DISTRICT COURT OF QUEENSLAND

CITATION:	*Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2011] QDC 5
PARTIES:	**CLAYTON UTZ LAWYERS (A FIRM)** **ABN 35 740 217 343** (Plaintiff) **AND** **P & W ENTERPRISES PTY LTD ABN 66 108 802 491** (Defendant)
FILE NO/S:	BS2595/10
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court
DELIVERED ON:	28 January 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2010
JUDGE:	Reid DCJ

ORDER:

[1] Order that Clayton Utz deliver itemised bills with respect to each invoice referred to in the application filed on 19 November 2010 within a period of three months and that the proceedings otherwise be stayed to a date which is 21 days from the date of delivery of such itemised bills or until the date on which the costs assessor files his certificate should the court make an order for the assessment of costs charged by the plaintiff to the defendant.

[2] In respect of the Respondent's application for referral of the invoices for assessment, I order that the application filed 25 October 2010 be dismissed.

[3] Order that the plaintiff pay the defendant's costs of and incidental to the applications to be agreed or failing agreement to be assessed.

CATCHWORDS:	LEGAL PRACTITIONERS – COSTS – whether bills constitute 'itemised bills'

	Legal Profession Act (Qld) 2007 – ss 300, 330, 332, 335, 341,
	Costs Act (Qld) 1867
	Re Walsh Halligan Douglas' Bill of Costs (1990) Qd R 288
	Malleson Stewart Stawell and Nankivell v Williams (1930) VLR 410
	Vitobello and Hayter v Russell & Co Solicitors (2009) QDC 249
	Ralph Hume Garry v Gwillim (CA) (2003) 1 WLR 510
COUNSEL:	D. P. de Jersey for the Plaintiff
	G. J. Robinson for the Defendant
SOLICITORS:	Clayton Utz for the Plaintiff
	Reardon & Associates for the Defendant

Introduction

[4] In this matter the defendant (hereinafter "P&W") has by application filed on 9 November 2010 sought orders that its former solicitors (hereinafter "Clayton Utz", which is the plaintiff these in District Court proceedings for the recovery of money due to it from P&W) deliver an itemised bill in respect of each of six invoices. Clayton Utz had by earlier application filed on 25 October 2010 sought an order for assessment of its legal costs set out in such invoices.

History

[5] P&W sought advice from Clayton Utz with respect to issues which arose from its involvement in a residential development known as "Paragon on Arthur" (P&W). The retainer by P&W was from about 23 November 2009 until mid 2010. Each invoice was for a monthly account of Clayton Utz's services, and they are exhibited to the affidavit of Marek Reardon filed in the proceedings.

[6] Soon after being so retained, Clayton Utz sent an engagement letter, costs agreement and fee schedule to P&W. Those documents were executed by P&W on

15 December 2009 and returned to Clayton Utz. Although the content of those documents may well be relevant to issues in the proceedings for recovery of the solicitor's fees and charges, they do not appear to be of significant relevance to the issues before me. I note, however, that the claim by Clayton Utz was filed on 10 September 2010 and a defence was filed by P&W on 7 October 2010. The defence asserts that P&W has no present obligation to pay all or any of the sum claimed, namely $218,393.83 plus interest.

[7] I should add that it is common ground that P&W have already paid Clayton Utz some $181,445.45 of fees claimed by Clayton Utz of some $399,844.28.

[8] Some time after the delivery of each of the six invoices, P&W sought advice from its current solicitors. That firm wrote to Clayton Utz on 24 August 2010 and requested "itemised accounts in assessable form in respect of the (various) bills". Clayton Utz responded by providing further copies of the earlier invoices. On 10 September 2010 the solicitors for P&W replied to Clayton Utz, asserting that:

> "The entries in your bills of costs do not allow our client, or for that matter a prospective assessor of the bills, to determine whether the amount charged in respect of a particular item is reasonable, necessary or a proper professional charge. Indeed, as previously identified, items charged in your bill of costs in many cases are grouped together with a lump sum charge attributed to that item. On that basis alone, it is not possible to determine whether the individual attendances which comprise a particular lump sum or grouped item are in themselves reasonable, necessary or proper professional charges.
>
> In those circumstances, our client maintains its views that the bills as delivered are not properly described as itemised bills as that term is defined by s 300 *Legal Profession Act* 2007."

[9] Clayton Utz, by letter of 13 September 2010, indicated that they did not agree with such an assertion that the bills were lump sum accounts within the meaning of the *Legal Profession Act*.

Legal Profession Act

[10] The *Legal Profession Act* 2007 governs the matter of solicitors' costs and their recovery. Pursuant to s 330 of that Act, a bill may be in the form of a lump sum bill or an itemised bill. The question of whether the invoices to which I have referred constitute a lump sum bill or an itemised bill is the central issue before me.

[11] Section 332(1) of the Act provides:

> "(1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.
>
> *Note—*
> *A bill in the form of a lump sum bill includes a bill other than an itemised bill.*"

[12] Subsection (2) of the section requires the law firm to comply with any such request within 28 days.

[13] Section 335(1) provides:

> "(1) A client may apply for an assessment of the whole or any part of legal costs."

[14] Pursuant to subsection (3) of s 335, such a costs application may be made even if the legal costs have been wholly or partly paid, as has here occurred, at least with respect to the earlier invoices.

[15] Section 341(1) of the Act sets out the criteria for assessment. It provides:

> "(1) In conducting a costs assessment, the costs assessor 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 way; and

> (c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that s 340 applies to any disputed costs."

[16] Section 342 contains provisions with respect to the payment of the costs of an assessment. Generally, and without being definitive, if legal costs of an assessment are reduced by 15% or more, the law practice pays the costs of the assessment but otherwise the client pays such costs.

[17] Finally, and most importantly, the term "itemised bill" is defined in s 300 of the *Legal Profession Act* as follows:

> "**Itemised Bill** means a bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under Division 7."

[18] I should indicate that s 341 of the Act, which I have previously set out, is contained within Division 7 of the Act.

[19] It can be seen that the question of whether the invoices on which Clayton Utz rely as being itemised bills are of critical importance to the matter before me. If these are properly categorised as "itemised bills", then they can be directed to be assessed in their present form as Clayton Utz urge upon me in accordance with their application. If they are not, then it seems clear that P&W is entitled to seek an itemised bill as it purported to do on 8 October.

[20] I should add that counsel for P&W also referred in his submissions to the provisions of r 743A of the Uniform Civil Procedure Rules. That rule requires a person applying for a costs assessment to file an affidavit stating the grounds on which the applicant disputes the amount of the costs or its liability to pay them. P&W's counsel submits that in order for P&W to do so, the bill must be sufficiently

particularised to enable P&W to know the grounds on which it disputes the amount or liability to pay any particular item of costs.

The Law

[21] Apart from the provisions of the *Legal Profession Act* to which I have referred, there are a number of relevant cases which were referred to in argument and which deal with the question of whether a bill was an itemised bill at common law and/or pursuant to provisions of earlier legislation, such as the *Costs Act 1867 (Qld)*, governing such matters.

[22] In *Re Walsh Halligan Douglas' Bill of Costs* (1990) Qd R 288, Dowsett J held that the bills there delivered did constitute bills of "fees, charge and disbursements" within the meaning of s 22 of the *Costs Act* 1867. His Honour in that case noted a difficulty with time charging, as has occurred in the case before me, in that:

> "It may be difficult for the client to know whether the hours worked in preparation were fairly attributable to the presentation of his case or whether they might more accurately be described as self education on the part of an inexperienced or ill-educated practitioner …"

[23] His Honour also pointed to the particular circumstances of the case before him (in that case that the client employed its own corporate solicitor who supervised the case on its behalf, and had its Sydney solicitors also supervise the work of Walsh Halligan Douglas) and said:

> "Many of the cases concerning the obligation of a legal practitioner to his client as to fees contemplate a client with little or no commercial strength and little or not recourse to other legal advice."

[24] Although there is no direct evidence of the level of commercial sophistication of P&W, I infer it is not an insubstantial development company and certainly has the advice of its current lawyers. An affidavit tendered during the hearing indicated that

Mr Willis, P&W's managing director had significant experience as a project manager and was familiar with the matter in dispute in the principal proceedings.

[25] At p 294 of the case, Dowsett J cited with approval a passage of Mann J in *Malleson Stewart Stawell and Nankivell v Williams* (1930) VLR 410, where his Honour had said:

> "Courts have repeatedly held that a bill of costs must contain such details as will enable the client to make up his mind on the subject of taxation, and will enable those advising him to advise him effectively as to whether taxation is desirable or not."

[26] Dowsett J continued:

> "The bill must sufficiently particularise the charges to enable the client to take informed advice as to whether he should demand taxation."

[27] Referring again to the client's level of commercial and legal sophistication, his Honour said also at p 294:

> "I consider that the adequacy of the bills must really be considered in the light of all of these factors. If the test be what is adequate in order to enable the client to determine on advice whether to seek taxation, it is reasonable to take into account the degree of business and legal sophistication of the client, whether the client has in-house legal advice, whether another firm of solicitors is also advising and any agreement reached between the parties as to the basis of charging."

[28] His Honour continued at p 295:

> "The bills describe the ways in which the hours were being spent, and anybody with reasonable experience in the field of litigation would be able to judge the reasonableness or otherwise of those hours. Of course, even an experienced client may not be able to do that, but the test for the purposes of s 22 contemplates the taking of advice."

[29] In the recent case of *Vitobello and Hayter v Russell & Co Solicitors* (2009) QDC 249, Robin DCJ emphasised this question of advice as to the desirability of referring a matter for assessment. At p 6 of his judgment, his Honour said:

> "The stakes are high in the sense that whoever does badly in the assessment may have to bear the costs of it. The clients should be given a clear idea of what is involved in items they contemplate challenging."

[30] That view is reinforced by the decision of the Court of Appeal in *Ralph Hume Garry v Gwillim (CA)* (2003) 1 WLR 510. In that case, Ward LJ in a judgment with which Mance LJ and Sir Martin Norse agreed said at p 522:

> "Against that background the principles to be deduced from these cases appear to me to be these.
>
> (1) The legislative intention was that the client should have sufficient material on the face of the bill as to the nature of the charges to enable him to obtain advice as to taxation. The need for advice was to be able to judge the reasonableness of the charges and the risks of having to pay the costs of taxation if less than one-sixth of the amount was taxed off.
>
> (2) That rule was, however, subject to these caveats:
>
> (a) precise exactness of form was not required and the rule was not that another solicitor should be able on looking at the bill, *and without any further explanation from the client*, see on the face of the bill all information requisite to enable him to say if the charges were reasonable;
> (b) thus the client must show that further information which he really and practically wanted in order to decide whether to insist on taxation has been withheld and that he is not already in possession of all the information that he could reasonably want for consulting on taxation.
>
> (3) The test, it seems to me, is thus, not whether the bill on its face is objectively sufficient, but whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right then open

> to him, viz, to seek taxation reasonably free from the risk of having to pay the costs of that taxation.
>
> (4) A balance has to be struck between the need, on the one hand, to protect the client and for the bill, together with what he knows, to give him sufficient information to judge whether he has been overcharged and, on the other hand, to protect the solicitor against late ambush being laid on a technical point by a client who seeks only to evade paying his debt."

The bills

[31] Examination of the invoices in my view brings me to the strong conclusion that they do not meet the requirements of an "itemised bill" as defined in s 300 of the *Legal Profession Act*. In my view, they do not state, in detail, how the legal costs are made up in a way that would allow those costs to be assessed, having regard to s 341 of the Act. In my view, an experienced litigation solicitor, having perused the bill and conferred with representatives of P&W and in particular with Mr Willis, the company managing director, would not be able to properly advise it about a decision as to whether to require assessment, or as to the reasonableness of the solicitors in carrying out the work to which the costs relate, whether the work was carried out in a reasonable way, and the fairness and reasonableness of the amount of legal costs in relation to the work.

[32] In my view, the description of the work performed in the various invoices is little more than a recitation of the hours of work performed and a brief and wholly inadequate explanation of the work actually performed.

[33] Some examples may be used to illustrate my concerns.

[34] On 21 December 2009 a claim is made for 8.9 hours of work by a solicitor. The charge amounts to some $2,581, being 8.9 hours at $290 per hour. The following description is given of the work:

> "Various activities including letter to Dibbs Barker re Mitchell Brandtman report; prepare response to show cause notice; peruse affidavits and email to counsel re same."

[35] In my view, it is clear from the description of the work that activities other than those specifically enumerated are said to have been performed. Furthermore, there is no indication, for example, of the detail of the letter to Dibbs Barker, or of the work involved in preparing a response to the show cause notice. It is not clear what affidavits were perused. In my view, a reasonably experienced litigation solicitor, with the benefit of advice from Mr Willis or other representatives of P&W, would not be able to form an opinion as to whether the 8.9 hours of work performed on that day was reasonable or otherwise required having regard to the provisions of s 341 of the *Legal Profession Act*.

[36] On 23rd December an entry from the same solicitor is made for 12.3 hours, amounting to some $3,567. The following description is given:

> "Various activities including emails to and from L Willis re various issues; prepare response to show cause notice and confer with D Brackin re same; telephone out to L Willis re response to show cause notice; amend submissions; prepare bank guarantee letter, response to show cause notice letter and response to expert review notice letter; letter to Dibbs Barker re Michael Brandtman report; prepare for hearing; review amended submission, application and fresh affidavit of F Nardone; emails to and from F Nardone re hearing; emails to counsel briefing them with fresh material."

[37] In my view, similar comments to these that I made earlier apply in respect of the description of work on that day.

[38] In my view, the invoices are redolent of such generalised descriptions which are of little and sometimes no assistance to the client or to their current solicitors, even having regard to the client's knowledge of the matter, information themselves of the need for an assessment.

[39] Despite a rhetorical submission by counsel for Clayton Utz of, "what more could be needed for an assessor to consider the matters referred to in s 341(1)?", it is in my view unlikely that the solicitors would, on any assessment, rely on nothing other than a diary note containing only the words contained in the description of the work in the various invoices. In my view, on any assessment, it is highly likely that solicitors will refer to the work they have performed in significantly greater detail, to justify the extent of work they claim to have performed.

Conclusion

[40] In determining that the bills in this case are not sufficiently particularised to constitute "itemised bills" as defined in s 300 of the *Legal Profession Act*, I am conscious of the salutary warning of Patteson J in *Keene v Ward* (1849) 13 QB 515, namely:

> "In requiring the delivery of an attorney's bill, the Legislature intended that the client should have sufficient materials for obtaining advice as to taxation; and we think that we fulfil that intention by holding the present bill sufficient within that principle; whereas, if we required in respect of every item a precise exactness of form, we should go beyond the words and meaning of the statute, and should give facilities to dishonest clients to defeat just claims upon a pretence of a defect of form in respect of which they had no real interest."

[41] I make that remark in circumstances where counsel for P&W submitted that to constitute an itemised bill, a bill in the form of an example annexed to the affidavit of Mr Reardon (Exhibit MJR5) might be necessary to constitute a properly itemised costs statement. In my view, it is not necessarily so that a descent to the level of particularly contained in that document is necessary to constitute an itemised bill within the meaning of the definition in s 300 of the *Legal Profession Act*. I make no finding beyond one that the bills constituted by the invoices relied on by Clayton Utz in this case do not constitute an itemised will as defined.

[42] In the circumstances I order that Clayton Utz deliver itemised bills with respect to each invoice referred to in the application filed on 19 November 2010 within a period of three months and that the proceedings otherwise be stayed to a date which is 21 days from the date of delivery of such itemised bills or until the date on which the costs assessor files his certificate should the court make an order for the assessment of costs charged by the plaintiff to the defendant.

[43] In respect of the plaintiff's application for referral of the invoices for assessment, I order that the application filed 25 October 2010 be dismissed.

[44] I give leave to either party to apply upon the giving of three days' notice in writing to the other.

[45] Subject to argument to the contrary, I order that the plaintiff pay the defendant's costs of and incidental to the applications to be agreed or failing agreement to be assessed.