05/12; [2012] VSC 49

SUPREME COURT OF VICTORIA

BALDSING v VOITIN WALKER DAVIS PTY LTD

Macaulay J

6-7, 22 February 2012

CIVIL PROCEEDINGS – CLAIM BASED IN CONTRACT ISSUED BY SOLICITORS FOR CLIENT – CLAIM SUBSEQUENTLY SETTLED – CLAIM BY SOLICITORS FOR PROFESSIONAL COSTS AGAINST CLIENT – WHETHER LEGAL PRACTITIONERS NEGLIGENT – WHETHER WORK VALUELESS – WHETHER ASSESSMENT OF COSTS PROPERLY QUANTIFIED – FINDING BY MAGISTRATE THAT CLAIM BY LEGAL PRACTITIONERS MADE OUT – COUNTERCLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR.

B. retained solicitors 'VWD' to issue and conduct litigation in the Supreme Court in relation to B.'s purchase of a nursery business. The case settled before trial but VWD ceased acting for B. VWD acted both for B. and C. – the purchaser's guarantor under the land sale contract. When VWD later sued B. in the Magistrates' Court for outstanding legal fees, B. denied that there was any debt due and alleged that certain fees were not recoverable because they were excessive or the work for which they charged was unnecessary. The Magistrate upheld the solicitors' claim for costs – albeit at a reduced sum – and dismissed B.'s counterclaim. Upon appeal—

HELD: Appeal dismissed.

1. In relation to the claim that the solicitors' services were worthless, on instructions, VWD engaged experienced counsel to draw a claim seeking damages for the things B. claimed to be entitled to yet deprived of – the export business, the financial records and the email address. With B.'s knowledge, VWD spent considerable time and costs, seeking discovery from the vendors, and trying to obtain financial evidence verifying the existence and value of the export business. Whilst it is true that by October 2008 – the time of the mediation – it appeared that (despite attempts) little evidence had been obtained to verify B.'s instructions, nonetheless, there was advice at that time from counsel urging B. to instruct VWD to obtain independent financial analysis of the business records to try and tie the reason for the business' underperformance to the cause asserted by B. Those instructions were not forthcoming.

2. In those circumstances, there were ample grounds for the Magistrate to conclude that the contract claim had sufficient apparent merit and that the solicitors' services were not worthless and that their claim was not lacking in merit.

3. In relation to B.'s claim that there was a potential for a conflict of interest in VWD acting for both B. and C., both B. and C. gave instructions on numerous occasions that they were 'in it together' and wanted the solicitors to act for them both. Each, but particularly C. were advised to obtain independent legal advice.

4. It is not the law that a solicitor can never act for parties who have a potential conflict of interest. The law imposes obligations upon solicitors to ensure that if they do, they only do so having made full disclosure of the material facts and with properly informed consent. Here the magistrate found that such informed consent had been obtained – a finding of fact open to him to make.

5. In any event, B.'s pleaded claim was that by acting for both of them VWD was negligent and caused him loss and damage. Assuming that VWD had been negligent, B. needed to establish that the negligence caused him some loss. None was found. Nor was it at all evident what that loss was or could have been. And as the magistrate correctly pointed out, even if the conflict had materialised and VWD was thereafter precluded from acting for B. or C. or both, even that circumstance did not render the work done to date 'valueless'.

MACAULAY J:

Introduction

1. Ainsley Baldsing, the appellant, retained solicitors Voitin Walker Davis Pty Ltd ('VWD'), the respondent, to issue and conduct litigation in the Supreme Court of Victoria. The case settled before trial. Before the settlement VWD ceased acting for Baldsing. When VWD later sued Baldsing in the Magistrates' Court of Victoria for outstanding legal fees Baldsing denied that any debt was due. In the alternative he alleged that certain fees were not recoverable because they were excessive or the work for which they were charged was unnecessary.

2. In broad terms, Baldsing argued that the solicitors should never have issued proceedings on his behalf. Therefore, he said, they were not entitled to any costs beyond some preliminary investigation costs. Secondly, he argued that, even if the proceedings were properly commenced, the solicitors were negligent in the conduct of the litigation so that certain costs should have been disallowed or he should have been awarded damages to be set off against any costs due. Thirdly, he took issue with the basis upon which the bills of costs were drawn. He also counterclaimed for the costs he had incurred when he retained new solicitors after VWD ceased acting.

3. After hearing the matter, a magistrate dismissed the counterclaim and upheld the solicitors' claim for costs, albeit at a reduced sum. Baldsing has appealed both the award on the claim and the dismissal of the counterclaim. Brought under s109 of the *Magistrates' Court Act* 1989 (Vic), the appeal is confined to questions of law.

4. To explain the issues that were argued in the Magistrates' Court, and the grounds of this appeal, further explanation is required about the Supreme Court litigation.

The Supreme Court litigation

5. Baldsing entered into two contracts of sale on 17 February 2004 to purchase land in Heatherton Road, Clayton South and a nursery business, trading as 'Fernworld', conducted on that land: (1) a contract of sale of real estate; and (2) a contract of sale of business. When it appeared that the business was not performing as he expected, Baldsing consulted VWD in March 2005.

6. After taking initial instructions the solicitors sought and obtained the relevant transaction documents from Baldsing. (He had retained a different firm of solicitors for the conveyancing transactions). Further instructions were taken from him in early May 2005 in a conference with an experienced commercial barrister.

7. A proceeding was issued in the Supreme Court of Victoria on 30 May 2005 with Baldsing named as plaintiff and the vendors named as defendants. By that proceeding Baldsing claimed damages for breach of the business sale contract, and for misleading and deceptive conduct (in breach of the *Fair Trading Act* 1999 (Vic)) based upon alleged misrepresentations, inducing entry into both contracts. The statement of claim was amended in November 2006 to add some new elements constituting the contract breaches and the misrepresentations, and to add a claim for unconscionable conduct.

8. The precise nature of the claims, and whether they were maintainable and by whom, gave rise to some of the issues in the Magistrates' Court.

9. In their defence and counterclaim the vendors admitted the contracts of sale between them and Baldsing. However, they also alleged that Baldsing had nominated a newly incorporated company, Fernworld Australia Pty Ltd ('Fernworld Aust'), to be the purchaser under the land sale contract without relieving Baldsing of his liability for performance of the purchaser's obligations. Baldsing admitted that nomination and its effect.

10. The vendors made no allegation that Fernworld Aust had been nominated as purchaser under the business sale contract. Nevetheless, the company's role in apparently paying part of the contract price and thereafter operating the business gave rise to further issues in the Magistrates' Court.

11. The vendors counterclaimed for the balance of purchase monies payable under the land sale contract. Those monies had been due to be paid on 31 May 2005, the day following the date on which the writ initiating the proceeding was first filed. The counterclaim was not only brought against Baldsing but also against the guarantor under the land sale contract, Judy Clancy. The timing of the filing of the writ, and the fact that VWD acted for both Baldsing and Clancy in the proceeding, are matters that also gave rise to issues in the Magistrates' Court.

12. A mediation occurred on 21 October 2008 but the matter did not settle. Shortly after, VWD wrote to Baldsing reporting on the outcome of the mediation, raising issues for further instructions but also demanding payment of outstanding legal fees. On the bills rendered by end of September 2008, those fees were in excess of $60,000. Until then Baldsing had been paying the firm $500

per month in reduction of his fees but even that arrangement came to an end shortly after the mediation. The solicitors terminated the retainer by filing a Notice of Ceasing to Act soon after sending a letter dated 12 November 2008 warning that they would do so if security for payment of the fees was not forthcoming.

13. In January 2009 Baldsing retained his present solicitors to conduct the Supreme Court litigation, and also to defend VWD's claim for legal costs which they had issued in the Magistrates' Court on 26 November 2008. Baldsing settled the Supreme Court claim in May 2009 on terms which are not revealed, and the proceeding was struck out.

The Magistrates' Court claim

14. VWD's Magistrates' Court claim initially sought the sum of $64,062 (for costs billed to September 2008). It was later amended to $86,810.65 (for costs billed to and including November 2008).[1] Baldsing's defence and counterclaim produced the numerous issues requiring determination by the magistrate.

15. By his pleaded defence, Baldsing:

- Denied any debt was owing;
- Alleged a failure to make proper costs disclosure as required by the *Legal Practice Act* 1996 (Vic) ('the 1996 Act');
- In the alternative, sought a reduction of costs under s91 of the 1996 Act and/or for being not fair and reasonable;
- Alternatively, alleged negligence in the performance of the retainer for, amongst other things, not advising Baldsing there were no prospects of success and refusing to issue the proceeding; making unnecessary amendments; failing to take adequate instructions; and acting in a conflict of interest by also acting for Judy Clancy – all resulting in loss and damage; and
- Alleged misleading and deceptive conduct for falsely representing that the *Legal Profession Act* 2004 (Vic) ('the 2004 Act') applied to the bills of costs, resulting in loss and damage; alternatively, if the 2004 Act did apply, breaches of that Act in relation to cost disclosure obligations.

16. The loss and damage claimed under the various heads were asserted as a set-off to any debt found due. A counterclaim alleged the same matters and, in addition, claimed further loss and damage, including costs incurred instructing new solicitors to conduct the Supreme Court litigation.

The magistrate's decision

17. After a trial that lasted 11 days and produced nearly 1300 pages of transcript, the magistrate published reasons for decision[2] ('reasons') that ran for 38 pages. I will give a brief synopsis of his findings and decision.

18. After outlining the essential facts and mentioning some relevant factual concessions or matters of common ground, his Honour defined the critical issues that were raised by way of defence to the solicitors' claim for costs. They were

> (a) first, arguments concerning the proper basis for the claim for costs: that is, what was the applicable legislation; whether costs were claimable under a costs agreement, upon scale, or on a 'fair and reasonable' basis; and what was the proper quantification of costs, and
> (b) secondly, an argument that no costs were payable at all, beyond $11,000 for preliminary investigation costs, because the solicitors' services were valueless and thus there had been a total failure of consideration.

19. Understandably, the learned magistrate dealt with the second argument first. He identified 3 grounds upon which that argument was put, namely that:

> (a) the services were valueless because Baldsing had no claim of substance in law, and the claim should never have been issued;
> (b) the services were valueless because Baldsing had only a weak claim on the facts, and should have been advised not to pursue it; and
> (c) because of a conflict of interest between Baldsing and Clancy, the solicitors should not have acted for either of them.

20. His Honour dismissed each of those grounds of defence.

21. The learned magistrate then returned to the first set of issues concerning the basis of the claim for costs and their quantification. In response to various arguments put by Baldsing he

decided as follows:

> (a) the 1996 Act applied to bills rendered from May 2005 until 22 July 2008, and the proper basis for quantifying those costs was on the applicable scale of costs and not as charged by the solicitors;
> (b) from 22 July 2008 when a costs agreement was entered between the parties, the 2004 Act applied and the proper basis for quantifying costs from then until the end of the retainer in November 2008 was under the costs agreement;
> (c) it did not follow that, assuming VWD had represented that the 2004 Act applied to the bills rendered before 22 July 2008, those representations caused the 2004 Act to apply so that, because of VWD's failure to make disclosures as required by that Act, no costs could be claimed at all; and
> (d) the quantum of costs payable on scale until 22 July 2008 was $59,625.48, and costs payable thereafter under the costs agreement was $16,783.43; and, since $18,903.02 had been paid, an order was made against Baldsing for $57,460.89.

The grounds of appeal

22. Baldsing initially raised 44 grounds of appeal and 44 questions of law (simply expressing the grounds as questions). These were reduced to 28 grounds before an associate judge of this court. I will not set them out in the body of these reasons, but they are contained in the attached appendix. I have endeavoured to distil those 28 grounds to 9 issues. The table below sets out those issues (without any comment at this juncture as to whether they are appropriate as grounds) and references the numbers of the original grounds which are comprehended within those issues.[3]

No.	Issue	Ground(s)
1.	Did the fact that Fernworld Aust paid most of the purchase price and operated the business, or was nominated as purchaser of the business, have the effect that Baldsing had no substantial claim?	1, 2, 3, 4, 14, 23, 26
2.	Did the Magistrate wrongly conclude that Baldsing had a meritorious claim in contract: • By taking into account the misrepresentation claim, or Fernworld Aust's losses? • When the pleaded case could not succeed or was too insubstantial?	14, 23, 26 15, 17, 18, 19, 20
3.	Did the solicitors commence the proceeding for an improper purpose?	8
4.	Did the Magistrate impose on Baldsing an incorrect onus to prove the law?	21
5.	Did the solicitors act in conflict of interest and, if so, what was the consequence?	29, 30, 31
6.	Did the Magistrate apply the wrong test of negligence – namely 'fundamental' negligence?	10
7.	Did the Magistrate wrongly fail to deal with the issue of negligence over the whole retainer rather than just at inception?	11, 12, 13
8.	Did the Magistrate fail to properly quantify the solicitors' costs, by: • Failing to exercise a power to reduce costs under the 1996 Act? • Wrongly taking account of costs spent on the misrepresentation case? • Not properly evaluating competing expert opinion?	32 36 37, 39, 42, 43.
9.	Was it misleading and deceptive conduct to represent that the 2004 Act applied to the bills of costs?	35.

23. Issues 1, 2, 3, 4, 5 and 6 encompass the various arguments put forward as to why the magistrate was wrong in failing to find that the solicitors should not have issued proceedings at all, and why their services were valueless and could not constitute any proper basis for the allowance of costs.

24. Issue 7 addresses a contention that the magistrate wrongly failed to deal with an issue raised on the pleadings and argued below. That issue was: even if the solicitors were not negligent in issuing the claim, were they nevertheless negligent in the conduct of the litigation after issuing the claim so that they should not be able to recover all of their claimed costs?

25. Issues 8 and 9, broadly speaking, related to the question of the assessment of costs as claimed in the bills delivered by the solicitors.

26. Seen in this way there were in fact 3 broad issues on appeal: (1) whether the magistrate erred in not finding that the solicitors' services were valueless; if not, (2) whether the magistrate erred in not considering post-issue negligence; and (3) whether the magistrate properly quantified the costs. I will deal with the arguments under these 3 broad headings.

Were the solicitors' services valueless?

27. Baldsing's two pleaded contentions as to why his claim had no prospects of success, and should not have been instituted, are set out in paragraphs 15(d) and (e) of his defence to VWD's claim in the Magistrates' Court. They were (in reverse order):

> 'There had been a nomination pursuant to a contract of sale to Fernworld Australia Pty Ltd and there had not been any representations made to the said company and no loss or damage suffered by [Baldsing]'. (i.e. a 'no loss' argument)
>
> 'That the central allegation [of Baldsing in his Supreme Court pleadings] that there had been a misrepresentation as to the amount of export sales was contrary to the financial documents provided to [Baldsing] and his accountant'." (i.e. a 'weak loss' argument)

28. It was further alleged (in his counterclaim) that a legal practitioner acting with reasonable care and skill would have refused to initiate Baldsing's claim and would have advised him that there was no prospect of success.

29. Baldsing argues that the magistrate failed to consider the issues raised and, had he done so, his Honour would have found in his favour.

30. Baldsing's arguments as to why his claim was doomed to fail strayed beyond these two issues, both before the magistrate and before me. His counsel, Mr Levine (who appeared both below and before me), justified this departure on the basis that the magistrate declared that he would determine the issues on the basis of what was actually raised and argued before him, and not necessarily by reference to the pleadings.

31. Having looked at those parts of the transcript where this discussion took place I am inclined to think that the magistrate intended by these remarks to be restrictive rather than expansionary. Nevertheless I will deal with those matters that might broadly be covered by the two allegations set out above as the starting points of the appeal grounds.

No (or insubstantial) loss/wrong plaintiff[4]

32. Baldsing argued that he was not the person who suffered the losses that were claimed (at least those of any substance), he should have been informed of that fact and the solicitors should not have issued the claim. The precise bases of Baldsing's arguments on this issue were sometimes a little hard to follow.

33. VWD pleaded two principal causes of action on Baldsing's behalf against the vendors in respect of the business sale contract: a claim in contract, and a claim under the *Fair Trading Act* for misleading and deceptive conduct ('the misrepresentation claim').

34. Only Baldsing was named as plaintiff in the action. Fernworld Aust was not a plaintiff to the claim against the vendors. The company was later added as a party to the proceeding when the defendant-vendors counterclaimed for the unpaid balance of purchase monies under the land sale contract. They did so, as explained above, because in relation to the land sale contract there was an express written nomination of the company as purchaser pursuant to a nomination clause in the contract.

Contract claim

The claim was legally limited[5]

35. Insofar as the contract claim was concerned, Baldsing argued before me that his recoverable damages for breach of contract were, as a matter of law, confined to $25,000 (the amount of the deposit) because that was the only component of the purchase price which he paid out of his own pocket and therefore the full extent of his possible loss.

36. Although, as the magistrate observed, it was not entirely clear where the balance of the price (a further $175,000) came from, it was taken as being common ground that Baldsing himself had only paid the deposit. There was some evidence to suggest that the balance came from Fernworld Aust after borrowing money from a bank to do so, but no express finding was made to that effect.

37. In support of this argument Baldsing relied upon the basic principle that:

> As a general rule, A cannot sue B for an injury B has done to C. C is the proper plaintiff because C is the injured party in whom the cause of action is vested ... .[6]

38. There is no doubt that as a general rule this proposition is correct. But Baldsing's argument in this case rests upon the further, unsupported, foundation that the injury that a defaulting vendor inflicts by failing to perform a contract is inflicted upon the person who pays the price rather than the person contractually entitled to receive performance of the vendor's promise. Alternatively, it assumes that the innocent party's contractual remedy for breach is limited by the amount of consideration that party personally contributed. Neither of those propositions is correct in law. No authority was cited in support of either proposition apart from the general principle set out above.

39. The issue in *Avzur's case*, from which the general principle was cited, was whether the original contracting party, or a nominee who had been nominated as purchaser in place of the original contracting party, was the proper person with title to sue the vendor for breach. The Judge found that the nomination effected a true novation of the contract to Avzur Hotels so that it was the proper plaintiff rather than the original contracting party.

40. The case said nothing about confining either party's capacity to sue by reference to the portion of consideration they actually paid. Indeed, it is obvious why that is not the case. Where a contract remains on foot and has not been rescinded, a party suing for damages for breach of contract does not seek compensation for the consideration they have paid, and therefore 'lost'; rather, they seek compensation for the value of the promise made by the other party which has not been performed.

41. Two trite propositions of law answer Baldsing's first point:

> An inevitable consequence of a breach of contract by a promisor is that the promisee is entitled to claim damages. That right accrues to the promisee at the time of the promisor's breach.[7]
> and
>
> The rule of common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[8]

42. I ignore for the moment the possibility there was a nomination effecting a novation of the business sale contract to Fernworld Aust. If at the date of settlement of the contract the vendors failed to transfer to Baldsing the whole of the business described in the contract, then Baldsing had an entitlement to damages, measured at that date, to put him in the position he would have been in had the promise been performed. It matters not what he did with the business thereafter (eg. assigned it or allowed another to operate it), or whether he was the one who personally paid the contract price (so long as it was paid[9]).

43. The magistrate concluded:

> In this context issues like whether he paid only $25,000, whether and in what circumstances Fernworld Australia Pty Ltd was incorporated and might have paid the balance of purchase price for the business and were the actual operators at law, would not be a bar to a significant award of damages for breach of contract, should the breach or breaches pleaded be established at trial.[10]

44. His honour's conclusion and reasoning on this issue discloses no error of law.

Implied nomination[11]

45. As I understood it, Baldsing's next point was that even if the first proposition was incorrect, nevertheless there had been a nomination of Fernworld Aust as purchaser which had the effect that Baldsing could not sue for damages for breach of the contract. This point seemed to have several manifestations: that the magistrate should have found there was a nomination; that he failed to consider whether there was a nomination; and that he failed to give adequate reasons for not finding there was an implied nomination which barred Baldsing's claim in contract.

46. Unlike the land sale contract, there was no evidence of a written nomination of any kind in relation to the business sale contract. Baldsing conceded before the magistrate,[12] as he did before me,[13] that there had been no nomination of Fernworld Aust which effected a substitution of it as purchaser, and that the only person who could sue as purchaser under the contract was Baldsing.

47. However, he still argued that there was evidence of a nomination of the kind which amounted to a direction to transfer the business to Fernworld Aust,[14] and that the legal effect of that species of nomination was to preclude Baldsing from suing in contract. That nomination, he said, was implied from the circumstances of Fernworld Aust paying the bulk of the price and operating the business.

48. There are numerous obstacles to Baldsing's submission. First, the magistrate did consider whether or not there had been a nomination and he did make a finding. Secondly, his finding is a question of fact, not an appellable question of law. Thirdly, at best Baldsing could only point me to post-settlement conduct between himself and Fernworld Aust, not involving the vendors or being done with their knowledge, as the purported evidence of an implied nomination. It could not have sufficed. Fourthly, even if there was a nomination in the sense of a direction to transfer the business at settlement to Fernworld Aust, but not a novation, that circumstance would not alter the position that Baldsing was the proper plaintiff to sue for any damages for contractual non-performance by the vendors. And for the reasons already given, those damages were not confined by the extent of the purchase price contributed by Baldsing personally.

49. The magistrate concluded as follows:

> Whilst I recognise that following the second mediation [21 October 2008] the possibility that Fernworld Australia Pty Ltd had 'purchased' the business under the contract of sale of the business had to be the subject of further instructions from Mr Baldsing and possibly might have seen Fernworld Australia Pty Ltd added as a plaintiff or substituted as a plaintiff, there is no evidence before me that Fernworld Australia Pty Ltd was or ought to have been regarded at any time by the plaintiff as a 'purchaser' of the nursery business such that it could sue for any alleged breach of contract or misrepresentation.[15]

50. Baldsing's submission that the magistrate failed to consider the matter, or give reasons for not accepting his argument, simply amounted to a repetition of his arguments on the facts which the magistrate rejected. No error of law is demonstrated on this point and the grounds directed to it.

The claim was factually insubstantial[16]

51. Baldsing's next point was that the pleaded claims in contract were so insubstantial and weak that the solicitors should not have initiated any claim on his behalf. He argued that the magistrate failed to properly analyse the merits of the pleaded claim in contract, and wrongly took into account elements of the misrepresentation claim to conclude there was a claim of substance.

52. Baldsing drew attention to the fact that the claim for breach of contract, as pleaded by VWD on his behalf, limited the breaches to three things, namely the failure to transfer:

- The books and records of the business pertaining to the wholesale component of the business;
- The export component of the business; and
- The email address 'ausfern@msn.com' which formed part of the business and its goodwill.

53. Baldsing argued, first, that these items were not listed as assets of the business in the contract and thus the failure to deliver them could not have been a breach of the contract. Secondly, he argued, even so, none of them had any obvious or apparent value.

54. It must be said at first that Baldsing's arguments have an air of unreality, and even mischief, about them. Baldsing's instructions to VWD from the outset were that the business was not achieving the turnover he was led to expect the business would achieve. His expectation was drawn from what he had been told about it by the vendors, and what was reflected in the financial records shown to him before purchase. The magistrate found he had instructed VWD at the conference in early May 2005, attended by counsel, that not only had there been misrepresentations made about the turnover, but that the nursery's valuable export business had not been provided to him.

55. He now argues that the contract did not expressly stipulate an 'export business' as being comprised in the business assets and, therefore, he had no contractual entitlement to it. There is nothing in this point. What was comprehended by the 'business' and its 'goodwill', transferred under the contract, was doubtless going to be an issue at trial. But Baldsing's instructions were

that the business did include that component. And, in my view, there was nothing in the terms of the contract that was inconsistent with or necessarily contradicted such a claim.

56. If Baldsing's instructions were true, then there must have been some explanation for the significant drop in turnover. One explanation – the one he offered – was that a valuable component of the business had been withheld by the vendors. The nature and composition of the business could be established at trial from its financial books and records which, again, Baldsing instructed had not been delivered up. The email address 'ausfern@msn.com.au' could well have formed part of the valuable goodwill of the business, particularly if it was the established means by which export customers communicated with the business.

57. On instructions, VWD engaged experienced counsel to draw a claim seeking damages for the very things he claimed to be entitled to yet deprived of – the export business, the financial records and the email address. Baldsing now argues that these elements were worthless, and sufficiently obviously so such that the magistrate ought to have concluded that VWD's pursuit of damages on his behalf was a valueless exercise.

58. With Baldsing's knowledge, VWD spent considerable time, and costs, seeking discovery from the vendors, and trying to obtain financial evidence verifying the existence and value of the export business. It is true that by October 2008, the time of the mediation, it appeared that (despite attempts) little evidence had been obtained to verify Baldsing's instructions. Nonetheless, there was advice at that time from counsel (a different, but equally experienced barrister) urging Baldsing to instruct VWD to obtain independent financial analysis of the business records to try and tie the reason for the business' underperformance to the cause asserted by Baldsing. Those instructions were not forthcoming.

59. The magistrate dismissed Baldsing's argument that the claim was so obviously weak from the outset that the solicitors should have so advised and refused to initiate it. He explained his reasons in 8 sub-paragraphs over several pages of his reasons.[17] They included that:

- as the case was never run, its true strength or weakness was never tested;
- the evidence before him concerning the financial evaluation of the business did not enable him to conclude whether the claim was strong or weak;
- the nature of the case and of Baldsing's instructions meant that any real verification of the merits of the claim would have required, at least, the process of discovery, but likely also the services of a forensic accountant;
- he could not conclude on the material before him that the claim was weak and had little chance of success.

60. The magistrate drew this conclusion of fact. It was clearly and transparently reasoned. It was a conclusion open to him. Baldsing has not demonstrated any error of law on this issue.

61. Baldsing also attempted to attack the magistrate's conclusion on this issue by pointing to certain observations his Honour made to the effect that the strength of his contract claim would depend on alleged oral representations to be tested at trial. There is little if any substance to this point. What I have already summarised so far provides ample justification for the magistrate's conclusion as a matter of law even without considering the potential need to examine oral statements.

62. But, to the extent the learned magistrate took into account the possibility that the strength of the case might depend on oral representations, he was not in error to do so. Given that the meaning of the contract may have needed to be interpreted in its commercial context[18] – for example, to ascertain the factual background known to both parties at the time of contract, such as what the business comprised – the oral statements of the parties prior to the contract could very well have a bearing on what was sold and, therefore, what breaches could be proven.

63. Even if he was in error on this point, in my view his Honour's decision would not have been different regardless of the strength the case might have gained from the untested evidence of oral representations. As I have shown, there were ample grounds for concluding the claim was not obviously lacking in merit before considering that issue. Any such error would not vitiate his conclusion.[19]

64. Baldsing also complained that the magistrate clearly relied upon losses that properly belonged to the misrepresentation claim (which he argued could only have belonged to Fernworld Aust, if anyone) in determining that the contract claim (assuming it belonged to Baldsing) had substance. For this he relied upon this sentence –

> 'Evidence of losses incurred by the [sic] Fernworld Australia Pty Ltd in operating the nursery business arguably would go to seeking to establish his [Baldsing's] claim in contract'.[20]

65. I see nothing wrong in principle with this statement. I take the magistrate to mean that Baldsing would, amongst other things, try and prove that the true scope of the business sold included an export component by comparing its pre-sale and post-sale performance, and showing that its higher pre-sale performance was attributable to the existence of an export component that was not delivered upon settlement. In other words, there was forensic value in looking at the post sale performance to prove that the vendors did not deliver what they had promised to deliver.

***Misrepresentation claim*[21]**

66. Most of Baldsing's argument was directed to the contract claim as already discussed. Assuming he had dispatched any merit in the contract claim, he relied upon a concession made by VWD before the magistrate that any claim on Baldsing's behalf relying upon the misrepresentation claim was limited to the amount he had paid under the business sale contract ($25,000).[22] He contended, therefore, the solicitors' services could not be justified by reference to the misrepresentation claim that was brought solely in Baldsing's name.

67. This argument falls away somewhat as a basis for contending that the solicitors' services were valueless once it is accepted, as I do, that the magistrate was not wrong to conclude that the contract claim had sufficient apparent merit, on instructions given by Baldsing, to be properly pursued. I will deal with the argument in much shorter compass.

68. The object of an award of damages in tort is to place the plaintiff in the position he or she would have been in had the tort not been committed. So, where damages are claimed as the result of a purchase induced by deceit (to which statutory misleading and deceptive conduct is likened for this purpose), the amount recoverable is at first to be measured by the difference between the price paid and the actual value of the thing purchased at the time of the purchase.[23]

69. Presumably, VWD's concession was based on the reasoning that, since Baldsing had only himself paid $25,000 toward the purchase price, his actual tortious loss must be capped at that sum. I need not pause to consider whether or not this was a correct concession. In any event, there may also have been a number of possible arguments open to Baldsing to enable him to claim greater loss based upon the fact that he was sole director and shareholder of the company; or upon commercial relations between him and the company; or upon the scope afforded by s159 of the *Fair Trading Act* for damages to be claimed by those suffering loss 'because of' contraventions of the Act.

70. Baldsing urged me to undertake my analysis of the correctness or otherwise of the magistrate's decision, as a matter of law, on the basis that Baldsing's case had to be evaluated strictly as VWD had pleaded it, including the choice of plaintiff. In my view such a restriction is not necessarily justified. The primary argument was that the solicitors' services were valueless because the case lacked substance. The substance of the case, for this purpose, was to be evaluated upon the instructions given to the solicitors, not necessarily confined by the way it was pleaded from time to time. Pleadings can, and very often are, amended, added to and refined as a case progresses. Subject of course to the particular circumstances, parties can be joined or substituted.

71. It is not without significance that at no stage did the vendors, themselves represented by experienced solicitors and counsel, seek summary dismissal of the claim or plead that there was an insuperable bar to it. There is no evidence that either of the two counsel retained for Baldsing expressed that view.

72. It was suggested in October 2008 by Baldsing's then counsel that Fernworld Aust may need to be added as a plaintiff, or substituted as the plaintiff, for the misrepresentation claim. The magistrate acknowledged that prospect as seen in a portion of his reasons extracted above. [24] No application was made to do so before the retainer was terminated. Although it was argued

by Baldsing before me that had that been done it would have rendered all the work performed by the solicitors to date worthless, I am at a loss to understand why that would be so.

73. If Baldsing relied upon a contention that the solicitors' services were valueless because Fernworld Aust was not a party to the misrepresentation claim, or because Baldsing suffered no loss because of it, or otherwise contended that the magistrate failed to consider the issue – and it was not clear to me whether they were his contentions – I reject those arguments.

Improper purpose[25]

74. Baldsing contends that the magistrate was in error for not considering whether the solicitor was negligent for issuing a proceeding for an ulterior purpose, namely to avoid a payment due and payable under the land sale contract.[26]

75. The first point is that Baldsing made no such allegation in his lengthy pleadings in the magistrate court. He particularised the solicitors' negligence to include the commencement of a proceeding with no prospect of success (dealt with above), and in circumstances of a conflict of interest (see below), but not for the pursuit of an improper purpose. If any allegation needed to be pleaded, that one did.

76. Its absence as a pleaded issue is sufficient to dispose of that ground. Lest a different view could be taken I will deal with it briefly.

77. Far from having found that the solicitors knew that the case was without merit from the beginning, but instituted it for an ulterior or improper purpose, the magistrate found the opposite to be the case. He found, as I have set out above, that the claim was issued on the instructions of Baldsing that the vendors did not deliver the business they promised to him, and had induced him to enter the contracts by false representations. The magistrate rejected Baldsing's arguments that the solicitors either knew or should have known at the outset the claim was without any merit or was hopeless. For reasons I have already explained those findings were open to the magistrate. They cannot now be challenged in this appeal.

78. Baldsing latches onto the magistrate's observations about the timing of the proceeding being instituted. Dealing with the conference on 10 May 2005 between Baldsing, the solicitors and counsel, his Honour said –

> It is also clear that there was discussion about whether to issue proceedings on the one hand or commence some investigation of the situation before issuing proceedings. Included in the notes, clearly indicating that this matter was discussed if a decision to issue proceedings was taken: 'Risk is if allegations are wrong you may be liable for legal costs'. In the end, as Mr Baldsing admitted in his cross-examination, there was pressure existing in the situation because of the imminence of the payments due on 31/5/2005 and with the need to avoid any suggestion of default under that contract [the land sale contract], he wanted the proceedings commenced before then.[27]

79. A number of things can be said. First, the magistrate found it was Baldsing who wanted the proceeding commenced urgently with the knowledge that the solicitors had not been able to fully investigate its strengths. Secondly, there was no inherent legal or factual bar to a meritorious claim, providing the facts ultimately supported Baldsing's instructions.

80. Thirdly, there was at least a valid, potential strategic advantage to Baldsing, if a proceeding was ultimately to be issued, that it be issued before the final payment under the land contract was due to give him some bargaining position with the vendors.

81. Fourthly, without proof of an absence of a belief that the contract or misrepresentation claim had any legitimate foundation, a desire to secure a perceived, strategic advantage by the timing of the institution of the claim falls a long way short of establishing an improper purpose of the kind described in the authorities.

82. Fifthly, if there was any negligence in giving advice to Baldsing that by issuing the claim he could avoid making the final land contract claim payment (if any such advice was given), that allegation was not pleaded; nor was there evidence that Baldsing relied upon any such advice in issuing the claim at all; nor could it alone found the allegation of improper purpose.

83. To the extent the issue was raised and needed to be determined by the magistrate, in my view the findings the magistrate made on the merits of the claim as issued, and his findings as recorded in the above passage, sufficiently state his conclusions on the issue and his reasons for them. No error is demonstrated on this ground.

Onus to prove the law?[28]

84. I have set out in paragraph 43 above the learned magistrate's conclusion about the significance or otherwise of various matters to the merits of Baldsing's contract claim. I have found that his Honour's reasoning was sound. Immediately after that passage his Honour continued – I am satisfied that [VWD's] analysis of this aspect of the case is consistent with the authorities cited above and is to be accepted. Given that Mr Baldsing bears the onus on the issue, perhaps the proper way to put it is that I am not satisfied that the above analysis is not the correct position at law.[29]

85. Baldsing contends that, by this passage, his Honour revealed he had imposed an unlawful onus upon him to 'prove the law', and that error impugned the immediate point with which his Honour was dealing. Further, he argues that such a view may well have infected the whole of his reasoning so that it impugned the whole decision.

86. I disagree. I am not satisfied that it discloses any error of law that either vitiates the immediate point his Honour was dealing with, much less the whole decision.

87. The immediate point was that damages for breach of contract compensate for loss of the bargain, not for losses incurred in reliance on wrongful conduct. That distinction informed the conclusion in the earlier passage to which I have already referred. His Honour then stated, in the first sentence that followed his conclusion, he was satisfied the legal analysis that underpinned it was correct. In my view he was right to be satisfied.

88. Properly understood, the second sentence, where he refers to 'onus', builds upon the first; it does not undermine it or qualify it. But if his Honour was expressing any diffidence about his initial conclusion, he need not have done so.

89. Ultimately, the broader 'issue' the magistrate was grappling with was whether the solicitors had been negligent in advising Baldsing to pursue a claim in contract. Involved in his decision in the solicitors' favour was an acceptance of the analysis that a contract claim of substance could exist despite another party, Fernworld Aust, having paid the bulk of the purchase price and operating the business after purchase.

90. Of course, in this context it would be wrong in principle to recognise and apply any legal 'onus of proof' on any party to 'prove the law'. But reading the whole passage in context of the preceding passages it is clear that, in referring to an 'onus' the learned magistrate was referring to Baldsing's onus to establish his defence. He was saying no more than that Baldsing had not persuaded him that his defence, involving elements of fact and the application of legal principle, was made out. There was no error of law involved in that statement. For these reasons I reject this ground of appeal.

Conflict of interest[30]

91. VWD acted both for Baldsing and for Judy Clancy, the purchaser's guarantor under the land sale contract. Judy Clancy worked in the nursery after it was purchased.

92. The magistrate found that Baldsing was informed by VWD from an early stage there was a potential for a conflict of interest in acting for both, but that both Baldsing and Clancy gave instructions on numerous occasions that they were 'in it together' and wanted the solicitors to act for them both. Each, but particularly Ms Clancy, were advised to obtain independent legal advice.

93. His Honour also found, as a fact, that while a potential for conflict existed, that potential never materialised or even threatened to materialise.

94. It is not the law that a solicitor can never act for parties who have a potential conflict of

interest. The law imposes obligations upon solicitors to ensure that if they do, they only do so having made full disclosure of the material facts and with properly informed consent.[31] Here the magistrate found that such informed consent had been obtained – a finding of fact open to him to make.

95. In any event, Baldsing's pleaded claim was that by acting for both of them VWD was negligent and caused him loss and damage. Assuming that VWD had been negligent, Baldsing needed to establish that the negligence caused him some loss. None was found. Nor was it at all evident what that loss was or could have been. And as the magistrate correctly pointed out, even if the conflict had materialised and VWD was thereafter precluded from acting for Baldsing or Clancy or both, even that circumstance did not render the work done to date 'valueless'.

96. There was no substance to this point.

'Fundamental negligence': a novel standard?[32]

97. Lastly on the topic of 'valueless services', Baldsing argued that the magistrate had adopted and applied a novel standard of negligence to the question of whether the solicitors' were negligent in instituting the claim, namely 'fundamental negligence'.

98. The learned magistrate said,[33] when introducing the first issue relating to the solicitors' alleged negligence for having even instituted the claim –

> .. establishing negligence on the part of [VWD] over the course of the retainer will not suffice: what Mr Baldsing must establish is such fundamental negligence at such an early stage in the retainer that it can be said that that negligence rendered the resultant work undertaken by [VWD] for him as 'valueless'...
>
> ... Many matters that arose over the course of the retainer were raised in lengthy cross examination of Ms Flanagan [a solicitor with VWD]. I do not intend to deal with many of those matters in the course of these reasons because, in my view, many, if not most of them related to issues that could be seen to have arisen during the course of the retainer, and did not go to establish the fundamental negligence that is required to establish the case.

99. I reject this argument. Only two paragraphs earlier in his reasons the learned magistrate had quoted a passage from the judgment of Winneke P in *Carew Counsel Pty Ltd v French*[34] setting out the proper scope of a solicitor's duty and standard of care. It is perfectly clear that the learned magistrate was referring to the fact that, to succeed in proving the solicitors' services were 'valueless', Baldsing had to show that their negligence occurred at the inception of the retainer and concerned the fundamental existence of a claim. He was not setting any novel standard of care.

Negligence over the whole retainer[35]

100. Thus far I have dealt with the various grounds directed to the argument that the solicitors' services were valueless because the claim should not have been issued at the outset. The second broad argument was that the magistrate failed to consider the various arguments about the solicitors' negligent conduct of the retainer once the claim was issued.

101. True it is that Baldsing pleaded, in the alternative, that VWD had charged excessive and unreasonable fees, and had charged costs for amendments to pleadings, letters and other documents which they ought not be able to recover due to lack of care and skill. Baldsing said the magistrate's error lay in failing to consider and decide upon these allegations that were squarely raised for decision, an error he said was evident from the second of the two passages extracted at paragraph 98 above. At first blush there may seem to be something in this argument, but upon closer inspection of the magistrate's reasons the argument can be seen to be wrong.

102. After dealing with the various ways that Baldsing argued the 'valueless services' point, his Honour then turned his attention to the proper quantification of the costs that the solicitors charged over the whole of the retainer. He ultimately reduced the solicitors' costs after hearing evidence from two competing experts on the issue of what costs were properly claimed and charged for. In doing so he heard evidence from the rival experts on the way in which the solicitors carried out the legal work. He considered the opinion of the expert called for Baldsing, a Mr McGregor, that there should be reductions for re-drafting and amending, and for careless, loose or excessive work.[36]

103. The magistrate had also heard cross-examination of the solicitor who had performed much of the work, on the 'many matters ... raised' about the alleged deficiencies in conduct. He heard the competing costs consultants' views on what items were properly claimable on scale, and at what rate. He then made a decision on what were the properly claimable costs over the whole retainer.

104. In those circumstances I am satisfied that the magistrate did deal with and decide the issues particularised as the negligence of VWD over the course of the retainer. Indeed, dealing with those issues in the way he did was a more satisfactory way of dealing with them than assessing loss and damage caused by negligent conduct and then setting off any damages so assessed from the solicitors' gross bills.

Quantification of legal costs[37]

105. Baldsing raised a number of arguments concerning the learned magistrate's decision on the quantum of costs.

Section 91 of the 1996 Act[38]

106. The magistrate was invited to exercise the power provided under s91 of the 1996 Act to reduce a bill of costs on an 'assessment' of the bill if satisfied that a firm had not given disclosure as required by s86 of the Act. Such disclosure had not been given.

107. The magistrate concluded he did not have the power provided by s91 as only the Taxing Master of the Supreme Court could undertake the 'assessment' referred to in the section. Having read the provisions in Part 4 of the Act, especially in Divisions 1, 2, 4 and 5, I am satisfied that the magistrate's decision on this point was correct as a matter of statutory construction.

108. No error of law is disclosed.

Costs spent on the misrepresentation claim[39]

109. Baldsing argued that the magistrate erred in law by not reducing the costs by the amounts charged for investigating the misrepresentation claim. Such costs included any accounting costs in evaluating the losses suffered in operating the business.

110. There was nothing in this point. First, it was a matter of pure fact what the magistrate considered was properly chargeable. Secondly, Baldsing's argument on this point flowed from the same misconception discussed above, namely that an examination of the performance of the business after the sale could not be relevant to determining whether the vendors failed to deliver what the contract required them to deliver. It could have been relevant for reasons already discussed.

111. No error of law is disclosed.

Competing experts[40]

112. Baldsing raised a raft of objections about the magistrate's preference for the evidence of the expert costs consultant called by VWD over the consultant called by Baldsing.

113. In some 12 sub-paragraphs over 5 pages the magistrate carefully explained why he preferred the evidence of VWD's witness. I am not going to detail those reasons. It suffices to say that they are clear and well reasoned. Baldsing's complaints on this topic raising matters such as natural justice, insufficient reasons and lack of evidence were nothing more than a disguised attack on findings of fact.

114. No error of law is disclosed.

Representation that the 2004 Act applied[41]

115. Finally, Baldsing had argued before the magistrate that he was entitled to damages because of misleading and deceptive conduct on the part of VWD as to the applicability of the 2004 Act to the bills of costs they rendered to him. (As already stated earlier, the magistrate found the 2004 Act did not apply until after 22 July 2008 when a new retainer was entered).

116. The argument was pleaded this way: by including a notice on each bill required by the 2004 Act, VWD represented that the 2004 Act applied; if it did not apply, the notice was misleading and

deceptive contrary to s52 of the *Trade Practices Act* 1974 (Cth) or ss9 or 11 of the *Fair Trading Act*; and, because of that, Baldsing suffered loss and damage if VWD was able to resile from that position and dispute that it did apply.

117. Notably, nothing was alleged to connect the alleged misleading and deceptive conduct to any loss. No act of reliance upon the conduct was alleged or, as far as I can tell, established on the evidence. At its highest, the argument could only support a claim for damages to be set off against the claim for costs; but no damage was established or even identified.

118. What Baldsing seemed to contend was that the consequence of his allegations, if true, was that therefore the 2004 Act did apply (contrary to the magistrate's findings which are not challenged) and that because VWD did not comply with that Act's disclosure requirements, VWD was disentitled from recovering any costs pursuant to s3.4.17 of the Act.

119. This reasoning is a nonsense. The magistrate was perfectly correct to conclude, as he did, that the alleged representation could not be relied upon to invoke s3.4.17 of the Act to prevent VWD recovering costs for the period up to 22 July 2008.

120. In so concluding, the magistrate considered that the rendering of a bill was not conduct in 'trade or commerce', relying by analogy upon a decision of Osborn J in *L.T. King Pty Ltd v Besser*. [42] Whether or not it was necessary to rely on that principle does not detract from the correctness of the magistrate's decision on this point.

121. No error of law is disclosed.

Conclusion

122. In the result, Baldsing failed to establish any error on the part of the learned magistrate involving a question of law. The appeal will be dismissed.

123. I will hear the parties on the form of the order and on costs.

APPENDIX

Appellant's grounds of appeal[43]

1. The magistrate erred in law by failing to make any findings as to whether there had been a nomination to Fernworld Australia Pty Ltd as nominee under the terms of the contract of sale of business dated 17 February 2004.
2. The magistrate erred in law and failed to consider that if there had been a nomination to Fernworld Australia Pty Ltd as nominee under the terms of the contract of sale of business dated 17 February 2004 that the appellant would not receive a substantial award of damages from the cause of action against the vendors for breach of contract.
3. The magistrate erred in law in holding that the circumstances in which Fernworld Australia Pty Ltd was incorporated and paid the purchase price for the business and/or operated the business at law as trustee for the Baldsing Family Trust could not be a bar to a significant award of damages to the appellant.
4. The magistrate erred in law and provided insufficient reasons for finding that the circumstances in which Fernworld Australia Pty Ltd as trustee for the Baldsing Family Trust was incorporated and might have paid the purchase price for the business and/or were the actual operators of the business at law could not be a bar to a significant award of damages to the appellant. 5. ... 6. ... 7. ...
8. The magistrate erred in law by not considering whether a solicitor was negligent in issuing proceedings on behalf of the appellant in relation to the contract of sale of business that had the purpose of avoiding a payment that was due and payable pursuant to the contract of sale of real estate. 9. ...
10. The magistrate erred in law in finding that in relation to the allegations of negligence that the negligence had to be fundamental, that it had to be at an early stage of the retainer, at least before the issue of legal proceedings on 30 May 2005, and that the effect of the fundamental negligence had to render all the resultant legal work valueless, on the basis that there had been a total failure of consideration.
11. The magistrate erred in law by failing to make any findings in relation to the negligence of the respondent, during the course of the retainer.
12. The magistrate erred in law and made a wholly erroneous assessment of the issues by limiting the allegations of negligence by the appellant to a claim that there had been a total failure of consideration, in a contractual sense.
13. The magistrate erred in law by failing to find that if the appellant's claim that there had been a total failure of consideration, in a contractual sense failed, that there could also a partial failure of consideration, in the sense that part of the legal work undertaken by the respondent during the course of the retainer was valueless.

14. The magistrate erred in law by taking into account and finding that there would be a substantial cause of action in contract against the vendors pursuant to the sale of the business on the merits of a cause in action against the vendors in misrepresentation.
15. The magistrate erred in law in holding that the appellant had a substantial cause of action in contract against the vendors in the sale of business, when the magistrate did not consider that there were no contractual terms that required the vendors to the sale of the business to transfer the books and records of the business, the export component of the business or the email address of the business as pleaded in the Supreme Court proceedings and there was no breach of the contract terms as pleaded in the Supreme Court proceedings.
16. ...
17. The magistrate erred in law in holding that the appellant had a substantial damages claim against the vendors in the sale of business, as pleaded in the Supreme Court proceedings for the failure to transfer the books and records of the business, the export component of the business and the email address of the business.
18. The magistrate erred in law and provided insufficient reasons for finding that the appellant had a substantial cause of action in contract against the vendors pursuant to the sale of business and in particular on the merits of each of the causes of action in contract.
19. The magistrate erred in law because he failed to consider the following matters when he decided that the appellant had a substantial cause of action in contract against the vendors pursuant to the sale of business:
(a) the causes of action in contract as pleaded in the Supreme Court proceeding;
(b) the terms of the contract of the sale of business;
(c) the merits of each of the causes of action in contract as pleaded in the Supreme Court proceeding;
20. The magistrate erred in law and provided insufficient reasons for finding that the appellant could receive a significant award of damages for the cause of action in contract.
21. The magistrate erred in law in holding that the onus of proof on the appellant to establish its case in negligence, encompassed issues of law as well as fact. 22. ...
23. The magistrate erred in law in holding that the losses incurred by Fernworld Pty Ltd as trustee for the Baldsing Family Trust were relevant and could be used to establish the losses suffered by the appellant.
24. ... 25. ...
26. The magistrate erred in law in holding that there was a need for a forensic examination of the financial documents of the vendors when the respondent had conceded that the Supreme Court proceeding should not have been issued in respect of misrepresentation and there would be no utility in assessing that material in respect of the claim in contract. 27. ... 28. ...
29. The magistrate erred in law in holding that a solicitor could act in the same legal proceeding for two clients who had a potential conflict of interest, where one client had guaranteed the obligations of the other client pursuant to a contract of sale of real estate.
30. The magistrate erred in law in holding that when a potential conflict of interest materialised between two clients that the solicitor had being acting for in the same legal proceedings, that the solicitor could continue to act on behalf of one of the clients.
31. The magistrate erred in law in holding that when a potential conflict of interest materialised between two clients that the solicitor had being acting for in the same legal proceeding, that the solicitor's file would be available to either client.
32. The magistrate erred in law in holding that the Magistrates' Court did not have any power to reduce the costs payable to a solicitor pursuant to s91 of the *Legal Practice Act* 1996 (Vic) because of their failure to comply with the disclosure requirements of s86 of that Act. 33. ... 34. ...
35. The magistrate erred in law in holding that a solicitor does not engage in trade or commerce within the meaning of the Trade Practices Act 1974 (Cwth)/Fair Trading Act 1999 (Vic), when it sends a bill to a client.
36. The magistrate erred in law in finding that there would be no reduction for the costs associated with the pleading and preparation of the cause of action in misrepresentation and with discovering/perusing the financial statements/documents of Fernworld Australia Pty Ltd.
37. The magistrate denied the appellant natural justice in finding that Mr Wood was a more qualified cost expert than Mr McGregor when their respective expertise was not an issue before him. 38. ...
39. The magistrate erred in law in holding that Mr McGregor had formed a poor view of the work undertaken by the respondent that could not have been fairly formed on a review of the respondent's file, when the file was not in evidence before the magistrate and thus there was no evidence upon which he could have made such a finding. 40. ... 41. ... 42. The magistrate erred in law in holding that Mr McGregor demonstrated a lack of impartiality, when it had never been put to him that he had not acted in an impartial manner and it was not in issue before him.
43. The magistrate erred in law and provided insufficient reasons for finding that Mr Wood took a reasonable and proper approach in costing the respondent's file. 44. ...

---

[1] A further revision downwards to $85,515,35 was made during the course of the hearing before the magistrate.
[2] *Voitin Walker Davis Pty Ltd v Ainsley Baldsing* (Unreported, Magistrates' Court of Victoria, J.F. Fitz-Gerald M, 25 November 2010) ('*VWD v Baldsing*').
[3] Some grounds are listed more than once as they appear to give rise to more than one issue.
[4] Issues 1 and 2 in the table above, and the grounds listed against them.
[5] Issue 1 in the table above, and the grounds listed against it.

[6] *Avzur Hotels Pty Ltd v Ivanhoe Entertainment Pty Ltd* [2009] FCA 701; (2009) 257 ALR 498, 499 (Finkelstein J).
[7] J.W. Carter, *Carter's Breach of Contract* (Lexis Nexis Butterworths, 2011) 5.
[8] *Robinson v Harman* [1848] EngR 135; (1848) 1 Ex 850, 855 (Parke B).
[9] In this case, the contract stipulated that ownership of the business passes when the whole of the price was paid.
[10] *VWD v Baldsing*, above n 2, [29(f)].
[11] Issue 1 in the table above, and the grounds listed against it.
[12] *VWD v Baldsing*, above n 2, [7], [29(f)].
[13] Appellant's Outline of Submissions in Reply dated 13 October 2011, paragraph 8.
[14] See the distinction between a nomination that operates as a novation, and one that operates as a direction to transfer: *Tonelli v Komirra Pty Ltd* [1972] VR 737, 739; *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458; *Salter v Gilbertson* [2003] VSCA 1, [17]; *Commissioner of State Revenue v Politis* [2004] VSC 126, [15].
[15] *VWD v Baldsing*, above n 2, [29(f)].
[16] Issue 2 in the table above, and the grounds listed against it.
[17] *VWD v Baldsing*, above n 2, [32(a) – (h)].
[18] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352-3.
[19] *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207, [163].
[20] *VWD v Baldsing*, above n 2, [29(f)].
[21] Assuming this was an issue actually raised, it is reflected in issues 1 and 2 in the table above, and in particular grounds 14 and 23.
[22] *VWD v Baldsing*, above n 2, [29(d)].
[23] *Gould v Vagelas* [1985] HCA 85; (1985) 157 CLR 215, 220 and 265; *Kizbeau Pty Ltd v W.G.&B Pty Ltd* [1995] HCA 4; (1995) 184 CLR 281, 291.
[24] Refer to extract at paragraph 49 above.
[25] Issue 3 in the table above, and the ground listed against it.
[26] *Flower & Hart v White Industries* [1999] FCA 773; (1999) 87 FCR 134; *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509.
[27] *VWD v Baldsing*, above n 2, [10].
[28] Issue 4 in the table above, and the ground listed against it.
[29] *VWD v Baldsing*, above n 2, [29(e)].
[30] Issue 5 in the table above, and the grounds listed against it.
[31] *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449, 465; *Beach Petroleum NL v Abbot Tout Russell Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1 47 [203].
[32] Issue 6 in the table above, and the ground listed against it.
[33] *VWD v Baldsing*, above n 2, [25], [27].
[34] [2002] VSCA 1; (2002) 4 VR 172.
[35] Issue 7 in the table above, and the grounds listed against it.
[36] *VWD v Baldsing*, above n 2, [76(f)].
[37] Issues 8 and 9 in the table above, and the grounds listed against them.
[38] Part of issue 8 in the table above.
[39] Part of issue 8 in the table above.
[40] Part of issue 8 in the table above.
[41] Issue 9 in the table above, and the ground listed against it.
[42] (2002) VSC 354.
[43] Those grounds deleted upon the order of the associate judge have been omitted, but the original numbering has been retained.

APPEARANCES: For the appellant Baldsing: Mr J Levine, counsel. Richelle Scherman, solicitor. For the respondent Voitin Walker Davis Pty Ltd: Mr A Panna SC, counsel. Stynes Dixon Lawyers.
