08/04; [2004] VSC 79

SUPREME COURT OF VICTORIA

BROTT & Co v LEVENE

Osborn J

10, 19 March 2004

CIVIL PROCEEDINGS – CLAIM BY LEGAL PRACTITIONER FOR REMUNERATION – TERMS OF RETAINER – WHETHER LEGAL FEES TO BE PAID BY CLIENT OR THIRD PARTY – LIMITATION OF ACTIONS – TERM EXCLUDING LIABILITY – ABSENCE OF EXPRESS AGREEMENT – CLAIM DISMISSED BY MAGISTRATE ON BASIS THAT RETAINER EXCUSED CLIENT FROM OBLIGATION TO PAY LEGAL FEES – FINDING BY MAGISTRATE THAT CLAIM WAS STATUTE BARRED – WHETHER MAGISTRATE IN ERROR.

B. a legal practitioner, was retained by L. in relation to civil proceedings in the Supreme Court. At the time, B. was also acting for C., a partner in a firm of accountants who were alleged to have misappropriated funds belonging to L. Subsequently due to non-payment of the legal fees, B. withdrew from the action and sought to claim the fees outstanding from L. in the Magistrates' Court. At the hearing, in dismissing the claim, the magistrate found that the evidence supported the proposition that the *prima facie* position of the retainer was displaced. Further, that the claim by B. was barred by the provisions of the *Limitation of Actions Act* 1958. Upon appeal—

HELD: Appeal allowed. Magistrate's decision set aside. Referred for hearing by another magistrate concerning the question of quantum.

1. The evidence established that B. was retained to act for L. In those circumstances the *prima facie* obligation to remunerate B. placed the evidentiary burden upon L. to establish a term excluding L. from liability for B.'s costs.

2. Having regard to the evidence led by L., it was not open to the magistrate to conclude that there was an agreement that B. would not under any circumstances look to L. for payment of his costs and disbursements. Whilst there was an understanding that C. would fund the litigation in the first instance, it did not reflect nor could not be read as reflecting an express agreement that L. would not in any circumstances be liable for B.'s costs. Accordingly, the magistrate was in error in finding otherwise.

3. L. withdrew from the action when disbursements were not paid. In those circumstances no cause of action accrued until the withdrawal of L. from the action at the earliest. This occurred at a date within the relevant limitation period and the magistrate was in error in finding otherwise.

OSBORN J:

1. This is an appeal pursuant to s109(1) of the *Magistrates' Court Act* 1989. In essence it is contended by the appellant that it was not open to the Magistrate to dismiss a claim by a solicitor for remuneration in respect of the partial conduct of a Supreme Court action.

2. The questions of law forming the basis of the appeal to this Court are stated in the order of Master Wheeler made on 30 June 2003:

> "(a) Whether on the whole of the evidence it was open to the Magistrate to find that the respondent's retainer with the appellant as her solicitor included a term that excused her from the obligation to pay the appellant for his services ... ?
>
> (b) Whether the Magistrate erred in finding that appellant's failure to comply with rule 12 of the *Solicitors (Professional Conduct and Practice) Rules* 1984 disqualified him from maintaining his claim for the payment of professional costs and disbursements in acting as solicitor for the respondent?
>
> (c) Whether the learned Magistrate erred in finding that the complaint was barred by the provisions of the *Limitation of Actions Act* 1958?"

3. When the matter came on before me it was conceded on behalf of the respondent that the provisions of r12 of the *Solicitors (Professional Conduct and Practice) Rules* 1984 did not provide a bar to the appellant's claim.[1]

4. It was further conceded that the statute of limitations defence would not bar the whole of the appellant's claim.

5. In these circumstances two issues arise for determination.

> (a) Whether it was open to the Magistrate to dismiss the claim on the basis of the terms of the solicitor's retainer; and
>
> (b) If not, whether it was open to the Magistrate to conclude the provisions of the *Limitation of Actions Act* 1958 provided any defence to the claim and to what extent?

The Terms of the Appellant's Retainer

6. There is no dispute that in or about November 1994 the appellant was retained by the respondent to act on her behalf in respect of civil proceedings in the Supreme Court of Victoria against the National Australia Bank and others. The respondent had previously retained a firm of accountants named Galanti & Associates, in which one Mr Canzoneri was a partner, to provide her with investment advice. Upon taking that advice she provided Galanti & Associates with two cheques, one for $300,000 and the other for $200,000 which were then misappropriated. She remained on good terms with Mr Canzoneri, however, and he suggested that it should be possible for the respondent to sue the National Australia Bank with respect to dealings with the cheques. He also suggested that it may be possible to sue Galanti & Associates with a view to obtaining recovery from the firm's insurer. The appellant was retained to institute and prosecute such proceedings on behalf of the respondent. At the time the appellant was acting for Mr Canzoneri with respect to police investigations being conducted into alleged frauds. The appellant and Mr Canzoneri were well known to each other and jointly owned the Clock Tower building in Carlton through companies which they controlled. The respondent contends that in this context it was agreed that the appellant would be paid by Mr Canzoneri and by Mr Canzoneri alone for the conduct of the respondent's action.

7. The Magistrate's reasons were as follows:

> "There ought to be judgment in favour of the defendant. Mrs Levene understands her position to be that she is not obliged to pay. That is as simply as it can be put and about as complicated as it needs to be. My view is that the evidence is quite eloquent of that agreement, and I simply refer you to Exhibits DL1-63. The evidence contained in those exhibits is on all fours with what is said in *McKenzie v The Director-General* at paras. 54-7. In other words, in my view the evidence supports the proposition that the prima facie position that there is a retainer is displaced. That is, that there is an agreement that Mrs Levene will not pay, with some qualification in relation to actual recovery. So there is another question, I suppose, that I have to ask myself; should she pay if she recovers, and the answer to that is no, because in my view the evidence discloses much more than that first limb (which allows Mrs Levene to succeed) and what I say is that the evidence allows some very easy inference about the relationship which existed between Mrs Levene, Mr Brott and Mr Canzoneri, which Mrs Levene left at a point where she said she did not have to pay. I think, probably, if she turned her mind to it she would agree with me, that the inference that is to be drawn is that the reality is that Mr Canzoneri is Mr Brott's client and Mrs Levene is very much secondary to this relationship, despite very superficial appearances. Of course, a retainer is not at first blush a superficial appearance, but it is relegated to superficiality by the evidence and the inferences that can be drawn. I draw the very strong conclusion, which can be inferred from the evidence, that the introduction of Mrs Levene to Mr Brott was a pre-emptive strike by Mr Canzoneri to forestall action against him, and that Mr Brott and Mr Canzoneri by virtue of association and appreciation of the overall situation both knew it. It has been submitted that non-compliance with Rule 12 is fatal. I see it as fatal to Mr Brott's case in another way, in that the non-compliance with Rule 12 betrays the secondary status of Mrs Levene. In my view, he has probably not seen fit to oblige her with that statement because she on the one hand was not seen as the client, so far as the second limb is concerned; what goes with that is that she was not seen as having the obligation to pay either, in the same way that all significant demands are to Canzoneri when, if Mr Brott was correct, one would think they would be to Mrs Levene or Mr Canzoneri's attention, or, equally strongly, to both. In any event, my view is that it is correct on the evidence to conclude that there is, at least on the face of it, an agreement that she would not pay, and that is, after all, all that is called for in *McKenzie v The Director-General*, to break the nexus – the apparent nexus, solicitor/client nexus. His Honour did not really ask for much as long as it was strong evidence; and the evidence is overpowering here, in my view, simply because it leads to that second conclusion, that Canzoneri is in fact the client."

8. The form of the Magistrate's reasons reflects that they were initially given *ex tempore* and

they should be read with due allowance for this fact. They can be summarised as follows:

(a) they refer firstly to the respondent's subjective understanding of the agreement;

(b) they then refer to evidence which is eloquent of an agreement and in particular DL1-63;

(c) such agreement supports the proposition that the *prima facie* position of liability for costs on the part of the respondent is displaced (the reference to a "retainer" should be understood in this way);

(d) this agreement was subject to "some qualification in relation to actual recovery";

(e) in substance the appellant acted for Mr Canzoneri and his actions on behalf of the respondent were in fact undertaken on behalf of Mr Canzoneri;

(f) the failure to comply with r12 supports the view the respondent was not the appellant's client.

9. The appellant relies upon the principle stated by Bankes LJ in *Adams v London Improved Motor Coach Builders*[2]:

> "When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to the solicitors for costs, and that liability would not be excluded merely because the union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs."

10. Atkin LJ stated:

> "It appears to me therefore that the learned judge was perfectly correct in saying that the solicitors were in fact acting as solicitors for the plaintiff. If they were so acting, they did so upon the ordinary terms applicable to a person who employs a professional man to do professional work on his behalf – namely, that he shall remunerate him. That is the *prima facie* obligation which at once emerges when the employment is proved. It is perfectly possible for the agreement of employment to contain a term by which the agent agrees that he will not claim remuneration from his employer, but either do the work for nothing or claim remuneration from some third party. But in the absence of such a term - which would have to be proved by the party setting it up – the ordinary deduction from the employment of a professional man accepted in this way is that the person accepting the agent's services is bound to remunerate the agent."[3]

11. In the present case it was admitted that the appellant was retained to act for the respondent. In these circumstances the *prima facie* obligation referred to in the above statements of principle placed the evidentiary burden upon the respondent to establish a term excluding her from liability to the appellant for costs.

12. This principle has been applied in a series of cases relating to insurers which are analysed by Gillard J in *McKenzie v Director General of Conservation and Natural Resources and Others*[4]. In *Davies v Taylor (No. 2)*[5] Viscount Dilhorne stated at p230:

> "In this case the solicitors, no doubt first instructed by the insurance company, were the solicitors on the record as solicitors for the respondent. They acted for him and, in the absence of proof of an agreement between him and them and between them and the insurance company that he would not pay their costs, they could look to him for payment for the work done and his liability would not be excluded by the fact that the insurance company had itself agreed to pay their costs."

This statement was quoted with approval by Mason CJ in *Halliday v Sacs Group Pty Ltd*[6].

13. An agreement of the kind alleged by the respondent is unusual. In *Giannarelli v Wraith (No. 2)*[7] McHugh J stated at 598:

> "The respondents, of course, rely on the affidavit of Mr O'Donahoo. His affidavit, however, does not address the central dispute in the taxation, that is, whether the solicitors have foregone their right to recover their costs from the respondents. The respondents also rely on the fact that, as was pointed out in *Davies v Taylor (No. 2)*, an agreement of the sort alleged by the appellants 'would be most unusual'. There is a presumption therefore, that such an agreement does not exist: *Reg v Miller*; *Hudgson v Endrust (Australia) Pty Ltd*." (Citations omitted)

14. The primary question before me is whether it was open to the Magistrate to conclude on the evidence before him that there was a bargain between the appellant and the respondent that under no circumstances was the respondent to be liable for costs or as the amended defence put it:

> "It was an express term of the retainer that the defendant would not be responsible for the payment of costs and disbursements."

15. It is not open to this Court to simply substitute its view of the probabilities. In *Young v Paddle Bros Pty Ltd*[8] Herring CJ stated the relevant test as follows:

> "If on any reasonable view of the evidence that decision can be supported, then the party who complains of that decision cannot have it set aside and the contrary decision that he desires substituted for it. It is a question of what he is entitled to as a matter of law, and he is only entitled to a contrary decision when that decision is the only possible decision that the evidence on any reasonable view can support."

16. For the reasons stated by Phillips JA in *S v Crimes Compensation Tribunal*[9] the notion of what is "reasonably" open may be thought to involve a distraction:

> "Whether centred on a finding of fact based upon the acceptance of direct evidence or on an inference of fact based upon other facts of which there is direct evidence, the question is whether that finding or that inference was open to the tribunal."

17. In the present case the Magistrate had before him the evidence from the respondent to the following effect:

> "Q. What was said between Mr Canzoneri and Mr Brott? ... ----Mr Canzoneri said to me 'I will pay the fees to Mr Brott to pursue this case through the courts', words to that effect. Q. And what did Mr Brott say in response?----He said he would take the case and he could get the money back. Q. Was anything said in relation to your - to pay any fees?----No, because Mr Brott knew at that point that I was on a pension. ... Q. Why did Mr Brott know that you were on a pension?----Because I told him. Q. Was anything discussed about a litigation loan at that time?---No, I don't know what that means. Q. Was it ever explained to you by Mr Canzoneri as to why he was going to pay your fees?---Well, Mr Canzoneri had $500,000 cash of my money which had gone missing and I assumed he was paying to right a wrong. Q. Did he ever say anything like that to that effect?---He just said 'I am happy to pay your fees, you'll get your money back.' They both said I'd get it back. Q. Did anyone ever say anything to you about what would occur if Mr Canzoneri didn't pay?---No, there was no mention of that."

18. Despite the underlying context to which I have referred, namely one in which Mr Canzoneri was Mr Brott's client and might be thought to have a personal interest in assisting the respondent, there are two fundamentally problematic aspects to this evidence. Firstly, the conversation about impecuniosity might give rise to a mutual understanding the respondent could not at that time pay but not that it was objectively agreed she would at no time thereafter have an obligation to pay. Secondly, nothing was said about what would occur if Mr Canzoneri did not pay. The net effect of the respondent's evidence was that Mr Canzoneri agreed to fund the litigation but there was no agreement as to the residual position of the respondent. There was no express agreement to the effect alleged in the amended defence.

19. During cross-examination of the plaintiff's principal, Mr Isaac Brott, the respondent also put in evidence as part of her case a file note made by Mr Brott. This file note stated:

> "Diana Levene attends. I ask Sebastian Canzoneri to wait until I speak to the client and I will then call him explained billing and must be paid. She says S/C said he will pay told her I will look to her for payment. Told her S/C given me details of transactions and review the cheque advance and the relationship. He is currently funding her with respect to a dress shop problem he has pumped money into venture. Says not having relationship with him. Told her potential conflict and explain about criminal charges against S/C. Says he didn't rob her but simply bad business and everyone caught in recession. Tell her police investigation underway and he may be charged by police she says it doesn't affect her and she likes him. He is helping her with money explained might be able to sue his practice and claim from insurance if they have insurance but it probably would be cancelled by fraud and would advisably issue against him and partners to invoke policy - she says to do it. She says I can be paid from settlement - I said no I can help out and go easy on account but must be paid disbursements as they arise and some fees whilst other can be deferred. She says S/C will

> help her. She says no use suing S/C he had lost everything she says she will not complain to police because he helped her our (*sic*) and was currently helping her out. She wants to know prospect sof (*sic*) getting money. I tell her if there is insurance policy in existence, if she relied on him and no fraud and if money invested negligently okay but don't have enough info yet. With respect to bank action on cheque told her S/C says others (other clients) have recovered but I haven't seen cases and need to get counsel's advice. S/C called in - tell him what we spoke about. He insists that bank have paid other clients cheques in cases but can't tell me citations (will provide info). He says plenty of assets in practice to pay investors but his ex partners stole them. He says he doesn't know if the insurance policy was current at time and the terms, i.e. if obviated by fraud. He will check in his garage at home and will tell me. Says will pay Levene's costs but when we get award wants money back. She says okay. I tell them that solicitor/client costs might not be recovered from other side if we will (*sic*) and additional amount for solicitor/client costs will need to be paid. She says okay and okay to repay S/C. S/C will help."

20. It is to be observed that the above note which was adopted in evidence by Mr Brott and, as I have said, tendered on behalf of the respondent, does not assist the respondent in the following respects:

> (a) It records that the respondent said Mr Canzoneri said he would pay but Mr Brott told the respondent he would look to her for payment.
>
> (b) It records the respondent said Mr Brott could be paid from the settlement of the action. Mr Brott said he would help out and go easy on the account but must be paid disbursements as they arise together with some fees.
>
> (c) The respondent said Mr Canzoneri would help her.
>
> (d) Mr Canzoneri said he would pay the respondent's costs but when they got an award he wanted his money back. The respondent agreed.
>
> (e) The respondent was advised that solicitor/client costs might not be recovered from the other side even if the case was successful and the respondent agreed to the payment of such costs and agreed to repay Mr Canzoneri.

21. Therefore, although the document records an agreement that Mr Canzoneri would help fund the action, it does not record that the appellant would look to Mr Canzoneri alone for costs nor that the respondent would not in any circumstances be liable for costs. Indeed it was expressly envisaged that upon successful conclusion of the action Mr Canzoneri would be repaid for moneys he had advanced and the respondent would be liable for solicitor/client costs.

22. The evidence of the respondent and the attendance notes put in evidence on her behalf embodied the evidence put forward on behalf of the respondent before the Magistrate which went directly to the terms of the agreement. Other evidence adduced in cross-examination of Mr Brott went to the underlying relationship that he enjoyed with Mr Canzoneri. It cannot be said, however, that this relationship of itself could provide a basis for concluding that Mr Canzoneri did more than agree to fund the institution and conduct of the litigation. It does not support any necessary inference that the respondent would be other than jointly liable for costs in the ultimate and would do other than look to the defendants of the proposed action to recover the costs of the litigation.

23. Mr Uren submitted to me that Mr Brott's own evidence as to the terms of the agreement was inherently probable and consistent with his attendance notes. Whilst this may be so, in my view it was open to the Magistrate to reject Mr Brott's evidence and proceed on the evidence adduced on behalf of the respondent. Accepting this to be the case it was nevertheless in my view not open to conclude that the evidence on behalf of the respondent to which I have referred amounted to evidence of an agreement that the appellant would not under any circumstances look to the respondent for payment of his fees. There is simply no direct evidence of an agreement that he would not look to the respondent for the payment of his fees upon the conclusion of the proceedings.

24. The respondent also relied upon the terms of a series of accounts and letters forwarded by the appellant to Mr Canzoneri and the respondent in the course of the conduct of the action on behalf of the respondent. These included:

(a) accounts rendered to Mr Canzoneri;

(b) requests for payment addressed to Mr Canzoneri;

(c) requests for instructions about procedural matters addressed to Mr Canzoneri;

(d) persistent references in correspondence to obligations owed by Mr Canzoneri and the undertaking of Mr Canzoneri to pay;

(e) an absence of requests to the respondent for payment.

25. The flavour of the correspondence is reflected by a series of letters written towards its end. On 5 July 1999 the appellant wrote to the respondent (sending a copy of the letter to Mr Canzoneri)

> "I have carried your matter for some years. In the absence of Sebastian meeting his stated obligations, we cannot continue further. Sebastian has not paid the substantial disbursements outstanding and the obligations I seriously have to my family, my staff and myself preclude me from subsidising this matter further and spending the considerable effort required. Hence we will not carry on further which places your cause at great risk of being struck out and substantial costs orders being made against yourself."

26. On 16 July 1999 the appellant again wrote to the respondent (sending a copy of such letter to Mr Canzoneri):

> "I note your letter of 10 June, 1999 and sincerely sympathise with your predicament. I assumed conduct of your matter on the assurance I would be paid and the barrister would be paid. Despite two years of repeated entreaties around $6,000 of barrister's fees are owing and not paid. This is beside very substantial professional fees outstanding. I have a responsibility to my new and very young family and cannot further subsidise the matter in the hope that eventually Sebastian or yourself will meet the obligations owed."

27. On 19 August 1999 the appellant wrote to the respondent stating:

> "Whilst sympathetic to your obvious plight you will appreciate we undertook this matter on the undertaking of Sebastian Canzoneri to pay all legal fees involved whether professional fees or disbursement. Despite many, many requests he is totally ignoring our entreaties hence forcing our withdrawal from the matter. … We have had no option but to withdraw from the matter. It is suggested, as a matter of urgency you seek independent legal assistance."

28. On 19 August 1999 the appellant forwarded the respondent a Notice by Solicitor Ceasing to Act. Thereafter, another firm of solicitors took over the conduct of the action on behalf of the respondent. The respondent also tendered to the Magistrate correspondence between these solicitors and the appellant relating to a dispute concerning an alleged lien held by the appellant over his files. This dispute was ultimately settled on terms on 6 January 2000. The terms provided for the event that the new solicitors received from any of the defendants any sums in excess of the unpaid solicitor-own client costs owed to them in respect of the proceedings. In this event it was agreed that a sum not exceeding $16,000 would be held upon trust in the joint names of the appellant and the respondent and was only to be released in accordance with the terms. It was further provided that the new solicitors would notify the appellant upon receipt of such sum and that the retained sum would be released:

(a) in the event that the appellant did not issue a bill of costs to the respondent within two months of being so notified in which case the new solicitors might disburse such sum to the respondent; and

(b) in the event that the appellant did issue a bill of costs to the respondent such sum would be held on trust –

> "until the completion of the taxation, if any, of the bill of costs and the completion of any proceedings issued in consequence of such taxation in default of the (respondent) in paying the bill and only to release such sum upon order of the Court or agreement between the parties, provided the (appellant) issues such proceedings within two months of the date of such taxation, and in default of issuing proceedings within such time, then the retained sum … be returned to the (respondent)."

29. The agreement further recorded that the respondent expressly denied any liability to the

appellant in respect of the payment of fees and disbursements in relation to the Supreme Court action and that the agreement did not prevent the appellant from issuing or serving a bill of costs or proceedings for the recovery of such costs.

30. In due course the new solicitors gave notice to the appellant on 25 July 2000 that they held the sum of $16,000 pursuant to these terms of settlement. The appellant, however, failed to serve a bill of costs within two months and the sum was disbursed to the respondent. On 9 October 2000 the appellant served a bill of costs upon the respondent which remains unpaid. The exhibits referred to by the Magistrate, DL1-DL63, record this sequence of events and also disclose a receipt for $3,000 paid on account of costs by a company associated with Mr Canzoneri on 8 February 1995.

31. In my view the correspondence and chain of documents as a whole is consistent with an understanding that Mr Canzoneri would fund the litigation in the first instance but that ultimately the plaintiff would be liable for costs. Conversely, it does not reflect and cannot be read as reflecting an express agreement that the respondent would not in any circumstances be liable for the appellant's costs.

32. Strictly speaking however, the conduct of the parties subsequent to the making of a contract is not relevant to the interpretation of the contract: *FIA Traders Insurance Co Ltd v Savoy Plaza Pty Ltd*[10]; *Ryan v Textile Clothing and Footwear Union of Australia*[11]; *Brambles Holdings Ltd v Bathurst City Council*[12].

33. As Brooking J said in *FIA Traders Insurance Co Ltd v Savoy Plaza Pty Ltd*[13]*:*

> "The view which a party to a contract takes of its effect has no bearing on its construction, whether that view is made manifest by conduct or by express statement and whether that view is sought to be proved by evidence of conduct (including statements) or by direct evidence of state of mind given in the litigation by the party to the contract."

34. In *Brambles Holdings Ltd v Bathurst City Council* Heydon JA summarised the relevant principles as follows:

> "The first relevant principle of law is that pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous and if the pre-contractual conduct casts light on the genesis of the contract, its objective aim, or the meaning of any descriptive term: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; 149 CLR 337 at 347-352; (1982) 41 ALR 367; (1982) 56 ALJR 459. The second relevant principle is that post-contractual conduct is admissible on the question of whether a contract was formed: *Howard Smith & Co Ltd v Varawa* [1907] HCA 38; (1907) 5 CLR 68 at 77; 14 ALR 169; *Barrier Wharfs Ltd v W. Scott Fell & Co Ltd* [1908] HCA 88; (1908) 5 CLR 647 at 668, 669, 672; *B. Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9,147 at 9,149, 9,154-9,156; *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9,251 at 9,255. The third relevant principle is that post-contractual conduct is not admissible on the question of what a contract means as distinct from the question of whether it was formed. As explained by Priestley JA (Meagher JA agreeing) in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 326-330, the status of the relevant High Court authorities is unclear: hence unless it is demonstrated that the later decisions of the Victorian Full Court and Court of Appeal against admissibility, *Ryan v Textile Clothing & Footwear Union of Australia* [1996] VicRp 67; [1996] 2 VR 235; (1996) 130 FLR 313; (1996) 66 IR 258; (1996) 14 ACLC 555 and *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] VicRp 76; [1993] 2 VR 343; [1993] ANZ Conv R 469; [1993] Aust Contract Reports 90-025; [1993] V Conv R 54-466, are clearly wrong or they are overruled, they should be followed in New South Wales. No attempt was made to demonstrate that they are clearly wrong. The fourth relevant principle is that the construction of a contract is an objective question for the court, and the subjective beliefs of the parties are generally irrelevant in the absence of any argument that a decree of rectification should be ordered or an estoppel by convention found. No argument of these kinds was advanced in this case."[14]

35. It follows that the evidence which the Magistrate specifically identified as "eloquent" of the agreement of which he was persuaded cannot be so regarded. Exhibit DL1 is Mr Brott's attendance note and its terms are directly inconsistent with the respondent's case and directly supportive of the appellant's case. Exhibits DL2-63 are not admissible for the purpose for which the Magistrate had regard to them. Moreover in any event they are in my view entirely equivocal as to the critical issue.

36. The Magistrate also relied on the appellant's failure to comply with r12 of the *Solicitors (Professional Conduct and Practice) Rules* 1984. This required the appellant as soon as practicable after first taking instructions from a client, to provide the client with written advice of the reasonable estimated costs and disbursements or the manner of calculation of such costs. The evidence was that no such advice was given to the respondent or Mr Canzoneri by the appellant. Indeed Mr Brott maintained he was not aware of his obligation to provide such advice. In any event, however, such failure could not provide a logical basis for concluding that Mr Canzoneri, rather than the respondent, was the client. Both Mr Canzoneri and the respondent were treated in the same way.

37. In summary then the Magistrate relied on the following matters:

(a) The subjective understanding of the respondent. This is not admissible as evidence of the parties' objective intention.

(b) Exhibit DL1 – this supports the appellant.

(c) Exhibits DL2-63 – these are not admissible as evidence of the terms of the agreement.

(d) The background relationship between the appellant and Mr Canzoneri. This is entirely equivocal as to whether it was agreed the respondent would not be liable for fees even in the event the action was successful.

(e) The failure to provide advice to the respondent in accordance with r12. This is also entirely equivocal in terms of the critical issue.

38. Furthermore, as I have outlined, neither the oral evidence of the respondent nor the appellant's file note which was tendered on behalf of the respondent, provide direct evidence of the necessary agreement or of matters from which such agreement could be inferred.

39. Having reached these conclusions I am satisfied it was not open to the Magistrate to conclude that there was an agreement between the parties that the respondent would not under any circumstances be liable for costs and disbursements.

The Limitations Defence

40. The appellant claimed $29,746.89. The bill tendered in support of the claim makes clear that this claim was overstated. The bill included matters going back to 1988 i.e. matters not relating to the retainer of November 1994 pursuant to which the appellant sues.

41. Insofar as the appellant sues for work done and incidental disbursements from November 1994 onwards the respondent contends that the claim is in part statute barred because proceedings were not issued until 15 May 2001.

42. The appellant contends that the contract with respect to fees, insofar as it related to the respondent, was an entire contract to conduct the action to the end. The appellant relies upon the authorities analysed by Walters J with whom King CJ and Cox J agreed in *Caldwell v Treloar & Ors*[15]. In *Underwood, Son & Piper v Lewis*[16] Lord Esher MR said:

> "When one considers the nature of a common law action, it seems obvious that the law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action to the end. When a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all the necessary steps in it, and to carry it on to the end. If the meaning of the retainer is that the solicitor is to carry on the action to the end, it necessarily follows that the contract of the solicitor is an entire contract – that is, a contract to take all the steps which are necessary to bring the action to a conclusion. When it is shewn that there were no special terms, but only the ordinary retainer for the purposes of the action, the implication I have mentioned is that which every reasonable person would make, and therefore the implication which the law makes in such a case."

43. In *Warmingtons v McMurray*[17] Goddard J (as he then was) said:

> "The distinction does not depend upon whether the action is in the nature of one at common law or in an equitable suit for administration; that of itself would afford no ground of difference. The question is whether or not the employment is one to which the doctrine of entire contract applies."

44. In the present case the file note of Mr Brott tendered by the respondent makes clear that the appellant was retained on the basis that the appellant would receive provisional payments only and not final payments until completion of the action.

> "I said no I can help out and go easy on account but must be paid disbursements as they arise and some fees whilst other can be deferred."

45. The correspondence tendered by the respondent makes clear that the appellant withdrew from the action when disbursements (and in particular counsel's fees) were not paid.[18]

46. In these circumstances no cause of action accrued until the withdrawal of the appellant from the action at the earliest. This occurred at a date within the relevant limitation period.

47. Indeed, although it is unnecessary to decide the point, the "qualification in relation to actual recovery" to which the Magistrate at one point referred, is also supported by the appellant's file note. The evidence relied on by the respondent thus supports the view that the respondent would not be liable to the appellant for legal costs and disbursements unless and until money to cover such costs and disbursements was recovered in the action. The essence of the arrangement was that until money was recovered Mr Canzoneri would fund the action on a provisional basis, i.e. with a right to reimbursement. As I have said, however, this last conclusion is unnecessary to dispose of the limitations defence.

Conclusion

48. For the above reasons the appeal must be allowed. The Magistrate's decision must be set aside and the matter will be remitted for rehearing by a differently constituted court. The matter requires rehearing because, although I have found firstly that the Magistrate's finding as to the exclusion of liability for costs on the part of the respondent cannot be upheld, and secondly that there is no limitations defence open to her, and thirdly that it is now common ground a breach of r12 does not provide a defence of the claim, nevertheless the transcript of the proceedings before the Magistrate discloses very serious issues remain to be resolved as to quantum in this matter.

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[1] See *Harrison v Lederman* [1978] VicRp 55; [1978] VR 590.
[2] (1921) 1 KB 495 at 501; [1920] All ER 340.
[3] Ibid at 502.
[4] [2001] VSC 220.
[5] (1974) AC 225.
[6] [1993] HCA 13; (1993) 113 ALR 637; (1993) 67 ALJR 678 at 679.
[7] [1991] HCA 2; (1991) 171 CLR 592; (1991) 98 ALR 1; 65 ALJR 196.
[8] [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301.
[9] [1998] 1 VR 83 at 89-91.
[10] [1993] VicRp 76; [1993] 2 VR 343; [1993] ANZ Conv R 469; [1993] Aust Contract Reports 90-025; [1993] V Conv R 54-466.
[11] [1996] VicRp 67; [1996] 2 VR 235; (1996) 130 FLR 313; (1996) 66 IR 258; (1996) 14 ACLC 555.
[12] [2001] NSWCA 61; (2001) 53 NSWLR 153.
[13] n10 at 351.
[14] n12 at 163.
[15] (1982) 30 SASR 202 at 202.
[16] [1894] 2 QB 306 at 309-310.
[17] (1936) 52 TLR 381.
[18] n15 at 210.

APPEARANCES: For the plaintiff Brott: Mr G Uren QC with Mr J Isles, counsel. Isaac Brott & Co, solicitors. For the defendant Levene: Mr P Cawthorn with Mr G McCormick, counsel. Goldsmiths, solicitors.
