

Terminating the retainer for just cause and on reasonable notice

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The Court has inherent jurisdiction over practitioners as officers of the court, allowing the Court to make personal costs orders against practitioners where there is failure to act with the required aptness. This was recently underlined again by the Supreme Court of Victoria in the matter of *Ilienski v Zbon* [2014] VSC 442.

THE FACTS

The Plaintiff engaged a new law firm Arnold Thomas & Becker (ATB) in June 2014. The matter was set for trial on 26 August 2014.

The new firm was engaged because the Plaintiff's long-time solicitor had his practising certificate cancelled and his firm ceased operating.

In late May 2014, agreement was reached and ATB took over the file from the Plaintiff's former solicitor. They received the file around 12 June 2014 but the Plaintiff was not contacted until the middle of July. During the first consultation (14 July 2014) there was no discussion regarding fees or how the action would be funded.

The aspect of funding was raised for the first time about 10 days later in a telephone conversation but no specific figures were discussed. The first time specific figures were mentioned for discussion was during a consultation on 29 July 2014 and then subsequently a letter was sent, setting out the substantial amount of costs involved to see the matter through to judgement.

At the directions hearing the following day the court was advised that there was still the unresolved issue of the future funding of the litigation, but the matter was set down for trial as per the client's instructions for 26 August 2014.

Three weeks before the trial ATB approached the court and sought leave to

cease acting for the Plaintiff based on his inability to fund the proceedings. Leave was granted and the trial adjourned due to the Plaintiff now being unrepresented.

THE ISSUE

Even though an order was made to permit ATB to cease acting, Forrest J made a further order which required ATB to file an affidavit setting out reasons why they should not pay for the wasted costs of the adjournment.

Under Supreme Court Rule 63.23(1) [Victoria], the Court has the jurisdiction to make costs orders against solicitors who "...caused costs to be incurred improperly or without reasonable cause..."

The court restated what was said by the *Court of Appeal in Yarra Australia Pty Ltd & Ors v Oswal*, that the main purpose of Supreme Court Rule 63.23 "is not punitive or disciplinary but compensatory, ... The primary objective is not to punish the solicitor but to protect the client."

However, the court concluded that mere negligence would be enough to enliven the discretion of the court to order costs against practitioners and it does not have to be "serious professional impropriety or serious or gross negligence." The court further stated that caution should be exercised as such orders are the exception rather than the rule and the breach must be identified to the court.

THE DECISION

In applying the principles the court concluded that leaving the issue of funding until the very last minute was improper as it left no time for the client to get his finances in order so the trial could continue. The firm would very shortly after taking on the matter have had the necessary information to have the discussion regarding finances with the client, they did not do this.

The court further reasoned that even though it may not have been an easy matter to take over, the firm certainly had the required expertise to deal with the matter appropriately.

The solicitors were accordingly ordered to pay the Defendant's wasted costs occasioned by the postponement.

APPLICATION

In South Australia, Supreme Court Rule 263(2)(d) determines that costs for an adjournment arising from a party's default are to be awarded against the defaulter and also Rule 264 in which the court may exercise a discretion to award costs on any basis the court deems appropriate. Indemnity costs may be ordered for unreasonable conduct, if the conduct in question warrants the disapproval of the court to be expressed in such a way.

Practitioners also need to be aware of sections 42(1) and (3) of the *District Court Act 1991, SA* which confirms the court's discretion to award costs in case of neglect or incompetence by practitioners.

This must be read in conjunction with Australian Solicitors' Conduct Rule 13.1.3 which requires a practitioner with assigned responsibility for a matter to complete that matter unless..."the law practice terminates the engagement for just cause and on reasonable notice."

Terminating the retainer without reasonable notice may not only attract the disapproval of the court but may also constitute a breach of the practitioner's professional obligations and further attract a disciplinary sanction on top of the costs order - the proverbial "double whammy"!

Practitioners are therefore reminded to be aware of their professional obligations, take timely action and always act in the best interest of the client. **B**