EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2015-009-1777
[2016] NZDC 14953

BETWEEN	IZARD WESTON Plaintiff
AND	DANIEL FRANCIS AYERS First Defendant
AND	ELEMENTARY SOLUTIONS LIMITED Second Defendant

Hearing: 14 June 2016

Appearances: R Cahn for Plaintiffs
Mr Ayers in person for Defendants

Judgment: 23 August 2016

JUDGMENT OF JUDGE R E NEAVE

Introduction

[1] This is an application for summary judgment in respect of the unpaid legal fees the plaintiff claims is owing in respect of work carried out by it and counsel, Mr C A McVeigh QC, on behalf of the defendant.

[2] The defendants in this litigation are plaintiffs in litigation currently proceeding in the High Court (apparently stayed as at the date of the hearing before me awaiting provision by the defendants of security for costs). That litigation arose out of letters published in a legal publication by LexisNexis (the defendants in the High Court proceedings) which are said to have been disparaging and defamatory of a software product owned and marketed by the defendant.

[3] That proceeding, as such matters are wont to do, became bogged down in pleading issues and interlocutory applications.

[4] I have read four decisions on interlocutory applications, three by Associate Judges and one of Kós J (as he then was) on review from the first decision by Gendall AJ (as he then was).[1]

[5] The defendants now decline to pay the plaintiff's outstanding accounts which represent about one third of the total fees rendered by the plaintiff and Mr McVeigh to the defendants.

[6] In essence, the defendants argue that the advice and representation received from the plaintiff, particularly as it related to the pleading of the claim, was defective and incurred unnecessary expenditure. More specifically, they submit that as a result of the plaintiff's negligence, they were required to be involved in arguments over points which should never have been in dispute and that in effect the outstanding accounts represent wasted expenditure for which the defendants should not be liable. The defendants claim that the arguments in which they became embroiled over whether they ought to have claimed general or special damages and whether sufficient particulars had been provided arose through the plaintiff's negligence.

Summary judgment principle

[7] The principles which govern applications for summary judgment, both in this Court and the High Court have been discussed in many cases. They are usefully summarised by McGrath J in *Jowada Holdings v Cullen Investments Limited* (unreported CA248/02, 5 June 2003) :

> [28] In order to obtain summary judgment under rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On

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[1] Ayers and *Elementary Solutions v Lexis Nexis NZ Ltd* CIV-2010-485-1274 High Court Wellington 29.11.11 Gendall AJ.
[2012] NZHC 3055, Kós J.
[2014] NZHC 2998, Smith AJ.
[2015] NZHC 1348, Smith AJ.

> the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and inexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* (1987) NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.
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> [29] This present appeal is concerned with a contract based claim in circumstances where both parties seek to rely on evidence of circumstances said to form part of the relevant context in which the contract is to be interpreted. Their evidence is in conflict. That, however, does not preclude the Court from giving summary judgment in a contract claim if it is satisfied that resolution of the factual matters in dispute is not necessary to provide the Court with such contextual background as is necessary to resolve the claim. This is simply an application of the principle that where, despite differences on factual matters, the lack of a tenable defence to a cause of action is plain on the material before the Court, and the Court is sure on that point, summary judgment will normally be entered. In such circumstances there is no reason why a contract should not be interpreted and applied in summary judgment proceedings: *Pemberton v Chappell* at pp 4 and 8 CA; *Haines v Carter* [2001] 2 NZLR 167, para 128 CA.
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> [30] Once the Court has been satisfied that there is no defence rule 136 confers on it a discretion to refuse summary judgment which is of a residual kind. While the types of cases in which the discretion will be exercised to refuse judgment cannot be exhaustively defined, the most common instance is where there would be an unfairness in proceeding immediately to judgment, for example if the defendant were unable to get in touch in the time available with a material witness who it was reasonably thought might be able to provide it with material for a defence: *Bank Für Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541, 548(CA). In that case Cairns LJ also said that harsh or unconscionable behaviour of the plaintiff might require a matter to proceed to trial so that any judgment obtained was in the full light of publicity. Generally, however, where the ground relied on in seeking summary judgment goes to the substance of the litigation, the interests of justice would not permit refusal of judgment unless they provided a basis for it to be refused at the substantive hearing: *Inner City Properties Ltd v Mercury Energy Ltd* (1990) 13 PRNZ 73 (CA). It should not be thought that a plaintiff who has shown that there is no arguable defence will be denied judgment except in rare circumstances.

[8] It is worth noting that not every allegation or assertion in a defendant's notice of opposition or affidavits requires to be accepted at face value. The Court is entitled to take a robust approach and examine whether the allegations are inherently credible

and/or are supported by independent evidence. In *Pemberton v Chappell* [1987] 1 NZLR 1, the first major Court of Appeal case on the then new Summary Judgment Procedure, it was noted by Somers J, page 4, lines 10-17 :

> "Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident – that is to say, satisfied – that the defendants statements as to matter of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 and in the judgment of Greig J in *Attorney General v Rakiura Holdings Limited* (Wellington, CP 23/86, 8 April 1986)".

[9] In the same case, Casey J examined the facts and found that it was only because of supporting evidence provided (after the initial hearing) by an independent expert witness that he came to the view that there was an arguable defence. In the absence of such evidence, he would have agreed with the decision in the High Court that no arguable case was disclosed on the evidence.

The plaintiff's arguments

[10] Mr Cahn argues that there is no suggestion that the work which is the subject of the invoices has not been done and, in the absence of evidence of an arguable defence, the accounts are payable. He submits that the evidence provided by the defendants does not go so far as to suggest the work was of such a poor quality that the plaintiff should be denied payment. He submits the work that was carried out clearly provided value in relation to issues "unconnected with the problems raised by the defendants".

[11] It was submitted by the plaintiff that the defendant must show there was no value in the work done and that there was no evidence of what losses were in fact incurred. Furthermore, it was submitted that there is no prejudice to the defendants if they wish to pursue these issues later by way of a counter-claim.

[12] In relation to the particulars point, it is submitted that the pleadings as filed by the plaintiff on behalf of the defendant came from information provided and instructions received from Mr Ayers.

[13] Mr Cahn's submission details the lengthy discussions which are revealed particularly in Mr McVeigh's correspondence. He further details the legal difficulties that arise in pleading damage for corporations (which was required to be economic), and the difficulty of the intersection between rule 5.33 of the High Court Rules, s 43 (1) of the Defamation Act 1992 and s 6 of the Defamation Act. These difficulties are particularly illustrated in Gendall AJ's decision confirmed on review by Kós J.

[14] Ultimately, the plaintiff's submission is that this is a difficult area of the law and that combined with the instructions received from Mr Ayers as to the nature of the losses he sought to claim, the actions of the plaintiffs were reasonable.

The defendant's arguments

[15] The defendant argues that the High Court has repeatedly found the pleadings to be deficient and that these deficiencies were avoidable and that the failure to spot the deficiencies lead to, effectively, wasted expenditure. Mr Ayers further claims that Mr McVeigh's fees were in general excessive and he submits that the research and preparation that went into the drafting of the pleadings was obviously below the requisite standard. Mr Ayers submits that an appropriate standard of research would have revealed the English authorities on the point that he cited to me.

[16] In particular, Mr Ayers refers to the decision of *Ratcliffe v Evans* [1892] 2 QB 524 as well as more recent formulations such as *Collins Stewart v Financial Times* [2005] EWHC 262.

[17] Mr Ayers submits that it is inappropriate for this Court to make a finding on the propriety of the fee and that such matters need to be determined by the Law Society, and in particular, a Standards Committee. He submits that that is the appropriate body to determine the propriety of the fees.

[18] The last of those points can be easily disposed of. There is no evidence that Mr Ayers or the company have referred either the plaintiff's or Mr McVeigh's fees to the Law Society for consideration. No valid explanation has been given as to why

that has not happened if that is something he intends to do. Until such time as there is a determination of the Law Society as to the propriety of those fees, the plaintiff is entitled to sue to recover its own and counsel's fee. Furthermore Mr Ayers will not be precluded from mounting such a complaint if it is justified by the entry of summary judgment.[2]

[19] As to the arguments about *Ratcliffe v Evans* (supra) and the drafting of the pleadings, it should perhaps be noted that neither Gendall AJ nor Kós J have referred to this and other cases. Presumably neither did counsel for the other party. I therefore fail to see how this in any way assists the defendant.

[20] This and other relevant authorities were raised by Mr McVeigh in the first of the hearings before Smith AJ when the point was more firmly being addressed. Indeed, it was only in this first hearing before Smith AJ that the particular issue to which this case relate really emerged.

[21] Mr Ayers relies on the acknowledgment from counsel who appeared in the last of the interlocutory judgment that an argument in relation to special damages could not be sustained as establishing somehow negligence on the part of the plaintiff.

[22] While the position had clearly been reached by then that there was a recognition that this particular aspect of the claim could not succeed, there is no evidence as to when that realisation occurred. There is no evidence of the circumstances which lead to that realisation. There is no evidence from the defendants' new counsel or solicitors as to why a concession was now being made before the court nor anything to suggest that this was a concession that should have been made much earlier. There is simply no evidence that the claim that was being advanced, on Mr Ayers instructions, was realised to be untenable.

[23] It is clear from the lengthy report prepared by Mr McVeigh to Mr Ayers in March of 2015, which is not challenged by Mr Ayers, that it was not until the brief

[2] cf Law Practitioners Act 1982 which made it much more difficult to challenge a bill that had already been paid.

from the accountant Mr Ross, was received at some point in the latter part of 2014 that it was not going to be possible to claim specific losses. The plaintiff alleges, and Mr Ayers does not contradict, that the nature of the instructions that were being received from Mr Ayers indicated it was proper to claim specific losses. Until the evidence was clarified, I do not see how there could be any argument of negligence on the part of the plaintiff.

[24] Mr Ayers' argument appears to be that the plaintiff should not have included this aspect of the claim in the pleadings until there was adequate information to support it. He submitted at paragraph 39 of his synopsis "further, if insufficient information was available to properly draft pleadings, the plaintiff and Mr McVeigh should have advised the defendants to delay filing the claim until it was ready – and obtained informed consent from the defendants (that the pleadings may be deficient and prone to applications for further and better particulars) if the defendants insisted on proceeding regardless".

[25] Such a course of action would have required consent from the defendants in the High Court proceedings which was by no means guaranteed to be forthcoming. Given the much reduced limitation period applying to defamation proceeding, the defendants' advisers would have been in an impossible position. Had they waited to plead the claim, they would undoubtedly faced criticism and probable negligence action if they had allowed the limitation period to lapse. Alternatively, they would have had to plead the claim without reference to this particular aspect, and hope that they obtained leave later on to amend the claim. All this is in spite of the difficulties in respect of the legal position which was far from clear.

[26] It is clear that it was not until the accountants' brief was received that the exact position on the defendants' ability to claim losses was known. In any event the issue is not whether the damages claimed were special or general but rather whether the losses claimed (whatever label they carried) required greater specificity in their pleading than the defendants were able to provide. Mr Ayers seems to be indicating that from the outset the position ultimately achieved would have been clear. Such an argument would require a much greater degree of prescience than is normally required of counsel.

[27] It may be possible to construct an argument that realisation of the ultimate position ought to have been occurred sooner, but not on the evidence available to me.

Discussion

[28] In drafting proceedings and advancing arguments before the Courts, the plaintiffs and Mr McVeigh were carrying out functions essentially regarded as those of a barrister. Barristers are subject to the same general rules as to liability for negligence as other professionals and the test as to whether there has been negligence in the conduct of their profession is the standard of the ordinary and skilled man or woman exercising and professing to have that special skill. In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, at 218O and 220D. Lord Diplock stressed that not every error made by a barrister or any other professional constitutes negligence, but only such error as "no reasonably well informed and competent member of that profession could have made."

[29] In *Hall v Simons* [2002] 1 AC 615 when the House of Lords abolished a barrister's immunity from suit, the standard of care was expressed by Lord Hope to be that of ordinary professional practice and ordinary skill while Lord Hobhouse expressed himself essentially as Lord Diplock had done in *Saif Ali v Sydney Mitchell & Co* (supra).

[30] Certainly, there are some people carrying on professions or trades who, by the nature of that trade, effectively undertake to achieve a particular result or end product. However, like a medical practitioner, a barrister engages to perform a particular service to the best of his or her ability and appropriate professional standards, but does not undertake to achieve a particular result. Of course even within legal practice, there may be occasions where a person is engaged to carry out a particular task or, a particular result is required to be achieved. For example, a solicitor instructed to prepare and execute a will, is required to ensure that the will is validly executed and achieves the desired effect. However, in the conduct of litigation, a particular result can never be guaranteed and it follows that it will not be every error or matter requiring an exercise in judgment that amounts to negligence. Furthermore, the actions and advice of counsel will be very much dependent on the

instructions and information provided to him or her by the client. There are many cases in which something which might be described as an error of judgment but which does not amount to negligence.

[31] Further, in so far as pleading is concerned in *McFarlane v Wilkinson* [1997] 2 Lloyds Rep 259, the English Court of Appeal held that the relevant test was :

> "… if a barrister omits to plead a cause of action in a situation where no other reasonably competent barrister, acting with ordinary care, would have failed to plead that cause of action, then he or she will be liable to compensate the client if loss flows foreseeable from that negligence. If on the other hand other reasonably competent barristers holding themselves out as competent to practice in the relevant field and acting with ordinary care might also have decided not to plead that cause of action, then there will be no question of professional negligence." Per Brooke LJ

[32] Similarly, a decision to plead a particular cause of action in the light of the instructions received will be governed by the same test.

[33] The real difficulties in the defamation case seem to have arisen not so much from pleadings, but from a decision to advance particular types of claims at the request of the defendants. In essence, the defendants say they should never have been allowed to pursue these claims because properly instructed counsel would know that such claims could not be sustained. Mr Ayers submits that the position eventually adopted by his counsel in the matter who appeared before Smith AJ for the second time, ought to have been apparent from the outset.

[34] The difficulty with this argument is it seems to me to ignore the fact that the various claims that were being advanced were done so on the basis of the information that the plaintiffs had received from Mr Ayers. He assured them that an accountant was preparing information that would sustain the claim and it was only after consideration of that accountant's report that eventually it was accepted that the claims could not be pursued, either as special or general damages.

[35] There is difficulty about resolving factual disputes in a summary judgment application. As already observed, where there is a tenable argument, even if it is one the Court may think is likely to be unsuccessful, the appropriate course is to allow the matter to proceed to a substantive hearing.

[36] On the other hand, there is an obligation on a defendant to provide some evidential foundation for the contention that there is a defence.

[37] If there was a credible argument that the plaintiff's (and counsel's) service to the defendants fell below the standard expected of a reasonably competent barrister, then in my view the proper course would be to allow the matter to be fully litigated.

[38] However, I am not satisfied that such a foundation has been laid in this case. The defendant's contentions are based on Mr Ayers' opinion and the decision of the High Court, in particular Smith AJ. There is no evidence from any source that the decisions that were made would not and should not have been made by competent counsel. No expert evidence has been tendered to this effect. One can contrast this case with *Pemberton v Chappell* (supra) where the provision of further evidence on appeal provided the factual basis for the arguable case which is missing here. Casey J noted that absent the additional material he would not have differed from Doogue J's assessment at first instance that no arguable defence was shown.

[39] Further, it needs to be remembered that to a certain extent the arguments advanced by Mr McVeigh were successful and it was noted that the point was novel. Other points in the judgments were successfully argued.

[40] Ultimately, the issue came down to the nature of the claims Mr Ayers wished to argue. These claims required particularisation and it was only late in the piece that evidence was available from Mr Ross which might have enabled particularisation. The obtaining of the evidence was in the hands of the defendants.

[41] In these circumstances, I struggle to see how there could be any arguable case that the plaintiffs were negligent in pursuing the instructions of their client. Had they not advanced the claims, I rather suspect Mr Ayers would have been much more concerned. Given it is counsel's duty to protect the interests of his or her client, a cautious approach in advancing the claim is understandable. Much of the procedural difficulty that followed arose from the intersection between the various principles I have referred to and in respect of which the plaintiffs in fact succeeded to some extent in front of Gendall AJ and Kós J.

[42] In considering issues of negligence in the conduct of previous litigation, a Court will, and should, be slow to analyse each and every tactical decision taken by counsel in relation to the instructions received from the client in determining whether there has been negligence by counsel.

[43] The evidence in this case falls well short of establishing an arguable case of negligence by the plaintiffs.

[44] Any finding by me that the evidence does not, at this point establish an arguable case for negligence, is not a final determination which will prevent Mr Ayers from raising the claim separately as a counter-claim should he wish to do so. Mr Cahn accepted that the defendants would not be prejudiced nor prevented from pursuing such a claim in the future if there was an evidential foundation.

[45] On the evidence before me, I am not satisfied that there is sufficient evidence of any actions or neglect on the part of the plaintiffs which would somehow disentitle them to recover fees which would otherwise be properly payable. There has been no suggestion that the work has not been carried out, or that the bills are themselves in any way excessive. Mr Ayers simply says "I shouldn't have to pay them because my solicitors and barristers made a mistake." As I am not satisfied there is evidence of anything amounting to a mistake which might give rise to liability on the part of the plaintiffs, there are no grounds for withholding judgment for the plaintiff in respect of the fees which are properly payable.

[46] The plaintiff is therefore entitled to judgment in the sum of $66,916.03 together with costs and disbursements on a 2B basis. The plaintiff is entitled to interest in terms of its terms and conditions and a calculation should be submitted showing interest outstanding as at the date of this judgment.

R E Neave
District Court Judge

Signed this …….. day of August 2016 at ……. am/pm