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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 79/86

NOT RECOMMENDED

1339

BETWEEN DAVID LINDSAY FRANCIS of Paraparaumu, Account Manager

Plaintiff

A N D BRYCE FRANCIS LIMITED a duly incorporated company having its registered office at Wellington and carrying on business as a Printer

Defendant

Hearing: 28 August 1986

Counsel: J R Wild for plaintiff, to oppose
C S Chapman for defendant, in support

Judgment: 8 September 1986

RESERVED JUDGMENT OF GREIG J

The plaintiff commenced this action in March 1986 seeking damages for breach of his contract of employment with the defendant. By his amended statement of claim dated 19 March 1986, to which the defendant filed its defence dated 16 May 1986, it is alleged that he was employed as a senior manager and was a director of the defendant which is a private family company of which the plaintiff's father is the principal shareholder and managing director. By 1985, it is claimed, the expectations of the plaintiff to become the next managing director, of which particulars are given, had become a term, "implied if not expressly agreed" of the contract of employment. On Monday, 9 September 1985, there was a conversation between the plaintiff and his father which notified the plaintiff that he had been demoted and his brother had been promoted over him. It is alleged this amounted to a constructive dismissal and repudiation of the contract. The plaintiff says that he tendered his resignation by letter on 8

October 1985 which was accepted on 16 October 1985. He avers that he has lost his position, remuneration and benefits, including salary, company car and medical insurance, and his contractual right to appointment as managing director and the benefits to accrue from that position.

The relief claimed is expressed as follows:

"(a) Special damages for wrongful dismissal in the sum of $65,000 (those damages equating to one year's salary and benefits [paragraph 13(a)])

(b) General damages for wrongful dismissal or, alternatively, for breach of contract, in the sum of $30,000 comprising:

(i) $25,000 in respect of the loss of benefits he would have received as Managing Director of the defendant (paragraphs 6 and 13(b))

(ii) $5,000 for distress, injury to his feelings and to his standing in the printing industry, frustration and disruption (paragraph 14)

(c) The costs of and incidental to this proceeding."

The defendant, by interlocutory application filed in Court on 21 July 1986, moves for an order dismissing and striking out the paragraphs (a) and (b) quoted above. The grounds upon which this is sought as stated in the defendant's written submissions are as follows:

"(a) That no cause of action is disclosed by the pleading and thus no relief is available.

(b) A cause of action is disclosed but no loss is

pleaded so that, in a claim based upon breach of contract, no prayer for relief for other than nominal damages is sustainable.

(c) Both the cause of action and the loss is sufficiently pleaded but the loss is one which as a matter of law is not recoverable."

The jurisdiction, which is founded on the inherent jurisdiction of the Court and RR 186 and 477, is to be exercised sparingly and only in a plain case because it is a jurisdiction which stops the proceedings and prevents the plaintiff from pursuing his case on the steps of the Court and without an opportunity to be heard in full. The decision is made on the basis of the plaintiff's statement of claim as if all the averments were proved and will be made in favour of the defendant if it is shown that the causes of action raised and the relief claimed cannot possibly succeed and cannot possibly be granted (Peerless Bakery Ltd v Watts [1955] NZLR 339; Takaro Properties v Rowling [1978] 2 NZLR 314).

The first ground of the defendant as it relates to the claim for special damages, paragraph (a) of the relief, is that on the averments in the amended statement of claim the plaintiff affirmed the contract and did not accept the repudiation. Reference is made to s 7 (5) Contractual Remedies Act 1979 and to the common law. It is submitted that taking into account the delay in response between 9 September and 8 October and the actual response of resignation, it seems on notice since it was not accepted till 16 October, these must amount to an affirmation.

That affirmation may arise from silence and conduct is no doubt correct; see, for example, Denmark Production Ltd v Boscobel [1968] 3 All ER 513, and especially the judgment of Winn LJ, but whether silence and passive conduct does so amount

to affirmation is and must be a question to be decided upon evidence. It is not acquiescence but affirmation, a positive concept, which is in issue. I do not think that on the material before the Court now it can be said that on the proper standard of proof affirmation must be inferred and, in my view, to succeed on this point the defendant has to take the matter to that point. In other words, it cannot be said that the plaintiff is bound to fail on this issue.

The second point made by the defendant is that the plaintiff has not adequately pleaded the loss. He has claimed the maximum but has not pleaded any matters which will have to be taken into account to determine the loss, such as amounts received since 9 September 1985 from the defendant or in mitigation from any other person.

Mr Wild accepted that such matters are in issue and will be canvassed at the hearing of the case but he submits, I think correctly, that this point of the defendant's relates to quantum and in diminution of the amount claimed but not necessarily or inevitably in extinguishment of the amount claimed. It may be a matter for further particulars or even interrogatories, noting that it is the plaintiff's duty to mitigate his loss, but it cannot be right to strike out the claim and debar the plaintiff from recovery of damages because he has claimed the maximum without pleading what may be relevant to reduce that.

The third point relates to the claim for $25,000 general damages, paragraph (b) (i) of the relief, and again the defendant submits that no cause of action is disclosed and no sufficient pleading as to loss suffered. The basis of this part of the defendant's application is that the term for appointment to managing director does not describe the time and circumstances of that appointment and the pleadings do not aver that time had arrived or when it would arrive. Since it is implicit from the pleadings that the contract of employment was

terminable on 12 months' notice the giving of such notice would terminate the term for appointment. Plainly Mr Bryce Francis is managing director and there is no averment that he is to depart from that position within the twelve months.

There are two flaws in this submission. The first is that the claimed relief is in respect of the lost contingency of appointment. The term alleged for appointment is plainly a contingent one depending at least on the continued holding of the office by Mr Bryce Francis. Whether it is also dependant on the continuity of the plaintiff's contract of employment is not clear but that might raise other questions such as arose in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206. The plaintiff is claiming, either by the wrongful dismissal or by breach of contract separately, that he has lost that contingent right and that he should be compensated in damages. There can be no doubt that on either ground there is a basis of loss though its quantification may be difficult depending, as it will, on the assessment of contingencies. The defendant has incorrectly approached the issue as if the claim was for the loss of the appointment itself. That leads to the second flaw which arises because the defendant has considered a hypothetical situation, the giving of 12 months' notice, and not the actual alleged wrongful dismissal and breach of contract. I am not persuaded that the plaintiff's claim is untenable.

Once again the plaintiff has made a claim without particularising the matters, contingent or otherwise which might be taken into account in the hearing of the case. For the reasons I have already stated that will necessarily not extinguish the damages claim and at all events the plaintiff would be entitled to nominal damages.

The final question is the claim for $5,000 general damages (para (b) (ii) of the relief). The defendant here, founding on Addis v Gramophone Co Ltd [1909] AC 488, submits that this claim cannot succeed.

The authority of that case is not only of the highest and long-standing but has been followed and applied in wrongful dismissal cases many times in many common law jurisdiction. In Vivian v Coca-Cola Export Corporation [1984] 2 NZLR 289, Prichard J in a full and careful judgment, if I may say so with respect, notes and discusses many of the recent cases in England, Australia and Canada as well as New Zealand. In the result Prichard J struck out a prayer for relief couched in very similar language to this one. There is very powerful authority in favour of the defendant on this which strongly supports its contention that the plaintiff cannot obtain such general damages.

There are a number of points raised by the plaintiff. These include the submission that each case must depend on its own facts and that this case is different from Vivian's and any other. The next point is that the principle stated in Addis has been criticised and confined to a narrow scope. It is suggested that in New Zealand that scope may be narrowing further and reliance is placed on the tenor of observations of the Court of Appeal in Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372.

I do not think that those two considerations are sufficient to persuade me to stay my hand against striking out. It is however to be noted, and it was emphasized by Mr Wild, that this claim is also based on breach of contract, that is, the loss of right to be appointed managing director. There may well be a right to recover such damages for breach of such a contract but the question is whether the claim for wrongful dismissal overwhelms all. Reliance is placed on Cox v Philips Industries Ltd [1976] 3 All ER 161 where damages were given, quite apart from damages for wrongful dismissal, for breach of a term of the employment contract. There are some similarities in the cases because, as alleged here, there was a specific benefit or right in status or office as a term of the contract which was repudiated by the employer. A further

recent case is Shove v Downs Surgical pic [1984] 1 All ER 7, a claim for damages for wrongful dismissal in which Sheen J distinguished Cox's case.

I too think Cox's case is distinguishable from this case. Although it is not entirely clear on what basis the claim was made or presented by Mr Cox, who appeared in person, it seems that it was dealt with otherwise than as a claim for wrongful dismissal. In fact Mr Cox was paid the full contractual entitlement on dismissal. It was too a claim for breach during the term of employment that is up to but not beyond the dismissal.

In the present case everything arises on and from the dismissal. The breach of contract, though separately expressed, is that dismissal. The claim for $5,000 on the facts alleged in the amended statement of claim cannot succeed on the ground of wrongful dismissal and ought not to be allowed to proceed. What the plaintiff wants to do is to proceed with that claim under the guise of breach of contract but which is a contract of employment breached by wrongful dismissal. It cannot be right that the claim should succeed on that basis which is a distinction without a difference.

There will be an order striking out paragraph (b) (ii) of the prayer for relief in the amended statement of claim. Otherwise the defendant's application fails.

The defendant has succeeded in part, a small part, of its application. Normally it might be right to award costs to the defendant but in this case its success being only a trifling part of the claim I think both parties should bear their own costs. I make no order as to costs.

Solicitors for the plaintiff: Olpherts (Wellington)
Solicitors for the defendant: McGrath Vickerman (Wellington)