



Transcript of Proceedings

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Date: 26 May, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No BS11924 of 2003

AUSTRALASIAN PROPERTY HOLDINGS PTY LTD First Plaintiff
(ACN 010 637 804)

and

GEORGE CONOMOS Second Plaintiff

and

CON MICHAEL PLASTIRAS Defendant

BRISBANE

..DATE 18/05/2004

JUDGMENT

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HIS HONOUR: This is an application by the defendant pursuant to rule 171 of the Uniform Civil Procedure Rules 1999 for an order that "the plaintiff's action" discloses no reasonable cause of action and should be struck out. There are two plaintiffs and not just one in the proceeding, which was instituted on 22 December 2003 by claim. The argument before me proceeded as if it were an application to strike out all of the plaintiffs' amended statement of claim, which is exhibit 1 admitted at the hearing on Friday last, 14 May.

In the amended statement of claim it is alleged that the first plaintiff is a company which provided services to the second plaintiff, a solicitor practising under the name George Conomos Lawyers. The defendant, it is alleged, was a staff solicitor employed by the first plaintiff from 8 December 1997 to 4 January 1999, when his employment was "terminated...as a consequence of various breaches of the contract of employment and/or fiduciary duties" (paragraph 11). The contract of employment, it is alleged, was an agreement partly in writing and partly oral, made on or about 26 November 1997. The terms of the alleged contract of employment appear in paragraphs 5 (express written terms), 6 (express oral terms), and 7 (implied terms). What are pleaded as particulars of the defendant's breaches of contract and/or fiduciary duties appear in paragraphs 11, 12, 13, and 14; and in paragraph 15(a) to 15(i) the plaintiff's alleged resultant loss and damage is particularized. The argument before me focussed on paragraph 15, and the prayer for relief which was as follows:

"THE PLAINTIFF CLAIMS:

1. An account of professional fees rendered by the defendant to former clients of the George Conomos Lawyers in the 12 month period following 4 January 1999. 1
2. Damages for breach of contract and/or breach of fiduciary duties in the sum of \$73,804.34 plus the amount determined by the account. 10
3. Exemplary damages in the sum of \$50,000.00 20
4. Interest on damages pursuant to the *Supreme Court Act* 1995.
5. Costs. 30
6. Such further or other order as the court considers appropriate."

In paragraphs 15(a) and 15(b), it is alleged that the first plaintiff suffered a loss of \$15,000 arising from the payment of the defendant's salary for seven weeks "in June/July when George Conomos was overseas" (\$7,000); and "during November and December" (\$8,000). In those paragraphs it is alleged that the second plaintiff suffered losses of \$22,361.50: 40

\$15,361.50 in June/July, and \$7,000 in the November and December. (It seems clear that both periods referred to were in 1998.) The allegation of the loss of the \$15,000 appears to be based first on the allegation that there was an express 50

written term in the contract that the defendant's "base remuneration package" under the contract was \$52,000.20 (paragraph 5(b)); and the allegation of the loss of the \$22,361.50 appears to be based on the allegation that the defendant acknowledged in an express written term of the contract that he was "expected to perform to a minimum budget of paid billings for his work" which equated to "three times his base remuneration package" (paragraph 5(a)). Further, there were, it is alleged, express written terms that the defendant would devote substantially the whole of his work time and attention to the business of the second plaintiff and use his best endeavours to promote the interests of the practice (paragraph 5(c)), and implied terms of the contract and/or fiduciary duties cast upon the defendant loyally to serve the plaintiffs (paragraph 7(b)), to use his best endeavours to carry out the tasks of the employment (paragraph 7(c), not to compete with and/or carry out any acts to the detriment of the plaintiffs (paragraph 7(e)), and to carry out the duties of his employment in a proper and competent manner (paragraph 7(i)). In paragraph 11(a) it is alleged that in the seven weeks in June and July 1998 the defendant billed a total of \$5,638.50 in professional fees when he "ought" to have billed at least \$21,000 gross professional fees "during that period had he devoted his working time diligently to the performance of his contract of employment". In paragraph 11(f) it is alleged that during the months of November and December (1998) the defendant failed to devote his entire working time to his duties under the contract of employment, and in those months he billed gross professional fees "in the

order of \$17,000 whereas he ought to have billed gross fees of at least \$24,000". The \$22,361.50 is then arrived at by subtracting the fees allegedly billed, \$22,638.50, from those that allegedly should have been billed, \$45,000.

The case against the defendant could rest on construing the clause pleaded in paragraph 5(a) as a warranty of usefulness by the defendant; but if so, the defendant was entitled to know that, it was submitted on his behalf.

The claim to the \$7,000 in paragraph 10(a) does not, it appears, rest simply on the failure of the defendant to achieve \$21,000 gross professional fees, but also on an added allegation, implied only, in paragraph 11(a) of the defendant's failure to devote his working time diligently to the performance of his contract of employment. To plead such a case properly a statement of the material facts on which the plaintiffs rely should have been included: the work the defendant was required to do, the ways in which his doing the work was deficient, the fact that the defendant's failure was a breach of the contract identifying the alleged breach with precision, and the basis of the estimates of the fees that would have been earned had the work the defendant was required to do been done diligently, etc. As to the last-mentioned see rule 155(2)(c). As the amended statement of claim is at present framed, the claim to the \$7,500 is so unclear as to prejudice or delay the fair trial of the proceeding.

The same conclusion follows concerning the claim to the \$8,000 in paragraph 15(b) of the amended statement of claim, which relates to the defendant's conduct - or misconduct - in November and December 1998. Again, the material facts I have mentioned are not pleaded although certain other facts, which may or may not be relevant to this part of the claim, are pleaded in paragraph 11: the defendant's purchase of blank computer diskettes and instructing a named secretary to do certain things with the diskettes (paragraph 11(b)); prior to 4 December 1998 the defendant's offering the secretary a position in the defendant's new legal firm and causing her to resign her employment with the first plaintiff, with effect on 4 December 1998 (paragraph 11(c)); during the course of his employment with the first plaintiff and during office hours and utilizing the facilities of the first plaintiff commencing negotiations concerning his own legal practice (paragraph 11(d)); and failing to devote his entire working time to his duties under the contract of employment (paragraph 11(f) to which I have already referred). Those pleaded facts do not, on my assessment, make up for the deficiency to which I have alluded.

The claims to the \$15,361.50 in paragraph 15(a) and the \$7,000 in paragraph 15(b) are lacking in statements of the material facts I have mentioned.

I should add that it is not clear to me how the defendant can be responsible for losses calculated by adding to the deficiency of billings the salary paid to him. Claims

bringing about that result have been achieved by reliance the
dichotomy - artificial in the extreme in this context -
between the first plaintiff as the services company to the
second plaintiff and second plaintiff.

In paragraph 15(c) of the amended statement of claim the
second plaintiff claims \$21,865.99 as the loss of gross fees
"that ought to have been billed by the defendant during his
employment". In making that claim, the second plaintiff
relies, evidently first on an allegation in paragraph 6(a)
that one of the express oral terms of the contract of
employment was that the defendant would charge all work he
performed for all clients at the second plaintiff's standard
rate of \$200 per hour, and that no discount or reduction in
charges was to be extended to any person unless with the prior
consent of the second plaintiff; secondly on the terms of the
contract of employment alleged in paragraphs 5(c), and
7(b), (c), (e), and (i); and thirdly on an allegation in
paragraph 11(h) that, without the authorization of the
plaintiffs, the defendant performed legal work on behave of
certain clients on the basis that he would not render
professional fees and for the purpose of ingratiating himself
with those clients and obtaining their legal work upon
establishing his own legal practice, or alternatively did work
at reduced professional fees without the authorization of the
plaintiffs. Particulars of the clients, the work done and the
value of the work performed for no fee or reduced fees are
given in paragraph 11(h). The claim in paragraph 15(c) is, I
think, clear enough.

On behalf of the defendant it was argued that since the clients in question are being in separate proceedings in another court for the same fees, inconsistent claims "are thus made against different parties in different Courts the applicant [presumably the plaintiffs] seeking not to be bound by an estoppel". On behalf of the second plaintiff that argument was satisfactorily met first by reference to the fact that it was the defences in the other proceedings, in which the clients are represented by the defendant's firm, that identified the alleged breach of duty by the defendant, and secondly by the concession - if a concession is needed - that while the same sum is sought in both proceedings, only one can succeed.

In paragraph 15(d) of the amended statement of claim, the first plaintiff seeks to recover \$1,600 "[h]oliday leave paid by [it] to the defendant for 25 December 1998 to 11 January 1999". The allegation concerning holiday leave in paragraph 11(i) is that the defendant took holidays and received holiday pay in respect of the period 25 December 1998 to 4 January 1999 "in circumstances where he had leased premises to operate a legal firm from 1 January, 1989 [sic, presumably '1999' was intended] without telling the plaintiffs". The first difficulty with this part of the claim is the discrepancy between the alleged dates of the leave: 25 December 1998 to 11 January 1999 as alleged in paragraph 15(d), and 25 December 1998 to 4 January 1999 as alleged in paragraph 11(i). The significance of the allegation in paragraph 11(i) concerning the period from 1 January is not clear at all. Adding to that

lack of clarity is the submission made on behalf of the first plaintiff that "[s]ince the defendant had not truly been employed for a period of 12 months he was not entitled to any holiday pay", and that "the facts alleged by the plaintiff demonstrate that the defendant ceased to work for the plaintiff in or about November 1998". Those submissions are at odds with the allegation in paragraph 11 of the amended statement of claim that the defendant's employment terminated on 4 January 1999, and furthermore there is no explicit pleading of those allegations. The present state of the amended statement of claim has then, in paragraph 15(d), a tendency to prejudice or delay the fair trial of the proceeding.

In paragraph 15(e) of the amended statement of claim there is a claim for \$212.50 arising from the first plaintiff's payment of the defendant's practising certificate fee for six months. It is alleged in paragraph 6(b) of the amended statement of claim that the first plaintiff would pay the defendant's practising certificate fee for the period of the defendant's employment, and if the defendant's employment were terminated for any reason whatsoever then the defendant would reimburse the first plaintiff pro rata for the fee for the balance of the period to which the certificate was paid up. Further particulars of how the figure of \$212.50 was arrived at are probably required but that part of the plaintiff's claim is clear enough, as are those in paragraphs 15(f) and (g) in which claims of \$7,800 and \$3,964.35 are made in respect of

agency fees incurred by the first plaintiff to place a new employed solicitor and a legal secretary respectively.

In paragraph 5(g)(ii) it was alleged that it was a written term of the contract of employment that from the date he finished employment with the second plaintiff the defendant would not solicit other employees for personal gain or for the benefit of his employer for a period of twelve months, but in this case the acts relied on occurred before the defendant finished employment with the second plaintiff. The claims in paragraphs 15(f) and (g) may be open to serious argument on behalf of the defendant but, bearing in mind that the jurisdiction to strike out should be exercised sparingly, I shall not strike them out.

In paragraph 15(h) of the amended statement of claim \$1,000 is claimed for the estimated cost of outlays incurred by the first plaintiff as a result of the defendant's using the first plaintiff's facilities (paper, labour, photocopying machines, etc.), in making unauthorized copies, as alleged in paragraph 11(g): the defendant, it was alleged, instructed the secretary referred to to photocopy precedents and client files comprising three ring binders, documents which were removed from the second plaintiff's offices after copying. It may be that further particulars of the estimate should be provided, if asked for, but there is, I think, no reason at present to strike out this part of the claim provided the plaintiff supplies any particulars sought.

In paragraph 15(i), the claim is made for "[l]oss of profits (which the second plaintiff is unable to quantify until an account is taken)". In paragraph 5(g)(i), it was alleged that the express written terms of the contract of employment provided that from the date the defendant finished employment with the second plaintiff, the defendant would not market to, or solicit business from, any client of the practice for personal gain or for benefit of his "successive employer" for a period of twelve months.

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The allegations in paragraphs 13 and 14 of the amended statement of claim are as follows:

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"13. In breach of the contract of employment and fiduciary duties the defendant has derived profit from opportunity and knowledge obtained by reason of his employment with the first plaintiff in that he has performed legal work for clients of George Conomos Lawyers during the period of 12 months following the termination of the contract of employment. The plaintiffs are unable to particularise the profits or clients from which such profits were derived until after disclosure and inspection by the defendant, save to say that the clients included the clients particularised in paragraph 11(h) hereof.

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14. Following the termination of the defendant's employment with the first plaintiff he has acted on behalf of former clients of George Conomos Lawyers in disputing memorandum

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of fees issued by George Conomos Lawyers in respect of
work performed by the defendant during his employment
with the first plaintiff and those clients allege that
such fees are not owing because the defendant agreed to
do the work at no charge or alternatively at reduced
fixed fees."

It is not at all clear from the amended statement of claim
whether what is alleged in paragraph 15(i) is a breach of the
restriction imposed on the defendant in the provision alleged
in paragraph 5(g)(i) or of some other provision of the
employment contract. This aspect of the claim can accurately
be described, as it was on behalf of the defendant as "an
unparticularized fishing expedition", which should, in my
view, be struck out as having a tendency to prejudice or delay
the fair trial of the proceeding.

Finally, the claim to exemplary damages was challenged. Rule
158(2) of the Uniform Civil Procedure Rules requires a party
claiming exemplary damages to include particulars of all
matters relied on in support of the claim in the party's
pleading. That was not done in this case and so that part of
the prayer for relief will be struck out.

It follows that paragraphs 15(a), 15(b), 15(d), 15(i), and
paragraphs 1 and 3 of the prayer for relief should be struck
out.

I shall invite further submissions on the question what further orders should be made in relation to the amended statement of claim and costs.

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HIS HONOUR: The order will be that paragraphs 15(a), 15(b), 15(d), and 15(i), and paragraphs 1 and 3 of the prayer for relief in the plaintiffs' amended statement of claim be struck out.

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I give leave to the plaintiffs to replead.

I order that the plaintiffs pay to the defendant his costs of and incidental to the application to be assessed.

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