Black v Alexiou & Anor [2014] NTSC 46

PARTIES:	BLACK, Cecil (Applicant for Review) v ALEXIOU, Michael (Respondent to application for Review) And COULEHAN, Terence – The Costs Assessor appointed by Law Society Northern Territory.
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	126 of 2013 (21355817)
DELIVERED:	9 October 2014
HEARING DATES:	23 JANUARY 2014
JUDGMENT OF:	KELLY J

CATCHWORDS:

LEGAL PRACTITIONERS – Costs – *Legal Profession Act* (NT) – Application for statutory review of assessment of costs by assessor – Applicant bears the onus of showing a review should be conducted – Ordinarily necessary to show error of fact or law in the assessment – Fair and reasonable costs – Appropriateness of disclosure of estimated costs – Appropriateness of deductions – No error in assessment shown – Application for review dismissed

LEGAL PRACTITIONERS – Advocate's immunity – Recovery of outstanding fees – Common law immunity overridden by *Legal Profession Act* (NT) – No error in assessment shown – Application for review dismissed

Legal Profession Act (NT) ss 3, 303(1)(c), 310, 323, 332, 339, 340, 341, 344, 345, 347, 349, 352, 353, 354, 361, 362, 366.

D'Orta-Ekenaike v Victorian Legal Aid (2005) 223 CLR 1; *Giannarelli v Wraith* (1988) 165 CLR 543, applied.

REPRESENTATION:

Counsel:

Plaintiff:	D McConnel
Defendant:	Self represented

Solicitors:

Plaintiff:	Cecil Black
Defendant:	Self represented

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Black v Alexiou & Anor [2014] NTSC 46
No. 126 of 2013 (21355817)

BETWEEN:

CECIL BLACK
Applicant for Review

AND:

MICHAEL ALEXIOU
Respondent to Application for Review

AND:

TERENCE COULEHAN – THE COSTS ASSESSOR APPOINTED BY LAW SOCIETY NORTHERN TERRITORY

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 9 October 2014)

[1] The applicant, Mr Cecil Black, acted for the respondent, Mr Michael Alexiou, in connection with a family law dispute. A dispute arose between the two over an amount said to be owing by Mr Alexiou to Mr Black under a costs agreement, for work done in connection with that family law dispute and Mr Black made application under s 332 of the *Legal Profession Act* ("the Act") for an assessment of those costs. The application was made to

Mr Terence Coulehan, a costs assessor appointed by the Law Society under s 366 of the Act.

[2] Mr Coulehan conducted an assessment of those costs pursuant to s 344 of the Act, issued a certificate of determination under s 345 (dated 12 November 2013) and published reasons for his determination in accordance with s 347. The amount in dispute was $36,781.75 (being the amount of all accounts rendered less the sum of $11,054.25 which had already been paid). The assessor found that the disputed costs were unfair and unreasonable and he substituted for the amount claimed the sum of $14,781.75 which, in his opinion was fair and reasonable.

[3] In his reasons, the assessor set out a number of complaints made by the respondent about the work done by the applicant pursuant to the retainer. Some of these the assessor characterised as a matter of professional judgment. There were several areas, however, where he made findings that there were deficiencies in the quality of the work done. These were matters which had been the subject of adverse comment by the Court hearing the respondent's matter. The first of these was the introduction of affidavits that were not required and affidavits containing inadmissible material; the second was the failure to prepare a financial statement that made adequate financial disclosure. In relation to these the assessor said:

> "There were deficiencies in the quality of the work done. Insufficient attention was paid to the provision of financial information and there were deficiencies in the affidavit evidence. While these deficiencies were the subject of adverse comment, it is

> not possible to say whether or not they contributed to the result… Nevertheless, it is possible to conclude that, in these respects, the quality of the work done was below the proper standard that may have been expected and that it would not be fair and reasonable to allow the full amount claimed."

[4] Section 303(1)(c) of the Act requires a law practice to disclose an estimate of the total legal costs if reasonably practicable, or a range of estimates and an explanation of the major variables that will affect the calculation of those costs. Section 310 obliges the law practice to disclose any substantial change to anything included in a disclosure as soon as reasonably practicable after becoming aware of the change.

[5] The total costs billed to the respondent by the applicant was $47,836.00. In his initial disclosure the applicant estimated that the total cost would be $4,500.00 though this, the assessor said, "was hedged about with qualifications". The estimate was for parenting proceedings and did not include maintenance proceedings and DVO proceedings which were later brought.

[6] It appears from Mr Coulehan's reasons for determination that by the time the maintenance proceedings were commenced, Mr Black had already billed Mr Alexiou $9,310.45 (on the original proceedings for which the estimate had been $4,500.00.) Each time a bill was rendered, Mr Black gave a new estimate of costs. The first revised estimate was for total costs of $10,000. The second revised estimate of $11,500.00 was only for fees, including those already charged, "up to the next court date". This estimate was given

on the date that Mr Black received notice that the wife intended to claim for maintenance and Mr Coulehan made the following finding:

> "The applicant did not provide an estimate of the total cost or a range of estimates with an explanation of the major variables. This should have been done in accordance with s 310 of the Act, assuming that there had been proper disclosure initially."

[7] Thereafter, as each bill was rendered, the applicant gave the respondent an estimate of the fees to the next hearing. In relation to that, the assessor made the following finding:

> "Nor was it fair and reasonable for the applicant to have approached the costs disclosure requirements in such a piecemeal fashion. The respondent may have reasonably expected a realistic estimate of the total legal costs at the outset, and a realistic estimate of the total legal costs when the maintenance issue arose. This was not done and the disclosure requirements were not satisfied."

[8] He concluded:

> "The difficulty is in arriving at a figure that is fair and reasonable in all the circumstances. It is not possible to achieve this with arithmetical precision, so that a sum needs to be arrived at which is fair to both parties. It must be acknowledged that, while the applicant provided substantial legal services of which the respondent had the benefit, the respondent was not given proper disclosure as to costs and some of the work done was of poor quality. It would be reasonable to reduce the bill by $10,000 to allow for the failure to provide proper disclosure, and a further $10,000 to allow for the poor quality of some of the work that was done, a total of $20,000."

[9] The applicant has now made application under s 352 of the Act for a review of that costs assessment. The application is said to be made under s 354, but that section sets out the powers of a reviewer and prescribes the method

whereby a review is to be conducted if one is undertaken. The application for a review by a party to an assessment is made pursuant to s 352.

[10] Section 352 provides that an application to a reviewer for a review of a determination of a costs assessor under s 344 may be made by a party to the costs assessment. If, as was the case here, the assessor was appointed by the Law Society, the reviewer is the Supreme Court (s 351).

[11] Section 353 provides that the reviewer may (not must), within 30 days after the issue of a certificate of the assessment, decide to review that determination (and must ensure notice of the reviewer's decision is given to the parties to the proposed review at least seven days before conducting the review).

[12] Section 354 provides that on the conduct of the review, the reviewer has all the functions of a costs assessor and must determine the application in the way a costs assessor would be required to determine an application for a costs assessment. The assessment must be conducted on the evidence that was received by the costs assessor and, unless the reviewer decides otherwise, neither fresh material nor submissions are received. In other words, when conducting a review of a costs assessment, the reviewer has to re-conduct the assessment from scratch – not just determine whether there has been any error in the original assessment.

[13] Section 349 of the Act provides that a costs assessor's determination of an application is binding on all parties to the application and no appeal or other

assessment lies in relation to the determination, except as provided by Division 8 (which contains all the assessment, review and appeal provisions in relation to costs assessments); and s 361(1) provides that a reviewer's determination of an application for review of a costs assessor's determination is binding on all parties to the assessment the subject of a review.

[14] Section 362 provides an appeal to the Supreme Court from an assessor's assessment on a question of law, and s 361(2) applies that same right of appeal to a determination or decision of a reviewer.

[15] The effect of these provisions is that a reviewer to whom an application for review of a costs assessment is made needs to make a preliminary decision under s 352 whether or not to conduct a review. If the party who applied for a review is aggrieved by that decision, that party has a right to appeal to the Supreme Court on a question of law against the reviewer's decision not to review the assessment.

[16] There are no statutory criteria to guide the reviewer in making that preliminary determination; one must look to the purpose of the legislative provisions in question in their context in the scheme of the Act. The two relevant objectives in s 3 (which sets out the main purposes of the Act) are:

(a) to promote the administration of justice; and

(b) to provide for the protection of consumers of legal services and the public generally.

[17] Looking at the context in which s 352 appears, the legislature intended that, for the most part, determinations by an assessor would be final and binding on the parties: s 349. That, and the fact that a reviewer, on conducting a review, must re-assess costs, not merely correct error (s 354), leads me to the view that it was not intended that a reviewer would automatically decide to conduct a review simply because an application had been made. The co-existence of a right of appeal on questions of law (s 362) supports that conclusion.

[18] It seems to me that an applicant for a review under s 352 bears the onus of showing that a review should be conducted. Ordinarily that will entail demonstrating that there has been an error either of fact or of law in the assessment. The legislature can hardly have intended a reviewer to carry out the costly and time consuming process of re-doing an assessment that has already been done by an experienced and expert assessor[1] unless some reason to do so – some error in the original assessment – has been demonstrated.

[19] There is no prohibition against receipt of submissions to assist the reviewer in making that preliminary determination, and I have received submissions on behalf of both the applicant for a review, and the respondent to that

[1] In this case the costs assessor, Mr Terence Coulehan, is the retired Master of the Supreme Court, with many years' experience in conducting taxations of costs, a different but related exercise to the assessment of costs under the Act, with far more experience at, and expertise in, the assessment of costs than any of the judges of the Supreme Court to whom the role of reviewer is given under the Act.

application. (Those submissions also stand as the parties' submissions in relation to the conduct of the review, should I determine that one should be conducted. At a preliminary hearing I gave the parties leave to submit brief written submissions for that purpose.)

[20] Mr Duncan McConnel, Counsel for the applicant, submits that the assessment suffers from the following three errors of approach.

(a) Any disallowance of costs requires an assessment of the reasonableness of the particular costs incurred in any given matter. Mr McConnel submits that no such assessment was undertaken and that it should be undertaken on review.

(b) He submits further that it was not open to the costs assessor to make any disallowance of costs on the basis of a perception of poor performance or failure to meet the requisite standard of care as to do so would infringe the principle of advocates' immunity.

(c) Finally, he submits that the disallowance made in respect of non-compliance with the disclosure requirements in the Act was disproportionate to the amount of the costs charged and the seriousness of the non-disclosure.

[21] I do not agree that the assessment suffers from the errors complained of by counsel for the applicant.

Alleged failure to assess the reasonableness of the particular costs incurred

[22] The assessor clearly did assess the reasonableness of the costs. He set out and applied the criteria from s 341 of the Act relevant to the exercise he was engaged upon: whether or not it was reasonable to carry out the work to

which the costs relate, whether or not the work was carried out in a reasonable way, and the fairness and reasonableness of the amount charged. He also noted that in assessing what is fair and reasonable he was to have regard, amongst other things to any disclosures made and the quality of the work done.

[23] Counsel for the applicant submitted that the assessment of costs was not undertaken on the correct basis as demonstrated by four particular matters.

[24] First, he complains of the assessor's conclusion that the applicant should have exercised a discretion not to introduce affidavits containing material criticised by the Family Court as containing unnecessary and inadmissible material. He says that the proper consideration for an assessment was whether the work (preparing the affidavits) was reasonable or was carried out in a reasonable way. He says the costs consequences of deciding to introduce irrelevant material would be to prolong the hearing, or cause it to be delayed and that there was no evidence that either outcome eventuated.

[25] I disagree. The issue is much simpler than that. If the affidavits were unnecessary or contained inadmissible material (and so were useless for the purpose for which they were intended) the work done in preparing them was unnecessary and ought not to have been charged for. This is, not unnaturally, a relevant criterion for assessment under s 341(1)(a). (They may also have had the further consequences referred to by Mr McConnel.)

[26] Second, counsel for the applicant contends that the assessor ought not to have concluded (as he did) that the applicant ought to have been more forceful in ensuring that proper information was provided and that the respondent was adequately prepared to give evidence about his financial circumstances. This, he contends, is a criticism of a failure to undertake work, not of work unreasonably undertaken – a criticism directed at the ultimate outcome of the proceeding, not at the reasonableness of work or the manner in which it is conducted in the context of a dispute as to the charges for that work.

[27] Again, I disagree. The Act requires the assessor to have regard to the quality of the work. If proper instructions are not taken and not insisted upon, then the quality of the evidence to be presented in court suffers. This appears to have been the case here, as reflected in the adverse comments made by the Family Court on the quality of the financial evidence presented on behalf of the applicant.

[28] Third, the applicant contends that it was not permissible for the assessor to use the criterion of what is "fair and reasonable" when that was precluded by the existence of a costs agreement.

[29] Again, I disagree. Section 341 provides that in conducting an assessment of legal costs, the costs assessor must consider (inter alia) the fairness and reasonableness of the amount of legal costs in relation to the work except to the extent that section 339 (or 340) applies to any disputed costs. *(emphasis*

added) Subsection 341(2) provides that in considering what is a fair and reasonable amount of legal costs, the assessor may have regard to any or all of the matters set out in that subsection. Section 339 provides that a costs assessor must assess 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 323.

[30] On one view of these provisions, the mere existence of a costs agreement that has not been set aside precludes a costs assessor from taking into account the fairness and reasonableness of the amounts charged, and therefore from having regard to any of the matters set out in s 341(2). An alternative view of the provisions is that the existence of a costs agreement simply precludes the assessor from substituting what he considers to be a fair and reasonable rate or amount for a rate or amount specified in the fee agreement.

[31] In my view, the latter interpretation is to be preferred.

> (a) It accords with the plain meaning of s 339.
>
> (b) Section 341(1)(c) does not say that the costs assessor must consider the fairness and reasonableness of the amount of legal costs in relation to the work unless s 339 applies, but rather except to the extent that s 339 applies, indicating that the matter may be one of degree.

(c) Section 341(2) provides that the assessor may take into account any or all of the factors set out in s 341(2), and the factors set out in that subsection include matters which would be relevant whether or not a costs agreement was in place, for example, "the retainer and whether the work done was within the scope of the retainer"[2] and "the quality of the work done",[3] as well as others that would be of particular relevance only in the absence of a costs agreement.[4]

[32] Here the assessor did not purport to substitute a rate or amount different from the rate or amount specified in the fee agreement. Rather, he assessed whether the total costs charged were fair and reasonable having regard to the relevant criteria set out in s 341. He was not in error in adopting this approach.

Alleged infringement of the principle of advocates' immunity

[33] The applicant contends that the principle of advocates' immunity applies to the work undertaken by the applicant and that, as a consequence, the applicant cannot be precluded from recovering fees payable to him even if it had been found (which it has not) that he was negligent.

[34] I reject this contention. The High Court in *D'Orta-Ekenaike v Victorian Legal Aid*[5] approved the basic statement of the principle of advocates'

[2] s 340(2)(e)

[3] s 340(2)(g)

[4] for example, a relevant advertisement as to the law practice's costs

[5] (2005) 223 CLR 1; [2005] HCA 12

immunity in *Giannarelli v Wraith*[6] that, at common law, an advocate cannot be sued by his or her client for negligence in the conduct of a case, or in work out of court which is intimately connected with the conduct of a case in court. The principle is said to arise as a principle result of two matters:

> (a) the place of the judicial system as a part of the government structure; and
>
> (b) the necessity for rules designed to achieve finality in the quelling of disputes by the exercise of that judicial power.[7]

[35] As the majority in *D'Orta-Ekenaike* explained:[8]

> "[T]he central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind. No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind."

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[6] (1988) 165 CLR 543

[7] *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 per Gleeson CJ, Gummow, Hayne and Heydon JJ at [25]

[8] at [45]

[36] There is no reason why this principle should not extend to a dispute between the advocate and the client in relation to the fees charged by the advocate in connection with the conduct of the case in court. Indeed, the High Court in *D'Orta-Ekenaike* explicitly recognized that it could.[9]

[37] However, the principle is a principle of common law. It can be over-ridden by statute. To the extent, if any, that an assessment of the reasonableness of legal costs by reference to the quality of the work done would offend the principle of advocates' immunity, the relevant provisions of the *Legal Profession Act* discussed above, indicate a clear intention to over-ride the principle. There is nothing at all in the relevant sections to suggest that they are not intended to apply to all legal costs, including costs charged in connection with the conduct of cases in court or work closely associated with the conduct of cases in court. The words of s 341 are of general application and should be so construed.

Alleged disproportionate nature of deductions

[38] The applicant submits that the total charges for preparation of affidavits was $9,100, less that the amount deducted. I am unable to conclude that that figure is correct. A brief perusal of the applicant's bill reveals more work which is likely to be attributable to affidavit preparation than that highlighted by the applicant. Moreover, many of the descriptions of the work done are of a general nature and it is not possible to say with certainty

[9] *D'Orta-Ekenaike* para [69]

whether some or all of the work so described may be attributable to preparation of affidavits. There is no obvious error, which, in my view, would warrant allowing the application for a review of the assessment.

[39] Counsel for the applicant makes further submissions under this heading predicated upon a perusal of the files, and inviting a judgment about work which was said to be proper and necessary. These submissions would be relevant to a review of the assessment should this application be successful. In my view it is not appropriate for a reviewer to go into that level of detail when considering whether to grant the application to review. To do so would be to subvert the evident purpose of the legislation – that is to provide an efficient summary alternative form of assessment of costs. It would not be consistent with this purpose for the reviewer to effectively perform a review of the assessment when determining whether or not to perform a review.

[40] The applicant claims that the deduction of $10,000 for poor quality work was substantial and disproportionate, amounting as it did to between 21% and 25% of the fees invoiced, depending upon the time period adopted. Again, this seems to me to be a submission relevant to the conduct of a review if one were to be performed. It would depend on an assessment of the amount of work considered to be unnecessary in the preparation of unnecessary and irrelevant affidavits as well as an assessment of the degree of defectiveness in the preparation of financial material. The deduction is not manifestly excessive such that, in and of itself, it is indicative of error,

so as to warrant allowing the application for a review and re-doing the assessment from the beginning.

[41] The same goes for the submission that the deduction of $10,000 for failure to provide adequate costs disclosure is excessive. It is not manifestly excessive in the sense that there must have been an error of principle even if the nature of it is not manifest.

[42] The applicant refers to the assessor's statement that the applicant should have been able to give a more complete estimate of at least the likely minimum cost of the whole proceeding by March 2013, and says that he did give an estimate of $50,000 on 14 May 2013 and warned that future costs would be substantially more than that given a likelihood of a five or six day trial and an additional complication of an international relocation issue. Counsel for the applicant contends that the failure to give adequate disclosure therefore lasted for only two months, over which time the respondent incurred fees of $32,000 but during which time there was some disclosure.

[43] This does not follow. From the summary of the applicant's bills set out in the assessor's reasons, it is clear that at no time did the applicant comply with either the letter or the spirit of the disclosure rules. The purpose of these rules is to ensure that the client knows from the outset the likely magnitude of the costs he will incur in conducting the action, or a range of estimates along with an explanation of the major variables that will affect

the magnitude of those costs. This was not done. For the most part the applicant simply gave an estimate of likely costs to the next hearing or the next stage in proceedings. This failure is not a mere technicality. The kind of piecemeal disclosure given by the applicant did not allow the respondent to make an informed judgement about whether to continue the proceeding or to make more strenuous efforts to settle the dispute without incurring the additional costs, or indeed whether to seek alternative legal advice and to make a meaningful comparison between alternative providers of legal services. Moreover, this failure was compounded by the fact that the initial estimate of total costs ($4,500) was arguably misleading. Of this estimate, the assessor made the following finding: "Even without the benefit of hindsight, an experienced legal practitioner should have regarded this estimate as optimistic." (The first bill issued by the respondent, on 11 January 2013 was for $508.20, the second, a week later, was for $5,054.20.)

[44] For these reasons, I am not satisfied that there was any error in the approach taken by the assessor or any manifest error in the assessment which would warrant a review of the assessment. The application for a review of the assessment is therefore dismissed.