21/87

SUPREME COURT OF VICTORIA — FULL COURT

OLDAKER v CURRINGTON

Murray, McGarvie and Marks JJ

7, 10 November, 19 December 1986 — [1987] VicRp 61; [1987] VR 712

PRACTICE AND PROCEDURE – PROFESSIONAL COSTS – SENIOR AND JUNIOR COUNSEL BRIEFED – RELEVANT CONSIDERATIONS IN AWARD OF COSTS – WHETHER RETENTION REASONABLY NECESSARY – WHETHER POSITION OF COURT IN HIERARCHY A RELEVANT CONSIDERATION – UNCOMPLICATED PERSONAL INJURY CASE – WHETHER SENIOR COUNSEL REASONABLY NECESSARY – WHETHER TWO-THIRDS FEE FOR JUNIOR COUNSEL APPROPRIATE.

1. As a general rule, allowance of fees for senior counsel depends on the nature and circumstances of the particular case and not on the position of a particular court in the hierarchy of courts.

2. In deciding whether to allow fees for senior counsel, the question is whether the case is one in which the skill and experience expected of a Queen's Counsel was reasonably regarded by a party's legal advisers as necessary for the adequate presentation of the party's case.

3. Where a County Court trial of an uncomplicated personal injury action involved 10 witnesses over five days, no error was shown in the trial judge's allowing fees for senior counsel. However, as the burden of junior counsel was not a particularly heavy one, it was not appropriate to allow junior counsel's fee at two-thirds of the fee of senior counsel.

THE COURT: *[After setting out the grounds of appeal and certain provisions of the* Rules of the Supreme Court and County Court*, the Court continued]:* … **[4]** With one exception, it is our opinion that, as a general rule, a more restrictive approach is not to be adopted to the allowance of fees to senior counsel in the **[5]** County Court than in the Supreme Court. It may be accepted that it is part of the policy of the *County Court Act* and *Rules* that the expense of litigating in the County Court is to be less than that of litigating a similar case in the Supreme Court. However, it is established that whether it is appropriate to allow the fees of senior counsel depends, as a general rule, on the nature and circumstances of the particular case and not on the position of a particular court in the hierarchy of courts *Stanley v Phillips* [1966] HCA 24; (1966) 115 CLR 470 at pp478 and 490-1; [1967] ALR 197; 40 ALJR 34; *Bailey v Wallace* [1970] VicRp 15; (1970) VR 109 at pp112-4 and 116-8; *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; (1978) VR 505 at p517; (1978) 3 ACLR 289; [1978] ACLC 40-381.

The exception to which we refer arises from the wording of item 29(h)(iii) in the *County Court schedule*, which enables a fee to be allowed to senior counsel when the trial judge certifies the retention of two counsel as being reasonably necessary and proper. Regulation 29 in the *Supreme Court Rules* provides for the allowance of such costs, charges and expenses as appear to have been necessary or proper for the attainment of justice or for defending the rights of a party. The significance of the use of the word "or" in the Supreme Court Regulation has been mentioned in the cases *In re Malleson, Stewart, Stawell and Nankivell* [1931] VicLawRp 32; (1931) VLR 127 at pp133-4; *Magna Alloys and Research Pty Ltd v Coffee (No. 2)* [1982] VicRp 10; (1982) VR 97 at p103.

It was not suggested before us that if the retention of two counsel was reasonably necessary it was not proper. It is therefore sufficient for the purposes **[6]** of this appeal to direct attention to the test whether the retention of two counsel was reasonably necessary. Subject to the exception which flows from the words of the provision in the *County Court schedule*, the principles relevant to this appeal are those relevant to the application of Regulation 29 in the *Supreme Court Rules*. That Regulation restates the principles which existed before it was made. *Stanley v Phillips* [1966] HCA 24; (1966) 115 CLR 470 at p477; [1967] ALR 197; 40 ALJR 34. Thus the principles on which the application of the Regulation depends have been applied to decide whether fees to senior counsel should be allowed in Magistrates' Courts. *Bailey v Wallace* [1970] VicRp 15; (1970) VR

109 at pp117-8; *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; (1978) VR 505 at pp516-8.

The question to be asked is whether the retention of senior counsel was reasonably necessary for the attainment of justice or the enforcement of the plaintiff's rights. As was emphasised by Starke J in *Peile v Nobel (Australasia) Pty Ltd* [1966] VicRp 60; (1966) VR 433 at p438, the question must be looked at from the point of view of the party who has to make the decision before the trial, at the time when it is proper, in the circumstances of the case, that counsel should be briefed. It is necessary to guard against hindsight in deciding the question. The reasonable necessity of retaining senior counsel at the time it was done is not to be tested by reference to what the trial may ultimately show to have been the plaintiff's rights or the justice of the case. See also *Stanley v Phillips*, *supra*, at pp479 and 490-1.

[7] In this case it is consistent with the various statements of principle to ask whether the case was one in which the plaintiff's advisers might reasonably have regarded the engagement of senior counsel as necessary for its adequate presentation. To be adequate, a presentation would need to be entirely sufficient. Considerations of the advancement of the plaintiff's interests and the achievement of a just result in the litigation are relevant in determining whether the retention of senior counsel might reasonably be regarded as necessary for the adequate presentation of the case. Compare: *Stanley v Phillips*, *supra*, pp478-9, 486 and 490; *Peile v Nobel (Australasia) Pty Ltd* [1966] VicRp 60; (1966) VR 433 at pp437-8.

The first issue in this case is whether it was appropriate to order that the defendant bear the costs of the plaintiff's senior counsel. The cases establish that because this is the issue, it is not enough that the plaintiff's advisers might reasonably have regarded the retainer of senior counsel as the way of best protecting the plaintiff's interests. It is not sufficient that the presence of senior counsel may have been regarded as reasonably necessary to ensure the maximum prospect of success for the plaintiff. In *Stanley v Phillips*, *supra*, having said that the case before the Court was one in which it was over-cautious to employ two counsel, Menzies J added:

> " ... I say this recognizing that it may well be that the plaintiff's chances of obtaining maximum damages were improved by the employment of one of Her Majesty's counsel. It is, however, to the defence of rights and the attainment of justice that O.LXV, r27, R.29 commands attention – not to a plaintiff's natural liking for, or to a defendant's **[8]** natural dislike of, the last penny of damages (p492)."

See also per Barwick CJ at pp478-9 in the same case and *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; (1978) VR 505 at p517; (1978) 3 ACLR 289; [1978] ACLC 40-381. The cases show that a wide variety of circumstances may be treated as warranting the engagement of senior counsel. A common circumstance is the weight of the case which may make a division of labour between counsel desirable. Another is the need for the special skills and experience to be found within the inner bar. *Stanley v Phillips*, *supra*, at pp489-90.

In the present case Mr Riordan submitted that the retention of senior counsel was warranted because the case was technical and difficult with a nice analysis being required; it was a protracted case and the injuries were of some magnitude. It is basic to this appeal that the orders the subject of it were made by the learned judge in the exercise of discretions. It must be considered within the familiar limitations on appeals against the exercise of discretions, stated by Kitto J in *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at p627, a case concerned with the review of a taxation of costs.

It is necessary to look at the nature and circumstances of the particular case as it would appear to the plaintiff's legal advisers at the time when senior counsel was briefed. *[The Court then described the facts of the case and continued].* ... **[11]** The decisive question for this Court is whether in the circumstances of this case it was within the range of the discretion of the learned trial judge to decide that at the time when senior counsel was briefed the plaintiff's solicitors might reasonably have regarded the engagement of senior counsel as necessary for the adequate presentation of the plaintiff's case.

In deciding this question it is open to the Court to bear in mind decisions in other cases which indicate the standards of importance and difficulty which have been Regarded as warranting or not warranting the retention of senior counsel. However, other decisions can be used as no more

than guides indicating the approach of courts in other cases determined on their own facts. They cannot be regarded as establishing formulae to be applied in later cases: *McKenna v McKenna* [1984] VicRp 58; (1984) VR 665 at pp674-5; *Mallet v Mallet* [1984] HCA 21; (1984) 156 CLR 605 at pp608-9; (1984) 52 ALR 193; [1984] FLC 91-507; (1984) 9 Fam LR 449; (1984) 58 ALJR 248; *Bailey v Wallace* [1970] VicRp 15; (1970) VR 109 at p113. Substantially the Court relies on its knowledge of contemporary forensic practice.

[12] We do not think that the trial could have been foreseen as so protracted that for this reason alone two counsel were needed to divide the work of presenting the plaintiff's case. It would have been expected that the trial from commencement to verdict would have involved about the 10 witnesses and have lasted about the five days that it did.

The basic question is whether the case was one in which the skill and experience expected of a Queen's Counsel might have been regarded as reasonably necessary for the presentation of the plaintiff's case. Of the importance of the case to the plaintiff there can be no doubt. Any case in which a plaintiff claims to have suffered from injuries the permanent disabilities claimed by the plaintiff in this case has great importance to a plaintiff. Although the claim was limited to $100,000, the limit of the jurisdiction of the County Court, under s37A of the *County Court Act* 1958 a verdict for a higher amount could be obtained. The Court was informed that in final address senior counsel for the plaintiff put it to the jury that it would be open to them to award damages up to about $300,000.

It is to be borne in mind that *Stanley v Phillips* [1966] HCA 24; (1966) 115 CLR 470; [1967] ALR 197; 40 ALJR 34 was a case in which the High Court held there had been an error in the exercise of discretion in the Court below, so it exercised the discretion itself. The first question for this Court is whether there was an error in the exercise of the discretion. That question is to be approached on the basis that "there is a strong presumption in favour of the **[13]** correctness of the decision appealed from, and that the decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong". *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; [1953] CLR 621 at p627.

There was very little, if anything, in the nature and issues of this case which took it out of the usual run of personal injury cases, especially having regard to the fact that whiplash injuries are now frequent and well recognised injuries resulting from motor car accidents. The fact that the medical evidence could not be confirmed by radiological examination is by no means unusual. The many and varied symptoms and complaints suffered by accident victims are an unfortunate but common feature in evidence in the courts. Disputes as to whether the symptoms and complaints are real or imaginary, physical or psychological, deliberately exaggerated or bravely understated are commonplace. Briefing senior counsel in such cases can rarely be justified and cases in which the burden of the expense of senior counsel may fairly be imposed upon the opposite party must be out of the ordinary and must present some special difficulties which require the attention of senior counsel.

With this in mind, we have examined the reasons given by the learned trial Judge for his decision to allow the fees of senior counsel. The learned Judge is an experienced trial judge and his reasons demonstrate that he was fully aware of the relevant principles which govern the exercise of his discretion. We cannot point to any obvious error in his reasons and if the appeal is to succeed it must therefore **[14]** be upon the basis that the decision to allow the fees of senior counsel was so manifestly wrong that there must have been an error in the exercise of discretion. With very considerable hesitation we have come to the conclusion that the decision was not so manifestly wrong as to justify our intervention on this basis.

It was argued that the learned judge in exercising his discretion overlooked relevant considerations or took into account irrelevant considerations. We do not think that it is shown that the judge erred in this way. It does not appear that he overlooked that the question for him was not merely whether the retainer of counsel was warranted in the plaintiff's interests but whether in the circumstances there was warrant for imposing the cost of the plaintiff's senior counsel on the defendant. The judge decided as he did in the light of the combined factors of the length of the trial and the importance and difficulty of the case. There is nothing to indicate that he looked at what happened at the trial for any purpose other than for assistance in identifying

what could reasonably be expected at the time senior counsel was retained. The appeal on the first issue therefore fails.

For the appellant it was submitted that the learned judge erred in allowing a fee to junior counsel which was, excluding a circuit fee, equal to two-thirds of that of senior counsel. At the trial it was submitted that this fee was not warranted for junior counsel. The judge referred to the reasons he had given for concluding that the employment of a Queen's Counsel was justified and **[15]** added "Junior counsel was counsel of long experience and counsel who is Regarded as having special knowledge in the particular jurisdiction in this locality. His employment at the two-thirds fee was entirely justified." For the appellant it was emphasised that the rule of the Victorian Bar now is that:

> "Where two counsel are briefed in a matter, the junior of them should charge a proper fee in all the circumstances of the case. A proper fee may be more or less than two-thirds of the fee of the senior of them."

Restatement of Basic Ruling on Professional Conduct and Practice by the Victorian Bar Council, 13(b); Gowans, *The Victorian Bar: Professional Conduct, Practice and Etiquette*, pp18 and 57. In a case where junior counsel is expected to bear a heavy burden it may be entirely appropriate that the fee on brief should be equal to two-thirds of senior counsel's fee. Compare: *Magna Alloys & Research Pty Ltd v Coffee (No. 2)* [1982] VicRp 10; (1982) VR 97 at pp107-8. However, in this case there was nothing to indicate that if senior counsel were briefed the burden of junior counsel would be a particularly heavy one. Indeed the engagement of senior counsel, who would be expected to take the primary responsibility for making the most difficult decisions and dealing with the most difficult parts of the case, would normally lighten the load which junior counsel would have borne if conducting the case alone.

There may be other grounds in a particular case which would warrant the fee of junior counsel being equal to (or more than) two-thirds of the fee of senior counsel. **[16]** They would, however, be grounds which flowed from the expected role of junior counsel in preparation or at trial. In our opinion what was said by His Honour indicates that in allowing a fee of $1,200 instead of the scale fee of $625, he did not direct his attention to the role which junior counsel would be expected to perform.

For this reason his discretion miscarried in respect of the certification of junior counsel's fee and that part of the order must be set aside. The members of this Court are not sufficiently familiar with either the details of this case or with contemporary practice in the County Court to exercise the discretion with regard to junior counsel's fee. The trial judge is in the best position to exercise that discretion and the matter will be remitted to him for decision.

The appeal will be allowed in part. That part of the order of the learned judge which allows fees for junior counsel fixed at $1,200 will be set aside and the question of allowing junior counsel fees higher than those in the scale will be remitted to the trial judge for decision.
