

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2015-409-000243
[2015] NZHC 3245**

BETWEEN MIKE PERO MARKETING LIMITED
 First Plaintiff

AND MICHAEL PERO
 Second Plaintiff

AND MIKE PERO MORTGAGES LIMITED
 Defendant

Hearing: 13 October 2015

Appearances: J P Forsey for Plaintiffs
 G B Blanchard and J P Nolen for Defendant

Judgment: 16 December 2015

**JUDGMENT OF ASSOCIATE JUDGE OSBORNE
ON PLAINTIFFS' SUMMARY JUDGMENT APPLICATION**

Introduction

[1] The second plaintiff (Mr Pero) is a businessman with an established national reputation. The first plaintiff (MP Marketing) is an entity owned and controlled by him.

[2] Mr Pero established a mortgage business which the defendant (MP Mortgages) purchased in March 2004. Pursuant to the acquisition agreement, MP Marketing and MP Mortgages entered into a consultancy agreement whereby MP Marketing would provide consultancy services to MP Mortgages. In 2011, a real estate business (Mike Pero Real Estate Limited (MP Real Estate)) was formed with MP Marketing and MP Mortgages each holding 50 percent of the shares.

[3] Relations between the owners and directors became strained by early 2014. The main protagonists are Mr Pero on the one side and a Sherman Ma (of Liberty Financial Pty Ltd) on the other.

[4] The plaintiffs say that Mr Pero had continued to provide the services which MP Marketing had contracted to provide. Their claim is based on an agreement dated 3 February 2011 which on its face was entered into between the plaintiffs and the defendant (the consultancy agreement). The plaintiffs say that MP Mortgages ceased payment of fees payable under the consultancy agreement. They allege that the continued non-payment is a repudiation of the consultancy agreement. On 3 April 2015 the plaintiffs gave notice of termination of the consultancy agreement.

[5] They claim \$525,000. It is calculated by multiplying the annual fees identified under the consultancy agreement by what would have been the remaining period of the term of the consultancy agreement (to 3 February 2021).

[6] The plaintiffs apply for summary judgment upon the basis that MP Mortgages has no arguable defence to their claim as summarised above.

Plaintiffs' summary judgment application – the principles

[7] The starting point for a plaintiff's summary judgment application is r 12.2(1) High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[8] I summarise the general principles which I adopt in relation to this application:

- (a) Commonsense, flexibility and a sense of justice are required.¹
- (b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.²
- (c) The Court will not hesitate to decide questions of law where appropriate.³
- (d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.⁴
- (e) In determining whether there is genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.⁵
- (f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is

¹ *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].

² *Pemberton v Chappell* [1987] 1 NZLR (CA).

³ *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (CA) at 516.

⁴ *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 (SC).

⁵ *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).

under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.⁶

- (g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of tenable defence is plain on the material before the Court.⁷
- (h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.⁸
- (i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.⁹

The plaintiffs' claim

[9] The plaintiffs' claim can be summarised by setting out the following paragraphs from its Statement of Claim:

- 4 On or about 5 March 2004, the first plaintiff entered into an agreement for sale and purchase of the first plaintiff's business to the defendant (The Sale and Purchase Agreement).
- 5 The Sale and Purchase Agreement provided for a consultancy role to be performed by MP Marketing. This involved procuring the second plaintiff to perform specialised services (The Consultancy Role).
- 6 The initial period of The Consultancy Role was for three years.

⁶ *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).

⁷ *Jowada Holdings Ltd v Cullen Investments Ltd* CA 248/02, 5 June 2003 at [28].

⁸ *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).

⁹ *Pemberton v Chappell*, above n 2.

- 7 By letter dated 29 March 2004 the term of the Consultancy Role was extended to ten years.
- 8 On 3 February 2011 the parties entered a contract for consultancy services which formalised and extended The Consultancy Role (the Consultancy Agreement).
- 9 The full terms of the Consultancy Agreement are relied on for their full force and effect...
- 10 Schedule 1 to the Consultancy Agreement sets out a summary of consultancy services provided to Mike Pero Mortgages limited by Mike Pero Marketing Limited (procuring the services of Michael Pero).
- 11 Schedule 1 to the Consultancy Agreement set remuneration at \$70,000.
- 12 Schedule 1 to the Consultancy Agreement provided an initial term from 5 March 2004 to 4 March 2014 and a term extension effective from 3 February 2011 to 3 February 2021
- ...
- 14 The plaintiffs provided the Consultancy Services at all material times.
- ...
- 16 The defendant paid the plaintiffs for the Consultancy Services so rendered under the Consultancy Agreement on a monthly basis until June 2014.
- ...
- 23 The Consultancy Agreement was signed for the defendant by Mr Mark Thornton, then a director of the company and his signature was witnessed.
- 24 Notwithstanding the documented Consultancy Agreement and the performance of the agreement by the defendant, the defendant resiled from its obligations under the Consultancy Agreement from June 2014.
- 25 Since resiling from the agreement the defendant has requested that the plaintiffs provide the Consultancy Services pursuant to The Consultancy Agreement.
- 26 The plaintiffs remained ready willing and able to perform obligations under the Consultancy Agreement.
- 27 The defendant has breached its obligations under the Consultancy Agreement.

- 28 The plaintiffs have made repeated requests for payment pursuant to the Consultancy Agreement and the defendant has refused to pay.
- 29 As a result of the repudiation of the Consultancy Agreement by the defendant, the plaintiffs terminated the Consultancy Agreement on 3 April 2015.

The consultancy arrangements – background

[10] The plaintiffs sue on the consultancy agreement dated 3 February 2011 (which carried the heading “Contract for Consultancy Services”). The parties were MP Mortgages, MP Marketing and Mr Pero. The consultancy agreement contains a useful background and summary of earlier arrangements, in these terms:

1. BACKGROUND

This contract summarises earlier consultancy services arrangements entered into by the parties and serves to up date those contractual arrangements to align with business activities of both Mike Pero Mortgages Limited and Mike Pero Marketing Limited whereby Michael Pero’s consultancy and personality services are required by Mike Pero Mortgages Limited for an extended term.

2. SUMMARY OF EARLIER CONTRACTUAL ARRANGEMENTS

- 2.1 The Sale and Purchase Agreement of the Mike Pero Mortgages business, entered into on 5 March 2004, outlined the consultancy role to be undertaken by Mike Pero Marketing Limited (procuring Mike to perform the services) and records the term of Mike’s consultancy service as being a three year period. The term was later extended to ten years by letter dated 29 March 2004 issued by George Gould (the then Chairman) and signed in acknowledgement by Mike.
- 2.2 A formal contract of the consultancy services was not entered into. Instead a letter dated 3 June 2004 was issued to Mike by Jeff Staniland (the then CEO of Mike Pero Mortgages Ltd) referring to clause 10.3 and schedule 7 of the Sale and Purchase Agreement which together set out the consultancy role term, services and remuneration. Mike acknowledged acceptance by signing off on the letter on 7 June 2004.
- 2.3 In May 2006 Mike approached the Mike Pero Mortgages Ltd Board to review the remuneration and functions of his consultancy services and he presented to the board a proposal paper entitled, ‘Compensation & Remuneration Review For Mike Pero’. Mike held an expectation of the remuneration fees being substantially increased however the MPML board was not prepared to approve an increase to the proposed level and it was agreed that Jeff Staniland and Mike would review and then attempt to determine the revised functions and remuneration of Mike’s consultancy role.

- 2.4 Jeff Staniland prepared a working paper dated 9 June 2006 which included a table of the consultancy role functions and an annual fee (rather than an hourly rate as had originally been agreed in the Sale and Purchase Agreement). Mike and Jeff exchanged emails on the 11th and 12th June referring to Jeff Staniland's working paper.
- 2.5 On 16 June Mike sent an email to Jeff Staniland accepting the terms reached within their email exchanges however his acceptance was only confirmed for the period to 1 Oct 2006, by which time a new Board was to have been formed and Mike would seek a further review of the consultancy fees. Following this period the new Mike Pero Mortgages Ltd Board subsequently approved an increase of Mike's consultancy fees from \$60,000 to \$70,000 per annum.

The (2011) consultancy agreement – operative provisions

[11] Although the difference between background provisions and operative provisions of the 2011 agreement is not clearly defined the following appear to have been the operative provisions of the 2011 agreement:

3. OTHER RELATED FUNCTIONS

- 3.1 The parties acknowledge that in addition to the consultancy services outlined in this contract Mike also provides directorship services to Mike Pero Mortgages Ltd. The role and remuneration set out in this contract is entirely separate from Mike's directorship role to Mike Pero Mortgages Ltd.
- 3.2 Further, the parties entered into a separate Contract for Services dated [3 February 2011] whereby Mike (as procured by Mike Pero Marketing Ltd) contracts to MPRE Ltd to provide Managing Director Services. The role and remuneration set out in this contract is entirely separate from Mike's Managing Director role to MPRE Ltd.

4. REVISED ROLE AND REMUNERATION

- 4.1 Schedule 1 outlines Mike's role, remuneration, and initial term, reflecting the revised duties and remuneration agreed upon following the review undertaken during 2006.
- 4.2 In addition, the schedule is further updated to reflect an extended term of contract agreed to by the parties which aligns the provision of Mike's consultancy services with a ten year license to use the Mike Pero Mortgages brand as granted to MPRE Ltd under a License Agreement dated [3 February 2011].
- 4.3 In the event MPRE Ltd should cease trading during the term of this contract (or any extension or revision of this contract), the expiry date of this contract shall be the greater term of either the contract or the MPRE Ltd cessation date.

[12] Schedule 1 to the consultancy agreement provided for consultancy services on the following terms:

Initial Term: 5 March 2004 to 4 March 2014.

Term Extension Effective from 3 February 2011: 3 February 2021

Remuneration: \$70,000

The Schedule then described in detail the consultancy services to be provided.

MP Mortgages' grounds of opposition

[13] In his written synopsis, Mr Blanchard for MP Mortgages identified (in line with the Notice of Opposition) four grounds of opposition:

- (a) The consultancy agreement was never authorised by the Board of MP Mortgages and is invalid.
- (b) Alternatively, the plaintiffs failed to perform the required services.
- (c) Alternatively, MP Mortgages has a set-off entitlement arising from breaches by MP Marketing of the MP Real Estate Shareholders' Agreement and Constitution and breaches by Mr Pero of director's duties owed to MP Real Estate and MP Mortgages (pursued in proceedings in the Auckland Registry of the High Court).¹⁰
- (d) The plaintiffs' calculation of damages is untenable.

[14] The plaintiffs' summary judgment claim cannot succeed unless the plaintiffs establish, beyond argument, that the 3 February 2011 agreement binds MP Mortgages.

¹⁰ *Mike Pero Mortgages Ltd v Mike Pero* CIV-2014-404-2193, summarised in *Mike Pero Mortgages Ltd v Mike Pero* [2014] NZHC 2798, [2015] 3 NZLR 246.

Ground 1 – invalidity of consultancy agreement

[15] The first, most fundamental, ground of opposition of MP Mortgages is that the consultancy agreement on which the plaintiffs sue was not authorised by the Board of MP Mortgages and is therefore unenforceable.

Method of contracting of MP Mortgages

[16] The constitution of MP Mortgages provides for methods of contracting as follows:

10. METHOD OF CONTRACTING

- 10.1 Deeds: A deed which is to be entered into by the Company may be signed on behalf of the Company, by:
- (a) two or more Directors; or
 - (b) if there is only one Director, by that Director whose signature must be witnessed; or
 - (c) a Director, and any person authorised by the Board, whose signatures must be witnessed;
 - (d) one or more attorneys appointed by the Company.
- 10.2 Other written contracts: An obligation or contract which is required by law to be in writing, and any other written obligation or contract which is to be entered into by the Company, may be signed on behalf of the Company by a person acting under the express or implied authority of the Company.
- 10.3 Other obligations: Any other obligation or contract may be entered into on behalf of the Company in writing or orally by a person acting under the express or implied authority of the Company.

[17] In February 2011 the directors of MP Mortgages were Mark Thornton, Mr Ma and Mr Pero.

[18] On the execution page of the agreement, the agreement has been signed for MP Marketing by Mr Pero as director and Mr Pero has signed for himself, in his personal capacity. For MP Mortgages the document has been signed by Mr Thornton above the word ‘director’ (with the alternative standard form words “Authorised Person” deleted by a pen-stroke).

[19] In his written synopsis, Mr Forsey addressed the question of Mr Thornton's status and authority in these terms:

The Consultancy Agreement was signed on behalf of the defendant by Mark Hume Thornton who, at the time, was a director of the defendant. Mr Thornton's signature on the Consultancy Agreement was witnessed... Mr Thornton confirms his understanding of the Consultancy Agreement and his authority to sign it...

...

The defendant's Constitution provides that the defendants may enter into a deed by having the deed signed by one director, whose signature is witnessed...

Mr Thornton deposed to signing the Consultancy Agreement "in line with normal practice" and in the belief that Mr Ma has full knowledge of the terms and conditions of the Consultancy Agreement... Mr Thornton's evidence and his authority to sign as a director of the defendant has not been challenged by the defendant.

[20] To these submissions, Mr Blanchard, for MP Mortgages, responded with an analysis of the inapplicability of clause 10.1 of the constitution (which would apply if Mr Thornton's execution of the agreement was as "director", the basis identified by Mr Forsey). Mr Blanchard also spoke to the inapplicability of clause 10.2 (should the plaintiffs rely on actual authority).

[21] As Mr Blanchard's submissions succinctly dealt with the validity of M.P Mortgages' execution, whether based on execution as director or execution pursuant to authorisation, I set out those submissions verbatim:

5. The plaintiffs appear to rely on clause 10.1(b) of the Constitution. However, this provision plainly does not apply because MP Mortgages did not have only one director. Clauses 10.1(a), (c) and (d) obviously also do not apply because the purported Consultancy Agreement was only signed by one director and it was not signed by a second person authorised by the Board or by an attorney appointed by the company.
6. Although the plaintiffs rely on 10.1(b) of the Constitution, an analysis of Clause 10.2 provides that any contract (other than by deed), may be signed on behalf of the company by a person acting under the express or implied authority of the company. The question would therefore be whether Mr Thornton was authorised to sign the purported Consultancy Agreement.
7. The authority in question must be actual authority, whether express or implied. Apparent authority and s 18(1)(b)(iii) of the Companies

Act 1993 have no application in this case. Mr Pero is an insider and has, or ought to have, by virtue of his position with or relationship to MP Mortgages, knowledge as to whether Mr Thornton acting alone had authority to sign the purported Consultancy Agreement on behalf of the company.

8. The Board of Directors of MP Mortgages has overall responsibility for the management of the company and, while the Board could delegate its powers, it is clear that the decision to enter the purported Consultancy Agreement was one that had to be made by the Board. The decision was not delegated by the Board to Mr Thornton or any other party.
9. The manner in which the Board operates is governed by clause 9. The following provisions are relevant in this case:
 - 9.7 **Voting:** Subject to clause 9.8 every Director has one vote. In the case of an equality of votes, the chairperson does not have a casting vote. A resolution of the Board is passed if it is agreed to without dissent of all Directors present, or if a majority of the votes cast on it are in favour of the resolution. A director present at a meeting of the Board is presumed to have agreed to, and to have voted in favour of, a resolution of the Board unless he or she expressly dissents from [sic] or votes against, or expressly abstains from voting on, the resolution at the meeting.
 - 9.8 **Non-Voting Director:** Notwithstanding any other provision of this Constitution, Michael Pero shall not have a vote, nor shall he be entitled to vote, on any resolution of the Board and no account of his presence or absence at a meeting of Directors shall be taken into account for the purposes of voting.
 - 9.9 **Written resolution:** A written resolution, signed or assented to by all the Directors entitled to vote on that resolution is as valid and effective as if passed at a meeting of the Board duly convened and held provided those Directors would constitute a quorum for consideration of the resolution at a meeting of the Board. Any such resolution may consist of several documents (including facsimile or other similar means of communication) in similar form, each signed or assented to by one or more Directors. A copy [sic]/[of] any such resolution shall be entered in the records.
10. At the time the purported Consultancy Agreement was executed (3 February 2011) the Board of MP Mortgages comprised Mark Thornton, Sherman Ma, and Mr Pero.
11. It will be seen that both Mr Thornton and Mr Ma had to assent to the purported Consultancy Agreement for Mr Thornton to be authorised to sign it. This is because a majority for the Board had to be in favour of it and, although Mr Pero was a director, he was not entitled to vote, so it was only possible to achieve the requisite majority if

both Mr Thornton and Mr Ma were in favour. This requirement was known by Mr Pero.

12. It will also be seen that there were three ways in which the Board could have authorised the purported Consultancy Agreement. Firstly, they could have passed a resolution in favour of the agreement by voting at a Board meeting or by written resolution. Secondly, they could have signed or assented to the agreement in a written resolution. The written resolution did not need to be a formal document signed by both directors. It could have taken the form of facsimiles or other similar communications provided they were signed or otherwise demonstrated the assent of the directors. Each director's signature or assent could have appeared on a separate facsimile or other similar communication. Thirdly, the two directors could have simply each signed the purported Consultancy Agreement.
13. There is no evidence whatsoever that either of these steps was followed. There is no record of a resolution being passed in favour of the agreement at a Board meeting nor is there any formal written resolution in favour of the transaction signed by Mr Thornton or Mr Ma. There is nothing informal in the nature of a facsimile or other similar communication (or otherwise) to show that Mr Ma assented to the agreement. If Mr Rollason had the power to authorise the transaction (which is disputed for the reasons given below), then similarly there is no communication to show that he assented to the agreement. It necessarily follows that Mr Thornton's signing of the agreement was not authorised by the Board of MP Mortgages. Further, the purported Consultancy Agreement was not signed by Mr Ma.

(Footnotes omitted.)

[22] For the reasons identified by Mr Blanchard in his paragraphs 5 and 6, the single signature of Mr Thornton as a director of MP Mortgages was not permitted as a method of contracting under any of the limbs of clause 10.1 of the constitution.

[23] Equally, and for the reasons also identified by Mr Blanchard, the requirements of the constitution of MP Mortgages (particularly under clause 9) have not been complied with so as to authorise Mr Thornton to execute the consultancy agreement in terms of the constitutional provisions.

[24] Although Mr Forsey's submissions for MP Mortgages contained the proposition that Mr Thornton, in his affidavit evidence, had confirmed "his authority to sign", what Mr Thornton's evidence stated was:

The Consultancy Agreement was signed by me for MP Mortgages *as a director* on 3 February 2011 in line with normal practice. My signature was witnessed. On this basis I believe that Sherman Ma/the Liberty alternate, had full knowledge of the terms and conditions of the Consultancy Agreement.

(Emphasis added.)

[25] The first difficulty with Mr Forsey's submission on authorisation is that Mr Thornton expressly deposed that he had signed the agreement as a director in line with normal practice. For any concept of authorisation within Mr Thornton's affidavit, I infer that Mr Thornton's words in the next sentence – "on this basis" – do not refer to his previous sentences where he records his signature "as director". Rather, "on this basis" appears to be a reference back to an earlier part of Mr Thornton's affidavit where he refers to a meeting on 19 October 2010 when the establishment of MP Real Estate was discussed at a board meeting of MP Mortgages. Mr Thornton records that the meeting was attended by Peter Rollason as an alternate for Mr Ma and that there were no objections to the establishment of MP Real Estate by either shareholder. Mr Thornton adds:

The documents which I signed on 3 February 2011 were required to start the new business, and given both shareholders were in agreement, and copies of the documents were provided to Liberty on 1 February 2011, I signed them accordingly.

[26] As evidence of the awareness of Mr Ma/Liberty of the terms of the consultancy agreement, Mr Thornton exhibits an email dated 1 February 2011 sent by Ruth Gardiner (MP Mortgages' General Business Manager at the time). The addressees included Mr Rollason (Mr Ma's alternate). The attachments were a Shareholders Agreement, a License Agreement, a contract for services between MP Real Estate and MP Marketing and the Consultancy Agreement.

[27] The implication of Mr Forsey's submission, based upon Mr Thornton's evidence, is that all the relevant people not only knew of the proposed documentation, but beyond that there was some form of majority board approval when Mr Thornton signed on 3 February 2011. Mr Forsey's submission overlooked the fact that Mr Rollason's position as Mr Ma's alternate director by its nature would be relevant to any step taken as director, but does not inform the separate question of actual authorisation by the Board.

[28] Mr Blanchard responded with detailed submissions on the issue of authorisation. In a summary judgment context, I accept that the points he makes constitute collectively a tenable argument as to the invalidity of MP Mortgages' execution of the consultancy agreement. Mr Blanchard identified to three limbs of Mr Forsey's argument, before responding to it.

- (a) Mr Forsey refers to the fact that MP Mortgages in February 2011 executed the MP Real Estate Shareholders Agreement and Intellectual Property Licence Agreement, both of which have been treated by all parties as binding and continuing in force.
- (b) Mr Forsey submitted that MP Mortgages has now "cherry picked" one of three inter-related contracts as being supposedly non-compliant with the constitutional requirements for execution.
- (c) Mr Forsey refers to the consultancy agreement as being part of a "suite of documents" approved by MP Mortgages and circulated in advance to its directors.

[29] In fact, as Mr Blanchard submitted, the evidence points to the discussions concerning the various documents as differing in extent and timing. The Shareholders Agreement and the Licence Agreement were extensively discussed at a MP Mortgages board meeting on 17 December 2010. There is no evidence of discussion at that meeting as to a consultancy agreement. The Shareholders Agreement and the Licence Agreement were then drafted by MP Mortgages' solicitors and were forwarded in draft to Mr Thornton and Mr Ma that month. A consultancy agreement was not referred to when the December draft documents were forwarded.

[30] On 1 February 2011 the consultancy agreement was emailed to Mr Thornton, making its first appearance at that point. Mr Thornton was not asked for comment or approval – rather he was asked to sign.

[31] Unlike the December emails forwarding the Shareholders Agreement and the Licence Agreement which were sent to Mr Ma, neither the 1 February 2011 email nor the consultancy agreement was sent to Mr Ma.

[32] These matters of documentary history may explain an email sent by Mr Pero to Mr Ma and another director (Simon Frost) on 23 May 2014 when relationships had deteriorated. In the email, Mr Pero states to Mr Frost and Mr Ma:

Hi again,

I'm suspecting you guys are not aware of my contract for services to MPM.

That may help you understand why I am trying to fulfil my other executive role.

Read this.

Cheers Mike

The consultancy agreement was attached for Mr Ma and Mr Frost to read.

[33] The email provides significant supporting evidence (that is, supporting the documentary evidence from the time of execution) that Mr Pero himself appreciated that Mr Ma may not have been “in the loop” when the consultancy agreement was prepared and signed. Otherwise there is little explanation for Mr Pero’s suspicion that Mr Ma was not aware of the consultancy agreement.

[34] If Mr Ma and Liberty were unaware of the developments at the time (as is at least arguable), the plaintiffs’ arguments in favour of some form of implicit authorisation arising from Mr Ma’s knowledge and involvement also fall short of the evidential requirements for summary judgment.

Conclusion

[35] The primary ground of opposition identified by MP Mortgages is established. It is arguable that the consultancy agreement dated 3 February 2011 is not enforceable because it was executed for MP Mortgages neither by the authorised number of directors nor by a person with actual authority.

[36] While a defendant in these circumstances must also be able to point to the plaintiff's knowledge of the deficiency in relation to the defendant's execution of the contract, such knowledge on the facts in this case is arguable without further detailed analysis. Mr Pero and MP Marketing, through their involvement in MP Mortgages, were privy to the constitutional requirements of MP Mortgages and were in as good a position as any other party to appreciate the requirements of the constitution of MP Mortgages and to ensure they were followed.

Alternative grounds of opposition

[37] By reason of the conclusion reached, it is unnecessary that the Court engages with the second ground of opposition advanced by MP Mortgages. This relates to an allegation that the plaintiffs, in any event, failed to perform services required under the consultancy agreement. The analysis required in that regard is, by its nature, heavily fact-based. The same observation applies to the defendant's set-off claims. Given that such findings will now be for a trial Court I refrain from making any observation as to the competing arguments. I nevertheless record that counsel responsibly addressed detailed argument on these two grounds.

[38] It is also unnecessary to examine in any detail the fourth ground of opposition which focused on the amount of the plaintiffs' claim. The simple multiplication of annual fees in order to arrive at a claimed figure fails to properly address the calculation of damages in relation to a cancelled contract. Mr Forsey conceded that, were the Court to award summary judgment as to liability, the most appropriate outcome would be an order directing trial on the amount of damages.

Orders

[39] I order:

- (a) The plaintiffs' summary judgment application is dismissed.
- (b) The costs of the summary judgment application are reserved.¹¹

¹¹ Pursuant to the practice in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).

Case management directions

[40] I adjourn the proceeding to an initial case management conference (by telephone Associate Judge Osborne) at 11.00 am, 9 March 2016.

[41] Counsel are to file and serve by 24 February 2016 either a joint memorandum dealing with all Schedule 5 matters or, failing that, counsel are to file separate memoranda (counsel for the plaintiffs by 24 February 2016 and counsel for the defendant by 2 March 2016).

[42] The defendant is required to file its Statement of Defence within 10 working days, save that should counsel agree that any amendment of the plaintiffs' Statement of Claim is desirable counsel may also agree an amended timetable which provides for the filing of an amended Statement of Claim before the Statement of Defence is filed.

[43] In any event, the parties shall comply with their duties of initial disclosure when filing any pleadings.

[44] Upon the filing of pleadings, counsel are to co-operate with a view to completing discovery promptly. Counsel are also to confer as to the future conduct of this proceeding including any extent to which it is affected by proceedings in the Auckland Registry.

[45] I reserve leave to counsel to request an earlier case management conference if that becomes appropriate.

Associate Judge Osborne

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