24/90

SUPREME COURT OF VICTORIA

CARROLL v YOUNG

O'Bryan J

16 January 1990

CIVIL PROCEEDINGS – WORK AND LABOUR DONE BY SOLICITOR – CLAIM ON *QUANTUM MERUIT* – DEFENCE LODGED – CLAIM THAT SOLICITOR AGREED TO LESSER FIXED SUM – ONUS OF PROOF – WHETHER DEFENDANT HAD BURDEN TO DISCHARGE: *SUPREME COURT ACT* 1958, S87.

1. Section 87 of the *Supreme Court Act* 1958 provided that a solicitor and client may agree in writing as to the form and amount of remuneration of the solicitor, but is not relevant to a claim based on a bill of costs and defended on the basis that the solicitor orally agreed to perform work for a fixed sum.

2. Where a client claimed that a solicitor agreed to perform work for a fixed sum less than the amount claimed by the solicitor, there was no shifting in the onus of proof. The solicitor was required to prove there existed a contract for remuneration on a *quantum meruit* basis and that it was not a term of the contract that the remuneration should be limited to the lesser amount.

O'BRYAN J: **[2]** This is the return of an order nisi to review a decision in the Magistrates' Court. The plaintiff, a solicitor, claimed from his former client, the defendant, in the Magistrates' Court at Melbourne, $2,423.07 for work done at the request of the defendant. Pursuant to the *Magistrates' Courts Rules*, the defendant gave notice of defence and particulars of defence as follows:

> 1. The defendant denies that he is indebted to the complainant in the sum of $2,423.07 or at all.
>
> 2. The complainant, in or about March 1985, agreed to prosecute to completion a claim for the defendant for the agreed sum of $800.
>
> 3. The complainant failed to prosecute the claim to completion. The defendant has paid the sum of $500 to the complainant on account of legal costs and disbursements.

The claim was heard at Prahran Magistrates' Court on 1 August 1989. Counsel for the plaintiff informed the court that the claim involved a dispute over solicitor's costs. A bill of costs had been prepared on behalf of the plaintiff and forwarded to the defendant's solicitors on 27 July 1987, in compliance with s62 of the *Supreme Court Act* 1986 (formerly s81 of the *Supreme Court Act* 1958) to which bill the defendant's solicitors has replied as follows:

> We are satisfied that the bill of costs could be justified on taxation."

The amount of the bill was the subject matter of the claim. **[3]** Counsel for the defendant informed the court that the single issue was whether there had been an agreement concerning the costs to be charged by the plaintiff for the work to be done. If it was not expressly stated, it was implied that no issue was raised that the amount claimed, $2,423.07, was a fair and reasonable amount for the work carried out by the plaintiff for the defendant.

The plaintiff and the defendant each gave evidence concerning the central issue. The plaintiff said there had been no agreement to limit costs to $800. The defendant said that when he inquired as to the likely cost of the work, he was informed 'around $800'. During the hearing, it became clear that the plaintiff's bill of costs included a claim for $315 on account of a disbursement for an expert's opinion which had been paid by the defendant. Accordingly, the plaintiff's claim had to be reduced by $315. It was conceded on behalf of the defendant, therefore, that if there was an agreement to limit costs to $800, the plaintiff was entitled to the difference between $800 and $315 already paid by the defendant, namely $485.

The learned magistrate determined the dispute by dismissing the claim altogether. In

giving reasons, he said that the complainant was required to prove his case on the balance of probabilities and that both versions were credible and that the complainant had failed to discharge his onus of proof. This result was not only inconsistent with the concession made on behalf of the defendant, that he was liable to pay $485, but difficult to justify on the **[4]** facts, as the defendant said in evidence that he had been quoted costs of 'around $800', which was not a fixed price.

When the order nisi was granted, no ground was sought that the decision was either against the evidence and the weight of the evidence or one that no reasonable magistrate could reach. It is now too late to add such a ground. The power to amend grounds may not be exercised so as to transform a ground into something entirely new. *Pruscino v Nibaldi* [1973] VicRp 9; [1973] VR 113 at 119-120; (1972) 27 LGRA 114.

Two grounds to review the decision were granted to the plaintiff by Master Evans:

1. That the learned magistrate erred in law in holding that the defendant could rely on (an) oral agreement as to costs as a defence to the claim.

2. That the learned magistrate erred in law in holding that the burden of disproving the existence of an agreement as to costs rested on the plaintiff.

The first ground is based upon an argument raised by the plaintiff that s64 of the *Supreme Court Act* 1986 or its predecessor, s87(2) of the *Supreme Court Act* 1958, precluded the defendant from relying upon an oral agreement as to costs as a defence to the claim. This submission, if it is to succeed, must be founded upon s87(2) of the 1953 Act in my opinion, because the agreement relied upon by the defendant was made in 1985 when the relevant legislation was the 1958 Act.

[5] Section 87 provides:

"It shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor before or in the course of the transaction of business done or to be done by such solicitor, whether as a solicitor, or in matters of conveyancing for the remuneration of the solicitor for his services in respect of such business, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum or by commission or percentage or by salary or otherwise, and it shall be competent for the solicitor to accept from the client and the client to give to the solicitor remuneration accordingly.

(2) The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf.

(3) The agreement may, if the solicitor and the client think fit, be made on the terms that the amount of remuneration therein stipulated for either shall include or shall not include all or any disbursements made by the solicitor.

(4) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor."

Sub-sections (5) and (6) are not relevant. There is nothing in the section to show that Parliament intended to bar the client from relying upon an oral agreement as to the amount of costs, as a defence to a claim by a solicitor for remuneration of the solicitor for his services. The section empowers a solicitor to agree with a client on a form and amount of remuneration. Such an agreement "shall be in writing signed by the person to be bound thereby or by his agent in that behalf."

[6] Section 87 was enacted for the protection of a client of a solicitor who is sued for an agreed amount of remuneration. The decision of the Full Court in *Bear v Waxman* [1912] VicLawRp 53; [1912] VLR 292; 18 ALR 269; 34 ALT 6 , makes this clear. Before the legislature enacted s262 of the *Supreme Court Act* 1890 (the equivalent of s87) a solicitor could make a binding agreement with his client that he should receive a lump sum as his remuneration for conducting litigation but at Common Law, the solicitor had to prove that the agreement "was fair, open and free from any kind of compulsion exercised by the solicitor".

Section 87 should be construed, in my opinion, by reference to s81. By s81, a solicitor may

not bring an action for costs until the expiration of one month after such solicitor has delivered to the party to be charged, a bill of costs. Section 81 is subject to the provisions in Division 10 which include s87. The construction of s87 contended by Mr Beach for the plaintiff cannot be justified.

In my opinion, s87 is not relevant to the claim by the plaintiff for remuneration based on a bill of costs and defended upon the basis that the plaintiff agreed to perform the work for a fixed sum. The purpose or object of the section would not be promoted by construing it in the manner sought by the plaintiff. Its purpose is to afford protection to the client of a solicitor who is sued for a fixed sum for costs. Accordingly, Ground 1 of the order nisi must fail.

Mr Beach next argued in support of Ground 2, that as **[7]** all the elements of the claim were admitted by the defendant, the defendant carried the burden of proving the existence of the fixed price element of the agreement to pay fair and reasonable remuneration to the plaintiff. He relied upon a passage in the judgment of Justice of Appeal Walsh in the Court of Appeal of New South Wales, *Currie v Dempsey* (1967) 69 SR (NSW) 116; (1967) 2 NSWR at p532. When Currie applied for a club licence under the *Liquor Act*, three persons objected to the application. The magistrate who determined the application held that the onus of proof was on Currie to prove the statutory conditions. Justice of Appeal Walsh said at 539:

> "In my opinion the burden of proof in the first sense lies on a plaintiff if the fact alleged, whether affirmative or negative in form is an essential element in his cause of action – e.g. if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant if the allegation is not a denial of an essential ingredient in the cause of action but is one which, if established, will constitute a good defence – that is, an avoidance of the claim which *prima facie* the plaintiff has."

In my opinion, the principle stated in *Currie* is not applicable to the facts in the present case because the allegation of the defendant is not a denial of an essential ingredient in the cause of action but is an avoidance of the claim. The defence was that the plaintiff was suing upon a *quantum meruit*. The defence was that the plaintiff agreed to accept $800 for work done and accordingly, the plaintiff had the onus of proving firstly, the contract; secondly, the performance of the work; and thirdly, the value of the work, if the remuneration is not ascertained by the contract. [See *Riverside Motors Pty Ltd v Abrahams* [1945] VicLawRp 5; [1945] VLR 45; [1945] ALR 70 at **[8]** p51, a decision of the Full Court].

In order to succeed, the plaintiff had to prove it was a term of the contract that he should be remunerated on a *quantum meruit* basis. The defence taken also required him to prove it was not a term of the contract that his remuneration should be limited to $800. If at the end of the case the plaintiff failed to satisfy the court it was not a term of the contract that his remuneration should be limited to $800, he would be entitled to no more than $800 the amount admitted to be due by the defendant less $315 already paid.

I am unable to accept Mr Beach's submission that the defendant carried the burden of proving that the contract was one for a fixed price. Mr Gebhardt for the defendant conceded however that the learned magistrate fell into error in ordering that the claim be dismissed. He further submitted that if the court made the order nisi absolute, the claim should be re-heard in the Magistrates' Court. I am persuaded that when the learned magistrate made the findings he did, an order dismissing the claim was not just. When he dismissed the claim, the Magistrate then ordered that both sides bear their own costs. No reason was given for departing from the usual order as to costs namely, that costs are awarded to the successful party save for exceptional reason. I am faced with a difficulty because Ground 2 of the order nisi in its narrow form has not been made out and a more appropriate ground was not obtained from the Master. **[9]** Section 93 of the *Magistrates' Courts Act* 1971 confers upon the court very wide powers including the power or jurisdiction which the court possesses or might exercise under *certiorari*. Sub-section (e) empowers the court to make "any other order as to the court or judge seems just". The width of the powers was considered in *Vaughan v Lennie* [1981] VicRp 25; (1981) VR 229, by Anderson J at 233.

As I believe the learned magistrate did not err in law in holding that the ultimate onus of proof lay with the plaintiff, Ground 2 is not made out. However, the plaintiff was entitled to judgment for $485 and possibly to interest and costs. The question is whether this court should make such

an order now as it would be just to do so, or should return the matter to the Magistrates' Court with a direction that the court enter the appropriate judgment. I shall invite counsel to address me on this question at this stage.

APPEARANCES: For the applicant Carroll: Mr J Beach, counsel. Duffy Forrest Harrison Hannan, solicitors. For the respondent Young: Mr SP Gebhardt, counsel. Cleary Ross, solicitors.
