**06/03; [2003] VSC 92**

**SUPREME COURT OF VICTORIA**

# *CHAKERA v KUZAMANOVIC & ANOR*

**Nettle J**

**19 March 2003**

**CIVIL PROCEEDINGS – BILLS OF COSTS – BARRISTER'S FEES – PAID BY SOLICITOR – CLAIM BY SOLICITOR AGAINST CLIENTS – FAILURE BY SOLICITOR TO GIVE INFORMATION TO CLIENT BEFORE TAKING PROCEEDINGS – WHETHER COMPLIANCE WITH ACT A COMPLETE DEFENCE TO THE CLAIM – CLAIM DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *LEGAL PRACTICE ACT* 1996, SS86, 106, 107.**

C., a solicitor, sued his client (K.) for unpaid barrister's fees. At the hearing, K. alleged that he had not been given notices as required by s86 of the *Legal Practice Act* 1996 ('Act'). The magistrate held that a solicitor's failure to comply with s86 rendered legal costs irrecoverable and dismissed the claim. Upon appeal—

**HELD: Appeal allowed. Remitted for further hearing and determination.**
**1. It does not follow *a priori* from a failure to comply with a statutory requirement that a contract is rendered void and unenforceable. One must determine as an exercise in statutory construction whether the statute intends that result or some other consequence.**

**2. When one looks to the other provisions of the Act it is plain that the Act intends other consequences such as those laid down in s91 of the Act.**

**3. S91 provides both express and implied guidance as to the consequence of a solicitor's failure to comply with s86. Expressly it provides for a reduction in the costs which a solicitor may recover and thus it implies that a solicitor who fails to comply with s86 is not precluded from recovering legal costs. Accordingly, the magistrate was in error in finding otherwise.**

**4. S106 of the Act provides that a legal practitioner or firm must not commence legal proceedings to recover legal costs from a person until at least 30 days after the practitioner or firm has given a bill of costs to the person. S107 requires that a bill of costs be signed by the legal practitioner or another legal practitioner authorised by the legal practitioner or by an approved clerk.**

**5. In the present case, C. delivered a copy of the barrister's fee slip to K. before joining K. as a third party. This was not sufficient compliance with ss106 and 107 of the Act. A solicitor could comply with ss106 and 107 by writing a letter to the client signed by the solicitor enclosing counsel's fee slip or specify in the letter the amount of counsel's fees shown in the fee slip.**

**NETTLE J:**

1. This is an appeal from an order of the Magistrates' Court at Melbourne made on 25 September 2002. The question of law is whether the failure of a solicitor to comply with section 86 of the *Legal Practice Ac*t 1996 of itself prevents the solicitor from recovering legal costs from his client.

2. The proceeding before the Magistrates' Court arose out of a claim made by a barrister against the appellant solicitor for unpaid fees. Initially the appellant defended the barrister's claim but later consented to judgment for unpaid fees of $3,862.30, with interest of $375.46 and costs of $2,302. The solicitor then commenced a third party claim against the respondents to recover the judgment sum.

3. In the particulars of the third party claim, the appellant alleged that he had incurred his liability to the barrister as solicitor and agent for the respondents and thus that the respondents were liable to indemnify the appellant against the amount of the barrister's claim. In their notice of third party defence, the respondents alleged amongst other grounds of defence that the appellant did not give the respondents the notices required under the *Legal Practice Act* 1996.

4. When the matter came on for hearing before the Magistrate on 25 September 2002, his Worship asked the solicitor who then appeared for the respondents to identify the defences which they relied upon and the response given was that the two main defences were that the appellant had not complied with section 86 of the Act and that the appellant had not complied with section 106 of the Act. That invoked a submission from counsel who then appeared for the appellant that section 86 had nothing to do with barristers' fees.

5. Long discussion ensued between counsel and the Magistrate about the application and effect of sections 86 and 106 in the course of which counsel for the appellant conceded that the appellant had not complied with section 86; submitted that the appellant had complied with section 106; and asked that he be permitted to adduce evidence to demonstrate compliance with section 106. But he was not afforded that opportunity. The Magistrate effectively terminated the discussion with the observation which is recorded at page 25 of the transcript, that:

> "My ruling is, until you can – unless you've got something new, I am going to say 86 is a threshold point. You must have that complied with before anything else happens."

6. Counsel for the appellant then strove to persuade the Magistrate otherwise, making reference among other things to the dire consequences for the many solicitors whom he said may frequently fail to comply with section 86, and he asked that he be permitted time and the opportunity to call expert evidence to show how widespread may be the failure of solicitors to comply with section 86. But the Magistrate was to have none of it. At page 27 of the transcript his Worship is recorded as responding to counsel's submissions in these terms:

> "No, the flavour of the legislation says that first of all he must do what's required of 86. If he tries to do that and falls short in some aspects of 86 and the client goes to s115, the client can have his costs reduced to the extent that the solicitor hasn't complied with 86. But where there's absolutely no compliance with 86, you don't even get there."

7. Again counsel attempted to persuade the Magistrate to a different view but the Magistrate's mind was made up. At page 28 of the transcript his Worship is recorded as restating his position as follows:

> "I will restate my ruling in case you want to go further. My ruling is based on the accepted proposition that there has been no information whatsoever, given by s86. That is an accepted fact here, it is not a finding of fact, that is an accepted fact. If that is an accepted fact, then it is my ruling that s. 86, being a mandatory provision and not having been complied with, the agreement, the contract between the solicitor and his client is not enforceable because of 86. The attempts to use s91 do not ameliorate that so far as the solicitor is concerned because 91 only comes into play after s115 has been in play. And of course, in a case - and I have had them before where a solicitor has given his client notice under 86 but it has been an incomplete notice, it has not been a very full notice or it has left some vital point out. Then that is a situation where the client has got two courses open to him, I would have thought. One is via 115 but then he is caught by a time limit, he is caught by the - I think it is two months, isn't it, he is caught by a time limit. But, it might even be, even then, to the extent that 86 has not been complied with, he would have a defence in a contractual attempt by the solicitor, to gather his fees in this court. But in this particular case we do not even get there, it is a conceded fact that there is no information provided to the client in this case, pursuant to s86. I do not even have to then get into the sections about bills of costs. Thank you very much. The matter is dismissed."

8. Despite the many times and the many ways in which the Magistrate repeated the proposition that the appellant could get nowhere without demonstrating compliance or perhaps substantial compliance with section 86, it is not clear to me why the Magistrate thought that a solicitor's failure to comply with section 86 renders legal costs irrecoverable or that section 91 only applies to a case of partial failure to comply with section 86 as opposed to complete failure to comply.

9. I suspect the Magistrate had in mind the oft stated proposition that a contract expressly or impliedly prohibited by statute is void and unenforceable, but if so it seems that the Magistrate may have fallen into error by failing to notice that that proposition is subject to exceptions and, ultimately, that the effect of failure to comply with a statutory requirement varies according to the statute.

10. The true position is as stated by Gibbs ACJ in *Yango Pastoral Company Pty Ltd v First Chicago Australia Limited*[1] as follows:

> "It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable... Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed..."

More recently in *Nelson v Nelson*[2] McHugh J has reiterated the principle as follows:

> "... The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality; otherwise the courts would embark on an assessment of moral turpitude independently of and potentially in conflict with the assessment made by the legislature. Second, the imposition of the civil sanction must further the purpose of the statute and must not impose a further sanction for the unlawful conduct if Parliament has indicated that the sanctions imposed by the statute are sufficient to deal with conduct that breaches or evades the operation of the statute and its policies. In most cases, the statute will provide some[3] guidance, express or inferred, as to the policy of the legislature in respect of a transaction that contravenes the statute or its purpose. It is this policy that must guide the courts in determining, consistent with their duty not to condone or encourage breaches of the statute, what the consequences of the illegality will be. Thus, the statute may disclose an intention, explicitly or implicitly, that a transaction contrary to its terms or its policy should be unenforceable. On the other hand, the state may inferentially disclose an intention that the only sanctions for the breach of the statute or its policy are to be those specifically provided for in the legislation."

11. In short, it does not follow *a priori* from a failure to comply with a statutory requirement that a contract is rendered void and unenforceable. One must determine as an exercise in statutory construction whether the statute intends that result or some other consequence.

12. When one looks to the other provisions of the *Legal Practice Act* 1996, it is in my view plain that the Act does intend other consequences. It intends the consequences which are laid down in section 91 of the Act.

13. That section provides both express and implied guidance as to the consequence of a solicitor's failure to comply with section 86. It expressly provides for a reduction in the costs which the solicitor may recover, and thus it implies that a solicitor who fails to comply with section 86 is not precluded from recovering legal costs, albeit that they may be reduced. The policy of the statute as revealed by the terms of section 91 is that a solicitor who fails to comply with section 86 may have his fees reduced in the circumstances mentioned in section 91. It is not that his fees will be rendered irrecoverable.

14. Furthermore, I am unable to see any basis for the Magistrate's conclusion that section 91 is limited to cases of partial compliance with section 86. The section does not say so and if that were its effect, one may wonder how one would go about assessing whether the degree of non-compliance in any particular case were sufficiently serious to vitiate the retainer or sufficiently venial to result only in a reduction in fees.

15. Counsel for the respondent submitted that if the failure were one of not providing information of the kind prescribed by 86(1) (*scil.* information on the basis on which fees would be charged), it would vitiate the contract. But if the failure were a failure to provide information of the kind described in 86(3), it probably would not do so. It was, he submitted, a question of fact and degree, having regard to the overriding purpose of the legislation, which he suggested is to ensure that "consumers" of legal services are provided with adequate information as to the basis on which fees may be charged.

16. That seems to me to be most unlikely. It cannot have been intended that the question of whether a retainer is vitiated should turn on some sort of *ex post facto* assessment of the gravity of the solicitor's failure to provide information. Furthermore, section 93 expressly provides for

cases in which there has been no fees agreement entered into but in which fees are recoverable. When one has regard to the attributes of a costs agreement set out in section 96 of the Act, and in particular to the possibility recognised in section 96(3) that a costs agreement may consist of no more than a written offer that is accepted in writing or by other conduct, it becomes even more apparent that costs may be recoverable despite the failure of a solicitor to communicate to his client the basis upon which he proposes to charge for services to be rendered.

17. In the course of his submissions, counsel for the appellant made reference to a number of authorities in support of propositions.

> • First, that when an Act is divided into parts it is to be presumed that each part relates to a particular subject and is not affected by clauses in another part[4].
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> • Secondly, that when construing statutes it is a well-known rule of construction that where a special remedy is given for failure to comply with the directions of a statute, that remedy must be followed and no other can be supposed to exist[5].

18. It was submitted that the first of those propositions supports the view that section 91 was intended exhaustively to provide for the consequences of a solicitor's failure to comply with section 86 (because sections 86 and 91 are both in Division 1 of Part 4 of the Act) and unlikely that the operation of section 91 is confined to an assessment of costs under section 115 of the Act (because section 115 is to be found in Division 5 of Part 4).

19. There is perhaps some force in that submission, although modern Acts of Parliament tend to contain many more sections than Acts used to do. It may be doubted that the same sort of precision as was contemplated in *Re Commercial Bank of Australia Limited* is to be expected these days.

20. It was submitted that the second proposition provides support for the view that because section 91 provides specifically for the consequences of a solicitor's failure to comply with section 86, the solicitor's client is not intended to have a further remedy of treating the retainer as avoided. I agree with that submission.

21. In my opinion, the failure of a solicitor to comply with section 86 of the Legal Practice Act does not of itself operate to render fees irrecoverable. It follows that the question of law which is the subject of appeal should be answered no.

22. That is not sufficient, however, to dispose of the appeal in the way in which matters developed. It remains to deal with the effects of sections 106 and 107 of the Act.

23. The evidence before the Magistrate was that the appellant had delivered a copy of the barrister's fee slip to the solicitor's client before joining the client as a third party and it was submitted on behalf of the appellant that because the fee slip was signed by the barrister's clerk, the solicitor's delivery of the fee slip to the clerk [client] was sufficient compliance with sections 106 and 107. I do not accept that submission.

24. Section 106 provides that a legal practitioner or firm must not commence legal proceedings to recover legal costs from a person until at least 30 days after the practitioner or firm has given a bill of costs to the person in accordance with section 107. Section 107 requires that a bill of costs be signed by the legal practitioner or another legal practitioner authorised by the legal practitioner or by an approved clerk.

25. "Legal costs" are defined in section 3 of the Act to include disbursements, and hence the appellant was bound to serve on the client a bill of costs for the barrister's fees before the appellant could recover the barrister's fees from the client. Certainly, section 107 provides that a bill of costs can be signed by a legal practitioner or by another legal practitioner authorised in that behalf or by a barrister's clerk. But that does not mean that a barrister's clerk can sign a solicitor's bill of costs; even a solicitor's bill of costs for disbursements comprised of the barrister's fees. Even if that be the literal meaning of section 107(1), it is certainly not the meaning which one derives when the provision is read in context[6]. The context reveals that the provision for signature of a bill of costs by a barrister's clerk is limited to bills of costs issued by barristers.

26. Section 107(2)(b) expressly provides that in the case of a firm of solicitors a bill of costs must be signed by a partner. And since a "bill of costs" includes a bill for disbursements, the evident intent of section 107(2)(b) is that, in the case of a firm of solicitors, a disbursement bill for counsel's fees must be signed by a partner of the firm. That being so I see no reason to think that a different result was intended in the case of sole practitioner. In the case of a sole practitioner, I think that section 107(1) was intended to have the effect that a disbursement account for barrister's fees must be signed by the sole practitioner or another legal practitioner authorised in that behalf.

27. It was submitted on behalf of the appellant that section 107(2) should be seen as inapplicable to a solicitor's bill of costs for disbursements comprised only of counsel's fees, and hence that section 107 should be read as requiring no more than that the solicitor give to the client a copy of counsel's fee slip signed by counsel's clerk. That was so, it was said, because the purpose of the section in requiring a bill of costs to be signed is to provide a certification that the amount of the bill is due. And it was contended that in the case of a barrister's fees there is adequate certification in the signature of the barrister's clerk.

28. But all of that appears to me to proceed upon a misconception. Even if the purpose of the section is to ensure certification of amounts which are claimed in bills of costs, a barrister's clerk's signature could not operate as a certification of a solicitor's bill of costs for disbursements comprised of a barrister's fees.

29. It would be different if the barrister were to bill the lay client directly. In those circumstances the signature of the barrister's clerk might operate as a certification that the barrister's fees were in accordance with the barrister's retainer. Equally, if the barrister were to render an account for fees to his or her instructing solicitor, the barrister's clerk's signature might operate as a certification that the barrister's fees had been charged in accordance with the barrister's retainer. But the barrister's clerk's signature could not amount to a certification that the barrister had been briefed on terms, and thus had charged on terms, which the lay client had expressly or impliedly authorised the solicitor to agree to. Only the solicitor would know if the barrister had been retained on terms which accorded with the lay client's express or implied authority to the solicitor to brief counsel, and hence only the solicitor could certify that counsel's fees had been calculated on that basis.

30. In my opinion a barrister's clerk's signature on a fee slip may suffice for the purposes of the barrister's claim against the barrister's instructing solicitor and, if the barrister has a direct claim against the lay client, it may suffice for the purpose of that claim. But a barrister's clerk's signature on a barrister's fee slip is not sufficient compliance with section 107 for the purposes of the instructing solicitor's claim against the lay client (even if the claim be for disbursements constituted only of the barrister's fees).

31. I should say that I do not think that anything very elaborate is required for a solicitor's bill of costs for the recovery as disbursements of a barrister's fees. If a solicitor is seeking to recover no more than counsel's fees as a disbursement, the solicitor could comply with sections 106 and 107 by writing to the client a letter signed by the solicitor enclosing counsel's fee slip, signed by an approved clerk, and requesting that the client pay the amount of the fees to the solicitor. Because section 107 allows for the lump sum bills of costs, I think that it would also be sufficient if instead of enclosing counsel's fee slip, the solicitor were simply to specify in his or her letter to the client the amount of counsel's fees shown in the fee slip signed by counsel's clerk and requesting payment of that amount to the solicitor. As between those two methods the former has an advantage in terms of clarity, but either should suffice.

32. Be that as it may, there has not yet been a determination by the Magistrate as to whether there was compliance with section 106. Although there was reference by counsel for the appellant to the provision by the solicitor to the client of counsel's fee slip, or a copy of it, the matter was left on the basis which appears from page 25 of the transcript. In his submission to the Magistrate counsel for the appellant said:

> "I think you are correct in that if we haven't provided the bill of costs, we definitely fail. And that's a matter which, if you allow us to continue I can show you how we have provided the bill of costs."

33. But the Magistrate did not allow counsel to continue in his endeavour to show how a bill of costs had been provided. Immediately after counsel had asked for that opportunity, the Magistrate steered the discussion to section 86 and foreclosed further debate on the basis of his ruling that failure to comply with section 86 was fatal to the appellant's cause of action. In the way in which matters were left, evidence was not adduced and findings were not made one way or the other as to whether as a bill of costs had been provided. In the result the matter must be remitted to the Magistrate for further hearing and determination according to law.

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[1] [1978] HCA 42; (1978) 139 CLR 410 at page 413; 21 ALR 585; (1978) 53 ALJR 1.
[2] [1995] HCA 25; (1995) 184 CLR 538 at page 613; (1995) 70 ALJR 47; [1996] ANZ Conv R 280; (1995) 19 Leg Rep 14.
[3] See also *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355, 388-9; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41; Goff & Jones, *The Law of Restitution*, 5th Ed, pp 609-612; Thompson, *The Rights of Parties to Illegal Transactions*, pp4-12.
[4] See *Re Commercial Bank of Australia Ltd* [1893] VicLawRp 56 (1893) 19 VLR 333, 375.
[5] See *Bailey v Bailey* (1884) 13 QBD 855, 859; *Graziers Association v Durkin* [1930] HCA 22; (1930) 44 CLR 29, 36; 36 ALR 306.
[6] See *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* [1925] HCA 5; 35 CLR 449, 455; 31 ALR 117; *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390, 397; *Project Blue Sky supra*; Pearce & Geddes *Statutory Interpretation in Australia* at [4.2].

**APPEARANCES:** For the appellant Chakera: Mr G Parncutt, counsel. Rogers & Gaylard, solicitors. For the respondent Kuzamanovic: Mr F Holzer, counsel. Keith Hercules, solicitors.

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