12/11/84

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

No. M.50/84

1366

BETWEEN ARTHUR BRUCE EVANS

Appellant

A N D EAGLES & EAGLES

Respondent

Hearing: 5 November 1984

Counsel: M. Coughlan for Appellant
W. Dawkins for Respondent

Judgment:

JUDGMENT OF HOLLAND, J.

The appellant and the respondent in this matter are both solicitors. The claim originated in the District Court in a summons issued by the respondent against the appellant claiming $4,184.73 being the balance of an account for professional costs and disbursements alleged to have been incurred in acting on instructions from the appellant for one Barr between March and October 1983. The proceedings commenced by way of default summons without a statement of claim but later an amended statement of claim was filed. That document however does not advance the details of the plaintiff's claim much further except as to particulars of amounts and dates. The appellant in his statement of defence acknowledged that he referred Barr to the respondent and that the respondent sent certain accounts to his office but denied that he expressly or impliedly guaranteed personally as agent or

in any other capacity for any work carried out or costs rendered in respect thereof for Barr.

It was the appellant's contention that he was no more than agent for Mr Barr and that he as agent for Mr Barr asked the respondent to act for him in circumstances where the respondent would receive his instructions and obtain his remuneration direct from Mr Barr.

The respondent maintained that he was at all times instructed by the appellant as solicitor and that the appellant remained as solicitor throughout and thereby was liable to pay fees properly earned and incurred by the respondent. The District Court Judge stated:-

> "... I have a clear view that despite the usual practice of the defendant when instructing the plaintiff firm to handle some of his clients common law matters, in this particular case he chose to retain a firm hold on the client concerned and the situation and, instead of passing Barr over to the plaintiff, he chose to remain the intermediary.
>
> That was clearly the contract and I accept Mr Eagles' evidence in that behalf and certainly the sequence of correspondence supports that acceptance.
>
> On the other hand the evidence of the defendant was evasive and defensive and his lack of record did not assist him."

The quantum of the respondent's bill of costs was not in issue and judgment was entered for the respondent against the appellant with costs and interest. The appellant appeals against this judgment.

The appellant, although holding a practising certificate as a barrister and solicitor, practises in Invercargill as a solicitor essentially handling conveyancing work. He does not do Court work. He gave evidence that when he had a client involved in litigation or possible

litigation he would normally hand the client over for that matter entirely to another solicitor. In those circumstances, that other solicitor had always rendered his bill of costs direct to the lay client and not to the appellant. That had happened on a number of occasions in the past between the appellant and the respondent.

I agree with the District Court Judge, however, that that was not the case here. The evidence shows that Mr Barr had been charged with a bank robbery, then the largest robbery in the history of New Zealand. He had consulted the appellant as solicitor and had requested that an Auckland barrister, Mr P.A. Williams, be retained. Either the appellant, Mr Williams, or Mr Barr, or all of them, agreed that there should be an Invercargill lawyer to assist in the local work and to appear as junior counsel to Mr Williams. I have used the term lawyer generally so as not to confuse the distinction between barrister or solicitor. Mr Eagles' evidence, which is confirmed by the appellant, was that in the middle of March 1983 the appellant informed him that he was solicitor for Mr Barr and that he wished to arrange to have someone to appear for Mr Barr in the District Court to pursue an appeal to the High Court against a refusal of bail. At a later stage the appellant advised the respondent that it proposed that he should appear as junior counsel to Mr Williams at depositions and trial. On 3 June 1983 the respondent rendered an account for $194.40 to the appellant personally "re Barr" and relating to bail and associated preliminary matters. He accompanied that bill with a letter, the first paragraph of which was as follows:-

> "We now enclose a note of our fee for services to date. We do not wish to be further involved in the case unless and until some clarity is brought into the matter on the question of who is acting for Barr and on what terms. We understand that Mr Peter Williams has been engaged as senior counsel. However, it is not clear whether Mr Fitzgibbon of Christchurch is to act as junior or whether the writer will have some involvement. Mr Fitzgibbon has attempted to give us instructions as to what we should do with the bail application but we would prefer to take our instructions either from yourself or from Mr Barr."

The letter concluded:-

> "Whether or not the writer should be involved is a matter for you. We are happy to act but only on a clear basis and we would also like the question of our own fees then discussed so that we could be sure there would be no difficulty in making payment. We think that there should not be any delay as we have the strong feeling that a number of enquiries should be made now but are conscious of the fact that practically nothing has been done."

Mr Eagles deposes that following this letter he had a telephone conversation with the appellant in which the appellant said that he would like him to continue with the case and he asked for an estimate of his costs for doing so. This evidence was accepted by the District Court Judge. The respondent replied immediately by letter of 8 June stating that he estimated costs for all work up to and inclusive of depositions as being between $1,500 and $2,500, and the additional work up to and including the High Court trial in which it was contemplated he would appear as junior as being between $2,500 and $4,000. The respondent received no reply to this letter from the appellant and never at any stage did the appellant indicate to the respondent that the fees proposed were unreasonable or that he wished to retract from his earlier statement that he wished the respondent to continue in the matter.

It is clear that there was not much communication henceforth between the appellant and the respondent. Nor was there much communication between senior counsel, Mr P.A. Williams and the respondent. Nor did the respondent ever ascertain what Mr Fitzgibbon's position was in the matter and it is significant that the appellant acknowledged that he instructed Mr Williams as counsel but did not ever instruct Mr Fitzgibbon or refer Mr Barr to him. The respondent did considerable work prior to depositions including investigatory work which incurred a substantial liability to a motor cycle expert. This was later included as a disbursement in the respondent's bill. At the depositions hearing apparently Mr Barr was represented by three counsel, Mr Williams, Mr Eagles and Mr Fitzgibbon.

Some time between the depositions and the date fixed for the trial in the High Court Mr Williams withdrew because satisfactory arrangements had not been made for his fee. On 19 September the respondent forwarded a bill of costs to the appellant for $1,115.43. The first account submitted by the respondent to the appellant for $194.40 on 3 June had been paid by the appellant. A third account was rendered by the respondent to the appellant on 7 July after depositions for $2,554.30 including the second unpaid account. This account was not paid but no indication was given to the respondent that it would not be paid by the appellant, nor was he told that it should be rendered direct to Mr Barr. On 19 September the respondent forwarded a further bill for $1,115.43 with an estimate that the remaining costs for the trial would be in the vicinity of $3,500. That letter concluded:-

> "As our instructions came from you and we have no desire to see you embarrassed at all in the matter, we think it would probably be better if you could tell us as soon as possible if you wish us to cease further work in the interim because of the financial position. We do not really want to do this if only for Barr's sake because we have the impression that if we cease doing anything then no-one will be working on the case."

It was indicated that the motor cycle account was still to come. An account for $515 in that respect was forwarded by the respondent to the appellant on 4 October. On 19 October the respondent wrote to the appellant saying:-

> "We confirm that we have now notified Mr Barr that we will be unable to act on his behalf in respect to the trial for want of satisfactory arrangements regarding payment. We gave Mrs Barr the same understanding when she called at our office on October 18th and we are also advising Mr Fitzgibbon.
>
> We request that our outstanding fees and disbursements be paid within one month."

The accounts were not paid and Mr Barr at his trial in the High Court was represented by Mr Fitzgibbon. Apparently Mr Barr has now been declared bankrupt. The appellant claims that he is under no personal liability to the respondent who should have sought payment direct from Mr Barr.

The mere recital of the above facts, which facts were accepted by the District Court Judge, must completely answer that contention. The dispute is essentially one in contract. At no stage did the appellant make it clear that he was acting only as agent for Mr Barr and that he accepted no responsibility personally for the work to be performed by the respondent. On the contrary he clearly indicated that he had funds for Mr Barr and he paid the first account. He requested the respondent to continue. It may be

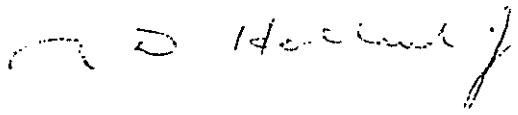
that he did not supervise the costs being incurred by the respondent or the nature of the services being provided but it is not suggested that those costs were in any way unreasonable and it would be clear that it was the duty of the respondent to take all reasonable steps in the interest of the appellant's client and in pursuance of the contract made by the appellant with him.

It is not insignificant that Mr Williams in the letter that was written is described as a barrister and in the New Zealand Law Register 1984 is described as a barrister. As such it is improper for him to have accepted instructions except from a solicitor. That lends some support to the respondent's view that the appellant at all stages remained solicitor for Mr Barr. It is not insignificant that the appellant in concluding his evidence did not say that he at any stage ceased to be solicitor for Mr Barr, and although he said he had not rendered costs to Mr Barr over this matter he said:-

> "I have not rendered a bill myself to date. Barr is bankrupt and it is only very recently that he has been found guilty so I told his wife I would leave it over and see what happens, and at this stage I have not rendered a bill for any of my services in connection with this trial."

It is perhaps unfortunate that there has been a misunderstanding between the appellant and the respondent as to their respective responsibilities and rights but I agree with the learned District Court Judge that the facts in this case are clear and that the appellant is liable. It may well be that if the matter had come before me at first instance I would not in my discretion have awarded interest, and I may not have ordered costs other than

disbursements because counsel appearing for the respondent was in fact an employee of the respondent. That is not in itself a bar to the respondent obtaining an order for costs but this being a professional matter between two solicitors arising from a misunderstanding, I might have been persuaded to exercise my discretion not to award costs. No grounds however exist for my interfering with the discretion exercised by the District Court Judge as to both costs and interest. The appeal is dismissed. There will be an order that the appellant pay the respondent any disbursements incurred in respect of the appeal but I make no further order as to costs.



Solicitors:

M.H. Coughlan, Invercargill, for Appellant
Eagles & Eagles, Invercargill, for Respondent