40/12; [2012] VSC 575

SUPREME COURT OF VICTORIA

BOBBY v DANILIUK

Beach J

26, 29 November 2012

COSTS – CRIMINAL PROCEEDING DISMISSED – APPLICATION FOR COSTS – QUANTUM OF COSTS – INDEMNITY PRINCIPLE – RECEIVING PARTY'S LIABILITY – RETAINER – COSTS LIMITED BY AGREEMENT BETWEEN LAWYER AND CLIENT – COSTS CAP INTRODUCED – ORDER BY MAGISTRATE FOR THE AMOUNT OF THE COSTS CAP PLUS LOSS OF INCOME – WHETHER MAGISTRATE IN ERROR: *LEGAL PROFESSION ACT* 2004, SS3.4.2 AND 3.4.27; *CRIMINAL PROCEDURE ACT* 2009, S272(1).

Upon the dismissal of two charges laid by a police officer, an application was made to the Magistrate for costs. The defendant's solicitor filed and served a bill in taxable form totalling $83,909.40 and subsequently the solicitor gave evidence in support of the application for costs. One of the documents referred to by the solicitor contained a statement that the solicitor set the defendant a costs cap of $6,600. The Magistrate made an order against the Chief Commissioner of Police for the sum of $6,600 plus an amount of $779.80 in lost income. Upon appeal by the defendant in relation to the quantum of costs—

HELD: Appeal dismissed.

1. It was well open to the Magistrate to conclude on the evidence that the defendant had no liability to pay his lawyers any more than $6,600 in respect of the Magistrates' Court proceeding.

2. One does not determine whether an agreement is a conditional costs agreement by reference to the subjective intention of the parties or – even worse in this case – by the subjective intention of one of the parties. The first step is to construe the costs agreement, remembering it is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party, by words or conduct, would have led a reasonable person in the position of the other party to believe. The meaning of the terms of the costs agreement is to be determined by what a reasonable person would have understood them to mean. The second step is to determine whether the costs agreement, as properly construed, satisfies the definition of "conditional costs agreement" in s3.4.2 of the *Legal Profession Act* 2004.

3. While there was much force in the Magistrate's analysis on this issue, in the end, it was unnecessary for the Supreme Court to form any concluded view. The Magistrate concluded on the evidence that the defendant had no liability to his lawyers beyond the sum of $6,600. That conclusion was open to the Magistrate. In the circumstances, it was unnecessary to determine whether a different construction of the costs agreement may have led to the conclusion the costs agreement was made in breach of s3.4.27(2) of the *Legal Profession Act*.

4. Once it was concluded that the Magistrate was entitled to find that the defendant had no liability to his lawyers for costs beyond the sum of $6,600, the Magistrate was not required to conduct an item-by-item assessment of the bill of costs because of the determination that the defendant was not liable to his lawyers for any amount greater than $6,600. Having made that conclusion, the Magistrate then took the most favourable approach that could be taken to the defendant and made an order in his favour for the total amount of his liability to his lawyers.

BEACH J:

Introduction

1. This appeal concerns the quantum of costs ordered against the Chief Commissioner of Police following the unsuccessful prosecution of the appellant in respect of two charges laid against him by the respondent pursuant to s52(1) of the *Summary Offences Act* 1966. On 22 June 2012, the presiding Magistrate, GA Hubble M, ordered the Chief Commissioner of Police to pay costs in the amount of $7,379.80 and that there be a stay of those costs for three months.

2. The appellant now appeals to this Court in respect of the costs order made in his favour. The appeal is brought under s272(1) of the *Criminal Procedure Act* 2009, which provides for an appeal on a question of law only.

3. The grounds of appeal are as follows:

"1. The learned Magistrate erred in law in concluding that there was no agreement between the appellant and his lawyers which would permit his lawyers to charge the appellant the amounts claimed in the bill of costs.

2. The learned Magistrate erred in law in concluding that the agreement between the appellant and his solicitors was a conditional costs agreement.

3. The learned Magistrate erred in law in failing to ascertain, consider and give due regard to the terms of the agreement between the appellant and his solicitors when arriving at her conclusions that:
(a) there was no agreement between the appellant and his lawyers which would permit his lawyers to charge the appellant the amounts claimed in the bill of costs and –
(b) the agreement between the appellant and his solicitors was a conditional costs agreement.

4. The learned Magistrate erred in law in failing to distinguish between:
(a) the work which the costs cap was intended to relate to and –
(b) the additional (but unforeseen) work that had to be performed by reason of the summary trial taking longer than expected.

5. The learned Magistrate erred in law in failing to take relevant considerations into account, including:
(a) the contents of the letter of 8 November 2010 from the appellant's lawyer to the appellant ('the retainer letter');
(b) the contents of the DISCLOSURE STATEMENT which accompanied the letter of 8 November 2010;
(c) the contents of the letter of 23 November 2010 and Tax Invoice from the appellant's lawyer to the appellant;
(d) the contents of the letter of 4 February 2011 from the appellant's lawyer to the appellant ('the costs cap letter');
(e) the fact that the costs cap letter was sent at a time when the summary trial was estimated to last one, perhaps two, days;
(f) the fact that the summary trial lasted ten days;
(g) the fact that the appellant and his lawyers were at Court every day of the trial;
(h) the fact that the appellant's barrister asked questions of prosecution witnesses and made submissions based on instructions;
(i) the fact that the appellant, his partner and his partner's sister entered the witness box upon being called by his barrister and gave evidence;
(j) the fact that the appellant was present when his barrister applied for an order that the Chief Commissioner of Police pay his reasonable costs;
(k) the fact that the appellant provided his solicitors with his pay slips to include in the bill of costs.

6. The learned Magistrate erred in law in fettering her discretion by:
(a) purporting to take into account all the circumstances;
(b) not conducting an item by item assessment of the bill of costs, and –
(c) purporting to take a global approach to the question of costs.

7. The appellant was denied natural justice by reason that:
(a) the learned Magistrate failed to direct the prosecutor to file and serve a Notice of Objections;
(b) The prosecutor did not file or serve a Notice of Objections;
and –
(c) the learned magistrate failed to warn the appellant, and give him a reasonable opportunity to respond, before arriving at her decisions that:
(i) there was no agreement between the appellant and his lawyers which would permit them to charge him the amounts itemised in the bill of costs, and –
(ii) the agreement between the appellant and Access Law was a conditional costs agreement and such agreements were expressly prohibited in relation to criminal proceedings."

The proceeding below

4. The proceeding below concerned the hearing of charges filed against the appellant by the respondent on 5 October 2010. The appellant was charged with assaulting a member of the police force in the execution of his duty and inciting another to hinder that same member of the police force in the execution of his duty. The charges were originally fixed for hearing on 29 and 30 June 2011, together with charges against a co-accused, one Clarke. However, the trial in fact took place on 29 and 30 June 2011, 7, 8 and 9 March 2012 and 7, 8, 9, 11 and 15 May 2012 – a total of ten days over a period of 11 months.

5. Both the appellant and Mr Clarke pleaded not guilty. The appellant was represented by

his current counsel, Mr David Perkins, who was instructed by Mr Gabriel Kuek of Access Law. Mr Clarke was unrepresented, but participated substantially in the trial.

6. On 15 May 2012, Hubble M found Mr Clarke guilty, but dismissed the charges against the appellant. The Court ordered the Chief Commissioner of Police to pay the appellant's reasonable costs of the proceeding.

7. On 1 June 2012, the appellant's solicitor filed and served a bill in taxable form totalling $83,909.40: $34,650 of this bill was a disbursement for counsel's fees; $779.80 was a disbursement for the appellant's lost income over five days; and $45,031.70 was itemised as the appellant's solicitors' professional fees.

8. On 22 June 2012, the matter came back before her Honour for the resolution of outstanding costs issues. Mr Kuek was called by Mr Perkins. Mr Kuek gave evidence in support of the application for an order for costs to be made in accordance with the bill that had been delivered.[1] The tenor of Mr Kuek's evidence was that the items in respect of which claims were made were reasonably incurred and reasonable in amount. Mr Kuek was cross-examined and then there was some re-examination.

9. In the course of giving his evidence, the following documents were produced:

(a) a letter from Access Law to the appellant dated 8 November 2010;
(b) a document headed "Disclosure Statement" sent under cover of the 8 November 2010 letter;
(c) a letter from Access Law to the appellant dated 23 November 2010; and
(d) a letter from Access Law to the appellant dated 4 February 2011.

10. The letter of 8 November 2010 contained the following:

"**Disclosure statement**
A DISCLOSURE STATEMENT accompanies this letter. It sets out information you should know. The information set out in the document is incorporated into our retainer.
Please read it carefully and keep it in a safe place in case you need it in the future.

Legal expenses
The work we undertake for you will be charged at the rates set out in the DISCLOSURE STATEMENT.

Estimate of legal costs
The legal expenses you have to pay depends largely on how you propose to plead to the charges. At this stage, it is wise to reserve your decision until we obtain the Preliminary Brief from the informant. The Preliminary Brief should contain a summary of the evidence the informant intends to lay against you as well as the statements of witnesses he intends to call.

The cost for obtaining the Preliminary Brief and advising you on it is $440.00. We will inform you of the further costs you have to pay once you have decided how you would plead to the charges.

Your entitlement to recover legal costs
If the charges are contested and dismissed, you are entitled to seek an order for costs against the prosecution. Generally, you can expect the Court to make an order for costs in your favour. However, it is unusual to recover all of your costs. As a rule of thumb, you can expect to recover about two thirds of your own costs.

Also, as costs are discretionary, a Court may refuse your costs application in certain circumstances; for example, if your conduct had caused charges to be brought against you or if you had prolonged the hearing of the case. ...

Costs cap
Not everybody can afford to pay full legal cost (sic). Pursuant to our 'access to justice' policy we are willing to fit our costs within the budget of people who have inadequate means to meet their full legal costs. We do this by capping our legal fees by negotiation. This is explained in the DISCLOSURE STATEMENT. If you wish to negotiate a costs cap, please provide us with a financial statement listing your assets, liabilities and incomes and make a proposal as to the cap you wish us to accept. We have capped your fees as set out above. ...

Confirmation of your instructions

Please confirm your instructions to represent you on the terms set out in this letter. You can do this by signing and dating, then returning the enclosed copy of this letter to us.

By signing this letter you are entering into a Costs Agreement with us."

11. The disclosure statement contained the following:

"**• Cost cap**
In appropriate cases we are willing to cap the costs we charge. That sets an upper amount of the legal costs you have to pay.

If a costs cap is set in your case, we will apply our scale of costs to the work we undertake. But once the costs reach the cap you will not be required to pay any more money unless you are successful in your case and an order for costs and/or damages is made in your favour. ...

• Disbursements
We will charge you at cost for any expense we incur on your behalf. These expenses include, but are not limited to, Goods and Services Tax, filing fees, registration fees, barrister's and expert's fees, bank charges, travel expenses, stamp duty, courier fees, long distance telephone calls, photocopying fees, company searches, document conversion, (sic) title searches."

12. The letter of 23 November 2010 contained the following:

"We refer to our letter dated 8 November 2010. We have now received a copy of the Preliminary Brief from the informant.

In our opinion, you should plead not guilty to the charges. On the police evidence S/C Harris had punched Clarke in the face, causing him to fall to the ground. It was after that event that you were said to have approached Wright and/or Harris 'aggressively'. ...

If you wish to plead not guilty, we have to participate in a Case Conference with the prosecution. If the Case Conference does not result in the charges being withdrawn, the case will have to be booked in for a contested hearing. We estimate the case will take one day to complete if you are the only defendant. However, if Mr Clarke's case is heard at the same time, the joint trial may take two days to complete.

If you decide to plead not guilty, much more work will have to be undertaken on your behalf. These include negotiations with the prosecution, a Case Conference, correspondence with the informant and the Court, briefing Counsel and preparation for trial. Altogether, your legal fees may be in the vicinity of $7,000. However, if we negotiate a withdrawal at an early stage, it may cost you as little as $2,200. If the charges are dismissed, you can seek an order for reimbursement of most of your legal expenses.

We enclose our Tax Invoice for obtaining the Preliminary Brief and advising you on it for your kind attention. Please attend to payment of $440 and sign and return the duplicate copy of our retainer letter to us at your earliest convenience."

13. The letter of 4 February 2011 contained the following:

"We confirm your instructions to plead not guilty to the charges and Mr Kuek's advice that we would set a cap of $6,600 for what you have to pay. The balance of legal costs will be recovered from the Chief Commissioner of Police if the charges are dismissed.

We confirm your advice that you can make payment of the $6,600 in two months time.

Naturally, if the case is concluded without a hearing by police withdrawing the charges your legal costs will be less than $6,600 and any excess will be returned to you."

14. While none of the disclosure statement, the letter of 23 November 2010 nor the letter of 4 February 2011 contained any requirement for the appellant to acknowledge their contents, the letter of 8 November 2010 contained a place for the appellant to sign (which he did on 3 February 2011) acknowledging that the letter of 8 November and the disclosure statement constituted a costs agreement and instructing Access Law to act on the appellant's behalf on the terms set out in the letter of 8 November.

15. During the course of Mr Kuek's evidence, her Honour raised what she saw as an issue being the sum of $440, which was referred to in the 23 November 2010 letter, and the ultimate bill for more than $80,000. Her Honour said, "That would come as a shock for most people, let alone a casual, a person who works casually in manual labour".[2] At this point in the costs hearing, the letter of 4 February 2011 and its contents had not been raised or adverted to.

16. Following the raising of this issue, there was then an exchange between Mr Kuek and her Honour as follows:

> "MR KUEK: So, and there was ongoing advice to Mr Bobby, particularly after the first two days of hearing. That was when the work enlarged. Now, I can't say, as I sit here, whether I confirmed that advice in writing or whether it was merely oral.
> HER HONOUR: Can you check your file to see if there was anything written? Your letter indicates that for clients who don't have a lot of money, you might reach a costs cap. Was there any discussion of a costs cap with Mr Bobby?
> MR KUEK: There's a letter of 4 February ... 2011."[3]

17. This was the first time the letter of 4 February 2011 was referred to. There was then further cross-examination of Mr Kuek about the contents of this letter, before the following exchange:

> "HER HONOUR: Well, you were asked a question, is that the most Mr Bobby will ever have to pay you and you said no. So my question was, in what circumstances would he have to pay you more than $6,600? Are there any circumstances, under this agreement, in which Mr Bobby pays you more than $6,600?
> MR KUEK: I think, to be frank, no, given that I have given him the costs cap beyond a certain level.
> PROSECUTOR: If Mr Bobby was found guilty, how much would he have to pay you?
> MR KUEK: $6,600, because that is the costs cap. The costs cap is ... is something that limits his liability to me beyond what is recovered from the Chief Commissioner.
> PROSECUTOR: So he would never have to pay you more than $6,600 in any event?
> MR KUEK: I think that that would be the effect of it if you analyse it."[4]

18. Following the conclusion of Mr Kuek's evidence, Mr Perkins made submissions as to why the Chief Commissioner for Police ought to be ordered to pay the appellant's costs in accordance with the bill of costs, altered to reflect such concessions as had been made by Mr Kuek in his evidence. Despite the obvious issue of the costs cap and its capacity to limit the quantum of costs that might be ordered in favour of the appellant, Mr Perkins made no submissions dealing with these matters. His submissions to the Magistrate concerned the reasonableness and appropriateness of the conduct of the trial and the costs charged.[5]

19. The prosecutor then made a submission in the following terms:

> "My submissions, Your Honour, is that the accused is only told to seek his costs he's paid for any costs that had been reasonably incurred by him. My submission is that the police prosecution doesn't have to pay any costs. Mr Bobby has incurred costs, and according to the document dated the 4th February 2011 as tendered by Mr Kuek when he was in the witness box, he was told that he wouldn't have to pay more than $6,600.00. And my submission is that ought be the costs that are sought from the prosecution. I've got no objection to that amount. Your discretion comes under the *Magistrates Court Act*, section 131, and whereto how and why you should award costs.
>
> My submission, Your Honour, is if you don't accept the fact that the prosecution only has to pay $6,600.00, I ask for an apportionment order from Your Honour and, pursuant to section 131(a) of the *Magistrates Court Act*, that the matter be adjourned for the Costs Court, which is designed to deal with these complicated costs that have arisen, particularly from the Magistrates Court. So the prosecution is only entitled to pay the costs actually incurred by the accused. Even though he hasn't paid anything. I understand that there's a debt there. And my submission is that $6,600.00 is the appropriate amount, not including loss of wages that still needs to be covered...Mr Bobby's loss of wages."[6]

20. Her Honour then asked the prosecutor whether issue was taken with the loss of wages claim. The prosecutor said no issue was taken with this. Her Honour then asked Mr Perkins whether he had anything to say by way of reply. Mr Perkins' reply submissions were as follows: "Well, Your Honour has a discretion. The authorities make it plain that it's Your Honour's discretion. And I point that it's the matter that Your Honour should proceed, in my submission. It shouldn't be referred anywhere. It should be simply dealt with."[7]

The Magistrate's reasons

21. After identifying the factual basis for the application for costs, her Honour set out relevant authorities and principles before going on:

> "In my view, the principles distilled above rest upon the foundational principle that an order of costs ensures that a defendant is not left out of pocket in respect of fees and expenses that he or she is liable for. Accordingly, an order for costs should not include items or amounts that the defendant has not been charged or could never be charged.
>
> The Bill of Costs tendered in support of the application for costs in this matter itemises legal work that has apparently been performed by the applicant's legal representatives, and disbursements that have apparently been incurred by them, but there is no agreement between the applicant and his lawyers which would permit them to charge him these amounts. The advice by Access Law Lawyers to the applicant in the letter dated 4 February 2011 that '*the balance of legal costs will be recovered from the Chief Commissioner of Police*' misconceives the nature of an order for costs by implying that costs can be recovered from the police without the client ever having been charged for the work performed.
>
> It might be said in answer to this that the agreement between the applicant and Access Law Lawyers permits the applicant to be charged for work performed over and above $6,600, if, and only if, the case is successful and the court makes an order of costs against the respondent for more than $6,600. However, if the costs agreement between the applicant and Access Law Lawyers is construed in this way, the agreement is in reality a conditional costs agreement. A conditional costs agreement is defined by the *Legal Profession Act* 2004 section 3.4.27 as follows: *(1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome.* The *Legal Profession Act* Section 3.4.27(2) goes on to expressly prohibit conditional costs agreement in relation to criminal matters.
>
> In all the circumstances, I do not think it appropriate to conduct an item by item assessment of the Bill of Costs tendered in support of the application for costs. I propose to take a 'global approach' to the question of costs, and have determined that the sum of $6,600 is a reasonable sum to award to the applicant for the costs incurred by him in the proceedings. I further find that the sum of $779.80 in lost income is reasonable and should also be awarded to the applicant."

22. In stating that "an order for costs should not include items or amounts that the defendant has not been charged or could never be charged", her Honour was referring to a principle that has come to be known as the indemnity principle. The indemnity principle has been the subject of two recent Court of Appeal decisions: *Kuek v Devflan*[8] and *Shaw v Yarranova Pty Ltd.*[9] As stated in Dal Pont, *Law of Costs*:[10]

> "If a successful party is not liable to meet his or her own lawyer's costs, there is no basis upon which the indemnity rule is to operate. The compensatory aim of the indemnity rule has no function to play in such a case, and a costs order against the unsuccessful party would enrich the successful party by the amount of any such payment which is inconsistent with the basis of the indemnity rule. So an agreement under which a litigant is absolved from paying lawyer-client costs ousts the litigant's ability to recover costs from an adversary against whom a costs order is made."

Grounds 1 and 5

23. In Ground 1 it is asserted that her Honour erred in law in concluding that there was no agreement between the appellant and his lawyers which would permit his lawyers to charge the appellant the amounts claimed in the bill of costs. The related Ground 5 contends that her Honour erred in law in failing to take into account a number of matters said to be relevant in the determination of this question. In argument, it was put that any agreement to cap the costs liability of the appellant entered into in February 2011 was impliedly (if not expressly) amended by the fact that the trial took much longer than was originally contemplated in circumstances where the appellant's lawyers continued to act for the appellant. The problems with these submissions are manifest.

24. First, no submission of any such kind was made to the Magistrate below. Secondly, no evidence was led or attempted to be led before the Magistrate as to any alleged variation of the costs agreement between the appellant and his lawyers. While an attempt was made in the course of this appeal to introduce evidence which might have supported such a case if led below, the short point is that there was no evidence adduced before the Magistrate as to any variation of the costs agreement for which the appellant now contends.

25. Recognising his difficulty so far as the lack of any evidence of an actual variation was concerned, Mr Perkins spent some time trying to persuade me that her Honour was bound to conclude that the costs agreement had been impliedly varied because at the time the costs cap was agreed, it was thought the trial would only take one to two days. Mr Perkins submitted that as the trial expanded to occupy ten days over eleven months and as the appellant's lawyers continued to act for him,[11] there was an error of law in her Honour not concluding that the costs agreement had in fact been varied so that the costs cap did not apply – either at all, or at least beyond the end of the second day of the trial. I reject these submissions.

26. First, they were not put below. Secondly, there was no evidentiary basis upon which it could be said that her Honour was bound to come to such conclusion. In my view, there was simply no evidentiary foundation for the implication of any variation of the costs agreement as contended for by the appellant. Her Honour was well entitled to accept the evidence of Mr Kuek that there were no circumstances under which the appellant would be liable to pay any more than $6,600 – even if one accepts the relevance of all of the facts referred to in the various sub-paragraphs of Ground 5 (and in particular the matters set out in sub-paragraphs (e) to (k)).

27. For these reasons, Grounds 1 and 5 must be rejected. It was well open to the Magistrate to conclude on the evidence that the appellant had no liability to pay his lawyers any more than $6,600 in respect of the Magistrates' Court proceeding. Indeed, while it is not necessary for me to go so far, it might be contended that Mr Perkins' reply submissions contain within them a concession that it was open to her Honour to hold that the appellant's entitlement to professional costs and disbursements was limited to $6,600 by the costs cap in the letter of 4 February 2011. Certainly, no submission to the contrary was put below.

Ground 2

28. In Ground 2, it is contended that the Magistrate erred in law in concluding that the agreement between the appellant and his solicitors was a conditional costs agreement. I reject this complaint. Her Honour made no such conclusion. Her Honour held that under the costs agreement, the appellant was not liable to pay his lawyers more than $6,600. Her Honour then dealt with the alternative possibility that the costs agreement might be construed as one where the appellant's lawyers were permitted to charge more than $6,600, but only if they were successful at trial and the Court made a costs order against the appellant for more than $6,600.

29. Section 3.4.27 of the *Legal Profession Act* 2004 provides:

> "(1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.
>
> (2) A conditional costs agreement may relate to any matter, except a matter that involves criminal proceedings or proceedings under the *Family Law Act* 1975 of the Commonwealth.
>
> (3) A conditional costs agreement—
> (a) must set out the circumstances that constitute the successful outcome of the matter to which it relates; and
> (b) may provide for disbursements to be paid irrespective of the outcome of the matter; and
> (c) must be—
> (i) in writing; and
> (ii) in clear plain language; and
> (iii) signed by the client; and
> (d) must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement; and
> (e) must contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement.
>
> (4) Subsection (3)(c)(iii), (d) and (e) does not apply to a conditional costs agreement made under section 3.4.26(1)(c).
>
> (4A) Subsection (3)(c)(iii), (d) and (e) does not apply to a conditional costs agreement made with a sophisticated client.
>
> (5) If a client terminates an agreement within the period referred to in subsection (3)(e), the law practice—

> (a) may recover only those legal costs in respect of legal services performed for the client before that termination that were performed on the instructions of the client and with the client's knowledge that the legal services would be performed during that period; and
> (b) without affecting the generality of paragraph (a), may not recover the uplift fee (if any)."

30. The expression "conditional costs agreement" is defined in s3.4.2 to mean:

> "... a costs agreement that provides that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, as referred to in section 3.4.27, but does not include a costs agreement to the extent to which section 3.4.29(1) applies;"[12]

31. Her Honour noted that if the costs agreement was construed in the alternative way she described, then the agreement was in reality a conditional costs agreement, and that conditional costs agreements are expressly prohibited in relation to criminal matters by s3.4.27(2).

32. The appellant submitted that the letter of 4 February 2011 "was not intended to be a conditional costs agreement". Whether or not that is so is beside the point. One does not determine whether an agreement is a conditional costs agreement by reference to the subjective intention of the parties or – even worse in this case – by the subjective intention of one of the parties. The first step is to construe the costs agreement, remembering it is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party, by words or conduct, would have led a reasonable person in the position of the other party to believe. The meaning of the terms of the costs agreement is to be determined by what a reasonable person would have understood them to mean.[13] The second step is to determine whether the costs agreement, as properly construed, satisfies the definition of "conditional costs agreement" in s3.4.2.

33. In further elaboration of his submissions on this ground, the appellant contended that the costs agreement could not be a conditional costs agreement because:

> "(a) it did not set out the circumstances that constitute the successful outcome of the matter to which it related 3.4.27(3)(a),
>
> (b) it was not signed by the client 3.4.27(3)(c)(iii),
>
> (c) it did not contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement 3.4.27(3)(d), and –
>
> (d) it did not contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement 3.4.27(3)(e)."[14]

34. These submissions must also be rejected. The fact that a conditional costs agreement might not comply with one or more paragraphs of s3.4.27(3) does not mean that the agreement (if it satisfies the definition contained in s3.4.2) is not a conditional costs agreement. One cannot enter into a conditional costs agreement in breach of s3.4.27(2) and then seek to say that such an agreement is permitted because it also breaches a provision contained in s3.4.27(3). The appellant's submission on this point only has to be stated to be rejected.

35. While I think there is much force in the Magistrate's analysis on this issue, in the end, it is unnecessary for me to form any concluded view. Her Honour concluded on the evidence that the appellant had no liability to his lawyers beyond the sum of $6,600. That conclusion was open to her Honour. In the circumstances, it is unnecessary to determine whether a different construction of the costs agreement may have led to the conclusion the costs agreement was made in breach of s3.4.27(2) of the *Legal Profession Act*.

36. For these reasons, Ground 2 must be rejected.

Ground 3

37. In respect of Ground 3, it is asserted that the Magistrate "did not advert to the substantial evidence which informed on the terms of the agreement between the appellant and his lawyers, for instance, the enlargement of the trial and the appellant's requests for continued legal representation".[15]

38. Ground 3 must be rejected, essentially for the same reasons given in respect of Grounds 1 and 5. A substantial flaw in Ground 3 is the underlying assertion that there was a substantial body of evidence before the Magistrate which bound her to come to a different conclusion concerning the meaning of the agreement. Apart from the fact that the trial took ten days when it was originally expected to take one to two days and the fact that the appellant's lawyers continued to act for him, there was no such substantial body of evidence as is now asserted to have been in existence before the Magistrate. Specifically, the appellant did not give any evidence on the costs issues and, as I have noted above, there was no evidence of any express variation of the costs agreement following 4 February 2011. Again, it must be noted that none of the matters raised under this ground (and in respect of which it is said that her Honour failed to give proper consideration) were in fact put to her Honour in any submission on behalf of the appellant.

39. As a further argument under this ground, the appellant contended that the Magistrate failed to give consideration "to what impact, if any, the letter of 4 February 2011 had on the appellant's liability to pay the barrister's fees [which was dealt with separately in the retainer letter and disclosure statement] or the evidence Mr Kuek gave of the agreement on 22 June 2012".[16] The first point that may be made in respect of this submission is that no submission was made to her Honour that the letter of 4 February 2011 may have had some different consequence so far as barristers' fees are concerned. In the event that it had been put to the Magistrate, it would have been well open to her Honour to reject this submission in any event. The disclosure statement referred expressly to barristers' fees under the heading "Disbursements" as an expense that the appellant's solicitors would charge the appellant at cost. In the circumstances (if the matter had been raised below), it would have been well open to her Honour to conclude that the costs cap provided in the letter of 4 February 2011 was a cap on professional fees and disbursements – including barristers' fees.

40. For the above reasons, Ground 3 must be rejected.

Ground 4

41. In Ground 4, complaint is made that the Magistrate erred in law in failing to distinguish between the work which the costs cap was intended to relate to and the additional (but unforeseen) work that had to be performed because the trial took longer than expected.

42. Ground 4 must be rejected for the reasons already given in respect of Grounds 1 and 5. First, no submission of this kind was made to her Honour. Secondly, if such a submission had been made, it would have been well open to her Honour to reject it on the evidence presented below – and specifically the evidence of Mr Kuek at p74 of the costs application transcript.

Ground 6

43. Ground 6 is misconceived. Once it is concluded that her Honour was entitled to find that the appellant had no liability to his lawyers for costs beyond the sum of $6,600, Ground 6 must necessarily fail. Her Honour was not required to conduct an item-by-item assessment of the bill of costs because her Honour (in a conclusion that was open to her) determined that the appellant was not liable to his lawyers for any amount greater than $6,600. Having made that conclusion, her Honour then took the most favourable approach that could be taken to the appellant and made an order in his favour for the total amount of his liability to his lawyers. In saying that she took a global approach, her Honour was taking the most favourable approach that was then open to her so far as the appellant was concerned. Ground 6 must be rejected.

Ground 7

44. In Ground 7, complaint is made that the appellant was denied natural justice. First, it is contended that there was a denial of natural justice in the Magistrate failing to direct the prosecutor to file and serve a notice of objections and in the prosecutor not filing or serving a notice of objections. Secondly, it is asserted that there was a denial of natural justice in the Magistrate failing to warn the appellant (and give him a reasonable opportunity to respond) before arriving at her decision that there was no agreement between the appellant and his lawyers which would permit them to charge the amounts set out in the bill of costs and that the agreement was a prohibited conditional costs agreement.

45. The notice of objections complaint is without merit. The following points can be made.

First, the appellant did not seek an order or direction from the Magistrate that the prosecutor be made to file a notice of objections. Secondly, the point is of no moment once the conclusion is reached that it was open to her Honour to find that the appellant had no liability to his lawyers for costs beyond the sum of $6,600. Thirdly, even if the appellant had sought an order in respect of a notice of objections and even if there was no relevant costs cap, a mere failure to provide a notice of objections does not in all circumstances amount to any denial of procedural fairness - each such case would have to be considered on its individual merits.

46. I turn now to the complaint that the Magistrate denied the appellant natural justice by failing to warn him, and give him a reasonable opportunity to respond, before arriving at her decision that there was no agreement between the appellant and his lawyers which would permit them to charge the amounts itemised in the bill of costs. This complaint is also without merit. Once the letter of 4 February 2011 was produced during the course of Mr Kuek's cross-examination, it was obvious that the question of the liability of the appellant to his lawyers for costs in an amount greater than $6,600 was in issue. The principles underlying these issues were well known both to Mr Kuek and Mr Perkins. So much is apparent of the proceedings in *Kuek v Devflan Pty Ltd*.[17]

47. Further, the prosecutor's submission at the conclusion of evidence was directed substantially to this issue. Following the prosecutor's submissions, Mr Perkins was asked whether he had anything to say in reply. Nothing relevant to this issue was said in the very short reply submissions. No application for an adjournment was made, and no submission was made that the appellant was taken by surprise. In my view, there could have been no doubt in anyone's mind that one of the matters her Honour had to determine was whether the appellant had any liability for costs beyond the sum of $6,600. In proceeding with the matter and coming to the conclusion her Honour came to, there was no denial of natural justice.

48. Finally, I turn to the complaint that there was a denial of natural justice by her Honour failing to warn the appellant of her decision that the agreement was a conditional costs agreement expressly prohibited by s3.4.27(2). This complaint fails for the reasons given in respect of Ground 2. Put shortly, her Honour did not make the decision asserted to have been made in this complaint.

Conclusion

49. The appeal must be dismissed.

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[1] Although in the course of this evidence, Mr Kuek made some concessions in relation to a small number of items.
[2] Costs application transcript, p63.
[3] Costs application transcript, p68.
[4] Costs application transcript, pp73-74.
[5] Costs application transcript, pp81-99.
[6] Costs application transcript, pp99-100.
[7] Costs application transcript, p101.
[8] (2011) 31 VR 264.
[9] [2011] VSCA 55. See further, *Kuek v Devflan Pty Ltd* [2012] VSC 571 (Kyrou J).
[10] Second edition, (2009), [7.10] (references omitted).
[11] And see further the various matters referred to in the sub-paragraphs of Ground 5.
[12] Section 3.4.29(1) deals with contingency fees.
[13] *Toll (FGCT) Pty Limited v Alphapharm Pty Limited & Ors* [2004] HCA 52; (2004) 219 CLR 165, 179 [40]; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204.
[14] Appellant's submissions dated 5 October 2012, [35].
[15] Appellant's submissions dated 5 October 2012, [39].
[16] Appellant's submissions dated 5 October 2012, [40].
[17] [2009] VSC 91; reversed on appeal (2011) 31 VR 264.

APPEARANCES: For the appellant Bobby: Mr D Perkins, counsel. Access Law, solicitors. For the respondent Daniliuk: Ms C Melis, counsel. Victorian Government Solicitor's Office.
