

H. L. (E) MYERS

APPELLANT

1939 v

Oct 19, 23, ELMAN

RESPONDENT

24, 25, 30
Dec. 5,

Solicitor - Alleged professional misconduct - Delivering defence suspected to be false - Filing inadequate affidavit of documents - Proceedings conducted by clerk - Liability of solicitor to pay costs personally - Jurisdiction of judge

The jurisdiction of the Court to order a solicitor to pay the costs of proceedings is not limited to cases where he personally has been guilty of misconduct, but extends to a case where his managing clerk, to whom he has entrusted the necessary work, is guilty of misconduct, as for example, in the preparation and filing of inadequate affidavits of documents. The jurisdiction is not limited to deal with cases of misconduct or default, but extends to the case where costs have been improperly incurred or without reasonable cause or have proved fruitless by reason of undue delay in proceeding under a judgement or order.

An order for discovery requires the client to give information in writing and on oath of all documents which are or have been in his possession or power, whether he is bound to produce them or not, but as a client cannot be expected to realise the whole scope of that obligation without the aid and advice of his solicitor, the latter has a peculiar duty as an officer of the Court carefully to investigate the position, and, as far as possible, see that the order is complied with. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information which he is entitled to require or if the client insists on swearing an affidavit which the solicitor knows to be imperfect, the solicitor's duty is to withdraw from the case. A solicitor who has innocently put upon the file an affidavit by his client which he subsequently discovers to be false, owes a duty to the Court to put the matter right at the earliest moment if he continues to act as solicitor on the record.

Decision of the Court of Appeal (reported sub nom *Myers v Rothfield* [1939] 1K B 109) **reversed** Lord Russell of Killowen dissenting on the ground that the evidence submitted to the House failed in his opinion to establish any of the charges against the managing clerk, and, therefore, the order against the respondent could not stand.

- (i) Conspiracy – The crime of conspiracy to defraud takes place when two or more individuals agree to injure the rights of another. No further action is required. In practice, however, it is difficult to prove conspiracy unless the agreement to do something dishonest is put into effect;
- (ii) Dishonesty – acting dishonestly is an essential ingredient in the crime. In legal terms the knowledge of doing something wrong in relation to another person (whether overtly or covertly) constitutes dishonesty. Where covert action is concerned it may not be necessary to tell a lie or misrepresent the truth, a decision by someone who is aware of the true position to remain silent and in this way deprive an individual of his entitlement may constitute an implied lie or misrepresentation, and deliberate failure to correct a previous wrong interpretation of an individual's entitlement which he took on trust almost certainly amounts to an implied lie. It is important to note that such action – or failure to act – constitutes dishonesty even if the person concerned believes in good faith that some valid public purpose is being served by it;
- (iii) To defraud – this is to deprive someone of something to which he is properly entitled; either directly or by implied lie or misrepresentation