CITATION: *Fiorido v McLaren [2008] NTMC 024*

PARTIES:	GUISEPPE FIORIDO
	v
	ASHA MCLAREN
TITLE OF COURT:	Local Court
JURISDICTION:	Small Claims
FILE NO(s):	20707207
DELIVERED ON:	28 April 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	12 November 2007, 25 February and 13 March 2008
JUDGMENT OF:	Mr VM Luppino SM

CATCHWORDS:

Legal Practitioners – Breach of retainer – Professional negligence – Measure of Damages – Counterclaim for professional fees – Pre-requisites to action for professional fees.

Crimes (Victims Assistance) Act s 17; Local Court Act s 19; Legal Profession Act s735; Legal Practitioners Act ss 119 and 120.

REPRESENTATION:

Counsel:

Plaintiff:	Litigant in Person
Defendant:	Mr Close

Solicitors:

Plaintiff:	Self represented
Defendant:	Asha McLaren

Judgment category classification:	C
Judgment ID number:	[2008] NTMC 024
Number of paragraphs:	41

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20707207

BETWEEN:

GUISEPPE FIORIDO
Plaintiff

AND:

ASHA MCLAREN
Defendant

REASONS FOR DECISION

(Delivered 28 April 2008)

Mr VM LUPPINO SM:

1. This is a matter in the Small Claims jurisdiction of the Local Court involving a claim against the defendant in her capacity as a legal practitioner and her counterclaim for the balance of her professional fees.

2. Typically of pleadings drawn by a litigant in person in this jurisdiction, it was not easy to discern the particular cause of action upon which the claim was based, nor the nature of the alleged damages. Consequently, I initially questioned the plaintiff as to the nature of his claim and ascertained that it is a claim based both in contract for breach of retainer, as well as in tort for professional negligence and the case proceeded on that basis.

3. The background to the action is that the defendant acted for the plaintiff in an appeal to the Supreme Court from a decision of a Mr Lowndes SM which dismissed the plaintiff's application for an assistance certificate pursuant to the Crimes (Victims Assistance) Act ("the CV Act"). Hereafter, I will refer

to the claim under the CV Act as "the primary claim". The defendant did not act for the plaintiff in the primary claim.

4. The evidence reveals that the plaintiff's claim represents a refund of the fees which he has paid to date to the defendant for her legal services in relation to the appeal. In my view the amount the plaintiff can potentially claim against the defendant is significantly more. If the plaintiff were able to prove his case then, having regard to the appropriate measure of damages, the maximum potential claim would be the amount that would have been awarded to the plaintiff by way of an assistance certificate in his primary claim less any properly incurred and otherwise not recoverable costs.

5. The defendant counter-claims for the balance of her fees. The amount of her claim exceeds the Small Claims jurisdictional limit. The defendant has abandoned that excess.

6. The primary claim was dismissed by Mr Lowndes on 15 September 2004. The reasons for decision of Mr Lowndes were put in evidence before me. In summary, Mr Lowndes was not satisfied that the plaintiff had proved that he suffered "injury" as a result of the commission of an "offence" as required by the CV Act. In the course of that decision Mr Lowndes made a number of factual findings as well as a ruling on the admissibility of certain evidence.

7. As to the factual matters, Mr Lowndes essentially found that the plaintiff was not a credible witness. The ruling on the admissibility of evidence was based on section 17(3) of the CV Act. That subsection provides that *"...in proceedings under this Act, all evidence other than the evidence referred to in subsection (4) is to be given by affidavit"*.

8. The plaintiff in the primary claim sought to lead evidence which was not in the form of an affidavit as required by section 17(3). Mr Lowndes was of the view that section 17(3) was a mandatory provision and that he had no discretion to admit the evidence which was not deposed to in an affidavit as

required by that section. The evidence the subject of that ruling was of peripheral value only. It was hearsay and self serving. Although hearsay evidence can be admitted in matters under the CV Act, nonetheless, it had little probative value.

9. The plaintiff, being unhappy with the decision of Mr Lowndes, instructed the defendant to appeal that decision. The defendant was instructed relatively late in terms of the time limits for appeals from decisions of the Local Court. The defendant, being concerned to comply with those time limits, lodged the appeal with basic grounds only pending an opportunity to receive all the relevant material and to fully consider the matter. Although the Notice of Appeal initially filed had one ground which was based on an error in law, mostly issues of errors of fact were raised. Section 19(1) of the Local Court Act provides that appeals to the Supreme Court from a final decision of a Magistrate can only be on the basis of errors of law. The plaintiff either does not understand the distinction or deliberately chooses to ignore it as many of the matters that he raised in complaint against the defendant related to her failure to raise matters which were clearly not permitted by section 19(1) of the Local Court Act given that they were not matters going to an error in law.

10. Following a directions hearing in the Supreme Court the defendant filed amended grounds of appeal. In addition, the plaintiff instructed the defendant to raise matters of a factual nature arising from events occurring after Mr Lowndes dismissed the plaintiff's claim. Clearly this raises the issue of fresh evidence on appeal. The plaintiff was convinced that had that evidence been before Mr Lowndes, it would have had the effect of reversing the adverse credibility finding which Mr Lowndes had made in the primary claim. Despite the plaintiff's belief as to the probative value of the evidence, having heard the nature of that evidence, the plaintiff's belief is unreasonably optimistic. Nonetheless, in compliance with the plaintiff's instructions to seek to introduce that evidence, the defendant made the

appropriate application for leave to adduce fresh evidence on appeal. That leave was refused.

11. At the hearing of the appeal, Justice Southwood ruled that section 17(3) of the CV Act was a directory and not a mandatory provision and that Mr Lowndes could have admitted the subject evidence notwithstanding the absence of the affidavit required by that section. Justice Southwood however also considered the probative value of that evidence and formed the view that, had that evidence been before Mr Lowndes, it would not have changed Mr Lowndes' view.

12. Justice Southwood ultimately dismissed the appeal. The plaintiff was unhappy with that decision and he conceded that he wished to appeal that decision also. I suspect that the plaintiff failed to appreciate the relevance of this concession as it was to prove very telling in terms of his credibility. Although he had brief discussions with the defendant concerning the possibility of such a further appeal, the plaintiff did not instruct the defendant to take that action.

13. That represents the background to the matter. After the plaintiff instructed the defendant and in the course of the conduct of the matter by the defendant, the plaintiff had paid the total sum of $2,100.00 into the defendant's trust account on account of fees and by payments made at various times during the course of the matter. He had also paid for various disbursements.

14. The defendant submitted a number of accounts to the defendant. Those accounts are in lump sum form and they are not itemised. The defendant counterclaims outstanding fees in the sum of $14,754.30 after accounting for the funds which the plaintiff paid into the defendant's trust account. From an arithmetical perspective, the sum claimed does not tally precisely with all the tendered documents or with the evidence which was given by Mr Walters (see below). Nothing turns on that in my view. It is a relatively minor

discrepancy. Even on the version most favourable to the plaintiff, the jurisdictional limit of the Small Claims Court is surpassed. As the defendant has abandoned the excess of her claim beyond the small claims jurisdictional limit, the discrepancy is irrelevant.

15. In relation to the law regulating actions for recovery of legal fees, as the plaintiff first instructed the defendant before 31 March 2007, by reason of section 735(1) of the Legal Profession Act, the proceedings to recover outstanding fees are regulated by the provisions of Part X of the Legal Practitioners Act. This requires compliance with section 119(2), namely that the payer is provided with an account, at least in lump sum form. That has been satisfied based on the evidence of the defendant and the documentary evidence comprising the copies of the various accounts which were tendered in evidence. Once section 119(2) has been complied with, thereafter recovery proceedings cannot commence for one month (section 119(5)(a)). They were commenced well after that time as is apparent from the court file. The plaintiff had a right to request an itemised statement within a fixed time and that step is a preliminary to any further challenge by way of taxation of costs (section 120(1)). Although the evidence reveals that the plaintiff lodged a complaint with the Law Society alleging overcharging by the defendant, there has been no request for an itemised statement pursuant to section 119(2) of the Legal Practitioners Act within the time limited for that purpose by that Act. The only recourse available to the plaintiff, absent a request for an itemised statement, is to apply to the Supreme Court to stay the recovery proceedings. I have no evidence of such a stay.

16. In the course of the investigation of the complaint of overcharging, the Law Society arranged for an independent assessment of the defendant's fees to be conducted. If that assessment were to prove correct then the amount that the defendant would be potentially liable for would be far less than the amount the defendant seeks. The defendant however disputes the correctness of that assessment and maintains her claim for all fees outstanding, subject only to

the abandonment of the excess of the Small Claims jurisdictional limit. Other than the reference to the existence of that assessment, no-one was called to give evidence in relation to that assessment.

17. On the other hand, the defendant commissioned an opinion from Mr David Walters and he was also called to give evidence. Mr Walters holds both legal and accounting qualifications. He has practised as a solicitor for the last 19 years and specifically as a legal cost consultant which he says represents approximately 50% of his work. He has considerable experience and expertise in respect of legal costs.

18. Mr Walters expressed the opinion that the defendant's account is fair. His evidence was challenged only by questioning by way of cross examination, very ineffective in any event, and not by any contradictory testimony. The cross examination was to the effect that the account could not be correct as it related to a Crimes Victims Assistance application and the CV Act has controls over the fees that a solicitor may charge a claimant. That is clearly wrong. The matter involves an appeal from a decision in a Crimes Victims Assistance matter and fees in appeals are not regulated in the same way as for the primary application. The plaintiff also suggested that Mr Walters was either incompetent or acting in collusion with the defendant. These are totally gratuitous, baseless and scandalous accusations which, as with other scandalous and offensive remarks which the plaintiff regularly made throughout the hearing, only serve to reflect poorly on the plaintiff.

19. Mr Walters' evidence therefore remains effectively unchallenged. Although there is evidence of the existence of a conflicting opinion as to the appropriateness of the defendant's fees, that was the extent of that evidence. The author of that opinion was not called and was not therefore subject to cross examination. Moreover that conflicting opinion is quite simply a bare statement without explanation. There is quite simply no basis to prefer that conflicting opinion to that of Mr Walters in the circumstances.

20. For those reasons I assess the quantum of the defendant's counterclaim at the jurisdictional limit of this Court, namely, $10,000.00.

21. In relation to issues of liability, the evidence of each of the parties is almost entirely at odds with the other as to key issues. There was much contradictory evidence as to the exact nature of the instructions given by the plaintiff to the defendant, the exact nature of documentation provided to her and the precise actions taken by the defendant in the course of carrying out those instructions. By reason of that and the nature of the respective claims, the result turns largely on the question of which evidence is to be preferred. For the reasons which follow, I reject the version of the plaintiff in its entirety and prefer the evidence called on the part of the defendant whenever the two versions conflict.

22. The plaintiff was initially very vague as to the precise instructions he gave to the defendant. He finally agreed that he instructed the defendant to appeal all aspects of the decision of Mr Lowndes. He said that he specifically instructed the defendant use "all documents" and to use "everything possible" in the appeal. He claims that he gave all relevant documents to the defendant for this purpose. A chronology and a list of documents were tendered in evidence. In evidence in chief the plaintiff said that he gave the defendant the chronology. In cross examination however, and apparently having forgotten what he said about that in evidence in chief, he acknowledged that the defendant prepared the chronology. Having viewed the document and comparing it to the many crude documents which the plaintiff has prepared and filed in the current proceedings, and noting the plaintiff's obvious lack of sophistication and difficulty with English language and grammar, it is inconceivable that the plaintiff could have prepared that document. The defendant said that she prepared both documents for use in conjunction with the appeal.

23. The plaintiff said that the defendant did not give him any advice in relation to the appeal. This is quite an extraordinary claim in itself given the apparent steps taken by the defendant, which seems to fit nicely with the instructions the plaintiff claims he gave the defendant. Although the plaintiff was initially evasive as to the consultations he had with the defendant (and at one point he denied there were ever any consultations at all), he eventually agreed that there were a number of consultations held with the defendant. However he then insisted that at all consultations, the defendant would not let him talk and simply told him what she would do. He also insisted that the defendant never made any notes of the attendances. Having regard to my observations of the plaintiff and his obsessively insistent behaviour, I find it most unlikely that he would be so submissive. He is a demanding and insistent individual. He could not subdue nor disguise these traits throughout the course of the hearing and I have no hesitation in rejecting this claim of the plaintiff. As to his rather extraordinary claim that the defendant made no notes of attendances, something which experience tells me is most unlikely in any event, it was no surprise when the defendant put her substantial file notes into evidence.

24. The plaintiff was obsessively intent upon using the appeal process to address a number of matters and findings of a factual nature in the primary claim with which he disagreed. The difficulty of course is that appeals such as his could only be on the basis of errors of law and not of fact. The plaintiff however was fixated with the notion that as use was made of various specific facts with which he disagreed, consequently he believed that his version should have been accepted and as a result the decision of Mr Lowndes was unjust and wrong as a result.

25. The plaintiff also claimed a failure by the defendant to communicate with him and to keep him informed of developments in relation to the matter. He claimed that he was not advised of a directions hearing before Justice Southwood and he claims that had he been aware of the matters raised by

Justice Southwood at a directions hearing, that he would not have proceeded with the appeal. The defendant was uncertain as to whether the plaintiff was present at that directions hearing. Although at first blush the failure to communicate may not appear to be causative of any loss and is probably best classified as a matter of complaint of professional standards, when that allegation is considered in the context of his claim that he would not have proceeded with his appeal had he been informed of certain matters, it does become relevant at least to the assessment of damages on the counterclaim at the very least. That however stands or falls with the credibility of that claim and for the reasons that follow I reject that claim.

26. Apparently, and this is no doubt a matter of record, at that directions hearing Justice Southwood reminded the defendant that appeals from the Local Court could only be on the basis of errors of law. He pointed out that the grounds in the notice of appeal initially filed, largely raised matters of a factual basis. Apparently thereafter, the solicitors for the respondent on that appeal wrote to the defendant to the effect that unless errors of law were to be particularised, the appeal should be withdrawn. The plaintiff relied upon this as the basis for his claim and that had he been informed of that letter from the solicitors for the respondent, he would have withdrawn the appeal.

27. The evidence however reveals that even if he was not in attendance at the directions hearing, he was advised of the matters which he now claims would have impacted on his decision to proceed with the appeal post the directions hearing. If that is the case, then any failure to be notified of the directions hearing, assuming he was not in attendance as he claims, is not significant.

28. In any event I reject the assertion that he would have withdrawn his appeal if aware of those matters. The plaintiff had clearly not heeded any advice given to that point and he was then fixated on the correctness of his own view of the matter and the incorrectness of Mr Lowndes' decision not to

accept his evidence. I cannot accept that he would have felt constrained in any way to not proceed to finality simply because of the concerns raised, especially as they were raised by the opposing solicitor.

29. The plaintiff also admitted that he insisted on a further appeal from the decision of Justice Southwood when that decision went against him. That very much cuts across his claim that he would have withdrawn his appeal had he been aware of the comments made at the directions hearing. It is confirmation of his attitude of appeal at all costs. Even without that, the plaintiff's fixation and firm views and attitudes towards the whole matter, make his claim untenable and I reject that claim.

30. The plaintiff agreed with the assertion that the defendant had told him that the appeal had limited prospects of success but that he nonetheless instructed her to proceed with the appeal. This takes any possible finding of professional negligence based on an allegation of failing to properly advise out of the equation. Moreover it confirms the plaintiff's fixation with the correctness of his own view. The defendant's version is more logical and fits in better with the objectively established facts. Her evidence is that she was instructed at a very late stage and with time for appeal running out. She said that for that reason, she quickly prepared and filed a notice of appeal which was to ensure that the appeal time limit was met. Her evidence is that after subsequent discussions with the plaintiff, amended grounds of appeal were filed and they were the basis upon which the appeal was argued.

31. Throughout the hearing numerous other matters relevant to the plaintiff's credit emerged. Firstly the plaintiff's attitude was totally unweilding. He refused to concede the possibility that he was in error. Indeed, many of the allegations he made were in direct opposition of objectively proven facts, eg he was insistent that the defendant did not prepare grounds of appeal when it is clearly evident that she did.

32. He refused to concede many obvious matters and often to a ridiculous extent. When his assertion that the defendant did not file any amended grounds for appeal was challenged in cross-examination and the Amended Grounds of Appeal were produced, he disputed the authenticity of the Court's seal on those documents. Further, noting that the notice of appeal had a different action number than the action number of the proceedings before Mr Lowndes, he insisted that the defendant had forged the document, suggesting some sort of sinister motive on her part. He would not even accept my explanation that the Supreme Court gives a matter a new case number when an appeal is lodged.

33. Another ridiculous refusal to make a concession involved the transcript of the proceedings before Mr Lowndes. Although the plaintiff admitted that he had read the transcript in the Supreme Court Registry, i.e., from the Supreme Court file, he would however not concede that the transcript was before Justice Southwood for the purposes of the appeal. That is a ridiculous assertion given that he himself has read the transcript from the Supreme Court file, but is clearly untenable in light of known appeal procedures.

34. His evidence was widely inconsistent throughout, in particular, his initial insistence that he never had any conferences with the defendant. At one point he refused to admit even the initial conference with the defendant. How she could possibly have been engaged to act without at least an initial conference beggars belief. Despite the plaintiff's insistence on this point, he admitted signing a fee agreement. That fee agreement fits in with the defendant's evidence and that it was signed when instructions were given and its date fits very neatly with the evidence of the defendant and her file notes as to initial consultations.

35. Despite insisting that he did not have any conferences with the defendant, he said that the defendant would never let him talk during conferences. He said

that the defendant insisted that he did things her way and that she threatened to cease to act if he did not comply. I find this very hard to believe. I do not believe that the plaintiff is a person who would be intimidated in such a manner and to such an extent. Indeed my own experience with him in Court was that it was almost impossible to stop him talking over me, even when I was attempting to explain procedural matters and to assist him in the presentation of his case.

36. Despite overwhelming evidence to the contrary, he insisted that Justice Southwood was not presented with any of the documents which he instructed the defendant to use. He was insistent that Justice Southwood had nothing before him and that must clearly be wrong. His assertion sits directly counter to Justice Southwood's decision, which makes it clear that documents were provided to him. There may have been scope for some argument in favour of his assertion if he was not so insistent on embellishing things, i.e., if he had suggested that perhaps one or two documents may not have been provided to Justice Southwood, this may have been maintainable. However, as I thought was a common thread in his assertions, everything was exaggerated in a way which I think he perceived would emphasise his point. Rather than emphasise his point, it however highlights how untenable his claims are.

37. In cross-examination it was put to him that Justice Southwood said that if all the documents which had not been admitted had been utilised, that no difference would have resulted in the decision. His answer was not responsive and clearly indicative of a person in deep set denial as he would only and unreasonably insist that his Honour had not seen those documents.

38. When the effect of Justice Southwood's decision was put to him, i.e., that had the documents been admitted, they would not have made a difference to the case, the plaintiff, a man lacking legal training and sophistication could

only answer that by saying that his Honour made an error in coming to that conclusion.

39. Lastly, in rejecting the plaintiff's evidence, I also rely on the plaintiff's demeanour in Court. Although I am loathe to rely on this solely as a basis for preferring the testimony of one witness over another, in the case of this plaintiff the behaviour is so pronounced that it is telling in itself. He was rude and obnoxious throughout, he made suggestions of trickery, his answers appeared rehearsed (badly at that), he made quips and laughed during various parts of the defendant's evidence. He took every opportunity to make scandalous defamatory comments. His documents tendered and filed at Court are littered with such comments against the defendant, against employees of the Law Society and against Mr Lowndes. Generally he behaved offensively throughout the hearing. Such antics are not consistent with a truthful and objective witness.

40. As I reject the plaintiff's evidence in its entirety and as I accept the evidence called by the defendant, accordingly I dismiss the plaintiff's claim and find for the defendant on the counterclaim. I enter judgment for the defendant on the counterclaim in the sum of $10,000.00.

41. I will hear the parties as to costs and any other ancillary orders.

Dated this 28 day of April 2008.

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Mr V M LUPPINO
STIPENDIARY MAGISTRATE