IN THE SUPREME COURT OF QUEENSLAND Appeal No. 18 of 1985

Before the Full Court/Court of Criminal Appeal

Mr. Justice Kelly S.P.J.

Mr. Justice Williams

Mr. Justice Moynihan

BETWEEN:

PETER DONNELLY & ASSOCIATES PTY. LTD. (Plaintiff) Respondent

- and -

PETER WINDSOR (Defendant) Appellant

JUDGMENT - MOYNIHAN J.

Delivered the 22nd day of November 1985.

CATCHWORDS:

Appeal from findings of an obligation to pay and of quantum of damages awarded. Findings reasonably open on evidence. No basis for disturbing trial judge's findings demonstrated. Finding that judgment should be in favour of first named plaintiff also reasonable on evidence.

Counsel: Mr. Galloway for appellant
Mr. D. Fraser for respondent
Solicitors: John M. O'Connor & Company for appellant
McCullough & Robertson for respondent
Hearing date: 12th November, 1985.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 18 of 1985

FULL COURT

BETWEEN:

PETER DONNELLY & ASSOCIATES PTY. (Plaintiff)

LTD. Respondent

- and -

PETER WINDSOR (Defendant) Appellant

JUDGMENT - MOYNIHAN J.

Delivered the day of 1985.

The appellant (the defendant below) appeals against a judgment of $2,462.78 together with costs. The action was brought to recover money said to be owing in respect of the provision of services in arriving at a name and formulating a design for use in respect of a business enterprise which the defendant contemplated undertaking.

During the course of the trial the learned District Court judge gave leaveto the plaintiff respondent to add P.D.A. Production Pty. Ltd. as a second plaintiff. He also gave leave in general terms to make amendments consequential on that and in respect of what was cryptically referred to as "the implied term". This was clearly a reference to the contention by the plaintiff, or rather by both plaintiffs, of the implication of a term to pay a reasonable price for the rendering of the services involved in the task for the appellant whether by the first or second defendant or both of them. Nothing was however done to implement the steps for which leave was given until this appeal came before the court.

When the learned trial judge delivered his reasons and gave judgment the action was still constituted as it had been at the commencement of the trial and judgment was given for Peter Donnelly & Associates Pty. Ltd. the only plaintiff on the record. The judgment makes no reference to any issue as to whether that entity, or the entity in respect of which leave had been granted, was the appropriate party to recover. When this appeal came on for hearing, counsel for the respondent sought leave to regularise the position in terms of a document received by

the court and described as an amended plaint. After hearing argument, this court gave leave to permit this to be done on condition that what was now the first plaintiff or first respondent pay the costs of the appeal in any event. In that circumstance, counsel for the now respondents to the appeal was free to contend that the judgment below should be upheld in favour of either the first plaintiff or the second plaintiff and a number of issues raised by the notice of appeal became irrelevant.

The appeal then proceeded on the basis that the appellant contended:—

1. There was no evidence which could have satisfied the learned trial judge that $2,000.00 was a proper figure to be attributed to the matters in respect of which His Honour awarded it.

2. That the respondents had not made out any basis for the finding that of $462.78 as the other component of the damages awarded.

3. That in any event there was no basis for finding any obligation on the part of the defendant to pay in respect of the work that was done.

4. That the defendant/appellant ought to have succeeded on its counter-claim.

His Honour found that the work in respect of which the action was brought was done. His Honour found that the defendant accepted that it was at his request that the work was carried out and that there was never any suggestion that the work was to be performed gratuitously. He did this in the context of his finding of instructions being given by the appellant and of various meetings and of the work being produced for the appellant's inspection. In short, it seems to me clear enough, that there was evidence upon which His Honour could be satisfied that there was at least an implied undertaking by the defendant to pay a fair and

reasonable price for what was done and no basis has been shown for interfering with his finding.

So far as the $462.78 is concerned this is the subject of an invoice and was expressed to be for some letterhead mock-ups and similar materials. The invoice was placed in evidence and was sworn to. It was perfectly open for His Honour to accept it and he did.

The complaint about the $2,000.00 component of the judgment arises in this way. The plaintiffs contended for an amount of $20,000.00 in respect of the work. The learned trial judge rejected the evidence upon which that contention was founded. The defendant had called a witness who gave evidence that a figure in the range $300.00 to $2,000.00 was appropriate. The learned trial judge accepted that evidence and awarded $2,000.00. The appellant complains that there was no basis for him adopting the top of the range. The witness was cross-examined in order to seek to demonstrate that the range for which he contended was too low. When one takes that into account, coupled with the evidence that the work was done and as to what was involved in doing it, I think there was evidence upon which His Honour could act in arriving at the figure which he ultimately did and no basis for disturbing his finding has been demonstrated.

The counter-claim was founded on an allegation of negligent advising in respect of the availability of a particular name to be used by the appellant's proposed business enterprise. His Honour found that it was no part of any agreement between the parties that the respondent (now the respondents) were required to ensure the commercial availability of the identity created, or that any assurance was given to the defendant. That finding was perfectly open to him on the evidence and no basis has been shown for us to disturb it. His Honour further found that he was not satisfied that the parties were so placed that the defendant was, by reason of the plaintiff's profession, calling or other special position, entitled to rely on the

latter's skill, judgment or ability to make enquiry or to give reliable advice in respect of the matters complained of. Once again, this was open to His Honour and no basis has been shown for disturbing it.

The only question remaining is whether His Honour correctly gave judgment for what is now the first-named plaintiff or whether the judgment ought to go in favour of the second-named plaintiff. It seems to me clear enough that there was evidence upon which the learned trial judge could find that the plaintiff's dealings were with Peter Donnelly & Associates Pty. Ltd., although, for reasons of internal arrangements of whatever kind, that plaintiff chose to have some of the necessary work done on a charging basis by P.D.A. Production Pty. Ltd.

I would dismiss the appeal thus affirming the judgment given by the learned trial judge.