IN THE SUPREME COURT OF QUEENSLAND Misc. No. 503 of 1995

Brisbane

IN THE MATTER of the *Costs Act* 1867 (as amended)

- and -

IN THE MATTER of GEOFFREY JOHN IRVINE

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 5 August 1996

CATCHWORDS:

TAXATION OF SOLICITOR-CLIENT BILL - application to show cause why judgment should not be entered in relation to certificate of taxation - s.12 *Legal Practitioners Act 1995* - bill taxed on appointment - allegations of applicant's professional negligence - procedure not appropriate - summons dismissed.

Counsel: D. Smith for the applicant
P. O'Shea for the respondent
Solicitors: Halletts Solicitors for the applicant
Harris Sushames Solicitors for the respondents
Hearing Date: 30 April 1996

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REASONS FOR JUDGMENT - MOYNIHAN J.

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This is a summons seeking that the respondent show cause why judgment should not be entered against him "in relation to the certificate of taxation issued in Misc. no. 503 of 1995".

The taxation was of an "attorney's bill of costs" (a solicitor-client bill) delivered as a consequence of the respondent's having retained the applicant. The applicant delivered a bill and it was taxed under the authority of the *Legal Practitioners Act* 1995 (the Act) - formerly the *Costs Act* 1867 after an appointment was made for taxation. The costs taxed out at $7,374.39.

The respondent resists the relief sought, first on the basis that the procedure is irregular. Secondly, the respondent has commenced an action for damages for professional negligence against the applicant in respect of work performed under the retainer founding this application. The taxing officer refused to permit the professional negligence issues to be canvassed on the taxation. The respondent claims to bring to account his claim (it is not restricted to costs and overtops the taxed costs) against the amount certified by the taxing officer so as to prevent the applicant obtaining the relief claimed.

Section 12 of the Act provides:

> "**Form of application for taxing. 6 & 7 Vic. c. 73 s. 43.** All applications made under this Act to refer any such bill as aforesaid to be taxed and settled and for the delivery of such bill and for the delivered up of deeds documents and papers shall be made in the matter of such attorney.
>
> **Certificate of officer.** and upon the taxation or re-taxation and settlement of any such bill the certificate of the officer by whom such bill shall have been taxed shall (unless set aside or altered by order decree or rule of court) be final and conclusive as to the amount thereof and payment of the amount certified to be due and directed to be paid may be enforced according to the course and practice of the Supreme Court.

> **Enforcement of payment.** and it shall be lawful for such court or a judge thereof to order judgment to be entered up for such amount with costs unless the retainer shall be disputed or to make such other order thereon as such judge shall deem proper."

It may be accepted that the procedure adopted reflects *Re Lawless and Son* (1848) 6 Common Bench Reports 123. That procedure, subject to qualifications seems to have been adopted for this court; *Jager v. Gannon re Bellas* (1688-1872) II S.C.R. Queensland 187. The procedure is designed to permit a judgment being obtained without the necessity to institute an action.

In *Re Neighbour; Re Russell* 23 V.L.R. 459, the Victorian Supreme Court took the view of comparable legislation that the procedure for obtaining judgment on a certificate of the taxing officer applied only where there was an order referring the bill to taxation and not when the taxation took place on appointment. Parity with the reasoning in that case suggests the reference in the first paragraph of s.12 to "refer any such bill to be taxed" and to "such bill in the second" has the consequence that the same conclusion applies here. On the other hand, the Supreme Court of New South Wales (sitting in banc.), took the view that differentiation between taxation on appointment and as a consequence of a referring order was not justified. This seems, in part, at least to have been based on a difference in form if not of verbiage between the Victorian and New South Wales provisions.

I have not been referred to any authoritative determination of this Court on the particular point. I am inclined to favour the New South Wales view as the desirable outcome but it is apparently somewhat dependent on the form of the legislation under consideration there. The view of the Supreme Court of Victoria seems a technical one but is arguably sustained by the words of s.12.

Incidentally, *Jager* (ante) is authority for the proposition that the procedure of entering judgment based

on the taxation certificate cannot be used by a client to enter a judgment when the whole of the taxation finds a balance in the client's favour. A contrary view was taken in *United Service Insurance* (ante) but the subsequent outcome of applying that view is not apparent from the report.

The retainer founding the taxation in the present case arose as a result of a partnership dispute between the respondent and others. The respondent retained the applicant to act for him. The dispute was referred to arbitration on the applicant's advice. The arbitrator disclosed a draft interim award which was unfavourable to the respondent. The respondent sued the applicant alleging that as a consequence of the applicant's:

> "... breach of retainer and/or negligence, the plaintiff has suffered the prospect of a judgment against him in the sum proposed to be awarded by the arbitrator under his draft interim award (both as the principal sum of the judgment and costs) and has been denied his costs. The approximate sum of such loss is $200,000.00 as hereinbefore particularised."

The negligence and breach is then pleaded as follows:

> "8. The defendant's advice to the plaintiff on the 12th August, 1994 to enter into an arbitration agreement containing such clauses without caveat was in breach of the retainer and was negligence;
>
> (a) the defendant failed (as a reasonably prudent solicitor properly conversant with the provisions of the *Commercial Arbitration Act* would not have failed) to advise the plaintiff that in consequence of his New Zealand citizenship, the arbitration agreement was not a "domestic arbitration agreement" for the purposes of the *Commercial Arbitration Act* and in the consequence no appeal or other application setting aside the findings of the arbitrator could be made by the plaintiff;
>
> (b) the defendant failed (as a reasonably prudent solicitor properly conversant with the provisions of the document and the provisions of the *Commercial*

Arbitration Act would not have failed) to advise the plaintiff that the express provisions of the arbitration agreement excluded certain rights of appeal otherwise expressly provided for in the *Commercial Arbitration Act*;

(c) the defendant failed (as a reasonably prudent solicitor properly conversant with the provisions of the document and the provisions of the *Commercial Arbitration Act* would not have failed) to advise the plaintiff that the effect of the "just and equitable" clause was that the plaintiff's rights as law might be displaced by an arbitrator's express reliance on that clause rendering the plaintiff liable to other members of his partnership other than in accordance with law.

.....

12. Alternatively, on the 6th day of July, 1994 and immediately prior to the dissolution of the firm of Purvis Duncan the defendant by Gallagher advised the plaintiff that it was in order for the plaintiff to send a letter to some of the clients of the firm Purvis Duncan advising clients that the firm was intending to dissolve and inviting the clients to contact him to make arrangements for the conduct of their business after the date of the dissolution of the firm (which was then imminent). The defendant by Gallagher further advised the plaintiff that it was in order to send such a letter without prior notice to any other member of the firm Purvis Duncan.

13. Mr Arbitrator MacGillivray in the course of delivering his draft interim award found that the sending of a letter in terms of the advice in 12 without notice to the other partners of Purvis Duncan was in breach of the plaintiff's fiduciary duty to his former partners (or found that on the basis of the just and equitable provision in the arbitration agreement, such conduct amounted to a breach of such duty).

14. If it be found at the trial of this action that as a matter of law the approaching of clients or the sending of the letter to the effect pleaded without notice to the former partners was in fact a breach of the plaintiff's duty to the plaintiff's former partners, the defendant was negligent in failing to

> advise the plaintiff to that effect before the letter was sent."

As I have said, the taxing officer in this case refused to deal with the respondent's allegations of negligence. That is at the least arguably correct. The taxing officer's jurisdiction was to determine whether the steps taken in incurring the costs, "were entirely useless or that the work charged for was not proper: . . in the sense in which that word is used in the authorities referred to above."

In such a case:

> "... the costs may be disallowed notwithstanding that it is also arguable that the reason for the work being useless was that the solicitor was negligent and that such negligence resulted in the loss of the whole action."

Per Williams J., in *Baker and Johnson's bill of costs ex parte Roberts* (O.S. 821/94, judgment delivered 16 December 1994).

In the present case, the action for negligence is as yet undecided. It seems to me that, had he embarked on a consideration of the negligence of the allegations, the taxing officer would have had to embark on, if not determine, the issues in the applicant's action in order to decide whether the work was useless or that charges were not proper. It is difficult to see how that could be done independently of the action. In other words, the view of the taxing officer was justified.

In *Baker and Johnson's bill of costs* (supra) Williams J. went on:

> "There is an obvious injustice in concluding that the solicitor was negligent resulting in the whole action being lost, but nevertheless holding that in the first instance the client should pay the costs; the proviso being that he could seek to recover such costs in a separate action in negligence against the solicitor."

The outcome of these considerations, it seems to me, is that the taxation certificate is determinative of the applicant's costs in that, that it is final and conclusive "as to the amount thereof." Whether the applicant's negligence rendered costs useless improperly incurred and whether the respondent can, on that account, otherwise avoid paying them or whether he has suffered damages overtop of them is a matter for the defendant's action.

In summary, the better view of the law seems to be that, absent a reference in terms of s.12, the procedure is not appropriate. If s.12 does apply to permit it leaving questions of the applicant's negligence, its effect on its entitlement to its fees are whether the respondent suffered damages overtopping the taxed amount to the respondent's action. I therefore dismiss the application.