IN THE COURT OF APPEAL OF NEW ZEALAND

CA377/2010
[2011] NZCA 15

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	LEE GRACE SHERIDAN Respondent

Hearing: 15 November 2010

Court: Chambers, MacKenzie and Simon France JJ

Counsel: J G Rowan QC for Appellant
J D Evans for Respondent

Judgment: 17 February 2011 09:00:00

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis, increased by 50 per cent, and usual disbursements.

REASONS OF THE COURT

(Given by Chambers J)

Legal aid top-ups

[1] It is rather difficult to define the issues on this appeal as the courts, and Lee Sheridan, the respondent, have been taken on a rollercoaster ride by Jeremy McGuire, the appellant and Ms Sheridan's former lawyer. The case we have now to resolve is quite different from the case Ronald Young J faced in the High Court; indeed, the case evolved considerably from that advanced in the notice

of appeal. Essentially, however, the case is about whether Mr McGuire could sue his former client for top-up fees over and above his entitlement to funds from the Legal Services Agency.

[2] The factual background to the dispute is convoluted. For present purposes, the following slimmed-down chronology will do.

[3] In 2007, Ms Sheridan retained Mr McGuire to act for her on a claim she wished to bring under the Family Protection Act 1955 with respect to her late grandmother's estate. Ms Sheridan applied for and was granted legal aid with respect to that proceeding. Sometime later, at Mr McGuire's behest, she signed two contingency fee arrangements and one fixed fee arrangement with Mr McGuire. Mr McGuire did not tell Ms Sheridan about the need to get the Agency's approval for such an agreement; nor did Mr McGuire tell the Agency at that time about what had been agreed.

[4] Ms Sheridan's family protection claim settled at a settlement conference in the High Court. The settlement was at such a level that Mr McGuire considered a fee of $30,000 justified. When he gave Ms Sheridan a bill for that amount, she complained to the New Zealand Law Society. It was then she learned for the first time of the restriction imposed by s 66 of the Legal Services Act 2000. That section prevents lawyers from taking top-up fees from legally-aided clients without the Agency's permission.

[5] Mr McGuire then issued summary judgment proceedings in the District Court seeking to recover his fee. Ms Sheridan opposed the application on two grounds: the proceeding should be stayed until her Law Society complaint about Mr McGuire's fee was resolved; and, in any event, s 66 prohibited Mr McGuire from collecting his claimed fee. Judge Susan Thomas stayed the claim.[1] Mr McGuire appealed. Wild J allowed the appeal to the extent that Mr McGuire was permitted to litigate the s 66 issue.[2] His Honour also transferred the proceeding to the High Court pursuant to s 43 of the District Courts Act 1947.

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1 *McGuire v Sheridan* DC Wellington CIV-2008-085-1498, 26 August 2009.
2 *McGuire v Sheridan* HC Wellington CIV-2009-485-1901, 4 March 2010.

[6] Ronald Young J then heard that part of the claim which Wild J permitted to go forward. Over the course of a two day hearing, Mr McGuire's claim became completely transformed. He abandoned his claim based on the fee agreement and various other claims. In the end, all he pursued was a quantum meruit claim for approximately $9,800. Even then, it was accepted by Mr McGuire that he would be entitled to recover only if he could establish that Ms Sheridan had agreed to abandon her legal aid grant. Ronald Young J found Ms Sheridan had not agreed to abandon her legal aid grant. That meant Mr McGuire's claim had to fail.[3] Subsequently, on 12 May 2010, Ronald Young J delivered a costs judgment, awarding Ms Sheridan indemnity costs in the sum of almost $23,000.[4]

[7] The costs judgment prompted Mr McGuire to appeal to this Court against both of Ronald Young J's judgments. In the case of the first judgment, Mr McGuire was out of time, but Glazebrook J extended time for the bringing of that appeal. The notice of appeal set out various grounds. We do not need to articulate them as Mr Rowan QC, who has belatedly come into the picture as Mr McGuire's counsel, abandoned all those arguments. The only argument he has pursued before us is one which was not advanced in the High Court or in the original notice of appeal. It was certainly arguable that we should simply not hear the new ground of appeal, but Mr Evans, for Ms Sheridan, was prepared to join issue on it, perhaps confident that the new argument would be as meritless as the earlier arguments Ronald Young J had rejected.

What Mr McGuire now seeks

[8] Ronald Young J recorded a concession by Mr McGuire that, if the Court found that Ms Sheridan had not agreed to abandon her legal aid grant, then s 66 prohibited his quantum meruit claim.[5] Mr Rowan submitted that the concession had been wrongly made. He submitted that s 66 prevented lawyers *receiving* payments without the Agency's authority; it did not prevent them from making agreements for such payments or suing for declarations.

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3 *McGuire v Sheridan* HC Wellington CIV-2009-485-1901, 15 April 2010 ["the April 2010 decision"].

4 *McGuire v Sheridan* HC Wellington CIV-2009-485-1901, 12 May 2010.

5 The April 2010 decision at [56].

[9] We pointed out to Mr Rowan that Mr McGuire had never sought declaratory relief. Mr Rowan said that he did now. We then pointed out that, even in his submissions, he did not clearly articulate what the declaratory relief sought was. Initially, Mr Rowan said he was suing for a declaration as to the validity of the fixed fee agreement, putting s 66 to one side. We pointed out that it was simply not possible for Mr Rowan to present an argument based on the fixed fee agreement, as Mr McGuire had abandoned the claim based on that agreement during the course of the High Court hearing.

[10] Eventually, it was accepted that Mr McGuire could not pursue a claim based on the agreement. This led to his reframing the suggested declaration: what was now sought was a declaration that a lawyer is not in breach of s 66 unless and until he or she receives a payment without proper authority.

Is Mr McGuire entitled to the declaratory relief sought?

[11] Section 66 reads as follows:

> No listed provider may take payments from or in respect of a person to whom services are provided under any scheme unless the payments are authorised by or under this Act, or by the Agency acting under the authority of this Act or any regulations made under it.

[12] It is certainly true that the lawyer does not breach s 66 until he or she takes the unauthorised payment. But that is not the issue. The declaration eventually sought does not advance Mr McGuire's case at all.

[13] The appellant's argument appeared to be that s 66 should not prevent a lawyer suing a client for a fee, any judgment being subject to adjustment if the Agency subsequently advised no top-up or only a reduced top-up was permitted. That argument is, with respect, unsustainable. Where a person is legally-aided and the lawyer is prepared to act or continue to act only if a top-up is paid, then, assuming the client agrees to the top-up, the first thing the lawyer must do is seek the Agency's permission. Only if that permission is given may the lawyer subsequently sue for the fee in the event of non-payment. Courts cannot deliver judgments

conditional on decisions of the Agency as to whether to give permission for top-ups. Clearly the Agency's decision must come first.

[14] Quite apart from that, Mr McGuire in this case did seek the Agency's consent on 13 November 2008 to his being paid an agreed fee. He proposed that his client's "legal aid funding [would] be fully repaid from the settlement money". What he was proposing was a top-up by another name, as Mr McGuire seems to have recognised in an email he sent to the Agency:

> That raises a possible issue under s 66 of the Legal Services Act 2000. I possibly need the Agency's authority to get payment from my client from the settlement. I don't think this section applies but I suppose it pays to be careful.

[15] Section 66 did apply. Although we have not been shown the Agency's answer, we were told by Mr Evans that it was common ground at the hearing that the Agency had not agreed to Mr McGuire's proposal. It was after that became clear at the hearing that Mr McGuire decided to abandon all his claims based on the alleged agreements.

[16] The appellant's argument therefore also fails on the facts. This was not a case which fitted within the (incorrect) proposition of law, as the Agency had, prior to the commencement of proceedings, refused consent to a top-up or its equivalent. In those circumstances, Mr McGuire was not entitled to sue Ms Sheridan or obtain a judgment, whether conditional or otherwise, against her.

[17] However the case was put for Mr McGuire, it was hopeless. He is not entitled to the declaratory relief now sought on his behalf. Judgment was correctly entered in Ms Sheridan's favour in the High Court. The appeal must be dismissed.

[18] Mr Rowan did not press the appeal against the award of indemnity costs. He was right not to do so. Mr McGuire should consider himself lucky that we are not similarly awarding indemnity costs. We do, however, think this is an appropriate case for increased costs under r 53E of the Court of Appeal (Civil) Rules 2005. The appeal ultimately advanced was quite different from that which had been signalled and bore no relation to what had been run at trial. It was completely lacking in merit

both factually and legally. For this reason, we consider a 50 per cent uplift is warranted.

Solicitors:
Jeremy J McGuire, Palmerston North, for Appellant
Hayman Lawyers, Wellington, for Respondent