11/97

SUPREME COURT OF VICTORIA

TRUCKPOWER AUTOMOTIVE ENGINEERING PTY LTD v GOULOPOULOS SHIELS & MANGOPOULOS

O'Bryan J

14, 18 October 1996

CIVIL PROCEDURE – BILL OF COSTS – PROCEEDING COMMENCED TO RECOVER COSTS – DEFENCE FILED – NO ALLEGATION THAT BILL NOT SIGNED – SOLICITOR FAILED TO PROVE DELIVERY OF A SIGNED BILL - WHETHER DEFENDANT REQUIRED TO PLEAD SPECIFICALLY NON-COMPLIANCE WITH ACT – WHETHER OPEN TO MAGISTRATE TO APPLY SUPREME COURT RULES – WHETHER OPEN TO MAGISTRATE TO GRANT AN ADJOURNMENT TO ENABLE THE ISSUE RAISED BY DEFENCE TO BE MET: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, RR1.14, 9; *SUPREME COURT GENERAL RULES OF PROCEDURE IN CIVIL PROCEEDINGS*, O13; *SUPREME COURT ACT* 1986, S61.

After the delivery of a bill of costs to TAE, GS&M, solicitors, took proceedings to recover costs due and unpaid. The notice of defence filed admitted receipt of an account but denied all other allegations in the particulars of claim. When the matter came on for hearing, the claim was defended on the ground that the solicitors had not proved delivery of a signed bill of costs as required by s61 of the *Supreme Court Act* 1986 ('Act'). The solicitors submitted that this particular of the defence should have been raised in the Notice of Defence. Further, Rule 1.14 of the *Magistrates' Court Civil Procedure Rules* 1989 ('Rules') allowed the magistrate to adopt and apply Order 13 of the *General Rules of Procedure in Civil Proceedings in the Supreme Court* whereby the defendant was required to plead specifically, by way of defence, non-compliance with s61 of the Act. In upholding this submission, the magistrate found that the defendant's failure to refer to s61 of the Act in the Notice of Defence together with the provisions of Order 13, operated to the effect that the defendant had admitted receipt of a signed bill of costs. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted for rehearing.
1. The solicitors were required by s61 of the Act to prove that a signed bill of costs had been served on the defendant. Order 9 of the Rules, which deals with defences and particulars, did not require the defendant to plead by way of defence non-compliance with s61 of the Act. However, when the issue arose the proper course was to grant an adjournment to the solicitors to allow them time to meet the new issue.

2. Order 13 has no counterpart in the Rules. Less formality is required in the Magistrates' Court in the way of defining issues and usually, civil litigation in the Magistrates' Court does not require formal pleadings.

3. Rule 1.14 of the Rules did not exist to enable the Magistrate to adopt and apply Order 13. The procedure prescribed in the Magistrates' Court in relation to a complaint and a defence was not wanting or in doubt. Even if Order 13 applied, it did not entitle the magistrate to treat the requirements of s61 as admitted.

O'BRYAN J: [1] This appeal arises out of an order made in the Magistrates' Court at Melbourne on 28 June 1996 whereby the appellant (defendant in the Court below) was ordered to pay the sum of $6,545 and interest $556.28 and costs $2,502.10 to the respondent (plaintiff in the Court below). The claim was for legal professional costs and fees allegedly incurred between August 1994 and March 1995 in defending a claim made against the appellant in the Magistrates' Court by one G. Andoniou. A bill of costs prepared by or on behalf of the respondent was in two parts: professional costs totalling $3,750 and disbursements totalling $3,295. The disbursements included $3,063 for counsel's fees. An amount of $500 received from the appellant on account of costs and disbursements was deducted from the bill.

In the Court below the claim was defended upon the ground that the respondent had failed to prove delivery to the appellant of a signed bill of costs in accordance with s61 of the *Supreme Court Act* 1986 as a result of which, so it was argued, the respondent should be non-suited. Counsel for the respondent submitted to the learned Magistrate that the non-signing of the bill of costs should have been raised in the particulars of defence, if it was intended by the appellant to rely upon s61. Further, Rule 1.14 in the *Magistrates' Court Civil Procedure Rules* 1989 allowed

the Court to adopt and apply to the proceeding Order 13, Rules 13.2, 13.5, 13.7 and 13.12 of the *General Rules of Procedure in Civil Proceedings in the Supreme Court* whereby the appellant was required to plead specifically by way of defence non-compliance with s61. The learned Magistrate held that the Court could and should adopt and apply Order 13 to the proceeding and in the absence of a plea in the defence that non-compliance with s61 barred the claim it should be taken as admitted that the appellant did receive a signed bill of costs in compliance with s61.

The appellant's defence also raised an issue that the professional costs and fees incurred by the appellant were excessive and unreasonable. The learned Magistrate held that because the appellant did not apply for taxation of the **[2]** bill of costs pursuant to s61(4) he was not entitled to enquire into the reasonableness of costs charged or disbursements incurred but would make findings as to the agreement between the parties and determine whether the bill of costs was levied within the contract. The learned Magistrate found that the bill of costs was levied within the terms of the contract made by the parties.

The appeal raised a number of questions of law. The second question of law should be considered first. It is in these terms:

> "Did the Magistrate err in law by finding that, in the absence of any reference to s61 of the *Supreme Court Act* 1986 in the pleadings, the combination of Order 13, Rules 13.2, 13.5, 13.7 and 13.12 operated to the effect that the appellant had admitted receipt of a signed bill of costs pursuant to s61 of the *Supreme Court Act* 1986?"

The particulars of claim comprised two paragraphs:

> 1. The plaintiffs were at all material times registered pursuant to the *Business Names Act (Vic.).*
>
> 2. The plaintiff's claim is for the sum of $6,545.50 being legal professional costs and fees incurred by the defendant at the defendant's request, full particulars of which have been provided to the defendant in an account dated 9 March 1995 the total amount of which was $6,545.50.

The claim was for $6,545.50 plus costs, plus interest pursuant to statute. The defence comprised three paragraphs:

> 1. The defendant admits paragraph 1.
>
> 2. Save that an account dated 9 March 1995 in the sum of $6,545.50 was provided to it, the defendant denies each and every allegation in paragraph 2.
>
> 3. Further and in the alternative if the plaintiff did incur professional costs and fees, which is denied, the defendant says that the professional costs and fees incurred by the plaintiff were excessive, unreasonable, not a solicitor/client costs and/or not reasonably incurred or of a reasonable amount.

[3] The references in the pleadings to an account dated 9 March 1995 provided to the defendant are to a bill or account sent on 9 March 1995 by the respondent to the appellant. James Constantinou, a principal of the respondent, gave evidence and produced an unsigned copy of the bill dated 9 March 1995. The document was marked Ex. 4. Under cross-examination he said "that he had not signed the bill dated 6 (sic 9) March 1995 nor was he able to say whether or not the bill had in fact been signed and if so by whom". (Affidavit of Charles Leonidas sworn 26 July 1996, page 5). A copy of Ex. 4 was produced to Mr Leonidas and marked CL8. The document is on the letterhead of the respondent and is addressed to the appellant at Werribee. It is undated. The document is a bill of costs in respect of G. Andoniou and details the claim for professional costs and disbursements less an amount of $500 received on account of costs and disbursements. The document is not signed. If the account was provided to the appellant with an accompanying letter, the letter was not produced in evidence. A director of the appellant, Paul Yankos, admitted in evidence receiving a bill of costs dated 9 March 1995. A conclusion may be reached that Ex. 4 is not the counterpart of the bill of costs received by the appellant for Ex. 4 is undated.

I was informed by counsel that no discovery of documents was undertaken prior to the hearing. Section 61 of the *Supreme Court Act* 1986 relevantly provides:

> "(1) Except where there is a solicitor-client agreement, a solicitor must not commence any proceeding to recover costs due to the solicitor until after the solicitor has complied with this section.

(2) A solicitor may draw and serve on the party to be charged a bill of costs ... drawn—
(a) in taxable form; or
(b) in lump sum.

(6) A bill of costs may be served on a person by—
[4] (a) delivering it personally to that person ...; or
(b) sending it by post to that person ...; or
(c) leaving it for that person at that person's place of business or last known place of residence.

(7) A bill of costs must be signed by the solicitor, or if the costs are due to a firm, by one of the partners of that firm, either in that partner's own name or in the name of the firm.

(8) If it is proved that a bill of costs was signed and served as provided in this section, it is not necessary for the solicitor to prove the contents of the bill and it must be presumed, until the contrary is shown, to be a bill that complies with this section."

It was common round that no solicitor-client agreement was made between the parties concerning costs. It was also common ground that a bill of costs in taxable form had been drawn by the respondent and served on the appellant, the party to be charged, in the manner prescribed by ss(6). It cannot be gainsaid that the evidence led in the Court below did not prove compliance with ss(7). In *Maroun v Myall Pty* [1996] VicRp 24; (1996) 1 VR 387, Nathan J considered s61 and the pre-conditions contained in the section. He said (at 391):

"Subsection (1) lays down conditions precedent to the commencement of cost recovery proceedings. It follows that these conditions must be complied with before an action is commenced, despite these conditions being introduced as qualifications."

The respondent was not required by Order 4 of the Rules to plead compliance with s61. In this Court pleading rules would require the appellant to plead and prove non-compliance. Cf. Rule 4.02(d) and Rule 9 in *Magistrates' Court Rules* with Rule 3, *Supreme Court Rules*. The appellant was not required by Order 9 of the Rules to plead by way of defence non-compliance with s61 by the respondent. However, a prudent practitioner should alert his opponent to the non-compliance defence to avoid possible adjournment of the proceeding on account of surprise. Had the proceeding been instituted in this Court, Rule 13 of the *General Rules of Procedure in Civil Proceedings* would have required the appellant to plead in its defence non-compliance with s61 (see Rule 13.02(1)(b)). **[5]** Order 13 has no counterpart in the *Magistrates' Court Rules*. Less formality is required in the Magistrates' Court in the way of defining issues for the very good reason that costs escalate with formal pleadings and interlocutory steps and, usually, civil litigation in the Magistrates' Court does not require formal pleadings. A fair trial of the issues can be had without formal pleadings.

Reference was made in the Court below to Rules 13.5, 13.7 and 13.12. In my opinion, the scope of Rule 13.5 probably extends to the pre-conditions required by s61. See Williams' *Civil Procedure Victoria,* Vol. 1, para13.05.5. Rule 13.7(1), sometimes known as the "surprise" rule, if applicable, would require a party desiring to rely upon non-compliance with s61 to do so before trial in their pleading. However, as *Williams* observes (para.13.07.1): "Breach of the Rule does not mean automatic exclusion of evidence to prove the fact or matter that ought to have been pleaded. Thus, for instance, if at trial a party desires to rely upon a ground of defence required under the Rule to have been raised by his pleadings, the Court might nonetheless allow the party to introduce the ground by amendment of pleading, provided any prejudice to the other party due to surprise can be overcome by granting an adjournment to allow time to meet the new defence." Rule 13.12(1) was relied upon by counsel for the respondent in the Court below to found an argument that because the appellant did not specifically deny in its defence non-compliance with s61(7) the allegation in paragraph 2 of the particulars of claim coupled with the admission in paragraph 2 of the defence "that an account dated 9 March 1995 in the sum of $6,545.50 was provided to it" entitled the Court to treat as admitted the requirements of s61.

In my opinion, if Rule 13.12 applied to the proceeding in the Court below, the Rule did not entitle the Court to treat as admitted the requirements of s61. No allegation was made by the respondent in paragraph 2 of the particulars of claim that the account dated 9 March 1995 provided to the appellant was signed by one of the partners of the firm. Had paragraph 2 done so there would be force in the argument that non-compliance with s61 was not in issue; alternatively that the defence impliedly admitted the requirements of s61, including ss(7).

[6] The important question remains: what did Order 13 of the *Supreme Court Rules* have to do with the proceeding in the Magistrates' Court? Mr Northrop of counsel for the respondent submitted that Rule 1.14 in Part 4 of the *Magistrates' Court Rules* entitled the learned Magistrate to adopt and apply in the proceeding Order 13 of the *Supreme Court Rules*.

The heading to Rule 1.14 reads:

> "Procedure wanting or in doubt".
> "1.14. Where the manner or form of the procedure—
> (a) for commencing, or for taking any step, in a proceeding; or
>
> (b) by which the jurisdiction, power or authority of the Court is exercisable—
> is not prescribed by these Rules or by or under any Act the general principles of practice and the Rules and forms observed and used in the Supreme Court may, at the discretion of the Court, be adopted and applied to any proceeding with such modification as may be necessary."

In my opinion, the criteria prescribed in paragraphs (a) or (b) did not exist to enable the learned Magistrate to adopt and apply Order 13 in the proceeding. The Rules in the Magistrates' Court to which reference has already been made: Rule 4 and Rule 9, governed pleading procedure in the Magistrates' Court. The procedure prescribed in relation to a complaint and a defence was not wanting or in doubt. In my opinion, no basis existed to adopt and apply in the proceeding in the Court below Order 13. "Order 13 regulates the form and content of a pleading and it applies to every kind of pleading. The order is modelled closely on O18 of the 1965 Rules in England. It gathers in one order all the rules of pleading which were formerly contained in several orders." (*Williams*, para13.01.0).

The learned Magistrate erred in my opinion, in exercising his discretion to adopt and apply Order 13 to the proceeding. The consequence was that the appellant was deemed to have admitted that the bill of costs had been signed by one of the partners of the respondent firm. **[7]** It is perfectly clear that during the hearing in the Court below an issue arose as to whether s61(7) had been complied with. If the respondent failed to prove compliance it would be non-suited. When the issue arose the proper course would have been to grant an adjournment to the respondent to allow it time to meet the new issue. The respondent might have located the original account dated 9 March 1995 or, a letter accompanying the account, signed by one of the partners. At all events, the learned Magistrate was not entitled to proceed as he did and shut out an arguable defence. I uphold the second question of law. It is unnecessary to consider any other question of law. I shall order that the orders made in the Magistrates' Court on 28 June 1996 be set aside and the matter be referred to the Magistrates' Court to be reheard before a differently constituted court in accordance with law. Respondent to pay costs.

APPEARANCES: For the Appellant (Truckpower Auto Pty Ltd): Mr Sasse, counsel. Solicitors: Comlaw. For the Respondent (Goulopoulos Shiels & Mangopoulos): Mr Northrop, counsel. Solicitors: Goulopoulos Shiels & Mangopoulos.
