03/87

SUPREME COURT OF VICTORIA — FULL COURT

DONOVAN v MILLER

Young CJ, King and Beach JJ

26 May, 18 August 1986 — [1987] VicRp 16; [1987] VR 221

PRACTICE – COSTS – REVIEW OF PARTY AND PARTY TAXATION – BRIEF TO COUNSEL DELIVERED 31 DAYS BEFORE TRIAL – WHETHER PREMATURE – FEE ALLOWED – WHETHER DISCRETION MISCARRIED.

1. The proper conduct of litigation requires a solicitor to prepare and deliver a brief to counsel in good time.

2. In determining the question of party and party costs, the court must consider the individual features of the case and decide whether a reasonable and prudent, but not over-cautious solicitor in all the circumstances would have considered that the time for doing the work had arrived.
***Peile v Nobel (Australasia) Pty Ltd* [1966] VicRp 60; [1966] VR 433, applied.**

3. Where a brief to counsel was delivered two days after a pretrial conference at which no agreement to compromise the action was reached, and 31 days before the hearing date, no miscarriage of discretion occurred where the court allowed fees to counsel.

THE COURT: [1] This is an appeal by a defendant in an action in the County Court from a decision by His Honour Judge Walsh given upon a review of the taxation by the Registrar of that Court of the plaintiff's costs payable by the defendant. In the action the plaintiff claimed from the defendant damages for personal injuries and other loss suffered by the plaintiff as a result of a collision between a motor vehicle which she was driving and a motor vehicle driven by the defendant. The collision occurred on 18th March 1982. The plaintiff suffered multiple injuries **[2]** the most significant of which was a whiplash injury to the neck. The plaintiff became entitled to compensation pursuant to the *Workers Compensation Act* in the form of weekly payments and medical expenses.

The action was commenced by a summons issued on 13th September 1982. The claim was for $25,000. Following the issue of the summons negotiations took place between the parties but no agreement was reached. On 20th October 1983 interrogatories for the examination of the defendant were delivered on behalf of the plaintiff and on 24th October 1983 interrogatories for the examination of the plaintiff were delivered on behalf of the defendant, but on that day the defendant's solicitors advised the plaintiff's solicitors that liability was admitted.

The plaintiff's answers to the defendant's interrogatories were delivered on 22nd March 1984. A certificate of readiness for trial signed by the solicitors for the parties was filed on 9th April 1984. A pre-trial conference attended by the solicitors for the parties was held on 2nd July 1984 but no agreement to compromise the action was reached and accordingly the 6th August 1984 was fixed for the hearing.

On 2nd July 1984, after the pre-trial conference, the solicitors for the defendant wrote to the solicitors for the plaintiff advising that a medical examination of the plaintiff by a surgeon retained by the defendant had been arranged for 17th July 1984. On 4th July 1984 the solicitors for the plaintiff delivered a brief to counsel to appear on the trial. The brief was marked with appropriate fees for the brief and conference and a time for a conference on 2nd August, was arranged. **[3]** On 13th July 1984 the plaintiff's solicitors received notice that the sum of $25,000 had been paid into court with an admission of liability but correspondence ensued between the solicitors for the parties as to whether the sum so paid into court was inclusive or exclusive of $3,926.80, the amount of the weekly payments of workers compensation, and $832.44, the amount of the medical expenses incurred by the plaintiff. On 19th July 1984 the plaintiff's solicitors were

advised by the defendant's solicitors that the payment into court had been made on the basis that the plaintiff was to retain the benefit of the workers compensation payments.

The plaintiff's conference with counsel was held as arranged on 2nd August 1984 and as a result the plaintiff decided to accept the amount paid into court. The defendant's solicitors were notified of such acceptance on 3rd August 1984 and on 6th August His Honour Judge Dyett ordered that the plaintiff's costs be taxed and paid by the defendant. Upon taxation the Registrar disallowed the amount paid to counsel on the brief and conference. The plaintiff sought to review the Registrar's decision and upon that review His Honour Judge Walsh in a very careful judgement concluded that the Registrar was in error and that the fees to counsel should be allowed. It is from that decision that the appeal is brought.

It was first of all contended before us that the learned judge was in error in that the Registrar's decision was a discretionary judgment and that no sufficient ground had been shown to justify the learned judge's interference with the Registrar's exercise of discretion.

[4] We do not have a record of the reasons given by the Registrar for disallowing counsel's fee but in an affidavit filed on behalf of the plaintiff this passage appears: "...the Registrar indicated that in disallowing items relating to the delivery of Brief to Counsel to Appear, he felt himself bound by the decision of the Chief Judge in the case of *Hancock v Tynan*, an unreported Judgment of this Honourable Court dated the 8th day of June 1984 in which the Chief Judge decided in the circumstances of that case the delivery of the Brief to Counsel to Appear earlier than two weeks prior to the date of trial was premature, and should be disallowed." The defendant nowhere contradicted this statement.

We were provided with a transcript of the learned Chief Judge's judgment in *Hancock v Tynan* from which it appears that His Honour had disallowed the costs of briefing counsel for a trial at Ballarat upon the ground that the delivery of the brief in that case was premature. It had been delivered in Melbourne on or about 13th December 1983 for appearance at an action set down for hearing at Ballarat in the March 1984 sittings. The action was an uncomplicated and unexceptional personal injuries claim. In his reasons for judgment His Honour said:

> "If the indemnity cost rule did not exist one could hardly contemplate that a prudent and reasonable solicitor would put his client at risk for payment of the brief fee by delivering the brief on trial in such a case as this, 2½ months prior to the earliest possible date for trial."

We are not, of course, concerned with the correctness of His Honour's decision in that case which must depend upon all the circumstances of that particular case. The decision **[5]** could only have provided guidance of a most general kind to the Registrar in the present case. But the learned Chief Judge, in a passage which immediately follows the passage we have quoted, went on as follows:

> "In an uncomplicated and unexceptional case such as this, I am of the confident view that delivery of the brief to counsel on trial two weeks prior to the commencement of the sittings would have afforded more than ample time to counsel to become fully prepared to present the plaintiff's case on trial. Further, it must be remembered that the size and calibre of the Victorian Bar is such that for a case such as this, there are many members of counsel who are of the requisite seniority and capacity to ably conduct it on behalf of the plaintiff. This was certainly not a rare and unusual case requiring the services of some uniquely talented counsel."

If in that passage His Honour was intending to lay down a rule that even in an uncomplicated and unexceptional case, delivery of a brief to counsel on trial more than two weeks before the commencement of a circuit sittings was necessarily premature, His Honour fell into error, for clearly every case must be decided upon its own facts and no rule of thumb can be applied. Probably His Honour had no such intention. His remarks may perhaps be regarded as no more than emphasizing his view that in the case before him there had been a premature delivery of the brief to counsel. The second passage we have quoted from His Honour's judgment is clearly *obiter dictum*.

Unfortunately, however, the Registrar seems to have regarded the Chief Judge's decision as laying down some such rule. His observation that he regarded himself bound by the Chief Judge's decision really admits of no other explanation. His Honour Judge Walsh thought that the

[6] Registrar acted on an incorrect principle in considering himself bound by the Chief Judge's decision to reject the claim for counsel's fees. It might as well be said that the Registrar had not exercised his discretion at all but had merely applied a rule which he considered to have been laid down by the Chief Judge.

But whether it be expressed as a failure to exercise the discretion or as an exercise of the discretion upon a wrong principle, it is clear that Judge Walsh was correct in deciding that he must review the Registrar's decision and himself make the discretionary judgment. The appellant's first argument therefore fails.

The appellant falls back on to the second argument which was that Judge Walsh's discretion miscarried. In order to succeed, however, he must show that the decision is clearly wrong in the sense in which that expression is used in the well known passage in the judgment of Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at p627. In attempting to do so counsel was not able to point to any wrong principle applied by His Honour, nor to the giving of weight to extraneous or irrelevant matters, nor to the failing to give weight or sufficient weight to relevant considerations, nor to making a mistake as to facts.

Counsel did not contend that the result was so unreasonable that the learned judge must have fallen into error even though that error could not be detected. Instead counsel attacked some of His Honour's reasoning, and suggested reasons why, if the discretion were to be exercised by this Court, it might be exercised differently. It was said that it was not an exceptional case, nor was it complicated. **[7]** His Honour relied upon some observations of Madden CJ in *International Financial Society v Smith* [1897] VicLawRp 24; (1897) 22 VLR 114 at p119 where the Chief Justice had said that in his view briefs could not be too soon prepared. Counsel before us suggested that the Chief Justice was there drawing a distinction between the preparation of a brief and its delivery to counsel.

We see no basis for such a distinction and although we do not wish to encourage the premature delivery of briefs we wish to emphasize that the proper conduct of litigation in the interests of a party requires a solicitor to prepare a brief to counsel in good time and to deliver a brief to counsel in an appropriate case in good time. What is "good time" will of course vary from case to case but it must be governed principally by consideration of the interests of the solicitor's client. To borrow the language of the headnote in *Peile v Nobel (Australasia) Pty Ltd* [1966] VicRp 60; [1966] VR 433, what has to be considered are the individual features of each case, not merely what kind of a case it is. (And see per Starke J at pp437-8).

In determining whether a step taken by a solicitor in an action has been taken prematurely the test to be applied is: Would a reasonable and prudent, but not over-cautious, solicitor in all the circumstances consider that the time for doing the work has arrived? No reason has been shown why this Court should interfere with the learned Judge's exercise of his discretion and the appeal must therefore be dismissed.
