

ROYAL COURT
(Samedi Division)

24th May, 1993

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Before the Judicial Greffier

BETWEEN:	Michael James Bland	FIRST PLAINTIFF
AND:	Martin Frank Corlett	SECOND PLAINTIFF
AND:	Brian Thomas Walsh	THIRD PLAINTIFF
AND:	First National Commercial Bank plc	DEFENDANT
AND:	Epiette Limited	FIRST PARTY CITED
AND:	Corporate Administrators Limited	SECOND PARTY CITED
AND:	Christopher John Scholefield	PARTY CONVENED

Advocate A.P. Begg for the First Plaintiff
Advocate R.G.S. Fielding for the Party Convened

JUDGMENT

JUDICIAL GREFFIER: This action was commenced by Order of Justice which was signed on 25th September, 1991, and the action was placed on the pending list on 4th October, 1991.

On 17th and 18th October, 1991, the Royal Court sat to consider the application of the Defendant and the First Party Cited, *inter alia*, to discharge the interim injunction contained in the Order of Justice and on 18th October, 1991, the said interim injunction was lifted and the Plaintiffs were condemned jointly and severally to pay the taxed costs of the Defendant and the First Party Cited.

Nothing further occurred in the action until October 1992 when the Defendant filed a summons seeking security for costs. On 17th November, 1992, Advocate C.J. Scholefield, who had up to that point purportedly acted for all three Plaintiffs, wrote to me indicating that he was without instructions and asking that his name be removed from the record as appearing for or on behalf of the Plaintiffs. As notice of the fixing of the date for the application for security for costs and notice of the relevant summons had been properly given to the address for service of the Plaintiffs, on 19th November, 1992, the summons for security for costs proceeded in the absence of the Plaintiffs and I ordered that the Plaintiffs furnish the Defendant with security for costs in the action up to the close of inspection of documents by paying to me the sum of £24,000 and that the Plaintiffs pay the costs of and incidental to the application for security for costs. On 9th February, 1993, a date was fixed for the hearing of a further summons in which the Defendant sought to strike out the Order of Justice and to seek an Order for the costs of the whole action against the Plaintiffs upon the ground that the Plaintiffs had failed to comply with the Order for the payment of security for costs. Again, notice of that summons was given to the address for service and a copy of the summons was served at the address for service of the Plaintiffs. The summons for striking out was due to come before me on 1st March, 1993.

On or about 16th February, 1993, I received a telephone call from the First Plaintiff and on 17th February, 1993, I received a facsimile transmission from the First Plaintiff which contains the following paragraphs -

"I refer to the above action and wish to notify you of a change of address for service in respect of myself, the First Plaintiff.

I understand that my previous advocate, Advocate Schofield, can off record as acting for me sometime late last year and that my address for service is on record as 21 Hill Street (which in any event I understand is no longer the address of the offices of Advocate Scholefield.

Please note my new address for service is;

*M.J. Bland
c/o Andrew Begg & Co
20 Britannia Place
Bath Street
St. Helier
Jersey JE2 4SU*

I would be grateful if you could, as a matter of urgency, supply me with copies of any notices and/or documents, if

any, which have been sent to 21 Hill Street following Advocate Schofield's notification of coming off record.

Yours faithfully,"

As a result of this, on 22nd February, 1993, Advocate A.P. Begg sent me a facsimile letter which included a draft summons in which he sought on behalf of the First Plaintiff, amongst other things, that the Order for security for costs be set aside or alternatively that the time prescribed for providing security for costs be extended or alternatively that the action be stayed pending the outcome of related proceedings in the High Court of England and Wales, and/or in Portugal.

On 1st March, 1993, I received a copy of a letter from Advocate Begg to Advocate Journeaux, acting for the Defendant, in which he indicated that he was no longer instructed to attend the hearing of the summonses on 1st March, 1993.

Accordingly, on 1st March, 1993, I dismissed the First Plaintiffs' summons dated 23rd February, 1993, and ordered that the First Plaintiff pay the costs of and incidental to that summons on a full indemnity basis.

On 1st March, 1993, I ordered that unless the Plaintiffs shall, within one month from the date hereof, furnish the Defendant with security for its costs in relation to this action up to the close of inspection of documents by paying to the Judicial Greffier the sum of £24,000.00, then without any further Order of the Court being required -

- (a) the Order of Justice shall be struck out both as against the Defendant and as against the Parties Cited; and
- (b) the Plaintiffs shall pay the costs of and incidental to the whole action, other than such costs as have already been dealt with by earlier Orders of the Court, on a full indemnity basis.

That on or about 26th March, 1993, Advocate Begg applied to me for the abridgment of time for the fixing of a date of a further summons. That summons sought a variety of Orders including -

- (iii) that pending the hearing of the summons, the Orders made by me as set out in an Act of Court dated 1st March, 1993, be stayed;
- (iv) that the time prescribed by the Act of Court of 1st March, 1993, for furnishing security for costs be extended; or
- (v) that the Orders made by me as set out in the Act of Court dated 1st March, 1993, should not be stayed on the grounds

that Advocate Scholefield had no authority or instructions to commence proceedings on behalf of the First Plaintiff nor to swear an affidavit in support of the application for the interim injunctions contained in the Order of Justice nor to give an undertaking in damages in respect thereof; and/or

- (vi) that the action be stayed on the grounds set out in subparagraph (v) above;
- (vii) that the Defendant pay the costs both recoverable and irrecoverable incurred by the Plaintiff of and incidental to this summons and of and incidental to this action; or
- (viii) that Advocate Scholefield pay the costs both recoverable and irrecoverable incurred by the Plaintiff of and incidental to this summons and of and incidental to this action;
- (ix) that Advocate Scholefield indemnify the Plaintiff in respect of all costs incurred by the Plaintiff of and incidental to this summons and of and incidental to this action.

As the application appeared to be based on the premise that Advocate Scholefield had not been acting for the First Plaintiff, and as that appeared to be contradicted by the terms of the First Plaintiff's letter to me dated 17th February, 1993, and as the whole sequence of actions of the First Plaintiff, as set out above, together with the issuing of the first summons appeared to me to constitute an attempt to abuse the process of the Court, I refused to abridge time.

Accordingly, Advocate Begg gave notice to Advocate Journeaux, on behalf of the Defendant, and to Advocate Scholefield to attend in order to fix a date for the hearing of the summons on 2nd April, 1993, and on that date a date for the summons was fixed for 5th May, 1993, at 10 a.m.

At the present hearing, Advocate Journeaux on behalf of the Defendant, protested both that his client had not received proper notice of the summons and that a lengthy further affidavit had been filed very late on the previous day and requested that an adjournment of the summons dated 2nd April, 1993, be granted. Advocate Begg did not oppose this but Advocate Fielding, acting for Advocate Scholefield did oppose this if it meant that he could not proceed with an application for summary dismissal of the First Plaintiff's summons. However, it then became clear that it would be possible to proceed with certain preliminary points in relation to paragraphs (viii) and (ix) of the summons which were matters in issue between the First Plaintiff and Advocate Scholefield. Accordingly, I granted the adjournment in relation to Advocate

Journeaux upon the basis that the hearing in relation to these paragraphs will be confined to certain preliminary issues.

Those preliminary issues are :-

- (a) whether Advocate Scholefield could be properly convened to the summons in this way as he was not a party to the action;
- (b) whether the Judicial Greffier had the necessary jurisdiction to deal with this matter;
- (c) whether this was an appropriate procedural manner in which to proceed with the matter; and
- (d) whether the Royal Court or the Judicial Greffier had any jurisdiction in relation to the matter other than that which was defined in the case of Skinner -v- Myles, Public Health Committee and Bois Labesse (1990) JLR 98.

It was agreed that I should confine myself to those specific points and not consider, in any way, the merits of the claim of the First Plaintiff that Advocate Scholefield had never been properly instructed to act on his behalf.

Advocate Fielding submitted as follows:-

- (1) that Advocate Scholefield was not a party to the present action and that an Order for costs could not be made against a person who is not a party to the action;
- (2) that the only basis for the making of the type of Order which was being sought by the First Plaintiff was the case of Skinner -v- Myles & Ors. The second paragraph of the head note on page 99 of that Judgment reads as follows-

"(2) The court has jurisdiction to order that an award of costs against the plaintiff be paid by the plaintiff's advocate as an aspect of its power to discipline its own officers for behaviour which tends to defeat the course of justice. Such an order would not be made against an advocate who had made a mere mistake or error of judgment, but it could be made against an advocate in respect of professional negligence causing such inordinate and inexcusable delay in the prosecution of an action that, as here, the action was struck out for want of prosecution (page 100, lines 10-19; page 101, lines 28-44)."

Advocate Fielding argued that the jurisdiction under Skinner -v- Myles was a disciplinary jurisdiction and was vested in the Inferior Number or the Superior Number of the Royal Court and not in the Judicial Greffier. He also argued that this jurisdiction applied when an Order for costs had been made

against a party and was an Order to the lawyer to indemnify that party.

- (3) That the procedure in this case was incorrect inasmuch that Advocate Scholefield had merely been joined as a party to an interlocutory summons when he was not already a party to the action and this was incorrect.

Advocate Begg, quoted from the section on Solicitor and Client of 4 Halsbury 44 and in particular from paragraph 115 which reads as follows:-

"115. Effect of acting without authority. The fact that a solicitor was not authorised to institute proceedings is not a defence to those proceedings and, although in special circumstances the correct course may be for the court to strike out proceedings instituted without authority, the proper method of raising the question of want of authority is usually by an application to stay the proceedings. Accordingly, if a solicitor takes, defends or continues proceedings without the authority of the litigant whom he purports to represent, those proceedings will be summarily stayed if the proceedings are instituted without authority, or the defence will be struck out if they are defended without authority, on the application of a party by motion or summons. Moreover, if proceedings were originally begun or defended with authority, but that authority is revoked and the claim or defence is continued by the solicitor while unauthorised, the position is similar with regard to the proceedings taken during the unauthorised period. If the solicitor has been purporting to act for a plaintiff the order will direct him to pay the plaintiff's costs on a common fund basis and also all costs which the plaintiff may have been ordered to pay to the defendant and the defendant's additional costs on a common fund basis. If the solicitor has been purporting to act for a defendant a similar converse order will be made as to costs. The court has, however, a discretion, in some cases at any rate, to regularise the proceedings and permit them to continue. Thus, a litigant may by conduct waive his right to have proceedings stayed, and a purported plaintiff may adopt by ratification proceedings instituted without his authority. Accordingly an application to visit the solicitor with costs, if it is to be made, should be made promptly, although it may be made after notice of discontinuance has been given. If costs are paid by the opposite party to the solicitor on the assumption that he had authority which in fact he did not have, they may be recovered back as money had and received.

The solicitor may, further, in serious cases, be committed for taking proceedings in the name of a person without

authority, and in gross cases, where there is fraud, his name may be struck off the roll."

Advocate Begg referred me to the case of Fricker -v- Van Grutten [1896] 2 Ch. 649, CA. This case related to a second plaintiff who had been wrongly added as an additional plaintiff to an action without the necessary formalities being completed.

The following sections of the Judgment are particularly relevant to this case -

- (1) The following section commencing on page 654 -

"This case is important, not only to the parties, but on the question of practice. The application is by Mr. Weller, the trustee in bankruptcy of the plaintiff James, who has been added as a co-plaintiff in the action, asking to have his name removed from the writ and all subsequent proceedings in the action, including certain interlocutory orders of this Court, under which he has been ordered to pay costs."

The writ in the action was issued in December, 1895, by the three first-named plaintiffs, Mr. Weller not being then a party. An application was to be made in that action, and Mr. Toppin, the plaintiffs' solicitor, considered that Mr. Weller ought to be joined as a plaintiff. An interview took place on that subject, and there is some controversy as to what happened. Mr. Weller says that Mr. Toppin told him that his being joined was a mere matter of form, and that he would be indemnified against costs, and that in fact there would be no costs. I do not think that Mr. Toppin quite admits that, but what was done was this. Mr. Weller was asked to allow his name to be added, and Mr. Comins, of the firm of Comins & Drewry, Mr. Weller's solicitors, who was present at the interview, wrote, upon the summons asking for liberty to amend by adding Weller, "We consent on behalf of Mr. Weller, the trustee," and signed the name of his firm. That summons, with that consent indorsed on it, was taken before the chief clerk, and he thereupon made a fiat for the amendment of the writ by adding Mr. Weller as a plaintiff; and his name has been added, and has since been on the record, and is still there."

- (2) The section beginning on page 658 which reads as follows -

"That is simple, and was the principle that Sir George Jessel acted upon in Nurse v. Durnford. That being so, what ought we to do here? If we look at Reynolds v. Howell we see that what was done was that the names of the plaintiffs were not struck out ab initio, but all proceedings were stayed. There is no gain in undoing what has already been done. What we do

is this. We direct a stay of all proceedings in the name of Mr. Weller, and all proceedings against him in the action since his name has been added. That will protect him, and will stop all executions under the orders made against him. As to the money that has been paid, that should obviously be returned. Without consent we could not have made that order now; but Mr. Foote's clients have authorized him to consent, and he must give an undertaking that they will return the moneys recovered under the execution. That will leave his clients to bear a small sum which has been paid to the sheriff. As regards Mr. Toppin, he has done what he ought not to have done. He got this informal consent, and acted on it, and occasioned the trouble that we are asked to set right; and, following the course adopted in *Nurse v. Durnford and Newbiggin-by-the-Sea Gas Co. v. Armstrong*, we must order him to pay all Mr. Weller's costs, and all costs which he has been ordered to pay, and he must also pay to the defendants their costs so as to indemnify them. He must pay Mr. Weller's costs as between solicitor and client, and the costs of the defendants as between party and party; and such costs must include the costs of this application both here and in the Court below. Mr. Weller's name should be struck out for the purpose of all future proceedings."

The question which arose in my mind was as to the relationship between the type of case epitomised by the Skinner -v- Myles Judgment and the type of case epitomised by Fricker -v- Van Grutten.

The position was clarified when I was able to look at the R.S.C. (1993 Ed'n) pages 1279-81.

I am now quoting sections 3873 and 3874 therefrom -

3873

"Jurisdiction to order the solicitor to compensate others for his neglect or misconduct in proceedings before the Court -
"Where negligence or other breach of duty is committed by a solicitor, an officer of the Court, in a matter of which the Court has seisin, the Court may, and, if it can do full justice, will summarily order its officer to make good the loss occasioned by his neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The Court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the negligence or misconduct" (per Lord Russell of Killowen, *Marsh v. Joseph* [1897] 1 Ch. 213 p. 245, C.A. In that case the alleged negligence of the solicitor consisted in allowing an unauthorised solicitor to use his name and thereby obtain an

order for the payment out of a fund in Court). But while some judges have agreed that the jurisdiction is compensatory (see *Myers v. Elman* [1940] A.C. 282, p.289, per Lord Maugham) others have said that it is punitive (*ibid.*, p.303, per Lord Atkin) or both punitive and compensatory (*ibid.*, p.319, per Lord Wright). However that may be, on this principle solicitors are ordered personally to pay the amount of the interest lost by their failure to procure the investment of moneys paid into Court (*Batten v. Wedgwood* (1855) 31 Ch.D. 346; *Re Dangar's Trusts* 91889) 41 Ch.D. 178) costs incurred to a party by their issuing proceedings without authority, (para.3874), or advising or permitting a client to make an inadequate or false affidavit of documents (*Myers v. Elman* [1940] A.C. 282) or giving an estimate of the length of trial which should have been known to be wrong (*Ibbs v. Holloway Bros.* [1952] 1 All E.R. 220) or subjecting the opposite party by their negligence or oppressive conduct to additional costs (*Wilkinson v. Wilkinson* [1963] P.1, C.A.; *D. v. D.* [1963] 1 W.L.R. 194). It is not to the point that the solicitor has removed himself from the record at the time that the Court is asked to act (*Brendon v. Spiro* [1938] 1 K.B. 176) or that he never acted as a solicitor for a party in the proceedings (*Re Carroll* [1902] 2 Ch. 175, where the solicitor borrowed trust moneys from the trustee, his employee, with knowledge that they were trust moneys) or that the conduct is that of a clerk of the solicitor, and not the solicitor himself (*Myers v. Elman*) or that the offender is an unqualified person who has assumed and acted in the character of a solicitor (*Re Hulm and Lewis* [1892] 2 Q.B. 261; *Re Hurst and Middleton* [1912] 2 Ch. 520, C.A.). And as a solicitor is accountable to the Court as well as to his client, it seems that where he is accountable to his client for moneys the Limitation Acts affords him no defence (*Cheese v. Keen* [1907] 1 Ch. 245, p.252). Where damages for negligence or breach of duty are awarded against a solicitor, the judgment debt rate is appropriate as the rate of interest on those damages (*Pinnock v. Wilkins and Sons*, *The Times*, January 29, 1990. C.A.).

There is express power by O.62, r.11 to make a wasted costs order in respect of a solicitor. But the Court must give the solicitor a reasonable opportunity to appear and show cause why an order should not be made (see notes at 62/11/3).

Where a Circuit Judge sitting in the Crown Court has jurisdiction to order that a solicitor personally should pay costs the order cannot be overruled in a higher court: *R. v. Smith (Martin)* [1975] Q.B. 531; [1974] 1 All E.R. 651, C.A. (see further now Solicitors Act 1974, s.50(3)).

In *Rondel v. Worsley* [1969] A.C. 191; [1967] 3 All E.R. 993, the H.L. confirmed that an action cannot be maintained

against a barrister for negligence in the conduct of proceedings, and (obiter) expressed the view that similarly a solicitor might not be liable for negligence in contentious business in carrying out work in litigation which would have been carried out by counsel if counsel had been employed. See also *Saif Ali v. Sydney Mitchell & Co. (a firm)* [1980] A.C. 198; [1978] 3 All E.R. 1033, H.L.; reversing [1978] Q.B. 95, C.A. where it was held that the work that the barrister was charged to have done negligently namely advising as to the parties and settling pleadings in accordance with that advice was outside the area of immunity to which he was entitled. Contrast the case of a solicitor who in *Conner v. Michel Cohen & Company (a firm)* April 29, 1975 (unrep.) was held by the Court of Appeal to be liable for negligence for everything up to the door of the court. And see *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48; [1984] 1 All E.R. 321. See also para. 62/11/1 and cases there cited.

Where solicitors made a serious misjudgment by issuing proceedings which a more careful solicitor might have seen would come to grief, the appropriate remedy was an inter partes order for costs, not an order that the solicitor's personally pay the costs. Solicitors are not entitled to shelter behind the view of counsel on complex and specialist matters, unless counsel has sufficient experience of the particular form of dispute (*Swedac Ltd v. Magnet & Southern plc* [1990] F.S.R. 89, C.A.).

3874

Solicitor acting in proceedings without authority - A solicitor warrants his authority to take any positive step which he takes in the action. He warrants his authority to issue the writ, to put in a defence or any other positive step. If he has no authority, even if he does not know that he has no authority, it is likely that he is personally liable. Quære whether a solicitor is to be treated as continuing to warrant his authority whilst he is "inert". *Geraldo Orchestras Ltd. v. Sarl Dale*, October 16, 1991, C.A. (unrep.). Solicitors may be ordered to pay personally the costs of proceedings taken by them without a client's authority. This principle applies where proceedings are instituted without authority or acknowledgment of service is served (*Re Gray* (1891) 65 L.T. 743; *The Neptune* [1919] P.21) or the proceedings are defended without authority or an authority once given comes to an end. For example, the plaintiff may be non-existent (*Simmons v. Liberal Opinion Ltd.* [1911] 1 K.B. 966) or may die (*Tetlow v. Orela Ltd.* [1920] 2 Ch. 24) or may be an infant (*Geilinger v. Gibbs* [1897] 1 Ch. 479) or may be or become of unsound mind (*Yonge v. Toynbee* [1910] 1 K.B. 210, C.A.) or may be a limited company which has no director properly appointed or other

officers capable of giving instructions to institute proceedings (see *West End Hotels Syndicate v. Bayer* (1912) 29 T.L.R. 92) or the instructions may have come from minority directors (*Fergus Navigation Co. v. Kingdon* (1861) 4 L.R. 262) or directors not properly appointed (*John Morley Building Co. v. Barras* [1891] 2 Ch. 386) or dissident directors acting mala fide (*Marshall's Valve Gear Co. v. Manning Wardle & Co.* [1909] 1 Ch. 267). The jurisdiction exists even where the solicitor bona fide believes he has authority and if there is a substantial dispute as to the facts, may in a proper case leave the party asking for costs to bring his action for damages for breach of warranty of authority (*Yonge v. Toynbee*). Usually it will, if necessary inquire or direct an inquiry into the facts - for example, whether a plaintiff, alleged to be of unsound mind, was capable of instructing a solicitor (see *Pomery v. Pomery* [1909] W.N. 158); for if the proceedings are unauthorised they should be stayed. There is even authority for the proposition that a solicitor wilfully bringing an action without authority may be attached or committed (2 *Hawkins P.C.II*, Chap. 22, s.6; *Re Stuckey* (1791) 2 Cox 283). In *Babury Ltd. v. London Industrial plc*, (1989), 189 New L.J. 1596, solicitors were ordered to pay costs where they had pursued in good faith an action on behalf of a company which had been dissolved.

The want of authority of the plaintiff's solicitor cannot be raised as a defence; it should be raised promptly to avoid the answer that it was ratified (*Reynolds v. Howell* (1873) L.R. 8 Q.B. 398, p.400; *Danish Mercantile Co. v. Beaumont* [1951] 1 All E.R. 925) and should be made by application (*Russian, etc., Bank v. Comptoir de Mulhouse* [1925] A.C. 112) to a Judge in the Chancery Division and a master in the Q.B.D. Nevertheless if in the course of an action the Court becomes aware that the plaintiff is incapable of giving any retainer at all; it will not allow the action to proceed (*Daimler Co. Ltd. v. Continental Tyre & Rubber, etc., Ltd.* [1916] 2 A.C. 307, 337).

The ordinary practice is to serve the notice of motion or summons on the opposing party as well as the solicitor responsible; and, where the want of authority is that of the plaintiff's solicitor, asking that the action may be stayed or dismissed and that the solicitor do pay the costs of the plaintiff and of the defendant on the indemnity basis (O.62, s.11(1)(a)). If the want of authority only relates to one plaintiff that party's name should be struck out (see *Fricker v. Van Grutten* [1896] 2 Ch.649, C.A.). But if the want of authority can and should be cured, the Court will, in a proper case, only stay the proceedings (for example, to enable a next friend to be appointed, *Cooper v. Dummett* [1930] W.N. 248; or to enable the wishes of shareholders to

be ascertained, *East, etc., Mining Co. v. Merryweather (1864) 2 Hem. & M. 254*). If it is an acknowledgment of service which was served without authority, it will be vacated (see O.12, r.1 nn.). The application may be made at any stage in the proceedings - for example, after the action has been discontinued (*Gold Reefs of Western Australia Ltd. v. Dawson [1897] 1 Ch.115*) or at the conclusion of the trial (*Simmons v. Liberal Opinion*) or to strike out the applicant's name from a final order (*Re Savage (1880) 15 Ch.D. 557*). A solicitor who has been ordered to pay costs personally may appeal without leave (*Re Bradford (1883) 15 Q.B.D. 635*).

See *Waugh v. H.B. Clifford & Sons Ltd. [1982] Ch. 374; [1982] 1 All E.R. 1095* where the Court of Appeal held that solicitors without express or implied authority to bind their client to the terms of a compromise of an action had ostensible authority to do so."

From the section it is clear to me that there are two separate ways of dealing with neglect or misconduct on the part of solicitors in proceedings before the Court as follows -

- (1) The first is in relation to compensation for neglect or misconduct and is epitomised by the case of Myers -v- Elman [1940] A.C. 282; [1939] 4 All E.R. 484; (1939) 109 L.J.K.B. 105; Sol. Jo. 184; 56 T.L.R. 177, which is referred to in the Skinner -v- Myles Judgment. This appears to relate to a situation where a client has suffered loss and where the Court in the exercise of its disciplinary function orders the solicitor to compensate the client for the loss.
- (2) The second type of case is that set out in section 3874 quoted above and relates to a situation where a solicitor acts in proceedings without authority. In such a case, in England the Courts have not merely left any order for costs against the client stand and then ordered the solicitor to indemnify the client but have followed the principles set out in Fricker -v- Van Grutten, namely, they have stayed all orders against the client and ordered the solicitor directly to pay various costs. This procedure is advantageous to the client in the event of the solicitor failing so to do.

The most important section of 3874 in this case is that which reads -

"the ordinary practice is to serve the notice of motion or summons on the opposing party as well as the solicitor responsible, and, where the want of authority is that of the plaintiff's solicitor, asking that the action may be stayed or dismissed and that the solicitor do pay the costs of the plaintiff and of the defendant on the indemnity basis."

That practice seems to be suited to the situation in which one party finds that the other party's solicitor was not instructed rather than to the situation where an apparent party claims that he never instructed the solicitor.

I have set all this out at some length both in order to assist the parties in this case and also in order to assist the legal profession generally because of the lack of clear authority in Jersey in relation to the matter of a Jersey lawyer acting in proceedings without authority.

At the time when the summons came before me, the Order of Justice had been struck out by virtue of the Unless Order and the case dismissed, although it is my understanding of the principles in relation to an Unless Order that that would not prevent a party from seeking an extension of the time during which the Unless Order would operate. However, this creates a curious situation because paragraphs (viii) and (ix) of the summons purport to bring in an additional party to an action which has already been struck out.

I am satisfied that this application ought not to have been brought before me. Both types of case as set out in sections 3873 and 3874 of the White Book are disciplinary in nature and are not, in my view, within my jurisdiction as the disciplinary jurisdiction is reserved to the Inferior Number or the Superior Number of the Royal Court.

The question as to whether it is procedurally correct to proceed in such a matter by simple summons also arises. In my view, the best method of procedure, in such a case, where the action has already been struck out is for the First Plaintiff to bring a separate but related proceeding by Representation. In a case such as this, where the facts are clearly disputed, there will clearly need to be pleadings and a trial on the facts and these would most conveniently be dealt with in this manner. Notwithstanding English procedure in this matter, it appears to me that the correct Jersey procedure is to proceed by Representation where there is an allegation on the part of a party that a certain lawyer was never instructed to represent him and where the action has been effectively completed before he decided to take the matter to Court.

I would also comment in passing that apart from the jurisdictional question mentioned above, I would not have thought it appropriate to deal with disputed matters of fact on affidavits and would, in any event, have needed to remit these to the Royal Court (Inferior Number) which is the appropriate forum for the hearing of evidence and the determination of issues of fact.

It follows from the above, that I do not need to go on to determine whether or not in Jersey Law a similar approach would be

applied to that set out in a case such as Fricker -v- Van Grutten in England. That will, ultimately, be a matter for the Inferior Number of the Royal Court. However, it would appear to me to be very likely, upon the basis that the Royal Court adopted the type of jurisdiction set out in R.S.C. (1993 Ed'n): section 3873 that it would also adopt the type of jurisdiction set out in 3874.

Accordingly, I am dismissing paragraphs (viii) and (ix) of the summons and will need to be addressed on the matter of costs in relation thereto.

Authorities

Skinner -v- Myles, Public Health Committee & Bois Labesse (1990)
J.L.R. 98.

4 Halsbury 44: para. 115.

Fricker -v- Van Grutten (1896) 2 Ch. 649 C.A.

R.S.C. (1993 Ed'n): p.p. 1279-81: s. 3873 & 4.

Myers -v- Elman [1940] A.C. 282; [1939] 4 All E.R. 484; (1939)
109 L.J.K.B. 105; 84 Sol. Jo. 184; 56 T.L.R. 177.

Fernée -v- Gorlitz [1915] 1 Ch. 177.