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PRIORITY

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 1506/91

887
BETWEEN B.R. EVERETT, D.J.
SPENCER, N.A.
HARRISON AND P.J.P.
GRACE

Plaintiffs

A N D PH II INC.

Defendant

Hearing: May 18, 1992

Counsel: Mr. Tatham for Plaintiffs
Mr. Hall for Defendant

REASONS OF MASTER ANNE GAMBRILL

The Plaintiffs acted for a company called Hydrox Corporation Limited and had acted for it for some years past. That company was wound up at Auckland on 15th March 1989. The Plaintiffs had dealings with Hydrox Corporation Limited in an effort to avoid winding up. The Plaintiffs say that they acted at the same time for PH II Inc., an associated company, in the role of beneficial owner of assets held by Hydrox Corporation Limited. The Plaintiffs say the attendances for this work were billed to Messrs. Coudert Bros., Hong Kong, the solicitors for Hydrox Corporation Limited and the Defendant by agreement. This evidence arises from the affidavit of Mr. D.J.

Neesham who was the solicitor involved in the work. After the winding up there were subsequent negotiations in which representatives of the Defendant, the Official Assignee and Mr. Neesham from Messrs. Duthie Whyte were involved.

The Defendant opposes on the following grounds (a) there was no contract in existence between the parties for the performance of legal services alleged by the Plaintiffs; (b) there was no or insufficient admissible evidence as to such contract; (c) that the Defendant's evidence is to be preferred to the Plaintiffs as the only evidence of a retainer is a deposition of the Plaintiffs; (d) that the account rendered has not been substantiated; and (e) that the affidavits give rise to issues of credibility.

Turning to the Statement of Claim and the account rendered. The pleading is that at all times all legal services were undertaken by the Plaintiffs through the partnership at the specific request, oral and/or written, of the Defendant by its duly authorized officers and agents. On 5th May 1989 the Plaintiffs rendered a bill of costs to the Defendant in the sum of \$35,000. That bill of costs reads as follows:

"The Treasurer
PH II Inc.
.....

Re: PURCHASE FROM HYDROX CORPORATION LIMITED (IN LIQUIDATION)

TO: Our interim account 16 March 1989 to
30 April 1989
OUR FEE

\$35,000"

.....

The account was not paid, there was some correspondence that occurred in November 1990 and there was an allegation relating to a deed of trust made on 20th April 1988 where a former partner of the firm, one Stephen Howard Barter, became trustee of certain assets of Peers Holdings Inc., subsequently PH II Inc.

I indicated to Counsel immediately upon seeing the account that it was not in a form suitable to bring a claim for Summary Judgment. The Court was not informed of the nature of the account, the work involved, the extent of the work and information which would be culled from an account relating to the course of the transaction and the parties involved. As there was dispute in relation who was the instructing principal bearing the responsibility for the account, I considered that the firm's records made at the time on which the fee was based should have been before the Court. I was disquieted by this practice of informing the Court only of the outstanding sum of \$35,000 with no substantiating evidence. I felt this was a reason to certainly refuse Summary Judgment as to quantum, if not liability.

The other issue between the parties related to evidence as to whether a contract existed. Counsel for the Defendant referred me to the matters raised to satisfy me that a retainer had been established. The Defendant's documentary evidence before the Court failed to show any consensus between the parties, or conduct by the Defendant by which an agreement or retainer could be implied and, in those circumstances as a matter of law, the Defendant's affidavit was to be preferred particularly in a Summary Judgment context. The Defendant relied on the fact that the only evidence to support the existence of an alleged retainer was evidence of the

Plaintiffs. There was no evidence of any written instructions from the Defendant to the Plaintiffs, there was no evidence which must have existed at the time of the parties' various negotiations and discussions as such that would be shown in an account of the parties' Mr. Neesham was taking instructions from and the Court was called upon to rely on Mr. Neesham's own deposition and recollection of the facts. The Defendant also pointed out that much of the correspondence relied upon was correspondence between Messrs. Duthie Whyte and third parties and correspondence to which the Defendant was not privy. The Defendant said the documentary evidence for the most part was conflicting and contradictory.

The Defendant accepts that it had instructed Messrs. Duthie Whyte on some minor matters but says none related to or was evidence of the Defendant's instructions on the sale of the Hydrox Corporation Limited assets. The Defendant through its deponent says that it did not instruct Messrs. Duthie Whyte either pre- or post-liquidation of Hydrox Corporation Limited. The only letter supporting the Plaintiffs' evidence is a letter by Mr. Kelly on behalf of PH II Inc., to Messrs. Coudert Bros., the solicitors in Hong Kong. It was written after the period in which the Plaintiffs' account was incurred and I do not have sufficient evidence of the circumstances in which this letter was written to be satisfied that the Defendant had accepted liability for the account.

The Defendant's second and major ground of opposition is that the documents are conflicting and contradictory. Without considering the evidence in depth, most of the correspondence I was referred to was between Messrs. Duthie Whyte and other parties. There is in the correspondence itself at worst a suggestion that the instructions were

coming from Messrs. Coudert Bros., in Hong Kong. The correspondence again has conflict within the various documents and the actual declaration made by Mr. Neesham to the Hong Kong Law Society over a dispute relating to the fees that arose between Messrs. Duthie Whyte and Messrs. Coudert Bros. Mr. Neesham said that:

".....In view of the debt level that Peers (now the Defendant) and Hydrox sustained, Duthie Whyte would require to be instructed by Coudert Bros., to protect payment of the fees for further attendances.....".

There is an element of conflict in this with the pleading that the Defendant is responsible for the fees.

Counsel for the Defendant considered all the correspondence in depth and raised various areas where there could be a presumption that if one was acting for PH II Inc., then certain documents would be available. Counsel referred me to Griffiths v. Evans [1953] 2 All ER, 1364 where Denning, LJ said at 1369:

"On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the Courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or at any rate, more weight is to be given to it:.....".

Counsel for the Defendant took me carefully to the evidence, much of which was hearsay and where there were conflicts. The supporting contemporary documentation is limited and this is one of the reasons I would have preferred to see the account and the record of the Plaintiffs' attendances,

upon whom, where and when, to constitute an account of \$35,000. I do not propose to consider the evidence of the Plaintiffs' in depth as this will be a matter for determination and assessment at the substantive hearing. In terms of Summary Judgment, all I have to be satisfied that there is a conflict in the evidence presented to the Court. I refer to the statement of Somers, J. in Pemberton v. Chappell [1987] 1 NZLR, 1 at 3:

"That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.....On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty."

In this case, I am left with a doubt as to who is the party that is responsible for the account. Clearly Hydrox Corporation Limited have been the client of Messrs. Duthie Whyte for several years. I am asked to assume there exists a change in the party who should bear the responsibility for the account. I cannot in the material before the Court find a clear and explicit acceptance, or written documentation that satisfies me the Defendant gave the Plaintiffs the retainer. There is conflict or lack of evidence and issues of credibility will arise. If I had had the account before me I might have been assisted by the record in the account being a contemporary document. This I do not have and I believe as there are issues of credibility it is essential that in this case the parties give their evidence viva voce and the accounts are produced to the Court to justify the sums claimed.

On the Defendant's application for costs I gave the Defendant a very limited award merely to encompass the costs on the time for hearing. I considered

that it was clear from the notice of opposition the defences the Defendant would raise, there have been no attempts made to produce the accounts to enable the Defendant to address the quantum and I believe in the circumstances it was a proper case for this limited award. Costs on all other matters were left outstanding. Costs on the issue of Summary Judgment and filing fees should follow the event and the parties accepted this was the proper way in which to handle these costs on the Summary Judgment application.


MASTER ANNE GAMBRILL

Solicitors:

Duthie Whyte, Auckland, for Plaintiffs
Bell Gully Buddle Weir, Auckland, for Defendant