28/00; [2000] VSC 41

SUPREME COURT OF VICTORIA

AHMED v RUSSELL KENNEDY (a firm)

Ashley J

7, 8, 15, 23 February 2000

CIVIL PROCEEDINGS – CLAIM FOR SOLICITORS FEES – TERMS OF RETAINER – FEES NOT PAID BY CLIENT – RETAINER TERMINATED BY SOLICITORS BEFORE ACTION COMPLETED – REFUSAL TO HAND OVER PAPERS TO NEW SOLICITORS – COSTS INCURRED IN ATTEMPTING TO OBTAIN PAPERS – CLAIM REFUSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – HEARING COMMENCED – APPLICATION TO AMEND DEFENCE – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR – *UNDERWOOD* PRINCIPLE RAISED – NOT ADDRESSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – REFUSAL BY MAGISTRATE TO REDUCE SUCCESSFUL CLAIM BY ONE-SIXTH – MAGISTRATE INFORMED OF EXISTENCE OF OFFER OF COMPROMISE – EFFECT.

A. engaged a firm of solicitors (ATRK) to act for him in a County Court proceeding. Some time after the hearing concluded but before a decision was handed down ATRK submitted a lump sum bill of costs to A. for more than $16,000. The following month A. requested an itemised bill and stated that a partner in the firm of ATRK had given A. an estimated maximum cost which was less than the amount claimed. Shortly after, ATRK wrote to A. stating, *inter alia*, that:

> "We are currently in the process of having the costs prepared in taxable form. Until such time as the dispute is resolved and our costs paid, we cannot act for you any further in this matter. We also give notice that we claim a lien over the documents and materials in our possession, so that the same will not be released out of our possession until such time as the costs issue is resolved."

Three months later a bill of costs in taxable form was supplied to A. by ATRK saying that it was "not prepared to act for [A.] any further". The dispute was not settled and no further costs or disbursements were paid by A. Some time later RK which was the new name of the firm ATRK issued proceedings in the Magistrates' Court to recover an amount for work and labour done. A. filed a notice of defence and a counterclaim in which he claimed the costs associated in engaging a new firm of solicitors to continue the action in the County Court. A. also asserted that: "By the plaintiff solicitor withdrawn the instruction unilaterally, they are estopped or barred of claiming any money or at all from the defendant." After the hearing commenced in the Magistrates' Court, A. filed an application to amend his defence by denying there was any contractual relationship between A. and RK. The magistrate refused the application but did not conclude that the amendment would cause RK irredeemable prejudice. The magistrate took into account the fact that the amendment would give rise to a "contingent or alternative" counterclaim and he had regard to A's concern that he wanted A's counterclaim to proceed.

In the course of the hearing, A. referred to *Underwood, Son & Piper v Lewis* [1894] 2 QB 306 and contended that a solicitor could not "discontinue to act for a client without good cause" and further, that a negligent solicitor was not entitled to recover fees from a client. A. also produced a bill of costs which showed that the sum of $114.20 had been incurred by the second solicitors in making unsuccessful attempts to obtain the file from RK. In delivering his reasons for decision, the magistrate upheld the claim by RK and concluded that A. had not established any failure by RK to exercise appropriate care and skill in conducting the County Court action. The magistrate found that RK had no lien because they had terminated the agreement with A. and the refusal to release the papers was a breach of the agreement. However, as A. had not established any loss attributable to the breach, A's counterclaim was dismissed. The magistrate made no mention of the *Underwood* principle in his reasons; however, the magistrate made a note to the effect that A. had "won on this issue and it was not necessary to refer" to this case. In relation to the question of costs, A. submitted that as the bill of costs had been reduced by more than one-sixth, RK should pay the costs of the taxation. A. also made reference to an offer of compromise. Ultimately the magistrate made an order in RK's favour for costs together with interest. Upon appeal—

HELD: Appeal allowed. Orders set aside. (1) Order that the claim and counterclaim be remitted to the magistrate for determination of the questions whether RK terminated the retainer with good cause and on reasonable notice. Further, in relation to the counterclaim, order that subject to determination of the questions referred to in para (1), an order be made in A's favour in the sum of $114.20.

1. Generally speaking, late amendment of a pleading should be permitted where it will not cause irredeemable prejudice to the opposing party. In exercising his discretion to refuse the amendment, the magistrate gave weight to extraneous or irrelevant matters. However, this question would not be remitted to the magistrate for rehearing. Such a course would mean that time and money would have been spent and to no substantial effect. Further, RK could be placed in a position of potential disadvantage if the matter were remitted.

2. The court documents upon which A. went to trial before the magistrate did not raise the *Underwood* principle. Speaking generally, the *Underwood* principle is that when a solicitor is retained by a client, the solicitor undertakes to finish the business the subject of the retainer. A retainer is ordinarily an entire contract. Remuneration is not recoverable where a solicitor withdraws without justification. But a term is ordinarily implied into a retainer that a solicitor may withdraw on good cause and upon reasonable notice.

3. It appears that the magistrate must have misapprehended the argument advanced by A. in relation to the termination of the retainer. The magistrate dealt with the termination of retainer arguments only in the context of the counterclaim and decided that RK were not entitled to retain the papers. In referring to *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 All ER 1049; [1980] 1 WLR 614, it was open to the magistrate to find that RK were bound to hand over A's papers to a new solicitor despite their lien on the papers for costs. However, the principle which derives from *Underwood* is a different principle to that exemplified by *Gamlen*.

4. Having regard to the magistrate's finding that RK were in breach of the retainer, it would have been open to the magistrate to make an order on the counterclaim in the sum of $114.20.

5. If the "one-sixth rule" had been applicable its effect would have been to oblige RK to pay the costs of the taxation — not to reduce RK's claim by one-sixth. There was no assessment of costs by the Taxing Master and the rule had nothing to do with the proceeding in the Magistrates' Court. The magistrate could hardly have been influenced in considering whether or not the one-sixth rule should be applied had he known of the amount of the offer of compromise.

ASHLEY J:

The sequence of events

1. In June 1992 Mohamed Ahmed ("Ahmed" or "the appellant") engaged a firm of solicitors then practising under the title Abbott Tout Russell Kennedy ("ATRK") to act for him in a County Court proceeding in which he was sued by the ANZ Banking Corporation on a guarantee.

2. The proceeding came to trial in September 1993.

3. The hearing concluded in early October 1993.

4. On 25 October 1993 ATRK submitted a lump sum bill of costs to the appellant. An amount of $14,446.50 in costs and $1,915.30 in disbursements – the latter sum being net of amounts previously paid to the solicitors by the appellant – was claimed.

5. On 14 November 1993 the appellant requested an itemised bill. In his letter the appellant said this:

> "More than one telephone call have been conducted with Mr Harcourt in relation to the objection of the cost. There was an estimated cost of maximum of $6,000 made by Mr Michael Main."

6. Mr Main was the partner in the solicitors' firm with whom the retainer agreement had been concluded in June 1992. The reference to $6,000 was a reference to a contention consistently pursued by the appellant in the course of the subsequent Magistrates' Court proceeding — that is, that by the retainer agreement the appellant was obliged to pay a maximum of $6,000 to the solicitors to conduct his County Court proceeding.

7. In December 1993 the County Court advised the parties that the judge who had conducted the trial was unable by reason of illness to give a decision. The trial was aborted.

8. On 15 December 1993 ATRK wrote to the appellant saying, *inter alia*, the following:

> "We note that there is currently a dispute between yourself and our office regarding the proper solicitor/client costs in this matter. We are currently in the process of having the costs prepared in taxable form. Until such time as the dispute is resolved and our costs paid, we cannot act for you any further in this matter. We also give notice that we claim a lien over the documents and materials in our possession, so that the same will not be released out of our possession until such time as the costs issue is resolved."

9. The dispute evidently concerned the appellant's contention, denied by the solicitors, that

he was liable to pay nothing beyond $6,000 to the solicitors – an amount which he had already paid. The consequence of his contention was that in substance he disputed his obligation to pay, *inter alia*, any disbursements then outstanding.

10. On 25 March 1994 ATRK provided a bill of costs in taxable form to the appellant. Costs were noted at $12,995 and disbursements at $8,895.40. The latter sum had not been netted off to reflect amounts already paid by the appellant.

11. On the same day ATRK wrote to the appellant saying that it was "not prepared to act for you any further and unless you obtain another solicitor to take over the conduct of the file, we will make application to the County Court to be removed from the court record".

12. The dispute was not settled, no further costs or disbursements were paid, and the appellant retained other solicitors. The new solicitors did not succeed in obtaining possession of the file.

13. In the period to September 1994, the old solicitors made abortive attempts to have their costs taxed — first in this Court, then in the County Court.

14. On 15 September 1994 Russell Kennedy (RK) — by now the old solicitors' partnership was trading in that name — filed a complaint in the Magistrates' Court seeking the sum of $16,019.30 for work and labour done. Paragraph 1 of the particulars of claim was as follows:

> "The Plaintiff is, and has been since 1 May 1994, a firm of solicitors carrying on business under the name and style of Russell Kennedy and is capable of suing and being sued in the name set out above pursuant to the rules of Court. Prior to 1 May 1994 the name of the firm was Abbott Tout Russell Kennedy."

15. The amount of $16,019.30 was smaller than the amount of the bill in taxable form. In substance, several additional amounts were claimed, then credit was given for about $7,500 paid by the appellant, as the solicitors said, on account.

16. The claim was founded on a retainer agreement said to have been made on 25 June 1992 between RK and the appellant, that retainer being to act for the appellant in the defence of an action brought against him by the bank.

17. On 10 October 1994 the appellant filed a defence and counterclaim. This document was drawn by the appellant himself. By paragraph 1 of the document paragraph 1 of the particulars of claim was admitted. By paragraph 2 the appellant admitted, in substance, that a retainer was made on 25 June 1992 between RK and himself. The detail of the retainer, so far as it concerned the appellant's financial obligations, was put in issue. The appellant denied indebtedness. He raised a counterclaim. In part it asserted that he had been obliged to engage fresh solicitors by reason of the solicitors' breach of duty, and that

> "The cost of the new solicitor firm must be carried by the plaintiff solicitor for the reason that the new appointed solicitor firm commences the conduct of the file from the beginning and substantial time is required to do that. The Court must allow the cost of the new solicitor to be born on the plaintiff solicitor."

18. The document also asserted this, by paragraph 5(g):

> "By the plaintiff solicitor withdrawn the instruction unilaterally, they are estopped or barred of claiming any money or at all from the defendant".

19. The County Court proceeding came on for retrial in November 1994. It was compromised, the appellant agreeing to pay the bank $27,000 all in.

20. The Magistrates' Court proceeding did not come on for hearing until some two years had passed from the time of its inception. At about the time when the hearing commenced RK delivered amended particulars of claim. The amount claimed was reduced to $14,191.30. That sum represented simply the amount of the bill in taxable form less the amount which the solicitors claimed had been paid on account.

21. The appellant delivered separately an amended defence and an amended counterclaim; the former, it seems, in December 1996 and the latter in September 1996.

22. By his amended defence the appellant admitted paragraph 1 of the amended particulars of claim. The document contained two paragraphs numbered "2". One admitted that he had retained RK. The other asserted that he had retained ATRK.

23. The starting point of the appellant's amended counterclaim was his allegation that he had retained the RK.

24. Amongst the particulars of breach of retainer this was alleged:

> "(vii) The Plaintiff withdrew from acting on behalf of the Defendant but refused to release the Defendant's file to his new solicitors."

25. The particulars of loss and damage were extensive. None of them clearly identified a monetary consequence of that alleged breach. For the most part they could have had no connection with it.

26. The amended counterclaim did not replicate paragraph 5(g) of the earlier document.

27. Trial of the proceeding began on 18 September 1996.

28. The hearing continued on 19 and 20 September, and resumed on 18 December. Shortly prior to 18 December the appellant served summonses to witness on Messrs Main and Harcourt. I have already referred to Mr Main. The evidence showed that he was a partner in the firm of ATRK in the period 1992-1994, and that he was a partner in the firm of RK thereafter. Mr Harcourt was, as I understand it, an employee solicitor of those firms at relevant times. In addition to seeking production of quite inappropriate documents and information, the summons to witness addressed to Mr Main sought

> "8. (As Senior Partner) all agreement relating to amalgamation and disolution of the partnership between Abbott Tout Russell Kennedy (a Firm) and Russell Kennedy (a Firm) relating transferring the files and costs of work in progress. 9. Writing authorisation from Abbott Tout Russell Kennedy (Firm) to Russell Kennedy (a Firm) to collect fees and costs."

29. RK thereafter applied to strike out the summonses to witness. Before it did so the appellant was informed, in writing.

> "In respect of item 8 of Mr Main's Summons, there was no amalgamation and dissolution of the partnership between Abbott Tout Russell Kennedy and Russell Kennedy and accordingly, there is no agreement relating to transferring the file and costs of work in progress in the manner stipulated by your Summons. The change in name of the firm was just that, a change of name. It was not a change in partnership. In any event, we note that in your Defence you have admitted the allegation stated in paragraph 1 of the Complaint."

30. Debate about the witness summonses led on to the appellant filing an application to amend his defence. The proposed amendment was as follows:

> "1. The defendant deny's the allegation of paragraph 1.
> PARTICULARS
> (a) the defendant was contracted with a firm so called Abbott Tout Russell Kennedy (ATRK) on the 25/06/92.
> (b) This firm Abbott Tout Russell Kennedy had cease in existence on the 5/05/94.
> (c) There is no contractual relationship whatsoever between the defendant and Russell Kennedy.
> (d) There is no relationship between Abbott Tout Russell Kennedy and the firm so called Russell Kennedy.
> (e) If there is any contractual relationship between Abbot Tout Russell Kennedy and Russell Kennedy, Russell Kennedy must prove it through:
> I) the Closing Accounting books
> II) Assets & Liabilities of Partnership
> III) Work in Progress of (ATRK)
> IV) Minutes of dissolution of Partnership

V) Authorization from the retired Partners of (ATRK) to Russell Kennedy
VI) Advertising of the dissolution of the Partnership of (ATRK) in the Government Gazette and any Newspapers in every state that (ATRK) is in operation."

31. RK filed material in opposition to the application, which application was considered and refused by the learned magistrate on 3 February 1997.

32. His Worship noted that he had approached the matter very carefully in circumstances where the appellant was unrepresented. He concluded that if the amendment was permitted, and the appellant succeeded on that score, it would be fatal to the success of his counterclaim; but not so if the appellant failed on that issue. The counterclaim should thus be characterised as "contingent or alternative". Such a procedure was unknown to his Worship. Nor, he believed, was it permitted by Rules of Court.

33. His Worship noted that the appellant "was clear he wanted his counterclaim to proceed". That could only be the result, his Worship said, if he refused the amendment which had been sought.

34. The hearing continued, in respect of what were a claim and counterclaim of modest size, on 4, 24, 25, 26, 27 and 28 February, 3, 4, 5, 20, 21 and 24 March, and 24 and 25 June 1997. The evidence continued until 24 June. Final submissions commenced on that day and concluded on 25 June. The evidence examined in minute detail, amongst other things, the conduct of the solicitors in maintaining the appellant's defence to the bank's claim.

35. In the course of his submissions the appellant, who appeared unrepresented, contended that a solicitor could not "discontinue to act for a client without good cause". In that connection he cited *Underwood, Son & Piper v Lewis* [1894] 2 QB 306. He further submitted that a negligent solicitor was not entitled to recover fees from a client.

36. The magistrate delivered his decision on 18 August 1997. Concerning RK's claim his Worship focussed on the dispute whether Main (for the solicitors) had agreed with the appellant that the maximum amount payable under the retainer by the appellant would be $6,000, or was rather unlimited. His Worship concluded that the solicitors had made out their case in that connection.

37. In large part his Worship's reasons direct upon issues raised by the counterclaim. In that connection his Worship concluded that the appellant had not established any failure by the solicitors to exercise appropriate care and skill in conducting the County Court litigation.

38. In dealing with the counterclaim his Worship also addressed what he described as the defendant's argument that "retention of or refusal to release the papers in the circumstances of the case was in breach of the retainer agreement and/or in breach of the duty of care the plaintiff owed to the defendant".

39. He then identified two arguments which he said were open to the appellant in this connection. First, that the solicitors had no lien because they had terminated the agreement. Second, that the solicitors were in breach of Rule 5(1)(a) of the *Solicitors (Professional Conduct and Practice) Rules* 1984.

40. It is convenient to set out Rules 5(1)(a), 5(2) and 5(3).

"5 (1) (a) Subject to sub-rule (3) hereof, a solicitor shall, within a period of one month after being so requested in writing by a client or such further period as the client in writing allows or as may in the circumstances be reasonable, render to the client a Bill of Costs in such detail as to be capable of being taxed and covering all work performed for that client to which such request relates and for which the solicitor has not already rendered such a Bill of Costs or been paid. (2) Without prejudice to any other liability of the solicitor, if the solicitor fails or neglects to render such a Bill of Costs within such period as aforesaid the solicitor shall, subject to sub-rule (3), forthwith pay to the client all moneys and deliver to the client all documents which the solicitor is holding on behalf of that client notwithstanding that the solicitor may otherwise be entitled to a lien upon those moneys or documents for payment of the solicitor's costs. (3) The foregoing provisions of this rule shall not apply

to a solicitor who has a sufficient and satisfactory reason for not complying with the said request of the solicitor's client."

41. His Worship concluded that

* The Respondent had terminated the retainer;

* The Respondent had not complied with a request by the Appellant to provide him with an itemised bill either within a month of the request or within a time which was reasonable;

* Therefore the Respondent was not entitled to retain the papers;

* The Respondent knew or should have known that to retain the papers was unjustified. So its refusal to release the papers was a breach of agreement and/or breach of duty of care.

42. As to damage, his Worship held that the appellant had not established any loss attributable to the proven breach. In so concluding, he focussed upon the items of loss and damage as they were broadly specified in the counterclaim. None of those items, as I earlier noted, clearly addressed the question of added expense incurred by the appellant by reason of the solicitors' refusal to give up the papers.

43. His Worship did not fix the amount that the solicitors should recover on their claim. He left that for later determination. He did order that the counterclaim be dismissed, reserving the costs of the successful defendant to counterclaim.

44. There followed debate, at first between the parties, then in court, as to how the solicitors' claim for costs was to be quantified. Before the matter returned to court, which was in November 1997, the appellant had commenced an appeal against the learned magistrate's ruling on the amendment application and the decision which he announced on 18 August 1997. A solicitor acted for him in that connection.

45. When the matter returned to court on 25 November 1997 the appellant raised matters old and new in an attempt to prevent an order being made against him. It will be necessary to refer to several of those matters hereafter. He further contended that "if the court chooses to give judgment in favour of the plaintiff, then the court makes no order as to costs in favour of the plaintiff".

46. On 25 November the learned magistrate adjourned the matter to a date to be fixed. It was in contemplation that in some way a taxation of the solicitors' costs might be referred to the Taxing Master of this Court.

47. The matter returned to court on 12 February 1998. In the absence of agreement about referral of the matter to the Taxing Master the learned magistrate determined to quantify the appropriate amount of the solicitors' claim.

48. On 16 June 1998 each of the parties had a costs consultant at court. The experts conferred out of court. By early 17 June agreement was reached that the solicitors' claim set out in the bill of costs dated 15 March 1994 should be reduced by $4,737.10. The net amount payable, giving the appellant credit for $8,163 earlier paid, was then $9,454.20. An agreement was signed by the parties. The magistrate was informed that the amount of the claim had been determined in this way.

49. Then, that is on 17 June 1998, the appellant submitted that the bill of costs had been reduced by more than one-sixth, and that in consequence the solicitors should pay the costs of the taxation. The appellant relied, as I understand it, upon s119(2) of the *Legal Practice Act* 1996. Having ultimately agreed upon the amount of the claim he now contended that if the magistrate had no power to apply the one-sixth rule he should refer the bill to the Taxing Master. Counsel for the solicitors submitted that the section applied only to a matter before the Taxing Master; and he observed that the appellant had at all times refused the solicitors' urging that there be a taxation.

50. The learned magistrate "totally reject(ed)" the appellant's contention that he had been told or led to believe by his Worship that in "taxing" the bill his Worship would be exercising all the powers of the Taxing Master. He said that the proceedings before him had not been an "assessment" of costs by the Taxing Master, and that the negotiations between the costs consultants which culminated in the agreement had not been an "assessment". Further, the parties had not agreed that s119(2) of the *Legal Practice Act* should operate. His Worship did not accede to what he understood to be the appellant's application to adjourn the matter so that he, the appellant, could apply to this court for an order for assessment of his costs.

51. There is no doubt that on several occasions on 17 June 1998, after the parties had informed the learned magistrate that agreement had been reached as to the amount payable on the respondent's claim, and in the course of debate about the "one-sixth rule", the appellant referred to an offer of compromise which, it appears, he had made in September 1996. The appellant has deposed in his affidavit sworn 10 September 1998 that the learned magistrate asked him what was the amount offered; and that he replied "$10,000". The affidavit of Victor Harcourt sworn 6 March 1999 for the respondent, the notes of an employee of the respondent (Exhibit VH12), and a transcript of the learned magistrate's notes (Exhibit VH6 at p147) are quite inconsistent with the appellant's account that he mentioned the amount of the offer. Whilst it would not affect the outcome of the appeal, I consider that it accords with general practice to accept the accuracy of the material adduced for the respondent in respect of this factual dispute.

52. The plaintiff thereafter prepared and provided to the appellant a bill of costs. The appellant was given time to consider it. The hearing resumed before the learned magistrate on 13 August 1998. On this occasion the appellant was represented by counsel. Many items or costs were not disputed. His Worship resolved a few matters that were disputed. The addition of items agreed and items resolved led to a sum of $28,182.

53. The plaintiff sought interest of $4,817.51. Counsel for the appellant made no submissions against such an award.

Orders were made

54. On 13 August 1998, then, at the end of this extraordinary saga, the learned magistrate made an order on the claim for $9,454.20 together with interest of $4,817.51 and costs of $28,182. He dismissed the counterclaim (in fact he had done so on 18 August 1997). He made no order for costs on the counterclaim, but evidently the costs awarded on the claim took care of the costs of the counterclaim.

A second appeal was commenced

55. From the final orders of the magistrate the appellant appealed. His appeal picked up matters which had been the subject of his earlier-commenced appeal, the earlier appeal facing the problem that (save in respect of the counterclaim) there had been no "final order".

56. On 17 September 1998 a Master ordered that the following questions of law were shown by the appellant to be raised by the appeal:

> (a) Did the learned Magistrate err in law by finding that the Appellant had suffered no loss or damage by reason of the Respondent's breach of retainer of duty (see paragraphs 12, 14 and 15 of the exhibit 'MAV1') to the Affidavit filed in proceeding number 7069 of 1997?
>
> (b) Did the learned Magistrate err in law by failing to allow the Appellant to amend his defence in the proceeding so as to put to issue:
> (i) The identity of the persons constituting the Respondent firm as at the date of:
> (y) issue of proceedings; and/or
> (z) hearing;
> (ii) Whether the Respondent could recover costs based on the Bills of Costs signed by Abbott Tout Russell Kennedy on 16 October 1993 and 25 March 1994?
>
> (c) The Magistrate having found that the Respondent determined its 'retainer', was it open to him to order the Appellant to pay any costs in respect thereof (see exhibit 'MAV1' to the Affidavit of the Appellant filed in proceeding number 7096 of 1997)?

(d) Was it open to the Magistrate to further reduce the Respondent's claim by one-sixth having regard to the reduction in the amount claimed in the proceeding (see paragraph 9 to 14 of the Affidavit of the Appellant in this proceeding)?

(e) Whether the learned Magistrate erred in allowing himself to be told of the question of an offer of compromise before ruling on the one-sixth rule?"

57. There are problems with some of the questions thus stated. During the hearing Mr Strang of counsel for the appellant asked me to state three further questions:

1. Whether in the circumstances the learned Magistrate erred in law in failing to apply *Underwood, Son & Piper v. Lewis* [1894] 2 QB 306 (*Underwood's case*) so as to find that the Appellant was not liable to pay the legal fees of the Respondent.

2. Whether the learned Magistrate erred in law in failing to consider *Underwood's case* and to make a finding as to whether the Respondent had terminated its retainer without good cause.

3. Whether the learned Magistrate erred in exercising his discretion in ordering that the Appellant pay the costs of the Respondent when the learned Magistrate ought to have ordered that there be no costs ordered to the Respondent or alternatively ought to have ordered that the Appellant pay only a portion of the Respondent's costs."

58. Questions 1 and 2 were an attempt to clarify the issues intendedly raised by question (c).

59. Question 3, as I understand it, was an intended (but wider) recasting of question (d); wider in that it sought to challenge generally the exercise by the learned magistrate of his costs discretion.

60. Mr Strang submitted that in some circumstances it is open to a judge to permit further questions (to be stated), or to amend existing questions. He relied on the judgment of Hansen J in *Jones v Purcell* (judgment 19 July 1995, unreported) at p16. But in any event, he contended, I was able to deal with the substance of the subject matter of question (c).

61. Mr Bevan-John, for the respondent, submitted that I had no power to add to or amend questions stated by the Master. He also submitted that the approach taken by Mandie J in *Director of Public Prosecutions v Hinch* (judgment 5 August 1994, unreported), and by other judges – myself included – was not open.

62. I would not on any account grant leave to the appellant to state proposed question (3). It is directed to a discretionary exercise of power, lacks precision, and would enable matters admittedly not advanced at trial to be argued on appeal.

63. Proposed questions (1) and (2), I consider, are intendedly embraced within question (c), which is infelicitously phrased.

64. As I shall later explain, the appellant did raise below the proposition that the solicitors were not able to recover their costs because they had terminated the retainer. He did refer to *Underwood*. In considering the counterclaim the learned magistrate did hold that the solicitors had terminated their retainer. He made orders that were inconsistent with an application of *Underwood* favourable to the appellant. He said nothing about Underwood, or the appellant's particular submission, in his reasons. When complaint was raised, his Worship made a note which I consider to be pertinent. Later I must amplify what I have just said. In the circumstances, I consider that it would be wrong not to consider the substance of the issue raised by question (c). I further consider that I may and should do so by directing that the matters broadly comprehended by proposed questions (1) and (2) be considered and determined on the hearing of the appeal. The real import of proposed question 1, I add, lies in the proposition that the learned magistrate was compelled to find for the appellant if he applied the principle in *Underwood*.

Question (b)

65. It is convenient to first consider question (b). Generally speaking, even late amendment of a pleading (a defence in the Magistrates' Court is, if not a pleading, akin to a pleading — see below) should ordinarily be permitted where it will not cause irredeemable prejudice to the opposing

party: *State of Queensland & Anor v JL Holdings Pty Limited* [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294; *Howarth v Adey* [1996] VICSC 4; [1996] VicRp 85; [1996] 2 VR 535.

66. Where the proposed amendment will have the effect of withdrawing an admission, the court is concerned to understand why the admission was made, and the circumstances in which it is sought to withdraw it. Where an explanation of substance is given, an amendment of the type under discussion will ordinarily be allowed, though if it has stood for a long time and its withdrawal would cause prejudice to the other side it may be refused. See, generally, Williams, *Civil Procedure Victoria*, paragraph 36.01.260.

67. The appellant swore an affidavit on 22 January 1997 in support of his application to amend. It revealed that he had made business name searches of ATRK and RK in June 1996. This was long after the Magistrates' Court proceedings had been commenced. No explanation for the delay was offered. The appellant sought to explain the delay thereafter in making application to amend by referring to a letter dated 5 December 1996 sent to him by RK.

68. Most of the content of the appellant's affidavit was argumentative, and very likely wrong. The impetus for the application was said to be that new and retired partners would be wrongly advantaged or wrongly disadvantaged depending upon the outcome of the proceeding.

69. Notwithstanding the lateness of the proposed amendment, the explanation offered for the delay, and the fact that the appellant had for several years admitted that he had made a retainer agreement with RK, the learned magistrate did not conclude that amendment would cause the respondent irredeemable prejudice. In exercising his discretion adversely to the appellant he took into account the fact that amendment of the defence would give rise to a "contingent or alternative" counterclaim – a procedure unknown to him; and he had regard to the appellant's concern that he "wanted (his) counterclaim to proceed".

70. Treating the defence and counterclaim as pleadings, I do not consider that the appellant was precluded from bringing a counterclaim which assumed, contrary to the proposed amended defence, that the retainer agreement had been made with RK. On the other hand, the counterclaim should have been amended (if amendment of the defence had been permitted and the claim had stood unamended) to make it clear that the counterclaim proceeded upon an assumed state of fact contrary to that contended for by the defence.

71. Turning to the second consideration to which the learned magistrate referred, the appellant's conduct shows very clearly that he was keen to pursue his counterclaim. It could not have been the case, however, that no one had standing to pursue the claim which the respondent pursued. It seems clear that Main, who entered into the agreement for the benefit of the firm, could have done so. Alternatively, the partners of the firm during the period of the retainer could have done so. Had the learned magistrate permitted amendment, I consider it is inevitable that, to erase room for doubt, application would have been made to join another plaintiff or plaintiffs and to amend the particulars of claim to allege that one or more of the plaintiffs had contracted with the appellant. It is possible, but I think less likely, that application would have been made to substitute Main or all of the partners at relevant times as plaintiff(s). But whichever course was adopted, the learned magistrate must surely have permitted the proposed joinder or substitution and amendment. No limitation provision could have intruded. In those circumstances there is no room to doubt that the appellant would have been able to pursue his counterclaim.

72. His Worship exercised a discretion in refusing amendment. It is very difficult, but not impossible, to successfully challenge a decision involving discretionary judgment. Pertinent types of error are described in the judgment of Kitto J in *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 84 CLR 621 at 627; to which may be added the observation of Hedigan J in *Urban No. 1 Co-Operative Society v Kilavus & Anor* [1993] VicRp 69; [1993] 2 VR 201 at 211; [1993] ANZ Conv R 397; [1992] V Conv R 54-452 that "It is sometimes said that the appellant must show that it will suffer a substantial injustice if the order appealed from is allowed to stand".

73. It appears to me that his Worship in the exercise of his discretion did give weight to

extraneous or irrelevant matters. But even if I was prepared to extrapolate from that conclusion and conclude that an error of law had been demonstrated, I would not in respect of that assumed error make an order favourable to the appellant. I should say why.

74. Section 109(3) of the *Magistrates' Court Act* 1989 empowers this court, after hearing and determining an appeal, to make such order as it thinks appropriate.

75. The appellant would say, assuming error was demonstrated, that the orders made by the learned magistrate at the end of the long trial, in the course of which the appellant pursued – in very large measure unsuccessfully – as many points as human ingenuity could devise, should be set aside.

76. He could hardly argue that the solicitors should be denied a re-hearing by reason of the assumed discretionary error on his Worship's part. If he did pursue such an argument, I would reject it. Upon the assumption that error was made, then, should the matter be remitted for re-hearing in order that the discretion might be re-exercised? I would answer that question "no". If the matter was remitted, even on a limited basis, and the appellant was granted leave to amend his defence, the solicitors would inevitably apply to join or substitute a plaintiff or plaintiffs and to amend their particulars of claim. Subject to any argument that there could now be in connection with the *Limitation of Actions Act* – as to which see Williams, *supra*, paragraphs 9.06.20 and 36.61.215 – joinder or substitution and amendment would surely be permitted. Other considerations apart, the solicitors had very substantial success on the merits of the claim and counterclaim. The fact that, according to these reasons, there is an issue which requires determination by the learned magistrate, an issue whose determination, on one view of things, could deprive the solicitors of success on the claim and counterclaim, would not provide reason for refusing an application by the solicitors of the kind now under discussion.

77. If, then, the matter was remitted to the Magistrates' Court, leave to amend the defence was granted, and then leave to join or substitute a plaintiff or plaintiffs, and to amend the particulars of claim, time and money would have been spent and to no substantial effect.

78. But suppose that the solicitors were refused leave to join or substitute a plaintiff or plaintiffs on the ground that some problem existed in connection with the *Limitation of Actions Act* (though I do not say that there would be a problem). The solicitors, potentially, would be grossly disadvantaged by an error in the exercise of a judicial discretion committed as long ago as February 1997, an error compounded by the extraordinary length of the trial in the Magistrates' Court – a matter for which the appellant should bear substantial blame – and thereafter the time between commencement and disposition of the appeal. The solicitors certainly should not be placed in a position of such potential disadvantage unless it was entirely necessary. I do not consider that it would be entirely necessary.

79. It may be accepted, for purposes of argument, that it is doubtful whether RK was properly named as plaintiff. Rule 6.04 of the *Magistrates' Court Civil Procedure Rules* 1989 — a wider version of Rule 17.10 of Chapter 1 of the Rules of this Court — is archetypally directed to sole traders. Even if Main could have sued on the retainer agreement, it would not follow that he could sue in the name of RK.

80. Some reference was made to Rule 17.01 of Chapter 1, and to Rule 1.14 of the *Magistrates' Court Rules*. They would not aid the respondent if an assumption is made that the cause of action would already be time-barred. For the solicitors did not assume the name of the respondent, in pursuing their practice, until May 1994.

81. In short, then, it is doubtful but not certain that the solicitors were disentitled to sue on the retainer agreement in the name of RK.

82. Turning, then, to the substance of the matter there is no reason to believe that new partners would be unfairly benefited by an order in the respondent's favour, or that now retired partners would be unfairly prejudiced. (I add, it is not decisive, that there has been substantial continuation in the constitution of the partnership since 1992).

83. There is, next, no reason to believe that the respondent would not pay the amount of any successful counterclaim and costs if the appellant succeeded upon the issue in respect of which – as I later conclude – the matter must be remitted. After all, the respondent was previously ordered to pay costs on a failed County Court application to tax the costs. Nothing suggests that those costs were not paid.

84. Overall, in the second of the postulated situations, neither form nor substance should require remission of the matter for a re-exercise of the magistrate's discretion whether or not to permit the appellant to amend his defence.

Question (c)

85. This question, as formulated, contains problems. An affirmative answer could be given without the real issues sought to be agitated by the appellant being resolved. Proposed further questions (1) and (2), though not without their own problems, were an attempt to frame the real issues. Being satisfied that those issues were raised below, I intend to deal with the substance of the matter by giving an appropriate direction but without making any order for further questions.

86. I should first explain why it is that I am satisfied that the issues of substance were raised in the Magistrates' Court. The starting point is the documents filed in the Magistrates' Court by the appellant. It was not alleged by the defence or amended defence that the solicitors' claim was not maintainable because the solicitors had terminated the retainer without good cause or without giving reasonable notice. It was, however, alleged by the counterclaim of 10 October 1994 that the solicitors "were estopped or barred of claiming any money or at all from the defendant". But this allegation was not pursued by the amended counterclaim dated 18 September 1996. Then the particulars of breach of agreement alleged against the solicitors included this: "the plaintiff withdrew from acting on behalf of the defendant but refused to release the defendant's file to his new solicitors". That allegation had first been raised in a counterclaim dated 10 November 1994 which had been prepared by solicitors then acting for the appellant.

87. The state of the court documents on which the appellant went to trial did not make it clear that the appellant alleged that he was not liable at all to the solicitors because they had terminated the retainer without good cause or without giving reasonable notice. A number of positive allegations – some of fact and some of law – were specifically raised by the amended defence. This was not one of them. The original counterclaim, which had raised the issue, had been supplanted by a new document which did not do so. Termination of the contract, insofar as the amended counterclaim made it relevant, was significant as the starting point of an allegedly wrongful refusal to release documents.

88. For the most part the appellant was unrepresented during the course of the Magistrates' Court proceeding. Mainly he drew the court documents; although he made some use of documents drawn by solicitors. It is not decisive of the question whether the *Underwood* principle was a live issue below to resolve the question whether the Magistrates' Court should be considered a court of pleading: see *Zambelis v Nahas* (1991) V Conv R 54-396, and compare – to an extent – *Intrac (Sales) Pty Ltd v Riverside Plumbing and Gasfitting Pty Ltd* [1997] ATPR 41-572 (Eames J, judgment 2 July 1997) at 10-12 (original judgment). For present purposes it is enough to say that the court documents upon which the appellant went to trial did not raise the *Underwood* principle.

89. At the trial evidence was in fact admitted of the circumstances leading up to the solicitors' letter of 25 March 1994. That letter and the dispute which preceded it were relevant to issues joined between the parties. The evidence which was admitted enabled determination of the question whether the solicitors had terminated the retainer agreement without good cause or without giving reasonable notice.

90. Further, at two points in conducting his case the appellant relied on documents which intendedly raised the *Underwood* principle: see pp39-40 of Exhibit MAL to the appellant's affidavit sworn 17 September 1997, and page numbered 35 forming part of Exhibit MAT to that same affidavit.

91. Whilst it is not easy to understand just how the appellant pursued his final submissions, it is apparent that he

> * referred to *Underwood* as authority for the proposition that "a solicitor cannot discontinue to act without good cause" (Exhibit VH6, p138).
>
> * submitted that a negligent solicitor is not entitled to recover fees from the client and the client may be entitled to recover on counterclaim (Exhibit VH6, p138).
>
> * submitted, further, that the solicitors had unlawfully refused to release their file (Exhibit VH6, p138)

92. Apparently he spoke to written submissions, which are Exhibit MAV to his affidavit sworn 17 September 1997. The exhibit is 19 pages long, and is not easy to understand. But it does seem to me that paragraph 2 – referred to in the transcript of the learned magistrate's notes, Exhibit VH6, p138 – was by intent a submission that the solicitors had no just cause to terminate the contract, and that it was not simply a complaint that the solicitors had acted negligently. Indeed, the submission separately addressed the subject of negligence.

93. It is next clear that the learned magistrate dealt with the termination of retainer arguments only in the context of the counterclaim. He decided that the solicitors were not entitled to retain the papers for either one of two reasons: first, because the solicitors had terminated the retainer; second, because the solicitors were in breach of their obligation under Rule 5 of the 1984 *Professional Conduct and Practice Rules*. His Worship made no finding whether or not the solicitors had terminated the retainer for good cause, or had given reasonable notice to their client.

94. It is, I think, significant to note the authorities to which his Worship referred in connection with the first of those two matters. The most recent was *Gamlen Chemical Co (UK) Ltd v Rochem Ltd & Or* [1980] 1 WLR 614; [1980] 1 All ER 1049, where the Court of Appeal followed several earlier authorities, to one of which the learned magistrate referred in the present instance.

95. In *Gamlen* the question was whether original solicitors, having discharged themselves in the course of an action, were bound to hand over their client's papers to a new solicitor despite their having, at least potentially, a lien on the papers for costs. The critical conclusions are summarised in the headnote at [1980] 1 All ER 1050:

> "(i) The practice whereby a solicitor who discharged himself in the course of an action was required to hand over his client's papers to the client's new solicitor, against undertakings to preserve his lien on the papers for costs and to redeliver the papers to him at the end of the litigation, should still be followed because of the overriding principle that a solicitor discharging himself should not be allowed to exert his lien so as to interfere with the course of justice, and therefore the original solicitor only had a qualified lien on the papers. Accordingly, where a solicitor discharged himself the court would normally make a mandatory order obliging him to hand over the client's papers to the new solicitor against an undertaking to preserve his lien. ...
>
> (iii) ... the original solicitors were not entitled to retain the papers pending determination of the issue whether they had had good cause to withdraw from the action and (per Templeman LJ) even if they had had reasonable cause to discharge themselves there were no exceptional circumstances which would justify modifying the usual practice that a solicitor who discharged himself was bound to hand over the papers to the new solicitor, against an undertaking as to his lien".

96. It can readily be seen that in reaching the conclusion that he did his Worship did not make, and need not have made, any finding whether or not the solicitors had reasonable cause for terminating the contract; or had given reasonable notice. His finding was directed to that particular in the amended counterclaim which alleged simply that the solicitors had withdrawn from acting on the appellant's behalf but had refused to release their file to the new solicitors. It was, if I may say so with respect, a recourse to proper authority with a proper outcome on the facts.

97. Evidently, the learned magistrate dealt with the termination of retainer issue as it was raised by the court documents on which the trial proceeded. On the other hand, it seems clear (I shall later return to this matter) that his Worship did not address an issue which not only emerged in evidence, but was the subject of discrete submission by the appellant. That he did not do so is readily understandable having regard to the state of the court documents and the complicated way in which the appellant presented his case. Even so, the issue was raised.

98. Generally speaking, I have taken a restrictive view of the ambit of s109 of the *Magistrates' Court Act* 1989; see *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342. That accords with the view of the section taken by McDonald J in *Emer v Queen Victoria Women's Centre Trust* [1999] VSC 115 at paragraphs 42-49. In the present case, however, notwithstanding the problem with the appellant's court documents, the *Underwood* principle, which question (c) attempts to raise, was addressed by evidence and was broadly raised for the consideration by the appellant's final submissions (though the sub-issue of reasonable notice was not clearly identified). I consider that it is properly before me.

99. The principle is straightforward. Speaking generally, when a solicitor is retained by a client he undertakes to finish the business for which he is retained. A retainer is, ordinarily, an entire contract. Remuneration is not recoverable where a solicitor withdraws without justification. But a term is ordinarily implied into a retainer that a solicitor may withdraw on good cause and upon reasonable notice. An instance of good cause is failure to provide funds for disbursements. See *Halsbury's Laws of England*, 4th Ed, Vol 44, paragraphs 114-118. Clear it is, then, that a solicitor can terminate a retainer and yet be entitled to his costs.

100. The argument intendedly raised by the appeal, as proposed questions 1 and 2 show, in substance proposes that the learned magistrate failed to apply *Underwood*; and that if he had done so he must have found that the retainer had been terminated without good cause.

101. The principle which derives from *Underwood* is a different principle to that exemplified by *Gamlen*. Its essence is that a solicitor who terminates an (entire) retainer agreement without good cause and without giving reasonable notice cannot sue for his costs. Nowhere in his Worship's reasons are the issues of good cause and reasonable notice (in that context) considered and decided. They were pertinent to the claim by the solicitors as well as to consideration of particular (f) of the particulars of loss and damage subjoined to paragraph 9 of the amended counterclaim.

102. It could not be said, simply because his Worship failed to refer to *Underwood* by name, that he did not consider the authority and its application in the particular instance. It might be said that by resolving the solicitors' claim in their favour, and not ordering that the respondent repay the moneys which the appellant had earlier paid, his Worship should be taken to have concluded that the solicitors did have good cause to terminate the retainer; and that they gave reasonable notice of termination.

103. Such conclusions would have been well open. There was evidence that when the retainer was terminated, and for months prior thereto, an amount of disbursements remained unpaid. (In settling quantum the amount of disbursements was ultimately reduced by agreement. That stands apart from the evidence which was before his Worship – for he was simply informed of the overall amount by which the sum claimed was to be reduced). Moreover, though counsel for the appellant submitted before me that his client had never refused to pay the disbursements or costs, but had merely sought an itemised account, it was well open to the learned magistrate to have concluded that the failure to pay was in substance a refusal. (I make it clear that I am not saying that only a refusal to pay disbursements – as distinct from a failure to make payment – could be relevant to determination of "good cause").

104. Again, by about November 1993 it was apparent that the appellant and his solicitors were in serious disagreement about the terms of the retainer. By January 1994 the point had been reached, as the evidence showed, that the solicitors were accusing their client of telling lies about the terms of the retainer.

105. I do not see why the learned magistrate should not have concluded that each of the appellant's refusal (or failure, in the circumstances) to pay any outstanding disbursements, and the breakdown in the solicitor/client relationship – in the context of what his Worship might have concluded was the appellant's knowing misstatement of the terms of the retainer – gave good cause for the solicitors to terminate the retainer.

106. Next, it was well open to the learned magistrate to have concluded that the solicitors had given the appellant reasonable notice of termination. They had warned the appellant what action they might take in December 1993. Even the letter of 25 March 1994 might be said not to have been final. But if it was so treated, the re-trial was months away.

107. It is one thing to say, however, that it was well open to the learned magistrate to have resolved the questions of good cause and reasonable notice favourably to the solicitors; that his not mentioning *Underwood* by name does not convey his failure to consider the propositions for which the case stands; and that his orders on the claim and counterclaim are consistent with his having considered the propositions and resolved them in favour of the solicitors. But the critical questions are whether it is fairly open to conclude that he did consider *Underwood* and apply it in the solicitors' favour. I do not consider that it is.

108. When the matter came on for hearing on 25 November 1997 the appellant referred to *Underwood* and to *Kaufman & Anor v McGillicuddy* [1914] HCA 63; (1914) 19 CLR 1; [1914] ALR 457. The learned magistrate made this note (Exhibit VH6, p141):

> "# in reasons there is not reference to *Underwood's Case* or to *Kaufman's Case* [But the defendant won on this issue and it was not necessary to refer to these cases in addition to others – and if I should have referred to these cases and didn't he can argue I was in error because of that omission – I don't intend to reconsider issues that have been determined or that should have been decided but were overlooked – if they were overlooked he can argue there was an error as a consequence]"

109. It appears, insofar as the note referred to *Underwood*, that his Worship must have misapprehended the argument that the appellant had advanced; for the appellant did not win "on this issue". Perhaps his Worship understood the argument to refer to the plea that the solicitors had wrongly retained the file. Be that as it may, I consider it would be a fiction in the circumstances to say that his Worship should be taken to have considered and resolved the *Underwood* issue in favour of the solicitors. Concerning *Kaufman*, a case about dissolution of partnership and the ability of new partners to sue on a contract made by a partnership now dissolved, nothing need be said other than that the appellant did not win on the issue to which that authority relates; so his Worship's observation could not have been directed to that matter.

110. In the event, I consider that upon the substance of question (c) the appellant has made good his complaint that the learned magistrate failed to consider his submission based upon the principle in *Underwood*. He has not made good his complaint that the magistrate was compelled to make a finding favourable to him upon that issue.

111. Looked at from the respondent's perspective I cannot say that the solicitors' case on the *Underwood* issue, though it was strong, must necessarily have succeeded. The solicitors cannot sustain the decision below by successful reliance on the well-known principle to which I referred in *Popovski v Ericsson Australia Pty Ltd* [1998] VSC 61 at paragraphs 27 and 28. (The fact that *Popovski* is on appeal on other issues does not call into question the accuracy of my description of that principle).

Question (a)

112. His Worship was entitled to conclude that the solicitors should have given up their file.

113. That was the only breach of retainer and/or breach of duty of care that he found the appellant to have established.

114. His Worship considered each of the items of damage particularised in paragraph 9 of the amended counterclaim dated 18 September 1996. He accepted the respondent's submission that "none of these costs were incurred as a result of or as a consequence of the refusal or failure of the plaintiff to release the defendant's papers to Koltay and Myers".

115. His Worship concluded, particularly, that costs incurred by the appellant to his later solicitors had been incurred because the first trial in the County Court had aborted.

116. The second solicitors' bill of costs was in evidence. It showed that a small amount of costs was referable to the solicitors' unsuccessful attempts to obtain the file after their first request had been refused. It is understandable, in light of the many and larger issues argued in the trial, that his Worship did not pay specific attention to those few items. But having regard to his finding of breach it is very difficult to see how he could not have made a small order on the counterclaim. Beyond that he was not compelled to go; and, indeed, his reasons generally on the issue are unexceptionable.

117. Counsel for the appellant submitted that items 2-8, 21, 59-62, 67, 68 and 72 in the bill of costs submitted by the second solicitors were attributable to the breach which his Worship found to have been established. It is necessary to distinguish between costs incurred because of the termination and costs incurred because of the breach. For that reason I consider that only items 21, 59-62, 67, 68 and 72 could meet the necessary criteria. Item 21 could be considered doubtful; but apparently there was an earlier request or requests for the file. The other documents were not, I think, in evidence. But their import is clear enough. Doing the best I can, I consider that the learned magistrate was bound to have made an order on the counterclaim for $114.20.

Question (d)

118. This question draws on events which occurred on 17 June 1998. The question is not apt. If a "one-sixth rule" had been applied, its effect would have been to oblige the respondent to pay the costs of the taxation – not "to further reduce the respondent's claim by one-sixth". Further, the appellant relied on s119(2) of the *Legal Practice Act* 1996, which gives the Taxing Master a discretion whether or not to apply the rule (by contrast with the situation under the now repealed s74(3) of the *Supreme Court Act* 1986, which, together with s71 of that Act, earlier empowered the Taxing Master to resolve costs disputes between solicitor and client). In consequence, the answer to question (d), if it had referred to the costs of the taxation, and if s119(2) had any application to this matter, must be "yes". But that would not mean that failure to apply the one-sixth rule constituted an error of law.

119. Problems with the question apart, neither s119(2) or its legislative predecessors had anything to do with the proceeding in the Magistrates' Court. There was no assessment of costs by the Taxing Master. Neither of the events envisaged by ss115 and 116 of the *Legal Practice Act* had occurred. Moreover, though this is really surplusage, the learned magistrate was not invited to consider the exercise of his costs discretion generally having regard to the principle which would apply had the matter been before the Taxing Master.

Question (e)

120. I have earlier set out the factual circumstances upon which this question is based. I have rejected the appellant's account that the learned magistrate was told the amount of the offer of compromise. His Worship could not have prevented the appellant initiating reference to his having made an offer of compromise. All his Worship could do, and what he did do, was put an end to further mention of the matter. Had the amount of the offer been mentioned the appellant would be in no better position on the appeal. The offer was $10,000 inclusive of party and party costs, with denial of liability. It was, on the face of it, silent as to the disposition of the counterclaim. Assuming that the offer was not in objectionable form, it is quite obvious that the amount of the respondent's claim, interest and costs must have exceeded $10,000 whether or not the "one-sixth rule" was applied. The learned magistrate could hardly have been influenced in considering whether or not the one-sixth rule should be applied had he known of the amount of the offer. Nor, if it matters, could any reasonable person entertain a belief that his Worship could have been so influenced. So, even if his Worship had known of the amount of the offer on 17 June 1998, and even if that could be said to be error of law on his part, I would not make an order favourable to the appellant on the appeal.

What should be done?

121. Very limited factual issues remain undetermined in connection with question (c). Further, an order for a small amount should have been made on the counterclaim, regardless of the outcome of the unresolved question (c) issues.

122. Having regard to the fact that an inordinate amount of time was spent litigating this matter in the Magistrates' Court, that in very great part necessary issues were determined, that evidence pertinent to the question (c) issue was received, that some of that pertinent evidence was in documentary form, that the learned magistrate made very substantial notes, and that the proceeding could hardly be expected to have faded from his Worship's memory, I consider that the proper course is to allow the appeal, set aside the orders made below (the matter was argued as if the appeal against the dismissal of the counterclaim was commenced within time – sensibly, because an appeal was commenced in this court in 1997) and order that the proceeding be remitted to the learned magistrate for determination of the question whether the solicitors terminated the retainer with good cause and on reasonable notice; such questions to be determined upon the

evidence adduced at the trial, subject only to his Worship, in the interests of justice, permitting further evidence to be adduced upon those questions by either party; and that upon determination of those questions, and in any event bearing in mind my resolution of the issue raised by question (a), orders (including an order or orders as to costs) be made upon the claim and counterclaim.

123. I add three matters. First, having regard to the fact that my orders will define the issue for determination, I consider that it would be otiose to require the Magistrates' Court documents to be amended. It is to be assumed that the appellant contends that the retainer was terminated by the solicitors, and that the solicitors allege, in substance, that the retainer was terminated for good cause and with reasonable notice.

124. Second, before me counsel for the solicitors sought to raise several contentions in connection with the retainer and its termination that were not advanced at trial. I make it clear that I do not intend by my orders to open up for determination anything other than the discrete issue that I have identified.

125. Third, in addition to the orders I have foreshadowed it will be necessary to give a direction of the kind referred to in *Hinch* (supra) and made by me in *Popovski* (supra).

Orders

126. Subject to anything that counsel may say as to form I will give directions and make orders in accordance with the following minutes:

Direct that -

pursuant to R58.13 of Chapter 1, the questions whether the learned magistrate failed to consider the principle in *Underwood, Son & Piper v Lewis* [1894] 2 B 306, and whether, if he did so, he was compelled to decide the issue in the instant case favourably to the appellant, be considered and determined on the hearing of this appeal.

Order that –

1. The appeal be allowed.
2. The Orders of the Magistrates' Court made on 18 August 1997 and 13 August 1998 be set aside.
3. The claim and counterclaim be remitted for determination of the questions whether the respondent terminated the retainer with good cause and on reasonable notice, such questions to be determined by the learned magistrate who constituted the Magistrates' Court at the hearing between September 1996 and September 1998.

Direct that –

4. In determining the questions referred to in paragraph 3 noted the learned magistrate act upon the evidence adduced at the hearing referred to in that paragraph, subject only to his Worship, in the interests of justice, permitting further evidence to be adduced upon those questions by either party.

Order that –

5. The counterclaim be remitted also so that, subject always to determination of the questions referred to in paragraph 3, an order be made in the appellant's favour in the sum of $114.20.

Direct that –

6. the costs of the proceeding generally, including the costs of the trial held between September 1996 and August 1998, be re-determined by the learned magistrate in the exercise of his discretion.

127. I shall hear the parties on the question of the costs of the appeal, and upon what order should be made in proceeding 7096 of 1997.

APPEARANCES: For the appellant Ahmed: Mr M Strang, counsel. George Liberogiannis & Associates, solicitors. For the respondent Russell Kennedy: Mr M Bevan-John, counsel. Russell Kennedy, solicitors.
