REASONS FOR DECISION

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CORAM	:	REGISTRAR DIXON
HEARD	:	ON THE PAPERS
DELIVERED	:	18 December 2013
FILE NO/S	:	LPA 27 of 2011
BETWEEN	:	HAKUNA MATATA CORPORATION PTY LTD Applicant v McDONALD PYNT LAWYERS Respondent

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Catchwords:

Requirements of costs agreement – offer to enter in to costs agreement – turns on its own facts

Legislation:

Legal Profession Act 2008 (WA)

Counsel:

Applicant	:	On the papers
Respondent	:	On the papers

Solicitors:

Applicant	:	Stewart Forbes
Respondent	:	Coulson Legal

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

AW & LM Forrest Pty Ltd v Beamish (1998) 146 FLR 450 at 458.

REASONS FOR DECISION

[1] This is the latest chapter in a long-running dispute arising from a series of bills rendered by the respondent, McDonald Pynt, to the applicant which I will refer to as Hakuna.

[2] McDonald Pynt acted for Hakuna between November 2008 and January 2011 in a matter which ultimately involved it in two actions in this court, being CIV 2995 of 2009 and CIV 3000 of 2009. Over that period they rendered a series of bills to Hakuna which were drawn on a time basis and not by reference to the Supreme Court scale. I have previously delivered reasons in relation to whether certain bills rendered by McDonald Pynt to Hakuna were interim bills and as to when time began to run for the purposes of Hakuna seeking a costs assessment. I now have to decide whether there was a binding costs agreement between the parties in circumstances where Hakuna did not sign any of the costs agreements sent to it by McDonald Pynt.

[3] The starting point is that it is for McDonald Pynt to establish the retainer and its terms, which I think would include whether the parties had entered into a costs agreement - see ***AW & LM Forrest Pty Ltd v Beamish (1998) 146 FLR 450 at 458***.

[4] The parties filed a number of affidavits on this issue and on 19 September 2013 a number of deponents were cross-examined on those affidavits. Submissions have also been provided both prior to and after 19 September 2013.

[5] Based upon those affidavits and the evidence of the deponents on cross-examination, I make the following findings:

(1) Hakuna, through its director Glenn Warren Primrose, instructed McDonald Pynt in relation to two proceedings commenced against it in this court.

(2) The lawyer at McDonald Pynt with the conduct of the matter was Andrew Foster. On or about 26 November 2009 he prepared two costs agreements on the instructions of David McDonald, the managing director of McDonald Pynt, one agreement for each of the two Supreme Court actions ("the first costs agreements"). Due to a mix up within the firm those costs agreements were not sent to Hakuna by either Mr Foster or Mr McDonald.

(3) This became apparent to Mr Foster in a meeting with Mr Primrose on or about 16 February 2010. He then sent the costs agreements to Mr Primrose by email dated 19 February 2010. Mr Primrose received those costs agreements.

(4) Para 31 of the costs agreements provided as follows:

> *Please note that if you continue to instruct us after the above date without signing this agreement then we will assume that you have agreed to be bound by these terms and conditions. We reserve the right to cease to act for you if you do not sign this agreement at our request.*

(5) I accept Mr Primrose's evidence that he was not aware of that provision in the first costs agreements because he did not read that far into them. That was because of his concerns about the likely costs that were set out earlier in the documents. Whilst there was evidence to the effect that Mr Primrose was a hands-on client who read all material provided to him in detail, that does not change my view. His evidence was clear about this. Aside from that, I am not satisfied that even if he had read the whole of the agreements he would have been aware of para 31. The final few paragraphs of the costs agreement in relation to CIV 3000 of 2009, which included para 31, were for some reason corrupted and therefore incomprehensible when printed out. I do not know whether that was also the case for the costs agreement in relation to CIV 2995 of 2009. It is also not clear whether that was simply a printing fault or whether they were received by Hakuna in that corrupted form. Mr Primrose could not say because he did not read that far into them but it is a distinct possibility that they were received in that corrupted form.

(6) Mr Primrose did not sign the costs agreements on behalf of Hakuna and McDonald Pynt continued to do work for Hakuna.

(7) Following discussions between Mr Primrose and Mr Foster in March 2010 regarding the costs incurred to that date, Mr Foster sent an email to Mr Primrose dated 29 March 2010 enclosing further costs agreements ("the second costs agreements"). They contained the same para 31. There is no suggestion that that part of the agreements was corrupted. Again Mr Primrose says he did not

read para 31 and again he did not sign those costs agreements. McDonald Pynt continued to do work for Hakuna.

(8) There is dispute as to whether Mr Primrose ever informed McDonald Pynt that he would not sign the costs agreements however in light of the conclusion I reach below, I do not need to resolve that dispute.

(9) It appears from the correspondence that McDonald Pynt's position over this period was that there were no binding costs agreements until Hakuna signed them. For example, by an email dated 23 April 2010 Mr McDonald advised Mr Primrose that

> *as I do not have a signed costs agreement with Hakuna Matata Pty Ltd we are not able to continue to brief Nicholas as you have requested because we are ultimately responsible for payment of Nicholas's fees. We can only be able to comply with your instructions if you sign our costs agreement as previously forwarded to you....*

(10) Similarly Mr Foster informed Mr Primrose by an email dated 3 May 2010 as follows:

> *There is also the question of our retainer and Nicholas Dillon's retainer. We cannot (and have not) formally briefed Mr Dillon to draft the submissions as we are not properly instructed (ie our costs agreement remains unsigned) and we are not as yet in funds to cover Mr Dillon's anticipated fees. I refer you to David McDonald's email of 23 April 2010 in this regard.*

(11) Finally by an email dated 18 May 2010 Mr Foster advised Mr Primrose that McDonald Pynt would give Hakuna a $5000 credit on future fees on the conditions that all outstanding accounts were paid in 14 days and the costs agreements were signed.

(12) It appears that McDonald Pynt became conscious of para 31 of the costs agreements at some time in May 2010. Mr Foster deposes in his affidavit sworn 25 June 2013 that he was informed of para 31 and its effect by Mr McDonald in or about May 2010 and that he then proceeded to act in the matters based upon the costs agreements. There is dispute between the parties as to whether Mr

McDonald then informed Mr Primrose of the existence and effect of para 31. Again, I do not need to resolve that issue for the purposes of these reasons.

(13) Ultimately this there was a falling out between the parties. The costs agreements were never signed by Hakuna.

[6] As I understand it, McDonald Pynt says that there are valid costs agreements pursuant to s.282(3) of the *Legal Profession Act 2008* by reason of Hakuna's conduct in accordance with para 31. That conduct is said to have been in continuing to instruct McDonald Pynt after receipt of the costs agreements and in giving instructions to McDonald Pynt to seek indemnity costs which, it is said, amounted to Hakuna seeking to rely upon the terms of the agreements for its own benefit.

S.282 of the Act provide as follows:

(1) A costs agreement may be made —

(a) between a client and a law practice retained by the client; or

(b) between a client and a law practice retained on behalf of the client by another law practice; or

(c) between a law practice and another law practice that retained that law practice on behalf of a client; or

(d) between a law practice and an associated third party payer.

(2) A costs agreement must be written or evidenced in writing.

(3) A costs agreement may consist of a written offer in accordance with subsection (4) that is accepted in writing or by other conduct.

(4) The offer must clearly state —

(a) that it is an offer to enter into a costs agreement; and

(b) that the offer can be accepted in writing or by other conduct; and

(c) the type of conduct that will constitute acceptance.

(5) Except as provided in section 309, a costs agreement cannot provide that the legal costs to which it relates are not subject to costs assessment under Division 8.

(6) A reference in section 288 and in any prescribed provision of this Part to a client is, in relation to a costs agreement that is entered into between a law practice and an associated third party payer as

referred to in subsection (1)(d) and to which a client of the law practice is not a party, a reference to the associated third party payer.

[7] Having regard to s.282(3) and (4), there will be binding costs agreements if written offers by McDonald Pynt were accepted by Hakuna by its conduct so long as McDonald Pynt's written offers **clearly state** that they are offers to enter into costs agreements, that they can be accepted in writing or by conduct and the type of conduct that will constitute acceptance. Presumably these strict requirements are designed to ensure that the client appreciates that there is no obligation to enter into a costs agreement, that the document itself is simply an offer which can be refused and that there are circumstances in which there may be a binding costs agreement even though he or she has not signed the agreement.

[8] The first costs agreements and the second costs agreements were identical terms other than to refer to two different actions and to have different estimates as to costs. They were sent with covering emails. I do not believe that the costs agreements and the covering emails satisfy s.282(4)(a) and (b)

[9] As regards (a), whilst it may be that the costs agreements provided to Hakuna amounted to offers to enter into costs agreements which could either be accepted or rejected by Hakuna, the agreements and the covering emails do not clearly state that they are offers to enter into costs agreements. The word *offer* does not appear anywhere in the documents and nor is there any other form of words that would make it clear that the McDonald Pynt is offering to enter into costs agreements.

[10] McDonald Pynt suggest that though the costs agreements do not use the word *offer*, it is clear from the terms of the costs agreements that Hakuna could decide whether to accept them or not and that the accompanying emails made it clear that they were simply offers to enter into costs agreements. The difficulty with these propositions is that to accept them I would have to read down s.282(4) considerably by ignoring the words *must clearly state*.... I see no basis for doing so.

[11] McDonald Pynt also refer to *Walter v Buckeridge [No. 5]* [2012] WASC 495 at [48] and onwards in which Le Miere J found a costs agreement which did not appear to use the word *offer* to have effect retrospectively. The decision does not, however, deal with the meaning and effect of

s.282(3) and (4), in relation to that particular costs agreement, perhaps because it was not argued before his Honour, and so the decision has no relevance here.

[12] Similarly I do not believe that the costs agreements clearly state that the offer can be accepted in writing or by other conduct. As I have said, there is no reference to the costs agreements being offers and nor is it expressly stated that there are two ways in which the terms of the agreements may be accepted. The agreements and the covering emails clearly anticipate that the costs agreements will be executed by Hakuna's directors. The two covering emails refer to the agreements being signed and then returned to McDonald Pynt. Para 2 of the agreements refers to legal advice being obtained before signing the agreement and para 17 also refers to the agreements being signed. There are the usual signing clauses at the end of the agreements just above which para 31 sets out the provision regarding acceptance by conduct. While it could be said that it is clear from a reading of the whole of the agreements that Hakuna would be bound by the agreements if it signed them or by reason of its conduct in terms of para 31, on balance I do not believe that this amounts to a clear statement that acceptance may be in writing or by conduct.

[13] It follows that I do not believe that valid costs agreements were entered into between McDonald Pynt and Hakuna.

[14] There is one further issue that I will deal with briefly as, judging by the amount of time that Mr Primrose was cross examined on it, it is clearly an issue of significance to McDonald Pynt though, having regard to the conclusion that I have already reached, it can have no bearing on my decision. According to McDonald Pynt, Hakuna, from March to May 2010 pressed McDonald Pynt to seek indemnity costs based on the costs agreements it now denies having entered into. This, it is said, is conduct that shows that Hakuna accepted and agreed to be bound by the cost agreements.

[15] The short answer to McDonald Pynt's proposition is that I am not satisfied that Hakuna was seeking to rely upon the costs agreements when instructing McDonald Pynt to seek indemnity costs nor that it was even aware of the significance of there being valid costs agreements. Mr Primrose was cross-examined at length on this issue but in the end that achieved little. There is nothing in the communications from McDonald Pynt to Hakuna which refers to the costs agreements in the context of

recovering indemnity costs and in fact McDonald Pynt was, for much of this time, dealing with Hakuna on the basis that there were no binding costs agreements in place. I am satisfied that Mr Primrose's position was that he wanted McDonald Pynt to do whatever it could to recover costs from the other side that Hakuna had paid to McDonald Pynt and that this position was not based on an acceptance that Hakuna had entered into binding costs agreements with McDonald Pynt.

Conclusion

In the circumstances I find that no binding costs agreements were entered into between McDonald Pynt and Hakuna.