



THE LAW SOCIETY
OF NEW SOUTH WALES

FILE COPY

Our Ref: JC:RRB P7:CO:2009
Direct Line: 9926 0216

23 September 2009

The Hon. John Hatzistergos, MLC
Attorney General for NSW
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney General

Re: GST Implications: Boyce v McIntyre [2009] NSW CA 185

The unanimous decision of the Court of Appeal in this case was delivered on 20 July 2009.

The judgment concerned legal costs payable by the respondent under a sub lease she entered into with the lessor. The lessor's solicitor (the appellant) rendered an account for preparation of the lease; the sub lease provided that the lessor's reasonable legal costs would be payable by the respondent. There was no costs agreement between the sub lessee and the appellant.

The main decision deals with whether a costs assessor must assess an application for assessment by a non-associated third party payer as defined in s.302A of the Legal Profession Act 2004 (the Act) by reference to a costs agreement the appellant entered into with his client, the lessor.

The issue with which this submission is concerned is whether the costs assessor was entitled to determine the right of the client (the lessor) to charge or recover from the non-associated third party payer (the respondent) an amount which represents GST. The Court held that by virtue of the Act the costs assessor is empowered to assess costs that are defined by s.302(1) of the Act as including fees, charges disbursements, expenses and remuneration. GST does not fall within that definition. The Court went on to state that "GST is an issue in respect of taxation, not legal costs".

It appears to the Law Society that implications of this decision are wide-ranging. It would apply to all assessments of costs, both solicitor / own client costs as well as costs between parties to litigation. There is a great deal of confusion and conflicting views have been expressed whether GST can be recovered, either from the client in a solicitor / client assessment, or in a litigation matter where the successful individual litigant is not registered for GST. It appears that individual litigants in party / party matters are especially vulnerable. Many successful individual litigants would be deprived of substantial sums as reimbursement of GST either paid or due to be paid to their solicitor. An example of such a litigant would be a personal injury claimant.

The Law Society recommends an urgent amendment to section 302(1) of the Act so that any payment for GST is included in the definition of "costs" for the purposes of costs assessment under the Act. It is further submitted that the amendment should be retrospective, with effect from the date the judgment was delivered. If this is done, the unintended effects of the decision may be kept to a minimum.

I shall be grateful for your urgent consideration and response to this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joseph Catanzariti', written in a cursive style.

Joseph Catanzariti
President