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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1292/92

BETWEEN	EQUITICORP FINANCIAL SERVICES LIMITED (In Statutory Management)
	First Plaintiff
AND	EQUITICORP FINANCE LIMITED (in Statutory Management)
	Second Plaintiff
AND	NORMAN EUAN DONALD
	First Defendant
AND	MURRAY STUART McKECHNIE & OTHERS
	Second Defendants

Hearing: 17 June 1998

Counsel: E. F. Mills for Plaintiffs
M. J. Corry for Second Defendants

Judgment: - 3 JUL 1998

JUDGMENT OF SALMON, J.

Solicitors: Howard-Smith & Co., Auckland for Plaintiffs
McKechnie Quirke & Lewis, Rotorua for Second Defendants

The two applications for decision are:

1. An application by the second defendant to strike out the statement of claim.
2. An application by the plaintiff to strike out the defence of the second defendant.

Background

The plaintiff issued proceedings against the first defendant based upon breach of contract and misrepresentation in relation to a compromise entered into between the plaintiffs and the first defendant. At a later date when sufficient information had been obtained on discovery the statement of claim was amended and the second defendants were joined. Later the plaintiffs settled with the first defendant and discontinued against him.

The plaintiff issued interrogatories against the second defendants, which have not been answered. The second defendants filed their application to strike out the statement of claim and the plaintiffs followed with their application to strike out the defence on the grounds of failure to comply with the order relating to the interrogatories.

1. The Second Defendants' Application

In order to understand this application it is necessary to record in more detail the nature of the claim against the first defendant and the claim against the second defendants.

The statement of claim discloses that in 1988 the first plaintiff lent the first defendant an amount of just over $118,000 which was to be repaid together with interest on 3 March 1989. The total sum to be repaid was $148,072.58. In December 1988 the first plaintiff assigned its interest in the agreement to the second plaintiff. The first defendant failed to pay the sum falling due on 3 March and in September 1989 the plaintiff and the first defendant entered into an agreement as to repayment.

The first defendant failed to comply with the terms of that agreement and the first cause of action against him claims damages for that breach.

The cause of action against the first defendant which is most material for the purposes of this decision is one in which it is alleged that the plaintiff was induced to enter into the agreement of September 1989 as a consequence of misrepresentations made by the first defendant. Those misrepresentations related primarily to the value of the first defendant's farm property, which was apparently his only significant asset.

Information regarding his assets and liabilities was supplied by the first defendant to the plaintiffs in a statutory declaration. The value of the farm property was said to be $720,000 as shown in a valuation supplied. However, some months before he made that declaration the first defendant had agreed to sell his farm property for $1.2 million to a company called Arbridge Developments Ltd, of which he was a director. That agreement was dated 23 June 1989 and the property was transferred to Arbridge in September 1989.

The statement of claim alleges that as a consequence of the failure to make full disclosure and of the misrepresentations the plaintiffs agreed to the compromise. The plaintiffs claim the balance owing in respect of the original loan together with interest.

In its claim against the second defendant the plaintiffs allege that the second defendants, and in particular Mr Lewis of that firm, had acted for the first defendant for a considerable period prior to the completion of the declaration of assets and liabilities in September 1989. It is alleged that as a consequence of having acted for the first defendant, the second defendants would have known that the representations made and the contents of the declaration were in a number of respects untrue or misleading and that they failed to fully disclose all material facts in relation to the first defendant's financial position and the fact of the sale of the first defendant's farm property.

The plaintiffs also allege that the information supplied to them by the second defendants, including the declaration of the first defendant was provided at their request and that the second defendants owed a fiduciary duty and a duty of care to the plaintiffs to use reasonable care and skill to ensure that the information was correct. A breach of that fiduciary duty is claimed.

Finally, the plaintiffs claim that the second defendants have breached the provisions of the Fair Trading Act 1987.

As mentioned above the plaintiffs settled their claim against the first defendant and 18 months later discontinued their claim against him.

The second defendant seek to strike out the statement of claim on the following grounds:

1. That the first and second defendants are joint tort feasors, that the release rule applies and the release of one joint tort feasor discharges the other.
2. That the unilateral discontinuance by the plaintiffs against the first defendant was an abuse of process with consequences which justify the strike out of the plaintiffs' claim against the second defendant.

Alternatively, if the strike out grounds are rejected the second defendants seek that the discontinuance against the first defendant be set aside.

As a separate issue the second defendants claim that the cause of action alleged under the Fair Trading Act is statute barred and that cause of action should be struck out for that reason.

The Joint Tort Feasor Argument

It is beyond dispute as a result of the decision of the Court of Appeal in ***Brooks v New Zealand Guardian Trust Co. Ltd*** [1994] 2 NZLR 134 that the release rule applies in New Zealand and that a release of one joint tort feasor discharges the other. The essential issue for resolution at this stage, therefore, is whether it is reasonably arguable that the claim against the solicitors can stand on its own, that is to say, that they were not necessarily joint tort feasors with the first defendant.

For the second defendants, Mr Corry referred to paragraphs 17, 33 and 37 of the amended statement of claim and argued that there was only one group of misrepresentations which was pleaded against both defendants. He also referred to the affidavit of Mr Donald, filed in support of the application, in which he said that the statement of assets and liabilities, which formed the basis for the plaintiffs' claim against him was

prepared entirely by him and that the second defendants did not give him any advice in relation to it or the terms of settlement.

There is at least one document which seems to fall into a separate category. I have already referred to the declaration setting out the first defendant's financial position. That declaration was dated 14 September 1989. The letter to which reference has been made above is also dated 14 September 1989. It records acceptance of the settlement proposal in the following terms:

> "The Manager
> Equiticorp Finance Group Ltd
> (In Statutory Management)
> PO Box 7240
> Wellesley Street
> AUCKLAND
>
> Attention: Mr Coleman
>
> Dear Sir
>
> re: Norman E Donald
>
> Further to your letter of 6 September 1989 we confirm, on behalf of our client Mr Donald, his acceptance of the proposal as set out in that letter.
>
> Accordingly, upon the basis that Equiticorp agrees to limit its debt to the sum of $70,000.00, Mr Donald will arrange to repay to Equiticorp the sum of $55,000.00 by the end of September 1989 and the balance sum of $15,000.00 not later than the last day of September 1991. No interest will accrue on this balance sum.
>
> In the event that our client nets more than $400,000.00 from the sale of his farm property at Tarawera (before 30 September 1991), then our client Mr Donald, will pay to Equiticorp such sum in excess of $400,000.00 up to a maximum of $60,000.00. "Net" is to be taken as follows:
>
> > Sale price, less GST, less legal and selling costs, less repayment of all Mortgages on the property.
>
> Our client confirms that he will not disclose to any third party whatsoever the existing terms of the settlement herein contained, except with the written consent of your client.
>
> Mr Donald's sworn Assets and Liability Declaration is enclosed.
>
> Mr Donald's acceptance of your proposal is confirmed by his signature at the bottom of this letter.

Kindly acknowledge receipt of this letter.

Yours faithfully
TROTTER McKECHNIE QUIRKE & MORRISON

Accepted

P.A. Lewis

N.E. Donald

14 September 1989"

It seems, at least arguable that at the time that letter was written the solicitors were aware of the sale of the farm for $1.2 million. It will be noted that the letter enclosed Mr Donald's sworn assets and liabilities declaration which showed the value of the farm as $720,000. In these circumstances it is the plaintiffs' claim that the solicitors independently misrepresented the first defendant's asset position and that they had a duty to the plaintiff to disclose the fact that the statement of assets and liabilities was not accurate because of the existence of the agreement for the sale of the farm. It will be recalled that in fact the memorandum of transfer is also dated September 1989. That transfer was prepared by the second defendants. In June 1989 the plaintiff made a statutory declaration referring to the agreement for sale and purchase which was declared before one of the partners of the second defendants.

It is certainly arguable that there is liability on the second defendants arising from the letter of 14 September and that such liability is independent of any liability arising as a joint tort feasor with Mr Donald. Accordingly, the statement of claim should not be struck out on the basis of the release rule.

Abuse of Process

The defendants claim that their position has been prejudiced as a result of the settlement with the first defendant. This submission relies on the proposition that the second defendants knew nothing of the settlement and the subsequent discontinuance. It was submitted on behalf of the second defendant that during the lengthy period between the time of the settlement with the first defendant and the discontinuance, almost two years later, the first defendant's financial position may have changed in a manner adverse to any claim by the second defendants for contribution. However, it is clear from correspondence produced by the plaintiff that the second defendant knew of the settlement between the plaintiffs and the first defendant by at least March 1996, at which stage no payment in terms of the settlement had been made. I reject the abuse of process claim.

Should the Discontinuance be Set Aside?

In support of the submission that the discontinuance against the first defendant should be set aside, counsel for the second defendant referred to my decision in ***Turners & Growers Ltd v Westpac Merchant Finance Ltd & Ors*** (unreported, High Court, Auckland Registry, CP.32/95, 26 March 1998). In the ***Turners & Growers'*** case the proceedings had been set down for hearing at the time of the discontinuance against one of the defendants. For practical purposes it was too late to join as a third party, the party against which a discontinuance had been filed. I effectively restricted the conclusions I drew in that case to the circumstance where a discontinuance

against one defendant had been filed after the proceedings had been set down for hearing.

In this case the second defendants were aware in March 1996, prior to any payments being made by the first defendant, that the plaintiffs had undertaken to file a notice of discontinuance once all of the payments which the first defendant was to make, had been paid. The second defendants were therefore on notice and took no steps to file a cross notice. In those circumstances I do not propose to set aside the discontinuance. I do not consider that the second defendant has been prejudiced in any way by the discontinuance and, of course, the second defendant is still able, if it wishes, to join the first defendant as a third party.

The Fair Trading Act Pleading

The second defendant claims that this pleading was statute barred. The second defendant submits that the matter giving rise to the application occurred in September 1989 and that the claim against the second defendants was not commenced until September 1994. Section 43(5) of the Fair Trading Act 1986 requires applications under that section to be made within three years "from the time when the matter giving rise to the application occurred". In ***Murray v Eliza Jane Holdings Ltd*** [1993] 6 PRNZ 251 the Court of Appeal held that the expression "the matter giving rise to the application" refers to the conduct alleged and not the occurrence or discoverability of loss or damage.

It was argued in that case that in the case of fraud time should not run until the discovery of that fraud. The Court noted that a claim based on s.9 of the Fair Trading Act involves an allegation of misleading or deceptive conduct and that deceptive conduct was analogous to fraud. The Court held that it was not possible as a matter of logic to rely on that deceptive conduct to found an estoppel or some other equitable basis for defeating the limitation provision.

Mr Mills, for the plaintiffs, argued that the Court had left open the possibility that conduct apart from that which founds the claim, might be sufficient to extend the time by analogy with s.28 of the Limitation Act or on the basis of estoppel. In this case he submitted that the actions of the first and/or the second defendant in failing to comply with the requirements of the rules in relation to discovery, amounted to such conduct.

There is nothing in the material before me which would suggest that the second defendants were in any way to blame for any delay in the provision of discovery by the first defendant. In any case even the action against the first defendant was not commenced until 22 October 1992, which was more than three years after the "matter giving rise to the application". In my view the statement of claim contains no pleading that would bring it outside the principles enunciated in ***Murray*** and accordingly, I dismiss the Fair Trading Act cause of action.

The Plaintiffs' Application to Strike Out

The plaintiffs' application to strike out the second defendant's statement of defence is based on the second defendant's failure to provide answers to interrogatories. The order requiring the second defendant to answer interrogatories was served on the second defendant on 12 March 1998. The application by the second defendants to dismiss the plaintiffs' claim was served on 1 April 1988. The order requiring the second defendants to answer interrogatories required compliance within 21 days of the date of service. That 21 day period expired on 2 April by which time the application to dismiss had been filed. In those circumstances I accept that it was reasonable for the second defendants to wait until the strike out application had been determined before answering the interrogatories. That justification has now ended and I order that answers to interrogatories be provided within 21 days of the date of this judgment.

Orders

1. The cause of action against the second defendant relying on the Fair Trading Act is struck out.

2. In all other respects the application to strike out the plaintiffs' claim is dismissed.

3. The application by the plaintiffs that the second defendants' defence be struck out is dismissed.

4. The second defendants shall comply with the order to answer interrogatories within 21 days of the date of this judgment.

5. A conference date is to be allocated so that orders may be made concerning the future conduct of these proceedings.

6. All issues relating to costs on the applications the subject of this judgment are reserved.