**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2007-404-001372**

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| BETWEEN | SHAUN ROGER NIXON (WITHDRAWING PARTNER) AND MARTIN VICTOR RICHARDSON AND SHAUN ROGER NIXON AS TRUSTEES OF THE FIRM TRUST (NIXON TRUSTEES)<br>Appellants |
| AND | GEOFFREY DONALD CAMPBELL WALKER, ROWN JOHN CHAPMAN, TIMOTHY JOSEPH GOLDFINCH, MARTIN VICTOR RICHARDSON, DIANNE MAREE LUDWIG AND KURT SHERLOCK (CONTINUNIG PARTNERS) AND GOSLING CHAPMAN LIMITED (GCL)<br>Respondents |

Hearing: 1 May 2009

Appearances: S A Grant for Appellants
F J Thorp for Respondents

Judgment: 8 May 2009

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**JUDGMENT (No 2) OF KEANE J**

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This judgment was delivered by Justice Keane on 8 May 2009 at 3pm
pursuant to 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Boyle Mathieson, Henderson, Auckland for Appellants
Fleming Foster & Co, Manurewa, Auckland for Respondents

[1] On 7 October 2004 Shaun Nixon and a trust, of which he is one of two trustees, entered into an agreement with the then remaining partners of the insolvency and auditing partnership, Gosling Chapman Chartered Accountants, and the company associated with it, Gosling Chapman Limited, governing the terms on which he was to withdraw from the partnership and to relinquish any shares he held directly or indirectly in GCL and some other companies.

[2] Two categories of claim were reserved for arbitration. The first category related to goodwill. Mr Nixon had received one payment from recently admitted partners, Kurt Sherlock and Dianne Ludwig and, though a withdrawing partner, claimed to be entitled to a second, $34,360. They claimed rather that he owed them a refund of the first, $20,664.

[3] These two questions turned on the date Mr Nixon withdrew from the partnership. In the October 2004 agreement he was taken to have withdrawn on 9 March 2004. But as to the goodwill questions, he was to be taken to have withdrawn on one of two dates, 31 March 2004 or any earlier date determined at arbitration. Two terms in the 1995 partnership agreement were in point: as to the right to the second payment, cl 10(b); as to any duty to refund the first payment, cl 11(f)(iii).

[4] The second category of issue was what compensation, if any, Mr Nixon was entitled to from the continuing partners. He claimed that, contrary to a consultancy agreement they had entered into, or representations that he was to be a consultant they were estopped from denying, they ousted him. He was obliged to resign. He claimed $496,130 damages – earnings from his accountancy practice he might have commenced two years earlier had he been given three months notice. Instead he was forced to take up a less rewarding consultancy. He claimed $15,000 damages for stress and humiliation.

[5] On 18 December 2006 the Arbitrator, the Honourable Robert Fisher QC, made a partial award adverse in all respects to Mr Nixon. On the evidence as a whole, he found, Mr Nixon had withdrawn from the partnership for all purposes, including goodwill, earlier than 31 March 2004. Mr Nixon had withdrawn on 9 March 2004 and that, and the basis on which that happened, were fatal to his two

categories of claim. In his final award, as well as denying Mr Nixon any award, and awarding to the newly admitted partners $20,654 and interest $4,210, the Arbitrator required Mr Nixon and his trust to pay costs, $115,000, and to meet other costs and disbursements. Mr Nixon's total liability, and that of the trust, became $138,834.

[6] Mr Nixon, seeking to contest that award and to resurrect his two claims, applied for leave to appeal to this Court as to eight questions. On 13 July 2007 John Hansen J gave him leave to pursue four, two concerning goodwill and two the consultancy. In my decision, dated 12 December 2008, I concluded that the Arbitrator had made no error in his interpretation of the 2004 and 1995 agreements. As to the consultancy issues, I regarded myself as bound by the Arbitrator's findings of fact. I dismissed the appeal.

[7] Mr Nixon seeks now leave to appeal my decision to the Court of Appeal and that raises two issues. The first is that he has sought leave out of time and requires an extension. The second is whether, if I extend time for him to apply, and that is opposed, he is entitled to the leave he seeks.

**Extension of time**

[8] Mr Nixon is obliged to obtain leave to appeal my decision to the Court of Appeal: s 5(5), Schedule Two, Arbitration Act 1996. And his need for an extension of time arises from his advisers not appreciating that. On 23 December 2008, they lodged his notice of appeal in the Court of Appeal without leave. They did not become aware of their error until advised by the other side on 16 February 2009.

[9] Under the rules as they then were (the new rules did not come into force until 1 February 2009), r 890 allowed Mr Nixon 28 days from the date of my decision within which to seek leave. That expired on 9 January 2009. When Mr Nixon came to make his application, however, as Mr Thorp accepts for the remaining partners, s 9(4) of the Judicature Amendment Act (High Court Rules) 2008 made Mr Nixon subject to the time limit for leave in the new rule, r 26.14, 20 working days from the date of my decision. That expired on 2 February 2009.

[10] I do not think it right to hold Mr Nixon accountable for the delay immediately after 2 February 2009. His advisers' failure to appreciate the need for leave was not brought home until 16 February 2009. The less excusable delay is between 16 February and the date he applied, 6 March 2009. Because, however, the remaining partners are unprejudiced, it would be wrong, I think, to deny Mr Nixon his opportunity to apply.

**Leave to appeal**

[11] The threshold Mr Nixon must now pass to obtain leave was recently settled in *Downer Construction (NZ) Ltd v Silver Field Developments Ltd* [2008] 2 NZLR 591, CA, a case concerning the identical threshold, that for special leave. 'The primary focus', the Court of Appeal said, at para [33], 'is on whether the question of law is worthy of consideration'. And that, it held, is to be assessed from the three converging perspectives identified by Randerson J in *Cooper v Symes (No 2)* (2001) 15 PRNZ 166, at para [12]:

> (a) The appeal must raise some question of law … capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.
>
> (b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied in the Court below.
>
> (c) Not every alleged error of law is of such importance either generally or to the parties as to justify further pursuit of litigation that has been twice considered and ruled upon by a Court.

[12] Ms Grant contends that all Mr Nixon needs to do is to show some arguable question or questions of law: *Lancaster v Cullen Investments Ltd* (CA 26 May 2003, CA 51/03). I am unable to accept that. In *Cullen* the Court of Appeal did not begin to consider by what measure a point of law is to be assessed as arguable; an issue discussed by the Court but not resolved in *Casata Ltd v General Distributors Ltd* [2005] 3 NZLR 156. The Court's most recent statement in the *Downer Construction* case has to be prescriptive.

**Award and appeal**

[13] Mr Nixon, the Arbitrator held, was not entitled to the second goodwill payment he claimed under cl 10(b), $34,360, because he was not an existing partner on 1 April 2004 when that payment became due. He had ceased to be a partner on 9 March 2004. He would have been no more entitled had he left the day before it was due, 31 March 2004.

[14] Mr Nixon, the Arbitrator held, was obliged instead under cl 11(f)(iii) to refund the newly admitted partners his share of the first goodwill payment, $20,664. To have been immune from that liability he would have had to have left the partnership in excess of 24 months after their date of entry, no earlier than 2 April 2004.

[15] On the appeal I accepted that both these issues were matters of interpretation raising questions of law susceptible of appeal, but both were to be resolved on the basis of the Arbitrator's finding that Mr Nixon had ceased to be a partner on 9 March 2004; and I agreed with the Arbitrator's conclusions on each issue for essentially the reasons he gave.

[16] As to the consultancy claim, the Arbitrator did not accept that any consultancy had ever been agreed in late July 2003, let alone that any could only be terminated on three months notice. The critical terms remained at large. The existing partners had not ratified any such agreement, expressly or by conduct. There was no evidence of part performance, or any basis for an estoppel. This claim failed for want of any foundation.

[17] The Arbitrator did not accept, therefore, that on 10 February 2004, as Mr Nixon contended, the continuing partners were answerable for cancelling such an agreement without notice. Nor did he consider Mr Nixon had any equivalent right in estoppel. The Arbitrator saw no need to assess whether, if Mr Nixon ought to have had three months notice, that lack meant he could not begin his present accountancy practice immediately and had to remain within a less rewarding consultancy for two years.

[18] On the appeal I held that the Arbitrator's findings of fact in a primary sense precluded Mr Nixon asserting, as a matter of law, the contract he contended for or advancing any related claim in estoppel. I did not consider the law as to either possibility or begin to assess his claim in damages though, on its face, I was sceptical as to its merit.

**Proposed grounds of appeal**

[19] On his proposed appeal Mr Nixon seeks to contend that on the first claim he was given leave to pursue on appeal to this Court, his claim to the second goodwill payment under cl 10(b) of the 1995 consultancy agreement, I made two errors. They are these:

> (i) Interpreting cl 10(b) as requiring partners to be existing partners at the time a goodwill payment is due or made, rather than solely requiring the partner to be an existing partner at the time the goodwill was sold;
>
> (ii) Failing to take into account the relevant mutual subsequent conduct of the parties in not requiring a previous partner to remain a partner until the date that a goodwill payment was made or due.

[20] As to the second question allowed, that concerning Mr Nixon's liability to refund to the incoming partners the first goodwill payment under cl 11(f)(iii), he seeks to contend that I made three errors:

> (a) Wrongly holding that cl 11(f)(iii) applied to Mr Nixon because he withdrew or retired from the partnership, when his departure was forced upon him.
>
> (b) Incorrectly adopting a literal interpretation of cl 11(f)(iii) to the effect that a partner had to remain in the partnership until 2 days after the financial year end to avoid having to make a refund when the purpose and context of the clause from a commercial perspective called for a proposive construction to the effect that a refund was only due if a partner left the firm within two years of a new partner joining.
>
> (c) Incorrectly holding that Mr Nixon was obliged to pay a refund under cl 11(f)(iii) for leaving too early, when that circumstance was brought about by the partner's own conduct in forcing his resignation, contrary to the principles in *New Zealand Shipping Co Ltd v Societe Des Ateliers et Chantiers de France* [1919] AC (PC).

[21] As to the third question allowed, whether Mr Nixon did enjoy the benefit of a consultancy agreement, and the right to three months' notice, I am said to have made these errors:

> (a) Wrongly holding that the fact that the Arbitrator had held that there was no expressly agreed contract meant that Mr Nixon could not succeed in a claim that the partners had accepted by their conduct that a contract had come into existence no Mr Nixon's terms.
>
> (b) Wrongly finding that a lack of agency authority of Mr Richardson to bind the partnership prevented acceptance by conduct when the conduct engaged in was conduct of all the partners.

[22] As to the fourth question, Mr Nixon's claim in estoppel to much the same effect, he seeks to say that I made this error:

> Incorrectly finding that the lack of certainty of some terms of the consultancy arrangement was fatal to Mr Nixon's claim in estoppel, contrary to long established principles of law.

**Conclusions**

[23] The goodwill grounds of appeal rest on an interpretation of the 1995 agreement that the Arbitrator and I rejected. That cannot be decisive. It is not unknown for arguments to succeed for the first time on a second appeal. The issue is rather whether there is sufficient substance to the argument to make it worthy of consideration. I consider that there is. The terms of the contract do call for interpretation. Mr Nixon's interpretation is considered, not specious, and highly detailed. In these senses it is capable of bona fide and serious argument.

[24] The consultancy claim, potentially of far greater significance, is one, I held, that was resolved once and for all by the Arbitrator's findings of fact. I am left, however, with this question, whether a lack of agreement as to the essential terms of a consultancy agreement, especially as to notice, precluded his claim on an estoppel; if not his precise claim then one that might afford him some measure of relief. Cases I did not consider are *Flinn v Flinn* [1999] VS CA 109 and *Holiday Inns Inc v Broadhead* (1974) 232 EG 951, Goff J.

[25] These issues cannot be said to have public significance. Those as to goodwill turn on the 1995 partnership agreement, which is specific to the partnership. The consultancy claim is also particular and that it involves estoppel, a perhaps still evolving doctrine, does not give it any wider significance. I do accept that, so far as the parties are concerned, Mr Nixon especially, they do have high significance.

[26] Mr Nixon seeks to avoid having to pay $20,654 and interest of $4,210. He seeks to be paid $34,360. His damages claim, $496,130, may be overstated. I cannot exclude the possibility that, if he succeeds in some fashion in making out his consultancy, he may be entitled to some measure of damages. More tangibly, Mr Nixon's liability to costs now stands at a very significant level.

[27] To be weighed against that is, as the remaining partners say, that the purpose of an arbitration is to achieve finality and Mr Nixon, having not succeeded before the Arbitrator or on appeal to this Court, now wishes to try again. The costs they have sustained, they say, are also considerable and they are mounting.

[28] The conclusion to which I have come, however, despite these considerations, which I accept have force, is that Mr Nixon's proposed points of appeal are sufficiently arguable, and his personal interest in the outcome is significant enough, to warrant allowing him the further opportunity he seeks. I grant him an extension of time within which to bring his application for leave, and leave to appeal to the Court of Appeal.

[29] Though Mr Nixon has succeeded in this application, he has done so despite having failed to apply within time and the grant of leave he has obtained was by no means a foregone conclusion. The remaining partners, in opposing the application, had good grounds to do so. I did not discount those grounds lightly. Costs will lie where they fall.

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P.J. Keane J