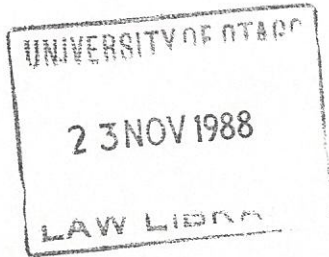


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BETWEEN KEVIN GRANT HETHERINGTON
of Auckland, Advertising
Executive

Appellant/Plaintiff
(CP 231/87)

AND BARRY DEARNESS ARMSTRONG
of Auckland, Advertising
Executive

Appellant/Plaintiff
(CP 232/87)

A N D DOUGLAS FAUDET of
Auckland, Company Director

First Respondent/
Defendant

AND JAMES BELICH of
Wellington, Advertising
Executive

Second Respondent/
Defendant

AND STUART HENRY ERNEST
RAPHAEL of Wellington,
Company Secretary

Third Respondent/
Defendant

AND USP NEEDHAM LIMITED OF
Wellington, Advertising
Agent

Fourth Respondent/
Defendant

Coram: Cooke P.
McMullin J.
Bisson J.

Hearing: 20 October 1988

Counsel: A.G. Stuart for Appellants
J.L. Marshall and D.J.A. Cairns for
Respondents

Judgment: 20 October 1988

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

These are appeals and cross-appeals from a judgment of Sinclair J. dealing with two separate but very similar actions in which each plaintiff claims damages for wrongful dismissal or wrongful constructive dismissal and for conspiracy. The defendants move to strike out the conspiracy allegations, which are contained in paragraphs 15 and 16 of each statement of claim. The Judge dismissed that application insofar as it was based on the contention that the conspiracy causes of action were frivolous or vexatious or an abuse of the process of the Court. He acceded to it, however, insofar as it was based on the ground that the statement of claim disclosed no reasonable cause of action. The plaintiffs appeal and the defendants cross-appeal.

The plaintiffs were senior executives in Auckland of the fourth defendant, called at the material time USP Needham Limited. It was a holding company for a group. They were also directors and shareholders of that company. On 31 October 1986 the group managing director, the first defendant, wrote or delivered to each plaintiff a letter strongly critical of their management of the Auckland office and asking for their retirement on terms set out in detail in a document enclosed with the letter, for signature. In the alternative the letter indicated that they would be

removed with two months' salary in lieu of notice in accordance with their original agreements with the company. Comparative financial statements were also supplied and showed that the retirement option would be more advantageous than the dismissal one. Further, the letter enclosed copies of special resolutions by minute book entry. Also dated 31 October 1986, these resolutions removed the plaintiffs from their offices as directors. It appears from the uncontradicted affidavit of Mr Raphael, the third defendant and secretary of the fourth defendant, that on the same day, 31 October 1986, each plaintiff signed the early retirement document, being in effect a letter of resignation. The opening of the document was worded as follows. We take this from the document signed by Mr Armstrong:

I, BARRY ARMSTRONG, of Auckland do hereby retire from my employment at USP Needham New Zealand Limited and resign as a director of that company on the following terms and conditions and agree not to dispute or criticise such terms with anyone in anyway whatsoever.

The plaintiffs also signed share transfer forms enclosed with the company's letter. They received and banked substantial cheques.

On the contractual cause of action each plaintiff claims among other items director's fees for 12 months. The net claim of Mr Armstrong on this cause of action is apparently \$9735.65 (covering all items). The net claim of Mr Hetherington on this cause of action is \$7650.65. The

Court is not now directly concerned with it, as the defendants have not moved to strike it out. That point is of some importance, as it means that part of the statement of claim will stand and a trial could take place whatever the fate of the conspiracy allegations.

Paragraphs 15 and 16 read:

15. ON a date or dates unknown to the Plaintiff the First, Second, Third and Fourth Defendants conspired to harm the Plaintiff by unlawful means in that they conspired to obtain the dismissal of the Plaintiff by USP and his removal as a director of USP Needham New Zealand Ltd in a manner that was in breach of the contract of employment between the Plaintiff and USP and such dismissal and removal was calculated or intended to injure the reputation of the Plaintiff in the advertising industry and in particular among the clients of USP and its subsidiaries with whom the Plaintiff had been dealing in the course of his employment and so prevent the Plaintiff obtaining further employment in the industry or from competing with USP or its subsidiaries.

16. THE conspiracy of the Defendants has caused loss or damage to the Plaintiff in that as a result of the circumstances of his leaving the employment of USP the Plaintiffs reputation is damaged so that he is not now able to obtain employment in the advertising industry at a level or for a salary comparable with that previously enjoyed by him.

On this cause of action each plaintiff claims \$200,000. Sinclair J., while far from encouraging about the conspiracy cause of action, held that it should not be struck out as frivolous and vexatious or an abuse of process. The argument for the defendants under this head, presented by Mr Marshall, invokes the plaintiffs' acceptance of the retirement option and the cheques. Mr Marshall contends that this resulted in estoppel. That may be so,

but we share the Judge's view on this aspect. It seems on the face of such documentary evidence as we have at this stage that the plaintiffs were confronted without warning with a sudden ultimatum on 31 October 1986 and responded in the way hoped for the by defendants or some of them. It is not far-fetched to recognise a real possibility that this was the very object of the alleged conspiracy. The facts need investigation before any opinion could be formed. The cross-appeals therefore fail.

As to the appeals, the issues here are difficult. The arguments today by Mr Stuart, Mr Marshall and Mr Cairns demonstrate if nothing else that the case bristles with questions of law in fields that are developing or controversial or uncertain. Two strands of reasoning are to be found in Sinclair J.'s judgment. One is that in a breach of contract situation, a cause of action for tort cannot arise, for which he relies on McLaren Maycroft & Co. v. Fletcher Development Co. Ltd [1973] 2 N.Z.L.R. 100 a case which, as has been said more than once in this Court, requires at least reconsideration in the light inter alia of later developments, and Vivian v. Coca Cola Export Corporation [1984] 2 N.Z.L.R. 289, a judgment of Prichard J. which was not taken on appeal and has not been considered in this Court. We note that neither McLaren Maycroft nor Vivian was concerned with a claim based on conspiracy. Indeed the Judge in the present case cites no case concerning conspiracy.

The other line of reasoning is that the conspiracy pleading is an attempt to circumvent Addis v. Gramophone Co. Ltd [1909] A.C. 488. That may be so, but this Court has already indicated in Horsburgh v. N.Z. Meat Processors Industrial Union of Workers (C.A. 102/86; judgment 21 June 1988) that the applicability of the rule in Addis as generally understood calls for consideration in present-day New Zealand. We are aware that academic writers have argued against it; that it has been judicially questioned in Canada; and that some New Zealand High Court Judges have also voiced misgivings about it: see for example Barker J. in Gee v. Timaru Milling Co. (Auckland High Court A387/85; judgment 4 February 1986) where the Judge said:

...it is a matter of comment in these days of sensitive industrial relations, that, for persons not members of a union or covered by an individual award, the law in relation to damages properly claimable for unlawful dismissal has not moved from the intransigent position in Addis v. Gramophone Company.

To the extent that Addis rests on public policy, it seems contrary to the public policy now recognised in the industrial sphere by such legislation as the New Zealand Labour Relations Act 1987, which does not however apply to employees of the seniority of the present plaintiffs.

Conspiracy is a tort whose true definition is somewhat elusive. Apart from the Addis points there are arguments that, in the context of a dismissal case, it is necessary to show a overt act which is independent of the

dismissal itself before a claim in tort can lie and that, if the injury is to reputation, conspiracy is not available but only defamation. Nor do those exhaust the questions of principle that may arise.

It has been said often enough that the jurisdiction to strike out on the ground of no reasonable cause of action has to be exercised sparingly and only in plain and obvious cases, although the mere fact that extensive argument is required to satisfy the criterion is not conclusive. It is enough to cite R. Lucas & Son (Nelson Mail) v. O'Brien [1978] 2 N.Z.L.R. 289, 294-5. Considerations of the kind referred to in Taranaki Catchment Commission v. R. & D. Roach Ltd [1983] N.Z.L.R. 641, 644 are also relevant:

The case falls generally into the difficult and evolving sector of law where, by exercise or omission to exercise public responsibilities involved in the powers or duties of local or other statutory authorities, harm may be caused to individual citizens; and the question arises whether those citizens have rights of action in negligence.
...

If one point more than any other emerges from those cases [certain authorities cited] it is that problems in this field cannot satisfactorily be disposed of at an abstract level. It is essential to know at least the main facts before attempting to apply or adapt the relevant principles of law. In this particular case that is very evident.

We are not suggesting of course that the question of public authority liability is involved in the present case, but what was said about the difficulty of disposing of problems at an abstract level does in our view apply here.

So, applying the foregoing principles, while recognising that the plaintiffs have formidable legal hurdles to surmount, we do not think that the law is as clear cut as the judgment under appeal tends to indicate. We think, too, that it would be unwise for this Court to try to pronounce in the abstract on questions of the kind ventilated in argument today. An adequate coverage of the arguments would verge on a textbook. Some of the issues are very important. Decisions on them should be left until concrete facts are before the Court. There is enough in such knowledge of the facts as we have to cause some disquiet about the manner of dismissal or resignation. With respect, we do not think that the learned Judge gave sufficient weight to these considerations. The appeals should be allowed.

Of course the plaintiffs will proceed at their own risk as to costs. If they do proceed, Mr Stuart recognises that amendment to the statement of claim may be advisable, but we have dealt with the hearing today on the basis of the existing pleadings.

The judgment under appeal must be vacated. We leave costs in the High Court to be dealt with by that Court in due course. As to the appeals and cross-appeals just dealt with, there will be no order for costs.

R B Lister P.

Solicitors:

Webster Malcolm & Kilpatrick, Auckland, for Appellants
Buddle Findlay, Wellington, for Respondents