12/13; [2013] NSWSC 160

SUPREME COURT OF NEW SOUTH WALES

LEWIS v LAMBIDES

Gzell J

6 February 2013

CIVIL PROCEEDINGS – RESTORATION OF A VINTAGE MOTOR CAR – EARLIER PROCEEDINGS SETTLED – DEED EXECUTED BETWEEN THE PARTIES WHICH REQUIRED AGREEMENT IN WRITING IF FURTHER RESTORATION WORK ON VINTAGE MOTOR VEHICLE, INCLUDING STORAGE, WAS TO BE CARRIED OUT – FURTHER WORK CARRIED OUT BY ORAL AGREEMENT – NO AGREEMENT IN WRITING – MAGISTRATE FOUND THAT THE ARRANGEMENT ENTERED INTO BETWEEN THE PARTIES WAS PARTLY ORAL AND PARTLY IN WRITING WHICH SUPPLANTED THE PROVISIONS OF THE DEED – WHETHER MAGISTRATE IN ERROR.

HELD: Summons dismissed.
1. When the car owner agreed to pay the remuneration without an agreement in writing but by a handshake, the parties abandoned the arrangements set out in the Deed in favour of the oral agreement between them for the ongoing restoration of the motor vehicle.

2. As a result, the provisions in the Deed as to the cost of any further work had to include any storage charge, the non-waiver provision and the indemnity for reasonable legal fees were spent.

3. It was open to the magistrate to find that the agreement supplanted the Deed and the appellant failed to establish that the only basis upon which the magistrate could have come to her decision was to adopt the provisions in the deed.

4. Further, the magistrate was entitled to make an order for costs and that the operation of cl 7 of the deed in relation to the indemnity for costs was spent.

GZELL J: (*Ex tempore* Judgment)
1. Before the Court is an appeal from the Local Court. Under s39(1) of the *Local Court Act* 2007 (NSW), a party to proceedings before the Local Court sitting in its General Division who is dissatisfied with a judgment or the order of the Court may appeal to the Supreme Court, but only on a question of law.

2. That excludes a review on the merits. *B & L Linings Pty Limited v Chief Commissioner of State Revenue* [2008] NSWCA 187; (2008) 74 NSWLR 481 was an appeal from an Appeal Panel of the Administrative Decisions Tribunal to the Supreme Court under a provision in like terms. At 494 [38]-[39] Allsop P said:

> "In my view, the appellants' argument should be rejected. In relation to internal appeals to the Appeal Panel a clear distinction is made in s113(2) of the *Administrative Decisions Tribunal Act* between an appeal on any question of law and a review of the merits of the appealable decision. When one contrasts that provision with the terms of s 119 one finds no authority in the Supreme Court to engage in a 'review of the merits' of the Appeal Panel decision from that section. The appeal to the Supreme Court against a decision of the Appeal Panel is expressed to be on a question of law. The contrast with s113 is both immediate and clear.
> It is also clear from decisions of this Court, the Federal Court of Australia, the Victorian Court of Appeal and the Western Australian Court of Appeal that the phrase 'on a question of law' in this context of judicial review of the legality of a decision of an administrative tribunal does not, of itself, provide a simple gateway to an appeal by way of rehearing upon the identification of some question of law that is sought to be argued in the appeal."

3. At 510 [138]-[139] Basten JA said:

> "It follows that, in the present context, the use of such language does not indicate any expansion of the subject matter of the appeal so as to permit the Court to address questions other than the question of law identified by the appellant. This understanding of the subject matter and scope

> of the appeal has, as noted by Allsop P, been the construction adopted of the relevantly identical provision in s44(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth), at least since *Brown v The Repatriation Commission* [1985] FCA 194; (1985) 7 FCR 302 (at 496 [48] *supra*). As the Full Court of the Federal Court explained in *Brown*, a different approach was required to that available under the former s196 of the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth), which permitted an appeal from a decision of the Taxation Board of Review that 'involves a question of law'. As their Honours noted (at 303), that language permitted 'the whole case, and not merely the question of law' to be subject to the appeal, referring to *Ruhamah Property Company Ltd v Federal Commissioner of Taxation; Krew v Federal Commissioner of Taxation* and *XCO Pty Ltd v Federal Commissioner of Taxation.*
>
> It is clear that the proper construction of s119 and s120, in accordance with well-established authority, precludes this Court from engaging in any review of a decision beyond determining material questions of law identified by the appellant. It would seem to follow that the powers of the Court do not extend to making an evaluative judgment based on primary facts as found by the Tribunal, or exercising a discretionary power vested in the Tribunal, unless the finding or order was the only one open."

(Citations omitted)

4. Mr Eardley, who appears for the appellant, does not challenge these propositions. His client bears the onus of establishing that the magistrate could not have found on any other basis the matter that is put forward as the error of law in this case.

5. What the magistrate said in her judgment was this:

> "The Court accepts the plaintiff's evidence on those matters on the basis that that party, that is the plaintiff, not only kept written records in relation to them – and those, I have to say, were very comprehensive – but also communicated his concerns directly to the defendant who on the evidence before the court appeared to treat the issues and concerns of the plaintiff with regard to the defendant's property with complete disregard. Apart from those matters bearing directly on the dealings between the parties relating to the work to be done on the vehicle, the defendant now raises an issue which he perceives going to the plaintiff having made misrepresentations to him. While the defendant raises those allegations, he has not put on any evidence in respect of that matter. And for that matter, he has not put on any evidence in respect of a number of other allegations which are contained in his pleadings.
>
> Since the defendant fails to present any evidence or any reliable admissible evidence to support his pleadings, the court is left only with the supported evidence of the plaintiff and the support is by way of documents that I have already referred to a couple of times, and for that matter, the defendant's evidence to the extent that it corroborates the evidence – or certainly supports the evidence given by the plaintiff as to the dealings between these two parties. There is nothing in that evidence which leads the court to reject it. Indeed as I have already noted, in the fundamental aspects the defendant's evidence, perhaps unwittingly, supports the plaintiff's case."

6. The background to the matter before the Court is that the Appellant owned a vintage car, a Ferrari Dino 246 that had been placed with the respondent for repair and restoration.

7. The parties came to differences when the appellant ceased to make payments, and the matter came before the Court.

8. The large measure of the damages claimed was a storage fee component. The matter was settled and the parties executed a deed on 17 March 2006, which contained three provisions of significance, so far as the current proceedings are concerned. First, there was a cl 4 in the following terms:

> "In the event the parties agree to further work being performed on the car by the Plaintiff, the Plaintiff will not commence that work until a description of the work, the time for completion of it, the cost of the work and the terms of payment are agreed in writing between the parties and signed by them. The cost of the work must include any storage charge to be made by the Plaintiff in relation to that work."

9. Then there was a cl 7, providing an indemnity in the following terms:

> "The Plaintiff indemnifies the Defendant against any claim made against him by Laki Harris or Marie Lambides in respect of, or in relation to, or in connection with the matters mentioned in this deed. Without limiting that, the indemnity includes an indemnity for any reasonable legal fees incurred by the Defendant in defending such claim."

10. Finally, there was a clause with respects to waiver, cl 9, as follows:

> "The waiver of a provision of this Deed or a party's consent to a departure from a provision by another party will be ineffective unless in writing executed by the party who has the benefit of the provision."

11. The evidence before the magistrate was that subsequent to 17 March 2006, the appellant approached the respondent to determine what might be done with respect to the ongoing need for restoration of the motor vehicle and an arrangement was entered into, portions of which were recorded in a notebook by the respondent. It was in the following terms:

> "AS AGREED LABOUR
> 1300 hours x 65 = $84,500 GST $8,450 TOTAL $92,950".

12. The agreement was not in writing, apart from that record. It was an agreement on a handshake.

13. The agreement did not specifically refer to storage fees but that had been the largest element in the previous proceedings and cl 4 required that any storage be included in the charges for the cost of work under cl 4.

14. There was some confusion as to the extent of time over which the Appellant made payments that had been agreed at $3,000 per month. But payments were made by the Appellant in respect of the new arrangement that had not been reduced to writing as required by cl 4.

15. The magistrate took the view that the new arrangement was entered into and that new arrangement stood outside the operation of the three clauses of the deed to which I have referred.

16. In addition to the specific reference to storage fees being included in the cost of the works in cl 4 of the deed, there was a series of communications by the Respondent to the Appellant extending over a significant period of time in which reference was made to a storage charge being made and requests for the payment of the storage charge which was mounting to a considerable amount were made.

17. For example, in a facsimile or SMS communication, the date of which is hard to read, reference was made to the storage costs to date standing at $8,460.

18. There was no response by the Appellant to this series of communications apart from two occasions.

19. The Appellant identified those two occasions in his affidavit in [11] and [13]:

> "On or about 10 November 2008 I sent a fax to Laki Harris updating him on progress on our Manly development, requested an account status and requested what his claim of $22.50 a day was. Annexed hereto and marked E is a true copy of the fax dated 10 November 2008."

20. I pause to say that Laki Harris was another name used by the Respondent.

> "On or about 6 March 2009 I sent Laki Harris from Valet Mechanical Management a fax and letter advising that the additional storage charges were not agreed, in accordance with the Further work on the car provisions set out in the settlement deed dated 17 March 2006. A true copy of the letter dated 6 March 2009 is annexed hereto and marked G."

21. Between those two dates, however, there was a considerable number of communications addressed by the Respondent to the Appellant that went unanswered. It seems to me that if the magistrate was wrong in concluding there was a fresh agreement between the parties after the deed had been executed, a basis in acquiescence might have been made out.

22. But the point is that both parties departed from the requirements of cl 4 of the deed in the arrangements they put in place in November 2010.

23. The Appellant agreed to pay the remuneration to which I have indicated without an agreement in writing but by a handshake. And, clearly, the parties had abandoned, in my view,

the arrangements set out in the deed in favour of an oral agreement between them for the ongoing restoration of the motor vehicle.

24. That being so, it seems to me that the force of the non-waiver provision in cl 9 of the deed was spent.

25. The Appellant raises an argument in relation to costs. Reference is made to the indemnity for any reasonable legal fees in cl 7 of the deed and it is said that the magistrate should not have made an order for costs against him because of it.

26. No argument was raised when her Honour gave judgment in favour of the Respondent and made the order for costs. But two further things can be said.

27. The first is that the parties had moved on in coming to their fresh arrangement, as I have indicated, such that the force of the indemnity in cl 7 of the deed was also spent.

28. Secondly, there was an inclusion of an indemnity for reasonable legal fees that, in my view, would not include an order for costs by the Court. What that phrase suggests is that if the Appellant had sustained any reasonable legal fees from his legal advisors that was a matter within the indemnity, but it did not extend to an order for costs.

29. In my view there was an arrangement entered into between the parties, partly orally and partly in writing, which supplanted the deed by performance by both sides inconsistent with the terms of the deed.

30. In my view, it was open to the magistrate to so find and the appellant has failed to establish that the only basis upon which the magistrate could have come to her decision was to adopt the provisions in the deed.

31. Secondly, I am of the view that the magistrate was entitled to make an order for costs and that the operation of cl 7 of the deed was spent.

32. The summons is dismissed. I order the Appellant to pay the Respondent's costs. I order that any exhibits and subpoenaed material be returned forthwith.

APPEARANCES: For the appellant Lewis: D Eardley, counsel. Downey's Lawyers Pty Ltd.
