30/10; [2010] VSC 225

SUPREME COURT OF VICTORIA

AJH LAWYERS PTY LTD v HAMO

Beach J

25, 31 May 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—

HELD: Appeal dismissed.

1. 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. 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. On the evidence, it was open to the Magistrate to find that OTCO was insolvent and that AJH knew that it was insolvent.

2. 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. Ultimately, the real complaint made by AJH is not the imposition of a duty in perfectly conventional terms but rather the questions of whether there was any evidence of breach or a causal link between a failure to give advice and a course taken by H. Accordingly, the Magistrate was not in error (much less an error of law) in determining that AJH had a duty to provide relevant (or holistic) advice.

3. Whilst it was open to the Magistrate 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 monies defending a winding up application if the company is insolvent. As this advice was not given, it follows that there was no error (much less an error of law) in the Magistrate's conclusions in respect of this matter.

4. It was open for the Magistrate to infer from the advice given by AJH that as a matter of probability H. was encouraged to believe there was utility in defending the Supreme Court proceedings to wind-up OTCO. Further, it was open to infer that H. (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.

5. It was open to the Magistrate to infer from ordinary human behaviour that H. would not have expended thousands of dollars in defence of an application that was futile or might result in a Pyrrhic victory. Whilst it was not a conclusion which the Magistrate was necessarily compelled to make, it could not be said that it was not open in the circumstances of this case.

6. In relation to the dismissal of the other parts of the claim, in the circumstances it was open and correct to infer that the Magistrate concluded that the other claims were proved subject to monies paid wrongly being attributed to a file in respect of which the work done was valueless. They are conclusions in respect of factual matters which were open. It follows that the complaint that the Magistrate failed to give judgment in respect of the other matters was not well-founded.

BEACH J:

Introduction

1. AJH Lawyers Pty Ltd, the appellant, is an incorporated legal practice. Mr Basim Hamo, the respondent, is one of its former clients.

2. On 15 July 2009, AJH sued Mr Hamo in the Magistrates' Court to recover $7,555.45, which it alleged Mr Hamo owed it in relation to legal services provided by it. The matter was heard by Braun M on 28 and 29 October 2009.

3. On 29 October 2009, Braun M dismissed AJH's claim. In dismissing the proceeding, his Honour upheld a submission by Mr Hamo that in acting for him in one of the matters in which it was retained, AJH was negligent.

4. AJH now appeals to this Court against the Magistrate's decision. It brings the appeal under s109 of the *Magistrates' Court Act* 1989, which provides for an appeal on a question of law only. For the reasons given below, AJH's appeal will be dismissed.

The proceeding below

5. Mr Hamo retained AJH to act on behalf of his company, OTCO Global Pty Ltd. There were four matters in respect of which AJH was retained. The matters were described below as:

(a) "the printers press matter";
(b) "the haystack matter";
(c) "the furnace matter"; and
(d) "the Campbell matter".

6. The furnace matter was a proceeding in this Court brought by The Melbourne Furnace Pty Ltd against OTCO, seeking to have OTCO wound up. It is not necessary to describe the other three proceedings.

7. At the commencement of the trial, AJH was given leave to amend its claim to an amount of $7,905.45. The amounts claimed in respect of each proceeding were as follows:

(a) The printers press matter – $ 731.80.
(b) The haystack matter – $ 44.00.
(c) The furnace matter – $6,821.65.
(d) The Campbell matter – $ 308.00.

8. Mr Hamo's defence was set out in a statement of defence as follows:

"1-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.
2-The plaintiff's solicitor (Mr Alex 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 Sandbach). Mr Sandback (sic) advised me on the phone that it was most likely that the winding up application would be successful.
3-As a result, I gave the consent to wind up the company on 27 May.
4-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 (sic) months after.
5-All costs and disbursements in the plaintiff's claim were after the plaintiff's negligent advice on 12 March.
6-All costs and disbursements in the plaintiff's claim were a result of the plaintiff's negligent advice.
7-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."

9. The trial of the proceeding below was conducted as an arbitration in accordance with Order 21 of the *Magistrates' Court Civil Procedure Rules* 2009. Whilst rule 21.03 provides that the notice of defence in an arbitration proceeding must state with particularity the date, place, circumstances, facts or matters relied on in defence of the claim, rule 21.04 (headed "No pleadings, discovery, interrogatories etc") provides that no party in an arbitration proceeding may serve a request for further and better particulars of claim, counterclaim or defence. Further, in its terms, the requirements of rule 21.03 are less stringent than those of rule 9.02, which deals with the contents of defences in proceedings not governed by Order 21.

10. Section 103 of the *Magistrates' Court Act* contains provisions governing the conduct of an arbitration. Specifically, s103(2) relevantly provides:

"(2) In conducting an arbitration, the court—
(a) is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit; and

(b) is bound by the rules of natural justice; and

(c) is not required to conduct any proceedings in a formal manner; and

(d) may exercise any powers that the court may exercise in hearing and determining a complaint."

As will become clear from what follows, the arbitration conducted in this case was conducted in accordance with s103(2). The transcript reveals that the Court below was concerned to conduct the matter without undue formality and with an eye to resolving the real issues in dispute between the parties.

11. At trial, Mr Hamo was asked to state his defences. In summary, Mr Hamo contended:

(a) first, he never appointed AJH as his personal lawyers, and any amounts owing were the responsibility of OTCO;

(b) secondly, "all these fees they are claiming in the claim are the result of their negligent advice", a contention which the Magistrate interpreted as "that the work they did was of no value whatsoever and there was a total failure of any consideration justifying any claim for fees";[1] and

(c) thirdly, in any event, AJH had received payment in full in respect of its bills.

12. Before evidence was called, counsel for AJH[2] raised with his Honour the fact that the defence claiming OTCO was responsible for any outstanding amount had not been pleaded. His Honour indicated that he did not propose to shut Mr Hamo out of any defence and asked counsel for AJH whether he was taken by surprise. The question of an adjournment was foreshadowed by his Honour, but counsel for AJH said, "No, we want to press on".[3] Indeed, counsel for AJH subsequently said, "We don't want the matter adjourned, we want to press on because it seems like we have a strong case".[4] An examination of the whole of the transcript shows that the proceeding below was conducted on the basis that Mr Hamo (who was unrepresented) would not be held to the printed words of his defence, provided that any departure did not take AJH by surprise.[5]

13. AJH called two witnesses below: first, Mr Alex Di Blasi, the solicitor with the carriage of

the four OTCO matters; and secondly, Mr Alan Sandbach, a barrister who was briefed by AJH in the furnace matter. Mr Hamo cross-examined AJH's two witnesses. Various documents passing between the parties were tendered by AJH and Mr Hamo. At the conclusion of AJH's case, Mr Hamo was offered the opportunity to give evidence and call witnesses. He chose not to do so.

14. Submissions were then made by counsel for AJH. Those submissions were essentially to the effect that AJH had proved its case and an entitlement to judgment in the sum of $7,905.45. During the course of AJH's submissions, his Honour asked what gave AJH the right to assign various monies paid by Mr Hamo to particular matters (why one of the four matters as compared to another of the four matters?). Further, his Honour asked counsel for AJH whether there were any legal principles which supported the proposition that monies paid by Mr Hamo could be assigned to whichever file AJH wished to assign them. Counsel for AJH said there was no legal principle involved and that the question was a matter of fact for the Court.[6]

15. Following the submissions of counsel for AJH, Mr Hamo then addressed his Honour. During the course of these submissions, Mr Hamo referred to the failure of AJH to advise him that even if he successfully resisted the winding up order in the furnace matter, there was no purpose in spending money to achieve this outcome if OTCO was actually insolvent and would eventually be wound up in any event. Mr Hamo's complaint was that AJH knew or ought to have known that OTCO was insolvent and that there was no point in spending money resisting the application to have it wound up.

16. At the completion of Mr Hamo's submissions, counsel for AJH was given leave to make further submissions in reply. At no stage in these reply submissions did counsel for AJH contest that OTCO was insolvent. I note this matter now because one of the grounds of appeal (to which I will come below) is that there was no evidence that OTCO was insolvent at all relevant times.[7] It is, at least, curious that if the issue of the solvency of OTCO was not in issue at the time of final addresses, no reference was made to this by counsel for AJH in his reply submissions. In the circumstances, it seems to me more likely from reading the transcript that the case was conducted on the basis that OTCO was at all relevant times insolvent.

The decision below

17. The Magistrate rejected Mr Hamo's defence that it was OTCO (and not him) who was responsible for the payment of any outstanding fees. However, his Honour accepted the negligence defence. His Honour's reasons in relation to the negligence defence were 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[8] 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 an 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."

18. So far as the other claims (the printers press matter, the haystack matter and the Campbell matter) were concerned, his Honour said:

> "In relation to the other claims I find them all proved despite the defence of payment, save and except this, that in so far as any money was taken from trust and applied against the Furnace matter it must be brought into account on the basis that I find that the work was valueless. That might mean an adjustment which effectively results in a sum of money payable to the plaintiff, to the defendant.

I must say I haven't done the arithmetic but there is no cross claim and there is no counterclaim before the court and I am not about to create one even though the defendant is personally represented. I did in fact warn the defendant at the outset of these proceedings that he had no cross claim or counterclaim. I did ask him if on the outset of these proceedings if he had taken legal advice. I did tell him at the outset of these proceedings that they are complicated and he did express to me the confidence of being able to represent himself. So, Mr Lombardi you may care to assist me in determining whether there was any sum allowed, I'm sorry, credited against the Furnace matter."

19. This was followed by the following exchange between his Honour and counsel for AJH:

"Counsel: Yes that would show up in the trust ledger that's been exhibited.
His Honour: Which one is it?
Counsel: That would be - -
His Honour: It looks like it might be $2000. I'm sorry, $3925.
Counsel: I don't have that exhibit.
His Honour: 11th May, $3,925.
Counsel: That would be it then.
His Honour: So if you take $3925 and we apply it to the balance or the account generally, what if any monies are owed to you?
Counsel: We would be owing money.
His Honour: Therefore your claim is dismissed entirely.
Counsel: But, as you have said there is no counterclaim or set off. So - - -
His Honour: That's where it stops.
Counsel: So there is no order for costs? That's it? If it pleases your Honour.
His Honour[9]: Unless Mr Hamo wants to persuade me he has a right to costs. He has won the case, partially, and if he wants to try to persuade me that he has a right to costs I will hear him. But I will tell him now that costs awarded in this court are of two sorts: legal costs, he doesn't seem to have any - -
Counsel: No, he has no lawyers.
His Honour: And witnesses expenses.
Counsel: And he has none of them.
His Honour: I don't know, I will hear it from him."

The grounds of appeal

20. In its notice of appeal, the appellant set out its grounds of appeal as follows:

"1. Failing to hold that the Appellant was entitled to payment of the unpaid professional costs and disbursements in respect of the Furnace matter in which the Appellant was duly retained by the Respondent and the company.
2. Finding, in the absence of any evidence, that successful opposition by the company to the Supreme Court winding up application in the Furnace matter would have only created a 'pyrrhic victory'.
3. Allowing three of the four separate claims by the Appellant for payment of unpaid professional costs and disbursements in other matters defended by the company, but failing to give judgement for those amounts because of his finding in relation to the fourth matter, the Furnace matter, that successful opposition to the Supreme Court winding up application in the Furnace matter would have only created a 'pyrrhic victory'.
4. Holding, in the absence of any evidence capable of supporting that conclusion, 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.
5. Holding that the Respondent was seeking 'holistic' long-term advice from the Appellant in the Furnace matter in circumstances where:
(a) the uncontradicted evidence was that the Respondent's instructions in the matter were limited to opposing the Supreme Court winding up application; and
(b) there was no evidence that the Respondent was seeking the advice identified by the learned Magistrate; and
(c) the Appellant had no duty to advise the Respondent about the financial position or viability of the company.
6. Reasoning that the work done by the Appellant in opposing the Supreme Court winding up application in the Furnace matter was, in essence, the equivalent of a neurosurgeon performing a minute and delicate surgery to a patient when the patient's heart has stopped beating, despite there being no evidence about:
(a) the financial position of the company at the relevant time; and
(b) the ability of the Respondent and/or the company to obtain funds from other sources for the purpose of preserving the company; and
(c) the company's ability to enter into further instalment arrangements with the creditor for payment of the debt, the subject of the Supreme Court winding up application in the Furnace matter; and

(d) the steps which the Respondent and/or the company would have taken differently if advice were given to him to accede to the Supreme Court winding up application.

7. Holding, implicitly, that the Appellant had breached the duty found to exist by the learned Magistrate to the Respondent to provide the Respondent with 'holistic' long-term advice when the uncontradicted evidence constituted by the Appellant's e-mail of 12 March 2009 was that the Appellant had given the Respondent both advice as to the prospects of succeeding in the Furnace matter in the Supreme Court and strategic advice in relation to opposing that application.

8. Finding, in the absence of any evidence, that the company was insolvent at all relevant times.

9. Finding, in the absence of any evidence, that insolvency of the company at all relevant times rendered the work done by the Appellant in the Furnace matter as worthless to the Respondent.

10. Finding, in the absence of any evidence, that at all relevant times the Appellant knew that the company was insolvent and hence knew or should have known that the work done by the Appellant in the Furnace matter was worthless to the Respondent.

11. Determining the Complaint on the basis of an unpleaded defence, that is, implied breach of the supposed duty of Appellant to provide the Respondent with 'holistic' long-term advice.

12. Failing to determine the issue raised by the Respondent in his Defence, namely, whether the Appellant was negligent in the advice provided to the Respondent by e-mail on 12 March 2009.

13. Failing, on the uncontradicted evidence of the Appellant's witnesses, Mr A. Di Blasi and Mr A.W. Sandbach, to find that the Appellant was not negligent in the advice provided to the Respondent by e-mail on 12 March 2009, as alleged by the Respondent in his Defence.

14. Failing to hold on the uncontradicted evidence of Mr Sandbach that Mr Sandbach did not advise the Respondent that the Supreme Court winding up application would be successful, as alleged by the Respondent."

21. However, before me, principal attention was given by AJH to its contention that there was no evidence upon which his Honour could have found AJH negligent; and no evidence upon which his Honour could have found that any different advice given by AJH to Mr Hamo would have resulted in Mr Hamo taking a different course from that which he ultimately took. Before proceeding further, it is necessary to set out the advice Mr Hamo received from AJH.

The advice

22. Mr Hamo received advice from AJH in an email sent on 12 March 2009. This advice is the advice that Mr Hamo alleged was negligent in his statement of defence.

23. The email of 12 March 2009 provided 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 itself 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*'.

The creditors statutory demand as served on OTCO Global also states at paragraph 3 thereof that '*The Creditor requires the Company, within 21 days after service on the Company of this demand ... (b) to secure or compound for the total of the amounts of the debts to the Creditor's reasonable satisfaction.*"

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."

24. At the hearing below, Mr Hamo contended that this advice was negligent because it told him he had a good case, Melbourne Furnace's application being "clearly misfounded" and "misconceived". At the hearing before me, counsel for AJH contended that there was nothing wrong with the advice. Further, he contended that in advising of the possibility of the service of a fresh statutory demand and the possibility of a further winding up application, AJH were neither saying that the defence of the existing winding up application was guaranteed nor that Melbourne Furnace would not be able to succeed if it issued another statutory demand and commenced a further winding up application.

The conduct of the winding up proceeding after the provision of the advice

25. In response to the 12 March 2009 email, Mr Hamo sent an email to Mr Di Blasi on 13 March in the following terms:

> "I will adopt the following alternative:
> Your 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."

26. Mr Hamo's email was a cut and paste of the third-last paragraph in the 12 March 2009 email. AJH submitted before me that, in giving these instructions, Mr Hamo was not accepting the advice of 12 March. However, in my view, this proposition is unsound. A fair reading of the 12 March email was that AJH were recommending two alternative approaches. Mr Hamo took the second of the alternative approaches.

27. The application to wind up OTCO came on for hearing on 8 April 2009. On that day, the application was adjourned. The application came on again on 20 May 2009 – and was again adjourned. On 20 May, AJH reported on the adjournment to Mr Hamo as follows:

> "Dear Bas,
> We confirm the matters raised in your telephone attendance with Mr Alan Sandbach 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 return date of 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 instructions 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 the 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 seeks to rely upon by 26 May 2009.
3. Costs reserved."

28. On 26 May 2009, AJH sent a draft affidavit to Mr Hamo for filing and serving in the winding up proceeding. Mr Hamo responded to this with an email in which he said: "After careful consideration, I decided to let the company get winded (sic) up." The winding up of OTCO then proceeded unopposed.

AJH's complaints

29. AJH's complaints in this appeal can be divided into seven categories:

(a) First, AJH makes complaint about his Honour's finding in relation to what it contends was an unpleaded defence. Grounds 11 and 12 relate to this complaint.

(b) Secondly, complaints concerning his Honour's finding of a duty to give "holistic advice". Grounds 4, 5, 7, 11 and 13 relate to these complaints.

(c) Thirdly, complaints that there was no evidence to support certain findings. Grounds 1, 2, 8, 9 and 10, and parts of Grounds 3 and 6 relate to these complaints.

(d) Fourthly, complaints concerning his Honour's finding of breach of duty. Whilst there is some overlap in relation to the complaints of no evidence to support findings, the ground that relates specifically to these complaints is Ground 7.

(e) Fifthly, complaints concerning causation. Again, there is some overlap with other complaints. However, Ground 6 relates specifically to these complaints.

(f) Sixthly, complaints concerning the failure to give judgment for AJH in relation to the printers press matter, the haystack matter and the Campbell matter. Ground 3 relates to these complaints.

(g) Seventhly, Grounds 12 and 14.

The unpleaded defence complaint

30. The basis upon which his Honour found that AJH was negligent (and thus its work in relation to the furnace matter was valueless) was that AJH should have given advice that there was no point in defending the winding up application if OTCO was insolvent. This was not the negligence pleaded by Mr Hamo in his statement of defence. Nevertheless, it is apparent from the transcript that the case proceeded below on the basis that Mr Hamo would not be confined to his pleading unless he took a course which took AJH by surprise.[10]

31. Further, this basis of Mr Hamo's defence was articulated by him in his final submissions. No complaint was made by counsel for AJH in his reply submissions and no application was made either for an adjournment or to confine Mr Hamo's case to the pleaded case. From reading the transcript, one gets the clear impression that AJH intended to pursue the hearing to its conclusion, whatever case Mr Hamo chose to run.[11]

32. Remembering that s103(2)(c) of the *Magistrates' Court Act* provides that the Court is not required to conduct an arbitration in a formal manner, in my view, there is no substance in the complaint that Mr Hamo was permitted to rely upon an unpleaded defence. The time to make any complaint about that issue was in submissions before his Honour delivered judgment. No such complaint was made. Accordingly, these grounds must fail.

The duty to give holistic advice

33. 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.[12] 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.

34. 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. Indeed, in argument, counsel for AJH asserted that the email of 12 March 2009 was holistic advice.[13] 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 questions 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.

35. 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.

No evidence to support findings

36. AJH makes complaint that there was no evidence capable of supporting the findings that:

> "(a) OTCO was insolvent;
>
> (b) AJH knew that OTCO was insolvent;
>
> (c) as a result, a successful defence in the Supreme Court would only achieve a short breathing space for OTCO;
>
> (d) there was no purpose in defending the furnace matter; and
>
> (e) a victory in defending the furnace matter would have been a pyrrhic victory and a very short lived one at that."[14]

37. It is to be remembered that a question of law is not involved in a decision simply because a conclusion of fact may be demonstrably unsound.[15] The question with respect to these complaints is whether there was any evidence capable of supporting the findings in respect of which complaint is made. The question is not whether I, having read the evidence below, would have made the same findings of fact as (or different findings of fact from) those made by his Honour.

38. If there was evidence to support the findings that OTCO was insolvent and that AJH knew that OTCO was insolvent, then the findings referred to in sub-paragraphs (c) to (e) would be capable of following from those findings. In my view, it was open to the Magistrate to find that OTCO was insolvent and that AJH knew that it was insolvent. The evidence capable of supporting these findings is to be found in the letter of 20 May 2009 from AJH to Mr Hamo.[16]

39. In support of its complaint that there was no evidence capable of supporting the finding that there was no purpose in defending the furnace matter, AJH relied upon the evidence given by Mr Di Blasi below that the scope of his instructions was that it was in "the client's interests to preserve the company at all costs".[17] His Honour made no reference to this evidence in his judgment. It is possible that his Honour rejected the evidence on the basis that there was nothing in the documentary material which suggested that it was in Mr Hamo's interests to preserve OTCO at all costs. On the other hand, it is possible that his Honour disregarded the evidence because, 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. In any event, there is no appeal in this proceeding concerning any alleged inadequacy of his Honour's reasons. It is sufficient to say that AJH has not persuaded me there was no evidence to support the findings made by his Honour. Again, that is not to say that I would necessarily have made the same findings had I heard this proceeding at first instance. Further, and in any event, as I have already said, an examination of the transcript discloses good grounds for contending that the case below was conducted on the basis that OTCO was at all relevant times insolvent.[18]

40. It follows that the complaints predicated on there being no evidence capable of supporting key findings must be dismissed.

Breach of duty

41. 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 monies 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.

Causation: the consequences of AJH's breach

42. Mr Hamo did not give evidence. AJH contended that as a result of Mr Hamo not giving evidence, there was no evidence justifying the conclusion that Mr Hamo "was encouraged to believe that there was some purpose in the Supreme Court proceedings".[19] Further, AJH contended that the statement in the reasons that "Mr Hamo said that he was encouraged to believe there was some purpose in the Supreme Court proceedings when clearly there was none at any time" was wrong in that Mr Hamo never gave evidence.

43. It is unlikely that when his Honour attributed this statement to Mr Hamo, his Honour was asserting that Mr Hamo gave evidence. It is more likely that his Honour was referring to Mr Hamo's submissions (and referring to them as submissions). A difficulty for AJH in this regard is that there is a portion of his Honour's reasons immediately prior to this statement which was inaudible and not capable of being transcribed. Therefore, the precise statement of his Honour and its context is unknown.

44. I am not prepared to conclude that his Honour based his judgment on a wrong perception that Mr Hamo gave evidence. It is much more likely that what his Honour was referring to was an inference that was open from the evidence – and specifically the advice of 12 March 2009. 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.[20] 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.[21]

45. In my view, it was open to his Honour 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. Whilst it was not a conclusion which his Honour was necessarily compelled to make, I cannot say that it was not open in the circumstances of this case. It follows that this ground of complaint must fail.

Failing to give judgment for AJH in respect of the printers press matter, the haystack matter and the Campbell matter

46. Whilst there was debate between his Honour and counsel for AJH as to the basis upon which certain payments made by Mr Hamo were assigned to the printers press matter, the haystack matter and the Campbell matter, ultimately his Honour found that (putting aside the furnace matter) the claims in respect of those matters were proved. However, his Honour found them "proved despite the defence of payment, save and except this, that insofar as any money was taken from trust and applied against the furnace matter it must be brought into account on the basis that I find that the work was valueless".[22]

47. AJH's complaint is that his Honour said the following at the commencement of the hearing:[23]

> "You've told me the defences for the furnace matter are these. You are not the client, OTCO was. Secondly, in any event, nobody should have to pay any of the fees because the work was valueless, had no value. Now in relation to that let me say something, you have not made any counterclaim or setoff. And even if you were successful in showing the work was valueless you could not setoff or claim any loss that that may have caused you in these proceedings. Do you understand that?"

Mr Hamo responded that he understood what had been said to him.[24]

48. On one view, what his Honour said can be interpreted as meaning that if Mr Hamo persuaded the Court that the furnace matter work was valueless, then if no other defence succeeded, he would be liable to judgment being given against him in respect of the three other matters. However, in my view, the matter is not clear, in circumstances where it appears that his Honour was far from satisfied that AJH was entitled to take monies paid to it by Mr Hamo and attribute them to whichever file it liked. Again, there is no complaint in this appeal concerning the adequacy of his Honour's reasons. In the circumstances, it is open (and in my view correct) to infer that his Honour concluded that the other claims were proved subject to monies paid wrongly being attributed to a file in respect of which the work done was valueless. As I have said before, these conclusions are not conclusions that I would necessarily have reached had I heard the matter at first instance. However, they are conclusions in respect of factual matters which, in my view, were open.

49. If I am wrong in the above analysis and his Honour permitted a setoff to occur notwithstanding what his Honour said at the commencement of the hearing, then in my view no relevant error has been disclosed in any event. Counsel for AJH acquiesced in the course taken by his Honour in the exchange between them on p184 of the transcript, and only made a faint complaint which was not persisted with eight lines into p185 of the transcript below. Again, consistently with an approach that the proceeding should be heard and determined before his Honour without undue formality, it might be said that the proceeding evolved – and counsel for AJH chose not to take the point (or at best raised a slight complaint which was not persisted with). In my view, it is too late to take the point now. AJH is bound by the way it conducted its case below.

50. It follows that AJH's complaint concerning the failure of the Court to give judgment in respect of the printers press matter, the haystack matter and the Campbell matter is not well founded.

Grounds 12 and 14

51. I have already dealt in part with Ground 12. This is the complaint that his Honour failed to determine the issue raised by Mr Hamo in his defence (namely whether AJH was negligent in the advice provided on 12 March 2009). The short answer to this ground is that, having found for Mr Hamo for the reasons already given, it was not necessary for his Honour to go on and determine the pleaded defence. To the extent that Ground 12 is a complaint that his Honour determined the matter on a basis not pleaded, I have already given reasons why this complaint is not well founded.

52. Ground 14 is related to Ground 12. It fails for reasons similar to the reasons I have given in respect of Ground 12. Having determined the case in Mr Hamo's favour for the reasons his Honour gave, it was not necessary for his Honour to make a finding that Mr Sandbach did not advise Mr Hamo that the Supreme Court winding up application would be successful.

Conclusion

53. For the reasons given above, AJH's appeal must be dismissed. I will hear the parties on the question of costs.

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[1] T13 below.
[2] AJH were represented by different counsel on this appeal.
[3] T15 below.
[4] T16 below.
[5] See for example T72 below.
[6] T168 below.
[7] See ground 8 of the notice of appeal herein.
[8] The transcript records his Honour as saying "empiric". However, it is clear that his Honour used the word "pyrrhic" throughout his reasons.
[9] In the transcript, this statement is attributed to counsel for AJH. However, in context, it was clearly said by his Honour.
[10] See for example T72 below.
[11] Cf T16 where counsel for AJH said "We don't want the matter adjourned we want to press on because it seems like we have a strong case".
[12] *Carew Counsel Pty Ltd v French* [2002] VSCA 1; (2002) 4 VR 172, [29]; (2002) 190 ALR 690; (2002) 166

FLR 460 per Winneke P.
[13] See T15.8.
[14] See paragraph 7(a) of the appellant's outline of argument dated 4 May 2010.
[15] *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436, [58]; (1998) 28 MVR 327; (1998) 14 VAR 189 per Callaway JA.
[16] See further the evidence of Mr Di Blasi at T82 – 85 below.
[17] T52 below.
[18] See paragraph [16] above.
[19] T182 – 3 below.
[20] As to what might be described as customary evidence that if advice had been given a person would have behaved differently, see *University of Wollongong v Mitchell* [2003] Aust Torts Reports 81-708; [2003] NSWCA 94 where Meagher JA said at [17] that such evidence "invites the customary judicial cynicism". See also *Betts v Whittingslowe* [1945] HCA 31; (1945) 71 CLR 637, 649 and *Chappel v Hart* [1998] HCA 55; (1998) 156 ALR 517; (1998) 72 ALJR 1344; (1998) 14 Leg Rep 2 (1998) 195 CLR 232 at 273.
[21] See *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357; (1999) 43 IPR 545; [1999] ATPR 41-687, per Kiefel J (with whom Wilcox J agreed) at [45]. See further *Gould v Vaggelas* [1985] HCA 75; (1985) 157 CLR 215; 58 ALJR 560; [1984] ASC 55-376; [1984] Aust Torts Reports 80-313; 56 ALR 31 and *Scootmore Holdings Pty Ltd v Bidvest Australia Limited* [2001] QSC 329, [131] per Holmes J.
[22] T183 – 184 below.
[23] T17 below.
[24] T18 below.

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