

Charging Costs on a Recovery Basis

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1. It is not uncommon for a practitioner to not want to charge a client, but also still want to be paid. The common sense way this is achieved in litigation is to say to the client “you’ll only need to pay me if we get a costs order.” But it is also plain, from the perspective of the other side, that there are arguably then no costs to be indemnified for the purposes of a costs order; that is, because of the conditional nature of the agreement between the solicitor and client, in the absence of a costs order, there are no costs for the other side to indemnify.
2. The Court of Appeal has largely settled the issue in *Mainieri & Anor v Cirillo* [2014] VSCA 227, providing that a client could benefit from a costs order even though her liability to her solicitor was conditional on the existence of that costs order.

Facts in *Mainieri v Cirillo*

3. In *Mainieri*, a mother had sold her home to pay down her son’s and daughter-in-law’s mortgage on the condition of staying with them rent free, only to be left without a home or a place to stay after difficulties. At first instance, the mother was successful in obtaining an equitable lien over the son’s and daughter-in-law’s home and also received a costs order in her favour.
4. The costs order was made over the opposition of the son and daughter-in-law, who pointed to the costs agreement between the mother and her solicitor, which provided that she would not need to pay legal costs unless either: a Court orders another party to pay her costs; or if the case is settled for a sum that includes payment of legal costs. Further, the amount that the mother had to pay her solicitor in that event was limited to the value of either the Court’s order or that included in the settlement sum. They therefore argued that there was nothing for them to indemnify because at the time of the making of the order, the mother had nothing to pay her solicitor.
5. That original decision was appealed as to the substance of the judgment and as to the costs point. Gratefully for jurists, as the trial judge offered no reasons

for awarding costs in the face of opposition, the Court of Appeal was required to consider the matter afresh.

The Court of Appeal's Reasoning

6. In deciding the appeal, the Court of Appeal recognised the divergent authority. It was not in dispute that costs orders are in the nature of an indemnity.¹ At its most simple, therefore, the appellants raise a valid point that the mother had no loss to indemnify as without a cost order she would not be required to pay her solicitor's costs. However, the principle for awarding costs goes on to acknowledge that the right to be indemnified "does not require that the costs have been paid, but it does require that there be a legal liability to pay costs."² The question, therefore, is whether contingent liability, as in *Mainieri*, was sufficient to enliven the right to an indemnity.
7. Before deciding the point, the Court considered the largely analogous *Wentworth* further, and noted that of the three judges, Santow JA found that the right to an indemnity existed, Basten JA found that it did not and Hislop J expressly abstained from stating a view. However, the Court of Appeal accepted that the weight of dicta since *Wentworth* favours Basten's JA view.³
8. However, and expressly conscious of the desire to have uniformity among the State's Courts of Appeal, our Court of Appeal rejected Basten's JA view and followed that of Santow JA on the basis that:
 - a. the *Legal Profession Act 2004* recognises the possibility of conditional costs agreements;
 - b. such agreements acknowledge that payment of costs is contingent on the successful outcome of the matter;
 - c. no distinction is drawn in that Act between conditions that are precedent or subsequent; and

¹ *Wentworth v Rogers*, (2006) 66 NSWLR 474, 504

² *Ibid*

³ *Mainieri & Anor v Cirillo* [2014] VSC 227, [51]

- d. no distinction is appropriate in the context of the right to an indemnity.⁴
9. Accordingly, the Court upheld the costs order in favour of the mother, providing unambiguous authority that practitioners can charge costs under a on a recovery basis, that is, conditional of a costs order being made in favour of the client.
10. The Court, did, however, leave one matter for further consideration: costs agreements conditional on recovery by the client from the other side. On that point, the Court expressly reserved comment, holding that it may be that such a condition might not be sufficient for the client to be liable to the solicitor for the purposes of determining whether the client is entitled to an indemnity from the other side.⁵

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⁴ Ibid

⁵ Ibid, [52]