Limited v Wilmoth Field Warne [2010] VSC 308

[1] I have been asked to determine on the papers an issue regarding the applicability of s 293 of the *Legal Profession Act 2008* to a series of bills rendered by respondent McDonald Pynt to the applicant which I will refer to as Hakuna.

[2] By way of background, McDonald Pynt acted for Hakuna between November 2008 and January 2011 in a matter which ultimately involved it in two actions in this court. It is not clear whether there was a binding costs agreement between the parties but that is not something that I need to determine. McDonald Pynt rendered a series of accounts to Hakuna between 18 December 2008 and 31 January 2011. By an application dated and filed 23 November 2011 Hakuna has applied to have McDonald Pynt's bills assessed. McDonald Pynt opposes the application in relation to all bills issued prior to 30 September 2010. Hakuna does not seek assessment of the first bill rendered by McDonald Pynt dated 18 December 2008. The dispute is therefore in relation to accounts rendered by McDonald Pynt from 25 June 2009 to 30 August 2010.

[3] The issue between the parties concerns s.293 of the Act and in particular when time runs in relation to applying for a costs assessment pursuant to s 295(6) of the Act where a series of bills have been rendered by a practitioner to a client in a matter. Section 293 provides as follows:

> **293. Interim bills**
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> *(1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.*
>
> *(2) Legal costs that are the subject of an interim bill may be assessed under Division 8, either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid.*

Section 295(6) provides as follows:

> *(6) An application by a client or third party payer under this section must be made within 12 months after —*
>
> *(a) the bill was given in accordance with Division 7 or the request for payment was made to the client or third party payer; or*
>
> *(b) the costs were paid if neither a bill was given nor a request was made.*

[4] Hakuna says that the effect of s 293 and s 295(6) is that it was entitled to apply for a costs assessment of McDonald Pynt's bills from 25 June 2009 to 30 August 2010, which it says are interim bills, either within 12 months of each interim bill being given or within 12 months of the final bill dated 31 January 2011 being given, irrespective of how much time had passed since the each interim bill had been given. If that is right then as Hakuna made its application

for an assessment of all of McDonald Pynt's bills on 23 November 2011 and within 12 months of the final bill dated 31 January 2011, its application is within time.

[5] McDonald Pynt has two answers to this. Firstly, it says that the bills in question are not interim bills but final bills. It follows, it says, that the 12 month period in s 295(6) runs only from the date that each bill was given. If that is right then Hakuna is out of time in relation to the bills that are in issue here. It goes on to say, as I understand it, that even if the bills are interim bills in terms of s 293, then there is still an overriding 12 month period within which the application for an assessment had to have been made. So, for example, in relation to the bill given 30 April 2010, even if it is an interim bill the application for an assessment had to have been made within 12 months of that date, irrespective of when the final bill was delivered.

[6] The first issue that I will deal with is whether the bills are in fact interim bills in terms of s 293. I do not think it necessary to go beyond s.293 in order to determine what is an interim bill. It is a bill that "covers part only of the legal services" that McDonald Pynt was retained to provide. That was the view taken in ***Golder Associates Pty Ltd v Challen*** [2012] QDC 1 at [31] and ***Turner v Mitchells Solicitors*** [2011] QDC 61 at [3] in relation to an identical provision in s.331(1) of the Queensland *Legal Profession Act*. In ***Turner v Mitchells Solicitors*** McGill DCJ said at [3] as follows:

> The term "interim bill" is not defined either in s 300 or in the Schedule to the Act, but it seems to me that the terms of subsection 333(1) provided an effective definition: it is a bill covering part only of the legal services the law practice was retained to provide. That contemplates that there was a retainer in place, and that under it the law practice was to provide particular legal services. Obviously the question of what legal services the law practice was retained to provide is a question of fact.

[7] It follows that if the bills in question covered part only of the work that McDonald Pynt was retained to provide then they are interim bills in terms of s 293.

[8] McDonald Pynt, on the other hand, says that the bills are final bills rather than interim bills under s 293 because they were rendered in a series of natural breaks in the proceedings. They rely on a number of authorities in support of this argument. I do not think that these authorities assist McDonald Pynt. ***Re Romer & Haslem*** [1893] 2 QB 286, ***Lynch & Co Bill of Costs*** [2000] QSC 003 and ***Lewis Blyth & Hooper v Dennis*** [2007] WASC 177 do not deal with s 293 or its equivalent in other jurisdictions but with the more general question of whether a retainer is an entire contract, a practitioner's right to render interim bills where there has been a natural break in the proceedings and whether, in the particular case, there had been a natural break in the proceedings. Those authorities are not

controversial but do not assist in understanding s 293 in my view. The remaining case relied upon by McDonald Pynt, ***Tabtill No 2 Pty Ltd & ors v DLA Phillips Fox (a firm)*** [2012] QSC 115, does deal with the Queensland equivalent of s 293. Applegarth J in ***Tabtill No 2 Pty Ltd & ors v DLA Phillips Fox (a firm)*** refers to ***Turner v Mitchells Solicitors*** in some detail and expressly follows the decision. While Applegarth J also refers to ***Lynch & Co Bill of Costs*** with approval and refers to a "natural break" in proceedings, it seems to me that the decision is not based on the notion that a bill rendered during a natural break in proceedings is a final bill for the purposes of s 333 of the Queensland Act but rather on the question of whether or not the bill was rendered during or at the end of the retainer. His Honour states as follows at [70] and [71]:

> This is a situation in which the costs agreement covered certain legal work, namely the work that had been the subject of specific instructions in relation to preparation for trial and representation at trial, and also governed other legal work which the first respondent might be instructed to carry out in relation to the conduct of the nominated proceedings. The particular legal work involving preparation for the trial and appearance at the trial was completed on 9 November 2009. Nothing more was to be performed at that point. There is no suggestion that once the trial concluded existing instructions required further work to be carried out at that stage. Further disputes might have been in contemplation once judgment was delivered. There was at least a break in hostilities, even if no-one expected an outbreak of peace.
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> To adopt the expression used by Chesterman J, there was a "natural break" in the litigation at the conclusion of the trial. **The first respondent had performed the work it was retained to perform in connection with the proceedings. No further instructions were given at that stage in connection with the proceedings. A bill sent at that point in relation to the conduct of the trial was a final bill for the purposes of s 333.** (my emphasis)

[9] It follows that I need only to determine the nature of the retainer entered into between the parties so that I can then determine whether McDonald Pynt rendered bills which covered only part of the services that it was to provide and which would be interim bills. I need not be concerned as to whether bills were rendered during any natural breaks in the proceedings. Unfortunately I am unable to determine this on the evidence before me. Originally I was to deal with only one issue on the papers, that being the issue of whether Hakuna could have applied for a costs assessment of McDonald Pynt's interim bills either within 12 months of each interim bill being given or within 12 months of the final bill dated 31 January 2011. That did not require any additional material to be put before me. Subsequently however, the second issue as to whether the bills in question are interim bills was raised. Whilst there is some material as to the nature of the retainer and what work was done at various times I do not think it

adequate to enable me to deal with this point beyond the general conclusion that I have reached.

[10] As to the second issue, namely whether the effect of s 293(2) is that Hakuna could have applied for a costs assessment of McDonald Pynt's interim bills either within 12 months of each interim bill being given or within 12 months of the final bill dated 31 January 2011 being given, there are competing authorities in other Australian jurisdictions. The parties have referred me to ***Retemu Pty Ltd v Ryan*** (NSW District Court, Coorey DCJ, delivered 16 April 2010, unreported) and also to ***Turner v Mitchells Solicitors*** and ***Golder Associates Pty Ltd v Challen*** which all say that that it could have done so. I have already mentioned that Applegarth J in ***Tabtill No 2 Pty Ltd & ors v DLA Phillips Fox (a firm)*** refers to ***Turner v Mitchells Solicitors*** in some detail and expressly follows the decision. I have also been referred to ***Dromana Estate Limited v Wilmoth Field Warne*** [2010] VSC 308 which takes the opposite view in relation to the similar provisions in the Victorian *Legal Profession Act 2004*. In ***Dromana Estate Limited v Wilmoth Field Warne*** Associate Justice Wood found at [34] that the Victorian equivalent to s 293(2):

> enables an interim bill to be reviewed at the time it is delivered and also at the time the final bill is reviewed, even if the interim bill has been paid or if it has been previously reviewed. This is all subject, however, to the application to review both the interim bill and the final bill being filed within 12 months of the bills being received.

[11] I prefer, however, the view adopted in ***Retemu Pty Ltd v Ryan, Turner v Mitchells Solicitors*** and ***Golder Associates Pty Ltd v Challen*** largely because I think that that is what the section says. I adopt the reasoning of McGill DCJ in ***Turner v Mitchells Solicitors*** at [18] and following:

> I do not find the reasoning of the Victorian decision persuasive. Subsection (2) permits the costs to be assessed at two different times. An assessment under Division 7 is initiated by an application, so it contemplates that an application may be made at the two different times. Unless this has the effect of overriding the limitation in s 335(5), there would be no point to the section. The effect of the Victorian decision is that the application can only be made at the former time, that is, within 12 months of the interim bill, and can be made when a final bill is delivered only if the final bill is also delivered within that 12 months. That plainly can be done anyway, and in my view the effect of the interpretation adopted in Victoria is that s 333(2) would have no work to do. Such an interpretation should be avoided.
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> There is also the consideration that the reference to two different times is not strictly speaking a reference in the alternative; the concluding clause, which logically must only operate by reference to the second preceding alternative time, permits assessment at the time of the final bill whether or

not the interim bill has previously been assessed. In other words, the subsection expressly provides that the legal costs covered by an interim bill can be assessed twice. That may seem at first glance a startling proposition, but when one stands back a little from the minutiae of the statute and considers the practicalities of the situation, the idea is not so startling.

The common law treated a retainer of a solicitor as prima facie an entire contract for the practical reason that it was a contract to do something, the full benefit of which was really only going to accrue to the client once it had been completed. Costs assessed under Division 7 have to be assessed under s 341, which involves a consideration of some matters which are likely to be easier to apply by reference to the legal costs of a complete performance of legal work than by the examination of a particular part of the work in isolation. For example, in the case where s 341(1)(c) applies, it would be best for the fairness and reasonableness of the amount of legal costs in relation to the work to be assessed by reference to all of the work performed under the retainer, rather than by reference to some particular piece of the work viewed in isolation. Looked at in the abstract, the idea that there ought to be an assessment at one time of the whole of the work done, under what would at common law be regarded as an entire contract, is I think the best way to perform an assessment of legal costs, in the interests of protecting the client, which is the basic purpose of these provisions.

I also think, with respect, that there is considerable force in the practical observation of Coorey DCJ that the position of the client in relation to the continuing performance of legal services under a retainer may well be prejudiced if there is a dispute in relation to an interim bill. In consumer protection legislation such as this, rights to seek assessment ought not to be interpreted in a way which will restrict the protection available to a consumer, if two views are fairly open. This principle favours the interpretation in New South Wales, because it looks at the practical considerations of piecemeal assessment of the costs: it is likely to disrupt the continuing lawyer-client relationship.

There is also the practical consideration that, for a lay client, whether there is a need for assessment of the costs associated with particular legal services may not be readily appreciated early on in the performance of those legal services. For example, if an estimate is given of $30,000 to perform the legal services, the first few bills of about $5,000 might not excite any particular suspicion of overcharging, which may arise only once the bills exceed $30,000, and may well crystallise if for example a final bill of say $20,000 is delivered on top of interim bills totalling $35,000. In such a situation, a client may reasonably conclude that there has been overcharging all the way along. It would be unsurprising if the legislature would wish to confer on a client in such a situation a right to have all of the bills assessed.

[16] It follows that if the bills in question cover only part of the work that McDonald Pynt were retained by Hakuna to provide, then because the final bill was rendered on or about 31 January 2011 Hakuna's application for a costs assessment is in time and it is entitled to have the bills in question assessed pursuant to the Act. I will relist the matter so that the parties may put before me any further evidence as to the retainer.