HALLIDAY

v.

SACS GROUP PTY. LTD.

JUDGMENT
(oral)
23/12/1992

DAWSON J.

HALLIDAY

v.

SACS GROUP PTY. LTD.

In February 1990 Spectra Systems Pty. Ltd. ("Spectra"), a company of which the applicant was a director, instituted proceedings against the respondent to these proceedings, Sacs Group Pty. Ltd. (now called High Performance Personnel Pty. Ltd.), in the County Court of Victoria. That action was dismissed with costs on 29 July 1991. By a notice of appeal dated 26 August 1991 the applicant, as "assignee", gave notice of his intention to appeal to the Full Court of the Supreme Court of Victoria against the judgment and orders of the County Court. However, on application to the Supreme Court this notice of appeal was set aside on the grounds that the applicant was not a competent appellant and that the notice of appeal was therefore an abuse of process. A further document dated 22 October 1991 and headed "Amended Notice of Appeal" was also set aside. On 15 November 1991 the applicant applied to this Court for special leave to appeal from

the whole of the judgment of the Supreme Court. On 8 May 1992, this Court refused the applicant leave to appear in person to make the application for special leave to appeal and dismissed the application for special leave to appeal. It further ordered that the applicant pay the respondent's costs "of and incidental to the ... application such costs to be taxed by the proper officer of this Court". On 30 January 1992, that is, before the hearing of the application for special leave to appeal, a Master of the Supreme Court ordered that the respondent be wound up by the Court. Spectra has also since been wound up, pursuant to an application made by the respondent, by order dated 12 March 1992.

At the commencement of the taxation of the respondent's costs on 22 July 1992, the applicant raised a general objection to the bill. This objection was that the respondent was not entitled to recover the costs of the application for special leave to appeal because it had not incurred any liability to pay those costs. The taxation proceedings were adjourned to 6 August 1992, at which time the taxing officer ordered a further adjournment to allow the parties to prepare written submissions concerning this objection. After

both parties had filed their written submissions, the taxing officer heard oral argument addressed to those submissions on 3 September 1992. Following a consideration of the arguments advanced by the applicant and the respondent, the taxing officer overruled the applicant's objection and proceeded to tax the bill. On the completion of the taxation the taxing officer stated that she would not sign the certificate of taxation until fourteen days had elapsed (this period was later extended on the application of the applicant to 21 days). Before the certificate was signed, the applicant applied to the taxing officer to review the taxation in respect of certain items pursuant to O.71, r.87(1) of the Rules of Court. In accordance with O.71, r.88(1) the taxing officer thereupon reconsidered and reviewed the taxation in relation to those objections. On 11 November 1992, the taxing officer dismissed all of the applicant's objections and on the same day signed a certificate of taxation which certified that the respondent's bill of costs had been taxed and allowed at $5,307.40. By a summons issued on 25 November 1992 under O.71, rr.22 and 89(1), the applicant applied for a review of the taxation, including the decision made on 3 September

1992 together with certain items disallowed by the taxing officer on 11 November 1992.

The principles guiding such a review are well established. This Court will review the decision of a taxing officer where it appears that the correct principle has not been applied. However, where it is not contended that the taxing officer has not applied the correct principle but only that the he or she has not properly exercised a discretion which is vested in him or her, then although the Court has the power to do so, it will be reluctant to interfere with a decision made by the taxing officer in the exercise of that discretion unless it appears that the officer has not exercised that discretion or has exercised it in a manner that is manifestly wrong(1). For these reasons the Court will rarely review the decision of a

(1) *Australian Coal and Shale Employees' Federation v. The Commonwealth* (1953) 94 C.L.R. 621, at pp.627 629 and in particular the quotations from *Hill v. Peel* (1870) L.R. 5 C.P. 172, at pp.180-181 and *Schweppes' Ltd. v. Archer* (1934) 34 S.R.(N.S.W.) 178, at pp.183-184; *Cohuna Sewerage Authority v. Flannery* (1977) 14 A.L.R. 146, at p.147; *Raybos Australia Pty. Ltd. v. Tectran Corporation Pty. Ltd.* (1987) 76 A.L.R. 69, at p.73; *Clark, Tait & Co. v. Federal Commissioner of Taxation* (1931) 47 C.L.R. 142, at pp.145-146.

taxing officer on the basis of amount alone[2]. Further, only objections raised before the taxing officer can be the subject of a review[3].

I turn first of all to the general objection raised by the applicant (who appears in person), namely, that the respondent is under no liability to pay the costs of the application for special leave to appeal with the result that the respondent is not entitled to recover those costs from the applicant. The applicant contends that the respondent is not so liable because it was the respondent's insurer, FAI General Insurance Co. Ltd. ("FAI"), rather than the respondent, who instructed and paid the solicitors, Minter Ellison, to act on the respondent's behalf in those proceedings. Therefore, so the applicant argues, it is FAI, and not the respondent, who is liable to Minter Ellison for the costs associated with those proceedings.

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(2) *Australia Coal and Shale Employees' Federation v. The Commonwealth* (1953) 94 C.L.R., at p.628; *Cohuna Sewerage Authority v. Flannery* (1977) 14 A.L.R., at p.147.

(3) *Australian Coal and Shale Employees' Federation v. The Commonwealth* (1953) 94 C.L.R., at p.626.

This argument is clearly based on the principle stated by Bankes L.J. in *Adams v. London Motor Builders*(4):

> "The principle upon which costs as between party and party are allowed is that the costs are awarded to the person claiming them as an indemnity. That being the principle, it follows that any one who is not in a position to claim to be indemnified is not entitled to an order for party and party costs."

For this reason it has been held that costs cannot be claimed by a party in an action if the solicitors in the action were not engaged by that party, that is, if there was no contract of retainer between the solicitors and that party(5). However, contrary to his submissions, it is the applicant who bears the onus of establishing the absence of this contract of

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(4) [1921] 1 K.B. 495, at p.499; see also Younger L.J. at p.505.

(5) ibid., per Bankes L.J. at pp.500-501, Atkin L.J. at p.502. See also *Gundry v. Salnsbury* [1910] 1 K.B. 645, per Cozens-Hardy M.R. at p.649, Fletcher Moulton L.J. at p.650, Buckley L.J. at p.653; *Harold v. Smith* (1860) 5 H. & N. 381, at p.385 [157 E.R. 1229, at p.1231]; *Davies v. Taylor (No.2)* [1974] A.C. 225, per Viscount Dilhorne at p.230, Lord Cross of Chelsea at p.234; *Reg. v. Miller* [1983] 1 W.L.R. 1056.

retainer(6).

The mere fact that a person appears on the record as the solicitor for a party does not necessarily justify the conclusion that there is a contract of retainer between the solicitor and that party(7). But, at least where the party is aware of this and takes no steps to rectify it, then a presumption must arise that there is a contract of retainer between them(8). And, both in so far as the Court is concerned and as between the parties to an action, the presumption that the solicitor on the record represents the party for whom he is recorded as being solicitor must surely be a strong one(9).

The notice of appearance dated 29 November 1991 entered for the respondent in relation to the application for special leave to appeal is signed by

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(6) *Adams v. London Motor Builders* [1921] 1 K.B., per Bankes L.J. at pp.500, 501, Atkin L.J. at p.502.

(7) See, by way of analogy only, *Hall v. Laver* (1842) 1 Hare 571, at pp.575-576 [66 E.R. 1158, at p.1160].

(8) See, by way of analogy only, *Reynolds v. Howell* (1873) L.R. 8 Q.B. 398, per Blackburn J. at p.400.

(9) See *Lady de la Pole v. Dick* (1885) 29 Ch.D. 351, per Cotton L.J. at p.347. See also O.7, rr.2(2), 7(2).

Minter Ellison as the solicitors for the respondent. Moreover, apart from the initial stages of the County Court proceedings, when the respondent was represented by another firm of solicitors, the solicitors appearing on all the relevant court documents as the solicitors for the respondent are Minter Ellison. Accordingly, the applicant must displace the presumption that there is a contract of retainer between Minter Ellison, as the solicitor on the record for the respondent, and the respondent.

In an attempt to do so, the applicant presented evidence that in the proceedings initiated by the respondent to have Spectra wound up, counsel briefed by Minter Ellison to appear for the respondent received instructions from "FAI Insurance". The applicant further relied upon a letter to Minter Ellison dated 16 March 1990 in which FAI, apparently purporting to exercise its rights under a professional indemnity policy taken out by the respondent, instructed Minter Ellison in relation to the proceedings instituted by Spectra in the County Court against the respondent "to consider the material, meet with the [respondent], advise on indemnity and, if indemnity is confirmed, thereafter assume conduct of the [respondent's] defence

in the interests of" the insurer. Upon these materials, I am not satisfied that the applicant has displaced the onus cast upon him.

The materials before the taxing officer suggest that, in giving instructions to Minter Ellison, FAI was pursuing its right to subrogation as the respondent's insurer, either at common law or, more likely, under an insurance contract between them. If, upon this basis, FAI took over the conduct of the litigation on behalf of the respondent, it did so in the respondent's name and costs incurred by Minter Ellison were incurred on behalf of the respondent(10). I should add that the liquidator appointed to wind up the respondent company confirmed the instructions given on behalf of the respondent that Minter Ellison should act for it in the application for special leave to appeal.

The existence or absence of some arrangement by way of subrogation between the respondent and FAI whereby Minter Ellison would act for the respondent would not

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(10) See *Rex. v. Archbishop of Canterbury* [1903] 1 K.B. 289, at p.295.

mean that Minter Ellison did not incur costs in acting on behalf of the respondent, being costs which might appropriately be the subject of an order for costs in favour of the respondent. Nor would the position be different if there were an express agreement by FAI to indemnify the respondent against liability for those costs(11). There was no agreement binding on Minter Ellison that the respondent would incur no costs and, in the absence of such an agreement, the costs incurred were costs incurred in the name of the respondent and are recoverable as such(12). Accordingly, I must reject the applicant's contention that Minter Ellison incurred no costs on behalf of the respondent which are recoverable pursuant to the order for costs in favour of the respondent.

I turn now to the objections made with respect to specific items contained in the bill.

First, the applicant contends that as the respondent is a company in liquidation and as, on

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(11) See *Davies v. Taylor (No.2)* [1974] A.C. 225.
(12) See *Adams v. London Improved Motor Coach Builders Ltd.* [1921] 1 K.B. 495; cf. *Gundry v. Sainsbury* [1910] 1 K.B. 645.

taxation, the amount of the professional charges and disbursements contained in the bill of costs was reduced by more than a sixth part then, pursuant to O.71, r.86, costs should not have been allowed to the solicitor leaving the bill for taxation for drawing and copying it or for attending the taxation. However, this rule applies only to the taxation of a bill of costs "payable out of a fund or estate or out of the assets of a company in liquidation". That is, there must be an order making the fund or estate or assets liable for those costs(13). This is clear not only from the words of the rule but also from its purpose which is "something in the nature of administration for the benefit of a class of persons"(14) who have an interest in the funds out of which the costs are to be paid. As the costs in this case are to be paid by the applicant personally this rule has no application; it would have been different had the respondent been ordered to pay the costs.

Next, the applicant contends that a letter dated 22 July 1992 from the relevant counsel's clerk which

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(13) See *Simmons v. Simmons* (1895) 39 *Solicitors' Journal* 673.

(14) *Buchan v. Ayre* [1915] 2 Ch.D. 474, at p.478.

was produced at the taxation and which stated that all fees payable to counsel had been paid was insufficient for the purposes of O.71, r.103. That rule provides that "[a] fee to counsel ... shall not be allowed on taxation unless unconditional payment is vouched by the signature of counsel or otherwise proved to the satisfaction of the taxing officer". In the reasons given by the taxing officer on 11 November 1992, the taxing officer stated that this letter, together with counsel's backsheet (which was also produced at the taxation), satisfied her that the fees payable to counsel had been paid. I see no reason to interfere with this conclusion.

The applicant raises other grounds of objection, namely, that the respondent is entitled only to reduced costs by reason of neglect or delay before the taxing officer or is disentitled to any costs at all because of a conflict of interest on the part of Minter Ellison. I see no substance in these grounds and find it unnecessary to pursue them. Likewise, I find untenable the further suggestion that the proceedings have been affected by bias and, for that reason, should be referred to an international panel of jurists.

For these reasons, I dismiss the applicant's objections and order that the applicant pay the costs of the proceedings before me.