



Transcript of Proceedings

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[2002] QSC 241

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No S176 of 2002

COMMONWEALTH BANK OF AUSTRALIA
ACN 123 123 124

Plaintiff

and

KENNETH HENRY DAVIES

Defendant

BRISBANE

..DATE 12/08/2002

ORDER

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HER HONOUR: This is an application for leave to withdraw from the record in the proceeding filed by the respondent/defendant's solicitors. The application comes before the Court pursuant to rule 990 of the Uniform Civil Procedure Rules.

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By way of background, there is litigation between the plaintiff and the defendant which commenced in 1996. The trial is to commence on 26 August 2002, a fortnight away.

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On 26 November 1996 the applicant's solicitors wrote a letter to the respondent/defendant and his wife setting out the terms on which they were prepared to continue to act in the litigation. Those terms included payment of disbursements and payment of interim accounts, and there was provision reserving the right to cease to act in the event those accounts were not paid. That letter made provision for counter signature by the defendant and his wife, but there is no evidence before me that they in fact signed it. Nevertheless, the solicitors continued to act.

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On my perusal of the material it would seem that over the ensuing years there have been tensions in the solicitor/client relationship. It is not for me to pass any judgment on the rights or wrongs of those tensions in this application. From December 2001 the solicitors told the respondent/defendant that they would require funds to be placed in their trust account before taking the matter to trial. No details of such requests were before me this morning.

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ORDER

On Friday 2nd August 2002 two communications were served contemporaneously by e-mail on the respondent/defendant.

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One of them was a request to be put in funds for the trial by midday on Monday 5 August 2002. The total sum of \$83,379.08 was requested. That included (inter alia) "agreed professional fees payable to BCK [the solicitors] to 25 August 2002 inclusive of GST" \$14,850, and it included estimated fees for counsel being six days for senior counsel at \$4,500 per day plus GST (that is \$29,700); fees for junior counsel, six days at \$3,000 per day plus GST (that is \$19,800); plus an estimate of junior counsel's fee for an advice on evidence, \$1,320.

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The second document served at that time was a notice in compliance with rule 990 of the UCPR. The notice requirements under the UCPR have been satisfied.

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The solicitor who appeared for the respondent/defendant submitted that the contract with his client was an entire contract. I took him to accept that the solicitors would nevertheless be justified in refusing to act further if they requested funds on reasonable notice and funds were not provided in response. The point I understood him to take was that in the circumstances of this case the notice that was given, from Friday until midday Monday, was unreasonable.

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The fact is the solicitors have ceased to act.

It is not for me on an application of this type to determine where the rights and wrongs of their ceasing to act lie. I respectfully refer to the decision of the High Court in Plenty v. Gladwin (1986) 67 Australian Law Reports 26 where Justices Wilson, Brennan, Deane and Dawson considered order 7 rule 7(1) of the High Court Rules. Although the wording of the UCPR rule 990 and following is not precisely the same as that under consideration there, both rules deal with the same topic and in my view the same principle is applicable.

This is what their Honours said of the High Court Rule.

"Its concern is with the record of the Court and with the service of documents. It comes into play when, rightly or wrongly, a solicitor has ceased to act and the party has not given notice of change of solicitor or notice of intention to act in person. The solicitor may then take steps to have his name removed from the record. The first step is by applying to the Court or a justice for an order declaring that the solicitor has ceased to be the solicitor acting for the party in the proceeding. As we have noted the court has a discretion whether or not to make the order, but unless there are special circumstances which render it expedient to retain the solicitor on the record the order will generally be made as a matter of course upon proof that the solicitor has, in fact, ceased to act for the party and that no steps have been taken to take the solicitors name off the record. Order 7 rule 7(4) makes it plain that an order made under the rule does not affect the rights or liabilities of a solicitor and a party as between themselves."

The question, then, is whether there are special circumstances justifying keeping these solicitors on the record. The trial date is very close and there may be documents or other communications to be received from the plaintiff. However, the solicitors have indicated that, as a matter of courtesy, they are prepared to receive same and pass them on.

In the circumstances I am not satisfied that there are such special circumstances that the solicitors should be required to remain on the record. I am prepared, however, to stay the effect of my decision for one week. If, in that time, any compromise can be reached between the solicitors and the respondent/defendant, so be it. If that does not happen, well, the withdrawal of the solicitors must proceed in accordance with rule 991(3) and it will take effect in accordance with 991(4).

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