NOT RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND CA 75/93

BETWEEN CAULTON HOLDINGS LIMITED

Appellant

AND PETER JAMES FREDRICSON

Respondent

Coram Richardson J
McKay J
Gallen J

Hearing 17 November 1993

Counsel K F Gould for Appellant
Mrs Raylee Harley for Respondent

Judgment 17 November 1993

JUDGMENT OF THE COURT DELIVERED BY GALLEN J

This appeal is from a summary judgment given by the Master in favour of the respondent on claims for consultancy fees and interest on those fees.

The background to the matter is that the plaintiff is 1 of 2 partners who provided in partnership, business and financial advice and in the course of that business were providing business and financial advice to a company known as Autotelic Properties Limited the principal shareholders of which seem to have been a Mr and Mrs Cooper. During the course of that advice the partnership was required to endeavour to negotiate the cancellation of a franchise, to collect outstanding debts and at some stage to look at the possibility of structuring a joint

venture with other interests to establish a new car rental franchise for those interests in New Zealand.

From February to May of 1991 there was a written letter of engagement between the partnership and the Coopers and Mr and Mrs Cooper guaranteed payment of the fees of the partnership. Between February and May of 1991 the partnership produced a business plan for Mr and Mrs Cooper.

The various parties involved in the joint venture which was proposed for the establishment of the new rental car franchise were negotiating towards setting up such an arrangement. It became desirable to establish that through a company and an approach was made through the solicitors to the joint venture for the acquisition of what was described as a shelf company owned by the solicitors concerned and which appeared to have a fairly restricted capital. Various proposals were considered for the establishment of the joint venture and work was alleged to have been done by the partnership in respect of that.

In late November of 1991 the Coopers withdrew from the joint venture proposal. In December of 1991 the shelf company Caulton Holdings Limited having been acquired changed its shareholding. On 5 February 1992 the plaintiff on behalf of the partnership sent invoices to the appellant. Those invoices covered work which was alleged to have been provided by way of business and financial advice for the parties ending on the 31 August, 30 September, 31 October and 30 November 1991. The amounts so claimed not having been paid the plaintiff endeavoured to recover them by way of the issue of summary judgment proceedings. The summary judgment proceedings were initiated with a Statement of Claim annexed to which were a number of documents which were verified by the affidavit of the respondent and it was met in due course by a Notice of Opposition.

The Notice of Opposition set out a substantial number of grounds for opposing the claim.

First it was contended there had never been an expressed or implied contractual arrangement between the respondent partnership and the appellant. Secondly, that the parties against which the claim was made were incorrect. They were not those nominated in the proceedings; that the true parties responsible for the fees claimed were Messrs Cooper and Griggs another shareholder in Autotelic; that the defendant company was not responsible for the claims made during the period that the invoices were rendered; that no consent had been obtained from the other partner in the respondent partnership; that there was an arguable defence which required findings on disputed facts; that the plaintiff was resident out of New Zealand and security for costs should be provided and there was also an allegation relating to an order for searching.

The evidence which was ultimately before the Master came partly from the Statement of Claim to which reference has already been made and it was supported with documentary material conveyed by affidavit by the respondent. That affidavit did not, however, go into any great detail with regard to the claim. The respondent provided additional material in an affidavit filed in reply and it is appropriate to refer to 2 of the clauses of that affidavit:

> "9. It was not until early December 1991 that Mr Cole and I agreed that CF associates would act for the defendant on a pro bono basis. Mr Cole had then made a final decision to be involved with the joint venture. Mr Cole then expected, on my suggestion of the corporate structure to the parties, to be offered the position of Managing Director. Mr Cole and I then agreed that Mr Cole would discuss the matter of fees with Mr Strouse of National Car Rentals Systems Inc. The outcome of Mr Cole's ultimate discussion with Mr Strouse was a meeting of Messrs Strouse and Cole and me on Tuesday 18 February 1992 held at the South Pacific Hotel at Auckland. In the meeting Mr Strouse talked about the value of the

> tangible assets that the defendant had as a direct result of the efforts of CF associates by way of comment such as "now that they are completed and we have them they are not worth anything." When Mr Cole left the meeting to make a telephone call, Mr Strouse said to me that the defendant had a "moral obligation" to CF associates and he suggested that I should put a proposal to the defendant as to what CF associates might accept by way of compromise. I did put such an offer of settlement dated 29 February 1992 to the defendant which rejected it by letter dated 16 March 1992 from Mr Lamberg.
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> 10. On the morning of 29 October 1992 Mr Cole and I met at Mr Cole's home. I discussed filing these proceedings with Mr Cole. Mr Cole used the same "moral obligation" argument as that advanced by Mr Strouse. Mr Cole agreed on 29 October 1992 to canvass the directors of the defendant for some form of settlement if I refrained from filing for a further week. I took advice, and as a result I advised Mr Lamberg that I would proceed with the filing, but that I could withdraw proceedings as soon as Mr Cole had heard back from his directors if a settlement was appropriate. No such communication has been received."

In opposition affidavits were filed by the solicitors for the appellant and by Mr Cole. The solicitors for the appellant referred to the general development of the project and said specifically at para 10 of that affidavit:

> "As a Director of Caulton Properties Limited, until my resignation on 23 December 1991, neither I, nor the other director, gave any instructions to CF to act for Caulton Properties Limited. Indeed, it was a "shelf company" and "waiting in the wings" to be used as the ultimate company for the joint venture partnership."

At para 11 he said that:

> "The suggestion that the Defendant, Caulton Holdings Limited, entered into an express or implied contractual relationship with CF is baseless and unsubstantiated."

Mr Cole dealt with the matter in some detail and he said in para 38:

> "Between March 1991 and 23 December 1991 the Directors of Caulton Properties Limited were Lloyd Warren Lamberg and another solicitor from his office. CF never received instructions to

> act for Caulton Properties Limited from either of these two directors."

He went on in para 40 to agree that the plaintiff in a personal capacity had received instructions from Caulton Properties Limited but had been paid for those services and in para 41 indicated that a large proportion of the work which the respondent had claimed to be done had been done for Autotelic not the appellant in these proceedings.

There is clearly, therefore, a disputed question of fact in this case and generally speaking a dispute of fact is not appropriate for resolution by way of summary judgment. Nevertheless if it can be established in terms of the authorities that the court is sure, convinced persuaded to the point of belief or left without any real doubt or uncertainty as expressed by Somers J in ***Pemberton v Chappell*** (1987) 1 NZLR 1 3/49-4/3, then it is nevertheless open to the court to give a summary judgment. In this case the Master considered that there was sufficient evidence to lead him to the required degree of certainty in coming to that conclusion. He accepted that there was sufficient evidence to establish that the work referred to in the invoices had been done and we agree that there is evidence which would properly lead to that conclusion. The real question in the case is whether the appellant is the person for whom it may be said that that work was done and had an obligation for the cost of it. The Master considered that there were a number of reasons which might lead to that conclusion including documentary material. The first document to which he referred is headed Caulton Properties Limited which showed the respondent and the respondent partnership as contact persons for the defendant company. That is obviously material which has some relevance but does not go very far towards establishing a contractual obligation. The second document to which he referred was the minutes of a conference call on 25 September 1991. That was headed Caulton Properties Limited and records as the participants in the conference, a representative of National Car Rentals, Mr Cooper and Mr Ryan

representing Quadriga Investments, Mr Cole and the respondent representing the respondent partnership and Mr Lamberg representing the solicitors. The Master drew attention to the fact that the appellant argued that the participation of the respondent and his partnership in that telephone conference was in its capacity as advisers to Mr Cooper. The Master accepted that that was at least a possibility but that the more likely explanation was that they were there as advisers to the joint venture. That of course was not decisive in these proceedings since on the conclusion at which the Master had arrived the participation was for a party other than the appellant.

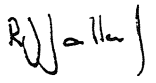
The third item of documentary material upon which the Master relied was a budget prepared for the joint venture dated 17 October 1991. That budget included an item identified as being "Consultancy" and made provision for payments of $5,000 in November, $5,000 in December, and $10,000 in January, those months being in 1991 and 1992 respectively. He noted that there was no evidence of any consultants other than the respondent or his partnership.

The only other documentary material to which the Master referred as being in some sense supportive of the respondent's case was the fact that he was informed during the course of the year that there were 2 files held by the partnership, one marked "National" and the other marked "Autotelic". The significance of that was that the partnership saw it as significant to keep its obligations separate. It seems to us that it cannot be said that any of that material taken singly or in combination could be regarded as decisive of the respondent's claim. It is confirmatory of the assertions made by the respondent in the affidavits and to that extent it may have some significance in an action but we do not consider that it would have been enough to lead to a conclusion that there was a sufficient certainty to allow the judgment by way of summary judgment.

The Master referred to further factors by way of subsequent events upon which he placed a considerable reliance. He drew attention to the fact that there had been correspondence between the solicitors for the parties, that demand was made for payment, that there was a response from the appellant's solicitors involving no denial of liability only a statement that the matter had been referred to Mr Cole for his instructions. He placed some emphasis on the fact that the same letter requested details of the work done. Those details were supplied. Following that supply there was no denial of liability or any questioning of quantum. There was a lapse of time of between some 1-2 months before the matter was further raised and the Master considered it significant that the appellant did not choose either to deny liability or question quantum.

The evidence to which he referred is all material which has a bearing on whether or not the assertion made by the plaintiff could be accepted in contradistinction to the assertions made on behalf of the appellant. At the same time we do not think that it goes beyond that. Whether those factors are considered singly or in combination it is our view that they cannot be regarded as decisive. In any event the evidence falls short of establishing that the appellant company either directly itself authorised work or accepted responsibility for work which was carried out for the joint venture. That being so we do not consider that this was an appropriate case for the entry of summary judgment. We have not discussed the evidence upon which the Master ruled in detail because it is undesirable to do so in view of the fact the claim must now proceed to a hearing.

In view of this conclusion the appeal will be allowed and remitted to the High Court for hearing as an ordinary action. Costs will be reserved.



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