17/83

SUPREME COURT OF VICTORIA

JOCKEL v BRESKIC

King J

10 September 1982

LEGAL PRACTITIONER – RECOVERY OF PROFESSIONAL COSTS – TWO ITEMS OF WORK – LUMP SUM BILL FOR FIRST ITEM – NO BILL FOR SECOND ITEM – WHETHER COURT CAN AMEND BILLS OF COSTS.

J. is a solicitor. She sought to recover professional costs for work alleged by her to have been done on B's behalf. The work comprised 2 items – a motor car accident and a conveyancing transaction. In respect of the first item, a lump sum bill had been delivered to B., but no bill had been delivered for the second item. A few months after the action was commenced, B. was served with a notice of intention to apply for leave to amend the particulars of demand, and was delivered 2 bills of costs relating to the work done by J. When the matter came on for hearing, B's counsel objected to the court's jurisdiction, because the bills of costs had not been delivered to B. one month or more before the commencement of the action as required by s81 of the *Supreme Court Act* 1958. The Court refused to allow the amendment sought and ordered the striking out of the summons. On order nisi to review—

HELD: Order nisi discharged.
The court correctly refused to allow the amendment. The court does not have power to allow amendment so as to substitute bills of costs delivered after the commencement of the action, for bills originally relied on. Where a defendant requests further particulars of the complainant solicitor's demand, this does not constitute a waiver of his rights to rely upon the requirements of s81 of the *Supreme Court Act* 1958.

NOTES: Where a bill of costs is rendered for a lump sum in connection with a conveyancing transaction, see *Patel v Sica* [1982] VicRp 25; (1982) VR 273. For a discussion of bills of costs in respect of contentious or non-contentious business, see *Re A Solicitor* (1955) 2 QB 252; (1955) 2 All ER 283. Ed.

KING J: *[After setting out the facts as referred to above and the grounds of the order nisi to review, His Honour continued]*: … As the complainant's affidavit shows, no evidence was led by either party before the Magistrate nor was any copy of any bill of costs tendered, the matter being dealt with on counsel's submissions. However, Mr Judd had conceded before the Magistrate that at least one of the two lump sum bills of costs referred to by Mr Gyorffy was delivered to the defendant presumably more than one month before the action was commenced. He had also conceded before the Magistrate that the complainant had given notice of application for leave to amend her particulars of demand so as to rely on two bills of costs dated 22nd July 1981 alleged to have been delivered to the defendant on or about that date. He did not concede that such bills of costs had been delivered so that the Magistrate had not had these facts proved before him but, as it is not necessary for a party to prove facts alleged in proposed amended pleadings in order to have an application for amendment allowed, this situation did not prevent the Magistrate from considering Mr Gyorffy's application. This application was not expressed in terms of an application for leave to amend the complainant's particulars of demand but rather of an application for leave to amend the lump sum bills of costs which, if properly entertained and granted, would not of itself, in the absence of leave to amend the particulars of demand, enable the complainant to rely in its then pending action on the bills of costs thus amended. Furthermore, the Magistrate expressly addressed himself only to an application for leave to amend the bills of costs.

I think, however, that I should construe the application by Mr Gyorffy set out in paragraph 11 of the complainant's affidavit as including a request for leave to amend her particulars of demand so as to insert a reference to the bills dated 22nd July 1981 as the basis of her claim. However, such an amendment of itself would be abortive as it would be clear that the action had not been commenced one month or more after the delivery of the bills of costs relied upon. For this reason, the Magistrate should not have allowed such an amendment.

To achieve the complainant's purpose it would be necessary to equate the bills dated 22nd

July 1981 with the lump sum bills originally delivered by amending the latter so that they take the form of the former, in such a way that the amended bills have attributed to them in law the date of delivery of the unamended bills. It is not clear how this last-mentioned effect can be achieved by such an amendment. However, Mr Gyorffy's contention was that the Magistrate had power to give leave to the complainant to amend the original bills of costs and to amend the particulars of demand so as to bring the amended bills of costs into the framework of the action, thereby enabling the complainant to assert that the dates of delivery of the amended bills were in law the dates of delivery of the original bills.

In putting this contention, Mr Gyorffy relies on a part of the order made by Douglas J in *Currie v Robinson* [1968] QWN 25; 62 QJPR 101. In this case His Honour ordered the setting aside of a judgment obtained in default of appearance in favour of a solicitor in an action on a bill of costs on the same ground as that on which Mann J denied the complainants relief in *Malleson & Ors v Williams* [1930] VicLawRp 62; (1930) VLR 410; [1930] ALR 310, which case Douglas J cited and followed. Referring to *Lumsden v Shipcote Land Company* (1906) 2 KB 433, Douglas J said at p52 that insofar as it might be necessary it seemed that the plaintiffs should be given leave to deliver a fresh bill, and he made an order to that effect. Mr Gyorffy submits that as that order was given in an action still on foot, His Honour must have intended that fresh bill to take the place of the original bill, as otherwise the action must fail because the bill relied upon was not delivered at least one month before the action was commenced. *Lumsden's Case* (*supra*) is no authority that such an effect can be brought about by judicial order.

The point was apparently not argued in *Currie v Robinson* (*supra*) and I do not think that Douglas J can be taken to have made any considered ruling on the point. Furthermore, whilst he allowed the plaintiffs before him to deliver a fresh bill, he did not allow amendment of the proceedings so as to substitute the new bill of the original bill. It would be consistent with the order he made for the plaintiffs to have to issue new proceedings at least a month after the delivery of their fresh bill. In *Malleson & Ors v Williams* (*supra*), which was a decision on a summons for final judgment, Mann J ordered that the summons be dismissed and that leave be given to the defendant to defend. At page 412 he said:

> "The result, I think, is that, in accordance with the law as there laid down, this bill is not such a bill as is contemplated by sec 92, and is not therefore apparently one on which the plaintiffs are entitled to sue. If this view of the law is accepted by the plaintiffs they may take steps which will make it unnecessary to proceed further with the action; but, on the present summons, the proper order to make is to dismiss the summons, and give the defendant unconditional leave to defend."

"s92" referred to is a section of the *Supreme Court Act* 1928. It seems thus that His Honour took the view that the defect in the bill before him would prevent the action proceeding, but as the matter was before him on a summons, which had failed, it was not appropriate for him to dismiss the action. The same inference is, I think, to be drawn from Douglas J's order. The remarks of Vaughan Williams LJ in *Lumsden's Case* (*supra*) at p436 suggest that a solicitor who has delivered a bill of costs should obtain leave before he brings in for taxation a second bill in respect of the same services; if this is correct (and I find no need to decide the point), Douglas J's order is explicable as leave to deliver a new bill as a basis for a further action.

I think therefore that the authority relied on by Mr Gyorffy would not justify the Magistrate entertaining the complainant's action. I do not need to decide whether or not the Magistrate had power to allow the complainant to deliver further bills of costs in lieu of the original bills, or whether the consent of a court was needed to enable her to do so. My view is that if he does have such a power he cannot exercise it, together with his power to allow amendment of the complainant's particulars of demand, so as to substitute bills delivered after the commencement of the action for bills originally relied on. *Zizza v Seymour* (1976) 2 NSWLR 135 at p137.

I have however to consider Mr Gyorffy's further submission that the defendant has waived his right to invoke the time limitation in s81 of the *Supreme Court Act* by the request of his solicitors in their alleged letter dated 12th June 1981, which was said to have been answered by delivery of the bills dated 22nd July 1981, and by the defendant's failure for four months thereafter to seek taxation. Mr Judd has not admitted, nor was there any proof before the Magistrate of, the sending of this letter or receipt of the bills dated 22nd July 1981, so that if the complainant were successful in this action she would have to prove such matters to the Magistrates' Court before

proceeding further in her action. However, it was open to the Magistrate to consider and to rule on the preliminary contention raised by Mr Judd, on the basis of what Mr Gyorffy claimed to be provable facts. I must assume that this is what the Magistrate did although he said nothing about it. I assume that the alleged letter of 22nd July 1981 was a request for further particulars of the complainant's particulars of demand. Such a request would not normally constitute a waiver of a condition precedent of jurisdiction. Thus it could not constitute a waiver of a defence based on the *Statute of Frauds* or the *Statute of Limitations*. The defendant would be entitled to keep his defences in reserve.

I do not think that in this case such a request could overcome the objection raised by Mr Judd. As to the reference to the four months which have elapsed without taxation, the defendant was under no obligation to take such action and consequently no inference can be drawn from his inaction. In order to support his contention that the defendant had waived his rights to rely on s81, Mr Gyorffy has referred to the prohibition in s81 against maintaining as well as commencing an action in s81 as the basis of a submission that this prohibition is not mandatory. Whether or not this prohibition is substantive or procedural I think that the effect of the reference in s81 to maintaining an action is to prevent an action which has been commenced proceeding any further, thereby reinforcing the said prohibition. However this may be, the fact is that there has been no waiver of rights by the defendant so that the prohibition in s81 still stands in the path of the complainant.

In view of these considerations, the Magistrate was right in dismissing the complainant's action and I discharge the order nisi.

APPEARANCES: Mr T Gyorffy, counsel for Applicant/Complainant. Mr Judd, counsel for Respondent/ Defendant.
