39/82

SUPREME COURT OF VICTORIA

CRASE & CRASE v DOWNEY

Starke J

12 May 1982 — [1982] VicRp 80; [1982] VR 803; noted 56 Law Inst Jo 430

COUNSEL'S FEES – ITEM 19(a) SCALE OF COSTS – NOT CONFINED TO BARRISTERS AND SOLICITORS WHO HAVE SIGNED THE ROLL OF COUNSEL – COUNSEL'S FEES PAYABLE TO SOLICITOR BRIEFED EXCLUSIVELY AS COUNSEL AND NO PAYMENT MADE TO HIM AS COUNSEL – MAGISTRATE IN ERROR IN FINDING THAT ITEM 19(a) RELATED ONLY TO PRACTITIONERS WHO HAD SIGNED THE ROLL OF COUNSEL: *MAGISTRATES COURT RULES* 1980, SCALE OF COSTS, item 19(a).

Where a solicitor was briefed by another firm of solicitors and conducted the case in court, and he acted solely as counsel and not in any way as solicitor, he was entitled to be remunerated as counsel. Accordingly, a magistrate was in error in ruling that Counsel's fee in the Scale of Costs related only to practitioners who had signed the Roll of Counsel.

STARKE J: This is an application for an order to review the decision of a Magistrates' Court at Geelong made on 22nd July 1981, made by the presiding Stipendiary Magistrate. The matter being reviewed relates only to the question of costs. An order nisi was granted by the learned Chief Justice on 11th September 1981 and the sole ground relied on is:

> "That the Magistrate erred in law in holding that 'counsel' in the Scale of Costs contained in Part I of the Third Schedule to the *Magistrates Court Rules* 1980 was confined to barristers and solicitors who had signed the Roll of Counsel."

The matter arose in this way. The applicants in these proceedings were complainants in a default summons in the Magistrates' Court. Their claim, I think, was for work and labour done and there was a counter-claim by the defendant. In the upshot, the learned Magistrate allowed the claim in part and also the counter-claim in part and, having announced his decision, the question of costs was argued. He reserved his decision and delivered it the next day.

What happened, the material reveals, is this: Mr Fitzgerald is a barrister and solicitor practising in Yarra Street, Geelong; he was communicated with by a partner in the firm of SV Winter & Co who practise as barristers and solicitors at 143 Franklin Street, Melbourne; he was asked if he would accept a brief to appear on behalf of the applicants at the Magistrates' Court and during the conversation it was agreed between Mr Fitzgerald and the partner in Winter & Co that he would accept a brief on behalf of the complainants and would be remunerated on the appropriate scale charged by counsel for appearing in the Magistrates' Court. The fee on the appropriate scale is: brief on trial, $100, and conference, $13. The Magistrate, having heard argument and considered the matter, was of the opinion that the item in the scale related only to practitioners who had signed the Roll of counsel. It is to be noted that nothing in the scale suggests that the item is limited in that way. However, it has apparently been treated in Magistrates' Courts for many years as being applicable only to counsel who are members of the Bar.

The Magistrate made an order for costs on the following basis:

Instructions to sue	$52.00
General preparation	$100.00
Attending court on hearing	$55.00
Witnesses expenses	$100.00
Stamp duty on summons	$12.50
Service fee	$5.90
Mileage fee	$10.25
TOTAL	$335.65

The item "Attending court on hearing" was granted under Item 16 of the Rules which is for

attending court on hearing solicitor without counsel for the first three hours. What is submitted here is that the item that should have been allowed was No 19(a) - under "Counsel's fees":
"Brief on trial $100.000
Conference $13.00."

There have been a number of cases referred to by Mr Neesham in respect of matters touching on this problem but none directly in point. I wish to observe that in deciding this case I desire it to be understood that I am limiting my decision strictly to the very narrow issue which arises here. Since 1891 the profession has been amalgamated by statute under the *Legal Profession Practice Act.* Section 5(1) of that Act provides:

> "No person shall be admitted to practise as a barrister or solicitor solely, but every person admitted by the Supreme Court shall be admitted to practise as a barrister and solicitor.'

Since then, of course, there has grown up within the profession an independent Bar but that, although tending to be recognised in various statutes of recent years, is nevertheless basically a private union or association of persons admitted to practise. By signing the Bar roll and joining the Bar the practitioners agree to practise solely as barristers and also agree not to appear with any person who has not signed the Bar roll and become a member of the Bar. If any barrister departs from these basic rules he will be struck off the Bar roll but he will continue of course to be a barrister and solicitor of the Supreme Court of Victoria.

The cases to which I have been referred have related either to cases where one partner instructs another as counsel or where questions of whether the one solicitor can charge for his services both as a solicitor and counsel, and do not touch on the problem that confronts me. Here a firm of solicitors briefed another solicitor to appear for their client, By 'their client' I mean the client of the first-named solicitors. A fee was agreed as counsel's fee. The charges made were all for work done by the instructing solicitors. The only charge made by the complainants' solicitor, Mr Fitzgerald, was for his appearance as counsel in the Magistrates' Court and for the conference prior to the hearing. Neither he nor his partner nor his firm received any other money at all. There were no solicitor's fees incurred by his firm nor was there any agency fee payable to him by the Melbourne solicitors.

The argument put to me on behalf of the applicants is, in my opinion, supported by the provisions of Section 11 of the *Legal Profession Practice Act*, which provides:

> "No barrister and solicitor shall be entitled to any costs whether as between party and party or between solicitor and client for instructions to or attendances upon counsel: he or his partner or partners being such counsel or for attendances at court on trial or hearing or in chambers as solicitors where he or his partner or partners are also acting and receiving a fee as counsel for the like attendance and for the same client."

This section clearly strikes at the evil of having the same firm of solicitors charging twice over for the same work. The significance of it, as far as this case is concerned, is the section clearly recognises that if that section itself was not passed, both partners in a two-man business could charge for the same work. This, of course, offends one's sense of justice and, accordingly, it was found necessary to insert legislation in the Act to stop any such practice. But the fact that it stops that practice, and no other practice, rather supports me in the conclusion that I have reached that provided a solicitor acts solely as counsel and not in any way as solicitor, then he is entitled to be remunerated as counsel.

In this case Mr Fitzgerald was, in every sense, counsel at the hearing. He was briefed by another firm of solicitors. He received a brief. The fee was arranged. The conference was arranged and held. He conducted the case in court. Neither he nor his partners received any agency fee nor was any remuneration paid to him or anybody else bar the fee which he was paid as counsel for the complainants. The only thing which sets him aside from a man who could legitimately claim to be counsel is the fact that he had not signed the Bar roll.

It seems to me as a matter of principle and, unguided by authority, that the whole purpose of the amalgamation Act was to permit such conduct, and such restrictions which have since been imposed by statute or by judicial opinion is aimed at the evil of double charging. But where a man

acts, as has happened here, entirely as counsel and is paid solely as counsel, to hold otherwise, I would think, strikes at the whole spirit of the amalgamation Act. I am told that it has been the practice for many years for Magistrates to refuse to certify for counsel in a case such as this. If that is so I see no great evil arising from this decision because it seems to me not only just but in accordance with the law that if a man acts as a barrister, if he is otherwise qualified to, he should get paid as a barrister and, accordingly, the Order Nisi is made absolute.

I should add perhaps this: the point here is a very narrow one – the question of what might happen if a man was briefed in this situation but his partner did some solicitor's work or if he himself did some solicitor's work is a matter which I have not determined. The *ratio* of my decision is based solely on the fact that the solicitor (that is Mr Fitzgerald in this case) was briefed exclusively as counsel and no payment was made to him except as counsel.
