22/3

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP.690/88

NOT RECOMMENDED

BETWEEN PETER JOHN HARRIS of Christchurch, Company Manager

Plaintiff

307

A N D DAVID JOHN GROSE of Christchurch, Landlord

Defendant

Hearing: 6-8 March 1991

Counsel: P F Whiteside for Plaintiff
M A Gilbert and V J Stanbridge for Defendant

Judgment: 15 MAR 1991

JUDGMENT OF FRASER, J

This action comprises two separate and distinct claims: one for remuneration pursuant to a contract, the other for damages for defamation. Both arise from the business relationship between the parties.

Defendant is a property investor. In 1985/87 his business included the acquisition, management and development of properties in New Zealand; he maintained an office in Christchurch.

One of the properties owned by defendant was situated in Elliot Street, Auckland. In 1985 he entered into negotiations with Concept Projects Ltd (a member of the Chase group of companies) for the sale to it of the Elliot Street property. No agreement eventuated.

Plaintiff is engaged in management and has worked, usually on a consultancy or contract basis, for a variety of companies. In 1986 he commenced work part-time at $20 per hour for the defendant evaluating buildings and assisting with leasing. In August of that year defendant's manager resigned and by agreement plaintiff took over additional duties. From that date he was remunerated by a payment of $500 per week (shortly afterwards increased to $600 per week). Some other terms of this arrangement are in dispute.

By an agreement dated 15 December 1986 defendant agreed to sell and Chase Corporation Limited to buy a number of properties (including the Elliot Street property which it had unsuccessfully negotiated to purchase through one of its subsidiaries in 1985) for $30,355,000. Plaintiffs claim for remuneration relates to this sale.

The August 1986 arrangment between plaintiff and defendant terminated on 3 January 1987. From then until 17 June 1988 plaintiff was engaged in locating and formulating investment projects for the defendant for which he was remunerated on an agreed commission basis. In addition, between mid-January and mid-April 1987, he was engaged at $40 per hour to assist with completion of settlement of the sale to Chase Corporation Ltd in respect of rent reviews and other ancillary details.

On 29 August 1988 defendant wrote the following letter to Mr Brian Phillips, Wrightson Real Estate, 166 Hardy Street, Nelson:

" Dear Brian,

re: 98 to 102 Cashel Street Etc.

I confirm your option to control the property until 9 a.m. 31st August, 1988 as requested by you.

In addition I confirm that Peter Harris was removed in his position of Manager of my Christchurch office by my General Manager, Mr Henny Windmeyer. This was made effective from 17th June 1988, and since that time, we have had no further contact with Mr. Harris nor given him any authority. We stress that there is no financial or other arrangement between Mr. Harris and ourselves as his services were terminated over a serious matter. For that reason he will never be in our employ either directly or indirectly at any time in the future again. I have set this down as a firm decision to Mr. Windmeyer also.

I hope this clarifies the situation. Should you require any further information would you please contact the writer by return.

Yours faithfully,
David J. Grose"

It is that letter which gives rise to the claim for damages for defemation.

Although not pleaded as defamatory or forming part of the cause of action plaintiff contends that another letter written on the same day by Mr Phillips to the General Manager, Tokyo Hotels, Auckland is material. That letter is as follows:

" Attention Ronald Chua

Dear Ronald

RE: HOTEL DEVELOPMENT CHRISTCHURCH.

Further to my telephone call last week and my letter to you dated 27 January 1988 naming Peter Harris as our representative to present this project to you.

I now wish to inform you that he has been dismissed from his position with the property owners for reasons that I don't wish to discuss and that I will personally handle all matters dealing with this project.

I will ensure that more progress is made to your satisfaction and service as with our previous meetings and I apologise for our being let down by Peter Harris and I ask that you don't have any dealings with him or his representative Don Turner in order to save litigation on this matkter.

I will get in touch with you once I have sorted this matter out and I can assure you that your support on this matter is very much appreciated.

I hope that this letter finds both Fugi and yourself in good health and I look forward to seeing you both again soon.

Please find enclosed letter stating Peter Harris' position for your information from the property owners.

Yours faithfully

Brian Phillips
COMMERCIAL & INDUSTRIAL "

The first claim - remuneration for sale of properties

The pleadings

Plaintiff alleges (1) that on 29 August 1986 defendant agreed to employ him to sell all properties owned by him in New Zealand and that in consideration he was to be paid the equivalent of 50% of the standard New Zealand Real Estate Institute fees in respect of the sale price of all the defendant's properties for which a sale was negotiated by the plaintiff. (2) that pursuant to that agreement plaintiff negotiated and concluded the sale of the defendant's properties between August and December 1986 for $30,355,000.00 entitling the plaintiff to a payment of $252,078.75 of which only $10,000 has been paid leaving a balance owing and unpaid of $242,078.75.

Defendant admits (1) that he had a meeting with the plaintiff on or about 29 August 1986 (2) that between August and December 1986 the defendant sold properties for $30,355,000

(3) that he paid the plaintiff (inter alia) a bonus of $10,000 but in all other respects the plaintiff's allegations are denied. Defendant also pleads that plaintiff is precluded from recovering by s.62 of the Real Estate Agents Act 1976.

The Evidence

There is a direct conflict on crucial matters between the plaintiff and the defendant. In summary, plaintiff says that following an assessment of the defendant's financial position and some attempts to sell properties through real estate agents he advocated offering all the properties as a package to specific potential purchasers. On 29 August 1986 there was a meeting between him and defendant at which this matter was discussed. Defendant gave him a letter authorising him to negotiate a sale and there was a discussion resulting in agreement as to remuneration. Plaintiff asked that this arrangement be recorded in writing but defendant refused saying that it was unnecessary. Plaintiff then approached various potential buyers without success but eventually through a real estate agents' firm in Auckland, arranged a meeting with representatives of Chase Corporation Limited followed by other meetings which culminated in the agreement for sale concluded on 15 December 1986. Following the signing of the contract plaintiff says he again took up the question of his remuneration with the defendant asking that the arrangement be put in writing. Defendant said that no such remuneration was payable but that he would pay a bonus of $10,000 by 31 December 1986. The payment was not made. At a meeting early in January 1987 plaintiff gave defendant an invoice detailing his services

and debiting what he said was the amount payable. In April 1987 $10,000 was paid to him which he treated as being in reduction of the amount due.

Defendant agrees that plaintiff was employed by him in connection with his property business and that he did assist him in connection with the sale to Chase Corporation Limited but says that there was no such agreement as alleged on 29 August 1986 nor indeed any discussion about remuneration. He also denied any discussion on the same topic following the completion of the agreement in December 1986 and that plaintiff's invoice was given to him early in January 1987. His evidence is that the negotiations were conducted by him personally and he completed the sale. The $10,000 paid in April 1987 had a twofold purpose: one to clear up miscellaneous claims which plaintiff had been pressing him about for some time and the other to resolve a difficulty between the plaintiff and another of his employees to whom plaintiff owed $10,000. The cheque was paid on the basis of an appropriate invoice and was immediately endorsed to and sent to the person to whom plaintiff owed the money.

Plaintiff called Mr A M Walker, a property executive, who had handled the December 1986 purchase from the defendant on behalf of the purchaser. He described a meeting in Auckland in late October 1986 attended by plaintiff defendant, and others. He had further discussions during November 1986 with defendant and in addition some telephone conversations with plaintiff. He was unable to recall whether there had been any meetings in person with plaintiff but acknowledged that they might have taken place as plaintiff

claimed. He came to Christchurch on 5 December 1986 meeting with plaintiff and defendant at defendant's office on that day and again the following day as a result of which an agreement was reached which was ultimately recorded in the agreement for sale and purchase in writing dated 15 December 1986. He described plaintiff's role as being a support one and expressed the view that an agreement would not have been concluded as early as 15 December 1986 if the negotiations had been carried out solely with the defendant.

Defendant called Mr Moore and Mr Wintersmith, employees of the defendant at some of the material times. They said that a claim for the amount involved here had never been mentioned to them. Mrs Bee, a typist, who commenced work for defendant on 12 January 1987, said she had not typed the January 1987 invoice which plaintiff initially, at least thought she had.

I do not accept defendant's evidence that remuneration was never raised and discussed at the meeting of 29 August 1986 or subsequently. I reach that conclusion on the basis of the combined effect of the following matters.

(a) In several instances defendant made categorical statements which cross-examination showed to be overstatements e.g.

(1) he said that when arrangements were made with people such as the plaintiff his practice was that the arrangements were put in writing. He was asked whether there were any exceptions and replied "No there cannot be". Both the words and the tone were emphatically positive. He later

agreed however that neither the April 1986 nor the August 1986 arrangements with the plaintiff (most of the terms of which were common ground) were not recorded in writing. I think it is correct that as a matter of general practice the defendant did generally record such arrangements in writing as shown by the documents produced and the concession made by the plaintiff. The point for present purposes is that to say that all such arrangements without exception were put in writing (with the implication that if there was no record in writing there was no agreement) goes too far.

(2) He was asked whether it was his practice to have his employees sign the wages records. He answered "Yes absolutely". Again both the words and the tone were emphatically positive. Such wages records as were produced have no signature by the employee. When asked about that he said that he understood "signing" the wages records meant that some employee "wrote" the wage records. I do not accept that evasive explanation.

(3) Defendant said that he requested an invoice for 100% of the payments he made and in cross-examination agreed that all invoices had to come to him for approval for payment. Yet at the same time he maintained that an invoice on which some payments had been made had never been seen by him.

(4) In connection with the period leading up to the agreement for sale with Chase Corporation Ltd he said

that he could not get written reports from the plaintiff and severely criticised him for it. At a later stage of the evidence in connection with another phase of the matter he was shown a number of memoranda which had been written to him by the plaintiff. Having previously given and I think intended to give the impression that he never get reports from the plaintiff he contended that these later reports were received because he had at last harrassed the plaintiff into writing reports as he was supposed to do. I found that unconvincing.

None of the instances I have mentioned are of vital importance on matters of fact but they are indicative of defendant's approach to the giving of evidence and signal the need for caution in accepting what he said as reliable.

(b) I think that there were extravagant exaggerations by the defendant, e.g.:

(1) He agreed that he had a meeting with the plaintiff at the latter's request on 29 August 1986 in respect of which an appointment was made for 9 o'clock and one hour allowed, but in fact the meeting went on for nine and a half hours, almost non-stop, during which the plaintiff never stopped talking and was still talking as the defendant left the room, most of what was said being mere rambling about the future of the company and where it was going. That particular

construction of events was not put to the plaintiff. While the latter tended to be wordy and discursive in his answers in evidence his manner and presentation were not consistent with defendant's portrayal of him. I do not believe defendant's assertion.

(2) Defendant's evidence was that prior to 29 August 1986 there had been discussion from time to time about plaintiff working on the sale of the properties but he did not want him doing that, reluctantly gave authority on 29 August but even then did not take the plaintiff terribly seriously and did not think he had the capacity to carry out the project. This version of events does not fit with his giving to the plaintiff that very day the written authority to negotiate a sale, plaintiff's getting the Auckland real estate agents to arrange the meeting with Chase Corporation Ltd, defendant having plaintiff with him at the initial meeting which was obviously going to be important, and at the final meeting in Christchurch, which again was important. If he thought that plaintiff's contribution was so ineffective he need not have given him the authority or involved him in those meetings. I think the position is that he did want plaintiff's services at that time, that plaintiff did make a contribution and that the assssment in the evidence is a distorted exaggeration.

The matters discussed are of course not conclusive but the approach taken by the defendant does not

engender confidence that what he said in evidence is reliable.

(c) It was eventually common ground that there was a meeting between the parties on 29 August 1986, that the sale and required price of properties owned by the defendant were discussed and the defendant gave to the plaintiff a written authority to negotiate a sale. I think it is inherently improbable that at such a meeting when those matters were discussed by two people whose lives largely revolved around buying and selling property that remuneration was not discussed.

(d) My evaluation of the manner and demeanour of the defendant while giving evidence was that he was not a person whose evidence could be relied on.

I accept the plaintiff's evidence that remuneration was raised and discussed at the meeting on 29 August 1986 and again following the signing of the contract in December of that year and that an invoice for the amount claimed by the plaintiff was handed by him to the defendant on or about 5 January 1987.

I do not consider however that the evidence establishes to the required standard (1) that there was an agreement as alleged, namely, for plaintiff to sell all properties owned by the defendant in New Zealand in consideration of which defendant was to pay him 50% of standard real estate institute fees on the sale prices of all defendant's properties for which a sale was negotiated by plaintiff, or (2) that plaintiff negotiated and concluded the sale of the defendant's properties to Chase Corporation Ltd.

I make those findings on the basis of a combination of the following factors:

(a) There is uncertainty as to the terms of the alleged agreement. In his evidence in chief the plaintiff said:

> " .....
> He (defendant) did say .... there was quite a considerable amount of money that could be made by myself because the arrangement that we had in the sale of any property instigated by myself this arrangement being as he pointed out was equivalent to 50% of the standard real estate fee for a sale if it was sold through the real estate, he emphasisted that he got the other 50% so it was to his advantage to encourage me and he suggested that we should place some advertisements in the paper. We then went along to discussing what I felt should be done, I said ...."

In cross-examination at p.35 there is the following passage:

> " What exactly was it you were required to do in order to earn the commission in terms of this August 1986 agreement? You mean the agreement with Chase? No between you and Mr Grose - to earn your commission? To receive the remuneration David was talking about I had to instigate an introduction to the parties at the value $30M for the sale of the package of the properties that we were offering, to that date nobody had offered the package of 30M to any party. So when you came away on 29 August from your meeting with Mr Grose it was your understanding what you had to do to earn this commission was to introduce him to a purchaser of all the properties for $30M? At the time it was $24M and then it went up to 26M. So the original deal as you understood it it was your job to introduce a purchaser to Mr Grose for all his properties at $24M so long as you did that you would get the commission? That is correct."

The relevant words in the statement of claim are "negotiate and conclude". Plaintiff in his evidence referred to "instigating a sale" or "instigating an

introduction". I take it that he means by the word "instigate" that something is brought about having been initiated by him. If a person in this sense instigates an introduction which later results in a sale he may be said to have instigated the sale itself but the variation leaves unclear what was said at the time.

In his evidence he referred to "any" property whereas the written authority refers to "a sale package of my New Zealand Property Holdings". It is clear from plaintiff's own evidence that the property at Elliott Street Auckland was at that stage excluded from the proposed sale. In his evidence in chief he said that he pressed defendant to include it but "he (defendant) once again disagreed and said it would not be incorporated". That remained the position when plaintiff had a discussion and some negotiations with a representative of Landmark Corporation, plaintiff saying that the offer received from Landmark Corporation "included the Elliot Street property which I advised him David did not wish to sell". Landmark Corporation was not interested any further in view of that information.

The Elliot Street property is important. There were 14 separate properties sold by defendant to Chase Corporation Limited, that is the 13 listed in the schedule dated 19 August 1986 and Elliot Street. It is not entirely clear how the final figure was arrived at but it seems that in broad terms defendant regarded the 13 properties in the schedule as being worth approximately $14M and Elliot Street (to which various

possible sale prices had been attributed at different times) to be worth $16M. At all events it was accepted by all parties that the Elliot Street property was the most valuable and it was regarded as the key to a sale to Chase Corporation Ltd of all the properties. It was Elliot Street that Chase Corporation Ltd wanted and it was apparently prepared to buy all 14 and dispose of the other 13 itself so that it could obtain the Elliot Street property.

I do not think that the discussion between the parties on 29 August could have been directed to a sale at $30M or at $24 because at that stage defendant's attitude was that Elliot St was not to be sold. That was no question of the other properties without it warranting either of those figures.

The uncertainty as to whether Elliot Street came within the ambit of the arrangement, the inconsistency in recounting as part of the events of that day total sale prices which only became relevant at a later date, and the differing descriptions of precisely what plaintiff's obligation under the alleged agreement were, in my opinion are inconsistent with a concluded agreement.

(b) The alleged agreement was not recorded in a signed agreement nor was there any letter or memorandum by either of the parties. It was a matter of importance to plaintiff. He expected that there would be a substantial sum involved. He realized that a written

record was important because he asked for one and he received an unsatisfactory explanation as to why it would not be provided. It is surprising that he did not take some steps himself for example by a memorandum to the defendant setting out his understanding of what had been agreed.

(c) Shortly after the contract was completed when the question of remuneration was raised again the plaintiff knew that defendant did not accept his claim and did not acknowledge an agreement, but proposed to pay a bonus of $10,000. Plaintiff says that was not acceptable but as in the meantime the deal was "only in contract and had not been settled" it was a waste of time discussing it any further until settlement. I find that explanation difficult to accept. There was a binding contract and no reason to suppose that it would not be carried into effect in accordance with its terms. I can understand that if there was a proper claim a person in the position of the plaintiff might well not expect payment until settlement but in the light of the rejection of his claim I would have expected some step to be taken to record a protest at the defendant resiling from his agreement and plaintiff detailing the terms of that agreement and what he claimed to be entitled to. That he did not do so suggests to me that he did not think at that time that there was in fact an agreement.

(d) The invoice of January 1987 debiting $252,078.75 is in the following terms:

" For Consultancy Services - July to December 1986
Sale of Grose Property Portfolio to Chase Corporation Ltd.

- Develop and formulate sale policy and strategy
- Assist in the establishment of property portfolio value
- Establish and evaluate potential purchasers
- Establish basic terms and conditions of sale
- Contact potential buyers, evaluate their ability to meet Mr Grose's requirements.
- Arrange initial meeting with Chase Corporation
- Establish terms for Heads of Agreement for Chase purchase
- Negotiate with Chase/Grose to allow the satisfactory completion of a Sale and Purchase Agreement between the two parties

Fee - based on the scale fees of the Real Estate Institute of New Zealand - Less 50%
Sale Price $30,355,000-00

Fee: $229,162-50
G.S.T. 22,916-25
TOTAL: $252,078-75 "

It is to be noted that the invoice does not refer to any agreement. If the debit was on a basis which had been arrived at in an agreement on 29 August 1986 it seems more probable that it would have simply recorded remuneration as per agreement of 29 August 1986 and it is unlikely that it would have referred to services from "July to December 1986". I think the invoice is more consistent with an endeavour to justify a claim which the plaintiff thought was meritorious rather than a debit for an already agreed sum.

(e) After the invoice of January 1987 there was no reference to the debit in later invoices and no statement. Plaintiff gave an explanation as to why he did not pursue the matter immediately, namely that he

was continuing to work with the defendant and expected that the continuing contact and resulting work would be valuable to him, but if he regarded himself as being entitled to a sum agreed many months before and which had not been paid I would have expected that in June 1988 when his arrangement with the defendant was terminated he would have said in his final memorandum to defendant that the remuneration was still owing and unpaid and that he expected payment.

(f) In April 1987 when the $10,000 was paid plaintiff says he regarded it as a bonus and part payment of the agreed remuneration but at defendant's request he provided an invoice on a different basis altogether, i.e., reimbursement of expenses. After describing the nature of these expenses the invoice has the words "additional functions carried out at your request"; the invoice embraces the period 1 April 1986 to 31 March 1987. Plaintiff says defendant requested the invoice for accounting and taxation purposes. But in view of its wording it is surprising that he did not endorse the invoice with some such words as "except for" or "without prejudice to my claim for remuneration in respect of the sale to Chase Corporation Ltd".

(g) The allegation in the statement of claim is that the plaintiff "negotiated and concluded the sale". Whatever may be the precise scope and limit of those words I do not think that on any reasonable interpretation what plaintiff did amounts to negotiating and concluding the sale. In my opinion the appropriate description is that

applied by Mr Walker who said that plaintiff played a supporting role. The initial meeting with Chase Corporation representatives was arranged by an Auckland firm of real estate agents at the request of the plaintiff. Representatives of that real estate agency (Jack Partington, Don Partington and Jack Jones) were all at the meeting. Defendant was also present. There is some uncertainty about the precise number of meetings which plaintiff had with Mr Walker of Chase Corporation, but the letter of 24 November 1986 which spelled out defendant's negotiating position at that time and which led up to the final meeting on 5 December 1986 was prepared, signed and sent by the defendant. Both plaintiff and defendant participated in the meeting with Mr Walker at which agreement was finally reached. This is not to say that plaintiff's contribution was unimportant or of no value but I think it fell considerably short of negotiating and concluding the sale.

I find that remuneration for the plaintiff was raised and discussed at the meeting on 29 August but without agreement being reached. The plaintiff assisted in the sale. He believed that in fairness he ought to be remunerated. His actions in doing what he did to assist the sale are explicable on the basis that he was currently employed by the defendant and in receipt of a weekly wage and he expected that he would receive additional remuneration. Such a payment was in fact received: the $10,000 paid to him which according to his own

evidence (despite the invoice to the contrary) was in respect of the sale to Chase Corporation.

In my judgment plaintiff has not proved a concluded agreement nor his allegation that it was he who negotiated and concluded the sale.

Defamation

Defendant admits plaintiff's allegation that defendant's letter of 29 August 1988 to Brian Phillips of Wrightsons Real Estate is defamatory of the plaintiff. The defence is that the statement is true: it is pleaded in the statement of defence that:

> " The serious matter referred to related to the plaintiff endeavouring to stake a personal interest in the acquisition of a property at 75 -83 Shands Road Christchurch in conflict with his contract of employment with the defendant."

To succeed the defendant must establish the truth not only of the bare statements of fact in the alleged libel but also any imputation which the words in their context could be taken to convey. Plaintiff alleges in the statement of claim that the words in their natural and ordinary meaning meant and were understood to mean that the plaintiff had been dismissed by the defendant for a serious misdemeanour and/or breach of his obligation as an employee of the defendant. That is formally denied in the statement of defence but was not challenged at the trial. I agree that the words do convey that meaning in their context and it is that which must be justified if the defence is to succeed.

On 6 April 1988 plaintiff entered into a contract with ACI New Zealand Limited as vendor and "Peter J Harris or his nominee" as purchaser under which the purchaser agreed to buy from the vendor a property at Shands Road, Christchurch, for $6.3M on various terms and conditions. One clause in the contract made it expressly clear that notwithstanding the right of nomination plaintiff remained personally liable. Clause 10 of the special conditions provided:

> " This agreement is further conditional on the giving of a personal guarantee by David Grose of Christchurch Company Director or another individual or company acceptable to the vendor of each and every obligation of the purchaser herein such guarantee to be provided to the vendor no later than 1 June 1988 failing which this agreement shall be at an end."

No guarantee was given by the defendant or any other person in terms of clause 10 and the contract lapsed.

It was common ground that plaintiff and defendant discussed price and possible leasing arrangements and inspected the property where defendant was introduced by plaintiff to the vendor's representatives as the prospective purchaser. Plaintiff's evidence is that he regarded the situation as one where defendant had the first right or option to purchase the property but if he did not take it plaintiff wanted to be free to try and make a sale to some other purchaser. An important factor was negotiating a lease to some suitable tenant. Wrightson NMA Limited was interested for the purpose of a woolstore and there were ongoing discussions between their representatives and plaintiff which were reported on from time to time by plaintiff to defendant or his general manager. Although the contract came to an end on 1 June 1988 the vendor

was still interested in selling and Wrightson NMA Limited in pursuing the question of the lease so the prospect of a sale and a lease remained and was followed up by the plaintiff.

Plaintiff's evidence is that just prior to 17 June 1988 the position with the prospective lessee was that the local manager had recommended it, but a decision was still awaited from a higher level of management. Plaintiff reported that he expected that within 10 days, if it was favourable, he would be able to put a proposal to the defendant for the purchase of the building. Plaintiff says that he had had a difficult relationship with defendants general manager, Mr Windmeyer, and on this occasion Mr Windmeyer's response was:

> " That proves the point. I have told David that you intend to flick it on."

Plaintiff says the expression "flick" on is an understood term in the industry meaning that he would buy the property himself and then on sell it to the defendant for a higher price so making a quick profit without risk and for no outlay. Plaintiff denied that, objected to the accusation and said that he would be telling defendant that he could not continue working with the general manager. Mr Windmeyer responded by saying "That's good. Your finished. Go and don't come back." Plaintiff flatly denied that he had any intention of "flicking on" the property to defendant.

By letter dated 17 June 1988 Mr Windmeyer on behalf of defendant wrote to Mr Jim Arscott, Wrightson Real Estate, Christchurch, heading the letter "Re Mr Peter Harris" and saying inter alia:

" Mr Harris has on a number of occasions represented our company in various property dealings.
By mutual consent this arrangement has now ceased and we wish Mr Harris every success in his future endeavours.
..... "

On 24 June plaintiff sent a memorandum to defendant saying he accepted that it was management's right to disagree with his methods but he did not have to agree with that and he hoped that they would maintain their friendship. By memorandum dated 28 June defendant responded saying inter alia that he was most disappointed by plaintiff's actions and there was nothing further to say.

Defendant's evidence is that he regarded plaintiff as being obliged pursuant to the arrangement set out in the letter of 3 January 1987 to devote his full time endeavours to promoting the defendant's interests, that any property purchased was to be in the defendant's name alone and that when he learned of the agreement between ACI New Zealand Ltd and "Peter J Harris or his nominee" he was most displeased and required plaintiff to take steps to see that defendant became the purchaser under the contract. He denied that he knew about the contract until he saw it about six weeks after it had been signed, that is in about mid-May 1988. Defendant's account in evidence of the reason for the dismissal was:

" That he dishonestly and deceitfully utilised our name to get a property under contract without his principal's knowledge i.e., myself, withheld that information from his principal and attempted to parlay that document at a later stage for substantial capital profit.
What do you mean by parlay the document? No he would intend to parlay it. To whom? With me.
...."

Insofar as there is conflict between the evidence of the plaintiff and the defendant I prefer and accept that of the plaintiff.

I agree that the way in which the purchaser was named in the contract meant that plaintiff was prima facie in a position to sell to anybody or to endeavour to sell to defendant for a higher price. Despite that he may have been legally bound to nominate defendant as purchaser if so required but that point was not argued and is not the relevant issue. Plaintiff's evidence was that he had no intention of "flicking" the property on and that at all times he regarded the defendant as having the first right to buy if he chose to exercise it. The only reason for having the contract in his own name was so that if defendant was not interested he could deal with somebody else. I accept that evidence. I think it is consistent with him introducing defendant to the vendor's representatives as the prospective purchaser and the frequent reports to defendant or his manager about progress with Wrightson NMA Limited about a lease. There is no evidence that the plaintiff was in fact dealing with anybody else. He said he had possible purchasers in mind if the situation arose but he had never discussed it with them. There is no evidence of any approach by him to defendant to buy from plaintiff at a price higher than that in the contract signed by ACI New Zealand Ltd.

Defendant's conclusion that plaintiff was using defendant's name deceitfully with a view to making a quick profit for himself at the defendant's expense is not warranted.

It is not true as stated in the letter of 29 August that plaintiff was removed "in his position as manager of my Christchurch office" (he was not the manager, at least at that date or any date after April 1987) and it is not true that plaintiff was dismissed for a serious misdemeanour and/or breach of his obligations as an employee of defendant. His employment came to an end because there was a disagreement between plaintiff and defendant's general manager as to the method by which plaintiff was proceeding in the venture in which they were concerned and plaintiff accepted that in those circumstances defendant or his manager had a right to terminate the employment.

I do not think that the termination of employment was seen as "a serious matter" (in the sense now attributed to it by the defendant) by the general manager at the time of the termination because of the letter which he wrote to Wrightsons Christchurch office at the time saying that the employment had been terminated by mutual consent and they wished the plaintiff every success. I do not think those words would have been written if plaintiff had been peremptorily dismissed for a serious misdemeanour and/or breach of his obligations as an employee of the defendant.

In my judgment the defence of justification has not been established and must fail.

Damages

Mr Whiteside's general submission is that this was a serious defamation which had consequences for the plaintiff and a substantial award should be made. Mr Gilbert submits that

defendant cannot be held answerable for the passing on of defendant's letter to Mr Chua as a party will only be answerable for a repetition of his statement by another in certain limited circumstances none of which apply here. He referred me to McGregor on Damages 15th edn paras 1652 and 1653 in which Ward v Weeks (1830) 7 Bing.211 and Speight v Gosnay (1890) 60 LJ QB 231 are cited and discussed. Mr Whiteside argued for plaintiff that the republication which took place was in the contemplation of defendant and flowed naturally and logically from the original defamatory statement.

It was put to defendant in evidence that his purpose in writing the letter was to ensure that plaintiff could have no dealings with Mr Chua in relation to the Pan Pacific Project in Cashel Street. Defendant denied that and said that his purpose was to accede to a request by Mr Phillips to make plain it was Mr Phillips not plaintiff who could deal on defendant's behalf in connection with his Cashel Street property.

I do not consider that what was said by Mr Phillips in his letter to Mr Chua was authorised or intended by defendant and I do not think that the second letter was the natural consequence of the first in the very limited sense in which those words are used in this context. Moreover, it was not exactly a republication. The words used are different. In the latter there is reference to dismissal but no amplification of the reasons, merely the statement that Mr Phillips did not wish to discuss them. Those words may themselves carry some derogatory imputation but that was not argued. In my judgment the Phillips letter to Chua is not a republication or a consequence of the defamatory letter for which defendant is answerable in damages.

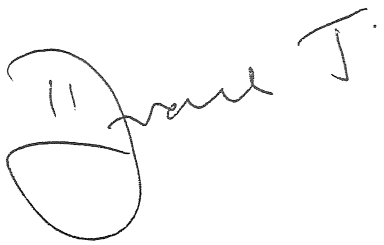
The general principle on which damages are to be awarded is formulated in Halsbury 4th edn vol 28 para 235 as follows:

> " ....
> damages are awarded to compensate the plaintiff for (1) the injury to his reputation; and (2) the hurt to his feelings. Such damages are compensatory and are at large."

The factors which I consider should be taken into account are (1) this was a serious imputation reflecting on the conduct of the plaintiff in the course of the business in which he was employed. (2) The statement was made by defendant in his capacity as recent employer and accordingly carried much more weight than if it had been made e.g. by some outside third party not personally involved in the business concerned. (3) It was made gratuitously in the sense that the request made to the defendant by Phillips was to make it plain that Phillips, not Harris, was to act on defendant's behalf with respect to defendant's Cashel Street property. That could have been made abundantly clear without resort to the defamatory statement which was in fact made. (4) It is true that the libel had a limited circulation in the sense that it was in a letter to an employee in another business concern and not, for example, in a newspaper or broadcast to the public at large. On the other hand the recipient was a responsible officer in a large real estate agency and real estate is one of the fields in which plaintiff is engaged. It is the type of business in which personal contact is frequent and reputation important.

I consider that an appropriate award would be $10,000. The plaintiff is to have judgment for that sum.

The question of costs was not canvassed at the hearing and I think it best in view of the nature of the findings on the separate claims to reserve all questions of costs with leave to the parties to apply.



Solicitors:

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