38/94

SUPREME COURT OF VICTORIA

GUSS v ISLES

Harper J

28 March, 12 April 1994

CIVIL PROCEEDINGS – CLAIM FOR BARRISTER'S FEES FROM SOLICITOR – COUNTERCLAIM FILED BEYOND COURT'S JURISDICTION – SHORTLY PRIOR TO HEARING SOLICITOR SOUGHT TRANSFER OF PROCEEDINGS TO SUPREME COURT – DELAY SAID TO BE DUE TO NEGOTIATIONS BETWEEN PARTIES – APPLICATION TO STAY PROCEEDING REFUSED – WHETHER OPERATION OF RULES SUSPENDED DURING NEGOTIATIONS – NOTICE OF DISPUTE SHORT SERVED – NOTICE NOT GIVEN OF INTENTION TO RELY ON AFFIDAVIT – COMPLIANCE WITH RULES – COUNTERCLAIM STRUCK OUT – INTEREST ALLOWED FROM DATE OF DELIVERY OF FEE VOUCHER – WHETHER PROPER EXERCISE OF DISCRETION: *MAGISTRATES' COURT ACT* 1989, S101(1)(c); *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, RR2.04, 14, 16.02; *SUPREME COURT ACT* 1986, SS58, 60(2)(c), 67.

I., a barrister, claimed barrister's fees from G., a solicitor. By his defence and counterclaim G. alleged that I. was negligent in advising him and claimed damages in excess of $350,000. Five days before the hearing date, G. applied for a transfer of the proceeding to the Supreme Court. When the matter came on for hearing five days later, G. indicated that the delay in applying of the transfer was due to the fact that the parties had been negotiating a settlement. G.'s application for a stay pending the outcome of the application for a transfer was refused and the proceeding commenced to be heard and determined. During the hearing, I. was permitted to rely on an Affidavit and a Notice to Admit, notwithstanding that the notice of intention to rely on the Affidavit had not been given and that G. had short-served a Notice of Dispute. The Magistrate made an order on the claim with costs and interest from the date of delivery of the fee voucher and struck out the counterclaim as being beyond the Court's jurisdiction. On appeal—-

HELD: Appeal dismissed.

1. The operation of the Rules of Court is not suspended simply because negotiations for settlement are under way. Accordingly, it was not open to G. to rely on the failure of negotiations for settlement to explain his failure to apply for a transfer of the proceeding earlier.

2. The Magistrate was not in error in:
(i) refusing leave to G. to rely on his Notice of Dispute;
(ii) admitting the affidavit into evidence;
(iii) striking out the counterclaim; and
(iv) awarding interest from the date when the demand for payment was made namely, the date of delivery of the fee voucher.

HARPER J: [1] On 16 June 1993, Mr Patrick Street, Magistrate, ordered the present appellant (Joseph Guss) to pay the sum of $3,450 to the present respondent (James Isles). This was the amount which Mr Isles claimed as barrister's fees, and was made up as follows:

Drawing two affidavits		$300
Conference		$300
Appearance before the Full Court on an application against Mr Guss' client for security for the costs of appeal (10 April 1992)		$1,200
Appearance 24 April 1992		$450
Appearance 8 May 1992		$1,200
	Total	$3,450

It was not contested before me that neither this amount, nor any part of it, has been paid. It was not contested that, save for such rights to an equitable set-off as adhered to a defence and counterclaim issued by Mr Guss on 7 December 1992, he has no defence to the claim. By his defence and counter claim, Mr Guss alleges that Mr Isles was negligent in advising him in relation to a Supreme Court proceeding (No. 133875 of 1990) entitled *Mark II Ski Club v Alpine Resorts*

Commission. The pleading does not otherwise condescend to particulars, or indeed to any specific allegations at all. It claims unspecified damages.

These defects were the subject of a request for further and better particulars issued on 24 December 1992. In his response dated 19 March 1993, Mr Guss identified by subject matter but not (save to the most limited and unhelpful extent) by date the aspects of Mr Isles' advice **[2]** which were said to be wrong. In general, the further and better particulars are very poorly drawn. If there is, lurking somewhere in the relationship between Messrs. Isles and Guss, a right in the latter to an equitable set-off, then his pleadings do not bring it to light. Indeed, it appears that Mr Isles' claim arises out of a brief to appear (received after most, if not all, of the impugned advice had been given) in an application for security for costs. The advice itself had nothing to do with such an application, although it did concern the litigation under appeal. The further and better particulars of 19 March 1993 gave some particulars of Mr Guss' alleged loss. Included among them was a claim for general damages of $250,000. Also included was a claim for special damages amounting to a further $116,134.

It was clear, therefore, that the counterclaim could not be heard in the Magistrates' Court unless, pursuant to s100(1)(a) of the *Magistrates' Court Act* 1989, Mr Isles consented in writing to that course, or unless the claim for damage was reduced to the extent necessary to fall within the general jurisdictional limit of that Court.

By 11 June 1993, neither of these steps had been taken. It was then, over six months after its issue, that Mr Guss initiated an application to transfer the proceeding to the Supreme Court. He filed in the Magistrates' Court a document dated 11 June 1993 and headed "Referral under Part 3 of the *Courts (Case Transfer) Act* 1991." This application had not been dealt with by 16 June, the day on which Mr Isles' complaint was heard. Mr Guss therefore asked Mr Street to vacate that date. It had, **[3]** however, been fixed on 14 April 1993, two months before. The Magistrate refused Mr Guss' request.

In support of his application for a new trial date, Mr Guss had relied upon the fact that from 22 March 1993, when a pre-trial conference had been held, until 11 June that year, the parties had been negotiating a settlement. It was for this reason, Mr Guss submitted, that he had not earlier sought to transfer the proceeding to the Supreme Court. The Magistrate rejected this excuse. In my opinion, he was justified in so doing. It must be remembered that it is possible to negotiate otherwise than in good faith. There is no evidence here that Mr Guss entered into negotiations with Mr Isles for the purpose of exploiting to his own advantage his delay in prosecuting his case against Mr Isles. Whether by accident or design, however, that is in fact how Mr Guss, in putting his submissions to his Worship, sought to make use of the negotiations.

Litigants, and especially members of the legal profession, must appreciate that the operation of the Rules of Court is not suspended simply because negotiations for settlement are under way. If it were otherwise, an unscrupulous litigant could gain a considerable tactical advantage by pretending to seek a compromise with an opposite party. To say this is not to discourage genuine negotiations. It is always open to a party to suggest to the opposition that, in order to serve costs, a step which otherwise ought to be taken be put aside pending the outcome of the negotiations. For example, it was open to Mr Guss to inform Mr Isles of his intention, should negotiations fail, **[4]** to apply for a stay of the hearing of Mr Isles' claim. In the absence of such an approach, however, the usual time constraints should generally be enforced. It is consistent neither with the Rules of Court nor with ordinary fair dealing for a party to first use the fact of negotiations as an excuse for failing to take a step in the proceedings, and then exploit that failure as a means of gaining an advantage over an opposite party.

This is precisely what Mr Guss attempted to do. Having issued his counterclaim in the Magistrates' Court, he waited for six months before initiating proceedings for its transfer to the Supreme Court. He then put forward his application for a transfer as a reason why Mr Isles' claim should not be heard on the date fixed two months earlier as the date of hearing. In other words, he sought to put off into the indefinite future any hearing of Mr Isles' claim; and he sought this, not because Mr Isles had failed to prosecute the claim in accordance with good practice, but because Mr Guss had not earlier done something which had to be done before Mr Guss' counterclaim could be determined on its merits.

Having refused the application for a stay, his Worship then considered an application by Mr Guss for leave to rely on a notice of dispute. This had been served, out of time, in response to a notice to admit filed by Mr Isles. Indeed, the notice of dispute was dated 15 June and was served on Mr Isles on the following day, which was also the morning of the hearing. Again, the excuse centred upon the negotiations: the notice to admit was received whilst negotiations were in progress, and it was therefore **[5]** reasonable (so Mr Guss contended) for him to disregard the rules. These provide that a party may serve on another party a notice stating that unless that party, within a time to be expressed in the notice (which shall not be less than 14 days after service), disputes the facts specified in the notice, that party shall, for the purpose of the proceeding only, be taken to admit those facts: rule 14.03 of the *Magistrates' Court Civil Procedure Rules* 1989. If the party served with the notice does not dispute any fact specified by serving notice that the party disputes the fact within the time allowed for that purpose, the party shall, for the purposes of the proceeding only, be taken to admit that fact: rule 14.03(2).

It follows that the magistrate was required to proceed on the basis that Mr Guss had admitted the facts specified in Mr Isles' notice to admit. No other course was open unless, in the exercise of his discretion, his Worship were to give leave to Mr Guss to withdraw the admissions which, by his late service of the notice of dispute, Mr Guss was taken to have made. This his Worship could do pursuant to rule 14.03(3). But his Worship was not bound to proceed in this way; and in this case he declined to do so. His decision, not being a final order, is not appealable: *Magistrates' Court Act* s109.

Having referred the proceeding to a court co-ordinator, and it having been assigned to him as the Magistrate who should hear the claim itself, Mr Street proceeded to a consideration of the evidence. That in support of the claim was limited to the facts set out in the notice to admit, and to those facts to which Richard John Howells (Mr Isles' clerk) deposed in an affidavit sworn on **[6]** 25 May 1993. Mr Guss did not challenge their sufficiency in making out the cause of action on which Mr Isles relied. Indeed, in argument before his Worship, Mr Guss submitted that, if the Magistrate did not allow him to withdraw the admissions he was deemed to have made, he "would be effectively shut out from defending the case as [Mr Isles] would be deemed to have admissions in respect to all of the evidence that he needed to prove his case and obtain a judgement": see the affidavit sworn by Mr Guss on 16 June 1993 and filed in support of the present appeal
.

One cannot feel much sympathy for Mr Guss in these circumstances. Even if one assumes, as I do, that he did not attempt to gain a tactical advantage over Mr Isles by deliberately failing to do what ought to have been done, he was nevertheless the author of his own misfortune. He could not plead ignorance, because he is a solicitor. And had his Worship acceded to Mr Guss' several interlocutory applications, Mr Isles' position would have been prejudiced. It is true that an order for costs in favour of Mr Isles, provided that it required taxation as between solicitor and client, might have constituted some, indeed considerable, compensation; but it would not have accorded Mr Isles anything like perfect justice. As was admitted before me, the facts upon which Mr Isles relied for his claim were not open to challenge – no matter what the notice of dispute might have sought to portray. Moreover, the counterclaim – even after the provision of the further and better particulars – is poorly drafted. It gives the reader no confidence, at least as it presently stands, that it conceals the seeds of a viable cause of action for anything like the **[7]** amount claimed – let alone the seeds of an equitable set-off. In my opinion, it was and is too flimsy a document to be used as a means of preventing Mr Street's consideration of Mr Isles' claim.

The relative merits of the two parties at this stage in the proceeding before his Worship can, I think, be summarised succinctly. Had Mr Guss succeeded on either application, and had the hearing been stayed or adjourned as a result, the adverse consequences thereby occasioned would have fallen as much on Mr Isles, the innocent party, as on Mr Guss, who was guilty of a failure to prosecute his (possibly unmeritorious) case with due diligence. If Mr Isles had thereafter failed to obtain an order in his favour for costs taxed on a solicitor/client basis, then the gain to the guilty and the loss to the guiltless would have been complete. The matter may be looked at from another angle, but with the same result. Mr Guss had it in his power to ensure that his counterclaim was heard with Mr Isles' claim. He failed to take the steps necessary to achieve this end. He cannot, in these circumstances, come forward at the last minute with a very imperfectly pleaded cause of action and expect the assistance of the courts in requiring Mr Isles to fall in behind Mr Guss' idiosyncratic timetable.

This, as I understand it, was the position adopted by his Worship. Having considered the notice to admit and Mr Howells' affidavit, he gave judgment for Mr Isles. Before doing so, he rejected a submission, made by Mr Guss after the affidavit had been read to the court, that its contents not be received into evidence. That submission **[8]** relied upon the fact that the conditions required (by rule 16.02 of the *Rules of the Magistrates' Court*) before an affidavit might be used had not been made out. In particular, Mr Isles had not given within time, or perhaps not at all (the material before me is not clear on the point) notice of his intention to rely upon the affidavit. His Worship rejected the submission. He held, in effect, that Mr Guss must have known the purpose behind service of the affidavit upon him. He referred again to the fact that Mr Guss is a solicitor.

It is indeed highly unlikely that Mr Guss did not anticipate an attempt to use the affidavit in support of Mr Isles' claim, or that he was prejudiced by its use in fact. As to the first point, Mr Guss himself conceded before his Worship that a copy of the affidavit, together with a covering letter and the notice to admit, had been sent to him, within time, by Mr Isles' solicitors; and, as to the second, the affidavit material before me does not suggest any prejudice. Mr Guss does not now submit, and apparently did not submit to Mr Street, that he was any worse off by reason of Mr Isles' failure to give the notice than he would have been had notice been received within the stipulated time. Moreover, only one use for the affidavit was reasonably open, given its heading and nature of its contents, and given that Mr Isles' claim had by the time the affidavit was sworn been set down for hearing on 16 June next. In these circumstances, it was in my opinion open to his Worship to exercise the powers given to him by rule 2.04 of the *Rules of the Magistrates' Court*. His Worship was, in the exercise of **[9]** his discretion, entitled to dispense with compliance with the requirement that a notice under rule 16.02 be served.

The decision to allow use of the affidavit was not, of course, part of a final order of the Magistrates' Court, let alone a final order in itself. That being the case, it is not appealable: *Magistrates' Court Act* 1989, s109. I express my opinion about the exercise of his Worship's discretion only because, by orders made by Master Evans on 16 July 1993, this is one of the questions of law raised by the appeal; and the parties may be assisted by my consideration of the matter. Having heard the evidence, Mr Street made the orders to which I referred at the beginning of these reasons. One of these was the order that Mr Guss pay the sum of $3,450 to Mr Isles. This is a final order. It is subject to appeal. An appeal has been instituted, and is now before me. The appeal must be dismissed. The challenge to his Worship's order is without any foundation. That order was based squarely on the facts. The facts are not challenged. The only challenge is to the method of their proof. That was the subject of a series of decisions of his Worship. None were final. None are appealable. Even if they were, Mr Guss has in my opinion failed in each instance to show that the Magistrate's discretion miscarried.

His Worship also ordered, pursuant to s101(1)(c) of the *Magistrates' Court Act*, that the counterclaim be struck out as beyond the jurisdiction of the Court. In the circumstances, no other course was open, save an order that the proceeding be stayed pending the making of an application **[10]** under Part 3 of the *Courts (Case Transfer) Act*: see *Magistrates' Court Act*, s101(1)(b). But there was no point in taking this step. The counterclaim will require extensive re-pleading before it is fit to command the serious attention of a trial Judge. In these circumstances, and given that Mr Guss has already wasted Court time, it was better that he be left to institute such fresh proceedings in the Supreme Court as he might be advised.

Although not squarely raised as a separate issue in the orders of Master Evans made on 16 July 1993, the question of interest was argued before me. His Worship ordered that Mr Guss pay interest calculated from 12 May 1992 rather than from 5 November 1992, when Mr Isles' complaint was issued. The date chosen by the Magistrate was doubtless selected because Mr Isles rendered his account at about that time (according to his notice to admit, the date was on or about 8 May 1992). By s67 of the *Supreme Court Act*, a barrister or the solicitor who briefed him or her may have the barrister's fees taxed by the Taxing Master: s67(5). An appointment may be made for this purpose: s67(7); but, if an appointment is not obtained within one month of the delivery to the solicitor of a bill for the fees, the barrister is entitled to recover them.

No appointment was made in this case. Accordingly, as of 8 June 1992 or thereabouts, Mr Isles was entitled to be paid by Mr Guss. He was also entitled to interest from that time, or from the date of receipt of the fee voucher, or from the date of commencement of the complaint in the

Magistrates' Court on 5 November 1992. The choice is, I **[11]** think, dictated by the provisions of whichever of ss58 and 60 of the *Supreme Court Act* are applicable. Both sections speak of a proceeding in which a debt is recovered. This is such a proceeding. By s60(2)(c), however, nothing in that section applies in relation to any sum on which interest might be awarded by virtue of s58. So the two sections must be distinguished. But the point of distinction is so obscure as to be practically invisible. In *David Leahey (Australia) Pty Ltd v McPherson's Ltd* (unreported, 7 September 1989) Tadgell J ventured a possible rationalisation of the two sections as being:

> "that a debt recovered upon an oral contact and for which no demand for payment was made before action (which must be rare) is not within s58(1) but then falls within s60. However that is, it is clear that in this case s58(1) does apply and s60(1) does not."

In that case, his Honour held that the plaintiff's judgment was plainly for a debt recovered in terms of s58(1). It was for a sum for which, under the old rules of pleading, the action of debt could successfully have been brought; and the recovery of such a sum is within s58(1) once a demand for payment has been made. This in my opinion is the position here. It was submitted on Mr Guss' behalf that the proceeding fell within s60 because there was no evidence about the time when the debt became due, nor concerning any demand for payment. The answer in each case is, I think, that:

(i) by the operation of s67 of the *Supreme Court Act* on the facts as established by the notice to admit, the debt became due a month after the delivery of Mr Isles' fee voucher; and **[12]**

(ii) the delivery of the voucher constituted a demand.

The Magistrate was therefore correct in holding that s58 applies in the circumstances of this case. By that section, interest is in those circumstances to be calculated from the time when demand for payment was made. Again, therefore, the magistrate was correct in calculating interest from May 1992.

I have, I think, now covered all the grounds of appeal argued before me. The questions of law which, according to the orders made by Master Evans on 16 July 1993, were raised by the appeal, have also been dealt with. It seems to me that some of them run into difficulties with s109 of the *Magistrates' Court Act*, which restricts the right of appeal from a civil proceeding in that Court to an appeal from a final order. Be that as it may, none of the questions should in my opinion be answered in the appellant's favour. The Magistrate's assessment of the costs payable by Mr Guss was briefly raised before me. This being a matter entirely within his Worship's discretion, I ought not interfere unless I am satisfied that he acted upon a wrong principle. I am not so satisfied. For these reasons, the appeal must be dismissed.

APPEARANCES: For the appellant Guss: Mr P Cawthorn, counsel. Joseph Guss LL B, solicitor. For the defendant Isles: Mr G Hardy, counsel. Patrick W Dwyer, solicitor.
