24/00; [1999] VSC 167

SUPREME COURT OF VICTORIA

TUCZYNSKI v BRISTOW

O'Bryan J

11, 20 May 1999

CIVIL PROCEEDINGS – BARRISTER'S FEES – CLAIM FOR – GUARANTEE AND CHARGE EXECUTED FOR PAYMENT OF FEES – PARTY GUARANTEED THE DUE AND PUNCTUAL PAYMENT OF FEES – BARRISTER RENDERED ACCOUNT WHILST TRIAL CONTINUING – FEES NOT PAID – BARRISTER TERMINATED SERVICES AND WITHDREW FROM HEARING – CONSTRUCTION OF GUARANTEE – WHETHER BARRISTER RESTRAINED FROM RENDERING ACCOUNT UNTIL COMPLETION OF TRIAL – BARRISTER'S CLAIM UPHELD – WHETHER MAGISTRATE IN ERROR.

T. were officers and shareholders of L P/L. When L P/L became involved in legal proceedings against Telstra, B. a barrister was engaged to perform legal services for L P/L. B. carried out pre-trial services for L P/L and rendered his account. A dispute arose as to the quantum of fees but the issue was resolved when the parties executed an agreement which provided for the payment of the pre-trial fees "on the conclusion of the trial or settlement of the L P/L case." Upon request from T., B. agreed to act for L P/L on the trial. On the second day of the hearing, T. executed a Guarantee and Charge whereby T. jointly and severally guaranteed "the due and punctual payment of" B's fees. When the evidence in the trial was completed and the judge had requested counsel for the parties to prepare final submissions in writing, B. rendered an account for his fees to date. "payable within 30 days". When neither L P/L nor T. paid the outstanding fees, B. terminated his services and withdrew from the hearing. Subsequently, B. claimed a sum for the trial fees based upon the Guarantee and Charge. The magistrate upheld the claim. Upon appeal—

HELD: Appeal dismissed.
A barrister is entitled to request a client to pay fees in advance or periodically during the course of a trial and to enter into an agreement accordingly. This is reasonable if the trial is likely to occupy many days of hearing. The Guarantee and Charge did not contain an express term restraining B. from rendering an interim account for trial fees incurred. In the absence of an express term it was not reasonable to imply a term which would restrain B. from rendering an account for fees to date during the trial. Accordingly, it was open to the magistrate to find that there was no term in the Guarantee and Charge or the agreement that fees on trial were to become payable only at the conclusion of the case.

O'BRYAN J:

1. This is an appeal from an order made in the Magistrates' Court at Melbourne on 23 November 1998 wherein the appellants (J & L Tuczynski) were ordered to pay the respondent (A N Bristow) the sum of $18,000 for legal fees, plus interest $1,815.25, plus costs $10,252. The claim for legal fees was based upon a "Guarantee and Charge".

2. The appellants appealed the order and on 21 December 1998 the appellants obtained an order from Master Wheeler pursuant to Rule 58.09 of the *Supreme Court Rules of Civil Procedure* that three questions of law are to be decided.

> (i) The respondent, having terminated his retainer prior to the completion of the relevant trial, was entitled to enforce the guarantee in respect of his fees?
>
> (ii) Was the respondent entitled to enforce the guarantee in respect of previously incurred fees?
>
> (iii) Should the appellants have obtained independent legal advice prior to execution of the guarantee?

3. The order made by Master Wheeler, authenticated on 24 December 1998, refers to an order made in Complaint No L00380013 (the Bristow case) for an amount of $24,200 pursuant to a "deed guarantee" and costs of $10,252.00. The amount claimed in the Bristow case was $18,000 plus interest not $24,200. A counterclaim, in No L01571914, in which Liberty USA Pty Ltd was plaintiff and Andrew Nigel Bristow was defendant (the Liberty case) was heard in the court below at the same time as the Bristow case. The counterclaim in the Liberty case was for a sum

of $24,200, plus interest, plus costs. $18,000 of the counterclaim was identical to the amount claimed in the Bristow case.

4. The court did not make an order in the Bristow case for $24,200. It made an order for $24,200, plus interest, plus costs on the counterclaim in the Liberty case and no appeal was commenced in this Court against that order.

5. Ground (i) in this appeal is not expressed clearly. It was intended to read: "Was the respondent (A N Bristow) entitled to enforce the guarantee in respect of his fees, having terminated his retainer prior to the completion of the relevant trial"?

6. Ground (ii) is inappropriate and incompetent because in the Bristow case the respondent did not claim "in respect of previously incurred fees". It will be made clearer later in these reasons that an amount of $6,200 in respect of "previously incurred fees" was part of the claim for $24,200 in the counterclaim in the Liberty case and not part of the order from which this appeal was taken.

7. Ground (iii) is also inappropriate and incompetent because the appellants never raised, by way of defence to the claim in the Bristow case, the absence of independent legal advice.

8. The appellants never alleged in their Notice of Amended Defence dated 22 July 1998 that they were under a "special disability" sufficiently evident to the respondent to make it unfair or unconscientious for him to be allowed to rely on the Guarantee and Charge unless he advised or offered the appellants the opportunity to seek independent legal advice before they signed the document. *The Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; (1983) 151 CLR 447; 46 ALR 402; (1983) 57 ALJR 358; 19 ATPR 41-288; [1983-84] ANZ Conv R 169. The Reasons for Decision of the learned magistrate do not refer to an Amadio defence raised at the hearing. There being no issue of "special disability" in the court below, the appellants are not entitled to raise the issue on appeal. They may not introduce fresh evidence or make submissions on the law in respect of a defence not raised below.

9. In any event the evidentiary material sought to be introduced now by the appellants does not raise an arguable defence based upon "special disability".

10. In the Magistrates' Court the central issue turned upon the construction of a Guarantee and Charge dated 2 December 1998.

11. The respondent is and was at all material times a qualified legal practitioner practising as a barrister. In 1994 the appellants were officers and shareholders of Liberty USA Pty Ltd (hereinafter referred to as "Liberty"). Liberty commenced a proceeding against Telstra in 1994 in the Federal Court and engaged the respondent to perform legal services for Liberty. The respondent performed pre-trial legal services for Liberty and rendered accounts for fees totalling $6,200. The appellants disputed $4,900 of those fees but desired the respondent to act for Liberty upon the trial. The respondent was reluctant to act for Liberty on account of the dispute regarding his pre-trial fees and the poverty of Liberty. The problem was resolved, however, when the parties executed an agreement on 2 December 1997 (the said agreement) which provided for the payment of the pre-trial fees "on the conclusion of the trial or settlement of the said action" (i.e. the Liberty case).

12. The appellants then agreed to pay the respondent fees for acting for Liberty at the trial, such fees to be at the rate of $2,000 per day and including two days preparation. The respondent believed Liberty did not have the means to pay his fees at trial and sought a personal guarantee from the appellants as to payment of those fees and security, by way of a Charge over a suburban property the appellants owned jointly or as tenants in common. The Guarantee and Charge did not guarantee or secure payment of pre-trial fees.

13. The appellants duly executed a Guarantee and Charge on 2 December 1997 the second day of hearing. The appellants jointly and severally guaranteed "the due and punctual payment of your fees for acting for Liberty at the said trial such fees to be at the agreed rate of $2,000 per day and including two days preparation". In order to secure the payment of the fees at trial the appellants charged their right title and interest in the property known as 27 Tamarisk Avenue, Glen Waverley being all the land in Certificate of Title Volume 8618 Folio 164. When the *Legal Practice Act* 1996 became law a legal practitioner was permitted to take security from a client for

legal costs and interest on unpaid legal costs and to refuse or cease to act for a client who did not provide reasonable security (section 94). By section 96 a "costs agreement" can be made between a client and a legal practitioner.

14. On 1 December 1997 the hearing of the Liberty trial commenced in the Federal Court. On the second day of the hearing the Guarantee and Charge and the said agreement were executed by the appellants. On 10 December the respondent rendered an account for his fees to date — two days preparation at $2,000 per day and seven hearing days at $2,000 per day — total $18,000. The fee voucher issued by the respondent's clerk included the following: "In the absence of an arrangement to the contrary these fees are payable within 30 days of this account".

15. At that stage evidence in the Liberty trial was complete and the learned judge had requested counsel for the parties to prepare final submissions in writing. The respondent believed that the preparation of submissions in writing would occupy a further two days preparation time. He became concerned, firstly, that no fees had been paid for his services, pre-trial or at trial, and secondly, that Liberty did not have the means and ability to pay his fees if it became the unsuccessful party. The appellants offered further security in the form of a mortgage but the respondent was not satisfied.

16. When neither Liberty nor the appellants paid the fees totalling $18,000 the respondent terminated his services and withdrew from the hearing. The consequence was that the appellants had to engage another barrister to present Liberty's case.

17. Whilst it is not the role of this court to rule upon the reasonableness of the respondent's actions, nor is it the role of the court to comment upon the ethics of counsel withdrawing from a trial before the trial has concluded it is appropriate to refer to a principle stated by Sir Gregory Gowans:

> *Professional Conduct Practice and Etiquette - the Victorian Bar* (1979):
>
> "It is a fundamental obligation of counsel who has once commenced the hearing of any proceeding to continue in attendance until its conclusion regardless of the inconvenience to himself or any possible financial loss" (At 80).

How far this principle has been eroded by the *Legal Practice Act* was not revealed during the appeal.

18. During argument Mr Cameron of counsel who appeared for the respondent submitted that the appellants terminated the respondent's services. A perusal of the learned magistrate's reasons shows that he found the respondent terminated his services I shall proceed upon that basis.

19. The critical issue argued in the court below was whether the respondent was entitled to render an account for his fees on trial before the conclusion of the trial and to terminate his services when he did early in February 1998.

20. The appellants argued in the court below that the respondent had breached the said agreement between the parties because the said agreement provided that the respondent would act for Liberty in the said trial from its commencement until its completion, that is, until judgment was given or settlement reached.

21. The appellants argued that the respondent was precluded by the said agreement and/or the Guarantee and Charge from rendering an account for payment of his fees before the conclusion of the trial and was not entitled to terminate his services prior to completion of the case. In doing so, they argued that the respondent repudiated the said agreement and was not entitled to be paid for his services or not entitled to sue for his fees on trial. No other arrangement to extend payment of fees beyond 30 days of the account was suggested by the appellants.

22. At the hearing in this Court the appellants were unrepresented but they were able to place before the court a written argument in support of each ground of appeal.

23. As indicated earlier grounds (ii) and (iii) are incompetent. The claim in the Bristow case

below was limited to "trial fees" and was not concerned with "previously incurred fees". And an *Amadio* defence was not raised in the court below.

24. In support of ground (i) the written argument ranged over a number of matters not relevant to the ground and asserted, frequently, fraud on the part of the respondent. There is no justification for the repetitive assertion of fraud and the court will ignore it.

25. The appellants confused the purpose and effect of "the said agreement" and the purpose and effect of the "Guarantee and Charge". The purpose of "the said agreement" was to specify terms for the payment of unpaid previously incurred fees. It did not deal with fees on trial. The said agreement does not assist the appellants, its relevance in the court below was limited to the Liberty case.

26. The Guarantee and Charge was relevant only to the claim of the respondent in the Bristow case that his fees on trial (including two days preparation) had been guaranteed personally by the appellants and secured by a charge over land owned by them.

27. As earlier indicated, in the guarantee document the appellants "jointly and severally hereby guarantee to you the due and punctual payment of your fees for acting for Liberty at the said trial such fees to be at the agreed rate of $2,000 per day and including two days preparation".

28. The appellants submitted that the proper construction of the Guarantee required the respondent not to render an account for payment of his fees nor to seek payment of his fees, until the trial was completed. In rendering an account they submitted that the respondent repudiated the Guarantee and Charge and was not entitled to rely upon the Guarantee and Charge for the payment of his fees by the appellants.

29. The submission was put in several different ways. The questions for the court below were whether the respondent was entitled:

(i) to render an account for trial fees incurred to date, before completion of the trial;

(ii) to terminate his services before completion of the trial;

(iii) to sue the appellants for unpaid fees on trial?

30. A barrister is entitled to request his client pay his fees in advance or periodically during the course of a trial and to enter into an agreement accordingly. This is reasonable if the trial is likely to occupy many days of hearing. Should the client be unable to provide reasonable security for fees on trial the *Legal Practice Act* permits a "costs agreement" and or reasonable security.

31. The Guarantee and Charge does not contain an express term restraining the respondent from rendering an interim account for trial fees incurred during the Liberty v Telstra proceeding.

32. In the absence of an express term, is it reasonable to imply a term which would restrain the respondent from rendering an account for fees to date during the trial? I think not. Conditions which must be satisfied to justify the implication of a term into a contract are not present in the present case. See *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1977] HCA 40; (1977) 16 ALR 363; (1977) 45 LGRA 62; (1977) 52 ALJR 20; 32 ALT 41; (1977) 180 CLR 266.

33. It is unreasonable to imply a term into the Guarantee and Charge which would preclude the respondent from terminating his services before the conclusion of the trial when the appellants failed to pay fees on trial within 30 days of the account being rendered. No argument was put in the court below that the respondent had not earned $18,000 on account of his services at trial. The issue was whether the respondent was entitled to seek payment of his fees before completion of the trial.

34. In my opinion, the learned magistrate was entitled to find, as he did, that neither the Guarantee and Charge nor the said agreement required the respondent to act in the Liberty proceeding until completion either by of judgment or settlement of the case. The learned magistrate held, correctly in my opinion, there was no term that fees on trial were to become payable only

at the conclusion of the case.

35. It follows that ground (i) of the appeal is unsuccessful. Each question of law is answered in the negative. The appeal must be dismissed with costs.

APPEARANCES: The appellants Tuczynski appeared in person. For the respondent Bristow: Mr Cameron, counsel. Robert Wood & Associates, solicitors.
