

Can Counsel Sue for Their Fees?

By David Garnsworthy, LLB, BA, editor The Costs Newsletter

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The Plaintiff is a Queen's Counsel in Western Australia and in other states, the defendants to the Proceedings practice as Barristers and Solicitors in Partnership in Western Australia. The Plaintiff sued for the balance of fees alleged owing at \$767,033.33 plus interest. The statement of claim set out several courses of action. The defendants applied to strike out the whole of the Plaintiff's Statement of Claim on the ground that no reasonable cause of action was disclosed or alternatively it was an abuse of process. Judgment was also sought against the Plaintiff on the basis that the defects alleged could not be cured by way of amendment. The acting Master was to hear the matter but without doing so the application was referred to the Full Court.

Several courses of action were alleged. First it was said that the Court had the jurisdiction to enforce the undertakings of its offices and to supervise their conduct. Secondly the Plaintiff relied on the inherent jurisdiction. Thirdly the Plaintiff relied on contract and finally on misleading and deceptive conduct under the Trade Practices Act. In support of its application the defendants argued the Barrister couldn't not sue for his fees incurred as a barrister conducting proceedings before the court. Further reliance was placed on section 65(1) of the Legal Practitioners' Act 1893 which prevents a practitioner from suing to recover fees until a bill has been served on the party charged. It was alleged that this has not been done and that there had been no compliance with the requirements of section 65(3). The sub-section requires each Bill of Costs to contain an endorsement in the terms of the sub-section. The endorsement to the effect that the party charged has the right to request taxation of the account. Further it was argued that failures to comply with that requirement was fatal to the action; *Zizza v Seymour* [1976] 2 NSWLR 135. Held: By Kennedy ACJ, & Rowland JJ

that it was not appropriate to resolve these questions by way of summary proceedings, Rowland J commented that the procedure of referring the matter directly to the Full Court without the Master first giving reasons was not to be encouraged. The defendants' summons was therefore dismissed.

Shand v Doyle & Ors lib no. 960510 16 September 1996.

Editor: The decision of the Court not to decide the many important issues raised was in some respects not surprising but Kennedy J and Rowland J both produce reasons examining the issues in some detail without reaching definite conclusions.

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Kennedy ACJ doubted whether the justifications advanced for the continuation of the rule about Barristers not suing for their fees were of doubtful relevance for the final decade of the twentieth century. Further His Honour had some difficulty in understanding why Counsel should be able to require payment of fees in advance of accepting a brief and thereby avoid the problems of instituting proceedings for the recovery of fees. The decisions from New Zealand and Canada were not of great assistance. The Canadian cases at least assume "that a person practising as a barrister and Solicitor is entitled to sue for fees in respect of services as a Barrister". Kennedy ACJ decided the plaintiff should at least be given the chance of testing the position and therefore summary judgment should not be granted. The policy considerations re-

lating to the rule has not been evaluated in recent times. Kennedy ACJ also commented (reasons page 13) that if a Barrister is entitled to sue for fees then it is not apparent why the Barrister should be excluded from the operation of part 6 of the Legal Practitioners' Act and not subject to any statutory control over fees. Rowland J noted that the Legal Practitioner' Act in Western Australia has never given power to a Barrister to maintain a claim to recover fees. Some have raised the interesting question of whether a legal practitioner practising as both Barrister and Solicitor could sue for fees but a Barrister who is not practising as a solicitor is unable to do so. Public policy to support the rule that a Barrister cannot sue exists but there seems to be little else supporting it. His Honour also noted that the argument a Barrister is not able to sue for fees involves the fiction that the Barrister's fee was an honorarium. It might now be time to look at that rule again. Counsel for the Plaintiff had argued that section 65 of the Legal practitioners' Act did not apply to the relationship between barrister and instructing solicitor. His Honour did not decide the point and noted that if the accepted rule applied that the Barrister could not sue for fees. The requirement about placing a statement on his account enabling the client to call for taxation seem to be rather unusual. This highlighted another interesting point about whether the client as against the solicitor should be liable if at all in contract. His Honour said, "at the moment, I am not aware of any binding authority which would make it necessary for the trial judge to follow the common law rule, notwithstanding its antiquity, if it be considered that the policy reasons for the rule no longer apply and, if the context of the constitution and profession within Western Australia, it was said that it should not apply." It is not clear that the reasons of the court are

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NT Copyright Policy

The NT recently adopted a new policy in respect of copyright in legislation. Details as published in the Government Gazette follow:

For the information of the public, the Northern Territory has adopted the following policy in respect of copyright in legislation with effect from 8 October 1996:

1. Copyright legislation in Northern Territory Legislation is owned by the Attorney-General. The Attorney-General asserts copyright on behalf of the Northern Territory.
2. "Legislation" includes
 - Bills introduced by Ministers into the Parliament of the Northern Territory
 - Acts of the Parliament of the Northern Territory
 - regulations, rules, by-laws, codes of practice and instruments made under an Act of the Northern Territory.
 - any explanatory material published in connection with legislation.
3. The Northern Territory grants permission to any person to publish or deal with any legislation of the Northern Territory in accordance with the following conditions, and the Northern Territory will not assert rights of copyright in any legislation where these conditions are met:

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necessarily authority for anything since neither the acting Chief Justice nor Rowland J reached a concluded view. However there is comment in both the written reasons suggesting that the time has now arrived for a review of the basic policy position. If the court finds that policy considerations no longer justify a barrister being unable to sue then there may be a very interesting situation created. It is not beyond the realm of possibility that the trial judge could find that although a Barrister can sue Counsel will be subject to the requirements of part 6 of the Legal practitioners' Act and therefore required to endorse the account with the advice contained in the section 65 of the Act. Failure to comply with requirements for section 65 could be fatal to an action for recovery: *Bowen Buchbinder Vitensky v Vanning [Library No 960325]*. There are other interesting issues to be raised and ultimately dealt with by the court. For example, the Plaintiff is arguing that his action is based on contract but if that is the case then presumably there must be an argument about whether:

- (a) section 59 of the Legal Practitioners' Act applies; and
- (b) if it does whether or not such agreement has been reached as complies with the requirements of the section.

The outcome of the judgment will obviously be awaited with considerable interest by practitioners throughout Australia.



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Please note a change of location for this participant. *Tyrepower/Independent Battery Distributors* can be found at:

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