7/99; [1999] VSC 147

SUPREME COURT OF VICTORIA

SOPHIADAKIS & ORS v RELJIC & ANOR

Teague J

10 August 1998; 7 May 1999

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – SOLICITOR INSTRUCTED TO ACT FOR ONE PARTY – INQUIRY AGENT INSTRUCTED BY SOLICITOR TO ASCERTAIN IDENTITY OF, INTERVIEW WITNESSES AND PREPARE DIAGRAM OF SCENE – SUBSEQUENT CLAIM FOR PAYMENT OF INQUIRY AGENT'S FEE – WHETHER FEE A "DISBURSEMENT" – WHETHER FEE PAYABLE ON A PARTY AND PARTY BASIS.

A solicitor instructed a licensed inquiry agent to ascertain the identity of and interview witnesses following a motor vehicle collision. The inquiry agent was also asked to take photographs, make a videotaped record and prepare a diagram of the scene. Upon completion of the work the inquiry agent claimed the sum of $6892 for work done. The subsequent proceedings in the Magistrates' Court were settled save for the question of the payment of the inquiry agent's fee. The magistrate ruled that the fee was not recoverable on a party and party basis. Upon appeal—

HELD: Appeal dismissed.
1. In determining whether a particular type of expenditure can be characterised as a disbursement, custom or practice or precedent (in addition to other criteria) are important factors.

2. A party cannot be allowed as a disbursement, a fee for work which a party's solicitor has a duty to carry out exercising professional skill, but the solicitor chooses to delegate that work to a person who is neither another solicitor in the jurisdiction or a clerk in the employ of the solicitor. A professional disbursement will be allowed where the work is performed professionally, either by the solicitor personally or by a solicitor or clerk for whom the solicitor is professionally responsible. It will not suffice if the work is contracted out to a person for whom the solicitor is not professionally responsible. Accordingly, the magistrate was not in error in declining to allow as a disbursement the fee claimed by the inquiry agent.

TEAGUE J:

1. I have before me an application under Order 56 seeking relief by way of *certiorari*. The application relates to proceedings in the Magistrates' Court which arose originally out of certain motor vehicle collisions. Put shortly, I am concerned with the entitlement of a party to litigation to recover, as a disbursement on a taxation on a party and party basis, a certain kind of fee. The fee is that of an inquiry agent acting as a motor vehicle collision investigator. The application also raises questions as to the appropriateness of *certiorari*.

2. The motor vehicle collisions occurred at the same time. They occurred on the Western Ring Road on the morning of Saturday 14 December 1996. Aleksandar Reljic, who was the defendant in the Magistrates' Court proceedings, and the first defendant in the proceedings before me, was driving a car in the outside lane. Several motorcyclists from the Outcasts Motorcycle Club were riding along the highway in the same direction as the defendant. The defendant stopped or slowed down suddenly. Some of the motorcyclists collided with the back of the defendant's car. The collisions resulted in injury to the motorcyclists and damage to their motorcycles. The motorcyclists were the plaintiffs in both the Magistrates' Court proceedings and the proceedings before me.

3. The plaintiffs instructed a solicitor soon after the collision. On 15 December 1996, Mary Sophiadakis, the wife of the plaintiff Adam Sophiadakis, attended on a solicitor, Michael Ruse of Bourke Street, Melbourne. On 19 December, Michael Ruse attended the motorcycle club rooms to obtain information about the collisions. He was informed, amongst other things, that at least five motorcycles were involved in the collisions, that some of the injured riders of the motorcycles were in different hospitals rather than the same hospital, and that there were a number of independent witnesses. He formed the opinion that extensive efforts were going to be required to interview all relevant persons about the collision. On 20 December, Michael Ruse instructed Raymond Wregg,

a licensed Inquiry Agent to speak to the police, to ascertain the identity of witnesses, to interview witnesses, to take photographs, to make a videotaped record and to prepare a diagram of the scene of the collisions. Affidavits sworn by Michael Ruse and Raymond Wregg as to the instructions and as to the work done pursuant to the instructions were before me.

4. Raymond Wregg made enquiries by telephone, and, when he considered it necessary, he personally attended to take statements. His actions included what follows. On 21 December 1996, he attended on the defendant Aleksandar Reljic. On 22 December, he attended on an independent witness. Between 6 January and 9 January 1997, he attended on six motorcyclists. He obtained signed hand-written statements from those on whom he attended. He reduced these statements to typewritten form. He presented the statements to Michael Ruse, who checked them before returning them to Raymond Wregg. He re-attended the interviewees to obtain signatures on the typewritten statements. He gave copies of the typewritten statements to the police. He inspected the scene of the accident. He took photographs and made videotape record of the scene. He later made a schematic drawing of the scene.

5. On 17 January, he submitted a progress report of the results of his inquiries, together with the videotape, to Michael Ruse. On 21 January, he sent a letter to Michael Ruse enclosing the photographs and schematic drawing. On 10 February, he sent a further letter to Michael Ruse, enclosing an invoice for his services. The account was for a total of $6,892.25. On the materials before me it appeared that $5,962.25 was paid on 4 December 1997. It was not made known to me what the position was as to the other $930.

6. On 28 April 1997, Michael Ruse was contacted by a representative of Quest Investigations and was told that Quest was acting on behalf of RACV Insurance Ltd, the insurer of the defendant. Michael Ruse provided to Quest a copy of all witness statements obtained by Raymond Wregg. Michael Ruse took other steps to prepare the claims of the plaintiffs. The decision was made to make a claim on behalf of the plaintiffs for approximately $53,000.00 of property damage to 5 motorcycles and $6,000.00 of damage to clothing and safety gear for six injured persons. On a date not revealed in the papers before me, proceedings were commenced in the Magistrates' Court in the form of two Complaints, K01517264 ("the six plaintiffs' claim") and K01517253 ("the Johns claim"). On the materials before me, it appeared that the decision to commence two proceedings rather than one was governed by jurisdictional limitations.

7. On 29 July 1997, Michael Ruse was contacted by Bruce Kent, solicitor of Russell Kennedy. Bruce Kent said that he had been instructed to act on behalf of the defendant. On 1 August 1997 a Notice of Defence on each complaint was served on Michael Ruse. On 25 November 1997 a court conference took place. The claims were not resolved at that conference. On 15 December 1997, a further court conference was held. At that conference, an agreement was arrived at in relation to both claims. The six plaintiffs' claim was settled for $33,860.07. The Johns claim was settled for $5,479.08. The terms of the agreement were confirmed in a letter dated 18 December 1997 from Michael Ruse to Bruce Kent. It was stated in the letter that the question of costs was to be referred to the Magistrates' Court for determination in the absence of agreement. In December, a claim was made on behalf of the six plaintiffs and Johns for $10,881.25 for the costs and disbursements of both proceedings: $2,920.50 for the six plaintiffs' claim, $1,068.50 for the Johns claim, plus $6,892.25 for the investigator's fee. On 20 January 1998, Bruce Kent made an offer of $6,250.00 for the costs and disbursements of both proceedings. A counteroffer of $8,300.00 was made and not accepted. The question of costs was referred to the Magistrates' Court.

8. The two applications seeking the determination of costs came before a learned magistrate at the Melbourne Magistrates' Court on 6 March 1998. Mr Purvis of Counsel appeared on behalf of the plaintiffs and Mr Randall of Counsel appeared for the defendant. The plaintiffs relied on the affidavits of Michael Ruse and Raymond Wregg, both sworn on 4 March 1998. Exhibited to the affidavit of Raymond Wregg was a copy of the invoice for his services and of the three pages of time sheets for the services. Time was charged out at $65 per hour, and travelling expenses at .55 cents a kilometre. Other disbursements of $74.50 were included with minimum detail. The defendant relied on an affidavit of Bruce Kent sworn 6 March 1998. Prior to the applications coming on for hearing counsel negotiated a limited agreement. The applications before the magistrate then proceeded as applications in respect only of the fee of Raymond Wregg. The magistrate was requested to rule on the plaintiffs' entitlement to recover the fee on a party and party basis.

9. My information as to what happened before the magistrate was extracted from two affidavits, sworn by each of Mr Purvis and Mr Randall. It is necessary to set out significant portions of those affidavits. I will then make some comments thereon.

10. As to what happened prior to the matter coming before the magistrate, Mr Purvis said: "I discussed with Mr Randall the costs and disbursements claimed by my client in each action. I had prepared a list of the said costs and disbursements...which I showed to Mr Randall. He indicated that he was prepared to agree to the respective figures for the costs and disbursements claimed therein, with the exception of the investigator's fee. I agreed with his suggestion that the applications should therefore simply proceed as applications in respect of the said fee." Mr Randall generally agreed, but added: "...I indicated that I would agree with the costs and disbursements claimed therein if the claim for the investigator's fee was abandoned."

11. As to what happened initially before the magistrate, Mr Purvis said: "I explained to His Worship the circumstances of the case and the nature of the application before the Court. I indicated that the remaining matter in dispute between the parties was the investigator's fee. I attempted to explain to his Worship that the said fee was a necessary and proper cost in the proceeding by reason of:

> (a) the large number of witnesses, several of whom were hospitalised;
>
> (b) the use made by the Firstnamed Defendant's Solicitors of the investigator's report during settlement negotiations, including the reliance by Mr Kent at a pre hearing conference upon one of the witness statements contained in the report;
>
> (c) the costs savings to the Firstnamed Defendant of receiving a copy of the report at an early stage in the proceeding;
>
> (d) the costs savings to the Firstnamed Defendant resulting from the Plaintiffs suing as co-Plaintiffs, rather than each bringing separate actions.

Mr Randall agreed, but added: "I indicated to His Worship that the investigator's fee was a solicitor/client cost and that there was no precedent for claiming such a fee in any Magistrates' Court matter, much less in respect of claims for property damage."

12. As to what the magistrate said at that time, Mr Purvis said:

> "His Worship...engaged me in a protracted exchange concerning the investigator's fee...His Worship made the following statements, inter alia, with regard to the said fee:
> (a) that there was no legal basis or precedent of which he was aware for allowing such a cost in a proceeding and he was not prepared to create a precedent;
>
> (b) to allow such a cost would create or encourage 'a whole new industry' of 'such people';
>
> (c) that it was "standard practice" in the WorkCover and personal injury jurisdictions to disallow such costs. In relation to (a), His Worship said several times words to the effect: 'I'm not prepared to set a precedent here'. In relation to (b), His Worship stated that 'there are a lot of people out there trying to get work' and seemed to suggest that to allow the investigator's fee in this case would provide an opportunity for such people to make money from the legal system. In relation to (c), His Worship stated that no legal practitioners in the WorkCover or personal injury field would ask for such costs, because 'they know they're not entitled to them'."

13. As to those matters, Mr Randall said that he generally agreed, but that, in relation to (a) "His Worship invited Mr Purvis to refer him to authority or to refer him to a "single instance" where another Magistrate had awarded such a cost in a proceeding. Mr Purvis was unable to refer him either to authority or to any instance where another Magistrate had made an award. It was in that context that His Worship observed words to the effect 'I am not prepared to set a precedent here'." Mr Randall said that he did not recall His Worship using phrases in relation to (b) as claimed by Mr Purvis. However, there was a discussion which revolved around the concern that the amount of the inquiry agent's fees exceeded the whole of the legal costs including disbursements for two Magistrates' Court actions. I believe that he made an observation to the effect that to allow such a claim on a "party and party basis would stimulate claims." Mr Randall said that in relation to (c):

> "... a discussion of practice in the WorkCover and personal injuries jurisdictions arose in the context of an invitation by His Worship to Mr Purvis to refer him to another jurisdiction in which similar amounts were allowed on a 'party and party' basis. Mr Purvis was unable to point to a precedent and His Worship observed that while it was standard practice in the WorkCover and personal injuries jurisdictions to obtain investigator's report prior to the institution of proceeding, in his experience such expenses were claimed on a 'party and party' basis. He may have observed that such costs were not claimed on a 'party and party' basis because practitioners were aware that such items were not properly claimable."

14. At this point of the hearing, there was a lunch break, before which the magistrate said that he would read the affidavits during the break. After the break, Mr Purvis said that he sought to put to the magistrate an argument based upon Rule 26.02 of the Rules, the effect of which would be to have an increased amount allowed for professional charges. It appears that he did not press that submission when Mr Randall claimed that it was in breach of what had been agreed between counsel.

15. Mr Purvis said that, after that exchange:

> "His Worship...then indicated that the application in respect of the investigator's fee would be refused. He made no reference whatsoever to any matter raised in the affidavit material...His Worship preferred Mr Randall's suggestion that the applications be simply marked struck out or dismissed with no order as to costs." Mr Randall added: "I believe that His Worship observed that it was a matter in respect of costs and that the matters were in his discretion. In his discretion he was refusing the application for Orders which included the investigator's fees as a party and party disbursement."

16. There are a number of observations which I would make about what the materials before me reveal and do not reveal as to what happened before the magistrate. The first is that it appears to me that the magistrate was asked to decide only one question and that was whether the inquiry agent's fee was allowable in full as a disbursement or not at all. The second is that there is no indication from the affidavits that either counsel referred the magistrate to any statutory provision, reported case or rule of court save Rule 26.02, and the latter only on a submission that was not pressed. The third is that there is no indication from the affidavits that any request was made to the magistrate for a fuller statement of reasons. The fourth is that, as there was no affidavit filed answering the additions of Mr Randall, I have treated the additions as accurate. The fifth is that neither Mr Purvis nor Mr Randall expressly commented as to whether the magistrate said, or the circumstances warranted the inferring, that what was said by the magistrate in exchanges with counsel should or should not be treated as properly to be incorporated into the reasons for his decision. That represents an obstacle for the plaintiffs, in that I am troubled about inferring that any judicial officer should have attributed to him or her as part of the reasons for a decision, what has been said during exchanges with counsel, since matters can so often be raised in running in a way calculated to probe and explore rather than reveal the basis for ultimate conclusions.

17. The plaintiffs brought their application in this Court by originating motion dated 4 May 1998. They relied in support of the application on the affidavits of Mark Purvis sworn on 4 May 1998, and of Michael Ruse sworn on 6 May. The application before this court is for an order in the nature of *certiorari* to quash the decision of the Magistrate on 6 March 1998 regarding the allowance of the investigator's fee on a party/party taxation of costs. It also seeks an order in the nature of *certiorari* quashing any final orders made by His Worship in respect of the six plaintiffs' claim. The plaintiffs ask this court to order that the matter be referred back to the magistrate with a direction that he allow, in full, the amount claimed. As a secondary position, they ask that there be a referral back to the Magistrate with a direction that he allow the investigator's fee as a disbursement and determine what part of it has reasonably been incurred. Not surprisingly, there is no affidavit from the magistrate, and a letter on the court file records that the magistrate will abide the result of the application to this court.

18. Before me, a number of threshold issues were raised. The plaintiffs were represented by Mr Berglund of counsel and the defendant was represented by Mr Brett of counsel. Mr Brett argued that *certiorari* did not lie, that there was no basis for the remedy sought, and hence no need to proceed to argue the merits of the case. He put to me that there was no basis upon which the plaintiffs could show either jurisdictional error or error on the face of the record. Accordingly, he said, it was not appropriate to examine the magistrate's decision at all, even though such

examination would reveal that there was no error, as there had been a proper exercise of the magistrate's discretion in the rejection of the application, because the investigator's fee was not a professional disbursement.

19. Mr Berglund submitted that there were errors by the magistrate, and that *certiorari* was appropriate on the grounds of both jurisdictional error and error of law on the face of the record. He adverted to another *certiorari* issue, that of whether there was an alternative remedy. He referred to s109 of the *Magistrates Court Act* 1989, under which an appeal is available to the Supreme Court on a question of law from a final order made in a civil proceeding in the Magistrates Court. He put to me that such an appeal was not appropriate here because a refusal to make an order for costs in a case such as this was either certainly not or at least doubtfully, a final order for the purposes of s109. I have noted two cases that have some bearing on that issue. In *Lovejoy v Johnson and Anor* (*Magistrates Cases* 7/98), Coldrey J allowed an appeal under s92 of the *Magistrates' Court Act* against the decision of a magistrate not to make an order for the preparation costs on the grounds that such a claim was covered by the certificate. Section 92, like s109, permits an appeal only from a final order. However, it seems not to have been argued that an appeal was inappropriate. In *Sobh* v *Children's Court of Victoria* [1994] 74 A Crim R 453 which dealt with an application for relief by way of *certiorari* on an issue as to costs, Mandie J noted at 455 that counsel for the defendants had said that he had been instructed not to raise the question of whether an appeal under s200(1) of *Children and Young Persons Act* 1989 was open. Section 200(1) also permits an appeal only from a final order.

20. Mr Berglund relied on *Bailey v Wallace* [1970] VicRp 15; [1970] VR 109 to support his submission that the Magistrate had erred in law and failed to properly exercise his discretion as to costs in that he applied a wrong principle, and in that he failed to consider three matters properly or at all, being first, the provisions of Order 26.02 of the *Magistrates Court Civil Procedure Rules* and Item 30 of Appendix A to those Rules, secondly, the role and duty of a solicitor in obtaining evidence for use at trial, and thirdly the meaning of disbursement, and in that he took into account three irrelevant matters, being first an unpreparedness to create a precedent, secondly the practice in relation to WorkCover and thirdly, the potential implications of encouraging more claims in relation to the investigative industry.

The starting point for my consideration of *certiorari* issues is what was said by the High Court in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. Propositions which were laid down in that case include: [*After setting out these propositions and discussing the matter further, His Honour continued*] …

25. I turn to the case put on behalf of the plaintiffs. Mr Berglund submitted that the magistrate had erred in principle as to the criteria to be satisfied before a fee would be recoverable as a disbursement. Mr Berglund argued that for a fee to be allowed as a disbursement it must be either a payment which was made in pursuance of the professional duty undertaken by the solicitor or a fee which was accepted by general practice and custom as being a disbursement. If the fee satisfied those criteria there were three further questions as to reasonableness to be answered regarding the fee sought to be recovered as a disbursement. The first was whether the task undertaken which resulted in the disbursement being incurred was reasonable. The second was whether the method of performing that task was reasonable. The third was whether the quantum of the fee was reasonable. For reasons I will come to I had no difficulty accepting those propositions.

26. However, it was also part of Mr Berglund's case that a solicitor was entitled to delegate work which the solicitor had a professional duty to perform, and to recover the fee paid for that work as a disbursement. He argued that, while the professional duty of a solicitor included the obtaining of proofs from witnesses, securing of evidence and such matters, the duty to collect the evidence did not have to be performed in person, so that engaging an agent to perform the work would satisfy the duty. He accepted that while practices had developed to recognise that there was a distinction between the work of a solicitor which was, and was not, normally delegated, a fee for services performed by a delegate of the solicitor could properly be treated as a disbursement even if it was for doing work in carrying out the solicitor's professional duty. He argued that that was so in part because the fact that a solicitor delegated that work to another did not necessarily relieve the solicitor of liability. For those reasons the reasonable fee of a solicitor's delegate was recoverable as a disbursement.

27. Mr Berglund argued that the magistrate was in error in that he had not recognised the above principles. He agreed that he was not able to point out to me any decided case where there had been allowed as a disbursement a fee paid by a solicitor to a delegate closely comparable to the inquiry agent Raymond Wregg. He submitted that that was not a reason to refuse to allow the fee as a disbursement, since the Rules provided for the allowance of disbursements and the fee could properly be so categorised. He submitted that investigators have in the past been engaged with their fees being recognised as being allowable as disbursements. In that regard, he referred to *Ottoway v Hamilton* [1878] 2 CP 393; *Myer v Myer* [1932] VicLawRp 46; [1932] VLR 322; 38 ALR 320, and *Frankenburg v Famous Lasky Film Service Ltd* [1931] 1 Ch 428; [1930] All ER 364. I will come later to those cases.

28. I turn to the question of what principles or criteria are appropriately to be applied to determine whether a particular kind of expenditure is to be characterised as a disbursement in the setting of legal costs. My review of potentially relevant statutes, rules of court and reported cases has led to my summarising the position as follows:-

> * the criteria for determining what is a disbursement cannot be determined except in the context of the whole scheme which governs legal costs;
>
> * the scheme contemplates that work involving the professional skills of lawyers will be costed in a structured way;
>
> * the scheme does have regard to logic, but also to legal history and custom, which often reflect long-standing policy considerations;
>
> * the scheme is kept updated by various statutes and rules of court;
>
> * "disbursement" is not defined by statute or rules of court;
>
> * within different parts of the scheme, words like "costs", "charges", "expenses" and "disbursements" can have different meanings;
> * central to the scheme is the role of the Taxing Master;
>
> * the scheme encourages first agreement on costs and then the application of scales, but recognises that it may be necessary to fall back on assessment of the reasonableness of a particular charge for a particular item of work;
>
> * while the scheme encourages lump sum costing, itemisation is or may be required to assess reasonableness;
>
> * a broad definition of "disbursement" has been accepted through the reported cases, but that definition has its limitations;
>
> * in assessing whether a particular fee is properly to be treated as a "disbursement", custom or practice or precedent plays an important part.

29. I turn to the making of a brief review of provisions in statutes and rules of court. Section 131 of the *Magistrates' Court Act* 1989 provides that the costs of all proceedings are in the discretion of the Court, unless otherwise expressly provided by that or any other Act or by the Rules.

30. Rule 26.02 of the *Magistrates' Court Civil Procedure Rules* 1989 No. 199 provides:

> "(1) Subject to paragraph (2), costs must be fixed in accordance with the scale of costs in Appendix A to these Rules.
>
> (2) If in any case the Court thinks that any item in the scale is inadequate or excessive, the Court may allow a greater or lesser sum than the scale provides.
>
> (3) If the scale of costs does not provide for any case, the Court may allow reasonable costs."

31. I add the comments first that neither that Act nor that Rule nor any other Act or rule of court checked by me contains a provision defining "disbursement", and secondly that, as I noted earlier, it appears that, on the hearing of the application in the Magistrates' Court, the magistrate was only referred to one provision in the Rules, namely Rule 26.02, and that was relative to a submission that was not pressed.

32. Item 29 of Appendix A provides for the payment of service fees.

33. Item 30 provides:

> "In addition to the above amounts, money properly paid out of pocket and the expenses of witnesses and interpreters are to be allowed, and disbursements and counsel's fees of the nature referred to in item 21 that are reasonably incurred on behalf of a client may be charged."

34. I add the comment that what "disbursements" in Item 30 is meant to cover is not stated, nor are there any criteria stated to determine what might properly be included as disbursements.

35. Division 8 of Part 5 and Division 2 of Part 6 of the *Supreme Court Act* 1986 contain quite lengthy provisions about costs, although there is little of direct relevance to the issues before me. Even more detailed provisions are to be found in Part 4 of the *Legal Practice Act* 1996. In a broad sense, the focus is more on party and party costs in the first and more on solicitor and client costs in the second. The importance of the supervisory role of the Supreme Court in general and the Taxing Master in particular is apparent from perusing those provisions. While it is unnecessary to go into a summary of the provisions, I would note that in Section 3 of the *Legal Practice Act*, there is a definition of "legal costs" but not of disbursements. "Legal costs" means all amounts that a person has been or may be charged by, or is or may become liable to pay, a legal practitioner or firm for the provision of legal services including disbursements but not including interest.

36. Section 93 of the *Legal Practice Act* provides:

> "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 an applicable practitioner remuneration order of scale of costs: or
>
> (c) if neither paragraph (a) or (b) applies, according to the reasonable value of the legal services provided."

37. What is apparent from the review of the statutory provisions, and from texts on costs, is the difficulty of definition. *Oliver* at page 1 of his book *Law of Costs* (Law Book Co, 1960) writes:

> "In its primary sense, the word 'costs' means the remuneration of a solicitor for professional services rendered to a client and *such payments made in connection with those services as are sanctioned as professional payments by the general and established custom and practice of the profession*....An order simply awarding costs to a party gives not only professional charges, but also *disbursements and expenses incurred, such as counsel's fees and witnesses' expenses*; however, various Acts and Rules use, in conjunction with the word 'costs', such terms as 'fees', 'charges', 'disbursements' and expenses".

The italics are mine, and are noted here relative to a later reference to what was said in the case of *In re Remnant*.

38. I would make a number of other observations. The first is that, although at times in what follows, I refer to cases involving other than party and party costs that should not be treated as any indication that I have lost sight of the fact that the instant dispute is as to an item claimed on a taxation on a party and party basis. The second is that it is customary to distinguish *professional* disbursements and *non-professional* disbursements to differentiate between respectively payments which a solicitor is by duty or custom bound to make on the client's behalf from payments a solicitor makes only on the instructions of the client. Professional disbursements belong in a solicitor's bill of costs. Non-professional disbursements belong in a solicitor's statement of account. The distinction matters for such reasons as the maintenance of a solicitor's accounts, the application of the one-sixth rule, and questions as to a solicitor's personal liability. The third is that I recognise that a better understanding of the customs as to disbursements necessitates a review of some areas of the law which have had historically a particular bearing on the treatment of disbursements, and particularly principles and practice on implied authority, the one-sixth rule, rules as to unusual expenses, the effect of the right to practice on the right to charge costs and on a solicitor recovering costs on acting for himself. In summary the rule on unusual expenses is that

a solicitor has a duty to advise a client, relative to particular work, or a particular disbursement, that it is unusual, and that it will or may not be allowed on a party and party taxation, and then to obtain the client's express authority to do the work or incur the expenses.

39. Work which a solicitor's education, training and experience qualifies him or her to perform as a professional person is specialised work. It is a precondition of a person being able to charge for legal professional work that that person has a right to practice as a legal practitioner. The statutory provisions are protective of the public against unqualified persons and against qualified persons acting inappropriately. They are also linked with provisions which provide for the supervision and accountability of legal practitioners. Part of that accountability includes the obligation to subject bills of costs to the scrutiny of the Taxing Master. There are beneficial aspects from the viewpoint of both lawyers and clients. The clients have the benefit of the observance of higher standards by persons whose training and experience is calculated to ensure that those standards are met. The benefits to the solicitor include the implied authority to incur expenses for which the client must pay, provided that the expenses are usual. That authority is implied from the fiduciary relationship between solicitor and client.

40. The development of detailed procedures for the supervision of solicitor/client costs and party/party costs has resulted in a comprehensive coverage of principles and practices which have reduced potential for abuse and injustice. The importance of professional skills was noted in *Buckland v Watts* [1970] 1 QB 27 at 38 where Danckwerts LJ quoted with approval *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 876-877 in which Bowen LJ said, [referring to Lord Coke's *Commentary*, 2 Inst. 288]

> "His meaning seems to be that only legal costs which the court can measure are to be allowed, and that such legal costs are to be treated as expenses arising from the litigation and necessarily caused by the course which it takes. Professional skill and labour are recognised and can be measured by the law: private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed in taxing a bill of costs..."

41. One example of specialist work which involves the application of professional skills and knowledge is proofing a witness. An investigator can gain experience in obtaining statements. However, there is a substantial difference between obtaining a statement and obtaining a proof of evidence. A proof would or should involve assessing one or more of such matters as the relevance, admissibility, probative weight, ethical difficulties or evidentiary problems of the potential evidence. In the case before me, it does appear that the investigator did things that could scarcely be expected to be done by a solicitor. It appears to me that, on occasions there was no need to personally attend where the investigator attended. Witnesses can be telephoned and letters can be written. Whilst this is potentially less expedient, there was no need for great urgency. Further, there is generally only a need for a signed statement if there is a reasonable expectation that an important witness may resile. There is generally no need for lengthy statements. And there can be ethical problems. One of the first acts performed by Mr Wregg was that he went to the potential defendant, Mr Reljic, drafted a statement and got him to sign it. I doubt that a lawyer's professional body would approve a legal practitioner doing that or authorising an employee or other delegate to do that.

42. Reference to statutes and rules of court provides considerable background information as to legal costs, but little assistance in helping to determine what makes a fee paid by a solicitor a disbursement for legal costs purposes. Reference to legal texts typically provides two things.

43. The first is a short statement based on what was said in *In re Remnant* [1849] EngR 776; 50 ER 949; (1849) 11 Beav 603. The second is a list of fees customarily treated or allowed as disbursements. I will return to the matter of lists. Example of texts giving the case as reference are *Oliver*, and *Halsbury's Laws of Australia*, which under "Meaning of costs" says:

> "The term 'costs' is used to describe the remuneration and expenses incurred in relation to legal work. The two broad headings of costs are remuneration and disbursements. Costs can be agreed between solicitor and client or, failing agreement, scale costs are applied. Disbursements are those payments which have been made in pursuance of the professional duty undertaken by the solicitor which he or she is bound to perform or have been sanctioned as professional payments by the general practice and custom of the profession."

44. *In re Remnant* was a case in which the then Master of the Rolls was concerned to differentiate between payments to be treated as professional disbursements and payments to be dealt with in the cash account. He called on the Taxing Masters for a certificate as to the general practice of the profession. He then said:

> "...it seems to me a very reasonable and proper rule, that those payments only, which are made in pursuance of the professional duty undertaken by a solicitor and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs."

45. *In re Buckwell & Berkeley* [1902] Ch 596 was a case where the distinction had to be made between a payment which was a disbursement and one which was to be entered in the cash account. Both Vaughan Williams LJ and Romer LJ referred to *In re Remnant* and applied the above test.

46. *In re Blair & Girling* [1906] 2 KB 131, like *In re Remnant,* was a case of a reference back to Taxing Masters for opinion as to the practice of the profession. Both cases were concerned with the one-sixth rule as applicable to solicitor and client costs. Noted at 133-4, the Taxing Masters, in their certificate to the court said:

> "...the practice as to the payments by a solicitor proper to be included in his bill of costs remains the same as it was certified to be in *In re Remnant*. For a time the practice in the taxing office was unsettled by the decision in *In re Lamb* but the Court of Appeal in *In re Kingdom & Wilson* restored the practice, and in *In re Buckwell & Berkeley* confirmed it on what the taxing Masters venture to think are the proper lines and in accordance with the ordinary business relations between a solicitor and his client. The taxing Masters are of the opinion that the duty payable on registration of a joint stock company in respect of its capital is not an ordinary professional disbursement such as a solicitor can be required by his client to make. He is not bound to find the money, but if he does, the disbursement is properly and unusually included in his cash account, and not in his bill of costs."

47. In relation to whether a payment was a "professional disbursement", Vaughan Williams LJ posed as the question for determination whether the payment had been made by the solicitors "in their professional character as solicitors" or "as agents independently of that character". In relation to the question whether by the custom and practice of solicitors the particular disbursement had been treated as a professional disbursement between solicitor and client, he said that he did not think it had been established. All members of the Court held that the affidavit as to the practice of solicitors did not establish the custom. Fletcher Moulton LJ said at 139:

> "I must say that I find the principle laid down in *In re Remnant* very difficult of application, but applying it as best I can I think that on the whole it puts the onus on the solicitors to prove that the item is rightly included in the bill of costs."

Vaughan Williams LJ said at 138:

> "... I do not think that we ought to draw the inference that there is such a custom merely because many solicitors habitually insert this particular payment in their bill of costs. If, on the other hand, a particular disbursement has appeared in a bill of costs which have gone to taxation, and that disbursement has been habitually treated upon taxation as an item properly introduced into the bill of costs, then I think that that would go far to establish such a custom. To my mind the certificate of the taxing Masters is correct. To put it shortly, the ground of my decision is that prima facie this particular disbursement is not a professional disbursement, and the solicitors have failed to prove that there is any custom which has established that, as between solicitor and client, this particular disbursement is properly included as a disbursement in the bill of costs as distinguished from the cash account. For these reasons, in my opinion, the appeal must be dismissed."

48. *In re Blair & Girling* is not only significant because it clarifies aspects of the application of the test in *In re Remnant*, but because it is another example of a reference back to the Taxing Masters, showing how important their assessment was seen to be, and because it reveals that the Court would be prepared to change its position as to the characterisation of a fee, but that might depend upon evidence and a change of attitude by the Taxing Masters.

49. For reasons adverted to in later cases, I am troubled by the notion that the words of the Master of the Rolls in *In re Remnant* are to be treated as if they were a statutory provision. However,

I would expect the same conclusion to be arrived at as to the correct approach to characterisation, whether the issue was approached as an exercise in construction or as a matter of principle. It seems to me that a party cannot be allowed as a disbursement, a fee for work which the party's solicitor has a duty to carry out exercising professional skill, when the solicitor chooses to delegate that work to a person who is neither another solicitor in the jurisdiction or a clerk in the employ of the solicitor. I accept that that means drawing a line between an employed clerk and an independent contractor. Such a line may seem inappropriate when an employed clerk may be inexperienced and an independent contractor may be experienced and professional in his or her own way. However, a legal practitioner can be held, both personally and as to his or her employees, to higher standards. The courts have maintained an involvement in the supervision of the work of lawyers. It is partly as a result of that concern with standards that the courts have maintained an involvement in the setting of scales. Lawyers can justify their costs only if they act with integrity and professionalism. The courts can hold lawyers accountable. In saying that, I recognise that community attitudes may have changed to some degree to result in a position where legal liability and professionalism may be weighed differently now to what was once the case.

50. Mr Berglund, in putting to me that in paying Raymond Wregg's fee, Michael Ruse was making what could be characterised as a "payment in pursuance of his professional duty undertaken as a solicitor, which duty he is bound to perform", was picking up the terms used in *In re Remnant.* I am of the opinion that the words "professional" and "perform" are treated as importing that the work must be performed professionally, either by the solicitor personally or by a solicitor or clerk for whom the solicitor is professionally responsible. A solicitor has an obligation to supervise the work of employees, both qualified and unqualified. With this responsibility comes the ability to measure the reasonableness of the disbursement, the time spent and the scales and rates. Likewise, comes the capacity to assess work done against standards for the exercise of professional skills. In other words, it will not suffice if the work is contracted out to a person for whom the solicitor is not professionally responsible.

51. I would add a sidenote. I had the experience, when practising as a solicitor, of appearing on dozens of taxations of costs, and of reading hundreds of inquiry agents' reports. No question ever arose as to the possible claiming as a disbursement of the fee for an inquiry agent's report. On occasions, a claim was made, and allowed as a charge and not as a disbursement, for perusing such a report where the report had been provided to the solicitor. Where a solicitor, personally or by an employee for whom the solicitor was directly responsible, performed a service such as preparing a witness proof, a claim was made and allowed for that service, not as a disbursement, but as a charge.

52. As noted earlier, various lists have been published in texts and elsewhere which deal with specific fees, which are treated as disbursements. For example, *Oliver* includes in a list of fees which have been held to be disbursements: court fees, counsel's fees, payments to witnesses, shorthand reporter's fees, and the charges of an agent beyond the jurisdiction.

53. The *Solicitors Remuneration Order* 1995 contains this list:

> "duties or fees payable at public offices; fees payable to municipalities or public authorities, surveyors, valuers, auctioneers or counsel; travelling and accommodation expenses; duty stamps; postage stamps; courier or delivery charges; the direct cost incurred on the clients behalf in the use of Lawyer's Information Network or other electronic systems of communication and other disbursements reasonably and properly incurred and paid."

54. *Oliver* also cites several examples of fees that should not be included as disbursements. They include the charges of an agent within the jurisdiction which should be set out in the bill as if the principal had done the work. The case given to support that example is *re Pomeroy and Tanner* (1897) 1 Ch 284. Sterling J looked at the question first as a matter of principle, and he also sought the opinion of the Taxing Masters. He concluded that the agent's charges:

> "are not mere disbursements, but are items taxable in the strictest sense as between the client and the country solicitor, just as much as items in respect of work done by the country solicitor personally, or by the clerk whom he employs in the country."

His analysis of principle went:

> "It is well settled that between the client and the London agent of the country solicitor there is no privity. The relationship of solicitor and client does not exist between the client and the London agent. What is done by the London agent is part of the work done by the country solicitor for the client. The country solicitor does or may do the work personally. He does or may do part of his work through clerks whom he employs in the country. Or, if necessary - and the necessity occurred in this case - he may do part of his work through a London agent. But as between the country solicitor and the client the whole of the work is done by the country solicitor."

55. As noted earlier, Mr Berglund drew my attention to cases which dealt with the fees of inquiry agents or detectives who were hired to establish evidence sufficient to justify a finding of adultery in divorce proceedings. They were *Ottoway, Frankenberg* and *Myer. Ottoway* was concerned with the entitlement of a solicitor acting for a woman to recover from the woman's husband the expenses of employing a detective to obtain information relating to the acts of adultery alleged to have been committed by the husband. Under the then law, a husband would be liable to pay "necessaries" supplied to his wife. The expenses were not allowed as part of the costs of the wife when taxed on a party and party basis. It was held by the Court of Appeal that the expenses were recoverable as "necessaries". *Ottoway* was considered carefully by Cussen ACJ in *Myer v Myer*. He was concerned with the question of whether there should be allowed on a taxation of costs on a party and party basis the costs of private detectives engaged by a woman to watch the movements of her husband. It is not clear to me upon what basis he arrived at his conclusion. However, he did say at page 333:

> "Such expenses though sometimes allowed to the wife to a reasonable amount are when on a lavish scale not encouraged by the Court. If the inquiries had been successful – though I do not suggest that this alone is a conclusive test - and could have been used at the hearing the result might have been different."

56. In *Frankenburg* the investigator was potentially a witness who might give evidence of a surveying nature. In the other two cases the expenses were paid to people who were potentially witnesses preparing to give evidence of adultery. It seems to me that the fees paid are appropriately characterised as witness expenses and not as expenses for a solicitor's delegate performing functions which it is a solicitor's duty to perform, but which he chooses to delegate. I am not prepared to treat those cases as establishing a precedent of application in the present context.

57. Before reviewing what was done by the magistrate, there is one more point I wish to make. It is as to lump sum fees or charges as against the detailed itemising of fees or charges. I have noted earlier that the scheme of legal costing contemplates that lump sums will be accepted, but only up to a point. Bills of costs must contain such details as will enable the person paying to obtain advice as to taxation and the Taxing Master to assess whether the fees or charges are properly allowable. As to that see the cases cited in *Oliver* at 25 and s108 of the *Legal Practice Act* 1996. The scheme of legal costing recognises how important it is that the courts retain the capacity to measure services performed by lawyers against not only standards of reasonableness, but against standards aimed at maintaining a high level of professional skill. As noted earlier, it is a pre-condition of a person being able to charge for legal professional work that that person has a right to practise as a legal practitioner. That is the reason for the provisions dealing with aspects of the prohibition on unqualified legal practice set out in Part 12 of the *Legal Practice Act* 1996. The *Legal Practice Act* also contains a multiplicity of provisions which deal with the supervision and accountability of legal practitioners. Part of that accountability includes the obligation to subject bills of costs to the scrutiny of the Taxing Master. There are beneficial aspects. They include the implied authority to incur expenses for which the client must pay, provided they are usual. There is an extremely comprehensive scheme based on policy considerations, and supported by specific rules, remuneration orders, practice positions and appendices, for the supervision of costs (as between solicitor and client and as between party and party). The evolution and continuing efforts to improve that scheme have resulted in a position which is calculated to reduce the potential for abuse and injustice. Treating an inquiry agent's fee as a legal disbursement would be inconsistent with the whole tenor of that scheme.

58. In the light of the above review, I come back to what happened before the learned magistrate. I am unable to accept that he made any error of principle in exercising his discretion. I believe

that there is a fundamental flaw in the alternative approach which was suggested to me. I accept that a solicitor can delegate, or is not precluded from delegating, his professional duty to a non-professional. I do not accept that if he or she does so, the fee for that work can be recovered as a legal disbursement. At first blush, it might seem that there was a reference to irrelevant materials in that the magistrate referred to his preference to rely on his experience and to his not wanting to be seen to be encouraging the making of like claims by other inquiry agents. However, I take the view that, given that those remarks were made in running, they represented only comments of a testing nature, and that were not inappropriate in a context where custom and precedent are particularly significant. As noted earlier, there was no argument addressed to the magistrate about guidance he might find in statutes or reported cases or other legal texts. It seems to me that, if there had been such argument, it would have served only to confirm that he was properly exercising his discretion in the way that he did.

59. There is one final matter. Mr Berglund argued that there was sufficient material before the Magistrate for him to exercise his power to award part of the fee as a disbursement. I cannot agree. I accept that the position may well have been different if the original claim for costs had been presented on an alternative basis, but that was not the case. I will elaborate. In a broad sense, one can separate the work of the investigator into that which did not involve the exercise of legal professional skills (taking photos and making a videotape record of the scene) and work which did involve the exercise of such skills (preparing a proof of evidence). It may well have been appropriate, if the application had been made on a proper basis and the necessary detail had been provided, to allow part of the fee as a disbursement. However, in my view, it would have been impossible, or at least very difficult, for the magistrate to assess what sort of figure to allow in that regard on the material before him. However, the magistrate was not asked to allow part of the fee. He was asked to allow or disallow the fee in total. The error, it seems to me, was on the part of whoever instructed Mr Purvis to go before the magistrate with material that was inadequate to permit any other approach than to ask the magistrate to determine that one question. That question was bound to be determined in the way that it was determined. The learned magistrate cannot justifiably be criticised for not making an analysis and applying principles and practice which he was not asked to apply, because it apparently suited the plaintiffs to proceed as they did. The learned magistrate not only could, but should have exercised his discretion as he did.

The application will be dismissed with costs.

APPEARANCES: For the plaintiff Sophiadakis: Mr H Berglund, counsel. Michael D Ruse, solicitors. For the Defendant Reljic: Mr J Brett, counsel. Russell Kennedy, solicitors.
