48/10; [2010] VSCA 222

SUPREME COURT OF VICTORIA — COURT OF APPEAL

AJH LAWYERS PTY LTD v HAMO

Maxwell P and Nettle JA

30 August 2010

CIVIL PROCEEDINGS – ARBITRATION – LEGAL PRACTITIONERS – CLAIM FOR PROFESSIONAL COSTS – MAGISTRATES' COURT ARBITRATION – CLIENT RETAINED LEGAL PRACTITIONERS TO PROVIDE LEGAL SERVICES IN RELATION TO WINDING-UP PROCEEDINGS TAKEN IN RESPECT OF CLIENT'S COMPANY – ADVICE GIVEN THAT ASIC NOTICE WAS MISCONCEIVED AND UNLIKELY TO SUCCEED – COMPANY INSOLVENT – CLIENT INFORMED BY BARRISTER THAT WINDING-UP APPLICATION WOULD NOT BE SUCCESSFUL – CLIENT CONSENTED TO WINDING-UP ORDER BEING MADE AGAINST HIS COMPANY – SUBSEQUENT CLAIM BY LEGAL PRACTITIONERS FOR MONIES OWED FOR THEIR LEGAL SERVICES – FINDING BY MAGISTRATE THAT LEGAL PRACTITIONERS WERE NEGLIGENT AND THEIR SERVICES VALUELESS – CLAIM DISMISSED – WHETHER FINDINGS AND DECISION OPEN ON THE EVIDENCE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS103, 109; *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 2009, RR9.02, 21.03, 21.04.

H. retained AJH Lawyers ('AJH') on behalf of his company OTCO Global Pty Ltd in respect of four matters. The main one so far as money amount was concerned was a proceeding brought by The Melbourne Furnace Pty Ltd ('Furnace') against OTCO seeking to have OTCO wound up due to its insolvency. In correspondence between H. and AJH, AJH recommended that a letter be sent to the solicitors for Furnace to the effect that its winding-up application was ill-founded and an invitation to Furnace to withdraw its application. Alternatively, AJH recommended that H. appear on the return date of the application and seek orders that the application be dismissed with costs. Shortly prior to the hearing of the application, H.'s barrister advised him that it was most likely the winding-up application would be successful.

Subsequently, H. gave consent to have OTCO wound up and was later served by AJH with a claim for monies owed to them for the provision of legal services. At the hearing, the Magistrate found that the work done by AJH in respect of the Furnace matter was valueless and of no use to H. because of ATCO's insolvency. The Magistrate also found that AJH had a duty to tell H. about the holistic situation especially since ATCO in financial difficulties was being asked to provide many thousands of dollars to win a Pyrrhic victory. In relation to the other claims, the Magistrate said that any money which was taken from the Furnace matter trust was to be applied to the other matters and accordingly, the claim was dismissed. Upon appeal to the Supreme Court (Beach J) (MC 30/10; [2010] VSC 225) the appeal was dismissed. Upon appeal—

HELD: Appeal allowed. Order of Beach J set aside. Order of the Magistrate quashed and judgment on the plaintiff AJH's claim. *AJH Lawyers Pty Ltd v Hamo* MC 30/2010; [2010] VSC 225, overruled.

1. The question was whether AJH owed a duty to H. to provide him with 'holistic' long-term advice. There was a problem with the way in which the Magistrate characterised AJH's duty to H. as one to provide 'holistic' advice. It failed to define the circumstances of which the Magistrate considered H. needed to be warned. Additionally, it was not in the least clear what the Magistrate meant by a requirement to 'tell [H.] about the holistic situation'. On one view of the Magistrate's reasons, it meant a requirement to warn H. that the defence of the winding up application could only result in a short breathing space. On another interpretation, it meant that AJH was bound to warn H. in terms or to the effect that, because the company was insolvent, and because the defence of the winding up application would only result in a short breathing space, there was no purpose in defending the winding up application.

2. The Magistrate did not decide the matter on the basis that AJH were bound to warn that there may be no point in expending funds in defence of the application. The plain and ordinary meaning of what he said is that he decided on the basis either that AJH was bound to warn H. that the defence of the winding up application could only result in a short breathing space or, alternatively, that AJH was bound to warn H. that the company was insolvent and, because the defence of the winding up application could only result in a short breathing space, there was no purpose in defending the winding up application. Either way, the Magistrate was in error.

3. The question of whether a party owes another a duty of care is a question of law. It was open to the Magistrate to conclude that AJH was under a duty to warn H. that the defence of the winding up application might result in no more than a short respite. On one view of the Magistrate's reasons,

he so concluded. But there was no basis to find that AJH breached that duty. The terms of the email of advice of 12 March 2009 made plain that a successful defence of the application would leave it open to the creditor to serve a fresh statutory demand and a further application to wind up the company. The Magistrate was also in error, therefore, in holding that AJH breached that duty.

MAXWELL P:

1. In this matter I shall ask Nettle JA to deliver the first judgment.

NETTLE JA:

2. This is an appeal from a judgment given in the Common Law Division dismissing an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 (Vic).

The facts

3. The appellant's ('AJH') claim in the Magistrates' Court was for professional fees alleged to be due in respect of four separate matters, one of which was described as 'the Furnace matter'. The Magistrate held that AJH was entitled to recover the fees claimed in respect of three of the matters but dismissed AJH's claim in respect of the Furnace matter.

4. The Furnace matter concerned an application by Melbourne Furnace Pty Ltd to wind up Mr Hamo's company, OTCO Global Pty Ltd. Mr Hamo's initial instructions to AJH in the matter were in the form of an email of 12 March 2001 to Mr Alex Di Blasi of AJH, as follows:

> Dear Alex,
> Please find attached the settlement that we reached with Furnace.
> They have put on OTCO's registration at ASIC that they files to wipe up the company [sic].
> Please advise as I want to remove that ASAP.
> Regards,
> Bas Hamo
> Managing Director.

5. Mr Di Blasi responded with an email of advice later the same day, as follows:

> Dear Bas,
> Thank you for your email below. We note your comments in regard to the Melbourne Furnace giving notice to ASIC of its application to wind up your company. This is a requirement to be followed by applicants in accordance with the *Supreme Court (Corporations) Rules* 2003, although having regard to the particular circumstances of this case, the lodging of this Notice with ASIC and equally the winding up application are clearly misfounded.
>
> We have reviewed the application filed by the Melbourne Furnace and note that it is misconceived and is not likely to succeed.
>
> You will recall that the parties entered into terms of settlement (as attached) prior to the expiry of the 21-day period for compliance by your company with the statutory demand. It is specifically stated in the Recitals to the terms of settlement (at paragraph C therein) that "*The Creditor and the Company agree to settle the* ***debt****, proceedings and costs on the following repayment schedule*".
>
> It is our view that by The Melbourne Furnace entering into a Deed of settlement on or about 11 December 2008, on terms which were negotiated and agreed to by the parties, and by your conduct of making payment to the creditor of one or more of the instalment amounts in performance of the company's obligations under the Deed, it would seem that The Melbourne Furnace would be prevented from relying on its original statutory demand dated 17 November 2008 for the fact that the claim concerning the debt has been subsequently compromised. At the same time, as there have been instalment payments by OTCO Global towards the debt due, the total amount of the debts as claimed in the original statutory demand is clearly inaccurate. It follows therefore that The Melbourne Furnace would be required to serve a fresh statutory demand.
>
> This does leave it open to OTCO Global to challenge the winding up application currently before the Court. *Although, that is not to say that The Melbourne Furnace cannot issue a further winding up application in the Supreme Court at a later stage, if a fresh statutory demand was served to recover the debt amount due and OTCO Global failed to comply with the demand within a period of 21 days. However, it does give OTCO Global the benefit of more time within which it may raise funds to pay out these debts.*

> In the present circumstances and given your concerns in respect of the ASIC Notice lodged by The Melbourne Furnace, we would recommend that OTCO Global provide its instructions for our firm to send a letter to Leonard Legal, solicitors for The Melbourne Furnace to put the applicant on notice that its winding up application is ill founded on the basis of the terms of settlement entered into between the parties and inviting their client to consent to withdraw their application within a specified time period and for their client to immediately lodge a prescribed Notice of withdrawal of winding up proceeding with ASIC.
>
> The other alternative would be for our firm not to give notice to the applicant of the inherent deficiencies with the application and to proceed to prepare, file and serve affidavit material in response and for counsel to appear on the return date of the application on 8 April 2009 to seek orders that the application be dismissed with costs. *This option would arguably give you more time.*
>
> On balance however, if your main concern is to have the ASIC winding up notification withdrawn, it would seem more appropriate that the former course be adopted, even for the fact that any notice on the applicant as to the winding up application can be subsequently relied upon by OTCO Global on the question of costs if The Melbourne Furnace was to nonetheless proceed with its application. We look forward to receiving confirmation of your instructions in this regard.
>
> Kind regards
> Alex Di Blasi[1]

6. Mr Hamo replied by email on 13 March 2009, as follows:

> Dear Alex,
> I confirm not to give notice to the applicant of the inherent deficiencies with the application and to proceed to prepare, file and serve affidavit material in response and for counsel to appear on the return date of the application on 8 April 2009 to seek orders that the application be dismissed with costs. This option would arguably give you more time.
> Regards Bas Hamo

7. Mr Alan Sandbach of counsel gave evidence before the Magistrate that he was briefed to appear for the company when the matter came on for hearing on 8 April 2009 but that, on that occasion, the hearing was adjourned by consent to 20 May 2009. He deposed that he received the papers shortly before the hearing and took the view that success was by no means as assured as AJH had advised. He recalled that he spoke to Mr Hamo by telephone that day and advised him that in his opinion there was a significant risk that the defence would not succeed. He also said that, while he did not consider the defence to be hopeless, he advised Mr Hamo that, if he wanted to keep his company afloat, he needed in the near future or certainly down the track, to come to terms with the creditor. Mr Sandbach added that he also discussed with the solicitor for Melbourne Furnace the prospects of resurrecting an instalment arrangement and was aware that progressive negotiations had then occurred between 8 April 2009 and 20 May 2009 before the matter came back for further hearing on the latter date.

8. When the matter came back on for hearing on 20 May 2009, Melbourne Furnace sought to rely upon a late filed affidavit and the matter was further adjourned to 29 May 2009. Mr Di Blasi so reported to Mr Hamo by email of 20 May 2009, as follows:

> Dear Bas,
> We confirm the matters raised in your telephone attendance with Mr Alan Sandbatch of counsel, namely that OTCO Global has been extremely fortunate with the application hearing being adjourned by His Honour Associate Justice Efthim due to the plaintiff's careless insistence to seek to rely on the late served affidavit of Jasmine Halliday.
>
> As discussed, now that we have some "breathing space" until the adjourned date on 29 May 2009 and as we understand that you intend to preserve the company, we would recommend that you offer to verify the current financial situation of the company to the plaintiff (and, if necessary, to go on affidavit on this issue) in order to demonstrate that there is a secured creditor, ANZ, and there are no assets of substance and accordingly there is a real risk of no recovery to unsecured creditors if the company is wound up in insolvency. This would point out to the plaintiff that unless they agree to negotiate with the company on the terms proposed to them at Court, then the plaintiff and likewise the other creditors are not likely to see anything in monetary terms if the plaintiff was to proceed with its winding up application and ultimately be successful.
>
> We look forward to receiving your further instruction in this regard, as early as possible.

Further, in order to strengthen OTCO Global's position, we propose to write to the plaintiff's solicitors highlighting the indication of His Honour Associate Justice Efthim at this morning's hearing, that the central issue in this matter is one of "accord and satisfaction" and the question of other creditors of the company is irrelevant if solvency is not an issue.
In brief, the orders made by His Honour Associate Justice Efthim at this morning's hearing were, in substance, as follows:

1. The hearing of the plaintiff's application be adjourned to 29 May 2009.

2. The defendant file and serve any affidavit material it seek to rely upon by 26 May 2009.

3. Costs reserved.

Kind regards.

9. On 26 May 2009, Mr Di Blasi sent the following further email to Mr Hamo:

Dear Bas,
We attach an affidavit in reply to the affidavit of Jasmine Halliday, [to] be sworn by you.
The affidavit is due to be filed and served by 4.00 pm today in accordance with the orders made by Associate Justice Efthim at last week's hearing.

If you are satisfied that the contents of the attached affidavit is true and correct, please attend to swearing the affidavit in the presence of a qualified witness and return a sworn copy of the affidavit to our office by this afternoon.
We thank you in advance for your prompt attendance in this respect.

Kind regards,

10. Mr Hamo responded the next day by email that he had determined not to defend the application:

Dear Alex,
After careful consideration, I decided to let the company get winded up.

Regards,

11. On 18 June 2009 AJH wrote to Mr Hamo enclosing a Statement of Outstanding Accounts in respect of professional costs due to the firm in connection with the Furnace matter. It included a claim for $3,835.45 in respect of professional costs and $3,720.000 for counsel's fees. Mr Hamo did not pay the account or, so far as appears, otherwise respond to it.

12. On 15 July 2009, AJH filed a complaint in the Magistrates' Court seeking recovery of the outstanding fees. Mr Hamo responded with a Notice of Defence in which he alleged that nothing was due, because:

The plaintiff gave me as the former director of OTCO Global Pty Ltd a negligent advice on 12 March 2009.

They advised that the winding up application and ASIC notice were misfounded, misconceived and were not likely to succeed. See attachment.

The plaintiff's solicitor (Mr Di Blasi), gave me a ring about one hour before the hearing at the Supreme Court on 20 May with regard to the same above mentioned matter. He asked me to talk to his appointed barrister (Mr Alan Sandbatch). Mr Sandback [sic] advised me on the phone that it was most likely that the winding up application would be successful.

As a result, I gave the consent to wind up the company on 27 May.

If the plaintiff had given me the right advice on 12 March; I could have given my consent to wind up the company then rather than about a 2 and half months after.

All costs and disbursements in the plaintiff's claim were after the plaintiff's negligent advice on 12 March.

> All costs and disbursements in the plaintiff's claim were the result of the plaintiff's negligent advice. As a result, I am not liable to the costs and disbursements in the plaintiff's claim. The company and I could have taken different strategy, if we had been given the right advice on 12 March.

The Magistrate's reasoning

13. The Magistrate made no findings as to whether the advice of 12 March 2009 overstated the prospects of defeating the statutory demand or whether, if it did, the advice was negligent. Instead, after AJH had closed it case, his Honour suggested to Mr Hamo that it was part of his complaint that AJH 'was negligent in failing to tell you that there was no purpose in defending the application if the company was insolvent'. Then, having gained Mr Hamo's assent to that proposition, the Magistrate decided, on that basis, that 'the work [AJH] did [on the Furnace matter] was of no value whatsoever and there was a total failure of any consideration justifying a claim for fees'. The Magistrate thus expressed his reasoning as follows:

> The second defence is perhaps the one that he really was most concerned to agitate in this Court. It was the defence that this work was valueless. It was of no use to him at all or his company because at all material times his company was insolvent, because the plaintiff always knew this, because the defence being considered as worthy of taking in the Supreme Court to the winding up application could even if successful only have achieved a short breathing space because the plaintiff knew that this case was (inaudible) — for all those reasons he, Mr Hamo, said that he was encouraged to believe that there was some purpose in the Supreme court proceedings when there clearly was none at any time. The expression pyrrhic[2] victory comes to mind, although not used by any of the witnesses, but what he is suggesting is that even if he had won the Supreme Court proceedings all that would have created would be a pyrrhic victory and a very short lived one at that. To put it another way, and again this is not a reference to the witnesses but clearly it is one way of looking at it, there is no purpose in neurosurgery of a minute and careful procedure when the patient's heart has stopped beating. And that is what he said that everybody in this case knew but no one explained to him and that's where he says the plaintiff was negligent. The plaintiff he says is a lawyer, the particular solicitor handling the matter, a qualified practitioner and he had the duty not to provide him with some refined assessment of a discrete point of law but to tell him about the holistic situation especially since he was asking the company in financial difficulties to find many thousands of dollars to win a pyrrhic victory. I agree with him. I therefore dismiss the claim in relation to Furnace.

The appeal to the judge below

14. AJH appealed to the judge below on numerous grounds.[3] Perhaps surprisingly, they did not include that the Magistrate erred by deciding the case on a basis which was not pleaded or dealt with in evidence. But AJH did put at the centre of its contentions that the Magistrate was in error:

> 1. In holding, in the absence of evidence capable of supporting the conclusion, that the appellant owed a duty to Mr Hamo in the Furnace matter to provide him not only with an assessment of a confined issue of law, but also with 'holistic' long-term advice (Ground 4).
>
> 2. In holding that Mr Hamo was seeking 'holistic' long-term advice from the appellant in the Furnace matter, in circumstance where:
>
> (a) the uncontradicted evidence was that Mr Hamo's instructions in the matter were limited to opposing the winding up application;
>
> (b) there was no evidence that Mr Hamo was seeking 'holistic' long term advice; and
>
> (c) the appellant had no duty to advise Mr Hamo about the financial position or viability of the company (Ground 5).
>
> 3. In holding that AJH breached the duty found to exist to provide Mr Hamo with 'holistic' long-term advice when the uncontradicted evidence constituted by AJH's e-mail of 12 March 2009 was that AJH had given Mr Hamo both advice as to the prospects of succeeding in the Furnace matter and strategic advice in relation to opposing the winding up application (Ground 7).
>
> 4. In holding that the failure to give 'holistic' long term advice resulted in Mr Hamo taking at course different to that which he would otherwise have taken (Ground 6(d)).

The judgment below

15. The judge below rejected AJH's contentions. His Honour held that:

> 1. '[T]here was no error (much less an error of law) in determining that AJH had a duty to provide relevant (or holistic) advice.'

> 2. Although 'AJH relied upon the evidence give by Mr Di Blasi [of AJH] below that the scope of his instruction was that it was "in the client's interests to preserve the company at all costs"' and the Magistrate 'made no reference to the evidence in his judgment' it was 'possible that [the Magistrate] rejected this evidence on the basis that there was nothing in the documentary material which suggested that it was in Mr Hamo's interest to preserve OTCO at all costs'; alternatively, 'even if that was the scope of AJH's instructions, it may have been subject to the giving of proper advice as to the lack of utility in defending a winding up application in respect of an insolvent company'; and there was 'no appeal in this proceeding concerning any alleged inadequacy of [the Magistrate's] reasons'.
>
> 3. It was open to the Magistrate to conclude that AJH breached the duty 'to provide relevant (or holistic) advice' by failing to warn Mr Hamo that 'even if [the defence of the winding up application were] successful' it would 'only have achieved a short breathing space'.
>
> 4. It was open to the Magistrate 'to infer from the advice of 12 March 2009 that as a matter of probability Mr Hamo was encouraged to believe there was utility in defending [the winding up application]. Further, it was open to infer that Mr Hamo (acting rationally) would not expend thousands of dollars defending a proceeding if the same would only delay matters for a short period … it was open to [the Magistrate] to infer from ordinary human behaviour that Mr Hamo would not have expended thousands of dollars in defence of an application that was futile or might result in a pyrrhic victory'.

Grounds of appeal to this court

16. AJH seeks leave to appeal to this court on several grounds, including (as proposed ground (g)) that:

> The learned judge ought to have held on the grounds set out in the Appellant's Notice of Appeal dated 30 November 2009 that the Appeal should be allowed.

17. One of the grounds set out in the Notice of Appeal of 30 November 2009 was that the Magistrate erred in holding that the appellant owed a duty to the respondent in the Furnace matter to provide him not only with an assessment of a confined issue of law but also with 'holistic' long-term advice, in the absence of any evidence capable of supporting that conclusion. The first contention set out above was based on that ground.

18. For reasons which will become apparent, it is convenient to deal with that ground first. The question is whether the judge erred in law in upholding the Magistrate's decision that AJH owed a duty to Mr Hamo to provide him with 'holistic' long-term advice.

Duty to provide 'holistic' advice

19. The Magistrate's use of the term 'holistic' was unusual and unfortunate. According to the *Oxford English Dictionary*, 'holistic' means 'of or pertaining to holism' or 'characterized by the tendency to perceive or produce wholes', and the primary denotation of 'holism' is 'the tendency in nature to produce wholes (ie bodies or organisms) from the ordered grouping of unit structures'. In medicine, 'holistic medicine' connotes 'a form of medical treatment that attempts to deal with the whole person and not merely with his or her physical condition'. But, so far as appears from the dictionary or authority, there is no accepted or even generally understood conception of 'holistic legal advice'.

20. Possibly, the Magistrate meant by 'holistic', advice which pertained to the whole or all of the possible consequences of defending the application to wind up the company, as opposed to just the possibility of succeeding in the immediate defence of the application. Semasiologically, that would more or less accord to the accepted denotation of 'holistic'. But, logically, it is not very likely that the Magistrate intended to go so far. The infinite extent of possible consequences of defending the winding up application dictated that AJH could not reasonably be expected to advise Mr Hamo on them all. More probably, the Magistrate had in mind a duty to advise on what he considered to be the obvious possibilities of defending the application. That would be consistent with his Honour's allusion to the pointlessness of a surgeon advising on a neurological procedure for a patient whose heart has stopped. But that, too, creates difficulties at several levels.

21. Obviousness depends on circumstances. In terms of the Magistrate's medical allegory, the futility of brain surgery might be obvious in the case of a patient whose heart has stopped, but not necessarily if there is a realistic chance of restarting the patient's heart. In this case, the Magistrate was oblivious to the circumstances. He did not give any attention to the opportunity to gain time in which to raise additional funds.

22. In upholding the Magistrate's conclusion that AJH was under a duty to give 'holistic' advice in relation to the winding up application, the judge said that:

> A solicitor's duty is to act with reasonable care and skill in the discharge of his or her retainer to his or her client. What is required for the performance of this duty in the particular case depends upon the circumstances, including the scope of the retainer and the nature of the task entrusted to and undertaken by the solicitor.[4]
> ...
> There can be no doubt that unless a solicitor's retainer is specifically limited, he or she should exercise reasonable care and skill in giving necessary advice in and around the performance of the retainer. *Such advice would include (in appropriate cases) advice that defending a proceeding may not be worthwhile in circumstances known (or that ought to be known) to the solicitor.* Such advice might be called 'holistic'. So far as the grounds of appeal complain about the imposition of a duty to provide 'holistic' advice is concerned, these grounds must fail for this reason.

23. With respect, however, what his Honour there said was only partially correct. As Deane J said in *Hawkins v Clayton*,[5] depending upon the circumstances, a solicitor may come under a duty to do more than simply perform the task defined by his instructions. A duty to warn may arise where circumstances give rise to a real and foreseeable risk of economic loss by the client or, in particular circumstances, even a person who was not a client but who may be adversely affected.[6] But there is a problem here with the way in which the Magistrate characterised AJH's duty to Mr Hamo as one to provide 'holistic' advice. It failed to define the circumstances of which the Magistrate considered Mr Hamo needed to be warned. Additionally, it was not in the least clear what the Magistrate meant by a requirement to 'tell [Mr Hamo] about the holistic situation'. On one view of the Magistrate's reasons, it meant a requirement to warn Mr Hamo that the defence of the winding up application could only result in a short breathing space. On another interpretation, it meant that AJH was bound to warn Mr Hamo in terms or to the effect that, because the company was insolvent, and because the defence of the winding up application would only result in a short breathing space, there was no purpose in defending the winding up application.

24. In seeking to resolve the conundrum thus created, the judge said that:

> In my view, a prudent solicitor in the position of AJH when retained to resist a winding up application would have advised the client that unless there were particular reasons for defending the application, if the company was insolvent, there may be no point in expending funds in defence of the application.
> ...
> Indeed, in argument, counsel for AJH asserted that the email of 12 March 2009 was holistic advice. Ultimately, it seems to me, that the real complaint made by AJH is not the imposition of a duty in perfectly conventional terms – but rather the question of whether there was any evidence of breach or a causal link between a failure to give advice and a course taken by Mr Hamo.
>
> It follows from what I have said, that there was no error (much less an error of law) in determining that AJH had a duty to provide relevant (or holistic) advice.[7]

25. But with respect that does not overcome the problem either. The Magistrate did not decide the matter on the basis that AJH were bound to warn that there may be no point in expending funds in defence of the application. The plain and ordinary meaning of what he said is that he decided on the basis either that AJH was bound to warn Mr Hamo that the defence of the winding up application could only result in a short breathing space or, alternatively, that AJH was bound to warn Mr Hamo that the company was insolvent and, because the defence of the winding up application could only result in a short breathing space, there was no purpose in defending the winding up application. Either way, the Magistrate was in error.

26. If the Magistrate decided the case on the basis that AJH was bound to warn Mr Hamo that the defence of the winding up application could only result in a short breathing space, he was plainly wrong. Logically, the least encomiastic thing that could properly be said about defending the winding up application was that it may achieve no more than a short breathing space. And as has been seen, AJH in effect so advised Mr Hamo by the email of advice of 12 March 2009. If, however, the Magistrate decided the case on the basis that AJH was bound to warn Mr Hamo that, because the company was insolvent, there was no purpose in defending the winding up application, the Magistrate was equally wrong. For even if AJH knew or ought to have known that the company was insolvent,[8] it did not follow that a defence of the winding up application

was pointless. To the contrary, as AJH said in the email of advice of 12 March 2009, it gave the company 'the benefit of more time within which it may raise funds to pay out these debts'.

27. Moreover, even if the Magistrate had decided the case on the basis that AJH was under a duty to warn that there may be no point in expending funds in defence of the application, the Magistrate would have been wrong. For the existence of such a duty assumes an obligation to advise on the commercial utility of defending the application and, in fact, there was no basis to conclude that AJH owed an obligation of that kind. As was said in *Heydon v NRMA*,[9] the content of a duty to warn in a case of this kind is governed by the relationship of proximity giving rise to the duty, and in general the content of the duty is governed by the assumption of responsibility and reliance. Here there was no evidence that AJH assumed a responsibility to predict the commercial utility of obtaining more time in which to raise funds to meet the company's debts. Nor was there any evidence that Mr Hamo or any other officer of the company relied upon AJH's opinion as involving any prediction of that kind, still less did not understand that the company's financial position was fraught with the obvious consequences of failing to raise more funds within that time. Mr Hamo declined to give evidence, despite the Magistrate expressly warning him of the consequences of adopting that course, and such evidence as there was suggested that Mr Hamo needed no such advice. The documentary evidence before the Magistrate showed that, after the statutory notice was first presented, Mr Hamo himself negotiated terms of settlement which gave the company time to pay.

Breach of duty to advise

28. The Magistrate's analysis of breach has already been referred to. The judge rejected the appellant's criticisms of it, as follows:

> It is not disputed that AJH did not give Mr Hamo advice that there was (or may be) no point in defending the winding up application in relation to OTCO if OTCO was insolvent. I have already held that it was open to his Honour to conclude that in the exercise of reasonable care and skill, a solicitor retained in relation to the defence of a winding up application should advise that unless there were particular reasons, it may be pointless to expend moneys defending a winding up application if the company is insolvent. As this advice was not given, it follows from what I have said above that there was no error (much less an error of law) in his Honour's conclusions in respect of this matter ...
>
> In my view, it was open for his Honour to infer from the advice of 12 March 2009 that as a matter of probability Mr Hamo was encouraged to believe there was utility in defending the Supreme Court proceedings. Further, it was open to infer that Mr Hamo (acting rationally) would not expend thousands of dollars defending a proceeding if the same would only delay matters for a short period of time. The question of causation can sometimes be resolved not by direct evidence as to what part advice played in the decision-making process, but by a court determining what effect must be taken to have resulted. Indeed, this course may sometimes be preferable to one which rests solely on evidence later given on the point.[10]

29. With respect, however, that does not withstand analysis either. At the risk of repetition, if the Magistrate decided the case on the basis that AJH was under a duty to warn that there was no point in defending the winding up application, the Magistrate was wrong. As was explained in the email of advice of 12 March 2009, the point was that, even though the creditor could start again with a fresh statutory demand, the defence of the existing demand would give more time in which to raise funds to meet the company's debts. Alternatively, if the Magistrate decided the case on the basis that AJH was under a duty to warn that there may not be a point in defending the winding up application (and that is not the way in which the Magistrate expressed it), the Magistrate was in error, because there was no evidence that AJH assumed a responsibility to predict the commercial utility of obtaining more time in which to raise funds to meet the company's debts and no evidence that Mr Hamo or any other officer of the company relied upon AJH's opinion as involving any prediction of that kind.

30. Furthermore, while it may have been open to infer that Mr Hamo was encouraged by the email of advice to outlay costs in defending the winding up application (presumably, because it offered a means of gaining more time to raise funds to pay off the debts of the company), it certainly was not open to infer that Mr Hamo was unaware that the defence might only delay matters for a short period of time, or, therefore, that his decision to proceed with the defence of the application was made in ignorance of that possibility. The email of advice of 12 March 2009 expressly stated that, although it was 'open to OTCO Global to challenge the winding up application currently

before the Court':

> ... that is not to say that The Melbourne Furnace cannot issue a further winding up application in the Supreme Court at a later stage, if a fresh statutory demand was served to recover the debt amount due and OTCO Global failed to comply with the demand within a period of 21 days. However, it does give OTCO Global the benefit of more time within which it may raise funds to pay out these debts.

31. Given the clear terms of the advice of 12 March 2009, particularly the emphasised passages, there is no reason to doubt that Mr Hamo would have understood that there would be nothing to stop the creditor issuing a further statutory demand and a further winding up application within the 21 day statutory period thereafter. There was no reason to doubt that Mr Hamo would have understood that he had two options: either point out to the creditor that the demand was defective, and seek to get the creditor to withdraw the application by consent or, alternatively, defend the application in the hope of gaining more time to find funds to pay the company's debts. Indeed, his own email of 13 March 2009 puts the matter beyond doubt. And there was no reason to doubt that Mr Hamo would have understood that, if his main concern were to have the notice of application withdrawn, AJH was of the view that the better course was to approach the creditor's solicitors rather than defend.

32. The fact that Mr Hamo chose not to give evidence, after being warned by the Magistrate of the consequences of adopting that course, implies that anything which he might have said about his understanding of the email of advice would not have assisted his case. In view of his instructions to defend the application, it is to be inferred that his main concern was not to have the notice of application withdrawn but rather to gain as much time as possible to raise funds to pay off the debt.

The effect of the Magistrate's errors

33. The question of whether a party owes another a duty of care is a question of law.[11] If follows from what has been said that the Magistrate was wrong in law in holding that AJH was under a duty to warn that there was no point in defending the winding up application or that there may be no point in defending the application. There was a point, which was to gain time to raise funds to satisfy the company's debts, and that was explained in AJH's email of advice of 12 March 2009.

34. The commercial utility of adopting that course was not a matter on which AJH was shown to have assumed a responsibility to advise or in respect of which the company was shown to be reliant on AJH for advice. There was, therefore, no basis to conclude that AJH was under a duty to advise on the commercial utility of adopting that course. Consequently, if the Magistrate decided the case on the basis that AJH was under a duty to advise on the commercial utility of defending, the Magistrate was in error to do so.

35. It was open to the Magistrate to conclude that AJH was under a duty to warn Mr Hamo that the defence of the winding up application might result in no more than a short respite. On one view of the Magistrate's reasons, he so concluded. But there was no basis to find that AJH breached that duty. The terms of the email of advice of 12 March 2009 made plain that a successful defence of the application would leave it open to the creditor to serve a fresh statutory demand and a further application to wind up the company. The Magistrate was also in error, therefore, in holding that AJH breached that duty.

36. The fact that a decision is contrary to the weight of the evidence does not raise a question of law.[12] It is an error of law, however, to make a finding of fact for which there is no probative evidence.[13] The errors made by the Magistrate in concluding that AJH breached its duty to Mr Hamo (as opposed to the conclusion that AJH owed a duty to Mr Hamo) were essentially errors of fact. But the Magistrate's determination that AJH breached its duty to Mr Hamo was based on the erroneous legal supposition that AJH owed a duty of care to Mr Hamo to warn that there was no point in defending the winding up proceeding or no utility in defending the proceeding. The Magistrate's conclusion thus involved an error of law.[14]

Other grounds of appeal

37. Among other grounds of appeal, AJH contended that the Magistrate and thus the judge erred in holding that AJH knew that the company was insolvent; that the case was conducted on

the basis that the company was insolvent; and that it was not disputed that AJH failed to advise Mr Hamo that there was not or might not be any point in defending the application.

38. Those issues are probably also questions of fact. For present purposes, however, it is unnecessary to decide that point. It is sufficient to determine the outcome of this application that the Magistrate erred in law in holding that AJH owed a duty to Mr Hamo to warn that there was no point (or may be no point) in defending the winding up application and, therefore, erred in law in finding that AJH breached that duty.

Further hearing not appropriate

39. Ordinarily, in a case of this kind it would be appropriate to order that the matter be remitted to the Magistrates' Court for further hearing according to law. In this case, however, Mr Hamo did not give evidence below and, as the evidence stands, there is no basis for upholding Mr Hamo's defence that he was not advised as to the commercial utility of defending the winding up application.

40. There was of course the further aspect of Mr Hamo's defence that AJH's advice of 12 March 2009 was negligent, not only because it did not warn him that there was no point in defending the winding up application but also because it presented too optimistic a view of the chances of the defence succeeding. But apart from Mr Sandbach's opinion, there was no evidence that the advice overstated the prospects of success, still less that the advice was negligently given and, as matters stand, it is not open to conclude that it was negligently given. Presumably, that is why the Magistrate did not deal with the point.

41. Possibly, Mr Hamo would be able to improve his position on one or other aspect of his defence if there were a further hearing at which he was permitted to adduce additional evidence. But it would not be fair on AJH to allow that to be done. The matter was fully contested before the Magistrate. Mr Hamo was warned of the consequences of not giving evidence, and he took his chances. In those circumstances, it would be an injustice to let him try again.[15]

Conclusion and orders

42. The appeal should, therefore, be allowed. The order of the judge below should be set aside. In lieu thereof, it should be ordered that the appeal to the Supreme Court be allowed; the order of the Magistrate be quashed; and, in lieu thereof, there be judgment for the appellant in the amount of its claim.

MAXWELL P:

43. I agree and would allow the appeal and make the orders his Honour has identified for the reasons which his Honour has given.

44. It follows that the orders of the Court are these.

1. The appeal is allowed.

2. The order of Beach J made 31 May 2010 is set aside and in substitution for that order, it is ordered that:

1. The appeal be allowed.

2. The order of the Magistrate made 29 October 2009 be quashed and in substitution for the magistrate's order, there be judgment for the plaintiff in the sum of $7,555.45, together with interest pursuant to statute to be fixed by the Court, and costs.

3. The defendant pay the plaintiff's costs of the proceeding.

4. The respondent pay the appellant's costs of this appeal.

45. Mr Hamo, under what is called the *Appeal Costs Act* 1998 (Vic), where you have had to come to this Court because, as it turns out, of an error of law by Beach J, you are entitled to claim against the public purse for the costs you now have to pay in respect of this appeal. You understand that is because, if the judge below had reached what we think was the right answer, you would not be here and you would not be paying the costs of the appeal. So we grant you a

certificate under the *Appeal Costs Act* 1998 (Vic) in respect both of the appeal from the Magistrates Court to the judge and in respect of the appeal from the judge to this Court.

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[1] Emphasis added.
[2] The transcript of the Magistrate's reasons reproduces the word as 'empiric' but, as the judge discerned, the Magistrate must have meant 'Pyrrhic'.
[3] Set out in a Notice of Appeal dated 30 November 2009.
[4] *Carew Counsel Pty Ltd v French* [2002] VSCA 1; (2002) 4 VR 172, [29]; (2002) 190 ALR 690; (2002) 166 FLR 460 (Winneke P).
[5] [1988] HCA 15; (1988) 164 CLR 539, 583-5.
[6] See also *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, 650; [1990] ANZ Conv R 230; *Heydon v NRMA Ltd* [2000] NSWCA 374; (2000) 51 NSWLR 1, 52 [143]–[148]; 19 ACLC 1; 36 ACSR 462; [2001] Aust Torts Reports 66,275.
[7] Citations omitted.
[8] In fact, the evidence established no more than that, at the relevant time, AJH knew that the company was having some difficulties in paying its debts.
[9] [2000] NSWCA 374; (2000) 51 NSWLR 1, 81 [237]; 19 ACLC 1; 36 ACSR 462; [2001] Aust Torts Reports 66,275 (Malcolm AJA).
[10] Citations omitted.
[11] *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614, 620; 56 ALR 417; (1985) 59 ALJR 156; [1984] Aust Torts Reports 80-312 (Gibbs CJ); *Shire of Sutherland v Heyman* [1985] HCA 41; (1985) 157 CLR 424, 498; (1985) 60 ALR 1; (1985) 59 ALJR 564; (1985) 56 LGRA 120; [1985] Aust Torts Reports 80-322; 10 ATPR 41-238 (Deane J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254, 294 [118]; (2000) 176 ALR 411; (2000) 75 ALJR 164; [2001] Aust Torts Reports 81-585; [2001] ANZ Conv R 92; (2000) 21 Leg Rep 8 (Hayne J).
[12] *Motor Accident Board v Coutts* [1984] VicRp 69; [1984] VR 790, 796; (1984) 1 MVR 407; *Banger v Drift Fruit Juices Pty Ltd* [1974] VicRp 82; [1974] VR 677; (1974) 30 LGRA 433; *Ericsson Pty Ltd v Popovski* [2000] VSCA 52; (2000) 1 VR 260, 265 [13]; *Azzopardi v Tasman UEB Industries Ltd* [1985] 4 NSWLR 139.
[13] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 355–157; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1 (Mason CJ).
[14] *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1, 9; (1984) 57 ALR 331; (1984) 13 A Crim R 250; (1984) 2 MVR 161; (1984) 59 ALJR 124; [1984] Aust Torts Reports 80-315.
[15] *Nemo debet bis vexari pro una et eadem causa.*

APPEARANCES: For the appellant AJH Lawyers Pty Ltd: Mr IW Upjohn, counsel. AJH Lawyers. The respondent Hamo appeared in person.
