21/05; [2005] VSC 239

SUPREME COURT OF VICTORIA

THEUNISSEN v VILLASECA

Byrne J

29 June 2005

CIVIL PROCEEDINGS – PROFESSIONAL FEES – CLAIM BY ACCOUNTANT FOR ACCOUNTING SERVICES RENDERED – WRITTEN AGREEMENT BETWEEN THE ACCOUNTANT AND CLIENT FOR SERVICES TO BE RENDERED AND FEES TO BE PAID – ACCELERATION PROVISION IN AGREEMENT FOR PAYMENT OF FEES – DISPUTE DEVELOPED BETWEEN PARTIES – CLIENT FAILED TO PROVIDE DOCUMENTARY MATERIAL – ACCOUNTANT CEASED PROVIDING SERVICES – CLAIM MADE BY ACCOUNTANT PURSUANT TO ACCELERATION PROVISION – PROCEEDINGS ISSUED BY ACCOUNTANT – CLAIM DISMISSED BY MAGISTRATE – FINDING THAT CLAIM BREACHED STATUTORY PROVISION – FINDING THAT THE ACCELERATION PROVISION WAS VOID AS A PENALTY – WHETHER MAGISTRATE IN ERROR: *INCOME TAX ASSESSMENT ACT* sub.s251L(1) and (5).

T. is an accountant but was not a registered tax agent when T. and a client V. entered into a written agreement whereby T. would provide certain accounting services in return for a monthly flat fee. Some work was done pursuant to the agreement but a dispute developed between the parties which led to a cessation of work. T. later issued proceedings in the Magistrates' Court claiming payments pursuant to the acceleration provision in the contract of engagement. The magistrate dismissed the claim finding that the claim breached the provisions of section 251L of the *Income Tax Assessment Act* (Act) and that the acceleration was void as a penalty. Further, that V. was not in breach of the contract. Upon application for review—

HELD: Application dismissed.
1. The appropriate procedure for T. to have taken was not by way of judicial review but by appeal pursuant to s109 of the *Magistrates' Court Act* 1989. As there are no exceptional circumstances, the application for judicial review must fail.

2. *Obiter:*
(a) T. was not a registered tax agent at the relevant time. This means that while he was entitled to prepare or lodge a return or other tax document, to give advice on a taxation matter or to deal with the Australian Tax Office, he was prohibited by the Act, from demanding or receiving payment for so doing or from suing for such a fee. There was evidence upon which the magistrate could have found that the statements in the contract were a mere sham; that T. was in fact providing tax services and charging for them at the monthly fee of $82.50. This finding would bring about the dismissal of the claim.

(b) As to the operation of the acceleration provision, it should be noted that its impact will depend upon the date of its breach, not the severity of the breach. If it occurs in May, then only one instalment is accelerated; the work done over the preceding 10 months has been paid for. If, as here, it occurs towards the beginning of the year its impact is greater for a year's payments must be made for no services for the ensuing 10 months. This impact bears no relationship otherwise to the severity of the breach. It was open to the magistrate to treat the clause as a penalty and accordingly was void.

BYRNE J:

1. The plaintiff, Terrence John Theunissen, is an accountant carrying on practice in Dandenong under the name Std Accounting. The first defendant, Edmundo Villaseca, conducts a cleaning business. The second defendant, the Magistrates' Court at Dandenong, has indicated it wishes to take no part in this proceeding but is content to abide by the order of the court, as is the usual practice.

2. In mid 2004 Mr Villaseca engaged Mr Theunissen to provide certain accounting services. For this purpose they executed an agreement in writing dated 12 July 2004. The services to be provided under this agreement are expressed to be for the financial year ending 30 June 2004.

3. In the document, the services are set out as follows:

> "Monthly Cash Book reconciliation's and printouts thereof.
> Monthly postings of above to General Ledger entries plus Trial Balance
> General Ledger Spreadsheet update and printout."

4. In the document, the printed charging rates for these items are struck out and provision is made for payment of what is called a flat fee of $82.50 per month. There is in the document provision for the performance of other services, but the boxes beside these are not ticked. These services include the following, beside each of which the fee is struck out and written in its place the words: "No charge":

> "BAS Return details only. (Responsibility for completing and submitting BAS return to the ATO remains with The Client).
> Income tax return details only. (Responsibility for completing Tax Return to the ATO remains with The Client.)"

Beneath this in handwriting appears the following:

> "All outstanding GST against expenses for 2003-2004 to be claimed from ATO."

5. It seems that notwithstanding this document, what Mr Villaseca wanted to be done immediately in July 2003 was that Mr Theunissen revisit his accounts for the year just completed, which accounts had been prepared by another accountant, and to recover GST payments to which he thought he was entitled. For this Mr Theunissen charged, and Mr Villaseca paid, $1,000.

6. This work was done but no recoveries of overpaid GST were made. The situation then becomes somewhat obscure. Mr Villaseca, on 30 August 2004, paid to Mr Theunissen the sum of $164 for which he received a receipt which stated that the payment was made in respect of "Accounting service re: July/August 2004". Why this payment was $164 rather than $165, as per the engagement agreement, is uncertain.

7. Furthermore, no accounting services were provided in those months. According to Mr Theunissen, this was because Mr Villaseca failed to provide him with the necessary documentation when he called to collect it on 30 August 2004, as agreed.

8. For some reason the relationship between the two men then became very sour. On 3 September matters came to a head when Mr Theunissen called upon Mr Villaseca again. The bad relations erupted into violence and Mr Theunissen left empty handed. He forwarded to Mr Villaseca on the same day a letter of demand informing his client that he would cease work, that he applied the clause 3 acceleration provision in the contract of engagement and that he would bill the client at the rate of $55 for similar calls made in the past.

9. The sum demanded was $1,055. The amount to which Mr Theunissen told me he was entitled was 10 months fees for the balance of the year 2004/2005, namely $825, plus six visits at $55, namely, $330. Again, the reason for the sum demanded being less than $1,155 is obscure.

10. On 24 September a complaint was issued in the Magistrates' Court at Dandenong seeking $1,055. The defence of Mr Villaseca dated 4 October 2004 raised by way of defence section 251L of the Income Tax Assessment Act and an allegation that the services of Mr Theunissen were discharged on 10 September 2004.

11. The matter came on for hearing before the Magistrates' Court on 2 December 2004 with Mr Theunissen representing himself and Mr Villaseca represented by counsel. Each of the parties gave evidence and each was cross-examined. At the conclusion of the hearing the magistrate dismissed the claim, with costs of $1,005, granting a stay of one month. Mr Theunissen, being unhappy with this result, has, on 8 December 2004, filed in this court an originating motion seeking judicial review of the magistrate's decision. Various grounds are specified, most of which appear to be of no relevance to this procedure.

12. On behalf of Mr Villaseca counsel first contended that judicial review is not available, absent exceptional circumstances, or that, as a matter of discretion, I should refuse it on the basis that the appropriate procedure is by appeal under section 109 of the Magistrates' Court Act 1989. This

submission is supported by authority which is binding on me,[1] so that this application must fail at this point unless there are exceptional circumstances. None have been asserted and I can see none from my reading of the transcript of the Magistrates' Court proceeding or the papers before me. That, then, is the end of the matter.

13. Nevertheless, since Mr Theunissen is unrepresented and in the hope that what I say may be of assistance to him, I shall shortly venture my views upon the complaints of substance in his application.

14. The originating motion, as I have mentioned, contains a great variety of peripheral complaints about the proceeding before the magistrate and I shall not dwell upon them. When pressed at the commencement of the hearing Mr Theunissen asserted two matters:

> (1) the magistrate did not apply his mind properly to the facts; and
> (2) the magistrate denied him the opportunity to call a witness, Gloria Winskewski.

To these may be added a third:

> (3) that he was denied the opportunity to address the court at the conclusion of the evidence.

15. When asked, Mr Theunissen specifically disavowed any contention that the magistrate had committed some error of law. Notwithstanding this, I have examined the material to see if there be any such error. It is clear that in reaching his conclusion the magistrate found adversely to Mr Theunissen as follows:

> (1) that his claim breached section 251L;
> (2) that clause 3, the acceleration provision, was void as a penalty; and
> (3) that his claim that Mr Villaseca was in breach of contract was not made out.

I add that in this regard I prefer the tape to the transcript of his Honour's conclusions.

16. At the commencement of the hearing I explained to Mr Theunissen, and he appeared to understand, that an application for judicial review can succeed only where there is an error of law on the face of the record, or where the order is vitiated by some procedural irregularity.

17. His first complaint that the magistrate failed to apply his mind properly to the facts is not therefore a complaint which will found judicial review. I should add that the details of this complaint which are to be seen in his affidavits do not persuade me that his complaints have any substance. The magistrate, if I may say so, appears to have applied himself properly to the resolution of this difficult case.

18. Next, it is said that Mr Theunissen was denied the right to call a witness. This complaint also is without substance at many levels.

19. First, it is factually incorrect. Mr Theunissen was told before the luncheon adjournment at the hearing in the Magistrates' Court that he must have his witness in court at 2 p.m. When at that time the witness was not present, he asked that the case be stood down to 3 p.m. or 3.30 p.m. for the convenience of the witness. The magistrate refused, as he was entitled to. Mr Theunissen then closed his case. He was not denied the opportunity to call the witness.

20. Second, the evidence which the witness was to give was not, as things turned out, of any significance. Mr Villaseca did not deny that he signed the contract. It is true that he denied that the terms on the reverse were explained to him in his native language by the witness, but this may not have availed him, having regard to the decision of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[2].

21. In any event, His Honour did not decide the case on the basis that Mr Villaseca was not bound by the terms of a contract which he had not read or understood.

22. The third complaint, which may be seen as one as to procedure, was that Mr Theunissen was denied the right to make a final address. The magistrate made it clear on more than one

occasion that he would hear Mr Theunissen on any matter of law. The magistrate was entitled to refuse to hear submissions on the evidence, which in fact was short and of narrow compass. It follows then that Mr Theunissen's complaints are without substance.

23. I pass now to the legal issues. The first depended upon the admitted fact that Mr Theunissen was not a registered tax agent. This means that while he is entitled to prepare or lodge a return or other tax document, to give advice on a taxation matter or to deal with the Australian Tax Office, he is prohibited by the *Income Tax Assessment Act* sub-s251L(1) and (5), from demanding or receiving payment for so doing or from suing for such a fee.

24. It was contended on behalf of Mr Villaseca that this is what Mr Theunissen was doing in his demand for payment and in his Magistrates' Court claim. Mr Theunissen challenged this, drawing attention to the terms of the contract, including those which I have summarised above. He said that he was providing tax services for no charge but that he was charging for his accounting services.

25. This was a large part of the dispute before the magistrate. It should be noted that what Mr Theunissen in fact did for his client and what he was paid for is largely a factual dispute which lies in the hands of the magistrate. It cannot be challenged on review, or indeed upon appeal. It seems to me that there was evidence upon which the magistrate could have found that the statements in the contract were a mere sham; that Mr Theunissen was in fact providing tax services and charging for them at the monthly fee of $82.50. This finding would bring about the dismissal of the claim.

26. Next is the finding that clause 3 of the contract, the acceleration provision, is void as a penalty. It is in these terms, and I set the term out in full:

> "Std Accounting agrees and undertakes to perform the ordered work in not more than 14 days from the date upon which the last information/details required from The Client was provided by The Client, unless an extension is mutually agreed upon by both parties. Provided that all the necessary details and documentation required by Std Accounting for the purpose has been provided. The Client will provide all such information as is required by Std Accounting within 48 hours of it being requested in order to properly perform and complete its accounting function as per this Order. Failing which Std Accounting reserves the right to cease work until such information is forthcoming and the balance of the fees for the Tax Year will become payable immediately. In this regard any documentation which requires to be collected by Std Accounting in order to complete the work will attract a fee of $80 per hour and a minimum charge of $50 per trip."

27. Broadly speaking, the question is whether, viewed from the date of the contract, the contractual consequence of a breach by one party exceeds the loss which the innocent party might suffer. In the present case the contract provides for a monthly fee of $82.50. For the purposes of considering this agreement, I assume, contrary to my conclusion, that this was for accounting, that is, for non-taxation, services only. The contract creates a breach where the client fails to provide certain information necessary for the provision of the accounting services. In this event two things occur: first, the accountant may cease work; and second, the balance of fees for the year become immediately payable. This is the acceleration provision to which I have referred.

28. As to the operation of the acceleration provision, it should be noted that its impact will depend upon the date of its breach, not the severity of the breach. If it occurs in May, then only one instalment is accelerated; the work done over the preceding 10 months has been paid for. If, as here, it occurs towards the beginning of the year its impact is greater for a year's payments must be made for no services for the ensuing 10 months. This impact bears no relationship otherwise to the severity of the breach.

29. The submission put on behalf of Mr Villaseca, which the magistrate upheld, was that the accelerated sum is payable even if there be no loss caused by the breach. If the breach occurs no work has to be done and no costs or time for this are expended. This may not be strictly correct, as Mr Theunissen observed, for capital costs are not work related. Nevertheless, it was in my view open to the magistrate to treat this clause as a penalty and I find no fault in his conclusion.

30. The third reason, which his Honour mentions in passing, is that no breach of contract had

been established. I am of course aware that Mr Theunissen gave evidence that his client did fail to provide the requested documentation. It does not appear from the transcript that Mr Villaseca contradicted this. In these circumstances I am not sure that the finding can be supported but in any event it would not affect the result.

31. I conclude therefore that the application for judicial review should be dismissed.

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[1] *Kuek v Victoria Legal Aid* [2001] VSCA 80; (2001) 3 VR 289.
[2] [2004] HCA 52; (2004) 219 CLR 165; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204.

APPEARANCES: The Plaintiff Theunissen appeared in person. For the first defendant Villaseca: Ms N Wolski, counsel. Wisewoulds, solicitors.
