A

GEOFFREY MILES JOHNSON
PETER IAN KNIGHT

v.

NORMAN WILSON HEPBURN

B [SUPREME COURT—Rooney, J.—20 June, 1986]

Civil Jurisdiction

Action for fees charged by Solicitors—No retainer in writing—denial by defendant of any authorisation—circumstantial evidence—court entitled to infer contract of retainer.

C

A. Tikaram for the Plaintiffs
T. Fa for the Defendant

The plaintiffs were partners in a firm of Solicitors, Cromptons, practising in Suva. In this action, they sue for fees of $5,290 for work done and materials provided, being professional work carried out for the defendant. The defence was a denial that the plaintiffs carried out any D work in accordance or pursuant to any contract with the defendant. Counsel for the defendant except for certain affidavit evidence (see later) did not call evidence, nor, as reported, was there any denial that the work sued for was done, or that the sums charged therefor were not justified by reference to that work. The learned trial Judge interpreted the defence as a denial of any express contract; it did not deny an implied contract.

It is not necessary to summarise the evidence called on behalf of the plaintiff E other than to say that the plaintiff was not able to produce any written authority from the defendant or his Sydney Solicitor, a Mr McCarthy, nor had he anything in writing from a Mr Powell who apparently gave instructions taken to come from the defendant. His authority so to act was not the subject of evidence. In an affidavit by the defendant produced and accepted in evidence by consent, he stated, inter alia, that he never spoke to the partners of Cromptons nor ever authorised anyone to give F instructions to that firm to act on his behalf.

The learned trial Judge referred to the evidence including documents put forward by the plaintiffs. It was argued it could be inferred that the plaintiffs were indeed acting for or entitled to assume he was retained by the defendant. It is not necessary to set that evidence out in detail here.

G *Held:* The general rule was that if a Solicitor neglected to take written instructions or obtain a retainer in writing there is nothing if the retainer is later questioned but assertion against assertion; the Solicitor must bear the cost of the risk he thus undertakes *(Wiggins v. Peppin* (1840) 2 Beav. 403).

The existence of a retainer may be inferred from the acts of the parties. *(Blyth v. Fladgate* (1891) 1 Ch. 337). A

On the evidence offered, there was established an implied contract of retainer between the defendant and the plaintiffs as his solicitor.

Judgment for the plaintiff.

Cases Referred to: B

Wiggis v. Peppin (1840) 2 Beav. 403.
Blyth v. Fladgate (1891) 1 Ch. 337.

ROONEY Mr Justice

Judgment C

The plaintiffs are a firm of solicitors practising at Suva. They are suing the defendant for $5,290.00 for work done and disbursements made on the defendant's behalf in the matter of the purchase of properties at Korolevu and Nadi in 1983.

The defence is a denial that the plaintiffs carried out any work on behalf of the defendant in accordance with the terms of any contract. The defendant further denies that he instructed the plaintiffs to carry out the work. While the defence, as D pleaded, appears to deny the existence of any expressed contract as alleged in the statement of claim, it does not deny an implied contract. It follows that if the plaintiffs can establish on the evidence the existence of circumstances upon which it can be inferred that the defendant was obliged to accept responsibility for payment of their charges and disbursements, they do not have to prove anything further in order to succeed in their claim.

E

The defence was filed by Messrs Jamnadas and Associates in November 1984. In April 1986 this firm was replaced by Messrs Tevita Fa & Associates as solicitors for the defendant. The notice of change was filed on the 14th April. 1986, the day before the date fixed for hearing.

I saw counsel in chambers on the morning of the 15 April. Mr Fa sought a postponement as he had other commitments. His client, who lives in Sydney, was F not present. Mr Tikaram for the plaintiffs said that he had no instructions to consent to an adjournment.

I was not satisfied that the application for a postponement was reasonable. Counsel should never assume that the Supreme Court will grant an adjournment, even with the consent of all parties. It is not the policy of superior courts to conduct business in order to accommodate the convenience of counsel. On the other hand, G counsel owe a duty to all the courts before which they intend to appear to ensure that the administration of justice by these courts is not unduly delayed or interrupted.

Notwithstanding my reservations, I postponed the hearing until Tuesday the 28th April to enable Mr Fa to contact his client in Australia.

On the 28th April. Mr Fa reported that although he had been in touch with his Australian correspondent. a Mr B. McCarthy. he had no instructions. He wanted to H withdraw from the case. As he was the solicitor of record. he could not be discharged from that responsibility without resorting to the proper procedure. I suggested to Mr

Fa that his appearance in the case as counsel was not a matter for the Court. He could withdraw, if he thought fit, but his absence would be noted on the record.

I could appreciate the difficulties which faced Mr Fa. The practice of the courts of Fiji, based as it is, on the Rules of the Supreme Court in England as extant nearly 20 years ago, does not make any allowances for a fused profession where there are no real distinctions between the functions of a solicitor or a barrister. The resulting anomalies have not yet been removed.

Mr Fa did not withdraw. He remained to undertake the defence, handicapped by the absence of his clients. I am satisfied that he took the proper course.

The trial proceeded. After the lunch break, Mr Fa reported that he had been in touch with Mr McCarthy. As a result he renewed his application for a postponement of the trial. This was rejected but I said I would review the situation when the days hearing had been concluded.

After the witnesses for the plaintiffs, Mr Miles Johnson and Miss Vinmala Sugrim had given evidence, the further hearing of the case was postponed until Thursday 22nd May.

At the resumed hearing, Mr Fa told the court that his client could not travel to Fiji until June. Once again Mr Fa asked for a postponement of the trial. This was refused.

The defendant's case was closed without his adducing any evidence. By consent, Mr Fa was invited to make written submissions within 14 days. These have not been received, so I must assume that Mr Fa's patience with an unsatisfactory client has at last run out.

The failure of the defendant to produce evidence does not release the plaintiffs from the obligations of proving their case on the balance of probabilities. I shall now consider that evidence.

Mr Miles Johnson (PW1) is the senior partner of Cromptons, Solicitors of Suva. He explained that the Tourist Corporation of Fiji. (T.C.F.) a public company, encountered financial problems and was heading for liquidation. One of the secured creditors was U.E.B. Industries Ltd of New Zealand. It was represented by a Mr Laurie Powell, who was engaged in realising the mortgaged properties on behalf of his employers.

In the middle of 1983, Mr Powell advised Cromptons that he had contacted a Mr Hepburn (the defendant) who was interested in purchasing the Paradise Point Hotel at Korolevu and the Westgate Hotel at Nadi. Mr Powell undertook these negotiations reporting progress to Mr Johnson. Although the defendant visited Fiji from time to time, he never called at the plaintiffs office and Mr Johnson has never met him.

Mr Johnson did meet a Mr David Wyatt whom he believed was an accountant employed by the defendant. Mr Wyatt gave instructions about a lease of the Westgate Hotel from the defendant to a Mr Reg Williams.

Matters proceeded and Cromptons attended to mortgage documents, and exchange control approvals for the purchase of the properties by a non resident of Fiji. There were problems about the water supply to the Paradise Point property. It

was Mr Powell who gave the instructions on these matters on behalf of the defendant. Mr Powell indicated that the defendant required Cromptons to undertake all the legal work on his behalf. Mr Johnson proceeded on that basis. A

Messrs Bell, Gully & Company, Solicitors of Wellington, New Zealand also became involved in preparing the contract of sale between U.E.B. Industries Ltd and the defendant. Mr Powell was anxious to see matters completed as soon as possible. He travelled between Wellington, Suva and Sydney in connection with this business.

B

Among the documents prepared and registered by Cromptons was exhibit D, which is a transfer from Claremont Investments (Fiji) Limited (formerly T.C.F.) to Norman Winston Hepburn of land at Korolevu for a consideration of $687,500 and registered on the 30th March, 1984, and Exhibit F which is a transfer from the same company to the defendant of land at Nadi for $500,000 also registered on the 30th March 1984.

C

Mr Johnson said that all the work involved was done on behalf of the defendant and that if any one had suggested at the time that his firm was not acting for the defendant, he would have been surprised. As the properties were subject to mortgages in favour of the ANZ Bank, his firm were unable to assert a lien over Exhibits D or F. His firm acted for the original owners, the mortgagees and the defendant. The defendant never appointed another firm of solicitors to act for him in the matter. D

Cross-examined by Mr Fa, Mr Johnson admitted that he had no written authority from either the defendant or his Sydney solicitor, Mr McCarthy. Nor had he anything in writing from Mr Powell confirming the position.

The settlement of the transaction had been effected in Sydney, so Mr Johnson was not concerned with such matters as the water rates due in respect of the Korolevu property. He conceded that as other solicitors were acting for U.E.B. Industries, he was their solicitor in a "qualified sense". He had not considered the existence of any conflict of interest between the parties he was representing. He agreed that on the 27th April, 1984, McCarthy wrote to him and said that the defendant at no time requested or engaged his firm in connection with the matter. He had not mentioned in his letter to the defendant dated 22nd February, 1984, that his instructions had come through Mr Powell. He denied that the defendant had himself obtained exchange control authority for the transaction. He knew that the defendant had made enquiries at the Central Monetary Authority. But, it was his firm which obtained the formal approval of that authority. E F

Miss Sugrim's evidence did not add anything of importance to the plaintiffs case. She drew up the transfer and mortgage documents in her capacity as a professional assistant employed at Cromptons. G

She met Mr McCarthy and went with him to the Registry of Titles. McCarthy wanted to inspect the certificates of Title to the Paradise Point and Westgate properties. When he asked about her charges for this attendance, she said it was all right as she assumed that it would be included in the firm's bill of costs. She could not recall who paid the search fee. Her main dealings had been with Mr Powell.

H

The defendant filed affidavits at an ealier stage in the action and these were put in by consent as evidence at the trial. In an affidavit sworn on the 22nd January 1985,

the defendant exhibited a letter dated 22nd February 1984 written by Mr Johnson. This included an interim account for $5,000 and an indication that the total account might be something less than a total of $14,000 based on a scale of fees. This was replied to by Mr McCarthy, but, only after the transfers had been effected on the 30th March.

In his affidavit the defendant states that he never spoke to the partners of Cromptons and he never authorised anyone to give instructions to Cromptons to act on his behalf. He referred to a letter dated 23rd September, 1983 which he received from the C.M.A. He said that at that date he had not made a final decision to purchase the properties in Fiji. He considered the reference in the C.M.A.'s letter to Cromptons was to an application made on behalf of U.E.B. Industries Ltd.

The letter of the 23rd September 1983 reads as follows:

"*Re: PARADISE POINT RESORT AND WESTGATE HOTEL*

I refer to your letter of 5th September 1983 on the above subject and in reply enclose an extract from a letter written to Messrs. Cromptons dated 22nd September 1983 in which certain Exchange Control permissions have been granted concerning the purchase of the above property by you.

Please note that if you wish to incorporate a company for the purposes of your proposed investment, Exchange Control permission will be required for the issue of any shares to non-residents. Similarly Exchange Control permission will be required should you wish to borrow funds either from local or overseas sources.

Please let us know if you require any further information."

The attached extract of the letter to Cromptons contains the following:

"Your letter herein does not mention the source of these funds but if the funds are to be borrowed, we know you will request Mr Hepburn to seek our consent as required under the Exchange Control Act".

This suggests that the C.M.A. were under the impression that Cromptons were also acting for the defendant. That is not important, but, when the defendant received that letter he may have gained the same impression. If he did he did nothing to correct it.

I have no doubt that Mr Johnson embarked upon this work on behalf of the defendant in good faith and in the belief that he was acting, not only on the instructions of U.E.B. Industries and the A.N.Z. Bank, but, on behalf of the defendant as well. Lawyers should never take things for granted and it was remiss of Mr Johnson to fail to put anything in writing to the defendant or Mr McCarthy before the 22nd February 1984. It was imprudent to have proceeded and registered the transfers before he received a reply from the defendant either accepting the position or repudiating Cromptons authority to act for him. On the other hand the defendant left Mr Johnson's letter unanswered and thereby obtained the benefit that Cromptons secured the transfer into his name of the properties at Korolevu and Nadi.

Mr Johnson's instructions to act on the defendant's behalf were given to him by Mr Powell. Mr Powell's authority to act as the agent of the defendant in this regard

has not been established by the evidence. If the plaintiffs had joined Mr Powell as a defendant and Mr Johnson's evidence had not been contradicted, then the plaintiffs might have expected to have obtained judgment against either or both of them. A

The general rule is that although the retainer of a solicitor need not be in writing, if he neglects taking the precaution, and his retainer is afterwards questioned, there is nothing but assertion against assertion, he must bear the cost of the risk he thus undertakes. *(Wiggins v. Peppin* (1840) 2 Beav. 403).

However, the existence of a retainer may be inferred from the acts of the parties. B *(Blyth v. Fladgate* (1891) 1 Ch. 337).

The plaintiffs completed and registered the transfer documents and the defendant became the registered proprietor of land in Fiji. If it were found that the plaintiffs had performed this work in a negligent fashion with the result that the defendant's title to the land was defective in some respect, would he not look to the plaintiffs for redress and would the plaintiffs be in a position to escape liability on C the basis that they acted in this matter without the written instructions of the defendant?

There are three circumstances present which are relevant.

(1) The C.M.A. letter to the plaintiffs were written in September 1983 and copied to the defendant which at the very least indicated that the Authority regarded Cromptons as the defendant's solicitors. D
(2) The failure of the defendant to repudiate at once the suggestion made in Cromptons letter of the 22nd February that they were acting as his solicitors and proposed to charge him fees for their services.
(3) The fact that the defendant did not appoint any other solicitors in Fiji to act in his interest and obtain titles to the land, he purchased in this country.

From these it may be inferred that the defendant was well aware of the plaintiffs E position and he was content to let them proceed in the matter of the transfer for his benefit without taking any steps to advise them that they should not do so in the expectation of any reward from him.

I find that there has been established an implied contract of retainer between the defendant and the plaintiffs as his solicitors.

There shall be judgment for the plaintiffs with costs to be taxed. F

Judgment for the plaintiff.