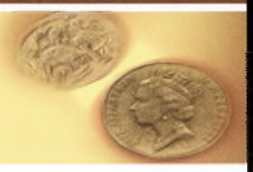
Getting the retainer right



By Peta Solomon

WHEN IS THERE A RETAINER?

While a costs agreement provides certainty, a retainer may be presumed in certain circumstances in the absence of a costs agreement. The Supreme Court of Victoria has recently reconsidered the principles applicable to the presumption of a retainer. In *Shaw v Yarranova Pty Ltd & Anor*,[1] the Court affirmed the principle that a contract of retainer will generally be accepted when a solicitor has performed work on behalf of a person with their knowledge and assent, in circumstances which are consistent with that person being the client of the solicitor. The Court also confirmed that a party which challenges the existence of a contract of retainer, and the liability of the client for the solicitor's costs, bears the onus of establishing the absence of a retainer. The Court further confirmed the mere fact that a person appears on the record as the party's solicitor does not prove a retainer, but where the party is aware of this and takes no steps to rectify it, then a presumption arises that there is a contract of retainer between them.

The Court also held that the fact that an entity other than the client/party has an obligation to pay the costs, and does pay the costs, does not prevent there being a concurrent liability on the part of the client who is the party to the litigation.

ACTING FOR AN INCAPABLE PERSON

It is established law that a protected person does not have the capacity to enter into a costs agreement or a contract of retainer with his or her solicitor. As a general rule, where a tutor is appointed, s/he becomes liable to pay the solicitor acting for the protected person and is entitled to an indemnity out of the estate for costs that were fairly and reasonably incurred.

The court recently considered the consequences of appointing of a tutor to, *inter alia*, enable recovery of legal costs from a protected person's estate in *Re S*.[2] The failure to appoint a tutor had been an irregularity that was waived by the defendants to the proceedings. While holding that, in this case, the tutor would not be personally liable for costs incurred prior to his appointment, the court also held that the solicitor should not be deprived of his ability to recover costs. In the absence of a costs agreement (as the incapable person had no capacity to enter into a costs agreement) the solicitor was entitled to recover costs under s319 of the *Legal Profession Act* 2004 according to the fair and reasonable value of the legal services provided. This court held that the same outcome would have applied whether or not a tutor had been appointed.

NO WIN:NO FEE AGREEMENTS

In contracting on a 'no win, no fee' basis, practitioners need to word their costs agreements carefully and consider the value of the likely verdict, as their fees may be restricted to the amount of the verdict. In *David Brady v Bale Boshev Solicitors*,[3] the court held that a law practice that had entered into a no win, no fee agreement was not entitled to recover more in fees than the amount of the verdict on the basis that the term 'no win, no fee' meant that the 'client will not have to pay the solicitor other than from the proceeds of the claim'. In considering the competing policy issues, the court took the view that a prudent solicitor can put in place a costs agreement (mandated by the *Legal Profession Act* 2004) which can specifically define what is meant by 'a win' and provide that the fees may exceed the amount that is recovered by way of damages. In failing to do so, the firm's costs were limited to the amount of the verdict.

LUMP SUM/FIXED FEE AGREEMENTS: REQUIREMENT TO PROVIDE AN ITEMISED BILL

Many practitioners have elected to undertake work on a fixed-fee basis. This is attractive to firms on a number of bases, one of which is that the firm considers that it will not be necessary to time record or do so on a rigorous basis.

In the recent case of *Richard Dale v Stephen Paul Firth*,[4] a request was made by the client under s332A *Legal Profession Act* 2004 for an itemised bill of costs. The defendant solicitor sought to resist an application to court to compel production on the basis that the client had entered into a fixed-fee agreement for a lump sum. Section 361 of the *Legal Profession Act* 2004 provides that a costs assessor must assess the amount of any disputed costs by reference to a costs agreement. In such circumstances, it was argued that where there is a costs agreement providing for payment of a lump sum, there is no necessity or requirement for an itemised bill. McCallum J held that, notwithstanding the assertion that there was an agreement for a lump sum, the plaintiff was nevertheless entitled to an itemised bill, having regard to the rights provided for by s332A of the *Legal Profession Act* 2004 (LPA).

Further, His Honour noted that under s328 of the LPA, the plaintiff had the right to seek to have the costs agreement set aside. A number of considerations may be taken into account by an assessor when considering such an application, including s328(2)(f) LPA which permits the assessor to consider '*whether and how the agreement addresses the effect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement*'. His Honour considered that knowledge as to the work *in fact* undertaken would be relevant to the plaintiff's determination as to whether to pursue that remedy.

The court also held, contrary to the defendant's argument, that s728 LPA did give the court the power to order the provision of a bill of costs in the event of a failure to provide same following a request properly made under s332A.

There are a number of reasons to maintain proper recording of time spent and rigorous file records, even in the context of a fixed-fee agreement. A client can rely on a broad range of factors in an application to set aside the >>

costs agreement. Further, if there are found to be defects in disclosure, the work will be assessed under s319 of the LPA – that is, in accordance with a fixed-fee provision (s319(1)(a) or, if none applies, on a *quantum meruit* basis (s319(1)(c), in which latter event the practitioner will be required to prove and substantiate the work done.

SECURING FEES

When a retainer is terminated, the client may seek to have the file transferred to their new solicitor without having paid all outstanding fees. While Solicitors' Rules 8 and 29 apply in relation to the provision of a tripartite deed by way of security, the Supreme Court in *Gigi Entertainment Pty Limited v Basil John Macree* (No. 2)[5] recently examined the form of security a solicitor is entitled to before having to release files to a client's new solicitor. The matter was listed for hearing within days and the client contended that the file should be transferred only on the security of an executed standard tripartite agreement. The solicitor argued that this was insufficient security, and requested the Court to order a substitute security. The client alleged that the solicitor had failed to make proper disclosure under the LPA in terms of a proper estimate and the continuous obligation to disclose any substantial change to anything previously disclosed. The Court considered the effect of s317, holding that while it postpones a client's obligation to pay costs, pending an assessment, it does not destroy any solicitor's lien that would otherwise arise.

The Court considered the client's prospects of success in the litigation and held that a tripartite agreement was of little value where the fruits of the principal proceedings were uncertain. The Court also considered the client's limited capacity to pay and the possible stultifying effect of an order for security, and determined that the solicitor was entitled to security in the sum of $100,000, representing half the solicitor's outstanding fees to be secured by way of a charge over the client's real estate.

The issue of security was also considered by the Supreme Court in *Burrell Solicitors Pty Ltd v Reavill Farm Pty Limited & Ors* (No. 2).[6] The solicitor had not complied with the LPA disclosure obligations but had a second mortgage securing the payment of legal costs, and had lodged a caveat in respect of the mortgage which had lapsed. The Court decided that in the absence of proper disclosure, there was no presently payable debt to be secured by the mortgage, and therefore the solicitor was not entitled to lodge a fresh caveat. The security was worded so as to secure costs payable 'under' the solicitor's tax invoices. The court held that in the absence of disclosure, costs were not due under the tax invoices but would become due under the certificate of determination, and this was not covered by the wording of the mortgage.

The position was otherwise in relation to a second agreement, whereby the client agreed to pay the proceeds of sale of properties to the solicitor to reduce the debt due to the solicitor. While there was no present debt payable, the court held that such debts could well become payable following an assessment. The fact that there was not presently a debt payable to the solicitor did not mean that the solicitor was not entitled to have the net proceeds of sale applied in due course to reduce the client's debt. The solicitor was granted leave to lodge caveats in respect of the properties referred to in the second agreement.

It would be prudent to ensure that any security covers both a solicitor's tax invoices and/or a certificate of determination and/or is otherwise worded so as to properly achieve the solicitor's objectives in obtaining the security. ■

Notes: **1** *Shaw v Yarranova Pty Ltd & Anor* [2011] VSCA 55 (3 March 2011). **2** *Re S* [2011] NSWSC 536 (19 May 2011). **3** *David Brady v Bale Boshev Solicitors* [2009] NSWDC 387 (20 November 2009). **4** *Richard Dale v Stephen Paul Firth* (unreported Supreme Court of New South Wales, 31 January 2012). **5** *Gigi Entertainment Pty Limited v Basil John Macree* (No. 2) [2011] NSWSC 869 (12 August 2011). **6** *Burrell Solicitors Pty Ltd v Reavill Farm Pty Limited & Ors* (No. 2) [2011] NSWSC 1615 (22 December 2011).

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