

WHITE J

CORRS CHAMBERS WESTGARTH

Applicant

and

PETER JOHN DOUGLASS

Respondent

BRISBANE

..DATE 06/03/98

JUDGMENT

HER HONOUR: This action was due to commence by way of trial on 2 March 1998.

In the morning, counsel for the plaintiff, who is not presently before the Court, indicated that an adjournment would be sought so that the plaintiff could explore the possibility of joining another defendant in the action.

The late application was because informal discovery had been had some time in the past from the possible new defendant but that as recently as two days before the trial a writ of third party discovery to that party had revealed the existence of documents which suggested at first glance that the present defendant may not be either responsible or entirely responsible as alleged by the plaintiff.

Mr Stewart, who was counsel for the plaintiff, indicated that there had been no opportunity to examine those documents. At the same time, the solicitors for the

defendant, Mr Peter Douglass, sought leave to withdraw as solicitors on the record for Mr Douglass and read a supporting affidavit by Katrina Jane Newell. That summons was adjourned, although prior to doing so, Mr Douglass had indicated that he opposed the withdrawal and that he was ready to proceed with the trial.

It was my understanding that over the ensuing days the parties endeavoured to reach some compromise in respect of the matter. That seems not to have occurred, although that does not concern me today. The solicitors have reactivated their application to withdraw.

The solicitors were retained by Mr Douglass' insurers when this action commenced. In the course of the interlocutory steps before trial, it appears that the insurers were placed in liquidation, and the solicitors were faced with the situation of whether or not to continue in the action, their instructions from the insurer having been withdrawn as a consequence.

I will not set out all the steps which are contained in the affidavit of Miss Newell which led to the situation where the solicitors agreed to continue to act for Mr Douglass and to receive instructions from him as defendant in the action. There were, apparently, conferences between the solicitors and Mr Douglass.

On 7 August 1997, the solicitors wrote to Mr Douglass, (Exhibit E), in which they refer to a conference between Mr Douglass, Mr Bartley and Miss Newell on 4 August 1997. The letter states, "We confirm that you wish to retain this firm to act on your behalf in light of the withdrawal of instructions from the liquidator of your insurer." There then appears in block capitals, a heading, "Basis of Retainer". The following then appears, "The basis upon which we are prepared to act on your behalf in this matter was discussed at our meeting."

Under the heading, "Professional Costs", the solicitors state that they were prepared to accept Mr

Douglass' instructions on the basis that the solicitors received payment of their professional costs only if he succeeded in his defence at trial and obtained an order that his costs be paid by the plaintiff. They indicated that as a consequence they would not be sending him accounts for work done in the course of preparation for trial. They reminded him that there may well be a shortfall even if the plaintiff was ordered to pay his costs.

Then, under the heading, "Disbursements", which is in the same size type setting as "Professional Costs" and, on any reading, a subset of the major heading being "Basis of Retainer", the solicitors state that the most significant outlays that they anticipated were fees for the expert engineer and for counsel.

They then state, "As discussed, we anticipate that those fees will be in the vicinity of \$20,000. Since this firm is responsible for the fees of experts and counsel, we confirm that we will require payment of \$20,000 on account of anticipated outlays." The solicitors then set out a timetable for the payment of that amount relating particularly to the briefing of counsel.

Mr Douglass has tendered a letter, which was copied to him, dated the previous day, 6 August 1997, from the solicitors to Russell and Company, the solicitors for the plaintiff, in which the solicitors indicated that, since Mr Douglass had instructed the solicitors to act on his behalf, they would not be proceeding with an application to withdraw, which I note had been foreshadowed earlier. The solicitors indicated that they had agreed to act on the basis that they would recover their costs from the plaintiff when the action was dismissed. Mr Douglass has tendered some pages from diary notes that he kept in the week of 23 February 1998 concerning conferences with counsel. Might I say that Mr Freeburn, who was the counsel concerned and who appears on this application for the solicitors, has indicated that there is not agreement on his side with Mr Douglass' recollection of what occurred in

all cases. I think probably, for this application, nothing turns on what differences there might be but it appears that extensive conferences were held with Mr Freeburn and the solicitors and also with expert witnesses.

Mr Freeburn indicated that he would consider the evidence to decide whether he would be prepared to take the case on a no win/no fee basis and, in the course of the meetings, he decided on the Wednesday that he was not satisfied that he wished to take the case on that basis.

Mr Douglass has maintained that he was prepared to appear on the trial on his own behalf, assisted by the solicitors. His understanding of the agreement was that he could dispense with experts who required to be paid for their report and evidence and also with counsel but could retain the assistance of the solicitors during the trial, that is, accept that they would act on a no win/no fee basis but not have the services of counsel. He indicated that one of the experts had offered to appear on a no win/no fee basis but he accepts that he did not tell the solicitors this.

As I read the agreement to which Mr Douglass did not respond in any way after receipt of it on 7 August 1997, it was an entire agreement. It would be most unusual for solicitors to be prepared to act speculatively on a trial of this kind without retaining counsel and expert engineers and the plain tenor of the letter setting out the agreement makes this, to my mind, quite clear.

Now, I accept that Mr Douglass may well have approached this in a different way with the understanding of a lay person, that he could in fact appear on his own behalf as advocate with the assistance in court of solicitors. All that means is that at the end of the day that there was no agreement between the parties if that be the case. The basis upon which the solicitors were prepared to act was in a normal fashion, that is, that they would retain counsel and experts as required for the proper

running of the trial. Mr Douglass thought that it could be a different arrangement.

The solicitors, in my view, are therefore entitled to seek leave to withdraw as solicitors on the record for Mr Douglass on the basis that the conditions of the retainer have not been met and, accordingly, I make the declaration sought in the summons that Corrs Chambers Westgarth have ceased to be the solicitors acting for the defendant in this action.