

24/99; [1999] VSC 491

SUPREME COURT OF VICTORIA

O'CALLAGHAN v SIMPSON

Vincent J

6 October, 2 December 1999

CIVIL JURISDICTION – FEES TO COUNSEL – ORAL AGREEMENT BY SOLICITOR AS TO RATE OF FEES TO COUNSEL – BACKSHEET SIGNED BY SOLICITOR ON DAY OF HEARING – ENDORSEMENT ON BACKSHEET THAT SOLICITOR AGREED TO PAY ALL FEES PROPERLY CHARGEABLE BY COUNSEL – WHETHER SOLICITOR PERSONALLY LIABLE FOR FEES – REASONS GIVEN BY MAGISTRATE – DUTY TO GIVE REASONS – WHETHER REASONS ADEQUATE.

Eleven days before a trial commenced in the County Court, an oral agreement was reached between O'C, a solicitor, and S. a barrister, as to the rate of fees S. would charge. Shortly prior to the commencement of the trial, whilst seated at the Bar table, S. reminded O'C that he had not yet signed the backsheet and requested that he do so. The document, which contained an endorsement "Counsel is retained by the solicitor directly and accordingly agrees to pay all fees properly chargeable by counsel", was handed to O'C who signed it and returned it to S. Subsequently, S. rendered his fees in accordance with the agreed rates but O'C declined to pay the amounts on the ground that he had never agreed to be personally liable for them. S. later issued a complaint against O'C. In upholding the claim, the magistrate in his reasons said that the signed backsheet evinced an intention by O'C to be personally responsible for the payment of counsel's fees. The magistrate noted that O'C had been a legal practitioner for some years, that the backsheet was simple and unambiguous and that the trial was not expected to last any considerable period of time. O'C appealed on the ground that the magistrate failed to provide any adequate reasons for his conclusion.

HELD: Appeal dismissed.

1. As a general rule, a magistrate should state reasons for decision. As a general proposition, adequate reasons are required to be given so that an appeal court can ascertain the reasoning upon which the decision is based and to ensure that justice is seen to be done.

Pasha v Edmonds & Anor [1998] VSC 169; (1998) 28 MVR 217; and

Bevis v Alex Gregson Roof Tiles Pty Ltd, unrep, VSC, 19/6/1997, Gillard J, applied.

2. Whilst the magistrate did not refer to a number of relevant principles of the law of contract and their application to the matter being determined, the situation did not require such an elaborate exposition when both parties were experienced legal practitioners. The case was a simple one involving the single issue of whether the signing of the backsheet by O'C evinced an intention by him to be bound by all of the terms of the agreement. It was open to the magistrate to find in S.'s favour on the claim and in the circumstances, the magistrate's statement of reasons was adequate.

VINCENT J:

1. This matter arises by way of an appeal against a decision of a Magistrate, dated 9 April 1999, who ordered the appellant to pay to the respondent the sum of \$30,450.00 together with interest of \$2,462.00 and costs of \$8,717.00.

Factual Background

2. The appellant and respondent both practise as legal practitioners within the meaning of s3 of the *Legal Practice Act* 1996 (Vic). Mr O'Callaghan, a solicitor, is self-employed and practises under the name "O'Callaghan's Solicitors". Mr Simpson is a barrister and a member of the Victorian Bar, and is also a member of the Hyland list of barristers.

3. The appellant, who had been retained by a client named Silvana Febbrarino to act as her solicitor in a claim for damages arising from personal injuries suffered by her, delivered a brief to the respondent to act as counsel in the trial of the matter which was to commence, on 1 April 1998, in the County Court of Victoria. Due to other commitments, the respondent was unable to accept the brief for that date. As the appellant was unable to retain counsel, the trial was adjourned until 15 April 1998. Following the adjournment of the matter, the respondent approached the appellant and indicated that he would be able to represent Ms Febbrarino at that later time. This was apparently regarded as satisfactory and he was accordingly retained. There appears to be no

dispute that an oral agreement was reached, on 3 April 1998, as to the rate of fees to be charged by him. It should be pointed out in the present context that, at no stage prior to the 15 April, was there any discussion in relation to any possible personal liability of Mr O'Callaghan for counsel's fees.

4. On 6 April, the respondent's clerk, Mr Hyland, faxed a copy of the back sheet of the brief to the appellant, upon which it was noted that counsel's fees had been agreed at \$150.00 per hour and \$1,350.00 per day of the trial. Also appearing on the back sheet was John Simpson's signature, dated 3 April 1998, along with the following stamped indorsement: *Counsel is retained by the solicitor directly and accordingly agrees to pay all fees properly chargeable by counsel.*

5. The appellant was requested by Mr Hyland to "Please sign and return back sheet at your earliest convenience". No response was made to this request.

6. Very shortly prior to the commencement of the trial, on the morning of 15 April 1998, and whilst seated at the bar table, the respondent reminded the appellant that he had not yet signed the back sheet and requested him to do so. He then handed the document to Mr O'Callaghan who placed his signature upon it and returned it. It was common ground that nothing was said by either of the parties in relation to any personal liability of the appellant for the fees set out. The appellant claims that he did not see the stamped indorsement mentioned above and that his signature was merely a confirmation of the fee arrangement previously discussed.

7. The respondent then appeared on behalf of Ms Febbrarino at the hearing and subsequently rendered fees, in accordance with the agreed rates, in the sum of \$36,400.00. Despite demands for payment made upon the appellant he failed or refused to pay the amounts claimed, on the basis that he had never agreed to be personally liable for them.

8. In due course, the respondent issued a complaint in the Magistrates' Court. After a hearing that lasted two days and which included the presentation of submissions on behalf of both parties, the Magistrate arrived at the conclusion that prior to the commencement of the hearing in the County Court Mr O'Callaghan had accepted that he would be personally responsible to pay counsel's fees and had "evidenced" his intention to be so liable by signing the back sheet containing an indorsement to that effect. He then ordered the appellant to pay the outstanding fees along with interest and costs.

9. The appellant has, before this Court, challenged that decision relying upon a single ground of complaint namely: Did the Magistrate err in law in failing to provide any or any adequate reasons for concluding that the appellant's action did evidence an intention to be bound by all of the terms and conditions appearing on the back sheet?

10. The duty of a court to give reasons was recently considered in *Pasha v Edmonds & Anor* [1998] VSC 169; [1998] 28 MVR 217. In that case Smith J said at p219:

"It is common ground that as a general rule a judge or a magistrate should state his or her reasons ... Like most rules, however, there are exceptions and it is clear that a judge does not on every occasion commit error if he or she fails to state reasons."

11. Further, in *Sun Alliance Insurance v Massoud* [1989] VicRp 2; [1989] VR 8 at p19 Gray J (with whom Fullagar and Tadgell JJ agreed) stated:

"That does not mean that on every occasion a judge will be in error if he fails to state reasons. The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision. Some examples of such situations were given by Cussen ACJ in *Brittingham v Williams* [1932] VicLawRp 35; [1932] VLR 237 at 239; 38 ALR 176. In such cases the foundation for the judge's conclusion will be indicated as a matter of necessary inference ..."

Appellant's Submission

12. In the present matter, counsel for the appellant argued that (*inter alia*) although the Magistrate said that he did not find a decision on the point "particularly easy", he failed to state upon what evidence he relied in reaching his conclusion or to indicate what actions of the appellant

evidenced as he asserted "an intention to be bound by all of the terms and conditions appearing on the back sheet of 15 April".

13. Importantly, it was said, he did not make any findings of fact as to whether or not he believed O'Callaghan's evidence, nor did he make any findings as to the basic matters of offer and acceptance, intention to create legal relations, whether the back sheet was a contractual document and whether or not Mr O'Callaghan was aware that the indorsement was on the back sheet when he signed it.

14. In my opinion, the submissions advanced by counsel for the appellant lack substance. His Worship made a number of statements which clearly demonstrate the reasoning process that he adopted and which also indicate that he was mindful of the task at hand. His approach can be observed in the following passage:

"The issue is whether the signing of the back sheet on 15 April by the defendant evidences an intention by the defendant to be bound by all of the terms of the new agreement. ... On behalf of the plaintiff it was said that the defendant had notice of this term on 6 April, whether he acceded to it or not on that day. *There is the fact that the defendant is a person of full age and capacity, and what is more is a professional lawyer, and has been a professional lawyer for some years. There is the fact that the document is in its nature simple, cursory and unambiguous. There is the submission, which I find to be correct, that the defendant did have, bearing in mind the nature of the document, sufficient time to comprehend its nature, and what was written upon it.* Against the proposition the defendant said that the document was signed, there was no issue that it is in fact the defendant's signature, otherwise there was no place specifically provided, that the signing of the document would be a significant departure from what the defendant rightly understood to be the prior and existing agreement. It was also put that such a departure incurred a considerable risk for the defendant, given that both parties were of the view that Ms Febbrarino's case was going to be a very difficult one to win. The consequences of losing a long drawn out, or potentially long drawn out case, of course, were significant. *It must be said, however, that on 15 April the fact that this trial would last for a considerable period of time may not have been altogether evident. The original estimate was some six days, as I recall the evidence.* The defendant also says the document was signed in an atmosphere of some urgency, and while it was not specifically put that the defendant was overborne or pressured unduly by the plaintiff, but certainly a suggestion that that was part of the atmosphere surrounding the signing. The court, of course, is not essentially concerned with the question as to why a party enters into a binding contract. The court's task is to undertake an objective construction of the parties' intentions as evidenced by their deeds, and their words." (My italics)

See pp40-41 transcript of Magistrates' Court hearing 9/4/99.

15. It is, I think, reasonably clear that the Magistrate was satisfied that by signing the back sheet Mr O'Callaghan accepted the conditions contained thereon. Mr O'Callaghan was a solicitor, and had been for some years. It is also, in my opinion, apparent that His Worship did not accept the appellant's claim that he had not seen and understood the effect of the indorsement on the back sheet when a copy was forwarded to his office on 6 April or that he was unaware of its presence when he signed the back sheet at the Court. In this context, it is to be observed that although the appellant argued that he would not have signed such a document given that Ms Febbrarino's case was going to be a difficult one to win, His Worship pointed out that the trial was expected to occupy only 6 days and in so doing suggested that the risks involved in the acceptance of personal liability may not have been perceived as substantial by Mr O'Callaghan. The Magistrate was in this passage directing his mind to the possibility that the appellant would not have consciously undertaken the financial risk involved in the acceptance of personal liability for counsel's fees and he was clearly unimpressed by the argument advanced on this aspect. He also appears to have rejected the contention that the appellant may have signed the back sheet subject to a degree of pressure imposed by the respondent. Presumably this argument had been advanced in order to explain how it came about that an experienced practitioner would sign a document without reading it.

16. Mr Fox argued, in the alternative, that if any reasons were provided they were inadequate. In *Bevis v Alex Gregson Roof Tiles Pty Ltd* Vic. SC, unreported 19 June 1997 Gillard J said at p5:

"In determining whether adequate reasons have been given it is important to consider the nature of the proceedings, the issues, the way the proceeding is conducted, the submissions made and whether the decision was given following the end of the hearing. ... The appeal or reviewing court should adopt a pragmatic approach. The Court must look at the whole of the reasons and in their context. The Court is entitled to draw inferences to determine the reasoning process."

His Honour then went on to say at p6:

"As a general proposition, adequate reasons are to satisfy two basic requirements, namely, to enable an appeal court to ascertain the reasoning upon which the decision is based and to ensure justice is seen to be done. See *Sun Alliance Insurance Ltd v Massoud supra*. The latter obligation no doubt is to ensure the losing party knows the reasons why he failed. In considering this latter obligation it should not be overlooked that counsel does have the right to ask a judicial officer to give reasons to amplify or clarify them. Counsel should seek further reasons where appropriate. If failing to do so, an appeal court may draw the inference that the reasons were adequate for the legal representative to understand the decision and to be able to explain the loss to his or her client."

17. In this case, and not surprisingly in my view, counsel did not request His Worship to elaborate upon the reasons for his decision.

18. Whilst it is certainly the position that His Worship did not refer to a number of relevant principles of the law of contract and their application to the matter before him, it does not appear to me that the situation required elaborate exposition of either the relevant law or a dissertation of the interaction of basic principles of law and relatively straightforward facts when both parties were experienced legal practitioners.

19. At this point reference should be made to a passage of the transcript of the Magistrate's Court hearing immediately prior to His Worship's retirement to consider his decision:

"If I accept that Mr O'Callaghan was aware that that endorsement was on that back sheet when he signed it, that is really enough. All right. That is what it comes down to."

20. The case before His Worship was very simple. It had in the course of the proceeding narrowed down to a single issue, that being whether the signing of the back sheet by the appellant demonstrated or evidenced an intention by him to be bound by all of the terms of the new agreement. After taking into account a number of considerations, the Magistrate found, as he was clearly entitled to do on the evidence before him, in favour of the respondent. His statement of reasons was adequate in the circumstances.

21. This appeal must fail.

APPEARANCES: For the appellant O'Callaghan: Mr P Fox, counsel. O'Callaghans, solicitors. For the respondent Simpson: Mr M Wise, counsel. Browne & Co, solicitors.
