SUPREME COURT OF QUEENSLAND

CITATION:	*Drakos & Anor v Keskinides* [2003] QCA 109
PARTIES:	**HAROLD STANLEY DRAKOS and CONSTANTINE GEORGE CASTRISOS trading under the name, firm or style of H. DRAKOS & COMPANY, SOLICITORS** (plaintiff/respondent) **v** **ATHANASIOS KESKINIDES** (defendant/applicant)
FILE NO/S:	Appeal No 11463 of 2002 DC No 2216 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	13 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2003
JUDGES:	de Jersey CJ, McMurdo P and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL-PRACTICE AND PROCEDURE - QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT - GENERALLY PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – BILLS OF COSTS – ACTIONS TO RECOVER COSTS – OTHER CASES PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – RETAINER – IN GENERAL – where no written retainer or costs agreement – where applicant alleged fees to be charged on a contingency basis – where applicant's action unsuccessful – whether respondent had proved term of retainer in relation to identification of performance for which remuneration was due *Coshott v Sakic* (1998) 44 NSWLR 667
COUNSEL:	M J Byrne QC for the applicant R Cameron for the respondent
SOLICITORS:	Drakopoulos Black for the applicant John Drakos & Co for the respondent

THE CHIEF JUSTICE: I invite Justice White to deliver the first judgment.

WHITE J: This is an application for leave to appeal pursuant to section 118(3) of the District Court Act 1967, against the Order of a District Court Judge made on 19 November 2002, allowing an appeal from the decision of Mr T A Allingham stipendiary Magistrate which was made on the 9th of May 2002.

The applicant for leave was the defendant in an action by his former solicitors in the Magistrate Court to recover professional costs and outlays arising out of the conduct of litigation on his behalf. The Magistrate found in favour of the client. Judge Noud in the District Court allowed the appeal by the solicitors.

In or about August 1990 the applicant retained the respondent firm of solicitors to investigate for him a common law action for damages for personal injuries which arose in the course of his employment. The terms of the retainer were oral. There was no written costs agreement or written retainer. As the law then stood, there was no obligation on the solicitors to do so.

Communication between the applicant and Mr Drakos of the firm of solicitors was in the Greek language because it seems the applicant was far from fluent in English. Litigation was commenced and a trial was heard in the District Court in Brisbane in August 1996. The applicant was unsuccessful and the trial Judge ordered that he pay the costs of those

proceedings. In May 1997 the solicitors delivered to the applicant an itemised bill of costs in respect of legal professional fees and outlays incurred in the action.

These were not paid and on the 22nd of July 1999 the solicitors commenced proceedings in the Brisbane Magistrates Court claiming some $23,677.00 for legal professional fees, outlays, interests and costs. In its statement of claim the solicitors alleged that the applicant retained the solicitors for reward to act for him. This allegation was admitted on the defence but the applicant also alleged that the retainer was on a speculative basis the terms of which were that he would pay for disbursements incurred on his behalf by the solicitors and would be required to pay the solicitors legal professional costs only if the applicant was successful and received an award of damages and costs. Since the applicant was unsuccessful in his action he denied any indebtedness to the solicitors for any amount representing legal professional costs.

At the commencement of the hearing in the Magistrates Court it was acknowledged by the applicant that he was to pay for the outlays and by consent judgment was entered for the solicitors for those outstanding amounts. Some outlays had been paid in the course of preparation for the trial, but the applicant was usually dilatory in paying and protested his cashflow poor status. He had secure assets in houses of which the solicitors knew. It was the solicitors case that the applicant was obliged to pay the outlays when they fell due,

but that his liability to pay the legal professional fees by an arrangement with the applicant was deferred until after the trial as was their regular practice in cases of this kind.

Mr Drakos gave evidence that he had no independent recollection of specifically outlining to the applicant in conference at the commencement of the retainer, the basis upon which the firm was prepared to accept his instructions to act on his behalf in the common law claim. Neither was there any note in the file, correspondence with the applicant or any writing to suggest the arrangement contended for by the solicitors.

However Mr Drakos's firm evidence-in-chief and in cross-examination was that his firm's practice in such matters in 1990 was that it never acted on a speculative basis and subsequently would only agree to do so in a case where liability was either not in dispute or was assessed as being clear cut which was not the applicant's case. Mr Drakos's evidence was that, "In the end we came to an agreement that so long as he met the outlays as we went, I'd wait for any fees at the end of the trial". Mr Drakos was not cross-examined on that evidence.

Otherwise at no time during the retainer from 1990 until 1996 did the solicitors raise the question of payment of professional fees. In June 1999 the solicitor sent a notice of demand for payment of unpaid fees to the applicant. On the 1st of July 1999 in response the applicant wrote in English to

the solicitors, "I regret that I am unable to pay this account".

The letter was signed. At the trial the applicant identified the signature as his signature without seeing the text of the letter, and when he did, contended that his signature was a forgery. Thereafter the applicant retained other solicitors who wrote to the solicitors contending for a no win no fee arrangement. The Magistrate concluded that the applicant probably did sign and send the letter of the 1st of July, but subsequently regretted doing so and sought to remedy the perceived damage.

The Magistrate made specific findings about the evidence:

(1) The applicant was, "At least in one respect untruthful in his evidence in my judgment. In view of this it may be unsafe to place too much weight upon other aspects of his evidence."

(2) "Mr Drakos was in my judgment truthful on the whole of his evidence so far as it went".

(3) Mr Drakos did not claim to have any independent recollection of having spelt out to the applicant what would happen about legal professional fees for the firm in the event that the action was unsuccessful. He simply spoke of what his normal practice would have been. He did not say that his normal practice had been specifically explained to the applicant.

(4) The solicitors took no step during the course of the action to record in writing the nature of this aspect of the retainer between them and their client. It took no step to raise the matter orally over a period of more than five years.

(5) The solicitors did raise with the applicant during discussions with counsel about the possibility of settlement that the applicant would need to pay solicitor and own client fees from his own funds if he was to accept an offer that each party should walk away from the action, and each pay their own costs.

(6) The applicant in forwarding the letter of 1 July 1999 without apparently professional advice was adopting the same strategy that in his experience had proved successful in avoiding the need to pay the outlay accounts throughout the conduct of the action.

The Magistrate noted that a plaintiff will always bear the onus of proof. He sought to resolve the matter by determining whether there was sufficient on the solicitors' own case to find in its favour on the balance of probabilities. He concluded that the contract could possibly have been formed in the way that Mr Drakos believed that it had been but thought there were difficulties to be overcome before it could be said that the parties without any specific communication had reached an understanding on the payment of fees for professional services in the event that the action was unsuccessful.

The Magistrate accepted Mr Drakos's evidence about the normal practice of his firm, but he noted that it may not have been actually implemented or accepted as an agreement in this particular case. The Magistrate concluded that in the absence of any recording on the solicitor's file of relevant details of the retainer, or other definite evidence to this effect, he was unable to find that the solicitors had satisfied the onus of proof.

The learned District Court Judge noted the applicant's defence but held that the necessary ingredients of the solicitors' cause of action were set up in the statement of claim, and, subject to the defence, the firm was entitled to recover. His Honour concluded that the Magistrate had held that the applicant's defence was without merit or at least could not be accepted; that Mr Drakos was entirely truthful and therefore found that the Magistrate erred in not giving judgment for the solicitors.

The evidence included the evidence that the firm never undertook speculative work in 1990 and the arrangement with the applicant about deferred payment. Accordingly the learned District Court Judge concluded that the Magistrate erred in not attaching the necessary weight to the evidence of Mr Drakos and erred by introducing an irrelevant issue, "Namely that the solicitors had to prove that the applicant had been told that fees would be charged if the litigation was unsuccessful".

The applicant bore the evidentiary onus of proving his allegations but the Magistrate had reservations about his truthfulness. The body of evidence remaining supported the conclusion of the learned District Court Judge that in some way the Magistrate failed to appreciate the extent of Mr Drakos's evidence. Neither the Magistrate nor the learned District Court Judge were referred to the decision of the New South Wales Court of Appeal in Coshott v. Sakic 1998 44 New South Wales Law Reports 667 upon which Mr Byrne QC for the applicant places some weight.

That case is virtually indistinguishable from the present. The terms of the retainer were entirely oral. The solicitor gave evidence of his invariable practice. The trial Judge made no finding accepting the client's evidence on the retainer.

Chief Justice Spigelman, with whose reasons for judgment Mason P and Handley JA agreed, concluded that it was not appropriate to characterise the issue for determination as "Was there a special arrangement?" His Honour at 672 of the reasons for decision said:

> "Rather what the respondent alleged was that certain events were a precondition to the payment of reasonable fees and those events had not occurred. It may have been that, without this assertion, the Court would readily infer that payment was to be made upon performance. However, the onus of establishing the contract upon which the appellant sued remained throughout on the appellant."

And this required him to prove all the terms of his retainer 'including identification of the performance for which the payment was to be remunerated'. The Court concluded that the

solicitor's case depended on inferences from surrounding circumstances and subsequent conduct and that that was insufficient to discharge the onus of proof.

Here there was a body of accepted evidence which went further than in Coshott v. Sakic and asserted a positive agreement to defer payment. In my view the District Court Judge was correct on the facts of this case to conclude that the evidence was sufficient for a finding in the solicitor's favour and it was either a misapprehension of that evidence or a misunderstanding of the onus of proof to add a further layer requiring the solicitors to prove that the terms of the agreement included that the fees would have to be paid even if unsuccessful.

It cannot be the case that a solicitor must specifically disabuse a client that he would not need to pay if the litigation being undertaken was unsuccessful before he could successfully sue for his fees. These issues involved an analysis of the evidence and the application to it of well known principles about the onus of proof.

The District Court Judge, in my view, correctly applied those principles and did not err in his review of the evidence. Accordingly, in my view, leave should be refused.

THE CHIEF JUSTICE: I agree.

THE PRESIDENT: I agree.

THE CHIEF JUSTICE: Leave is refused.

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THE CHIEF JUSTICE: The application is refused with costs to be assessed.
