

08/03; [2003] VSC 149

SUPREME COURT OF VICTORIA

CAAMANO v BLACKSTONE LEGAL COSTING

Byrne J

12 May 2003

CIVIL PROCEEDINGS – COSTS – CLAIM FOR LEGAL FEES – ACCOUNT RENDERED FOLLOWED BY REMINDER LETTER – DEBT PAID AFTER COMPLAINT FILED BUT BEFORE SERVICE – ENDORSEMENT ON COMPLAINT THAT IF CLAIM AND COSTS PAID FURTHER COSTS MAY BE AVOIDED – CLAIM INCLUDING COSTS UPHeld BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: MAGISTRATES’ COURT ACT 1989, S131.

Section 131 of the *Magistrates’ Court Act 1989* provides that costs of all proceedings are in the discretion of the court. Accordingly, a magistrate had a discretion to award or refuse costs where payment of an account had been made before service of the complaint and without knowledge of the proceeding.

BYRNE J:

1. This is an appeal brought pursuant to s109 of the *Magistrates’ Court Act 1989* against an order for costs made by the Magistrates’ Court at Melbourne on 20 November 2002. The order was that the defendant before the Magistrates’ Court and the appellant in this proceeding, Antonio Caamano, pay to the plaintiff in the Magistrates’ Court and the respondent before me, Blackstone Legal Costing, the sum of \$1,385 for its costs of the proceeding. This sum was ordered to be payable by instalments of \$465 per month.

2. There is no dispute that Mr Caamano, a solicitor, engaged Blackstone to prepare a bill of costs for certain litigation which he had conducted on behalf of a client. The work was done and Blackstone’s bill of \$1,549.69 was not in issue.

3. An account was rendered, followed ultimately by a reminder letter to the effect that if the account was not paid the matter would be placed in the hands of debt collectors. It seems that this was done.

4. Mr Caamano had withheld payment pending receipt of an agreed sum in settlement of the litigation. The amount was received by him and on Saturday, 2 February 2002 he forwarded a cheque for the amount of the Blackstone account. The cheque was received on 5 February and banked by Blackstone.

5. Meantime, unbeknown to Mr Caamano, Blackstone’s solicitors had, on 31 January 2002, commenced the proceeding in the Magistrates’ Court. The complaint sought payment of \$1,549.69 and costs. The complaint bore the following endorsement in accordance with Rule 4.03 -

“If you pay the amount of \$1,549.69 and costs of \$426 to the plaintiff or the plaintiff’s solicitors without giving notice of defence you may avoid further costs.”

6. The complaint was later served on Mr Caamano but not until 12 April 2002. Mr Caamano filed a defence on 6 May asserting payment and alleging further that no letter of demand had been written and that he was not indebted. And so the case moved forward as a defended matter.

7. Mr Caamano on 20 November 2002 filed an amended defence in which he alleged that the payment of the debt had been made in full satisfaction of the amount outstanding. Furthermore, it was alleged that it was a term of his agreement with Blackstone that payment for the work was not due until a reasonable time after he received payment.

8. The case came on for trial before the Magistrate on 20 November 2002. A transcript of over 50 pages was in evidence. At the conclusion of the hearing the Magistrate gave a reasoned

decision for rejecting Mr Caamano's defences and for making the order for costs which I have mentioned.

9. The Master has certified two questions of law –

“(a) In circumstances where a payment by a defendant in full of the debt is made after the filing of a complaint but before service thereof and without the knowledge of such filing, is the plaintiff nonetheless entitled to its costs?

(b) Is such entitlement (if any) affected in any and what way by rendering, between the filing of a complaint and the service thereto, a statement claiming the debt only without reference to any possible claim for costs”.

10. As to the first of these questions, it was submitted that, as a matter of law, the Magistrate had no discretion but to refuse costs where payment had been made before service of the complaint and without knowledge of the proceeding. Against this, counsel for Blackstone submitted that the costs in the Magistrates' Court are discretionary in accordance with s131. To my mind this is correct. The regime established under the *Magistrates' Court Act* and the Rules made under it contain no provision equivalent to the Rules of the Supreme Court, Rule 5.09. The statutory endorsement which uses the expression “you may avoid further costs” confirms this. It is clear, too, that the proceeding is commenced upon the filing of the complaint and not upon service (see Rule 4.04).

11. The position, then, on 2 February was that Mr Caamano was exposed to the risk that a costs order might be made against him notwithstanding that he was unaware that the proceeding had been commenced. Whether this risk might become reality depended upon the order which might be made under s131.

12. In the exercise of this discretion the Magistrate would, naturally enough, have regard to the line of cases to which I was referred including the line of authority commencing with *Toms v Powell*^[1]. It is evident from his reasons that he did so. Likewise, in his reasons he gave consideration to the contrary line of authority culminating in *Shire of Lachlan v Towers*^[2]. His Worship exercised a discretion which I would be reluctant to disturb. Nor, if I may say so, is there any basis shown for my thinking that he fell into error.

13. I should add that the apparent finding that the payment was not made and accepted in satisfaction of the debt was not certified by the Master. It is, in any event, a question of fact and I say nothing more about it.

14. The second question of law is not a substantial one. After the payment was made, Blackstone on Monday, 4 February rendered another account, again seeking payment of \$1,549.69. No mention in this account is made of the Magistrates' Court proceeding or of the possibility of a liability for costs in that proceeding. I must say that I do not see this to be a question of law, nor was I persuaded that it was. Nor do I see the point as having any legal substance.

15. It follows that the two certified questions should be determined adversely to the appellant. The appeal will be dismissed with costs including costs reserved.

[1] [1806] EngR 14; 170 ER 824; (1806) 6 Esp 41.

[2] (1935) 52 WN (NSW) 164.

APPEARANCES: For the appellant Caamano: Ms Irene Bolger, counsel. Antonio Caamano, solicitors. For the respondent Blackstone Legal Costing: Mr FJ Holzer, counsel. John Dunne & Associates, solicitors.
