IN THE HIGH COURT OF NEW ZEALAND 615 CP.40/88
TIMARU REGISTRY

BETWEEN ROBERT THOMAS HENDERSON

Plaintiff

498

NOT RECOMMENDED

A N D BERNARD ANDREW MacGEORGE and DAVID ALAN WOOD and DOUGLAS JAMES BLAIKIE

First Defendants

A N D BERNARD ANDREW MacGEORGE and DAVID ALAN WOOD

Second Defendants

Hearing: 19 April 1994

Counsel: D H Hicks for Plaintiff
A C Beck for Defendants

Judgment: 27 APR 1994

JUDGMENT OF FRASER, J.

This is an application pursuant to s 26P of the Judicature Act 1908 and r 61C of the High Court Rules to review a Master's decision striking out a counterclaim.

At all material times up to 31 March 1984, plaintiff and first defendants practised as solicitors in partnership. On or about 31 March 1984, the parties orally agreed to dissolve the partnership on certain terms. By a written memorandum of agreement dated 15 April 1991 the parties agreed that the net value of the plaintiff's interest in the partnership was $13,650, but that such agreement was

without prejudice to various matters, including defendants' counterclaim in the present proceedings.

In the action, the plaintiff claims judgment for the above mentioned sum of $13,650 and interest from the first defendants and certain other sums from the second defendants.

The defendants' first amended statement of defence and counterclaim were the subject of an application to the Master to strike out in some respects and for particulars. In a reserved judgment given on 8 June 1993 the Master substantially upheld plaintiff's application but gave leave to amend.

A third amended statement of defence and counterclaim was filed and plaintiff moved to strike out the counterclaim. Again, plaintiff's objections were substantially upheld by the Master in a reserved judgment, but defendants were given leave to amend in certain respects. The Master made it clear, however, that he was concerned at the course of events, warned defendants that the pleadings required careful consideration, and said that they were being given a last chance.

A fourth amended statement of defence and counterclaim was filed. The counterclaim had four causes of action based on breach of fiduciary duty, breach of contract of dissolution, unlawful interference with client relations and promissory estoppel. In respect of the first cause of action they claimed certain expenses and $5,000 general damages. In respect of the three alternative claims in the second, third and fourth causes of action they claimed an

inquiry as to damages, $3,000 for "investigation time", $5,000 by way of general damages, and interest. Plaintiff moved once more to strike out. At the hearing before the Master the first cause of action based on fiduciary duty was abandoned. The other three were struck out but in respect of those based on breach of contract and unlawful interference with client relations, leave was given to amend. Defendants were warned that no further chance to amend would be given. They were also ordered to pay $5,000 by way of costs in respect of all the applications to date.

The present application is to review both the striking out and the order for costs.

When dealing with the causes of action relating to breach of contract and promissory estoppel, defendant had pleaded that there was a partly written and partly oral partnership agreement made on 1 April 1980 containing inter alia, a covenant in restraint of trade to the effect that upon dissolution none of the partners would practice in the district for a period of five years without the consent of the other parties. The relevance of this, according to defendants, is that they agreed not to enforce the covenant as against plaintiff in consideration of which he was to take only certain specified clients (subject to their consent) and that this arrangement was either a term of the oral agreement between the parties or, if not amounting to a contract, was a sufficient foundation for promissory estoppel.

One fundamental matter in this approach is the partnership agreement containing the relevant clause. In his judgment the Master said:

> " At the hearing a document was produced which the defendants purported to rely on. This was an old partnership agreement with various hand-written alterations to it. There was an attempt to identify whose handwriting it was. The document in this changed form is unsigned, and even for striking out purposes I cannot hold it to be a written agreement. In my view, it is no more than a draft. There is no pleading it was agreed to by all parties."

On this basis he struck out the relevant parts of the breach of contract cause of action and the whole of the promissory estoppel cause of action.

Defendants submit that their case has been misunderstood by the Master.

Mr Beck says that the allegation about the agreement is that on or about 1 April 1980 the parties orally agreed to enter into partnership as solicitors on the terms contained in the draft agreement produced to the Court including all handwritten amendments and annotations.

Mr Beck says it is now also alleged that the covenant in restraint of trade was not as pleaded in para 16 of the fourth amended statement of defence and counterclaim but as set out in the draft document including, specifically, that consent to continue practice was not required from all former partners, only a majority of them (a provision contained in a handwritten amendment to the typewritten draft).

In the course of argument I pointed out to Mr Beck that the promise alleged in the promissory estoppel cause of action was different from the term in the oral contract alleged in the breach of contract cause of action and I

enquired whether this implied that defendants were relying on different words and acts in respect of these two causes of action.

Mr Beck responded that the defendants relied on the same words and conduct and that the case is that what was said and done amounted to either a contract or a promissory estoppel. He accepted that the promissory estoppel cause of action would require to be amended to make that clear.

The pleadings as they stand in the fourth amended statement of defence and counterclaim are confusing and obscure and do not adequately plead defendants' case as explained by Mr Beck. It is hardly surprising that defendants' case was misunderstood by the plaintiff and the Master.

In the light of the position as now put forward I consider that defendants should be permitted to plead the partnership agreement and the restraint of trade clause on the basis outlined by Mr Beck, and that defendants should have leave to amend in this regard.

The next point considered by the Master in relation to the breach of contract clause of action was that para 18(a) was framed on the basis that the partners had some proprietary right in the clients and their business and that, as such is clearly not the case, the pleadings should be redrawn on the basis of a claim to the client list which the Master considered would not be objectionable.

Mr Beck says that defendants do not allege a proprietary right in the clients of the partnership and that their claim relates to a contract making arrangements for a

division of the work on the dissolution of the partnership which was always subject to the wishes of individual clients.

A pleading must be such that if the allegations are proved, a cause of action will have been made out. It must also fully and fairly inform the opposite party of the nature of the case and enable the true issues to be defined by the opposite party's pleading in reply.

Paragraph 18(a) as presently framed was reasonably seen by the plaintiff, and, I think, properly held by the Master to amount to an allegation of a proprietary right in clients and their business. As the defendants accept that there is no such right and counsel disclaims an intention to plead it, the pleadings must be reframed to say precisely what the allegation is so that the pleading as a whole discloses a sustainable cause of action. If that is not done this cause of action must be struck out. I confirm the Master's decision on this point.

The next, alternative, cause of action is under the general heading of "unlawful interference with client relations". After pleading current instructions from the various clients concerned, particulars of that allegation are set out in para 23 clauses (a) to (d) as follows:

> "(a) Mr G F Lane had property deeds, wills and investments with the Defendants
>
> (b) Mr and Mrs Cooney had property deeds, family gifting programmes and family mortgages with the Defendants, as well as a small investment.
>
> (c) Mr G O Hamilton had property deeds, family loan documents and securities with the Defendants, as well as investments.

(d) Mr G D McKenzie had his will, property deeds and investments with the Defendants. His file was active with family gifting arrangements.."

In para 24 it is alleged that by obtaining the clients' files, plaintiff unlawfully interfered in the relationship between the clients and defendants, or alternatively that the plaintiff unlawfully interfered in the business of the defendants with the intention of injuring that business.

Mr Beck's submissions made it clear that the allegation in the first part of para 24 that plaintiff unlawfully interfered in "the relationship" between the clients and defendants means specifically unlawful interference with the contract between them. He argues that the facts pleaded are sufficient to provide the basis for that allegation but that, in any event, the alternative of unlawful interference with the business with the intention of injuring it which the Master did not deal with separately is a tort in which it is not necessary to establish that there is an existing contractual relationship.

The Master held:

"In my view, the holding of these documents on its own is not sufficient to establish current instruction from the client concerned. There is certainly no allegation of any long term retainer or contractual basis for the pleading. The defendants in this pleading rely on there being a current instruction. In my view, no current instructions are established by the particulars, although it is perhaps indicated in the case of Mr McKenzie.

The counterclaim defendants will be given a final opportunity to amend this pleading. They must particularise the current instructions and the exact nature of those instructions and the work they were engaged in for the clients at that time. If they can no more state they were holding deeds

> and investments, this cause of action should not be pleaded. I stress that this is the final chance the counterclaim defendants can be given on this cause of action."

The first point, I think, is that the particulars given (except possibly in respect of McKenzie) are merely that defendants held documents for the clients and do not amount to what defendants say are current instructions. If there was no current contract there cannot be a cause of action based on interference with contractual relations. This cause of action cannot stand as pleaded.

In respect of the alternative approach, unlawful interence in defendant's business with the intention of injuring it, the gist of the action is damage. If there were no current contracts and the only alleged wrongdoing is the obtaining of clients' files by the use of forged authorities there is no basis for the allegation that defendants have thereby lost an estimated $10,000 in fees. As I see it, the obtaining of the files without the client's authority could not possibly prevent or hinder the clients from giving or the defendants receiving instructions in respect of future work.

I confirm the Master's decision with regard to this cause of action.

The Master struck out the cause of action based on promissory estoppel because of the view which he took of the nature of the agreement pleaded. As already discussed this view, which I think was entirely understandably reached on the pleadings as they then were, is said to be a misunderstanding and that the true nature of the partnership agreement and the covenant in restraint of trade which the

defendants wish to allege is as explained in Mr Beck's submissions.

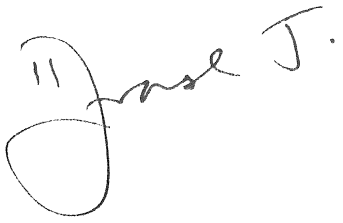
I think that defendants should have an opportunity to amend the pleadings in this respect and to incorporate the intimation by Mr Beck that the promise relied on relates to the same occasion and the same words and conduct as are relied on in the second cause of action relating to breach of contract. Accordingly I vary the Master's decision in respect of the promissory estoppel cause of action by allowing leave to amend it as well.

Having regard to the abandonment of the first cause of action, the modifications and explanations put forward by Mr Beck in the course of argument and the deficiencies in respect of which leave has been given to amend, it is obvious that if this counterclaim is to stand, it requires radical reformulation.

The end result is that the remaining three causes of action are struck out but leave is granted to amend as set out above. The fifth amended statement of defence and counterclaim is to be filed within 21 days from the date of this judgment. Leave is reserved to plaintiff to apply further to strike out if so advised. The time-table order made by the Master stands as set out in his decision.

In connection with the Master's order as to costs I have reviewed the history and circumstances of the various applications and it is my view that no adjustment is required. I consider that the costs awarded were within the range available for the series of applications which he dealt with.

Although on the present application defendants have succeeded in part, the review was only necessary because of the lack of clarity and precision in what they themselves had previously put forward, and the plaintiff has been put to further expense. I consider that there should be a further award to the plaintiff on the present application. I fix this sum at $750.00.



Solicitors:

R T Henderson, Waimate, for Plaintiffs
Michael Guest, Dunedin, for Defendants.

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A N D	BERNARD ANDREW MacGEORGE and DAVID ALAN WOOD and DOUGLAS JAMES BLAIKIE First Defendants
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