

23/05; [2005] VSC 264

SUPREME COURT OF VICTORIA

ZEGARAC v DELLIOS

Cummins J

28 June 2005

CIVIL PROCEEDINGS – CLAIM BY SOLICITOR FOR PROFESSIONAL FEES – COSTS AGREEMENTS ENTERED INTO BETWEEN SOLICITOR AND CLIENT – AGREEMENTS FAILED TO SET OUT THE CIRCUMSTANCES THAT CONSTITUTE A SUCCESSFUL OUTCOME OF THE MATTER – FINDING BY MAGISTRATE THAT COSTS AGREEMENTS WERE INEFFECTUOUS – WHETHER MAGISTRATE IN ERROR – FINDING BY MAGISTRATE THAT SOLICITOR ENTITLED TO COSTS – WHETHER MAGISTRATE IN ERROR: LEGAL PRACTICE ACT 1996, SS93, 97(4), 102.

D., a solicitor, entered into two Costs Agreements with Z. in relation to services rendered for substantial Supreme Court proceedings. The Costs Agreements failed to set out the circumstances that constitute a successful outcome of the matter as required by s97(4) of the *Legal Practice Act 1996* ('Act'). When Z. failed to pay D.'s costs, proceedings were taken in the Magistrates' Court. After hearing evidence, the magistrate ruled that because s97(4) of the Act was not complied with the Costs Agreements were void. However, the magistrate upheld the claim by reference to the relevant Supreme Court scale or on a *quantum meruit* basis. Upon appeal—

HELD: Appeal dismissed.

It is apparent that 102(2) of the Act leads to s93(b) and (c). The Magistrate rightly found that the costs agreements were ineffectuous because they failed to set out the circumstances that constitute a successful outcome of the matter. However, the Magistrate was correct to proceed on a *quantum meruit* basis or upon a basis of reference to the relevant Supreme Court scale and was not in error in making the order in D.'s favour.

CUMMINS J:

1. This is an appeal by Ms Slavica Zegarac from an Order made by His Honour Magistrate Cashmore in the Magistrates' Court at Heidelberg on 26 April 2005, which Order was that the appellant pay to the respondent Paul Dellios, a solicitor trading as Dellios West & Co, the sum of \$15,382.50 being professional costs and disbursements and interest of \$2,748.41, together with costs of that hearing of \$14,216.95 with a stay of 21 days.

2. The appeal is pursuant to s109 *Magistrates' Court Act 1989*. Before me Ms Zegarac has appeared on her own behalf and Mr Nixon counsel has appeared on behalf of the respondent, the solicitor Mr Dellios. By s109(1), a party to a civil proceeding in the Magistrates' Court may appeal to the Supreme Court on a question of law from a final order of the Magistrates' Court in that proceeding. In this case, demonstrably the Order below was a final order and thus an appeal pursuant to s109(1) on a question of law is competent.

3. By s109(3) an appeal under sub-s(1) must be brought in accordance with the Rules of the Supreme Court. By s109(2)(a) the appeal must be instituted not later than 30 days after the relevant Order complained of. By s109(5) the Supreme Court may grant leave under sub-s(4) and the appellant may proceed with an out of time appeal if the Supreme Court is of the opinion that the failure to institute the appeal within time was due to exceptional circumstances and that the Court is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay. In this case there is also filed – and this is the reason I referred to sub-s(5) – a summons filed 2 June 2005 by Ms Zegarac seeking that the appeal be heard in anticipation of a difficulty in relation to time. The Order below was made on 26 April 2005. The notice of appeal, as I have said, was filed on 26 May 2005 and presumably it was thus considered that a summons might be necessary. However, as I have said to the appellant and counsel for the respondent, I wish this matter to be dealt with on the merits; and responsibly that has been the view taken by counsel on behalf of the respondent and I thus need to make no further reference to the summons filed 2 June 2005 or the out of time provisions in s109.

4. The critical matter in s109 is that the appeal is an appeal on a question of law. In the notice of appeal drawn by Ms Zegarac personally there are 16 purported questions of law with numerous sub-parts. In truth most of them are questions of fact, not of law, a circumstance to which I shall come.

5. The affidavit in support of the appeal was either sworn or affirmed, it does not state which, on 2 June 2005. In paragraph 1, Ms Zegarac deposes that:

“I believe His Honour was not correct in finding that the respondent could recover his costs pursuant to s93(c) *Legal Practice Act*.”

She then proceeds to multiple sub-paragraphs setting forth the foundation for that contention. The affidavit concludes:

“11. The Order sought in place of that form which the appeal is brought is that the respondent’s claim as plaintiff in the Magistrates’ Court proceeding be dismissed with costs.

12. Recently I found out that Mr Dellios has issued a warrant to enforce the Court Order from the Magistrates’ Court dated 20 April 2005.

13. I seek injunction for that warrant to be executed.” (Meaning an injunction preventing that execution).

Indeed in the summons to which I have referred filed 2 June, in paragraph 1(c) that injunction also was sought. Again, in order to directly address the merits of the appeal, I proceed on the basis that that injunction is sought before me.

6. Immediately it comes to attention that the costs order below of over \$14,000 was very substantial. That was a consequence of the extraordinary circumstance that the costs hearing below took 13 days. Initially the claim below was of the solicitor who took Magistrates’ Court proceedings for recovery from Ms Zegarac of professional costs and disbursements as her solicitor pursuant to a bill of costs dated 18 September 2003 for service rendered from 10 May 2001 to 26 November 2001 for substantial Supreme Court proceedings. The amount claimed by the solicitor below as applicant was \$16,109.30 but as the Magistrate stated in some handwritten notes which are the only record of his reasons and to which I shall come, in fact the amount of \$15,506 approximately was the appropriate claim under the bill as the balance were some extraneous costs in relation to an application before the Master as to taxation.

7. The Order below exhibited before me, as Exhibit 1 to Ms Zegarac’s affidavit, states:

“Slavica Zegarac to pay Paul Dellios
Claim \$15,382.50 and interest \$2,748.41. Costs \$14,216.95. Stay 21 days.”

That is the Order below from which the s109 appeal derives. In the remarks column, which Ms Zegarac objects to before me as being unfactual, the remarks column not constituting part of the order, there appears:

“The defendant did not take the opportunity to have any bill of costs tax i.e. not prepared to have matter adjourned to enable any bill of costs to be taxed.”

I note that simply because it is part of the remarks column of the Register below. I have no further regard to it in review of Ms Zegarac’s objection to it as being unfactual.

8. The short history of the matter is this. A purported costs agreement was entered into between Ms Zegarac and the solicitor Mr Dellios dated 25 June 2001, being a proforma Law Institute of Victoria Legal Assistance Scheme Costs Agreement exhibited before me, together with on the same date a Supplementary Costs Agreement being a four paragraph supplementary agreement. That is the foundation of the proceeding below.

9. Mr Dellios in his affidavit sworn 23 June 2005 sets forth a history of the matter from his perspective and to which I have had regard just as I have had regard to Ms Zegarac’s primary affidavit in support of the appeal, being her affidavit of 2 June 2005. It is unnecessary to rehearse

the matters in detail. However I have read carefully the appellant's typed submissions below of 106 paragraphs, including multiple allegations of conflict of interest, unfairness, bias, undue influence, negligence, mistake, breach of contract and defamation. I have also read Mr Dellios' submissions below and most relevantly I have read the Magistrate's 58 pages of handwritten reasons below. In relation to that matter I might add that the 58 pages of handwritten notes of his judgment below are demonstrably not a complete record of the judgment because in it appears at times "refers" to other material. That is not inconsequential in this case because under Order 58 Part 3, "Appeals on a question of law", the procedure for compliance on an appeal before this Court is set forth. Rule 58.06 provides that Part 3 applies to an appeal under s109 *Magistrates' Court Act* 1989. Rule 58.09 provides that:

- "The appellant shall file an affidavit stating the acts, facts, matters and circumstances relating to—
- (a) the order under appeal;
 - (b) the ground set out in the notice of appeal.
- (2) That there shall be included as exhibits to the affidavit –
- (a) a copy of the order under appeal; and
 - (b) a copy of any reasons given for the order—
- or their absence as exhibits shall be accounted for in the affidavit."

10. It is not Ms Zegarac's fault that the reasons below are in a handwritten and imperfect form. Ms Zegarac, as a self-represented litigant, plainly has done her best to put material before this Court from the imperfect procedure below as to the recording of the judgment namely the 58 handwritten pages self-evidently incomplete. As Ms Zegarac is a self-represented litigant and cannot be held responsible for the imperfection of the recording below, I have approached her claim before me, being the appeal, in a plenary and beneficent mode and have sought as best I can to ascertain the findings below and consider them in the light of her submissions before me. To that end I spent two hours last Sunday reading the material and again last night and have given Ms Zegarac the full quantum of time under the rules in this Court for a hearing and am now after 5.15 pm today am giving my judgment.

11. Before me Ms Zegarac's submissions, just as the notice of appeal and her affidavit in support, ranged far and wide, primarily over questions of fact. She asserted before me that the Magistrate below was biased, that there was an unfair hearing, that she was precluded from lodging a counterclaim, that there was conflict of interest, that she was precluded from giving evidence, that she was cut short and that the proceedings below essentially lacked any due process. Bearing in mind her submissions, I have considered as best the material permits me that material and applied her submission to it.

12. So far as I can determine, there is nothing made out below to support an appeal on the question of law before me save as to one point which in fact does not avail the appellant before me in any event. I consider that the Magistrate below extended extraordinary locus to Ms Zegarac in the hearing below and I must say, given that the Courts are public places publicly funded, I can see no justification for a hearing lasting 13 days, let alone for there being any validity in the submissions before me of Ms Zegarac that she was cut short below and the proceeding below should have gone even longer and she should have been enabled to prevent even further material.

13. In terms of the requirements of Rule 58.09 as to the presentation before me of that which was below, Ms Zegarac has submitted to me that she wishes to play before me various extracts from the multitudinous audio recordings of the proceedings below to fulfil the requirements of proof of the record below. Merely one or two questions from me to Ms Zegarac demonstrated that such a proceeding would be an entirely futile exercise because she rapidly changed her position in relation to that part which she wished to play from questions from me. It is demonstrable that what would occur is if the recordings of 13 days were to be played here, I would be listening to many hours, if not days, if not 13 days, of desultory recordings. That is not the function of a s109 appeal.

14. The only question of law I consider properly raised before me is a question of construction under the *Legal Practice Act* 1996 – the legislation applicable to this appeal. By s93 is provided:

"Legal costs are recoverable—

- (a) under a costs agreement made in accordance with Division 3; or
- (b) in the absence of a costs agreement, in accordance with the applicable practitioner remuneration order or scale of costs; or
- (c) if neither paragraph (a) or (b) applies, according to the reasonable value of the legal services provided.”

15. Section 102 provides:

“(1) A costs agreement that contravenes any section of this division is void.

(2) Subject to sub-s(3), legal costs under a void costs agreement are recoverable as set out in s93(b) and (c).

(3) A legal practitioner or firm that has entered into a costs agreement in contravention of section 97(5), 98(3) or 99 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.

(4) If a legal practitioner or firm does not repay an amount required by sub-section (3) to be repaid, the person entitled to be repaid may recover the amount from the practitioner or firm as a debt in a court of competent jurisdiction.”

16. By s97(4) the following is provided:

“A conditional costs agreement—

(a) must set out the circumstances that constitute a successful outcome of the matter; and

(b) may exclude disbursements from the legal costs that are payable only on the successful outcome of the matter.”

17. It is apparent that 102(2) leads to s93(b) and (c). The Magistrate rightly found that the costs agreement was inefficacious (that is the two costs agreements both of the same date, 25 June 2001), because they failed to set out the circumstances that constitute a successful outcome of the matter. On this appeal the only question of law raised is whether the Magistrate was correct to proceed on a *quantum meruit* basis or upon a basis of reference to the relevant Supreme Court scale. However that issue does not affect this appeal because, whether one proceeds by the pathway of s93(b) or s93(c) the result is the same. In my view the Order made below was entirely apposite. Certainly no error of law affecting the Order made below has been made out and in my view the pathway, paragraph (b) or paragraph c) of s93, makes no difference whatsoever to the Order below being competent in that the quantum ordered is justified in either event.

18. For those reasons I dismiss the appeal.

19. I should add that Mr Nixon, in the highest traditions of the Bar, has placed before me all that can be fairly be said on behalf of the self-represented applicant as well as on behalf of his own client and I express my appreciation to Mr Nixon for fulfilling in full that tradition.

20. In relation to the injunction, I do not propose to order any restraint upon the warrant being issued. As Mr Nixon has very fairly pointed out, Ms Zegarac can apply under the *Judgment Debt Recovery Act 1984* for instalment payments.

APPEARANCES: The appellant appeared in person. For the respondent Dellios: Mr J Nixon, counsel. Dellios West & Co, solicitors.