57/08; [2008] VSC 603

SUPREME COURT OF VICTORIA

HARDY v GADENS LAWYERS

Byrne J

1 December 2008

CIVIL PROCEEDINGS – LEGAL PRACTITIONER – LUMP SUM BILLS – CLIENT REQUESTED ITEMISED BILL IN RESPECT OF LAST LUMP SUM BILL ONLY – WHETHER SOLICITOR MAY COMMENCE PROCEEDING TO RECOVER LEGAL COSTS CONTAINED IN ALL BILLS – DEFENCE REJECTED BY COURT – DEFENDANT NOT NOTIFIED – ORDER MADE IN DEFAULT OF DEFENCE – APPLICATION FOR A REHEARING – CLAIM BY APPLICANT THAT HE HAD AN ARGUABLE DEFENCE – FINDING BY MAGISTRATE THAT THERE WAS NO DEFENCE ON THE MERITS – ORDER BY MAGISTRATE ON BILLS WHERE NO APPLICATION FOR AN ITEMISED BILL MADE – WHETHER MAGISTRATE IN ERROR: *LEGAL PROFESSION ACT* 2004, S3.4.36.

1. Section 3.4.36 of the *Legal Profession Act* 2004 is concerned with costs disclosure and review and it provides, in essence, that where a solicitor delivers a lump sum bill, a person or the client, may apply for review of the legal costs to which the bill relates within 30 days after the delivery of the bill. The section then provides that the solicitor must comply with the request within 21 days. The scheme of the legislation is that where there are multiple bills and an application for an itemised bill is made in respect of some of them, then a non-compliance with that request will have the consequence of preventing the solicitor from suing on that bill. It is open for the client not to seek an itemised bill in respect of some or other of a series of bills. If such a bill is not sought, then subsection (4) does not prevent the solicitor from proceeding to recover the amount in those lump sum bills.

2. In relation to the question whether, as a matter of discretion, the magistrate should have set aside the order on the ground that the solicitors had applied for default judgment without giving notice to the defendant's solicitors of their intention to do so, the ordinary courtesies would normally expect that such a notice be given but there is no principle of law that says that a judgment regularly entered for which no defence is available, should be set aside on the basis that this courtesy has not been complied with.

3. In relation to the rehearing application, the principles which the magistrate was obliged to follow are set out in *Kostokanellis v Allen* [1974] VR 596 where the Full Court observed that the requirement that the defendant against whom a default judgment has been entered, should show an arguable defence is pre-eminent in this area. In the present case the defendant in the Magistrates' Court failed to show an arguable defence and in the circumstances it would have been entirely inappropriate for the magistrate to have given leave to defend so the court would then have the pleasure of hearing the argument which the magistrate had described correctly as being unarguable.

BYRNE J:

1. Before the court is an application by originating motion dated 22 October 2008. The plaintiff, Rodney Hardy, was the client of the first-named defendant, Gadens Lawyers.

2. The evidence shows that Gadens acted for Mr Hardy for some years in a Family Court matter. In the course of this, they delivered ten bills which were described as interim accounts. The tenth bill was delivered on 30 August 2006 for an amount of $1,516.90. The total amount billed in all of the bills was $76,960.83. There were payments made and reductions for other reasons so that the total of the bills outstanding as at 13 March 2008 was $63,810.83. On that date, Gadens filed a complaint in the Magistrates' Court, in proceeding X00678416, seeking that amount and interest and costs.

3. On 11 April 2008, the solicitors for Mr Hardy filed and served a notice of defence. This document regrettably contained no information required to be included in such a notice of defence. It appears to have been little more than the notice provided as an annexure to the complaint and summons without any detail of the defence. It was not signed or dated. On receipt of the notice of defence, or soon afterwards, the Magistrates' Court rejected the document as not in appropriate form and advised Mr Hardy's solicitors.

4. On 5 May 2008, Gadens, who were acting for themselves in this matter, applied for judgment in default of defence. That was processed administratively in the Magistrates' Court and judgment was entered against Mr Hardy for the amount claimed, namely $63,810.83, together with interest, $1,132.86 and costs, $423.50.

5. On 28 May 2008, Mr Hardy issued an application to set aside the judgment and this was heard on 25 August. Both parties were represented before the magistrate and at the conclusion, the magistrate set aside the default judgment but entered a judgment for a lesser amount, namely $62,293.91 and interest, $1,132.86 and costs of $423.50. The figure which differed from the amount of the earlier default judgment is explained by the fact that the sum of $1,516.90 was deducted in circumstances which I shall explain.

6. The application before me, as I have mentioned, is brought by originating motion seeking review under O56. The grounds on which the relief are sought are set out in the originating motion. For the most part they are repetitious and essentially the complaint made is three-fold. The first is that the defendant had an arguable defence to the claim and therefore the magistrate should have set the matter down for trial. The arguable defence turned upon the provisions of s3.4.36 of the *Legal Profession Act* 2004. The section here is concerned with costs disclosure and review. It provides, in essence, that where a solicitor delivers a lump sum bill, a person or the client, may apply for review of the legal costs to which the bill relates within 30 days after the delivery of the bill. The section then goes on to provide that the solicitor must comply with the request within 21 days and then follows the relevant subsection (4) which I set out in full:

> "If a person makes a request for an itemised bill in accordance with this section, the law practice must not commence legal proceedings to recover the legal costs from the person until at least 35 days after complying with the request."

7. The point taken on behalf of Mr Hardy is this; the nine interim bills were lump sum bills. No request was made for an itemised bill in respect of any of them. The tenth bill was also a lump sum bill and within the 30 day period, Mr Hardy requested an itemised bill. Pursuant to subsection (2), Gadens ought to have delivered an itemised bill within 21 days but they did not. In fact, no itemised bill was ever provided. Accordingly, the argument goes, Gadens is not entitled to bring a proceeding to recover the legal costs set out in any of the ten bills. Reliance is placed upon the definition of 'legal costs' in the statute.

8. The magistrate, faced with that argument, characterised it as unarguable and rejected it. I agree. It seems to me that the scheme of the legislation is that where there are multiple bills and an application for an itemised bill is made in respect of some of them, then a non-compliance with that request will have the consequence of preventing the solicitor from suing on that bill. It is open for the client not to seek an itemised bill in respect of some or other of a series of bills. If such a bill is not sought, then subsection (4) does not prevent the solicitor from proceeding to recover the amount in those lump sum bills.

9. The second point arose from the circumstances that passed between the solicitor and the former client in the period after the bill was rendered. It is said that in May or June 2007, the parties reached an agreement to settle Gadens' claim for $50,000. It was put to the magistrate and to me that this is a matter which raises a triable issue and that therefore the claim under the bill had merged in the agreement to settle. This argument faces a number of difficulties, not the least of which there is really no evidence that such an agreement was reached.

10. The affidavit of Mr Walker filed in the Magistrates' Court on 20 August 2008, presumably in support of the judgment, confirms this:

> "In May 2007, the plaintiff [Gadens] offered to accept $50,000 in full and final payment of the outstanding amount. It appears that the offer was accepted by the Defendant on 19 June 2007 on the proviso that payment occur after 1 September 2007 by which time the Defendant would be in a position to pay the agreed amount."

11. It is said that that is evidence of a concluded agreement whereas in fact it is a provisional agreement. Mr Walker then goes on to exhibit a series of e-mails and letters dealing with this matter and they confirm that any offer that was made was a conditional offer and it is clear that

the condition was never complied with. Mr Hardy has not paid his $50,000, nor has he set in place any of the arrangements which he said he was going to set in place to achieve that result either within the time specified or at all. Accordingly, the agreement, if there was such an agreement, is at an end and Gadens are at liberty to bring their claim for the amount previously owing, whatever that amount might be.

12. It follows from this that the magistrate was right in seeing that there was no defence on the merits in this proceeding.

13. The question then arose as to whether, as a matter of discretion, the magistrate should have set aside the order on the ground that Gadens, on 5 May 2008, had applied for default judgment without giving notice to Mr Hardy's solicitors of their intention to do so.

14. As I mentioned to counsel, in the course of argument, the ordinary courtesies would normally expect that such a notice be given but I am aware of no principle of law that says that a judgment regularly entered for which no defence is available, should be set aside on the basis that this courtesy has not been complied with.

15. I return now to the originating motion to see on what other bases it is said that the magistrate fell into error. Reference is made to jurisdictional error, failing to give weight to various matters, and failing to take proper account of the affidavit. Many of these are probably issues of fact but none of them raises any issue other than the ones I have mentioned which were the matters which were raised by counsel before me.

16. The principles which the magistrate was obliged to follow are set out in the decision of the Full Court of this Court in *Kostokanellis v Allen*.[1] In that case the Full Court observed that the requirement that the defendant against whom a default judgment has been entered, should show an arguable defence is pre-eminent in this area.[2] In the present case the defendant, Mr Hardy, the plaintiff before this court, the defendant in the Magistrates' Court, failed to show an arguable defence and in the circumstances it would have been entirely inappropriate for the magistrate to have given leave to defend so the court would then have the pleasure of hearing the argument which the magistrate had described correctly, in my view, as being unarguable.

17. What the magistrate then did, notwithstanding that his Honour found that there was no defence, was nevertheless to set aside the order and to insert in its place an order for the amount due minus $1,516.90, being the amount of costs sought in the last interim bill for which a request for itemised bill had been delivered and not complied with. Again, it seems to me that the magistrate was entitled to do this and there was no error in law in deleting or reducing the claim by that amount.

18. There was some uncertainty before me as to what the consequence of all this might be whether, as counsel for Gadens said, his client abandoned the $1,500 in which case it was not necessary to go further, or whether the magistrate on his own motion, reduced the amount in which case the position would be that the matter would remain on foot for the Gadens claim for $1,500.

19. On the face of the order itself nothing seems to have been done about the $1,500. The position then is whether I should, as a matter of proper disposition of this matter, vary the order that is made to insert that the claim by Gadens lawyers against Mr Hardy to order $1,500 should proceed which it seems Gadens does not want and Mr Hardy probably would not want either, or whether I should let things stand as they are. We are in an area of discretionary remedies under O56. In my view, if no party seeks otherwise I should not require them to litigate a modest sum of $1,500. Accordingly the application is refused.

20. The defendant before this court, Gadens, shall have its costs of the application and I so order. The orders that I will make in the proceeding is that the application be dismissed and that the plaintiff pay the first defendant's costs of the application including reserved costs.

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[1] [1974] VicRp 71; [1974] VR 596.
[2] [1974] VicRp 71; [1974] VR 596 at 605-6.

APPEARANCES: For the plaintiff Hardy: Mr J Isles, counsel. Salinger & Associates, solicitors. For the first defendant Gadens Lawyers: Mr J Davidson, counsel. Gadens Lawyers.