CITATION: *Withnall Cavanagh & Co Pty Ltd v Wainwright* [2010] NTMC 050

PARTIES:	WITHNALL CAVANAGH & C0 PTY LTD T/AS WITHNALLS V JENNIFER WAINWRIGHT
TITLE OF COURT:	Local Court
JURISDICTION:	Small Claims
FILE NO(s):	20940739
DELIVERED ON:	24 August 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	17 August 2010
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

EXISTENCE AND SCOPE OF RETAINER AGREEMENT BETWEEN LAWYER AND CLIENT. COSTS DISCLOSURE AND ASSESSMENT - *LEGAL PROFESSION ACT* CHAPTER 3, PART 3.3

REPRESENTATION:

Counsel:

Plaintiff:	Mr Rowbottam
Defendant:	In Person

Solicitors:

Plaintiff:	Withnalls
Defendant:	N/A

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 050
Number of paragraphs:	54

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20940739

BETWEEN:

WITHNALL CAVANAGH & CO PTY LTD T/AS WITHNALLS
Plaintiff

AND:

JENNIFER WAINWRIGHT
Defendant

REASONS FOR JUDGMENT

(Delivered 24 August 2010)

Mr J JOHNSON JR:

The Issue Stated

1. By Statement of Claim filed in this jurisdiction on 25 November 2009, the plaintiff claims the sum of $5,173.69 from the defendant comprised a single tax invoiced amount of $4,977.39 for professional legal services rendered between the period 24 June and 7 October 2009, and $196.30 in Court costs.

2. The essence of the defendant's defence is that it was a "term of the engagement" that the legal fees to be incurred would be $1,500.00 and that the legal services provided "did not meet the defendant's requirements as they were not suitable for use by the defendant in its business and did not comply with current legal and professional standards".

3. The defendant, by email dated 11 November 2009, offered $3,200.00 inclusive of GST "in full and final settlement of this matter" but that offer was rejected by the plaintiff (exhibit "P8").

Evidence of the plaintiff

4. The plaintiff relied principally upon the viva voce evidence of one of its Directors, Ms Vanessa Farmer, and documentary evidence sourced from the defendant's file.

5. The evidence was that, following a brief telephone consultation on 24 June 2009 with a then employed solicitor of the plaintiff, Mr Antony Downs, the defendant met with Mr Downs on 9 July 2009 for the purpose of providing instructions and engaging the services of the plaintiff. The evidence was to the effect that the defendant gave instructions and sought advice in relation to three separate matters.

6. The *first* of these was to draft a "letter of engagement and non-disclosure agreement" for the defendant which, in her profession as a financial services advisor, she could give to clients so as to have contractual certainty as to payment for her services and confidentiality in terms.

7. *Secondly*, the defendant sought advice in relation to a contractual dispute with her former employer. At the time, as I understand it, the file in relation to that matter was in possession of lawyers in Queensland but the defendant, it appears, was exploring the possibility of the matter being transferred to the conduct of the plaintiff.

8. The *third* matter concerned the defendant's relationship with her ex de facto partner, a Mr Mark Sullivan. Mr Sullivan, it seems, was indebted to the defendant in the amount of approximately $14,000 for tax invoiced services rendered and that tax invoice remained unpaid. Further, Mr Sullivan was at the time engaged in litigation over a pastoral property dispute and his lawyers were seeking the agreement of the defendant to appear as a witness in, or assist in the preparation of, Mr Sullivan's case.

9. There were other discussions between the parties relating, as I understood the evidence, to the matter of a Will, a Power of Attorney, asset protection,

and the *De Facto Relationships Act*; the plaintiff's evidence, which I accept, was that "several issues were floating around at the time". However, none of these were finalised prior to the plaintiff ceasing to act for the defendant in October 2009.

10. Some 4 weeks after their initial meeting on 9 July 2009, Mr Downs caused a letter to be sent to the defendant headed "Letter of Engagement and Employment Matter", dated 5 August 2009 and exhibited in the proceeding as exhibit "P2". That letter referred to only two of the three matters outlined in paragraph 6,7 and 8 above but I take that to reflect the ambit of firm instructions held at that time.

11. Exhibit "P2" went on to purportedly make costs disclosure to the defendant pursuant to section 303 of the *Legal Profession Act*. The plaintiff also relied upon exhibit "P2" as the requisite "Letter of Engagement" and asserted that such letter, and the conduct of the parties thereafter, constitute the retainer agreement between them.

12. Notwithstanding the 4 week delay in the initial meeting between the plaintiff's Mr Downs and the defendant receiving exhibit "P2", it appears that nothing further was done until Mr Downs resigned his employment with the plaintiff at the end of August 2009. Ms Farmer of the plaintiff then reviewed Mr Downs' files and contacted the defendant by telephone on 4 September 2009 with a view to "starting again". A meeting was arranged for that purpose on 7 September 2009. At that meeting Ms Farmer recalls that the defendant expressed disappointment that nothing had happened to progress the first matter in paragraph 6 above, but did not recall the defendant's assertion that she had specifically discussed the urgency of having that matter attended to.

13. In the end result, further delay ensued and it was not until 17 September 2009 that the plaintiff was able to provide a draft letter of engagement and non-disclosure and, it appears, not until 12 October 2009 (paragraph 20

below) that a "useable product" was delivered. Some further work was attended to by the plaintiff during September and early October 2009, including the receipt of payment for the outstanding tax invoice referred to at paragraph 8 above.

14. On 7 October 2010 the tax invoice the subject of these proceedings, exhibited as exhibit "P1", was sent to the defendant and, it being unpaid within the 14 day period specified, the plaintiff thereafter ceased to act for her.

15. I should pause to note that, at paragraph 9 of her Defence, the defendant appears to challenge the assertion that a signed copy of exhibit "P1" was sent to her by post (section 325(5) of the *Legal Profession Act*), but did not press that matter at hearing; I presume because of the ameliorating provision of section 325(7).

16. Finally, the plaintiff conceded three errors in its tax invoice which reduced the total amount by $480.00 plus GST, and no charge was made for the defendant's initial consultation with Mr Downs on 9 July 2009 (17 units). In the end result the adjusted total of the plaintiff's Memorandum of Costs and Disbursements which is claimed against the defendant is $4,449.39 inclusive of GST.

17. I stress that the above is a relatively compressed version of the plaintiff's evidence but it does, I think, serve to summarise its main thrust and I can now turn, in similar vein, to the defendant's evidence.

Evidence of the defendant

18. The defendant, it must be said, struggled to marshal her evidence in cogently documented sequence; a product both of her unfamiliarity with legal procedure, and what she described as the "intimidating" environment of the Court. In fairness, it ought be observed that the defendant was unrepresented in a proceeding against her where the plaintiff, its counsel

and, indeed, the presiding Judicial officer, were lawyers. In those circumstances the perception of the Court as an intimidating environment may be well understood.

19. Notwithstanding, the defendant managed to articulate the primacy of her requirement for the "letter of engagement and non-disclosure agreement" referred to in paragraph 6 above. This, it was said, was critical to her capacity to properly engage with her client base in her role as an incorporated financial consulting company, and at all times during her relationship with the plaintiff she had explicitly made known the urgency of it.

20. Perhaps the clearest articulation of the defendant's issues with the plaintiff's claim is that contained in her email of 12 November 2009 addressed to the *Statutory Supervisor*:

> 2. The fees include the numerous times I had to contact their office to follow up this matter due to ongoing and unacceptable delays in providing me with urgent documents.
>
> (1) Original instructions on the Agreement matter were given to Withnalls on the 24th June 09. The Agreement was finalised and sent through on 12th October 2009.
>
> (2) It took 9 weeks for a useable product to be delivered resulting in multiple follow up enquiries by me to try to gain some result or alternative.
>
> (3) Vanessa charged me for emails that told me she was going on annual leave and further delaying my urgent documents.
>
> (4) Vanessa charged me for emails saying she still hadn't got to my work but would try – this is not work product.

21. As I have outlined at paragraph 12 above, at the "start again" meeting between the defendant and the plaintiff's Ms Farmer on 7 September 2009, Ms Farmer recalls that the defendant expressed disappointment that nothing had happened to progress her matter, but did not recall the defendant's assertion that she had specifically discussed the urgency of having it attended to.

22. I am satisfied that the defendant did make known, and that the plaintiff was aware, of the urgency of the defendant's requirement for a letter of engagement and non-disclosure agreement. Between her first contact with Mr Downs on 24 June 2009 and the meeting with Ms Farmer over 2 months later on 7 September 2009, it appears common ground that nothing at all had been done to progress the matter, notwithstanding that the defendant had provided a draft existing document to assist in that purpose. In the defendant's diary notes of that meeting (exhibit "D2") she notes that the matter was "now critical" and the apparent commitment by Ms Farmer that she could "complete [the task] in 2 weeks". Then, 7 days later, on 14 September 2009 the defendant emailed the plaintiff (exhibit "D3"):

> As expressed to Vanessa at our meeting on Monday – this letter is **absolutely critical** to hanging on to my clients and engaging work – I had waited over 4 weeks for Antony [Downs] to get back to me and it's (sic) now been 8 weeks since I needed to supply it to my clients – I am now at the point of losing business. I cannot express how **desperate** I am to get this small matter done….(I cannot charge my engagement fee either til (sic) a signed letter is on file – thus I'm also going BROKE!). I have 20 clients awaiting this letter – please get this done for me.

23. In my view, any notion that the plaintiff was unaware of the urgency of the defendant's requirement for a letter of engagement is not supported on the evidence before me. On balance, it appears to me that the plaintiff may

simply not have had the capacity to meet the undertakings as to time it gave to the defendant during the relevant period: Mr Downs had resigned; Ms Farmer was on leave at a critical time; had "a number of critical urgents regarding children in Family Law" and "court commitments which pre-existed the other urgent matters" (exhibit "D3").

24. I will refer again to some aspects of the defendant's evidence when discussing her Defence at paragraph 45 below.

The Law

25. In my opinion there are two foundational requirements of which I must be persuaded, on the usual standard of civil persuasion, if the plaintiff is to maintain its claim in this proceeding.

26. *Firstly*, the entitlement of the plaintiff to charge the defendant for professional legal services arises out of contract evidenced by a retainer agreement. There is no requirement for the retainer agreement to be in writing; it may be inferred or implied by the conduct of the parties, but the elements of a contract must be present: G E Dal Pont, *Law of Costs*, Second Edition, LexisNexis Butterworths Australia, 2009 at [2.3].

27. *Secondly*, the entitlement of the plaintiff to charge the defendant for professional legal services is conditioned upon compliance with the costs disclosure regime of the *Legal Profession Act* ("The Act") and, in particular, Part 3.3 of Chapter 3 entitled *Costs disclosure and assessment*. These provisions prescribe a quite rigorous regime of costs disclosure by lawyers to their clients with accompanying sanction for a failure to comply ie, the absence of capacity to maintain a proceeding in recovery (section 311(2) of the Act).

28. There was no costs agreement between the parties and costs agreements are not mandated by the *Legal Profession Act* (section 317).

The existence and scope of the retainer agreement

29. In this proceeding I am satisfied as to the existence of a retainer agreement between the parties. I make such finding based upon my assessment of Exhibit "P2", the evidence of meetings, emails, and telephone conversations between them, and the intentions evidenced in their overall conduct.

30. It is here prudent to note that at no time during the period of the retainer did the defendant comply with the agreement's requirement to deposit funds into the plaintiff's trust account. However, in my opinion that fact is not, of itself, determinative of the existence or otherwise of a retainer agreement; my view is that I am bound to attach appropriate weight to the overall conduct and professional relationship of the parties to which I have previously referred, and to the work performed by the plaintiff and accepted by the defendant.

31. In her evidence the defendant claimed to have been unclear as to the procedure for depositing funds into the plaintiff's trust account and, notwithstanding a number of written demands by the plaintiff, gave evidence that at the meeting with Ms Farmer on 7 September 2009, she (Ms Farmer) did not press the issue. What is clear is that the plaintiff continued to perform work for the defendant and neither party argued before me that in the absence of funds in trust I ought find a failure of consideration.

32. Having been satisfied as to the existence of a retainer agreement between the parties, I must now be persuaded that the services for which the plaintiff seeks to be remunerated come within its scope.

33. In my opinion the evidence forcefully points to a situation of the defendant having a range of issues "floating around" and nothing in the evidence before me indicates other than that she had an expectation that the retainer agreement extended to all of the matters upon which she sought advice. The fact that some of those matters were not, ultimately, acted upon by the

plaintiff does not, in my opinion, detract from the overall intention, and indeed scope, of the retainer agreement between the parties. It is not unusual in my experience for a retainer agreement to extend, in mutual fashion, beyond that which was initially agreed between a law firm and its client, particularly in circumstances where the client is a professional working independently in the financial services or similar industry.

34. I therefore find the existence and scope of a retainer agreement between the parties sufficient to found the entitlement of the plaintiff to charge the defendant for the professional legal services pleaded in its Statement of Claim

The costs disclosure provisions

35. As I have said at paragraph 27 above, Section 303 of the *Legal Profession Act* is quite rigorous in its terms, requiring exhaustive disclosure of a client's rights in relation to the costs of a law practice. Section 326 likewise prescribes disclosure at the time of rendering a bill of costs. In that context, I have carefully considered the costs disclosure evidenced in exhibits "P1" and "P2" and I am satisfied that those documents effectively comply with the Act. I have also considered them against the *Costs Disclosure Statement* published by the Law Society of the NT and recommended for use by practitioners in this jurisdiction. Whilst that document is more fulsome than the exhibits before me, in my opinion, and with one relatively minor exception, I find that relevant costs disclosure has occurred. The one exception relates to the rate of interest (if any) that the plaintiff charges on overdue legal costs (section 303(1)(e) of the Act.

36. The plaintiff did concede that formal costs disclosure was not undertaken in respect of the third matter in paragraph 8 above but as exhibit "P2" involved costs disclosure in the range $3-5,000, a conscious decision was taken that further costs disclosure was not required (as to which see section 306(1)(b)(i) of the Act).

37. Perhaps the more important issue from the defendant's standpoint was costs disclosure in relation to the first matter (paragraph 6 above) which was estimated in exhibit "P2" at $1,500. Upon close inspection of exhibit "P1", and attributing as best I can the charges specifically related to its attention, it does appear that the costs exceeded $1,500. However it is difficult to be certain about that, given the overlapping nature and apparent urgency of all the matters being attended to and, as is made plain in exhibit "P2", the estimate of costs was given to be "in the vicinity" of $1,500. Whilst I am mindful of the provisions of section 306(2) of the Act, given my finding that costs disclosure pursuant to section 303 of the Act has, in an inclusive sense, been properly made to the defendant, I do not find the defendant's argument on this particular aspect persuasive.

38. I heard no submission from the parties as to whether or not the defendant ought be considered a "sophisticated client" as that term is defined in section 295(1) and thereby exempt from the requirement for costs disclosure by force of section 306(1)(c)(iii) of the Act.

39. I find that the costs disclosure provisions of the *Legal Profession Act* have been sufficiently complied with by the plaintiff for it to maintain this proceeding in recovery against the defendant (section 311 of the Act).

40. Having made such finding it is nonetheless important, I think, to understand the philosophical underpinning of the various Divisions of Chapter 3, Part 3.3 of the Legal Profession Act. In *Law of Costs* (supra), the learned author (with references omitted) writes:

> [2.20] The key objective of costs disclosure is, it has been said, to ensure adequate consumer protection. It is designed as a vehicle to empower the client vis-à-vis the lawyer, by giving the client the opportunity to make an informed choice costs wise whether or not to retain the lawyer or to continue with the representation. As the retainer is what attracts practically all duties and liabilities owed by

> lawyer to client, the disclosure obligations present lawyers with an opportunity to give proper consideration to setting the boundaries of the retainer. By clearly explaining to the client the parameters of the retainer through the disclosure regime, the lawyer can reduce the client-lawyer expectation gap and the prospect for client dissatisfaction. Setting these parameters also serves to alert the lawyer to the circumstances that, if the matter progresses beyond or differently to that anticipated, may amount to a new retainer. This assumes importance in both managing client expectations, and in alerting the lawyer to circumstances that may attract new disclosure obligations.

41. Whilst these views of the learned author are buttressed by citation, they are not, nor do they purport to be, a statement of the law. But, as I have said above, they do provide at least a philosophical underpinning to the provisions of Chapter 3, Part 3.3 of the Act.

42. They also give pause to reflect upon the fact that the defendant in this proceeding, rightly or wrongly, clearly articulated a "client-expectation gap" and "dissatisfaction" with the service provided to her by the plaintiff. Whilst I accept that the defendant was, at times, importunate in her relations with the plaintiff, that was against a background of a delay of some 14 weeks between giving initial instructions to Mr Downs on 24 June 2009, and being delivered, what on her evidence, was documentation time critical to her professional pursuits, on 12 October 2009.

43. The plaintiff is a busy law firm, perhaps short staffed, and with a range of other pressing priorities secondary to those of the defendant (see, for example, exhibit "P5"). For the defendant, her matter is her first priority and she finds it difficult to understand the delay and the legal costs which accrued to her partly as a result.

44. Certainly there was delay, in my opinion sometimes inexcusable delay, on the part of the plaintiff. In fairness the defendant was not, to use the vernacular, backward in coming forward and her constant emails and telephone calls would have made her, at times, a problematic client with which to deal. Somewhere in that mix both parties, in my opinion, ought shoulder some censure for what on the evidence resulted in a total breakdown of the professional relationship between them.

The defendant's Defence

45. In paragraphs numbered 3 and 5 of her Defence the defendant complains of a number of matters with which I have already dealt, but it is appropriate for the sake of completeness to refer to some of those in further detail.

46. At paragraph 3, these include that the legal services to be provided in relation to the first matter would be delivered in 2 weeks; that she placed reliance on that; and that it was a term of the engagement that the documents would be suitable for use by the defendant in its business and would be properly drafted in accordance with current legal and professional standards. I accept that the plaintiff did indicate to the defendant at their meeting on 7 September 2009 that the work could be completed within 2 weeks (exhibit "D2") and that it was not in fact completed, on the defendant's evidence, until 12 October 2009. Whilst I have found that delay, on occasion, to be inexcusable (paragraph 44 above), nothing in the defendant's evidence or pleading particularised any pecuniary loss which accrued to her as a result. Similarly, no evidence was led before me to indicate that the final document was not properly drafted in accordance with current legal and professional standards; indeed, in her email to the *Statutory Supervisor* the defendant herself describes the documents finally delivered to her as a "useable product".

47. At paragraph 5 of the Defence, matters complained of include that the plaintiff's tax invoice was excessive and duplicitous, that the tax invoice

charged a non-legal employee at solicitor's rates (the plaintiff conceded this and made appropriate deduction: see paragraph 16 above); and other matters to which I have made reference at paragraph 20 above. Again, and whilst I can understand the frustration of the defendant's experience of the plaintiff, nothing before me indicates that such frustration or the matters pleaded in her Defence were productive of pecuniary loss. Nor, on the evidence before me, am I able to conclude (keeping in mind the deductions conceded by the plaintiff at hearing) that the plaintiff's bill of costs is "excessive" or "duplicitous". To the contrary, against the background of what I have elsewhere found to be a number of issues "floating around", and the at times importunate nature of the relationship between the parties, there is in my opinion nothing intrinsically unreasonable in the overall bill of costs rendered by the plaintiff for the work which it performed for the defendant.

Mediation and Costs Assessments

48. Finally, I should touch upon Divisions 7, *Mediation of costs disputes* and Division 8, *Costs assessments* of Chapter 3, Part 3.3 of the *Legal Profession Act*.

49. Given the state to which the relationship between the parties had deteriorated by October 2009, the dispute between them appeared to me ripe for application of the mediation provisions of Division 7 of Part 3.3, Chapter 3 of the Act. In fact the defendant attempted to invoke these provisions herself by email of 12 November 2009 addressed to the *Statutory Supervisor* (section 330(1) of the Act). On 16 November 2009, the *Statutory Supervisor*, Mr Michael Grant QC, caused an email to be sent to the plaintiff and to the defendant inviting them to participate in mediation. However, it appears the plaintiff was uninterested in such a process as it did not respond to the *Statutory Supervisor* (the *Statutory Supervisor* cannot force any party to participate in the mediation process) and, some 13 days later on 29 November 2009, filed proceedings for recovery in this jurisdiction.

50. At first blush it appeared to me that I may have power pursuant to section 330(3) of the Act, by written notice, to require the plaintiff and the defendant to enter into a process of mediation. However, upon closer inspection "Registrar" in section 330(3) of the Act is defined (section 4) by reference to section 9(1) of the *Supreme Court Act* as a Registrar appointed under the *Supreme Court Act*. Somewhat curiously therefore, it seems I do not have the power to require mediation in the terms envisaged by section 330(3). I say 'curiously' because the jurisdictional limit to require the parties to enter into a process of mediation ($5,000) is significantly less than that of the Small Claims jurisdiction ($10,000).

51. Clearly, the defendant also had recourse to Division 8, *Costs assessments* of Chapter 3, Part 3.3 of the Act. Such application must be made within 12 months of the subject bill of costs being given ie, by 7 October 2010. However, there is no bar to the plaintiff maintaining its action for recovery in this proceeding because the defendant had not applied for costs assessment prior to the proceeding being filed on 25 November 2009 (section 336(b) of the Act). The defendant adverts to this issue in paragraph 7(c) of her Defence by assertion that the plaintiff commenced this proceeding prior to her becoming aware that the plaintiff had refused to participate in the mediation process, but no Application for a stay was made upon that basis. Conversely, it appears also to be the case that the Act provides no bar to the defendant applying for costs assessment post 25 November 2009. If that application had been made, costs assessment could legitimately have been underway during the course of this proceeding had there been a similar absence of application for a stay, albeit only until the date of this Decision when, presumably, *res judicata* would intervene.

52. In the event, as I have no power to order either mediation or costs assessment under the *Legal Profession Act*, and this proceeding is not in the nature of a taxation of costs under the *Local Court Act*, I am left only with

the course of properly determining the dispute between the parties on the pleadings and evidence before me.

Summary of Findings

53. I am satisfied on the balance of probabilities as to the existence and scope of a retainer agreement between the parties sufficient to found the entitlement of the plaintiff to charge the defendant for the professional legal services pleaded in its Statement of Claim. I am also satisfied on the balance of probabilities that the plaintiff has complied with the costs disclosure requirements mandated by Chapter 3, Part 3.3, Division 3 of the *Legal Profession Act* and is, thereby, entitled to maintain a claim in recovery of its legal costs against the defendant. Finally, nothing in the defendant's pleadings or evidence was sufficient to persuade me, on the usual standard of civil persuasion, that the plaintiff's claim for professional legal services (as amended) was excessive, duplicitous, or otherwise unreasonable when viewed against the dealings between the parties as a whole.

54. That being the case, the plaintiff is entitled to succeed in its claim.

Orders:

1. The defendant is to pay to the plaintiff the sum of $4,645.69, comprised legal costs of $4,449.39 and Court costs of $196.30, within 30 days.

2. No Order as to costs.

Dated this 24th day of August 2010

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JULIAN JOHNSON
JUDICIAL REGISTRAR