

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-14-06385

K&L GATES AUSTRALIA, LLC (ARBN 161 633 174)

Plaintiff

v

Defendant

ZAC SWINDELLS

JUDGE: HER HONOUR JUDGE KENNEDY
WHERE HELD: Melbourne
DATE OF HEARING: 26 February 2016
DATE OF RULING: 4 March 2016
CASE MAY BE CITED AS: K&L Gates Australia - v - Swindells
MEDIUM NEUTRAL CITATION: [2016] VCC 173

REASONS FOR JUDGMENT

Catchwords: Costs- Deed of Settlement entered into in respect of solicitors' costs- Judgment entered by Judicial Registrar pursuant to the Deed- Application to file review of decision of Judicial Registrar under Rule 84.02 of the *County Court Civil Procedure Rules 2008*– whether rights and obligations under Deed of Settlement replaced rights under the *Legal Profession Act 2004* – whether other grounds sustained- extension of time granted- decision of Judicial Registrar confirmed.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr M Wise

K&L Gates Australia

For the Defendant

In Person

HER HONOUR:

1 This is an application seeking an extension of time to review a decision of a
Judicial Registrar made on 8 December 2015 and, further, seeking a review of
her decision under Rule 84.02 of the *County Court Civil Procedure Rules 2008*.

2 The decision under review was made by Judicial Registrar Tran whereby she
entered judgment for the plaintiff against the defendant in the sum of
\$96,200.58 plus statutory interest, pursuant to a Deed of Settlement.

3 The issues before me are whether or not, firstly, the applicant should obtain an
extension of time to bring his application for review and, secondly, whether the
decision under review should be confirmed or set aside.

4 Mr Swindells appeared for himself without the benefit of legal representation.
However, he was articulate and rational in his presentation before me.

Background

5 This proceeding commenced on 17 December 2014, whereby K&L Gates
sought to enforce two costs agreements with respect to legal services provided
by it to Mr Swindells between December 2013 and July 2014. The proceeding
was served late in 2014.

6 On 18 February 2015, a Deed of Settlement was entered into between K&L
Gates and Mr Swindells.

7 By clause 1.1, Mr Swindells acknowledged and agreed that he was indebted to
K&L Gates in the total sum of \$105,868.58 (defined as the "Debt"). Pursuant
to clause 1.2 he further agreed to repay the Debt and certain costs (defined as
the "Costs") the subject of the current proceeding by a series of instalments,
commencing on 30 April 2015 and culminating in a final instalment by 30
September 2016, at which time accrued interest was also to be payable.

8 Pursuant to clause 4.2 Mr Swindells further agreed to:

"... release and forever discharge K&L Gates from all or any claims,
suits, demands or actions which he has, or but for the execution of this

Agreement, may have had against K&L Gates by reason of, arising out of or in any way connected with the Debt, the County Court Proceeding, the Costs and the legal services provided by K&L Gates for and on behalf of Mr Swindells in connection with the Matters.”

9 Clause 5.1 provided that should there be default in making payment of any of the Debt and the Costs, then the outstanding balance of the Debt and the Costs would become immediately due and payable and K&L Gates would be entitled to enter judgment in this Court for the outstanding balance.

10 It is not in dispute that Mr Swindells did in fact default, such that K&L Gates brought an application for judgment to be entered which duly occurred when the Judicial Registrar entered judgment on 8 December 2015.

11 By notice dated 3 February 2016, Mr Swindells then sought leave to review the decision of Judicial Registrar Tran (out of time) accompanied by a notice seeking a review of her decision if such leave was to be granted.

12 It should further be noted that Mr Swindells did file an application to VCAT under s 3.4.32 of the *Legal Profession Act 2004* (“LPA”) seeking an order that the costs agreements be set aside on 9 November 2015 although I was informed that this application was now lapsed. Mr Swindells also indicated that he would like to proceed to the Costs Court for a review under Division 7 of Part 3.4 of the LPA (although no such application has been attempted/made).

13 Essentially he maintained that the Deed of Settlement left these remedies open to him which should now be allowed to take their course.¹

Nature of the review

14 Pursuant to Rule 84.02(5), in conducting a review, a Judge may exercise all the powers and discretions of the Court with respect to the subject matter of the review, and further, may confirm, set aside or vary the order of the Judicial Registrar or make such other order as the case requires. Unless otherwise

¹ It appeared to be accepted by the parties that, absent the Deed of Settlement, these remedies would still be open to Mr Swindells. This approach appears to be correct. Although the LPA has now been repealed by the *Legal Profession Uniform Law Application Act 2014*, cl 18(1)(b) of Schedule 4 of that Act provides that the provisions of the LPA relating to legal costs continue to apply if the client first instructed the law practice before the commencement day (1 July 2015).

ordered, further evidence is not received on the review and the party giving notice of such appeal should also not raise any ground of objection not stated in the notice (Rule 84.02(6)).

Grounds of appeal

15 The grounds relied upon in the Notice filed by Mr Swindells are as follows:

- “1. The Judicial Registrar erred in the determination that the Deed of Settlement relinquished the rights to the defendant afforded by the Legal Professions Act 2004. The Deed of Settlement did not in clear language relinquish the defendants rights under section 3.4 of the Legal Professions Act 2004 and the obligations of the Plaintiff for full disclosure as required under the Legal Professions Act 2004.
2. In making Judgement for the plaintiff, the Judicial Registrar referenced her decision on the Plaintiffs precedents of Gadens Lawyers v Beba Enterprises [2012] VSC 519 [14] and GLS v Goodman Group Pty Ltd S CI 2014 04206. The Judicial Registrar erred in applying these as both cases did not preclude the rights of parties afforded under the Legal Professions Act 2004 nor fiduciary obligations of the Plaintiff under the Legal professions Act 2004.
3. The Judicial Register erred to rule that the Deed of Settlement was the overarching document that replaced the rights of the defendant under the Legal Professions Act 2004 and the fiduciary obligations of the Plaintiff to the defendant under the Legal Professions Act 2004.
4. The Plaintiff used Presumed Undue Influence in the construction and execution of the Deed of Settlement due to the relationship between the Plaintiff solicitor and the Defendant for over 10 years.
5. The Plaintiff breached its Fiduciary Obligations to the Defendant and under the Legal Professions Act 2004 in the construction and execution of the Deed of Settlement.”

16 As was accepted by Mr Swindells, grounds 1, 2 and 3 appear to essentially raise the same complaint, namely, that the Deed of Settlement should not, and did not, replace the rights Mr Swindells has under the LPA.

17 Grounds 4 and 5 however warrant separate treatment and there were some further complaints made by Mr Swindells in oral submissions (which I have considered although they were not included within the grounds as provided for by Rule 84.02(6)).

Extension of time

18 Dealing first with the preliminary issue of the extension of time, Rule 84.02(4) provides that a copy of the notice seeking a review should be served within 14

days after the date of the decision. However, pursuant to Rule 3.02 the Court may extend any time fixed by the Rules.

19 A discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties. The applicant should explain the delay and the Court should take into account the history of the proceedings and the conduct of the parties. The Court can also take into account an assessment of the prospects of success of an application.²

20 The explanation for the delay provided by Mr Swindells is set out in his Notice seeking leave dated 3 February 2016. In that notice he emphasises that he was unaware of the 14 day time limit, and that his efforts to apply for review were somewhat hampered by the intervention of the Christmas holiday break, during which time he was unable to obtain assistance from the self-represented litigant co-ordinator at the Court (although he made attempts to gain such assistance).

21 Given Mr Swindells' unrepresented status, his explanation appears to be acceptable.

22 Counsel for K&L Gates, Mr Wise, also, helpfully, made no submissions in opposition to the grant of an extension, leaving the issue to the Court's consideration.

23 In the interests of justice, I consider that the appropriate course is to grant Mr Swindells the extension of time and deal with the appeal on the merits.

Decision of Judicial Registrar

24 In her decision, the Judicial Registrar relied upon two decisions of the Supreme Court: a decision of the Court of Appeal in *Beba Enterprises Pty Ltd v Gadens Lawyers*³ ("*Beba*") and a decision of Macauley J in *GLS v Goodman Group Pty Ltd*⁴ ("*GLS*"). Citing the decision of *GLS* (which applied *Beba* and was similar to this case) she noted that the settlement agreement "amounted to an accord

² See, for example, *Trkulja v Dobrijevic & Ors* [2015] VSCA 281 at paragraph 27 and cases cited therein.

³ [2013] VSCA 136.

⁴ [2015] VSC 627.

and satisfaction which replaced the obligations under the costs agreement, was not itself a costs agreement, and was therefore not subject to the obligations and rights provided for in the Legal Profession Act.”

25 The Judicial Registrar also cited policy considerations favouring the finality of settlement deeds and found no other reason why the Deed of Settlement ought not be enforced in light of the evidence before her.

26 In such circumstances, she therefore entered judgment pursuant to the terms of the Deed of Settlement.

Resolution of the review

Grounds 1, 2 and 3

27 In terms of the decisions of *Beba* and *GLS*, Mr Swindells emphasised that there were distinctions on the facts, including that there was a set fee in the *Beba* case and that the matter had already gone to the Costs Court (whereas he has not).

28 It is true that the decision in *Beba* arose in a slightly different factual situation wherein a borrower – that is, a “non-associated third party payer” – sought a review of the relevant costs in the Cost Court after already reaching a compromise in relation to such costs. The trial judge thereafter allowed an appeal from the Costs Court which denied *Beba* the right to review which decision was upheld by the Court of Appeal.

29 However, the reasoning utilised in *Beba* is applicable here. Thus, the Court of Appeal stated:⁵

“It is a corollary of the conclusions which I have already expressed that neither ss 3.4.26(5) nor 3.4.48A says anything about the ability of a client or associated third party payer to reach a binding settlement with a law practice respecting the quantum of legal costs charged, or of a non-associated third party payer to reach a binding settlement respecting the quantum of costs charged with the person who is under a legal obligation to pay those costs. Each of these situations – costs having been incurred and charged out – is temporally distant from the

⁵ *Beba Enterprises Pty Ltd v Gadens Lawyers* [2013] VSCA 136 at paragraphs 75 – 76 per Ashley JA (with whom Redlich and Priest JJA agreed).

time when a costs agreement may be entered into (and then only between clients or associated third party payers with a law practice).”

“In that event, subject to considering *Beba*’s submission that Division 7 is legislation of a kind that cannot be displaced by private agreement, it appears to me that non-associated third party payers, a fortiori clients and associated third party payers, are not prevented by Division 7 from entering into binding agreements to pay a quantified amount in costs, such agreements precluding a party from later seeking information or applying for a costs review.”

30 The temporal distinction made in the above passages was highlighted by Macauley J in the decision of *GLS*. That case was directly comparable with the present case given it concerned whether a settlement had been reached which prevented a client pursuing rights under the LPA in the Costs Court. Macauley J upheld the decision of the Costs Court summarily dismissing the client’s application for review given that an accord and satisfaction had been entered into.

31 In so doing, Macauley J rejected a suggestion that *Beba* was solely concerned with third party payers and went on to state:⁶

“Here, as set out above, the parties made a costs agreement between them at one point in time and, later, following a dispute about the costs, they entered an accord and satisfaction comprising the costs to be paid and displacing any existing right of action for or entitlement to review the costs incurred under the costs agreement. Notwithstanding the breadth of the definition of ‘costs agreement’ in the Act, applying *Beba*, the accord and satisfaction was not such an agreement and the parties here are not prevented from settling their dispute (including shutting off the possibility of a review of costs).”

32 In those circumstances, applying both *Beba* and *GLS*, the decision of the Judicial Registrar that the Deed of Settlement amounted to an accord and satisfaction which replaced obligations under the costs agreement(s) and was not itself a costs agreement is correct.

33 In fact, the position of K&L Gates in this case would appear to be even stronger given the terms of the release cited above.

34 The observations about the importance of favouring finality with settlement

⁶ *GLS v Goodman Group Pty Ltd* [2015] VSC 627 at paragraph 52 and paragraph 56.

deeds made by the Judicial Registrar are also appropriate. Thus, in the decision of *Beba*, Ashley JA says the following⁷ :

“In my opinion, the consequences which I have outlined make it extremely improbable that Parliament could have intended them. Whilst it must be recognised that Part 3.4, and specifically Division 7, is designed to protect persons obliged to pay legal costs, it does not follow that the desirability of parties bringing an end to a legal dispute, including its costs ramifications, and whether or not involving litigation, should be ignored. Nor would it do much for the administration of justice if agreements settling costs issues (whether solely relating to costs, or part of a wider resolution), entered into in apparent good faith, could be at risk of being partly set aside at the instance of the payer, the other party then being at risk, in some cases, of having to repay some part of moneys already received and paid to the party’s legal practitioner.”

35 I am therefore satisfied that there is no error in the reasoning of the Judicial Registrar. Moreover, that it was appropriate to give judgment pursuant to the terms of the Deed of Settlement which finally determined the obligations and rights of the parties, consistent with the release.

36 It follows that grounds 1 to 3 fail.

Ground 4 – Presumed undue influence

37 The concept of a presumed undue influence is explained in the decision of *Re P’s Bill of Costs*.⁸ Thus, although ordinarily the onus of proof rests upon a person asserting undue influence, this is altered in certain relationships of confidence or trust where a court presumes undue influence such that the onus is upon the other person to negative it. One of these relationships which has long been recognised in such a category is that of “solicitor and client.”

38 However, any complaint regarding undue influence in this case must relate to the time at which the Deed of Settlement was entered into. As at this time, there was no longer any relationship of solicitor and client between Mr Swindells and K&L Gates, the retainer having been well and truly terminated.

39 In those circumstances, the concept of “presumed undue influence” is

⁷ *Beba Enterprises Pty Ltd v Gadens Lawyers* [2013] VSCA 136 at paragraph 79.

⁸ (1982) 45 ALR 513 at pages 521 – 522.

inapplicable and the fourth ground of appeal cannot be sustained.

Ground 5 – Fiduciary

40 A similar problem arises for Mr Swindells in relation to ground 5.

41 Thus, the fiduciary relationship that did once exist between himself and K&L Gates clearly came to an end with the termination of the retainer. Thereafter, K&L Gates had no obligation to defend and advance his interests, particularly in circumstances where K&L Gates became litigious and, it must have been obvious, were no longer acting for him.⁹

42 In those circumstances, any complaint of breach of fiduciary duty in relation to the Deed of Settlement is misconceived.

Other grounds

43 It is not strictly necessary to consider this review any further. However, as indicated already, Mr Swindells sought to raise other matters to support his general contention that the Deed of Settlement should be set aside which I will deal with for the sake of completeness. The most significant of these were as follows:

- (a) that there was non-disclosure of a material fact where disclosure was required, namely, his rights to go to the Costs Court or elsewhere, which non-disclosure justifies setting aside the Deed of Settlement (citing *Harvey v Phillips*¹⁰);
- (b) that he did not feel that he had any other option or alternative but to sign the Deed of Settlement;
- (c) that there was a failure to negotiate; and
- (d) that the relationship with the solicitor was a longstanding one.

44 There is no evidentiary basis for a complaint of non-disclosure. Thus, the

⁹ See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at page 235.

¹⁰ (1956) 95 CLR 235 at page 244.

affidavit of Mr Swindells annexes invoices which contain a fulsome notification under s 3.4.35 of Mr Swindells' rights to seek a costs review under Division 7 of Part 3.4 of the LPA; to apply to VCAT to set the costs agreement aside; and/or to make a complaint to the Legal Services Commissioner.¹¹

45 The essence of this complaint was that there should have been some further oral advice given at the time he queried the bill. However, Mr Swindells was unable to identify any such obligation in the LPA.

46 Next, it may or may not be the case that Mr Swindells subjectively feels he had no other option or alternative at the time of signing the Deed of Settlement. In any event, his subjective views now about how he felt does not and cannot vitiate the terms of the Deed of Settlement. As a matter of objective evidence, there were also a range of options including seeking some remedy under the LPA and/or paying the entire amount and/or going into bankruptcy. As highlighted by the Judicial Registrar, the Deed of Settlement did provide him with some extra time and can be presumed to have presented a commercial alternative he elected to take at the time. The fact that he now regrets this decision cannot vitiate the Deed of Settlement.

47 In terms of the suggestion that further negotiations should have ensued, clause 6.1 of the Deed of Settlement provides as follows:

“...notwithstanding the contents of paragraph 5 above, should Mr Swindells notify K&L Gates not less than 1 business day before the due date that he will be unable to make any individual payment provided in sub-paragraph 1.2 then K&L Gates and Mr Swindells will seek to negotiate in good faith, and for a period of not more than 2 business days from the date of notice received from Mr Swindells, for an extension of time for the making of that payment by Mr Swindells. In the event that K&L Gates and Mr Swindells fail to reach agreement as to any extension at the expiration of 2 business days then K&L Gates will be entitled to enter judgment against Mr Swindells pursuant to paragraph 5 above.”

48 The material demonstrates that at the time that Mr Swindells asked for a moratorium (on 14 October 2015) he was already in default for the August and

¹¹ Affidavit of Zaccariah Swindells sworn 1 December 2015, Exhibit “ZS-10”.

September instalments, such that clause 6.1 was not actually operative.¹²

49 In any event, the evidence is that K&L Gates did meet with him on 26 October 2015 and engaged in discussions, notwithstanding that no further agreement was entered into.¹³

50 There can be no suggestion of an absence of good faith and/or a breach of the agreement in these circumstances.

51 The final point emphasised by Mr Swindells was the length of the relationship between himself and his former solicitor (of some 10 years). Although one might have considerable sympathy for Mr Swindells, this again provides no basis for a review of the Judicial Registrar's decision.

Conclusion

52 None of the grounds put forward are sustainable. I am also satisfied that it was appropriate to enter judgment pursuant to the Deed of Settlement.

53 The decision of the Judicial Registrar of 8 December 2015 should be confirmed. However, I will hear from the parties as to the precise form of orders.

¹² Affidavit of Stephen Gerard Meade sworn 16 November 2015, paragraph 11.

¹³ Affidavit of Stephen Gerard Meade sworn 16 November 2015, paragraph 13.